

# VARIETIES OF STATE–CHURCH RELATIONS AND RELIGIOUS FREEDOM THROUGH THREE CASE STUDIES

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## ABSTRACT

*This Article attempts to answer the questions: Is secularism a nonnegotiable aspect of liberal constitutionalism? And can nonsecular state–church relationship models guarantee freedom of religion as an indispensable condition of liberal constitutionalism? Hence this Article deals with the practice of religious freedom in countries representing distinct models of state–church relations from both a normative/theoretical and an empirical perspective. The normative part of the Article examines the different models of state–religion relationships, while the empirical part will compare different national constitutional regulations on religious rights in three countries: Hungary (which became a liberal democracy after 1989-90 but has been backsliding into an illiberal constitutional system since 2010); Israel (a liberal democracy with a very special accommodationist model); and Egypt (a country that between 2011 and 2013 started to build up a democratic system with an illiberal theocratic constitutionalism). The hypothesis for my project is that the model of state–religion relations determines the state of religious freedom of a given country: The secular separationist model is by definition tolerant towards all religions, while the theocratic model is necessarily intolerant towards minority religions. But the three case studies should give an answer to the question raised in the title of this panel: at least from the perspective of freedom of religion, whether secularism is a nonnegotiable aspect of liberal constitutionalism.*

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## MODELS OF STATE–RELIGION RELATIONS

In his famous book *The Clash of Civilizations and the Remaking of World Order*, 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."<sup>1</sup> 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 peoples of Western Christianity, on the one hand, from Muslim and Orthodox peoples on the other."<sup>2</sup> His concluding question and answer are: "Where does Europe end? . . . [W]here Western Christianity ends and Islam and Orthodoxy begin."<sup>3</sup>

Alfred Stepan convincingly argues against Huntington that the greatest obstacles to liberal democracy, for instance, in Turkey or Egypt, are posed "not by Islam but by military and intelligence organizations unaccountable to democratic authority."<sup>4</sup> Both countries have more restrictions on freedom of religious expression within civil society and on freedom of organization within political society than any longstanding Western liberal democracy. The same

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1. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 70 (1996).

2. *Id.* at 28, 217, 238.

3. *Id.* at 158.

4. See Alfred Stepan, *Religion, Democracy, and the "Twin Tolerations,"* in *WORLD RELIGIONS AND DEMOCRACY* 18 (Larry Diamond, Marc F. Plattner & Philip J. Costopoulos eds., 2005).

applies to Orthodoxy in Russia, where the 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.”<sup>5</sup> By “twin tolerations,” Stepan means that (1) religious institutions should not have constitutionally privileged prerogatives that allow them to mandate public policy to democratically elected governments; and (2) at the same time, individuals and religious communities, consistent with our institutional definition of democracy, must have complete freedom to worship privately.<sup>6</sup> 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 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.<sup>7</sup>

Let us first see how West European democracies have met the requirements of “twin toleration.” Some of the European Union (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 established churches. (Only Sweden disestablished the Lutheran Church in 2000.) Although Germany does not have an established church, Protestantism and Catholicism are recognized as official religions, and the majority of citizens pay a state-collected church

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5. See *id.* at 3. The essay originally appeared in Alfred Stepan, *Religion, Democracy, and the “Twin Tolerations,”* 11 *J. DEMOCRACY* 37 (2000). A much longer and more extensively footnoted version appeared in ALFRED STEPAN, *The World’s Religious Systems and Democracy: Crafting the “Twin Tolerations,”* in *ARGUING COMPARATIVE POLITICS* 213 (2001).

6. See STEPAN, *supra* note 5, at 217.

7. As is 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 are Portugal and Turkey.

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 relations can be differentiated in contemporary Europe: the one with an established church, the militant secular, and the mixed one with a dominant, but civil church. Silvio Ferrari describes these models using one country for each: English multiculturalism, French secularism, and Catholic civil religion in Italy.<sup>8</sup> Ferrari concludes that there are sharp distinctions between the religious freedom of individuals, which all European states protect, and the status of religious communities and institutions, which are subject to restrictions.<sup>9</sup> In another work on 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.<sup>10</sup> But the lesson from the European picture is that liberal democracies are compatible with both established churches and with unfriendly separation of church and state approaches. Therefore the concepts of secularism and the separation of state and religion have a place in Western European liberal democracy only in the context of Stepan’s “twin tolerations”. This means that we have to “leave room for democratic bargaining and the nonliberal public argument within religious communities that it sometimes requires.”<sup>11</sup>

Despite the fact that the Americas and Europe are considered to be exceptionally secular, constitutional declarations of state secularity are more pronounced in the countries of Asia and Africa: Twenty-two African and nine Asian constitutions affirm the secularity of the state either in their preambles or in their main texts.<sup>12</sup> A minority of nine of the world’s forty-four Muslim-majority countries declare themselves to be “Islamic states,” while eleven declare themselves to be secular or laic.<sup>13</sup> In other words, a higher

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8. See Silvio Ferrari, *Models of State–Religion Relations in Western Europe*, in *THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES* 202, 202 (Allen D. Hertzke ed., 2013).

9. See *id.* at 212.

10. Silvio Ferrari, *The Legal Dimension*, in *MUSLIMS IN THE ENLARGED EUROPE: RELIGION AND SOCIETY* 219, 226 (Brigitte Maréchal et al. eds., 2003).

11. See Stepan, *supra* note 4, at 11.

12. See Silvio Ferrari, *Constitution et Religion*, in 3 *Traité international de droit constitutionnel: Suprématie de la Constitution* 437, 451 (Michel Troper & Dominique Chagnollaud eds., 2013).

13. John T.S. Madeley, *Constitutional Models and the Protection of Religious Freedom*, in *ROUTLEDGE HANDBOOK OF LAW AND RELIGION* 209, 212 (Silvio Ferrari ed., 2015).

proportion of Muslim-majority countries have opted for ostensibly secular constitutions than the world's Christian-majority countries. But the original meaning of secularism and the separation of church and state are in permanent change also outside Europe.<sup>14</sup> In both India and Israel, for instance, by the 1990s, 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"<sup>15</sup>) did not prohibit the thirteen 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 all around the world, one can use Ran Hirschl's book, which differentiates nine extant models of state and religion relations.<sup>16</sup> For the purposes of this study, I use a less sophisticated structure of models, leaving out the communist regimes' atheist state model at the non-liberal end of the continuum and the illiberal pure theocratic model where supreme religious and political leadership is unified, such as in the former Hindu Kingdom or Nepal or Saudi Arabia, where the Quran and Sunna are the constitutions.<sup>17</sup> I put the remaining constitutionalist models into three major categories.

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14. 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 KEITH WARD, *RELIGION & COMMUNITY* 106-07 (2000). In other words, in a religiously plural society, secularism prevents state identification with one religion. Both the rigid nineteenth century 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 that affirm the secular character of the state, as Silvio Ferrari argues this relationship is not necessarily organic, since less than one third of secular states are also "separationist." See Ferrari, *supra* note 12, at 466.

