Permissive Constitutions, Democracy, and Religious Freedom in India, Indonesia, Israel, and Turkey

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PERMISSIVE CONSTITUTIONS, DEMOCRACY, AND RELIGIOUS FREEDOM IN INDIA, INDONESIA, ISRAEL, AND TURKEY

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I. Introduction

TENSIONS over religion-state relations have become increasingly salient in contemporary processes of constitution writing and rewriting around the world. Many of the current and expected projects of constitution drafting involve intensive disputes over the religious character of the state and are taking place in societies that are deeply divided over religious issues. In Egypt, after the fall of Mubarak, for example, the question of the precise role Islamic law should play in the new regime was central. This is also the case in the ongoing constitutional debates in Tunisia. Similarly, disputes over the definition of secularism and the role of religion in the public sphere stand at the heart of the constitution-drafting process in Turkey. In Israel the religious-secular conflict continues to be the main obstacle to advancing a written constitution. Even in Europe questions are reemerging regarding the role constitutions (and not only constitutional law) should play in redefining religion-state relations.[1]

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[1] On both the EU level (Shakman-Hurd 2008; Mancini 2010) and the level of national constitutions (Sajo 2008; Rosenfeld 2007).

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What role can, or should, constitutions play in mitigating the intense conflicts over the religious character of the state? What types of constitutional solutions might reconcile democracy with the type of religious demands raised in contemporary democratizing or democratic states such as Egypt, Tunisia, Turkey, and Israel? How should constitution drafters address questions of religion-state relations? And to what extent can they—and should they—leave these issues for future political deliberation and decision making? Despite the growing interest in these questions, the comparative and theoretical study of constitution writing and religion has remained surprisingly limited. While there has been much recent scholarly work on constitution making, as well as on the sociology of religion, only little academic attention has been paid to the link between constitution *drafting* and *religious* conflicts. Most scholars of constitutional law and constitutional theory focus on the normative aspect of constitutional adjudication in the sphere of religion, taking for granted the existence of formal constitutional arrangements (most notably in the case of the US constitutional literature), while advocating a liberal and deliberative constitutional framework as the paramount protector of human rights.[2] They pay little attention to questions of constitutional formation or constitutional design.[3] Alternatively, scholars of comparative politics who write about constitutional design tend to focus their research on institutional mechanisms that allow for democratic governance in the context of deep divisions between various identity groups. Yet these works say little about how struggles over the religious character of the state *as a whole* could be mitigated or how to settle conflicts on the role of religious law.[4] Finally, those who do research constitutional debates in the context of religious differences usually limit their focus to a particular case study, analyzing it in light of its own unique cultural, historical, and legal context.[5]

This article attempts to take some preliminary steps toward filling in the existing lacunae in the theoretical and comparative accounts of religion in constitution drafting. Its main argument is that the paradigm

[2] Greenawalt 2009; Eisgruber and Sager 2007; Rosenfeld 2007. Some works endorse a more comparative perspective, for example, Jacobsohn 2003; Hirschl 2010; and Shankar 2010. However, they do not look at the constitution-drafting debates but rather take the written constitution as their starting point of analysis. Similarly, large-N comparative studies such as Fox and Flores 2009 concern the constitutional texts as a given.

[3] See Choudhry 2008, 7–11.

[4] Among the prominent writings in this vast literature are Horowitz 1991; Horowitz 1993; Horowitz 2000; Lijphart 1975; Lijphart 1977; and Lijphart 2004. For a detailed overview, see McGerry, O'Leary, and Simeon 2008.

[5] For example, on Turkey, see Bali 2012; Özbudun and Genckaya 2010; on India, see Bhargava 2010; on Indonesia, see Hosen 2007; on Israel, see Lerner 2011a, chap. 3.

of liberal constitutionalism, commonly proposed to address religious controversies, is not a relevant framework for religiously divided societies. While normatively attractive, the ideal of liberal constitutionalism is not compatible with the political realities and the types of conflict that characterize contemporary societies deeply divided by the religious character of the state. The article explores four cases in which questions of religion were at the heart of the constitutional debate: Turkey, Indonesia, India, and Israel. Based on a process-tracing analysis of the constitutional debates,[6] I argue that under conditions of deep disagreement over the state's religious character, the drafters adopted either a *permissive* or a *restrictive* constitutional approach to address their intense internal religious conflicts. A *permissive* constitutional approach uses strategies of constitutional ambiguity, ambivalence, and vagueness to allow the political system greater flexibility in future decision making regarding controversial religious issues. It thus allows religiously divided societies to adopt a democratic constitution or function with an unwritten constitution. By contrast, a *restrictive constitutional approach* uses specific constitutional constraints designed to limit the range of possibilities available to future decision makers when addressing religion-state relations.

The article further proposes directions for comparative analysis of permissive and restrictive constitutional arrangements, by examining the long-term consequences of the constitutional arrangement adopted at the state's foundational stage in terms of two criteria: its ability to promote the democratic functioning of future governments and its ability to guarantee religious freedom. An analysis along these lines suggests that permissive arrangements—more than restrictive arrangements—are likely to facilitate the emergence of democratic institutions. On the question of religious freedom, I argue that the two approaches differ in their impact on freedom *of* religion (that is, protection of the rights of religious groups) and freedom *from* religion (that is, the right of individuals to opt out of religious practices and affiliations). Permissive constitutions for the most part allowed for greater freedom *of* religion than did restrictive constitutions. By contrast, freedom *from* religion was limited under permissive constitutional arrangements, compared with the restrictive constitutions studied here.

This study rests on the assumption that constitutions are a product of a political, rather than a legal, process. By bridging research in comparative constitution making, constitutional theory, and the politics of

[6] George and Bennett 2005.

identity (particularly religious identity), it strives to better understand the preferences and choices made by the political actors who debated and drafted constitutions under divisive circumstances. Moreover, this article hopes to extend the range of potential constitutional models and lessons that are commonly available to scholars and practitioners involved in contemporary constitution drafting. By theorizing a constitutional alternative to that of liberal constitutionalism and by drawing from the constitutional experience of non-Western societies, it aims to broaden the range of examples from which current discussions of constitution drafting tend to draw,[7] particularly when questions of religion-state are at the heart of the debate.

The article proceeds as follows: Section II briefly delineates the ideal type of liberal constitutionalism and the difficulties in implementing it in religiously divided societies. Section III theorizes the alternative approach of permissive constitutions, distinguishing it from restrictive constitutions, as well as from liberal constitutions. Section IV analyzes a variety of permissive and restrictive constitutional arrangements adopted by India (formal permissiveness), Israel (informal permissiveness), Turkey (imposed secularism through restrictive constitution), and Indonesia (shifting from religious constitutional permissiveness at the foundational stage to constitutional restrictiveness after 1959 and back to religious permissiveness in 1998). Section V highlights the similarities in arguments raised during the debates in support of permissive constitutions. Section VI offers a preliminary comparison between the long-term impact of the various constitutional arrangements on the emergence of democratic institutions and on the prospects for freedom *of* religion and freedom *from* religion in the four case studies. The conclusion proposes directions for additional research, with suggestions for both conceptual and empirical studies.

II. The Liberal Constitutional Paradigm and Religiously Divided Societies

Scholarly work on constitutions and constitution writing is dominated by the paradigm of liberal constitutionalism.[8] According to this ap-

[7] Academic research tends to focus on the models of the constitutions of the US, France, or the UK. Recently South Africa has also become a central model attracting the attention of constitutional scholars.

[8] The literature on the topic is vast. For a summary of the main debates, see Whittington 2008. For only a few representative examples of this approach, see Bryce 1901; Friedrich 1950; Hayek 1978; Sajo 2008; and Holmes 1995.

proach, constitutions, first, are expected to be written documents created by a formal legislative act.[9] Second, constitutional rules are expected to set out the legal framework for the political order and provide a legal tool for future judicial and legislative decisions. As such, they are perceived as distinct from and superior to ordinary legislation.[10] Their adoption is usually described in terms of "higher lawmaking," resting on greater democratic legitimacy than the "normal lawmaking" that is conducted by elected representatives.[11] Third, the liberal constitutionalist tradition, which has generally relied on the narratives of the US Constitution and the French Revolution, tends to perceive the moment of constitution making in foundational and transformative terms. Constitutionalist theorists from Hannah Arendt to Bruce Ackerman consider the act of constitution writing as a break or new beginning, in which a constitution is created either to formally incorporate the substantive achievements of a successful revolution or to serve as a point of departure for initiating a radical change and a clean break with the past.[12] Finally, liberal constitutionalism is normatively committed to the legal protection of fundamental human rights.[13] The institutionalization of constraints on political authorities in the name of human rights is the key feature that distinguishes constitutions that are considered "proper" or "real" from those that are viewed as "nominal" or "façade" constitutions.[14]

Many would consider this commitment to human rights a tacit, if not an overt, expression of public secularism. Religion in this scenario is relegated to the private sphere.[15] Most conceptions of liberal constitutionalism advocate for this divide between religion and the public sphere. The separation between religious identity in the private sphere and the shared civic identity of the citizenry is one of the definitive features of political liberalism[16] and of what Charles Taylor described as "the secular age of the North-Atlantic west."[17] According to the liberal

[9] Kelsen 1961. The UK unwritten constitution (as well as those of Israel and New Zealand) represents an exception to this general rule, as is evident from the fact that there is a formal constitution in almost each of the 193 UN member states, half of which have been written or rewritten in the past three decades. Elkins, Ginsburg, and Melton 2009, 215–21.

[10] Article VI in the US Constitution states: "This Constitution . . . shall be the supreme Law of the land." See also Alexander 2011, 1–24; and Raz 1998, 153–54.

[11] Ackerman 1992, 6; Ackerman 1991; Levinson 1995; Lutz 1994.

[12] Arendt 1965; Ackerman 1992; Preuss 1995.

[13] Elster 1993, 3; Sunstein 2001, 6–8.

[14] Sartori 1962, 861–62.

[15] Sajo 2008, 605–29; Macedo 1998.

[16] Rawls 1996.

