Religion and Constitutionalism

Gábor Halmai

GÁBOR HALMAI

RELIGION AND CONSTITUTIONALISM

The aim of this paper is to elaborate the relationship between religion and different forms of constitutionalism. What forms of church-state relations, and how much religious freedom are required in a liberal democratic constitution, and how do different types of illiberal polities regulate church-state relations and religious freedom in their constitutions? The paper plans to investigate the topic from both a normative/theoretical and an empirical perspective. The normative part of the paper starts with the very definition of liberal constitutionalism, and the role of religious freedom in this definition. In the empirical part of the paper I compare the status of the state-religion relationship in three countries, one of them, Israel, representing the traditional liberal, while Egypt and Hungary the illiberal constitutional approach. The joint characteristic of these cases is that they represent ethnically, religiously or politically, ideologically deeply divided societies and/or failed states, which offer an alternative idea of non-Euro-Atlantic liberal constitutionalism in an age of 'multiple constitutionalism'.[1]

Liberal and Illiberal Constitutionalism

In their study, Kalypso Nicolaidis and Rachel Kleinfeld use the term liberal democracy as a holistic picture of the separate, but interwoven elements of the rule of law, formal democracy, and human rights.[2] Formal democracy in this sense is a prerequisite to the rule of law, while human rights means guaranteed equal human dignity, and protection of minorities, including religious ones. In this concept rule of law contains a living list of the following principles from the point of view of citizens: 1) Citizens are free from the arbitrary use of power, 2) Citizens benefit from legal certainty, 3) All citizens are treated as equal before the law, 4) All citizens are granted accessible and effective justice, 5) All citizens can claim their rights including religious rights with a substantial degree of "legal certainty".[3]

---

[1] The term is used by Ulrich Preuss. See U. Preuss, 'Constitutionalism in a Globalized and Fragmented World: Failed States, Deeply Divided Societies and the Political Emancipation of the Arab World', Paper presented at a symposium in honor of Ulrich Preuss, Berlin, March 2011.
[2] K. Nicolaidis & R. Kleinfeld, *Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma*, Sigma Paper No. 49, 2012. 10-11.
[3] Id., 54-55.

Nicolaidis and Kleinfeld characterize illiberal democracies as systems, which lack one or two of the three interwoven elements. For instance the historical German legal positivistic term of Rechtsstaat does not necessarily democratic and respects human rights. In constitutional monarchies rights and laws can be respected, but these are non-democratic. Also many transitioning formal democracies, which are ruled by laws, minority rights are not upheld. Traditional rights respecting societies, i.e. tribal chieftaincies with concept of rights do not respect formal legal rules or democracy. Finally there are formal democracies without rule by law, and lacking fundamental rights as well.[4]

Liberal constitutionalism is normatively committed to the legal protection of fundamental rights, including religious rights, and institutionalizes constrains on political authorities in the name of these rights. The concept of constitutionalism necessarily requires respect for the equal religious beliefs of those who are resident in a country. In states where the dominant religion is intolerant, however, entrenching majoritarian beliefs is tantamount to falling out of the category of constitutionalism altogether.

Political arrangements where free and fair elections are not granted, are not democracies. One needs to note that Hannah Arendt, in The Origins of Totalitarianism (1951) has pointed out that totalitarian regimes can be rooted in liberalism when aiming to answer issues unanswered by liberalism.[5] It is known that the answers given by Nazism and Communism were the wrong answers, but not seeing the challanges of liberalism in relation to totalitarianism leads to wrong conclusions. Also Francis Fukuyama, in his recent book argues that liberal democracies were not immune to the pattern of stagnation and decay that afflicted all other political systems, and they too might need to be replaced by something else in order to achieve a 'well-ordered' society: besides rule of law and democratic accountablility a strong state is also required.[6] Fukuyama's tone is much less positive about the prospects of liberal democracy in general – though he does still profess a

---

[4] Id., 10-11.
[5] See J. Schell, *Introduction (*to Hannah Arendt, *On Revolution)* (2006), XIX.
[6] F. Fukuyama, *Political order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy,* Farrar, Straus and Giroux, 2014.

'normative preference' for liberal democratic regimes – as it was in his book published right after the fall of the Soviet Union arguing that Hegel's suggestion that political development ends with something like modern liberal democracy ought to be taken seriously, as only this has ultimately fulfilled basic human aspiration to freedom and dignity.[7]

Similarly Mark Lilla states that the big suprise in world politics since the the cold war's end is not the advance of liberal democracy, but the reappearance of classic forms of non-liberal and/or non-democratic political rule in modern guises.[8] The very reason for this according to Lilla is that even though liberal democracy seems to be the best way of achieving people's aspiration to be well governed, be secure and treated justly they don't necesserally understand the implications of liberal democracy and accept the social and cultural individualism it inevitably brings with it. He argues that since due to culture, ethnic divisions, religious sectarianism, illiteracy, economic injustice, senseless national borders imposed by colonial powers billions of people will not be living in liberal democracies in the near future the 'West' should consider the possibility of improving non-liberal and non-democratic regimes as a Plan B, even by ackowledging a model of constitutional theocracy, which gives Muslim countries a coherent way of recognizing yet limiting the authority of religious law and making it compatible with good governance. In his book The Stillborn God, Lilla while emphasizing his commitment to the Enlightenment's 'Great Separation', prying apart theology and politics – at least for the West -, he cautions against drawing up universal prescriptions: „Time and again we must remind ourselves that we are living an experiment, that we are the exceptions. We have little reason to expect other civilizations to follow our unusual path, which was opened up by a unique theological-political crisis within Christendom."[9] This means that even though liberal constitutionalism's mentioned committment to fundamental rights is a tacit, if not overt, expression of public secularism, where religion is relagated to the private sphere, what Charles Taylor described as „the secular age of the North-Atlantic west",

---

[7] See F. Fukuyama, *The End of History and the Last Man,* Penguin Books, London, 1992.

[8] See M. Lilla, 'The Truth About Our Libertarian Age. Why the Dogma of Democracy Doesn't Always Make the World Better?', *The New Republic,* June 14, 2014.

[9] Cf. M. Lilla, *The Stillborn God. Religion, Politics, and the Modern West,* Alfred A. Knop, 2007. 308.

we have to acknowledge the presence of other approaches of illiberal democracies in religiously divided societies.

One can of course challenge Lilla's inference regarding Christian specificity and the limits of the lessons of the Enlightenment by arguing that contemporary Japan and India, among other non-Christian countries, have also embraced the Great Separation. Therefore it isn't so sure that the Christian West is exceptional, even though it was the first proposing the answer that has gradually gained momentum almost everywhere except in the Islamic world, and partly in Israel.[10]

It follows from these tendencies that liberalism and democracy does not necessarily go hand in hand. As the case of the Muslim Brotherhood in Egypt after 2011 shows in the Middle East democratization is likely to push Islamist parties towards greater illiberalism. In religiously conservative societies there is in general widespread support for more mixing of religion and politics, not less. For example in Egypt – even after the overthrow of President Morsi – overwhelming majorities support Shari'a, as primary or only source of law, including the role of religious leaders in drafting legislation, religiously derived criminal punishment, and gender ineqaulity. This means that if democratic elections are provided Arabs would rather decide not to be liberal, as even the most moderate Islamist want the state to promote religious and moral values through the soft power of the state machinery, the educational system and the media. But as many examples in the secular Europe show, Islamist cannot fully express their Islamism in a strictly secular state, since the notion that liberalism is neutral can be accepted only within a liberal framework. Therefore for democracy to flourish in the Middle East it will have to find a way to incorporate Islamist parties and it will have to be at least somewhat illiberal.[11]

But what are the characteristics of an illiberal polity? To use the holistic picture of Nicolaidis and Kleinfeld a system, which provides formal democracy is illiberal if

---

[10] See R. Newberger Goldstein, 'The Political and the Divine', *The New York Times,* September 16, 2007.

[11] This is the argument Shadi Hamid uses against the ban of the Muslim Brotherhood in Egypt. S. Hamid, 'The Brotherhood Will Be Back', *The New York Times,* May 25, 2014.

either rule of law or fundamental rights are missing, for instance where the constitutional system does not guarantee equal religious rights for everyone. Theories similar to this talk about 'electoral' and 'delegative' democracy in cases where the principle of democracy is present only in the elections but the liberal and republican dimension of government accountability is not.[12]

At the same time illiberal constitutions that embrace a minimum level of contitutionalism are not the same as authoritarian regimes. Even when there is a formal written constitution an authocracy is not a constitutional system. Therefore, China, North Korea, Cuba, the former Soviet Union, and some of its the successor states, such as Russia or Belorussia cannot be considered to be constitutional systems[13], even though formal written constitutions are found as often in authocracies as in democracies. But as William J. Dobson argues is his book, The Dictator's Learning Curve, "today's dictators and authoritarians are far more sophisticated, savvy, and mimble that they once were".[14] They understand that in a globalized world the more brutal forms of intimidation are best replaced with more subtle forms of coercion, and it is better to appear to win a contested election than to openly steal it. Therefore they work in a more ambiguous spectrum that exists between democracy and authoritarianism, and from a distance, many of them look almost democratic. Their constitutions often provide for a division of powers among the executive, the legislature, and the judiciary – at least on paper.[15] They are also not particularly fearful of international organizations. Even a threat of foreign or international intervention and criticism can be a useful foil for stirring up nationalist passions and encouraging people to rally around the regime. Therefore comparision of authoritarioan and democratic constitutions conclude that although authotarian constitutions tend to be less specific, protect fewer rights, and provide for less judicial independence, but they do not contain higher levels of executive power in their texts,

---

[12] See G. O'Donnell, 'Delegative Democracy', 5 *Journal of Democracy* 1994, 55.

[13] In contrast to this, there are opinions, according to which these latter, anti-constitutionalist regimes can be considered as manifestations of illiberal constitutionalism. See K. L. Scheppele, 'The Agendas of Comparative Constitutionalism', *Law and Courts*, 2003, Spring, pp. 5–22.

[14] W. J. Dobson, *The Dictator's Learning Curve. Inside the Global Battle for Democracy,* Doubleday, 2012. p. 4.

[15] See a comprehensive and cross-regional analysis of this phenomena from a constitutional, legal perspective concentrating more on regime practices rather regime types in O. Varol, 'Stealth Authoritarianism', 100 Iowa Law Review (fortcoming 2015). Varol's approach leads to detect authoritarian practices in otherwise non-authoritarian polities as well.

and do not necesseraly differ with regards to rights provision from their democratic counterparts.[16]

As many scholars noted, there is an incredible range of non-democratic, non-autocratic regimes and their relationship with each other and democracy is often imperfect and unclear.[17] The problem of countries in this 'grey zone'[18] inspired a lot of concepts, which were created to capture the mixed, or 'hybrid'[19], nature of 'these regimes'. Steven Levitsky and Lucas A. Way introduced the term 'competitive authoritarianism' for a distinctive type of 'hybrid' civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-á-vis their opponents.[20] This theory does not try to solve the problems of all hybrid cases[21], but categorizes only regimes filling special criteria such as 'competitive authoritarian', and indicates 35 regimes, which were or became competitive authoritarian during 1990 and 1995. These 35 comprised around one sixth of all countries in the world at that time. For the authors, a way of describing regime change and stability is the interplay of domestic and external factors, the latter being more important and divided into two parts. They define three possible outcomes: democratization, unstable authoritarianism and stable authoritarianism. The 'high linkage to the West' tends to cause democratization, high organizational power

---

[16] Z. Elkins, T. Ginsburg and J. Melton, 'The Content of Authoritarian Constitutions', *in* T. Ginsburg and A. Simpser (eds.), *Constitutions in Authoritarian Regimes,* Cambridge University Press, 2014. Forthcoming, p. 162.

[17] See L. Diamond, J. Linz and S.M. Lipset, *Democracy in Developing Countries,* Boulder, CO, Lynne Rienner, 1988.

[18] The term grey zone is used by Georg Sørensen. See G. Sørensen, 'Democracy and Democratization', in K. T. Leicht and J. C. Jenkins (Eds.), *Handbook of Politics: State and Society in Global Perspective*, Springer Science and Business Media, London, 2010.

[19] The term hybrid regime was introduced by Terry Linn Karl in the mid 1990s. See T. L. Karl, The Hybrid Regimes of Central America, 6 *Journal of Democracy,* 3, 1995, pp. 72-96.

[20] See S. Levitsky and L. A. Way, *Competetive Authoritarianism. Hybrid Regimes After the Cold War,* Cambridge University Press, 2010. p. 5.

[21] The authors acknowledge the fact that there are hybrid regimes that do not fall under either of the authoritarian categories. These are: first 'tutelary regimes', where elected governments are constrained by nonelected religious, military or monarchic authorities; second, 'semi-competitive' (or restricted) democracies, where a major party is excluded from elections; and third, 'constitutional oligarchies' (or 'exclusive republics'), where a major segment of the adult pupulation is denied suffrage. As opposed to Huntington, who talked about the (third) wave of democartization, Levitsky and Way are talking about the 'wave of hybridization'. Id. p. 20.

brings authoritarian stabilization, and in the case of contradictory powers at play, the result will often be unstable authoritarianism.[22]

As opposed to Levitsky and Way, other scholars argue that all non-democratic, non-authoritarian regimes can be called 'hybrids' rather than democracy or authoritarianism with adjectives.[23] This approach tries to re-define the overarching concept of electoral and non-electoral regimes, and revive a multi-dimensional conceptualization of regimes based on competitiveness, tutelary interference, and civil liberties.[24]

The terms illiberal or non-consolidated democracy are antithesis to liberal or consolidated democracy. Similar terms are used also for describing hybrid regimes, which are neither democratic, nor authoritarian.[25] Certainly a significant part of countries that jettisoned authoritarian regimes between 1974 and 1999 (the 'third wave' of transitions) did not develop into stable democracies by the turn of the century.[26] One of these terms is 'managed democracy' used for Putinism, which is among other things is characterized by rigged, engineered, phony elections, simulated management.[27] The other term is 'democradura', used in the 1970's and 80's for some

---

[22] According to critics the Western linkage is the only casual factor theoretized by Levitsky and Way to explain the democratization of competitive authoritarian regimes in the post-Cold War era. See D. Slater,'Compatitive Authoritarianism. Hybrid Regimes after the Cold War, by Steven Levitsky and Lucan Way', Critical dialogue, *Perspectives on Politics*, Vol. 9, No. 2, June 2011, pp. 385-388, at 387. Another crtitic mentions Russia, which probably is never going to evidence even medium Western linkage or Western leverage, therefore it is a country with a regime trajectory which is only vaguely describable by the variables proposed by Levitsky and Way. See A. Raun, 'Book Review: How to Survive the Western Democratizing Pressure?', *Studies of Transition and Societies,* Vol. 5, 2013, Issue 1. p. 87.

[23] See L. Gilbert and P. Mohseni, Beyond Authoritarianism: The Conceptualization of Hybrid Regimes', *Studies in Comparative Interntional Development,* Vol. 46, 2011, No. 3, pp. 270-297.

[24] Cf. id. 293-294.

[25] The study of the Transatlantic Academy on the democratic disconnect published in May 2013 discusses the 'hybrid' nature of the post-soviet transformations. See S. Benhabib & D. Cameron & A. Dolidze, et al., 2013. Also Paul Lendvai in his most recent book on Hungary puts the country between democracy and authoritarianism. See P. Lendvai, *Hungary. Between Democracy and Authoritarianism*, Columbia University Press, 2012.

[26] Barbara Geddes even argues that only a minority of those countries became consolidated democracies. See B. Geddes, 'What Do We Know About Democratization After 20 Years?' '*Annual Review of Political Science,* 2 (June 1999), pp. 115-144. Valerie Bunce also relayed the same opinion about post-communist countries, when she communicated at the POMEPS Conference in May 2011 that more than 20 years after the fall of the Berlin Wall, the vast majority of countries that had brought down communism were still not democracies, but they are, at best, 'hybrid regimes'. Quoted by E. Bellin, 'Reconsidering the Robustness of Authoritarianism in the Middle East. Lessons from the Arab Spring', *Comparative Politics,* Volume 44, Number 2, 2012 January, pp. 127-149, at 143.

[27] See S. Holmes & I. Krastev, 'An Autopsy of Managed Democracy', *Journal of Democracy*,

Latin American systems by Guillermo O'Donnelltől és Philippe Schmitter.[28] But also the term 'post-democracy' first used by Colin Cruch refers to democracies of countries in crisis.[29]

Some political scientists are inclined to believe that constitutions themselves and their institutional structures are much less important in the distortion of liberal constitutionalism than political culture.[30] Conversely, constitutional scholars emphasizing the importance of constitutional regulations[31] differenciate between different forms of illiberal constitutions. Dieter Grimm contrasts the liberal-democratic (or democratic and rule of law-oriented, 'rechsstaatlich') constitutions as prototypes of modern constitutionalism with the non-liberal democratic ones, listing the documents of radical democracies without bill of rights (most of the Commonwealth constitutions until very recently), and the constitutions based on popular sovereignty, but little weight to the people's interest in the day-to-day politics (the constitutions of Latin American countries) as subgroups.[32] As other expressions of political ideas Grimm also considers the social or welfare state constitutions (such as the Indian, the Brazilian, the Japanese, the South Korean or the South African), which are not liberal regarding social and economic rights, as well as the liberal but non-democratic constitutions (such the ones in France after 1815), and finally the neither liberal nor democratic socialist constitutions (of the former communist and current communist countries).

Volume 23, Number 3, July 2012, pp. 33-45.

[28] The term is recently used by Andrew Arato, *Is There a Dictatorship in the E.U.?* booksandideas.net, 11 May 2012

[29] See J-W. Müller, 'Postdemokratie? Karriere und Gehalt eines problematischen Schlagwortes', *Neue Zürcher Zeitung*, 10. November, 2012.

[30] Such is the argument that says that the reasons for the ungovernability of the United States lie deeper than the institutional structure of the country. See: Th. L. Friedman and M. Mendelbaum, *That Used To Be Us: How America Fell behind in the World It Invented and How We Can Come Back*, New York, Farrar, Straus and Giroux, 2011, 33.

[31] For instance Sanford Levinson's excellent monography deals with the variety of the institutional models of different state constitutions of the United States. See S. Levinson, *Framed. America's 51 Constitutions and the Crisis* of Governance (2012), Oxford University Press, 2012, p. 6.

[32] D. Grimm, 'Types of Constitutions', in M. Rosenfeld and A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 98-132.

Models of State-religion Relations

The next question to investigate is what kind of state-religion relationship and religious systems are compatible with liberal democracy, and what are not. National constitutional regulations about religion and the adjudication of religious rights can be compared from both an individual rights perspective and a collective rights perspective. The individual rights perspective sees religious freedom as a matter of individual choice and the collective rights perspective sees religious freedom as a question of the continued viability of religious groups. To assess these different strategies for the state regulation of religion, different models of church-state relations, has to be examined, for example, how different governments officially recognize religious groups, encourage (or not) their practices and deal with religious dissenters. One has also look at international human rights treaties together with the jurisprudence of international treaty bodies because treaty commitments influence how states understand their legal obligations in this area as well. National constitutional approaches vary even in liberal constitutional democracies due to historical differences and the different religious compositions of different national populations.

This variety is substantial. Even though the constitutions of most Western democratic countries do not require a single state church, majority churches can be singled out as national churches, as in Italy (1947), Spain (1977) or Poland (1997). In multi-confessional polities, as Germany, special state recognition for multiple churches can lead to the collection of church taxes by the state, given back to the churches sometimes with an additional state subsidy. This constitutes a more benevolent type of secularism, with a 'cooperationist' attitude of the state towards churches. This sort of approach sometimes accords public law status to churches or formalizes concordats with the Holy See, as a legal entity, different from the Vatican, for example. State neutrality[33] in other liberal constitutions can also be associated with more secularist approaches, like the French laïcité or the American non-establishment system. In the

---

[33] Neutrality requires states not to favor or disfavor anyone on the ground of an official judgment about their conception of the good life, including their religious belief. See this concept of neutrality as non-discrimination in R. Dworkin, *A Matter of Principle*, 1985. 283. The application of Dworkin's concept to religious neutrality see J. Kis, 'State Neutrality', in M. Rosenfeld – A. Sajó (Eds.), *Oxford Handbook of Comparative Constitutional Law,* Oxford, 2012. 318-335, at 332-335.

strict separationist systems, as in France, and Turkey religion is largely privatized. This does not mean that all liberal, non-theocratic states are automatically secular. But in all liberal constitutions religious freedom has become accepted as an individual right from the 19th century onwards.

The disestablishment of religion guaranteed by the First Amendment[34] of the US Constitution aimed at liberating of religious institutions from the state. The purpose of this disestablishment was not so much to create a more secular public culture, but to free religious expression, and allow the free churches to flourish. In this model religion is free of government support, and free of government control. The structure of American liberty concerning religion was based on pluralism and diversity, because as Rawls pointed out, the aim of the government was to refuse to use state power to impose any particular understanding of the good life upon one's fellow citizens.[35] According to this liberal argument, allowing the government to establish religion with exclusive privileges would not strengthen, but weaken religion. The American type of separation of the state and church meant on the one hand the protection of individuals from compelled support for religions they did not believe in, and protection of religious associations from governmental interference on the other.

