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The Challenge of Strong Religion in the Liberal State

Gila Stopler*

Liberal states are struggling to find ways to deal with strong religion in a manner that would enable them to give due respect to the religious beliefs of citizens while at the same time to adhere to core liberal values such as respect for human rights and avoidance of undue entanglement of religious and state authority. One type of solution that has been offered is granting authority and autonomy to private religious tribunals, for example in the area of religious family law. Another type of solution is creating a direct link between state law and some religious obligations, as was done in the NY Get Laws. Both these solutions have been criticized by some as deviating from the pattern of religion state relations suitable for the liberal state, while others have embraced both. The article rejects the tendency to view these solutions as similar and claims that they differ in both the structure of religion state relations that they advance, and in their compatibility with human rights. It argues that only the latter solution, exemplified in the NY get laws, is a proper solution for the challenge of strong religion in a liberal state that aims to respect the rights of all, including weaker members of the community, such as women.

To clarify the important differences between the two solutions, in terms of both structure and rights, the article employs a wide comparative perspective on religion state relations, analyzing such relations in both liberal and non-liberal countries and offering a typology of three distinct approaches that states take towards religion – nationalization, authorization and privatization. It assesses the advantages and disadvantages of these approaches in responding to the challenge of strong religion, and their compatibility with liberal religion state structure and with liberal human rights. It then employs this analysis to highlight the significant differences between the two solutions to the challenge of strong religion, rejecting the calls for the authorization of private religious tribunals and embracing the

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careful and conditional incorporation of religious considerations into civil law, as was done in the NY Get Laws, claiming that the latter is an appropriate and indeed essential means for respecting both strong religion and liberal values, since it enables the liberal state to acknowledge the importance of religious belief in people’s lives while at the same time protecting the rights of all its citizens.

I. INTRODUCTION

The resurgence of strong religion across the globe, from the Middle East and Asia to Europe and the USA, and the growing debates in many liberal democracies surrounding the soundness and desirability of various multicultural policies that accommodate religious minorities, have brought to the forefront the difficulty of reconciling the liberal commitment to religious freedom, pluralism and equality with the accommodation of strong religion.\(^1\) Liberal states are struggling to find ways to deal with what I will call the challenge of strong religion in a manner that would enable them to give due respect to the religious beliefs of citizens while at the same time to adhere to core liberal values such as respect for human rights and avoidance of undue entanglement of religious and state authority.

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\(^1\) On the resurgence of strong religion see John L. Esposito, *Foreword: Religious Fundamentalisms & the Global Resurgence, in Fundamentalism, Politics, and the Law*, vii (Marci A. Hamilton and Mark J. Rozell eds., 2012); Paul Cliteur, *State and religion against the backdrop of religious radicalism* 10 I•CON 127, (2012) Many terms have been used interchangeably to describe all encompassing conservative religions that place high demands on their adherents, condemn deviance and repudiate modernity and the outside world. These include the terms *strict religions* (see Laurence R. Iannaccone, *Toward an Economic Theory of "Fundamentalism"* 153 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) 100, 104 (March 1997)), *fundamentalist religions* (Michael O. Emerson and David Hartman *The Rise of Religious Fundamentalism*, 32 ANN. REV. SOCIOLOG. 127–44 (2006)) and *strong religions* (Andras Sajo, Preliminaries to a Concept of Constitutional Secularism 6 INT'L J. CONST. L. (I•CON) 605, 606 (2008) Sajo uses the term to denote religions that are either isolationist, and wish to be exempted from state laws and be governed by their own religious precepts, or religions that seek a stronger presence in the public sphere; see also Gabriel A. Almond ET AL., *Strong Religion: The Rise of Fundamentalisms Around the World*, 14 (2003)). In this article I chose to use the term strong religion both in order to escape the negative and extremist connotations associated with the term fundamentalist religion and in order to denote the strength of the hold that the religious commitment has not only on the community but also in the life of its individual members, including women.
There are at least two aspects to the challenge of strong religion. One arises from the fact that the spread of strong religion is accompanied by calls to grant religious communities more authority and more autonomy, by enabling them to enforce their religious communal laws. The second aspect of the challenge of strong religion, which stems from the reluctance of liberal states to get entangled with religion, is that the refusal of the state to cope with various constraints that deeply held religious beliefs place on religious adherents may jeopardize their rights. Both aspects of the challenge are particularly relevant to the rights of weaker members of the community, often women, who may find that they are faced with a stark choice between abandoning their religion and their community in order to free themselves from its oppressive aspects, and renouncing their rights to equality and to dignity in order to maintain their identity and community.²

One type of solution that has been offered to the challenge of strong religion in response to demands for more authority and autonomy is to grant private religious tribunals authority in the area of religious family law.³ This can be done in various ways, including joint governance schemes that involve the direct transfer of state power to religious communal authorities, or by allowing decisions of private religious tribunals to be enforced

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² Ayelet Shachar, Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law 9 THEO. INQ. L. 573 (2008). While women are the ones whose rights are most often at risk, another disempowered group whose rights may be adversely affected by the challenge of strong religion is children. See Robin Fretwell Wilson Privatizing Family Law in the Name of Religion 18 WILLIAM & MARY BILL OF RIGHTS J. 925 (2010)

³ This article will focus only on the question of granting authority to private religious tribunals in the area of family law, since this is the area in which the enforcement of decisions of private religious tribunals raises the greatest risk to the rights of the disempowered members of the religious community, such as women. For general arguments for and against state enforcement of arbitration decisions of private religious tribunals see Michael A. Helfand, Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders, 86 N.Y.U LAW REVIEW 1231 (2011) [supports the enforcement of arbitration decisions by private religious tribunals but recommends the tailoring of the doctrines of public policy and unconscionability used by civil courts as a check on arbitral power to the context of religious arbitrarion]; Nicholas Walter, Religious Arbitration in the United States and Canada, 52 SANTA CLARA L. REV. 501(2012) [objects to any enforcement of religious arbitration, except for decisions on purely religious matters that cannot be solved in a civil court, on the grounds that such enforcement violates religious freedom]
as arbitration decisions. Another type of solution offered to the challenge of strong religion is to create a direct link between state law and some religious obligations, as was done, for example, in the NY Get Laws, which are aimed at ameliorating the plight of observant Jewish women whose husbands refuse to divorce them religiously. Both types of solutions have been criticized by some as deviating from the pattern of religion state relations suitable for the liberal state, while others have embraced them both, seeing them as a necessary response for the challenge of strong religion in the liberal state. Thus, from the critics’ perspective, while joint governance and religious arbitration schemes violate the First Amendment by attempting to transfer state power into the hands of religious groups, by unduly entangling the state with religion, and by violating religious freedom, the NY Get Laws and similar schemes are accused of violating the First Amendment by enacting religious obligations into state law and violating religious freedom. Conversely, proponents of these solutions, such as Ayelet Shachar, believe that regardless of state entanglement with religion, these solutions for the challenge of strong religion are both appropriate and important, since they help women negotiate and reconcile between their identity and membership interests on the one hand and their dignity and equality on the other.

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4 For joint governance schemes see e.g. Russell Sandberg et al. Britain’s Religious Tribunals: Joint Governance in Practice, OXFORD JOURNAL OF LEGAL STUDIES, (2012), pp. 1–29, doi:10.1093/ojls/gqs031; AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001). For recognition of decisions of religious tribunals as arbitration decisions see e.g. Helfand, supra note 3


6 On joint governance schemes see Helfand supra note 3 at 1278-1279; On religious arbitration see id. at 1244 and Walter supra 3 note at 547-551, and on the N.Y Get Laws see Lisa Zorenberg, Beyond the Constitution: Is the New York Get Legislation Good Law? 15 PACE L. REV. 703, 706-707 (1995). It is important to note that while the state enforcement of arbitration decisions of private religious tribunals has been the norm for many years in the US and has gone fairly unchallenged, this has changed in recent years, primarily due to the extensive recent debates over enforcement of religious arbitration in other western countries such as Canada and the UK which have brought to the forefront the difficulties surrounding this type of enforcement. see Helfand supra note 3 at 1237-1238.

7 Privatizing Diversity supra note 2
This article rejects the inclination to view these solutions to the challenge of strong
religion as similar and argues that they differ in both the structure of religion state relations
that they advance and in their compatibility with human rights, and in particular with
women’s rights. It rejects the authorization of private religious tribunals in the area of
family law but embraces the careful and conditional incorporation of religious
considerations into civil law, exemplified in the NY get laws. It argues that only the latter is
a proper solution to the challenge of strong religion in a liberal state that aims to respect the
rights of all, including weaker members of the community, such as women. It further
contends that since studies have consistently shown that across religions and continents
beliefs in patriarchal family structures and in traditional gender roles stand at the core of
strong religions, the need to examine the solutions to the challenge of strong religion in the
liberal state from the perspective of women’s rights is paramount.

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

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8 See part IV of the article
9 Emerson and Hartman supra note 1 at 135 and the studies cited therein.
10 See part II of the article
nationalization of religion. As will be explained, this difference is important both in terms of structure and in terms of the protection of human rights.

Part II of the article will elaborate on the suggested typology of the three approaches that states take towards religion while reserving the application of the typology to the challenge of strong religion in the liberal state to parts III and IV. Although the approaches identified represent distinct ways of dealing with religion, they are not necessarily exclusive, and states may use either one of them or any combination of them to manage different aspects of their relations with the religions within their borders. \(^{11}\) The first approach to religion, which I will call the nationalization of religion, usually involves the establishment of a state religion and of close ties between religion and the state. \(^{12}\) The state uses the chosen religion and its religious law as a basis of governance in various areas, but maintains control over the content of the religion through secular institutions, such as parliament and the civil court system. Examples for the nationalization of the majority religion can be found in non-liberal Muslim countries, such as Egypt and Malaysia, while an example for the partial nationalization of a minority religion is the nationalization of the religious family laws of religious minorities in India. Importantly, nationalization allows the state, if it chooses to do so, to ameliorate the violation of women’s rights that may result from conservative interpretations of religion.

