
Religion and Personal Law in Secular India

A Call to Judgment

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Personal Law Systems and Religious Conflict

A Comparison of India and Israel

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Although India and Israel differ dramatically in size, population, and affluence, there are many important similarities. Each is the contemporary vehicle of an old and resilient culture or civilization that expresses a distinctive, influential, and enduring arrangement of the various facets of human experience.

Each of these cultures underwent a prolonged colonial experience in which its traditions were disrupted and subordinated to a hegemonic European Christian culture;¹ each had an earlier experience with victorious, expansive Islam;² each has reached an uneasy but flourishing accommodation with the secular, scientific modernity of the West.³ In each case this was achieved by a movement that embraced "Enlightenment" values (Haskalah/Hindu renaissance) and in turn provoked a recoil from modernity to a rediscovery of tradition.⁴ In each there is a conflict between those with "modern" secular views of civil society and those revivalists or fundamentalists who seek to restore an indigenous religious society. The secular nationalism that predominated in the struggle for independence and the formation of the state is now countered by powerful tides of conservative reaction.⁵

In the course of their long histories, Hindu and Jewish cultures had some contact, but each had been largely peripheral to the other; they were not the major presences in each other's arenas, but at most bit players. But now, in the new "global" setting at the turn of the new millennium, there is a proliferation of new connections. Each has successfully absorbed elements of the culture of the Christian West, which has supplied the idiom of intensified global communications. Each is a major

participant in the global scholarly/intellectual exchange. Each has regained a political dimension and is now "represented" in the international arena by a state situated at the contested frontiers of Islamic militancy.

India and Israel are both new nations with multi-ethnic populations.⁶ Each emerged as a nation-state in the first wave of de-colonization through a partition process that reduced the presence of its largest minority and increased the preponderance of its largest religious group.⁷ Each has a Westminster-style parliamentary system—frequently populated by a fragmented coalition government.⁸ Each has a legal system based on the British common law model (with an admixture of American-style constitutionalism, more in India, less in Israel) with many lawyers and strong higher courts that are major players in conflicts about the most fiercely controverted policy issues.⁹ Each has a legal system that incorporates in a truncated form traditions of all-encompassing sacred law that, in their earlier forms at least, aspired to achieve both holiness and spiritual progress.¹⁰ These truncated systems of sacred law are present as "personal law." In both India and Israel, the presence of these personal laws raises the question of reconciling their distinctive religious legacy with a convergent world of "universal" rights. Specifically, it involves reconciling claims for group integrity with claims for individual fulfillment and gender equality.

In this essay, we compare the way the administration of personal law systems reflects and shapes the social identities of religious communities within India and Israel. We also compare the way these personal law regimes affect the roles, rights, and burdens of women. We examine the evolution of personal law systems in India and Israel, and we focus on the way these systems affect the religious and ethnic communities they regulate.¹¹

By systems or regimes of personal law, we refer to legal arrangements for the application within a single polity of several bodies of law to different persons according to their religious or ethnic identity.¹² Personal law systems are designed to preserve to each segment its own law.¹³ In the last several centuries, the most prominent instances have been personal law regimes in the areas of family law (marriage, divorce, adoption, maintenance), intergenerational transfer of property (succession, inheritance, wills), and religious establishments (offices, premises, and endowments).¹⁴ Such personal law typically co-exists with general territorial law in criminal, administrative, and commercial matters.¹⁵ On occasion, some commercial or criminal rules may be included in personal law.¹⁶

As the new millennium begins, many countries that maintain such

personal law systems are under increasing pressure to abandon these structures and adopt a universal set of rules and regulations that apply to all citizens. According to Bassam Tibi, globalization and the twentieth century's technological revolution have projected the concepts of fundamental human rights and freedom to even the most culturally traditional societies.¹⁷ As a result, countries with personal law systems experience a clash between two ideological perspectives. Opponents of religiously based separate systems embrace a concept of universal human rights and freedom where "there is an urgent need for establishing globally-shared legal frameworks on cross-cultural foundations."¹⁸ Those who favor maintaining personal law are suspicious of such (primarily Western-based) concepts as human rights and freedom, and they challenge the compatibility of human rights and freedom with their cultural traditions.¹⁹

We shall return to this conflict after we have examined the two different ways that personal law is institutionalized in India and Israel. Let us begin by first turning to the personal law system of India.

India: Division between Religious Communities

India and Israel represent very different systems of institutionalizing personal law. In India, the British raj established a general territorial law that operated in a common law style and was administered in a nationwide system of government courts.²⁰ Over time, through infusion of common law and codification, the substantive law came to resemble its British counterpart.²¹ At the same time, the British preserved enclaves of personal law. The Bengal Regulation of 1772 provided that in suits regarding inheritance, marriage, caste, and other usages and institutions, the courts should apply "the laws of the Koran with regard to Mohammedans, and those of the Shaster with respect to the Hindus."²²

Under the British, the personal laws of Hindus and Muslims were administered in the regular courts by judges trained in, and familiar with, the style of the common law.²³ Until about 1860, the courts had attached to them "native law officers," pandits and kasis, to advise them on questions of Hindu and Muslim law respectively.²⁴ To make the law more uniform, certain, and accessible to British judges—as well as to check the discretion of the law officers—the courts relied increasingly on translations of texts, on digests and manuals, and on their own precedents.²⁵ In 1860, when the whole court system was rationalized and unified, the law officers were abolished and the judges took exclusive charge of finding and applying the personal law.²⁶ These religious law

systems were now reduced to texts severed from the living systems of administration and interpretation in which they were earlier embodied. Refracted through the common law lenses of judges and lawyers, and rigidified by the common law principle of precedent, there evolved distinctive bodies of Anglo-Hindu and Anglo-Muslim case law.²⁷

These bodies of personal law were administered by the courts of British India and (later) independent India. The Constitution of 1950 appears to envision the dissolution of the personal law system in favor of a uniform civil code.²⁸ Article 44 directs the state to "endeavor to secure for the citizens a uniform civil code throughout the territory of India."²⁹

After the Constitution came into force in 1950, the continued administration of separate bodies of personal law for the various religious communities was challenged as a violation of the right to equality guaranteed by the Constitution. The Indian courts upheld the continued validity of disparate personal law and the power of the state to create new rules applicable to particular religious communities. The judges in the leading case³⁰—a Hindu and a Muslim, both distinguished legal scholars as well as prominent secularists—were sanguine about the continued existence of personal law, presumably in anticipation of its early replacement. The unwillingness, though, of the Muslim minority to relinquish the *Shari'at* (or the Anglo-Muslim amalgam administered in its name) sidetracked plans for a uniform code. Instead, the reformist forces within the Hindu community fashioned a major codification and modification of Hindu law, enacting in 1955–56 a series of statutes known collectively as the Hindu Code.³¹ These acts modified the Anglo-Hindu law in important ways. They abandoned the *varna* distinctions, the indissolubility of marriage, the preference for the extended joint family, and for inheritance by males only and by those who can confer spiritual benefit.³² In their place the new law emphasized the nuclear family, introduced divorce, and endorsed the equality of *varnas* and sexes.³³ Very few rules remained with a specifically religious foundation.

The Hindu Code was in large measure tutelary;³⁴ it mirrored "the values of [the] governing groups rather than those of . . . the congeries of communities that make up Hinduism."³⁵ While diluting if not effacing the traditional *dharma* basis of Hindu law, the Hindu Code rearranged the relationship between the state and religious authorities. It marked the acceptance of the Indian Parliament as a kind of central legislative body for Hindus in matters of family and social life.³⁶ It discarded the notion, prevalent during the British period, that government had no mandate or competence to redesign Hindu society.³⁷ In contrast to earlier times when the absence of centralized governmental

or ecclesiastical institutions rendered general or sweeping reforms impossible, the modern Indian state could now accomplish across-the-board changes.

While retaining the personal law system, independent India introduced a note of voluntarism. The Special Marriage Act of 1872 had provided a code of general law under which couples could choose to marry and divorce, but in order to utilize this option they had to affirm that neither was a Christian, Jew, Hindu, or Muslim.³⁸ In effect they had to renounce their religious and property relations with their families. In 1954, Parliament passed a new Special Marriage Act that eliminated the onerous renunciatory costs of availing of civil marriage.³⁹

India retains a system that governs certain family matters of Hindus, Muslims, Parsees, and Christians by their respective religious laws. There is also a set of religiously differentiated public laws regulating religious endowments. While personal law in India covers issues of adoption, succession, and religious institutions,⁴⁰ marriage and divorce are the main focus of public attention. Twelve pieces of national legislation deal with particular issues of marriage and divorce for the various religious groups in the country.⁴¹ The administration of these personal laws in India remains in the hands of state judges.

