
THE CHALLENGE OF STRONG RELIGION IN THE LIBERAL STATE

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ABSTRACT

Liberal states are struggling to find ways to deal with strong religion in a manner that would enable them to give due respect to the religious beliefs of citizens while adhering to core liberal values, such as respect for human rights and avoidance of undue entanglement of religious and state authority. One solution is granting authority and autonomy to private religious tribunals, for example, in the area of religious family law. Another solution is creating a direct link between state law and some

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religious obligations, as in the New York Get Laws (“NY Get Laws”). Some people have criticized these solutions as deviating from the pattern of religion-state relations suitable for the liberal state, while others have embraced them. This Article rejects the tendency to view these solutions as similar and claims that they differ in both the structure of religion-state relations that they advance and in their compatibility with human rights. It argues that only the latter solution, exemplified in the NY Get Laws, is a proper solution for the challenge of strong religion in a liberal state that aims to respect the rights of all, including weaker members of the community, such as women.

In order to clarify the important differences between the two solutions, in terms of both structure and rights, this Article employs a wide comparative perspective on religion-state relations, analyzing such relations in both liberal and non-liberal countries and offering a typology of three distinct approaches that states take towards religion – nationalization, authorization, and privatization. It assesses the advantages and disadvantages of these approaches in responding to the challenge of strong religion and their compatibility with liberal religion-state structure and with liberal human rights. It then employs this analysis to highlight the significant differences between the two solutions to the challenge of strong religion, rejecting the calls for the authorization of private religious tribunals and embracing the careful and conditional incorporation of religious considerations into civil law, as in the NY Get Laws. This Article argues that the latter is an appropriate and essential means for respecting both strong religion and liberal values since it enables the liberal state to acknowledge the importance of religious belief in people’s lives, while at the same time protecting the rights of all its citizens.

I. INTRODUCTION

The resurgence of strong religion across the globe, from the Middle East and Asia to Europe and the United States, and the growing debates in many liberal democracies surrounding the soundness and desirability of various multicultural policies that accommodate religious minorities have highlighted the difficulty of reconciling the liberal commitment to religious freedom, pluralism, and equality with the accommodation of strong religion.¹ Liberal states are struggling to find ways to deal with, what this

¹ On the resurgence of strong religion, see Paul Cliteur, *State and religion against the backdrop of religious radicalism*, 10 INT’L J. CONST. L. 127 (2012); John L. Esposito, *Foreword: Religious Fundamentalisms & the Global Resurgence to FUNDAMENTALISM, POLITICS, AND THE LAW*, at vii (Marc A. Hamilton & Mark J. Rozell eds., 2011). Many terms have been used interchangeably to describe all encompassing conservative religions that place high demands on their adherents, condemn deviance, and repudiate modernity and

Article will call, the challenge of strong religion in a manner that would enable them to give due respect to the religious beliefs of citizens, while adhering to core liberal values, such as respect for human rights and avoidance of undue entanglement of religious and state authority.

There are at least two aspects to the challenge of strong religion. One arises from the calls that accompany the spread of strong religion to grant religious communities more authority and more autonomy by enabling them to enforce their religious communal laws.² The second aspect of the challenge of strong religion, which stems from the reluctance of liberal states to get entangled with religion, is that the refusal of the state to cope with various constraints that deeply held religious beliefs place on religious adherents may jeopardize their rights.³ Both aspects are particularly relevant to the rights of weaker members of the community, often women, who may find themselves faced with a stark choice between abandoning their religion and their community in order to free themselves from its oppressive customs and renouncing their rights to equality and dignity in order to maintain their identity and community.⁴

One solution offered in response to demands for more authority and autonomy is to grant private religious tribunals authority in the area of religious family law.⁵ This can be done in various ways, such as through

the outside world. These include the terms “strict religions” (see Laurence R. Iannaccone, *Toward an Economic Theory of “Fundamentalism,”* 153 J. INST. & THEO. ECON. 100, 104 (1997)), “fundamentalist religions” (see Michael O. Emerson & David Hartman, *The Rise of Religious Fundamentalism*, 32 ANN. REV. SOC. 127, 128 (2006)), and “strong religions” (see Andras Sajo, *Preliminaries to a Concept of Constitutional Secularism*, 6 INT’L J. CONST. L. 605, 605 (2008)). Sajo uses the term to denote religions that are either isolationist, wishing to be exempted from state laws and be governed by their own religious precepts, or religions that seek a stronger presence in the public sphere. See also GABRIEL A. ALMOND ET AL., *STRONG RELIGION: THE RISE OF FUNDAMENTALISMS AROUND THE WORLD 2* (2003). In this Article, I chose to use the term strong religion, both in order to escape the negative and extremist connotations associated with the term fundamentalist religion and to denote the strength of the hold that the religious commitment has not only on the community, but also on the lives of its individual members, including women.

² See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1234-35 (2011).

³ See Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 576 (2008).

⁴ *Id.* at 586. While women are the ones whose rights are most often at risk, another disempowered group whose rights may be adversely affected by the challenge of strong religion is children. See Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 WM. & MARY BILL RTS. J. 925, 925 (2010).

⁵ This Article will focus only on the question of granting authority to private religious tribunals in the area of family law since this is the area in which the enforcement of decisions of private religious tribunals raises the greatest risk to the rights of the disempowered members of the religious community, such as women. For general arguments

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joint governance schemes that involve the direct transfer of state power to religious communal authorities or by enforcing the decisions of private religious tribunals as arbitration decisions.⁶ Another solution offered to the challenge of strong religion is creating a direct link between state law and some religious obligations, as in the NY Get Laws, enacted to ameliorate the plight of observant Jewish women whose husbands refuse to divorce them religiously.⁷ Both solutions have been criticized by some as deviating from the pattern of religion-state relations suitable for the liberal state, while others have embraced them both, seeing them as a necessary response for the challenge of strong religion in the liberal state.⁸ The critics argue that joint governance and religious arbitration schemes violate the First Amendment by attempting to transfer state power into the hands of religious groups, unduly entangling the state with religion and violating religious freedom, while the NY Get Laws and similar schemes violate the First Amendment by enacting religious obligations into state law and violating religious freedom.⁹ Conversely, proponents of these solutions, such as Ayelet Shachar, believe that regardless of state entanglement with religion, these solutions for the challenge of strong religion are both appropriate and important, since they help women negotiate and reconcile their identity and membership interests on the one hand and their dignity

for and against state enforcement of arbitration decisions of private religious tribunals, see Helfand, *supra* note 2, at 1241 (supporting the enforcement of arbitration decisions by private religious tribunals, but recommending the tailoring of the doctrines of public policy and unconscionability used by civil courts as a check on arbitral power in the context of religious arbitration); Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 *SANTA CLARA L. REV.* 501, 504 (2012) (objecting to any enforcement of religious arbitration, except for decisions on purely religious matters that cannot be solved in a civil court, on the grounds that such enforcement violates religious freedom).

⁶ For joint governance schemes, see, for example, Russell Sandberg et al., *Britain's Religious Tribunals: 'Joint Governance' in Practice*, 33 *OXFORD J. LEGAL STUD.* 263, 274-89 (2012); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 1 (2001). For recognition of decisions of religious tribunals as arbitration decisions, see, for example, Helfand, *supra* note 2, at 1237.

⁷ See Suzanne Last Stone, *The Intervention of American Law in Jewish Divorce: A Pluralist Analysis*, 34 *ISR. L. REV.* 170, 171 (2000).

⁸ See Walter, *supra* note 5, at 504; see also Helfand, *supra* note 2, at 1240.

⁹ On joint governance schemes, see Helfand, *supra* note 2, at 1278-79; on religious arbitration, see *id.* at 1244 and Walter, *supra* note 5, at 547, and; on the NY Get Laws, see Lisa Zorenberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 *PACE L. REV.* 703, 706-07 (1995). It is important to note that, while the state enforcement of arbitration decisions of private religious tribunals has been the norm for many years in the United States and has gone fairly unchallenged, this has changed in recent years, primarily due to the extensive recent debates over enforcement of religious arbitration in other western countries, such as Canada and the United Kingdom, which have brought to the forefront the difficulties surrounding this type of enforcement. See Helfand, *supra* note 2, at 1237-38.

and equality on the other.¹⁰

This Article rejects the inclination to view these solutions to the challenge of strong religion as similar and argues that they differ in both the structure of religion-state relations that they advance and in their compatibility with human rights, and in particular with women's rights. This Article rejects the authorization of private religious tribunals in the area of family law, but embraces the careful and conditional incorporation of religious considerations into civil law, exemplified in the NY Get Laws. It argues that only the latter is a proper solution in a liberal state that aims to respect the rights of all, including weaker members of the community, such as women.¹¹ It further contends that, since studies have consistently shown that beliefs in patriarchal family structures and traditional gender roles stand at the core of strong religions, across religions and continents,¹² the need to examine the solutions to the challenge of strong religion in the liberal state from the perspective of women's rights is paramount.

In order to clarify the important structural and human rights differences between these solutions, this Article employs a wide comparative perspective on religion-state relations, analyzing such relations in both liberal and non-liberal countries and offering a typology of three distinct approaches that states take towards religion – nationalization, authorization, and privatization.¹³ This typology sheds new light on our understanding of the differences between these solutions to the challenge of strong religion. While allowing communities to enforce religious family law is tantamount to a partial authorization of religion, schemes such as the NY Get Laws are the equivalent of soft nationalization of religion. This difference is important both in terms of structure and in terms of the protection of human rights.

Part II of the Article will elaborate on the suggested typology of the three approaches that states take towards religion. Parts III and IV will apply this typology to the challenge of strong religion in the liberal state. Although the approaches identified represent distinct ways of dealing with religion, they are not necessarily exclusive, and states may use either one of them, or any combination of them, to manage different aspects of their relations with the religions within their borders.¹⁴ The first approach to religion, which I will call *the nationalization of religion*, usually involves the establishment of a state religion and close ties between religion and the state.¹⁵ Under this

¹⁰ See Shachar, *supra* note 3, at 576.

¹¹ See discussion *infra* Part IV.

¹² See Emerson & Hartman, *supra* note 1, at 135, and the studies cited therein.

¹³ See discussion *infra* Part II.

¹⁴ See *infra* note 22 and accompanying text.

¹⁵ See discussion *infra* Part IIA.

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approach, the state uses the chosen religion and its religious law as a basis of governance in various areas, but maintains control over the content of the religion through secular institutions, such as parliament and the civil court system. Examples of the nationalization of the majority religion can be found in non-liberal Muslim countries, such as Egypt and Malaysia, while an example for the partial nationalization of a minority religion is the nationalization of the religious family laws of religious minorities in India. Importantly, nationalization allows the state, if it chooses to do so, to ameliorate the violation of women's rights that may result from conservative interpretations of religion.

The second approach to religion, *the authorization of religion*, also often implicates the establishment of religion in the state, but, unlike the first approach, it involves giving the religious establishment the authority and autonomy to determine the content of religion and apply it accordingly.¹⁶ Thus, secular state institutions have little or no say in the content and development of the religion of the state. This approach can be identified in more conservative Muslim countries, such as Saudi Arabia. It can also be identified on a much narrower basis, such as in the laws of marriage and divorce in Israel, which give the religious authorities of every religious community extensive control over the religious interpretation of their own laws of marriage and divorce.¹⁷ The authorization of religion leaves very little leeway for the state to ameliorate rights violations that may occur as a result of the application of conservative interpretations of religion.