The second approach to religion, which I will call the authorization of religion, also often implicates the establishment of religion in the state, but unlike the first approach it involves giving the religious establishment the authority and autonomy to determine the

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\(^{11}\) See f.n. 18 and accompanying text

\(^{12}\) See part IIA of the article
content of religion and apply it accordingly.\textsuperscript{13} Thus, secular state institutions have little or no say in the content and development of the religion of the state. This approach can be identified in more conservative Muslim countries, such as Saudi Arabia, but it can also be identified on a much narrower basis in the laws of marriage and divorce in Israel, which give the religious authorities of every religious community, including minority communities, extensive control over the religious interpretation of their own laws of marriage and divorce. The authorization of religion leaves very little leeway for the state to ameliorate rights violations that may occur as a result of the application of conservative interpretations of religion.

The third approach to religion I will discuss is the \textit{privatization of religion}.\textsuperscript{14} Under this approach religion is separated from the state through its privatization, but at the same time it is given extensive freedom and autonomy within the private sphere; this approach, which does not necessarily entail a complete separation between religion and the state (if such separation is at all possible), is prevalent in liberal democracies.\textsuperscript{15} It may include forms of cooperation between private religion and the state, but its main characteristics are the institutional differentiation between secular state government and private religious institutions and communities, and the grant of extensive autonomy to the latter, as well as an attempt to grant all religions an essentially equal treatment.\textsuperscript{16} As will be discussed, the

\textsuperscript{13} See part IIB of the article
\textsuperscript{14} See part IIC of the article
\textsuperscript{15} James Q. Whitman, \textit{Separating Church and State: The Atlantic Divide, in Law, Society, and History Themes in the Legal Sociology and Legal History of Lawrence M. Friedman}, 233 (Robert W. Gordon, Morton J. Horwitz eds., 2011)
privatization of religion is only partly successful in ameliorating rights violations that result from conservative interpretations of religion within religious communities.

Following the presentation of the three approaches in part II, part III will ask how successful is each of these approaches in responding to the challenge of strong religion and how compatible it is with liberal values. The answer to this question will be relevant to the examination in part IV of the two solutions offered to the challenge of strong religion in the liberal state – giving authority to private religious tribunals in matters of family laws and enacting civil legislation such as the NY Get Laws – in light of the suggested typology. I will claim in part III that although the privatization of religion, which is prevalent in liberal democracies, is the most compatible with liberal values, it is insufficient to respond to the challenge of strong religion, especially in light of the increase in adherence to strong religion in these countries. Nevertheless, the nationalization of religion and the authorization of religion, in their stronger forms, as practiced in non-liberal countries, are both incompatible with liberal values and are therefore unsuitable for liberal states. Yet, I will argue, the solutions that have been offered to the challenge of strong religion in the liberal state – giving authority to private religious tribunals in matters of family laws and enacting civil legislation such as the NY Get Laws – both constitute milder forms of either authorization of religion or its nationalization and should therefore be examined in light of the typology developed in this article.

Finally, in part IV I will employ this analysis to highlight the important differences between the two solutions to the challenge of strong religion discussed above. I will claim that while enabling Religious communities to enforce their religious family laws should be understood as a partial authorization of religion, measures such as the NY Get Laws that
condition the issuance of a civil divorce order on the prior grant of a religious divorce by one spouse to the other, are an example for the soft nationalization of religion. I will then claim that despite the liberal reluctance to entangle the state in religious matters and the liberal inclination to expand the autonomy and authority of religious communities, soft nationalization of religion, in the form of an increased and principled involvement of the state with religion through civil law and the civil courts, is the preferable means of responding to the challenge of strong religion in the liberal state. When carried out properly the soft nationalization of religion allows the liberal state to respect the religious needs of adherents of strong religions while safeguarding the rights of the weaker members of the religious community, such as women. Conversely, a partial authorization of religion with its transfer of power into the hands of private religious tribunals fails to protect the rights of weaker members of the religious community and may facilitate and entrench the conservative leanings of the community’s religious authorities.

II. THREE APPROACHES TOWARDS RELIGION

States and religions are probably the two most powerful forces that exist today and the variety of religion and state relations that exist around the globe are both a reflection and an outgrowth of this fact. Quite a few typologies of religion and state relations have been offered over the years to distinguish between types of these relations for various purposes. Perhaps the most basic typology distinguishes between systems with an established religion, systems with separation between religion and the state and mixed systems. A more

17 Theodor Hanf, Preface, in JIHAD NAMMOUR, STATE AND RELIGION: COMPARING CASES OF CHANGING RELATIONS - A CONFERENCE REPORT, 5 (2011)
A nuanced typology distinguishes between political atheism, the religiously neutral state, multiculturalism, state church, and theocracy. The typology offered in this article is distinct from other typologies heretofore offered in two senses. First, while most typologies identify states as falling under a certain structure of religion state relations, the typology offered here does not maintain that a certain state necessarily falls under one of the approaches discussed to the exclusion of the two others. Quite to the contrary, there are many countries which combine two or more of these approaches, even if one of the approaches is more dominant than the others. The impetus for the typology offered here is that each approach describes a different relationship between the power of the state and the power of religion, even if such different relationships might exist within the same state, and that this difference affects the rights of religious adherents, and especially of the weaker members of the religious community. Second, unlike many typologies that focus on variations of religion state relations within liberal states, the typology offered here looks to variations between non-liberal states in order to facilitate our understanding of the appropriate resolution of the challenge of strong religion within liberal states.

A. Nationalization of Religion


19 An example of a country that combines all three approaches is Israel in which the exclusive jurisdiction of the rabbinical courts in areas of marriage and divorce is an example of the authorization of religion, the law of return is an example of the nationalization of religion and the freedom granted to religious communities to pursue their religious practices in the private sphere is an example of the privatization of religion. For a critique of the one dimensional view of religion state relations and a claim that religion’s role may differ widely in different domains *see* Aernout J. Nieuwenhuis, *State and religion, a multidimensional relationship: Some comparative law remarks*, 10 I•CON 153 (2012).

20 Even some of the scholars that put a special emphasis on the analysis of non-liberal countries may lump all of them under the same category. For example, in his important book Constitutional Theocracy Ran Hirschl refers to all the non-liberal, mostly Muslim countries that he discusses as constitutional theocracies. RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010)
While one way of containing the power of religion is by relegating it to the private sphere, this may not always be suitable due to the type of religion in question and to the role that it plays in the life of the respective state. Thus, some states maintain their supremacy over religion by, on the one hand, allowing it to play a central role in the public life of the nation, while, on the other hand, controlling it and using it to advance both the religious as well as the wider goals of the state. This mode of operation, which I call the nationalization of religion, and which is prevalent in Muslim majority countries, can take various forms, but its central feature is that the state assumes the authority to determine what the content of the state religion is, sometimes trying to suppress opposing interpretations. For example, in the Islamic federation of Malaysia Islam is a central component of the ethnic Malay identity, but only around 60 percent of the population is Muslim. Consequently, the constitution includes special provisions for Islam, which both give preference to Muslims but at the same time restrict their behavior. Thus, the constitution allows state and federal law to restrict 'the propagation of any religious doctrine or belief among persons professing the religion of Islam'. As a result, it is forbidden to propagate non-Muslim religious doctrines to Muslims, and those wishing to propagate Muslim religious doctrines and beliefs to Muslims must obtain permission from state religious departments. Simultaneously, the

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21 As Montesquieu observed, different religions are better suited to different forms of government. Montesquieu, The Spirit of Laws, Book XXIV, Of Laws in relation to Religion Considered in Itself, and in its Doctrines, paragraph 5.


23 Article 11(4) of the Constitution of Malaysia

24 AHMAD FAUZI ABDUL HAMID, ISLAMIC EDUCATION IN MALAYSIA, RSIS Monograph No. 18, 25 (2010)
state is promoting a relatively moderate form of Islam (Islam Hadhari or civilizational Islam) in order to prevent the spread of more radical forms of Islam.\(^{25}\)

A similar nationalization of religion takes place in the supposedly staunchly secular Turkey. Although Turkey is defined in its constitution as a secular state, Islam has always played an important role in Turkish national identity.\(^{26}\) Consequently, while on the one hand the early Kemalist state repressed Islam, on the other hand it promoted its own interpretation of Islam in order to legitimate its secular nationalism.\(^{27}\) The notion of laicism, which initially meant a complete ban on Islam, was transformed to mean the control of religious expression by the state.\(^{28}\) As a result, at the same time that Turkey’s 1982 constitution defines it as a secular state,\(^{29}\) it also enshrines state control over Islamic education and its compulsory introduction into state schools.\(^{30}\) Furthermore, the secular state has established a Department of Religious Affairs (DIR) which controls 70000 mosques and thousands of Qur’anic courses, and supervises private forms of religious activities.\(^{31}\) State control over religion is so tight that the DIR even distributes the Friday sermons to the mosques around the country.\(^{32}\) The DIR promotes a relatively progressive form of Islam, which has been called


\(^{28}\) Agai *supra* note 26 at 152

\(^{29}\) The Constitution of the Republic of Turkey. The definition of Turkey as a secular state appears in article 2

\(^{30}\) The Constitution of the Republic of Turkey, article 24.

\(^{31}\) Agai *supra* note 26 at 153-154

\(^{32}\) Azak *supra* note 27 at 12
“Turkish-Islamic-Synthesis”, and which is aimed at undermining Islamic influences outside of state control and assisting in the project of national homogenization.  