15. U.S. CONST. amend. I.

16. See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 47-49 (2010).

17. "A state that has union with a particular religious order is a theocratic state, governed by divine laws directly administered by a priestly order claiming divine commission." See Rajeev Bhargava, *Secular Politico-Legal Regimes in Religiously Homogenous and Diverse Societies*, in *ROUTLEDGE HANDBOOK OF LAW AND RELIGION*, *supra* note 13, at 229-43.

The first model is the secular separationist. The Establishment and the Free Exercise Clauses of the First Amendment of the U.S. Constitution represent one of the subcategories of the model of separationism, where secularism is treated as neutral.<sup>18</sup> Hirschl describes the Canadian and the postapartheid South African state–religion relationships, along with other immigrant societies’ approaches, as “softer version[s] of [a] formal separation accompanied by a true commitment to multiculturalism and diversity.”<sup>19</sup> Another “more . . . de facto scenario than . . . de jure model[] involves countries where formal separation of church and state, as well as religious freedoms more generally, is constitutionally guaranteed” with de facto dominance of one church.<sup>20</sup> Some predominantly Catholic countries in Europe, such as Ireland, Malta, Portugal, Spain, Italy, Slovakia, and Hungary, either removed or formally never had the special status of Catholicism in their constitutions but de facto still acknowledge the dominance of the Catholic Church.

The second large model is that of the religious establishment. Its weak form is represented in the designation of the Evangelical Lutheran Church as the “state church” in the Scandinavian countries.<sup>21</sup> “In England, the monarch is the ‘supreme governor’ of the Church of England and ‘defender of the faith.’”<sup>22</sup> The constitution in Greece, without explicitly recognizing it as a state church, declares that the Greek Orthodox Christian religion is the prevailing religion in the country. “A[nother] diluted version of this model operates in Germany, where the institutional apparatuses of the Evangelical, Catholic, and Jewish religious communities are

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18. In the current political system of the United States, however, the separation of faith and government is more cozy than 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.” Rick Perry, Governor, *The Response: A Call to Prayer for a Nation in Crisis* (Aug. 6, 2011). Also, “Alabama Chief Justice Roy Moore . . . who once put up a granite monument to the Ten Commandments in the rotunda of the Alabama Judicial 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 Frank Bruni, *Too Much Prayer in Politics: Republicans, the Religious Right, and Evolution*, N.Y. TIMES (Feb. 14, 2015), <https://mobile.nytimes.com/2015/02/15/opinion/sunday/frank-bruni-republicans-the-religious-right-and-evolution.html> [<https://perma.cc/4UKN-2SN9>].

19. See HIRSCHL, *supra* note 16, at 28.

20. See *id.* at 29.

21. See *id.*

22. See *id.*

designated as public corporations and therefore qualify for state support from the German church tax.”<sup>23</sup> Hirschl calls the approach, 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,” listing Kenya, India, Israel, Ethiopia, Indonesia, Lebanon, Nigeria, Gambia, Senegal, Ghana, the Philippines, Singapore, Sri Lanka, and Tanzania under this model.<sup>24</sup> Israel’s government involvement in religion is low for the Middle East/North Africa (MENA) region but relatively high on a global scale.<sup>25</sup> As Hirschl argues, the state in such a setting has an embedded interest in preserving or promoting a viable “state religion” to the extent that this religion provides meaning to the national meta-narratives that constitute the nation as such.<sup>26</sup> He also mentions other less formal illustrations of this logic, such as the Ukrainian Orthodox Church in Ukraine and the Serbian Orthodox Church in Serbia, which both show close ties between nationalism and religious affiliation. As I will discuss later in more detail, the Hungarian Fundamental Law of 2011 declares that the state and religious communities shall operate separately. Therefore, the country belongs to the model of formal separation with *de facto* dominance of the Catholic Church, but with a strong emphasis on “the role of Christianity in preserving nationhood” and with other characteristics of an illiberal democracy.<sup>27</sup>

The third model—theocracy—can be labeled as one type of constitutionalism in illiberal polities.<sup>28</sup> 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

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23. *See id.*

24. *See id.* at 30-40.

25. The government involvement in religion (GIR) score in Israel is 37, while in Saudi Arabia it is 78, and in Iran, 67. *See Madeley, supra* note 13, at 219-21.

26. *See HIRSCHL, supra* note 16, at 29.

27. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb.

28. *See Li-Ann Thio, Constitutionalism in Illiberal Polities, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 133, 133-52 (Michel Rosenfeld & András Sajó eds., 2012). This 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. *See id.*



authority[, the existence of a constitutional catalogue of rights,] and the existence of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state [as the] “state religion”; (3) the constitutional enshrining of the religion and its texts, directives, and interpretations as *a* or *the* main source of legislation and judicial interpretation of laws—essentially, laws may not infringe on injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that often not only carry symbolic weight but are also granted official jurisdictional status . . . and operate in lieu of, or in an uneasy tandem with, a civil court system.<sup>29</sup>

The two subcategories, 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.<sup>30</sup> 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.”<sup>31</sup> For instance, “Saudi Arabia, arguably one of the countries whose legal system comes closest to being fully based on *fiqh* (Islamic jurisprudence), . . . exempted the entire finance, banking, and corporate capital sectors from the application of Shari’a rules.”<sup>32</sup> The mixed system comes the closest to the ideal model of constitutional theocracy.<sup>33</sup> 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* constitutional court, is composed of six mullahs appointed by the supreme leader and six jurists proposed by the head of the judicial system and voted on by the Majles, the Iranian parliament, which means that the Constitution also respects the popular source of sovereignty, the elected parliament, and some separation of powers

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29. See HIRSCHL, *supra* note 16, at 3.

30. See *id.* at 21-49. Similarly to Hirschl, others argue that there are two distinct subcategories of theocratic constitutions: 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 THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 28, at 1287, 1287-303.

31. See HIRSCHL, *supra* note 16, at 33.

32. See *id.*

33. Saudi Arabia (with 78) and Iran (with 67) score first and second on the government involvement in religion (GIR) measure of regulatory burdening in the religious field, which accords with what is widely known about their theocratic systems of government, their treatment of certain religious minorities, their extensive system of regulation, and their privileging of religious legislation. See Madeley, *supra* note 13, at 219-21.



principles.<sup>34</sup> 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 grappled with the contested status and role of Shari’a.<sup>35</sup> In other words, constitutional theocracies are constitutional systems but not necessarily liberal ones.

#### 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, it won two-thirds of the seats in the 2010 Parliamentary elections.<sup>36</sup> With this overwhelming majority, it was able to enact a new constitution without the votes of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitution. The new constitution, entitled the Fundamental Law of Hungary, which was passed by the Parliament on April 18, 2011, similar to the Israeli and the Egyptian approach, shows the role of religion in national legitimation. The document characterizes the country not only as the community of ethnic Hungarians but also as a Christian community, narrowing even further the range of people who can recognize themselves as belonging to it. The preamble to the Fundamental Law, which must be taken into consideration when interpreting the main text,<sup>37</sup> 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.”<sup>38</sup> The

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34. *Council of Guardians*, ENCYCLOPEDIA BRITANNICA (last updated Feb. 18, 2016), <https://www.britannica.com/topic/Council-of-Guardians> [<https://perma.cc/8H2D-P7DU>].