The third approach to religion is *the privatization of religion*.¹⁸ Under this approach, while religion is separated from the state through its privatization, it is also given extensive freedom and autonomy within the private sphere. This approach, which does not necessarily entail a complete separation between religion and the state (if such separation is at all possible), is prevalent in liberal democracies.¹⁹ It may include forms of

¹⁶ See discussion *infra* Part IIB.

¹⁷ The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law. See BRITISH ORDER IN COUNCIL, Aug. 10, 1922, para. 51 (Palestine). The authority of the Muslim religious courts can still be found in Sign 52 of the King's Order in Council (1922), and that of the various Christian denominations in Sign 54 of the Order. *Id.* at paras. 52, 54. The authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.). The authority of the Druze religious courts can be found in the Druze Religious Courts Law, 1962. Druze Religious Courts Law, 5723-1962, 8 LSI 27 (1962-1963) (Isr.).

¹⁸ See discussion *infra* Part IIC.

¹⁹ James Q. Whitman, *Separating Church and State: The Atlantic Divide*, in LAW, SOCIETY, AND HISTORY THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN 233, 236-37 (Robert W. Gordon & Morton J. Horwitz eds., 2011).

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cooperation between private religion and the state, but its main characteristics are: (1) the institutional differentiation between secular state government and private religious institutions and communities; (2) the grant of extensive autonomy to the latter; (3) the grant of equal treatment to all religions.²⁰ The privatization of religion is only partly successful in ameliorating rights violations that result from conservative interpretations of religion within religious communities.

Part III will examine the success each of these approaches has in responding to the challenge of strong religion and their compatibility with liberal values. The outcome will be relevant to the examination in Part IV of the two solutions offered to the challenge of strong religion in the liberal state – giving authority to private religious tribunals in matters of family laws and enacting civil legislation such as the NY Get Laws – in light of the suggested typology. Although the privatization of religion, prevalent in liberal democracies, is the most compatible with liberal values, it is insufficient to respond to the challenge of strong religion, especially in light of the increase in adherence to strong religion in liberal democracies. Nevertheless, the nationalization of religion and the authorization of religion, as practiced in non-liberal countries, are both incompatible with liberal values and are therefore unsuitable for liberal states. The two solutions constitute milder forms of either authorization of religion or its nationalization and should, therefore, be examined in light of the typology developed in this Article.

Finally, Part IV will employ this analysis to highlight the important differences between the two solutions discussed above. While enabling religious communities to enforce their religious family laws should be understood as a partial authorization of religion, measures, such as the NY Get Laws, that condition the issuance of a civil divorce order on the prior grant of a religious divorce by one spouse to the other are examples of the soft nationalization of religion. Furthermore, despite the liberal reluctance to entangle the state in religious matters and the liberal inclination to expand the autonomy and authority of religious communities, soft nationalization of religion, in the form of an increased and principled involvement of the state with religion through civil law and the civil courts, is the preferable means of responding to the challenge of strong religion in the liberal state. When carried out properly, the soft nationalization of religion allows the liberal state to respect the religious needs of adherents of strong religions while safeguarding the rights of the weaker members of the religious community, such as women. Conversely, a partial authorization

²⁰ Leni Franken & Patrick Loobuyck, *Is Active State Support for Religions and Worldviews Compatible with the Liberal Idea of State Neutrality? A Critical Analysis of the Belgian Case*, 55 J. CHURCH & STATE 478, 478-79 (2013).

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of religion, with its transfer of power into the hands of private religious tribunals, fails to protect the rights of weaker members of the religious community and may facilitate and entrench the conservative leanings of the community's religious authorities.

II. THREE APPROACHES TOWARDS RELIGION

States and religions are probably the two most powerful forces that exist today, and the variety of religion-state relations that exist around the globe is both a reflection and an outgrowth of this fact. Quite a few typologies of religion-state relations have been offered over the years. Perhaps the most basic typology distinguishes among systems with an established religion, systems with separation between religion and the state, and mixed systems.²¹ A more nuanced typology distinguishes between political atheism, the religiously neutral state, multiculturalism, state church, and theocracy.²² The typology offered in this Article is distinct from other typologies heretofore offered in two senses. First, while most typologies identify states as falling under a certain structure of religion-state relations, the typology offered here does not maintain that a certain state necessarily falls under one of the approaches discussed to the exclusion of the two others. Quite the contrary, there are many countries that combine two or more of these approaches, even if one of the approaches is more dominant than the others.²³ The impetus for the typology offered here is that each approach describes a different relationship between the power of the state and the power of religion, even if such different relationships might exist within the same state. This difference affects the rights of religious adherents and, especially, of the weaker members of the religious community. Second, unlike many typologies that focus on variations of

²¹ Theodor Hanf, *Preface to JIHAD NAMMOUR, STATE AND RELIGION: COMPARING CASES OF CHANGING RELATIONS - A CONFERENCE REPORT* 5 (2011).

²² See Cliteur, *supra* 1, at 128. For an even more detailed typology distinguishing between absolute theocracies, established churches, endorsed churches, cooperationist regimes, accommodationist regimes, separationist regimes, regimes that are inadvertently insensitive towards religion, and regimes that are hostile towards religion, see W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE – LEGAL PERSPECTIVES* 1, 19-25 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

²³ An example of a country that combines all three approaches is Israel. In Israel, the exclusive jurisdiction of the rabbinical courts in areas of marriage and divorce is an example of the authorization of religion, the law of return is an example of the nationalization of religion, and the freedom granted to religious communities to pursue their religious practices in the private sphere is an example of the privatization of religion. For a critique of the one dimensional view of religion-state relations and a claim that religion's role may differ widely in different domains, see Aernout J. Nieuwenhuis, *State and Religion, a Multidimensional Relationship: Some Comparative Law Remarks*, 10 *INT'L J. CONST. L.* 153, 156 (2012).

religion-state relations within liberal states, the typology offered here looks to variations between non-liberal states in order to facilitate our understanding of the appropriate resolution of the challenge of strong religion within liberal states.²⁴

A. Nationalization of Religion

While one way of containing the power of religion is by relegating it to the private sphere, this may not always be suitable due to the type of religion in question and the role that it plays in the life of the respective state.²⁵ Thus, some states maintain their supremacy over religion by, on the one hand, allowing it to play a central role in the public life of the nation, while, on the other hand, controlling and using it to advance both the religious and the wider goals of the state. This mode of operation, the nationalization of religion, which is prevalent in Muslim majority countries, can take various forms. Its central feature, however, is that the state assumes the authority to determine what the content of the state religion is, sometimes in an effort to suppress opposing interpretations. For example, in the Islamic Federation of Malaysia, Islam is a central component of the ethnic Malay identity, although only around sixty percent of the population is Muslim.²⁶ Consequently, the constitution includes special provisions for Islam that give preference to Muslims and, at the same time, restrict their behavior.²⁷ Thus, the constitution allows state and federal law to restrict “the propagation of any religious doctrine or belief among persons professing the religion of Islam.”²⁸ As a result, it is forbidden to propagate non-Muslim religious doctrines to Muslims; those wishing to propagate Muslim religious doctrines and beliefs to Muslims must obtain permission from state religious departments. This allows the pragmatist state to

²⁴ Even some of the scholars that put a special emphasis on the analysis of non-liberal countries may lump all of them under the same category. For example, Ran Hirschl refers to all the non-liberal, mostly Muslim countries that he discusses as constitutional theocracies. RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 1 (2010).

²⁵ As Montesquieu observed, different religions are better suited to different forms of government. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS*, BOOK XXIV 463 (Anne M. Cohler et al. eds. & trans., 1989).

²⁶ Farish A. Noor, *From Pondok to Parliament: The Role Played by the Religious Schools of Malaysia in the Development of the Pan-Malaysian Islamic Party (PAS)*, in *THE MADRASA IN ASIA: POLITICAL ACTIVISM AND TRANSNATIONAL LINKAGES* 191, 192 (Farish A. Noor et al. eds., 2008).

²⁷ FEDERAL CONSTITUTION OF MALAYSIA, arts. 11 (requiring permission for the propagation of Islam), 12 (guaranteeing financing only to Muslim education), 153 (guarantees preferential treatment to Malays, who must profess the religion of Islam in order to be considered Malays (on the definition of Malay see article 160(2))).

²⁸ *Id.* art. 11 § 4.

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promote a relatively moderate form of Islam (“civilizational Islam”), which the opposition views as a watered down understanding of Islam.²⁹

A similar nationalization of religion takes place in the supposedly staunchly secular Turkey. Although Turkey defines itself as a secular state in its constitution, Islam has always played an important role in Turkish national identity.³⁰ Consequently, the early Kemalist state repressed Islam, while promoting its own interpretation of Islam in order to legitimate its secular nationalism.³¹ The notion of laicism, which initially meant a complete ban on Islam, was transformed to mean the control of religious expression by the state.³² As a result, while Turkey’s 1982 constitution defines Turkey as a secular state,³³ it also enshrines state control over Islamic education and its compulsory introduction into state schools.³⁴ Furthermore, the secular state has established a Directorate of Religious Affairs (“DIR”), which controls 70,000 mosques and thousands of Qur’anic courses and supervises private forms of religious activities.³⁵ State control over religion is so tight that the DIR even “distributes the Friday sermons to the mosques around the country.”³⁶ The DIR promotes a relatively progressive form of Islam, which has been called “Turkish-Islamic-Synthesis,” and which is aimed at undermining Islamic influences outside of state control and assisting in the project of national homogenization.³⁷

An important arena in which the nationalization of religion is widespread is that of religious family law. Over the past twenty years, religious family law has been at the heart of Muslim identity.³⁸ Accordingly, family law in most majority Muslim countries is governed by Sharia; the struggles over who decides the content of the law and who is responsible for its

²⁹ Ran Hirschl *The Secularist Appeal of Constitutional Law and Courts: A Comparative Account*, 2011 ROBERT SCHUMAN CTR. FOR ADVANCED STUD. 10, available at <http://www.eui.eu/Projects/ReligioWest/Documents/events/conferencePapers/Hirschl.pdf>.

³⁰ Bekim Agai, *Islam and Education in Secular Turkey: State Policies and the Emergence of the Fethullah Gülen Group*, in *SCHOOLING ISLAM: THE CULTURE AND POLITICS OF MODERN EDUCATION*, 149, 151 (Robert W. Hefner & Muhammad Qasim Zaman eds., 2007).

³¹ Umit Cizre Sakallioglu, *Parameters and Strategies of Islam-State Interaction in Republican Turkey*, 28 *INT’L J. MIDDLE E. STUD.* 231, 236 (1996); UMAT AZAK, *ISLAM AND SECULARISM IN TURKEY: KEMALISM, RELIGION AND THE NATION STATE* 12 (2010).

³² See Agai, *supra* note 30 at 152.

³³ CONSTITUTION OF THE REPUBLIC OF TURKEY, 1982, art. 2.

³⁴ *Id.* art. 24.

³⁵ See Agai, *supra* note 30, at 153-54.

³⁶ Azak *supra* note 31, at 12.

³⁷ See Agai, *supra* note 30, at 156.

