11
THEOCRACY

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Introduction

Principles of theocratic governance are often regarded as relics of the past. In reality, however, it is hard to overstate their significance in early twenty-first century politics. From the surge in Christian fundamentalism to revivalist Islam to the spread of Catholicism and Pentecostalism in the global South, and from the rise of Hindu and Buddhist nationalisms in Asia to heated debates about religion-infused morality, cultural heritage, and boundaries of membership in the Americas and in Europe, the religious revival is readily evident. Meanwhile, virtually every major religious tradition has produced its own forms of extremism and growing disregard for the rights of "Others." In an increasing number of countries the alignment between religious identity and populist-nationalist politics seems stronger than ever.

In this chapter, I explore briefly three dimensions of the theocratic challenge to what is broadly understood to be the liberal political and constitutional order: (1) theocracy's historical background; (2) contemporary constitutional formulations of theocratic governing principles; and (3) religion-infused narratives of membership as part of the ethno-nationalist populist awakening worldwide.

Historical Background

As every amateur historian acknowledges, until roughly the eighteenth century in Europe, religion and politics were closely allied, indeed, often inseparable and unified, throughout much of human history. The gradual transition from an abstract, omnipresent, and near-communal perception of divine powers to the separate but often-symbiotic existence of the political and the religious appears to have started about 3,500 years ago with the emergence of embryonic forms of what may be termed state power. Medieval Europe, where "it was virtually impossible not to believe in God," as Charles Taylor and others have put it, illustrates vividly the close entanglement of religion and politics in the pre-modern world (Asad 1993; Taylor 2007). There, religion was embedded in the political and social fabric of the community and was integral to, and inseparable from, everything else. The prevalence of theological politics in medieval Europe, to pick one example, was reflected in virtually all aspects of life at the time, from economics and jurisprudence to architecture, culture, and the arts. The spread of monasticism in the early

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Middle Ages, the rise of Byzantium (the Eastern Roman Empire) in the sixth to eighth centuries, the Crusades of the eleventh to the thirteenth centuries, and the themes of Raphael's, Botticelli's, and Michelangelo's paintings during the High Renaissance of the early sixteenth century are popular illustrations of the centrality of religion and its governing institutions in early Europe's political and public life. The literature addressing the theocratic nature of medieval Europe is vast, ranging from historical accounts of the Byzantine theocracy (e.g. Runciman 1977) to the philosophy of medieval political theology (e.g. Kantorowicz 1957) and to genealogies of early Western Christendom (e.g. Brown 2013).

The sixteenth century also brought to the fore the doctrine of royal absolutism, the "divine right of kings," according to which a monarch was the ultimate authority in both political and spiritual matters and was subject to no earthly authority, but derived his right to rule directly from the will of God. The king was thus not perceived as subject to the will of his people, the aristocracy, or any other estate of the realm, including the church. This doctrine implied that any attempt to depose the king or to restrict his powers ran contrary to the will of God and could constitute treason. The doctrine reached its zenith in the seventeenth century during the reign of King James I in England and King Louis XIV of France. Meanwhile, religion wars in late medieval Europe, most notably the French Wars of Religion fought between Catholics and Huguenots in the second half of the sixteenth century (ending with the Edict of Nantes, 1592) over claims for accommodation and access to wealth and power, are said to have cost the lives of hundreds of thousands of people, perhaps as many as two million.

Occasional attempts to establish a religion-based political regime took place in the Christian world around that time. Two notable examples are the Savonarola reign in Florence (1494–1498) and the Anabaptist Kingdom of Münster (1534–1535). Lighter variations may be seen in sixteenth century Geneva under John Calvin with its revolutionary scheme of civic and ecclesiastical governance, and to a lesser degree in the religion-infused legal reform attempted by Oliver Cromwell's regime in seventeenth century England. The New England colonies under the Puritans are another example, as are the seventeenth century Jesuit Reductions in the area corresponding to modern day Paraguay.

Interestingly, some of the early attempts at formulating universal legal principles involved core elements of theological thought. Whereas modern constitutional theory often disregards religious law, major seventeenth century scholars of the "laws of nations" – notably Selden, Grotius, and von Pufendorf – were fascinated by Jewish law's distinction between general norms applicable to humanity and Jewish law applicable to Jews alone. Their interest in Jewish law was influenced in part by the "Hebrew revival" in political thought in the late sixteenth and early seventeenth centuries (Nelson 2010), which made respectable a hitherto unknown (to Christian Europe) or disreputable legal tradition. These thinkers – all working at the intersection of what would today be designated as international law, public law, and legal theory – devoted considerable time to studying the Noachide precepts of the Talmudic tradition and the possibility of its restoration as a baseline of moral obligations for all mankind.

