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## A Review of *Constitutional Theocracy* by Ran Hirschl

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Ran Hirschl's *Constitutional Theocracy*<sup>1</sup> is a comprehensive and sophisticated analysis of the relationship between religions, constitutions, and courts across much of the contemporary world. The book is based on extensive analyses of national debates and jurisprudence on issues of the relationship between state and religion and secular and religious law. The book draws on debates taking place among legal scholars, political scientists, political sociologists, and social philosophers and is uniquely poised to speak to multiple audiences. It also draws more general conclusions about trajectories of sociojuridical change in a world increasingly defined by the public resurgence of religious identities and claims-making.

The work is distinctive in several ways. First, it conceptualizes a new legal order—constitutional theocracy—that has emerged in the wake of the global resurgence of religion. Hirschl defines constitutional theocracies as characterized by simultaneous adherence to modern constitutional principles, including the core distinction between political and religious authority, and religious principles.<sup>2</sup> The latter aspect entails constitutional sanctioning of a “state religion” and religious law as *a* or *the* main source of legislation. Second, it examines the relationship between state and religion implicit in constitutional theocracies as part of a larger continuum of “state-and-religion models.”<sup>3</sup> One end of this continuum is occupied by communist regimes that have adopted active campaigns and policies to eradicate religion, and the other end is occupied by countries like Egypt, Israel, and Pakistan—some of the main exemplars of constitutional theocracy discussed in the book—that perennially struggle with reconciling

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1. RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).

2. *See id.* at 2-3.

3. *Id.* at 26.

foundational democratic ideals with equally core religious national identity issues. Between these two ideal types lie a host of countries in which the relationship between state and religion is mediated more moderately. Examples include the selective accommodation of religion in certain areas of the law (India, Kenya) and respect for religious difference through explicit adherence to ideals of multiculturalism and diversity (Canada, South Africa).

By bringing a larger set of national cases into a comparative framework, the book showcases the centrality of the religion question for constitution makers and interpreters across different political, cultural, and social settings. Such a focus leads Hirschl to make what in my view is the book's central and most original argument—constitutional theocracy allows modern states to contain the excesses of religion in contexts where there is popular support for imposition of religious law by delegating the state-and-religion issue to constitutional courts that are peopled by secularly inclined judges. In the process, these courts “have become bastions of relative secularism, pragmatism, and moderation, thereby emerging as effective shields against the spread of religiosity and garnering increased popular support for principles of theocratic governance.”<sup>4</sup>

First, Hirschl devotes a chapter to examining the multiple rationales that make the space of constitutional courts and law appealing to “secularist, modernist, cosmopolitan, and other antireligious social forces.”<sup>5</sup> These include: (1) co-optation of alternative religious discourses from competing traditional authorities;<sup>6</sup> (2) jurisdictional advantages that inhere from bringing religious law within the ambit of state law, which allows both the standardization and enforcement of the former;<sup>7</sup> (3) strategic delegation of potentially thorny social issues by political elites to constitutional courts;<sup>8</sup> (4) the very epistemology of constitutional law<sup>9</sup> that makes it “a more hospitable domain for secularist worldviews and policy preferences than for religious ideology”;<sup>10</sup> (5) constitutional challenges to religion-based associations such as political parties;<sup>11</sup> and finally (6) political control of judicial appointments, which effectively means that political elites are able to promote judges who have secularist leanings.<sup>12</sup>

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4. *Id.* at 50.

5. *Id.* at 51.

6. *Id.* at 51-59.

7. *Id.* at 59-64.

8. *Id.* at 64-72.

9. *Id.* at 72-82.

10. *Id.* at 82.

11. *Id.* at 83-85.

12. *Id.* at 85-101.

Next, Hirschl devotes two chapters to empirical cases to advance and substantiate his arguments. Chapter 4 draws on experiences of constitutional courts in seven countries (Egypt, Kuwait, Pakistan, Malaysia, Nigeria, Israel, and Turkey), and readers are taken on a voyage in which they get a glimpse of concrete issues ranging from Egypt's Supreme Constitutional Court's treatment of appropriate attire for women to the Supreme Court of Israel's handling of the foundational "Who is a Jew?" question. In these and most of the other examples presented, courts engage in dynamic and creative interpretations that depict religious laws and norms as constituting a moderate and flexible system of codes that coheres neatly with the democratic rights enshrined in constitutions. In Chapter 5, Hirschl extends the narrative to the secularist world through concrete legal cases from Europe, Latin America, South Africa, and Canada. The book shows that, like their counterparts in constitutional theocracies, constitutional courts in these societies also grapple with legal issues that emanate from popular support for religion and also serve as vehicles for curbing religious excesses. In his conclusion, Hirschl suggests the value of a truly comparative study of constitutional law and religion that yields generalizations extending beyond the traditionally studied world of North America and Europe, particularly in constitutional law.

Overall, Hirschl's book makes an impressive contribution to scholarship on law and religion in general and to the burgeoning literature on law in action in Muslim societies in particular. Because constitutional theocracies are presently predominantly found in the Muslim world, I will briefly consider the normative position of Hirschl's argument, which is informed by a realist, "consociational" view of constitutional design—as opposed to an ideational one—whereby the constitution becomes the site for power sharing among different interests, in the process encouraging moderation on all sides.<sup>13</sup> According to Hirschl, when courts themselves take a pragmatist, problem-solving oriented approach to constitutional law, they privilege social conciliation over inflexible adherence to foundational principles.<sup>14</sup>

I concur that in *most* cases discussed, constitutional courts have indeed taken a middle ground on the religion question and have served as important agents for mitigating contests over highly sensitive cultural issues ranging from women's rights, citizenship, minority rights, and so on. However, the privileging of religious law within formal state structures in effect legitimates institutional and discursive practices that *may* be amenable to gross violations of rights. Laying

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13. *See id.* at 44.

14. *See id.* at 80-81.

down legal frameworks that give greater space to religion is normatively good and desirable both because it reflects genuine popular will and because it tempers religious zeal for theocratic governance. However, initial containment of such zeal may have the effect of subsequent entrenchment of more moderate, but nonetheless illiberal, rights discourses. Thus in countries like Pakistan, women's groups pushing for reform of gender discriminatory laws continue to face intense opposition from a male-dominated public while political leaders who publicly critique draconian laws, such as the blasphemy laws passed by General Zia-ul-Haq in the 1980s, face threats to their very lives, as witnessed by the recent assassination of Punjab governor Salman Taseer.

Second, the book underrecognizes the extent to which Islamist political parties are invested in formal entry into, and control of, formal state apparatuses. Taking the case of Pakistan again, since the country's inception, Islamist political parties have been highly vocal participants in national constitutional debates on the relationship between the state and Islam, oftentimes presenting their own constitutional designs. Thus, the very power of the state—an entity that no doubt is founded on a modernist paradigm that is inherently inclined toward secularism—makes it a material and symbolic resource over which different groups vie to exert control. While modern states may be inherently inclined toward secularism, the rational organization, systematic ideological rhetoric, and democratic appeal of Islamist groups make it a real possibility that state structures can accommodate theocracy over constitutionalism. Examples of this can be found in Sudan and Iran. Notwithstanding these points, Ran Hirschl has written an ambitious and significant book that should interest legal scholars as well as those working in political sociology, political science, and religion.