We submit that India's personal law system is not associated with much conflict within the several religious communities. Political conflict in India over personal law appears more prevalent between, rather than within, religious communities. This is not to say, however, that *intra*-religious dissension is entirely absent in India. Debate about women's rights in their respective personal law systems is present within the Hindu, Christian, and Muslim communities. Many Hindu women who champion equal rights for women support drastic reforms within (if not a complete abandonment of) Hindu personal law.⁴² Many Indian Christian women, similarly, struggle and protest against the obstacles Christian personal law poses for women who seek divorce.⁴³ And there is a series of feminist critiques of Muslim law's treatment of women in divorce and maintenance.⁴⁴

This *intra*-religious conflict, however, is overshadowed by the tensions between religious communities in India. Consider the current debate over whether or not India should adopt a uniform civil code and thereby abolish the various personal laws. Proponents of a uniform civil code (who typically are Hindus) point to Articles 14 and 15⁴⁵ of the Indian Constitution as well as to Article 44 as evidence that the "uniform civil code . . . [is] an ideal towards which the state should strive."⁴⁶ The Bharatiya Janata Party, the principal party in the ruling coalition at present, has been a supporter of a uniform civil code over the past

eight years. During the 1996 and 1998 national election campaigns, the BJP, according to some observers, even made the enactment of a uniform civil code a tenet in its platform.⁴⁷ (Since coming to power in the spring of 1998, however, the BJP has not initiated any formal legislative proposals to alter the existing personal law structure.⁴⁸)

On the other hand, opponents of a uniform civil code (typically members of the minority religious communities) argue that the framers respected the fact that various religious communities deeply identified with their own personal laws and never intended for the country to implement one set of rules and regulations for its diverse population.⁴⁹ Many also contend that if a uniform civil code were adopted, the new laws would reflect the concerns of the majority Hindu population.⁵⁰

Shah Bano

The fear that a uniform civil code would jeopardize the rights and integrity of minority religious communities manifested itself dramatically in response to the Indian Supreme Court's best-known and arguably most important decision on personal law—the now famous *Shah Bano* case.⁵¹

The story begins in 1975 with a Muslim woman, Shah Bano, who after forty-three years of marriage found herself divorced by her husband Mohammad Ahmed Khan.⁵² In accordance with Islamic law, the divorce was performed by the procedure of *talaq*—that is the husband declaring (three times) that he ends the marriage.⁵³ Shah Bano had been a housewife who was financially dependent on her husband throughout the duration of the marriage.⁵⁴ With the marriage now ended, Shah Bano was left with no means to support herself. She sued her former husband for not providing her with adequate maintenance after the divorce under Section 125 of the Indian Code of Criminal Procedure. Section 125 states that maintenance, up to a maximum of five hundred rupees a month, must be provided for a former spouse who otherwise would be destitute.⁵⁵

Shah Bano filed her case in a lower court in the state of Madhya Pradesh, where a magistrate ruled that her ex-husband was required to pay a continual monthly maintenance payment of twenty-five rupees a month (at that time about four American dollars).⁵⁶ Shah Bano, disheartened at the paltry amount awarded to her, appealed to the Madhya Pradesh High Court, which in 1980 ruled that the payment should be increased to approximately one-hundred eighty rupees.⁵⁷ Following this judgment, Mohammad Khan (a lawyer by profession) appealed to the Indian Supreme Court, reiterating the argument he made in the lower

courts: that because he satisfied Section 127 of the Indian Code of Criminal Procedure, Section 125 did not apply to him. Section 127 states that Section 125 shall not apply where a divorced woman "has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law, applicable to the parties, was payable on such divorce."⁵⁸

Mohammad Khan contended that under Muslim personal law he had paid the "whole" sum to Shah Bano, and that as a result, he owed her no further payment.⁵⁹ Because he had paid Shah Bano a dower (*mahr*) of three thousand rupees prior to their marriage as well as having financially supported her for a three-month period after their divorce (*iddat*), Mohammad Khan claimed that he was no longer obliged to maintain his former wife.⁶⁰ Furthermore, Mohammad Khan disputed an additional argument made by Shah Bano that the Qur'an required, at the very least, that she receive a *mataa*, or a lump-sum payment made by the divorcing husband signifying the end of the marriage.⁶¹ According to Mohammad Khan, *mataa* payments had to be made only by those who were considered pious in the eyes of Allah (*muttaqeena*). This was a personal description he claimed did not apply to him.⁶²

The Supreme Court, in a bench comprised of Justices Chandrachud, Desai, Venkataramiah, Chinnappa Reddy, and Misra, affirmed the Madhya Pradesh High Court ruling and held that Mohammad Khan was still responsible to his former wife for maintenance payments.⁶³ Justice Chandrachud, writing for the Court, rejected Mohammad Khan's interpretation of Muslim personal law. Relying on its own research and understanding of the *Shari'at*, the Court opined that the principles of Islam, in fact, require that a husband not "discard his wife whenever he chooses to do so,"⁶⁴ without first ensuring that she is financially secure.

The Supreme Court's arrogation to itself of the power to ascertain authentic Islamic law understandably elicited great anger within the Muslim community.⁶⁵ Among many Muslims, there was a perception that the *Shah Bano* judgment marked the beginning of the end of Muslim personal law in India.⁶⁶ Rather than judicially balancing the general law against the personal law and then selecting the former as the basis for its decision, the Supreme Court's attempt to interpret the *Shari'at*, according to some observers, seemed to be a deliberate move to subvert Muslim personal law in favor of the primarily Hindu-based Indian Code of Criminal Procedure.⁶⁷

Two earlier Supreme Court cases, involving facts similar to *Shah Bano*, did not arouse the type of hostile reaction among Muslims that was seen in 1985. In *Bai Tahira v. Ali Husain Fissalli*⁶⁸ and *Fazlunbi v. K. Khader Vali*,⁶⁹ the Court twice upheld the rights of divorced Muslim women to receive maintenance for a period beyond *iddat*. Why was there

no uproar by the Muslim community to either of these decisions? Perhaps the reason lies in the fact that the author of these two judgments, Justice Krishna Iyer, judiciously weighed the personal law against Section 127 of the Code of Criminal Procedure to arrive at decisions that appear to have been accepted and respected by the opposing parties. As Madhu Kishwar notes, Krishna Iyer resists making any normative judgment about the *Shari'at*, and in fact, "not once in the *Bai Tahira* judgment does he even mention the word 'Muslim.'"⁷⁰

Following the *Shah Bano* decision, the Muslim lobby forced Prime Minister Rajiv Gandhi to push through the Muslim Women's Protection Act of 1986 which overturned the Court's decision and reinstated Muslim law, at least as previously understood.⁷¹ Not surprisingly, "Rajiv's Law" further aggravated the conflict between many Hindus and Muslims over whether or not the country should impose a uniform civil code for all Indian citizens.⁷² In fact, just recently the Bombay High Court ruled that "Rajiv's Law" actually entitles a divorced Muslim woman to maintenance payments for her "entire future."⁷³ Some observers predict that this Bombay judgment will rekindle the types of tensions between Hindus and Muslims similar to those seen after the 1985 *Shah Bano* decision.⁷⁴

There are other examples of inter-religious tensions over personal law questions as well. For example, Indian Parsees argue that without separate personal law systems, the result would be a uniform civil code that would inevitably reflect mainly Hindu interests.⁷⁵ Many Christians also fear that their status and autonomy as a minority community may be in jeopardy without separate personal laws.⁷⁶ Christians in the state of Kerala are especially sensitive to this issue, as indicated by their reaction to a 1986 decision by the Supreme Court. In *Mary Roy v. State of Kerala*, the Court held that a 1916 statute known as the Travancore-Cochin Christian Succession Act violated women's constitutional rights to inherit property.⁷⁷ Christian protesters attacked this ruling as part of an effort to undermine a legitimate minority community.⁷⁸ Arguably, the current wave of violence against Christians may deepen this community's worries that without established personal laws their constitutionally recognized status might eventually fade, and that they may lose their identity as well as their ability to practice their religion freely.⁷⁹

India: The "Second" Set of Personal Laws—Affirmative Action Benefits

In addition to its "traditional" personal law, India has a new body of rules which are a cousin to the personal laws and are also applied on the basis of personal identity; we might call this India's "second" system of

personal law. Since independence, India has pursued a wide array of policies of preferential treatment intended to benefit disadvantaged caste and tribal groups.⁸⁰ These policies of "compensatory discrimination" include legislative set-asides, reserved places in government services, reserved educational admissions, scholarships, and other special benefits.⁸¹ These benefits are for groups traditionally considered as "untouchables," who are classified as Scheduled Castes, and for tribal groups categorized as Scheduled Tribes. They constitute, respectively, some 15 percent and 7 percent of the population.⁸² An even larger set of groups designated as Other Backward Classes (OBCs) are included within some of the reservation and benefit schemes; the vast bulk of these potential beneficiaries are Hindus.⁸³

In the area of this "second" personal law, there is conflict on two levels. First, at the collective level, there is controversy over which groups are entitled to enjoy such benefits. Although the main contours of compensatory discrimination policies are determined by legislators, their decisions about which groups will be included as beneficiaries have frequently been reviewed by the courts, who have developed a jurisprudence of group standing and boundaries that draws on the jurisprudence of the personal law.⁸⁴

Since its founding, the Supreme Court has been active in defining which groups qualify as OBCs. In *Venkataramana v. State of Madras*,⁸⁵ the Court ruled that underprivileged caste groups could be considered within the OBC category. In *Balaji v. State of Mysore*,⁸⁶ the Court, while condemning the use of caste as a means of classification for state reservations, nevertheless upheld the legislature's method of categorization on the basis of caste identity. Other cases from this period also demonstrate the Court's willingness to shape the parameters of the OBC category. In *Chitrallekha v. State of Mysore*,⁸⁷ the Court reaffirmed the central tenet of *Balaji*, but qualified that decision by stating that factors apart from caste also must be considered.