The idea of closely tied but parallel political and religious leadership existed in several early civilizations as well. In most ancient cultures in the Near and Middle East – for example, Egypt, Canaan, and Mesopotamia – the predominant religious model was polytheism, which centred on the cult of regional patron deities. By contrast, separation of religious leadership and political leadership has long characterized the Jewish tradition (Stone 2008). The ancient Israelite kings, for instance, were not deified and seldom assumed any priestly functions. There are close ties but also a clear distinction between the Israelite kings as state rulers and the pastors (*cohanim*) and prophets (*nevi'im*) as religious authorities. This distinction between religious and political leadership became fuzzier later on, but was reestablished after the end of the

Second Temple Period in 70 C.E. Likewise, in the Jewish *kehila* (community) in medieval and early modern Europe, religious shepherding and political guidance were theoretically separate but remained closely entwined. Jewish "statelessness" helped maintain the distinction between intra-community spiritual guidance and more earthly affairs negotiated with or dictated by the "gentile" authorities.

The pre-modern Islamic world had its own experiments with the relationship of politics and religion. The Constitution of Medina – commonly considered to have established the first Islamic state – was drafted by the Prophet Muhammad circa 622 C.E. It formed an alliance among several local tribes (pagan at the time) and Muslim emigrants from Mecca. The community defined in the Constitution of Medina – the *ummah* (nation) – had a distinctly religious outlook. It sought to replace tribal identities as the main binding tie among people with a newly-created nation where faith served as the foundational binding concept. At the same time, the Constitution of Medina, while certainly not envisioning any distinction between the religious and the political or featuring any remote resemblance to modern constitutions, did address earthly issues such as taxation and day-to-day governance. It specified the rights and duties of citizens, as well as the relationship between Muslim and non-Muslim communities, most notably Jews. Importantly, it also distinguished between the polity's wars, which were binding on non-Muslim members of the polity, and the wars of the Muslims, from which non-Muslims were exempt. Still, the Constitution of Medina was an exercise in theological politics, where the distinction between divine and political authority was vague at best.

Over a millennium later, the Mahdiyah (1884–1898) was a short-lived theocratic state covering most of the territory of today's Sudan. Driven by the political and military aspirations of Muhammad Ahmad, known as the "Mahdi," the Mahdiyah was a hierarchical state run like a constant military operation. It was entangled in an ongoing war with the Anglo-Egyptian army led initially by Charles "Chinese" Gordon, and after Gordon's death in Khartoum, by Lord Herbert Kitchener, who in 1898 defeated the Khalifa, the Mahdi's successor, and reestablished British rule over the Sudan. The Mahdi modified Islam's five pillars to support the dogma that loyalty to him was essential to true belief. He also added the declaration "and Muhammad Ahmad is the Mahdi of God and the representative of His Prophet" to the recitation of the creed, the Shahada.

Experiments with a religion-based political regime have also characterized other religions. For instance, prior to the 2006 sacking of King Gyandera and the transition to democracy, Nepal was the last country in the world to endorse Hinduism as its constitutive faith. In imperial Japan during the Meiji era and through to the end of World War II, Shinto was the state-endorsed religion. The reconstruction Constitution after World War II rejected the Meiji era's concept of state-endorsed Shinto, and emulated many liberal constitutions by establishing a rigid separation of church and state, and by moving religion to the private sphere. Buddhism and Siamese (Thai) peoplehood have been closely entangled for over two millennia, through various eras of Buddhist political leadership. Finally, to pick another example, from 1911 to 1919 the Khalkha people of Outer Mongolia declared independence from the Chinese Empire and established a theocratic regime (known as *Bogd Khaanate*) headed by the eighth Bogd Gegeen, highest authority of Tibetan Buddhism in Mongolia and bearer of the title Bogd Khaan ("Holy Ruler").

Constitutional Theocracy

The last few decades have seen the rise of what I have termed elsewhere "constitutional theocracy" (Hirschl 2010). In a pure theocracy, (say, the Islamic state envisioned by the Prophet

Muhammad in the early seventh century or its emulation in Mahdist Sudan of the late-nineteenth century), the supreme religious leader is also the highest political leader. Law proclaimed by the ruler is also considered a divine revelation and hence the law of God. In an ecclesiocracy (e.g. the Vatican), which is closely related, an institutional religious leadership is at the helm; the religious leaders assume a leading role in the state but do not claim to be instruments of divine revelation. In a constitutional theocracy, by contrast, formal separation exists between political leadership and religious authority. Power in constitutional theocracies resides in political figures operating within the bounds of a constitution rather than in the religious leadership. Basic principles such as the separation of powers are constitutionally enshrined. The constitution also typically establishes a constitutional court that is mandated to carry out some form of active judicial review.

