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## SECULAR CONSTITUTIONALISM VINDICATED

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In discussing whether constitutionalism must necessarily be secular, it should first be made clear that the topic of constitutional secularism is not about belief. In addressing this theme and arguing in favor of secularism, I am not engaging in the deconstruction of religious belief which has been prominent in recent literature, such as Richard Dawkins in *The God Delusion*<sup>1</sup> or of Sam Harris in *The End of Faith*.<sup>2</sup> I am not decrying the dangers of belief in God or in gods or in “teapots orbiting the earth.” On the contrary, religious belief and its manifestation are guaranteed in the context of international human rights and secular constitutions. Secular constitutionalism guarantees a neutral public space for equal participation by those of religious belief and non-belief alike, and private space for matters, including religious matters, in which the state may not enter. What I aim to discuss in this paper is the benefits of secular constitutionalism for democratic regimes when contrasted with the alternatives and the alternatives are the non-secular: religious diversity, pluralism or theo-democracy. On this analysis, followed with examples of constitutional adjudication of the clash between each of the monotheisms and human rights, I argue that secular constitutionalism is essential to human rights.

### SECULARISM AND SECULAR HUMAN RIGHTS

Secular constitutionalism is a system not an ideological monolith. Secularism unadorned is the relegation of the eschatological ideology of religions to the private sphere, divorced from political power. The secular state bases the regulation of society on political decision-making made in accordance with prevailing norms of the times. In democracies, this decision-making is made by the elected

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<sup>1</sup> RICHARD DAWKINS, *THE GOD DELUSION* (2006).

<sup>2</sup> SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

representatives of the majority. It is a system which allows pluralism of thought and conscience to thrive. It is a system which allows individuals and groups to express themselves freely, not coerced by a prevailing creed. Under secular democracies, this may be achieved either by guaranteeing non-interventionist neutralism or of permitting promotion of religion in accordance with constitutional principles. Where the State adopts a policy of non-interventionist neutralism toward all the various forms of ethical ideology, religious or ethical belief remains a private matter and there is theoretically no problem in ensuring equal treatment. In such a situation the State needs only to ensure absolute non-intervention in the realm of private conscience and equal treatment for members of society; different beliefs or non-beliefs naturally follow. The solution of separation of State and religion has been intended to achieve this kind of egalitarianism on a conceptual level.<sup>3</sup> However, where religious or other forms of ethical expression are perceived as requiring public expression, and where the State adopts a promotionalist and not a non-interventionist stance, the problem of securing equal treatment for the various forms of religious belief, for non-belief and for secular conviction becomes crucial and problematic.

The value content of secular regimes is not in secularism as such but in secular human rights. Although human rights are not a *sine qua non* of secularism they are the child of secularism. Human rights doctrine is a product of the shift from a religious to a secular state at the time of the Enlightenment in 18<sup>th</sup> century Europe. The religious paradigm was replaced by secularism, communitarianism by individualism and status by contract. As historian Yehoshua Arieli writes, the modern concept of human rights is the product of secularism:

The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the homocentric world and to ways of thought freed from the transcendentalist premises and from the jurisdiction of religious authority. And so, the development of the doctrine of human rights is inseparably connected to the process

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<sup>3</sup> Eric Mack, *Liberalism, Neutralism and Rights*, in RELIGION, MORALITY, AND THE LAW 46 (J. Ronald Pennock & John W. Chapman eds., 1988). Although, as I will show below, it must be admitted that non-interventionist neutralism cannot be complete in a welfare state since there is inevitably support for humanist activities of one kind or another. In North America, where separation of church and state has been the constitutional precept, there are signs that—alongside the ideological conviction that promotionism is in essence inegalitarian—the inegalitarianism of non-promotionism is also beginning to be recognized. Irwin Cotler comments, “a more restrictive definition [of religion] is called for under the establishment clause, lest all ‘humane government’ programs be deemed constitutionally suspect.” Irwin Cotler, *Freedom of Conscience and Religion*, in YOUR CLIENTS AND THE CHARTER, LIBERTY AND EQUALITY 165, 174 (Gérald A. Beaudouin ed., 1988); see Norman L. Cantor, *Religion and State in Israel and the United States*, 8 TEL AVIV UNIV. STUDIES IN L. 185, 197-200 (1988).

of secularisation of Western society.<sup>4</sup>

Human rights developed as legal rights in the 20<sup>th</sup> century in international and in constitutional law. They represented a breakthrough from the religious past. In secular human rights regimes, individuals within a community were entitled to autonomous moral judgment; this entailed freedom of religion, conscience and expression. All citizens were entitled to equal opportunity to participate in social, political and economic institutions; this right to equal participation came to be extended over time to different racial and religious groups, to women and homosexuals.

#### CHALLENGES TO SECULARISM AND TO SECULAR HUMAN RIGHTS

The concept of human rights is currently challenged by traditionalist religious ideologies. These ideologies threaten the paradigm which lies at the heart of human rights. There is a confrontational stance opposing human rights on the part of orthodox religious institutions in most regions of the world, manifested in attacks on the political and civil rights of women, homosexuals, Dalits, heretics or non-believers. These orthodox religious institutions reject the norms of equality, freedom of conscience and freedom of expression where these infringe on religious sensibilities. Deference to religious values in negation of human rights in constitutional democracies has, in some cases, secured the exclusion of rights to equality, freedom of conscience and expression and freedom of religion from full constitutional recognition;<sup>5</sup> in others, it has resulted in legal policies which violate these rights.<sup>6</sup> Constitutional deference to religious norms or sensitivities is on a spectrum, which ranges from religious pluralism to theodemocracy.

Secularism is under attack not only by religious observers but also by academic and liberal commentators. During the present symposium, Michel Rosenfeld and Pavel Kloczowski, each from the perspective of their own discipline, called to abandon the secular monolith and adopt regimes of religious diversity and pluralism. In recent literature, Charles Taylor and Paul Horowitz critique the impact of the secular, liberal state on religious subgroups.<sup>7</sup> Arguing for a more supportive and

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<sup>4</sup> Yehoshua Arieli, *The Theory of Human Rights, its Origin and its Impact on Modern Society*, in MISHPAT VE-HISTORYAH 25 (Daniel Gutwein & Menachem Mautner eds., 1999).

<sup>5</sup> The prime example is Israel, which in concession to the religious lobby omitted these human rights from the Basic Law: Human Dignity and Liberty, 1992, S.H. 1391.

<sup>6</sup> Constitutional case law in various countries has focused on these violations. See Frances Raday, *Traditionalist Religious and Cultural Challengers—International and Constitutional Human Rights Responses*, 41 ISR. L. REV. 596 (2008).

<sup>7</sup> CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 249 (1995); Paul Horowitz, *The Sources*

accommodating approach toward religious belief and practices, they claim that liberalism is not value-neutral, it is a “fighting creed”: “At the very least, liberalism’s focus on the autonomous individual, and on the maximization of individual concepts of the good, tends to give it in practice an emphasis on freedom over tradition, will over obligation, and individual over community.”<sup>8</sup> John Gray, in *Black Mass*, compares the attempt to impose secular Utopias on the world by force with the crusades of religion and observes: “The hope of Utopia spilt blood on a scale that traditional creeds cannot match.”<sup>9</sup> In proof, he draws on the travesties of human rights in 20<sup>th</sup> century eschatological ideologies: National Socialism, Communism, Stalinism and Maoism. In conclusion, he concludes: “It is time the diversity of religions was accepted and the attempt to build a secular monolith abandoned. . . . It embodies a type of toleration whose goal is not truth but peace.”<sup>10</sup> David Kennedy suggests that “Assessing—or celebrating—humanist governance requires that we focus on humanism as a political project. Not humanism against power, talking to power, advising power, restraining power, but humanism as power.” Kennedy also critiques human rights idealism as “idolatry.”<sup>11</sup> Almond, Appleby and Sivan consider that religious fundamentalism has been a reaction against “aggressive secularization,” which they identify in the success of modernization, secularization and the scientific revolution;<sup>12</sup> they argue:

The strongest counter to the ‘strong religion’ of the fundamentalists would be economic reforms that promote economic growth and greater equality of income distribution, as well as political reform that extends the process of self-determination well beyond its current narrow circle of governing elites. . . . Given the opportunity to integrate into the polity, the disillusioned Islamists might opt for peaceful activism.<sup>13</sup>

Two major critical themes emerge from these attacks on secular human rights: first, the thesis of symmetry between religious and secular values as eschatological ideologies, which represents secularism as another competitor on the ideological map rather than a neutral facilitator of differing ideologies (Taylor and Horowitz); and second,

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*and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1, 14 (1996).