Due to the liberal American disestablishmentarism there have been no sustained calls for local, state or federal government to ban religious symbols from public places or schools. Yet in the context of court appearances, court detention, drivers' license issuance and air travel, U.S. policymakers and courts have authorized laws and practices that interfere with Muslim women's free exercise of their religion, namely, the wearing of hijab, niqab or burqa that conceals the hair or face from view.[36]

For instance the Michigan District Court dismissed a Muslim woman's lawsuit against a car rental company when she refused to unveil.[37] The Supreme Court of Michigan have sided with district Court by adopting an amendment to Michigan Rule

---

[34] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
[35] See J. Rawls, *Political Liberalism*, Columbia University Press, 1993. 29-32.
[36] A. L. Allen, 'Veiled Women in the American Courtroom: Is the Niqab a Barrier to Justice?'
Scholarship at Penn Law. Paper 2010. 329. http://lsr.nellco.org/upenn_wps/329
[37] Muhammad v. Paruk, 553 F.Supp.2d 893 (E.D.Mich.2008).

of Evidence, which provides that: "The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder, and (2) to ensure the accurate identification of such persons." Other states of the US have also laws giving judges authority to control attire.

The US Supreme Court has not directly addressed restrictions on Muslim headscarves or facial veils. In the landmark Cohen v. California (1971), the Court threw out the disorderly conduct conviction of a California man who donned a jacket bearing the offensive words "Fuck the Draft" in a courthouse corridor.[38] The Cohen decision rested on the requirements of freedom of expression protected by the First Amendment. The First Amendment also protects the free exercise of religion. If the first Amendment protects jackets worn for political purposes, it could be expected to protect modesty attire worn for religious purposes.

Unlike the American revolutionaries, their French counterparts declined to separate church from state, instead assumed even greater political control over religion. Inspired by the republican ideology of Rousseau they aspired to a state in which the individual wills of the citizens and the general will were in essential conformity. According to the French conception of citizenship, the citizen does not have an identity independent from the state.[39] Control over religion is essential in this concept, and religious pluralism is a threat to such a function of the state. The separation of church and state would be a mistake in this system, since it would lead to divided loyalties. The state assumed control over elementary education, and replaced religious instructions in the schools with what was called the tenet of „universal morality". In November, 1793, the Commune of Paris decreed „that all the churches and chapels of every religion and sect which exist in Paris shall be closed forthwith".

In 1795, the Convention shifted course and proclaimed liberty for all religions, with certain restrictions and limitations. The Constitution now provided: „No one can be prevented from exercising, comfortably to the laws, the religion of his choice." But this period of separation did not last. In 1802, Napoleon reestablished Catholicism as

---

[38] Cohen v. California, 403 U.S. 15 (1971).
[39] See M. Troper, 'French Secularism, or Laïcité', 21 Cardozo Law Review, 1267, 1268 (2000)

the religion of the state. Under the Napoleonic system all four major religions were entitled to financial support from the state. In 1905, however, France formally adopted a constitutional policy called laïcité, which remains in place today. This system is often describes as separationist, it is subtly different from the American separationism, in that it excludes religion from public influence, and thus is committed to ideological secularism with respect to public matters, rather than to neutrality. This means that France is committed to secularism but not to religious autonomy.

To compare the United States with France, the American culture is less secular than the French one. Certainly, Americans seem to be more religious as individuals than French people, and religion plays a more evident public role.[40] But on the other hand, religious education is funded by the state in France and in much of Europe, and religious symbols are more common in government schools and public settings that in the United States.

The French commitment to secularism (*laïcité*) "refers not simply to separation of church and state but to the role of the state in protecting individuals from the claims of religion."[41]

In the Dogru case at issue was a decision by a state secondary school in France in 1999 to expel an eleven year old Muslim girl for refusing to remove her head scarf during physical education classes. The school's rule stated that "discreet signs manifesting the pupil's … religious convictions shall be accepted in the establishment" but that all pupils must attend physical education classes in "sports clothes.", but school permitted the students to wear head scarfs when not in physical education classes. This rule was consistent with Conseil d'Etat jurisprudence which held that students should not be allowed: „To display signs of religious affiliation, which, inherently, in the circumstances in which they are worn, individually or

---

[40] R. Putnam, 'American Grace', Tanner Lectures on Human Values. Lecture One: Americans Are Religiously Devout and Religiously Divided, yet Religiously Tolerant. Why? Princeton University, October 27, 2010.

[41] J. W. Scott, *The Politics of the Veil. Princeton*, Princeton University Press, 2007, at 97-98.

collectively, or conspicuously or as a means of protest, might constitute a form of pressure, provocation, proselytism or propaganda, undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of the teachers, or, lastly, interfere with order in the school or the normal functioning of the public serve".[42]

In this vein, the Conseil d'Etat had annulled strict bans in schools on the wearing of any distinctive religious signs on the basis that they were worded too generally. It also held that a student could not be penalized for wearing a head scarf if it did not amount to an act of pressure or proselytism or interfered with public order in the school. Dogru went to the European Court of Human Rights, and after noting that the school's rule was consistent with the jurisprudence of the Conseil d'Etat and government policy, the Court held that it did not amount to a violation of Article 9 of the Convention.[43] The Court introduces its reasons by somberly noting that "in France, the exercise of religious freedom in public society, and more particularly the issue of wearing religious signs at school, is directly linked to the principle of secularism on which the French Republic was founded." [44] "The concept of secularism," the Court notes, arose "out of a long French tradition," and was enshrined in the 1905 Law on the Separation of Church and State, "which marked the end of a long conflict between the republicans, born of the French Revolution, and the Catholic Church." France's "secular pact," according to the Court, authorizes religious pluralism, requires state neutrality toward religions, and obligates citizens of faith to "respect the public arena that is shared by all."

The Court's reasons also refer to domestic legal developments in France, where the President of the Republic in 2003 established a commission Known as the "Stasi Commission" to inquire into the role of secularism in France. The Comission presented some of its conclusions in stark terms, in a passage quoted by the Court: „Regarding the head scarf, the report states that for the school community ... the

---

[42] 27 November 1989, no. 346.893 (Conseil d'Etat).
[43] Application No. 27058/05 (2008).
[44] Ibid., para. 17.

visibility of a religious sign is perceived by many as contrary to the role of school, which should remain a neutral forum and a place where the development of critical faculties is encouraged. It also infringes the principles and values that schools are there to teach, in particular, equality between men and women."[45]

The Stasi Commission's report led to legislation in 2004 banning students from wearing headscarves in primary and secondary schools. [46] Duly noting the 2004 legislation, the Court went on to characterize secularism as "a constitutional principle" in France, and "a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools."[47] In other words the Court's reasoning is saying that a threat to secularism is a threat to the republic, therefore to protect the Republic, France can enact militant measures that shield the secular nature of the public sphere from the exercise of religious freedom. As I mentioned, the Court in the Dogru reasoning made reference to the broader headscarf ban introduced into law in 2004, prohibiting students from wearing headscarves on school property. This reference to the 2004 law can be interpreted as a signal to France that the 2004 law would not violate Article 11.[48]

In July 2010 first the French National Assembly, than in September also the Senate voted into law a bill banning the wearing in all public places of full-face veils, such as the burqa or niqab, which are worn by some Islamic women. According to the law, women wearing a burqa or niqab in France will face a €150 fine and will be forced to take citizenship classes. Anyone deemed guilty of forcing a woman to wear a full-face veil will face a €30,000 fine and one year in jail. After the senat vote the presidents of the two legislative houses submitted the law to the Constitutional Council, which approved it in its October decision. However the Council ruled that women could

---

[45] Stasi Commission, Laïcité et République
[46] For a defence of the 2004 law, see P. Weil, 'Why the French Laïcité is Liberal', 30 Cardozo Law Review 2699 (2009); for critique, see J. Carens, 'Démocratie, multiculturalisme et hijab', ESPRIT, Jan, 2005, at 54.
[47] Ibid., para.72.
[48] See P. Macklem, 'Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe', Paper for Workshop on Militant Democracy held at the Center for Human Values at Princeton University in April 2010. Electronic copy available at: http://ssrn.com/abstract=1660649

wear burqas in places of worship. It noted that the burqa ban "could not restrict the exercise of religious liberty in places of worship that are open to the public". The anti-burqa law will become effective in the spring of 2011.

The approach of secularism was followed also by Turkey, after abolishing Islam as the religion of the state. In 1928, the Turkish Constitution of 1924 was amended to no longer proclaim that „the religion of the state is Islam". And in 1937, the Constitution was amended to expressly accord constitutional status to the principle of securalism (laicism).[49] The notion of laicism, which initially meant a complete ban on Islam, was transformed to mean the control of religious expression by the state. Although Turkey is defined also in Art. 2 of its current 1982 Constitution as a secular state, state control over Islamic education and its compulsory introduction into state schools are enshrined in the Constitution, which states that "education and instruction in religion and ethics shall be conducted under state supervision and control" and "instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools." (Art. 24).

Consistent with its constitutional commitment to secularism, the Turkish government has traditionally banned women who wear head scarves from working in the public sector, including teachers, lawyers, parliamentarians and others working on state premises. In late 1970s and early 1980s, the number of university students wearing headscarves increased substantially and in 1984, the ban was extended to prohibit the wearing of head scarves by university students. For instance Leyla Şahin was a fifth year female medical student at the faculty of medicine of the University of Istanbul. The university prohibited her from taking exams or attending lectures while wearing her head scarf. Since all of Turkish courts upheld the ban, the student brought a suit against Turkey. In *Şahin v. Turkey*, the European Court of Human Rights upheld the ban, stating that "in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[50] The Court granted Turkey a

---

[49] See L. Köker, 'Religion, Education and the Turkish Constitution: A Critical Assessment', *Turkish Review,* 14 October, 2010. 36-45.
[50] Şahin v. Turkey, Application No. 44774/98 (2005). para.97.

relatively wide margin of appreciation concerning the necessity of the ban, by stating that „"upholding the principle of secularism … may be considered necessary to protect the democratic system in Turkey."[51] The Court noted a particular significance that the Constitution of Turkey attaches to the principle of secularism: "this principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as covered by the freedom to manifest religion".[52]

Judge Tulkens, in her dissenting judgment argues against the majority's characterization of head scarf ban as a measure against extremist political movements: „Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views." The Şahin decision of the Court can be discussed in terms of „militant secularism".[53] Militant securalism, in other words, is an acceptable form of militant democracy.[54]

In Britain, instead of the American type of disestablishment, there was a long, slow, evolutionary development from the intolerant and coercive established Church of England to a tolerant, noncoercive arrangement in which the establishment became largely symbolic. The government, for instance gradually ceased to provide financial support for the Church of England – but without the sharp principled break that occured in the US and in France. While Parliament continued to execise superintending authority over the Church of England, it also debated measures to extend toleration. This means that Britain unlike the US and France is committed, historically, neither to autonomy nor to secularism.

---

[51] Ibid, para. 46.
[52] Ibid. par. 114.
[53] See A. Pedain, 'Do Headscarves Bite?', 63 Cambridge Law Journal 537, at 540 (2004)
[54] See Macklem, ibid.

The headscarf issue also arose recently in England, again in the context of school regulations concerning religious attire. The student population of Denbigh High School is overwhelmingly Muslim; in 2006, approximately 79 percent of its students were Muslim. In recognition of this fact, female students were given the option of wearing a shalmar kameeze, a smock like dress combined with loose trousers, as well as a head scarf of a specified colour and quality. Shabina Begum was a 14 year old student who had worn the shalmar kameeze to school for two years, but, at the start of a new school year, had requested that she be allowed to wear a more modest coat-like garment known as the jilbab, which concealed, to a greater extent than the shalmar kameeze, the coutours of her body. The school refused her permission, and eventually she sought judicial review of the school's decision, alleging that it was in breach of Article 9. The Court of Appeal agreed, finding that she held a sincere belief that her religion required her to wear a jilbab on attaining puberty and that the school's rules were not "necessary in a democratic society" as required by Article 9 of the Convention.[55] The House of Lords overturned the Court of Appeal's decision.[56] Lords Bingham, Hoffman and Scott, in separate reasons, held that the regulation did not interfere with Begum's religious freedom, given that she could have attended other schools that permitted the wearing of the jihab. Lord Hoffman, in particular, ruled that Article 9 "does not require that one should be allowed to manifest one's religion at any time and place of one's choosing."[57] Lord Nicholls and Baroness Hale disagreed, reasoning, respectively, that changing schools was disruptive of her education and was a decision not for her but for her parents to make. All judges, however, agreed that had there been an interference with her right to manifest her religion, the school's policy would have been justified under Article 9(2).

The reasons offered by the House of Lords echo the European Court's traditional approach to Article 9 that emphasizes reconciliation, albeit with adjustments that factor out the margin of appreciation that the European Court extends to domestic judicial review. But as Patrick Macklem notes, unlike Şahin, the House of Lord's

---

[55] R. (on the application of SB) v. Headteacher and Governors of Denbigh High School, [2005] EWCA Civ. 199.

[56] R. (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants), [2006] UKHL 15.

[57] Ibid., para.50.

decision in Begum reveals no underlying theme of militant secularism. And unlike Dogru, it reveals no underlying theme of militant republicanism.[58]

After comparing the discussed models of state-religion relations, I conclude that the American and the Turkish system seem to adopt the extrem, almost opposite approaches to religious autonomy, especially in the case of the Muslim veil, while the British as well as the German approach represent a middle way with their tolerant establishmentarianism.

International human rights law, starting with the Universal Declaration of Human Rights of 1948, treats freedom of religion within the general category of freedom of thought or conscience as an individual right, as a matter of negative rights against the state, and/or as a matter of minority rights protection. The collective nature of these rights is reflected in the individual right to worship in community, but may also be reflected in other collective formulations like the European Court of Human Rights' pronouncement that the right to religious freedom "safeguards associative life against unjustified State interference"[59]. International bodies like the European Court of Human Rights follow these two liberal characteristics of religious rights, namely their normative individualism, which prioritizes individual autonomy, and the neutrality of state, which does not espouse a shared conception of the good. In some cases the Court goes as far as emphasizing that state neutrality cannot be hostile or indifferent to religion[60]. Given the different approaches within Europe, the European Court of Human Rights not ignoring the local context of each of every case is constantly faces with the contradiction between universalism and particularism, but as the decisons of Leyla Sahin and Dogru shows is rather ready to uphold reasonable restrictions on wearing religious symbols in public schools in respect to both teachers and students. By doing this, the judges appear to attach a series of negative stereotypes – sexual inequality, proselytism and religious fundamentalism – which are based neither on an

---

[58] See Macklem, ibid.

[59] Metropolitan Church of Bessarabia v. Moldova: 13 December 2001, § 118.

[60] See the case Lautsi v. Italy on the public display of Crucifix in a classroom. Without going into the details of the rich literature about neutrality I just want to endorse the concept of neutrality as non-discrimination also in the case of religious neutrality. Cf. J. Kis, 'State Neutrality', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law,* Oxford University Press, 2012. pp. 318-335.

in depth theoretical discussion of this complex and multi-faceted symbol nor on the circumstances of the cases at issue. In the headscarf matter the Court merely presumed – and never actually demonstrated – the connection between the Islamic practice of veiling and the violation of those fundamental principles. One can assume that hypothetical challenges to the 2004 or the 2010 French statutes are currently unlikely to succeed if it would be based on religious expression grounds under Article 9 of the European Convention. Of course the judges in Strasbourg can always argue that the countries of Europe have not been, as yet capeable to agree to a common approach, but probably also the Court would be able to contribute to the enforcement of such kind of European consensus.

In his famous The Clash of Civilizations and the Remaking of World Order book Samuel Huntington says that the key characteristic of Western culture has been the separation of church and state, something that he sees as foreign to the world's other major religious systems: "In Islam, God is Caesar; in [Confucianism,] Caesar is God; in Orthodoxy, God is Caesar's junior partner."[61] Later in the book he argues regarding Islam, Confucianism, and post-communist Europe: "The underlying problem for the West is not Islamic fundamentalism. It is Islam…Confucian heritage, with its emphasis on authority, order, hierarchy, and supremacy of the collectivity over the individual, creates obstacles to democratization … the central dividing line . . . is now the line separating the people of Western Christianity, on the one hand, from Muslim and Orthodox peoples on the other."[62] His concluding question and answer is "Where does Europe end? Where Western Christianity ends and Islam and Orthodoxy begin."[63]

Alfred Stepan convincingly argues against Huntington that the greatest obstacle to liberal democracy for instance of Turkey or Egypt is posed not by Islam but by military and intelligence organizations unaccountable to democratic authority. Both countries are more restrictive of freedom of religious expression within civil society and of freedom of organization within political society than that of any longstanding Western liberal democracy. The same applies to Orthodoxy in Russia, where the

---

[61] S. P. Huntington, *The Clash of Civilization and the Remaking of World Order*, New York: Simon and Schuster, 1996. p. 70.
[62] *Id.* p. 28.
[63] *Id.* p. 158.

church is not really a relatively autonomous part of civil society because there is a high degree of subordination to secular power. Stepan also claims that 'separation of church and state' and 'secularism' are not intrinsic parts of the core definition of Western liberal democracy, but the minimal boundaries of freedom of action that must be crafted for political institutions vis-à-vis religious authorities, and for religious individuals and groups vis-à-vis political institutions, what he calls 'twin tolerations', are.[64] By 'twin tolerations' Stepan means that a) Religious institutions should not have constitutionally privileged prerogatives that allow them to mandate public policy to democratically elected governments, and b) At the same time, individuals and religious communities, consistent with our institutional definition of democracy, must have complete freedom to worship privately. In other words the one toleration obliges the state to protect and 'tolerate' the freedom of religious institutions to operate in civil society, while the other one requires from the religious communities to 'tolerate' each other by not deploying constitutional privileges or state power to squelch their competitors. Stepan adds to this concept that this institutional approach to liberal democracy necessarily implies that no group in civil society - including religious groups - can a priori be prohibited from forming a political party. (As well known, Christian Democratic parties have frequently ruled in Germany, Austria, Italy, Belgium, and the Netherlands. The two European countries whose constitutions prohibit political parties from using religious affiliations or symbols is Portugal and Turkey.)

Let us first see, how have West European democracies met the requirements of 'twin toleration'? Some of the EU Member States - Denmark, Finland, Greece, and the United Kingdom (in England and Scotland) - have established churches. Norway and Iceland although not in the EU, are other European democracies with an established church. (Only Sweden disestablished the Lutheran church in 2000.) Although Germany does not have an established church, but Protestantism and Catholicism are recognized as official religions, and the majority of citizens paiy the state-collected church tax. The two European countries with 'hostile' separations of church and state are France and Turkey. This means that three distinct models of state-religion

---

[64] See A. Stepan, 'The 'Twin Tolerations', in L. Diamond, M.F. Plattner, and Ph. J. Costopoulos (Eds.) *World Religions and Democracy,* The Johns Hopkins University Press, 2005. The essay originally appeared in the October 2000 issue of the Journal of Democracy, and a much longer and more extensively footnoted version appeared in Stepan's book Arguing Comparative Politics (2001).

relations can be differentiated in the contemporary Europe: the ones with an established church, the militant secular, and the mixed one with dominant, but civil church. These are described by Silvio Ferrari through one country in each model: the English multiculturalism, the French secularism, and the Catholic civil religion in Italy.[65] Ferrari concludes that there are sharp distinction between religious freedom of individuals, which all European states protect, and the status of religious communities and institutions, which are subject to restrictions. In another work speaking of Europe Ferrari claims that it is necessary to go beyond the traditional classification of church-state relations, and look at the common principles that are the basis of the European model of state-religion relations.[66] But the lesson from the European picture is that liberal democracies are compatible with established churches and with unfriendly separation of church and state approaches as well. Therefore the concept of secularism and the separation of state and religion has a place in the Western European liberal democarcy only in the context of Stepan's 'twin tolerations'. This means that we have to leave room for democratic bargaining and the non-liberal public argument within religious communities that it sometimes requires.

Despite the fact that the Americas and Europe are considered to be exceptionally secular, constitutional declarations of state secularity mark the countries of Asia and Africa more: 22 African and 9 Asian constitutions are found to affirm the secularity of the state either in their preambles or in their main text.[67] A minority of 9 of the world's 44 Muslim-majority countries are found to declare themselves to be 'Islamic states' while 11 declare themselves instead to be secular or laigue. In other words, a higher proportion of Muslim countries have opted for ostensibly secular constitutions than is found among the world's Christian-majority countries.[68] But the original meaning of secularism and the separation of the church and the state are in permanent change also outside Europe.[69] In both India and Israel for instance by the 1990s the

---

[65] See S. Ferrari, 'Models of State-Religion Relations in Western Europe', in A. D. Hertzke (Ed.), *The Future of Religious Freedom. Global Challenges*, Oxford University Press, 2014.
[66] S. Ferrari, 'The Legal Dimension', in B. Marechal, S. Allievi, F. Dasseto, J. Nielsen (Eds.), *Muslims in the Enlarged Europe,* Leiden-Boston, 2003.
[67] See S. Ferrari, 'Constitution et Religion', in M. Troper – D. Chagnollaud (ed.), Traité international de droit constitutionnel. Suprématie de la Constitution, Paris, Dalloz, 2013. 437-478, at 451.
[68] J. Madeley, 'Constitutional Models and the Protection of religious Freedom', in S. Ferrari (ed.), Routledge Handbook of Law and Religion, 2015. 209-226, at 212.
[69] The secular state is a recognition of the fact that in a society of many competing beliefs, no one set could reasonably be set up as normative. (See K. Ward, *Religion and Community,* Oxford, 2000. pp.

secular political traditions were challenged by opposition movements that drew some of their support to accommodate more fundamentalist and less tolerant visions of the polity. But even the separation of church and state originally mandated by the U.S. Constitution's First Amendment ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof") did not prohibit the 13 original states from having their own established religions. It merely prohibited the Congress from establishing one official religion for the United States as a whole.