35. For more about the jurisprudence of the Supreme Constitutional Court before the Arab Spring, see TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007); NATHAN J. BROWN, *EGYPT: A CONSTITUTIONAL COURT IN AN UNCONSTITUTIONAL SETTING* (2013).

36. *See Round 2 of the Parliamentary Election of 2010*, NATIONAL ELECTION OFFICE (HUNGARY) (last updated May 11, 2011), [http://www.valasztas.hu/en/parval2010/298/298\\_0\\_index.html](http://www.valasztas.hu/en/parval2010/298/298_0_index.html) [<https://perma.cc/47EQ-2CPP>].

37. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. R, para. 3.

38. *Id.* pmb1.

members of the Hungarian nation recognize the “role of Christianity in preserving nationhood” and honor the fact that the Holy Crown “embodies the constitutional continuity of Hungary’s statehood.”<sup>39</sup> Besides the sacral symbols, this choice of ideology is reflected—*inter alia*—in the Fundamental Law’s concept of community, its preferred family model,<sup>40</sup> and its provision regarding the protection of embryonic and foetal life from the moment of conception.<sup>41</sup>

The preamble, while giving preference to the thousand-year-old Christian tradition, states that “[w]e value the various religious traditions of our country.”<sup>42</sup> 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 extends to 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 nonreligious convictions of conscience.

Before January 1, 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 laws was the law on the status of 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 200 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 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

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39. *Id.*

40. *Id.* art. L, para. 1.

41. *Id.* art. II.

42. *Id.* pmbl.

the new regime, either because they did not elect their religious leaders or because anonymous giving constituted part of their financing. Nontraditional and nonmainstream 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 April 2013, in response to this decision, the Fourth Amendment to the Fundamental Law elevated the annulled provisions into the main text of the Fundamental Law with the intention of excluding further constitutional review.<sup>43</sup> 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 an application brought by nine religious communities and individuals, the European Court of Human Rights (ECtHR) in its judgment of April 9, 2014, in the case of *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, found that Hungary's unconstitutional church law also violated Article 9 on the right of religious freedom of the European Convention of Human Rights.<sup>44</sup> Hungary appealed the decision to the Grand Chamber. The Grand Chamber rejected that appeal, so on September 9, 2014, the decision became final and binding.<sup>45</sup>

As a reaction to the ECtHR judgment, in December 2015, the government submitted the Fifth Amendment to the Church Law. The amended law planned to replace the two-tiered system of classification for religious communities with a three-tiered system, consisting of “religious associations,” “registered churches,” and “certified churches.” Future classification within the categories would be determined by a court. Additionally, the draft law allows

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43. [FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY] art. IV (2013).

44. *Magyar Keresztény Mennonita Egyház & Others v. Hungary*, App. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12, 56581/12 Eur. Ct. H.R. (2014).

45. See Forum for Religious Freedom Eur., *Hungary: Government Ignores Judgment of the European Court of Human Rights*, at 1, ORG. SECURITY & CO-OPERATION EUR. (July 2-3, 2015), <http://www.osce.org/pc/169046?download=true> [https://perma.cc/HNW2-43J3].

the state to enter into “cooperative agreements” with individual religious communities on a discretionary basis in order to subsidize public interest activities performed by those religious communities.<sup>46</sup>

The amendment would have marked a significant improvement over earlier versions of the Church Law in that it provided explicit rights and protections for religious communities classified in the lower tiers. It would have also curtailed the role of Parliament in allocating legal recognition to religious groups. According to the draft law, all groups previously recognized as “incorporated churches” (previously the highest tier) would have been automatically recognized as “certified churches” after the amendments went into effect.<sup>47</sup> This meant that “incorporated churches” would have been exempted from applying to the court while religious associations would have been required to do so. Groups belonging to the lowest tier, that is, “religious associations,” would not have been allowed to collect the 1% church tax, which directly supports the religious activities of religious communities.<sup>48</sup> This discriminatory rule would have been in explicit contradiction to the above-mentioned ECtHR judgment, as the entire “amendment[] fail[s] to address the most serious violations of the right of religious freedom identified by the Court,” because “transitional provisions with the proposed amendments would perpetuate, rather than correct the earlier violations of the ECtHR [and] discretionary powers afforded the state would continue the arbitrary recognition procedure criticized by both the ECtHR and the Venice Commission.”<sup>49</sup>

Even this moderate amendment, according to which religious communities with the exception of the “incorporated churches” still would not have enjoyed full religious freedom, was not enacted by the governing majority. “Denied equality under the law and subject to opaque regulations, deregistered religious communities, like [NGOs unpopular in the eyes of the government], are subject to

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46. See *Az egyháziügyi törvény módosításának koncepciója* [Concept, Fifth Amendment to the Church Law] §§ 1.5, 1.6 (Hun.) (Dec. 2015), [http://www.kormany.hu/download/8/07/70000/Egyh%C3%A1z%C3%BCgyi%20t%C3%B6rv%C3%A9ny%20m%C3%B3dos%C3%ADt%C3%A1s\\_koncepci%C3%B3\\_normasz%C3%B6veggel\\_0918.pdf](http://www.kormany.hu/download/8/07/70000/Egyh%C3%A1z%C3%BCgyi%20t%C3%B6rv%C3%A9ny%20m%C3%B3dos%C3%ADt%C3%A1s_koncepci%C3%B3_normasz%C3%B6veggel_0918.pdf) [<https://perma.cc/CAS3-CTWC>].

47. See Forum for Religious Freedom Eur., *Hungary: Amended Church Law Remains at Variance with OSCE Standards and the European Convention on Human Rights*, ORG. SECURITY & CO-OPERATION EUR. (Sept. 30, 2015), <http://www.osce.org/odihr/186866?download=true> [<https://perma.cc/48QA-BNCB>].

48. See *id.*

49. See *id.* (explaining the recommendations regarding the draft amendment).

arbitrary and expensive audits, hindered or prevented from raising money, attacked in the government controlled media, and harassed by local officials.”<sup>50</sup>

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, but it is not a religious establishment approach of the type that exists in some of Europe’s most liberal and progressive polities, such as Norway, Denmark, Finland, and Iceland.<sup>51</sup> The latter have a formal, mainly ceremonial designation of a certain religion as the “state religion.” Nor does Hungary resemble 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.”<sup>52</sup> Hungary’s unique system is perhaps 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 emerging patterns of politically systemized hegemony of the Catholic Church and religion-centric morality is present in the constitutional arena. This illiberal approach to the state–religion relationship is similar to the previously mentioned approach in Ireland. The preamble of the new Hungarian 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.”<sup>53</sup> 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 survival of the nation.”<sup>54</sup>

While a completely neutral constitutional text is almost impossible, these provisions very much challenge the autonomy of individuals who do not accept the normative life models expressed in the Fundamental Law’s ideological values—as the preamble words

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50. See Letter from David Baer, Tex. Lutheran Univ., to The Economist & Human Rights Without Frontiers (Oct. 13, 2014), [http://www.hrwf.net/images/forbnews/2014/Hungary\\_2014.pdf](http://www.hrwf.net/images/forbnews/2014/Hungary_2014.pdf) [<https://perma.cc/89AX-HJY3>].