The Supreme Court, more recently, has continued to maintain a similar approach. In a landmark 1992 decision (*Indra Sawhney v. Union of India*), the Court upheld the central government's response to the Mandal Commission report. The Mandal Commission was established by the Janata Party-led government following the defeat of Indira Gandhi's Congress Party in 1977. The purpose of the Commission, led by a retired civil servant named B. P. Mandal, was to ascertain which groups should be deemed backward classes and how to improve their socio-economic conditions.⁸⁸ In 1980, the Commission issued its report, in which it proposed affirmative action programs for a majority of India's population on the basis of their membership in lower castes. It

called for the reservation of 27 percent of central government positions as well as seats in higher educational institutions for members of these groups.⁸⁹

After a decade of lying dormant, the Commission's report was revived by Prime Minister V. P. Singh in 1990. In attempting to implement the report, Singh faced strong opposition both at the government and grassroots levels.⁹⁰ In response to a constitutional challenge to the government's implementation of the Mandal Commission report, the Supreme Court in 1992 ruled, in a nearly three-hundred-page opinion, that the state indeed had the prerogative to set aside government posts and educational seats on the basis of a group's caste status, so long as other factors were considered as well.⁹¹ The Court ruled that Article 16 (4) provides the state with constitutional authority to continue pursuing compensatory discrimination schemes.⁹²

Affirmative action benefits, thus, can be conferred on the basis of membership in designated groups. But courts are also confronted with cases where they must decide which individuals are members of the designated groups and therefore eligible for preferences. In these cases, judges face determinations of individual identity that closely resemble the questions of identity implicated in the administration of the personal law. For example, there has been an ongoing question over whether or not "untouchable" Hindus (*dalits*) who convert to Christianity should continue to qualify for compensatory discrimination benefits.⁹³ The courts have ruled fairly consistently that converts cannot claim such benefits.⁹⁴ "The general rule, is conversion [by an individual] operates as an expulsion from the caste. . . . [A] convert ceases to have any caste"⁹⁵ and thereby any grounds to claim compensatory discrimination benefits. The difficulty these "Christian *dalits*" have in obtaining benefits is particularly troubling for leaders in the Indian Christian community. As Dr. Godfrey Shiri, associate director of the Christian Institute for the Study of Religion and Society (CISRS), notes, "just because these dalits are now Christians does not mean their socio-economic status has improved."⁹⁶

In an interesting elaboration on the conversion theme, however, the Supreme Court has ruled that converts to Christianity who reconvert back to Hinduism may qualify for compensatory discrimination benefits upon acceptance by that group.⁹⁷ Where an individual who otherwise would not qualify for compensatory discrimination benefits marries into a lower caste that is eligible for such preferences, the courts have ruled that sometimes (but not always) membership in the lower-caste group may be acquired by acceptance by the group.⁹⁸ Where an otherwise ineligible individual is adopted into a family that qualifies for

benefits, however, the courts have considered other factors, including the adoptee's lifestyle prior to being adopted, instead of whether or not there is community acceptance.⁹⁹

In 1996, the Supreme Court ruled that when an individual who enjoyed an "advantageous start in life" as a member of a "forward group" converts, marries, or is adopted into a group eligible for reservations, that individual does not become eligible for the benefits to which members of the group are entitled.¹⁰⁰

[w]hen a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also undergo same handicaps, be subject to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in forward caste and had march of advantageous life but is transplanted in backward caste by adoption, marriage or conversion does not become eligible to the benefit of reservation.¹⁰¹

Judicial decisions about personal identity in the area of compensatory discrimination are influenced by, although do not necessarily conform to, the doctrines that prevail in the traditional personal law. Clearly, the "second personal law" in India remains highly salient and is slated to grow as affirmative action policies become more nuanced and more contested.¹⁰²

Personal Law in Israel: Division within Religious Communities

In spite of this "second" personal law, most of the conflict over traditional personal laws in India is between religious communities. By contrast, conflict over the application of personal law in Israel occurs mainly within the majority religious community. Israel is a curious democracy. On the one hand, it was founded in order to be the national homeland of the Jewish people.¹⁰³ Judaism is not a state religion, but the state recognizes a special relation to it. As Martin Edelman observes, "religion in Israel is virtually synonymous with [Judaism, in particular] Orthodox Judaism."¹⁰⁴ On the other hand, Israel prides itself on treating all religious communities in a fair and equitable manner. While some 80 percent of the population is Jewish,¹⁰⁵ the state attempts actively to protect the religious freedom of the nearly one million non-Jewish Israeli citizens.¹⁰⁶

In comparison to India, Israel exemplifies an entirely different system of administering personal law. The Israeli personal law structure de-

scends from the *millet* system of the Ottoman Empire.¹⁰⁷ Under the *millet* system, each of the communities in the Empire—such as the Greek, Armenian, Jewish, Muslim, and Druze communities—had its own set of courts.¹⁰⁸ These courts were staffed by scholars of religious law who were empowered to apply their law to the respective communities. In instances of inter-communal conflict, matters were relegated to government courts. Since Islam was "the official religion of the Ottoman Empire,"¹⁰⁹ it was not uncommon for these courts to apply the *Shari'at*. The *millet* system conferred on the rabbinical courts full authority over all disputes among Jews,¹¹⁰ including marriage and divorce, as well as maintenance, inheritance (succession), guardianship, legitimation, incompetency, adoption, and burial.¹¹¹

With the arrival of the British Mandate, the rabbinical courts saw their jurisdictional authority shrink. The British administration of mandatory Palestine (1918–1948) established government courts (again in the common law style), but retained the *millet* system in matters of marriage, divorce, alimony, and succession.¹¹² Each of the religious communities had a court staffed by religious authorities who applied their respective religious laws.

When Israel achieved independence in 1948, there was a further transformation of the *millet* system. In a deal, known as the "status quo" agreement, struck between the secular Zionist government of David Ben Gurion and the religious parties of the time, it was agreed that the government would maintain the existing patterns of publicly enforced religious observance and recognition of religious authority.¹¹³ The Israeli government, specifically, opted to maintain the general system of allowing religious groups to retain their respective religious laws to govern certain matters relating to the family. Later, in 1953, the status quo agreement was narrowed by the Knesset; rabbinical courts retained a monopoly only to regulate marriages and divorces.¹¹⁴

The present situation in Israel is that some questions within the "traditional" ambit of personal law are determined by religious judicial institutions while others are determined by state judicial institutions. This legal division does not ameliorate the social division within the Jewish population, for many Orthodox Jews believe that all personal law matters should be handled by rabbinical courts, while secularists and non-Orthodox Jews resent being subject to any Orthodox rabbinical control, particularly in matters of vital concern such as marriage and divorce.¹¹⁵

All Jews—regardless of whether or not they are Orthodox—fall under the jurisdiction of the rabbinical courts in matters of marriage and divorce.¹¹⁶ In matters of marriage and divorce, there is no civil

law for Israeli Jews.¹¹⁷ Jews wishing to marry in Israel must seek the approval of the rabbinical courts that apply Jewish religious law, or *Halachah*.¹¹⁸ Some observers note that since 1947 the rabbinical courts have interpreted the *Halachah* more strictly than before the creation of the state.¹¹⁹

What specifically is it about adhering to the *Halachah* and the authority of rabbinical courts that many non-Orthodox Jews find so objectionable? For one thing, in order for Jews to be married in Israel, the rabbinical courts must find that both the man and the woman are, in fact, Jews. The rabbinical courts thus prohibit marriage between a Jew and a non-Jew.¹²⁰ In order to be deemed a Jew, the individual must prove that he or she is a child of a Jewish mother, or that he or she was converted in a ceremony recognized by the rabbinical court.¹²¹ Oftentimes, however, proving that an individual's mother was Jewish or securing agreement that a conversion conformed to the *Halachah* is not so simple a task.¹²²

The rabbinical courts also bar *mamzerim* (Jews born of adulterous unions) from marrying Jews other than other *mamzerim*.¹²³ Jewish couples whose marriage ends without the approval of the rabbinical court are forbidden to re-marry. Jewish women who commit adultery are not permitted to divorce and marry the individual with whom they are having the adulterous relationship. Jewish law forbids *kohanim* from marrying divorcées.¹²⁴

The imposition of such marital restrictions by the rabbinical courts pushes many Israeli Jews to marry outside the country. (Valid marriages performed outside Israel are recognized as legitimate by the Israeli government according to principles of private international law.¹²⁵) Obviously, traveling abroad for marriage entails considerable trouble and expense. Much of the non-Orthodox community holds the rabbinical courts in contempt for causing them to incur such problems.