An important arena in which the nationalization of religion is widespread is that of religious family law. Religious family law is at the heart of Muslim identity. Accordingly, in most majority Muslim countries family law is governed by Sharia and the struggles over who decides the content of the law and who is responsible for its application are at the heart of the relations between religion and the state. One important means of nationalizing religious family law is through its codification. Codification involves the creation of a written law on the basis of Sharia principles as they are expressed in the opinions of various Muslim jurists and schools. While the resulting law is invariably presented as Sharia based, its exact content is determined by the state and is influenced by changing socio-economic circumstances and by the public interest. Furthermore, it is the resulting state law that subsequently governs family relations and becomes the basis for judicial decisions, and the religious texts retain at most a residual power. Codification of religious law offers states two important advantages. First, in the process of codification the state chooses which elements of the religious law to adopt and which to reject and is thus able to make the law fit more closely with its own reformist or conservative agenda. Thus, codification is usually favored by women’s rights activists since it often reforms religious law and makes it less discriminatory towards women, and it may even enable women to take part in the drafting

33 Agai supra note 26 at 156
35 LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY, 13 (2007)
36 Id. at 13,16
37 Id. at 48-52
process. Conversely, religious leaders often oppose codification, especially if it is done through non-religious bodies, such as the parliament, claiming that these bodies have no authority to decide on the content of religious law.

The second advantage that codification affords the state is that codification, and especially a detailed one, may considerably narrow the discretion of judges, making the law more predictable and unitary. The vicissitudes of being subject to religious family law in the absence of codification were explained by a women’s rights activist during the debate on the promulgation of a codified family law in Bahrain in 2003 as follows: “The absence of such a law means that the shari‘i qadi has the final say, he rules on God’s command, what he says is obeyed and his order is binding. You find each shari‘i qadi ruling according to his whim; you even find a number of [different] rulings on the same question, which has brought things to a very bad state of affairs in the shari‘a courts. The demand for the promulgation of this law aims at eliminating many problems and at unifying rulings; it would reassure people of the conduct of litigation, and would guarantee women their rights rather than leaving them at the mercy of fate.” It is important to note however, that while codification may improve the situation of women such improvements depend on the will of the state, and are often incremental and incomplete. Even after its codification Sharia based family law may often remain incompatible with women’s right to equality in the family, as the extensive reservations of Muslim countries to the CEDAW convention can attest.

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38 Id. at 26-27; However, if the agenda of the state is a conservative one codification can actually worsen the situation of women. See also KNOWING OUR RIGHTS: WOMEN, FAMILY, LAWS AND CUSTOMS IN THE MUSLIM WORLD, 34-35 WLUM (3rd ed. 2006)
39 WELCHMAN supra note 35 at 28-29
40 Quoted Id. at 23; See also KNOWING OUR RIGHTS supra note 38 at 3
41 Id. at 34-35; See also CEDAW AND MUSLIM FAMILY LAWS: IN SEARCH OF COMMON GROUND, Musawah (2011)
While codification is one means of nationalizing religious family law, another important means is entrusting the implementation of the codified family law in the hands of secular courts. Just as Muslim countries differ in the extent and mode of their codification of Muslim family law, so do they differ in their choice with which courts to entrust the implementation of Sharia based family law.\textsuperscript{42} If we think of the nationalization of religious family law as a spectrum, ranging from minimal nationalization to extensive nationalization, then on one side of the spectrum we will find countries such as Saudi Arabia, who do not nationalize religious family law and where there is no family law code and religious judges have extensive discretion in implementing their own interpretation of sharia, while on the other side of the spectrum we will find countries such as Egypt and Morocco where religious family law is codified in great detail and implemented by the civil court system.\textsuperscript{43}

Nationalization of religious family law is not restricted to majority religions. An example of a partial nationalization of the religious family law of minority communities can be found in the treatment of the family law of religious minority communities in India, including Muslims, Christians, Parsis, and Jews. The main authority over adjudication of family law in India lies with civil state courts, whose personnel is not recruited according to group membership, and who are primarily trained in western law. Community courts of the different communities may also adjudicate family law matters but their decisions are subject to appeal to the state courts.\textsuperscript{44} In adjudicating family law matters state courts draw on a variety of sources, some universal and some group specific, including international law,

\textsuperscript{42} For a concise account of these differences in 21 countries see KNOWING OUR RIGHTS supra note 38 at 38-58
\textsuperscript{43} WELCHMAN supra note 35 at 39. On Saudi Arabia see http://genderindex.org/country/saudi-arabia#_ftn19
\textsuperscript{44} Narendra Subramanian, Legal Change and Gender Inequality: Changes in Muslim Family Law in India, 33 LAW & SOC. INQUIRY 631, 635- 636 (2008)
Indian constitutional rights, Indian criminal laws that are relevant to matrimonial life, Indian statutory group-specific law, uncodified group legal traditions, and other group norms.45

The nationalization of religion through the use of secular courts to interpret religious law may extend well beyond the family law arena, to other areas in which religious law has been prescribed as a source of state law. For example, Article 2 of the 1971 Egyptian constitution as amended in 1980, at the initiative of the Egyptian President at the time Sadat states that: ‘Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Sharia).’46 The amendment, which requires that Sharia principles become the principal source of legislation, and not just a source of legislation as in the original article, was understood by many of its supporters as entailing the Islamization of the entire body of Egyptian law. Accordingly, the Egyptian parliament initiated a process of drafting new Islamic codes in several areas of law.47 However, in 1981, after president Sadat was murdered by an extremist Islamic cell his successor Mubarak started gradually dismantling Sadat’s Islamization initiatives, without changing article II’s language. In response Islamists turned to the courts claiming that various articles of existing state legislation violated Sharia principles and were therefore in

45 Id. at 637. While much of the religious family law pertaining to the major religious groups in India is codified, the law pertaining to Muslims is less codified due to pressures applied by the Muslim community, and state courts use religious texts and traditions in adjudicating Muslim family cases more often than for other groups. State courts also use transnational Islamic law to develop Indian Muslim family law and have particularly tended to refer to Islamic state law in Muslim countries where women enjoy greater rights than in India in order to liberalize Indian Muslim family law. Id., at 634, 638. See also ALAMGIR MUHAMMAD SERAJUDDIN, MUSLIM FAMILY LAW, SECULAR COURTS AND MUSLIM WOMEN OF INDIA, PAKISTAN AND BANGLADESH, ch. 3 (2011)
46 Article II of the 1971 Egyptian Constitution. http://www.cabinet.gov.eg/AboutEgypt/Egyptian_constitution.aspx. The original article stated that Sharia was a principal source of legislation and was amended in 1980 after intense pressure from the religious opposition in Egypt. Hirschl supra note 25 at 107
47 CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT, 133-135 (2006)
violation of article II of the Egyptian Constitution.\textsuperscript{48} The Egyptian Supreme Constitutional Court (SCC) resolved the question in a manner which both restricted the effects of Islamization and allowed the SCC to develop a theory of Islamic law and legal interpretation which enabled it to preserve and even reinforce liberal constitutional principles.\textsuperscript{49} Thus, the SCC decided that the requirement prescribed in the amendment to article II, according to which legislation must conform to the principles of Sharia, applies only to legislation enacted after the amendment and that all the legislation enacted prior to it is not required to conform to these principles.\textsuperscript{50} In addition, the SCC developed a general theory of the application of Islamic legal norms as sources for the interpretation of constitutional norms which, according to Lombardi, resonates with several theories of Islamic law, but at the same time allows secular judges to act as authoritative interpreters of Sharia in constitutional litigation and leaves them with sufficient discretion in interpreting Islamic law as to enable them to preserve and even reinforce a relatively progressive jurisprudence, including on issues such as property rights and women’s rights.\textsuperscript{51}

\textit{B. Authorization of Religion}

Unlike the nationalization of religion which implies close state control over religion and an at least partial adaptation of the state religion to suit wider interests of the state, authorization of religion implies that religion (often the state religion) and its institutions are given control over certain aspects of governance, coupled with considerable autonomy from

\textsuperscript{48} Id. at 159  
\textsuperscript{49} Id. at 159  
\textsuperscript{50} Id.  
\textsuperscript{51} Id. at 158, 267-268. One example for a ruling interpreting Sharia on an issue that concerns the rights of women is the Egyptian Supreme Constitutional Court’s decision that the regulation of face veiling in public schools is compatible both with Islamic law and with religious freedom. For an English translation of the decision see Nathan J. Brown & Clark B. Lombardi, \textit{The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)}, 21 AM. U. INT. L. REV. 437-460 (2006)
state intervention. An example of a country in which there is a uniquely extensive authorization of religion is Saudi Arabia. Saudi Arabia has no constitution and its Basic Law of Governance states that the Qur’an and the Sunna are its constitution and that ‘The decisions of judges shall not be subject to any authority other than the authority of the Islamic Sharia’. Accordingly, Religious Sharia courts staffed with religiously qualified qadis who judge according to the ultra-conservative Wahhabi branch of Islam comprise the bulk of the Saudi court system. Furthermore, in some areas, such as family law, there is no codification and the qadis have extensive discretion in implementing their own interpretation of sharia. Similarly, there is no written penal code in Saudi Arabia and people are arrested, convicted and punished in accordance with Shari’a law as interpreted by the individual judges. Another powerful religious body which operates on the basis of its own interpretation of religious law and is largely insulated from government oversight is the Saudi religious police.