51. See HIRSCHL, *supra* note 16, at 29.

52. See Hungary: Government Ignores Judgment of the European Court of Human Rights, *supra* note 45.

53. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmb1.

54. See *id.* art. L.

it: “the form in which we want to live”—and they are capable of ostracizing them from the political community.<sup>55</sup> This double speech of formal separation and factual nonseparation of the Hungarian government can also be detected in political statements. “Zoltán Balog, minister of human resources and an ordained Hungarian Reformed minister, ruffled the feathers of those who take the separation of church and state seriously” by announcing that “religion is not a private matter; the confession of faith is the most personal public issue.”<sup>56</sup>

#### ISRAEL: STRONG ESTABLISHMENTARIANISM WITH RELIGIOUS JUDICIAL ENCLAVES

During Israel’s history, various individual and collective religious and national identities have developed, which are reflected in the country’s constitution and parallel legal systems.<sup>57</sup>

Israel, as a religiously deeply divided society, has turned in recent years to religion to justify its claim to statehood. In response to persistent delegitimation from within and without, the current government seems to support nonsecular Zionism’s efforts to expand the role of religion to provide it with political legitimation.<sup>58</sup> 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 form of Jewish nationalism based on a collective identity rooted in religion, which might well defeat “Israeliness” as an identity and important democratic principles, including the rights

55. See *id.* pml.

56. *Vissza a Középkorba? Balog Szerint a Vallás nem Magánügy [Back to the Middle Ages? According to Balog, Religion Is Not a Private Matter]*, NOL.HU (Apr. 30, 2016), <http://nol.hu/belfold/vissza-a-kozepkorba-balog-szerint-a-vallas-nem-maganugy-1613639> [<https://perma.cc/Y8X8-YMGJ>]; see also *Religion Is Not a Private Matter According to the Hungarian Government*, HUNGARIAN SPECTRUM (May 22, 2016), <http://hungarianspectrum.org/2016/05/22/religion-is-not-a-private-matter-according-to-the-hungarian-government/> [<https://perma.cc/D9M4-9SZG>] (providing the article in English).

57. See SUZIE NAVOT, CONSTITUTIONAL LAW OF ISRAEL 70-72, 309-18 (2007) (describing Israel as a Jewish state and the constitutional relationship between religion and state in Israel).

58. See generally Uriel Abulof, *The Roles of Religion in National Legitimation: Judaism and Zionism’s Elusive Quest for Legitimacy* (APSA 2013 Annual Meeting Paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2303131](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303131) [<https://perma.cc/89UT-DM4C>] (discussing the emergence of religious Zionism as a response to various sources of delegitimation toward Israel).

of national and religious minorities.<sup>59</sup> The State of Israel from the beginning of its establishment “embodie[d] an equivocal mix of constitutive principles that cannot be resolved in favor of either its liberal or illiberal elements,”<sup>60</sup> but the political aspirations of the current 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, a liberal demand to establish exclusively civil marriage would most probably not be accepted by the majority of the public.<sup>61</sup> Not only religious, but also partly secular Jews and Arabs, would oppose this approach and opt for religious marriage and divorce even if civil marriage were available. It would be difficult to find an overlapping consensus<sup>62</sup> in the matter between an arrangement based on liberal considerations and those based on religious–national ones. In this situation the state has to act positively to provide citizens with the ability to realize their *autonomy* to marry and divorce, but the liberal state also must use its *authority*, if necessary, via civil courts to help spouses who do not perceive themselves as divorced and cannot remarry without a religious “get.” This approach is consistent with the views of the vast liberal literature on the boundaries of autonomy that the liberal state should grant to a nonliberal minority group operating within its

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59. This description of nationalism very much fits the definition of the nation by the French philosopher, Ernest Renan: “A nation is therefore a large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future.” Ernest Renan, *What Is a Nation?*, in *BECOMING NATIONAL* 42, 53 (Geoff Eley & Ronald Grigor Suny eds., 1996). But as Ethan Bonner reminds us, 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 Ethan Bronner, *Israel: The Revised Edition*, N.Y. TIMES (Nov. 14, 1999), <http://www.nytimes.com/1999/11/14/books/israel-the-revised-edition.html> [<https://perma.cc/R6KV-4QBA>].

60. Graham Walker, *The Idea of Nonliberal Constitutionalism*, in *ETHNICITY AND GROUP RIGHTS* 154, 159 (Ian Shapiro & Will Kymlicka eds., 1997).

61. See Eric Cortellessa, *Why Is There No Civil Marriage in Israel?*, TIMES ISR. (July 12, 2015, 2:03 AM), <http://www.timesofisrael.com/why-is-there-no-civil-marriage-in-israel/> [<https://perma.cc/4WVB-8XMA>] (describing how the Israeli government failed to pass a bill that would recognize civil marriages).

62. See generally John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1 (1987) (defining an overlapping consensus as a longterm framework that reconciles opposing religious, philosophical, and moral doctrines).



realm.<sup>63</sup> The same approach has been taken by the High Court of Justice in the Emanuel case, where an ultra-Orthodox school, upon the request of one group of the parents, separated the Ashkenazi and Sephardic students.<sup>64</sup> The High Court of Justice, 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 that the action be abolished.<sup>65</sup>

A parallel civil and religious marriage and divorce track would enable and even legitimize marriage between Jews and non-Jews, and, in addition to the traditional Jewish elements, would support the Western liberal cultural element of the State's identity, together with "Israeliness" as a collective identity. The same applies to matters relating to 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.<sup>66</sup>

Special Conversion Courts, established by the state but staffed by Orthodox Rabbis and following Orthodox practice, have been very slow to approve conversions of immigrants from the former Soviet Union 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 on its website: A declaration of intent to observe Jewish religious commandments is sufficient.

The same is true about the question of how Sabbath work restrictions should be construed; whether they should be perceived

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63. See generally MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL (2011). See also WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001).

64. HCJ 1067/08 Noar KeHalacha Ass'n v. Ministry of Educ. 63(2) PD 398 (2009) (Isr.).

65. See *id.*; see also Haim Shapira, Equality in Religious Schools—Should the Court Intervene?, Address at Princeton University Conference on Religions, Rights, and Institutions (Nov. 24, 2014) (unpublished manuscript) (on file with the author) (giving a critical evaluation of the *Noar KeHalacha Association v. Ministry of Education* decision with the similar judgment of the United Kingdom Supreme Court in the Jewish Free School case).

