Religion–State Relations

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Constitution-Building Primer

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1. Introduction

Constitutions typically regulate the relationship between religious and state authorities. Some establish a connection between the state and a particular religion or religions, or even give religious laws or institutions a privileged place in the legal–political system. Others declare the secularity of the state or seek to protect the neutrality of the state from any religious affiliation.

Advantages and risks

For many people around the world, religious identification is an integral part of their communal and national identity, which some may seek to express through constitutional recognition. A desire to acknowledge and protect religious diversity in a society may also incline constitutional designers to give special recognition to various religious groups.

Religious recognition or institutional establishment, religious privileges or religious law may, however, have damaging effects on the rights of religious minorities, dissenters and people without religion. It may also increase tensions between an 'in group' and an 'out group'.

Where are relations between religion and the state an issue?

Most constitutional design processes will have to consider the problem of religion–state relations. There are particularly important constitutional designs associated with Muslim-majority countries, religiously diverse societies and societies where there have historically been tensions between religious and secular authorities.

2. What is the issue?

Regulating the relationship between the state and religion, between civil and religious authorities, and between secular and sacred codes of law, has historically been, and continues to be, one of the main functions of a constitution. Another important function of a constitution is to ensure peace and justice between all members of society, even in societies that are marked by deep religious divisions.

Yet, in many parts of the world, the relationship between the state and religion continues to be one of the most difficult issues for constitution-builders to resolve. The specific problems are unique to each case, but certain generalities often emerge. A particular religion may be associated with national identity or with the foundational values of the community. Public opinion may be expressed through parties that are motivated by, or identified with, a particular religion. These situations can give rise to demands for religions to be given specific constitutional status. There might be religious minorities who seek special protections, including the right to have personal matters governed by their own religious law, resulting in an asymmetrical constitutional framework. Such moves towards the constitutionalization of religion are likely to be opposed by those who believe that religion is essentially a private matter of conscience or that differences are best accommodated by combining universal freedom of religion with protections against discrimination on religious grounds, and with the state maintaining neutrality in religious matters.

In principle, constitution-makers can choose from a wide variety of constitutional options, ranging from the establishment of a particular state religion (with the incorporation of that religion's moral norms into law, the recognition of religious courts in certain areas of jurisdiction and the establishment of state-funded clergy or religious institutions), through the

symbolic recognition of the role of one or more religions in social and cultural life, to the declaration of the secular (non-religious) basis of the state.

In practice, it can be difficult to achieve agreement or compromise on these questions in the design of a constitutional text, in part because the issues involved concern matters of personal identity and deeply held principles that are not easily negotiated. Therefore, the question of whether and how religion should be incorporated—or, conversely, whether the state should be unambiguously secular—should be carefully and contextually considered with reference to prevailing political, historical and cultural circumstances.

This Primer discusses the various forms of religion–state relations that are possible in the development of democratic constitutions, articulates circumstances and contexts in which constitution-makers may have to confront a demand for religion, discusses concerns that may arise when incorporating religion and provides examples of different constitutional models of incorporation of religion and secularism.

3. Constitutional guarantees of religious freedom

Development of religious freedom

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof", thus building a wall of separation between Church and State.
>
> —Thomas Jefferson, fourth President of the United States (1802)

Throughout history, many states have been based on a close alignment of religious and civil authorities, and almost every pre-modern society has based its understanding of legitimate political authority on divine origins (Lilla 2008). Emperor worship, combining theocracy with absolute monarchy, was a feature of ancient China, Egypt and Japan. The city states of Greco-Roman antiquity had their own civic deities, priesthoods and shrines, and the institutions of religion were regarded as an integral part of the constitution of the state. The kingdoms, principalities and republics of much of medieval Western Christendom were integrated into a transnational structure of religious authority headed by the Pope. In the Islamic world, the system of law traditionally had a religious basis, with the roles of caliph and sultan often combined in one person.

In these circumstances, where religious and political authorities were so closely intertwined, religious dissent was often equated with political subversion. While certain minority groups who were more or less excluded from mainstream society might be tolerated to a limited extent, the civil authorities were often active in enforcing religious unity through the use of state force. Religious dissenters were subject to exile, torture and death. Several wars were fought to establish religious obedience by force. For example, much of Europe was devastated by the Thirty Years War (1618–48) between Protestant and Catholic powers.

This situation created a demand for religious toleration (granting religious minorities freedom to differ from national religious establishments in matters of faith, practice and organization), which would free people from religious proscription or enforced religious compliance. This, it was argued, would both protect the freedom of the individual conscience in religious matters and promote civil peace.

Significant gains in religious toleration were achieved in Transylvania by the Edict of Torda (1568), in the Netherlands by the Treaty of Utrecht (1579), in England by the Act of Toleration (1693), in France by the Declaration of the Rights of Man and the Citizen (1789) and in the United States by the First Amendment to the Constitution (1791). More recently, religious freedom was proclaimed in both the Universal Declaration of Human Rights of 1948 and in the International Covenant on Civil and Political Rights of 1966.

Religious freedom as a baseline

Today, religious freedom and freedom from religious coercion are near-universally recognized principles of liberal democracy. No state can today be regarded as free unless it guarantees freedom of religious belief and practice, including the freedom of religious minorities and of dissenters.

This historical recognition of religious freedom as an international norm—together with the recognition of other rights such as freedom of expression, due process of law and freedom from discrimination—establishes certain baselines in the constitutional relationship between the state and religion. A liberal democratic state cannot (a) forbid peaceful religious expression so long as this does not disturb public order or infringe the rights of others; (b) enforce unity or compliance in matters of religious faith or practice; or (c) punish or discriminate against people on account of their religious beliefs or identity.

These baselines necessarily provide for some autonomy and pluralism in matters of religion, excluding both the repression of religion by the state (state atheism) and state compulsion in religious matters (state theocracy). Nevertheless, they leave a wide latitude for different modes of religion–state relations at the constitutional level, which are discussed in the following sections.

4. Archetypes of religion–state constitutional relationships

Within the baselines of respecting religious freedom outlined above, the relations between the state and one or more religious groups may be structured in various ways, depending on (a) the extent to which the state funds, supports or endorses religion, or recognizes a religious basis to the nation or to public authority; and (b) the extent to which religious laws or institutions control or influence the state.

Although categorizations are always approximate and there is no precise standard terminology, the major approaches may be defined as (a) *laïcité* (strong secularism), (b) 'neutrality' (weak secularism), (c) 'pluralist accommodation', (d) 'recognition', (e) 'weak establishment' and (f) 'strong establishment'.