It is important to clarify that the authorization of religion does not necessarily mean that the state has no means of controlling the religious establishment. Rather, it is more accurate to say that for various political and ideological reasons, which differ in each particular case, control over the religious establishment, although theoretically possible, is in

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52 The Basic Law of Governance, article 1. http://www.saudiembassy.net/about/country-information/laws/The_Basic_Law_Of_Governance.aspx ; article 46
54 Welchman supra note 35 at 13
55 Eleanor Abdella Doumato, Saudi Arabia, in WOMEN’S RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA, Freedom House 2009 Gulf Edition. 87. An especially striking example of the power and immunity of the religious police is an event that occurred in 2002 when 15 schoolgirls were burned to death because the religious police refused to allow them to exit the burning school building without their abayas (the cloak that Saudi women are required to wear over their clothing in public). No one from the religious police was punished despite local and international protests. Id. at 88
practice exercised with extreme caution, if at all, and consequently, the religious establishment is able to exercise its own authority in a largely autonomous manner. Thus, for example, although the king in Saudi Arabia has the authority to control the religious establishment and even to annul Sharia court rulings, in practice he does not often use this authority, showing the religious establishment the deference and respect due to a crucial political ally whose support is vital for the continued stability of the kingdom.\textsuperscript{56}

While Saudi Arabia is a particularly stark example of the authorization of religion, such authorization can be found in narrower or milder forms in other countries as well. Furthermore, states may try to change their relations with religion by shifting from the authorization of religion to its nationalization in particular areas, or vice versa. The process of codification of family law detailed earlier is but one example of a shift from authorization of religion to its nationalization.\textsuperscript{57}

A narrow example of the authorization of religion of both majority and minority religions can be found in the exclusive jurisdiction over issues of marriage and divorce that religious courts maintain in Israel. Israeli law does not include a procedure for civil marriage, and marriages in Israel are conducted by the religious authorities of the various


\textsuperscript{57} This process is often prolonged and fraught with difficulty; it is not necessarily linear, and reflects power struggles and compromises; and consequently, it may involve internal contradictions and inconsistencies, as John Bowen shows in detail with regard to the process of the codification of Muslim family law in Indonesia, which was accompanied by a considerable strengthening of Muslim religious courts. JOHN R. BOWEN, ISLAM, LAW, AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING, 173-199 (2003)
religious communities that are officially recognized by the state. These include Jews, Muslims, Druze and various Christian denominations which are each subject to the personal religious laws of their particular religion. The authorization of religion manifests itself not only in the grant of exclusive jurisdiction in matters of marriage and divorce to the religious courts of the various religious communities, but is also manifest in the lack of codification of core aspects of religious family law. As already discussed, this lack of codification makes it very difficult for the state to initiate any reforms in family laws, and enables the religious courts to maintain ultra-conservative positions. This is especially troubling in the context of a country such as Israel, which maintains a commitment to human rights principles such as religious freedom and women’s equality alongside its commitment to its religious establishment. In fact, Israel is a particularly relevant example, since from all the countries discussed thus far it is the one which is ideologically most committed to liberal values, and the interplay between this commitment and the status of religion in the state is instructive when thinking about the challenge of strong religion in the liberal state. As will be discussed below, the authorization of religion in the area of family law results in the application of ultra conservative religious law by the religious courts, despite of, and at times because of, the liberal characteristics of the state.

58 Nevertheless, if an Israeli couple marries in a civil marriage abroad the state recognizes this marriage as valid.
59 The authority of the various religious communities was established through legislation from the period of the British Mandate that was later incorporated into Israeli law. See Sign 51(1) of the King's Order in Council, 1922. The authority of the Jewish Rabbinical Courts is set out in the Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953. The authority of the Muslim religious courts can still be found in Sign 52 of the King's Order in Council, (1922), and that of the various Christian denominations in Sign 54 of the Order. The authority of the Druze religious courts can be found in the Druze Religious Courts Act, 1962.
Israeli law grants the Jewish religious courts in Israel – the Rabbinical Courts - an exclusive jurisdiction in matters of marriage and divorce. With respect to the legal norms that the rabbinical court is instructed to use to adjudicate these matters the law is exceptionally succinct, stating only that ‘Marriage and divorce of Jews will be held in Israel according to the laws of the Torah.’ In addition to their exclusive jurisdiction and complete discretion in matters of marriage and divorce, the rabbinical courts also have concurrent jurisdiction with civil family courts in matters that are ancillary to the divorce, such as alimony and child support. Over the years, due to political considerations the rabbinical courts have been staffed almost exclusively with ultra-Orthodox judges who are members of the most radical Jewish religious community. Orthodox Jewish law discriminates against women in several respects, and especially when applied by ultra-Orthodox judges. In order to ameliorate the discrimination, women’s rights organizations have throughout the years successfully lobbied for statutory changes that both narrowed the jurisdiction of the rabbinical courts and codified more egalitarian arrangements on matters such as the division of property. Nevertheless, the legislative changes have not touched upon the exclusive jurisdiction and complete discretion of the rabbinical courts to determine the law in matters of marriage and divorce. In these matters the rabbinical courts, and indeed all recognized religious courts, are even immune to the scrutiny of the Israeli Supreme Court, which is only authorized to intervene in their decisions if they clearly overstep their jurisdiction.

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61 Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953
62 Section 2 of Jurisdiction of Rabbinical Courts (Marriage and Divorce) Act, 1953
64 Id.
65 Id.
66 Section 15(d)(4) of Basic Law: The Judiciary. The rabbinical courts are authorized to apply Jewish religious law in all matters directly related to marriage and divorce and the Supreme Court will not intervene in such matters (HCJ 8872/06 Ploni v. High Rabbinical Court). However, the Supreme Court has held that in all matters that are incidental to the marriage and divorce and that are brought before the rabbinical courts these
Supreme Court will not intervene in decisions of recognized religious courts even in cases of a clearly mistaken application of the relevant religious law.67

The interplay between the authority of religious judges bent on applying conservative religious law on the one hand, and the determination of civil society organizations and of civil state organs to promote liberal values in those areas of family law not directly subject to the exclusive authority of rabbinical courts, on the other hand, has resulted in a clash of power between the former and the latter and in the increasing radicalization of rabbinical court decisions. Thus, for example, in order to force women to subject themselves to rabbinical court rulings on matters of child support, and prevent them from turning to civil family courts for more egalitarian rulings, rabbinical courts have in recent years started resorting to the retroactive annulment of divorces.68 A retroactive annulment of divorce is a highly contentious practice in Jewish law, among other things because it retroactively turns a child that was born in a legitimate marital relationship (between the divorcee and her second husband) into an illegitimate child (a Mamzer) born to a woman from someone other than her husband.69 The status of Mamzer in Jewish law has devastating results for the child, such as the prohibition on marrying any other Jew. In the past rabbinical courts have adamantly rejected any claim for a retroactive annulment of divorce. Nevertheless, in recent years ultra-Orthodox judges in the rabbinical courts have started using retroactive annulments of divorce against women who, subsequent to the religious divorce, pursue their own and their children’s rights in civil courts, in order to

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67 HCJ 4577/12 Sabag v. Holy Synod of the Greek Orthodox Patriarchate of Jerusalem
68 Amichai Radziner, From Levov to Tel Aviv… 39 MISHPATIM 215-228 (2009)
69 Id.
deter women from turning to these courts. These developments are an example for the problems that may arise when granting authority to strong religion in general and in the liberal state in particular. Any attempt by the liberal state to enforce egalitarian values that contrast with conservative religious precepts triggers further radicalization on the part of the ultra-conservative religion.

The adoption by the state of Israel of the Ottoman Millet system, which granted each religious community the right to self-rule in certain areas meant that in Israel the authorization of religion in the area of family law applies to minority communities as well. While the partial establishment of Orthodox Judaism in Israel was motivated by the desire to entrench the Jewish character of the state, the authorization of minority religions in the area of family law can be seen as an expression of pluralism and multiculturalism, meant to allow religious minorities a measure of autonomy. Nevertheless, similarly to the authorization of Orthodox Judaism, the authorization of minority religions has largely entrenched ultra conservative interpretations of religious law and has proved to be an obstacle for reform. Thus, for example, the Greek Orthodox minority in Israel is governed by the religious establishment of the Greek Orthodox Church which rules in personal status matters on the basis of church doctrines from the 14th century, including doctrines according to which the husband has grounds for divorce if his wife slept out of the house without his consent, or if she went to racing or hunting parties without his approval. It is important to note that similarly to the king in Saudi Arabia, the Israeli state has the power to restrict the

70 Id.

71 For an empirical study concluding that liberal states should not grant state jurisdiction to religious courts of ultra conservative minority groups see Daphna Hacker, Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts, 27 J. L. & RELIGION 59, 80-81 (2011-2012)


73 Michael Karaynni, “Jewish and Democratic” Multiculturalism and the Greek Orthodox Community, in THE CONFLICT, RELIGION AND STATE IN ISRAEL 227 (N. Langental and S. Friedman ed., 2002) (Hebrew)
authorization of religion and to change its terms, since this authorization is determined by secular state law to begin with. Nevertheless, in practice various political and ideological constraints combine to prevent the state from using this power and from withdrawing authorization once it has been given.