³⁸ Marie-Aimée Hélie-Lucas, *The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws*, in *IDENTITY POLITICS AND WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE* 391, 396 (Valentine Moghadam ed., 1994).

application are at the heart of the relations between religion and the state.³⁹ One important means of nationalizing religious family law is through its codification. Codification involves the creation of a written law on the basis of Sharia principles as they are expressed in the opinions of various Muslim jurists and schools.⁴⁰ While the resulting law is invariably presented as Sharia-based, its exact content is determined by the state and is influenced by changing socio-economic circumstances and the public interest.⁴¹ Furthermore, it is the resulting state law that subsequently governs family relations and becomes the basis for judicial decisions; the religious texts retain, at most, a residual power.⁴² Codification of religious law offers states two important advantages. First, the state chooses which elements of the religious law to adopt and which to reject and is thus able to make the law fit more closely with its own reformist or conservative agenda.⁴³ Thus, women's rights activists usually favor codification, since it often reforms religious law, discriminates less against women, and may even enable women to take part in the drafting process.⁴⁴ Conversely, religious leaders often oppose codification, especially if it is done through non-religious bodies such as the parliament, claiming that these bodies have no authority to decide on the content of religious law.⁴⁵

The second advantage is that codification, and especially a detailed one, may considerably narrow the discretion of judges, making the law more predictable and unitary.⁴⁶ During the 2003 debates on the promulgation of a codified family law in Bahrain, a women's rights activist explained the vicissitudes of being subject to religious family law in the absence of codification as follows:

The absence of such a law means that the *shar'i qadi* has the final say, he rules on God's command, what he says is obeyed and his order is binding. You find each *shar'i qadi* ruling according to his whim; you even find a number of [different] rulings on the same question, which has brought things to a very bad state of affairs in the *shari'a* courts. The demand for the promulgation of this law aims at eliminating many

³⁹ *Id.* at 396.

⁴⁰ LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY 13 (2007).

⁴¹ *Id.* at 13, 16.

⁴² *Id.* at 48-52.

⁴³ *Id.* at 20.

⁴⁴ *Id.* at 26-28. However, if the agenda of the state is a conservative one, codification can actually worsen the situation for women. *See also* WOMEN LIVING UNDER MUSLIM LAWS [WLUML], KNOWING OUR RIGHTS: WOMEN, FAMILY, LAWS AND CUSTOMS IN THE MUSLIM WORLD 35 (3d ed. 2006) [hereinafter KNOWING OUR RIGHTS].

⁴⁵ WELCHMAN, *supra* note 40, at 28-29.

⁴⁶ *Id.* at 23.

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problems and at unifying rulings; it would reassure people of the conduct of litigation, and would guarantee women their rights rather than leaving them at the mercy of fate.⁴⁷

It is important to note, however, that while codification may improve the situation of women, such improvements depend on the will of the state and are often incremental and incomplete.⁴⁸ Even after its codification, Sharia-based family law may often remain incompatible with women's right to equality within the family, as the extensive reservations of Muslim countries to the Convention on the Elimination of All Forms of Discrimination Against Women exemplify.⁴⁹

While codification is one means of nationalizing religious family law, another important means is entrusting the implementation of the codified family law to secular courts. Just as Muslim countries differ in the extent and mode of their codification of Muslim family law, so do they differ in their choice of courts to implement Sharia-based family law.⁵⁰ One can think of the nationalization of religious family law as a spectrum, ranging from minimal nationalization to extensive nationalization.⁵¹ On one side of the spectrum are countries, such as Saudi Arabia, which do not nationalize religious family law, do not possess a family law code, and allow religious judges extensive discretion in implementing their own interpretation of Sharia.⁵² On the other side of the spectrum are countries, such as Egypt and Morocco, which codify religious family law in great detail and implement it through the civil court system.⁵³

Nationalization of religious family law is not restricted to majority religions. A partial nationalization of the religious family law of minority communities can be found in the treatment of the family law of religious minority communities, including Muslims, Christians, Parsis, and Jews in India.⁵⁴ The main authority over adjudication of family law in India lies with civil state courts.⁵⁵ The personnel of the civil state courts are not

⁴⁷ *Id.*; see also KNOWING OUR RIGHTS, *supra* note 44, at 3.

⁴⁸ WELCHMAN, *supra* note 40, at 20.

⁴⁹ *Id.* at 34-35; see also MUSAWAH, CEDAW AND MUSLIM FAMILY LAWS: IN SEARCH OF COMMON GROUND 1 (2011).

⁵⁰ For a concise account of these differences in twenty-one countries, see KNOWING OUR RIGHTS, *supra* note 44, at 38-58.

⁵¹ WELCHMAN, *supra* note 40, at 39.

⁵² *Id.* On Saudi Arabia, see *Saudi Arabia*, SOC. INST. & GEND. INDEX (Nov. 3, 2013), http://genderindex.org/country/saudi-arabia#_n.19 (expand "Discriminatory Family Code" hyperlink).

⁵³ WELCHMAN, *supra* note 40, at 39.

⁵⁴ Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631, 637 (2008).

⁵⁵ *Id.* at 634

recruited according to group membership, and instead are primarily trained in Western law.⁵⁶ Community courts of the different communities may also adjudicate family law matters, but their decisions are subject to appeal to the state courts.⁵⁷ In adjudicating family law matters, state courts draw on a variety of sources – some universal and some group-specific – including international law, Indian constitutional rights, Indian criminal laws that are relevant to matrimonial life, Indian statutory group-specific law, uncodified group legal traditions, and other group norms.⁵⁸

The nationalization of religion through the use of secular courts to interpret religious law may extend well beyond the family law arena to other areas in which religious law has been prescribed as a source of state law. For example, Article II of the 1971 Egyptian constitution as amended in 1980, at the initiative of the then-President Anwar Sadat, states: “Islam is the religion of the state, and the Arabic language is its official language. The principles of Islamic law are the chief source of legislation.”⁵⁹ The amendment, which requires that Sharia principles become *the* principal source of legislation and not just *a* source of legislation as in the original Article II, was understood by many of its supporters as entailing the Islamization of the entire body of Egyptian law.⁶⁰ Accordingly, the Egyptian parliament initiated a process of drafting new Islamic codes in several areas of law.⁶¹ However, in 1981, after then-President Sadat was murdered by an extremist Islamic cell, his successor Hosni Mubarak started gradually dismantling Sadat’s Islamization initiatives without changing Article II’s language.⁶² In response, Islamists turned to the courts, claiming

⁵⁶ *Id.*

⁵⁷ *Id.* at 634-36.

⁵⁸ *Id.* at 637. While much of the religious family law pertaining to the major religious groups in India is codified, the law pertaining to Muslims is less codified due to pressures applied by the Muslim community, and state courts use religious texts and traditions in adjudicating Muslim family cases more often than for other groups. State courts also use transnational Islamic law to develop Indian Muslim family law and have particularly tended to refer to Islamic state law in Muslim countries where women enjoy greater rights than in India in order to liberalize Indian Muslim family law. *Id.* at 634, 638; *see also* ALAMGIR MUHAMMAD SERAJUDDIN, *MUSLIM FAMILY LAW, SECULAR COURTS AND MUSLIM WOMEN OF SOUTH ASIA* 41 (2011) (discussing Indian courts’ rigid reliance on the opinions of classical and respected Muslim jurists).

⁵⁹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 2. The original article stated that Sharia was a principal source of legislation and was amended in 1980 after intense pressure from the religious opposition in Egypt. HIRSCHL, *supra* note 29, at 107.

⁶⁰ CLARK B. LOMBARDI, *STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI’A INTO EGYPTIAN CONSTITUTIONAL LAW* 133-35 (2006).

⁶¹ *Id.*

⁶² *Id.* at 159.

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that various articles of existing state legislation violated Sharia principles and were therefore in violation of Article II of the Egyptian Constitution.⁶³ The Egyptian Supreme Constitutional Court (“SCC”) resolved the question in a manner that both restricted the effects of Islamization and allowed the SCC to develop a theory of Islamic law and legal interpretation, which enabled it to preserve and even reinforce liberal constitutional principles.⁶⁴ Thus, the SCC decided that the requirement prescribed in the amendment to Article II, according to which legislation must conform to the principles of Sharia, applies only to legislation enacted after the amendment.⁶⁵ In addition, the SCC developed a general theory of the application of Islamic legal norms as sources for the interpretation of constitutional norms, which, according to Lombardi, resonates with several theories of Islamic law.⁶⁶ This theory also allows secular judges to act as authoritative interpreters of Sharia in constitutional litigation and leaves them with sufficient discretion in interpreting Islamic law, thus enabling them to preserve and even reinforce a relatively progressive jurisprudence on issues such as property rights and women’s rights.⁶⁷

B. Authorization of Religion

Unlike the nationalization of religion, which implies close state control over religion, and at least partial adaptation of the state religion to suit wider interests of the state, the authorization of religion implies that religion (often the state religion) and its institutions have control over certain aspects of governance, coupled with considerable autonomy from state intervention. Saudi Arabia is an example of a country where there is a uniquely extensive authorization of religion. Saudi Arabia has no constitution; its Basic Law of Governance states that the Qur’an and the Sunna are its constitution and that “[t]he decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia.”⁶⁸ Accordingly, religious Sharia courts staffed with religiously qualified qadis who judge according to the ultra-conservative Wahhabi branch of Islam

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 158, 267-68.

⁶⁷ *Id.* One example of a ruling interpreting Sharia on an issue that concerns the rights of women is the Egyptian Supreme Constitutional Court’s decision that the regulation of face veiling in public schools is compatible both with Islamic law and with religious freedom. For an English translation of the decision, see Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT.’L L. REV. 437, 437-60 (2006).

⁶⁸ THE BASIC LAW OF GOVERNANCE, Mar. 1, 1992, arts. 1, 46 (Saudi Arabia).

comprise the bulk of the Saudi court system.⁶⁹ Furthermore, in some areas, such as family law, there is no codification, and the qadis have extensive discretion in implementing their own interpretation of Sharia.⁷⁰ Similarly, there is no written penal code in Saudi Arabia, and people are arrested, convicted, and punished in accordance with Sharia law as interpreted by the individual judges.⁷¹ Another powerful religious body, which operates on the basis of its own interpretation of religious law and is largely insulated from government oversight, is the Saudi religious police.⁷²

It is important to clarify that the authorization of religion does not necessarily mean that the state has no means of controlling the religious establishment. Rather, it is more accurate to say that for various political and ideological reasons, which differ in each particular case, control over the religious establishment, although theoretically possible, is in practice exercised, if at all, with extreme caution. Consequently, the religious establishment is able to exercise its own authority in a largely autonomous manner. Thus, for example, although the king in Saudi Arabia has the authority to control the religious establishment, in practice he does not often use this authority, showing the religious establishment the deference and respect due to a crucial political ally whose support is vital for the continued stability of the kingdom.⁷³

While Saudi Arabia is a particularly stark example of the authorization of

⁶⁹ *The Legal System, in Saudi Arabia: A Country Study* (Helen Chapin Metz ed., 1992), available at <http://countrystudies.us/saudi-arabia/51.htm>; see Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yakin Ertürk, UN Doc. A/HRC/11/6/Add.3 (14 Apr. 2009), at 4, available at <http://www.refworld.org/docid/49f8448a2.html>.

⁷⁰ WELCHMAN, *supra* note 40, at 23.

⁷¹ *Saudi Arabia*, SOC. INST. & GEND. INDEX (Nov. 3, 2013), http://genderindex.org/country/saudi-arabia#_n.19.