[17] Taylor 2007.

approach, constitutions should avoid interfering with identity issues, particularly those that pertain to religion.[18] Although the inclusion of provisions for freedom of religion does not guarantee limitations on governmental intervention in religious affairs,[19] the ideal type of liberal constitutionalism indeed assumes that constitutions should play a minimalist role in matters of religion.

In sum, drafting a constitution, according to the liberal paradigm, is a revolutionary moment in which supreme principles, intended to guide future generations and prevent the violation of human rights, are to be embedded in a formal document. This ideal type of a liberal constitution is by all accounts normatively and theoretically attractive. However, as some observers recently noted: "[C]onstitutional democracy is at once an attractive idea and a daunting enterprise."[20] In the face of complex conditions of religiously divided societies, liberal constitutionalism confronts significant challenges.

What are religiously divided societies? Divided societies are generally defined in the comparative politics literature according to the level of intensity and comprehensiveness of the societal divisions[21] or according to the enduring nature of the schism.[22] Most research on divided societies does not distinguish between conflicts along ethnic, national, linguistic, or religious lines. By contrast, this study focuses on religiously divided societies, which may be characterized by either interreligious or intrareligious conflicts.[23] Religiously divided societies differ from multireligious or religiously heterogeneous societies in that they are characterized not only by religious diversity, that is, with their members belonging to various religious groups. Rather, religiously divided societies are also characterized by ongoing conflicts between competing perspectives regarding the religious character of the state as a whole. In such societies, frictions go beyond the type of tensions that could be bridged by what John Rawls termed "overlapping consensus."[24] They go beyond questions regarding religious symbolism

[18] Rawls 1996; Habermas 1998; Habermas 2001; Webber 1994; Webber 2000; Sajo 2008.

[19] Fox and Flores 2009.

[20] Tulis and Macedo 2010, 1.

[21] Lustick 1979, 325; Nordlinger 1972, 9; Lijphart 1977.

[22] Glazer 2010, 14; Choudhry 2008, 5.

[23] One should also note that the distinction between interreligious and intrareligious divides may vary across place as well as across time. For example, the Catholic-Protestant divide may be considered interreligious in Northern Ireland, while it may be viewed as intrareligious (that is, intra-Christian) elsewhere in European countries, such as in Germany or in Scandinavia. Similarly, the Sunni-Shia divide may be considered interreligious in the contemporary Lebanese context, while perhaps in the 1920s it was more commonly perceived as intra-Muslim, compared with the main division with the Christians.

[24] Rawls 1996, chap. 6.

or the allocation of resources to the various religious groups. Rather, disagreements usually concern questions about the place of religious law in the modern state or the relationship between religious authorities and democratically elected representatives. The conflict is not over group rights; instead, it focuses on the fundamental norms and values that should guide state policies in the area of religion for the entire population. Thus, tensions in religiously divided societies often stem from a fundamental controversy between those who advocate for the basic tenets of political liberalism, private religious identities, and a shared, public identity as citizens and those who reject these positions.

A good example for such a foundational schism is the one that exists between secular and Orthodox Jews within the Jewish population in Israel.[25] The two camps hold competing views regarding the definition of Israel as a Jewish state and whether in this context "Jewish" should be understood in cultural-national or religious terms. Thus, unlike multi-religious countries such as the US and Canada, where the fundamental principles of political liberalism are shared by the majority of the population and are enshrined in constitutional tradition, in religiously divided societies such as Israel, India, Indonesia, and Turkey, the conflict over political liberalism is a central issue in political and constitutional disputes. Unlike religious minorities in liberal countries, the Orthodox camp in Israel does not wish merely to enjoy legal exemptions or the protection of special group rights within a liberal constitutional framework. Rather, it seeks to impose its religious views on the state in toto. For example, the Orthodox political leadership demands a nationwide prohibition of public transportation on the Sabbath, as opposed to local limitations in cities and towns where the Orthodox constitute the majority of the population. Likewise, this sector insists on maintaining a religious monopoly over marriage and divorce, even for those who deny belief in God.[26] A similar schism cuts across the Muslim-Hindu divide in India, where tensions exist between fundamentalist religious camps and moderate liberal camps in both religious groups,[27] and across the societies of Turkey and Indonesia, in which the split is between people who define themselves as secular-liberal Muslim and people who define themselves as religious-conservative Muslim.[28]

[25] Among the Jewish population in Israel (age twenty or above), 41.7 percent defined themselves as not religious, secular, 40.2 percent as traditional, 9.8 percent as religious, and 8 percent as Ultra-Orthodox. Central Bureau of Statistics 2008, 7.4.

[26] Cohen and Susser 2000.

[27] Jaffrelot 1996; Hasan 1994.

[28] In Turkey this distinction also has a geographical dimension, between the urban setting and the periphery. Hale and Özbudun 2010.

When religiously divided societies engage in drafting a constitution, ideological disagreements are imported into the constitutional debate, as each side seeks to express its aspirations and goals in the constitutional document. When the clash is between competing factions that wish to impose their religious views on the state as a whole, the liberal constitutional paradigm, which is often considered the most rational solution to religious conflicts, faces substantial challenges and may ultimately be incompatible with these types of divisions. It is difficult to draft definitive constitutional principles to guide future legislative and judiciary decision making in the religious sphere in the absence of a societal consensus on the religious character of the state. Under such deep disagreements, especially when religious demands clash with basic rights and principles of gender equality and minority rights, liberal constitutionalism is not perceived by all drafters as a neutral ground intended to allow future democratic deliberation on controversial issues. Rather, it represents one side in the conflict over the religious identity of the state, namely, the liberal side. For this reason, the option of writing a "thin" procedural constitution, as advocated by many liberal constitutionalists, is at odds with the political realities in societies that are religiously deeply divided.[29] Under conditions of fundamental disagreements over religious issues, it is impossible to simply take religion "off the agenda," to use John Rawls's terminology. Finally, constitution writing perceived in revolutionary terms means decisionism. That is, the framers must take a stance and choose a side in the debate. However, under unstable conditions of intense internal conflicts, such decisionism risks exacerbating the conflict and may even lead to violence.[30]

More recently, experts in constitutional design have proposed a variety of institutional solutions to mitigate conflicts and advance democracy in divided societies. These include various degrees of federalism and devolution,[31] integrative arrangements of electoral rules,[32] power-sharing mechanisms,[33] and constitutional guarantees of the rights of special groups.[34] Some of these institutional proposals may be helpful in addressing interreligious conflicts, particularly when the disagreements concern issues of resource or power allocation among the religious

[29] For more on the notion of a "thin" constitution, see Lerner 2013.

[30] An excellent example is the failed Iraqi constitution-making process; see Arato 2010. For a broader discussion on the relations between constitution making and violence, see Soltan 2008.

[31] Stepan 2001; Safran and Suarez 2000; Tarr, Forest, and Marko 2004; Wachendofer-Schmidt 2000; Ghai 2000.

[32] Horowitz 1985; Horowitz 1993; Wilkinson 2004.

[33] Lijphart 1977; Lijphart 2004; McEvoy and O'Leary 2013.

[34] For example, Kymlicka 1995; Tully 1995.

groups. They are less helpful, however, when the clash concerns the religious identity of the state as a whole. Such mechanisms of conflict resolution typically fail to fully address the complexities of religiously divided societies as defined above. For example, Lijphart's theory of accommodation was indeed inspired by the religious (and social) cleavages in the Netherlands; but the main religious conflict in that case concerned the question of state aid to private denominational schools; the matter was then resolved in 1917 by proportional reallocation of state resources.[35] By contrast, the ongoing religious conflicts in the countries studied in this article do not concern resource allocation so much as they address competing worldviews regarding the religious character of the state and the relationship between state law and religious law. These types of conflicts, termed by Hirschman as "non-divisible," are characterized by the unwillingness of the parties to compromise.[36] Similarly, territorial solutions, including various forms of federalism or devolution, are usually irrelevant in the context of deep disagreement over the religious identity of the state, since they require geographical concentrations of the conflicting groups, which is rare for intrareligious conflict (for example, conflict between religious-conservative and secular-liberal Muslims in Egypt, Turkey, and Indonesia).

Thus, we are left with a difficult question: what kinds of democratic constitutions can be drafted and adopted by societies lacking consensus on the religious identity of their states? Since liberal constitutionalism and institutional design seem to play a smaller role in mitigating these types of conflict, an alternative constitutional paradigm is required.

III. Permissive versus Restrictive Constitutions

An empirical study of constitution drafting in four religiously divided societies—India, Israel, Indonesia, and Turkey—reveals that under conditions of deep disagreement over the religious identity of the state drafters adopt one of two types of constitutional arrangements in the area of religion, embracing either a *permissive* or a *restrictive* constitutional approach.

The permissive constitutional approach allows drafters to circumvent direct conflicts and to reconcile the deep disagreements regarding religious identity with the principles of democracy. Through strategies of indecisiveness, ambiguity, and vagueness, permissive constitutional arrangements afford the political system greater flexibility for future

[35] Lijphart 1969, 105–11.
[36] Hirschman 1994, 203.

decisions on controversial religious questions. Constitutional flexibility, in this context, does not refer to amendment rules or to the level of entrenchment or rigidity of the written constitutional provisions. Rather, flexibility relates to the degree to which the formal constitution limits the range of political possibilities to be decided by ordinary legislation. Such permissive constitutional arrangements were adopted by three of our case studies at their foundational stage: in India in 1950, in Israel in 1950, and in Indonesia in 1945.

In contrast to the permissive approach, the *restrictive* constitutional approach aims to limit the range of options for future political actors. Permissive constitutions allow political actors greater flexibility to reform policies surrounding religion at the level of "normal lawmaking." Restrictive constitutions, by contrast, constrain future decision making. Such restrictions may be included either formally in constitutional provisions or informally through authoritarian means. Among our case studies, restrictive constitutional means were adopted in Turkey in 1924 (and later reiterated in 1961 and in 1982) and in Indonesia after 1959.[37]

Permissive constitutional arrangements deviate not only from restrictive constitutions but also from the liberal constitutional paradigm presented in the previous section. First, by refraining from setting definitive principles that would guide and restrict decisions of future generations on religious issues, permissive constitutions relinquish the distinction between "higher lawmaking" and "lower lawmaking," a distinction that is a central pillar of liberal constitutional thinking.[38] By sidestepping substantial decisions on controversial religion-related issues, the framers of permissive arrangements transferred these decisions from the legal/constitutional level to the realm of ordinary parliamentary politics. This transfer rests on the assumption that the greater flexibility afforded in the domain of ordinary legislation could better accommodate the demands of the conflicting camps, providing, perhaps, more room for innovative and nuanced solutions.