C. Privatization of Religion

Unlike the nationalization of religion and the authorization of religion which give religion central public status and state power and authority, the privatization of religion separates state authority from religious authority.\textsuperscript{74} Religion and its institutions are not given state authority, but are given wide autonomy to function as private entities that are relatively free from state supervision and intervention.\textsuperscript{75} The privatization of religion through its separation from state authority is the central approach to religion adopted by liberal democratic states, even by those that actively cooperate with religion, such as Germany, or that have a formally established church, as does England.\textsuperscript{76} The clearest example of the privatization of religion can be found in the United States, where the religion clauses of the First Amendment to the constitution state that ‘Congress shall make no law respecting an


\textsuperscript{75} Myers \textit{supra} note 74 at 59-60; Franken and Loobuyck \textit{supra} note 74 at 478-479

\textsuperscript{76} Franken and Loobuyck \textit{supra} note 74 at 478-479; James Q. Whitman, \textit{Separating Church and State: The Atlantic Divide, in Law, Society, and History Themes in the Legal Sociology and Legal History of Lawrence M. Friedman} (Robert W. Gordon, Morton J. Horwitz eds.) 233-250 (2011); Also See generally LORENZO ZUCCA AND CAMIL UNGUREANU, LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS (2012); JOHN T. S. MADELEY, ZSOLT ENYEDI, CHURCH AND STATE IN CONTEMPORARY EUROPE: THE CHIMERA OF NEUTRALITY (2003); STEPHEN V. MONSMA AND J. CHRISTOPHER SOPER, \textit{The Challenge of Pluralism: Church and State in Five Democracies,} 169 (2nd ed., 2009)
establishment of religion or prohibiting the free exercise thereof’.\(^{77}\) These clauses have been interpreted as requiring ‘a wall of separation between church and state’.\(^{78}\) They are seen as forbidding any direct funding for religious activities by the state, as well as prohibiting any placement of religious symbols on government property in a way that may indicate government preference towards a certain religion.\(^{79}\) While the First Amendment prevents the government from giving direct aid or preference to religion it also prevents it from restricting the religious liberty of religious believers and in particular of religious institutions.\(^{80}\)

Contrary to the US, in Germany the privatization of religion does not prevent close cooperation between state and religion.\(^{81}\) The relationship between religion and state in Germany can be characterized as involving four principles: state neutrality, freedom of religion, church-state partnership and the autonomy of religious organizations.\(^{82}\) State neutrality is understood as a duty to support all religions without giving preference to one religion over others. Consequently, the German constitution enables the state to grant religious associations the status of corporations under public law and allows these religious

\(^{77}\) First Amendment to the U.S. Constitution.
\(^{78}\) Everson v. Board of Education, 330 U.S. 1, 16 (1947).
\(^{79}\) On the prohibition of direct funding for religious activities by the state see e.g. Bowen v Kendrik, 487 U.S. 589 (1988); Zelman v. Simmons-Harris, 536 U.S. 639 (2002)). On the prohibition on any placement of religious symbols on government property in a way that may indicate government preference towards a certain religion see McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005). For a debate concerning a possible shift in American law from strict separation to a milder form of state neutrality see STEPHEN MONSMA ED., CHURCH-STATE RELATIONS IN CRISIS - DEBATING NEUTRALITY (2002); For types of separation see also Carl H. Esbeck, Five Views of Church State Relations in American Thought, BIRGHAM YOUNG U. L. REV. 371 [1986]
\(^{80}\) For example, the U.S Supreme Court has recently upheld the ministerial exception which exempts religious institutions from the reach of anti-discrimination laws with respect to their employment decisions concerning employees that perform some religious functions, even if their primary functions are secular Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ____ (2012)
\(^{81}\) For a detailed account of religion and law in Germany see GERHARD ROBBERS, RELIGION AND LAW IN GERMANY (2010)
\(^{82}\) STEPHEN V. MONSMA AND J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES, 169 (2nd ed., 2009)
associations to levy taxes that finance their operations and to enjoy public subsidies.\textsuperscript{83} However, the duties of the state towards religions do not entitle it to intervene in the life of religious associations in any way, and these associations enjoy a basic right to autonomy and are free to regulate and administer their own affairs, without state interference.\textsuperscript{84}

German courts have granted expansive religious autonomy rights not only to churches but to any association directed toward the attainment of a religious goal, such as religious charity associations.\textsuperscript{85} For example, the German Constitutional Court refused to intervene in a case where a Catholic hospital dismissed a doctor for stating publicly that he opposed the teachings of the Catholic Church on abortion. The court held that the hospital's actions were protected by the right of the Catholic Church to self-determination.\textsuperscript{86}

While the privatization of religion characterizes liberal democracies, there are liberal democracies that accompany it with soft forms of nationalization of religion. In England for example, the Church of England is the established state church since the sixteenth century.\textsuperscript{87} However, while at the outset the Church of England enjoyed considerable state power and privileges, this power has been diluted over the years and has become largely symbolic.\textsuperscript{88} Alongside the largely symbolic establishment of the Church of England the state protects

\begin{footnotesize}
\begin{itemize}
\item Article 137 (5) & (6) of the German Constitution of 1919
\item Article 137(3)
\item Monsma and Soper, \textit{supra} note 82, at 165-166
\item DONALD KOMMERS, \textsc{The Constitutional Jurisprudence of the Federal Republic of Germany}, 494 (2\textsuperscript{nd}. ed. 1997). The case is The Catholic Hospital Abortion case 70 BVerfGE 138 (1985)
\item Monsma and Soper, \textit{supra} note 82, at 131
\end{itemize}
\end{footnotesize}
the free exercise of all religions and strives to ensure neutrality between religious groups as well as between religion and non-religion.\textsuperscript{89}

Importantly, while the privatization of religion prevents direct transfer of state authority to religious institutions it does not prevent religion from having a strong and even decisive influence on state policy and actions through various means such as participation in politics or control over privatized social and welfare services.\textsuperscript{90} Thus, in Germany the fact that the provision of social and educational services has always been the province of religious organizations has enabled them to prevent the institution of full day childcare centers, despite public demands to do so.\textsuperscript{91} In the US, despite its strong adherence to complete privatization of religion, religious precepts against abortions and against homosexuals have played an important role in the federal Hyde amendment that prohibits federal funding for abortions, and in the continued existence for many years of state criminal prohibitions on homosexual sodomy.\textsuperscript{92}

III. THE THREE APPROACHES TO RELIGION AND THE LIBERAL STATE

\textsuperscript{89} Id. at 145-148, 159-162. For more on the relationship between establishment and free exercise in the UK see Iain McLean and Scot Peterson, Entrenching the establishment and free exercise of religion in the written U.K. constitution 9 I•CON 230 (2011)
\textsuperscript{90} Gila Stopler, The Liberal Bind: The Conflict Between Women’s Rights and Patriarchal Religion in the Liberal State, 31 SOCIAL THEORY AND PRACTICE 191(2005); Cranmer, supra note 87 at 112
\textsuperscript{91} Kimberly J. Morgan, Forging the Frontiers between State, Church, and Family: Religious Cleavages and the Origins of Early Childhood Education and Care Policies in France, Sweden and Germany, 30 POLITICS AND SOCIETY 113, 138-140 (2002); Stopler, supra note 90 at 211-212
\textsuperscript{92} On the Hyde Amendment see Harris v. Mcrae, 448 U.S. 297, 319-320 (1980) (the Supreme Court acknowledged that the ban coincides with the religious tenets of the Roman Catholic Church, but held that the ban does not violate the Establishment Clause; On State laws criminalizing sodomy and their affirmance by the court in Bowers v. Hardwick, 478 U.S. 186 (1986) see JANET JAKOBSEN & ANN PELLEGRINI, LOVE THE SIN 19–44 (2003) (The Bowers decision was directly overruled 17 years later in Lawrence v. Texas, 539 U.S. 558 (2003). When overruling Bowers the Lawrence court stated that "Bowers was not correct when it was decided, and it is not correct today." pg. 578). See also Elizabeth Bernstein & Janet R Jakobsen, Sex, Secularism and Religious Influence in US Politics, 31 THIRD WORLD QUARTERLY,1023 (2010)
In what way can the suggested typology of state approaches to religion help us understand how liberal states should respond to the challenge of strong religion? Is the privatization of religion an adequate response to the increasing presence of strong religion in the liberal state? Can and should liberal states use some form of soft nationalization of religion or its partial authorization in order to respond to the challenge? In this section I will elaborate on the compatibility or incompatibility of each of the three approaches with liberal values, on the effects of each approach on strong religion and on its ability to guarantee the preservation of human rights, especially the rights of weaker members of the community. In part IV I will employ this analysis to highlight the important differences between the two solutions offered to the challenge of strong religion in the liberal state. I will claim that while enabling Religious communities to enforce their religious family laws should be understood as a partial authorization of religion, measures such as the NY Get Laws that condition the issuance of a civil divorce order on the prior grant of a religious divorce by one spouse to the other, are an example for the soft nationalization of religion. On the basis of this typology I will analyze these two measures and their compatibility as solutions for the challenge of strong religion in the liberal state both in terms of religion state structure and in terms of human rights.

