1

What Is Constitutional Intolerance?

Is justice, then, variable and changeable? No, but the times over which she presides are not all alike because they are different times.

—St Augustine

1.1 INTRODUCTION

What does it mean "to tolerate" in a post-Christian and post-secular state? Coexistence is not possible without a measure of tolerance, the forbearance of certain differences, or without holding tensions that may arise from differences in values and practices. This capacity for tolerance – which was long ascribed to the classical liberal tradition – has been meaningfully challenged by nationalist and populist movements, many of which have selectively embraced some version of anti-liberal communitarianism, and which have driven the so-called culture wars to a new momentum.[1] New forms of intolerance pertain to the position of religious, ethnoreligious, and sexual minorities in public life, echoing the concerns over the public visibility of minorities inhering in historical Christendom. The political articulation of certain groups as "other" to "the nation" is increasingly mediated through constitutional repertoires, such as constitutional revision and amendment, developments in constitutional hermeneutics, or pseudo-constitutional behaviour. This book demonstrates that antecedents of contemporary conflicts over diversity in Europe can be found in early modernity, specifically in early modern practices of toleration, which impacted both the belonging and the visibility of minorities.

This book offers a documentation and a comparative theoretical reflection on the rise of constitutional intolerance in Europe: the use of constitutions and constitutional repertoires to express the othering of religious, ethnoreligious, and sexual identities vis-à-vis the political community. This book presents four iterations of

[1] Stephen Holmes, "The antiliberal idea," in *The Routledge Handbook of Illiberalism*, ed. András Sajó, Renáta Uitz, and Stephen Holmes (Abingdon: Routledge, 2022), 3–15.

constitutional intolerance, based on case studies on France, the Netherlands, Hungary, and Poland: (1) France's leveraging of the broad concept of *laïcité* (i.e. strict separation of church and state) and reliance on the *living together* doctrine, such as in the penalisation of the full-face veil; (2) the liberties that the Dutch legislature has taken in the substantiation of the concept of *public order*, inscribing underspecified social norms into a principle that aims at objective concerns of security and good order, such as to penalise the full-face veil; (3) Hungary's discrimination against religious organisations that are critical of the Orbán government, with reference to constitutional amendments and defiance of the courts; and (4) the (in)visibility of Law and Justice (lesbian, gay, bisexual, and transgender) identities in Poland, mediated through pseudo-constitutional anti-LGBT resolutions, declarations, and Family Charters, also known as the "LGBT-free zones".

Europe faces significant challenges regarding the future of liberal democracy as its structures need to contain increasingly complex forms of identity and diversity: sometimes these challenges are expressed in widely criticised changes to the law and sometimes in seemingly inconsequential shifts.[2] Whereas there is a vast literature on the rise of illiberalism and critique of secularism, few scholarly works integrate the challenges of modern constitutional democracies in Europe across the liberal and illiberal spectrum. This comes at a political cost: that the protection of Muslim and LGBT identities become feuds of the political left, whereas the issue of religious freedom is increasingly claimed by right wing movements.

Contrary to popular conceptions of tolerance as referring to certain preferences and allowances, this book develops an analytical framework around practices of coexistence rooted in the pre-constitutional practices of toleration. Central to toleration is a fundamental conception of otherness, which is ascribed to minorities, who may coexist in space and in time, but without fully belonging to the political community and whose citizenship may or may not be contested. This designation of otherness is the reason that we can consider religious, ethnoreligious, ethnic, and sexual minorities in one conversation, also called the *tertium comparationis*. In stepping out of familiar binaries that pit religion and LGBT identities against each other, one might discern how the power dynamics inhering in constitutional law may change perspective as governing majorities come and go; and they remind us why it is important to protect "favoured" and "unfavoured" identities alike.

This comparison is facilitated by methods that transcend traditional approaches to comparative constitutional law. One of the strengths of European constitutionalism is its historical commitment to legal positivist methods: the detailed study of written law and judicial decisions. This study engages those traditional legal methods, such as the analysis of constitutional and legal texts and their Parliamentary history.

[2] Compare Renáta Uitz, "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary," *International Journal of Constitutional Law* 13, no. 1 (2015): 279–300.

This method is particularly relevant in the cases of France and the Netherlands, where the discernment of constitutional intolerance relies on a relatively technical analysis of the transformation of legal concepts such as public order and *laïcité*. This book brings to this technical analysis a further normative reflection integrating historical, sociological, and theological perspectives – perspectives that can bring further normative depth to the field of constitutional studies.[3] The first part of the book elaborates on theoretical dimensions of othering as non-belonging, such as the place of the other in public space and the understanding of the other in time. These chapters facilitate the normative integration of the case studies, enabling a deeper understanding of the cultural and normative significance of what otherwise might seem quite specific legal issues.