Laïcité (strong secularism)

> France is an indivisible, secular, democratic and social Republic. It ensures the equality of all citizens before the law, without distinction of origin, race or religion. It respects all beliefs.
>
> —Constitution of the Fifth French Republic

Some constitutions explicitly state that the state will be secular (or, to use the French term, which is sometimes used even in English-language literature to distinguish this model of secularism from other, less strident forms, *laïc*). France provides the archetype of this form of secularism. Its constitution declares the state to be secular, reflecting a policy that was codified in 1905 and that has become synonymous with 'the Republic'—that is, with a democratic regime. According to this model, the state recognizes and protects the right of religious

freedom in personal and private life but maintains a defensive attitude against public religiosity, which is 'often perceived as threatening—potentially or in reality—to the prerogative of the authorities and the laïcity of the Republic' (Willaime 2003). Instead, the state proclaims its own civic republican ethos, which, while not enforced, is actively encouraged through the school system and civic rituals. This ethos is not supposed to replace or prohibit private and particular forms of religious expression but to transcend them. Its general approach might be summed up by the idea that there is neither Catholic nor Protestant, Muslim nor Jew, believer nor skeptic, for all are one in the French Republic.

A consequence of this doctrine is that French secularism is comfortable with prohibiting overt displays of religious affiliation in public places: banning headscarves in public buildings and banning the wearing of religious insignia in public schools. Public ceremonies—from the inauguration of the president to local village fetes presided over by the mayor—are entirely non-religious in character.

It is important to note that secularism, even in this robust form, is not the same as 'state atheism'. Its aim is simply to reject religious privileges, communal religious identities, and direct religious influence over legislation and public policy. There is no attempt to prohibit religion as a matter of private practice or belief.

Religion–state neutrality (weak secularism)

> No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States' . . . Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .
>
> —US Constitution (article VI, section 3)

Religion–state neutrality means the impartiality of the state in matters of religion. The state neither endorses nor criticizes religion. It draws no distinction between religious values and beliefs. Religion of any kind may not be publicly enjoined, funded or supported by any public authority. The authorities may not prohibit, limit, promote or support any religious belief or practice, and may not discriminate against, or favour, any religion.

In contrast to *laïcité*, neutrality does not aim to protect the state or public sphere from expressions of religiosity (see Box 4.1). The state is neutral with regard to religion, in that it has no defining values of its own; instead, the state is a 'ring' within which different religious interests and opinions may freely coexist and participate in social and civic life on an equal basis.

As a result, religion–state neutrality does not restrict the expression of religiosity by public figures—in the United States, for example, the president is usually inaugurated with a prayer, and public officials typically take their oath of office on a book of religious scripture—although, crucially, they do this as a matter of personal choice or social custom, not because they are required to do so by any law.

Box 4.1. The difference between *laïcité* and religion–state neutrality: the wearing of religious insignia in public schools

Should children be permitted to wear obvious religious insignia (e.g. a cross, a headscarf) in public schools? French-style *laïcité* says no: the public school is no place for such things. It is a secular place, consecrated to the republic: its values are the values of the republic as expressed in the constitution. Teachers must not give any indication of their religious (or political) convictions during lessons and that pupils cannot use their faith as a reason for challenging rules or teaching.

US-style neutrality says yes: the public school, as an institution of the state, does not take a view on the propriety or otherwise of any religious position. It would be entirely within the rights of the child to wear a religious symbol if they wish to. It would not be permissible, however, for the school, or a teacher, to require or encourage (or to forbid) the wearing of a religious symbol.

Pluralist accommodation

> Religious bodies forming corporations with public rights are entitled to levy taxes on the basis of the civil tax rolls […] Religious bodies shall have the right of entry for religious purposes into the army, hospitals, prisons, or other public institutions, so far as is necessary for the arrangement of public worship or the exercise of pastoral offices, but every form of compulsion must be avoided.
>
> —Basic Law of the Federal Republic of Germany

Some constitutions (e.g. Germany, India, South Africa) aim to protect the religious neutrality of the state not by withdrawing from any religious support or endorsement (as with religion–state neutrality) but by promoting the equal and non-discriminatory treatment of religions. This means that the state tries to accommodate religions and may cooperate with religious institutions in their social functions.

Germany's Basic Law, for example, provides that religious institutions can act as 'public corporate bodies' with recognized rights, including the right to receive 'church taxes' from their adherents. As Willaime (2003) writes, 'religious institutions are recognized in Germany as political institutions that contribute to the common good. The German State gives a part of its sovereignty up to churches […] politics has to limit itself and that the State is powerless to define the fundamental conceptions of life.'

Pluralist cooperation gives religious bodies a protected, autonomous and public role in society that is recognized at a constitutional level. It recognizes a plurality of religious groups that exist side by side: the state does not favour one, nor does it discriminate against others. It simply recognizes that religions (plural) have an important role in society and that religious institutions (plural) are partners with civil authorities in the achievement of common goods.

Recognition without establishment

> The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.
>
> —Constitution of Ireland, prior to the deletion of this provision by the Fifth Amendment in 1972

A constitution may give formal or symbolic recognition to a particular religion in its constituent texts. The Constitution of Ireland, until the 1970s, recognized 'the special position' of the Catholic Church as 'the guardian of the Faith professed by the great majority of the citizens'. It still 'acknowledges that the homage of public worship is due to Almighty God', '[holds] His Name in reverence', and 'respect[s] and honour[s] religion' (Constitution of Ireland, article 44, as amended).

Such recognition differs from active secularism (*laïcité*) and from passive secularism (religion–state neutrality) in associating the state—and sometimes the nation itself—with a particular religious identity or set of religious identities. It differs from pluralist accommodation and from weak establishment in that such recognition does not, in itself, give the recognized religion or religions any special privileges or quasi-public powers. In Ireland, there is no state funding of religion, although much public spending on social matters such as health and education is channelled through religious institutions (O'Toole 2011).

Where the recognition of religion is an important matter of national identity, but where there is no clear desire for religion–state relationships to be constitutionalized, recognition may be expressed in the form of a preamble or para-constitutional declaration (e.g. a declaration of independence).

Religious establishment

> The Norwegian Church, an Evangelical-Lutheran Church, remains Norway's Church and is supported as such by the state.
>
> —Constitution of Norway, following amendment of 2012

Religious establishment is found where the state (while recognizing the democratic baselines of religious freedom and non-discrimination) maintains a formal connection with a specified religion, which is 'established' in the sense of being supported, funded, endorsed or patronized by the state. Religion can be established in various ways, with differing degrees of intensity. For example, a religion can be adopted as an official state religion, religious law can become a source of law or it may simply be a source of inspiration. It could be specified that the head of state needs to have certain religious qualifications, the government could be made accountable in accordance with religious norms or religious education could be encouraged.

