Outline

1. Sociological Background on Israel
2. Theory: Conflicting Models
3. Overview of the Israeli Model
4. Critical Evaluation
5. Summary
1. Sociological Background on Israel

<table>
<thead>
<tr>
<th>Population (8 M)</th>
<th>Orientamento religioso</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Jews</strong></td>
<td></td>
</tr>
<tr>
<td>6 M (80%)</td>
<td>8% Ultra-Ortodossi;</td>
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<tr>
<td></td>
<td>15% Ortodossi;</td>
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<tr>
<td></td>
<td>32% “Tradizionalisti”</td>
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<tr>
<td>6 M (80%)</td>
<td>45% Laici</td>
</tr>
<tr>
<td><strong>Arabs</strong></td>
<td></td>
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<tr>
<td>2 M (20%)</td>
<td>60% Ortodossi;</td>
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<tr>
<td>1.4 M (16.5%)</td>
<td>35% “Tradizionalisti”</td>
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<tr>
<td>0.4 M (2%)</td>
<td>5% Laici</td>
</tr>
<tr>
<td>0.3 M (1.5%)</td>
<td></td>
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<tr>
<td><strong>Muslims</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Christians</strong></td>
<td></td>
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<tr>
<td><strong>Druze</strong></td>
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</table>
1. Sociological Background on Israel

• **Zionism** (Jewish national movement, started in the early 20th century) has been essentially secular. The right of the Jewish People to “self-determination” based on the idea that the Jews are a “nation” rather than a religious group.
1. Sociological Background on Israel

Israel’s Constitutional identity as A Jewish and Democratic State: A liberal democracy; fulfills the Jewish People’s right to self-determination

- No explicit Constitutional norm.
- Equal protection to individual liberties of all citizens
- Priority to collective rights of the Jews (immigration policies, symbolic aspects of the public sphere).
1. Sociological Background on Israel

Two central social rifts: Intra-Jewish and Arab-Jewish

Intra-Jewish:

- Jewish Ultra-Orthodox anti-Zionists (for religious reasons); dilemmas of “thick” multi-culturalism
- Jewish Orthodox interested in including religious aspects in the public sphere
1. Sociological Background on Israel

Arab-Jewish rift:

- Arab-Palestinians oppose Israel’s identity (for national reasons)
- Dilemmas of “thick” Multiculturalism
- Religion as a sphere of autonomy and national self-governance
1. Sociological Background on Israel

No consensus about state and religion in Israel

- No Constitutional norm
- Informal “status-quo” agreement
1. Sociological Background on Israel

Politics

- Strong political power to Jewish Ultra-Orthodox political parties
- Promote secretarial interests (funding, autonomy, community public sphere, exemptions); but also shaping public spheres (general norms, behavior in public sphere)
- Religious autonomy to the Arab minority
Outline

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2. Theory: Conflicting Models

State and Religion

The concept of “state neutrality”: It is impermissible to impose religious beliefs or norms, or employ governmental powers for a religious purpose. 

[what makes it specifically impermissible is subject to debate. Probably, religion’s illiberal content]
State and Religion

There are, however, two possible justifications for employing powers to promote religious interests:

- Aspects of religion that are part of national identity
- Protection of religious freedom (including positive obligation).
2. Theory: Conflicting Models

State and Religion: National Identity

- A collective right to culture, that the state may enforce or encourage
- National identity resembles religious norms
2. Theory: Conflicting Models

Lautsi v. Italy, 2011 [ECtHR]: “[...] the presence of crucifixes in State-school classrooms, [is] the result of Italy’s historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered is important to perpetuate. [...] beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms is justifiable on that account”
2. Theory: Conflicting Models

State and Religion: National Identity

Concerns:

• Discrimination against minorities or causing them discontent with the state
• Disguise for enforcing religious beliefs
• “National identity” is vague and should be subject to debate and dissent
Enforcing religious norms is based on protecting interests of religious people. Two models: Narrow and broad.
Narrow Protection of Religious Freedom

• The right only prohibits the government from intentionally burden a person’s exercise of religion. A neutral, generally applicable law does not infringe the right.

• Religious freedom is thus an aspect of the right to equality rather than freedom of conscience.
2. Theory: Conflicting Models

Narrow Protection of Religious Freedom

- Only negative protection, based on the principle of state neutrality. Fulfillment of religious interests is private.

