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Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel

By JOSH GOODMAN*

Introduction

In February 2008, Britain's Archbishop of Canterbury stated in an interview that it "seems unavoidable" that parts of Islamic law, known as sharia, should be applied to Muslims in the United Kingdom in the interest of social cohesion. A firestorm of public controversy ensued. A similar row erupted in Canada in 2005, as the province of Ontario considered authorizing voluntary, sharia-based family law arbitration. Such conflicts over the accommodation of religious norms within secular, democratic legal systems are likely to become increasingly common. Despite the conventional wisdom that modernization and secularism go hand in hand, scholars have pointed to a global resurgence in religious belief and religious identification in recent years, especially with respect to fervent forms of religion and advocacy of religious politics. This

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2. Id.


religious resurgence, coupled with the increasing mobility and migration of global populations, suggests that Western liberal democracies will have populations that are increasingly religious and from increasingly diverse religious backgrounds. As a result, there will be social and political pressure in these states to revisit questions about the relationship between religion and the state that had previously seemed settled, and to create new legal structures that recognize certain religious claims. This paper analyzes and compares how two democratic states, Israel and India, incorporate discrete spheres of religious law into their secular legal systems. It argues that, contrary to the Archbishop's view, the incorporation of religious law into secular legal systems can undermine the authority of the secular legal system and erode the social cohesion that promotes effective democracy.

The relationship between religion and state is a foundational, constitution-level question. Liberal democratic states based on secular principles of governance have adopted various different religion-state arrangements.

One obvious arrangement is the United States' model of strong secularism, featuring a relatively robust separation between church and state, but this is not the only model. The United Kingdom, for example, has an official state church, and many other European countries do as well, although the influence of these state churches on the government is often low. Another model for accommodating religion, which I will call religious legal pluralism, contemplates that religious norms may be given some official legal status in particular areas of law - for example, in the family law disputes of religious adherents - within a broader secular, civil framework. Religious legal pluralism is an appropriate description for these legal regimes that admit multiple, hybrid, and sometimes overlapping and conflicting bodies and systems of law. The sharia proposals for Canada and the United Kingdom would have been examples of religious legal pluralism, although those proposals were controversial, in part, because those countries' traditional

5. There are, of course, debates about how robust the separation between church and state really is under U.S. law. Secularism in the United States and other countries is discussed in comparative perspective below.

6. For example, Norway, Denmark, Greece, Liechtenstein, Monaco, and others have established churches.

methods for accommodating religion and state are based more on separation than on pluralist recognition.\(^8\) India and Israel, however, are two democratic states that, for historical reasons, have employed religious legal pluralism since their independence. In these countries, certain matters of personal law are governed by the law of an individual's religious community, rather than by secular, civil laws. Personal law, generally, refers to questions of family law, inheritance, and personal status.

In 1947-1948, as India and Israel emerged from British rule and established themselves as independent nation-states, both countries preserved existing religious-based systems of personal laws as a compromise with religious elements of society. The leadership of both countries at the time of their national independence and for some time afterward was secular and moderately socialist in orientation, believing in the inevitable progression and triumph of the state, and probably that the political process would provide for the eventual elimination or reform of these religion-based legal spheres during the state-building process.\(^9\)

However, the opposite social trend developed: Forces promoting religious politics have grown more powerful in both countries in recent decades. Unable to reform the religious personal laws through the legislative process, the more secular-oriented forces in Israeli and Indian society have turned instead to constitutionalism and the courts to attempt to achieve these outcomes judicially. The purpose of this paper is to examine how this conflict of secular and religious legal norms has played out in the Israeli and Indian civil courts, and to draw out lessons from these countries' experiences with religious legal pluralism. These lessons will be of particular relevance for proposals to introduce religious legal pluralism into liberal, democratic states, because defenders of such proposals often offer judicial review by civil courts as a means to safeguard established civil rights from infringement by religious law.\(^10\)

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\(^8\) Of course, much of the controversy can also be attributed specifically to fears about Islam and Sharia in particular, rather than de-secularization and recognition of religious claims by law in general.

\(^9\) See discussion infra Parts I.A., I.B.

Part I of this paper will discuss different models of religious accommodation, and the current status and historical origins of state accommodation of religion in India and Israel, describing, in particular, the operation of each country's system of religious personal laws. Part II will analyze specifically how the civil courts of each country have exercised the power of judicial review over matters of religion and state, especially with respect to the personal laws.