Weak religious establishment

Some constitutions establish religion only in a limited way that may differ little from the archetype of recognition. For example, the state-supported religion may be self-funding or self-governing, and it may have little or no direct influence on public affairs. In Argentina, for example, the constitution proclaims that the federal government supports Catholicism (article 2), but other provisions of the constitution (such as the removal of the requirement for the president to be a Catholic in the 1994 amendments, and the exclusion of priests from public office) maintain the separation of religious and civil authorities and restrict both the state's control of religion and the extent of direct religious control over the state.

Strong religious establishment

A stronger form of religious establishment may include the reservation of certain senior positions for members of the established religion (for example, a requirement that the head of state must be a member of that religion, or the reservation of certain legislative seats for clerics of that religion). The lines of demarcation are somewhat artificial and rarely clear in practice, since relationships between the state and religious authorities may be symbiotic.

However, strong religious establishments can be subdivided into two forms:

1. Those where the religious hierarchy has superiority over the civil power, meaning that religious authorities are dominant over the state, and the state is subject to the controlling power of a religious body; and
2. Those where the religious hierarchy is under the control and patronage of the civil power, meaning that religious authorities are subordinate to the state, and religion is subject to the controlling power of the state.

Powers of appointment can be crucial in identifying this distinction. If the civil authorities can appoint (and especially if they can dismiss) religious leaders, then the religious establishment is likely to be of the state-dominant type, whereby religion is used by the civil authorities as a way of legitimating and supporting their power. If religious authorities have autonomy over their own appointments, then the religious establishment is likely to be of the religion-dominant type, where the religious authorities are able to exercise an autonomous countervailing power, even against the state authorities. At an extreme, strong religion-dominant establishment may give religious authorities veto powers over policy decisions.

Constitution-makers contemplating a strong establishment of religion need to think carefully about the relationship between religious and civil leaders: which will have the upper hand? Is it the intention that the state should control religion or that the religion should control the state? What are the implications of these arrangements for democracy, human rights and civil liberties?

While the Iranian Constitution is the most vivid example of a religion-dominant establishment that gives religious authorities a guardianship role in the state, a number of other countries also strongly establish religion to the point where democracy and pluralism suffer. For example, the Greek Constitution not only provides that 'the prevailing religion in Greece is that of the Eastern Orthodox Church of Christ', but also prohibits proselytizing and bans unauthorized translations of the Bible.

Norway has been a democratic country since its independence in 1905 and routinely appears among the highest-ranked countries for the quality of democracy. During most of its history, Norway had a form of constitutional religious establishment that made the Evangelical Lutheran Church a state church. In 2012, the position of the established church was altered, but not abolished, by a constitutional amendment (see Table 4.1).

In practice, the relationship between the state and religion is often more nuanced than the above classification suggests, with pragmatic arrangements made to address particular problems. For example, some self-declared secular states such as India still allow religious minorities autonomy to conduct their affairs in accordance with their religion in private legal matters, thus coming

closer, in some respects, to a pluralist cooperation model. Indeed, in India, the government has subsidized the pilgrimage to Mecca for some Muslims. Even in strictly secular France, the majority of national holidays are based on Christian festivals.

Table 4.1. Changing from strong to weak religious establishment in Norway

Original constitutional text	Text after 2012 amendment
'The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.' (art. 2)	**'The basis of our values remains our Christian and humanist inheritance. This Constitution is to ensure democracy, the rule of law and human rights.' (art. 2)**
'The King shall at all times profess the Evangelical-Lutheran religion, **and uphold and protect the same**.'(art. 4)	**'The King at all times professes the Evangelical-Lutheran religion.' (art. 4)**
'More than half the number of the Members of the Council of State shall profess the official religion of the State.' (art. 12)	**[Provision removed]**
'The King ordains all public church services and public worship, all meetings and assemblies dealing with religious matters, and ensures that public teachers of religion follow the norms prescribed for them.' (art. 16)	**'All inhabitants of the realm have the right to free exercise of their religion. The Norwegian Church, an Evangelical-Lutheran Church, remains Norway's Church and supported as such by the state. Specific provisions on the organization thereof are laid down by law. All religions and religious groups are supported equally.' (art. 16)**
'The King shall choose and appoint, after consultation with his Council of State, all senior civil, ecclesiastical and military officials.' (art. 21)	**'The King chooses and appoints, after consultation with his Council of State, all senior civil and military officials.' (art. 21)**

5. Designing the religion–state relationship

Understanding the religious context

The demographics of religion

Each constitution-building process takes place in a specific location that has its own array of religious histories, identities and cultures. These will necessarily shape the range of options that constitution-builders can choose from. Hence, it is necessary, before making constitutional choices, to understand the religious identities, needs and aspirations of the various communities.

For example, in countries with one dominant religious group, where membership of that religion has historically been tied to national identity, and where there are no significant religious or anti-religious minorities, it might be possible to give established status to one religion in a way that reflects a broad social consensus. In Malta, for example—a country that is more than 90 per cent Catholic, and where Catholicism has long been associated with national identity—the constitution states that Catholicism is the established religion, that Catholic religious instruction is compulsory in state schools and that the Catholic Church has the 'right and duty to teach which principles are right and which are wrong'.

In countries where there is one majority religion and a well-defined minority religion (or a small number of well-defined minorities), the constitution will have to reflect this in order to ensure that the majority does not oppress the minority. For example, the Lebanese political system is based on a balancing of Muslim and Christian powers intended to ensure that one does not oppress or exclude the other.

In religiously diverse countries, it is not possible either to establish one religion or to make specific accommodation for named minorities: such provisions would be odious and untenable. Instead, the range of options will be limited to those—such as pluralist cooperation or religion–state neutrality—that treat religions equally. Specific religions may have their own theological views on what form religion–state relations should take. These views can vary *within* as well as *between* religions.

Think Point 1

How does the difference between viewing religion as a matter of personal choice and conviction, on the one hand, or as a matter of fixed communal identity, on the other, shape approaches to the constitutional protection of religious freedom? Whose freedom is being protected, that of the individual or the group?

Religion is integral to identity

For many people, religious feelings, belonging and beliefs are integral to their identity. As such, religiously held positions are often non-negotiable, and any perceived threat to them can provoke a vehement and potentially violent reaction. The sensitivity of these issues must be considered when trying to find compromises between diverse groups in the drafting of a constitution.