⁷² Eleanor Abdella Doumato, *Saudi Arabia*, in *WOMEN'S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA: PROGRESS AMID RESISTANCE* 425, 427 (Julia Breslin & Sanja Kelly eds. 2010). An especially striking example of the power and immunity of the religious police is an event that occurred in 2002, when 15 schoolgirls were burned to death because the religious police refused to allow them to exit the burning school building without their abayas (the cloak that Saudi women are required to wear over their clothing in public). No one from the religious police was punished despite local and international protests. *Id.* at 429-30.

⁷³ *Saudi Arabia: Religious Establishment Key to Stability*, OXFORD ANALYTICA DAILY BRIEF SERV. (Sept. 08, 2005), available at <http://search.proquest.com.ezproxy.bu.edu/abicomplete/docview/192444208/1416FF8DB5993A68DB/42?accountid=9676#>; MONTE PALMER, *THE POLITICS OF THE MIDDLE EAST* 256-57 (2002). On the reluctance of the Saudi Royal family to go against the Saudi religious establishment, see HUMAN RIGHTS WATCH [HRW], *PERPETUAL MINORS: HUMAN RIGHTS ABUSES STEMMING FROM MALE GUARDIANSHIP AND SEX SEGREGATION IN SAUDI ARABIA* 9 (2008).

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religion, such authorization can be found in narrower or milder forms in other countries as well. Furthermore, states may try to change their relations with religion by shifting from the authorization of religion to its nationalization in particular areas, or vice versa. The process of codification of family law detailed earlier is but one example of a shift from authorization of religion to its nationalization.⁷⁴

A narrow example of the authorization of both majority and minority religions is the exclusive jurisdiction over issues of marriage and divorce that religious courts maintain in Israel. Israeli law does not include a procedure for civil marriage, and the religious authorities of various state-recognized religious communities conduct marriages in Israel.⁷⁵ These communities include Jews, Muslims, Druze, and various Christian denominations, which are each subject to the personal religious laws of their particular religion.⁷⁶ The authorization of religion manifests itself not only in the grant of exclusive jurisdiction in matters of marriage and divorce to the religious courts of the various religious communities, but also in the lack of codification of core aspects of religious family law. As already discussed, this lack of codification makes it very difficult for the state to initiate any reforms of family laws and enables the religious courts to maintain ultra-conservative positions.⁷⁷ This is especially troubling in the context of a country such as Israel, which maintains a commitment to human rights principles such as religious freedom and women's equality,

⁷⁴ This process is often prolonged and fraught with difficulty. It is not necessarily linear and reflects power struggles and compromises. Consequently, it may involve internal contradictions and inconsistencies, as John Bowen shows in detail with regard to the process of the codification of Muslim family law in Indonesia, which was accompanied by a considerable strengthening of Muslim religious courts. JOHN R. BOWEN, *ISLAM, LAW, AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING* 181 (2003).

⁷⁵ Nevertheless, if an Israeli couple marries in a civil marriage abroad, the state recognizes this marriage as valid. See *Marriage Information*, EMBASSY OF THE U.S., <http://israel.usembassy.gov/consular/acs/marriage.html> (last visited Nov. 4, 2013).

⁷⁶ The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law. See *BRITISH ORDER IN COUNCIL*, Aug. 10, 1922, para. 51 (Palestine). The authority of the Muslim religious courts can still be found in Sign 52 of the King's Order in Council, (1922), and that of the various Christian denominations in Sign 54 of the Order. *Id.* at paras. 52, 54. The authority of the Jewish Rabbinical Courts is set out in the *Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953*. *Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953*, 7 LSI 139 (1952-1953) (Isr.). The authority of the Druze religious courts can be found in the *Druze Religious Courts Law, 1962*. *Druze Religious Courts Law, 5723-1962*, 8 LSI 27 (1962-1963) (Isr.).

⁷⁷ WELCHMAN, *supra* note 40, at 32 (discussing conservative judges' opposition to the codification of family law in Bahrain).

alongside its commitment to its religious establishment.⁷⁸ In fact, Israel is a particularly relevant example, since it is the only country discussed thus far which is ideologically most committed to liberal values.⁷⁹ The interplay between this commitment and the status of religion in the state is instructive when thinking about the challenge of strong religion in the liberal state. The authorization of religion in family law results in the application of ultra-conservative religious law by the religious courts, in spite of the liberal characteristics of the state.

Israeli law grants the Jewish religious courts in Israel – the Rabbinical Courts – exclusive jurisdiction in matters of marriage and divorce.⁸⁰ With respect to the legal norms that the rabbinical court uses to adjudicate these matters, the law is exceptionally succinct, stating only that “[m]arriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.”⁸¹ In addition to their exclusive jurisdiction and complete discretion in matters of marriage and divorce, the rabbinical courts also have concurrent jurisdiction with civil family courts in matters that are ancillary to the divorce, such as alimony and child support.⁸² Over the years, due to political considerations, the rabbinical courts have been staffed exclusively with Orthodox judges.⁸³ When religious courts decide these ancillary matters, the outcomes have tended to be much worse for women, as the religious courts often ignore civil law and are generally more conservative than civil courts.⁸⁴ In order to ameliorate such discrimination, civil authorities have, throughout the years, successfully narrowed the jurisdiction of the rabbinical courts and codified into civil law more egalitarian arrangements on matters such as the division of property.⁸⁵ Nevertheless, the legislative changes have not touched upon the exclusive jurisdiction and complete discretion of the rabbinical courts to determine the law in matters of marriage and divorce. In these matters, the rabbinical courts, and indeed all recognized religious courts, are even immune to the scrutiny of the Israeli Supreme Court, which may only intervene in their decisions if they clearly overstep their jurisdiction.⁸⁶ The Supreme Court

⁷⁸ See generally Gila Stopler, *Religious Establishment, Pluralism and Equality in Israel – Can the Circle Be Squared?*, 2 OXFORD J. L. & RELIGION 150, 151 (2013).

⁷⁹ See *id.* for a discussion of Israel’s commitment to liberal values.

⁸⁰ Rabbinical Courts Jurisdiction (Marriage and Divorce), Law § 1.

⁸¹ *Id.* at § 2.

⁸² RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 233 (2004).

⁸³ Ruth Halperin-Kaddari, *Women, Religion, and Multiculturalism in Israel*, 5 UCLA J. INT’L L. & FOREIGN AFF. 339, 348 (2000).

⁸⁴ HALPERIN-KADDARI, *supra* note 82, at 233-34.

⁸⁵ *Id.* at 234.

⁸⁶ Basic Law: The Judiciary, 5744-1984, SH No. 2 p. 78 (Isr.). The rabbinical courts are authorized to apply Jewish religious law in all matters directly related to marriage and

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will not intervene in decisions of recognized religious courts even in cases of a clearly mistaken application of the relevant religious law.⁸⁷

The interplay between the authority of religious judges bent on applying conservative religious law and the determination of civil society organizations and civil state bodies to promote liberal values in those areas of family law not directly subject to the exclusive authority of rabbinical courts has resulted in a clash of power and in the increasing radicalization of rabbinical court decisions. Thus, for example, in order to force women to subject themselves to rabbinical court rulings on matters of child support and prevent them from turning to civil family courts for more egalitarian rulings, rabbinical courts have in recent years started resorting to the retroactive annulment of divorces.⁸⁸ A retroactive annulment of divorce is a highly contentious practice in Jewish law because it, among other things, retroactively turns a child that was born in a legitimate marital relationship (between the divorcee and her second husband) into an illegitimate child (a *Mamzer*) born to a woman from someone other than her husband.⁸⁹ The status of *Mamzer* in Jewish law has devastating results for the child, such as the prohibition on marrying any other Jew.⁹⁰ In the past, rabbinical courts have adamantly rejected any claim for a retroactive annulment of divorce.⁹¹ Nevertheless, in recent years Orthodox judges in the rabbinical courts have started using retroactive annulments of divorce against women who, subsequent to the religious divorce, pursue their own and their children's rights in civil courts, in order to deter women from turning to these courts.⁹² This development is an example of the problems that may arise when granting authority to strong religion in general and in the liberal state in particular.⁹³ Any attempt by the liberal state to enforce egalitarian values that contrast with conservative religious precepts triggers further radicalization on the part of the proponents of ultra-conservative religion.

divorce, and the Supreme Court will not intervene in such matters. H CJ 8872/06 Ploni v. High Rabbinical Court. However, the Supreme Court has held that the rabbinical courts must apply relevant Israeli civil law in all matters that are incidental to the marriage and divorce, and their failure to do so may trigger judicial review by the Supreme Court. See, e.g., H CJ 1000/92 Bavli v. High Rabbinical Court.

⁸⁷ H CJ 4577/12 Sabag v. Holy Synod of the Greek Orthodox Patriarchate of Jerusalem.

⁸⁸ Amihai Radzyner, *From Levov to Tel Aviv: 'Wrongful Divorce' Rulings in Israeli Rabbinical Courts*, 39 HEBREW U. L. J. 155, 215-28 (2009).

⁸⁹ *Id.*

⁹⁰ Stone, *supra* note 7, at 175.

⁹¹ Radzyner, *supra* note 88, at 164-72.

⁹² *Id.* at 215-28.

⁹³ For an empirical study concluding that liberal states should not grant state jurisdiction to religious courts of ultra conservative minority groups, see Daphna Hacker, *Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts*, 27 J. L. & RELIGION 59, 81 (2011-2012).

The adoption by the state of Israel of the Ottoman Millet system, which granted each religious community the right to self-rule in certain areas, meant that, in Israel, the authorization of religion in the area of family law applies to minority communities as well. While the partial establishment of Orthodox Judaism in Israel was motivated by the desire to entrench the Jewish character of the state, the authorization of minority religions in the area of family law is an expression of pluralism and multiculturalism, meant to allow religious minorities a measure of autonomy.⁹⁴ Nevertheless, similar to the authorization of Orthodox Judaism, the authorization of minority religions has largely entrenched ultra-conservative interpretations of religious law and hinders reform. Thus, for example, the Greek Orthodox minority in Israel is governed by the religious establishment of the Greek Orthodox Church which rules in personal status matters on the basis of church doctrines from the fourteenth century, including doctrines according to which the husband has grounds for divorce if his wife slept out of the house without his consent, or if she went to racing or hunting parties without his approval.⁹⁵ It is important to note that, similarly to the king in Saudi Arabia, the Israeli state has the power to restrict the authorization of religion and to change its terms, since this authorization stems from secular state law. Nevertheless, in practice, various political and ideological constraints combine to prevent the state from using this power and from withdrawing authorization once given.

C. Privatization of Religion

Unlike the nationalization and authorization of religion, which give religion central public status and state power and authority, the privatization of religion separates state authority from religious authority.⁹⁶ While religion and its institutions are not given state authority, they are given wide autonomy to function as private entities that are relatively free from state supervision and intervention.⁹⁷ The privatization of religion is the

⁹⁴ Michael Karaynni, *Jewish and Democratic Ricochets*, 9 MISHPAT UMIMSHAL (Law and Government in Israel) 461, 477-78 (Hebrew) (2006).

⁹⁵ Michael Karaynni, "Jewish and Democratic" *Multiculturalism and the Greek Orthodox Community*, in THE CONFLICT, RELIGION AND STATE IN ISRAEL 227 (N. Langental and S. Friedman ed., 2002) (Hebrew).

⁹⁶ See Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 25 (1991-1992); see also *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."); Leni Franken & Patrick Loobuyck, *Is Active State Support for Religions and Worldviews Compatible with the Liberal Idea of State Neutrality? A Critical Analysis of the Belgian Case*, 55 J. CHURCH & ST. 478, 479 (2013).