<sup>8</sup> Horowitz, *supra* note 7, at 14; Taylor, *supra* note 7, at 249.

<sup>9</sup> JOHN GRAY, *BLACK MASS: APOCALYPTIC RELIGION AND THE DEATH OF UTOPIA* 209 (2008).

<sup>10</sup> *Id.* at 208.

<sup>11</sup> David Kennedy, *Apogee and Epitaph: Celebrating the 60th Anniversary of the Universal Declaration of Human Rights*, Keynote Address at the Minerva Biennial Conference on Human Rights at the University of Tel Aviv (Dec. 9, 2008).

<sup>12</sup> GABRIEL A. ALMOND, R. SCOTT APPLEBY & EMMANUEL SIVAN, *STRONG RELIGION: THE RISE OF FUNDAMENTALISMS AROUND THE WORLD* 20, 224 (2003).

<sup>13</sup> *Id.* at 241.

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the claim that there is a threat to peace resulting from secular intolerance, either directly as a result of secularism's utopian wars (John Grey), or reflexively, as a result of the religious fundamentalist violence which secularism incites (Almond, Appleby and Sivan). It seems that none of these themes can ultimately justify the abandonment of secular human rights in favor of the religious alternatives.

The claim of symmetry between religious and liberal values does not justify—as suggested by the protagonists of this approach—accommodation and support for religious values even where they clash with human rights. In the case of an irresolvable clash of values between the secular-liberal and the religious, the outcome of symmetry would, logically and at the most, lead to stalemate and not deference to religious values. Nor would it lead to restriction of the reach of secular constitutionalism, which provides a facilitative framework for pluralism of belief and non-belief. Furthermore, there are good grounds for rejecting the symmetry thesis. There is no symmetry between religious and liberal human rights values. The idea that there is a secular monolith is misplaced. Inverting Taylor's and Horowitz's critique of liberalism, you find the values of tradition over freedom, obligation over will, and community over individual. While liberal values leave space for the religious individual and, to a considerable extent, the religious community, religious values do not recognize the entitlement of the liberal individual or community. There is no symmetry between the normative dominance of liberal values (freedom, will, individual) and the normative dominance of religious values (tradition, obligation, community) because the latter does not even acknowledge the private space of the dissident, the heretic, or the silenced voice within its own jurisdiction.<sup>14</sup> These values are primarily tools for the perpetuation of existing power hierarchies. The claim for symmetry is, therefore, based on tolerance of inequality and lack of liberty for those deprived of a voice by, or within, the religious community.

There is a flaw, as well, in the reasoning that calls for the autonomy of communities within a constitutional democracy, where that autonomy denies or reduces the right of some of its members or of non-members to equality and liberty, since the basis for the community's claim to autonomy vis-à-vis the constitutional regime rests on these very norms of equality and liberty.<sup>15</sup> Autonomy demands by minority communities have been organized in a useful typology by Jacob Levy.

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<sup>14</sup> See Yossi Nehushtan, *Religious Conscientious Exemptions* (2008) (Ph.D. Philosophy thesis, University of Oxford) (arguing that there should be no constitutional exemptions based on tolerance for religions which are in essence intolerant).

<sup>15</sup> ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 62-65, 163 (1990); MELVILLE J. HERSKOVITS, *CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM* 11-34 (1972).

Under that typology, Levy describes various minority claims for external rules limiting the freedom of non-members and for internal rules limiting the freedom of members, all in order to protect an endangered culture or cultural practice.<sup>16</sup> However, were such rules used to defeat equality claims, they would use the value of liberty to defeat liberty and of equality to defeat equality. They would allow deference to an inegalitarian cultural or religious hegemony over the right to equality and freedom of conscience.<sup>17</sup> Hence, the premise to be derived from an analysis of the divide between traditionalist culture and religion versus equality and human rights is that, in constitutional societies, equality and liberty should be the governing norms—the Grundnorm on which the whole system rests—including the right to enjoy one’s culture and religion. Constitutional democracy cannot tolerate enclaves of illiberalism whose inhabitants are deprived of access to human rights guarantees of equality and liberty.

The call for demoting secular human rights because they are intolerant and are a threat to peace is presented as an empirical observation. The empirical argument is made that it is secularism, not religion, which has wrought disaster in the 20<sup>th</sup> century. This assertion is arguable. Although the devastation and slaughter of the 20<sup>th</sup> century wars and revolutions were not waged in the name of religion; they were not waged against religion or in the name of secularism either. These ravages of humanity were certainly not committed in the name of secular human rights. On the contrary, critique of the worst excesses of these regimes is enhanced by application of secular human rights premises, and it was in revulsion against them that the International Declaration of Human Rights was promulgated.<sup>18</sup>

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<sup>16</sup> Jacob T. Levy establishes a useful typology for the rights claims of subgroups, identifying a range of claims, such as immunity from unfairly burdensome laws; assistance; self-government; external rules limiting freedom of non-members; internal rules limiting the freedom of members; recognition and enforcement of autonomous legal practices; guaranteed representation in government bodies; and symbolic claims. Jacob T. Levy, *Classifying Cultural Rights*, in *ETHNICITY AND GROUP RIGHTS* 22, 39 (Ian Shapiro & Will Kymlicka eds., 2000).

<sup>17</sup> Martha Nussbaum has documented the widespread existence of dissent among women in traditionalist cultures or religious communities in her outstanding work on women and culture. The presence of such dissent is also palpable in the shadow reports of NGOs from the countries reporting to the Committee on the Elimination of Discrimination against Women, which present the claims of women who seek to have the equality principles of the convention applied in full. This dissent requires the application of human rights standards to orthodox religions and traditionalist cultures in order that full expression be given to the human rights of the group as it really is and not as it is hegemonically represented in the voice of its traditionalist leadership. MARTHA CRAVEN NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 229-30 (2000).

<sup>18</sup> By contrast, the Crusades, the Christian religious wars of the Middle Ages, and Islamic Jihad have all been waged in the name of religion and in order to further the goal of domination by a certain religion. Dostoevsky said, “without religion, anything will be permitted” but it might be countered “with religion, anything will be permitted.” Malene Busk, *Remarks at the International Conference in Gothenburg, Sweden: Why is Secularism Essential?* (Mar. 7, 2009).

The peace motive in the proposal to restrict secularism because it incites fundamentalist religious responses, put differently, condones surrender to the power of the religious. This is abundantly clear in Pakistan's surrender of the Swat Valley to the Taliban. This motif is, however, applicable beyond the sphere of fundamentalist violence. It recurs where religious institutions acquire political power through manipulation of coalition politics, such as that by the religious parties in Israeli parliamentary democracy, and where they promote welfare dependence and totalitarian politics backed with violence, such as the domination of Hamas in the Palestinian territories. In this peace motive there is a disguised normative preference. There is a compromise for peace in exchange for the human rights of those who are oppressed by religious hegemony. This involves the compromise of the constitutional human rights values of equality and liberty.

The justification of this compromise in the theoretical literature is based, additionally, on arguments of diversity and pluralism, or of communitarianism and shared belonging. The literature justifies the need to respect the autonomy of the religious hegemony as though it were a legitimate choice for constitutional democracy. The impact of a choice of religious pluralism on human rights is ignored or marginalized in the anti-secularist literature. This is illustrated by the fact that the words gender, women, feminism, freedom of conscience or speech, homosexuality, patriarchy, apostasy, and heresy are usually not even to be found in the index. Occasionally, in this literature, the sacrifice of human rights is made explicit. Norman Solomon, who proposes that where religious demands conflict with universal human rights, "solutions can be approached in a pragmatic fashion accepting compromise," also observes:

[W]hereas anti-slavery consensus is strong enough for us to demand the abolition of slavery in any society that still endorses it on religious or other grounds [in the Bible the New Testament condoned slavery], there may not in practice be a strong enough consensus for a parallel demand to be made for the equalisation of women's status.<sup>19</sup>

Indeed, amongst those human rights to be sacrificed on the altar of religion, women's rights are foremost. It is, then, at women's expense and that of homosexuals and non-believers that the peace and tolerance of religious diversity or pluralism is to be purchased.

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<sup>19</sup> DOES GOD BELIEVE IN HUMAN RIGHTS? ESSAYS ON RELIGION AND HUMAN RIGHTS 101 (Nazila Ghanea, Alan Stephens & Raphael Walden eds., 2007).