The guiding argument of the book is that intolerance is not simply a potential undercurrent of illiberalism or indeed of liberalism, even though their manifestation is entangled in their political contexts. There is, of course, a risk that writing about liberal and illiberal leaning states might be perceived as contributing to the mainstreaming of illiberalism in Europe, but the gains of this comparison outweigh this concern. This comparison contributes to understanding the significance of constitutional repertoires in enabling right wing interests in both liberal and illiberal contexts. The vulnerability of these repertoires to political expressions of intolerance is not to be underestimated. They are not mere aberrations of otherwise functional constitutional systems, rather, they are embedded in constitutional structures that need to be supported by a sound conception of the rule of law. The blatant disregard for the rule of law by the Orbán administration in Hungary and the Law and Justice party in Poland certainly distinguishes the cases of Hungary and Poland from the Netherlands and France but also brings to the fore why shifting concepts of public order and *laïcité* in the Netherlands and France are so problematic. If such developments are accepted in liberal states, it will become more difficult to critique and contain the threats to constitutionalism that arise in Hungary and Poland, and indeed elsewhere.

Several chapters in this book build on previous doctoral work on the place of religious and ethnoreligious minorities in France, Germany, and the Netherlands, titled "Politics of Religious Diversity: Toleration, Religious Freedom and Visibility in Public Space".[4] This thesis, which was written at the Department of Politics and International Studies at the University of Cambridge, comprised a comparative legal-historical study of early modern practices of toleration, their relationship to

[3] Ran Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014); Kim Lane Scheppele, "Constitutional ethnography: An introduction," *Law & Society Review* 38, no. 3 (2004): 389–406.

[4] Marietta D. C. van der Tol, "Politics of religious diversity: toleration, religious freedom and visibility of religion in public space," PhD thesis, University of Cambridge (2020), https://doi.org/10.17863/CAM.64125.

political thought,[5] and the echoes of historical practices of toleration in the governing of religious difference in emerging "nation-states". This thesis was oriented to the expression of religious differences in public space and the role of constitutions in mediating continuities and discontinuities in the governing of religious diversity from pre-Revolutionary states to modern constitutional states. Sources consulted for this analysis derived from a number of languages, including English, French, Dutch, German, Spanish, and Latin, which gave further insight into the reception of the idea of "toleration",[6] "moderation",[7] publicness,[8] and "neutrality"[9] in different languages and jurisdictions, as partially expounded in the *Geschichtliche Grundbegriffe*. The variety in the reception of these ideas shows that secularisation, the separation of church and state, and a concept such as *laïcité* tend to be too readily equated in Anglophone literature, to the detriment of our understanding of the development of such ideas within specific political contexts, especially with regard to demography, the presence or absence of a single dominant church, the range of minorities present, and the historical relationships between them.

This book has taken a slightly different direction in that it presents Hungary and Poland as two very different exponents of illiberal politics. Research content derives primarily from desk-based study of legal documents and secondary literature, which in this case includes a number of sources in Polish and Hungarian. The challenges of this research are vast, not least because of the language barriers and the availability of pro-Orbán publications in English; this has been partially overcome through conversations with legal practitioners, political activists, and dissidents. While none of them were the "object" of this study, their insights assisted in the interpretation of the source materials. The same is true for research visits across Hungary and

[5] Compare Glen Newey, *Toleration in Political Conflict* (Cambridge: Cambridge University Press, 2013); Rainer Forst, *Toleration in Conflict* (Cambridge: Cambridge University Press, 2013).

[6] Gerhard Besier, "Toleranz," in *Geschichtliche Grundbegriffe. Historisches Lexicon zur politisch-sozialen Sprache in Deutschland*, Band 6, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1990), 445–523, 492; István P. Bejczy, "Tolerantia: a medieval concept," *Journal of the History of Ideas* 91, no. 4 (1997): 365–384, 375; Otto Busch, *Toleranz und Grundgesetz. Ein Beitraf zur Geschichte des Toleranzdenkens* (Bonn: H. Bouvier und Co Verlag, 1967).

[7] Ethan H. Shagan, *The Rule of Moderation: Violence, Religion and the Politics of Restraint in Early Modern England* (Cambridge: Cambridge University Press, 2011).

[8] Lucian Hölscher, "Öffentlichkeit," in *Geschichtliche Grundbegriffe. Historisches Lexicon zur politisch-sozialen Sprache in Deutschland*, Band 4, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1978), 413–467; Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA: MIT Press, 1989).

[9] Michael Schweizer, "Neutralität," in *Geschichtliche Grundbegriffe* Band 4, 317–337; Heinhard Steiger, "Neutralität," in *Geschichtliche Grundbegriffe* Band 4, 337–370; Andrea Pin, "Does Europe need neutrality? The old continent in search of identity," *Brigham Young University Law Review* 3 (2014): 605–634; Andrew M. M. Koppelman, "Ronald Dworkin, religion, and neutrality," *Boston University Law Review* 94, no. 4 (2014): 1241–1253.