However, not all religions or religious people understand their religious identity in the same way. For some, it is a hereditary cultural or ethno-cultural identity: one is a member of a religion because one was born into that religion; it is a fact of life, like a tribal identity, which is not easily changed without a sense of betrayal or loss to other members of the religious community. For others, religious identity is a matter of personal conviction—an individual choice. Different religions and different groups within religions take different approaches to these questions that constitutional designers must consider (see Box 5.1).

Religions and democracy

In some cases, religious leaders may be—for theological, ideological or instrumental reasons—supportive of democracy. For example, the protests that led to the downfall of Communist rule in the former German Democratic Republic (East Germany) followed prayer vigils organized by Lutheran pastors, while Poland's democratic transition was greatly influenced by the visit of Pope John Paul II (Garton Ash 1990). In other contexts, religious leaders may—openly or otherwise—regard democracy as an alien threat to their religion, their religious principles or their institutional religious power. In the former case, it is possible

that religious leaders might be willing to compromise their personal or sectional advantages for broader public goals associated with the consolidation of democracy. In the latter case, it will be important to either challenge religious authorities who are hostile to democracy or to find some accommodating arrangement that binds them to the democratic system and limits their destructive influence.

Box 5.1. Examples of theological views on religion–state relations: variations between Protestant Christian traditions

The relationship between religion and the state has been strongly contested in the history of Christianity, and, even within Protestant Christianity, different communities have taken different views on this issue. Those emerging from the Radical Reformation (e.g. Baptists, Quakers, Unitarians) have often made the separation of religion from the state—based on the idea of the church as a 'gathered society'—an important part of their religious identity (Balmer 2006).

Calvinists and Presbyterians have vigorously defended the autonomy and institutional separation of the church from the state but regard church and state as having a shared responsibility for creating a 'godly society'. This means that the church cannot stand aloof from political decisions that, in its view, affect a broad range of ethical, social and economic questions (Storrar 1990).

Lutherans and Anglicans have often been comfortable with an 'established' status: the church may be treated as a public institution under the direct legislative control of the state, and church leaders may even be appointed by the state. The adherents of each of these groups are likely to have divergent preferences on the constitutional establishment or recognition of religion.

Hierarchy and representation

Some religions are hierarchical, with a division into clergy and laity. Others, while not having such a formal division, give particular prominence to religious scholars, preachers or other leaders. Some have rather flat authority structures, organizing themselves on democratic lines. This is important to consider when dealing with constitutional questions such as whether the state is to appoint leaders of the established religion or whether religious leaders are to have a guaranteed place in public decision-making structures. It is also relevant in understanding the nature of religious demands on the state: what do religious leaders want, and why? Is it for their own power? To what extent do religious leaders really speak for the ordinary members of their community?

Think Point 2

What do religious leaders want, and why? Are their attitudes generally supportive of, or hostile to democracy? How much power do religious leaders have, and to what extent do these leaders really speak for the ordinary members of the religion?

Contextual reasons for recognizing or establishing a religion in the constitution

Popular demand

In some countries, there may be a nearly unanimous demand for according religion a formal role in the constitution. For example, overwhelming majorities of Muslims in Afghanistan (99 per cent) and Iraq (91 per cent) wanted Islamic law to be recognized in their new constitutions. In Iraq's constitution-making process, all parties, otherwise at odds on many other matters, accepted that some role for Islam would be reserved in the constitution, and disagreements centred on the strength of the language to be used in defining that role. In these cases, respect for public opinion necessitates some official role for religion.

Such popular demand for a constitutional connection between religion and the state may arise because it is seen as a necessary part of the vision of a good society. Many people may associate religion with social justice, public ethics or other desirable values, and may regard religious establishment as a way of holding the state accountable to certain moral principles embodied in religious teaching or religious law.

National identity

Constitutional provisions recognizing or establishing religion may help cement the identity of the state and to legitimate the existence of the nation state or political community. 'This state building function of constitutions is particularly important for young states, whose citizens have strong ethnic or communal identities that may compete with their loyalty to the state' (Elkins, Ginsburg and Melton 2009: 38). Pakistan is a prime example: Muslim nationhood and democracy based on the principles of Islam were seen as tools for forging a strong national identity and for uniting an otherwise disparate multilingual group of ethnicities together. Pakistan's Constitution thus makes strong references to Islam.

Constitutional autochthony

Religious recognition or establishment may be a way of asserting cultural nationalism and indigenous identity in the constitution, especially if the constitution would otherwise be perceived as a text negotiated with occupying powers or otherwise shaped by external parties.

Protection of religious freedom

A demand for religious recognition could be driven by the need to protect adherents in states that were historically hostile to certain groups. During the constitution-making process in Iraq in 2005, for example, political parties representing the Shia majority wanted to entrench a strong role for Islam in the constitution to limit state incursions into religious freedom. The argument was that during the previous regime under Saddam Hussein, religious people were often persecuted, and that such recognition would ensure 'that the state cannot limit public prayer, religious dress, or force state workers to eat during daylight hours during the month of Ramadan as they allege Saddam to have done' (Hamoudi 2010: 709). However, constitutional designers may also consider whether using a robust religious-freedom clause—rather than establishment—would be a better way of guaranteeing rights.

Accommodation of minorities

A pluralist from of religious recognition or establishment may help to signal cooperation and inter-faith harmony in a fragmented society. For example, Egypt's Constitution (2014), while formally establishing Islam, also specifically recognizes the rights of the Christian community. Such recognition may help minorities to feel included in, and protected by, the state. However, by specifically recognizing certain favoured minorities, other minorities that are not given such recognition may be excluded: in the case of Egypt, for example, there is no protection for the Baha'i minority.

Accommodation for religious minorities may include the right to manage communal affairs according to their own religious requirements. In Kenya, for example, article 170 of the constitution provides for Muslim-adjudicating courts (Kadhi) in situations where 'parties profess the Muslim religion' in suits addressing 'questions of Muslim law relating to personal status, marriage, divorce, or inheritance'. This was not included without friction: some Christian groups argued that the preservation of Kadhi courts granted preferential treatment to Muslims. Nevertheless, Kenyan Muslims view the courts as not only religiously important but also as a sign that the state accepts Islamic practice as compatible with their political identity in Kenya, especially considering the historical exclusions that the community has faced.