The hostility the non-Orthodox feel is not confined to the rabbinical courts wielding such power over Jewish marriages; the non-Orthodox are quite angry because these courts also control the process of divorce.¹²⁶ While divorce is allowable by Jewish law, rabbinical courts strongly favor preserving marriages. As observers note, contemporary rabbinical courts allow women to obtain divorces on many more grounds than in previous times.¹²⁷ But in form, the divorce is achieved only when the husband renounces the wife by delivering to her (under the supervision of a *bet din*, or rabbinical court) a *get* (divorce decree).¹²⁸ Rabbinical courts insist that the husband actually deliver a *get* to his wife in order to finalize a divorce.¹²⁹ Where a wife receives approval from the rabbinical courts to divorce her husband, but the husband refuses to

grant a *get*, the rabbinical courts will not decree a divorce. Under Israeli state law, the wife may ask the Attorney General to demand that the husband appear in front of (state) district court to explain why he refuses to grant the *get*.¹³⁰ If the district court is dissatisfied with the husband's response, it can order the husband jailed until he delivers the divorce decree to the wife.¹³¹ Sometimes the district court declines to jail the husband, and even if the husband is jailed, a *get* might still not be issued to the wife.¹³² What results, then, is that the wife is left to live her life as an *agunah* (literally a "tied" woman). She cannot re-marry under Jewish law,¹³³ and if she were to do so under some other legal provision (say by obtaining a foreign civil divorce recognized in Israel), her children would be deemed *mamzerim* by the rabbinical courts. In light of these problems, it is not surprising that sentiment for revamping marriage and divorce laws exists in the non-Orthodox community within Israel.

The fact that Orthodox rabbinical courts possess the authority to decide "who is a Jew" for the purposes of marriage, as well "who may divorce," provides this religious institution with the capacity to shape the social identities of many Israelis. Individuals who have always thought of themselves as Jewish may learn that, in the eyes of the *dayyanim*,¹³⁴ they are actually not Jews. Women, likewise, who wish to end a marriage but are unable to do so are disabled from re-marrying or starting new families.¹³⁵

The rabbinical courts are not the only legal institution that affects Jewish identity in Israel. State courts, too, play an important and, according to many in the Orthodox community, a damaging role in many aspects of Jewish life. As previously stated, prior to the creation of the state, the personal law jurisdiction included a number of matters in addition to marriage and divorce. For centuries these matters, and matters more generally relating to Jewish identity, were within the domain of the rabbi. But as Martin Edelman notes, since 1953 the state has reduced the jurisdiction of the rabbinical courts and allowed non-religious state courts to decide on many of these "personal laws" as well as on laws that more broadly affect "who is a Jew."¹³⁶ Those within the religious community see both types of involvement by state courts as a violation of the "status quo" agreement, and as contributing toward the further division of the Jewish people.

The encroachment by state courts upon the "turf" of rabbinical courts dates back to the 1960s. In the famous *Brother Daniel* case,¹³⁷ the Israeli Supreme Court decided in 1962 that it, not the rabbinate, would dictate who could qualify as a Jew for purposes of the country's "Law of Return."¹³⁸ "Who is a Jew?" thus was decided by a state, not reli-

gious, institution. Determinations of Jewish identity for application of public law resemble the "second personal law" of group identity that has arisen in the Indian setting.

In theory, "[i]n both its appellate and general equity capacities, the Supreme Court of Israel can consider matters relating to the various religious court systems only with regard to the *jurisdiction* of those courts to resolve a particular matter."¹³⁹ Nevertheless, the Supreme Court continues to venture into legal terrain that many within the Orthodox community believe is beyond the Court's domain. In early 1999, the Court was sharply attacked by ultra-Orthodox Jews who were upset not only with the Court's intervention in matters relating to marriage and divorce, but also with its involvement in other "second personal law" questions of Jewish identity.¹⁴⁰ The ultra-Orthodox were particularly angered by seventeen recent decisions that, in their view, undermined Judaism.¹⁴¹ Since the Court is rarely subject to public challenge, the recent attacks on the Court by the ultra-Orthodox have been of grave concern to many in the government.

The tension between the Orthodox and non-Orthodox communities in Israel is a complicated issue. One thing, though, is certain: each side believes that the other is contributing to the "decay"¹⁴² of Jewish society. The internal conflict is mirrored in the dual legal system within the country, in which certain questions of personal law and Jewish identity are decided by religious courts while others are decided by state courts. Abolishing this dual system would further anger and alienate the Orthodox side. Many Muslims and Christians would also oppose such a change. Even if it were politically feasible, which it is not at the moment, further abridgment of the power of the rabbinical courts is fraught with danger to the already strained fabric of civil life in Israel.

We have described how two personal law systems operate within two different religiously plural societies. We note six major differences that exist between the Indian and Israeli situations.

First, there is a difference in the location of the personal law courts. In Israel, personal laws are administered by qualified religious specialists in courts that are part of, or attached to, religious institutions. By contrast, in India, personal law is applied by common-law-trained judges in the regular state courts.

Second, both the Indian Supreme Court and the Israeli Supreme Court (especially in its capacity as the High Court of Justice) have intervened actively in human rights and public interest cases.¹⁴³ While the Supreme Court of India has been quite active in advancing the rights of

many sorts of public interest claimants,¹⁴⁴ Indian judicial activism has not, with rare exceptions, addressed questions of personal law. In Israel, on the other hand, the personal law area has been an important site of judicial activism.¹⁴⁵

Third, each country's personal law system contributes to different lines of conflict. In Israel, the rabbinical courts lend themselves to monopolistic control by more traditional elements unrepresentative of the wider Jewish community and are bitterly resented and resisted by a large segment of their constituents. In response, the rabbinate and its backers adopt a more rigidly orthodox stance and resist more adamantly any alteration of their status vis-à-vis the state.

By contrast, India's state-applied personal law system seems more resistant to traditionalizing elements and less provocative of conflict, at least among the Hindu population. The rise of the "second" personal law adds an element of conflict within the majority Hindu community, but this type of conflict remains overshadowed by the conflict between the country's differing religious communities.

A fourth major difference is the salience of the determination of membership in the majority community. In India, there is a general willingness on the part of Hindus to be expansive and inclusive; there is a lack of interest among Hindus in defining the details or boundaries of membership. In Israel, on the other hand, "who is a Jew" and who gets to decide who is a Jew are major foci of polarizing controversy.

This contrast is reflected in a fifth major difference regarding the way in which the majority religious law is seen to inform the character of the state. Although India has a sizable Hindu nationalist movement, there is no evident support for the restoration of traditional Hindu law.¹⁴⁶ Indeed, Hindu nationalists propose abolishing separate personal laws in favor of a general uniform law in matters relating to the family—and thus dissolving "Hindu law" as a living legal category. Although this position is asserted aggressively toward Muslims, it also amounts to an assertion that Hindu identity can be vouchsafed through the vehicle of the Indian state without specifically embracing the *dharmashastra* or empowering its exponents.

In Israel there is certainly disagreement over "who is a Jew," "who should decide whether or not an individual is a Jew," and "how much of a role Judaism should play in the Israeli state." But there is a general sentiment among the public that Israel should always remain the exclusive homeland of the Jewish people, that the state should be infused with a distinctive Jewish character, and that the Jewish law should be maintained and promoted by the state. As Martin Edelman puts it, "the

controversy is about the *way* the status quo agreement is implemented, not about the basic arrangement itself."¹⁴⁷

A final difference relates to the types of human rights and freedoms Indians and Israelis enjoy vis-à-vis their respective personal law systems. Both personal law systems offer their constituents what we might call a "comfortable shoe" brand of freedom. They are presented with a single, inalterable set of legal rules, but one that is an expression of a valued religious identity. For many or most of their constituents, the opportunity to have these doctrines and principles applied to them is embraced as valuable in itself. In both India and Israel, substantial populations uncomplainingly accept this personal law regime as giving them freedom to live as they wish. But personal law systems also may offer another sort of freedom by offering their constituents choices among alternative sets of rules. For instance, Indians can, in some circumstances, choose between religious-based marriage law and the law provided by the Special Marriage Act. This "menu" type of freedom is less available to citizens of Israel, where there is no escape from the legal monopoly of the various religious communities.¹⁴⁸

Some scholars have proposed that one way to solve the tension between a system of personal laws and a democracy committed to equality is to introduce or enlarge the voluntary element in the personal law.¹⁴⁹ But by adding this menu feature, the state would elevate individual autonomy over group identity.¹⁵⁰ For many Muslims in India and for Orthodox Jews in Israel, expanding or introducing a system of voluntarism would shatter the sense that obligatory religious law is the defining feature of their collective sense of being. These groups view mandatory personal law as crucial for maintaining group identity, solidarity, and a continued existence. Thus the "comfortable shoe" and "menu" freedoms represent incompatible principles of human freedom. So, for most Indian Muslims and for Orthodox Jews in Israel, personal law trumps claims based on individual autonomy, while for most Hindus and non-Orthodox Jews (both of whom are the majority groups in their respective societies), these autonomy claims trump personal law.