In trying to define the models of state-religion relationship in liberal democracies all around the world we can use Ran Hirschl's book, which differenciates nine extant models of state and religion relations[70]. If we leave out the communist regimes' atheist state model at the antireligious, non-liberal end of the continuum as well as the illiberal theocratic and semi-theocratic constitutions there still remain six different liberal models. Out of these three can be considered as rather secular separationist approach, one as a mixture of formal separation with a de facto dominance of one church, the fifth as a weak establishment type, and the sixth as religious jurisdictional enclaves model.

The first separationist model is the assertive (militant) secularism of France and Turkey. In the French policy of laïcité both the citizenship and the nationhood is thought through as religion-free. This militant type of secularism goes beyond neutrality of the state towards religion by banning the display of any religious symbols, including the headscarf in public schools. In Turkey, which provides another example of assertive secularism Islam as state religion was replaced in the constitution in 1937 by Atatürk with the 'republican, popular, atheist, secular, and reformist' character of the state, and in 1961 and 1982 supplemented by the official state policy of laicism, until a constitutional amendment in 2008 declared lifting the headscraft ban as unconstitutional. Another difference between the two secular

---

106-107.) In other words, in a religiously plural society secularism prevents the state identification with one religion. Both the rigid 19th centrury, and the more 'friendly' concept of separation of state and religion, which later permits state cooperation and support with religious organizations are related to the idea of a secular state. The core of the separation lies in the independence of the constituent power from every religious law that claims to limit the state's right to make laws. Although separation of state and church is more frequent in countries, which affirm the secular character of the state, as Silvio Ferrari argues this relationship is not necessarily organic, since less than one third of the secular states are also 'separatinist'. See S. Ferrari, 2013. 466.

[70] See R. Hirschl, *Constitutional Theocracy,* Harvard University Press, Cambridge, 2010. 29-49.

approaches is that while France finances religious schools, the Turkish Dyanet is part of the state organization.

The Establishment and the Free Exercise Clauses of the First Amendment of the US Constitution represent the second model of separationism, where secularism is treated as neutrality.[71] Hirschl describes the Canadian and the postapartheid South African state-religion relationship along with other 'immigrant societies' approach as a softer version of a formal separation accompanied by a true commitment to multiculturalism and diversity.

The mixed model, characterized by Hirschl is more a de facto scenario than a de jure model, involves countries where formal separation of church and state, as well as religious freedom more generally, is constitutionally guaranteed with de facto dominance of one church. In Ireland the special status of Catholicism was removed from the Irish Constitution, but Article 41 "recognizes the family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law", and the 8th 'Pro-Life Amendment' passed by referendum asserts that the fetus has an explicit right to life equal to that of the pregnant woman. Other predominantly Catholic countries in Europe, such as Malta, Poland, and to a lesser degree Slovakia, continue to grapple with similar tensions. Portugal in 1976, Spain in 1978 adopted new constitutions or constitutional amendments that disestablished Catholicism as their state religion. In Italy in 1984 there was a revision of 1929 Lateran Treaties, and the reference to Catholicism as the religion of the State that was included in them was dropped.

The weak form of religious establishment is represented in the already mentioned designation of the Evangelical Lutheran Church as the 'state church' in the

---

[71] In the current political system of the US however, the separation of faith and government is more cozy as it should be. For instance Rick Perry then the governor of Texas and presidential candidate in the 2012 race gathered some 30,000 people, most of them evangelical Christians, in a Houston stadium for an event called The Response: A Call to Prayer for a Nation in Crisis. Also Alabama Chief Justice Roy Moore, who once put up a granite monument to the Ten Commandments in the rotunda of the Alabama Judical System building, in an interview said, „Our rights, contained in the Bill of Rights, do not come from the Constitution, they come from God." See F. Bruni, 'Too Much Prayer in Politics', *The New York Times,* February 14, 2015.

Scandinavian countries, as arguably some of Europe's most liberal and progressive polities. In England the monarch is the 'supreme governor' of the Church of England and 'defender of the faith'. The constitutions in Greece without explicitly recognizing it as a State Church, declares that the Greek Orthodox Christian religion is the prevailing religion in the country. But the state established Orthodox Church is subject to state control through measures such as appointing the members of the Church's governing body (the Synod), and requiring governmental approval to all synodal decisions.[72] Until 1982 the state enabled the Church to retain exclusive control over marriages and divorces, when a socialist government introduced civil marriage after a heavy discussion.[73] As also mentioned, a diluted version of this model operates in Germany, where the institutional apparatus of the Evangelical, Catholic, and Jewish religious communities are designated as public corporations and therefore qualify for state support from the German church tax.

Hirschl calls the model, where the general law is secular, but a degree of jurisdictional autonomy is granted to religious communities, primarely in matters of personal status and education, religious jurisdictional enclaves listing Kenya, India, Israel, Ethiopia, Indonesia, Lebanon, Nigeria, Gambia, Senegal, Ghana, the Phillippines, Singapore, Sri Lanka, and Tanzania to this model. Israel's government involvement in religion is low for the Middle East/North Africa (MENA) region, but is relatively high in world context.[74] Besides Israel, what I investigate later in the paper separately, India is an interesting case here. After the 1998 and again the 2014 general elections, the Hindu revivalist Bharatiya Janata Party (BJP) formed the government. Although BJP also contains more moderate elements, it was pressured by its coalition partners, who want eventually to utilize the majority status of Hindus to make India a state that would privilege Hindu values as they interpret them. A major force opposing the BJP is the Gandhian-Nehruvian strand of Hinduism, which insists that both India and Hinduism are multivocal and that the deepest values of Hinduism must respect the idea of India as a diverse, tolerant state rather than a nation-state of Hindus.

---

[72] See E. Karagiannis, 'Secularism in Context: The Relations between the Greek State and the Church of Greece in Crisis', 60 *European Journal of Sociology,* 2009. 149.

[73] See C.P. Danopoulos, 'Church-State Relations, National Identity, and Security in Post-Cold War Greece', 30 *Journal of the Hellenic Diaspora,* 7, 2004. 18.

[74] The government involvement in religion (GIR) score in Israel is 37, while in Saudi Arabia it is 78, and in Iran 67. Cf. Madeley, 2015. 219-221.

As Hirschl argues, the state in such setting has embedded interest in preserving or promoting a viable 'state religion' to the extent that this religion provides meaning to the national metanarratives that constitutes the nation as such. He mentions also other, less formal illustrations of this logic, as the Ukrainian Othodox Church in Ukraine and Serbain Orthodox Church in Serbia, which both show close ties between nationalism and religious affiliation. As I will discuss later in more details, the Hungarian Fundamental Law of 2011 declares that the State and religious communities shall operate separately, therefore the country rather belongs to the model of formal separation with de facto dominance of the Catholic church, but with a strong emphasis of 'the role of Christianity in preserving nationhood', and with other characteristics of an illiberal democracy.

Hirschl discusses two models, which can be portrayed as constitutional theocracy, which labeled by others as one type of constitutionalism in illiberal polities[75]. Pure theocratic systems can be described as ones, where supreme religious and political leadership is unified, such as the former Hindu Kingdom or Nepal or Saudi Arabia, where the Quran and Sunnah are the constitutions.[76] This challenges liberalism's rational and tolerant ethos, since modern constitutionalism rejects non-secular authority, and marks a shift from divine to human or popular sovereignty.

Hirschl provides a more detailed description of theocratic constitutions by outlining their four main elements: (1) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority, the existence of a constitutional catalogue of rights, and the establishment of some form of active judicial review; (2) the presence of a single

---

[75] See L-A., Thio, 'Constitutionalism in Illiberal Polities', in M. Rosenfeld and A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 133–152. Thio also discusses communitarian constitutions as the other type of illiberal constitutionalism, like the ones in South-Korea, Singapore and Taiwan, where the well being of the nation, the community and society receive utilitarian priority rather than the individual freedom principle of liberalism.

[76] „A state that has union with a particular religious order is a theocratic state, governed divine laws directly administered by a priestly order claiming divine commission. See R. Bhargava, 'Secular Politico-Legal Regimes in Religiously Homogenous and Diverse Societies', in S. Ferrari (ed.), Routledge Handbook of Law and Religion, 2015, 229-243, at 229.

religion or religious denomination that is formally endorsed by the state as the "state religion"; (3) the constitutional enshrining of the religion, its texts, directives, and interpretations as 'a' or 'the' main source of legislation and judicial interpretation of laws—essentially, laws may not infringe upon injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that not only carry symbolic weight, but that are also granted official jurisdictional status and operate in lieu of, or in an uneasy tandem with, a civil court system.[77]

The two models, which are the closest to the ideal type of constitutional theocracy, are the model of secular jurisdictional enclaves, and the mixed system of religious law and general law principles.[78] In the former most of the law is religious, however, certain areas of the law, such as economic law, are 'carved out' and insulated from influence by religious law. For instance Saudi Arabia, arguably one of the countries whose legal system comes closest to being fully based on fiqh (Islamic jurisprudence), exampted the entire finance, banking and corporate capital sectors from application of Shari'a rule. The mixed system comes the closest to the ideal model of constitutional theocracy.[79] According to the 1979 Constitution of the Islamic Republic of Iran Shari'a is superior even to the Constitution itself. The Guardian Council, a de facto constititonal courts is composed of six mullahs appointed by the supreme leader and six jurist proposed by the head of the judicial system and voted on by the Majlis, the Iranian parliament, which means that the Constitution also respects the popular source of sovereignty, the elected parliament, and some separation of powers principles. Article 2 of the various Egyptian constitutions of 1971, 2012 and 2014 declared Shari'a as 'a' or 'the' primary source of legislation, and the Supreme Constitutional Court has always been grappling with the contested status and role of

---

[77] See R. Hirschl, 2010. p. 3.

[78] Ibid, pp. 21-49. Similarly to Hirschl, also others argue that there are two subcategories of theocratic constitutions to be distinguished: the Iranian, where Islam is granted an authoritative central role within the bounds of a constitution; and the Saudi-Arabian where Islam is present, without the formal authority of modern constitutionalism. See Chibli Mallat, 'Islam and the Constitutional Order', in M. Rosenfeld and A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 1287-1303

[79] Saudi Arabia (with 78) and Iran (with 67) score first and second on the government involvement is religion (GIR) measure of regulatory burdening in the religious field accords with what is widely known about their theocratic systems of government, their treatment of certian religious minorities, their extensive system of regulation, and their privilegaing religious legislation. See Madeley, 2015. 219-221.

Shari'a.[80] In other words, constitutional theocracies are constitutional system, yet not necessaraly liberal ones.

Religion and Law in Israel: A Liberal Approach?

In this empirical part of the work, I would like to use case studies to analyze the role of religious freedom in an originally liberal democracy, as Israel, which is religiously, ethnically, and politically deeply divided.

As we know from Clifford Geertz, law and religion are two competing cultural systems that constitute individual and collective identities, as well as social interaction.[81] In the history of Israel various individual and collective religious and national identities have been developed, which are reflected in the constitutional regulations, as well as in the different legal systems of the country existing parallel to each other.[82]

Judaism and Zionism: the Jewishness of the State of Israel

The normative starting point of Judaism has been a collective conception of subjectivity, in opposition to Western Christianity's individual choice and belief. The Jewish Enlightenment (Haskalah) of the last two decades of the 18th century and in the 19th century encouraged adoption of secular European culture, and has started a 'Kulturkampf' between secular and religious Jews. Haskalah challenged the rabbinical leadership, opposed the limitation of Judaism to the dimensions of Halakhic religion, and aspired to improve the lives of Jews by striving for their

---

[80] About the jurisprudence of the Supreme Constitutional Court before the Arab Spring see T. Moustafa, *The Struggle for Constitutional Power. Law, Politics, and Economic Development in Egypt,* Cambridge University Press, 2007, and after 2011 N. Brown, 'Egypt: A Constitutional Court in An Unconstitutional Setting', Constitutional Transitions and Global and Comparative Law Colloquim, New York University School of Law, 23 October 2013.

[81] See C. Greetz, Chapter 8: 'Local Knowledge: Fact and Law in Comparative Perspective', in *Local Knowledge,* New York, Basic Books, 1983. 167.

[82] On Israel as a Jewish state and on the constitutional relationship between religion and state in Israel see S Navot, *The Constitutional Law of Israel*, Kluwer Law international, 2007. 70-72, 309-318.

integration into Western culture.[83] Zionism, as a national movement of the Jews, claiming that Jews represent a common and single people, and that the only way they can live freely as Jews is the dwell in a Jewish state. Besides responding to the distressing condition of the Jewish existence in Eastern and Central Europe Zionists also reacted to this 'schism' with divided approaches. While Ahad Ha-Am aimed at transforming Jewish religion into a national culture, and liberal Zionist, like Theodor Herzl and Ze'ev (Vladimir) Jabotinsky opted for the European culture, religious Zionist preferred a Halakhic, and Micha Yosef Berdyczewski a Hebrew cultural approach. Parallel with this development the legal system during the British Mandate (1918-1948) due to the extensive borrowing from English law underwent an intensive process of Anglicization and liberalization.

The establishment of the State of Israel as a nation-state in 1948 required the revision and renewal of Judaism generally and of Jewish legal and moral discourse (Halakha) in particular.[84] Judaism has not been proclaimed the official religion of the state, neither Jewish law the applicable legal system, except in certain matters of personal status of Jews. Religious freedom and pluralism is reflected in the 1948 Declaration on the "Establishment of a Jewish State in Eretz-Israel, to be known as the State of Israel": "[The State] will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions." This is provided by the legislative text enacted in 1922 at the time of the British Mandate, and which is still in force in the State of Israel: „full liberty of conscience, and the free exercise of their forms of worship subject only to the maintenance of public order and morals" for „all persons in Palestine". Since later the two Basic Laws with quasi constitutional status failed to explicitely mention freedom of religion, the Israeli Supreme Court read it into the term 'dignity' which is protected by Basic Law: Human Dignity and Liberty.[85] And altough the exact content of freedom of religion is unclear, most agree that it has a negative and a positive aspect: freedom of religion (a version of the free exercise clause), and freedom from religion (a version of the

---

[83] About the Jewish Enlightenment see S. Feiner, *The Jewish Enlightment* (trans. Ch. Naor), University of Pennsylvania Press, 2004.
[84] Besides the establishment of the State of Israel, Michael Walzer mentions also the earlier process of emancipation, which brought Jews into inclusive democratic states as equal members as another achievement, which required the revision of Judaism. See Michael Walzer (ed.), Law, Politics, and Moralism in Judaism, PUP, 2006. Preface.
[85] See for example Horev v. The Minister of Transportation, HCJ 5016/96, 1997 PD 51(4) 1, 34.

disestablishment clause, without having a general prohibition on establishing religion).[86] In the case Shavit v. the Chevra Kadisha (Burial Society) of Rishon Le Zion, in which the Court overruled the decision of a local rabbi in charge of the cemetery refusing a family request to have the deceased's name inscribed on the tombstone in both Hebrew and Latin characters, Chief Justice Aharon Barak argued: "...the value (and liberty) of freedom of religion...is in my view, simply an aspect of Human Dignity...to my mind, freedom from religion equally constitutes an aspect of Human Dignity...it is not possible to conclude that in a clash between freedom of religion and freedom from religion, one or the other always has the upper hand." [87]

The new Jewish State brought the superiority of secular modern nationalism with Western liberal values against traditional religion over precedence in Judaism. Ben-Gurion, Israel's first prime minister distanced himself from the theological underpinnings of the Jewish tradition, and saw Zionism as giving birth to a newer and improved Judaism. This Judaism was cultural and not religious, modern and not traditional, and it was built upon a secularized return to the Bible and rejection of the rabbinic tradition. As Ben-Gurion himself put it: "I am not religious, nor were the majority of the early builders of modern Israel were believers. Yet their passion for this land stemmed from the Book of Books…though I reject theology, the single most important book in my life is the Bible."[88] When Ben-Gurion agreed to allow the religious establishment in mandate Palestine to continue to have jurisdiction over matters of personal law (including marriage, burial, and conversion) he did so in order to enhance the legitimacy of the Jewish nation-state in the eyes of its Jewish citizens and of diaspora Jews, and also to preserve Jewish unity, and for this he needed the support of Orthodox religious fraction, mainly that of the National Religious Party as well.[89] In making what is known as the 'status quo' agreement, he assumed that Jewish religiosity would dwindle after the founding of the state. In the long run he

---

[86] See Y. Blank, 'In Search of the Secular: The Dialectics of Religious and Secular Federalism in Israel', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)
[87] Decision of the Supreme Court, sitting as a Court of Civil Appeals), C.A. 6024/97 (1999).

[88] Quoted in A. Levenson, *The Making of the Modern Jewish Bible: How Scholars in Germany, Israel, and America Transformed an Ancient Text,* Rowan &Littlefield, 2011. 117.
[89] Cf. D. Barak-Erez, 'Law and Religion under the Status Quo Model: Between Past Compromises and Constant Change', 30 *Cardozo Law Review,* 2009. 2496-2497.

was an advocate of the separation of state and religion, and even in the meanwhile he has thought that the state will be able to control religion.

Indeed the 1940s and 1950s were seen for many as transition from Hebrew to Jewish culture, and religiosity as an anachronistic remnant. In the beginning of this period the dominant labor movement could be characterized as close to Socialism and collective values, which over the time the party has been changed favoring neoliberal belief in capitalism and endorsing individualism. Religion ceased to be the primary measure of Jewish identity, and as religious separatism and practice began retreat, a secular version of Zionism was actively promoted, and seculars have been ruling the country for decades. Antireligious sentiment was widespread in left-leaning Israeli circles of the 1960s.[90]

With the 1977 victory of the Likud a radical change occurred also in the collective identity of the State. The crisis of Jewish secularity, modernity and liberalism of the previous three decades caused the rise of religious fundamentalism within religious Zionists, but especially within ultra-Orthodoxy. Religious Zionists do not claim that the secular Zionists are wrong to see Israel as a Jewish State, and they also agree with each other that the establishment of a Jewish State created a new and different reality for Jews and Judaism. Conversely, since for the ultra-Orthodox Jews the notion that Israel is a Jewish State violates the basic religious tenets of the Jewish tradition, they reject the claim that Israel can be a Jewish state at all. While the religious Zionists treated religion as the exclusive source of normative authority, the Ashkenazi ultra-Orthodox group stood up against both modernism and Zionism, the Sephardic Shas party pursued the return to Judaism and introducing a Halakhic theocratic state. Also the National Religious Party stated that one of the party's goal is "to promote original legislation, based on Torah law and Jewish tradition".[91]

During these radical changes in the party politics, the Supreme Court of the country started a very activist jurisprudence in order to defend the secular liberal values of the pre-1977 period. Due to this activism of the Court, especially in its capacity as High

---

[90] See T. Judt, 'Israel Must Unpick Its Ethnic Identity', *Financial Times,* December 2009.
[91] Cited by Y. Z. Stern, 'Israeli La and Jewish Law: A Zero Sum Game?', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

Court of Israel dealing with citizens' petitions without concrete personal interest against administrative authorities Jewish law has been little felt in Israeli secular liberal law.

For the jurisprudence of the court it was instrumental the Foundations of the Law Act, 1980, which was enacted in order to disconnect the reliance upon English common law in cases of lacuna within the Israeli legislation. According to the act: "Where the court, faced with a legal question requiring decision, finds no answer to it in statutory law or case law or by analogy, it shall decide the issue in light of principles of freedom, justice, equity and peace of the Jewish heritage."[92] The purpose of this law, as Justice Elon wrote in the case of *Jereczewski v. Prime Minister*, is "cultural and nationalistic. Its aims are to create a link between the law of the Jewish State and the legal heritage of the Jewish people, throughout its generations and diasporas, and to implement the principles of justice, equity, freedom and peace that Jews have fostered throughout the generations and that have been expressed in the rich literature of the Jewish heritage in every generation."[93]

Even the most symbolic expression of the state's new identity, the two Basic Laws of 1992 on Human Dignity and Liberty and on Freedom of Occupation respectively declaring the State of Israel as a 'Jewish and democratic state' has got alternative interpretations. Courts and scholars are divided over whether the term 'Jewish' should be read as referring to Judaism as a religion, to Jewish nationality or to Jewish morality. Although the majority of views are that this 'constitutional' provision does not mandate the state to become a theocracy, because it is certainly excluded by the democratic character, but rather to 'integrate' or 'harmonize' the two poles, this phrase leaves ample room for competing interpretations.[94]

---

[92] Section 1 of the Foundations of the Law Act, 1980. see
http://www.israellawresourcecenter.org/israellaws/fulltext/foundationsoflaw.htm
[93] HCJ 1635/90 Joseph Jerecezwski v. Prime Minister, 45(1) PD 749.