Religious support for democratization

In some countries, religion continues to exert a strong influence as a source of public values, political authority and legitimacy. Religious approval may be more influential in shaping the public perception of a just political order than other normative frameworks, such as a commitment to universal human rights or democracy. Expressing constitutional principles in terms that draw on religious or theological sources, and that defer to religious values in the definition of rights, may therefore be necessary to secure the acceptance of democratic institutions and to reassure religious conservatives that a democratic constitutional order does not threaten their religious values.

Appeasing religious leaders

Moreover, religious leaders may have considerable social and political influence, and may be able to determine the fate of a constitutional system by granting or withholding their support. In such cases, it may be necessary, for the sake of achieving an agreement on democratic transition that is consensual, legitimate and enduring, to include religious-recognition or religious-establishment clauses that protect the perceived interests of religious communities or their leaders.

Moderating the effect of establishment

We should be wary of treating religions as monolithic actors in social and political life. Within many religious communities, there is a considerable diversity of views and approaches, ranging from those that are violent, intransient and prone to lead to conflict and violations of human rights to those that are moderate, mild and supportive of social cohesion. It has been argued that an established religion, secure in its social prestige and enjoying the legal and potentially financial support of the state, has no incentive to rely on populist rhetoric and no need to stir up the masses; hence, it will be more likely to be of the moderate variety. Moreover, an established religion may be controlled or influenced by the state in ways that enable the state to reward moderates and to exclude fanatics.

Contextual reasons for not establishing or recognizing religion in a constitution

Conflict with human rights

This is a frequently cited reason for not establishing or recognizing religion in a constitution. A deep constitutional commitment to religion is sometimes said to be potentially incompatible with the pursuit of human rights, especially if the constitution proclaims that human rights are to be limited by overriding religious commitments. There may be tensions between religious establishment and the civil rights of people of different faiths or of no faith. This is especially true if

citizens not belonging to the established religion are excluded from certain public offices, are subject to discriminatory rules or are assigned a lower social status.

Religious establishment may limit free speech or other fundamental rights on grounds such as blasphemy. In Pakistan, for example, Islamic clauses have been used to justify such actions (Lau 2006: 112–19), resulting in people being imprisoned for making innocuous statements. One way of mitigating this is to have a strong freedom-of-expression clause that specifically forbids restrictions on freedom of expression on the grounds of apostasy, blasphemy or heresy.

> The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant […], nor in any discrimination against adherents to other religions or non-believers.
>
> —UN Office of the High Commissioner for Human Rights (1993)

> While the notion of State religions is not per se prohibited under international human rights law, States have to ensure that this does not lead to a de jure or de facto discrimination of members of other religions and beliefs . . . It seems difficult,if not impossible, to conceive of an application of the concept of an official "State religion" that in practice does not have adverse effects on religious minorities, thus discriminating against their members.
>
> —UN General Assembly, Human Rights Council (2011)

However, not every reference to religion will impede the realization of human rights: a symbolic reference to God and a majority religion in a preamble, for example, may not in itself have this adverse effect in the absence of other operational clauses. Moreover, religions are not necessarily incompatible with human rights: indeed, human rights may in some cases be supported by a public religious ethos.

Exacerbating social division

Religion can be at the heart of tensions between social groups. As such, constitutional recognition or establishment can sometimes aggravate an already fragile situation. Just as the recognition of a religion may tell one group that the state belongs to them, it may also tell another group that is not so recognized or that objects to such recognition that it does not belong to them. For example, during the Egyptian constitution-drafting process in 2012, debates about the role of Islam caused friction between Islamist parties and parties representing non-

Muslim minorities. In Sudan, President Omar al-Bashir threatened that, if the South seceded, the constitution would then be amended, 'making Islam the only religion, Sharia the only law and Arabic the only official language'. This alarmed non-Muslims who would have to remain in the north of the country after South Sudan's independence.

Gender aspects

The tension between religious values and international human rights commitments is particularly salient in the context of gender equality. Religious law or custom (or traditional practices that are justified in religious terms) on matters such as marriage and divorce, dress codes, inheritance, child custody, birth control, abortion and genital mutilation, as well as access to the paid economy and to social and political life, can sometimes be discriminatory against women, and it may be difficult to reconcile such laws, customs or practices with the country's own undertakings in international treaties, including the 1979 Convention on the Elimination of All Forms of Discrimination against Women, which has been ratified or acceded to by 188 states around the world. In aiming to protect women's rights while giving recognition to religious identities, norms or values, one solution is to adopt a repugnancy clause, according to which religious practices are acceptable only if they are not repugnant to other constitutional rights or to treaty obligations.

6. Additional constitutional design considerations

Achieving compromise and deferring decisions

Considering the difficulties of reaching an agreement on religion–state issues in constitution-building processes, it is useful to consider some strategies for avoiding, reconciling, or overcoming tension.

Identifying interests and flashpoints

Religion–state relations, and the tensions arising therefrom, may be expressed in a wide range of substantive provisions beyond what the constitution explicitly states about religious establishment. Identifying these interests may help constitution-makers to achieve mutually acceptable bargains between religious and secular interests. For example, constitutionalizing policy positions on certain social, economic and cultural issues in accordance with religious preferences might be of greater importance to religious interests than achieving formal, but symbolic, recognition.

In some cases, the structural provisions of the constitution might also be significant. For instance, if there is a geographically distributed religious minority that habitually supports a religious party, then members of that minority might gain more from a proportional electoral system that enables them to express their identity and interests through party politics than from explicit constitutional recognition of their status. This technique was used to good effect by the Netherlands in the 20th century.

Recognition without establishment

One possibility is to give recognition to a majority religion and thereby to satisfy popular demand for religious *identification*, while finding compromise with those opposed to religious establishment by avoiding particular religious *privileges*. For example, the role of a religion in a country's culture or identity may be mentioned in the preamble or in an expressive article that may leave the door open to a more religiously sympathetic reading of the constitution by judges and by members of the public but without integrating the institutions or laws of religion into the state.

Constructive silence

Some constitutions (e.g. Chile, Sierra Leone and Suriname) do not mention the state's stance on religion at all, neither recognizing a religion nor declaring the state to be secular. These matters are left to be decided by ordinary law or conventional practice. Adopting this approach may make it possible to avoid conflict over religious identity in the constitution-building process, allowing constitution-makers to concentrate on finding pragmatic agreement on institutional structures.

Ambiguity and ambivalence

Another approach to reaching agreement is to incorporate ambiguous or ambivalent (even contradictory) language into the text of the constitution. Again, the effect of this is to facilitate agreement at the constitution-building stage, at the risk of disagreements in implementation and interpretation. Crucially, however, this strategy has the advantage that such disagreement should, at least in principle, be channelled through political institutions that enjoy a broad consensual basis of legitimacy in terms of electoral rules, presidential powers, structures of government etc.