Second, constitutional permissiveness refrains from providing a definitive set of norms and values that would serve as the legal tool for crafting future judicial and legislative decisions in religious affairs. As a consequence, permissive constitutions often allow issues of personal

[37] For the purposes of this article, the discussion of constitutional restrictiveness is limited to secular constitutions and excludes cases where democracy and religious freedom were not part of the explicit goals of the state (for example, Iran after 1979 or Saudi Arabia). Lebanon (1926) and Senegal (1950) are additional cases where the restrictive constitutional approach was adopted, and both deserve more detailed investigation.

[38] Ackerman 1991.

status to be regulated by religious-customary legal systems, wherein members of various religious communities are subject to the jurisdiction of their own communal norms and institutions. The employment of pluralistic personal status systems, some of which may well institutionalize discrimination on the basis of gender, ethnicity, and religion, conflicts with basic principles of liberal constitutionalism, such as legal harmony and equality before the law.[39]

Third, whereas liberal conceptions of constitutions tend to equate constitution making with a revolutionary act,[40] the drafting of permissive constitutional arrangements usually does not represent a moment of revolutionary change. Confronting an intractable struggle over how to define the state's religious identity, drafters of permissive constitutions prefer to avoid radical transformation, fearing that such radical changes may exacerbate rather than mitigate conflicts. Permissive constitutions thus tend to maintain existing legal arrangements on issues pertaining to the religious sphere, by preserving those arrangements as they were at the time of constitutional drafting.

Fourth, from a normative perspective, permissive constitutional arrangements are often criticized as inferior to liberal constitutions. This is because permissive arrangements tend to tolerate nonliberal worldviews and thus provide weaker protections for fundamental rights. In the absence of clear and unequivocal liberal constitutional statements, the religious institutions and the regulations that emerge tend to be conservative and traditional. Indeed, as will be demonstrated in Section VI, all three cases of permissive constitutions investigated in this article seem to generate state policies that limit the freedom of individuals to escape religious practices and traditions.

From a liberal perspective, therefore, permissive constitutional arrangements may be considered normatively inferior. Under circumstances of deep disagreements over the state's religious character, however, such permissive arrangements facilitate the enactment of a democratic constitution or allow the state to function without a written constitution. The next section will illustrate the variety of permissive constitutional arrangements, as well as the differences between permissive and restrictive constitutions in India, Israel, Indonesia, and Turkey.[41]

[39] Sezgin 2010.

[40] Preuss 1995; Ackerman 1992; Arendt 1965.

[41] To clarify, the analysis below does not attempt to present a comprehensive sociolegal study of constitutional evolution in these four countries; rather, it aims to exemplify the type of permissive/restrictive constitutional approaches adopted under conditions of deep disagreement on the religious character of the state.

IV. The Case Studies

The four states under discussion in this article differ greatly in size, history, and geopolitical conditions, as well as in the social and religious composition of their populations. The differences are striking in terms of sheer numbers: after the partition in 1947, the population in India was approximately 250 million, of which 85 percent were Hindus and 10 percent were Muslims; in Indonesia, at time of constitution writing in 1945, 65 percent of the population of approximately 77 million were Muslims, with large Christian and Hindu minorities; the Israeli population at independence, in 1948, comprised 600,000 Jews and about 180,000 Palestinians (18 percent), mostly Muslim; and in Turkey in 1924, 99 percent of the population of 20 million were Muslims. Nevertheless, there were striking similarities in the constitution-writing projects undertaken by these states. In all four cases, constitutional drafting took place in the first half of the twentieth century in the wake of a colonial or imperial past (Turkey had reinvented itself as a modern nation-state). In each case the ensuing constitutional debates addressed issues beyond the framework of regime change, government structuring, or power allocation. Instead, the constitution-making process was seen as a foundational moment in which "the people" had to be defined. In all four cases, the drafters of the constitution had a sense of operating as "founding fathers" and were engaged in debates over the identity of the emerging state: what does it mean to be Indian? What is Indonesia's Dasar Negara (philosophy of state)? What is the identity of modern Turkey? What is a Jewish state? In all of these debates, the question of religious identity was central and the disagreements between the framers were intense. The disputes extended beyond questions of religious symbolism and centered on the role of religious law in the new states. For example, in all four cases family law was based on religious traditions from the preindependence era, and the question of maintaining legal pluralism was central to the constitutional debate.

The constitutional debates on religious identity addressed two types of tensions, interreligious and intrareligious. In Indonesia and India interreligious tensions predominated and the objective of the constitution was to create a sense of unity amidst religious diversity.[42] Intrareligious arguments characterized the religious-secular conflict between Jews in Israel, the dispute over the role of religion in Turkey, and the debate on Hindu personal law in India.

[42] In both India and Indonesia the constitutional debates addressed diversity along religious, ethnic, or cultural lines or according to other types of diversity within the population. In this article I mainly focus on the issue of religious diversity.

In India and Israel, as well as in Indonesia in 1945, the drafters preferred to overcome divisions on religious questions by consensual means. Despite the differences between the three cases, they all debated and drafted the constitutional arrangements in assemblies or committees representing the various identity and ideological groups in their societies, and they all adopted permissive constitutional arrangements through a process of deliberation, negotiation, and compromise. In contrast, at the foundational stage of Turkey, religious differences were addressed by radical reforms based on exclusionary ideology that were imposed top-down by authoritarian means. Similarly, in Indonesia, the authoritarian government replaced a permissive understanding of the constitutional compromise with a more restrictive approach.

India: Formal Permissiveness

The process of constitution writing in India began in December 1946, seven months before Indian independence and the partition with Pakistan. The constitutional draft took three years to complete. From the very beginning the debate over India's religious identity was twofold. It revolved around interreligious issues between the Hindu majority and Muslim minorities and around intrareligious issues, regarding the question of state interference in religious practices. What is India's identity and to what extent is it exclusively Hindu? Should the state intervene in religious practices of either majority or minority religions that conflict with basic principles of equality and liberty? These questions were vigorously debated by the Constituent Assembly.[43] Personal law became a focal point for both the intrareligious and interreligious debates. At the intrareligious level, the Constituent Assembly debated whether Hindu family laws should be secularized by the state or maintain its traditional and often inegalitarian practices.[44] While Nehru viewed the reform of Hindu traditional family laws as essential to advancing India's development and modernization,[45] conservative hardliners and Hindu fundamentalists within the Congress Party objected to such reforms.[46] At the interreligious level, the Assembly was harshly divided over the question of the Uniform Civil Code, namely, whether personal law should be unified for all citizens, regardless of the individual's religious affiliation.[47]

[43] Constituent Assembly Debates (CAD), II. Minutes of subcommittee on Fundamental Rights, in Rao 1966. See also Austin 1999, chap. 3.

[44] The debate over codification of reformed Hindu law goes back to the Hindu Women's Rights to Property Act (1937) and the 1941 Hindu Law Committee appointed under the British rule.

[45] Som 1994.

[46] Jaffrelot 2004.

[47] CAD, VII, 540–50.

Ultimately, the Constituent Assembly refrained from making clear-cut decisions on either one of these issues. On the intrareligious front, it avoided the constitutionalization of a Hindu Code.[48] In the question of the Uniform Civil Code, the decision was to include it in the constitution. However, in order to pacify the Muslim minority that remained in India after partition with Pakistan and feared cultural Hindu homogenization, the article was included in the Directive Principles for State Policy section and was defined as nonjusticiable, meaning that it would not be enforceable by the courts.[49] The drafters, who preferred to follow an evolutionary rather than a revolutionary constitutional approach, directed the constitution's potential power to rule on the secular identity of the state back to the political arena, leaving future parliamentarians to decide whether and how to implement the recommendations set forth in the constitution.[50] Indeed, in the 1950s the legislature continued debating the Hindu Code and eventually split the law into four different pieces of legislation that were passed between 1955 and 1961, introducing reforms regarding issues such as marriage and divorce, inheritance laws, and adoption. By contrast, the Uniform Civil Code was never implemented. The result was the maintenance of a separate system of personal law in India for each religious group and the implementation of only minor reforms in the traditional Muslim and Christian personal laws.[51]

Overall, the set of ambiguous and ambivalent provisions included in the Indian constitution with regard to religion-state relations amounts to what Rajeev Bhargava termed "political secularism" or "contextual secularism." According to this model, the state is not separated from religion but rather keeps a "principled distance" from all religions, by providing equal protection and support for all religions and by selectively interfering in religious practices that conflict with the state's goals of promoting equality, liberty, and socioeconomic development.[52] While supporters of this approach have emphasized the advantage of such ambiguous arrangements for the purpose of maintaining stability and democracy at the foundational stage of the state,[53] its critics have pointed to the tendency of such arrangements to perpetuate—rather

[48] Som 1994.

[49] Article 44 of the Indian constitution states: "The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India."

[50] Jaffrelot 1996, 102–4.

[51] Subramanian 2010.

[52] For example, state regulation intended to reduce inegalitarian caste practices are thus justified as part of the overall secular identity of the state. Bhargava 1998; Bhargava 2002.