[94] See R. Gavison, 'Jewish and Democratic? A Rejoinder to the 'Ethnic Democracy' Debate', *Israel Studies,* Vol. 4, No. 1. 1999. 44-72.; R. Gavison, 'Can Israel Be Both Jewish and Democratic?', *Moment,* Vol. 25. No. 6. (December 2000).; H. Lerner, 'Democracy, Constitutionalism, and Identity: The Anomaly of the Israel Case', *Constellations,* Vol. 11. No. 2. 2004.; N. N. Rouhana, 'Jewish and Democratic? The Price of National Self-Deception', *Journal of Palestine Studies,* Vol. XXXV, No. 2. Winter 2006. 64-74; A. Ravitzky and Y.Z. Stern (Eds.), *The Jewishness of the State,* The Israel Democracy Institute, 2007.;A. Rubinstein, 'Can Israel Be Both Democratic and Jewish?', *Interdisciplinary Center (IDC) Herzlyah-Radzyer School of Law,* 2009.

Aharon Barak, the Court's Chief Justice for twelve years, and the person most closely identified with the Court's liberal jurisprudence proposed two concepts as contents of the 'Jewish state': a) as a 'national concept' of the State of Israel as a 'national home to the Jewish people', and b) as values derived from the Halakha, which in Barak's interpretation intends to prevent the direct application of the Halakha as part of Israeli law. In other words, Barak suggested a perception of a national, secular concept, as opposed to a strictly religious one. Contrary to Barak's approach, Justice Elon included Jewish religion in the term 'Jewish', and argued that following the enactment of the Basic Laws, applying Jewish law became a legal duty incumbent on every judge in the country.[95] Elon also claimed that, since the term 'Jewish state' is mentioned first in the phrase this is superior to that of developing the country's law as democratic law.[96] In Barak's view the 'Jewish state' and 'democratic state' concept should be approached on equal terms at peace with each other without raising any contradictions: "An appropriate analysis does not have to intensify these contradictions. On the contrary, a purposeful analysis, based on constitutional unity and normativity, harmony, aspires to find that which is unifying and common, while preventing contradictions and reducing points of friction. We must strive to find the common denominator and synthesis between the values of Israel as a Jewish state and the values of Israel as a democratic state."[97] Barak also emphasizes the fact that most of the population of Israel is secular and that some of its citizens are not Jewish. Regarding the democratic character of the state Barak indicates that it contains both the majority rule and the preserving human rights: "The values of the state of Israel are the same values that are being reflected on a given time the premise of modern democracy. This democracy is based mainly on two foundations: the first is the government of the people. A democratic regime is one where the people determine their destiny. The people use their representatives and the latter determine the result on a majority vote. The second foundation is human rights. A democratic regime is one who holds and develops human rights. Only the combination of both tiers can

---

[95] More radically opposing Elon's view some scholars take the position against interpreting the term Jewish in the Basic laws to include the Jewish religion altogether. See A. Levontin, 'Jewish and Democratic – Presonal Reflections', in J-E. Davis (ed.), *The State of Israel: Between Judaism and Democracy*, The Israel Democracy Institute, 2000. 251.

[96] Cf. M. Elon, 'Constitution by Legislation: The Values of a Jewish and Democratic State in Light of Basic Law: Human Dignity and Personal Freedom', in A. Maoz (ed.), *Israel as a Jewish and Democratic State*, Jewish Law Association Studies 2011.

[97] A. Barak, 'The Values of the State of Israel as a Jewish and Democratic State', *Jewish Virtual Library Publications,* August 2009.

lead to a true democracy."[98] Once on of these tiers is removed from the equation, it is analogous to losing its essence.[99]

But besides the interpretations of Barak and Elon, emphasising the national, Zionist character and the Halakha-values on the one hand, and Judaism based on the Halakhic commandments on the other, there are other possible interpretations of the 'Jewish state' concept. One of them excludes the Arab, the other the mostly overlapping Muslim part of the population.[100] In other words, the 'Jewishness' of the State means that while the Jewish people is entitled to use the state as a means of exercising its right to national self-determination, the Arabs are entitled to their rights on an individual basis only, i.e., as citizens of the state, but not in any way as a collective entity. This is true, even though the Arab citizens currently enjoy some rights that are of collective nature: a) Under Article 82 of the Palestine Order-in-Council, 1922, which is part of Israeli law, Arabic is an 'official language', b) the Arabs run a separate educational system, c) Israel preserves the millet system, which allows its Arab citizens (as well as its Jewish citizens) autonomy in the sphere of family law, which means that under Israeli law it is religious law that governs the family sphere, and religious courts have jurisdiction,[101] d) in certain areas there exist an affirmative action doctrine in favor of Arab citizens, e) under Israeli law the Arabs are entitled to maintain their religious sabbaticals and holidays. But more importantly, Israeli law prohibits Israel's Arab citizens from taking action aimed at changing Israel's current identity as the Jewish people's nation-state. For instance Section 7a(a)(1) of the Basic Law provides that no party will be allowed to participate in elections to the Knesset if its platform or actions amount to the 'denial of Israel's existence as a Jewish and democratic state'. Also Section 5 of the Parties Law of 1992 provides that no party will be registered if its goals and actions amount to the 'denial of Israel's existence as

---

[98] A. Barak, 'The State of Israel as a Jewish and Democratic Country', *Yiune Mishpat,* 24(1), 2000. 9.
[99] A. Barak, *Legal Interpretation – Constitutional Interpretation,* 1994. 336.
[100] In April 2010 20,4 % of Israel's citizens were Arabs against 75,5% Jews. Among the Arabs 83% was Muslim, 8% Christians, and 8% Druze.
[101] Jewish, Muslim, and Druze religious courts, which are established under state law and constitute state organs, are fully financed by the state as are other courts of law. The state also pays the salaries of the Chief Rabbis of the state and of local rabbis who are elected according to law. But Israel still lacks a comprehensive clear scheme of equal distribution of state funding among the various religious communities. Jewish religious institutions generally enjoy substantially more state funding than do other religions, and most of that funding goes to Orthodox institutions. See A. Maoz, 'Religious Human Rights in the State of Israel', in J. D. van de Vyer and J. Witte, Jr. (eds.) *Religious HR in Global Perspective: Legal Perspectives*.1996.

a Jewish and democratic state'. Section 134(c) of the Knesset Bylaws provides that the Knesset speaker will not approve the submission of any draft legislation, which 'denies the existence of the State of Israel as the Jewish people's state'.[102]

This concept of limited collective rights for Palestinian Arabs is based on Jabotinsky's policy regarding the Arab question: to erect an 'iron wall' of Jewish military force. For the leader of Revisionist Zionism the iron wall was a means to the end of breaking Arab resistance after 1936 to help onward march of Zionism. Once Arab resistance had been broken would it be time to offer the Palestinians civil and certain collective rights. As Avi Shlaim convincingly proves in his book, it was the Labor Zionists, led by David Ben-Gurion, who gradually came around to Jabotinsky's point of view that Jewish military power was the key factor in the struggle for a state.[103] In a later book, Shlaim calls the aftermath of the 1967 War when Israel occupied the West Bank, Gaza Strip, Sinai Peninsula and Golan Heights Zionism's transformation from a legitimate movement of national self-determination to an ideology tightly entwined with a colonial occupation.[104]

Constitutionalism and State-religion Relationship

In trying to place Israel within the models of state-religion relationship in liberal democracies all around the world we can use Ran Hirschl's book, which differentiates different extant models of state and religion relations. He puts Israel into the category, where the general law is secular, but a degree of jurisdictional autonomy is granted to religious communities, primarily in matters of personal status and education, religious jurisdictional enclaves. Israel's government involvement in religion is low for the Middle East/North Africa (MENA) region, but is relatively high in world context.[105] As Hirschl argues, the state in such setting has embedded interest in preserving or

---

[102] See Mautner, ibid, 194.

[103] See A. Shlaim, *The Iron Wall: Israel and the Arab World,* Penguin Book, 2000. Prologue: The Zionist Foundations.

[104] See A. Shlaim, *Israel and Palestine: Reappraisals, Revisions, Refutations,* Verso, 2009. Eversince the 2008 invasion of Gaza Shlaim keeps criticizing the Zionist colonial project beyond the Green Line. See 'How Israel Brought Gaza to a Brink of Humanitarian Catastrophe', *The Guardian,* January 6, 2009., and 'Israel Needs to Learn Some Manners', *The New York Times,* January 30, 2014.

[105] The government involvement in religion (GIR) score in Israel is 37, while in Saudi Arabia it is 78, and in Iran 67. Cf. Madeley, 2015. 219-221.

promoting a viable 'state religion' to the extent that this religion provides meaning to the national metanarratives that constitutes the nation as such.[106]

The State of Israel was originally a nationalist state for the Jewish people. There are authors, who claim that the Israeli state sponsors a particular communitarianism founded on a vision of Jewish statehood the mission of which is promoting Jewish culture embodied in the norms governing symbols and language, the Law of Return benefitting diaspora Jews, vesting state functions in religious, and the absence of civil marriage. While the Israeli polity protects individual rights such as religious freedom, but subordinates it to Jewish unity, which legitimates restrictions on Anti-Jewish speech or action, thus communitarian priorities may 'suppress the liberal inclinations of its citizens'[107]. The original 1950 Law of Return, stated that "Every Jew has the right to come to this country as an oleh" without defining who counted as a Jew. Ben-Gurion's government maintained that Jewish status was a matter of self-determination. But after more and more immigrants to Israel (especially from Poland and Russia were deemed not Jewish by birth the Law of return was amended in 1970 to define who was a Jew: "anyone born of a Jewish mother or who converted".[108] Currently there are also demands to make citizenship for the Arab minority less inclusive, and even to amend the Law of Return so as to give Orthodox rabbis the authority to determine whom the state of Israel recognizes as a Jew.

Besides the nationalistic, communitarian and therefore illiberal character of the state there were growing demands for it to be a religious state as well, especially over the last three decades, when there has been a continuous decline in the political power and representation of Israel's historically hegemonic and largely secular Ashkenazi constituencies, and grows of political forces representing Orthodox religious Mizrahi residents. As Hanna Lerner argues the paradigm of liberal constitutionalism is not a relevant framework for such religiously divided societies, like Israel. She claims that

---

[106] He mentions also other, less formal illustrations of this logic, as the Ukrainian Othodox Church in Ukraine and Serbain Orthodox Church in Serbia, which both show close ties between nationalism and religious affiliation.

[107] See B. Breslin, *The Communitarian Constitution,* Johns Hopkins University Press, 2004. p. 186.

[108] The catalyst for change was the public outcry after a ruling of the Supreme Court, which allowed the child of a Jewish father and non-Jewish mother to be registered as Jewish, in accordance with the father's wishes. H.C. 58/68 Shalit v. Minister of the Interior 23(2) P.D. 477, available in English in *Israel Law Reports*, Special Volume (1962-1969), 35-191.

under conditions of disagreement over the state's religious character, the drafters of constitutional design in different countries adopted either a permissive or a restrictive constitutional approach to address their intense internal religious conflicts. The permissive constitutional approach of Israel uses strategies of constitutional ambiguity, ambivalence, and vagueness to allow the political system greater flexibility in future decision-making regarding controversial religious issues. By contrast, a restrictive constitutional approach, such as the one chosen in Turkey, uses specific constitutional constrains designed to limit the range of possibilities available to future decision makers when addressing religion-state relations. Permissive constitutions, she argues for the most part allowed for greater freedom of religion, especially guaranteeing the survival of minority religious groups than did restrictive constitutions. By contrast, freedom from religion, namely the right of individuals to opt out of a religious affiliation is limited under permissive constitutional arrangements, like in Israel, compared with the restrictive constitutions.[109] Religious groups enjoy complete autonomy under Israeli law, while in Turkey respect for religious expression in the public sphere is limited, for example, Muslim women are prohibited from wearing headscarves in public institutions, including universities and public schools. By contrast, in Israel religious marriage and divorce are the only options for all citizens, including nonbelievers and atheists. This means that the right to marry is violated for hundreds of thousands of citizens, including interreligious couples or those who are not affiliated with any religion, which comprises about four percent of the population.

The Jewish state came into being on 14 May, by way of the 1948 Declaration of Independence, a mainly political document, which tried to distinguish between legislative and constitutive powers by creating a Provisional State Council and a Constituent Assembly. There were and are still several arguments against the enactment of a written Constitution.[110] One of the fiercest opponents of the project of drafting a constitution was David Ben-Gurion, Israel's first Prime Minister. One of the obstructions in adopting a Constitution means orthodox and secularist circles taking a decisive position on the unresolved questions of the relationship between

---

[109] See H. Lerner, 'Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel, and Turkey', *World Politics,* 65, no. 4 (October 2013), pp. 609-55.
[110] See for instance A. Shapira, 'Why Israel Has No Constitution, *St. Louis U. Law Journal,* Vol. 37, 1993, p. 283.

religion and state, and the national and cultural or religious nature of the declared Jewishness of the state. In other words, the main reason of uncertainty was the profound ideological rift in Israeli society between the secular and the religious vision of the state. But there were other reasons as well: Ben-Gurion wanted as least restrictions on his power; most of Jews were abroad and it seemed unfair to entrench a constitution by a minority; plus, the British experience was also an argument against adopting a constitution, and religious people objected because for them there was already a constitution – the Bible. As opposed to the American founders for whom a written constitution was needed to affirm their existence as a nation, Israeli founders were still struggling over the very definition of nationhood.[111] In this context some political-legal issues have arisen, such as the question 'who is a Jew?' which is relevant in matters of marriage and divorce. Further problems have arisen under the Law of Return and the rights to automatic citizenship for Jewish immigrants, which does not permit Arabs to reunite with their families who live in the West Bank, the Gaza Strip or elsewhere. These problems are also related to the fundamental characteristic of the Jewish law that there is no distinction between law and equity, between legal and ethical norms.[112] The position of the religious representatives was that a Jewish state should have Jewish laws. For instance the Orthodox Agudat Israel Party demanded that the legal system be based on the Halackha (Jewish religious law), and opposed the constitution with the following argument: „There is no place in Israel for any constitution created by man. If it contradicts the Torah – it is inadmissible, and if it is concurrent with he Torah – it is redundant"[113]. Ben-Gurion, and his governing Labor (Mapai) Party vehemently objected the aspiration to establish a 'theocratic state', holding that the success of the Zionist project required forstering a new Jewish identity – Israeli. Conversaly, orthodox representatives feared that a constitution would entrench secular principles, leading to a Kulturkampf.

Since both the secular and the religious parties opposed the constitution for different reasons, despite the large majority of the secular camp (only sixteen out of the 120 members represented the religious parties) in June 1950 the Knesset decided not to

---

[111] See G. J. Jacobsohn, Apple of Gold: Constitutionalism in Israel and the United Staates, Princeton University Press, 1993. p. 115.
[112] See H.H. Cohn, 'The Spirit of Israel Law', *Israel Law Review*, Vol. 9, No. 4, 1974.
[113] Knesset Record 4 (1950): 744. Cited by H. Lerner, 2011, p. 60.

draft a constitution in a single document. Following a heated debate on the religious and secular vision of Israel as a Jewish state a compromised resolution was passed, name after its sponsor, Haim Harrari, the chair of the Knesset Committe: Basic Laws, as chapters together will form the state constitution.[114]

In the absence of a written constitution as a single document the competing religious and secular claims have been dealt with through a series of informal consocational arrangements[115], known as 'the religious status quo', which over time became entrenched in the political landscape. These arrangements as a compromise between religious and secular leaders still effectively determine the non-separation between religion and state in certain areas. Various aspects were formally defined through legislation: the recognition of the Sabbath as the day of rest[116], the prohibition of public transportation on the Sabbath[117], traffic and road control during the Sabbath[118],

---

[114] About the constitution making attempts, including the Knesset debates see Chapter 3 in H. Lerner, *Making Constitutions in Deeply Divided Societies,* Cambridge University Press, 2011.

[115] The term is used by Hanna Lerner (2011, pp. 70-75.) based on the theory of consociational democracy, as defined by Arendt Lijphart. See A. Lijphart, 'Majority Rule Versus Democracy in Deeply Divided Societies', *Politikon* 4. No. 2 (1977), pp. 118-19.

[116] The Hours of Work and Rest Law of 1951 is a body of Israeli legislation that enumerates the restrictions of weekly work hours for employers and employees. It contains separate rules for Jews and non-Jews, requiring Jewish workers to take their weekly rest period on Saturdays and permitting non-Jewish workers to take off Friday, Saturday, or Sunday. Israel's self-identification as a Jewish state also manifests in this law: as a general matter, Jews may not employ other Jews, be employed, or be self-employed on the Jewish Sabbath (from Friday at sundown to Saturday night). The Israeli Supreme Court uphold the law's constitutionality in 2005. (HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. V. Rosenzweig). About the regulation, its enforcement by local and national authorities, and the challenges to its constitutionality in Design 22 in comparison with the landmark case of the U.S. Supreme Court in McGowan v. Maryland (1961) see Y. Kalman, 'Thou Shalt Accomodate the Secular: Sabbath Law's Evolution From „Day to Rest" to Day to Leisure"', 27.1 *Temple Int'l & Comp. L.J.*, 2013. 111-147.

[117] In most Israeli cities, public buses and railways do not run on the Sabbth, while private taxis, private bus lines, and Bun-Gurion International Airport do maintain operations. The irony of the explosion of the Haredi population is that the initial motivation for the military exemption and government subsidies which were granted upon Israel's founding was that the Haredi community was so small that it was believed that it would soon cease to exist. Government aid and special treatment has in fact facilitated the Haredi population's growth. See Y. Kalman, 'Thou Shalt Accomodate the Secular: Sabbath Law's Evolution From „Day to Rest" to Day to Leisure"', 27.1 *Temple Int'l & Comp. L.J.*, 2013. 122.

[118] In Horev v. Minister of Transportation the Israeli Supreme Court determined that the Minister of Transportation's decision to close the road, thereby endorsing the religious neighbourhood's unilateral actions, could only stand if a proper arrangement for secular residents could be found. In 1968, in Yiramax Ltd. V. S. I., the Supreme Court ruled that a law mandating the closure of gas stations on Saturdays was unreasonable, particularly considering the lack of access to public transit on Saturdays. See In most Israeli cities, public buses and railways do not run on the Sabbth, while private taxis, private bus lines, and Bun-Gurion International Airport do maintain operations. The irony of the explosion of the Haredi population is that the initial motivation for the military exemption and government subsidies which were granted upon Israel's founding was that the Haredi community was so small that it was believed that it would soon cease to exist. Government aid and special treatment has in fact facilitated the Haredi population's growth. See Y. Kalman, 'Thou Shalt Accomodate the

the flag and emblems expressing Jewish tradition, kosher food in state institutions, and in the army, and most importantly the institutionalization of a pluralist personal law system (following the millet system), an independent Orthodox educational system with the autonomy for religious schools, the transfer of state money to religious schools (Jewish, Christian, and Muslim), exemptions from military service for ultra-Orthodox (Haredi) yeshiva students [119] and religious women, and state appointed and funded clergy and religious services. But the most infamous example of Israeli enmeshing of religion and state is the exclusive Orthodox jurisdiction over Jewish marriage and divorce, in other words the lack of civil marriage and divorce. In contrast to the relative easy with the first nine Basic Laws that were passed after 1958 mainly dealt with institutional considerations, and were in essence the legal formalization of the existing structure of government, the religious parties objected to the draft of the Basic Law on Human and Civil Rights, proposed in 1989, because they claimed it would undermine the religious status quo. The religious laws are one of the reasons why the Basic Law on Human Dignity contains an explicit provision (Article 10), which protects the validity of laws, which were enacted before it coming into force. Indeed, the new Basic Laws of the early 1990s, which has changed the previous constitutional culture of legislative sovereignty, following the British constitutional tradition[120], made it possible to challenge in court some basic tenets of the status quo expressed in legislation. Although the activist stand of the Supreme Court of Israel made the status quo in many religious-related issues impossible, but the growing involvement of the Supreme Court in status-quo related issues should be assessed within the context of the intensifying activities of the Likud-led legislature

Secular: Sabbath Law's Evolution From „Day to Rest" to Day to Leisure"', 27.1 *Temple Int'l & Comp. L.J.*, 2013. 119-121.

[119] In February 2012, Israel's Supreme Court deemed the Tal Law, which gave students in yeshivot full-time exemptions from military service unconstitutional, but left the job of crafting a new policy to the Knesset. See Y. Ettinger and G. Cohen, 'Israel's High Court Rules Tal Law Unconstitutional, Says Knesset Cannot Extend It in Present Form', *Haaretz,* February 21, 2012. There are approximately 110,000 Haredi men who have not served in the military, and "Each year another 6,000-odd haredi yeshiva (Talmudic seminary) students reach the age of 18 and join the ranks of draft-dodgers. That figure already represents 13% of the Jewish male age group…and is set to grow fast…" See 'Judaism in Israel: Talmud and Cheesecake', *Economist,* July 28, 2012. The irony of the explosion of the Haredi population is that the initial motivation for the military exemption and government subsidies which were granted upon Israel's founding was that the Haredi community was so small that it was believed that it would soon cease to exist. Government aid and special treatment has in fact facilitated the Haredi population's growth. See Y. Kalman, 'Thou Shalt Accomodate the Secular: Sabbath Law's Evolution From „Day to Rest" to Day to Leisure"', 27.1 *Temple Int'l & Comp. L.J.*, 2013. Fn. 22.