We started with the notion that India and Israel represented distinct styles of administering personal law. We do not wish to suggest that such styles are unchanging and fated forever to run in parallel without any convergence. The career of the personal law in our two countries suggests otherwise. Although secularism, formally enshrined as an element of the Indian state, has been under attack from many quarters,¹⁵¹ there is at least a slight leaning toward dissolution of the personal law system in favor of uniform territorial law, together with a "secularization" or de-sacralization of the law of the largest community, and there

is no indication of any inclination to devolve the administration of personal law to the religious communities. In Israel, we see movement, fiercely resisted, from administration by religious authorities to administration by the state and a more pronounced movement toward more state supervision of what remains within the ambit of the religious courts (at least the Jewish ones). Like India, Israel seems to be moving in the direction of secularization or de-sacralization.

We may gain some perspective on these shifts from consideration of India's twin, Pakistan, which started in 1947 with the same personal law regime as India's. Pakistan's divergence from India flows from a characteristic that it shares with Israel. Pakistan and Israel are the only post-colonial new nations that were established to be religious homelands, respectively for the Muslims of the subcontinent¹⁵² and for the Jews of the world. (In each case less than half of the group actually lives in the homeland.) Each nationalist movement put forth claims in the name of a religion that emphasizes the legal ordering of social life.¹⁵³ Yet in each case the state was founded by secular modernizers and at first regarded askance by traditional religious formations.¹⁵⁴ In Israel, the founders reconciled themselves to incorporating religious law and its traditional expositors in some sectors, but the scope of religious courts has been narrowed by the state and its courts. In Pakistan, unlike Israel, we see movement in the opposite direction—from state-administered personal law toward an expanded guidance of personal law and of public law by traditional religious expositors.¹⁵⁵

Why has Pakistan moved toward de-secularization and sacralization of public life, while Israel and India have moved in the opposite direction? The contrast between Israel and Pakistan is stark: in Israel the majority of Jews are comfortable with modernity and want to confine religion to a restricted sphere of operation. The minority that wants to preserve or intensify religious control has a disproportionate say due to the electoral system in which cohesive minorities can demand concessions as coalition partners. In India, even with a "Hindu nationalist" government, we see no push for Hinduization of the law; indeed we see an undiminished willingness to attenuate further the connection of Hinduism, in its *dharmashastric* sense, with the law. In Pakistan, on the other hand, those who would separate religion from public life are a minority; the mainstream of politics has generated mass support for Islamicization and stifled opposition to it.¹⁵⁶ Why does India resemble Israel rather than Pakistan in turning away from the sacralization of personal law? Furthermore, how do we explain why the majority group in Pakistan resembles the insecure minorities we find in Israel and India? We leave these questions for another day.

Notes

1. Marc Galanter, "The Displacement of Traditional Law in Modern India," in *Law and Society in Modern India* (Oxford: Oxford University Press, 1989); Asher Arian, *The Second Republic: Politics in Israel* (Chatham: Chatham House Publishers, 1998), pp. 24-26.
2. Stanley Wolpert, *A New History of India* (Oxford: Oxford University Press, 1997), pp. 149-186; Arian, *The Second Republic*, p. 23; John L. Esposito, *Islam and Politics* (Syracuse: Syracuse University Press, 1991).
3. For an old, but still relevant, book on modernity in India, see Lloyd Rudolph, *Modernity of Tradition* (Chicago: University of Chicago Press, 1967); also see S. P. Gupta, *Modern India and Progress in Science and Technology* (New Delhi, Vikas, 1979); T. P. S. Nair (editor), *Modern India, Society and Politics in Transition* (New Delhi: Inter-India Publications, 1988); Yael Yishai, "Civil Society in Transition: Interest Politics in Israel," *The Annals of the American Academy of Political and Social Science* (1998), vol. 555, pp. 147-62.
4. For a discussion on the Haskalah, see Jacob Katz, ed., *Toward Modernity: The European Jewish Model* (New Brunswick: Transaction Books, 1987); Saul Goodman, ed., *The Faith of Secular Jews* (New York: Ktav Press, 1976). For a discussion on the Hindu renaissance and a literary review of important writers in this area, see David Miller, "Modernity in Hindu Monasticism," *Journal of Asian and African Studies* (1999), vol. 34, pp. 111-26.
5. Paul R. Brass, *Riots and Pogroms* (New York: New York University Press, 1996); David Landau, *Piety and Power: The World of Jewish Fundamentalism* (New York: Hill and Wang, 1993); Laurence Silberstein (editor), *Jewish Fundamentalism in Comparative Perspective* (New York: New York University Press, 1993).
6. Sunil Khilnani, *The Idea of India* (London: Hamish Hamilton, 1997), pp. 194-95; Arian, *The Second Republic: Politics in Israel*, pp. 28-41.
7. Wolpert, *A New History of India*, pp. 347-49; Arian, *Second Republic*, pp. 24-27.
8. Atul Kohli, "India," in Mark Kesselman, Joel Krieger, and William Joseph, eds., *Comparative Politics at the Crossroads* (Lexington: D. C. Heath, 1996), pp. 472-73; Samuel Krislov, "Israel," in W. Philips Shively, ed., *Comparative Governance* (New York: McGraw-Hill, 1997), p. 328; Deborah Sontag, "Barak Creates Wide Coalition with 7 Parties," in *The New York Times* (Internet edition), July 1, 1999.
9. Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), pp. 71-89; Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), pp. 164-84; H. E. Baker, *The Legal System of Israel* (Jerusalem: Israel University Press, 1967), pp. 197-

- 207, 232-43; Martin Edelman, *Courts, Politics, and Culture in Israel* (Charlottesville: University of Virginia Press, 1994), p. 46.
10. J. D. M. Derrett, *Essays in Classical and Modern Hindu Law* (Leiden: Brill, 1978), vol. 4, pp. 18-20; Izhak Englard, *Religious Law in the Israeli Legal System* (Jerusalem: Hebrew University), pp. 33-46.
11. For the most part, we focus on how personal laws affect the major religious community in each country: the Hindu community in India and the Jewish community in Israel. Because of the way the personal law system in India is structured, we see significant conflict between Hindus and Muslims. Hence, we devote some time to discussing how personal law in India affects not only the Indian Hindu community but also the Indian Muslim community. In Israel, because there is not the same degree of conflict between the various religious communities over issues involving personal status, we focus only on the country's majority Jewish population. The recognized minority religious communities in Israel are granted great autonomy to administer personal law matters. For example, the largest religious minority in Israel is the Muslim community. Muslims make up nearly 80 percent of the non-Jewish population, and this community is left almost entirely alone to handle issues relating to personal status. There are Muslim courts of first instance in which Muslim judges (*qadis*) apply Muslim law (*Shari'at*) to personal law cases. There is also a *Shari'at* court of appeals in Jerusalem. (There is no 'ulama' or set of formal religious scholars who are affiliated with religious institutions in Israel. Nor is there a community of *muftis* or religious specialists in Islamic law. Thus, *qadis* are the main authorities who interpret and apply the *Shari'at* in Israel.) These Muslim courts are left to deal with various personal law issues including: dower for brides-to-be; maintenance for divorced women; unilateral divorces by men (*talaq*); and succession. The *qadis*, moreover, have a significant impact on these four areas. With respect to the first two issues, evidence indicates that the *qadis* have encouraged the curtailing of dower and promoted equitable maintenance payments to divorced women. With respect to the last two issues, evidence suggests that the *qadis* have been unwilling to abolish completely the practice of *talaq* and that women still have yet to be given the same rights to inherit as men. For further information on Muslim courts, see: Edelman, *Courts, Politics, and Culture*, pp. 77-88; Aharon Layish, *Women and Islamic Law in a Non-Muslim State: A Study Based on Decisions of Shari'a Courts in Israel* (New York: John Wiley & Sons, 1975); Nathan Brown, "Sharia and State in the Modern Muslim Middle East," *International Journal of Middle East Studies* (1997), vol. 29, pp. 359-76; Yitzhak Reiter, *Islamic Institutions in Jerusalem: Palestinian Muslim Organization under Jordanian and Israeli Rule* (Boston: Kluwer Law International and Jerusalem Institute for Israel Studies, 1997); Abdur Rahman I. Doi, *Shari'ah and the Islamic Law* (London: Ta Ha Pub., 1984); John L. Esposito, *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 1982); Amira El Azhary Sonbol, *Women, the Family, and Divorce in Islamic History* (Syracuse: Syracuse University Press, 1996).

