SCLS Law Review Vol. 4. No.2 [May. 2021], ISSN (Online): 2523-9236, ISSN (Print): 2523-9228
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Judicial Protection of Religious Neutrality: The U.S. and European Experiences

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Abstract

There is a rise of religious extremism and intolerance and omnipotence of dominant religion even in traditionally liberal societies. Facing such reality, the judiciary may not simply ignore the constitutional and political contexts in which the dominant and non-dominant religious groups exist and interact. Democracy being a rule of the majority, protection of the minority always remains troublesome. Some argue that the judiciary can sometimes stand between crude majoritarian politics and the helpless religious minorities by halting illiberal retrogression through its apparently unpopular decisions. They can do this by anticipating the problems in advance and slowing the process of degradation by issuing prophylactic rulings. In the process, the courts can help prevent the problem of religious intolerance from arising at all. Some other scholars claim that without support from civil society and people in general, the courts are less likely to make any visible difference in this reagard. This paper briefly examines the comparative religious neutrality jurisprudences from the U.S. Supreme Court and the European Court of Human Rights. It argues that the U.S. and European courts are taking clues from populist and majoritarian governments and societies. Hence judicial protection of the states' religious neutrality and rights of the religious minorities are at greater risk than ever.

1. Introduction

Democracy, by its nature being a rule of the majority, the protection of the minority always remains troublesome. The judiciary's role in checking the majoritarian populism has been highlighted by theories like "representation reinforcement",[1] "counter-majoritarian representation and enlightenment",[2] and "prophylactic judicial decision making",[3] Scholars like Issacharoff[4] and Choudhury[5] also underscored the contribution of the judiciary in

[1] American scholar John Hart Ely's famous representation reinforcement theory argues that courts may act as a representative voice for the minorities who are less likely to have their voice heard in majoritarian political discourse. A minority who is not a king maker or a significant voting block is less likely to be attended by the political parties and their leaders. For details see: John H. Ely, *'Toward a Representation-reinforcing Mode of Judicial Review'* (1978) 37(3) Maryland Law Review 451.

[2] Luis R.Barrosso argues that apart from serving the interest of the unpopular minorities in a majoritarian democratic system (counter majoritarianism), courts may enlightening non-liberal societies by its liberal and progressive judgments. For dertails see: L R Barroso, *'Counter majoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies'* (2019) 67(1) The American Journal of Comparative Law 109.

[3] German scholar Prendergast argues that progressive and pro-minority courts may play the rule of cheking the growth and spread (prophylactic) of the societal disease of illiberalism, intolerance and minority repression. For details see: David Prendergast, *'The judicial role in protecting democracy from populism'* (2019) 20 German Law Journal 245.

[4] Samuel Issacharoff, *'Constitutional Courts and Democratic Hedging'* (2011) 99 Georgetown Law Journal 961.

checking political monopolisation, etc. The basic argument of these theories is that judicial review can sometimes stand between crude majoritarianism and democratic decay either by halting the retrogression through an unpopular decision or by anticipating the problems in advance and slowing the process of degradation by issuing preventive or *prophylactic* rulings and help prevent the problem from arising at all. There are, however, doubtful views as well. Daly[6] is rather cautiously optimistic about the capability of the judiciary in protecting liberal democratic ideals. He argues that absent support from civil society and people in general, the courts are less likely to make any visible difference.

When the question comes to the state's religious neutrality, the courts' problems are multiplied. There is a global rise of religious extremism and intolerance and omnipotence dominant religion even in traditionally liberal societies. Religion, by its nature, being a matter of passion, protection of unpopular religious minority is further problematic. The task of balancing the competing religious rights and the states' secular interests is not always straightforward. It is context-specific, and the judiciary may not simply ignore constitutional and political contexts in which dominant and non-dominant religious groups exist and interact.[7]

This paper draws a brief outline of the comparative American and European jurisprudence on constitutional rights and religious neutrality. It would show how the U.S. Supreme Court and the European Court of Human Rights (ECtHR) have struggled to draw a fine line between religious neutrality and dominant religious traditions. To identify the "dilemma of God and Cesare"[8] there, we take the non-establishment and free exercise clauses of the U.S. First Amendment[9] and compare the U.S. Supreme Court and European courts' jurisprudence.