[53] Bhargava 2010; Khilnani 1999; Jackobsohn 2003; Austin 1999; Hardgrave 1993.

than mitigate—conflicts over issues of religion and secularism, which ultimately resulted in overburdening India's political and judicial institutions.[54]

Israel: Informal Permissiveness

While in India constitutional drafters faced the challenge of advancing national unity in the face of interreligious (as well as linguistic, social, and cultural) diversity, in Israel the most heated debates during the constitutional discussion concerned internal divisions within the Jewish majority over a religious or secular definition of the state. The issue of interreligious relations was barely addressed by the drafters. The Palestinian minority in Israel, which constituted 18 percent of the total population (of less than 800,000), was able to exercise some political rights but was consistently excluded from Israeli nationhood, defined in terms of Jewish identity. Indeed, until 1966, a large part of the Palestinian population in Israel lived under military rule. In the early years of the state, the Palestinian minority was excluded from the constitution-drafting process and from efforts to define the state's basic tenets and credo.[55]

The secular Zionist leadership of the state, dominated by the socialist Mapai Party, perceived the Jewish character of the state in national-secular terms.[56] By contrast, Orthodox groups objected to the secular character of the state and sought to grant Jewish religious law precedence over state law.[57] Under the fragile circumstances of a newly independent state, many in the Knesset feared that writing a constitution would require clear-cut choices regarding the vision of the state and would stir up conflict between religious and secular Jews.[58] The government already faced serious challenges to its sovereignty from various underground nationalists and young religious zealots.[59] Hence, the threat of destabilization was not taken lightly by the drafters. Moreover, the government believed that the most urgent task during the state-building period would be the absorption of immigrants. The Jewish population in Israel in 1948 was less than 10 percent of world Jewry and the immigrants that were expected to arrive from the Jewish Diaspora were generally religious. Thus, despite a significant

[54] Needham 2007; Hasan 1994.
[55] Peled and Shafir 2005.
[56] Zameret 2002.
[57] *Knesset Records* 1950, 744, 812.
[58] Lerner 2011, chap. 3.
[59] Sprinzak 1999, 62–65; Friedman 1991, 60–66.

majority of secular Jews in the Knesset[60] and a formal commitment in the Declaration of Independence to draft a constitution, the Knesset decided in 1950 to avoid drafting a constitution. Instead, the constitution was to be enacted in a gradual manner, through a series of Basic Laws.[61] Among the chief reasons for the decision was the wish to avoid a greater division between religious and secular Jews.[62]

In the absence of a written constitution, religion-state relations in Israel evolved through ordinary legislation or through informal means during the early years of the state. These arrangements, known as "the religious status quo," stipulate the nonseparation between religion and state in various areas of life: a religious monopoly on marriage and divorce and the institutionalization of a pluralist personal law system (following the Ottoman millet system),[63] kosher food in state institutions, prohibition of public transportation on the Sabbath, autonomy for religious schools, and exemptions from military service for Orthodox yeshiva students and religious women. This religious status quo was never clearly defined. Yet a commitment to maintain it was included in most governing coalition agreements. Thus, although the religious status quo was criticized by both the religious and the secular-liberal camps, by and large the core religion-state arrangements that were formulated in the first decade of the state were preserved.[64]

The characterization of the State of Israel as "Jewish and democratic" was introduced in the 1992 legislation of the Basic Laws on Human Liberty and Dignity and to the Basic Law on Freedom of Occupation.[65] Yet the debate over the meaning and interpretation of what many consider a self-contradictory definition continues to divide Israeli society.[66]

Indonesia: Shifting from Religious Constitutional Permissiveness to Constitutional Restrictiveness and Back

The constitutional trajectory of Indonesia demonstrates the possibility of a religious type of permissive constitution. It also represents a case in which permissive constitutional arrangements intended to address

[60] Only 16 out of 120 Knesset members in 1950 represented religious parties.

[61] *Knesset Records* 1950, 1743.

[62] On the debates that led to this decision, see Lerner 2011, 60–70.

[63] Civil marriages are recognized only if performed outside of Israel.

[64] The Supreme Court intervened in some minor issues but never challenged the core arrangements of the religious status quo. Corinaldi 2004; Wood 2008.

[65] Article 1a, Basic Law: Human Dignity and Liberty; Article 2, Basic Law: Freedom of Occupation.

[66] A few recent examples of the voluminous writings on this problem include Maoz 2011; Gavison 1998; Mautner 1998; and Barak 1999.

religious conflicts at the time of independence (1945) were replaced by a restrictive constitutional approach almost a decade and a half later (1959). The restrictive constitution was itself replaced by a permissive constitution as part of subsequent democratization efforts (1998).

The first Indonesian constitution was drafted between May and August of 1945. The drafting process was initiated by the Japanese just three months before their surrender to the Allied Forces. Recognizing the imminent end of their rule in Indonesia, the Japanese formed the Investigative Committee for Preparatory Work for Indonesian Independence (BPUPK), comprising sixty-two members selected mainly from the older generation of Indonesian leadership from Java.[67] The main debates in the committee revolved around the role of Islam in the new state. The dispute was between the Islamists, who wished Indonesia to be an Islamic state, and the nationalists, who envisioned an all-inclusive Indonesian national identity rather than an exclusively Islamic identity. Due to Indonesia's sprawling geographical organization, its large non-Muslim minorities, and the different ways Islamic law may be understood and interpreted, the committee advocated a "state which will unite itself with the largest group but which can stand above all groups."[68]

The disagreements were bridged by the doctrine of *Pancasila* (literally, five principles) laid down by Sukarno in a famous speech on June 1, 1945, and later included in the constitutional preamble.[69] The first of these five vague principles, as they appeared in the preamble, was "belief in God."[70] In addition, Article 29 of the constitution states that "the state is based upon the belief in one supreme God." By avoiding the name of a particular God, the identity of the state is defined in panreligious but not in Muslim terms.[71]

The draft preamble to the constitution, known as the Jakarta Charter, included, in addition to *Pancasila*, two short statements: a seven-word sentence according to which all Muslims are obliged to follow Islamic law[72] and a requirement that the president must be Muslim.

[67] Some claim that committee membership had a strong majority of those who are "known to favor a religiously neutral form of territorial nationalism," while advocates of Islamic ideology constituted about a quarter of committee members. Elson 2009, 109; Ricklefs 2008, 245.

[68] Ramage 2006.

[69] For the text of the speech, see Feith and Castles 2007, 40–49.

[70] The additional four principles are Indonesian unity, humanism, democracy based on deliberation and consensus, and social justice. For detailed discussion of their meaning, see Ramage 1995, 12–14.

[71] Künkler and Sezgin forthcoming; Hosen 2007, 64, 194. As one observer noted, the first principle of *Pancasila* is a "multi-interpretable formula and must be appreciated as providing a real possibility for people to agree while disagreeing." Boland 1982, 39.

[72] Some analysts argue that even Muslim members of BPUPK did not agree on the practical implications of the famous seven words. Elson 2009, 113n59.

However, just before the constitution was enacted, these two Islamic statements were removed from the constitution. The decision was driven by a concern that predominately Christian eastern Indonesia would not join the unitary republic if the constitution characterized it as an Islamic state. There was concern as well about the internal division among the Muslim leaders, between those who believed Islamic law should be legislated at the national level and those who opposed state-enforced Islamic law.[73]

For the first fourteen years following independence, the exact meaning of *Pancasila* and the question of what should be the "philosophy of the state" (Dasar Negara) continued to be at the heart of public and political debates. The ambiguous character of *Pancasila* was preserved in the two constitutions that replaced the 1945 constitution and were formally in force between 1949 and 1957.[74] Like the 1945 constitution, the 1950 constitution, which established a parliamentary system, was enacted as a provisional arrangement meant to stand until such time as a democratically elected constituent assembly (the Konstituante) drafted a permanent and legitimate constitution. The debate about the meaning of *Pancasila* and over the philosophy of the state continued during the two and a half years of Konstituante discussions regarding the new constitution (1956–59).[75]

Yet the permissive constitutional framework established by the Indonesian leadership at its foundational stage was short-lived. It was replaced by the restrictive constitutional approach of Sukarno's regime of Guided Democracy, which was imposed by extraconstitutional means. The deterioration of the economy, the increase in national conflicts, and the apparent inability of the government to deal with the crisis caused support for the parliamentary system to diminish dramatically. It also led Sukarno to declare martial law in May 1957 and to begin creating the institutional framework of Guided Democracy, with the intent of restoring stability and preventing the disintegration of the republic. The army increased its pressure on the government and in 1958

[73] Ramage 2002, 15; Ricklefs 2008, 247. For various alternative explanations, see Elson 2009, 122–26.

[74] The first, a federal constitution of the United States of Indonesia, was adopted as part of the Hague Agreement between Indonesia and the Netherlands. It survived only few months, until the summer of 1950, when Indonesia withdrew from the Agreement and enacted a unitary constitution of the Republic of Indonesia.

[75] The Konstituante comprised 544 members, of which 514 were elected by free and open elections in December 1955. Thirty-four parties participated in the elections, as did forty million Indonesian citizens (about 90 percent of the registered voters). An additional thirty members of the Konstituante represented minority groups (Chinese, Indo-European, and the Dutch occupied territories of West Irian). Nasution 1992, 30–35.

demanded a return to the 1945 constitution, which provided a legal basis for greater military involvement in civilian affairs.[76] On June 2, 1959, in what became its final session, the Konstituante voted against the proposal, which was supported by the president and the National Council, to reinstate the 1945 constitution.[77] Sukarno subsequently published a presidential decree dissolving the Konstituante and reinstating the constitution.

The formal wording of the 1945 constitution was not altered. However, upon the establishment of Guided Democracy in 1959, *Pancasila* would begin to represent a substantively new conception. In 1945 it had been proposed as a vague set of inclusivist principles. It was viewed as a "forum, a meeting point for all the different parties and groups, a common denominator of all ideologies and streams of thought existing in Indonesia."[78] By contrast, after 1959, and especially with the consolidation of the authoritarian regime in 1965, *Pancasila* became part of the authoritarian regime's justifying ideology, much like Turkey's Kemalism. Invoking the "integralist state," the nationalist camp in the late 1950s presented *Pancasila* as the only political ideology that would guarantee national unity. Rather than serve as a common platform for the different political ideologies in Indonesia, *Pancasila* was reconfigured as an exclusivist ideology standing in opposition to other ideologies and streams of thought. Moreover, it was imposed by the military and by the government through authoritarian means.[79]

During the years of Sukarno's Guided Democracy (1959–65), as well as under Suharto's New Order (1966–98), the government maintained its monopoly on the interpretation of *Pancasila* as an ideology of the state that guarantees national unity through various means of indoctrination.[80] While already in the late 1980s Suharto's regime was more tolerant toward public expressions of Islam, as late as 1998, the government forbade any public debate on the place of religion in the constitution.[81]

[76] Lev 1966.