[120] See D. Barak-Erez, 'From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective', 26 *Columbia Human Rights Law Review,* 1995. 309.

and government in shifting the balance of the status quo on demand of the religious parties.[121] For instance an amendment to the State Education Law secure public funding for religious schools even if they do not meet the standard of basic curriculum as stated by the original State Education Law of 1953. This amendment of 2007 created a new phenomenon of autonomous education not meeting state standards subsidized by the government, despite the fact that even the original status quo document from 1947 stated, with regards to the independence of the religious Ultra-Orthodox education, that: "The state, of course, will determine the minimum of compulsory studies…history, science, etc., and will supervise the fulfillment of this minimum."[122]

The Supreme Court favored secular positions and Western liberal values, while some circles that are totally opposed to a Constitution, such as the haredi parties, together with some advocates of a Constitution,[123] support a separate Constitutional Court.[124]

---

[121] Concerning the instability of the status quo, see A. Ravitzky, 'Religious and Secular Jews in Israel: A Kulturkampf?', *The Israel Democracy Institute, Position Paper*, No. E1, 2000. 15-16.

[122] About the content of the status quo document see Ch. S. Liebman and E. Don-Yehiya, *Religion and Politics in Israel,* 1984. 31-34.

[123] Despite the constitutional revolution through Basic Laws and the practice of the HCJ, there is ongoing public debate over whether to adopt a formal Constitution. Most of the former Justices of the Supreme Court are in favor of a new written Constitution. Shimon Agrarat said in an interview that "The trouble is that we don't have a constitutional bill of rights, that we don't have a constitution." (Jerusalem Post, 6/6/1987.) Also Aharon Barak opposed the original arguments against the written Constitution: "I think that this argument is wrong. It was wrong when it was made. It is wrong now. In our declaration of independence it was provided that a 'Constitution . . . shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948'. Thus, a Constitution should have been adopted then." (B. Tóth, & G. Halmai, "A zsidó értékek elismerése mellett érvényesíthetők a demokratikus értékek is". Beszélgetés Aharon Barakkal, az izraeli legfelső bíróság leköszönt elnökével' ["Besides Jewish values, also democratic ones can be acknowledged." Interview with Aharon Barak, former President of the Isreali Supreme Court.], *Fundamentum,* No. 1, 2007, p. 27.) During 1985 and 1986, a Constitution-drafting process was undertaken at the Tel Aviv Law School by four law professors, with a draft published in 1988, and one segment was enacted by the Knesset in 1992: the law providing for the popular, direct election of the Prime Minister, which was then repealed in 2001. In 1998 two-thirds of the Israeli public supported the adoption of a formal Constitution; by the turn of the millennium this has exceeded 75%. In May 2003, the Constitution, Law and Justice Committee of the Knesset, initiated the Constitution by Broad Consensus Project, which aimed to write a Constitution for the State of Israel. The Committee had over 80 meeting till 2006 with the aim of producing a draft Constitution. A draft prepared by the Committee was presented to the Knesset on 13 February 2006. The proposed Constitution was supposed to be ultimately brought to the Knesset and the people for consideration and ratification.

[124] *See* R. Gavison, 'A Constitution for Israel – Lessons from the American Experiment', *Azure*, 2002, p. 5762. But Aharon Barak strongly rejects the establishment of a separate Constitution Court: "I am very much against having a separate constitutional court for Israel. We have a constitutional court in Israel. This is the Supreme Court. Like USA and Canada, we don't need this new institution. A constitutional court served a very important role in Europe and South Africa. It was a necessity for Transitory Justice. It is not necessary for Israel. It will politicize the judicial process. It will have a negative effect on human rights in Israel." *See* the interview with *Fundamentum*, *id.*, p. 28.

The highly activist doctrine of the Israeli Supreme Court adopted in the 1980s was a consequence of the decline of the political, social and cultural hegemony of the Labor movement and the renewal of religious fundamentalism in the second half of the 1970s, and the Likud victory in the 1997 elections. The group of former governing forces – identified with Western, secular liberal values – lost much power in Israeli politics and culture and found itself facing an alternative cultural option for the country, premised on the Halakha and traditional Jewish heritage. These liberals shifted much of their political action to the Supreme Court, which collaborated with them. Justice Aharon Barak, the Court's Chief Justice for twelve years, and the person most closely identified with the Court's activism, represented the view that any court of law should have competence to legally review any legal norm regulated human conducts. Barak, who called the enactment of the two Basic Laws on human rights as a 'constitutional revolution', provided the following interpretation of section 2 of the Basic Law on Freedom of Occupation on 'Israel as Jewish and democratic state': „The meaning of the Jewish nature of the state is not in the religious-Halachic sense, and hence the values of the State of Israel as a Jewish State should not be identified with the Jewish Law".[125] This led to mass demostration in Israel with against Barak and his Court. In a decision from February 2002 the Court for the first time granted formal recognition to Reform and Conservative conversions performed in Israel, which reignited the debate over the issue of 'Who Is a Jew?'[126] Critics consider this as a sort of legal fundamentalism and over-legalization, which has made the HCJ in the eyes of religious groups a partisan institution.[127]

The debate over the meaning and interpretation of what many consider a self-contradictory definition continues to divide Israeli society. In recent years the Israeli Palestinian minority demanded the transformation of the state from its definition as 'Jewish and democratic' to a 'liberal democratic' state in which the Paletinians would be recognized as a national minority. Until 1966 Israeli Arabs were under military rule, since the abolition of this they have enjoyed formal civic and political rights, but they were consistently excluded from Israeli nationhood, which had always been

---

[125] A. Barak, 'The Constitutional Revolution: Protected Human Rights', *Mishpat Umimshal: Law and Government in Israel*, 1, No. 1. 1992, 30-31.
[126] HCJ 5070/95 Naamat (Movement of Working Women and Volonteers) v. Ministry of the Interior PD 56(2) 721.
[127] See M. Mautner, *Law and Culture of Israel*, Oxford University Press, Oxford, 2011. 3.

understood in terms of Jewish identity, and therefore their citizenship was always constrained. The Law of Return, which grants only Jews the right to immigrate to Israel and settle there. The Arab population is excluded from military service, which is obligatory for all Jewish citizens.

By contrast there are constant efforts by Jewish nationalists to propose a new Basic Law, which would define Israel as the nation-state of the Jewish people. In 2011 Avi Dichter, member of the Kadima party together with another 39 Knesset members submitted such a bill, which in order to prevent Israel from becoming a binational state said that the right to self-determination would be unique to the Jewish people, that the Hebrew language would be considered the only official language, that the Hebrew calander would become the official calander of the state of Israel, and that Hebrew law would serve as an inspiration to Israeli legislators.[128] After Kadima chairwomen and Justice Minister Tzipi Livni publicly announced her opposition to the bill, Dichter withdrew the draft, and in its place proposed a more moderate one, which still defined Israel as the state of the Jewish nation, describes Arabic as 'a language of the state' rather than an official language. Since besides the opposition Labor Party also members of the governing coalition came against the draft has not passed a preliminary reading.

But in the Spring of 2014 two right-wing Knesset members submitted the newest version of the bill, which although has been stipped of some of its controversial clauses, but still pursues to establish Israel's status as 'the nation-state of the Jewish people', declares that the Jewish people have the exclusive right to national self-determination, and calls the 'land of Israel' the historic homeland of Jewish nation and none other. This time also Prime Minister Benjamin Netanyahu following a Palestinian refusal in peace talks to recognize the status of Israel endorsed the draft with the argument that the state of Israel is the nation state of the Jewish people is not sufficiently expressed in the basic laws. Justice Minister Livni has expressed her opposition again to 'any law that gives superiority' to the Jewish nature of the state over the country's democratic values. In the Fall of 2014 PM Netanyahu announced

---

[128] P/3541/18. Draft Basic Law: Israel – the Nation-State of the Jewish People. Presented to the Knesset speaker and his Deputies and tabled in the 18th Knesset, 3 August 2011.

support for an even more extreme version of Jewish Nation State bill sponsored by coalition whip Zeev Elkin (Likud) in order to protest the lack of progress by a panel estebalished by Netanyahu and Livni for the purpose of hammering out a compromise version of the bill. The new draft specifies that Jewish law is to be a source and 'inspiration' for new legislation and judicial rulings. The bill also states that holy places must be protected from „anything that could harm the freedom of access by religions to the places that are sacred to them or to their sentiments towards those places", which could support claims that Jewish people should be allowed to pray on the Temple Mount. Justice Minister Tzipi Livni refused to bring the bill to vote in the Ministerial Committee for Legislation reading a quote from Likud ideological forebear Ze'ev Jabotinsky to remind the Likud what he stood for: „I do not think that a state's constitution should include special articles explicitly ensuring the national character. A sign of a good constitution is if few such articles are found in it." As a response Foreign Minister Avigdor Liberman said that „Jewish values come before democratic values if and when there is a clash between them." Another coalition partner of Likud, Economy Minister Naftali Bennett warned with the break of the coalition argued that if there is no law 'establishing Israel as a Jewish state, the High Court will try to appy the Law on Return to non-Jews and act like it there was never a law stating otherwise." As a result of the the Cabinet of Israel on November 23 approved the draft legislation with 14 votes to 6, and will now proceed to the Israeli parliament for a first reading. On December 2, 2014 Prime Minister Netanyahu fired Justice Minister Livni and Finance Minister Lapid, and called for new elections.

As critics argue the proposal is not intended to reflect the status quo but to alter it in a fundamental way curtailing the democratic character of the state to reduce Israeli democracy to a 'democratic regime'.[129] The proposal does not promise full and equal rights to the minorities in Israel, as individuals and as collective, which is especially worrisome because the existing constitutional basis for the protection of individual and collective rights is weak, and some basic rights are not explicitly mentioned, including equality, freedom of expression, and freedom of religion.

---

[129] See A. Fuchs and M. Kremnitzer, 'Basic Law: Israel as the Nation State of the Jewish People – A Danger to the Zionist Enterprise', *Makor Rishon,* May 12, 2014.

As we demonstrated, the State of Israel, self-defined either as Jewish and democratic or only as Jewish, does not treat all its citizens equally, stemming largely from the fact that religion is an inseparable part of its Jewish identity. This change would remove the sovereignty from the citizens, and shift it to all Jews, many of whom are not citizens of Israel, which empties citizenship of meaning because it becomes exclusive to one ethnic group, and would give a privilege that is not part of the democratic game. In a seminal decision of the Israeli Supreme Court from 1970, regarding how to register children, whose mother was not Jewish, one of the justices, even though in the minority, wrote: „Jewish nationalism cannot be detached from its religious foundations." Jewish identity seems to defeat 'Israeliness' as a collective identity[130], and Judaism appears more and more to serve as extremely strong 'social glue' in Israel today. The process in which there is a strengthening of religious elements in society is called 'religionization'[131]. Jewish Israelis' changed attitudes toward religion is proved by public opinion survey, which show not only that religious groups are increasing in number, while the secular groups are shrinking, and the secular sector is no longer a majority, but a strong correlation between Israeli-Jewish self-definition along the religiousity continuum and the respondents' perception of the relative importance of Halakha compared to democratic principles[132]. 44 percent of them see a contradiction between them, which means that Israeli democracy is highly likely to be in the position of losing its foothold.[133]

The political background behind this phenomena is certainly the decay of the political left and the rise of the nationalist right, which have created a comfortable setting in

---

[130] In terms of nationality, until this very day a citizen of the State of Israel cannot be registered as an 'Israeli' in public record. It is either under such definition as a 'Jew' and 'Arab' a 'Druz', or nothing.
[131] See the special forum in the Israel Studies Review devoted to The 'Religionization' of Israeli Society. Volume 27, Issue 1, Summer 2012: 1-30.
[132] Approximately 20% of Israelis describe themselves as 'religious', about 40% consider themselves 'traditional', and over 40% identify as completely secular. See Sh. Shetreet, 'The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel', in W. Brugger and M. Karayanni (eds.), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law,* 2007. 134. The proportion of the ultra-Orthodox population has risen dramatically in recent years, now numbering one million. Between 1990 and 2008, the percentgae of ultra-Orthodox Jews in Israel rose from 3% to 9% of the Jewish population, and increase partially explained by the fact that religious Jews, and Haredim in particular, tend to have high birth rates. See E. Bronner and I. Kershner, ' Israelis Facing a Seismic Rift Over Role of Women, *The New York Times,* January 14, 2012.
[133] See T. Hermann, 'More Jewish Than Israeli (and Democratic)?', Israel Studies Review, Volume 27, Issue 1, Summer 2012: 4-9.

which religious power can flourish. This meant the collapse of secular, liberal Zionist hegemony, which is being filled by an Orthodox Jewish approach. Another interpretation of the same development is that we are witnessing the birth of a new, religious form of Zionism. Certainly Zionism has moved a long way from the ideology of its 'founding fathers', and became pressing territorial claims, religious exclusivity, and political extremism.[134] It certainly has to do with the failure of political leaders to reach a two-state territorial solution to the Israeli-Palestinian conflict, which has given way to a post-territorial nationalism, basing itself in a collective Israeli identity firmly rooted in religion.[135] In other words, religion plays a legitimating role in the pursuit of the current political leadership of Israel to keep the status qou of a one-state solution on the basis of one nation.[136]

Anti-liberal Pluralist Legal System

As regards the legal system two additional developments have taken place since the 1990s: a) religious Zionist jurists have established a system of arbitration tribunals aimed at resolving civil disputes according to the Halakha, in competition with the state's secular court system; and b) there have been calls for officially granting the Rabbinical Courts, which apply the Halakha, the power to serve as arbitrators in civil disputes.[137] But these efforts were rejected by the decision of the High Court of Justice (HCJ) in the Sima Amir case, in May 2006. The majority of the HCJ decreed that the official (or 'State') rabbinical court must not litigate in areas that do not concern marriage and divorce, and therefore has no authority to engage in arbitration at all, and that whenever it engages in arbitration it oversteps its authority. This means

---

[134] See T. Judt, 'Israel Without Clichés', *The New York Times,* June 2010.

[135] Cf. Yoram Peri's introduction to the debate on The 'Religionization' of Israeli Society, Israel Studies Review, Volume 27, Issue 1, Summer 2012: 2-3.

[136] About the role of religion in national legitimation in Israel see U. Abulof, 'The Roles of Religion in National Legitimation: Judaism and Zionism's Elusive Quest for Legitimacy', *Journal for the Scientific Study of Religion,* (2014) 53(3): 515-533. See also the failed attempts against the one-state status quo without any binational approach by Ruvi Rivlin, the current conservative President of Israel in David Remnick, 'The One-State Reality. Israel's Consrevative President Speaks Up for Civility and Pays a Price', *The New Yorker,* November 17, 2014.

[137] See M. Mautner, *Law and Culture of Israel*, Oxford University Press, Oxford, 2011. 53.

that the Halakhic status of the official rabbinical court is greatly affected by its status under Israeli law.[138]

In certain areas of the legal system there is no uniform law, but various judicial enclaves exist: a) each religious group applies its own religious law of marriage and divorce; b) there is also no uniform law to govern the observance of the Jewish Sabbath and other religious holidays; c) also the growing of pigs and the sale of pork is subject to different norms in different settlements[139]; and d) there are different regulations for religious and secular cemeteries. In some cases decentralization is an appropriate means to solve religious, cultural disagreements, but in others, like in the case of matrimonial laws by preventing mixed marriages between Jews and non-Jews serves religiously and ethnically discriminative interests of the state. [140] When introducing the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law in 1953 the Deputy Minister for Religious Affairs explained that one of the purposes of granting legal recognition exclusively to religious marriages was to exclude the possibility of mixed marriages that might result in the conversion of Jews to other faiths.[141] Similarly, when it became known that the Muslim Shari'a Courts in Israel were willing to marry Muslim me to Jewish women, the Ministry of Religious Affairs has instructed the Shari'a Courts to refrain from conducting such marriages.[142] Non-religious Jews resent the exclusive authority of the religious institutions and consider it a case of religious coercion. Non-believers and members of an unrecognized religious group are disadvantaged in matters of personal status, since there are no lay officials authorized to celebrate and register marriages, there is no secular law on

---

[138] See A. Radzyner, 'The Impact of Supreme Court Rulings on the Halakhic Status of the Official Rabbinical Courts in Izrael', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

[139] Attempts to entirely prohibit the selling of pork meat have failed due to the opposition of secularist forces. See D. Barak-Erez, *Outlawed Pigs: Law, Religion, and Culture in Israel,* The University of Wisconsin Press, 2007. 43-57.

[140] See Y. Laor, *The Myth of Liberal Zionism,* Verso, New York, London, 2009. 4-5.

[141] Cf. Z. Triger, 'There is a State for Love. Marriage and Divorce between Jews in Israel', in O ben Naftali and H. Nave (eds.), *Trials of Love,* Ramot, Tel Aviv, 2005. 173-226. (in Hebrew) Quoted by G. Stopler, 'National Identity and Religion-State Relationships: Israel in Comparative Perspective', in G. Sapir, D. Barak-Erez, A. Barak (eds.), *Israeli Constitutional Law in the Making,* Hart Studies in Comparative Public Law, 2013. 512.

[142] Cf. P. Shiffman, 'Civil or Sacred: Marriage and Divorce Alternatives in Israel – A Necessary and Feasible Change', ACRI, 2001. Quoted by G. Stopler, *ibid.* Stolper notes that although according to Islam, the Shari'a Courts can marry Muslim men to non-Muslim women, they cannot marry Muslim women to non-Muslim men, because women will eventually convert to men's religion, and thus, become non-Muslim.

marriages, and civil courts have no jurisdiction in matters of marriage and divorce.[143] As Gila Stopler argues these restrictive Israeli rules of marriage and divorce serve two functions: a) the unity function unites the Jews of Israel under a unitary national identity, and b) the gatekeeping function demarcates the boundaries of the Jewish nation along religious lines.[144] As we will demonstrate this 'thick establishment' of the Jewish religion in Israel violates the freedom of conscience and belief of all those who do not wish to marry in Jewish Orthodox religious ceremony: non-religious Jews, religious Jews following a different stream of Judaism, including for example Reform and Conservative Judaism, and also violates the rights to equal treatment of all non-Jews, who wish to marry with Jews.

Halakhic Marriage and Divorce Law

As mentioned, marriage and divorce law in Israel is subject to the authority of religious courts and Halakhic law in a way that prevents many Israelis from exercising their right to marry and divorce. This means that since civil marriage and civil divorce do not exist, persons who desire to marry or divorce are obliged to do so in a religious ceremony supported by the prevailing state law, even if they hold no religious beliefs.[145] According to the legal situation only Orthodox rabbis of the local rabbinate of the Jewish couples' place(s) of residence or that of their wedding are allowed to conduct such ceremonies, which clearly violates religious pluralism even of the Jews of other denominations, such as the Conservative and Reform.

The control of Orthodox Judaism over marriages of Jews in Israel is also preventing from marrying other Jews a vast majority of those hundreds of thousands of immigrants of Jewish descent the state has brought from the former Soviet Union to Israel under the Israeli Law of Return for the explicit purpose of strengthening the Jewish majority in the country. Due to the discrepancy between the definition of a

---

[143] Cf. R. Lapudoth, 'Freedom of Religion and of Conscience in Israel', 47 *Cath. U. L. Rev*. 1998. 441.
[144] See G. Stopler, 'National Identity and Religion-State Relationships: Israel in Comparative Perspective', in G. Sapir, D. Barak-Erez, A. Barak (eds.), *Israeli Constitutional Law in the Making,* Hart Studies in Comparative Public Law, 2013.
[145] Some argue that the mere duty to participate involuntarily in a religious ceremony doesn't violate freedom of religion. See G. Sapir and D. Statman, 'Religious Marriage in a Liberal State', 30 *Cardozo L. Rev*. 2009. 2855.

Jew under the Law of Return and the definition of a Jews under Orthodox religious law these marriages are prevented within the borders of Israel.[146]

In October, 2013, the Knesset enacted an amendment to the Marriage and Divorce Registration Ordinance, which provided that the couple may register for marriage with any rabbi authorized to register marriage in Israel, "regardless of the [couple's] place of residence or the location of their marriage". Ori Aronson, whose description of the amendament I rely on here calls the new system as mimetic pluralism, a design of a public institution that respect and reflect existing variations in belief systems, which as a bottom-up project of institutional design is thought of as a passive-responsive political strategy[147]. The formal justification for the amendment focused on the fact of young person's geographic mobility in contemporary Israel, which renders the requirement of local registration needlessly burdensome. In fact, representatives of secular constituents unable to muster the political force to enact a comprehensive civil marriage reform, instead recurrently opted for a second-best solution, having in mind that a local rabbinate might be not as strict as the one they might have been bound to under the previous place-of-residence-based option. As Aronson claims, modern-Orthodox registrar might treat couples differently than his ultra-Orthodox counterpart, and a rabbi in an urban setting might have different understandings of family and community than a rabbi in a small town or rural context. In other words the amendment allowed couples to 'shop' for a more hospitable rabbi-registrar from among those available in the existing distribution of local rabbinates throughout Israel[148].

---

[146] See A. Yakobson, 'Joining the Jewish People: Non-Jewish Immigrants from the Former USSR, Israeli Identity and Jewish Peoplehood', 43 *Israeli Law Review,* 2010. 218.

[147] See O. Aronson, 'The How Many Question: An Institutionalist's Guide to Pluralism', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

[148] A similar tendency of decentralization can be seen in the shift of jurisdiction from the central to local government. More and more cities decide whether to close down roads during the Sabbath, whether to limit the selling of pork meat within their jurisdiction, whether to prohibit sex stores from opening, and whether to allocate budgets and lands to religious activities. As Yishai Blank argues this particular form of decentralization of religious liberty in Israel has a mixed outcome: it has helped to waeken the monopoly of Orthodox Judaism in some locations and enable diverse communities to flourish and express their unique religious vision, but it has also radicalized some religious practices, execerbated tensions among competing religions and denominations, hightended religious-based residential segregation and jeopardized minorities. See Y. Blank, 'Localising Religion in a Jewish State'*, 45(2) Israel Law Review,* 2012. 291-321.