Despite of, and perhaps because of, its illiberal features, the nationalization of religion in its strong form discussed in part IIA seems to be the most effective of the three approaches outlined above in managing strong religion. By adopting a state religion, controlling its interpretation and limiting competing interpretations, as well as by codifying the state religion and entrusting its interpretation in the hands of civil authorities such as the courts and the legislature the state achieves a relatively high degree of control over religion which
allows it to curb strong religion and to advance more moderate forms of religion. Obviously, states may use the same methods to prevent more moderate forms of religion from competing with those promoted by the state, or even to advance a fundamentalist form of religion. It is not my claim that the nationalization of religion necessarily results in the promotion of a certain type of religion; my claim is simply that the nationalization of religion seems to be a more effective means for the state to advance the type of religion it is interested in advancing, than either the authorization of religion or its privatization. In practice, the countries discussed above as utilizing the nationalization of religion, such as Malaysia and Egypt, choose to promote relatively moderate forms of Islam, although with respect to women’s rights their codification of religious family laws could have been more egalitarian and no less compatible with progressive interpretations of Sharia.93

While the nationalization of religion is relatively effective in managing strong religion it is incompatible with liberal precepts for several reasons. First of all, the nationalization of religion may violate religious freedom. If it involves the suppression of dissenting religious voices, as it does in Malaysia for example, where the propagation of Muslim religious doctrines is forbidden without state permission, it violates the religious freedom of religious dissidents. In addition, state application of religious rules to citizens, even when these rules are codified into state law and applied by civil courts, allegedly violates citizens’ religious freedom, at least when no public reason can be offered for such application.94 Second, the nationalization of religion violates the principle of state neutrality, which is a fundamental principle in liberalism.95 Although neutrality is understood

93 Zainah Anwar, Jana S. Rumminger, Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform, 64 WASH. & LEE L. REV. 1529 (2007); KNOWING OUR RIGHTS, supra note 38 at 41
94 JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, 89-94 (2001)
95 Franken and Loobuyck supra note 74 at 478-479
differently in different liberal countries, state enforcement of a chosen type of religion is incompatible with state neutrality, which requires the state to treat all religions and non-religions on an equal footing.\textsuperscript{96} Finally, nationalization of religion precludes the differentiation between religion and the state which is required by liberalism. Here again it should be noted that this differentiation does not necessarily require strict separation and may be expressed in different ways in different countries.\textsuperscript{97} Nevertheless, the nationalization of religion impedes differentiation both due to the strong establishment of religion in the state and due to the excessive entanglement of the state in religion, expressed for example by the interpretation of religious texts by civil courts.\textsuperscript{98} Of the three approaches discussed here – nationalization, authorization and privatization – the nationalization of religion is the approach in which the boundaries between religion and the state, between the sacred and the secular, are the fuzziest. Not only does the civil state grant civil state power to a sacred state religion, but at the same time civil state institutions are given power to interpret sacred religious texts and recreate them through codification. Both these characteristics of nationalization are incompatible with liberal principles. Nevertheless, as will be discussed below, soft forms of nationalization of religion, such as the N.Y. Get Legislation, which respect both religious freedom and the rights of weaker members of the community, and do not engage in the interpretation of religious dogma, are far more compatible with liberal values and can serve as a good response to the challenge of strong religion in the liberal state.

\textsuperscript{96} Monsma and Soper, \textit{supra} note 82, at 6-10; \textit{See generally} Madeley and Enyedi \textit{supra} note 76
\textsuperscript{98} \textit{See for example} the case of Egypt discussed in f.n. 51 and accompanying text
The privatization of religion, which is the main approach taken by most liberal countries is of course most suited to liberal principles due to its basic characteristics of differentiation between religion and the state and the relegation of religion to the private sphere; freedom of religion and autonomy for religious institutions; and state neutrality and equal treatment of all religions. Nevertheless, although one of the motivations of liberalism’s privatization of religion was to curb the power of religion and its sectarian influence in the public sphere, I have argued that privatization is only partly successful in achieving this goal, and that consequently other liberal rights, such as the rights of women and of homosexuals, may be insufficiently protected. The strong emphasis on freedom and autonomy for religious communities and institutions, which characterizes the privatization of religion, might be used by conservative communities to restrict the rights of their own members, or to advance restrictive policies in the political arena. Furthermore, the refusal of liberal states to get entangled in religious matters may have dire consequences for religious individuals. Thus, for example, states that allow Jewish men who were married religiously to obtain a civil divorce without first requiring them to divorce religiously may inadvertently prevent their religiously observant ex-wives from ever marrying again. The inadequacy of privatization as a response to strong religion has been exacerbated by three distinct yet interrelated recent phenomena: the first phenomenon is what Casanova calls the ‘deprivatization of religion’, which he describes as ‘the fact that religious traditions throughout the world are refusing to accept the marginal and privatized role which theories

100 Id.; also see for example the recent Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ____ (2012), in which the U.S Supreme Court has upheld the ministerial exception that exempts religious institutions from the reach of anti-discrimination laws with respect to their employment decisions concerning employees that perform some religious functions, even if their primary functions are secular
101 See discussion of N.Y. Get Laws in part IVB below
of modernity as well as theories of secularization had reserved for them; the second is the increasing presence of strong religions in liberal countries due, among other things, to immigration; and the third is the rise of multicultural theory and with it of demands for multicultural accommodations.

The liberal emphasis on freedom and autonomy for religious institutions and communities, as well as the accommodations guaranteed by liberal multiculturalism, rely in large part on the notion of liberal expectancy. Nancy Rosenblum explains that liberal expectancy builds on the expectation that illiberal religious and cultural groups which reside within liberal societies will internalize liberal values over time, replacing their own illiberal values with liberal ones. With respect to the multicultural accommodation of illiberal communities Will Kymlicka explains that it is premised on “the hope and expectation that liberal democratic values will grow over time and take firm root across ethnic, racial, and religious lines, within both majority and minority groups, and that in the meantime there are robust mechanisms in place to ensure that multicultural policies and institutions cannot be captured and misused for illiberal purposes.” However, it is questionable whether liberal expectancy is enough to respond to the challenge of strong religions in liberal states. Scholars of strong religion point to the fact that it is most often reactive in nature and rises...
in response to secularization and modernization.\textsuperscript{107} If this is indeed the case then the liberal expectation that strong religions will liberalize as a result of their exposure to liberal values may be a misplaced expectation. Moreover, as Nancy Rosenblum concedes, liberal expectancy cannot be empirically demonstrated.\textsuperscript{108} Furthermore, it can be empirically demonstrated that the strengthening of religion across the world in recent decades has been the strengthening of strict religious movements, while mainline moderate religious movements that have made great efforts to conform to modernity are on the decline almost everywhere.\textsuperscript{109}

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

Finally, the approach that is least likely to curb strong religion is the authorization of religion, which gives the majority state religion, and in some instances minority religions as well, both state power and considerable autonomy and independence to implement their state backed religious authority. Under such conditions, if the religion given authorization by the state is a strong religion, it is likely that it will use its authorization to implement and

\textsuperscript{107} Almond et al., supra note 1 at 20
\textsuperscript{108} Rosenblum supra note 105 at 57
\textsuperscript{109} Peter L. Berger, \textit{The Desecularization of the World: A Global Overview}, in PETER L. BERGER (ED.), \textit{THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS} 1, 6 (1999). See also Esposito supra note 1 at vii-viii; Almond et al., supra note 1 at 1-2; Emerson and Hartman supra note 1
further entrench its ultra-conservative precepts. As has been discussed earlier, this has been the case with both Wahhabism in Saudi Arabia and ultra-Orthodox Judaism in Israel.\footnote{See section IIb. See also Hacker \textit{supra} note 71 at 80}

IV. \textbf{PRIVATE RELIGIOUS TRIBUNALS, GET LAWS, AND THE LIBERAL STATE}

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

\textit{A. Religious Tribunals in Matters of Family Law and the Partial Authorization of Religion}

Muslim groups in Canada and Britain have in recent years lobbied for state enforcement of decisions of private Sharia tribunals in family law matters through legal mechanisms such as
arbitration acts.\textsuperscript{111} While in Canada this demand was rejected after vigorous objections by women’s rights organizations as well as by some Muslim groups, in Britain the debate is still ongoing.\textsuperscript{112} In February 2008 supporters of the authorization of Sharia Councils in Britain have gained an important ally when the Archbishop of Canterbury, Rowan Williams, has stated in a much quoted speech that Britain should be more willing to delegate certain legal functions to the religious courts of religious communities and to enhance the role of Sharia Councils in Britain.\textsuperscript{113}

In terms of our suggested typology the enforcement of decisions of private Sharia Councils by the state should be understood as a partial authorization of religion.\textsuperscript{114} While the Sharia Councils remain private, the ability of the winning party to enforce their decision through a civil court makes them considerably more powerful than tribunals whose decisions cannot be enforced and whose implementation is subject to the good will of the parties. Furthermore, enforcement of judgments of Sharia Councils by the state should be seen as authorization of religion since the state enforcement power is granted to Sharia Councils who are free to interpret and implement religious dogma as they understand it, without any state interference. Thus, unlike in cases of nationalization of religion were the state codifies religious dogma and authorizes civil courts to apply it, the authorization of Sharia Councils or other religious tribunals in liberal states is unlikely to be accompanied by


\textsuperscript{112} For a concise summery of the objections in Canada see Walter supra note 3 at 539-540

\textsuperscript{113} Rowan Williams, Civil and Religious Law in England: A religious Perspective, 10 ECC LJ 262, 267 (2008)

\textsuperscript{114} Another form of private Muslim tribunals who are seeking recognition as arbitration tribunals in matters of family law are the Muslim Arbitration Tribunals. For the sake of brevity my discussion will refer to only Sharia Councils, but is applicable to both.
any state control over the substantive religious rules which these tribunals apply. This lack of control is understandable and is the natural outcome of the liberal reluctance to prescribe or supervise the religious doctrines issued by private religious authorities, since such intervention is considered an undue entanglement and a violation of religious autonomy. The lack of state control over the religious tribunals’ rulings means that the state lacks an effective means of preventing these tribunals from issuing conservative rulings that are discriminatory towards women. This is not merely a theoretical concern. Empirical studies, as well as experiences of women’s rights activists who help Muslim women in Britain in their interactions with Sharia Councils, show that many of these councils employ highly conservative and gender discriminatory interpretations of Sharia.115

Aware of the fact that authorizing private religious tribunals may endanger the rights of weaker members of the community such as women, those advocating the partial authorization of private religious tribunals in matters of family law in liberal democracies usually point to two safeguards that are aimed at preventing state enforcement of decisions by religious tribunals that are unjust and discriminatory. The first safeguard is granting civil judges who are charged with enforcing the decisions of private religious tribunals as awards in arbitral proceedings the discretion to refuse to enforce the decision.116 The second safeguard is the requirement that any arbitration, including one that is conducted by a