[77] On the final debates of the Konstituante, see Nasution 1992, chap. 2.

[78] Nasution 1992, 421.

[79] Nasution 1992, 65; Ramage 2002, 17–22, 26; Assyyaukanie 2009.

[80] For example, by establishing "The Guidance of Conscientization and Implementation of Pancasila," which was a national-scale program of indoctrination courses for members of the bureaucracy, armed forces, political leaders, businessmen, students, and religious leaders.

[81] For example, through the 1963 Anti-subversion Law. State policies toward religious organizations and practices varied during Suharto's regime, while the constitutional basis of *Pancasila* remained unchanged. In that respect, some point to the flexibility of *Pancasila* as a legal norm, even during the New Order. Künkler forthcoming.

After Suharto's resignation in 1998, the new political leadership attempted to restore a more ambiguous interpretation of *Pancasila* and return to a permissive constitutional approach. The constitution was amended in a series of reforms enacted from 1999 to 2002. These reforms established new democratic institutions and strengthened the protection of human rights. During the open and free debates, several Islamic parties renewed the demand to restore the Jakarta Charter and to insert Sharia law into the constitution. Yet the debate ended with MPR's (People's Consultative Assembly) decision to retain the wording of Article 29 and refrain from modifying the definition of the state's religious identity expressed in the constitution.[82] The amended democratic constitution of Indonesia enhanced religious permissiveness through additional ambiguous formulations, such as Article 28J (2), which guaranteed the protection of "religious values."[83] Whether the original ambiguous and moderate character of *Pancasila* can be fully restored through the process of democratization is still a controversial question in Indonesia. Some observers argue that once the five principles of *Pancasila* had been exploited by the authoritarian regime, it would never be possible to restore the term's original meaning.[84]

Turkey: Imposed Secularism through a Restrictive Constitution

Modern Turkey's first constitution was drafted in 1924,[85] one year after the establishment of the republic, by the Grand National Assembly, which was largely controlled by the RPP, Mustafa Kemal's "People's Party."[86] The constitution-writing project played a central role in the establishment of the Kemalist state. Kemalism was designed to advance a particular modernizing ideology based on three tenets: Westernization, Turkish nationalism, and a scientific approach to religion.[87] Kemal and his fellow founders aimed at constructing a prosperous, rational, and irreligious modern society.[88] Secularizing Turkish society and consolidating a homogenous national identity from its diverse ethnic and religious groups were the central goals of the state.[89] At the same time, Mustafa Kemal realized that Islam was deeply embedded

[82] Hosen 2007.

[83] Hosen 2007, 127–28.

[84] Jones 2010.

[85] The first Ottoman constitution was enacted in 1876. In 1921 the first Grand National Assembly adopted a short and provisionary constitutional document, yet it was never expected to serve as the republic's permanent constitution. Özbudun and Genckaya 2010, 8–10.

[86] Many of the 1923 Grand National Assembly were members of the first Grand Assembly (1920–23), yet none of those who opposed Ataturk (some of them Islamists) were allowed to be reelected. Özbudun and Genckaya 2010, 10–11.

[87] Hanioglu 2011.

[88] Hanioglu 2011.

[89] Yavuz 2009, 25; Bali 2012.

in Ottoman culture and could not be eliminated by the stroke of a pen. For that reason, the 1924 constitution included the statement that "the religion of the Turkish Republic is Islam"; in 1937, however, this statement was removed from the constitution and Turkey was defined as a secular state.

In contrast to the consensus-based approach to decision making on religious issues adopted by the drafters in India and Israel, the Turkish constitution represented a revolutionary model of imposed secularism. The founding elite's vision of a Kemalist revolution lacked the necessary broad social basis.[90] So, although attempts were made to introduce *Laikik* as a particular form of secularism,[91] ultimately, the transformation of Turkish society was promoted through a set of top-down policies enforced by powerful state institutions. Between 1924 and 1937 the republic introduced a series of radical reforms designed to advance state control of religion, as well as the secularization and homogenization of Turkish society. These reforms included the abolition of the caliphate and the subordination of all religious institutions to the state through the establishment of a Directorate of Religious Affairs, the replacement of Sharia personal status laws with a European-inspired civil code, the outlawing of traditional dress, the adoption of a Western calendar, and the replacement of the Arabic alphabet with the Latin alphabet.[92]

The revolutionary constitution was not designed to establish a truly democratic order. As some commentators observed, instead of a system of checks and balances, it envisioned a "Rousseauist" version of democracy, in which the legislature represents the "general will" of the people.[93] The constitution provided the conditions for the emergence of a single-party system (until 1946) and allowed for the establishment of tutelary state institutions, intended to safeguard the core commitments of the founding elite, particularly the security apparatus, the civilian bureaucracy, and the judiciary system. These institutions, formed during the constitutive moment of state formation, generated a legacy of repressive strategies, which is "now embedded in Turkish constitutional culture [and] provides the context against which to understand the state's institutional defensiveness in the face of contemporary demands for further liberalization."[94]

[90] Anderson 2009, 414–17.

[91] Influenced by the French *laïcité*, the Kemalist project of secularism—*Laikik*—aimed at controlling religion and limiting it to the private sphere of personal belief and worship. Yavuz 2005; Kuru 2007.

[92] Kuru 2007.

[93] Özbudun and Genckaya 2010, 12.

[94] Bali 2012, 9.

In the eight decades since independence, the Turkish political and constitutional trajectory has been characterized by recurring authoritarian interventions by the military in the enduring conflicts over the state's religious and national identity. Two of these coups were followed by a rewriting of the constitution under the supervision of the military (1961 and 1982), thereby reestablishing the Kemalist foundational ideological orthodoxy.[95] Since 1982 amendments to the Turkish constitutions introduced elements of democratization and liberalization into the document. Moreover, the more recent electoral successes of Islamic political parties have generated a more ambiguous relationship between state and religion (for example, by introducing compulsory religious education in schools and allowing prohibitions on alcohol in certain municipalities).[96] Nevertheless, the formal constitution is still commonly viewed as representative of the authoritarian and tutelary legacy of the National Security Council regime under which it was drafted.[97] In 2007 an attempt to draft a civilian constitution by the Özbudun committee failed. Yet expectations that a new constitution would be drafted after the June 2011 elections gave rise to numerous constitutional drafts proposed by think tanks and NGOs. Whether the next Turkish constitution will adopt a permissive rather than a restrictive approach to address the internal tensions regarding religion-state relations is a question that will be resolved by future developments.

V. Arguments for Constitutional Permissiveness

While the type of religious issues discussed in the Indian, Israeli, and 1945 Indonesian constitutional debates varies substantially, great similarities existed between the arguments raised by the drafters in the three cases in support of permissive constitutional strategies. To begin with, they all recognized the deep divisions within society and discussed the role of constitution as a tool for promoting and enforcing change under conditions of intense disagreement over basic norms and values.[98] Second, the drafters in the three cases realized that given the fragility of the newly independent state, any clear-cut decision could stir up political instability and promote violence. In India decisions were affected

[95] Zürcher 1997; Özbudun and Genckaya 2010, 14–29; Akan 2011. In the 1982 constitution the inalterable Article 2 states that "the Republic of Turkey is a democratic, secular and social state."

[96] Kuru 2009.

[97] Özbudun 2012.

[98] In Indonesia: Elson 2009, 115; Boland 1982, 27. In India: CAD, VII, 323. In Israel: *Knesset Records* 1950, 734.

by the shadow of the violent partition with Pakistan.[99] In Indonesia threats from the Christian minority, the geographical nature of the archipelago, and inter-Muslim divisions between nationalist-oriented Muslims and those who supported state-imposed Islamic law required more inclusive constitutional formulas than those provided by explicit Islamic identity. And in Israel the desire to maintain Jewish unity in the face of growing extremist threats to engage in a *Kulturkampf* was one of the main reasons that constitution drafting was ultimately avoided.[100]

Third, in all three cases constitutional arrangements concerning religion were designed to be temporary rather than permanent. In both Israel and India the constitutional framers predicted that consensus around a secular/liberal definition of national identity would be easier to achieve in the future. In the meantime, they preferred stability to either imposition or majoritarian decision, which in their view would have led to direct conflict.[101] In Indonesia the permissive religious constitutional arrangements were adopted as a temporary compromise, in order to promote political unity amidst religious and cultural diversity.[102] The 1945 constitution was perceived as a provisional tool on the way to complete independence; the expectation was that it would be followed by a more participatory process of constitution writing. Fourth, in all three cases, the compromises in the religious sphere were made in light of the perceived urgency of other tasks with which the young state had to contend, namely, advancing stability, security, and economic development, all of which required national collaboration despite the vast disagreement on issues of identity.[103]

Lastly, attempting to base their constitution on a broad consensus, the framers in the three cases decided to avoid clear-cut constitutional

[99] Austin 1999; Khilnani 1999, 173.

[100] *Knesset Records* 1950, 774, 812.

[101] Nehru stated in an interview in 1954 that he thought a uniform civil code was an eventual goal but that the time was not ripe to push it through. The *Times of India*, September 16, 1954, cited in Smith 1958, 165. In Israel, during the Knesset debates, explicit arguments were made in support of "evolution not revolution." *Knesset Records* 1950, 726, 775, 1277.

[102] In a speech on August 18, 1945, Sukarno stated: "[T]he constitution which had been made now is a provisional constitution . . . a lightning constitution . . . in a calmer atmosphere we will certainly reassemble the People's Consultative Assembly, which can make a more complete and more perfect constitution." Cited in Elson 2009, 125. See also Nasution 1992, 97.