66. See Leora Batnitzky, Is Conversion a Human Right? A Comparative Look at Religious Zionism and Hindu Nationalism, Address at Princeton University Conference on Religions, Rights, and Institutions (Nov. 23, 2014) (unpublished manuscript) (on file with the author).

and enforced as a day of rest or as a day of leisure.<sup>67</sup> The controversy surrounding this issue, marriage, conversion, and other issues touched upon above present another microcosm of religious–secular tensions and quest for identity in Israeli society and another product of a Kulturkampf.<sup>68</sup>

Israel, with its traditional values, a strong sense of community, and national interest, cannot be considered a liberal state forged entirely in the Western mold,<sup>69</sup> but it also cannot return to pre-modern political conditions. Rather it has to move in the direction of soft legal pluralism<sup>70</sup> controlled by the state. Of course, the hard question is: how much, and exactly which tradition, has to be acknowledged and integrated into the culture of the new society. In his recent book, Michael Walzer concludes that, although the total negation of exilic Judaism has failed, the secular Zionist modernizers should have sought a compromise with religion that would not have provoked the counterrevolution a generation later.<sup>71</sup> Walzer argues that some elements of “traditionalist world views” needed and “still need[] to be[] negated: the fearfulness and passivity . . . , the dominance of the rabbis, the subordination of women,” and the role of the Jewish courts.<sup>72</sup> But as I have shown in this Article, the secular modernists *did* compromise: by not taking away power over marriage and divorce from the religious authorities. I argued that this

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67. *See id.*

68. Ruth Gavison goes as far as to claim that the question of work on Sabbath is not about religious or secular accommodation, the freedom to practice religion, or the freedom not to practice religion, but rather about the culture war. *See* Ruth Gavison, *Days of Worship and Days of Rest: A View from Israel*, in *RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW* 379, 409 (Winfried Brugger & Michael Karayanni eds., 2007).

69. This can be the conclusion in many other areas not discussed here as well. For instance, a study on bioethics in Israel concludes that due to a fine line between the demands of autonomy-based secular bioethics and religious norms granting great weight to the sanctity of life, Israel is different from mainstream liberal democracies. *See generally* Michael L. Gross & Vardit Ravitsky, *Israel: Bioethics in a Jewish-Democratic State*, 12 *CAMBRIDGE Q. HEALTHCARE ETHICS* 247 (2003).

70. *See* John Griffiths, *What Is Legal Pluralism?*, 24 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1, 8 (1986). More generally, religious pluralism is commonly understood as several religions co-existing within the same society. *See* Peter Berger, *Desecularization*, *AM. INT.* (May 13, 2015), <http://www.the-american-interest.com/2015/05/13/desecularization/> [perma.cc/4J2J-HEA7].

71. *See* MICHAEL WALZER, *THE PARADOX OF LIBERATION: SECULAR REVOLUTIONS AND RELIGIOUS COUNTERREVOLUTIONS* 125-26 (2015).

72. *See id.*

compromise was necessary, even though the religious fundamentalists never really accepted the supremacy of the secular state in the first place.<sup>73</sup> I do not share the view of Marxists critics that secular revolutionaries weren't "absolutist" enough.<sup>74</sup> My claim is that their compromise went too far, and contrary to Ben-Gurion's expectations, the State of Israel lost control over its own religious establishment much more than in countries with similarly established churches. Examples include Greece, where civil marriage exists, or even Malaysia, where there is civil marriage at least for non-Muslims. Israel almost became a theocratic state for the sake of the religious freedom of (ultra)Orthodox Jews, who, as a political faction, do not exhibit appropriate respect for the rights of 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 ceases to be a democracy, or else it becomes a genuinely multi-ethnic democracy but would in that case cease to be "Jewish."<sup>75</sup> This choice became even more realistic after Likud won the March 17, 2015 elections, as Prime Minister 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

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73. In his review on Walzer's book, Michael Ignatieff criticizes Walzer for failing to ask the question of whether the fundamentalists were ever willing to accept the secular view. See Michael Ignatieff, *The Religious Specter Haunting Revolution*, 62 N.Y. REV. BOOKS 66 (June 4, 2015).

74. This is the position of Perry Anderson regarding the Indian case. See Perry Anderson, *After Nehru*, 34 LONDON REV. BOOKS 21 (Aug. 2, 2012).

75. These alternatives were drawn up by Tony Judt first in 2003, and then in his draft paper written in the summer of 2009, published in 2015. See Tony Judt, *Israel: The Alternative*, N.Y. REV. BOOKS (Oct. 23, 2003), <http://www.nybooks.com/articles/2003/10/23/israel-the-alternative/> [<https://perma.cc/3W56-BH89>]; Tony Judt, *What Is to Be Done?*, in *WHEN THE FACTS CHANGE: ESSAYS 1995-2010* 156 (Jennifer Homans ed., 2015). In the latter work, Judt also mentions a third outcome, whereby Israel forcibly removes a majority of its Arabs (or makes it intolerable for them to remain), which 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 Merav Michaeli, *Tony Judt's Final Word on Israel*, ATLANTIC (Sept. 14, 2011), <https://www.theatlantic.com/international/archive/2011/09/tony-judts-final-word-on-israel/245051/> [<https://perma.cc/XFH2-YVEP>].

radical Islam against Israel.”<sup>76</sup> 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 calls into question the commitment in 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 exists alongside the Jewish state.”<sup>77</sup>

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 midterm future will be more hypernationalist, anti-democratic legislation, including a new basic law on Israel as the Nation-State of the Jewish People.<sup>78</sup> Some argue that with his statement, Netanyahu made explicit the implicit beliefs and attitudes which are the real foundations of Zionist, Jewish Israel, or at the very least, of many of its citizens.<sup>79</sup> In other words, giving up the two-state solution, even if because “the reality has changed,” also ends any immediate hope for the position of liberal Zionism, which claims that the Jewish state must not deprive the legitimate national

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76. See Elliott C. McLaughlin, *Israel’s PM Netanyahu: No Palestinian State on My Watch*, CNN (Mar. 16, 2015, 6:17 PM), <http://www.cnn.com/2015/03/16/middleeast/israel-netanyahu-palestinian-state/> [<https://perma.cc/2VNE-CHHS>].

77. As Thomas Friedman argued after election day, with this statement Netanyahu will be the father of the one-state solution. See Thomas L. Friedman, *Netanyahu Will Make History*, N.Y. TIMES (Mar. 18, 2015), <https://www.nytimes.com/2015/03/19/opinion/thomas-friedman-bibi-will-make-history.html> [<https://perma.cc/4CX8-KR2H>].

78. 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 discrimination against the Israeli-Arab population, more wanton destruction of the villages of Israeli Bedouins, more warmongering, and quite possibly more needless war. See David Shulman, *Bibi: The Hidden Consequences of His Victory*, N.Y. REV. BOOKS (Apr. 23, 2015), <http://www.nybooks.com/articles/2015/04/23/bibi-hidden-consequences-his-victory/> [<https://perma.cc/9NJP-V5QY>].

79. See Anat Biletzki, *Making It Explicit in Israel*, N.Y. TIMES (May 11, 2015, 6:50 AM), <https://opinionator.blogs.nytimes.com/2015/05/11/making-it-explicit-in-israel/> [<https://perma.cc/6YAF-N7RF>].

aspirations of Palestinians.<sup>80</sup> The one-state solution means that Israel will become, in time, either a non-Jewish democracy or a Jewish nondemocracy.

#### 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, where the constitution was and continued to be theocratic. As we will show, the role of Shari'a as a source of legislation in the various Egyptian constitutions did not really change through the Mubarak, Morsi, and Al-Sisi eras, which also means that Muslim states use Islam for national legitimation by claiming their nation needs to be Muslim in the sense that Shari'a must be the law of the land.