## HUMAN RIGHTS COSTS OF DEFERRING TO RELIGION

There are current manifestations of the dissonance between orthodox religions and human rights standards in most regions of the world. The revival in the public sphere of Catholicism and Russian Orthodoxy in the ex-Soviet states, of orthodox Judaism in Israel, of radical Islam in Asia and in immigrant communities in Europe has put religion on the constitutional agenda. This revival resonates with no small measure of nostalgia for, in the words of Adam Seligman in this symposium, “trust, empathy and mercy.”<sup>20</sup> Indeed the magnetic pull of religion has been documented by sociologists who explain that religions offer social solidarity, psychological comfort, ways of coping with the unknown and death; they are inculcated by ritual, repetition, music and fear of transcendental as well as temporal punishment. However, whatever the benefits of these attributes of religion in the private sphere and in personal belief, it is doubtful that they can in any way justify deference to religion in the constitutional framework. Religion is not only a philosophical or psychological system operative at the level of thought, expression and choice, which are to be protected as human rights. In the case of the monotheisms, religions are socio-political institutions that operate as normative systems. As such, institutionalised religions are in confrontation with human rights, and deference to religion means surrender of human rights.

The fundamental tenets of monotheistic religions are at odds with the basis of human rights doctrine. Human rights doctrine is human-centric; it is based on the autonomy and responsibility of the individual (individualism) and systemic-rational principles (rationalism).<sup>21</sup> The doctrine takes as its premise the authority of the State (secularism)<sup>22</sup> and, as its goal, the prevention of abuse of the State’s power over the individual. Monotheistic religion, in contrast, is based on the subjection of the individual and the community to the will of God and on a transcendental morality. The confrontation between monotheistic religion and modern human rights is clearly evidenced in the gap between the concept of religious duty and human right;<sup>23</sup> in the clash between the religious prohibition of apostasy or heresy and freedom of

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<sup>20</sup> Adam B. Seligman, *Living Together Differently*, 30 CARDOZO L. REV. 2881 (2009).

<sup>21</sup> Talcott Parsons, *On the Concept of Influence*, 27 PUB. OPINION Q. 37 (1963). There is a rich literature on such hermeneutical efforts. See, e.g., Abdullahi Ahmed An-Na’im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13 (1990).

<sup>22</sup> See Arieli, *supra* note 4, at 44.

<sup>23</sup> Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

speech, conscience, and religion;<sup>24</sup> and, in the patriarchal, religious opposition to women's right to equality and to homosexuals' right to be homosexual. Within some divisions of monotheism as a whole, there has been a movement to reform and to close the gap with human rights doctrine, e.g., in Protestantism and Reform Judaism. There are also interpretations of Catholicism<sup>25</sup> and Islam,<sup>26</sup> issued by individual religious leaders, which are more consonant with a human rights approach. However, this hermeneutical endeavor is far from complete, in the best of cases, and is demonstratively absent in those cases where the religious community is asserting a defense against human rights claims.<sup>27</sup>

The idea that religions provide empathy, and that it is this empathy which is lacking from the human rights project, is misplaced. It is human rights, rather than religion, which provides empathy. It is true that the shared starting point of religion and human rights is considered to be in the monotheistic concept of *bezelem*, imago dei, which is considered to be the source of the right to human dignity. However, although *bezelem* acknowledged the common core of spiritual humanity in all human beings, it did not confer entitlement to equal treatment in religious or social institutions. Human rights created an entirely new concept of equal treatment to those who are other or different. They recognized the right of the other to experience the world in a way of equal value as oneself, insofar as the experiencing is regulated by political and legal organization. Religions have not been empathetic to the other. Based on a chain of authority leading to God, there is a clear mandate for authoritarianism in societal institutions.

Thus, patriarchy is a core message of the monotheistic religions. Rita Gross writes:

[I]n Christianity and Judaism . . . continued reflection and experiences led us to the realization that we were excluded from ritual and leadership because of certain theological concepts, especially the image of the deity as exclusively male. It became clear that if patriarchal control of ritual was eliminated, the patriarchal naming of God would closely follow, which could lead to even more experimentation with praxis in other areas.<sup>28</sup>

The monotheistic religions are hierarchical and patriarchal by definition. Carol Christ, for instance, claims that the Bible's core

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<sup>24</sup> Haim H. Cohn, *The Law of Religious Dissidents: A Comparative Historical Survey*, 34 ISR. L. REV. 39 (2000).

<sup>25</sup> POPE JOHN PAUL II, LETTER TO WOMEN (1995).

<sup>26</sup> MARTHA CRAVEN NUSSBAUM, SEX AND SOCIAL JUSTICE 86 (1999). There is a rich literature on such hermeneutical efforts. See, e.g., An-Na'im, *supra* note 21, at 13.

<sup>27</sup> Raimundo Pannikar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982).

<sup>28</sup> RITA M. GROSS, FEMINISM & RELIGION: AN INTRODUCTION 200 (1996).

message is one of intolerance and that its core symbolism makes male domination appear normal and legitimate, a mirroring on earth of male authority on high.<sup>29</sup> The hierarchically gendered family is the primary social unit in this system of male dominance, with men ruling over women in the home. Religious abhorrence of homosexuality is an inevitable emanation of this need to establish men as natural rulers, as opposed to those who are ruled. What religion offered to those who were not identified with the male hegemony of the monotheisms was compassion or charity, not empathy.

This discussion of religious patriarchy cannot be schematically separated from cultural practices. Indeed, the religious values discussed above are a part of human culture. However, religious norms form the hard core of culture, with a holy text, official interpreters, judgment and transcendental punishment. Religion interacts with traditionalist cultures. Although authoritarian and patriarchal cultural practices may not be directly mandated in the documentary sources of religion, there appears to be a correlation between certain violent cultural practices and the religious environments in which they thrive. A definitive correlation would require careful research, but an example of the symbiosis between the two may be found in the policy of the Islamic Republic of Iran to expand the culture of chastity, impose stricter veiling requirements, and to provide for imprisonment of up to twelve months and flogging of up to seventy-four lashes for offences relating to the dress code.<sup>30</sup> An extreme example is in the Taliban's prohibition of girls' education on pain of death. Violent traditional practices, defended in the name of traditionalist culture, that impinge on human rights are thus frequently protected under the wings of one religion or another. Such practices include: a preference for sons, leading to female infanticide (Islam and Hindu); female genital mutilation (Islam); a husband's right to obedience and power to discipline or commit acts of violence against his wife (Islam); marital rape (Islam and Christianity); family honor killings by the shamed father or brothers of a girl who has been sexually violated, whether with consent or by rape (Islam); stoning of adulterous women (Islam); compulsory dress codes for women, the violation of which results in violent punishment (Islam); prohibition of women's participation in religious ritual, enforced by violence (Judaism); and persecution of homosexuals (Judaism, Christianity and Islam). Thus, religion may condone violence in the enforcement of its patriarchal regime.

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<sup>29</sup> CAROL P. CHRIST, *LAUGHTER OF APHRODITE: REFLECTIONS ON A JOURNEY TO THE GODDESS* 59-60 (1987); see also *It's Too Broken to Be Fixed: The Feminist Case Against Theological Transformation of Traditional Religions*, in GROSS, *supra* note 28, at 140-46.

<sup>30</sup> The Secretary-General, *Situation of Human Rights in the Islamic Republic of Iran*, delivered to the General Assembly, U.N. Doc. A/52/472 (Oct. 15, 1997).

## SECULAR CONSTITUTIONALISM IN ACTION

It is secular constitutionalism which can provide a forum for women, homosexuals, Dalits, heretics and non-believers to assert their rights to equality and freedom of conscience in the face of repression by the hegemony of religious normative institutions. International treaty regulation establishes a hierarchy in which the rights to equality and to freedom of expression or conscience take precedence over the right to manifest one's religion or to enjoy one's culture. The clash between culture and religion, on the one hand, and human rights, on the other, is expressly regulated in two international conventions: ICCPR<sup>31</sup> and CEDAW.<sup>32</sup> Of the two, CEDAW provides a more specific hierarchy of rights. At the constitutional level, no express hierarchy has been articulated such as that found in international treaties. There may be some indication of a hierarchy of rights in that the right to equality is one of the few rights declared in absolute terms in some of the constitutions of Western democracies.<sup>33</sup> On this basis, the potential for establishing such a hierarchy of rights seems to be conceivable. Furthermore, even without the express determination of the primacy of equality and freedom of conscience over the right to manifestation of religion or enjoyment of culture, there is a mode of interpretation which regards the right to religious expression as private and not extending to the exercise of power or rights over others. By this interpretation, the secular constitutional realm will occupy the public space, guaranteeing pluralistic equality and with it a space for the manifestation of religion in a way that does not violate human rights.

It is in the courts that the constitutional struggle between traditionalist religious or cultural values and human rights has been waged. I have analyzed a sample of cases in which the cultural defense and the right to religious freedom have been raised in opposition to women's and homosexuals' claims to gender equality in constitutional courts. Traditionalist religions and cultures are bastions of patriarchal authority with regards to a wide range of issues in both the public and the private or domestic sphere, and there is a considerable body of constitutional case law concerning the clash with women's and homosexuals' human rights. My purpose was to compare the rhetoric and the outcome of the judgments in order to extrapolate some

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<sup>31</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 173.