At the same time, constitutional theocracies defy the doctrine of strict structural and substantive separation of religion and state, variations of which exist in France or the US. Like models of "establishment" or "state" religion, constitutional theocracies both formally endorse and actively support a single religion or faith denomination. Moreover, that state religion is enshrined as the principal source informing all legislation and methods of judicial interpretation. Unlike the handful of European countries that grant exclusive (largely ceremonial) recognition to a given state religion (e.g. the Anglican Church in England or Evangelical Lutheranism in Norway), the designated state religion in constitutional theocracies is often viewed as constituting the foundation of the modern state; as such, it is an integral part, or even the very pillar, of the polity's national meta-narrative. In this way religion often determines the polity's boundaries of collective identity, as well as the scope and nature of some or all of the rights and duties assigned to its residents.

Constitutional theocracies, however, do more than grant exclusive recognition and support to a given state religion: laws must conform to principles of religious doctrine, and no statute may be enacted that is repugnant to these principles. In most instances a well-developed nexus of religious bodies, tribunals, and authorities operates in lieu of, or in tandem with, a civil court system. The opinions and jurisprudence of these authorities and tribunals carry notable symbolic weight and play a significant role in public life. Importantly, however, this nexus of laws and institutions is subject to judicial review by a constitutional court or tribunal. This tribunal consists of judges who are often well versed in both general and religious law and can speak knowledgeably on pertinent matters of law to jurists, for instance at Yale Law School, as well as at al-Azhar, the centre of Islamic learning in Cairo.

The "ideal" model of constitutional theocracy is characterized by four main cumulative features: (1) the presence of a single religion or religious denomination that is formally endorsed by the state, akin to a "state religion;" (2) the constitutional enshrining of the religion and its texts, directives, and interpretations as either *a* or *the* main source of legislation and judicial interpretation of laws – essentially, laws may not infringe upon injunctions of the state-endorsed religion; (3) a nexus of religious bodies and tribunals that often not only carry tremendous symbolic weight, but are also granted official jurisdictional status on either regional or substantive bases, and which operate in lieu of, or in uneasy tandem with, a civil court system; and (4) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority, qualified protection of religious freedoms for minorities, and the existence of some form of active judicial review. Most importantly, their jurisdictional autonomy notwithstanding, some key aspects of religious tribunals' jurisprudence are subject to constitutional review by apex courts, often state-created and staffed.

The clearest contemporary manifestation of strong constitutional establishment of religion is what has been termed "Islamic constitutionalism" (Brown 1999; Arjomand 2007). Public

support for the principles of theocratic governance has grown considerably over the last few decades in much of the Islamic world. At the same time, principles of constitutionalism, human rights, economic development and other modernizing pressures dictate a moderate approach to what may be termed the "Islamic state." The result has been the rise of "Islamic constitutionalism" – a constitutional system based on an inherently dual commitment to religious fundamentals and constitutional principles, or a bi-polar system of constitutional *and* sacred texts and authority. Let us consider a few examples.

The 1979 Islamic revolution in Iran established what may be considered a paradigmatic example of a constitutional theocracy. The preamble of the Islamic Republic of Iran's 1979 Constitution enshrines the "movement towards Allah" as the ultimate goal of the political order and states that "the mission of the Constitution is to realize the ideological objectives of the movement and to create conditions conducive to the development of man in accordance with the noble and universal values of Islam." It further states that "[l]egislation setting forth regulations for the administration of society will revolve around the Qur'an and the Sunnah. Accordingly, the exercise of meticulous and earnest supervision by just, pious, and committed scholars of Islam (*al-fuqaha' al-'udul*) is an absolute necessity." The Preamble, alongside Articles 2 and 3, declare that the authority for sovereignty and legislation has a divine provenance (from the Shari'a) and that the leadership of the clergy is a principle of faith that "prevents any deviation by the various organs of that State from their essential Islamic duties." According to Article 4:

> [a]ll civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.