Part III will draw comparative conclusions about the ability of judicial review to protect principles of secularism from religious pressures. This part will first examine why questions of religion and state are being increasingly answered by courts, then it will assess the limits of judicial power in this area, and finally it will turn to conclusions for states that are considering introducing elements of religious pluralism into their legal systems.

This paper argues that although the judiciaries in India and Israel generally issue rulings supporting secularism, they have only a limited ability to resist trends that dominate majoritarian politics, including the pressures of religious constituencies, without losing legitimacy and power. Therefore, states that are generally committed to principles of secular governance and law should be wary about introducing elements of religious law into their legal systems, because in cases where civil legal principles conflict with religious mandates, regular civil courts may have difficulty upholding and enforcing the civil law.

I. Religion and State: Models for Accommodation

In recent years, the law in many democratic, constitutional states has converged around common understandings of the content of many basic civil, political, and human rights. Nevertheless, when it comes to freedom of religion - and more generally, the relationship between religion and state - the different arrangements that exist in the democratic world remain highly idiosyncratic, reflecting diverse histories and religious traditions. Despite these variations, however, it is still possible to identify a few basic models of accommodation of religion in states that follow principles of secular, democratic governance.  

1. parties the right to appeal to the courts.

11. The following framework is suggested by Ran Hirschl. Of course, there are other possible arrangements of religion and state outside the democratic world. In
First, there is the strong secularism or laïcité model. Exemplary states in this category include the United States, France, and Turkey. Under the pure form of this model, individuals have private religious freedom and religion plays no role in the affairs of state governance, and vice versa. However, in practical terms, all states that aspire to secularism have reached different legal arrangements in enforcing the separation between church and state and providing for private religious freedom; no state can be considered perfectly secular or can provide for complete free exercise of religious beliefs.

In the United States, the First Amendment to the constitution prohibits the government from establishing an official religion and from preventing the free exercise of religion. In general, U.S. government policies may not favor, promote, or fund any religion, although in some circumstances, limited government support is provided to religious organizations, for example through tax breaks or through "Charitable Choice," which allows government funding of faith-based social service initiatives. The United States also tends to provide greater protection for free exercise than France or Turkey, as detailed below.

In France, Article I of the constitution describes France as a secular state and establishes the principle of laïcité and respect for all beliefs. By tradition, religion, including religious expression by public figures, has little or no role in public life or public affairs. This approach to secularism has resulted in bans on common forms of religious expression in certain circumstances, such as the well-known 2004 law banning Islamic headscarves, Jewish skullcaps, large Christian crosses, and other prominent displays of religious affiliation in public schools. This approach would likely be

Saudi Arabia and Iran, different varieties of Islam are clearly established as official state religions and are coercively enforced through the legal system. In Egypt, Article 2 of the Constitution was amended in 1980 to establish Sharia as the source of law, but the state's Supreme Constitutional Court, rather than religious authorities, has the power to interpret the meaning of disputed Sharia matters. See Ran Hirschl, Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales, 82 Tex. L. Rev. 1819, 1820-34 (2004).

12. U.S. CONST. amend I.


14. 1958 Const. art. 1 (Fr.) ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs.").

unconstitutional in the United States due to protections granted by the Free Exercise clause.

In Turkey, secularism is specifically mentioned in the constitution as a founding pillar of the state.\textsuperscript{16} Secularism is considered one of the defining characteristics of modern Turkey, as opposed to its predecessor, the Ottoman Empire, which defined itself as an Islamic caliphate. Overt religiosity in Turkish public institutions, even by private individuals, is discouraged and, in some cases, prohibited. In a recent, well-known case, a Turkish student who was banned from wearing an Islamic headscarf in a public university claimed that Turkey violated the guarantee of freedom of religion contained in the European Convention on Human Rights, but the European Court of Human Rights ruled that Turkey had a sufficiently compelling reason for the ban.\textsuperscript{17} On the other hand, the Turkish government also organizes, subsidizes, and supervises all Sunni Muslim religious institutions, but it purports to do so in the interest of upholding secularism.\textsuperscript{18} Thus, Turkey has been accused of violating the principle of secularism with respect to both individual freedom and state involvement in religious affairs.

The differences between France, Turkey and the United States illustrate how idiosyncratic religion-state arrangements can be, even among states that purport to be overwhelmingly secular.