Neutral or catch-all recognition

Furthermore, references to religion in a constitution can be framed either in religion-specific ways or ways that recognize God but that are neutral between various religions. The Irish Constitution is an example of the former, since it is enacted 'In the Name of the Most Holy Trinity' and refers to 'our Divine Lord, Jesus Christ', phrases that might alienate Jews, Muslims and other non-Christians. In contrast, the Constitution of Poland (a country where, like Ireland, Roman Catholicism has been integral to national identity and to the struggle for independence) embraces 'all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources'.

Religious parties

A number of constitutions, especially although not exclusively in Africa and in Muslim-majority countries, prohibit parties 'formed on the basis of religion' or on a 'sectarian basis'. This prohibition may be part of a wider ban on religious, ethnic or regional parties. Supporters of such bans may justify them on the grounds that religious parties are factional or anti-democratic or that they pose a threat to national unity. Kenya's Constitution is illustrative of this practice. According to article 91 (2), 'A political party shall not—(a) be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis'.

It should be noted, however, that religious cleavages have historically been the basis for the formation of political parties in many democracies. In particular, Christian Democratic parties, which aim to bring Christian principles into the political sphere, have long been a feature of politics in Germany, Italy, Luxembourg, the Netherlands and many other democracies. Prohibiting the formation of religiously motivated parties could hinder the development of an open party system in which contending parties, which are rooted in social movements, may freely contest elections and compete for power. It could also encourage religiously motivated politicians to become hostile to democracy, and to seek other means of exerting their influence.

An alternative approach is found in the Tunisian Constitution. According to article 34, 'The freedom to establish political parties, unions, and associations is guaranteed. Parties, unions and associations, in their internal charters and activities, must abide by the constitution, the law, financial transparency and the rejection of violence'.This does not ban religious parties, but instead seeks to regulate parties on a democratic non-sectarian basis. It establishes a requirement that parties must adhere to democratic principles regardless of whether or not they are religiously based, which protects the state from anti-democratic parties without discriminating on religious grounds.

7. Design tutorial

The previous section discussed strategies for avoiding, reconciling, or overcoming tensions related to reaching agreement on religion–state issues in constitution-building processes. This design tutorial aims to put some of these strategies into practice.

Consider the following provisions of a (typical but hypothetical) constitution, taken verbatim from the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (Council of Europe 1953):

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

These provisions provide for freedom of religion, within various reasonable limits determined by the legislature and the courts. On their own, however, they neither recognize a religion nor prohibit such recognition.

Now consider three alternative versions of a third and fourth provision:

Version A

3. [The majority religion] is the official religion of the state. The head of state must belong to this religion.
4. Religious educational institutions of [the majority religion] shall be funded by the state.

Version B

3. The state is secular and no religion has official status.
4. Religious institutions shall not receive state funding.

Version C

3. The state recognizes the role of [the majority religion] in the history and culture of the nation and values its continuing contribution to the civic and social life of the people.
4. The state may make provision by law for the funding of religious educational institutions.

Version A is likely to win the support of those who regard religious recognition as an important part of national life but to encounter opposition from minorities and secularists.

Version B is likely to appeal to secularists but at the risk of alienating the supporters of the majority religion.

Version C may provide a mutually acceptable compromise, offering recognition without establishment, and leaving the question of the public funding of religious education to be decided by subsequent legislation.

Other compromises may be possible, for example, giving recognition to the majority religion as in clause 3 of version C, but at the same time prohibiting state funding of religious schools (clause 4 of version B); or making the state theoretically secular (clause 3 of version B), but making an exception permitting the state funding of religious schools (clause 4 of version C).

8. Special considerations for Muslim-majority countries

This section covers certain special considerations that constitution-builders may have to take into account in Islamic countries, here defined as 'countries in which a majority of the population are Muslims or in which Islam has traditionally been a dominant religious and cultural force'.

For religious and historical reasons, there are several additional aspects to religion–state relations in Islamic countries—and, sometimes, other countries where there is a sizeable Muslim minority—that require special care and attention from constitution-builders. Many of these aspects stem from the fact that Islam contains within its religious framework a set of principles and norms (*sharia*) governing areas of civic, social and economic life that are regarded by many Muslims as being of divine origin and thus highly desirable to implement as law within the state; indeed, for some Muslims, laws inspired by *sharia* should override those made by ordinary legislators, as *sharia* is considered to be a source of justice, accountability, rule of law and rights.

It is important for non-Muslims to recognize that *sharia* does not simply consist of a list of religious rules and prohibitions. It also contains many principles—such as the principle of access to justice and the principle of governing for the public good and with public consultation—that can restrain arbitrary government. Historically, a ruler's compliance with *sharia* was an important source of legitimacy since it signalled that the ruler was not absolute or tyrannical but, rather, a faithful administrator of a system of law believed to be of divine origin that placed substantive limits and obligations on the ruler.

Defining the state: Islamic or civil (with a Muslim majority)?

Islamic countries vary in the extent to which the state has an Islamic identity. Some countries, such as Afghanistan, Iran and Pakistan, style themselves as 'Islamic republics', in which the state claims an Islamic identity for itself. Others, such as Egypt and Tunisia, while recognizing Islam as the official religion and requiring the president to be a Muslim, do not claim an Islamic identity for the state.

Furthermore, the constitutions of Muslim-majority countries vary greatly in terms of just *how* Islamic the state is, regardless of how the state defines itself. A small number of Muslim-majority countries describe themselves as secular—most notably the Central Asian countries and Turkey, as well as Mali. However, nearly 60 per cent (27) of the 45 Muslim-majority countries in the world express some relationship to Islam in their constitution.

Of the 25 constitutions in the world that claim Islamic credentials, 23 include clauses that declare Islam to be the state religion. Clauses stating that Islam will be a source of law are present in 18 constitutions. Six constitutions contain repugnancy clauses (sometimes in addition to a source-of-law clause, as in the case of Iraq; see Box 7.1) stipulating that no laws can be passed that contradict Islam. In Iran, the constitution states that judges should refrain from executing laws that violate Islam. Similarly, in Saudi Arabia, 'judges bow to no authority other than that of Islamic *sharia'* (article 46).