Romania, including visits to "memory sites" and museums,[10] and attendance at the political festival *Tusványos* in 2022,[11] where Viktor Orbán spoke about the consolidation of illiberalism beyond his own generation, claiming that 'there are things which are eternal' (*van, ami örök!*). This book has certainly benefitted from time spent in the company of those who support (or ambivalently support) the Orbán administration. While specific conversations remain confidential, these conversations have shaped my impressions and interpretations of politics beyond the news headlines, and I remain grateful for the trust I received as a foreign and critical researcher.

1.2 WHAT IS TOLERATION?

This book introduces pre-constitutional toleration as a governmental technique, to be distinguished from tolerance as referring to popular sensibilities, although the two have often been fellow travellers. Toleration derives from early modern practices of coexistence, of both legal and social significance, and refers to the action or inaction of civil authorities with regard to religious "others" within a political community.[12] Toleration is reminiscent of Ethan Shagan's understanding of English moderation as a governmental technique, which could serve as an argument for either wielding or restraining the sword.[13] The distinction between toleration and tolerance is instructive, although not all European languages have the vocabulary to express the nuances between them.[14] Toleration is part of a family of words which signify permission, forbearing, long-suffering, licensing, and impunity.[15] It could be understood as a disposition or *une direction de la volonté*, a direction

[10] Sites visited include the Budapest History Museum, the Great Dohány Synagogue and its Memorial yard and the Jewish Museum, the Visegrad Citadel and Museum, Budapest Liberty Square, the Esztergom Basilica and Museum, the Cathedral of Saint Stephen, the Great Church on Kossuth Square Debrecen, the chapel of Debrecen Reformed Theological University, the Castle and Museum of Csókakő, and the monument for Miklós Horthy in Csókakő; Compare Natalia Krzyżanowska, "Politics of memory, urban space and the discourse of counterhegemonic commemoration: a discourse-ethnographic analysis of the Living Memorial in Budapest's 'Liberty Square,'" *Critical Discourse Studies* 20, no. 5 (2023): 540–560.

[11] Tusványos is an annual political festival held in Băile Tuşnad or Tusnádfürdő as it is known in Hungarian, in Transylvania (Romania); senior politicians, clerics, and public intellectuals appear in a number of public and livestreamed panels, speeches, and discussions. Interpretation from Hungarian into English and German were provided by the organisation of the festival, and these will be treated as primary sources in this book.

[12] Julia Costa Lopez, "Beyond Eurocentrism and Orientalism: revisiting the othering of Jews and Muslims through medieval canon law," *Review of International Studies* 42, no. 3 (2016): 450–470.

[13] Shagan, *The Rule of Moderation*.

[14] Jeffrey R. Collins, "Redeeming the Enlightenment: new histories of religious toleration," *The Journal of Modern History* 81, no. 3 (2009): 607–636, 613.

[15] William H. Huseman, "The expression of the idea of toleration in French during the sixteenth century," *The Sixteenth Century Journal* 15, no. 3 (1984): 293–310, 299–301.

of the will.[16] Theologically, toleration has often been anchored in an Augustinian hermeneutic of the parable of the wheat and the chaff (Matthew 13). Augustine applied this image primarily to the unity of the church, arguing that the church should be tolerant of minor errors in order to maintain its unity and peace, and only exert intolerance to "persisting" heretics.[17] The undercurrent of this toleration is the restraint of power, whether grounded in a personal direction of the will or in a form of civil power. But this restraint is a response to a prior recognition of difference or otherness, which is not self-evidently compatible with a community's theological or social self-understanding.

Toleration was first developed as a legal concept within the context of canonical law, in which the possibility of toleration was expressed through phrases like *tolerare potest*, signifying that this possibility was offered as a discretionary power.[18] It was mirrored by the phrase *dissimulare poteris*.[19] Dissimulation referred to the historical practice of concealing one's religious allegiance and this could occur as a result of external pressure or personal discretion. María Roca emphasises that neither toleration nor dissimulation implied normative endorsement, but instead were the outcome of personal and prudential decision-making.[20] Those who practised dissimulation were often seen as cowards and traitors, or otherwise dishonest.[21] This indicates a fundamental interconnection between the visibility of difference and toleration. This dependence of toleration on visibility has been documented by Benjamin Kaplan who analyses visibility in relation to public and private expressions of confessional allegiance in his book *Divided by Faith*.[22] It is relevant to note here

[16] François Olivier-Martin, *Le régime des cultes en France du Concordat de 1516 au Concordat de 1801* (Paris: Loysel Editions, 1988), 401.

[17] Edward L. Smither, "Persuasion or coercion: Augustine on the state's role in dealing with other religions and heresies," *Faculty Publications and Presentations* 14 (2006), http://digitalcommons.liberty.edu/lts_fac_pubs/14 (consulted 31 October 2017), 25, 34; Adam Ployd, *Augustine, the Trinity, and the Church: A Reading of the Anti-Donatist Sermons* (Oxford: Oxford University Press, 2015), 53.

[18] María J. Roca, "El concepto de tolerancia en el derecho canónico," *Ius Canonicum* 41, no. 82 (2001): 455–473, 460, 465, 472–473; R. Scott Appleby cites David Little in *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (New York: Rowman & Littlefield, 2000), 14; Compare Elizabeth Shakman Hurd discussing David Scott in "The political authority of secularism in International Relations," *European Journal of International Relations* 10, no. 2 (2004): 235–262.