[103] In Indonesia, Sukarno proclaimed the need to move "like lightning" and Oto Iskandardinata stated: "[W]e need talk about those things that are urgent." Cited in Elson 2009, 126. In India the key legal adviser of the Constituent Assembly noted in 1948: "[W]e have to bear in mind that conditions in India are rapidly changing; the country is in state of flux politically and economically; and the constitution should not be too rigid in its initial years." Rau 1948. In Israel, Ben-Gurion and other members of the government who opposed the constitutional drafting worried that disagreements over the constitution would divert too much attention from the urgent tasks of state-building. "Rather than concerning themselves with what needs to be done, Jews around the world would dispute over the constitution"; David Ben-Gurion in *Meeting of Mapai Party*, 1949.

decisions on controversial religious issues. Instead of formulating constitutional principles to guide future generations, they preferred to defer such decisions to future legislatures. As Sukarno stated in his 1945 speech in Jakarta:

> [I]f the Indonesian people really are a people who are for the greater part Muslim, and it is true that Islam here is a religion which is alive in the hearts of the masses, let us leaders move every one of the people to mobilize as many Muslim delegates as possible for this representative body . . . then laws issuing from the people's representative body will be Islamic.[104]

Similar statements were made in Israel and in India.[105] The ambiguous arrangements allowed the drafters to incorporate the element of time into the constitutional solution, by transferring decisions on controversial religion-related questions from the high-stakes arena of constitutional law to the sphere of ordinary politics.

It is important to distinguish here between the drafters' approaches to the institutional and the foundational, or symbolic, aspects of constitutions. While the establishment of governmental mechanisms requires clarity with regard to the "rules of the game," the foundational/symbolic aspect, which reflects the citizens' ultimate goals and shared identity, needs to convey the possibility of inclusion, rather than finality. Therefore, the drafters of these permissive constitutions, seeking to circumvent explosive conflicts, chose to include ambiguous or fuzzy provisions regarding the constitution's symbolic and normative aspect.

The three permissive constitutional arrangements investigated in this study had originally been adopted as temporary arrangements during the first years of independence. However, in all three cases, the temporary, ambiguous arrangements were reaffirmed in later years. The Uniform Civil Code was never implemented, and the ambiguous constitutional provisions that underpin India's "contextual secularism" remain a constant source of harsh political, legal, and public debate.[106]

[104] Along similar lines, in an interview in 1959, Mohammed Hatta, the first vice president, justified the removal of the famous seven words from the constitution by noting that "it was agreed that such a provision relating exclusively to the Muslim population could be established later by law, but it should not be part of the constitution." Cited in Elson 2009, 125.

[105] See, for example, Ambedkar's speech, defending the Directive Principles of State Policy: "[I]t is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must have regard to circumstances and keep on changing." *Constituent Assembly Debates*, III, 494. In Israel, see, for example, Yosef Burg's speech during the 1950 Knesset debates: "I advocate the enactment of basic laws instead of a constitution not because I object the notion of a constitution in principle. I prefer basic laws for reasons of methods and chronology . . . what we need at this time is to pause so as to clarify and deliberate about our problems. We need to get used to each other and together construct our common political and public life." *Knesset Records* 1950, 1310.

[106] Bhargava 2010.

In Israel, despite renewed and increasing criticism of inegalitarian religious arrangements and the continued violation of individual rights, as well as of the minority rights of the Palestinian population, attempts to draft a formal constitution in 2003–6 failed.[107] In Indonesia, despite transformations in the type of regime, the constitutional formulation of *Pancasila* remained formally unchanged. Open and free constitutional debates (in 1956–59, as well as during the constitutional reforms of 1999–2002) rejected proposals to increase the Islamic character of the Indonesian constitution.

VI. Long-Term Consequences

From a normative perspective, the constitutional arrangements adopted by the four religiously divided societies studied here, whether restrictive or permissive, seem inferior to the ideal-type of liberal constitutionalism. The restrictive constitutions adopted in Turkey and in Indonesia were imposed by authoritarian means that infringed upon citizens' basic human and political rights. Yet even the permissive constitutional arrangements in India, Israel, and 1945/1998 Indonesia, which were adopted by more consensual and democratic methods, are often criticized as normatively inferior to liberal constitutions for their failure to guarantee the type of human rights protection advocated by liberal constitutionalists.[108]

I would argue, however, that viewing permissive constitutional arrangements as merely failed projects compared with the liberal constitutional ideal oversimplifies the picture and precludes a more nuanced understanding of the risks and opportunities offered by ambiguous constitutional strategies. In this section I explore variation in the long-term impacts of the different constitutional models adopted by India, Indonesia, Israel, and Turkey. Such an investigation would have not only normative but also practical significance. It may provide guidance for current and future constitutional drafters and advisers, who struggle with questions about the role that constitutions should play in defining religion-state relations.

The following discussion proposes a preliminary framework for analyzing the consequences of permissive and restrictive constitutions.[109]

[107] Constitution, Law and Justice Committee 2006.

[108] For example, Raday 1995; Agnes 2004; Kremnitzer 2005; Needham and Rajan 2007.

[109] A comprehensive and nuanced evaluation of the political, legal, and social implications of permissive and restrictive constitutional arrangements requires a detailed empirical examination of legislative, executive, and judicial decisions, as well as a review of the social practices that evolved over the years in the four countries studied here. However, such a comprehensive comparison is beyond the scope of this article.

First, I examine the implications of constitutional choices made by political actors at the foundational stage of the state with regard to the emergence or endurance of democracy. Second, I explore the impact of constitutional permissiveness/restrictiveness on the attainment of religious freedom. I propose to unpack the conception of religious freedom, which is usually measured in general terms, to draw a distinction between institutions and regulations that promote freedom *of* religion and those that promote freedom *from* religion.

Democratic Institutions

As discussed in Section III, permissive constitutions by definition deviate from the ideal of liberal democracy. Nevertheless, such instruments are compatible with a consensual conception of democracy and thus are more likely to allow for the emergence of democratic institutions, characterized by open and free elections and the guarantee of civil and political rights to all citizens. Table 1 shows a correlation between ambiguous permissive constitutional arrangements and the emergence of democratic institutions.

The correlation between permissive constitutional arrangements in the area of religion and democracy is demonstrated in all cases examined in this article. In Israel and India permissive constitutions go hand in hand with a relatively stable democratic order.[110] In Indonesia the 1945 constitution, which included *Pancasila* as an ambiguous principle in order to overcome deep disagreements regarding the religious character of the state, was accompanied by a commitment to establish a democratic order that lasted over a decade after independence.[111] Formally, a parliamentary system was created only in 1950, but it functioned under difficult security and economic conditions, facilitating relatively free and open elections in 1955. By contrast, Indonesia's authoritarian government period (especially between 1959 and 1989) was characterized by a decisive interpretation of *Pancasila* along "integralist" anti-Islamic lines. As discussed above, during that period *Pancasila* lost its ambiguous, all-inclusive nature and was used as the state ideology, enforced by repressive means, rather than through consensus.[112]

[110] Except for the period of emergency rule in India. For a critical discussion of Israeli democracy, see Smooha 1997; Jamal 2007; and Jamal 2009.

[111] Nasution 1992, 4, 15–27; Ricklefs 2008, 273.

[112] In 1945, *Pancasila* was formulated in order to facilitate an inclusivist constitutional approach to the identity of the state, compared with the Jakarta Charter, which represented a more Islamic identity. After 1965, the authoritarian government had adopted policies towards religion which may be viewed as increasing inclusiveness of nonmonotheistic religions in Indonesia, but these were adopted on the level of ordinary politics, not on the constitutional level. See Künkler forthcoming.

After 1998 Indonesia's return to democracy was accompanied by an attempt to return to a more ambiguous definition of *Pancasila*, as well as a de facto (and partial) decentralization of regulations in the area of religion in several provinces and regions.[113]

Similarly, Turkey's trajectory reflects a correlation between restrictive constitutional arrangements in the area of religion and the authoritarian regime. As discussed above, a decisive Kemalist secular ideology was imposed during Turkey's foundational stage and reinforced in subsequent military coups (1960, 1981, and the "soft coup" of 1997). As in Indonesia, Turkey's gradual transition toward democracy over the past two decades has been accompanied by a growing ambiguity surrounding the definition of its secular identity. The departure from the decisive Kemalist ideology and the relaxation of the repressive secularism were reflected in electoral terms in the increasing influence of moderate Islamic parties (from DP to AKP) on religious legislation (for example, compulsory Muslim education in schools and prohibition of alcohol in certain municipalities), as well as in the growing demand to redraft the constitution and redefine religion-state relations.[114]

While a permissive constitution may be more likely to allow for the emergence of democratic institutions, such constitutional arrangements may pose a potential danger to democratic stability arising from long-term conflict over religion-state issues. The political inability to settle controversies over the state's religious identity tends to invite judicial intervention. Such interventions may create tension between the legislative and judicial branches. While an interinstitutional tension is common—and even welcomed—in any democracy, such tension may be particularly problematic if the Supreme Court and the Parliament hold opposing ideologies regarding controversial foundational issues, such as religion-state relations. A direct conflict between the two branches of government may lead to the delegitimization of both institutions in the eyes of the public. The court might lose its legitimacy as a neutral

[113] In addition to the special autonomy granted for Aceh, the 2004 Law on Regional Government allowed for the rise of what is usually termed "Sharia by-laws" (*perda syari'ah* literally mean Sharia Regional Regulations) issued by provisional or district-level administrations. Formally, the Law on Regional Government restricts regional/provisional regulations in the area of religion, yet because of ambiguities in the law, as well as in the constitutional order, more than two hundred regulations that contain some elements of Islamic law have been passed in recent years (at both district and provincial levels). These include, for example, the mandatory headscarf for women in civil service, the requirement to prove ability to read the Quran for applicants for government jobs or marriage licenses, a ban on prostitution in the name of "religions and morals," requirements to pray at certain times or to recite the Quran in schools, and mandatory religious tax collection. Parsons and Mietzner 2009; Bowen 2013; Salim 2007; Crouch 2007.

[114] Köker 2009; Özbudun and Genckaya 2010.