But despite this rather cosmetic change, especially those who are not permitted to marry under Halakha, such as couples of different religions, persons having no recognized religious affiliation, persons ineligible to marry, for instance a 'cohen', a member of the priestly class, and same-sex couples are still facing serious challenges. Actually, these couples according to the Israeli legal system have no 'official' possibility to marry each other. Furthermore the Halakhic law (as well as the shari'a) are gender based and hierarchical.[149] The Jewish wedding ceremony places the man in the active role of endower and buyer, and the woman in the passive role of receiver and the one being bought.[150] When a married woman has sexual relations with a man other than her husband, Jewish law considers it a serious violation, which has grave economic consequences, and a child born out of wedlock to a woman who is still married to another man carries the mark of a 'mamzer' (bastards). By contrast, Halakhic sanctions against a man, who set up a new family without being divorced are much more moderate. His children out of wedlock are not considered 'mamzerim'. The grounds for divorce are not the same for men and women. While a woman's infidelity is considered absolute ground for divorce, a man's infidelity is not generally recognized as grounds for divorce. The divorce law restricts the freedom of exit from the spousal relationship, particularly for the so-called 'chained' women, who fail to prove their husband's faults, and who also fail to obtain the husband's consent, the 'get' (also spelled as 'gett', agenot), and therefore cannot remarry and remain chained.[151] Although the rabbinical courts have the authority to achieve a religious 'get', in practice they very rarely do that.[152] Conversely in some cases, the

---

[149] This wasn't the case in the early Jewish histiory well into the Middle Ages. As Simon Schama points out in his book 'The Story of the Jews' (Ecco/HarperCollins Publisher, 2014.), Jews women exercised far more political and economic power than prefeminist histories or contemporary Orthodox Judaism would lead us to believe. In Elephantine, 'Lady' Mibtahiah owned her house and allowed only the use of it to each of her three husbands, one of whom she divorced. Millenniums later, the 'women of Ashkenaz' - that is, of Jewish Northern Europe - owned property, pleaded their causes in court, led other women in prayers, ran their husbands' businesses and even functioned as bankers.

[150] See R. H. Kaddari, *Women in Israel: A State of Their Own*, 2004. 235-236.

[151] About the fight of a woman before the rabbinic court against her cruel husband, who refuses to let her go for her freedom see the 2014 Israeli movie 'Gett: The Trial of Viviane Amsalem' written and directed by Ronit Elakbetz and Shlomi Elkabetz.

[152] One of the very rare exeptions is the complicated case, know as the Langer case, in which the Israeli rabbinate would not let a Jewish man marry a Jewish woman because the man's mother (who was Jewish) did not get a Jewish divorce from her first husband before marrying her second husband, the man's father. According to Jewish law, this made the children of the second marriage 'mamzerim', which meant they could not marry Jews. The case first came before the rabbinical courts in 1956 but was only resolved in 1972 by Rabbi Shlomo Goren, who just became Chief Rabbi of Israel. Goren intervened and solved the problem by focusing on the fact that the first husband had converted to Judaism in Europe before coming to Israel. Goren retroactively annulled the conversion of the

Halakha grants a man, whose wife has refused him a divorce, permission to marry another women.

As a replacement for civil marriage and divorce, Israeli secular law has developed some secular alternatives; the two most important of them being living together without marriage, and civil marriage abroad.[153] The institution for couples who maintain a marriage-like relationship but are not considered married by law is called cohabitation. These couples must prove in detail that their way of life suits the requirements of the law. On the other hand the dissolution of a cohabitation relationship does not require an official process, which weakens the legal defence enjoyed by such a relationship. Hence this institution does not provide an adequate substitute for their inability to marry in a civil ceremony. According to recent case law the registration official must record as married the persons who were married in a civil marriage abroad, based on the marriage certificate presented by persons who cannot marry in Israel, such as same-sex partners, mixed couples. But since Israeli law has not given final and official recognition to the validity of civil marriage outside of Israel, despite its registration in the population registry, the option of a civil marriage abroad cannot be a satisfactory substitute to the civil marriage either.[154] The Civil Union for Persons of no Religion Act passed by the Knesset in 2010 represents the third alternative to religious marriage, but this option enables only couples who do not belong to any recognized religion to establish a marital relationship, hence this law did not solve the problems of others who are prohibited from marrying under Jewish law, such as couples of different faith, same sex couples, women without the 'get' of their husband, or 'cohanim'.[155]

---

woman's first husband. Since the conversion was annulled, this wasn't a Jewsih marriage and a Jewsih divorce was not required either. Hence, the children of the second marriage were not mamzerim and could marry other Jews. (For an overview of the case, see D. Ellenson and D. Gordis, *Pledges of Jewish Allegiance: Conversion, Law, and Policymaking in Nineteenth and Twentieth-Century orthodox Responsa,* Stanford University Press, 2012. 145-148.) The case caused a public outcry in which many, including the that time Defence Minister Moshe Dayan, demanded that civil marriage finally be instituted in Israel.

[153] For a more detailed description of the marriage law see S. Lifsitz, 'The Pluralistic Vision of Marriage', in E. Scott and M. Garrison (Eds.), *Marriage at the Crossraods: Law, Policy and the Brave New World of the 21th Centuty Families,* 2012.

[154] Only slightly more than 10 per cent of Israeli couples marry civilly abroad, and the rate of interreligious marriages of Jews in Israel is even less than five per cent.

[155] See S. Fogiel-Bijaoui, 'The Spousal Covenant (Brit Hazuguit), or the Covenant with the Status Quo', 28 *Isr. Stud. Rev.* 2013. 210.

Therefore in the last decade or so several proposals have been raised replacing the current exclusively religious marriage approach as an extreme one-track solution and establishing civil marriage and divorce for all who wish to marry.[156]

One of the proposals is another one-track approach, namely an exclusively civil marriage uniform for the entire population.[157] This proposal did not intend to prohibit religious marriage, but the civil validity of it would be contingent upon its civil registration by the state, in other words, it would not have independent validity. Also, the marriage in this approach could be dissolved only in a civil procedure, according to civil rules, regardless of the manner in which the marriage was conducted. The proposal intends to end the state sponsorship for rabbinical courts.

Proposals were made already in the mid 1990s to introduce civil marriage as a parallel track to religious marriage.[158] According to this proposal, it would be possible the choose a civil track in which marriage, adjudication, and divorce are entirely secular, but those choosing religious marriage would be subject to the existing Halakhic law and not allowed to seek a civil divorce.

Also a sort of mixed system with the emphasis of the civil marriage track represents the proposal, which separates between marriage and divorce. According to this proposal, marriage would be civilian, but rabbis would also receive a license to perform civil marriages, and all civil marriages would be subject to divorce in a religious court.[159] Similarly in the spirit of the parallel, but not equal tracks model the Israel Institute for Democracy proposed a civil union bill, according to which religious marriage would remain the official marriage, and those who choose it would be subject to the religious laws of divorce. But there would be also possible to choose

---

[156] A comprehensive review and assessment of these proposals see S. Lifshitz, 'Civil Regulation of Religious Marriage in Israel from the Perspective of Liberal Pluralism, Human Rights, and Political Compromise', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

[157] This option was suggested in a book of Professor Pinhas Shifman. See P. Shifman, *Civil Marriage in Israel: The Case for Reform,* (2nd ed.), 2000. [In Hebrew, cited by Lifsitz, 2014.]

[158] See A. Rozen-Zvi, 'Rabbinical Courts, Halakha and the Public: A Very Narrow Bridge', 3 *Mishpat Umimshal,* 1995. 175 [In Hebrew, cited by Lifsitz, 2014.]

[159] Y. Artsieli, *The Gavison-Medan Covenant: Main Points and Principles,* 2004. Cited by Lifsitz, 2014.

the option for civil marriage, which contrary to the current legal situation would be open to anyone who cannot or does not want to enter into a religious marriage. Those choosing civil marriage would sign a declaration stating that the person is not considered to be married according to the Halakha, and therefore will be able to divorce following a civil procedure.[160]

Several years after the proposal of the Israel Institute for Democracy, its author, Shahar Lifsitz suggested a slightly revised compromise solution, which also emphasizes the importance of Halakhic as official marriage.[161] In other words this approach preserves the existing situation, in which state law recognizes exclusively religious marriage, but introduces a new legal institution, referred to as civil union open to all who wish to use it. The state registration of the civil union would grant couples all the legal rights and obligations that civil laws in Israel provide to married couples. But, according to the proposal, instead of the religious divorce laws a newly established civil procedure would be applied to civil union registrants under civil court supervision. Lifsitz argues that politically the civil union proposal has the greatest chances of being enacted in the current Israeli situation.

Palestinian-Arab Millet System

Accommodating religious minorities[162] on a group level, even to the extent of granting them full autonomy over family law matters, is generally considered to be liberal and tolerant in nature. Moreover, the beneficiary of liberalism and toleration in this context is the religious group rather than the individual. The model example for this was the 'millet system' of the Ottoman Empire, where Muslims, Christians and

---

[160] See S. Lifsitz, *The Spousal Registry,* The Israel Democracy Institute, 2006. Cited by Lifsitz, 2014.
[161] See Lifsitz, 2014.
[162] In terms of religion, minority is divided among three religions: Muslim (numbering about 1,200,000, which is 16 per cent of the total population), Christianity (numbering about 150,000, 2 per cent), and Druze (numbering about 120,000, 1.6 per cent). The Muslim and nine Christian denominations have already been recognized by the British mandate in 1939. Since 1948, two 'new' religious groups were formally recognized by the Israeli government and entrusted with public institutions and/or jurisdiction over their members' peronal status matters. Thus in 1957 the Israeli Druze community was recognized as a separate religious group, leading in 1962 to the establishment of state-backed Druze courts, and in 1970 the Evangelical Episcopal Church in Israel became the tenth Christian denomination to be awarded jurisdictional autonomy.

Jews were all recognized as self-governing units (or 'millets') within the Empire.[163] But while the Ottomans accepted the principle of tolerance, but did not accept the quite separate principle of individual freedom of conscience not tolerating individual dissent within the constituent communities. Therefore this was a distinct, non-liberal kind of toleration of group rights, which rather unites than separates church and state.[164]

Discussing Israel's Palestinian-Arab millet system, Michael Karayanni argues that especially once a state, such as Israel takes on a certain collective religious identity, making the entire state apparatus biased in favor of the majority religion, then a sense of justice calls for this bias to be balanced by conceding some authority to the religious minority. In his view the notion that the accommodation granted to a religious minority is a balancing act is essentially what makes it seem liberal and tolerant. So, Karayanni goes on saying, if in Western democracies a liberal stance holds a default position against the accommodation of religious groups unless there is sufficient justification suggesting otherwise, the default position of liberalism and toleration in a religiously identified state is exactly the opposite: it favors the accommodation of minority religions unless strong justifications suggest not doing so. But studying the judicial autonomy granted to the Palestinian-Arab religious communities in Israel, Karayanni concludes that it is far from being an act of toleration and liberalism.[165] The major reason that influenced Israel's policy of maintaining the Palestinian-Arab millets after 1948 was its quest to gain international legitimacy, but since then they created a natural barrier to inter-marriage, thereby helping preserve Jewish identity.

---

[163] The Ottomans between 1456 and the collapse of the Empire in World War I allowed three non-Muslim minorities (the Greek Orthodox, the Armenia Orthodox, and the Jews) not only the freedom to practice their religion, but a more general freedom to govern themselves in purely internal matters, with their own legal codes and courts. For an overview of the Ottoman millet system see K. S. Abu Jaber, 'The Millet System in the Nineteenth-Century Ottoman Empire', 57 *The Muslim World,* 1967. 212

[164] Will Kymlicka discuss the millet system as second form of tolerance based on group rights rather than individual rights, which latter is the liberal approach of John Rawls. He concludes that the millet system was, in effect a 'federation of theocracies'. See W. Kymlicka, 'Two Models of Pluralism and Tolerance, 13 *Analyse & Kritik,* 1992. 33. Michael Walzer also characterizes the Ottoman millet system as illiberal. See M. Walzer, *On Toleration,* Yale University Press, 1999. 17-18.

[165] See M. M. Karayanni: Tainted Liberalism: Israel's Millets, Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

*

Israel as a religiously deeply divided society in recent years turns to religion to justify its claim to statehood. In response to persistent delegitimation, from within and without, the current government seems to support non-secular Zionism's efforts to expand the role of religion in its political legitimation. This 'religionization' of Israeli Jewish society together with an ethnic division within the framework of a single territorial entity (due to the failure of the political leadership to reach a two-state territorial solution) leads to a Jewish nationalism, based in a collective identity rooted in religious foundations, which might well defeat 'Israeliness' as identity, as well the importance of democratic principles, including the rights of national and religious minorities[166]. As we saw, the State of Israel from the beginning of its establishment embodied an equivocal mix of constitutive principles that cannot be resolved in favor of either liberal or illiberal elements[167], but the political aspirations of the Israeli government for more illiberal constitutionalism seems to be the decisive element to find similarly restrictive measures for freedom of religion.

As regards the relationship of religious and state law seen in the example of the use of Halakhic law and Palestinian-Arab millet system regulating marriage and divorce I realize that a liberal demand to establish exclusively civil marriage would most probably not accepted by the majority of public. Not only religious but also partly secular Jews and Arabs would deny this approach and opt for religious marriage and divorce even if civil marriage were available. In other words, it seems to me that it would be difficult to find an overlapping consensus[168] in the matter between the arrangement based on liberal considerations and those based on religious-national ones. In this situation the state have to act positively to provide citizens with the ability to realize their *autonomy* to marry and divorce, but the liberal state also must

---

[166] This description of nationalism very much fits to the definition of the nation by the French philosopher, Ernest Renan: „A nation is a large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and those that one is prepared to make in the future." E. Renan, 'What Is a Nation?', in E. Geoff and S. R. Grigor (eds.), *Becoming National: A Reader,* Oxford University Press, 1996. 41-55. But as Ethan Bonner reminds Renan also added to this definition that a nation is „a group of people united by a mistaken view about the past and a hatred of their neighbors". See E. Bronner, 'Israel: The Revisited Edition', *The New York Times,* November 14, 1999.
[167] See G. Walker, 'The Idea of Non-liberal Constitutionalism', in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights*, New York University Press, 1997. 154.
[168] J. Rawls, 'The Idea of Overlapping Consensus', 7 *Oxford J. Legal Stud.,* 1987. 1.

use its *authority* if necessary via civil courts to help spouses who cannot perceive themselves as divorced and cannot remarry without a religious 'get' realized their right to marriage and divorce. This approach is consistent with the views of the vast liberal literature developed dealing with the boundaries of autonomy that the liberal state should grant to a non-liberal minority group operating within its realm.[169] (The same approach has been chosen by the High Court of Justice in the 'Emanuel case',[170] where an ultra-Orthodox school upon the request of one group of the parents separated the Ashkenazi and the Sephardic students. The HCJ representing liberal culture declared the action of the school on behalf of the illiberal Ashkenazi religious group as segregation and discrimination on ethnic grounds, and ordered to abolish it.[171])

A parallel civil and religious marriage and divorce track solution would enable and even legitimize marriage between Jews and non-Jews, and besides the traditional Jewish also would support the Western-liberal cultural element of the State's identity together with 'Israeliness' as a collective identity. The same applies to matters of the historical system of conversion, another part of personal law, which can also be maintained not at the expense of but in conjunction with uniform civil systems of law.[172] In the case of the already mentioned new immigrants from the former Soviet Union the Special Conversion Courts, established by the state, but staffed by Orthodox Rabbis and following Orthodox practice have been very slow in approving conversions and in particular have been rejecting many candidates for conversion on the basis of their alleged failure to commit to observing Jewish religious commandments. This strict interpretation of Orthodox Jewish religious rules was contrary to the official stance of the courts as published by the government at its website, which is that a declaration of intent to observe Jewish religious commandments is sufficient.

---

[169] Besides the already quoted Mautner, 2011., Kymlicka, 1992, see also W. Kymlicka, *Liberalism, Community and Culture,* 1989., W. Kymlicka, *Multicultural Citizenship,* 1995., as well as A. Shachar, *Multicultural Jurisdictions,* 2001.

[170] HCJ 1067/08 Noar KeHalacha Association v. Ministry of Education

[171] See the critical evaluation of the decision together with the similar judgment of the UK Supreme Court in the Jewish Free School case H. Shapira, 'Equality in Religious Schools. Should the Court Intervene?', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

[172] See L. Batnitzky, 'Is Conversion a Human Right? A Comaparative Look at Religious Zionism and Hindu Nationalism', Paper presented at the conference 'Religions, Rights, and Institutions', Princeton University, November 23-24, 2014. (Unpublished manuscript, on file with the author.)

But the same is true about the question how the mentioned Sabbath work restrictions should be construed, whether they should be perceived and enforced as a day of rest or as a day of leisure. The controversy surrounding this besides the marriage, the conversion or other issues touched upon in this paper is another microcosm of religious-secular tensions and quest for identity in Israeli society, and therefore a product of a Kulturkampf.[173]

This means that Israel as a religiously and ethnically deeply divided society with its traditional values, a strong sense of community, and national interest cannot be deemed as a liberal state forged entirely in Western mold[174], but it cannot return to the pre-modern political conditions either, rather has to move into the direction of 'soft legal pluralism',[175] controlled by the state. But contrary to Ben-Gurion's expectations, the State of Israel loosing control over its own religious establishment, much more than countries with similarly established churches, such as Greece, where civil marriage exists, or even Malaysia, where there is civil marriage at least for non-Muslims, and became an almost theocratic state, which for the sake of the religious freedom of (ultra-)Orthodox Jews does not respect the rights of its non-Orthodox religious, non-religious Jewish, and non-Jewish citizens.

In more general terms Israel after the repeated failures of the 'peace process' and the two-state solution faces very limited options. It either remains Jewish but ceased to be a democracy or else it could become a genuinely multi-ethnic democracy but would in that case cease to be 'Jewish'.[176] This choice became even more realistic after Likud

---

[173] Ruth Gavison goes as far as claiming that the question of work on Sabbath is not about religious or secular accomodation, the freedom to practice religion, or the freedom not to practice religion, but rather about the culture war. See R. Gavison, 'Days of Worship and Days of Rest: A View from Israel', in W. Brugger and M. Karayanni (eds.), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law,* 2007. 409.

[174] This can be the conclusion in many other areas not discussed here as well. For instance a study on bioethics in Isreal concludes that due to a fine line between the demands of authonomy-based secular bioethics and religious norms granting great weight to the sanctity of life. See M. L. Gross and V. Ravitzky, 'Israel: Bioethics in a Jewish-Democratic State', 12 *Cambridge Quarterly of Healthcare Ethics,* 2003. 247-255.

[175] See J. Griffith, 'What is Legal Pluralism?', 24 *Journal of Legal Pluralism,* 1986. 1-55.

[176] These alternatives were drawn up by Tony Judt first in 2003 and then in draft paper written in the summer of 2009, published in 2015. See T. Judt, 'Israel: The Alternative', *The New York Review of Books',* October 2003; T. Judt, 'What Is to Be Done?', J. Homans (Ed.), *When the Facts Change: Essays, 1999-2010,* Penguin, New York, 2015. Chapter XIII. In the latter work Judt also mentions a third outcome, whereby Israel forcibly removes a majority of its Arabs (or makes it intolerable for

won the March 17, 2015 elections, as PM Netanyahu declared that he will never permit a two state-solution between Israelis and Palestinians, adding: "Anyone who is going to establish a Palestinian state, anyone who is going to evacuate territories today, is simply giving a base for attacks to the radical Islam against Israel." Even though two days after the election victory Netanyahu tried to backtrack from his declaration by saying that he only intended to argue that the two-state solution was impossible right now, the pre-election statement questions the commitment to his speech in June 2009 at Bar Ilan University, where he said: "In this small land of ours, two peoples live freely, side by side, in amity and mutual respect. Each will have its own flag, its own national anthem, its own government. Neither will threaten the security or survival of the other. We will be ready in a future peace agreement to reach a solution where a demilitarized Palestinian state exist alongside the Jewish state." [177] But after the elections Netanyahu did not say he was ready to return to negotiations or to present any new plans for achieving peace. One of the very likely consequences of Netanyahu's victory for the near and the mid-term future will be more hypernationalist, anti-democratic legislation, including the new basic law on Israel as the Nation State of the Jewish People.[178] Giving up the two-state solution, even if because 'the reality has changed' also ends any hope for now for the position of liberal Zionism, which claims that Jews could have a state of their own, without depriving Palestinians of their legitimate national aspirations. [179] The one-state solution means that Israel will become, in time, either a non-Jewish democracy or Jewish non-democracy.

---

them to remain) would indeed ensure the survival of a Jewish democracy, but at a grotesque and ultimately self-destructive price. In his last interview Judt again promotes a binational or federal arrangement as the only viable solution in the current circumstances of Israel. See M. Michaeli, 'Tony Judt's Final Words on Israel', *The Atlantic,* September 14, 2011.

[177] As Thomas Friedman argued after the election day with this statement Netanyahu will be the father of the one-state solution. See Th. L. Friedman, Bibi Will Make History, *The New York Times,* March 18, 2015.