⁹⁷ See Myers, *supra* note 96, at 59-60; see also Franken & Loobuyck, *supra* note 96, at

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dominant approach to religion that liberal democratic states have adopted. This includes states that actively cooperate with religion, such as Germany, or that have a formally established church, such as England.⁹⁸ The United States offers the clearest example of the privatization of religion, as the First Amendment to its Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁹⁹ These clauses have been interpreted as requiring “a wall between church and state,”¹⁰⁰ thus forbidding any direct state funding for religious activities, and prohibiting the placement of religious symbols on government property in a way that may indicate governmental preference of a certain religion.¹⁰¹ Although the First Amendment prevents the government from giving direct aid or preference to religion, it also prevents governmental restrictions on the religious liberty of adherents and religious institutions.¹⁰²

Contrary to United States’ privatization of religion, German privatization of religion does not prevent close cooperation between the state and religion.¹⁰³ The relationship between the state and religion in Germany

478-79.

⁹⁸ See Franken & Loobuyck, *supra* note 96, at 478-79; see also James Q. Whitman, *Separating Church and State: The Atlantic Divide*, in *LAW, SOCIETY, AND HISTORY THEMES IN THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN* 233, 233-50 (Robert W. Gordon & Morton J. Horwitz eds., 2011); STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* 169, 169-213 (2nd ed., 2009). See generally JOHN T. S. MADELEY & ZSOLT ENYEDI, *CHURCH AND STATE IN CONTEMPORARY EUROPE: THE CHIMERA OF NEUTRALITY* (2003); LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (Lorenzo Zucca & Camil Ungureanu eds., 2012).

⁹⁹ U.S. CONST. amend. I.

¹⁰⁰ *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

¹⁰¹ For examples of the prohibition of direct funding for religious activities by the state, see *Bowen v. Kendrick*, 487 U.S. 589 (1988); see also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Regarding the prohibition on placing religious symbols on government property in a way that might indicate the government’s preference for a certain religion, see *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). For a debate concerning the possible shift in American law from strict separation to a milder form of state neutrality, see MONSMA & SOPER, *supra* note 98, at 169-70. For examples of types of separation, see generally Carl H. Esbeck, *Five Views of Church State Relations in American Thought*, *BRIGHAM YOUNG U. L. REV.* 371 (1986).

¹⁰² For example, the U.S Supreme Court has recently upheld the ministerial exception. This exempts religious institutions from complying with anti-discrimination laws concerning employment decisions when employees perform some religious function, even when their primary functions are secular. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012).

¹⁰³ See generally GERHARD ROBBERS, *RELIGION AND LAW IN GERMANY* (Roger Blanpain, ed., Wolters Kluwer Law & Business 2010) (offering a detailed account of

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involves four principles: (1) state neutrality; (2) freedom of religion; (3) church-state partnership; and (4) the autonomy of religious organizations.¹⁰⁴ State neutrality is understood as a duty to support all religions without giving preference to any particular religion.¹⁰⁵ Consequently, the German Constitution allows the state to grant religious associations the status of corporations under public law, which enables these religious associations to levy taxes to finance their operations and to enjoy public subsidies.¹⁰⁶ However, the state's duty to support all religions does not entitle the state to intervene in the life of religious associations because these associations retain a basic right to autonomy, which allows them to regulate and administer their own affairs.¹⁰⁷ German courts have not restricted these expansive religious autonomy rights to churches; they have also granted them to any association directed toward the attainment of a religious goal, such as religious charity associations.¹⁰⁸ For example, the German Constitutional Court refused to intervene in a case where a Catholic hospital dismissed a doctor for stating publicly that he opposed the Catholic Church's stance on abortion, holding that the Catholic Church's right to self-determination extended protection to the hospital's actions.¹⁰⁹

While the privatization of religion characterizes liberal democracies, some liberal democracies accompany this privatization of religion with soft forms of nationalization. For example, the Church of England has been the nation's established state church since the sixteenth century.¹¹⁰ While the Church of England enjoyed considerable state power and privileges at the outset, this power has been diluted over the years and has become largely symbolic.¹¹¹ England nonetheless strives to protect the free exercise of all religions and to ensure neutrality between religious groups, as well as between religion and non-religion.¹¹²

religion and law in Germany).

¹⁰⁴ See MONSMA & SOPER, *supra* note 98, at 169-70.

¹⁰⁵ See *id.*

¹⁰⁶ A GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], 1924 BGBl. §§ 137 (5), (6) (Ger.).

¹⁰⁷ See *id.* § 137 (3).

¹⁰⁸ See MONSMA & SOPER, *supra* note 98, at 197-203.

¹⁰⁹ See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 494-95 (2d ed. 1997). The relevant case is known as the Catholic Hospital Abortion Case. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 4, 1985, 70 Das Fallrecht [DFR] 138.

¹¹⁰ See Frank Cranmer, *Church State Relations in the United Kingdom: A Westminster View*, 6 *ECCLESIASTICAL L. J.*, 111, 111 (2001).

¹¹¹ See MONSMA & SOPER, *supra* note 98, at 131.

¹¹² See *id.* at 145-48, 159-62. See generally Iain McLean & Scot Peterson, *Entrenching the establishment and free exercise of religion in the written U.K. constitution*, 9 *I•CON* 230

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Importantly, while the privatization of religion prevents the direct transfer of state authority to religious institutions, it does not prevent religion from having a strong and even decisive influence on state policy and actions through participation in politics or control over privatized social and welfare services.¹¹³ Thus, in Germany the fact that the provision of social and educational services has always been the province of religious organizations has enabled these organizations to prevent the institution of full-day childcare centers, despite public demand.¹¹⁴ In the United States, despite the strong adherence to complete privatization of religion, religious precepts against abortion and homosexuals played an important role in the federal Hyde Amendment, which prohibits federal funding for abortions, and in the historical existence of state criminal prohibitions of homosexual sodomy.¹¹⁵

III. THE THREE APPROACHES TO RELIGION AND THE LIBERAL STATE

In what way can the suggested typology of state approaches to religion help us understand how liberal states should respond to the challenge of strong religion? Is the privatization of religion an adequate response to the increasing presence of strong religion in the liberal state? Can and should liberal states use some form of soft nationalization or partial authorization of religion in order to respond to the challenge? This section discusses each of the three state approaches to religion, their compatibility with liberal values, their different effects on strong religion, and how each guarantees the preservation of human rights, especially for weaker members of the community. Part IV employs this analysis to highlight important

(2011) (describing the relationship between establishment and free exercise in the United Kingdom).

¹¹³ See Gila Stopler, *The Liberal Bind: The Conflict Between Women's Rights and Patriarchal Religion in the Liberal State*, 31 *SOC. THEORY & PRAC.* 191, 201-31 (2005); see also Cranmer, *supra* note 110, at 112.

¹¹⁴ See Kimberly J. Morgan, *Forging the Frontiers Between State, Church, and Family: Religious Cleavages and the Origins of Early Childhood Education and Care Policies in France, Sweden, and Germany*, 30 *POL. & SOC'Y* 113, 138-40 (2002); see also Stopler, *supra* note 113, at 143.

¹¹⁵ On the Hyde Amendment, see *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (acknowledging that the ban coincides with the religious tenets of the Roman Catholic Church, but holding that the ban does not violate the Establishment Clause). On state laws criminalizing sodomy and their affirmance by the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), see JANET JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN* 19-44 (2003). On the overruling of *Bowers*, see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled."). For a general discussion of religion's influence in politics, see Elizabeth Bernstein & Janet R. Jakobsen, *Sex, Secularism and Religious Influence in US Politics*, 31 *THIRD WORLD Q.*, 1023, 1023-27 (2010).

differences between the two solutions offered to the challenge of strong religion in the liberal state. While enabling religious communities to enforce their religious family laws should be understood as a partial authorization of religion, measures such as the NY Get Laws, which condition the issuance of a civil divorce order on the prior grant of a religious divorce by one spouse to the other, exemplify the soft nationalization of religion. On the basis of this typology this Article will analyze these two measures and their compatibility as solutions for the challenge of strong religion in the liberal state, both in terms of religion state structure and in terms of human rights.

Despite its non-liberal features, the nationalization of religion in its strong form – as discussed in Part IIA – seems to be the most effective of the three approaches outlined above in managing strong religion. By adopting a state religion, controlling its interpretation and limiting competing interpretations, codifying the state religion, and entrusting its interpretation in the hands of civil authorities, such as the courts and the legislature, the state can achieve a relatively high degree of control over religion. This allows it to curb strong religion and to advance more moderate forms of religion. Obviously, states may use similar methods to prevent more moderate forms of religion from competing with those promoted by the state, or even to advance a fundamentalist form of religion. The claim is not that the nationalization of religion necessarily results in the promotion of a certain type of religion, but that the nationalization of religion seems to be a more effective means for the state to advance the type of religion it is interested in advancing in comparison to either the authorization of religion or privatization. In practice, the countries discussed above that utilize the nationalization of religion, such as Malaysia and Egypt, choose to promote relatively moderate forms of Islam. However, with respect to women's rights, their codification of religious family laws could be more egalitarian while still remaining compatible with progressive interpretations of Sharia.¹¹⁶

While the nationalization of religion is relatively effective in managing strong religion, it is incompatible with liberal precepts for several reasons. First, the nationalization of religion may violate religious freedom. If it involves the suppression of dissenting religious voices, as it does in Malaysia, for example, where the propagation of Muslim religious doctrines is forbidden without state permission, it violates the religious freedom of religious dissidents.¹¹⁷ In addition, state application of religious rules to

¹¹⁶ See KNOWING OUR RIGHTS, *supra* note 44, at 41. See generally Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 WASH. & LEE L. REV. 1529 (2007).

¹¹⁷ FEDERAL CONSTITUTION OF MALAYSIA, art. 11 § 4.

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citizens, even when these rules are codified into state law and applied by civil courts, allegedly violates citizens' religious freedom, at least when no public reason can be offered for such application.¹¹⁸ Second, the nationalization of religion violates the principle of state neutrality, which is a fundamental principle in liberalism.¹¹⁹ Although neutrality is understood differently in various liberal countries, state enforcement of a chosen type of religion is inherently incompatible with state neutrality, which requires the state to put all religions and non-religions on an equal footing.¹²⁰ Finally, nationalization of religion precludes the differentiation between religion and the state – a liberal state requirement. Again, this differentiation does not necessarily require strict separation and different countries may express it in different ways.¹²¹ Nevertheless, the nationalization of religion impedes differentiation due to the strong establishment of religion in the state and the excessive entanglement of the state in religion, as is the case when civil courts interpret religious texts.¹²² Of the three approaches discussed here – nationalization, authorization and privatization – the nationalization of religion is the approach in which the boundaries between religion and the state, between the sacred and the secular, are the least clear. The civil state not only grants state power to a religion, but also grants the power to interpret sacred religious texts and recreate them through codification to civil state institutions. Both of these characteristics of nationalization are incompatible with liberal principles. Nevertheless, as discussed below, soft forms of nationalization of religion, such as the NY Get Laws, which respect both religious freedom and the rights of weaker members of the community while not engaging in the interpretation of religious dogma, are far more compatible with liberal values and can serve as a good response to the challenge of strong religion in the liberal state.