[19] Stefania Tutino, "Between Nicodemism and 'honest' dissimulation: the Society of Jesus in England," *Historical Research* 79, no. 206 (2006): 534–553, 535; Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England 1500–1700* (Manchester: Manchester University Press, 2006).

[20] Roca, "El concepto de tolerancia en el derecho canónico," 458.

[21] Roca, "El concepto de tolerancia en el derecho canónico," 466. Filomena Viviana Tagliaferri, *Tolerance Re-shaped in the Early-Modern Mediterranean Borderlands: Travellers, Missionaries and Proto-journalists 1683–1724* (New York: Routledge, 2018), Introduction; Tutino, "Between Nicodemism and 'honest' dissimulation," 534–553.

[22] Benjamin J. Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Cambridge, MA: Harvard University Press, 2007).

that the minority religion was often tolerated only in private spaces, and that increased levels of toleration tended to imply a greater visibility of othered religion in public space. This has pertinence to contemporary discussions over the visibility of religion in public space, ranging from the contestation of religious symbols in public space to the normative weight attached to the privatisation of religion since the second half of the twentieth century.

Crucial to toleration is the distinction between differences that are or are not fundamentally challenging the societal order. This distinction is, of course, relevant in today's legal context: the law still makes a distinction between different kinds of "errors": ranging from administrative penalties to criminal offences which carry the temporary suspension of one's electoral rights. Sometimes, the law is more indifferent, usually with regard to the observation of particular religious rules and conventions. The law is, however, not altogether indifferent to religion, the matter of which is more complex than a mere institutional separation of church and state. The case studies on France, the Netherlands, Poland, and Hungary show how deeply constitutional, administrative, and criminal law can be entangled in questions of culture and coexistence. Sometimes, othering is not dependent on explicit "errors", but social sensibilities which condition belonging: for example, when those of different origin, race, religion, or sexuality may face additional expectations about their behaviour, their dress, their political preferences, or the renunciation of foreign allegiances in order to be socially accepted. Whereas such differences might appear irrelevant from the perspective of formal citizenship, one's economic and social status remains dependent on the de facto inclusion in local as well as national communities, while unrelated events in the world can trigger new waves of intolerance and exclusion.

Toleration must be understood against the backdrop of Europe's principal political imaginary in early modernity: the *corpus christianum*, which translates as the political expression of the body of Christ. This political imaginary gained prominence in a period of social, political, and ecclesial disintegration, when the *corpus christianum* transformed into multiple *corpora christiana*.[23] The *corpus* (one body) symbolised a sacred interconnectedness of territory, people, and teleology and retained its meaning throughout early modernity in various forms of religious and proto-secular political thought. This did not imply religious uniformity across Europe; in fact, a great measure of difference was considered part of a fractalised Christian unity: a unity that was constituted and sustained by a plurality of sacred spaces, in which the secular sometimes collapsed into the sacred.[24] It follows that not all differences were subject to the discretion of toleration, rather, that toleration

[23] William T. Cavanaugh, "'A fire strong enough to consume the house': wars of religion and the rise of the state," *Modern Theology* 11, no. 4 (1995): 397–420.

[24] Marietta D. C. van der Tol and Philip S. Gorski, "Secularisation as the fragmentation of the sacred and of sacred space," *Religion, State, Society* 50, no. 5 (2022): 495–512.

concerned the fringes of (im)permissible differences. It must be noted that the imaginary of the *corpus christianum* figured within a layering of temporalities: the idea that chronological time can have multiple different ascriptions of meaning to it.[25] An example of this is the notion of the eschaton, the idea that the present time must be viewed in relation to eternity, the return of Christ, and the Last Judgement, *sub specie aeternitatis*. Toleration was a governmental technique to protect Christian hope: hope of conversion and redemption, and progression in the economy of salvation. Alexandra Walsham terms this "Charitable Hatred", or the hatred that serves the redemption of the accused.[26]

The layering of temporalities has, however, become much less prominent in questions of coexistence today: not that secular time would not allow for layered temporalities, but they usually emanate from the immanent and the secular, *sub specie secularitatis*. Moreover, the acceleration of time has squeezed the "now" between the demand not to "lose time", nor to tarry in pressing change into the future, echoing the sense of urgency familiar from historical Christendom.[27] Similarly, liberal constitutional traditions have identified values of liberty and non-interference, the freedom of conscience and conceptions of the common good – ideas that can be hardly disentangled from cultural Christianity and a Western European emphasis on the individual.[28] These values, however, came with expectations about the rational engagement of differences, and the modernist optimism that truth would eventually, *sub specie aeternitatis*, triumph. Such expectations are not uncommon in the classical liberal tradition, which places great value on education, information, and the autonomous interpretation of thereof and the tacit assumption that education leads to the liberalisation of the mind and society. This presumed a willingness and capacity for engagement, as well as a measure of time available to undertake lengthy disputations – conditions that are not necessarily met in a time of headlines, tweets, statements, and fleeting attention and engagement. How can secular conceptions of time, which are relatively speaking narrower to historical Christendom, harness resources that allow for the passing of time in which meaningful differences can be tolerated?