2. The United States' Dilapidated "Wall of Separation".

The First Clause – Non-establishment clause - of the U.S. Constitution's First Amendment prohibits the state from establishing any particular religion as a favoured or official one. President Thomas Jefferson famously described this as a watertight "wall of separation"[10] between State and religion. A prominent U.S. judicial precedent on the non-establishment clause in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In this case, a unanimous Supreme Court declared any direct government assistance to religious schools unconstitutional. The court created what is now known as the *Lemon Test or Secular Purpose Test* for deciding whether a

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[5] Sujit Choudhury, *'"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy'* (2009) 2 Constitutional Court Review 1.

[6] Tom G. Daly, *'The Alchemists: Courts as Democracy-Builders in Contemporary Thought'* (2017) 6 (1) Global Constitutionalism 101.

[7] Thio Li-Ann, *'Courting Religion: The Judge Between Caesar and God in Asian Courts'* (2009) Singapore Journal of Legal Studies 52.

[8] *ibid*, 55.

[9] The First Amendment of the US Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[10] Immediately after accession to the Presidency in 1800, Thomas Jefferson wrote to a letter to a Baptist Church from Danbury, Connecticut, in which he explained his beliefs about the meaning of the Establishment Clause. Jefferson assured the congregation that the federal government could not interfere with their church or offer special favors to any particular sect. He wrote: "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 & State." See: Letters between Thomas Jefferson and the Danbury Baptists Association (1802), *The Church congratulating the newly sworn President and the President's reply on January 1, 1800*.

law violates the non-establishment clause. Under the rule, any policy having a secular purpose - not advancing or inhibiting any religion in its primary or principal effect and not inviting excessive government entanglement with religion - would survive the constitutional scrutiny even though such policy may indirectly benefit religious schools, communities, or institutions.[11] In line with this, several pre-and post-*Lemon* cases upheld indirect assistance to religious, educational institutions relying on justifications like "secular policy," "religious neutrality",[12] and "parental choice",[13] etc.

*Lemon'*s secular purpose test, however, appeared unsuitable for cases regarding public display of religious monuments, statues, sculptures, artifacts, symbols, and traditional religious prayers in state functions. In these matters, the U.S. Supreme Court rather relied on "customary and historical practice doctrine".[14] Under the concept, while the state takes the public significance of the dominant religious practices into account, it does not convey or attempt to convey that one religion is favoured or preferred over another.[15] In this analysis, the U.S. Supreme Court upholds ritualistic prayers in state functions[16] as historical practices. It, however, invalidated mandated posting of religious symbols,[17] organised prayer[18] , and even optional daily devotional scripture reading[19] in public schools. Those practices were seen establishing one religion over others.

While it is not our intention to label the "customary and historical practice doctrine" as a crude establishment of the dominant religion, the U.S. Supreme Court's attempt to secularise these dominant religious precepts for certain public purposes[20] indicates the impossibility of erecting a watertight wall of separation between the religion and state. In this sense, the historical practice doctrine's claim that those practices do not "advance or endorse any favoured religion" is paradoxical. The U.S. Supreme Court's non-establishment jurisprudence is likely to face difficult questions if the precepts of non-dominant religions, Islam, for example, are tested against the principles already set. It is doubtful whether the U.S. Supreme