[178] In his prediction, David Shulman also lists more deliberate and consistent attempts to undermine the authority of the courts (especially the Supreme Court), more rampant racism, more thugs in high office, more acts of cruelty inflicted on innocents, more hate propaganda and self-righteous whining by official spokesmen, more discrimintaion against Israeli-Arab population, more wanton destruction of the villages of Israeli Bedouins, more warmongering, and quite possibly more needless war. See D. Shulman, 'Bibi: The Hidden Consequences of His Victory', *The New York Review of Books,* April 23, 2015.

[179] See J. Freedland, 'The Liberal Zionists', *The New York Review of Books,* August 14, 2014, and also J. Freedland, 'Liberal Zionism After Gaza', *The New York Review of Books Blog,* July 26, 2014.

Illiberal Approaches

Egypt: Theocratic Constitutionalism

The role of religion in legitimation of the regime before and after its change can also be interesting to study in the case of Egypt, one of the countries of the Arab Spring, the constitution of which used and continued to be theocratic. As we will show the role of shari's as a source of legislation in the in the various Egyptian constitutions haven't really changed through the Mubarak, the Morsi, and El-Sissi era, which means that also modern Muslim states use Islam in national legitimation by claiming their nation needs to be Muslim in the sense that shari'a must be the law of the land.

Theocratic constitutions may designate religious laws as 'the' or 'a' source of state law relevant to legislation and adjudication. The most frequent type of theocratic constitutionalism is Islamic constitutionalism or constitutional Islamization. Muslim majority countries may specify in their constitutions that Islam is the state religion.[180] For example the Malaysian Constitution not only includes special provisions for Islam, but also allows state and federal law to restrict „the propagation of any religious doctrine or belief amonf persons professing the religion of Islam" (Art. 11(4)). Also, according to Malaysian law Muslims can only marry Muslims and must do so according to Islamic law, non-Muslims can marry in civil marriage, irrespective of their religion. Furthermore, if a non-Muslim wishes to marry a Muslim they must convert to Islam before the marriage. In this way Malaysian law is able to minimise intermarriage between Muslim Malays and non-Muslim non-Malays, who consist about 40 per cent of the Malaysia's population. Aside designating a state religion, some Muslim nations also state that Islam is either 'a' or 'the' source of law in the country.[181]

---

[180] See for example, Bahrain (Art. 2), Mauritania (Art. 5), Malaysia (Art. 3), Morocco (Art. 6), Saudi Arabia (Art. 1), Yemen (Art. 2).
[181] See for instance, Bahrain (Art. 2), Egypt (Art. 2), Kuwait (Art. 2), Oman (Art. 2), Qatar (Art. 1), Syria (Art. 3). For a review of constitutions in the Arab world, see N. J. Brown, *Constitutions in the Non-Constitutional World: Arab Basic Law and the Prospect for Accountable Government,* SUNY Press, 2001.

As a recent comparative research conducted by Dawood Ahmed and Tom [182] Ginsburg, which examines Iran, Afganistan, Egypt, and Iraq concludes, the Islamic supremacy clauses originated in British colonial law are not only popularly demanded, but were introduced in these countries during moments of liberalization and modernization, and are in most of the cases accompanied by an expansion, and not a reduction, in rights provided by the constitution. [183] Many Muslim states' constitutions include express provisions concerning religious freedom and the treatment of religious minorities. To protect the interest of religious minorities, these constitutions may include non-discrimination claues that protect individuals from religious discrimination. For instance, Article 18 of Bahrain's constitution states: „People are equal in human dignity, and citizens shall be equal in public rights and duties before the law, without discrimination as to race, origin, language, religion, or belief." Also Article 14 of Erithrea's constitutions reads: „All persons are equal before the law. No person may be discriminated against on account of race, ethnic origin, language, color, sex, religion, disablility, political belief or opinion, or social or economic status or any other factor..." These and other equality clauses are usually listed among the earliest provisions of 'basic rights' and occur without limitation or restriction.

Additionally, Muslim-majority countries' constitutions may include provisions that protect the religious freedom of individuals. Article 29(2) of the 1945 Indonesian constitution reads: „The State guarantees all persons the freedom of worship, each according to his/her own religion or belief." Similar approaches are included in the constitutions of Bosnia-Herzegovina (Art. II, Para 3), Erithrea (Art. 19), Malaysia (Art. 11), Mali (Art. 4), and Morocco (Art. 6). Article 2 or the new Iraqi Constitution besides providing that no law shall violate the established tenets of Islamic law, also describes the protection of the principles of democracy, or the basic freedoms of the constitution, among which are included the freedom of consience (Article 41).

---

[182] Although as a consequence of the Islamic State's violent movement growing social media conversation among Arabs calling for the implementation of Shari'a or Islamic law to be abandoned. See T. L. Friedman, 'How ISIS Drives Muslims From Islam', *The New York Times,* December 6, 2014.
[183] See D. I. Ahmed and T. Ginsburg, 'Constitutional Islamization and Human Rights: The Suprising Origin and Spread of islamic Supremacy in Constitutions', Public Law and Legal Theory Working Papers No. 477. The Law School of the University of Chicago, July 2014.

However the comparative study of Clark Lombardi, which besides Egypt and Iraq also included Kuwait, Sudan, the Yemen Arab Republic, the United Arab Emirates, Qatar, and Bahrain states that provisions stating that Islamic law is the chief source of legislation are generally understood today to mean that states are constitutionally barred from enacting un-Islamic legislation. Morover, under certain circumstances, a constitution that does not make islamic law the chief source of legislation will also be interpreted to prohibit un-Islamic legislation.[184] Therefore, Lombardi concludes that those who wish to predict the trajectory of democracy and liberalism in the Arab world should not focus myopically on the question how the clause on Shari'a as source of legislation is worded or even whether national constitutions contain provisions requiring state law to respect Islam. They should focus also equally hard on other question of constitutional design and interpretation of the courts.[185] For instance some Muslim countries provide qualifying remarks concerning the scope of the religious freedom of the individuals as an absolute freedom coupled with ambiguous limiting language about 'customs', 'public policy', and 'morals'. Article 22 of Bahrain's constitutions provides: „Freedom of consience is absolute. The State shall guarantee the inviolability of places of worship and the freedom to perform religious rites and to hold religious processions and meeting in accordance with the customs observed in the country." Also Article 35 of Kuwait's constitutions states: „Freedom of belief is absolute. The State protects the freedom of practising religion in accordance with established customs, provided that it does not conflict with public policy or morals." The Charter of the National Comprehensive Dialogue (Charte du diaolue national global) of Yemen in the section on 'identity of the state', point 10, entitled 'religion of the state' covers two points. The first defines Islam as the religion of the state and Arabic as the official language of Yemen. The second stipulates that „Yemen is a federal, civil, demeocratic, independent, and sovereign state, founded on equal citizenship, the will of the people, and the sovereignty of the law. It is part of

---

[184] Cf. Clark B. Lombardi, 'Constitutional Provisions making Shari'a „A" or „The" Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?', 28 Am. U. Int'l L. Rev. pp. 733-74 (2013).
[185] *Id.* p. 773.

the Arab and Islamic nation."[186] This shows tht religion is the fundamental marker of identity, competing with national allegiance.

But even if one argues that from a liberal standpoint that since there is relatively little state interference in religious rights in these Muslim majority countries, by republican lights such an order is unfree: it is a state in which religious minorities and would-be apostates are subject to domination, and these religious minorities and those who come to regard Islam as untrue are subject to non-interfering mastery.[187]

Even without going into the details of particular countries' judicial practice one can distingues between two different foundations of religious and liberal values, theocratic constitutionalism can rest on. As we will see, all constitutions of Egypt from 1971 till 2014 contain a 'constitutional Islamization' clause recognizing 'principles of the Islamic Shari'a as principle source of legislation'. Here, the degree to which rights such as religious freedom and equality are enjoyed depends upon secular court jurisprudence. The Egyptian Supreme Constitutional Court in most of the time since 1971 acted as de facto interpreter of religious norms, having developed a creative interpretive technique which enables it to construe Shari'a law consistently with human rights.[188] But similar interpretations can also be found in ducuments written by religious intellectuals. The Declaration of the al-Azhar on the Future of Egypt (Déclaration d'El Azhar sur l'avenir de l'Égypte) of June 19, 2011, drafted under the auspices of the sheikh of El Azhat, Ahmed al-Tayyeb essentially had the goal of determining the social and political principles that should govern the future of Egypt. The Declaration defined Islam as the religion of balance. Acting as the relation between religion and state, it poses Shari'a as the principal source of legislation, but establihes the principle of a nation-state which is constitutional, modern and

---

[186] Quoted by Y. B. Achour, 'The Historical Compromise between the 'Civil State' and Religion on Post-revolutionary Arab Noe-constitutionalism', in S. Ferrari (ed.), Routledge Handbook of Law and Religion, 2015.

[187] This is the argument of David Decosimo's presentation held at the colloquium of the Center of Theological Inquiry on 11 November 2012 based on the republican understanding of liberty represented for instance by Philip Pettit, 'Liberalism and Republicanism', *Australian Journal of Political Science* (1993), 28:4, 162-189.

[188] About Shari'a as rule of law see chapter 5 of Anver Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law,* Oxford University Press, 2012.

democratic, pluralist, founded on the will of the people, dialogue, the law, and liberties, and completely opposed to the theocratic state.[189]

On the other hand courts in other states with constitutional Islamization clauses may undermine constitutionalism, where judges import personal conceptions of religious law into constitutional interpetation, rendering individual rights nugatory and legitimating unequal treatment toward religious minorities. An example for this approach is how apostasy of Muslims in Muslim-majority Malaysia was treated by the court.[190]

But despite of the secular jurisprudence of the Egyptian Supreme Constitutional Court during the Mubarak era the greatest challenge facing Egyptian regime transition has been the deep moral conservatism and hierarchical nature of society - a challenge that obviously impacts the design of the institutional structure. Sunni Muslims make up 90% of Egyptians. Their religious conservatism and acquiescence to social hierarchies is antithetical to the values of liberal democracy, for example, the ideal of citizenship based on equal human dignity, which defined the Tahrir Square Revolution of January 2011. That is why revolutionaries spoke of their revolution as having been 'hijacked' first by the Muslim Brotherhood and later by the military. According to the Arab Spring's more pessimistic critics, the notion of 'revolution' mischaracterizes the events and processes in the region. What was happening instead in 2012 was a slow and gradual but deliberate establishment of Islamic society by the Muslim Brotherhood, and after July 2013 the return of the military's power. The latter interpretation of events suggests that, at least in the short run, Islamists did not intend to transgress against the values and interests held dear by the West.[191] One indication that this may have been the case was the involvement of Egyptian President Mohamed Morsi in brokering the Gaza armistice. This interpretation can also explain

---

[189] See Y. B. Achour, 'The Historical Compromise between the 'Civil State' and Religion on Post-revolutionary Arab Noe-constitutionalism', in S. Ferrari (ed.), Routledge Handbook of Law and Religion, 2015.
[190] See the High Court's decision in Lina Joy v. Majlis Agama Islam Wilayah, (2004), 2 MLJ 119 (High Court). Cited by Thio, 2012. 142.
[191] See H. Agha & R. Malley, 'This is Not a Revolution', *The New York Review of Books*, 8 November 2012.

why the Muslim Brotherhood's representatives – who, incidentally, tend to be educated and speak foreign languages - assured their foreign partners of their commitment to liberty, democracy, human rights, and free elections. Yet, at the same time, this new type of Islamic language, which relegated anti-Western and anti-Israel rhetoric to the background, could easily have alienated supporters of the 'Brotherhood.' An early indication of such a trend was that the Islamic parties' support dropped from 60% in the parliamentary election to 45% in the presidential election. This translated into 18 million votes. Moreover, the latter share of voters represented merely 5 million votes, since nearly half the voting age public failed to turn out, and almost half of those who cast a ballot opted for Mubarak's former prime minister. An optimistic reading of these numbers could have been that the people simultaneously long for Islam and welfare on the one hand and some form of democracy on the other, even if they do not conceive of the latter as liberal.

The 2012 constitutional process was dominated by two Islamist parties, the Muslim Brotherhood and the Salafists. Though the Constitutional Court, which was elected during the Mubarak era but achieved some measure of independence from the regime, dissolved the elected parliament and the committee in charge of drafting the constitution, President Morsi appointed another constitutional committee by decree. To avert the dissolution of the current committee, which most leftist and liberal representatives in the minority have since left, Morsi exempted all his acts from the Constitutional Court's review, pursuant to a decree issued on 22 November 2012. A few days later, bowing to protests by the judiciary and the threat of an impending strike by its members, Morsi signalled a willingness to narrow the range of acts exempted from constitutional review, but persisted in his refusal to submit the decree on the establishment of the constitutional drafting committee to constitutional scrutiny. Consequently, Egypt's 2012 constitution was drafted in line with ideas espoused by Islamists, which resulted in the constitutional incorporation of the Islamic character of the state, though in a more moderate formulation than the one observed in its Iranian counterpart. Article 2 of the new constitution – similarly to Article 2 of the 1971 constitution - proclaims Islam as the state religion and Shari'a as the fundamental underlying principle of legislation. Incidentally, even the secular left and liberal parties accepted this formulation; the Salafist Al-Nour Party was the only one opposed to it, demanding that not only the principles of the Shari'a, but its

individual rules, too, be designated as sources of legislation, including the legalization of female genital mutilation, which was banned in 2008, as well as the setting of the age of marriage at 9 nine years. The new Article 3 provides that the principles of religious law of Egyptian Jews and Egyptian Christians are the main source for legislation governing their religious communities and family relations. The new Article 4 provides enhanced stature for the Azhar, the mosque-college that represents the official religious establishment in Egypt. [192] This Article, in addition to recognizing the Azhar as an independent institution, also provides that "the views of the Committee of the Senior Scholars are to be taken into account with respect to all matters having a connection to Islamic law." Most controversially was the new Article 219, which provides that the 'principles of Islamic law' include its universal textual proofs, its rules of theoretical and practical jurisprudence, and its material sources as understood by the legal schools constituting Sunni Islam.[193]

In the rights section of the constitution Article 43 – also similar to Article 46 of the 1971 constitution – declares freedom of belief as an inviolable right, adding to the 1971 text that the state shall guarantee the freedom to practice religious rites and to establish places of worship for the divine religions as regulated by law. Article 10 of the constitution - which was also similar to Article 9 of the 1971 text – states that the family is the basis of the society and is founded on religion, morality and patriotism.

The only political force opposed to establishing Islam as state religion was the Free Egypt Party, which enjoyed little popular support. It demanded a 'civic state,' enshrining the principle of the separation of state and church, indeed, even a constitutional prohibition on religious parties. While an adoption of this alternative was not realistic, the question was whether the 'Brotherhood' acquiesces to a moderate jurisprudence resembling the previous judicial practice. Because in terms of how (liberal) democratic the character of the new Egypt would be, the question of the extent to which the Constitution can, in reality, safeguard the independence of

---

[192] See M. Fadel, 'Judicial Institutions, the Legitimacy of Islamic State Law and Democratic Transition in Egypt: Can a Shift Toward a Common Law Model of Adjudication Improve the Prospect of a Successful Democratic Transition?' *International Journal of Constitutional Law (ICON),* Vol. 11, 2013, No. 3, pp. 646-665, at 647.
[193] For an overview of the new Article 219, and its relationship to Article 2 and 4 in the 2012 Constitution see N. Brown and C. Lombardi, 'Islam in Egypt's New Constitution', *Foreign Policy,* Dec. 13, 2012.

ordinary courts and of the Constitutional Court, as key elements of the system of checks and balances, as well as rein in the military's political and economic power, proved to be decisive. (The military remained influential and continued to control 40% of the economy, while 70-75% of local municipal leaders still were recruited from the ranks of retired members of army and police.) Another question with relevance to the separation of powers was whether the Muslim Brotherhood, which supported a parliamentary form of government while in opposition, continues to adhere to its previous position even as it controls the presidency, and in how far it accedes at least to checks on presidential power. In any case, President Morsi's aforementioned decree of November 2012 did not point in this direction, and neither did the fact that the committee, fearing another ruling by the Constitutional Court to dissolve it, had rapidly adopted the text designated as final, which was then hurriedly submitted to a referendum by President Morsi. Following protests by those opposed to the draft on 5 December 2012, ten days before the planned referendum, blood was spilt again in the streets of Cairo, while the president's supporters chanted "We fight for divine laws against the secularists and liberals."

Finally the constitution was approved by the Egyptian Constituent Assembly on 30 November 2012 and ratified at referendum on 15 and 22 December 2012. That Constitution was in force as the Constitution of the Arab Republic of Egypt,[194] till 3 July 2013, when the military officers, following a forty-eight-hour ultimatum handed down by Egypt's military commander, Abdel Fattah El-Sissi, to President Mohamed Morsi, asking him to end the political impasse and respond to the demands of the people, removed the country's first democratically elected president, and announced suspension of the Constitution coupled with early presidential and parliamentary

---

[194] Constitution of the Arab Republic of Egypt, 2012, unofficial English translation prepared by International IDEA, available online at http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf. See one of the first assessments of the document: Z. Al-Ali, "The new Egyptian Constitution: An initial assessment of its merits and flaws", 26 December 2012, *Open Democracy,* available online at http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws. Later evaluations were provided by the working paper series of the International IDEA and The Center for Constitutional Transition at NYU Law. No.1, June 2013. Z. Al-Ali & M. Dafel, Egyptian Constitutional Reform and the Fight against Corruption. No.1, June 2013.; A. Welikala, The Legislature under the Egyptian Constitution of 2012. No. 8, June 2013.

elections and named the head of the Supreme Constitutional Court as interim president.[195]

What preceded the coup was a deepening division of the country, with an arrogant Muslim Brotherhood that misread electoral gains for a political blank check along with an incompetent and unpopular President on the one hand, and a reckless opposition that appeared ready to sink the country in order to bring down the Islamists on the other. But besides the opposition parties, Tamarrod (Rebellion), an activist group of young people has managed to collect 22 million signatures to reject Morsi's presidency. This has been indeed the greatest mass movement in Egyptian history, even if the petitions had an amateurish quality, since they did not contain any identification of the signatories[196]. On 30 June millions of people (the counts vary according to whom you choose to believe) went to the streets to demand Morsi's departure, smaller, yet still large numbers responded to insist on his remaining in office. It is hard to know what ultimately pushed the military – which for some time had sought to avoid direct political involvement – to enter the fray as blatantly as it did on 1 July when, though ambiguous as to precise meaning, it essentially ordered the president to yield critics' demands or face the consequences. According to senior advisers of the president, just before the military takeover was about to begin, President Morsi refused to accept a final offer submitted by an Arab foreign minister, who said he was acting as an emissary of Washington. The unspecified foreign minister asked if Morsi would accept the appointment of a new prime minister and

---

[195] Due to early indications that there will be amendments to the 2012 Constitution, a memorandum of International IDEA and The Center for Constitutional Transitions at NYU Law issued in July, 2013 offers a brief analysis of those provisions of the 2012 Constitution that estbalished the horizontal distribution of powers between the legislature, president and prime minister. The study argues that in the pre-Arab Spring era, countries in the Middle East and North Africa (MENA) region were dominated by a strong president who centralized political power, dominated political processes, and established a one-party state in which the president's political allies controlled the state bureaucracy and security services. Constitutional rules facilitated these constitutional failures by failing to limit presidential power, undermining the capacity of the legislature to act as a check on presidential power, and eliminating institutional procedures and safeguards. Constitutional design for the MENA region after the Arab Spring must therefore be driven by principles that guard against a repeat of these constitutional failures, while at the same time ensuring that government can proceed effectively and efficiently. S. Choudhry and R. Stacey, *The 2012 Constitution of the Arab Republic of Egypt: Assessing Horizontal Power Sharing Within a Semi-presidential Framework,* Interntional IDEA, The Center for Constitutional Transitions at NYU Law, July 2013.
[196] See P. Hessler, 'The Showdown. Winners and losers in Egypt's ongoing revolution'*, The New Yorker*, July 22, 2013.

cabinet, one that would take over all legislative powers and replace his chosen provincial governors.[197]   Morsi said no.

This refusal might be a sign of President Morsi's inability to achieve political consensus, and that he was veering toward a more overtly Islamist agenda, as evidenced by the appointment as governor of Luxor a member of a militant group and his overt support for calls for jihad against the Syrian regime. But he was the democratically elected president of the country. Regardless of what one thinks about his presidency, his removal has constituted a blow to Egypt's fragile democracy, entrenching the view that mass protests backed by the army and foreign governments can trump the ballot box, and that investing in a peaceful democratic process is simply not worthwhile[198].

This time Morsi's supporters said that "The democratic process has been hijacked".[199] On 14 August 2013 Egyptian security forces confronted an estimated tens of thousands of supporters of ousted president Morsi. According to the Egyptian Health Ministry, 638 people were killed that day. Of those, 595 were civilians and 43 were police officers.[200] On 19 August 2013, a court ordered the release of former President

---

[197] David D. Kirkpatrick and Mayy El Sheikh, Morsi Spurned Deals, Seeing Military as Tamed, New York Times, July 6, 2013

[198] The analysis of the International Crisis Group goes even further, saying that the military's attempt after the ouster of the President to crack down on Islamists and deprive them of their political rights – coupled with restrictions on the media, not to speak about the killing of more that 50 pro-Morsi demonstrators in the aftermath of the coup – would be almost certainly driving Islamist groups underground and giving rise to a generation of radicalized Islamists, in Egypt and beyond, who will have lost faith in peaceful, democratic change. See A difficult way forward in Egypt, International Crisis Group, Cairo/Brussels, 3 July 2013.