The contemporary focus on differences that pertain to one's identity, such as race, ethnicity, religion, gender, and sexuality, has facilitated a more precise understanding of ways in which structures like the law facilitate disadvantage, sometimes over the course of generations. Though readily dismissed as an instance of leftist

[25] Reinhart Koselleck, *Future's Past: On the Semantics of Historical Time*, transl. Keith Tribe (New York: Columbia University Press, 2004).

[26] Walsham, *Charitable Hatred*.

[27] Hartmut Rosa, ed., *High-Speed Society: Social Acceleration, Power, and Modernity* (University Park, PA: Penn State Press, 2010).

[28] Compare John Witte and Frank Alexander, eds., *The Teachings of Modern Protestantism on Law, Politics, and Human Nature* (New York: Columbia University Press, 2007); Tine Stein, *Himmlische Quellen und irdisches Recht. Religiöse Voraussetzungen des freiheitlichen Verfassungsstaates* (Frankfurt: Campus Verlag, 2007), 336.

"wokism" by some, this awareness has also offered alternative vantage points within time and within a post-secular framework. This is perhaps an opportunity for widening our sense of temporality within (and beyond) the immanent, taking stock of different ways in which time has been experienced by the structurally disadvantaged and disenfranchised. As democratic capital has impoverished under the influence of individualisation, de-institutionalisation, and digitalisation, this heightened social awareness may be as much a blessing as it is a curse.[29] Conservative critiques of diversity signal that the outburst of vantage points needs a reliable repertoire for fruitful negotiation within constitutional democracies, some of which may need to be newly developed, and which can bridge the liberal–illiberal divide. One dimension to this repertoire is the ability to compromise and to live in the "now" and in the "future" with unfulfilled as well as not yet fulfilled desires. It is the essence of tolerance.

1.3 THE THEORETICAL INCOMPATIBILITY OF (RELIGIOUS) INTOLERANCE AND CONSTITUTIONALISM

The secularisation thesis that was *en vogue* in the second half of the twentieth century is perhaps one of liberalism's unfulfilled desires.[30] The idea of privatisation of religion bears the resemblance of profound concerns over public visibility of religious difference under regimes of toleration.[31] Early modern distinctions between public and private helped to contain tensions in public and political life stemming from a double order: the power of the state and the power of the church. By designating religion as something that belongs "behind the front door" or through Rawlsian theorisations on religious content-free discursive practices, 'secularism arrogates itself the right to define the role of religion in politics', as Elizabeth Shakman Hurd puts it.[32] Whereas this "arrogance" is often associated with liberalism's approach to religion, anti-liberal attitudes to Muslim and LGBT

[29] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000); Robert D. Putnam, Robert Leonardi, and Rafaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1992).

[30] Van der Tol and Gorski, "Secularisation as the fragmentation of the sacred and of sacred space," 496–497.

[31] Thomas Luckmann, *The Invisible Religion: The Problem of Religion in Modern Society* (New York: Macmillan, 1967); Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City: Doubleday, 1969); Bryan R. Wilson, "Secularization: the inherited model," in *The Sacred in a Secular Age*, ed. P. E. Hammond (Berkeley: University of California Press, 1985), 9–20.

[32] Hurd, "The political authority of secularism in International Relations," 237; However, Rawls' ideas developed during his lifetime, compare John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); and John Rawls, "The idea of public reason revisited," *The University of Chicago Law Review* 64, no. 3 (1997): 765–807.

identities show their colours in their insistence on integration, assimilation, dissimulation, and decreased visibility – colours that are shared with both liberalism and with historical Christendom, even as its sources are communitarian rather than individualistic in character. The supposed "return" of religion has made the tensions inherent to the double order more apparent and possibly urgent. The reflex to rely on constitutional repertoires to curb these tensions (at least for some), mediated through majoritarian politics, is little short of a knee-jerk response to what are complex questions of coexistence.

Constitutions tend to be understood as the legal expression of a social contract. As the proclamation of sovereignty, it is a foundational 'form of social power'.[33] Nineteenth-century constitutions embodied the recognition that peace and order are not self-evident and that people with different convictions and interests need to coexist within frameworks of accountability. States emerging (again) after the Enlightenment,[34] the ravages of the French Revolution, and the military campaigns of Napoleon Bonaparte vested the hope for peace and order in the idea of nationhood, which transcended immediate religious differences modern states inherited from early modernity. Constitutions also create a double order: a constitution constitutes one political body which binds all its members, irrespective of their religious differences. The constitutional order often coexists with religious (or non-religious) commitments that require compliance with a different order, often a kind of religious order.[35] Expectations that emanate from the constitution and those that emanate from religious life may or may not always be compatible. As alternatives to fundamentalist theocratic political thought, both Catholic and Protestant traditions have produced ideas about subsidiarity and the possibility to maintain spaces of distinctiveness and autonomy within society. Either approach signals an awareness of the potential and perhaps inevitable incongruity between the two orders, but this incongruity predates the modern state by centuries despite and because of historical Christendom.