According to Article 6, the administration of the state is to be conducted by the wider population: the general public participates in the election of the President, the Majlis representatives (members of parliament) and municipality councils. Article 3.8 further entrenches popular participation by placing with the people of the state the power to decide political, economic and social issues. Most notably, Iran has seen the emergence of the Guardian Council – a *de facto* constitutional court armed with mandatory constitutional "preview" powers and composed of six mullahs appointed by the Supreme Leader and six jurists proposed by the head of the judicial system of Iran and voted in by the Majlis. The Supreme Leader has the power to appoint the religious members of the Guardian Council, but not its jurist members (Article 91). Iran's constitutional regime combines religious supremacy, pragmatist institutional innovations (e.g. Ayatollah Khomeini's 1989 introduction of the regime's Expediency Discernment Council to serve as the final arbiter between the generally more progressive Consultative Assembly and the distinctly more conservative Guardian Council), and aspects of the 1906 Imperial Constitution, primarily aspects relating to elected parliament, the notion of popular sovereignty, and some separation of powers principles.

Or consider the compound of constitutionalism and religiosity in Yemen. Article 2 of the Constitution of Yemen (adopted in 1991; last revised in 2015) declares that Islam is the religion of the state. Article 3 establishes that "Shari'a is the source of all legislation." Non-Muslims are forbidden to run for or hold elected office. Yet, this same constitution calls for an independent judiciary and establishes a separate commercial court system and a Supreme Court, where a combination of Shari'a interpretations and principles of modern constitutional law is applied. Unique constitutional amalgamations of religious and modern principles emerge, such

as Article 31 of the Constitution, which states, "Women are the sisters of men. They have rights and duties, which are guaranteed and assigned by Shari'a *and* stipulated by law," and Article 47 according to which "[c]riminal liability is personal. No crime or punishment shall be undertaken without a provision in the Shari'a or the law."

While these countries feature what are arguably some of the strictest manifestations of strong constitutional establishment of religion, several considerably softer versions of this model have emerged in Africa's and Asia's predominantly Islamic countries, from Mauritania to Oman to Pakistan. It is well known that Afghanistan has long been torn between conflicting values of tradition and modernism. From 1994 to 2001 the country was ruled by the radical Islamist Taliban, but the US-led military campaign removed the Taliban from power and installed a more moderate regime representing an array of groups hitherto in opposition: moderate religious leaders and the country's elites and intellectuals in exile. The new Constitution of Afghanistan came into effect in 2004. It states that Afghanistan is an Islamic republic (Article 1); that the "sacred religion of Islam is the religion of the Islamic Republic of Afghanistan" (Article 2); and that "[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan" (Article 3). Courts are allowed to use Hanafi jurisprudence in situations of constitutional lacunae (Article 130). At the same time, the constitution also enshrines the right to private property (Article 40) and resurrects a woman's rights to vote and to run for and serve in office (Article 22). It also establishes a Supreme Court (*Stera Mahkama*) composed of nine judges appointed by the president for a term of ten years (Articles 116–117). All members of the court "[s]hall have higher education in legal studies or Islamic jurisprudence" (Article 118).

Another variation on the theocratic constitutions model draws on the concept of jurisdictional enclaves to insulate certain aspects of the law from religious precepts. Here, most of the law is religious, but some areas of the law, such as economic law or the law affecting certain profitable industries (e.g. tourism), are "carved out" and insulated from influence by religious law. An interesting case in point is Saudi Arabia, arguably one of the countries whose legal system comes closest to being fully based on *fiqh* (Islamic jurisprudence). Article 1 of the Saudi Basic Law (1992) reads: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution." Article 23 establishes the state's duty to advance Islam: "The state protects Islam; it implements its Shari'a; it orders people to do right and shun evil; it fulfills the duty regarding God's call." At the same time, Chapter 4 of the Basic Law (entitled "Economic Principles") protects private property, provides a guarantee against the confiscation of assets (Article 19), and suggests (Article 22) that "economic and social development is to be achieved according to a just and scientific plan."

Interestingly, Article 14 refers indirectly to the country's enormous oil reserves in stating that:

> [A]ll God's bestowed wealth, be it underground, on the surface, or in national territorial waters, on the land or maritime domains under the State's control, all such resources shall be the property of the State as defined by the Law.

Moreover, while Saudi courts apply Shari'a in all matters of civil, criminal or personal status, Article 232 of a 1965 Royal Decree provides for the establishment of a commission for the settlement of all commercial disputes. Although judges of the ordinary courts are usually appointed by the Ministry of Justice from among graduates of recognized Shari'a law colleges, members of the commission for the settlement of disputes are appointed by the Ministry of Trade. In other words, Saudi Arabia has effectively exempted the entire finance, banking, and corporate capital sectors from application of Shari'a rules. Softer examples of this model are

common in the Islamic world, from Qatar or the United Arab Emirates to less-talked-about destinations such as the Maldives in the Indian Ocean.