- In the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual’s freedom of religion is exercised through his freedom to leave the community.
2. Theory: Conflicting Models

Narrow Protection of Religious Freedom

- A person's interest that others will respect religious norms is not protected.
- Religious freedom is a matter of the private sphere.
2. Theory: Conflicting Models

Narrow Protection of Religious Freedom

• The government may protect a person only from other persons' intentionally disrespectful activities. (E.g., Otto-Preminger-Institut v. Austria, 1994 [ECtHR]: [Only] in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them”).
Narrow Protection of Religious Freedom

• Certain religious norms are not protected, based on their harmful manner or illiberal nature (e.g., gender or sexual orientation discrimination). (e.g., Gündüz v. Turkey, 2003 [ECtHR])
2. Theory: Conflicting Models

Broad Protection of Religious Freedom

• Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, subject to the proportionality test.

• Religious freedom thus consists of the right to conscientious objection.

• A duty to employ reasonable accommodations.
2. Theory: Conflicting Models

Broad Protection of Religious Freedom

- Positive obligation: The rights protect collective aspects of religious beliefs, including shaping the public sphere, and restricting other persons' behavior.

- All religious norms are protected. Their harmful manner or illiberal nature may justify an infringement only subject to the proportionality test.
2. Theory: Conflicting Models

Broad Protection of Religious Freedom

- A right to shape a local public sphere according to the community's religious norms
- A right to autonomy to the religious community (adjudication in conflicts, setting rules of behavior in sacred sites and houses of worship, education systems). Both "negative" autonomy (right to freedom from intervention) and "positive" one (right to obtain government protection & funding).
2. Theory: Conflicting Models

Choice between the models

Pro-Narrow:

- “[i]f the state may aid [...] religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political control with it” [Everson v. Board of Education, 330 U.S. 1, 27 (1947)]
- Accommodating religion is harmful to liberal values. Anti-religion.
2. Theory: Conflicting Models

Choice between the models

Pro-Broad:

- Positive obligation is required (equality in fulfillment of the religious interests; state regulation is required to resolve intra-religion conflicts
- Religion is a cultural, inherently collective right, strong interest in community
- Justify (softly) imposing liberal values on religious institutions and practices
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Prohibition on State enforcement of religious norms
3. The Israeli Model

Religion as a Jewish national identity

- The State enhances Jewish “culture” in the public sphere: Public holidays, Prohibition on open businesses and work on Shabbat, symbols, Kosher food restrictions
- Religion-based autonomy rights to the Arab minority
- Religious law is state law in issues of marriage and divorce
3. The Israeli Model

Protecting religious interests of individuals

- Extensive State provision of religious services (schools, religious courts, religious-leaders, Kosher-food supervisors)
- An exemption from military service based on religious objection and from other duties
- Protection of community’s public sphere by restricting activities there
3. The Israeli Model

Regulating religious activities

- Regulating activities of public providers of religious services (equality, may enforce only religiously required norms)
  [Examples: Radio, graveyards, kosher supervisors]

- Regulating activities in sacred places
  [The Western wall; the Church of the Holy Sepulchre]
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4. Critical Evaluation

1. De-facto enforcement of religious norms
   a) The distinction between Jewish “culture” and “religion” is debated
   b) Protecting religious persons’ feelings

2. Public religious activities: public/private?
   a) Non-liberal practices, lack of “core” curriculum in religious schools
   b) Religious freedom

3. Religious law in issues of marriage and divorce: incompatible with democratic values
4. Critical Evaluation

1. Enhancing Jewish culture in the public sphere fulfills the right to culture;
2. Protecting the Arab minority’s collective rights;
3. Protecting free exercise requires governmental involvement;
4. Governmental involvement legitimizes partial regulation of religious practices.
5. Summary

• Lack of “overlapping consensus” not only about what the Israeli model of state and religion should be but also about what it is: A gap between the judicial interpretation and the political-branches’ one;

• An unstable model, which induces intensive public discourse and constant changes
Hypotheticals

- Prohibiting selling non-Kosher food
- Regulating activities in holy sites (forms of prayer near the Western Wall)
- Closure of roads on Shabbat
- Religious courts with men-only judges
- Separate seats in buses for men and women