Other popular clauses are those that require that the head of state or government be Muslim (15 constitutions contain such a requirement). The difference between these positions may be nuanced, and the practical effect may even be minimal in terms of its influence on politics, rights and jurisprudence. For example, some states that have a high degree of Islam in their constitution may have de facto low levels of Islamic law in terms of legislative content. Nevertheless, how the state defines itself is symbolically important because it defines the relationship between the state and Islam. Is the state itself Islamic or does the state (as a civil community of all citizens) merely recognize and establish Islam as the religion of the majority?

The Tunisian Constitution defines Tunisia as a 'civil state' (*dowlah madaniyyah*). This term came to prominence after the Arab Uprisings, and its meaning is still contested. At a minimum, it means a state that is governed by civilian politicians—that is, neither by clerics nor by the military. It also means a state that may recognize Islam and acknowledge a place for Islamic law but that is not an Islamic republic—the civil state is a 'community of citizens' and is not therefore coterminous with the community of believers.

Box 7.1. Islam in Iraq's 2005 Constitution

Article 2 of Iraq's 2005 Constitution states that Islam 'is a fundamental source of legislation' and that 'no law that contradicts the established provisions of Islam may be established'. The clause also provides that 'no law that contradicts the principles of democracy may be established [and that] no law that contradicts the rights and basic freedoms stipulated in this constitution may be established'. Ultimately, interpretation of this complex, three-pronged clause rests with the judiciary, which can develop it in a progressive or conservative direction. Thus, the Kurds, along with the secular Sunni, did not wish to see any Islamic jurists on the constitutional court, despite the insistence of the Shia that there be at least four *sharia* experts on the court. The Kurds and Sunni Arabs were concerned that the presence of jurists would mean that the court would be Shia-dominated and result in a particularly strong Shia.

Application of Islamic law

Source of law and repugnancy clauses

The constitutions of most Islamic countries give some recognition to *sharia* Islam as either 'a source of law' or 'the source of law'. Calls for recognition of *sharia* Islam as a source, or the source, of law are widespread and popular in the Islamic world, spanning broad ideological range. For example, the Egyptian Constitution has, since 1980, provided that 'principles of Islamic law are the principal source of legislation' (article 2). This basic provision remained unchanged in the short-lived 2012 Constitution, which was backed by Islamist politicians, and in the 2014 Constitution, which was instituted by a more secular-minded military-backed interim government. In various jurisdictions, including Afghanistan, Iran and Pakistan, the constitution also states (sometimes in addition to the source-of-law clauses) that no law can be enacted that is 'repugnant' or 'contrary to' Islam. Such so-called repugnancy clauses reinforce source-of-law provisions by giving Islamic law the highest place in the hierarchy of legal norms, or they can even sometimes play a similar function: that is, these clauses can be interpreted interchangeably to allow a form of Islamic judicial review of laws.

The distinction between 'a source' and 'the source' (and even the repugnancy clause) may imply a subtle difference in the application of the constitution:

- 'A source' of law (indefinite article) implies that there can be various sources of law. For example, *sharia* may be applied in certain areas of life,

or that principles of *sharia* may be combined with other sources of legal principles, such as international human rights norms.

- 'The source' of law (definite article) implies that *sharia* is the sole source of law to the exclusion of others or, at least, the most important and highest source of law that prevails over other sources of law whenever any incompatibility arises.
- Furthermore, there is also a difference between what precisely the source-of-law or repugnancy-clause references: for example, stating that the principles of *sharia* will be the source of law, as is the case in the Egyptian Constitution of 1979, allows more room for broader, interpretive flexibility to argue that religious principles include notions of justice, anti-corruption, social equality and so forth, as compared to a clause stating that '[*sharia*] is the source of all legislation' (Yemen 1994), which would in theory imply a stricter application of the law itself, which is sometimes perceived to be immutable. Similarly, referencing Islam as compared to *sharia* again implies more leniency in interpretation.

In practice, the effect of both source-of-law clauses and repugnancy clauses depends largely on application and interpretation: that is, while formulation is important, judges in some countries may give more precedence to the clause while, in others, they may treat it not so much as a check on law-making but as a symbolic marker of national identity. Furthermore, legislators and judges may interpret these clauses in ways that presume a clash between Islamic law and human rights commitments. Alternatively, they may also use the principles and methodology of *sharia* to support human rights in creative ways (see Box 7.2).

Box 7.2. Religious establishment and democracy

The constitutional incorporation of religion, despite popular assumptions, is not necessarily antithetical to constitutional democracy or modernity. Many constitutions that entrench religion, such as those of Afghanistan and Pakistan, also contain many human rights (including the freedom of religion) and other democratic features (including the separation of powers and judicial independence) that are compatible with liberal democracy. Indeed, in the Muslim world, constitutions that incorporate Islam as a source of law or make laws repugnant to Islam void contain, on average, more human rights than constitutions of Muslim-majority countries that do not (Ahmed and Ginsburg 2014). That is, the degree of democracy in a constitution and religion are two separate design issues that should not be conflated or assumed to be antithetical to each other.

In Egypt, for example, the Supreme Constitutional Court has generally interpreted a religious clause in the constitution so as to minimize a potential clash with rights. Judges have sometimes used religion to expand on constitutional rights. In Pakistan, it is not uncommon for judges to make references to Islamic law to expand the scope of public-interest litigation, access to justice and other rights. For example, a provincial bill that would have created a police force with power to enforce strict Islamic morals on society was passed but was annulled by the Supreme Court on grounds that it was unconstitutional.

Such progressive jurisprudence could be encouraged, for example, by also privileging constitutional rights or international human rights treaties in the constitutional hierarchy and training lawmakers and judges in these subjects. In Iraq, for example, laws must be tested against principles of 'democracy' and 'rights', as well as Islam. In Afghanistan, the constitution provides that 'the state shall observe the United Nations Charter, inter-state agreements, as well as international treaties […] and the Universal Declaration of Human Rights' (article 7).

Schools of jurisprudence

There are several schools of Islamic jurisprudence with different approaches to the interpretation and application of *sharia*. In some constitutions, one of these schools, in order to avoid legal uncertainty, may be given official status. The Constitution of Afghanistan, for example, states (article 130) that judges should, in the absence of other instructions from the Constitution or laws, rely on Hanafi jurisprudence. Provision may also be made for Muslim minorities to use their own jurisprudence: the Afghan Constitution states that disputes between Shia minorities are decided according to Shia law.

Extent of application

No modern state relies exclusively on *sharia*. In many Islamic countries, the legal system is a mixture of religious law and state law, with some areas of the legal system, such as those concerning family and personal status matters being more reliant on *sharia*, whilst aspects of commercial law and the law of intellectual property rely on secular codes (Hirschl, 2010).