The incongruity of this double order continues to exist in the modern state and is held in balance by the fundamental rights and freedoms that are inscribed in these constitutions, as well as in other documents, such as the European Convention on Human Rights and UN Charters. This balance is not given; it is tested and

[33] Daniel Philpott, *Revolutions in Sovereignty. How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton University Press, 2001), 71.

[34] Some scholars prefer to refer to "Enlightenments" rather than "the Enlightenment". I will refer to the Enlightenment as inclusive of Catholic, Protestant, and Jewish Enlightenments, see further: James E. Bradley and Dale K. Van Kley, *Religion and Politics in Enlightenment Europe* (Notre Dame, IN: University of Notre Dame Press, 2001), 2; Jonathan I. Israel, "Enlightenment! which Enlightenment?" *Journal of the History of Ideas* 67, no. 3 (2006): 523–545, 528.

[35] Compare the double ordering in late medieval theological and political thought, see Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to the Sources of Medieval Political Ideas* (Ithaca, NY: Cornell University Press, 1975), 271.

contested, and sometimes reframed. Given that religious difference and the foundation of political order were deeply entrenched in the question of toleration, constitutionalisation of religious freedom and the protection of religious minorities were vital to the project of the modern state. From the perspective of constitutional theory, the constitutionalisation of religious freedom brought about a diametric change in the relationship between minorities and the law: minorities are no longer responsible for justifying their deviancy (as in toleration), but the state is required to substantiate their interference in line with the constitutional requirements (as in freedom). This modifies the position of the person too: from subject to citizen, and from someone who is *not free unless* to someone who is principally *free unless*. Moreover, the negative obligation of the state – to not interfere with religious freedom – is appended with a positive layer, namely the obligation to protect and nurture the freedom of citizens to develop their religious commitments within the context of the political community that the state represents.[36]

The relative stability of constitutions in France, the Netherlands, and the United States also produces meaningful inequalities in rights. The freedom of religion, for example, is relatively well established. Whereas sometimes those freedoms are understood as exemptions or privileges,[37] constitutions recognise a liminal space in which the state has no competence to legislate unless some strictly delineated conditions are met. The state can only recognise freedom, potentially support it, or temporarily interfere with these freedoms. As such, religious liberty plays a crucial role in the negotiation of the double order. However, the contrast between religion as the classical liberal tradition understands it and the rights of women, sexual minorities, and ethnoreligious minorities is at times stark. The prominence of religion is a testament of the historical contestation of the rights of religious communities to live together, but it is also a testament to the power or political leverage that some religious communities held in the time that constitutions were written. Furthermore, the freedom of religion is hardly ever distributed evenly; the interests of Jewish communities as sometimes ethnic, sometimes racial, and sometimes religious are poorly conceptualised in the law, a vacuum that is to some extent replicated in the poor legal conceptualisation of Islam. This incongruence between the texts of constitutions and the needs of society produces deeper incongruences in the double order: there where religious freedom is contested as a "privilege" rather than a "right" for those with religious commitments, and there where the denial of fully developed rights to other minorities creates precarious sociopolitical margins.

The incompatibility of intolerance and constitutionalism rests on the inevitability of a double order; the realisation that oneness, as once expressed in the *corpus christianum* and later in the notion of the "nation-state" can only be produced by

[36] Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).
[37] John Adenitire, *A General Right to Conscientious Exemption: Beyond Religious Privilege* (Cambridge: Cambridge University Press, 2020).

violent means, and that its oneness cannot ultimately be sustained. In contemporary Europe, this double order arguably entails multiple orders, many of which exist on a spectrum of the secular, the sacred, and the secular-sacred. Constitutions as guardians of order have an assumed role in the mediation of different orders. This does not preclude the use of constitutions and constitutional repertoires to shape some form of arrangement and to sometimes make difficult decisions. It does preclude the ascription of fundamental otherness and the compromise of visibility and representation in public space.[38] Such ascriptions generate second-rate citizens and contribute to the mainstreaming of prejudice, discrimination, and even violence. For constitutions to be resilient beacons amidst the tides of tolerance and intolerance (however perfect or imperfect), those entrusted with power must learn to discern and respect their significance and navigate the waters carefully.