[199] This was the reason, Thomas L. Friedman talked about three revolutions in Egypt. The first, being when the Egyptian people and the Egyptian military topled Hosni Mubarak and installed the former defense minister, aging Field Marshal Mohamed Hussein Tantawi, as the de facto head of state. He was replaced via a revolutionary election by the Muslim Brotherhood's party, led by President Morsi, who was ousted by the third revolution of a new generation of military officers. T. L. Friedman, 'Egypt's Three Revolutions, International Herald Tribune, July 25, 2013. Yasmine El Rashidi argues that the real coup in Egypt was on February 11, 2011, when Mubarak left office, and one wonders when the real revolution might come. See Y. E. Rashidi, 'Egypt: The Misunderstood Agony', *The New York Review of Books,* September 26, 2013.

[200] Y E. Rashidi, 'Scenes from a Crackdown: What Really Happened in Cairo?', *The New York Review of Books Blogs,* http://www.nybooks.com/blogs/gallery/2013/sep/11/scenes-from-crackdown-what-happened-cairo/?utm_medium=email&utm_campaign=September%2017%202013&utm_content=September%2017%202013+CID_5c4b53ac77698b48afb26772737aef3b&utm_source=Email%20marketing%20software&utm_term=Scenes%20from%20a%20Crackdown%20What%20Really%20Happened%20in%20

Hosni Mubarak. Some analysts said that this provided a sign of the return of his authoritarian style of government. As proof of this, on 23 September 2013, a court issued an injunction dissolving the Muslim Brotherhood and confiscating its assets, banning all activities "emanating from it" and any institutions "belonging to it or receiving financial support of any kind from it." [201] According to the court, the organization "used the Islamic religion as a cover for their illicit activities, pushing people to go out in protest on 30 June." The Brotherhood's leadership is now in jail, accused of inciting violence and colluding with foreign organizations such as Hamas. Its assets were frozen. Some schools and hospitals run by the organization were raided and closed. Many thousand members were detained after 3 July, and some of them were reportedly mistreated.[202]

According to a new law promulgated by the interim president in the end of November, the government must be notified of all gatherings of more than 10 people.[203] Demonstrations overnight or at places of worship are banned. Moreover, the Interior Ministry, which controls the country's police force, has full discretion to reject applications, and the law threatens those who take part in banned protest with jail or heavy fines. On December 22, three activists who played central roles in the uprising against former President Hosni Mubarak were convicted of participating in recent protests and sentenced to three years in prison, raising fears that the new government was seeking revenge against opponents of Egypt's old order.[204]

Also social and charitable groups even loosely associated with the Brotherhood

---

Cair. On August 14, when Egypt's security services stormed two squares in Cairo where Morsi's supporters were holding sit-ins, the interim government imposed a state of emergency as well as a nighttime curfew, which was lifted after three months. See Kareem Fahim, 'Government in Egypt Eases Restrictions', *The New York Times,* November 14, 2013.

[201] David D. Kirkpatrick, **'**Egyptian Court Shuts Down the Muslim Brotherhood and Seizes Its Assets', *The New York Times,* September 23, 2013.
[202] Ursula Lindsey, **'**Ban of Brothers', The New York Times, September 26, 2013.
[203] David D. Kirkpatrick, 'New Law in Egypt Effectively Bans Street Protests', *The New York Times,* November 25, 2013.
[204] Kareem Fahim, 'In Blow of Leadership of '11 Revolt, Egypt Activist Are Given 3 Years in Prison, *The New Yrok Times,* December 22, 2013.

struggled after their funds were frozen by the state. It was a new level of disruption to a society already riven by violence and suspicion in the month since the military ousted President Morsi. In December 25 the military-backed government declared the Muslim Brotherhood a terrorist group, giving the security forces greater latitude to stamp out a group deeply rooted in Egyptian social and civic life.[205] The government had also sought to deny the group foreign help or shelter, urging other Arab governments to honor an antiterrorism agreement and shun the organization.

One of the more theoretical questions regarding the failure of the original democratic aspirations of the Arab Spring in Egypt so far is whether the failure proves again the robustness of authoritarianism in the Middle East. For most Middle East specialists, the events of the Arab Spring proved especially jarring, even if welcomed, because of their extensive investment in analyzing the underpinnings of authoritarian persistence, long the region's political hallmark. The empirical surprise of 2011 raised the pressing question, whether the specialists needed to rethink the logic of authoritarianism in the Arab world? One of these specialists argues that the Middle East was not singularly authoritarian because it lacked the prerequisites of democratization (whether cultural, socioeconomic, or institutional), because of the exceptional will and capacity of the coercive apparatus (firstly the military, and then the security forces too) to repress. The main question in January-February 2011 in Cairo was whether the military would shoot the protesters. As we know, they did not, because these events in Egypt (as well as similar events in Tunisia two month earlier), highlighted an empirical novelty of the Arab world, namely, the manifestation of huge, cross-class popular protests in the name of political change, as well as a new factor that abetted the materialization of this phenomenon, the spread of social media.[206] As we know now, the attitude of the military changed during the summer of 2013, which may be another reason for the reconsideration of the nature of

---

[205] Kareem Fahim and Mayy el Sheikh, 'Egypt Broadens New Crackdown on Brotherhood', *The New York Times,* December 26, 2013.

[206] See Eva Bellin's article, published in 2004 under the title 'The Robustness of Authoritarianism in the Middle East' (Comparative Politics, 36 (January 2004). Eight years later she reconsidered her earlier writing. See E. Bellin, 'Reconsidering the Robustness of Authoritarianism in the Middle East. Lessons from the Arab Spring', *Comparative Politics,* Volume 44, Number 2, 2012 January, pp. 127-149.

authoritarianism in Egypt.[207] The Egyptian army, a state within a state that used to protect its interest from the shadows, with the new constitution voted in mid-January 2014, took bolder steps to cement its power and asserting overtly, that it is accountable to no one. Article 234 gives the military the final say over who may be appointed as defense minister. Other articles mandate the military's budget be listed as a single entry in national accounts and civilians may be tried before military courts if they assault members of the armed forces in military zones and military-owned properties, which in Egypt includes at least a quarter of the country's economy.

The lessons to be learned from the failure is that one party cannot rule alone at a time of socio-political polarization and transformation, and that the new constitution, as a long-term social contract among Egyptians of varying ideological bents and ethnic, class and religious backgrounds, must be redrafted in ways acceptable to key political players and constituents, including the Muslim Brotherhood and their allies. International support, including that of the U.S. could have been important in limiting the creation of partisan constitutions in a situation of deep political division and power concentration in one group. Unfortunately in the case of Egypt, outsiders, like the U.S. or the European Union, have not really found proper mechanisms for how to do this. As a result, they are awkwardly defending with their lack of condemnation of events a de facto military coup, which cannot be a legitimate tool against a democratically elected president.[208] Many argue now that, following the Arab Spring, the society was too deeply divided for an election and for a new constitution.[209] But if these decisions were taken by the people of Egypt, even if not all of them were

---

[207] In his book, Thanassis Cambanis argues that Egyptians have paid a heavy price for their centuries-long tradition of authoritarian rule and the consequent political inexperience of its opponents at all levels. The supporters of demcracy in Egypt, he claims, always held a weaker hand than the outside worls imagined. Mubarak fell because of pressure form below, but also because the Egyptian Army was alienated by his plan th have his son Gamal succed him. See T. Cambanis, *Once Upon a Revolution. An Egyptian Story,* Simon and Schuster, 2015.

[208] These are different approaches by two New York Times columnists. For the first, see Thomas L. Friedman, 'Can Egypt Pull Together?*' The New York Times*, July 7, 2013, and for the second, see David Brooks, 'Defending the Coup*', The New York Times*, July 4, 2013. Brooks is 'defending the coup', because "Egypt…seems to lack even the basic mental ingredients for democracy".

[209] See Paul Collier, 'Democracy in Dangerous Places: Egypt – What Went Wrong?' *Social Europe Journal*, July 7, 2013. There are similar arguments after the coup and the massacres of Morsi's supporters that, rather than forcing Cairo to hold elections and threatening to suspend aid if it does not, suggest that Washington should press the current leadership to adhere to clear standards of responsible governance, including ending the violence and political repression, restoring the basic functions of the state, facilitating economic recovery, countering militant extremists and keeping the peace with Israel. See Ch. Kupcan, 'Democracy in Egypt Can Wait', *The New York Times,* August 16, 2013

listened to in the process, the consequences of their choices have to be fixed by them, too, and not by any external forces, even in an extreme, emergency situation. It would have been ideal, if the new, suspended constitution had provided any legitimate solution on how to get rid of an incompetent and unpopular president. This is the fault of the Muslim Brotherhood, but also those who supported the transition. In the absence of such constitutional approach, not the coup but a real revolution is the only solution, since in the case of the involvement of the military there are no guarantees against a military dictatorship. Of course, even after a revolution guarantees are needed to secure the consensual character of the transitional process.

After the Muslim Brotherhood's Constitution was suspended, Egypt's military-backed government began a two-phase process of creating a new constitution. During the first phase, the regime tasked a committee of ten judges, law professors and legal scholars with drafting a list of constitutional amendments. In the second phase, it appointed a committee of 50 representatives from various state institutions and social groups to build upon these amendments and write a new constitution. According to its president, Amr Moussa, a former minister of foreign affairs for Egypt in the Mubarak era and secretary general of the Arab League the Committee of 50 gave everyone a seat at the table, including Egyptian feminists, young people, and religious groups, including the Muslim Brotherhood, which did not respond to the invitation. Moussa argued that the document which was finalized on 1 December 2013, and voted on 14 January 2014 as the start of a two-day referendum turns the page decisively on both the 1971 and the 2012 Constitution marks a historic step on our path to a government that is of, by and for the Egyptian people.[210] External observers, like myself should me more cautious, remembering that the previous Constitution prepared almost exclusively by the Muslim Brotherhood was also approved by a referendum with 63 percent of the vote. This new Constitution seems to go into the other extreme of an illiberal constitution, as it was drafted with minimal input from Islamist perspectives and could further crush the Brotherhood by banning political parties based on religion. Therefore for those who saw the military as a better alternative to the Brotherhood in July 2013, the new Constitution, which gives special privileges to the military, certainly cannot be considered as a revolutionary one, rather a document of

---

[210] Amr Moussa, 'Blueprint for a New Egypt', *The New York Times,* 8 January 2014.

Egypt's counterrevolution.[211] Unfortunately as the US backed Mubarak's regime until its very last days, even during the mass protests of January 2011, the US hoped Mubarak could survive if ha made political concessions. But the US is not alone in this: also diplomatic support from Europe and Japan, which suffered minor interruption when the repression peaked late in the summer of 2013, has largely been restored. The West appears to see no contradiction in supporting the 'stability' of the Sisi regime at a time when the Egyptian population is suffering from the extreme instability that comes with mass arrests and torture.[212]

The 2014 constitution has removed Article 219 favored by the Islamist, and added Article 11 to the provision on the family saying that the state commits to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution, which means with Article 2 on the principles of Islamic Shari'a. Despite these changes, however, the 2014 text in all religious matters is very similar to the 2012 constitution, which was itself based on the previous constitution adopted in 1971. But one cannot forget the fact that the ban of the Muslim Brotherhood, the largest Islamist party in the country very much effects the religious rights of their previous members and supporter. And contrary to the situation during the Mubarak and the Morsi era the Supreme Constitutional Courts does not play any role to protect these religious rights.

Hungary: Restrictive Formal Separation

In Hungary the center-right government of FIDESZ, the Alliance of Young Democrats, with its tiny Christian Democratic coalition partner received more than 50 % of the actual votes, and due to the disproportional election system, they won two-thirds of the seats in the 2010 Parliamentary elections. With this overwhelming majority they were able to enact a new Constitution without the votes of the weak opposition parties. [213] But this constitutionalist exercise aimed at an illiberal

---

[211] Sara Khorshid, 'Egypt's Counterrevolution', *The New York Times,* 30 December 2013.
[212] See T. Stevenson, 'Sisi's Way'*, London Review of Books,* Vol. 37. No. 4. 19 February 2015.
[213] The common characteristic of the Hungarian and the Egyptian constitutional drafting procedures is that both were non-inclusive and non-consensual. The governing forces from different factions both in Hungary and Egypt were not ready to agree on the rules of the game and the desired constitutional system. So instead, each winning side proceeded with a winner-take-all mentality that was sure to

constitution. The new constitution, entitled the Fundamental Law of Hungary, which was passed by the Parliament on 18 April 2011, similarly to the Israeli and the Egyptian approach shows the role of religion in national legitimation through characterizing the nation referred to as the subject of the constitution not only as the community of ethnic Hungarians, but also as a Christian community, narrowing even the range of people who can recognize themselves as belonging to it. The preamble to the Fundamental Law, which it is compulsory to take into consideration when interpreting the main text (see, paragraph (3) article R), commits itself to a branch of Christianity, the Hungarian Roman Catholic tradition. According to the text of the preamble, "We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe", the members of the Hungarian national recognise Christianity's "role in preserving nationhood", and honours the fact that the Holy Crown "embodies" the constitutional continuity of Hungary's statehood. Besides the sacral symbols, this choice of ideology is reflected—inter alia—in the Fundamental Law's concept of community and its preferred family model (paragraph (1-9 of section L,), and its provision regarding the protection of embryonic and foetal life from the moment of conception (section II).

The preamble, while giving preference to the thousand-year-old Christian tradition, states, that "we value the various religious traditions of our county". The choice of words displays its model of tolerance, under which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to

---

alienate and frighten losers. Instead of consultations and consensus-building with other political parties and NGOs, the processes of constitutional preparation – in which Fidesz and the Muslim Brotherhood excelled – became arbiters of an ever-more polarized political stand-off. Fidesz didn't even try to hold a referendum on the final text of the constitution, while in Egypt the referendum was put before an under-informed and manipulated electorate. Both Fidesz and the Muslim Brotherhood perceived their successive electoral victories as a mandate to shape the polity as they deemed fit, overlooking the need to share power, weakening checks and balances in the new constitutions. Dismissing their admittedly ineffective opposition, both Fidesz and the Muslim Brotherhood instead focused on trying to first sideline and later co-opt state actors they deemed more important, and thus potentially more threatening, namely the constitutional courts and the ordinary judiciary. Sometimes even the tools, used were the same. For instance to have more loyal judicial leaders and judges both governments threatened judges with early retirement on grounds that they were Mubarak- and Kádár-era holdovers. Also both governments have taken control of state media outlets and censored commercial media channels. In addition, curtailment of freedom of religion of the more than two hundred deregistered smaller non-Christian churches in Hungary, and the non-Islamic churches in Egypt is a common characteristic of the two constitutional systems.

the various "religious traditions", but does not apply to the more recently established branches of religion, or to those that are new to Hungary, or to non-religious convictions of conscience.

Before 1 January 2012, when the new constitution became law, the Hungarian parliament prepared a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. One of these cardinal law was the law on the status of the churches, according to which the power to designate legally recognized churches is vested in the Parliament itself. The law listed fourteen legally recognized churches and required all other previously registered churches (more than two hundred religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as religious associations without the legal benefits offered to the recognized churches (like tax exemptions and the ability to operate state-subsidized religious schools). After this new law went into effect, only eighteen of the deregistered churches have been able to re-register, so the vast majority of previously registered churches have been deprived of their status as legal entities. Because registration requires an internal democratic decision-making structure and transparent finances the majority of previously registered churches were not able to continue to operate with any legal recognition under the new regime either because they did not elect their religious leaders or because anonymous giving constituted part of their financing. Non-traditional and non-mainstream religious communities – which had not faced legal obstacles between 1989 and 2011 – are now facing increasing hardships and discrimination as a result.

In February 2013 the Constitutional Court declared unconstitutional parts of the law regulating the parliamentary registration of churches. In response to this decision, the Fourth Amendment to the Fundamental Law in April 2013 elevated the annulled provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review. Even though the Constitutional Court argued that the registration of churches by the Parliament does not provide a fair procedure for the applicants, this procedure became part of the constitution. That effectively means a very serious restriction on the freedom to establish new churches in Hungary.

On the basis of nine religious communities and individuals the European Court of Human Rights in its judgment of 8 April 2014 in the Case of *Magyar Keresztény Mennonita Egyház and Others v. Hungary* [214] also found that Hungary's unconstitutional church law also violated Article 9 on the right of religious freedom of the European Convention of Human Rights. Hungary appealed the decision to the Grand Chamber. The Grand Chamber rejected that appeal, so on 9 September 2014 the decision became final and binding.

Since the judgement of the ECtHR, just like the decision of the Hungarian Constitutional Court had never been respected or implemented, not registered religious communities in Hungary still enjoy religious freedom the way NGOs enjoy freedom of association. Denied equality under the law and subject to opague regulations, deregistered religious communities, like NGOs unpopular in the eyes of the government, are subject to arbitrary and expensive audits, hindered or prevented from raising money, attacked in the government controlled media, and harassed by local officials.

In other words, it isn't easy to characterize the state and religion relations in Hungary using Hirschl's models. It is certainly not theocratic constitutionalism, and also not a religious establishment approach, which exist in some of Europe's most liberal and progressive polities, such as Norway, Denmark, Finland, and Iceland, having a formal, mainly ceremonial designation of a certain religion as the 'state religion', or even in Germany, where the institutional apparatus of the Evangelical, Catholic, and Jewish religious communities are designated as public corporations and therefore qualify for state support from the German church tax.[215] Hungary's unique system is perhaps the closest to a more de facto scenario than a de jure model, where formal separation of church and state, as well as religious freedom more generally, is constitutionally guaranteed, but where emerging patterns of politically systemized hegemony of the Catholic Church and religion-centric morality is present in the constitutional arena. This illiberal approach of state-religion relationship is similar to the previously mentioned approach in Ireland. The preamble of the new Hungarian

---

[214] Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12
[215] Cf. Hirschl, p. 29.

Fundamental law, entitled National Avowal states: "We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love." According to Article L of the Fundamental Law: "(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival."

The Fundamental Law's conception of marriage – which, incidentally, follows the definition serving as the basis for the Constitutional Court's Decision 154/2009 (XII. 17.) AB on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards faithfulness, procreation and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural-law principles, protects those of the people's interests that not everyone attributes themselves to, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family, a modern, living Constitution to especially a new Fundamental Law should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality.

With the constitutional ban on same-sex marriage, the Constitution-maker has ruled out the future ability of the Hungarian legislature, following the worldwide tendency, to make the institution of marriage available to same-sex couples. In keeping with this, article XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian Constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life – based on sexual orientation alone. This solution runs counter not only to the European Union's Charter of Fundamental Rights and the case law of the European Court of Justice (for the latest example, see judgment C-147/08 in the case of *Jürgen Römer v. Freie und*

Hansestadt Hamburg), but also to the provisions of Hungary's still effective Act CXXV of 2003 on the Promotion of Equal Treatment and Equal Opportunities.

While a complete neutrality of the constitutional text is almost impossible, these provisions very much challenge the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values – as the preamble words it: "the form in which we want to live" – and they are capable of ostracizing them from the political community.

At the end of 2012 the Constitutional Court annulled the very definition of the family in the law on the protection of families as too exclusive. Due to the Fourth Amendment now the Fundamental Law defines marriage and the parents–children relationship as the basis of family relationships, not mentioning extramarital relations and parenting.

Conclusions

Constitutions in the modern world often have a great deal to say about religious liberty. Liberal constitutions require freedom of religious belief and propitious conditions for collective worship. Illiberal constitutions often intermingle religion and state authority to the point where an official religion dries out contenders or where religious doctrine had direct legal status. Some illiberal constitutions ban any religious influence on political life. In this paper I tried to catalogue the different sorts of constitutional orders and provide a theoretical account of their differences, before focusing in on three constitutional approaches. One of them, Israel as a religiously deeply divided society in recent years turns to religion to justify its claim to statehood. In response to persistent delegitimation, from within and without, the current government seems to support non-secular Zionism's efforts to expand the role of religion in its political legitimation. This 'religionization' of Israeli Jewish society together with an ethnic division within the framework of a single territorial entity (due to the failure of the political leadership to reach a two-state territorial solution) leads

to a Jewish nationalism, based in a collective identity rooted in religious foundations, which might well defeat 'Israeliness' as identity, as well the importance of democratic principles, including the rights of national and religious minorities. Similarly, in Egypt and Hungary the growing importance of religion in national legitimation was one of the reasons that these two of the world's newest constitutions have taken an illiberal path escorted by religious intolerance and associated persecution of religious groups.

One of the lessons to be learned from these case studies is that different constitutional models of state-religion relationships alone do not indicate the very status of religious rights in a polity, as the three countries investigated here represent three distinct approaches: Egypt being a theocratic, Israel an accomodationist, and Hungary a formally secular one. Also religious divide is different in the three cases: Israel being religiously deeply divided, while Egypt and Hungary more homogenous, though having very distinct cultural history. In all cases the political aspirations for more illiberal constitutionalism, although in the cases of Israel and Hungary after a liberal democratic period, while in Egypt without such experiences, seemed to be the decisive element to find similarly restrictive measures for freedom of religion.