A second model of state accommodation of religion can be termed weak establishment. Under this model, a particular religion is recognized as having an official or special status, but individuals still retain full religious freedom in the private sphere, and the state religion in general does not play much of a role in governance. Examples of states in this category include the United Kingdom, where the Church of England is the official state church, and Norway, where the Church of Norway is official.\textsuperscript{19}

Finally, there is the model of religious legal pluralism. Under this model, within a generally secular state (based on either strong secularism or weak establishment), religion is granted special status

\begin{flushleft}
\textsuperscript{16} Constitution of Republic of Turkey preamble and art. 2 (“The Republic of Turkey is a democratic, secular and social state”).
\textsuperscript{18} These activities are carried out by the Presidency of Religious Affairs. See http://www.diyanet.gov.tr.
\textsuperscript{19} For other examples, see supra note 6.
\end{flushleft}
or authority within discrete spheres of law. The two most notable examples in this category are the subject of this paper: Israel and India. Both of these countries are democracies based on principles of secular law and secular governance, but both recognize religious law as governing certain matters of personal law.

To illustrate, when a Muslim gets divorced in India, the courts apply a version of Islamic law to the case, but when a Hindu gets divorced, a Hindu-based law is applied. Similarly, when a Jewish couple in Israel gets divorced, they must go to a rabbinical court that applies Jewish law with binding legal power, but when a Muslim couple gets divorced, they would go to a Muslim court of similar standing.

There are other examples of states that employ similar systems. In South Africa, the constitution instructs courts to apply the "customary law" of tribal groups where applicable, subject to rights established in the constitution and other legislation.\(^{20}\) In the United States, which is generally recognized as having separation of church and state, Native American tribal courts, which may base their rulings and procedures in tribal religious traditions, possess recognized legal jurisdiction over the members of native tribes.\(^{21}\) Malaysia, although not a secular state, maintains a dual system of secular and Islamic courts,\(^ {22}\) and there are other examples that can be found, for example, in Africa.\(^ {23}\)

The operation of religious law within an overall secular state has been described as creating a type of multicultural or differentiated citizenship in which individuals possess different religious and cultural group-based legal rights.\(^ {24}\) From the

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22. Although Malaysia ostensibly guarantees freedom of religion in its constitution, Malaysia, whose official religion is Sunni Islam, deploys religious police to enforce Islamic rules on Muslims, and according to the U.S. State Department International Religious Freedom Report, the state has monitored "the activities of the Shi'a minority, and the Government periodically [has] detained members of what it considers Islamic 'deviant sects' without trial or charge under the Internal Security Act (ISA)." International Religious Freedom Report: Malaysia, U.S. Dep't of State, available at http://www.state.gov/g/drl/rls/irf/2002/13899.htm.
24. See Ayelet Shachar, The Puzzle of Interlocking Power Hierarchies: Sharing the
perspective of the strong version of secularism, multicultural legal pluralism may be seen as violating basic liberal, secular tenets of universal citizenship and complete equality before the law. Modern understandings of human rights may be violated by legally imposed religious precepts. For example, many of the controversies generated by legal pluralism involve conflicts between legal rights to gender equality and traditional mandates of religious law (for example, the treatment of women under Islamic divorce law).

Nevertheless, it is not clear that religious legal pluralism necessarily constitutes a violation of liberal principles. Indeed, some modern political thinkers believe legal pluralism may further liberal principles of tolerance and autonomy. For example, where the ostensibly secular public culture and laws of the state clearly reflect the values, beliefs, and practices of the dominant religious group in society, as is the case in many countries, the pluralist model may allow religious minority groups spheres of autonomy in which they have official legal authority and protection to develop and maintain their own traditions.

Legal pluralism may also function to mediate conflicts between and among members of different religious groups in society. For example, Israeli Muslims are subject to sharia family law provisions that would never be enacted as generally applicable laws by Israel's legislature, due to its Jewish majority; thus, this pluralist arrangement may reduce a potential source of social conflict and provide the Muslim community with some autonomy from dominant Israeli cultural norms. Critics of legal pluralism, however, would claim that it perpetuates inter-religious conflicts by undermining equality, reducing social cohesion, and undermining a shared sense of civic identity. The debate over the value of legal pluralism often boils down to questions about the nature of society: Whether society is composed only of individuals or of groups as well, what rights groups should possess, to what extent legal frameworks themselves have the effect of constituting society, and


26. See Shachar, supra note 24; see also id. at 27.

27. See id.

Answering these fundamental, theoretical questions about the merits of legal pluralism is beyond the scope of this paper, which focuses on understanding and evaluating the experiences of the Indian and Israeli Supreme Courts in resolving conflicts between secular and religious claims to legal authority.