TABLE 1
PERMISSIVE/RESTRICTIVE CONSTITUTIONAL ARRANGEMENTS AND MEASURES OF DEMOCRACY

Country and Year of Const. Formation	*Type of Constitutional Arrangements in the Area of Religion*	*Freedom House*[a]				*Polity IV Project*[b]		
		Year	*Political Rights*	*Civil Liberties*	*Status*	*Year*	*Score*	*Type of Regime*
India	formal permissiveness					1950	9	democracy
1946–50		1972	2	3	free	1962	9	democracy
		1982	2	3	free	1972	9	democracy
		1992	3	4	partly free	1982	8	democracy
		2002	2	3	free	1992	8	democracy
		2012	2	3	free	2002	9	democracy
						2010	9	
Israel	informal permissiveness					1948	10	democracy
(1950)		1972	2	3	free	1962	10	democracy
		1982	2	3	free	1972	9	democracy
		1992	2	2	free	1982	9	democracy
		2002	1	2	free	1992	9	democracy
		2012	1	2	free	2002	10	democracy
						2010	10	democracy

Indonesia	1945–59:					1947	2	open anocracy
1945, 1959,	religious ambiguity					1957	0	open anocracy
1998–2002	1959–98:	1972	5	5	partly f	1962	-5	closed anocracy
	restrictive	1982	5	5	partly f	1972	-7	autocracy
		1992	6	6	partly f	1982	-7	autocracy
	post-1998:	2002	3	4	partly f	1992	-7	autocracy
	religious ambiguity	2012	2	3	free	2002	6	democracy
						2010	8	democracy
Turkey	restrictive constitution					1946	-7	autocracy
1924–37,						1956	4	open anocracy
1961, 1982		1972	3	4	partly f	1972	-2	closed anocracy
		1982	5	5	partly f	1982	-5	closed anocracy
		1992	2	4	partly f	1992	9	democracy[c]
		2002	3	4	partly f	2002	7	democracy
		2012	3	3	partly f	2010	7	democracy

[a] Freedom in the World Country Rating 1972–2012, Freedom House. At http://www.freedomhouse.org/template.cfm?page=439.

[b] Polity IV Individual Country Regime Trends, 1946–2010. At http://www.systemicpeace.org/polity/polity4.htm.

[c] Polity IV scores are based on coding of governmental institutions. While according to this institutional measure Turkey is defined as a democracy since the 1990s, it is still rated as "partly free" according to levels of political rights and civil liberties protection rated by Freedom House.

arbitrator in legal issues and the Parliament might lose its legitimacy as a representative body of the various interests in society.

Such developments have occurred in Israel: given the Knesset's legislative preference for the religious worldview, the secular-liberal camp turned to the Supreme Court to rule against the existing and growing religious arrangements. However, the court's increasing intervention in the religious status quo led to the public refusal on the part of religious leaders to abide by the Supreme Court's decisions and ultimately resulted in the obstruction of the constitution-making process. According to ongoing polls, public trust in the Supreme Court dropped from 88 percent in 1990 to 49 percent in 2010. And trust in the Knesset dropped from 45 percent in 1990 to 39 percent in 2010.[115]

In contrast to Israel, in India the Supreme Court has refrained from playing a contentious role in the struggle over the state's religious definition by maintaining a more ambivalent position in the religious-secular debate.[116] For example, in a series of rulings addressing the question of the Uniform Civil Code, the Supreme Court was inconsistent in its explicit call for the implementation of Article 44.[117]

Freedom of Religion and Freedom from Religion

To what extent do permissive constitutions allow for religious freedom? Most large-N comparative studies define religious freedom in terms of limited constraints imposed on religious organizations, institutions, beliefs, and practices.[118] Constraints on freedom of religion are generally perceived to be imposed by governments[119] and are usually linked to a tenuous separation of religion and state.[120] Some studies distinguish between various types of limitations on religious freedom, such as those imposed directly by governments, indirectly by government favoritism toward particular religions, or by social regulation of religion.[121] See Table 2 for various measurements of religious freedom in the four countries discussed in this article.

[115] Arian and Herman 2010.

[116] Shankar 2010; Jacobsohn 2010.

[117] Agnes 2011.

[118] Marshal 2008, 441. The term usually used is "restrictions on religious freedom." However, to avoid confusion with restrictive constitutions, I will use alternative terms such as constraints, limitations, and violations of religious rights/freedom.

[119] See, for example, the US Department of State's International Religious Freedom Report. At http://www.state.gov/g/drl/rls/irf/2010/148659.htm. Similarly, see Center for Religious Freedom (CIRI Human Rights Data Dataset).

[120] Fox 2008.

[121] Grim and Finke 2006. By social regulation of religion, they mean attempts of established religious groups to monopolize the arena and effectively shut out new religions and discourage other faiths from proselytizing.

TABLE 2
RESTRICTIONS ON RELIGIOUS FREEDOM SCORES FOR INDONESIA, INDIA, ISRAEL, AND TURKEY

Religious Freedom Indexes	*Indonesia*	*India*	*Israel*	*Turkey*
Religious Freedom Scale, 1–7 (Low Is More Freedom)[a]	5/7	5/7	3/7	5/7
2008 Freedom of Religion, CIRI Human Rights Data Project[b]	severe/ widespread government restriction on religious practices	moderate government restrictions on religious practice	moderate government restrictions on religious practice	severe/ widespread government restriction on religious practices
GRI: Government Regulation of Religion Index (0–10, Low Is Less Regulation)[c]	6.5/10	5.8/10	3.8/10	5.1/10
GFI: Government Favoritism of Religion Index (0–10, Low Is Less Favoritism)[d]	7.6/10	7.0/10	7.9/10	6.8/10
SRI: Social Regulation of Religion Index (0–10, Low Is Less Regulation)[e]	9.7/10	9.7/10	9.2/10	8.4/10
2002 Religion and State Score (0–100, Lower Is Less Governmental Intervention in Religion)[f]	45.22/100	22.87/100	36.84/100	47.21/100
2002 Regulation and Restrictions on Majority Religion or All Religion (0–33, Lower Is Less Regulation)[g]	6/33	7/33	2/33	11/33
2002 Religious Discrimination against Minorities (0–48, Lower Is Less Discrimination)[h]	14/48	3/48	3/48	13/48

[a] Marshal 2008.
[b] At http://ciri.binghamton.edu/index.asp.
[c] Grim and Finke 2006.
[d] Grim and Finke 2006.
[e] Grim and Finke 2006.
[f] Fox 2008.
[g] Fox 2008.
[h] Fox 2008.

By grouping together various types of state regulation of religion and focusing on broad and all-encompassing definitions of limitations on religious freedom, large-N studies tend to overlook an important distinction within the category of "religious freedom"—between two different types of rights. What most of these studies miss is the difference between the advancement of freedom *of* religion (guaranteeing the survival of minority religious groups) and the advancement of freedom *from* religion (providing protection from coercion to participate in religious customs and ceremonies). Whereas the former is concerned with the rights of religious *groups* to advance or protect their own culture, the latter is concerned with the right of *individuals* to opt out of a religious affiliation.[122] In the religiously divided societies discussed in this article, this distinction is particularly notable in the debate over secularism, which involves a conflict over the rights of atheists or nonbelievers to refrain from practicing any religion and the demands of religious groups to exert influence over the public sphere. Moreover, the distinction is important because the two types of freedom (of and from religion) can generate policies that conflict with rather than complement each other. Freedom of religion may imply state support for religious institutions and education, or limited state intervention in religious practices and traditions; those practices in turn may violate freedom from religion for individual members of these religious groups.[123]

As Table 3 demonstrates, comparing the impact of permissive and restrictive constitutions on freedom of religion and on freedom from religion is a complex task. Overall, permissive constitutions for the most part allowed for state policies that better protect freedom *of* religion as compared with state policies toward religion that evolved under restrictive constitutions. Freedom *from* religion, by contrast, appeared to be less protected under permissive constitutional arrangements.

Freedom *of* religion for all religious groups is by and large guaranteed in Israel and in India. Religious groups enjoy complete autonomy under Israeli law, and in India the government tends to intervene in Hindu religious practices and activities when they violate the principle of equality, most notably in the case of caste discrimination.[124] Thus, for example, the Indian constitution abolished the status of "untouchables"

[122] This distinction is usually discussed in the American constitutional context as the difference between implications of the "the establishment clause" and the "free exercise clause" in the First Amendment to the US Constitution. See, for example, Greenawalt 2007; Greenawalt 2009; Eisgruber and Sager 2009. See also Sapir and Statman 2005.

[123] For discussion of this problem in the context of gender equality and multiculturalism, see, for example, Okin 1999.

[124] Bhargava 2010; Jacobsohn 2006.

TABLE 3
FREEDOM OF RELIGION AND FREEDOM FROM RELIGION IN INDONESIA, INDIA, ISRAEL, AND TURKEY, 2012

	Type of Regulation	*Indonesia*	*India*	*Israel*	*Turkey*
Freedom OF Religion	state recognition of religions	six officially recognized religions: Islam (86.1% of population), Protestantism (5.7%), Catholicism (3%), Hinduism (1.8%), Buddhism and Confucianism[a]	no limitations	14 recognized religions	Islam (99.8% of the population), and three religious minorities recognized by the 1923 Lausanne Treaty: Greek Orthodox, Armenian, and Jewish (in total less than 0.2% of population).
	state funding of religious education	yes	yes	yes	yes
	funding religious institutions	yes	yes	yes	yes
	presence of religious courts with jurisdiction over personal law	yes	yes	yes	yes
	restrictions on religious practices	unrecognized religious groups can be registered only as social organizations	restrictions on Hindi discriminatory practices	no	no religious expression (including headscarf) in government offices (including universities and public schools); unrecognized religious groups cannot form a foundation/ association
	restrictions on conversions	no	in practice in some provinces	no	no
	linking particular religion to citizenship	ID states religion (one of the six recognized)[b]	no	automatic citizenship for Jews	only recognized religions are listed on national ID

TABLE 3 *cont.*

	Type of Regulation	*Indonesia*	*India*	*Israel*	*Turkey*
	monopoly of religious authorities on marriage and divorce	yes for Muslim alone	yes in practice, especially for Muslims	yes	no
	mandatory religious education	religious instruction is required in student's faith	no; religious education is forbidden in public schools	no	yes for Muslims; recognized religious minorities are exempted
	mandatory prayer in school	no	no	no	no
Freedom FROM Religion	restrictions on business on holidays/ Sabbath	no	no	yes	no
	dietary laws / restrictions on alcohol	yes in some regencies	restriction on cow slaughter in some provinces	yes	no
	religious rules regarding inheritance	no (since 2008)	in practice yes	no	no
	others	atheism is a-legal; government employees must declare belief in God			
Summary		FOR no FFR	FOR FFR mostly for Hindus FFR limited for Muslims	FOR no FFR	1924–81: FFR FOR limited 1982–2011: FFR limited FOR limited

SOURCES: US Department of State, *2010 Report on International Religious Freedom*; *Global Study of Islamic Family Law*, The Law and Religion Program of Emory University. At http://www.law.emory.edu/ifl/legal/; Marshal 2008; Fox 2008; Barak-Erez 2010; CIA The World Factbook. At https://www.cia.gov/library/publications/the-world-factbook/index.html.