The privatization of religion – the approach taken by most liberal countries – is most suited to liberal principles due to its basic characteristics of differentiation between religion and the state, relegation of religion to the private sphere, religious autonomy for institutions, and neutral and equal

¹¹⁸ See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 89-94 (Erin Kelly ed., 2001).

¹¹⁹ See Franken & Loobuyck, *supra* note 96, at 478-79.

¹²⁰ See MONSMA & SOPER, *supra* note 98, at 6-10. See generally MADELEY & ENYEDI, *supra* note 98.

¹²¹ See Cécile Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21 *J. POL. PHIL.* 67, 82 (2011), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9760.2011.00404.x/full>). See generally Whitman, *supra* note 98.

¹²² See e.g., Brown & Lombardi, *supra* note 67 (discussing how Egyptian civil courts' interpretations of religious laws reveal the entanglement of religion and the state).

treatment of all religions. Although one of the motivations of liberalism's privatization of religion is to curb the power of religion and its sectarian influence in the public sphere, privatization is only partly successful in achieving this goal, and may insufficiently protect other liberal rights, such as the rights of women and of homosexuals.¹²³ As a consequence, conservative communities might use the strong emphasis on religious freedom and autonomy to restrict the rights of their own members and advance restrictive policies in the political arena.¹²⁴ Furthermore, the refusal of liberal states to get entangled in religious matters may have dire consequences for religious individuals. For example, states that allow Jewish men who were married religiously to obtain a civil divorce without first requiring them to divorce religiously may inadvertently prevent their religiously observant ex-wives from ever marrying again.¹²⁵

The inadequacy of privatization as a response to strong religion has been exacerbated by three distinct, yet interrelated, recent phenomena. The first is what Jose Casanova calls the "deprivatization of religion," which he describes as "the fact that religious traditions throughout the world are refusing to accept the marginal and privatized role which theories of modernity as well as theories of secularization had reserved for them."¹²⁶ The second is the increasing presence of strong religions in liberal countries, partially due to immigration.¹²⁷ Finally, the third is the rise of multicultural theory and with it of demands for multicultural accommodations.¹²⁸

The liberal emphasis on freedom and autonomy for religious institutions and communities, as well as the accommodations guaranteed by liberal multiculturalism, rely in large part on the notion of liberal expectancy. Nancy Rosenblum explains that liberal expectancy builds on the expectation that non-liberal religious and cultural groups, which reside

¹²³ See generally Cranmer, *supra* note 110 and accompanying text; McLean & Peterson, *supra* note 112; see also Stopler, *supra* note 113.

¹²⁴ See Stopler, *supra* note 113; see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 694 (upholding the ministerial exception, which exempts religious institutions from certain anti-discrimination laws regarding employment decisions, and also holding these anti-discrimination laws do not apply if such institutions' employees perform some religious functions, even if their primary functions are secular).

¹²⁵ See generally Stone, *supra* note 7 and accompanying text discussing NY Get Laws; see also *infra* Part IVB.

¹²⁶ JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* 5 (1994).

¹²⁷ José Casanova, *Immigration and the new religious pluralism: a European-Union United States comparison*, in *SECULARISM, RELIGION, AND MULTICULTURAL CITIZENSHIP* 139, 139-48 (Geoffrey Brahm Levey & Tariq Modood eds., 2009).

¹²⁸ See Geoffrey Brahm Levey, *Secularism and Religion in a Multicultural Age*, in *SECULARISM, RELIGION, AND MULTICULTURAL CITIZENSHIP*, *supra* note 128, at 2.

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within liberal societies, will internalize liberal values over time, replacing their own non-liberal values with liberal ones.¹²⁹ With respect to the multicultural accommodation of non-liberal communities, Will Kymlicka explains that it stems from:

[T]he hope and expectation that liberal democratic values will grow over time and take firm root across ethnic, racial, and religious lines, within both majority and minority groups, and that in the meantime there are robust mechanisms in place to ensure that multicultural policies and institutions cannot be captured and misused for illiberal purposes.¹³⁰

However, it is questionable whether liberal expectancy is enough to respond to the challenge of strong religions in liberal states. Scholars of strong religion point to the fact that it is most often reactive in nature and rises in response to secularization and modernization.¹³¹ If this is indeed the case, then the expectation that strong religions will liberalize as a result of their exposure to liberal values may be misplaced. Moreover, as Rosenblum concedes, liberal expectancy cannot be empirically demonstrated.¹³² What can be empirically demonstrated is that in recent decades strict religious movements have gained support, while mainline moderate religious movements that have made great efforts to conform to modernity are on the decline almost everywhere.¹³³

As a result, while the privatization of religion may be largely compatible with liberal values, its ability to respond to the challenge of strong religion is uncertain due to its emphasis on granting freedom and autonomy to all religious communities and institutions, including to those that may use it to advance their conservative agendas at the expense of weaker members of the community.

Finally, the approach that is least likely to curb strong religion is the authorization of religion, which gives the majority state religion, and in

¹²⁹ See generally NANCY ROSENBLUM, *MEMBERSHIP AND MORALS* 55-58 (1998). A similar expectation is expressed by Rawls, who posits that toleration will lead the intolerant to believe in liberty. According to Rawls, liberals must tolerate the intolerant unless they have a sincere reason to believe that intolerance towards the intolerant is necessary for the liberals' own security. See JOHN RAWLS, *A THEORY OF JUSTICE (REVISED EDITION)* 193 (1999).

¹³⁰ WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* 94 (2007).

¹³¹ See Almond et al., *supra* note 1, at 20.

¹³² See ROSENBLUM, *supra* note 129, at 57.

¹³³ See Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS* 1, 6 (Peter L. Berger ed., 1999); see also Esposito, *supra* note 1, at vii-viii; Almond et al., *supra* note 1, at 1-2; Emerson & Hartman, *supra* note 1.

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some instances minority religions, state power, considerable autonomy, and independence to implement their state-backed religious authority. Under such conditions, if the religion given state authorization is a strong religion, it is likely that it will use its authorization to implement and further entrench its ultra-conservative precepts. As discussed earlier, this has been the case with both Wahhabism in Saudi Arabia and ultra-Orthodox Judaism in Israel.¹³⁴

IV. PRIVATE RELIGIOUS TRIBUNALS, GET LAWS, AND THE LIBERAL STATE

The previous parts of this Article have introduced the distinction between the three approaches to religion – nationalization, authorization and privatization – and have discussed the compatibility of each of the three approaches with liberal values, the effects of each approach on strong religion, and the ability of each approach to guarantee the preservation of human rights, especially the rights of weaker members of the community. This Part will employ this analysis to highlight the important differences between the two solutions offered to the challenge of strong religion in the liberal state. While enabling religious communities to enforce their religious family laws should be understood as a partial authorization of religion, measures such as the NY Get Laws, which condition the issuance of a civil divorce order on the prior grant of a religious divorce by one spouse to the other, are considered soft nationalization of religion. Mindful of this distinction, this Part will analyze these two measures and their compatibility as solutions for the challenge of strong religion in the liberal state, both in terms of religion-state structure and human rights. It will conclude with the assertion that only the latter is an appropriate response to the challenge of strong religion in the liberal state.

A. Religious Tribunals in Matters of Family Law and the Partial Authorization of Religion

In recent years, Muslim groups in Canada and Britain have lobbied for state enforcement of decisions of private Sharia tribunals in family law matters through legal mechanisms, such as arbitration acts.¹³⁵ While Canada rejected this demand following vigorous objections by women's

¹³⁴ See *supra* Part IIB; see also Hacker, *supra* note 93, at 80.

¹³⁵ See Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. art. 7., at 3 (2004), available at <http://www.bepress.com/mwjhr/vol1/iss1/art7/>; see also Beverly Baines, *Must Feminists Identify as Secular Citizens? Lessons from Ontario*, <http://ssrn.com/abstract=1303563>; Alia Hogben, *Introduction of Religious Family Laws in Canada: A Case Study*, in THE STRUGGLE FOR SECULARISM IN EUROPE AND NORTH AMERICA, DOSSIER 30-31, 183, 189-90 (2011).

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rights organizations and some Muslim groups, the debate is still ongoing in Britain.¹³⁶ In February 2008, supporters of the authorization of Sharia Councils in Britain gained an important ally, the Archbishop of Canterbury, Rowan Williams, who stated in an oft-quoted speech that Britain should be more willing to delegate certain legal functions to the religious courts of religious communities and to enhance the role of Sharia Councils in Britain.¹³⁷

In terms of our suggested typology, state enforcement of private Sharia Council decisions should be understood as a partial authorization of religion.¹³⁸ While Sharia Councils remain private, a winning party's ability to enforce their decision through a civil court makes them considerably more powerful than tribunals whose decisions cannot be enforced and whose implementation is subject to the good will of the parties. Furthermore, state enforcement of Sharia Council judgments should be seen as authorization of religion since the state enforcement power is granted to Sharia Councils that are free to interpret and implement religious dogma as they understand it without state interference. Thus, unlike cases of nationalization of religion in which the state codifies religious dogma and authorizes civil courts to apply it, the authorization of Sharia Councils or other religious tribunals in liberal states would not include any state control over the substantive religious rules these tribunals apply. This lack of control is understandable and is the natural outcome of a reluctance to prescribe or supervise the doctrines of private religious authorities when intervention would be an undue entanglement and a violation of religious autonomy.

The lack of state control over the religious tribunals' rulings means that the state lacks an effective means of preventing these tribunals from issuing conservative rulings that are discriminatory towards women. This is not merely a theoretical concern. Empirical studies and anecdotes from women's rights activists who have helped Muslim women within British Sharia Councils show that many of these councils employ highly conservative and gender discriminatory interpretations of Sharia.¹³⁹

¹³⁶ For a concise summary of the objections in Canada, see Walter, *supra* note 5, at 539-41.

¹³⁷ See Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 *ECCLESIASTICAL L. J.* 262-68 (2008).

¹³⁸ The Muslim Arbitration Tribunals are another form of private Muslim tribunals seeking recognition as arbitration tribunals in family law matters. Christopher R. Lepore, *Asserting State Sovereignty over National Communities of Islam in the United States and Britain: Sharia Courts as a Tool of Muslim Accommodation and Integration*, 11 *WASH. U. GLOBAL STUD. L. REV.* 669, 669 (2012). For the sake of brevity my discussion will only refer to Sharia Councils, yet it is applicable to both.

¹³⁹ See Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*,

Advocates of liberal democracies' partial authorization of private religious tribunals for family law matters usually point to two safeguards that prevent the state from enforcing unjust and discriminatory decisions by religious tribunals. The first safeguard is granting civil judges who are charged with enforcing the decisions of private religious tribunals as awards in arbitral proceedings the discretion to refuse to enforce the decision.¹⁴⁰ The second safeguard is requiring that both parties enter into all arbitrations freely, including those conducted by private religious tribunals.¹⁴¹ While these safeguards may prove helpful in some cases, there are two reasons why they would not prevent the implementation of discriminatory decisions of private religious tribunals in the majority of cases. First, in addition to the fact that arbitration acts often restrict the ability of a party to the arbitration to object to arbitral proceedings, civil courts are inclined to uphold arbitral awards, only setting aside those which patently and manifestly contradict public policy.¹⁴² Moreover, it is doubtful that many women will have the knowledge and ability to contest decisions of private religious tribunals.¹⁴³ In Britain, for example, many women are led to believe that Sharia Council decisions are binding even though they are not enforceable through state courts and contradict decisions by state courts on the same matters. As one of the women who turned to a Sharia Council in Britain in order to obtain a Muslim divorce explained her reaction to the proceedings:

I couldn't understand . . . they wrote me a letter saying that there was

1 L. SOC. JUST. & GLOBAL DEV. J., 1, 16, 19 (2007), available at http://www.go.warwick.ac.uk/elj/lgd/2007_1/bano; see also Sohail Akbar Warraich & Cassandra Balchin, *Recognizing the Un-Recognized: Inter-Country Cases and Muslim Marriages & Divorces in Britain* 79-80 (2006); Cassandra Balchin, *Having our cake and eating it: British Muslim women*, OPEN DEMOCRACY FORUM (Feb. 1, 2011) <http://www.opendemocracy.net/5050/cassandra-balchin/having-our-cake-and-eating-it-british-muslim-women>); Pragna Patel, *Cohesion, Multi-Faithism and the Erosion of Secular Spaces in the UK: Implications for the human rights of minority women*, in THE STRUGGLE FOR SECULARISM IN EUROPE AND NORTH AMERICA, *supra* note 135, at 137-39.