<sup>32</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>33</sup> ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 97 (2000).

empirical data as to the readiness of constitutional courts to apply rights in the hierarchical fashion required by the international treaties.

A. *Polygamy, Adultery, Obedience and Divorce*

The monotheistic religions all have regulatory norms on marriage, which share the theme of patriarchy in a hierarchical gendered family. There are significant differences in the specific marital laws of each religion, but the patriarchal asymmetry in power between husbands and wives is evident in all. Multicultural relativists, of the feminist and non-feminist variety, have argued that some of the specific rules are not necessarily repressive for women. And there has been a considerable amount of literature extolling the virtues of polygamy as benefiting women because multiple wives may share the burdens of family, or because it is a matter of free choice. However, polygamy seen in the comparative religious context is an ode to patriarchy. Polygamy in early Judaism (abandoned in the 6<sup>th</sup> century and prohibited in the 11<sup>th</sup> century) and in Islam, is neither symmetrical nor mutual as between men and women. Free choice is not accorded to existing wives when a new wife is brought in by the husband. The recognition of polygamy entails a different approach to adultery by men or by women, and in Islam women's adultery is penalized by stoning. In Jewish law, even after the prohibition of polygamy, women's adultery is punished by heavier penalties than those imposed on men, such as *mamzerut* of the children born of the adulterous union and prohibition of her marriage with her adulterous partner even after divorce. Asymmetrical divorce rules are clear evidence of patriarchy: in Judaism, the husband has absolute patriarchal power to refuse to divorce his wife and no authority other than that of the husband can release her from the chains of marriage; and in Islam, men have the patriarchal power to unilaterally divorce their wives by merely announcing "talak." Christian marriage vows retain an asymmetrical duty of obedience for the woman and a degrading ethos of chastity for real women, personified in the Virginity of the Holy Mother.

The approach of constitutional courts to marital status issues has varied as between jurisdictions. The United States Supreme Court has upheld women's right to equality in marital status, in the context reviewing statutory prohibitions on Mormon polygamy. In a series of cases, starting in 1879, the United States Supreme Court held that the free exercise clause did not protect polygamy from criminal sanction. The decisions related to the Mormons, a minority sect of Christianity, which is the religion of the majority. In *Reynolds*, the United States Supreme Court upheld a prohibition on the Mormon practice of

polygamy.<sup>34</sup> In 1880, in *Davis v. Beason*, Justice Field said: “Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women, and to debase man.”<sup>35</sup> As a constitutional matter, the Court held that, “[w]hile legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as ‘religion.’”<sup>36</sup> In 1946, in *Cleveland*, the majority opinion, delivered by Justice Douglas, held that the transportation of women across state lines for the purpose of polygamous cohabitation was “an immoral purpose” under the statutory language of the Mann Act and, hence, a criminal offence.<sup>37</sup> Citing *Reynolds*, the Court ruled: “it has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy.”<sup>38</sup> In his dissent, Justice Murphy introduced a note of doubt. He wrote:

It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is as well as what it is not. . . . Historically its use has far exceeded any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. . . . There is thus no basis in fact for including polygyny within the phrase ‘any other immoral purpose’ [along with prostitution and debauchery].<sup>39</sup>

In India, the Supreme Court refused to strike down the Muslim practice of polygamy for the large and politically active Muslim minority but refused to extend the right to polygamy to Hindu men who had converted to Islam. In 1995, in *Sarla Mudgal*, the Indian Supreme Court decided, in the case of a man who was married in a monogamous Hindu marriage, under the Hindu Marriage Act, and who converted to Islam, only to remarry without dissolving the first marriage, that the second marriage was prohibited.<sup>40</sup> The Court refused to recognize the second marriage as a polygamous marriage under the Muslim law. The

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<sup>34</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>35</sup> *Davis v. Beason*, 133 U.S. 333, 341 (1890).

<sup>36</sup> *Id.* at 345.

<sup>37</sup> *Cleveland v. United States*, 329 U.S. 14 (1946).

<sup>38</sup> *Id.* at 20.

<sup>39</sup> *Id.* at 25-27.

<sup>40</sup> *Sarla Mudgal v. Union of India*, (1995) 3 S.C.C. 635.

Court, pointing out that polygamy had been held injurious to public morals in the United States, said: “in the Indian Republic, there was to be only one Nation—the Indian Nation—and no community could claim to remain a separate entity on the basis of religion.”<sup>41</sup> In 1997, the Indian Supreme Court handed down a more ambivalent decision on polygamy. In *Ahmedabad Women Action Group*, the Court dismissed constitutional challenges by a women’s NGO to the Muslim practices of polygamy and triple talaq (a form of summary unilateral divorce by the husband) and to provisions of the Hindu Succession Act that discriminated against women.<sup>42</sup> The Court used very different rhetoric from that used only two years earlier: “a uniform law, though highly desirable, may be counter-productive to the unity and integrity of the nation” and “polygamy is recognised as a valid institution when a Muslim male marries more than one wife.”<sup>43</sup>

The Israeli Supreme Court has rigidly refrained from interfering in statutory provisions which empower the courts of the religious communities to determine the marital status of members of the three communities in Israel—Jewish, Muslim and Christian—even where the Court has acknowledged their violation of women’s human rights. The acquiescence of the Court is in the context of a powerful Orthodox Jewish political lobby which succeeds in keeping the religious legislation in place. In 1971, in *Boronovski*, Israel’s High Court of Justice rejected a woman’s claim to cancel the rabbinical license, issued in accordance with Jewish law, allowing her husband to remarry without her agreement to give him a ghet (divorce).<sup>44</sup> The woman petitioner had claimed discrimination on grounds of gender, since women are not symmetrically entitled to a similar rabbinical license in case of refusal of a ghet by their husbands. The majority decision rejected the petitioner’s claim and, although expressly recognizing the injustice to women and expressing regret, refused to find unjustifiable discrimination. In a minority opinion accepting the claim, Justice Haim Cohen concluded that there were no differences between men and women that could justify the difference in treatment.<sup>45</sup> In 1997, in *Rephaeli*, a woman petitioned to overturn the refusal of the Grand Rabbinical Court to oblige her husband—separated from her for more

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<sup>41</sup> *Id.* at 650; see also K. N. Chandrasekharan Pillai, *Women and Criminal Procedure*, in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SAKAR* 139-60 (Amita Dhanda & Archana Parashar eds., 1999).

<sup>42</sup> *Ahmedabad Women Action Group v. Union of India*, (1997) 3 S.C.C. 573.

<sup>43</sup> *Id.* at 577.

<sup>44</sup> HCJ (En Banc) 10/69 *Boronovski v. Chief Rabbinate*, [1971] IsrSC 25(1) 7.

<sup>45</sup> *Id.* at 18. It is interesting to note that the Court’s validation of the legislation results in a situation of greater equality, on the issue of men’s multiple marriages, for Muslim and Christian than for Jewish women.

than six years—to give her a divorce.<sup>46</sup> The High Court of Justice ruled unanimously to dismiss, holding that it could not intervene in the Grand Rabbinical Court’s decision. Although concurring in the judgment, Justice Cheshin remarked that, under Jewish law, the situation of a slave was preferable to that of a wife since even a slave would have been released after seven years of bondage.<sup>47</sup>

In 2007, the Canadian Supreme Court upheld the enforceability of a Jewish husband’s agreement, which had been made in made in the course of proceedings for a civil divorce, to appear before the rabbinical authorities to obtain a Jewish divorce, or ghet, immediately upon the granting of the divorce.<sup>48</sup> A wife cannot obtain a ghet unless her husband agrees to give it. Without one, she remains his wife and is unable to remarry under Jewish law. In this case, despite the wife’s repeated requests, in breach of the agreement, the husband consistently refused to provide a ghet for 15 years, and the wife sued for damages. The husband argued that his agreement to give a ghet was not valid under Quebec law and that he was protected by his right to freedom of religion from having to pay damages for its breach. The Supreme Court held the agreement enforceable. In its judgment, the Court took note of the gender discrimination the religious barriers to remarriage may represent and held that enforcement of agreements to release the wife harmonizes with Canada’s approach to equality rights, to divorce and remarriage and to religious freedom.

#### B. *Purchase, Matrimonial Property and Maintenance*

Underlying patriarchal religious matrimonial regimes there is a property rationale. In the Jewish marriage ceremony the woman is purchased. Judaism, Islam and some branches of Christianity impose a patriarchal division of property, according to which full property rights are vested in the husband or sons, and women are compensated either with reduced property rights or with compensation for loss of income or property on divorce.