116 Walter supra note 3 at 518
private religious tribunal, must be entered into freely by both parties.\textsuperscript{117} However, while these safeguards may prove helpful in some cases, it would seem that in most cases they will not prevent the implementation of discriminatory decisions of private religious tribunals, for two reasons. First, in addition to the fact that arbitration acts often restrict the ability of a party to the arbitration to object to arbitral proceedings, civil courts are inclined to uphold arbitral awards, only setting aside those which patently and manifestly contradict public policy.\textsuperscript{118} Moreover, it is doubtful that many women will have the knowledge and the ability to contest decisions of private religious tribunals.\textsuperscript{119} For example, in Britain, even today, when Sharia Council decisions are not enforceable through state courts, many women are led to believe that their decisions are binding, even when they contradict decisions by state courts on the same matters. As one of the women who turned to a Sharia Council in Britain in order to obtain a Muslim divorce explained her reaction to the proceedings: "I couldn’t understand . . . they wrote me a letter saying that there was issues to be taken into account that was about child custody, which was about the house, which was about possessions, which was about . . . all kinds of things. I thought, hold on, what jurisdiction do they have? I’ve already been through the courts; why do I have to go through a set of

\textsuperscript{117} Helfand \textit{supra} note 3 at 1243-1244; Walter \textit{supra} note 3 at 518

\textsuperscript{118} See e.g. sections 73 and 68 of Arbitration Act 1996 (of England) - 1996 CHAPTER 23 [17th June 1996]; Patel \textit{supra} note 115 at 137-138; For the US see Walter \textit{supra} note 3 at 517-519; See also Helfand \textit{supra} note 3 at 1288-1294 who suggests further restricting the ability of civil courts to use public policy arguments in order to vacate arbitration decisions of religious tribunals. Helfand also points to the fact that civil courts in the US have ruled that extreme communal pressures such as the issuance of a K’sav Seruv (the equivalent of excommunication) against those who refuse to submit to religious arbitration before a Jewish Bet Din do not constitute a reason to vacate the arbitration decision. \textit{Id.} at 1286-1287

\textsuperscript{119} MALEIHA MALIK, MINORITY LEGAL ORDERS IN THE UK: MINORITIES, PLURALISM AND THE LAW, 44 (2012); \textit{Privatizing diversity} \textit{supra} note 2 at 588-592
Islamic courts? Do I have to go through them again? It’s all been done and what if it means I can’t have custody? Who wins? English law or the Islamic Sharia Council?” 120

Furthermore, the second safeguard – that women turn to private religious tribunals out of their own free will and are therefore free to choose not to do so – is also insufficient. First, many women are pressured by their surrounding family and community to use these tribunals in order to conform to community norms, and the more standing and recognition these tribunals will acquire by both community and state the greater will the pressure be.121 Moreover, even if women have a formal right of exit, they often lack the means and opportunities to leave their community, especially if their community is repressive.122 Second, for Muslim women the assumption that they turn to a religious tribunal out of their own free will may be particularly ill suited. Unlike Muslim men who can divorce simply by pronouncing ‘talaq’ three times, any woman who wants to obtain a Muslim divorce must turn to a religious tribunal in order to obtain it. Many Muslim women feel that they need a religious divorce in order to be able to continue with their lives and therefore decide to turn to a religious tribunal.123 The fact that women wish to obtain a religious divorce does not mean that they accept of their own free will the tribunal’s authority to decide issues pertaining to child custody or to the division of property. Quite to the contrary, the tribunal may use the vulnerability of women applicants in order to pressure them to give up on rights which they are guaranteed under state laws. The authorization of private religious tribunals

121 Privatizing diversity supra note 2 at 590-592
122 Andrea Buchler, Islamic family law in Europe? From dichotomies to discourse – or: beyond cultural and religious identity in family law, 8 INT’L J. OF L. IN CONTEXT 196, 205 (2012)
123 Malik supra note 119 at 46-47
through the grant of state enforcement of their decisions will further exacerbate this phenomenon and give it an official, even if unintended, seal of approval.

Some multicultural theorists have suggested that liberal states should partially authorize religions of minority communities through joint governance schemes. One leading theorist of multiculturalism which advocates such partial authorization is Ayelet Shachar. In her influential book *Multicultural Jurisdictions* Shachar calls for the institutionalization of a joint governance approach that will divide the jurisdiction over members of religious and cultural minority groups between the state and the group. In doing so Shachar assumes that members of religious minorities desire to be governed by their communal religious authorities in a much more comprehensive way than the liberal state currently allows for. While this may be true for some members of religious minority communities, it is doubtful that the more vulnerable members of these communities, such as women, would be equally enthusiastic.

Being acutely aware of what she terms ‘the paradox of multicultural vulnerability’ - the fact that the weaker members of cultural and religious minorities, such as women and children, are in real danger of being deprived of their rights as a result of the grant of authority over various aspects of their lives to their illiberal group – Shachar suggests that the institutionalization be done through a complex system of joint governance which she calls ‘transformative accommodation’. Shachar’s impressive model is premised on three principles:

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124 MULTICULTURAL JURISDICTIONS supra note 4
125 In fact, an empirical study conducted in the American Muslim community found that the community is content to have an informal private system that offers spiritual, emotional and social comfort for some of its members, and there is almost no support for a parallel Islamic tribunal system. Julie Macfarlane, *Sharī‘a Law: Coming to a Courthouse Near You? What Sharī‘a Really Means to American Muslims*, Institute for Social Policy and Understanding, 11, 23 (January 2012 Report) [http://www.ispu.org/GetReports/35/2459/Publications.aspx](http://www.ispu.org/GetReports/35/2459/Publications.aspx)
126 MULTICULTURAL JURISDICTIONS supra note 4 ch. 6
group may have full authority over a subject matter. Thus, for example, in the area of family law the authority can be divided in such a way that the state retains control over property and maintenance issues while the group retains control over membership demarcation issues (marriage and divorce);\textsuperscript{127} (2) the no monopoly rule – which is a corollary of the sub matter allocation rule; and (3) the establishment of clearly delineated choice options that can be utilized by members of the group (especially women) when they feel that they are being wronged by the authorities of the group. In accordance with the liberal aversion to state intervention in the autonomy of religious and cultural groups, Shachar’s model does not allow the state any direct intervention in group practices, relaying instead solely on the sub matter allocation of authority and the exercise of choice options by the weaker members of the group to bring about the changes in group practices that will ensure that the rights of weaker members are respected.\textsuperscript{128}

Shachar believes that unlike other models of joint governance her model adequately protects women’s rights while at the same time granting to religious groups authority over their own members and control over essential aspects of their communal existence. However, it is unclear that Shachar’s model is better equipped to confront the challenge of the authorization of strong religion within the liberal state than other joint governance models.\textsuperscript{129} First, it is unclear how the sub matter allocation of authority and the no monopoly rule, which are intended to prevent a situation in which either the state or the group have an exclusive monopoly over an area such as family law, can achieve this goal in practice. As the example of rabbinical courts in Israel discussed in part IIB above shows, a

\textsuperscript{127} Id. at 121
\textsuperscript{128} Id. at 125-126
\textsuperscript{129} For various joint governance schemes see MULTICULTURAL JURISDICTIONS supra note 4 at 88-113; Sandberg et al. supra note 4 at 12-20
conservative religious court bent on circumventing liberal judgments of civil courts on maintenance and property matters can utilize religious doctrines such as the retroactive annulment of divorce in order to circumvent state rulings without overstepping what Shachar calls its sub matter jurisdiction. The preservation of clearly delineated boundaries between the independent religious authority and the state requires good will on the part of both. Not only do ultra-conservative religious communal authorities often lack good will towards the liberal state, but, as the Israeli example shows, it is precisely the states’ liberal egalitarian inclinations that inspire their outmost resistance. Second, as Shachar’s critics have observed, the assumption that the establishment of clearly delineated choice options will enable women who are being mistreated by the community authorities to turn to the state for help relies too heavily on women’s agency and on their ability to stand up to group pressures. It ignores the fact that women in many conservative groups are socialized into conformity and compliance, and that this socialization is more pervasive the more conservative the group. In fact, in important respects Shachar’s model is more challenging than the authorization of religion through the enforcement of decisions of private religious tribunals as arbitration decisions. In the religious arbitration model women have to actively opt in by going to the religious tribunal in the first place, or, alternatively, they can choose to conduct the entire divorce before a civil court. In Shachar’s model the religious tribunal has exclusive jurisdiction in sub matters agreed upon by the community

130 See f.n 68-70 above and accompanying text
131 As Jean Cohen argues: “...the notion that religious leaders would reform the patriarchal aspects of their communities’ rules to avoid mass exit or to get legal effect for their decisions is unconvincing. Orthodox or fundamentalist versions of religion tend to define themselves over and against feminism and reform break-away movements regardless of the cost in membership. Faithfulness to what they deem to be fundamental constitutive norms take precedence over numbers for true believers.” Jean L. Cohen, *The politics and risks of the new legal pluralism in the domain of intimacy*, 10 ICON 380, 387 (2012)
and the state, and the woman must submit to its authority. Furthermore, Shachar emphasizes that a woman can exercise her option to exit the communal religious system and turn to the state for help only in cases where she suffered a clear violation of her rights, since the right of the community over its members should not be taken lightly.\(^\text{133}\) The obstacles facing women who do not wish to submit to communal religious authorities under this model are therefore considerable.