¹⁴⁰ See Walter, *supra* note 5, at 518.

¹⁴¹ See Helfand, *supra* note 2, at 1243-44; see also Walter, *supra* note 5, at 518.

¹⁴² See, e.g., Arbitration Act, 1996, c. 23, §§ 68, 70 (Eng); see also Patel, *supra* note 139, at 137-39; Walter, *supra* note 5, at 517-19 (regarding the United States); Helfand, *supra* note 2, at 1288-94 (suggesting more restrictions on civil courts' ability to use public policy arguments to vacate the arbitration decisions of religious tribunals). U.S. civil courts have held that arbitration decisions should not be vacated due to extreme communal pressure – such as the issuance of a K'sav Seruv (the equivalent of excommunication) – levied against an individual who refused to submit to religious arbitration before a Jewish Bet Din. See *id.* at 1286-87.

¹⁴³ See MALEIHA MALIK, *MINORITY LEGAL ORDERS IN THE UK: MINORITIES, PLURALISM AND THE LAW* 44 (2012); see also Shachar, *supra* note 3, at 588-92.

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issues to be taken into account that was about child custody, which was about the house, which was about possessions, which was about . . . all kinds of things. I thought, hold on, what jurisdiction do they have? I've already been through the courts; why do I have to go through a set of Islamic courts? Do I have to go through them again? It's all been done and what if it means I can't have custody? Who wins? English law or the Islamic Sharia Council?¹⁴⁴

Furthermore, the second safeguard – that women turn to private religious tribunals out of their own free will and therefore are free to choose not to do so – is also insufficient. First, many women are pressured by their family and community to use these tribunals in order to conform to community norms; this pressure will increase if the community and the state accord these tribunals more standing and recognition.¹⁴⁵ Even if women have a formal right of exit, they often lack the means and opportunities to leave their communities, especially when such communities are repressive.¹⁴⁶ Moreover, the assumption that Muslim women will turn to a religious tribunal out of their own free will may be particularly ill-suited. Unlike Muslim men who can divorce simply by pronouncing “talaq” three times,¹⁴⁷ any woman who wants to obtain a Muslim divorce must turn to a religious tribunal. Many Muslim women feel that they need a religious divorce in order to proceed with their lives and therefore decide to turn to religious tribunals.¹⁴⁸ The fact that women wish to obtain religious divorces does not mean that they volitionally accept the tribunal's authority to decide issues pertaining to child custody or to the division of property. To the contrary, the tribunal may use the vulnerability of these women applicants in order to pressure them to give up rights that state laws guarantee. The authorization of private religious tribunals through the grant of state enforcement of their decisions will further exacerbate this phenomenon and give it an official, albeit unintended, seal of approval.

Some multicultural theorists have suggested that liberal states should partially authorize religions of minority communities through joint governance schemes. One leading theorist of multiculturalism who advocates such partial authorization is Ayelet Shachar. In her influential

¹⁴⁴ Samia Bano, *In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain*, 10 *ECCLESIASTICAL L. J.* 283, 305 (2008).

¹⁴⁵ See Shachar, *supra* note 3, at 590-92.

¹⁴⁶ See Andrea Büchler, *Islamic family law in Europe? From dichotomies to discourse – or: beyond cultural and religious identity in family law*, 8 *INT'L J. L. IN CONTEXT* 196, 205 (2012).

¹⁴⁷ For a description of the existence of talaq divorce and its procedure, see Welchman *supra* note 40, at 107-08.

¹⁴⁸ See Malik, *supra* note 143, at 46-47.

book, *Multicultural Jurisdictions*, Shachar calls for the institutionalization of a joint governance approach that would divide the jurisdiction over members of religious and cultural minority groups between the state and the group.¹⁴⁹ In doing so, Shachar assumes that members of religious minorities desire their communal religious authorities to govern them much more comprehensively than the liberal state currently allows. While this may be true for some members of religious minority communities, it is doubtful that the more vulnerable members of these communities would be equally enthusiastic.¹⁵⁰ Being acutely aware of what she terms “the paradox of multicultural vulnerability” – where weaker members of cultural and religious minorities, such as women and children, are in real danger of being deprived of their rights as a result of the grant of authority over various aspects of their lives to non-liberal groups – Shachar suggests that such institutionalization be conducted through a complex system of joint governance, which she calls “transformative accommodation.”¹⁵¹

Shachar’s impressive model is premised on three principles. The first is the sub matter allocation of authority, which provides that neither the state nor the group has full authority over a particular subject matter.¹⁵² In the area of family law, authority can be divided in such a way that the state retains control over property and maintenance issues, while the group retains control over membership demarcation issues (marriage and divorce).¹⁵³ The second is the no monopoly rule, a corollary of the sub matter allocation rule. The third is the establishment of clearly delineated choice options, which members of the group can utilize when they feel that their rights are being violated by authorities of the group.¹⁵⁴ This is especially important for women. In accordance with the liberal aversion to state intervention in the autonomy of religious and cultural groups, Shachar’s model does not allow the state any direct intervention in group practices. Instead, it relies on the sub matter allocation of authority and the exercise of choice options by the weaker members of the group to bring about changes in group practices that would ensure respect of the rights of

¹⁴⁹ See generally MULTICULTURAL JURISDICTIONS, *supra* note 6.

¹⁵⁰ An empirical study targeting the U.S. Muslim community found that it positively regards the concept of an informal private system that offers some of its members spiritual, emotional, and social comfort, yet offers almost no support for a parallel Islamic tribunal system. See Julie Macfarlane, *Shari’a Law: Coming to a Courthouse Near You? What Shari’a Really Means to American Muslims*, in INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING 11, 23 (Jan. 2012 Report), available at <http://www.ispu.org/GetReports/35/2459/Publications.aspx>.

¹⁵¹ See MULTICULTURAL JURISDICTIONS, *supra* note 6, at 117.

¹⁵² See *id.* at 117-45.

¹⁵³ See *id.* at 121.

¹⁵⁴ See *id.* at 120-26.

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weaker members.¹⁵⁵

Shachar believes that, unlike other models of joint governance, her model adequately protects women's rights while simultaneously granting religious groups authority over their own members and control over essential aspects of their communal existence. However, it is unclear whether Shachar's model is better equipped to confront the challenge of the authorization of strong religion within the liberal state than other joint governance models.¹⁵⁶ First, it is unclear how the sub matter allocation of authority and the no monopoly rule, which are intended to prevent a situation in which either the state or the group have an exclusive monopoly over an area such as family law, can achieve this goal in practice. As the example of rabbinical courts in Israel discussed in Part IIB shows, a conservative religious court bent on circumventing liberal judgments of civil courts on maintenance and property matters can utilize religious doctrines, such as the retroactive annulment of divorce, in order to circumvent state rulings without overstepping what Shachar calls its sub matter jurisdiction.¹⁵⁷ The preservation of clearly delineated boundaries between the independent religious authority and the state requires mutual good will. Not only do ultra-conservative religious communal authorities often lack good will towards the liberal state, but, as the Israeli example shows, it is precisely the states' liberal egalitarian inclinations that inspire their outmost resistance.¹⁵⁸ Second, as Shachar's critics have observed, the assumption that the establishment of clearly delineated choice options will enable women mistreated by community authorities to turn to the state for help relies too heavily on women's agency and on their ability to stand up to group pressures.¹⁵⁹ It ignores the fact that women in many conservative groups are socialized into conformity and compliance and that this socialization is more pervasive the more conservative the group.¹⁶⁰ In fact,

¹⁵⁵ See *id.* at 124-26.

¹⁵⁶ For various joint governance schemes, see *id.* at 88-113; see also Sandberg et al., *supra* note 6, at 12-20.

¹⁵⁷ See *supra* notes 86 – 88 above and accompanying text.

¹⁵⁸ As Jean L. Cohen argues: “[T]he notion that religious leaders would reform the patriarchal aspects of their communities’ rules to avoid mass exit or to get legal effect for their decisions is unconvincing. Orthodox or fundamentalist versions of religion tend to define themselves over and against feminism and reform break-away movements regardless of the cost in membership. Faithfulness to what they deem to be fundamental constitutive norms take precedence over numbers for true believers.” Jean L. Cohen, *The politics and risks of the new legal pluralism in the domain of intimacy*, 10 *I•CON* 380, 387 (2012).

¹⁵⁹ See, e.g., Eric J. Mitnick, *Individual Vulnerability and Cultural Transformation*, 101 *MICH. L. REV.* 1635, 1659-60 (2003) (reviewing Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*).

¹⁶⁰ *Id.* at 1659.

in important respects, Shachar's model is more challenging than the authorization of religion through the enforcement of decisions of private religious tribunals as arbitration decisions. In the religious arbitration model, women have to actively opt in by going to the religious tribunal in the first place, or, alternatively, they can choose to conduct the entire divorce before a civil court. In Shachar's model, the religious tribunal has exclusive jurisdiction in sub matters agreed upon by the community and the state, and the woman must submit to its authority. Furthermore, Shachar emphasizes that a woman can exercise her option to exit the communal religious system and turn to the state for help only in cases where she suffered a clear violation of her rights since the right of the community over its members should not be taken lightly.¹⁶¹ Therefore, the obstacles facing women who do not wish to submit to communal religious authorities under this model are considerable.

A further problem with the partial authorization of religious tribunals, either through joint governance schemes such as Shachar's or through religious arbitration, is that such authorization affirms and empowers religious tribunals, some of which are patriarchal power structures that exclude women, provide women with no voice in governance, and, in some cases, give women's testimony less weight than that of men, or reject it altogether.¹⁶²

B. The NY Get Laws and the Soft Nationalization of Religion

As was discussed, partial authorization of communal religious authorities gives too much power to the group and lacks the means to guarantee the preservation of the rights of individual members of the group. Conversely, soft nationalization, when carried out properly, can both recognize the importance of religion in the life of the religious individual and her community and ensure that the rights of the individual are not unduly violated by the group or its religious precepts. The NY Get Laws and similar legislation in other liberal democracies, such as England and Canada, are good examples of this idea.¹⁶³

The NY Get Laws is civil legislation intended to help Jewish women whose spouses refuse to divorce them religiously after they have obtained a civil divorce.¹⁶⁴ A spouse's refusal to divorce religiously has dire

¹⁶¹ See Shachar, *supra* note 3, at 123.