In both India and Israel, the Supreme Courts have recognized women’s right to equality in the division of matrimonial property where the division is being determined by religious authorities. In both countries the civil law provisions have introduced egalitarian matrimonial property and maintenance laws but, in both, there are religious sub-systems which apply religious law to these issues—in

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<sup>46</sup> HCJ 1371/96 Rephaeli v. Rephaeli, [1997] IsrSC 51(1) 198.

<sup>47</sup> *Id.* at 213. Nevertheless, despite this powerful rhetoric, Justice Cheshin, like the other judges, did not find a way to intervene.

<sup>48</sup> Bruker v. Marcovitz, [2007] 3 S.C.R. 607, 2007 S.C.C. 54.

India, Muslim and Christian minority sub-systems, and in Israel the Jewish Orthodox minority in a Jewish majority.

In India, with its Hindu majority, the clash between religion and women's right to equality has been examined in relation to the two minority religions (Islam and Christianity). For Hindu women, India follows a system in which personal status laws are determined by the law of the religion of the parties involved but are applied in civil courts. Many of the problems of inequality in Hindu family law were removed by the Hindu Marriage Act.<sup>49</sup>

In the 1985 *Shah Bano Begum* case, the Indian Supreme Court confirmed a maintenance award for a divorced Muslim woman, allegedly contrary to Shari'a law.<sup>50</sup> The Court was composed of five Hindu judges and the case was decided unanimously. On the question of the religious claims underlying opposition to the maintenance award, Chief Justice Chandrachud was, on the one hand, scathing about the inequality wrought by the Muslim personal code:

Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But is the only price of that privilege the dole of pittance during the period of iddat? And is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him forever from the duty of paying adequately so as to enable her to keep her body and soul together?<sup>51</sup>

The Court also found Islamic authority in verses 241 and 242 of the Qur'an for the proposition that there is an obligation to pay maintenance to divorced wives who are unable to maintain themselves.<sup>52</sup> The ratio of the case was, however, based on the Code of Criminal Procedure, under which a maintenance obligation may be imposed on a person who neglects or refuses to pay maintenance to a wife who is unable to maintain herself. In the aftermath of *Shah Bano*, the statutory Muslim Personal Law Board campaigned to reverse the ruling. It succeeded on

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<sup>49</sup> The Hindu Marriage Act, No. 25 of 1955; India Code (1955).

<sup>50</sup> Ahmed Khan v. Shah Bano Begum, (1985) 2 S.C.C. 556.

<sup>51</sup> *Id.* at 559.

<sup>52</sup> *Cf.* Abu Bakar Siddique v. S.M.A. Bakkar, 38 D.L.R. (AD) (1986). In Bangladesh, in 1986, the High Court ruled on a petition by a mother to retain custody of her son after the age of seven. The Court held that although the principles of Islamic law allowed the woman to be guardian of a male child only until the age of seven, a deviation from this rule would be possible where the child's welfare required it. According to the judge, there was no authoritative ruling on this issue in the Qur'an or the Sunnah, and hence he was within the principles of Islamic law in awarding custody to the mother in this unusual case, where the child was afflicted with a rare disease and the mother, a doctor, was able to take care of his treatment. In that case, the Court was ruling on a Muslim issue in a Muslim state and the decision does not appear to have been opposed by public opinion.

all fronts. The ruling Congress Party introduced legislation to reverse the judgment, and the petitioner waived all her rights under the Supreme Court judgment.<sup>53</sup>

In 1986, in *Mary Roy*, the Indian Supreme Court considered the constitutionality of the unequal inheritance provisions in the Christian Succession Act of 1916.<sup>54</sup> The petitioner, a Christian woman and resident of Kerala, claimed that the act infringed women's right to equality in that it provided for a lower inheritance share for women. The Supreme Court avoided the issue of constitutionality, holding that the Indian Succession Act of 1925, which grants equal inheritance rights to men and women, governed Christians in Kerala. According to Martha Nussbaum, the Synod of Christian Churches has supported opposition by the Christian community to the *Mary Roy* decision and has financed the drafting of wills to disinherit female heirs.<sup>55</sup>

In Israel, the *Bavli* case, in 1994, involved the division of matrimonial property.<sup>56</sup> Jurisdiction for determining the division of matrimonial property is sometimes under the rabbinical courts and sometimes the civil courts: jurisdiction is vested in the rabbinical courts either where both partners to the marriage agree to it or where one of the partners (usually the husband) has reached the rabbinical court with a request for a divorce and a request to include adjudication of the property issues, before the other partner has brought action in a civil court. Different regimes regarding the division of matrimonial property are applied in the two jurisdictions; in the rabbinical courts, the Jewish law regime of property separation is applied, and, in the civil courts, there is both a judicial and statutory presumption of community property, which is to be divided equally between the spouses on dissolution of the marriage. In the case in hand, the rabbinical courts had jurisdiction and refused to divide the matrimonial property equally. The divorced wife's petition to the High Court of Justice was accepted and the case returned to the rabbinical courts. Justice Barak, the president of the High Court, rejected the claim that the Jewish law regime of separate matrimonial property could not be considered discriminatory as it applied to men and women equally, holding that the social facts showed women are disadvantaged where a separate property

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<sup>53</sup> Amendments to the code of criminal procedure have strengthened women's right to maintenance in divorces. See Code of Criminal Procedure, 1973, No. 2 of 1974; INDIA CODE CRIM. PROC. (1974), § 125.

<sup>54</sup> *Mary Roy v. State of Kerala*, A.I.R., 1986 S.C. 1011.

<sup>55</sup> NUSSBAUM, *supra* note 26, at 98; see also Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101 (2000). According to Galanter and Krishnan, the rejection of the decision by the Christian minority group demonstrates concern about losing their identity if they do not keep the established personal law.

<sup>56</sup> HCJ 1000/92 *Bavli v. High Rabbinical Court*, [1994] IsrSC 48(2) 221.

regime is applied.<sup>57</sup> Following this decision, there were vociferous protests from Orthodox Jewish groups, and it is common knowledge that the rabbinical courts do not apply the ruling by the High Court of Justice.

Thus, in both countries the judicial rulings have failed to effect comprehensive social change. In India, Moslem riots against the judicial rulings led to a legislative override. In Israel, the rabbinical courts, exercising exclusive jurisdiction over divorce in Israel, do not implement the women's right to equality in divorce proceedings.

### C. *Control of Women's Reproductive Role*

Prohibition of abortion is ostensibly based on a contest between the rights of the woman and the rights of the child and, hence, not a matter of control of women's reproductive role. The right to life regards the prohibition as necessitated for protection of the "unborn child," based on the categorization of the fetus as a person from the moment of conception. However, deconstruction of the arguments presented in support of the right to life reveal clearly that the issue is one of control over women's reproductive role and denial of their autonomous moral agency. The idea that life begins at conception—and hence the fetus has equal rights to be balanced against those of the mother—is predicated not as claimed by some commentators<sup>58</sup> as a religious view as to when life begins, but one particular Christian religious view, accepted by most, though not all, branches of Christianity and not at all stages in the history of those branches which do prohibit abortion. It is not fully accepted by Judaism or Islam. The Christian prohibition of abortion is in a context which restricts women's autonomy independently of the existence of a fetus. The prohibition extends to prohibition of contraception. While this apparently affects men as it does women, it prejudices women's autonomy far more than it does that of men, who do not become pregnant or bear the child. Additionally, the restriction of women's autonomy has been presented, in Kennedy's plurality opinion in the United States Supreme Court's decision in *Carhart*, as protection of pregnant women as mothers, described by Reva Siegel as the "woman-protective rationale" which is not connected with the fetus' right to life.

Women's rights are violated by restriction of their right to decide whether to continue with a pregnancy or have an abortion: women's personhood, autonomy and individual dignity, their right to privacy,

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<sup>57</sup> *Id.* at 234.

<sup>58</sup> Judith Resnik, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict*, in *THE COURTS AND SOCIAL POLICY IN THE UNITED STATES* (2008).

equality, health and welfare are infringed. Furthermore, women's rights as citizens to freedom of conscience and freedom from religious coercion, irrespective of membership in the Christian faith or community which prohibits abortion, is violated. Beyond all of these, in numerous tragic cases, women's right to life is sacrificed. The WHO estimates that induced abortion, performed in an adverse social and legal climate under unsafe conditions, results in approximately 70,000 deaths each year.<sup>59</sup>

The Supreme Courts of the US, Canada, Germany, Columbia and Mexico have made rulings on this issue.