As recent comparative research conducted by Dawood Ahmed and Tom Ginsburg that examines Iran, Afghanistan, Egypt, and Iraq concludes, the Islamic supremacy clauses that originated in British colonial law are not only popularly supported but were introduced in these countries during moments of liberalization and modernization, and are in most cases accompanied by an expansion, and not a reduction, in rights provided by the constitution.<sup>81</sup> 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 nondiscrimination clauses that protect individuals from religious discrimination. Additionally, Muslim-majority countries' constitutions may include provisions that protect the religious freedom of individuals.

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

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80. See Jonathan Freedland, *The Liberal Zionists*, N.Y. REV. BOOKS (Aug. 14, 2014), <http://www.nybooks.com/articles/2014/08/14/liberal-zionists/> [<https://perma.cc/N8GY-ZDVN>]; see also Jonathan Freedland, *Liberal Zionism After Gaza*, N.Y. REV. BOOKS (July 26, 2014), <http://www.nybooks.com/daily/2014/07/26/liberal-zionism-after-gaza/> [<https://perma.cc/E8ZZ-QH53>].

81. See Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions* (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 477, 2014).

legislation are generally understood today to mean that states are constitutionally barred from enacting un-Islamic legislation.<sup>82</sup> Moreover, 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.<sup>83</sup> 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 of how the clause on Shari'a as a source of legislation is worded or even whether national constitutions contain provisions requiring state law to respect Islam. They should focus equally hard on other questions of constitutional design and interpretation of the courts.<sup>84</sup>

Even without going into the details of particular countries' judicial practices, one can distinguish between two different foundations of religious and liberal values that theocratic constitutionalism can rest on. As we will see, all constitutions of Egypt from 1971 until 2014 contain a "constitutional Islamization" clause recognizing principles of the Islamic Shari'a as a principle source of legislation.<sup>85</sup> Here, the degree to which rights such as religious freedom and equality are enjoyed depends upon secular court jurisprudence. Since 1971, the Egyptian Supreme Constitutional Court has usually acted as the de facto interpreter of religious norms, having developed a creative interpretive technique that enables it to construe Shari'a law consistently with human rights.<sup>86</sup> But similar interpretations can also be found in documents written by religious intellectuals. The Declaration of the al-Azhar on the Future of Egypt of June 19, 2011, drafted under the auspices of the sheikh of al-Azhar, Ahmed al-Tayyeb, essentially aimed to determine the social and political principles that should govern the future of Egypt. The Declaration defined Islam as the religion of

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82. See Clark B. Lombardi, *Constitutional Provisions Making Sharia "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. 733, 736 (2013).

83. See *id.* at 733-74.

84. *Id.* at 773.

85. See *Comparing Egypt's Constitutions*, CARNEGIE ENDOWMENT (last visited Apr. 18, 2017), <http://carnegieendowment.org/files/Comparing-Egypt-s-Constitutions.pdf> [<https://perma.cc/Q85R-FJXH>].

86. See ANVER M. EMON, *RELIGIOUS PLURALISM AND ISLAMIC LAW: DHIMMIS AND OTHERS IN THE EMPIRE OF LAW* 166-219 (2012).

balance.<sup>87</sup> Acting as the relation between religion and state, it poses Shari'a as the principal source of legislation but establishes the principle of a nation-state that is constitutional; modern and democratic; pluralist; founded on the will of the people, dialogue, the law, and liberties; and completely opposed to the theocratic state.<sup>88</sup>

But despite 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.<sup>89</sup> 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 Brotherhood and, after July 2013, the return of the military to 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 that the West holds dear.<sup>90</sup> 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 why the 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

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87. Ahmad al-Tayyeb, *al-Azhar Declaration on the Future of Egypt*, OFFICE OF THE GRAND IMAM OF AL-AZHAR, (June 19, 2011), <http://www.bibalex.org/Attachments/english/elazhar.pdf> [<https://perma.cc/ML6F-Y9L7>].

88. See Yadh Ben Achour, *The Historical Compromise Between “Civil State” and Religion in Post-Revolutionary Arab Neo-Constitutionalism*, in RELIGIONS AND CONSTITUTIONAL TRANSITIONS IN THE MUSLIM MEDITERRANEAN: THE PLURALISTIC MOMENT 26 (Alessandro Ferrari & James Toronto eds., 2017).

89. Middle East in Focus, *Has Egypt's Revolution Been Hijacked?*, MIDDLE EAST POLICY COUNCIL (last visited Apr. 18, 2017), <http://www.mepc.org/has-egypts-revolution-been-hijacked?print=> [<https://perma.cc/6Q6B-K8YW>].

90. See Hussein Agha & Robert Malley, *This Is Not a Revolution*, N.Y. REV. BOOKS (Nov. 8, 2012), <http://www.nybooks.com/articles/2012/11/08/not-revolution/> [<https://perma.cc/GG36-VMHL>].



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 nearly 70% in the parliamentary election<sup>91</sup> to 51.7% in the presidential election.<sup>92</sup> An optimistic reading of these numbers could be 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 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 had since left, Morsi exempted all his acts from the Constitutional Court’s review, pursuant to a decree issued on November 22, 2012. A few days later, bowing to protests by the judiciary and the threat of an impending strike by its members, Morsi signaled 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 (similar 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 Shari’a, but its

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91. Matt Bradley, *Islamic Parties Dominate Egypt Parliamentary Elections*, WALL ST. J. (Jan. 21, 2012, 11:30 AM), <https://www.wsj.com/articles/SB10001424052970204301404577174832117262816> [<https://perma.cc/2Q7B-Q4P4>]

92. David D. Kirkpatrick, *Named Egypt’s Winner, Islamist Makes History*, N.Y. TIMES (June 24, 2012), <http://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html?module=ArrowsNav&contentCollection=Middle%20East&action=keypress&region=FixedLeft&pgtype=article> [<https://perma.cc/7LZT-U2KN>]

individual rules too, be designated as sources of legislation, including legalization of female genital mutilation, which was banned in 2008, as well as the setting of the minimum age of marriage at nine years.<sup>93</sup>

The new Article 3 provide[d] that the principles of religious law[] of Egyptian Jews and Egyptian Christians are the main source[s] for legislation governing their religious communities and [] family relations. “The new Article 4 provide[d] enhanced stature for the Azhar, the mosque-college that represents the official religious establishment in Egypt.” This Article, in addition to recognizing the Azhar as an independent institution, also provide[d] 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 controversial[] was the new Article 219, which provide[d] that the “principles of Islamic law” include its universal textual proofs, its rules on theoretical and practical jurisprudence, and its material sources as understood by the legal schools constituting Sunni Islam.<sup>94</sup>

In the rights section of the Constitution, Article 43 (similar to Article 46 of the 1971 Constitution) declared 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 (similar to Article 9 of the 1971 text) stated that the family is the basis of society and is founded on religion, morality, and patriotism.