Although virtually none of these polities' constitutions was adopted in an authentic bottom-up, "we-the-people" fashion – in fact, quite the opposite is true in most cases – constitutional Islamization does reflect a set of values that a large portion of the population in these countries seems to support. In several other countries, precepts of Islam have been incorporated into the penal code and personal-status laws of sub-national units, most notably in several Nigerian states, Pakistan's North-West Frontier Province, Indonesia's Aceh, Philippines' Bangsamoro region (officially the Bangsamoro Autonomous Region in Muslim Mindanao), to varying degrees in two Malaysian states, and to an increasing extent in Russia's Chechnya and Dagestan.

Close affinity between a given country's constitutional order and a single religious denomination that is regarded as pillar of collective identity in that polity is not confined to Islamic polities. While they are certainly not constitutional theocracies, the political and constitutional order in countries as different as Israel and Sri Lanka is closely linked to religious affiliation. Israel defines itself as Jewish and democratic, with the recently adopted Basic Law: Israel as the Nation State of the Jewish People (discussed below) giving symbolic preference to Judaism and to Jewish citizens over other denominations. Article 9 of the Sri Lankan Constitution (1978) states that:

> The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana (that is, the Buddhist doctrine and tradition) while assuring to all religions the rights granted by Articles 10 and 14(1)(e).

The Constitution of Bhutan (2008) states that Buddhism is the spiritual heritage of the country, and that the Buddhist Drupka Lineage is practically the state religion of Bhutan. Buddhism also enjoys a *de facto* preferential status in other countries in the region, most notably Burma and Cambodia, where Theravada Buddhism has long been a pillar of collective identity and the faith of an overwhelming majority of the population.

Much like the considerable variations within the so-called liberal democratic world, wide variation exists within the world of strong constitutional establishment of religion. Granted, Morocco and Tunisia are a world apart from Iran or the Vatican in how lax or rigid the actual translation of religious principles into public life is. Likewise, the state of religious minorities, both *de jure* and *de facto*, diverge significantly across countries, and often across time within the same polity. In virtually all of these countries a single dominant religion not only plays a key role in the collective identity, but is also granted a formal constitutional status, serves as a source of legislation, whether symbolically or practically, and, more importantly, enjoys jurisdictional autonomy in matters extending from education and personal-status law to, in some cases, essentially every aspect of life, law, and politics. Clashes between liberal values and theocratic principles ensue.

Increasingly, these value conflicts manifest themselves through high-profile legal clashes and court cases in which the stakes for the competing parties and the social groups they represent are both high and visible. Protection of gender equality, reproductive freedoms (in particular the right to have an abortion), LGBTQ+ rights, or the right to die with dignity are considered some of the hallmarks of the current liberal constitutional rights jurisprudence (see Mancini and Palazzo 2021). Not all religious circles resist this emerging canon, yet many of them do, and some quite vehemently. The stance of the traditional Catholic Church, conservative Evangelical movements, Wahhabist Islam, and ultra-orthodox Judaism on these issues is well known. It is

diametrically opposed to the liberal constitutional view. Diverging worldviews also persist in broader areas such as general education versus denominational curricula, the legal status of religious entities (e.g. in the context of labour or tax law), and the general status of religion within a given polity's constitutional order. Constitutional clashes over these differing worldviews, ideational platforms, and their realization in various policy areas are countless and omnipresent in virtually all constitutional democracies (see also Huq 2021).

Religious sectors' fierce reactions to landmark court rulings such as the *Obergefell* v. *Hodges* decision in the US,[1] the UKSC ruling in *R (E)* v. *Governing Body of JFS*,[2] the ECtHR's judgment in *S.A.S.* v. *France*,[3] or the ECJ's ruling in *Achbita* v. *G4S*[4] are merely a few recent examples. And as the political turmoil in Pakistan concerning the Asia Bibi blasphemy case illustrates,[5] in polities with a history of religion-infused law and morality, issues such as blasphemy, proselytism, inheritance, and personal status often collide with constitutional provisions regarding equality, freedom of expression, and freedom of religion.