For example, the Constitution of Jordan (article 150) states: 'The Sharia Courts shall in accordance with their own laws have exclusive jurisdiction in respect of the following matters: (i) Matters of personal status of Muslims; (ii) Cases concerning *diyya* (blood money) where the two parties are Muslims or where one of the parties is not a Muslim and the two parties consent to the jurisdiction of the Sharia Courts; (iii) Matters pertaining to Islamic Awqaaf (religious endowments).' Other areas of law are primarily dealt with by civil courts.

Constitution-builders may therefore need to consider the extent of the applicability of *sharia*. Is it, as a substantive body of law, to be applied only to matters such as personal status, family law, inheritance and civil disputes between Muslims, or are the criminal and penal provisions of sharia, including punishments (*Hudūd*) such as stoning and amputation, to be applied? Whereas it might be possible to reconcile the role of *sharia* in family and civil law with international human rights norms, reliance on *sharia* in criminal law is likely to bring the state's practice into conflict with its international human rights commitments. Indeed, many Muslim countries have made reservations to international treaties, to the extent that they are only obliged to apply treaty provisions to the extent that they do not contravene *sharia*.

Composition of the judiciary

In order to implement *sharia*, there was traditionally a requirement for a special court system and a corps of specially trained judges with knowledge of *fiqh* (Islamic jurisprudence). However, in several jurisdictions, including Egypt and Pakistan, judges trained in civil or common law on supreme courts or constitutional courts pronounce on the compatibility of laws with *sharia*.

In some jurisdictions, especially where *sharia* is applied mainly in matters of family and civil law among Muslims, special courts are established with jurisdiction over those areas of law. For example, the Constitution of Kenya (article 170) states that a *Kadhi* (Islamic judge) must: (a) 'profess the Muslim religion'; and (b) 'possess such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court'. In other countries, however, religious matters are adjudicated within the civil-court system.

A further question arises over whether service as a judge on a *sharia* court should qualify one for subsequent appointment or election to a supreme or constitutional court—and, in other words, whether members of the highest court must be trained in secular law or *fiqh*. In Tunisia, the 2014 Constitution (article 115) states that three-quarters of the members of the Constitutional Court must be 'legal experts having no less than 20 years' experience', allowing up to one-quarter to be appointed from among Islamic-law scholars who are not trained in civil law. The balance between civil judges and *sharia* judges on the Constitutional Court will shape the way in which jurisprudence develops, particularly in regard to the balance between the Islamic parts of the constitution and human rights.

Religious minorities in Muslim-majority countries

Minority recognition

The constitutions of several Muslim-majority countries give particular recognition to non-Muslim minorities. For example, Egypt's 2014 Constitution specifically refers to Christian and Jewish minorities, and states that matters of personal status and religious affairs for these religious minorities are to be regulated by their own laws. Such specific recognition may be valuable to the named minorities in that it shows that they are included in the constitution and are part of the national community. However, while accommodating such privileged minorities, specific recognition may—in contrast to a catch-all right to religious freedom and separation of religion from the state—entrench the exclusion of those who are excluded from the list of recognized minorities.

Freedom of religion

An approach to constitutional design based on the segmentation of society into a Muslim majority and a number of tolerated and recognized religious minorities may help protect the religious freedom of members of the identified religious minorities. However, such provisions fall short of guaranteeing the religious freedom of those who do not belong to one of these privileged minorities. In particular, this approach offers no protection to atheists and those who do not wish to be associated with any religious group.

Afghanistan's 2004 Constitution provides that 'Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law'. This appears to be a more expansive provision because it extends to the followers of other religions without limiting them to a prescribed list. However, the right only extends to those who are already recognized as followers of other religions: there is no generalizable individual right to freedom of religion.

Apostasy

According to many interpretations of *sharia*, the penalty for leaving Islam—or apostasy—is death. This is very difficult to reconcile with freedom of religion since it denies the right of a person raised as a Muslim to convert to another religion or otherwise to abandon Islam. One way to protect against this is to have a very strong religious-freedom clause that includes freedom of religious dissent and non-belief and that explicitly protects the rights of apostates and non-believers. Tunisia's 2014 Constitution, for example, protects people against *takfir* (the excommunication of other Muslims as apostates).

9. Decision-making questions

1. What is the nature of the state? Is it a 'state of believers' or is it a 'state of citizens', a majority of whom may happen to belong to a particular religion?
2. How does the previous constitution express the state's relationship to religion? How did this work in practice? Where are the pressures for change?
3. Will adding religious-establishment or religious-recognition clauses impede religious freedom for religious minorities? Can a clause guaranteeing the equality of minority groups be drafted to resolve this?
4. What effect will religious-establishment or -recognition clauses have on the rights of women in matters of marriage, divorce, inheritance, bodily integrity, dress codes and on access to education, work and social and political life? How can the state ensure that it meets its obligations under the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)?
5. How strong is the demand for religious establishment or recognition? Is the demand symbolic or do people really want religious law and religious institutions to govern them? How much tension is there between religious and secular groups or between majority and minority religions? Who do the leading proponents of religious establishment speak for, and do they accurately reflect wider public concerns?
6. What are the flashpoints and bargaining positions? Will adding religious clauses give some groups the reassurance they need in order to accept progressive reform in other parts of the constitution? Alternatively, will the

inclusion of specific guarantees on substantive points (such as the right to life, accommodation for faith-based schools and recognition of the private laws of minorities) compensate for the absence of religious recognition?

7. Who is represented in the constitutional negotiations? Are there any religious groups which are not present but which may have particular fears or concerns? What can be done to bring them into the process?
8. Are minorities seeking religious recognition in order to enhance their freedom to practise? What other alternatives exist to satisfy their demands, short of incorporating religion?
9. Who interprets religious provisions? If it is a non-religious constitutional court, are there religious qualifications to be appointed a judge of that court? If there is a proposal to establish a special religious court or other guardianship body, what will the status and composition of this institution be? Will its interpretation of laws be binding upon state institutions? How will it relate to other institutions?
10. How will the state reconcile a commitment to a particular religion with international human rights law? Will both have equal or hierarchical status in the constitution? Which court or body will have the final say on how contradictions are resolved between the two?
11. What financial costs are involved in providing a religion with constitutional privileges? Will the state give religions access to public funding/tax breaks? How will this affect other aspects of the state budget?
12. Is it necessary to have the same religious provisions across the country? If religious groups are geographically concentrated, may options such as federalism or regionalism be appropriate?

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Annex

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