The only political force opposed to establishing Islam as the 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.<sup>95</sup> While an adoption of this alternative was not realistic, the question was whether the Brotherhood would acquiesce to a moderate jurisprudence that resembled the previous judicial practice. In terms of how (liberal) democratic the character of the new Egypt would be, a decisive

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93. For an overview of the constitution-making process, and especially the new Article 219 and its relationship to Article 2 and Article 4 in the 2012 Constitution, see Clark Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution*, FOREIGN POL'Y (Dec. 13, 2012), <http://foreignpolicy.com/2012/12/13/islam-in-egypts-new-constitution/> [<https://perma.cc/Y8WS-LX4U>].

94. See Mohammad 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 Prospects of a Successful Democratic Transition?*, 11 INT'L J. CONST. L. 646, 647 (2013).

95. See Lombardi & Brown, *supra* note 93.

question was the extent to which the Constitution would, in reality, safeguard the independence of 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. (The military remained influential and continued to control 40% of the economy, while 70-75% of local municipal leaders were still recruited from the ranks of retired members of army and police.)<sup>96</sup> Another question with relevance to the separation of powers was whether the Brotherhood, which supported a parliamentary form of government while in opposition, would continue to adhere to its previous position after it controlled the presidency and in how far it would accede 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 December 5, 2012, ten days before the planned referendum, blood was spilt again in the streets of Cairo.

Finally, the Egyptian Constituent Assembly approved the Constitution on November 30, 2012, and ratified it after a referendum on December 15 and 22, 2012.<sup>97</sup> That Constitution was in force as the Constitution of the Arab Republic of Egypt<sup>98</sup> until July

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96. Sharif Abdel Kouddous, *What Led to Morsi's Fall—and What Comes Next?*, THE NATION (July 5, 2013), <https://www.thenation.com/article/what-led-morsis-fall-and-what-comes-next/> [<https://perma.cc/MHM6-4PTC>].

97. See CORNELIS HULSMAN, DIANA SERÓDIO & JAYSON CASPER, *THE DEVELOPMENT OF EGYPT'S CONSTITUTION: ANALYSIS, ASSESSMENT, AND SORTING THROUGH THE RHETORIC* 8 (Cornelis Hulsman ed., 2013).

98. THE NEW CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 30 Nov. 2012, *as amended* 18 Jan. 2014, unofficial English translation prepared by International IDEA, <http://constitutionaltransitions.org/wp-content/uploads/2013/05/Egypt-Constitution-26-December-2012.pdf> [<https://perma.cc/P46T-WXPT>]; see Zaid Al-Ali, *The New Egyptian Constitution: An Initial Assessment of Its Merits and Flaws*, OPEN DEMOCRACY (Dec. 26, 2012), <http://www.opendemocracy.net/zaid-al-ali/new-egyptian-constitution-initial-assessment-of-its-merits-and-flaws> [<https://perma.cc/LESS-MFU4>]. Later evaluations were provided by the working paper series of the International IDEA and The Center for Constitutional Transitions at NYU Law. See Zaid Al-Ali & Michael Dafel, *Egyptian Constitutional Reform and the Fight Against Corruption* 1-2 (Int'l IDEA & Ctr. for Constitutional Transitions NYU Law, Working Paper No. 1, 2013), <http://constitutionaltransitions.org/working-paper-no1/> [<https://perma.cc/8PYU-7BPS>]; Asanga Welikala, *The Legislature Under the Egyptian Constitution of 2012* 1-2 (Int'l IDEA & Ctr. for Constitutional

3, 2013, when military officers, following a forty-eight-hour ultimatum handed down by Egypt's military commander, Abdel Fattah Al-Sisi, 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 a suspension of the Constitution coupled with early presidential and parliamentary elections and named the head of the Supreme Constitutional Court as interim president.<sup>99</sup>

On August 14, 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."<sup>100</sup> On August 19, 2013, a court ordered the release of former President Hosni Mubarak. Some analysts said that this provided a sign of the return of his authoritarian style of government. As proof of this, on September 23, 2013, a court issued an injunction dissolving the Brotherhood and confiscating its assets, banning all

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Transitions NYU Law, Working Paper No. 8, 2013), <http://constitutionaltransitions.org/working-paper-no8/> [<https://perma.cc/MKK7-SYHW>].

99. 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 established 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. See Sujit Choudhry & Richard Stacey, *The 2012 Constitution of the Arab Republic of Egypt: Assessing Horizontal Power Sharing Within a Semi-Presidential Framework*, INT'L IDEA & CTR. CONST. TRANSITIONS NYU L. 1, 1-6 (2013).

100. Yasmine El Rashidi, *Scenes from a Crackdown: What Really Happened in Cairo?*, N.Y. REV. BOOKS (Sept. 11, 2013), <http://www.nybooks.com/daily/2013/09/11/scenes-from-crackdown-what-happened-cairo/> [<https://perma.cc/JX6K-7Y8G>]. 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*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/world/middleeast/government-in-egypt-eases-restrictions.html> [<https://perma.cc/U5C7-WZME>].

activities “emanating from it” and any institutions “belong[ing] to it or receiv[ing] financial support of any kind from it.”<sup>101</sup> 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.”<sup>102</sup> The Brotherhood’s leadership is now in jail and 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 July 3, and some of them were reportedly mistreated.<sup>103</sup>

According to a new law promulgated by the interim president at the end of November, the government must be notified of all gatherings of more than ten people.<sup>104</sup> Overnight demonstrations 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 protests with jail or heavy fines. On December 22 2013, “[T]hree 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.”<sup>105</sup>

Social and charitable groups even loosely associated with the Brotherhood 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 months since the military ousted President Morsi. On December 25 2013, the military-backed government declared the Brotherhood a terrorist group, giving the security forces

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101. Ursula Lindsey, *Ban of Brothers*, N.Y. TIMES (Sept. 26, 2013, 10:40 AM), <https://latitude.blogs.nytimes.com/2013/09/26/ban-of-brothers/> [<https://perma.cc/8BP5-GL4Y>]; see also David D. Kirkpatrick, *Egyptian Court Shuts Down the Muslim Brotherhood and Seizes Its Assets*, N.Y. TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/world/middleeast/egyptian-court-bans-muslim-brotherhood.html> [<https://perma.cc/36FJ-G59B>].

102. See Lindsey, *supra* note 101.

103. See Kirkpatrick, *supra* note 101.

104. David D. Kirkpatrick, *New Law in Egypt Effectively Bans Street Protests*, N.Y. TIMES (Nov. 25, 2013), <http://www.nytimes.com/2013/11/26/world/middleeast/egypt-law-street-protests.html> [<https://perma.cc/YWK7-MQDE>].