12. Edouardo Vitta, *The Conflict of Laws in Matters of Personal Status in Palestine* (Tel Aviv: S. Bursi, 1947), p. 14.
13. M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford, Clarendon Press, 1975); John H. Mansfield, "The Personal Laws or a Uniform Civil Code?" in Robert Baird, ed., *Religion and Law in Independent India* (New Delhi: Manohar Publishers, 1993), p. 139; M. P. Jain, *Outlines of Indian Legal History* (Bombay: Tripathi, 1981), pp. 369-70, 393-94.
14. Edelman, *Courts, Politics, and Culture*, pp. 52-53; Mansfield, "Personal Laws," p. 144; for more on the jurisdiction of personal law see: Galanter, "The Displacement of Traditional Law in Modern India," in *Law and Society*; J. D. M. Derrett, *Religion, Law and State in India* (London: Faber & Faber, 1968); Derrett, *Essays in Classical*; Tahir Mahmood, *Muslim Personal Law, Role of the State in the Indian Subcontinent* (Nagpur: All-India Reporter, 1983); Tahir Mahmood, *Personal Laws in Crisis* (New Delhi: Manohar, 1986); Rajeev Dhavan, "Religious Freedom in India," *American Journal of Comparative Law* (1987), vol. 35, pp. 209-54; Izhak Englard, "Law and Religion in Israel," *American Journal of Comparative Law* (1987), vol. 35, pp. 125-208.
15. Mansfield, "Personal Laws," pp. 148-57.
16. *Ibid.*, pp. 173-74.
17. Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," *Human Rights Quarterly* (1994), vol. 16, pp. 277-99.
18. *Ibid.*, p. 285.
19. *Ibid.*, pp. 277-99.
20. Mansfield, "Personal Laws," pp. 146-47.
21. Mahmood, *Personal Law in Crisis*, pp. 42-43; Galanter, "The Displacement of Traditional Law in Modern India," *Law and Society*.
22. Bengal Regulation of 1772. By 1793, the language was amended to 'Mohamadan Laws' and 'Hindu Laws.' Regulation IV of 1793, Section 15.
23. Mansfield, "Personal Laws," p. 163.
24. *Ibid.*
25. Derrett, *Religion, Law and State in India*, pp. 274-320.
26. On the transformation of Indian personal law, see Galanter, "The Displacement of Traditional Law in Modern India," in *Law and Society*; Derrett, *Religion, Law and State in India*, pp. 274-320.
27. *Ibid.*; also see The Shari'at (Application) Act of India of 1937, which according to Derrett "was reactionary and tended entirely to the consolidation and unification of that [Muslim] community in terms of its personal law." Derrett, *Religion, Law and State in India*, p. 323.
28. Mansfield, "Personal Laws," pp. 148-50.
29. Art. 44, The Constitution of India. But see *ibid.* Mansfield makes the ar-

- gument that the 7th Schedule of the Constitution (Item 5 List III), and Article 44 might also lend support for the continuation of personal laws in the country. In addition, Mansfield argues that the language in Article 372, Sections 1 and 3, along with Article 13 (19) indicates that the framers intended for "laws in force" prior to 1947 (which included personal laws) to remain valid so long as they did not conflict with the Fundamental Rights section of the Constitution.
30. *State of Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84.
31. Galanter, "The Displacement of Traditional Law in India," in *Law and Society*.
32. *Ibid.*
33. *Ibid.* See also Derrett, *Religion, Law and State in India*, pp. 321-51. *Varnas* refer to the four great estates or divisions in Hindu socio-legal theory often mistranslated as caste. Anglo-Hindu law contained a number of rules that differed by "varna."
34. On the concept of tutelary laws, see Carl E. Schneider, "Moral Discourse, Bioethics, and the Law," *The Hastings Center Report* (1996), vol. 26, pp. 37-9; Luis Oropeza, *Tutelary Pluralism: A Critical Approach to Venezuelan Democracy* (Cambridge: Center for International Studies, Harvard, 1983); for a more general discussion, see Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971), p. 3.
35. Mansfield, "Personal Laws," p. 168.
36. Galanter, "The Displacement of Traditional Law in India," in *Law and Society*.
37. For a useful, extended discussion of this subject, consult Donald E. Smith, *India as a Secular State* (Princeton: Princeton University Press, 1963).
38. Special Marriage Act of 1872. Also see J. D. M. Derrett, *Hindu Law Past and Present* (Calcutta: A. Mukharjee & Co., 1957), p. 73.
39. Special Marriage Act of 1954; also see *ibid.*, p. 74.
40. Derrett, *Religion, Law and State in India*, p. 328.
41. The laws include: The Converts' Marriage Dissolution Act, 1866; The Indian Divorce Act, 1869; The Indian Christian Marriage Act, 1872; The Kazis Act, 1880; The Anand Marriage Act, 1909; The Child Marriage Restraint Act, 1929; The Parsi Marriage and Divorce Act, 1936; The Dissolution of Muslim Marriage Act, 1939; The Special Marriage Act, 1954; The Hindu Marriage Act, 1955; The Foreign Marriage Act, 1969; and The Muslim Women's Protection Act, 1986.
42. Interviews by second author in 1995 with leaders of the Multiple Action Research Group, All-India Democratic Women's Association, and All-India Women's Association.
43. Shyamla Pappu et al., "Women and the Law," in B. K. Pal (ed.), *Problems and Concerns of Indian Women* (New Delhi: ABC Publishing, 1987), pp. 132-33; Epp, *The Rights Revolution*, p. 79.
44. Anika Rahman, "Religious Rights Versus Women's Rights in India: A Test

- Case for International Human Rights Law," *Columbia Journal of Transnational Law* (1990), vol. 28, p. 473; S. Raj (ed.), *Quest for Gender Justice: A Critique of the Status of Women in India* (Madras: T.R. Publications, 1991); Asghar Ali Engineer (ed.), *Problems of Muslim Women in India* (London: Sangam, 1995).
45. These two articles propound the fundamental rights of equality. Article 14 states: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 15(1) states: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."
 46. Mansfield, "Personal Law v. Uniform Civil Code," p. 140.
 47. Saba Naqvi Bhaumik, "Surviving Friends," *India Today* (Internet edition), January 19, 1998; Khilnani, *Idea of India*, pp. 189-90.
 48. "Temple, Art. 370 not on Campaign Agenda: PM," *Times of India* (internet edition), August, 24, 1999. In this article there is a direct quote from BJP party leader, K. N. Govindacharya, who admits that the BJP "has not come out with its own manifesto" with regards to a uniform civil code.
 49. Mahmood, *Muslim Personal Law*, pp. 118-125.
 50. Rajkumari Agrawala, "Uniform Civil Code: A Formula Not a Solution," in Tahir Mahmood, ed., *Family Law and Social Change* (Bombay: M.N. Tripathi, 1975); Master-Moos, "The Personal Law of Parsees," in Namada Khodie, ed., *Readings in Uniform Civil Code* (Bombay: Thacker, 1975); Mahmood, *Personal Law in Crisis*.
 51. *Mohd. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945, 945-55.
 52. A.I.R. 1985 S.C. 946-47; also see Madhu Kishwar, "Pro Women or Anti-Muslim? The Shah Bano Controversy," in Madhu Kishwar, *Religion at the Service of Nationalism* (Delhi: Oxford University Press, 1998), p. 208; Robert Hargrave, "The Challenge of Ethnic Conflict," *Journal of Democracy* (1993), vol. 4, pp. 54-68.
 53. A.I.R. 1985 S.C. 947. For a discussion on *talaq* see note 11. Note, a husband upon saying a phrase such as "I divorce you," or "You are divorced," three times may end the marriage. See Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Delhi: Oxford University Press, 1999), pp. 111-12; Bruce Lawrence, *Shattering the Myth* (Princeton: Princeton University Press, 1998), p. 131; Kishwar, *Religion at the Service*, p. 217.
 54. A.I.R. 1985 S.C. 947.
 55. Section 125, All India Code of Criminal Procedure.
 56. A.I.R. 1985 S.C. 947.
 57. *Ibid.*
 58. Section 127 (3) (b), All India Code of Criminal Procedure. The purpose of this section was to accommodate dower or "mahr."
 59. A.I.R. 1985 S.C. 950-52.

60. *Ibid.*
61. *Ibid.*, p. 951.
62. *Ibid.*
63. *Ibid.*, pp. 954-55. Although we attribute no causal importance to this fact, it is interesting to note that the five justices in this case were at least nominally Hindus.
64. *Ibid.*, p. 947.
65. This was not the first instance of the Supreme Court attempting to define the essentials of a religious community. Cf. *Sastri Yagnapurushdasji v. Muldas Bhundardas Vaishya* (also known as the Satsangis case, A.I.R. 1966 S.C. 1119), where an earlier Supreme Court propounded its view of the essence of Hinduism to invalidate the practices of a Hindu sect. Galanter, "Hinduism, Secularism, and the Judiciary," in *Law and Society*.
66. Agnes, *Law and Gender*, pp. 100-06; Lawrence, *Shattering the Myth*, p. 163; Asghar Ali Engineer, "Forces Behind the Agitation," in Asghar Ali Engineer, ed., *The Shah Bano Controversy* (Hyderabad: Orient, 1987), pp. 39-41.
67. For a discussion on how Muslim law, in fact, may be more beneficial for women than is the Indian Code of Criminal Procedure, see Saleem Akhtar, *Shah Bano Judgment in Islamic Perspective* (New Delhi: Kitab Bhavan, 1994), pp. 243-61.
68. A.I.R. 1979 S.C. 362.
69. A.I.R. 1980 S.C. 1730.
70. Kishwar, *Religion at the Service*, pp. 206-207.
71. Epp, *The Rights Revolution*, p. 88; Daniel Latifi, "The Muslim Women Bill," in Asghar Ali Engineer, ed., *The Shah Bano Controversy*.
72. Since 1986 there have been two unreported cases, described by Flavia Agnes, in which an Allahabad High Court judge deemed *talaq* divorces unconstitutional. See, Agnes, *Law and Gender Equality*, pp. 112-116. The unreported cases are: *Rahmat Ullah v. State of U.P.*, Writ Petition no. 45 of 1993, and *Khatoon Nisa v. State of U.P.*, Writ Petition no. 57 of 1993.
73. Sultan Shahin, "Ulema to Launch Campaign for Personal Law," *Times of India* (Internet edition), May 6, 1999.
74. *Ibid.*
75. For a discussion of this position, see Agnes, *Law and Gender*, pp. 129-40; J. Hinnells, "Parsi Attitudes to Religious Pluralism," in Howard G. Coward, ed., *Modern Indian Responses to Religious Pluralism* (Albany: New York, 1987); also see more generally M. Shabbir and S. Manchanda, *Parsi Law in India* (Allahabad: Law Books Company, 1991).
76. For a discussion of this position, see Agnes, *Law and Gender*, pp. 141-63; Srimati Basu, *She Comes to Take Her Rights* (Albany: SUNY Press, 1999), p. 202.