Theocratic Elements in Illiberal Constitutionalism

One of the main characteristics of the current populist or illiberal trend in world politics is the increasing reliance on religious rhetoric and the heightened demarcation of "us/them." Religion-based boundaries (real or imagined) are reintroduced into politics or strategically deployed to advance exclusionary or nativist platforms (Hirschl and Shachar 2018a; 2018b; DeHanas and Shterin 2018). Much has been written about President Trump's persistent recourse during his presidency to playing the anti-Muslim card, his portrayal of the US as a Christian nation under siege, his repeated association of Islam with evil, and his countless allusions to Christian scripture and prophecy (Gorski 2017). Recent sociological research further suggests that symbolic defense of the US' perceived Christian heritage was a considerable factor in voters' support for Trump in the 2016 presidential elections (Whitehead, Perry, and Baker 2018). The alliance between religious-infused markers of identity and the current populist-nationalist assault on principles of liberal constitutionalism, from Poland under the reign of the right-wing, national conservative Law and Justice Party (PiS) to Hungary under Viktor Orbán and the Fidesz party, and to Turkey, where President Recep Tayyip Erdoğan and the AKP party have been advancing an illiberal constitutional agenda that, among other things, brings faith-based values back into the national collective identity discourse after over eighty years of militant secularism guided by the Kemalist vision (see further Yenigun 2021). This alliance translates into concrete policy preferences, from the Visegrád Group's objection – steeped with reference to protecting "Christian civilization" – to the EU's refugee policy, to Poland's near-complete ban on abortion adopted in 2020 and confirmed in early 2021 (Mancini and Palazzo 2021). (It is interesting to note that the preamble of the Constitution of Poland states, inter alia, that Polish culture is "rooted in the Christian heritage of the Nation and in universal human values.")

However, it is outside of Europe and North America where the intersection of theocratic rhetoric with ethno-nationalist populism and with illiberalism has been the most significant. In India, the largest constitutional democracy in the world, Hindu-based exclusionary talk is thriving. Narendra Modi, Prime Minster of India, has appealed to Hinduism and Hindu nationalism (what is commonly known as *Hindutva* – the official ideology of the Bharatiya Janata Party [BJP] since 1989) to galvanize support for his party. The official BJP platform begins with these words:

> The Hindu awakening of the late twentieth century will go down as one of the most monumental events in the history of the world. Never before has such demand for

> change come from so many people. Never before has Bharat, the ancient word for the motherland of Hindus – India, been confronted with such an impulse for change. This movement, Hindutva, is changing the very foundations of Bharat and Hindu society the world over.

To put its money where its mouth is, the BJP-led government has since been promoting a series of anti-Muslim policies, including the enactment of a controversial 2019 amendment to the citizenship law that eases the path to citizenship for Hindus, Sikhs, Buddhists, and Christians fleeing persecution in Afghanistan, Pakistan, and Bangladesh (all Muslim countries). Seemingly welcoming, the proposed bill rekindles religious and ethnic tensions in India by omitting Muslims from its purview, despite the fact that India is home to approximately 170 million Muslim citizens – the largest Muslim minority in the world (see further in Thiruvengadam 2021).

In Israel, the right-wing nationalist coalition government led by Benjamin Netanyahu and his Likud party, and involving two parties representing the ultra-Orthodox religious agenda and an extreme right party representing the worldviews and policy preferences of Jewish settlers in the West Bank, is forcefully advancing the "Israel is a Jewish state" ticket. Their efforts culminated in 2018 with the adoption of a new Basic Law: Israel as the Nation State of the Jewish People, dubbed the "nationality law", which aims to bolster the country's Jewish-national character while limiting its democratic character. While mainly symbolic in nature, the new Basic Law relegates all non-Jewish citizens of Israel to a "second-class" status. Attempts to prioritize Israel's Jewish nature over its democratic one are also evident in other domains of public life, from enhanced Judaic studies in school curricula to anti-refugee propaganda that emphasizes a supposed threat to Israel's Jewish nature and to increasingly common insistence on religion-based male/female separation of audience in public events (see Peled and Herman Peled 2019).