In 1973, in *Roe v. Wade*,<sup>60</sup> the United States Supreme Court, by a seven to two majority, struck a blow for women's autonomy. The Court ruled that because the fetus is not yet viable outside of the mother's womb, the woman has a right to decide during the first trimester whether to abort the pregnancy. This decision was followed by persistent state legislative attempts to limit women's autonomy in deciding on abortion, by requiring parental consent, spousal consent, doctors' right to refuse, funding restrictions and restrictions on certain kinds of abortion procedures. In 1992, in *Casey*,<sup>61</sup> the Court held by five to four, that before fetal viability, a woman has a right to terminate her pregnancy and a state law is unconstitutional if it imposes on the woman's decision an "undue burden." Justice Kennedy, writing for the majority, commented:

[T]he liberty of the women is at stake in a sense unique to the human condition and so unique to the law. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>62</sup>

Justice O'Connor found it necessary to point out that spousal notification is an undue burden: "Women do not lose their constitutionally protected liberty when they marry."<sup>63</sup> In 2000, in *Stenberg* again a five to four majority struck down legislative attempts to restrict women's autonomy in deciding whether to have an abortion: the majority struck down Nebraska Partial Birth Abortion statute as unconstitutional because it lacks the requisite exception "for the

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<sup>59</sup> See WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 7 (2003), available at <http://whqlibdoc.who.int/publications/2003/9241590343.pdf>.

<sup>60</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>61</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>62</sup> *Id.* at 852.

<sup>63</sup> *Id.* at 898.

preservation of the . . . health of the mother.”<sup>64</sup> However, Justice Kennedy switched positions, voting to uphold the partial birth abortion statute on the grounds that “moral principles having their foundation in the intrinsic value of human life including the life of the unborn.”<sup>65</sup> Jeffrey Toobin comments that “Kennedy’s hymn to autonomy in 1992 turned into a paean to the life of the unborn in 2000.”<sup>66</sup> In 2007, in *Gonzales v. Carhart*,<sup>67</sup> Justice Kennedy’s dissent in *Stenberg* became the majority opinion, with Justice Alito replacing Justice O’Connor, and a five to four majority upheld the Partial Birth Abortion Act as constitutional, even without a women’s health exception: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>68</sup> Justice Ginsburg, in dissent, considered the majority decision “alarming.”<sup>69</sup>

The German Constitutional Court<sup>70</sup> held in 1975, just two years after *Roe v. Wade*, that the unborn have a right to life guaranteed by the constitution, that abortion is “an act of killing,” and that the fetus deserves legal protection throughout its development. In the required balancing,

both constitutional values are to be viewed in their relationship to human dignity, the center of the value system of the constitution. . . . A decision oriented to Article 1, Paragraph 1, of the Basic Law must come down in favor of the precedence of the protection of life for the child [in the womb] over the right of the pregnant woman to self-determination. Regarding many opportunities for development of personality, she can be adversely affected through pregnancy, birth and the education of her children. On the other hand, the unborn life is destroyed through the interruption of pregnancy. According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Article 19, Paragraph 2, of the Basic Law, precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time.<sup>71</sup>

In the early 1990s, the German legislature (Bundestag) introduced

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<sup>64</sup> *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000).

<sup>65</sup> *Id.* at 979.

<sup>66</sup> JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 328 (2007).

<sup>67</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>68</sup> *Id.* at 159.

<sup>69</sup> *Id.* at 170.

<sup>70</sup> 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] 1975, 1 (F.R.G.).

<sup>71</sup> *Id.*

a system where a woman having an abortion during the first three months of her pregnancy does not face legal sanctions if she undergoes mandatory counseling which has as one of its goals to present the case that the developing fetus is an independent human life, and obeys a 72 hour waiting period between counseling and the abortion. Later abortions are not punishable if medical reasons, such as possible harm to the woman from continued pregnancy, or a severely deformed fetus, indicate so.

In 1988, the Supreme Court of Canada decision in *R. v. Morgentaler*, declared the entire section restricting women's right to have an abortion to be of no force or effect because it was held to violate section 7 of the Canadian Charter of Rights and Freedoms, which provides that: "Everyone has the right to life, liberty, and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>72</sup>

The majority of the Court held that "the structure—system regulating access to therapeutic abortions—is manifestly unfair. It contains so many potential barriers to its own operation that the [exception] it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify."<sup>73</sup> As such, the provision was held to violate the principles of fundamental justice and was struck down, leaving Canada with a legislative vacuum to this day. Justice Wilson wrote:

The right to 'liberty' contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Liberty in a free and democratic society does not require the state to approve such decisions but it does require the state to respect them. . . . 'Freedom of conscience and religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms 'conscience' and 'religion' should not be treated as tautologous if capable of independent, although related, meaning. The state here is endorsing one conscientiously-held view at the expense of another. It is denying freedom of conscience to some, treating them as means to an end, depriving them of their 'essential humanity'.<sup>74</sup>

There is a legislative proposal, which passed a second reading in 2008, to create a double offense in which injury to a pregnant woman would be regarded as a separate offense against the fetus; in this Bill the word "fetus" is replaced by "unborn child," and "pregnant woman" by "mother."<sup>75</sup> Opponents argue that the whole thing is just a pretext to

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<sup>72</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 50.

<sup>73</sup> *Id.* at 72-73.

<sup>74</sup> *Id.* at 36-37.

<sup>75</sup> Unborn Victims of Crime Act, Bill C-484, 39th Parliament, 2d Sess. (Can. 2007)

legislate a concept that will facilitate Charter challenges to abortion rights.

D. *Modesty and Restrictive Dress Codes*

Restrictive dress and behavioral codes to preserve women's modesty exist in all three monotheistic religions. The insistence on the covering of hair for married women in Judaism and Islam or the covering of their hair in church for Christian women are all related to modesty. The most severe remaining strictures are in ultra-orthodox Judaism, in which a very small community still requires women to shave their heads on marriage and in the Islamic world, where many millions of women are forced, by custom and sometimes by law, to wear covering ranging from the headscarf (*hijab*) to the *chador*, *niqab* and, in the most extreme cases, to the *burqa*. The Islamic feminist argument made in favor of the veil is that it protects women from sexual harassment. However, it seems scarcely feminist to argue that a woman's way to protection against sexual harassment is by restricting her own freedom of movement rather than restricting the male's freedom to harass. It is further claimed that in the West, Muslim immigrants wear the veil as a form of ideological and ethnic identity symbol. Although there are undoubtedly a significant number of Muslim women who express these views, it is clear from the comparative religious context that religious rules on modesty for women are not merely neutral cultural manifestations, but are connected to repression of women's sexuality and their subjection to male power in the family. Indeed the veil has been described by an Iranian women's movement as "the ideological banner of Iran's sexual apartheid and misogynist values."<sup>76</sup>

Two contrary trends regarding women's human rights as religious women have been brought before constitutional courts. There are those women who regard themselves as religious feminists who, rejecting the patriarchal norms of their religions, have demanded full and equal religious personhood. This includes Lutheran and Protestant women who have sought admission to the priesthood, and it includes Orthodox Jewish women who have sought equality in the rituals of worship, as practiced in the public arena. In the only constitutional case brought on this issue, the Israeli Supreme Court ultimately refused the women's claim to equality in ritual. In a different trend, there are Muslim women

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(sponsored by Conservative MP Ken Epp, a strong Mennonite Christian).

<sup>76</sup> AZAR MAJEDI, *WOMEN'S RIGHTS VS POLITICAL ISLAM: A SERIES OF POLITICAL WRITINGS ABOUT THE DEVASTATING EFFECTS OF POLITICAL ISLAM ON WOMEN'S SITUATION AND THE STRUGGLE OF WOMEN AGAINST IT* (2007).

who are asserting the right to conform to evidently patriarchal religious norms and express this through the demand to wear various forms of the Muslim head scarf in public and private institutions. These claims have produced a mass of constitutional and labor court decisions in Europe, where the Muslims are minority communities and in Turkey, where traditionalist religious Muslims are regarded as a minority in a secular constitutional state. The overall trend seems to be to recognize adult religious women's right to wear the veil, except where there are dress codes to which all members of an institution must adhere. However, the Courts have been more circumspect as regards the wearing of Muslim female apparel in educational institutions, regarding this as contrary either to state secularism or to gender equality.

In a series of three decisions between 1994 to 2004, Israel's High Court of Justice rejected the petition of the Women of the Wall (WOW) to pray at the Kotel (the Western Wall of the second Temple and a central national, cultural, and religious site for Jews) in a group (*tefila*), wearing prayer shawls (*tallit*) and reading aloud from the Torah Scroll (*Torah*), a manner of prayer customary for men, but not for women, and a subject of much controversy among Orthodox Jewish authorities.<sup>77</sup> The women's prayer in this manner—the three Ts—had been greeted with violent opposition from other Orthodox worshippers and prohibited by the secular authorities. The objections raised against the women's mode of prayer included the biblical restriction on women's wearing men's apparel and the Talmudic restriction on women raising their voices in song or prayer, which is considered seductive provocation.