77. A.I.R. 1986 SC 1011.
78. V. Menon, "Mother Roy," *Rediff on the Net*, 1997 (<http://www.rediff.com/news/oct/30arun.htm>). This news web site discusses how after the Court decision, there was a backlash by Christian community; also see Basu, pp. 201-02, 191-92.
79. The last half of 1998 and the first half of 1999 saw widespread reports of attacks on Christians in India. For a sample of articles, see: Dakshina Murthy, "Christian Prayer Service Attacked" *Hindustan Times* (Internet edition), November 24, 1998; "23 Million Christians to Protest Today," *Hindustan Times* (Internet edition), December 4, 1998; "CBI Accuses 18 in Staines Murder Case," *Times of India* (Internet edition), June 23, 1999; "Panel Presents Admission-Related Facts," *Times of India* (Internet edition), July 17, 1999.
80. Marc Galanter, *Competing Equalities* (Berkeley: University of California Press, 1984), pp. 41-42.
81. *Ibid.*, pp. 43-44.
82. *Ibid.*, p. 43.
83. *Ibid.*, p. 42. OBCs may include non-Hindu, tribal, and nomadic groups as well.
84. *Ibid.*, p. 534-35.
85. A.I.R. 1951 S.C. 229.
86. A.I.R. 1963 S.C. 649.
87. A.I.R. 1964 S.C. 1823.
88. Sunita Parikh, *The Politics of Preference* (Ann Arbor: University of Michigan Press, 1997), p. 186.
89. *Ibid.*, p. 187.
90. *Ibid.*, pp. 187-89. Parikh describes how Singh's policy decision sparked a chain of events that eventually led to the downfall of his government.
91. *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477.
92. *Ibid.*, pp. 536-54. Note that the Court also stressed the importance of Article 16(1) of the Constitution, which guarantees "equality of opportunity in matters of public employment." The Court noted that in order eventually to arrive at a situation where there could be equal opportunity for all, the government's plan needed to be implemented.
93. Swami Agnivesh, "A Concept of Insecurity," *Hindustan Times* (Internet edition), January 23, 1999. In this article, Agnivesh is critical of converts to Christianity who "shout for government charity"; also consider, John Webster, *The Dalit Christians: A History* (Delhi: ISPCK, 1994).
94. Galanter, *Competing Equalities*, pp. 312-14.
95. *Ibid.*, p. 312, quoting from *Michael v. Venkataswaran*, A.I.R. 1952 Mad. 478.

96. Jayanth Krishnan's interview with Dr. Godfrey Shiri, November 14, 1998, Bangalore, India.
97. *Rajagopal v. Armugam*, A.I.R. 1969 S.C. 101. But as Galanter (*Competing Equalities*, pp. 328-29) notes, consider the difficulty involved in the formula prescribed by the Supreme Court. Obvious questions emerge, including: What type of acceptance is necessary? What defines acceptance? Is acceptance required of the whole caste or just a section of it? Also see, *Guntur v. Y. Mohan Rao*, A.I.R. 1976 S.C. 1904.
98. *Wilson Reade v. C.S. Booth*, A.I.R. 1958 Ass. 128; *Horo v. Jahan Ara*, A.I.R. 1972 S.C. 1840. But see, *Urmila Ginda v. Union of India*, A.I.R. 1975 Del. 115, where the Delhi High Court ruled that a high-caste woman who sought membership into her husband's lower caste group for the purposes of seeking a reserved government post could not be admitted into this lower caste, even by the acceptance of its members. See also, *Mrs. Vaishali v. Union of India*, 1978 80 Bom. LR 182; *Smt. D. Neelima v. The Dean of P.G. Studies*, A.I.R. 1993 Andh. Pra. 299.
99. See, *Shantha Kumar v. State of Mysore*, 1971 Mys. L.J. 21; also see, Galanter, *Competing Equalities*, pp. 339-41; also see, *Natraja v. Selection Committee*, 1971 1 Mys. LJ 226; *R. Srinivasa v. Chairman, Selection Committee*, A.I.R. 1981 Karnataka 86; *A.S. Sailaja v. Kurnool Medical College Kurnool*, A.I.R. 1986 Andh. Pra. 209; *N. B. Rao v. Principal, Osmania Medical College*, A.I.R. 1986 Andh. Pra. 196. But also see, *Khazan Singh v. Union of India*, A.I.R. 1980 Delhi 60, where the court ruled that an adoption alone into a Scheduled Caste family was enough to acquire benefits.
100. *Valsamma Paul v. Cochin University*, A.I.R. 1996 S.C. 1011.
101. *Ibid.*, p. 1022.
102. Khilnani, *Idea of India*, p. 37.
103. Asher Arian, *Politics in Israel: The Second Generation* (Chatham: Chatham House, 1989), p. 18.
104. Edelman, *Courts, Politics, and Culture*, p. 51.
105. Krislov, "Israel," p. 302.
106. Of the one million non-Jews, Muslims make up nearly 80 percent, Christians (of which there are ten state recognized communities) make up approximately 15 percent, and Druze make up 8 to 10 percent. Figures are from Israeli Central Bureau of Statistics. For further information please see: <http://www.cbs.gov.il>.
107. Englard, *Religious Law*, p. 13.
108. Vitta, *Personal Status*, sixth chapter, pp. 145-175. Also, according to Lewis, the formal *millet* system was extended to the Jewish community in the nineteenth century. Bernard Lewis, *The Jews of Islam* (Princeton: Princeton University Press, 1984).
109. Edelman, *Courts, Politics, and Culture*, p. 76; for a further discussion of

- how Islam was the official religion of the state, also see Lord Kinross, *The Ottoman Centuries: The Rise and Fall of the Turkish Empire* (New York: Quill, 1977), p. 112.
110. *Ibid.*, p. 52.
111. Informally, the scope of rabbinical and communal control extended further to regulation of property, employment, and consumption. As Shaw states, "Together Jewish law and custom, community regulations and customs and judicial decisions constituted what amounted to a code of law and jurisprudence which regulated in great detail all religious, social and economic areas of life in each Jewish community as well as in the millet as a whole. The *kahal* enforced them with a kind of policy surveillance to make certain that they were applied, whether in the temple, the school, the marketplace, or the home. Various penalties such as *herem* (excommunication) and *niddui* (bans) were imposed by the *bet din* courts and by rabbis against those who violated the laws and regulations or their provisions and instructions. Prisons were maintained in the synagogue buildings, usually on the ground floors directly beneath the sanctuaries, to punish members who violated the community regulations and laws, while violators of the Sultan's laws and those requiring execution and more severe or lengthy punishments were turned over to Ottoman police and prisons." Stanford J. Shaw, *The Jews of the Ottoman Empire and the Turkish Republic* (New York: New York University Press, 1991), p. 65.
112. Edelman, *Courts, Politics, and Culture*, p. 52.
113. Among other things, the status quo agreement provides for: the Sabbath as the official holiday for state institutions; *kashrut* in all state institutions; rabbinical control over family law; and a two-track educational system where Jews may opt to send their children to Orthodox religious schools that are only minimally monitored by the state. *Ibid.*, p. 5; Asher, *Politics in Israel*, p. 238.
114. See Edelman, *Courts, Politics, and Culture*, pp. 52-53, for a useful discussion of this evolution of Jewish law from the time of the Ottomans through the time of the British Mandate and until 1955.
115. Yet, see *ibid.*, 54-57, where Edelman argues that the debate over the jurisdictional authority of the rabbinical courts is just one source of tension between the Orthodox and non-Orthodox communities. Another source, he contends, may be in the overall interpretation of what political culture and national identity mean in Israel to these communities. For the traditional Orthodoxy, religion is inseparable from Israeli political culture and Israeli national identity, while for the less religious or non-religious segment of the population, religion is separable from these other two concepts.
116. Baker, *Legal System of Israel*, pp. 159-82.
117. Yael Yishai, *Between the Flag and the Banner: Women in Israeli Politics* (SUNY: Albany, 1997), p. 186.