[a] Confucianism is recognized as a faith, rather than a religion.

[b] Legally, this issue is not formally regulated. Yet there are contradictory interpretations of the law.

and disallowed prohibitions on entry into Hindu temples. In Indonesia, while only five religions are formally recognized by the state,[125] these five religions encompass over 97 percent of the population. By contrast, freedom of religion in Turkey is relatively constrained. Respect for religious expression in the public sphere is limited. As a result, for example, Muslim women are prohibited from wearing headscarves in public institutions, including universities and public schools.[126] Moreover, those in the 12–27 percent of the population that identifies as Alevis[127] are not recognized as a religious minority. Consequently, their places of worship (*cemevleri*) are not officially recognized by the state and are not eligible for the same benefits received by mosques. Likewise, their demand to be exempted from compulsory Sunni religious teachings in public schools is disregarded.[128]

While permissive constitutional arrangements tend to guarantee freedom *of* religion, they are more likely to result in reduced protection of freedom *from* religion, compared with restrictive constitutional arrangements, such as those that exist in Turkey. In Israel, for example, religious marriage and divorce are the only options for all citizens, including nonbelievers and atheists. Consequently, the religious monopoly on marriage and divorce violates the right to marry for hundreds of thousands of citizens, including interreligious couples or those who are not affiliated with any religion (comprising about 4 percent of the population). Similarly, in India legal pluralism in the area of personal law results in greater freedom from religion for Hindus, while religious law is de facto applied to Muslim and Christian minority groups. The controversy over the *Shah Bano* case in India, followed by the legislation of the Muslim Women (Protection of Rights on Divorce) Act in 1986, demonstrated the persistence of legal pluralism in the area of family law.[129] At the same time, recent interpretations by the Indian Supreme Court (especially in the *Daniel Latifi* case) have arguably expanded the freedom of Muslim women from religious personal status laws.[130] Among the three countries that adopted permissive constitutional arrangements, freedom from religion is most constrained in Indonesia, where religious instruction is required, where citizens must state their religion on their identification card, where government

[125] Confucianism is recognized as a faith.

[126] Bali forthcoming; Kavakci 2010; Hale and Özbudun 2010, 71–74.

[127] The difference in the estimated number stems from vagueness in the self-definition of members of the Alevi community. Hale and Özbudun 2010, 78.

[128] Hale and Özbudun 2010, 79.

[129] Engineer 1987; Hasan 1989.

[130] Menski 2001; Hasan 2003; Subramanian 2008.

employees must declare their belief in god, and where atheism is not recognized by the state. By contrast, in Turkey freedom from religion was strictly protected by the secular Kemalist ideology for over half a century following independence. Limitations on freedom from religion began in 1982, when compulsory religious education was introduced in the public schools. However, members of the three religious minorities recognized by the 1923 Lausanne Treaty, namely, Greek Orthodox and Armenian Christians and Jews, are exempted from this requirement (Article 24).

It is interesting to note that while freedom from religion is more limited under the permissive constitutional arrangements of India, Israel, and Indonesia, none of these countries institutionalized compulsory religious education. To a large extent, the constitutional enforcement of compulsory religious teachings in primary and secondary schools in Turkey continues the restrictive constitutional tradition developed by the Kemalist secular ideologists, who prohibited any kind of religious education during the first two and a half decades of the republic (1924–49). The 1982 introduction of mandatory religious education should be understood as part of a larger process of the state's recognition of the central and legitimate role of religion.[131] The new education policy was designed to introduce a form of state-led Islamization, imposed from above through the synthesizing of conservative elements of Turkish nationalism with Islam.[132] By returning to a "homogenizing and nationalist model of Islam reminiscent of the early republican period,"[133] this new state-led approach to religion was meant to prevent processes of social and political fragmentation, which in the 1970s had led to direct violent confrontations.

VII. Conclusion

Constitutional scholarship is gradually recognizing that the global dissemination of constitutionalism does not necessarily mean that the same ideas of constitutionalism are shared by all who use the term.[134] As Ulrich Preuss recently observed, "[W]e live in an age of multiple constitutionalisms."[135] The idea of constitutionalism today, in his words, is

[131] Such as the creation of unofficial and private religious education networks and private sector Islamic enterprises during the 1983–90 ANAP government.

[132] Hale and Özbudun 2010, xx; Bali 2012, 11; Kuru 2012.

[133] Bali 2011b, 12.

[134] Among the few who acknowledge these differences are Arjomand 2003; Arjomand 2007; Brown 2002; Brown 2009; Ginsburg and Moustafa 2008.

[135] Preuss 2011.

viewed through a "plurality of lenses." Yet what does an alternative idea of non-Euro-Atlantic constitutionalism entail? Theorizing such an alternative approach was the main goal of the article. It suggests that permissive constitutional arrangements in the area of religion enable societies deeply divided over the religious identity of the state to enact a democratic constitution or function with informal constitutional arrangements. Ambiguous constitutional formulations in the area of religion allow controversial decisions on these divisive issues to be deferred to some future time and direct and even violent conflict to be averted. Further, they promote a consensual, rather than a majoritarian, perception of democracy, by reflecting the competing religious/secular visions held by "the people."

From a liberal, secular constitutionalist perspective, permissive constitutional arrangements are perceived as normatively inferior, as they allow for the endurance of conservative and nonegalitarian policies and institutions in the religious sphere. Moreover, by blurring the distinction between higher lawmaking and normal lawmaking, ambiguous constitutional arrangements forgo the educative role that constitutions are usually expected to play at both the judicial and the societal levels. Formal constitutions that include a comprehensive bill of rights have an important role to play, not only in providing the court with the legal means to promote human rights through adjudication but also in enhancing public support for human rights and democracy.[136] As B. R. Ambedkar, the chair of the drafting committee in the Indian Constituent Assembly, stated during the constitutional debates in 1948, a detailed written constitution is important for diffusing constitutional morality, "not merely among the majority of any community but throughout the whole. . . . Constitutional morality is not a neutral sentiment. It has to be cultivated."[137]

An important question that remains open is whether a permissive constitutional approach facilitates or hinders the evolution of a liberal "overlapping consensus" over time. While further comparative research is required, the Israeli and Indian experience seems to suggest that the drafters were misguided in their expectation that constitutionalizing secular principles in the future would be easier. Illiberal policies and institutions that were adopted in the state's formative stage were difficult to change in later years through procedures of ordinary politics

[136] Rubinstein and Medina 2005, 54; Bickel 1962, 26; Eisgruber 1992. A formal preamble may also play an important educational function. See Orgad 2010.

[137] CAD, November 4, 1948. See also Mehta 2010.

because their reforms were easily blocked by simple majorities.[138] In retrospect, some form of time-limiting constitutional mechanism, such as a sunset clause, might have helped prevent the long-term entrenchment of inegalitarian or illiberal religious policies and institutions.[139] However, whether instating sunset clauses at the time of constitution writing was politically feasible or whether such a mechanism would have been effective in preventing the perpetuation of illiberal religious arrangements are both questions difficult to resolve in a retrospective study.

It is to be hoped that the distinctions this article proposes between permissive and restrictive constitutional arrangements in the area of religion will be helpful for both constitutional scholars and practitioners who are concerned with contemporary projects of constitution drafting in religiously divided societies. As a growing number of constitution-drafting processes address issues of religious identity (as in Turkey, Egypt, and Tunisia), further research is needed in this area, at both the empirical and the theoretical levels.[140] A comparative study of other processes of constitution writing under conditions of deep disagreement over the state's religious identity (for example, Lebanon in 1936, Pakistan in 1956, and Senegal in 1959) may reveal new constitutional models and may better explain the political choices available when defining religion-state relations at the foundational stage of the state. Additional comparative research is required in order to clarify the relationship between process and outcome of constitution drafting in religiously divided societies and to enhance our understanding of the causal mechanisms that generate different constitutional trajectories, whether in the permissive or the restrictive direction. Further research would also help evaluate the long-term impact of permissive and restrictive constitutional arrangements in the area of religion on issues such as protection of human rights, conflict mitigation, political moderation, and societal reforms. Are there trade-offs between these

[138] This is the case, for example, in Israel, where the legislation of civil marriage is repeatedly blocked by the religious parties. See Lerner forthcoming.

[139] Arato 2010; Sunstein 2001.

[140] While short lived, the 2012 Egyptian constitution, for example, may represent a grey area between restrictive and permissive constitutional approaches toward religion. While the constitution seemed to enhance the role of Islam (Article 2 remained unchanged compared with the previous constitution and continued to define the principles of Sharia as the main source of legislation, yet new Article 4 gave an interpretive role to Al-Azhar, and new Article 219 tied the constitution to Sunni traditional jurisprudence), much seemed to be dependent on the interpretation of these articles by legislators, judges, and religious scholars. When the constitution was enacted, some observers argued that these provisions would continue to stir "fierce argument about what types of law are permissible in a self-styled Islamic state and, of course, about which are wise." Brown and Lombardi 2012.

effects (for example, between conflict reduction and protection of human rights), or could they be achieved simultaneously? Are restrictive constitutions authoritarian by definition, as in the case of Turkey, or could a restrictive yet liberal constitution, one that set clear and unambiguous standards for the protection of human rights, refrain from taking the authoritarian path? Debates over these and other questions will, one hopes, contribute to—as well as benefit from—political, legal, and public evolution in both current and anticipated constitution-drafting projects around the world.

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