In the first of its decisions, the Court recommended that the government find a way to enforce the WOW's right to freedom of worship while minimizing the injury to the sensitivities of worshippers.<sup>78</sup> In the second decision, the Court, composed of two women justices and one man, directed the government to implement the WOW's prayer rights at the Kotel within six months.<sup>79</sup> Orthodox Jewish political parties immediately presented a bill to convert the area in front of the Kotel into a religious shrine exclusively for Orthodox religious practice with a penalty of seven years' imprisonment for any person violating the current Orthodox custom of prayer. The attorney general requested a further hearing, and the president of the Supreme Court appointed an expanded panel of nine justices to reconsider the

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<sup>77</sup> HCJ 257/89 Anat Hoffman v. Commissioner of the Western Wall, [1994] IsrSC 48(2) 265.

<sup>78</sup> *Id.* at 356.

<sup>79</sup> HCJ 3358/95 Anat Hoffman v. Director General of Prime Minister's Office, [2000] IsrSC 54(2) 345. The author acted as counsel for the WOW. For a full discussion, see Frances Raday, *Claiming Equal Religious Personhood: Women of the Wall's Constitutional Saga*, in RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 255-98 (Winfried Brugger & Michael Mousa Karayanni eds., 2007).

issue. The Court held, by a majority of nine to two, that the members of WOW were entitled to pray in their manner at the Kotel; however, it also decided, by a majority of five to four, that, in order to prevent injury to the sensitivities of other worshippers, the government should make arrangements for a suitable prayer area for WOW at an adjacent site known as Robinson's Arch—an alternative to which the WOW were totally opposed—and only if the government failed to do so within a year would the WOW have the right to pray at the Kotel.<sup>80</sup> The government constructed a prayer area at Robinson's Arch at which the WOW do not pray.

There has been a series of cases, in Europe and in Turkey, on the wearing of Muslim head scarves—the hijab—in educational institutions or workplaces. The most rigid dress code has been the burqa (head-to-toe covering, with a veiled window for seeing through) or the veil (head-to-toe covering with an open slit for the eyes) and, in less extreme forms, the hijab (headscarf tied under the chin). In constitutional democracies, the issue is represented as a clash between the right of the women themselves to exercise freedom of religion and expression, on one hand, and the right to gender equality or to the freedom to express secular values, on the other.

In 1989, the Constitutional Court in Turkey held unconstitutional a bylaw of the Institutions of Higher Education that, as an exception to the requirement of “modern clothing” in universities, allowed the neck and hair to be veiled by a head scarf because of religious belief.<sup>81</sup> The Court held that the bylaw undermined the secular character of the state, was inconsistent with the law requiring civil servants to have their heads unveiled, and was invalid. This decision thus obliged the universities to ban the wearing of Muslim head scarves. In 2008, the Islamic AKP—the ruling party in Turkey—reversed the ban. The French courts have wavered on the issue of Muslim head scarves. In 1989, the Conseil d'Etat ruled that “the ostentatious wearing” of head scarves at state schools violated a law prohibiting proselytisation in the schools.<sup>82</sup> This decision was followed by unfavorable media attention to the wearing of the hijab; and in 1994, the Ministry of Education issued a directive prohibiting the wearing of “ostentatious political and religious symbols” in state schools.<sup>83</sup> In 1995, however, the Conseil d'Etat held that the

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<sup>80</sup> H CJ 4128/00 Director General of Prime Minister's Office v. Anat Hoffman, [2003] IsrSC 57(3) 289.

<sup>81</sup> Constitutional Court of Turkey, Decision 1989/652.

<sup>82</sup> Lionel Jospin, *Circulaire relative au port d'insignes religieux à l'école se referent à l'avis du Conseil d'Etat*, *Journal Officiel de la République [J.O.] [Official Gazette of France]*, Dec. 15, 1989, p. 15577.

<sup>83</sup> U.S. DEP'T OF STATE, *REPORT ON FRANCE HUMAN RIGHTS PRACTICES, 1995 (1996)*, available at [http://dosfan.lib.uic.edu/ERC/democracy/1995\\_hrp\\_report/95hrp\\_report\\_eur/France.html](http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_eur/France.html).

simple wearing of a Muslim head scarf does not provide grounds for exclusion from school.<sup>84</sup> This was settled by the legislature in 2004 in a law which upheld secularity of French state schools and prohibited the wearing of conspicuous religious symbols by students or teachers.

In 1999, in Switzerland, the Geneva Conseil d'Etat dismissed a teacher's challenge to a ban imposed by the Educational Department on Muslim teachers wearing headscarves in the public, secular education system. That judgment was upheld by the federal court, which, noting that the applicant's job made her a representative of the state, held that the head scarf constituted a strong vestimental sign of belief in a particular religion and that the restriction imposed by the education authorities was accordingly necessary to preserve both the principle of neutrality between different faiths and that of equality between the sexes within the school.<sup>85</sup> In 2003, Germany's Federal Constitutional Court ruled that Muslims could wear their veils while teaching but at the same time encouraged new laws to ban religious symbols.<sup>86</sup> Subsequently, eight of sixteen German states passed school laws that banned headscarves, saying they were an affront to Christian values.

The House of Lords adopted a contextualized approach in the *Denbigh High School* case in 2006.<sup>87</sup> It rejected a Muslim student's petition to be allowed to wear a jilbab to a school which had made provision for tunics and trousers acceptable to the local Muslim community. The opinion in the Court was divided between those judges who held that the school's refusal to allow Shabina Begum to wear a jilbab at school did not interfere with her article 9 right under the European Convention of Human Rights to manifest her religion and those who restricted themselves to holding that, even if it did, the school's decision was objectively justified. The majority of the judges thought it proper that schools should be called upon to explain and justify their decisions, as did the *Denbigh High School* in the specific context. Baroness Hale of Richmond was the only one of the judges to analyze the equality implications of the wearing of the veil. She wrote:

[S]trict dress codes may be imposed upon women, not for their own sake but to serve the ends of others. Hence they may be denied equal freedom to choose for themselves. They may also be denied equal treatment. A dress code which requires women to conceal all but their face and hands, while leaving men much freer to decide what

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<sup>84</sup> *Id.*

<sup>85</sup> *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. 447.

<sup>86</sup> *Kopftuch-Urteil* [Headscarf Decision], *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] [Federal Constitutional Court] 108, 282, Sept. 24, 2003, 2 BvR 1436/02, NJW 2003, 3111 (F.R.G.).

<sup>87</sup> *R (on the application of Begum) v. Denbigh High School Governors* [2006] UKHL 15, [2007] A.C. 100 (U.K.).

they will wear, does not treat them equally.<sup>88</sup>

She went on to explain that while adult women may choose the veil, schools are different. “Their task is to educate the young from all the many and diverse families and communities in this country in accordance with the national curriculum. Their task is to help all of their pupils achieve their full potential.”<sup>89</sup> In deciding how far to go in accommodating religious requirements within its dress code, such a school has to accommodate some complex considerations. These are helpfully explained by Professor Frances Raday in an earlier article:

[G]enuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult. The question is whether patriarchal family control should be allowed to result in girls being socialized according to the implications of veiling while still attending public educational institutions. . . . A mandatory policy that rejects veiling in state educational institutions may provide a crucial opportunity for girls to choose the feminist freedom of state education over the patriarchal dominance of their families. Also, for the families, such a policy may send a clear message that the benefits of state education are tied to the obligation to respect women’s and girls’ rights to equality and freedom. . . . On the other hand, a prohibition of veiling risks violating the liberal principle of respect for individual autonomy and cultural diversity for parents as well as students. It may also result in traditionalist families not sending their children to the state educational institutions. In this educational context, implementation of the right to equality is a complex matter, and the determination of the way it should be achieved depends upon the balance between these two conflicting policy priorities in a specific social environment.<sup>90</sup>

It seems to me that that was exactly what this school was trying to do when it devised the school uniform policy to suit the social conditions in that school, in that town, and at that time.

The workplace issue arose in Denmark in 2000, in the context of a Muslim girl’s demand to wear the Muslim head scarf at work. In August 2000 the Danish High Court held that, because the workplace did not have a general dress code, it could not forbid the girl to wear the head scarf.<sup>91</sup> Kirsten Ketscher comments: “Regrettably the question of the girl’s rights in relation to the non-discrimination principle of women was not raised. Therefore the outcome of the case was that a religion was being protected not a woman!”<sup>92</sup> In a later case, in 2005, the

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<sup>88</sup> *Id.* at 133.