1.4 OUTLINE OF THE CHAPTERS

Chapter 2 offers an analysis of toleration as legal practice and administrative discretion which finds its origins in canon law. This chapter articulates common frames of reference to toleration: a qualification of evil, the preservation of outward unity and social trust, economic benefit, and the duty to protect public peace and order – all interests that could inform a particular decision whether or not to tolerate certain practices. Toleration entailed a spectrum of practices of coexistence, which may be characterised as incorporation through marginalisation. This marginalisation commonly had a spatial aspect. The visibility of minority religiosity tended to be constrained through practices of segregation or specific rules about the expression of identity in public. Moreover, toleration was intended to be temporary and often appeared to be tentative and legally fragile. But then we have to understand that the alternative for toleration was that toleration could also be withheld, threatening the very existence of minority communities. These common frames of reference are illustrated with three of the so-called toleration treaties: the Union of Utrecht (1579), the Edict of Nantes (1598), and the Westphalian Peace Treaties (1648). All these treaties sanction the political imaginary of the *corpus christianum*, the image of the oneness of social, political, and ecclesial life. This image of the *corpus* provides the imaginary backdrop of the modern state.

Chapter 3 offers an in-depth reflection on the significance of time and temporality to the practice of toleration. Reliance on different imaginations of time enabled early modern Christians to make sense of religious differences between themselves and the other: the other was at a different point in time in their journey of faith – a journey which in the Christian imagination would inevitably lead to the recognition

[38] Valérie Amiraux and Gerdien Jonker, "Introduction: talking about visibility – actors, politics, forms of engagement," in *Politics of Visibility: Young Muslims in European Public Spaces*, ed. Valérie Amiraux and Gerdien Jonker (Bielefeld: Transcript, 2006), 13–14.

of the true Christian faith. Time thus shaped Christian imagining of the other as "becoming" and growing into its own image. Constitutions, too, exist within certain temporal rhythms: they bind people within a specific space and in a specific time to a set of fundamental rules and arrangements. The binding of time by constitutions is an assertion of power *in the saeculum* but also an expression of a need to better live with diversity. It is vital to the "emancipation" of modern constitutionalism from toleration that the constitution does not require a dominant or exclusive set of temporalities to establish order. Rather, constitutions need to allow for citizens to keep time differently, for example through the protection of rights and freedoms. The phenomenon of constitutional intolerance, however, rests on an overemphasis on the centrality of the political community and the assertion of the normative rather than legal priority of the constitution over other frames of reference. This happens when Muslim identities are alleged to be incompatible with certain political values and when (conservative) religious and ethnoreligious minorities are compelled to assimilate (even if in certain matters). It is also the case when the constitution ascribes normative priority to a secular-Christian iteration of some traditional values at the expense of Islam, liberalism, secularism, as well as non-European migrants and sexual minorities.

Chapter 4 elaborates on the relationship between space and coexistence, and ways in which hegemony is reproduced in public space. Whether this hegemony is grounded in notions of the secular or in different forms of sacralisation, such as national identity, it is asserted through the management of public space. Constitutionalism plays an ambivalent role in the reproduction of this hegemony, not least through the reproduction of a thick sense of publicness. This thick sense of publicness can be asserted against a range of "others", such as religious, ethnic, and sexual minorities, whose identities may be subject to privatisation and retreat from public spaces. This thick sense of publicness roots in the distinction between public and private in old regimes of toleration, which tended to confine minority identities to private spaces. At the same time, constitutionalism offered a tangible alternative for the old order of toleration, recognising that religious divisions would be permanent and that legal and social frameworks of accountability might support peace and order. Given that religious intolerance and the foundation of political order were entwined in early modernity, the establishment of the freedom of religion and the more general protection of religious minorities were vital to the project of the modern state. From a constitutional theoretical perspective, this brought about a diametric change: the dissenter was no longer responsible to justify themselves, but the state was now required to justify any interference with their basic rights and freedoms.

Chapter 5 opens a series of chapters with case studies on France, the Netherlands, Hungary, and Poland. The institution of French *laïcité* is commonly understood on the spectrum of church–state relationships, representing a strict separation of church and state. This chapter explains how *laïcité* has become entangled in the pseudo-constitutional notion of *vivre ensemble* and the rising significance of social norms for

the substantiation of the legal concept of *l'ordre public*. This is inferred from two particular expressions of constitutional intolerance: first, the overly general and restrictive prohibition of the full-face veil in public spaces, which culminated in the S.A.S. *v. France* case, and which normalised the phrase of living together outside existing constitutional frameworks. The idea of living together enables the marginalisation of ethnoreligious minorities, and especially veil-wearing Muslim women, questioning their rightful place in public space.[39] Second, it details the expansion of the legal concept of *laïcité* as expressed in the 2021 Law Concerning the Respect for the Principles of the Republic, which exercises extensive control over the organisation of religious institutions, sources of funding, and their political loyalty to the French Republic. Although the texts of the relevant laws avoid references to Islam or France's Muslim minorities, the parliamentary context makes explicit that these laws are rooted in a sense that Islam would be incompatible with Western values, and in particular with the values of the French Republic. This incompatibility is sanctioned with pre-emptive securitisation, which interferes with a number of fundamental freedoms, such as the freedom of association and the freedom of religion and belief. The chapter concludes with a reflection on the significance of these forms of constitutional intolerance and their reverberation beyond the borders of France.