¹⁶² See Cohen, *supra* note 158, at 388; see also Helfand, *supra* note 2, at 1294.

¹⁶³ Similar legislation can be found in other liberal democracies. See, e.g., Divorce Act, R.S.C. 1985, c. 3 (Can.); Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.) (codified as Matrimonial Causes Act, 1973, c.18, § 10A (Eng.)).

¹⁶⁴ For a detailed account of the New York legislation and its effects, see generally Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 PACE L.

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consequences for a religiously observant Jewish woman since, according to Orthodox Judaism, a woman whose spouse refuses to divorce her cannot remarry or cohabit, and any children that are born to her from a new relationship are considered religiously illegitimate (Mamzerim) and can only marry other Mamzerim.¹⁶⁵ Some men take advantage of the constraints that Jewish religious law places on women in order to extract financial and other concessions in exchange for their consent to the religious divorce; others refuse to grant the divorce, leaving the woman religiously anchored to the marriage.¹⁶⁶ The NY Get Laws attempt to resolve this problem by stipulating that a person filing for a civil divorce must take all steps within his or her power to remove all barriers to the other party's remarriage prior to receiving the civil divorce, including the grant of a religious divorce.¹⁶⁷ Moreover, since this provision cannot assist women whose husbands are not interested in obtaining a civil divorce, an additional provision was passed allowing civil courts to take into account a spouse's refusal to remove barriers to the other's marriage when ruling on the equitable division of the marital assets and setting maintenance.¹⁶⁸ In this manner, even a husband who is not interested in obtaining a civil divorce may be inclined to grant his wife the religious divorce she is seeking in order to escape the possible financial costs that a refusal to do so may generate. In contrast to strong forms of nationalization of religion, which impose state-sanctioned religious law on all citizens, this soft nationalization connects civil and religious law only insofar as religious law has already been privately used by the parties, and when it is used to ameliorate injustices that its later misuse may have created.

While critics of the NY Get Laws have accused them of violating the First Amendment by interfering with the recalcitrant husband's religious liberty and by impermissibly establishing religion in granting special benefits to a particular religion, these arguments have been rejected by the law's proponents and no constitutional challenge has yet been brought before the U.S. Supreme Court.¹⁶⁹ Similar disagreements regarding the

REV. 703 (1994-1995); Michael J. Broyde, *New York's Regulation of Jewish Marriage: Covenant, Contract, or Statute?*, in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION* 138 (Joel A. Nichols ed., 2011); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 *S. CAL. L. REV.* 781, 810-39 (1997-1998).

¹⁶⁵ See Stone, *supra* note 7, at 175.

¹⁶⁶ See *id.* at 171.

¹⁶⁷ N.Y. DOM. REL. LAW § 253 (2013).

¹⁶⁸ N.Y. DOM. REL. LAW § 236B 5(h), 6(d) (2013).

¹⁶⁹ For a detailed analysis of the compatibility of the NY Get Laws with the religion clauses, see Greenawalt, *supra* note 164.

compatibility of the intervention of civil authorities in a husband's obligation to grant a religious divorce have arisen in the famous Canadian Supreme Court decision *Bruker v. Markovitz*.¹⁷⁰ The wife in *Bruker* sued her husband for damages since he refused to grant her a religious divorce for fifteen years, despite his contractual obligation to do so according to their civil divorce agreement.¹⁷¹ The Canadian Court was divided on whether this section of the agreement was legally enforceable and binding.¹⁷² While the majority held that the contractual obligation was a valid civil obligation and that the wife was entitled to damages for its breach, the minority maintained that it was an unenforceable religious obligation whose enforcement by a civil court would violate the religious freedom of the husband by punishing him for refusing to carry out a religious obligation.¹⁷³ Even though the majority did not find that holding the husband accountable for his breach of contract would lead to any prima facie infringement of his religious freedom, it held that in the event of actual infringement, the court must balance it against other important constitutional rights and interests.¹⁷⁴ When weighed against the wife's rights to equality, religious freedom, and autonomous choice in marriage and divorce – which were all breached by his refusal to grant the religious divorce he committed himself to granting – the husband's alleged right to religious freedom had to give way.¹⁷⁵

The disagreement between the justices in *Bruker* highlights an important aspect of the challenge of strong religion in the liberal state and of the soft nationalization of religion as a response to it. While the minority justice claims that the civil court's intervention in this case would be an impermissible state involvement with religion because it would infringe on the husband's religious freedom, the majority rightly points out that the civil court's refusal to intervene in this case and to rule in favor of the wife would violate the wife's right to religious freedom, equality, and freedom in marriage.¹⁷⁶ Thus, the challenge of strong religion in the liberal state is that the state will probably affect the religious rights of individuals regardless of whether it intervenes or not. If this is true, shouldn't a liberal state that is committed to equality and dignity for all opt for soft nationalization, which enables it to judiciously intervene in favor of the wronged party, in lieu of both partial authorization, which allows traditional religious authorities to

¹⁷⁰ *Bruker v. Markovitz*, [2007] 3 R.C.S. 607 (Can.).

¹⁷¹ *Id.* at 608.

¹⁷² *Id.*

¹⁷³ For the majority opinion, see *id.* at 615-47; for the minority opinion, see *id.* at 647-78.

¹⁷⁴ *See id.* at 637-38.

¹⁷⁵ *See id.* at 645-46.

¹⁷⁶ *Id.*

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side with the wrongdoer, and privatization, which leaves the power in the hands of the wrongdoer?

Furthermore, while the separation of religion from the state is a crucial aspect of the liberal scheme of religion-state relations, its ultimate goal is to ensure both freedom of religion and equality for all. Consequently, the contours of the separation should be understood and crafted with this goal in mind.¹⁷⁷ The challenge of strong religion in the liberal state is for the liberal state to both respect the rights of adherents of strong religions and enable all, especially the weaker members in the community, such as women, to adhere to their beliefs while maintaining their equality and dignity. This necessitates some state recognition of the rights violations that women may suffer as a result of their adherence to strong religion and the crafting of an appropriate response through civil legislation or civil court rulings. In contrast to strong forms of nationalization of religion such as those discussed in Part IIA, in which the line between religion and the state gets dangerously unclear as state legislation explicitly dictates the content of the religious obligations, the soft nationalization offered by legislation such as the NY Get Laws maintains the differentiation between religion and the state required in a liberal society. In the NY Get Laws, the state does not determine the content of the applicable religious law; rather, it relies on existing religious law and requires its implementation in suitable instances in order to further the important interest of the state in the preservation of women's equality and dignity.

Moreover, although legislation such as the NY Get Laws requires the involvement of a private religious tribunal that has to issue the religious divorce, there are crucial differences between this soft nationalization of religion and the partial authorization of religion through religious arbitration or through joint governance schemes discussed in the previous section. First, although the religious tribunal (in this case the Beth Din) is involved in the process and its authority is needed in order to grant the religious divorce, the control over the process remains at all times with the civil court, which has complete discretion to decide whether or not to request the involvement of the religious tribunal and whether or not take its ruling into account.¹⁷⁸ Even more important, the relevant authority of the religious tribunal is restricted to carrying out a purely religious ceremony – the act of religious divorce – which the civil court cannot carry out, and which protects and promotes the liberal rights of the woman whose husband

¹⁷⁷ MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 11-12, 19-21 (2008).

¹⁷⁸ For example, a women's civil rights will not be affected if a religious tribunal refuses to issue a religious divorce after she has obtained a civil divorce, yet her situation will not improve from a religious perspective.

denies her rights through his refusal to grant her the divorce.¹⁷⁹ Thus, the cooperation between the secular state system and the religious communal authorities is limited only to those instances that are guaranteed to promote liberal rights and only insofar as there is no other way to achieve this important goal.¹⁸⁰

Finally, the NY Get Laws, just like its English and Canadian counterparts, was passed with the support of the Jewish religious community in New York, which has cooperated with its implementation.¹⁸¹ It is important to observe that this cooperation continues despite the bitter disagreement within the community regarding the provision allowing civil courts to take into account the refusal of a spouse to remove barriers to the other's marriage when ruling on the equitable division of the marital assets and setting maintenance.¹⁸² Moreover, while it is safe to assume that some members of Jewish religious communities prefer to see the state give their religious tribunals more authority, they have had to contend with a state system that insists on conducting all matters relating to divorce according to secular law.¹⁸³ Nevertheless, neither of these internal tensions has kept the community from realizing that even a limited cooperation with the state will benefit all sides and will promote the religious interests of the community, as well as the liberal values of the state. This may be an important lesson in how soft nationalization – the principled involvement of the state with religion through civil law and the civil courts without renouncing the state's commitment to its liberal values – can strengthen the more moderate voices in the religious community and advance equality and dignity for all.¹⁸⁴

¹⁷⁹ For a similar argument in a broader context, see Walter *supra* note 5, at 553-54 (arguing for the recognition of religious arbitration only when such arbitration regards solely religious matters that cannot be resolved by a civil court).

¹⁸⁰ For examples of cases, see Brody, *supra* note 164, at 159-60.

¹⁸¹ *See id.* at 161.

¹⁸² *See* Stone, *supra* note 7, at 177.

¹⁸³ *See id.* at 172.

¹⁸⁴ There are other examples of soft nationalization of religion. For example, Spain and England have introduced special forms of guardianship into adoption laws based on the Islamic law concept of *kafala* (a form of legal guardianship). *See* ANDREA BÜCHLER, ISLAMIC LAW IN EUROPE? LEGAL PLURALISM AND ITS LIMITS IN EUROPEAN FAMILY LAWS 69-70 (2011). These special forms of guardianship enable families with religious or cultural aversions to adoption, such as the adoption prohibition in Islamic law, to have legally-recognized parental rights over a child, offering the child a permanent family. *Id.* Thus, soft nationalization acknowledges the importance of religion and its precepts in the lives of religious individuals, yet also uses civil state law to ensure that such individuals can retain their religious affiliations while also enjoying their full and equal rights. Therefore, soft nationalization ensures that such individuals are not disadvantaged by their deeply held religious beliefs.

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V. CONCLUSION – THE CHALLENGE OF STRONG RELIGION IN THE LIBERAL STATE

The main approach that liberal states take towards religion is privatization, which gives religions great autonomy to act within the private sphere despite the injustices that strong religions may impose on weaker members of the religious groups, such as women. While some women may feel the need to have the state act to achieve more justice, some groups subscribing to strong religions desire not only autonomy, but also more authority over the daily lives of their members and call for state authorization that would strengthen their religious communal institutions.

Although, at first blush, such partial authorization of strong religion may seem to be compatible with liberal values, such as respect for religious autonomy and non-entanglement of the state in religious affairs, it might endanger the rights of weaker members of the group. Since authorization necessarily entails giving more power to existing communal institutions, it might also undermine the ability of the more liberal members of the community to change the community from within. This might contribute to further radicalization of the group. Conversely, soft nationalization avoids these pitfalls while enabling the state to acknowledge the significance of religion to the community and to the individual. Without infringing on the religious autonomy of the group, and preferably in cooperation with it, soft nationalization works to ameliorate the disadvantages that some religious individuals may encounter as a result of their adherence to their particular religion. Despite the liberal reluctance to entangle the state in religious matters, soft nationalization of religion is nonetheless the best means of meeting the challenge of strong religion in the liberal state. When carried out properly, like in the NY Get Laws, soft nationalization of religion allows the liberal state to respect the religious needs of adherents of strong religions, while safeguarding liberal values such as equal rights of all.