<sup>89</sup> *Id.* at 134.

<sup>90</sup> Frances Raday, *Culture, Religion, and Gender*, 1 INT’L J. CONST. L. 663, 709 (2003).

<sup>91</sup> Eastern High Court, Aug. 10, 2000, Ugeskrift for Retsvaesen U2000.2350Ø (Den.).

<sup>92</sup> Kirsten Ketscher, Lecture at the Hebrew University of Jerusalem: Women’s Fundamental Rights and the Freedom of Religion (2000) (on file with author); see also Kirsten Ketscher, *Einisk Liegebehandling, religionsfrihed og ligestilling mellem kvinder og maend – set i lyset af*

Supreme Court of Denmark held that employers may prohibit Muslim headscarves if it is in the framework of a general dress code that is part of the company's external presentation and is enforced consistently towards all employees in similar positions.<sup>93</sup> In 2003, the German Federal Labor Court held that a department store was not entitled to dismiss an employee who worked at the cosmetics counter because she insisted on wearing a headscarf.<sup>94</sup>

### E. *Homosexuality*

Religious abhorrence for homosexuality continues into the 21st century. Pope Benedict was accused of stoking homophobia in December 2008 after a speech, in which he declared that saving humanity from homosexuality was just as important as saving the rainforest from destruction. He said that humanity needed to listen to the "language of creation" to understand the intended roles of man and woman and behavior beyond traditional heterosexual relations was a "destruction of God's work." In Islam, the legal punishment for sodomy has varied among juristic schools: some prescribe capital punishment while others prescribe a milder discretionary punishment. Homosexuality is a crime and forbidden in most Islamic countries.

In the United Kingdom, the United States and Ireland, the approach of constitutional courts towards homosexuality was initially based on acceptance of religious abhorrence and criminal prohibition. From the time of the infamous trial of Oscar Wilde and up until 1980s, the courts did not insist on the right of homosexual partners to privacy, equality and human dignity. It was only some considerable time after the European Court of Human Rights had taken a clear stand on this human rights issue in 1981, in *Dudgeon v. United Kingdom*,<sup>95</sup> that constitutional systems followed suit. These developments, regarding the human rights of homosexuals, place the transition from religious edict to human rights pluralism in sharp focus and indicate the central part played by international human rights law in the process.

Despite the holding in the *Dudgeon* case, in 1983, the Supreme Court of Ireland upheld the prohibition of homosexual conduct.<sup>96</sup> The Court based its decision explicitly on the Christian character of the State and Justice O'Higgins wrote:

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*Føtex-sagen*, U2005B.235.

<sup>93</sup> 22/2004 Højesteret [Supreme Court of Denmark], Dec. 18, 2003, Ugeskrift for Retsvaesen U2005.1265H (Den.).

<sup>94</sup> Bundesarbeitsgericht [BAG] [Federal Labor Court] Oct. 10, 2002, 2 AZR 472/01, NJW 2003, 1685 (F.R.G.).

<sup>95</sup> *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149 (1982).

<sup>96</sup> *David Norris v. Attorney General*, [1984] I.R. 36 (Ir.).

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From the earliest days, organised religion regarded homosexual conduct, such as sodomy and associated acts, with deep revulsion as being contrary to the order of nature, a perversion of the biological functions of the sexual organs and an affront to both society and God. With the advent of Christianity this view found clear expression in the teachings of St Paul.<sup>97</sup>

The Court held that the decision of the European Court of Human Rights, which had decided in the *Dudgeon* case that the Irish legislation violated article 8 of the European Convention of Human Rights, was not binding law in Ireland. In 1986, the United States Supreme Court similarly held in *Bowers*<sup>98</sup> that homosexuality was contrary to public morals and thus upheld criminal prohibitions of consensual sexual intercourse between adults of the same sex.

It took twelve years after *Dudgeon* before homosexuality was decriminalized in both Ireland and the United States. In Ireland, homosexuality was formally decriminalized in 1993. In 2003, in *Lawrence v. Texas*,<sup>99</sup> the United States Supreme Court overruled *Bowers*, with Justice Kennedy writing for the majority:

The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . [The nation] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.<sup>100</sup>

The Court relied in part on the fact that laws prescribing this sort of conduct are invalid under the European Convention of Human Rights. In 1998, the Constitutional Court of South Africa, acting on the Equality Clause of South Africa's 1996 constitution—the first constitution ever to include sexual orientation in its anti-discrimination provisions—unanimously overturned “sodomy laws” in the country.<sup>101</sup> In a sweeping decision, it held that laws criminalizing consensual homosexual conduct violated not only privacy protections but the principles of equality and dignity as well. In eloquent language, both the majority opinion and a concurring opinion affirmed that respecting gay and lesbian equality and dignity was a key aspect of overcoming South Africa's repressive past.

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<sup>97</sup> *Id.*

<sup>98</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>99</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>100</sup> *Id.* at 567-71.

<sup>101</sup> *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) at 28 (S. Afr.).

F. *Freedom of Expression*

Freedom of expression also remains a constitutional issue. The opposition of religions to freedom of expression is not new. The Christian church has continued its tradition of banning heresy, from Galileo and Darwin to Voltaire and Thomas Hobbes, into the current era: the banning of Darwinism from school syllabuses and the banning of public advertising of family planning services. In the United States, following on the famous 1925 *Scopes* trial,<sup>102</sup> named in popular tradition the *Monkey Trial*, the issue of Darwinism remains moot. In 1987 a constitutional challenge was brought against a Louisiana law, which prohibited the teaching of the theory of evolution in the public schools unless that instruction was accompanied by the teaching of creation science, a Biblical belief. Schools were not forced to teach creation science. However, if either topic was to be addressed, evolution or creation, teachers were obligated to discuss the other as well. The Supreme Court held that the law violated the Establishment Clause. Writing for the majority, Justice Brennan found that Louisiana's law was not enacted to further a clear secular purpose as requiring schools to teach creation science alongside evolution does not advance academic freedom, the primary effect of the law was to advance the viewpoint that a "supernatural being created humankind," a doctrine central to the dogmas of certain religious denominations, and the law significantly entangled the interests of church and state by seeking "the symbolic and financial support of government to achieve a religious purpose."<sup>103</sup> This decision was followed by a Christian campaign for the teaching of intelligent design, and in 2005, a group of parents of high school students challenged a public school district requirement for teachers to present intelligent design in biology classes as an alternative "explanation of the origin of life." In *Kitzmiller v. Dover Area School District*,<sup>104</sup> the U.S. District Court for the Middle District of Pennsylvania ruled that intelligent design is not science, that it "cannot uncouple itself from its creationist, and thus religious, antecedents"; therefore, the school district's promotion of it violated the Establishment Clause.<sup>105</sup>

The Islamic *fatwahs* issued against Salman Rushdie and Hirsi Ali are well-known examples of current Islamic totalitarianism. Thus, in November 2008, the Organization of the Islamic Conference, whose members account for 57 of the U.N.'s 192 member states, won United

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<sup>102</sup> *Scopes v. State*, 278 S.W. 57 (Tenn. 1925).

<sup>103</sup> *Edwards v. Aguillard*, 482 U.S. 578, 591, 591 (1987).

<sup>104</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

<sup>105</sup> *Id.* at 765.

Nations backing for an anti-blasphemy measure: the U.N. General Assembly passed a nonbinding resolution that condemned “defamation of religion.” The resolution links religious defamation to incitement to violence, which would severely limit a broad range of peaceful speech and expression. This resolution was included in the agenda for the Durban II Anti-Racism Conference but was later withdrawn after threats by the European Union to join the United States, Italy, Israel and Canada in boycotting the conference.

#### CONCLUSION

Secular constitutionalism is essential to human rights. Secular constitutionalism, in its endorsement of freedom of conscience, of expression and of religion, provides true pluralism for individual and community choice. Secular constitutionalism has recognized and insisted upon the full and equal constitutional personhood of each human being, without discrimination on grounds of race, sex, religion or sexual preference. On this conceptual basis, the tension between religious norms and the human rights of the religious and non-religious other has been tested in constitutional courts. The outcome of those cases is not the determining factor in establishing that secularism is essential to human rights. It is the fact that constitutions provide an infrastructure of rights which deny the hegemony of religion and provide a forum, conceptual and jurisdictional, for challenging religious dictates which is so essential to the human rights era. Current academic endorsements of pluralistic religious autonomy, or of a preferred status for religious ideologies in constitutional democracies, relegate the human rights of women, homosexuals and dissenters to obscurity.