[11] Daan Brayeman, *'The Establishment Clause and the Course of Religious Neutrality'* (1986) 45(2) Maryland Law Review 352.
[12] In *Zelman v. Simmons-Harris* 536 U.S. 639 (2002) where a state voucher program was allegedly used by the parents for sending their children to private religious schools. Like the Everson court, a 5-4 majority of the bench held that the voucher program offered religiously neutral benefit for public and private schools. Once the program is proved to be religiously neutral, it was a matter of parental choice where to use the voucher.
[13] In *Board of Education v. Allen* 392 U.S. 236 (1968), the court upheld a law requiring public schools to lend books to private schools including the religious ones. Finding the law as a religiously neutral one, it was applicable irrespective of religions and beliefs and it had not established any particular religion. In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the court permitted Indian tribal funds' expenditure, given to the tribe by the federal government under treaty obligations, to support religious schools chosen by the tribe. The decision held that the Indians had treaty rights to the funds. The tribe, not the federal government, decided how to use them after incorporating the 'Establishment Clause' in the U.S.A. Constitution, many other countries also adopted a similar concept in their constitutions.
[14] *Van Orden v. Perry*, 545 U.S. 677 (2005); *Lynch v. Donnelly* 465 U.S. 668 (1984); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).
[15] Donald L. Beschle, *'Does the Establishment Clause Matter? Non-Establishment Principle in the Unites States and Canada'* (2002) 4(3) University of Pennsylvania Journal of Constitutional Law 451, 454-60.
[16] *Marsh v. Chambers* 463 U.S. 783 (1983).
[17] *Stone v. Graham* 449 U.S. 39 (1980).
[18] *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992).
[19] *Abington Township v. Schempp*, 374 U.S. 203 (1963).
[20] The dissenting judgement of *Lynch* tried to separate those practice from their religious roots and suggested that these religious symbols were only acceptable because they were a form of "'ceremonial deism', protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content" *Lynch v. Donnelly* 465 U.S. 668, 716 (1984).

Court would apply the same "secular purpose", "religious neutrality", or "parental choice" doctrines to cases where some state funding could have gone to Islamic or other non-dominant religious schools. It also appears unlikely that public display of any sculpture or symbols associated with Islamic or any other non-dominant religious traditions would survive the "historical or customary practice" doctrine. Reasons behind this doubt get some foothold when we see the recent Muslim Ban judgement of the U.S. Supreme Court - *Trump v Hawaii*. The Court has controversially discarded *Lemon*'s strict scrutiny of the "secular purpose" test and rather applied a "rational basis test" to Donald Trump's infamous Muslim Travel Ban despite overwhelming evidence of religious bigotry in Donal Trump. The court held that Donald Trump had a *rational basis* for forming an opinion on the necessity of the alleged immigration regulation, and the court was not in a position to judge the correctness or incorrectness of the president's views.[21]

2.1. The U.S. Supreme Court's Slippery Standards of Religious Freedom

The second clause – The free exercise clause – of the U.S. First Amendment guarantees freedom of religion for all. In religious freedom cases, the U.S. Supreme Court - depending on a liberal or conservative majority in the bench - has switched back and forth between "compelling state interest" and "secular purposes" behind freedom restriction.[22] As per the "compelling state interest" test - also known as the *Sherbert* test[23] - the state would need to show a compelling interest in suppressing any one religious practice. While this principle has been applied to bar the customary practice of polygamy of one religious minority,[24] it was disapplied to protect a Jew employee's right not to work on Saturday (Sabbath).[25] It was also disapplied to protect some parents' *right to ensure the religious upbringing of their children* even though such allowance could *moderately violate* a compulsory public-school attendance law.[26]

The "compelling state interest" test was later substituted by a "non-discriminatory application" test in *Oregon* v *Smith*.[27] In this case, an employee was fired for sacramental use of peyote, a legally prohibited drug in Oregon. She was denied unemployment benefits later. The conservative majority in the U.S. Supreme Court held that religious denominations are not free to disregard the generally applicable law of the land on the excuse of their religious norms. The state, in such cases, would not be required to show a compelling interest in regulating the religious practice concerned. It will be enough if the state could show the existence of a *religiously neutral law* and if the state shows that the law is *applied non-discriminatorily* to all the citizens of all religions. In response to *Oregon v. Smith*, the Democrat-controlled U.S. Congress enacted the Religious Freedom Restoration Act (RFRA)