105. Kareem Fahim, *In Blow to Leadership of ‘11 Revolt, Egypt Activists Are Given 3 Years in Prison*, N.Y. TIMES (Dec. 22, 2013), <http://www.nytimes.com/2013/12/23/world/middleeast/egyptian-activists-sentenced-to-3-years-in-prison-for-protests.html> [<https://perma.cc/98AZ-9YEL>].

greater latitude to stamp out a group deeply rooted in Egyptian social and civic life.<sup>106</sup> “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.”<sup>107</sup>

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.”<sup>108</sup> 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.<sup>109</sup> The main question in January and February 2011 in Cairo was whether the military would shoot the protesters. As we know, they did not. These events in Egypt (as well as similar events in Tunisia two months earlier) highlighted an empirical novelty in 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.<sup>110</sup> 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 authoritarianism in Egypt.<sup>111</sup> The

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106. Kareem Fahim & Mayy el Sheikh, *Egypt Broadens New Crackdown on Brotherhood*, N.Y. TIMES (Dec. 26, 2013), <http://www.nytimes.com/2013/12/27/world/middleeast/explosion-cairo.html> [<https://perma.cc/S76S-XK48>].

107. *See id.*

108. *See* Eva Bellin, *Reconsidering the Robustness of Authoritarianism in the Middle East: Lessons from the Arab Spring*, 44 COMP. POL. 127, 127 (2012).

109. *See id.* at 128.

110. *See* Eva Bellin, *The Robustness of Authoritarianism in the Middle East: Exceptionalism in Comparative Perspective*, 36 COMP. POL. 139, 144 (2004). Eight years later, she reconsidered her earlier writing. *See* Bellin, *supra* note 108, at 142-43.

111. 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 democracy in Egypt, he claims, always held a weaker hand than the outside world imagined.



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 assert 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 that 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 are 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 Brotherhood and their allies. International support, including that of the United States, 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 United States and 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.<sup>112</sup> Many argue now that, following the Arab Spring, the society was too deeply divided for an election and for a new constitution.<sup>113</sup> But if

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Mubarak fell because of pressure from below, but also because the Egyptian Army was alienated by his plan to have his son Gamal succeed him. See THANASSIS CAMBANIS, *ONCE UPON A REVOLUTION: AN EGYPTIAN STORY* (2015).

112. These are different approaches by two *New York Times* columnists. For the first, see Thomas L. Friedman, *Can Egypt Pull Together?*, N.Y. TIMES (July 6, 2013), <http://www.nytimes.com/2013/07/07/opinion/sunday/friedman-can-egypt-pull-together.html> [<https://perma.cc/5KBT-T9SB>], and for the second, see David Brooks, *Defending the Coup*, N.Y. TIMES (July 4, 2013), <http://www.nytimes.com/2013/07/05/opinion/brooks-defending-the-coup.html> [<https://perma.cc/SPV7-NXQY>]. Brooks is “defending the coup,” because “Egypt . . . seems to lack even the basic mental ingredients [for democracy].” *Id.*

113. See Paul Collier, *Democracy in Dangerous Places: Egypt—What Went Wrong?*, SOC. EUR. (July 12, 2013), <https://www.socialeurope.eu/2013/07/democracy-in-dangerous-places-egypt-what-went-wrong/> [<https://perma.cc/3WJY-LGM6>]. 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



these decisions were made by the people of Egypt, even if not all of them were 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 as to how to get rid of an incompetent and unpopular president. This is the fault of the Brotherhood but also those who supported the transition. In the absence of such a 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 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 fifty 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 fifty gave everyone a seat at the table, including Egyptian feminists, young people," and religious groups, including the Brotherhood, which did not respond to the invitation.<sup>114</sup> Moussa argued that the document, which was finalized on December 1, 2013, and put to a vote on January 14, 2014, as the start of a two-day referendum, "turns the page decisively on both the [1971 and the 2012] Constitutions and [] marks a historic step on the path to a government that is of, by[,] and for the Egyptian people."<sup>115</sup> External observers like myself should be more cautious, remembering that the previous Constitution, prepared almost exclusively by the Brotherhood, was also approved by a

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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 also* Charles A. Kupchan, *Democracy in Egypt Can Wait*, N.Y. TIMES (Aug. 16, 2013), <http://www.nytimes.com/2013/08/17/opinion/democracy-in-egypt-can-wait.html> [<https://perma.cc/CH9N-ZD9U>].

114. Amr Moussa, *Blueprint for a New Egypt*, N.Y. TIMES (Jan. 8, 2014), <https://www.nytimes.com/2014/01/09/opinion/blueprint-for-a-new-egypt.html> [<https://perma.cc/6QK8-7LVB>].

115. *See id.*

referendum with 63% 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 but rather as a document of Egypt's counterrevolution.<sup>116</sup> Unfortunately, as the United States backed Mubarak's regime until its very last days, even during the mass protests of January 2011, the United States hoped Mubarak could survive if he made political concessions. But the United States is not alone in this: 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 [Al-]Sisi regime at a time when the Egyptian population is suffering from the extreme instability that comes with mass arrests and torture."<sup>117</sup>

The 2014 Constitution has removed Article 219, favored by the Islamists, and added Article 11 to the provision on the family, which provides that the state is committed to achieving equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of the Constitution, including 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 Brotherhood, the largest Islamist party in the country, very much affects the religious rights of their previous members and supporters. And contrary to the situation during the Mubarak and the Morsi eras, the Supreme Constitutional Court does not play any role in protecting these religious rights.

## CONCLUSION

Constitutions in the modern world often have a great deal to say about religious liberty. Liberal constitutions require freedom of

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116. Sara Khorshid, *Egypt's Counterrevolution*, N.Y. TIMES (Dec. 30, 2013), <http://www.nytimes.com/2013/12/31/opinion/egypts-counterrevolution.html> [<https://perma.cc/L2FE-UJTV>].

117. See Tom Stevenson, *Sisi's Way*, 37 LONDON REV. BOOKS 3 (Feb. 19, 2015).

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 Article, I tried to catalog 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 nonsecular Zionism's efforts to expand the role of religion as a form of 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 on a collective identity rooted in religious foundations, which might well defeat "Israeliness" as identity, as well as 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 toward 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: Hungary being a formally secular country, Israel an accommodationist, and Egypt a theocratic one. As we saw in the case of Hungary, the secular model is not necessarily tolerant because individuals cannot exercise their rights to religious freedom unless they belong to a religious group recognized by the Parliament, and the theocratic model can be tolerant, as was the case in Egypt during the Mubarak era due to the rather liberal practice of the Supreme Constitutional Court. In Israel, it is also not the state-religion model and the status quo compromise themselves that make religious freedom more difficult, but the fact that the State of Israel for the sake of the religious freedom of (ultra)Orthodox Jews, who as a political faction do not exhibit appropriate respect for the rights of its non-Orthodox religious, non-religious Jewish, and non-Jewish citizens, lost control over its own religious establishment much more than countries with

similarly established churches. Also, the religious divide is different in the three cases: Israel is religiously deeply divided, while Egypt and Hungary are more homogenous, though they have very distinct cultural histories. 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. Conversely, coming back to the question of whether secularism is a nonnegotiable aspect of liberal constitutionalism, one can argue that freedom of religion can also be provided by nonsecular state–church approaches. This tendency of liberal constitutionalism is parallel with the desecularization of the world, even despite a shift in the institutional location of religion, such as the rapid decline in church-related religion.<sup>118</sup> In other words, the worldwide resurgence of religion forces liberal constitutionalism to adapt religious rights to different state–church relationships.

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118. See PETER L. BERGER, *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 3* (Peter L. Berger ed., 1999).