In a direct blow to more liberal and progressive streams of Judaism, the government approved in 2017 a controversial bill enshrining the strictly Orthodox Chief Rabbinate's monopoly over conversations to Judaism, thereby providing the Ultra-Orthodox branch of Judaism with control over the perennial "who is a Jew?" question and its implications for the naturalization processes prescribed by Israel's Law of Return. In adopting this law, the government overturned a string of Supreme Court decisions that recognized the pluralistic character of the world's Jewish community and upheld the legitimacy of conversion to Judaism according to different streams of Judaism. In contrast, the new legislation and the exclusionary rhetoric that surrounded it reject this pluralism. Instead, Israel – the only Jewish state in the world and a country that since its inception has seen itself as homeland of the entire world's Jewry – has adopted a new set of policies that effectively render the better part of Jewish communities outside of Israel, most notably American Jews affiliated with the Reform and Conservative movements, inauthentic, "second class" Jews. Responding to this legislative trend, the Supreme Court released a key decision in early 2021 recognizing the right to claim citizenship according to the Law of Return of those who underwent non-Orthodox conversion to Judaism within the State of Israel.[6]

The "Women of the Wall" (*Ne'shot Ha'Kotel*) saga provides another telling illustration of the central place of religion in Israel's constitutional landscape. For the last 15 years, an organization representing Reform, Conservative, and other non-Orthodox Jewish organizations has fought to secure the rights of women to pray at the Western Wall, traditionally reserved exclusively for Orthodox and ultra-Orthodox stream prayers controlled by the Chief Rabbinate. In a series of rulings, the Supreme Court of Israel – sitting as High Court of Justice – sided with the Women of the Wall group on various gender equality, freedom of expression, and administrative law grounds, and ordered the government to accommodate the Western Wall prayer

rights of non-Orthodox Jews. After an arduous process, a compromise was reached in early 2017. However, later that year, the Netanyahu government succumbed to pressure from ultra-Orthodox parties upon which the governing coalition depends and suspended the plan, citing concerns about the "authentic Jewish tradition" of Reform and Conservative Jews. Ultra-Orthodox rabbis went on to declare members of these streams as "heretical" and as "worse than gentiles."

Meanwhile, in Malaysia, the political sphere, at both the state and federal levels, has undergone substantial Islamization over the last four decades (Moustafa 2018; Tew 2018). The Islamic *dakwah* ("religious revival") movement emerged in the mid-1970s. The Pan-Malaysian Islamic Party (Parti Islam Se-Malaysia, PAS) has been gaining political support and clout since the 1980s. In the hotly contested 2013 general elections, a coalition of PAS and its allies (the Pakatan Rakyat coalition, PKR), received the majority of the popular vote. Nonetheless, as a result of Malaysia's rather peculiar electoral system, the mainstream BN coalition has still managed to secure the majority of seats in the parliament. The rise of political Islam has affected the mainstream moderate establishment. Even politicians affiliated with the BN must now resort to "religious talk" in their appeal to the Islamic vote. The former prime minister of Malaysia, Mahathir bin Mohammad, speaking as a representative of UMNO (the largest political party in Malaysia, and a pillar of the BN coalition), declared in 2001 that the country was an Islamic State (*negara Islam*), not merely a country that had endorsed Islam as its official religion.

The effect of the Islamization of political discourse on the sphere of Malaysia's constitutional jurisprudence has been profound. To provide but one example, a Catholic newspaper in Malaysia used the word "Allah" to refer to God in its Malay-language edition. A controversy arose regarding who may use the word "Allah:" whether it is an exclusively Muslim word (as some Muslim leaders in Malaysia suggest) or a neutral term referring to One God that may be used by all regardless of religion, as the newspaper argued. A law was enacted in the 1980s to ban the use of the term in reference to God by non-Muslims, but had seldom been enforced prior to 2007. In 2009, the High Court in Kuala Lumpur ruled that the ban on non-Muslims using the word "Allah" to refer to God was unconstitutional as it infringed on freedom of expression and freedom of religion principles. The court went on to state that the word "Allah" is the correct word for "God" in various Malay translations of the Bible and that it has been used for centuries by Christians and Muslims alike in Arabic-speaking countries. This ruling was viewed by radical Islamists as a legitimization of insidious attempts to convert Muslims to Christianity. Riots and church burning followed. The government appealed the High Court ruling (lest we forget: this is the government of a country that purports to be a polity of all of its members). In October 2013, Malaysia's Court of Appeal (in a three-judge, all-Muslim bench) reinstated the ban on the use of the term "Allah" in reference to God by non-Muslims. Supporting the government's position, the judges stated that the usage of the name "Allah," "is not an integral part of the faith and practice of Christianity. From such finding, we find no reason why the respondent [the Catholic newspaper] is so adamant to use the name 'Allah' in their weekly publication. Such usage, if allowed, will inevitably cause confusion." The newspaper appealed. But in June 2014, the Federal Court of Malaysia made a call on the matter. It drew on technical judicial review grounds to uphold (4:3) the ban on the use of "Allah" when referring to God by non-Muslims.[7] In 2021, a High Court ruling granted a Malaysian Christian the right to use the word "Allah" in her religious practice. And so, in a multi-ethnic polity where "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation" (Article 3), where "every person has the right to profess and practice his religion and to propagate it" (Article 11.1), and where "every religious

group has the right to manage its own religious affairs" (Article 11.3), the struggle between Muslims and non-Muslims over the use of the word "Allah" continues.