A. Religious Legal Pluralism in India

India is a country with an enormous population of more than one billion people, and is home to a great number of different religious traditions including Hinduism, Islam, Buddhism, Christianity, Sikhism, Jainism, and others. Hinduism and Islam are the two most common religions, representing 80.5 percent and 13.4 percent of the population respectively. Modern India is a secular state with no official state religion, but whose public culture has been significantly shaped by religion, and which maintains specific spheres of religious legal pluralism in its personal law.

Historically, various empires ruled over parts of India, but local communities generally operated as autonomous legal jurisdictions living by their own traditions and customs, despite the religion of the imperial ruler. In 1772, Warren Hastings, the first Governor-General of British India, introduced various legal reforms establishing a uniform criminal code (based mostly on Islamic law), and providing that “in all suits regarding marriage, inheritance, the laws of the Koran with respect to Mohammedans, and those of the Shastras with respect to [Hindus] shall be invariably adhered to.”

Thus the model of enclaves of religious personal law within a broader, uniform national legal system was introduced in India.

Initially, British colonial judges appointed Hindu and Muslim experts to help them decide matters involving religious personal law, but eventually these experts were eliminated and the judges interpreted the personal law on their own. Since both Hinduism and Islam contain a great diversity of traditions and customs, the

29. CIA WORLD FACTBOOK: INDIA (2001 census figures).
32. LARSON, supra note 30.
personal law administered by the British represented only one particular subset of religious interpretations that gained authority through the colonial legal system, and then continued to develop through case law and reforms.\textsuperscript{33} The consolidation of Hindu law and Muslim law into only two systems, therefore, represented a significant centralization of the previously existing systems of religious law in these communities.\textsuperscript{34}

According to Susanne Hoeber Rudolph and Lloyd I. Rudolph, the early British governors of India who ruled from 1772-1828 saw the subcontinent as composed of a constellation of different, autonomous cultural groups, each embodying distinct and valuable civilizations.\textsuperscript{35} These governors ruled accordingly, creating legal structures that recognized religious and caste groups as the basis of society.\textsuperscript{36} By contrast, the later British governors were liberal, utilitarian individualists who believed in universal progress and the emancipation of the individual, and saw little value in preserving local customs, religion, and culture.\textsuperscript{37} Not surprisingly, however, these later British rulers associated universal progress with the achievements of English and European culture. Thomas Babington Macaulay, who served on the governing council in India from 1834 to 1838 and who made English the official language of instruction in Indian colleges instead of Sanskrit and Arabic,\textsuperscript{38} wrote that "all the historical information which has been collected from all the books written in the Sanskrit language is less valuable than what may be found in the most paltry abridgments used at preparatory schools in England."\textsuperscript{39}

The elite class of anglicized Indians subsequently educated by the later British colonial system largely founded the Indian National Congress,\textsuperscript{40} the secular nationalist party that led the struggle for

\textsuperscript{33} Id.
\textsuperscript{34} RUDOLPH, supra note 31, at 52.
\textsuperscript{35} Id. at 39-42.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} These are the traditional literary and sacred languages in Hinduism and Islam, not the vernacular languages of Indian Hindus and Muslims.
\textsuperscript{40} Id.
Indian independence and dominated Indian politics for many years after independence was achieved in 1947.

The Congress Party sought to create a unified, majoritarian, secular, democratic state around the one-nation theory of Indian nationalism, in contrast to the two-nation theory that held that Indian Muslims and Hindus constituted different nations that needed different independent states. Muslim wariness of majoritarian democracy in India derived in part from the fact that the Muslim community stood to lose more than the Hindu community in such an arrangement because Muslims were a numerical minority. Eventually, the subcontinent was partitioned in 1947 into two states: India, defined as a secular state, and Pakistan, defined as an Islamic state. Despite massive migrations of Muslims from India to Pakistan, India still retained a substantial Muslim population.

In independent India, the new state, led by Prime Minister Jawaharlal Nehru and the Congress Party, tried as much as possible to reform Indian society around the vision of a secular, nationalist, moderately socialist state. Religion-based allocations of seats in government bodies, which had been introduced in the British era, were eliminated. While some politicians had advocated eliminating the distinct personal law systems as well, the Constituent Assembly did not go that far, fearing a conflict with the Muslim community, whose leaders supported maintaining the religious law. Instead, a compromise was reached.

The Indian constitution expresses the aspiration of eliminating the religious personal law in favor of a uniform legal code, but does not take any concrete legal steps toward doing so. Article 44 of the constitution reads: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." This article is in a section of the constitution that lists "Directive Principles of State Policy," which are to guide the state in lawmaking, but which are not actually enforceable in court.