118. Frances Raday, "Religion, Multiculturalism and Equality: The Israeli Case," *Israel Yearbook on Human Rights* (1996), vol. 25, pp. 211, 214-15.
119. Edelman, p. 53; also see M. Elon, "The Sources and Nature of Jewish Law and its Application in the State of Israel," *Israel Law Review* (1968), vol. 3, pp. 416-53.
120. Englard, *Religious Law*, pp. 62, 176
121. *Ibid.*, p. 62.
122. Recently immigrated Ethiopians and Russians who have come to Israel under the Law of Return continually find that the rabbinical courts often refuse to recognize their Jewish identity for the purposes of marriage. Interviews with members from the Association for Civil Rights in Israel (October 1998); also for a sample of articles on this subject, see Aryeh Dean Cohen, "Russian Immigrants Believe PM Caves in to Haredim," *The Jerusalem Post* (Internet edition), May 12, 1999; Haim Shapiro, "Ministry Must Justify not Registering Ethiopian Family as Jews," *The Jerusalem Post* (Internet edition), June 22, 1999.
123. D. Sharfman, *Living Without a Constitution* (New York: M. E. Sharpe, 1993), p. 79.
124. *Ibid.*, pp. 79-80. *Kohanim* are the "priestly caste"; membership passes patrilineally.
125. *Funk and Schlesinger v. Minister of Internal Affairs* (H.C.J. 143/62, 17 P.D. 222).
126. Raday, "Religion, Multiculturalism and Equality," p. 211.
127. Today, divorce most frequently occurs as a result of both parties mutually agreeing to end the marriage. (Jayanth Krishnan's interviews with lawyers from four of the country's most active women's organizations: Women's International Zionist Organization, Israeli Women's Network, Emunah, and Na'mat, October 1998).
128. Baker, *Legal System of Israel*, p. 210.
129. *Ibid.*
130. Edelman, *Courts, Politics, and Culture*, p. 64.
131. Baker, *Legal System of Israel*, p. 210.
132. Sharfman, *Living Without a Constitution*, p. 79. Also see Internet edition of the *Jerusalem Post*, March 1, 1999, where the article entitled "Chained Women to Picket Rabbinat Today" reports stories very similar to this scenario still currently occurring throughout the country.
133. Yishai, *Between the Flag*, pp. 186-87.
134. *Dayyanim* is the Hebrew word for rabbinical court judges. These particular judges are state officials. In order to serve they must take a competitive examination administered by the Chief Rabbinical Council. Members of a nomination committee within the Council then select the *dayyanim*. Edelman, *Courts, Politics, and Culture*, p. 53.

135. As opposed to restrictions on *agunot*, "the male divorce refusenik, on the other hand, can start a new family without fearing that the children born to the union will be bastards [mamzerim] (meaning that they can only marry other bastards [mamzerim])." Sharfman, *Living Without a Constitution*, p. 79. In addition, the problem of the *agunah* (the married woman who separates from her husband but cannot re-marry) is a classic and perturbing problem of Jewish law. Women whose husbands refuse a divorce are not the only *agunot*: the other major instance is the abandoned woman who is unable to prove that her husband is dead.
136. Edelman, *Courts, Politics, and Culture*, pp. 52-53, 62-63.
137. *Rufeisen v. Minister of the Interior* (Brother Daniel Case) (H.C.J. 72/62, 16 P.D. 2428).
138. The Law of Return is a statute passed by the 1950 Knesset. The law permits every Jew in the world to immigrate to Israel. As Asher Arian eloquently states, "the Law of Return is the concrete expression of the prophetic vision of the 'ingathering of the exiles'" (Arian, *Second Republic*, p. 10).
139. Edelman, *Courts, Politics, and Culture*, p. 32.
140. We define "second personal laws" as issues of education, conversion, burial, and exemption from military service that turn on the relation of public law to Jewish law and those who claim to interpret it.
141. The *Jerusalem Post*, in its February 12, 1999 Internet edition, entitled "A List of Haredi Grievances," summarizes the Court decisions that the Haredi are against. They include: two Court rulings that disallowed the withdrawal of a *kashrut* certificate in a public hall that displayed a Christmas tree as well as in another facility that held a New Year's Eve party; a Court ruling that prohibited military deferrals or exemptions for yeshiva students; a Court ruling that prohibited the Jerusalem Religious Council from setting the budget of a political party; a Court ruling that allowed for secular burial; a Court ruling that mandated that women be accepted in a course run by the Employment Service Board; two Court rulings stating that Religious and Conservative members be allowed to sit on religious councils; a Court ruling prohibiting the expulsion of a half-Jewish woman; a Court ruling that allowed a girl to return to a secular school after her father withdrew her; a Court ruling that prohibited *moshav* rabbis from engaging in certain political tactics; a Court ruling refusing to enforce the wearing of a *kippa* in a rabbinical court; a Court ruling allowing the registration of Reform conversions; a Court ruling prohibiting rabbis from distributing holy oil to voters; a Court ruling in favor of holding exams for women pleaders in rabbinical courts; and a Court ruling against giving double subsidies to Bnei Akiva. Also see the Internet edition of the *Jerusalem Post*, February 18, 1999, where the Court allowed women to hold the Torah and wear shawls as they pray at the Western Wall (article entitled "Women of the Wall Win High Court Hearing").

142. The term "decay" has been used by many scholars who study political culture. It refers to the destabilization or slow destruction of a political, social, or cultural community as a result of institutional in-fighting and instability. See, James Manor, "India," in Shively's *Comparative Governance*, p. 80. Also see Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1980).
143. Yoav Dotan demonstrates that the Israeli state judiciary has been an active policy-maker in range of rights-based matters. Article forthcoming in *Law & Society Review*.
144. Carl Baar, "Social Action Litigation in India: The Operations and Limitations of the World's Most Active Judiciary," *Policy Studies Journal* (1990), vol. 19, pp. 140-50. For a review of some of the general literature on public interest law in India, see: Rajeev Dhavan, *Litigation Explosion in India* (Bombay: M.N. Tripathi, 1986); Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *American Journal of Comparative Law* (1989), vol. 37, p. 495; Madhava Menon, "Justice Sans Lawyers: Some Indian Experiments," *Indian Bar Review* (1985), vol. 12, p. 444; P. N. Bhagwati, "Judicial Activism and Public Interest Litigation," *Columbia Journal of Transnational Law* (1985), vol. 23, p. 561; Robert Moog, "Indian Litigiousness and the Litigation Explosion: Challenging the Legend," *Asian Survey* (1993), vol. 33, p. 1136; Upendra Baxi, *Courage, Craft, and Contentions: The Supreme Court in the 1980's* (Bombay: M. N. Tripathi, 1985).
145. Edelman, *Courts, Politics, and Culture*, chapter 3. See also Dotan's forthcoming article in *Law & Society Review*.
146. For a detailed discussion, see Marc Galanter, "The Aborted Restoration of 'Indigenous' Law in India," in *Law and Society in Modern India*.
147. Edelman, *Courts, Politics, and Culture*, p. 61.
148. Our discussion on freedom draws on Isaiah Berlin's *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. 122-34.
149. Kishwar, *Religion at the Service*, pp. 245-46; Guido Tedeschi, *Studies in Israel Law* (Jerusalem: Hebrew University Students' Press, 1960), pp. 238-88; T. Mahmood, "Common Civil Code, Personal Laws and Religious Minorities," in Mohammed Imam (ed.), *Minorities and the Law* (Bombay: Tripathi, 1972), pp. 60-65; J. D. M. Derrett, "The Indian Civil Code or Code of Family Law: Practical Propositions," in N. Khodie, ed., *Readings in Uniform Civil Code*, pp. 28-30.
150. Mansfield, "Personal Law v. Uniform Civil Code," p. 169.
151. On the recent debate over secularism in India, see the various articles in Part IV of Rajeev Bhargava (ed.), *Secularism and its Critics* (Delhi: Oxford University Press, 1998); Brenda Cossman and Ratna Kapur, *Secularism's Last Sign: Hindutva and the (Mis) Rule of Law* (Delhi: Oxford University Press, 1999).
152. Lawrence, *Shattering the Myth*, pp. 56-64; Rashida Patel, *Socio-Economic*

- Political Status and Women & Law in Pakistan* (Karachi: Faiza Publishers, 1991), p. 2.
153. See *ibid.*; also see Rashida Patel, *Islamisation of Laws in Pakistan?* (Karachi: Saad Publishers, 1986), pp. 6-7.
154. See Lawrence, *Shattering the Myth*, pp. 54-64.
155. Patel, *Socio-Economic Political Status*, pp. 99-102; Rashid Ahmed, "Raise the Crescent," *Far Eastern Economic Review* (1998), vol. 161, no. 49, pp. 20-22; "Sharif's Sharia," *The Economist* (1991), vol. 319, p. 33.
156. Ahmed, "Raise the Crescent," pp. 20-22; Rashid Ahmed and Shiraz Sidhva, "Fundamental Pakistan," *Far Eastern Economic Review* (1998), vol. 161, no. 38, p. 20.