[21] *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
[22] Kathryn Page Camp, *In God We Trust: How the Supreme Court's First Amendment Decisions Affect Organized Religion*, (2006, KP/PK Publishing, 2006) 47-64.
[23] Named after the *Sherbert v. Verner*, 374 U.S. 398 (1963) case.
[24] *Reynolds v. United States*, 98 U.S. 145 (1879) (rejecting the polygamous marriage tradition of the "old order" Mormon).
[25] *Sherbert v. Verner*, 374 U.S. 398 (1963) (protecting an employee right not to work on Saturday (Sabbath) as there was not compelling state interest in forcing some employees to work on Saturday)
[26] *Wisconsin v. Yoder*, 406 U.S. 205 (1972) Compulsory school attendance law which required all children to attend public or private school until attaining the age of 16 was questioned in this case by parents belonging to Amish religious denomination. It was held that the burden placed on religious practices by Wisconsin's compulsory education law outweighed the general interest of the state in educating its citizens. Forgoing one to two years of compulsory education would not impair the welfare of their children or society as a whole.
[27] *Oregon v. Smith* 494 U.S. 872 (1990) (The *Free Exercise Clause*, never "relieves an individual of the obligation to comply with a 'valid and neutral law of general applicability' on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."(p 879)).

and restored *Sherbert*'s "compelling state interest" criteria. The RFRA would require the states to show that there was a *compelling interest behind* the restriction imposed. States will also need to show that the action taken was the least restrictive means possible to serve the interest. The U.S. Supreme Court, however, struck down the RFRA in *Boerne* v. *Flores*.[28]

3. Religious Neutrality and Religious Freedom Jurisprudence of ECtHR

Compared to the U.S. Supreme Court's subtle predicament to an unpopular religion, the European Court of Human Rights (ECtHR)'s antipathy towards the region's most unpopular religion expressed in the Islamic veil judgments discussed later - is rather crude. Unlike the U.S. Supreme Court, the ECtHR has upheld the states' direct subsidy for religious instruction[29] and institutions.[30] Like the U.S. Supreme Court, the ECtHR agreed that symbols of the dominant religion might have become sufficiently secularised and historical to justify their state-sponsored expression and displays. But where the U.S. Supreme Court would not justify the mandated display of those in school setups, the ECtHR would. [31]

In relation to the protection of religious freedom, particularly that of the minority Muslims, the ECtHR is notoriously illiberal. While some European nations have shown enhanced interest in protecting the rights of unpopular minorities over the reservation of dominant groups,[32] some other nations, including the ECtHR, have refused to be generous. The French and Belgian courts and the ECtHR's reservation on Islamic Veil or Burka appear comparable to the U.S. Supreme Court's anti-RFRA position. In this scenario, an unpopular religious minority's practice is likely to be suppressed if it contradicts the subjective perception of the majority. In *S.A.S.* v. *France*, the ECtHR upheld France's ban on the full-face veil, holding that though wearing the veil was a valid exercise of religion, it prevented people of France from "living together in the space of socialization".[33] A similar decision was made in two Belgian cases, *Dakir v. Belgium* and *Belcacemi and Oussar v. Belgium*.[34] While the ECtHR

[28] *City of Boerne v. Flores* 521 U.S. 507 (1997); For a discussion of the Boerne case, see: David M Ackerman, *The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status*, Report, June 25, 1998 (Washington D.C: University of North Texas Libraries) <https://digital.library.unt.edu/ark:/67531/metacrs570/> accessed April 17, 2021.

[29] In 1996, the ECtHR held that a nonbeliever may be required to pay the proportion of taxes to a state church. It argued that the church used those money for carrying out "secular functions" (*Kustannus Oy Vapaa Ajattelua Ab and Others v. Finland*, App. No. 2047/92 Eur. Ct. H.R. (1996). See also - *X v. The United Kingdom* App. No. 7782/77 Eur. Ct. H.R. (1978).

[30] *Darby v. Sweden* App. No. 15581/85 Eur. Ct. H.R. (1990).

[31] In *Classroom Crucifix II Case*, Federal Constitutional Court of Germany, 93 BVerfGE 1 (1995) held that "the cross cannot be divested of its specific reference to the beliefs of Christianity and be reduced to a general token of the Western cultural tradition" (para 3(a)). The ECtHR, however, did not accept the German reasoning. It instead endorsed an Italian one *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. (2011). In *Lautsi*, the ECtHR agreed that "beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable" (para 67). See: Justin Collings, *Democracy's Guardians A History of the German Federal Constitutional Court, 1951-2001*(Oxford: Oxford University Press, 2015). See also: Jeroen Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill Nijhoff 2012) 81.