Chapter 6 introduces the notion of an *ad libitum* or at-will use of the constitutional concept of public order. The concept of public order concerns the heart of constitutionalism, functioning as a gatekeeper in the protection of fundamental rights and freedoms. It fulfils an important role in the protection of minorities, but also extends far beyond the interests of religious and ethnoreligious minorities as such. The Dutch prohibition of the full-face veil demonstrated a susceptibility of the concept of public order to social norms. Initially a flagship of Geert Wilders' anti-Islam movement, the cabinet in some ways successfully captured the topic and diminished the language of aggressive othering of Islam to issues of communication and a vague concept of living together. This could be understood against the backdrop of political gains made on the far right across Europe, and the law perhaps contributed to an attempt at containing this threat of political gains from the far right. However, the seeds have been sown for the integration of social norms into public order in the Dutch constitutional system. This *ad libitum* use of public order cannot be seen as an aberration: it is embedded in the structure of the law. The logic of constitutional intolerance would insist that this use is unconstitutional. This chapter argues that *ad libitum* use of constitutional concepts should not be normalised, as this threatens the stability of constitutional law. Not only would such a development be undesirable from the perspective of constitutional law, but it also undermines efforts to protect constitutionalism in illiberal leaning states, where

[39] Martha C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge, MA: Harvard University Press, 2013).

freedoms taken with constitutional repertoires may not only affect minorities, but the stability of constitutional systems in their entirety.

Chapter 7 analyses constitutional intolerance on the basis of the Hungarian Church Law of 2011, which de-registered hundreds of religious organisations, attached special conditions to re-registration, and privileged a number of politically favoured religious organisations in return for their political legitimation and support. These micro-legal actions are analysed within the context of the notion of "the System of National Cooperation" and "constitutional identity". Constitutional intolerance in Hungary appears to stem from a commitment to protect traditional values: on the one hand, by strengthening the position of the main Hungarian churches, and on the other hand, by championing anti-liberal policies on gender and sexuality, including the prohibition from exposing minors to "gay propaganda". This has contributed to the commoning of the Hungarian public space in the name of traditional values. But the varnish of Christianity is relatively thin: Hungarian society is thoroughly secularised with low numbers of church attendance, with language and ethnicity taking precedence over religion in their importance to national identity. A picture emerges of a cultural Christianity, which is only marginally confessional and predominantly secular in its political orientation and instrumentarium. The particular vulnerability of Hungarian constitutional law to intolerance must be understood against the backdrop of the supermajority held by the coalition of Fidesz and its satellite party, the Hungarian Christian Democratic People's Party (KNDP). This supermajority facilitated the limitation of the powers of the Constitutional Court to scrutinise legislation on the basis of formal constitutional requirements only and the introduction of a new constitution in the form of the Fundamental Law in 2011.

Chapter 8 shows that constitutional intolerance is not only about religious or ethnoreligious identities. Much like ethnic and religious identities, LGBT identities have been subject to the regulation of their visibility in public space. This chapter discusses the anti-genderism of the Law and Justice Party in relation to the hyphenation of Polish-Catholic identity and the historical role of the Catholic Church in promoting Polish independence, as well as the instrumentalisation thereof towards political polarisation in its domestic and European context. This chapter understands the negative attitudes towards LGBT identities as highly symbolic of the anti-liberal backlash and will consider them against the background of Russian influence on anti-liberal coalitions of Central and Eastern Europe. In the absence of a supermajority like in Hungary, the Law and Justice party has not managed to pass amendments to the constitution; instead, it has sought to interfere with the legal system through "remedy laws". This chapter does not focus on the toolkit of illiberalism per se, but on the pseudo-constitutional anti-LGBT resolutions, declarations, and Family Charters adopted by circa one hundred local and regional authorities in response to the proposed pro-LGBT policies of the Mayor of Warsaw. A collaboration between the Law and Justice Party and a think tank called

the Ordo Iuris Institute accounts for the first wave of this backlash, which invoked the constitution and legal language to allude to a semblance of constitutionalism.

Chapter 9 reflects on the phenomenon of constitutional intolerance, its many faces, its entanglement in histories of toleration, and its implications for discourses on constitutionalism, illiberalism, and secularisation. It argues that the default lines have shifted from secularisation to fundamental questions about the future of constitutional democracy in Europe, considering the fundamental aspects of constitutional intolerance: the articulation of otherness vis-à-vis the political community and the sanctioning of this othering in public space. This reflection responds to the increased societal interest in structural injustice and inequality, as relating to religion, ethnicity (race), and sexuality, and argues that thick conceptions of publicness need to be unsettled to make room for these minorities. The conclusion also considers the rise of "cynical democracy" in the instrumental use of constitutional repertoires to further partisan interests, as well as the right wing tendency towards the overrepresentation of formal-procedural legalism, an attachment of legitimacy to legality, and a weakening of the capacity for normative reflection in the highest courts – both in Europe and the United States. It signals the "interruption" of the quiet enjoyment of constitutional democracy and expresses the hope that new movements will seek to protect constitutionalism from the populists' challenge.