A further problem with the partial authorization of religious tribunals, either through joint governance schemes such as Shachar’s or through religious arbitration, is that such authorization takes as a given, affirms, and empowers religious tribunals, at least some of which are in fact patriarchal power structures that exclude women, in whose governance women have no voice, and in some of which even women’s testimony will be altogether rejected, or at least given less weight than the testimony of a man.\(^\text{134}\)

**B. The N.Y. Get Laws and the Soft Nationalization of Religion**

Heretofore I have argued that partial authorization of communal religious authorities gives too much power to the group and lacks the means to guarantee the preservation of the rights of individual members of the group. Conversely, soft nationalization, when carried out properly, can both recognize the importance of religion in the life of the religious individual and her community, and ensure that the rights of the individual are not unduly violated by

\(^{133}\) Shachar *supra* note 124 at 123

\(^{134}\) Cohen *supra* note 131 at 388; Helfand *supra* note 3 at 1294
the group or its religious precepts. The N.Y. Get Laws and similar legislation in other liberal democracies such as England and Canada are a good example of this type of legislation.135

The New York Get legislation is a civil legislation that is intended to help resolve the plight of Jewish women whose spouses refuse to divorce them religiously after they have obtained a civil divorce.136 A spouse’s refusal to divorce religiously has dire consequences for a religiously observant Jewish woman since according to Orthodox Jewish religion a woman whose spouse refuses to divorce her cannot remarry or cohabitate, and any children that are born to her from a new relationship are considered religiously illegitimate (Mamzerim) and can only marry other Mamzerim. Some men take advantage of the constraints that Jewish religious law places on women in order to extract financial and other concessions in exchange for their consent to the religious divorce, while others refuse to grant the divorce leaving the woman religiously anchored to the marriage.137 The N.Y. Get legislation attempts to resolve this problem by stipulating that a person filling for a civil divorce must take all steps within his or her power to remove all barriers to the other side’s remarriage prior to receiving the civil divorce, including the grant of a religious divorce.138 Moreover, since this provision cannot assist women whose husbands are not interested in obtaining a civil divorce, an additional provision was passed that allows civil courts to take into account the refusal of a spouse to remove barriers to the other’s marriage when ruling on the

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135 Similar legislation can be found in other liberal democracies such as England - Divorce (Religious Marriages) Act 2002 which is now contained in s 10A of the Matrimonial Causes Act 1973, and Canada – section 21.1of the Divorce Act (R.S.C., 1985, c. 3 (2nd Supp.))


137 Last Stone supra note 5 at 171

138 N.Y. DOM. REL. LAW § 253
equitable division of the marital assets and setting maintenance.\textsuperscript{139} In this manner, even a husband who is not interested in obtaining a civil divorce may be inclined to grant his wife the religious divorce she is seeking in order to escape the possible financial costs that a refusal to do so may generate. In contrast to strong forms of nationalization of religion, which impose state sanctioned religious law on all citizens, this soft nationalization connects civil and religious law only insofar as religious law has already been privately used by the parties and in order to ameliorate injustices that its later misuse may have created.

While critics of the N.Y. Get Laws have accused them of violating the First Amendment by interfering with the recalcitrant husband’s religious liberty and by impermissibly establishing religion in granting special benefits to a particular religion, these arguments have been rejected by the law’s proponents and no constitutional challenge to these laws has yet been brought before the US Supreme Court.\textsuperscript{140} Similar disagreements regarding the compatibility of the intervention of civil authorities in a husband’s obligation to grant a religious divorce has arisen in the famous Canadian Supreme Court decision in Bruker v. Markovitz.\textsuperscript{141} In that case the wife sued her husband for damages after for fifteen years the husband has refused to grant her a religious divorce despite his contractual obligation to do so, which he undertook in the civil divorce agreement. The court was divided on the question whether this section of the agreement was legally enforceable and binding. While the majority held that the contractual obligation was a valid civil obligation and that the wife was entitled to damages for its breach, the minority held that it was an unenforceable religious obligation whose enforcement by a civil court would violate the

\textsuperscript{139} N.Y. DOM. REL. LAW § 236B 5(h), 6(d).
\textsuperscript{140} For a detailed analysis of the compatibility of the N.Y. Get Laws with the religion clauses see Grennwallt supra note 136 at 810-839
\textsuperscript{141} Bruker v. Markovitz, [2007] 3 R.C.S. 607
religious freedom of the husband by punishing him for refusing to carry out a religious obligation.  

Importantly, while the majority did not find that holding the husband accountable for his breach of contract leads to any prima facie infringement of his religious freedom, it held that even if holding the husband accountable would have infringed on his religious freedom, such infringement must be balanced against other important constitutional rights and interests. When weighed against the wife’s rights to equality, religious freedom and autonomous choice in marriage and divorce, which have all been breached by his refusal to grant the religious divorce he committed himself to granting, the husband’s alleged right to religious freedom must give way.

The disagreement between the justices in this case highlights an important aspect of the challenge of strong religion in the liberal state and of the soft nationalization of religion as a response to it. While the minority justice claims that the civil court’s intervention in this case would be an impermissible state involvement with religion because it would infringe on the husband’s religious freedom, the majority rightly points out that the civil court’s refusal to intervene in this case and to rule in favor of the wife would violate the wife’s right to religious freedom, as well as her rights to equality and to freedom in marriage. Thus, the challenge of strong religion in the liberal state is that whether the state decides to intervene or whether it opts for non-intervention, the religious rights of individuals will, in all probability, be affected. If this is the case, shouldn’t a liberal state that is committed to equality and dignity for all opt for soft nationalization that enables it to judiciously intervene in favor of the wronged party, over partial authorization that allows traditional religious

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142 For the majority opinion see pg. 614-646; For the minority opinion see pg. 647-678
143 Id. at 637-638
144 Id. at 641, 646
authorities to side with the wrong doer, and over privatization that leaves the power in the hands of the wrong doer?

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

Moreover, although legislation such as the N.Y. Get Laws requires the involvement of a private religious tribunal that has to issue the religious divorce, there are crucial

145 MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 11-12, 19-21 (2008)
differences between this soft nationalization of religion and the partial authorization of religion through religious arbitration or through joint governance schemes discussed in the previous section. First, although the religious tribunal (in this case the Beth Din) is involved in the process and its authority is needed in order grant the religious divorce, the control over the process remains at all times with the civil court, which has complete discretion to decide whether or not to request the involvement of the religious tribunal and whether or not take its ruling into account.\textsuperscript{146} Even more important, the relevant authority of the religious tribunal is restricted to carrying out a purely religious ceremony – the act of religious divorce – which cannot be carried out by the civil court, and which is aimed at protecting and promoting the liberal rights of the woman whose rights are being denied by her husband’s refusal to grant her the divorce.\textsuperscript{147} Thus, the cooperation between the secular state system and the religious communal authorities is limited only to those instances that are guaranteed to promote liberal rights and only insofar as there is no other way to achieve this important goal.\textsuperscript{148}

Finally, the N.Y Get legislation, just like its English and Canadian counterparts, was passed with the support of the Jewish religious community in N.Y., and is being implemented in cooperation with it.\textsuperscript{149} It is important to observe that this cooperation continues despite the fact that there is bitter disagreement within the community regarding the provision that allows civil courts to take into account the refusal of a spouse to remove

\textsuperscript{146} Thus for example, if the religious tribunal refuses to cooperate with the civil court and to issue the religious divorce this will in no way affect the civil rights of the woman, although from the religious perspective her situation will not change for the better.

\textsuperscript{147} For a somewhat similar argument in a larger context, calling to recognize religious arbitration only insofar as it deals solely with religious matters that cannot be resolved by a civil court see Walter supra note 3 at 553-554

\textsuperscript{148} For examples of cases see Broyde supra note 136 at 159-160

\textsuperscript{149} Id. at 161
barriers to the other’s marriage when ruling on the equitable division of the marital assets and setting maintenance.\textsuperscript{150} Moreover, while it is safe to assume that some in the Jewish religious community would have preferred to see the state give the community’s religious tribunals more authority, they have had to contend with a state system that insists on conducting all matters relating to divorce according to secular law.\textsuperscript{151} Nevertheless, neither of these internal tensions has kept the community from realizing that even a limited cooperation with the state, in order to resolve the plight of the Agunah, will benefit all sides and will promote the religious interests of the community, as well as the liberal values of the state. This may be an important lesson on how soft nationalization – the principled involvement of the state with religion through civil law and the civil courts without renouncing the state’s commitment to its liberal values - can strengthen the more moderate voices in the religious community and advance equality and dignity for all.\textsuperscript{152}

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

The main approach that liberal states take towards religion – its privatization - gives religions wide autonomy in the private sphere, often regardless of the injustices that granting wide autonomy to strong religions may create towards weaker members of the religious groups, such as women. While some women may feel the need to have the state act to

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\textsuperscript{150} Last Stone \textit{supra} note 5 at 177
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\textsuperscript{151} \textit{Id.} at 162
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\textsuperscript{152} There are other examples for soft nationalization of religion; one such example can be found in the laws of European countries such as Spain and England, who have introduced into their adoption laws a special form of guardianship which is based on the Islamic law concept of kafala (a form of legal guardianship). Islamic law forbids adoption and this special form of guardianship enables families who have religious or cultural difficulties with adoption to have parental responsibility over a child and offer him a permanent family. See Andrea Buchler, \textit{Islamic Law in Europe? Leal Pluralism and its Limits in European Family Laws}, 69-70 (2011). Thus, soft nationalization acknowledges the importance of religion and its precepts in the lives of religious individuals, and makes use of civil state law in order to ensure that religious individuals are not disadvantaged by their deeply held religious beliefs and that they can retain both their full and equal rights and their membership in their religious groups.
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achieve more justice for them, some groups subscribing to strong religions feel the need to have not only autonomy, but also more authority over the daily lives of their members, and call for state authorization that would strengthen their religious communal institutions.

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