[32] In *McFarlane v. Relate Avon Industries* the UK Court of Appeal denounce a claimant who refused to offer sexual counselling to same-sex couples because of his Christian beliefs. In *Ladele v. London Borough of Islington*, the Court of Appeal similarly denounced a registrar of births, deaths, and marriages who refused to officiate at civil partnerships between same-sex couples on the ground her religious conviction.

[33] *SAS v France*, 2014-III Eur. Ct. H.R. 341 para 122, 125–27, 142. See also: ECHR Press Release, *French ban on the wearing in public of clothing designed to conceal one's face does not breach the Convention*, (1st July 2014); available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4809142-5861661&filename=003-4809142-5861661.pdf, accessed on 17 April 2021.

[34] *Dakir*, App. No. 4619/12, Eur. Ct. H.R.; Belcacemi, App. No. 37798/13, Eur. Ct. H.R. Also: *Sahin v. Turkey*, App. No. 44774/98 (Eur. Ct. H.R. June, 29 2004), affirmed in App. No. 44774/98 (Eur. Ct. H.R. Nov, 10, 2005).

did not adequately explain how and why "living together in the space of socialization" could be affected by Muslim women wearing face covers,[35] the judgment is criticized for being discriminatory to the minority Muslims.[36] Also, the ECtHR's perception of the Islamic veil as a symbol of women suppression subjective and based on a presumption that all Muslim women are invariably "forced" to wear those.[37] It is also argued that the ECHR's concern about the "risk that results from allowing veils in public spaces" is not substantiated by any empirical evidence and is based on the subjective perception of the majority. Hence the restriction imposed is disproportionate to the purpose sought to be achieved.[38]

4. Concluding Note

This brief discussion on the religious neutrality and religious freedom jurisprudence of the U.S. Supreme Court and European Court of Human Rights shows that a watertight separation between religion and state has been rhetoric in the West rather than reality. The West's jurisprudence of secularism is not fully convergent to its theoretical commitment to religious freedom and neutrality.[39] With the wall of separation blurring, the protection of unpopular religious minorities is not very smooth, particularly when the courts have shown a controversial level of deference to the tides of religious populism. Protection of religious neutrality and freedom is context-specific. "Judicial populism"[40] and "abusive judicial reviews"[41] are particularly prone to develop in this area. It is particularly problematic when dominant religious groups take a suppressive posture. Once it starts to take its root, religious populism spreads quickly and wide. It is not unlikely that the judiciary also starts taking clues from the populist movements, parties, and governments. Doing this, the judiciary ventures a path of judicial populism and/or abusive exercise of judicial powers. The overall trend of the U.S. and European jurisprudence – as shown by the American *Trump* v. *Hawaii* Muslim Ban and European *Burqa Ban* cases – is in this direction.

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[35] Jasoer Doomen, *'A Veiled Threat: Belcacemi and Oussar v Belgium'* (2018) 20(2) Ecclesiastical Law Journal 190.

[36] Kati Nieminen, '*Eroding the protection against discrimination: The procedural and de-contextualised approach to S.A.S. v France*', (2019) 19(2) International Journal of Discrimination and the Law 69; See also: Eva Brems, *'The European Court of Human Rights and Face Veil Bans'* (2018) E-International Relations; available at: https://www.e-ir.info/2018/02/21/the-european-court-of-human-rights-and-face-veil-bans/, accessed on April 17, 2021.

[37] Eva Brems, '*Face veil bans in the European Court of Human Rights: The Importance of Empirical Findings*' (2014) 22(2) Journal of Law and Policy 517.

[38] Shaira Nanwani, *'The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?'* (2011) 25(3) Emory International Law Review 1431.

[39] Brett G Scharffs, *'The (not so) Exceptional Establishment Clause of the United States Constitution'* (2018) 33(2) Journal of Law and Religion 137.

[40] Anya Bernstein and Glen Staszewski, *'Judicial Populism'* (2020) University at Buffalo School of Law Legal Studies Research Paper No. 2020-005; available at: <http://dx.doi.org/10.2139/ssrn.3694132> accessed 17 April 2021.

[41] David Landau and Rosalind Dixon, *'Abusive Judicial Review: Courts Against Democracy'* (2020) 53(3) University of California, Davis Law Review 1313.