The balance struck in these and other settings between theocratic ideals and general constitutional principles is often a volatile one. Egypt's Islamist revolution of 2012 offers a cautionary tale of the considerable risks associated with setting fire to the identity-religiosity flame in a way that may quickly spin out of control. Article 2 of the Egyptian Constitution, to pick one example, was amended in 1980 so as to establish principles of Islamic jurisprudence (Shari'a) as the only primary (rather than one possible) source of legislation in Egypt. This significant change was preceded, however, by state patronage of religion, including nationalization of *waqf* assets and later of al-Azhar University, the great institution of higher Islamic learning in Cairo, and the imposition of state-control over al-Azhar's curriculum and faculty positions, including the appointment of Shaykh al-Azhar (head of al-Azhar University) –a major spiritual leader and Shari'a interpretive authority. Meanwhile, the Egyptian Supreme Constitutional Court (whose members are appointed by the government) developed an innovative interpretive matrix of religious directives – the first of its kind by a non-religious tribunal – so as to interpret the aforementioned Article 2 in a moderate way, all while political power-holders repeatedly outlawed the increasingly popular Muslim Brotherhood movement.

However, the rise of political Islam in Egypt could not be fully tamed by government control, constitutional or otherwise. The Egyptian revolution of 2012 (also known as the January 25 revolution) followed. The Constitution introduced in December 2012 by then-President Mohamed Morsi (of the Freedom and Justice Party founded by the Muslim Brotherhood) not only reproduced Article 2 (stating that principles of Islamic Shari'a are "the" source of legislation), but also introduced Article 219, which uses technical terms from the Islamic legal tradition to define what is actually meant by "the principles of the Islamic Shari'a" as stated in Article 2. That Constitution also guaranteed (Article 4) that al-Ahzar would be consulted on matters of Islamic law; Article 11 stated that the state is to "protect ethics and morality and public order;" and Article 44 prohibited the defamation of prophets and religious messengers, such that it may be interpreted as prohibiting blasphemy. This new Constitution clearly veered to the side of religion, threatening to turn Egypt into a full-fledged constitutional theocracy. In a volatile political environment, where constitution-drafting and re-drafting become a symbol and instrument of expressing different conceptions of the relation between law and religion, virtually all of these pro-religion changes were eliminated by the 2014 counter-revolution and its new Constitution, which essentially returned Egypt's constitutional recognition of religion to its pre-2012.

Conclusion

In contrast with the once-influential secularization theory that predicted the decline of religion as a meaningful social and political force in the public sphere as result of processes inherent in modernization, religion is experiencing a resurgence worldwide as a major spiritual, cultural and political force. Consequently, principles of theocratic governance – often thought of as remnants of political times long bygone – have staged a comeback, reflecting and further fuelling illiberal sentiments in an increasing number of polities. Whereas pure theocracies have indeed disappeared, legal entrenchment of and political deference to sacred texts, sanctified precepts, and religious authorities have not. As we have seen, a fusion of modern constitutionalism and theocratic principles has taken root in several predominantly Islamic polities, and has been posing considerable challenges to liberal conceptions of rights and to narratives of inclusion and toleration in many other settings worldwide.

Notes

1 Obergefell v. *Hodges*, 576 US (2015) [US Supreme Court].
2 *R (E)* v. *Governing Body of JFS* [2009] UKSC 15 [UK Supreme Court].
3 *S.A.S.* v. *France*, Application no. 43835/11, Judgment of July 1, 2014 [European Court of Human Rights, Grand Chamber].
4 Case C-157/15, *Achbita* v. *G4S*, Judgment of March 14, 2017 [European Court of Justice].
5 *Asia* Bibi v. *The State*, Criminal Appeal 39-L 2015, Judgment of October 31, 2018 [Pakistan].
6 *Dahan et al.* v. *Minister of Interior*, HCJ 11013/05, Judgment of March 1, 2021 [Israel].
7 *Titular Roman Catholic Archbishop of Kuala Lumpur* v. *Menteri Dalam Negeri* [2014] 6 C.L.J. 541 [Malaysia].

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