Article 25 of the Indian constitution provides freedom of religion. It reads, in pertinent part: "[A]ll persons are equally entitled to freedom of conscience and the right freely to profess,

41. Id. at 48.
42. INDIA CONST. art. 44.
43. See id. art. 37.
practise and propagate religion." Yet additional clauses of the same article specify that "Nothing in this article shall . . . prevent the State from making any law . . . providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus," which in this context includes Buddhists, Sikhs, and Jains (but not Muslims).

Thus, freedom of religion is constitutionally subordinated in India to the state's responsibility for social reform, and specifically for the reform of the Hindu society, which historically featured a rigid system of social inequality based on caste. Gary Jacobsohn sees secularism under the Indian constitution as "ameliorative" in nature: "[T]he Constitution seeks an amelioration of the social conditions of people long burdened by the inequities of religiously based hierarchies, but also embodies a vision of intergroup comity whose fulfillment necessitates cautious deliberation in the pursuit of abstract justice." Under this concept of ameliorative secularism, the Muslim community's exemption from the religious reforms of the constitution (evidenced by the lack of a reference to Muslims in Article 25, as well as Article 44's failure to abolish the religious-based personal laws due to Muslim concerns) becomes, for Hindu critics, a rejection of the social reform, progress, and modernization identified as the agenda of the independent Indian state. From the perspective of many in the Muslim community, however, this need for social reform was rooted in Hindu caste inequalities, and the preservation of the Islamic personal laws, spelled shariat in India, becomes identified with the preservation of Muslim community rights in a Hindu-dominated state. These clashing perspectives lay at the heart of many post-independence religion-state conflicts in India.

In the early years of Indian independence, the parliament enacted a wide-ranging reform of the Hindu - but not the Muslim - personal laws. These "Hindu Code" reforms introduced secular legal concepts into the Hindu personal law by promoting equality of caste and gender, introducing divorce, and endorsing the nuclear

44. Id. art. 25, cl. 1.
45. Id. art. 25, cl. 2.
46. Id. art. 25, cl. 2, explanation II.
family.\textsuperscript{48} Thus, reform of the Hindu Code in India was intimately linked with the overall project of Indian social reform and progress initiated in the constitution.\textsuperscript{49} The independent Indian parliament assumed the moral authority to reform and reshape Hindu society, eliminating past inequities.\textsuperscript{50} The Hindu Code reforms were initially envisioned as part of the process of creating a uniform civil code, but legislative consensus on reforming the shariat could not be reached.\textsuperscript{51} Nehru, speaking in 1954, said of adopting a uniform civil code reform at that time: "I do not think that at the present moment the time is ripe in India for me to try to push it through."\textsuperscript{52} Thus, the last colonial-era codification of Muslim Law, The Muslim Personal Law (Shariat) Application Act, 1937 remains in effect.

The uniform civil code provision and the lack of reform in the shariat quickly became a central point in subsequent debates and controversies over religion and secularism in India. This secular-religious struggle focuses on the appropriate nature of the relationship of the state with its constituent religious communities, and whether the state ought to recognize communities at all. It is a site of conflict between the Muslim community’s attempts to preserve their cultural autonomy on the one hand, and, on the other hand, the attempts of both bona fide universalist, secularists and particularistic, Hindu nationalists to eliminate legal pluralism in India. Because eliminating legal pluralism in India has proved impossible through the legislature, courts have become the primary battleground for this struggle.

\textbf{B. Religious Legal Pluralism in Israel}

Unlike in India, where ordinary civil judges have long interpreted the different religious-based codes of law, each recognized religious community in Israel maintains its own independent religious court system to apply and interpret religious law. These religious courts, financed by the state, have jurisdiction

\begin{itemize}
\item \textsuperscript{49} See Jacobsohn, \textit{supra} note 47, at 285.
\item \textsuperscript{50} See Galanter & Krishnan, \textit{supra} note 48, at 273.
\item \textsuperscript{52} Quoted in Sarla Mudgal v. Union of India, A.I.R. 1995 S.C. 1531.
\end{itemize}
over certain matters of personal status, such as marriage and divorce.\textsuperscript{53} There are fourteen recognized religious communities in Israel: Jews, Muslims, Druze, Bahai, and ten Christian denominations.\textsuperscript{54} The religious composition of Israel, which has a population of roughly 6.5 million, is 76.4 percent Jewish, 16 percent Muslim, and roughly 2 percent Christian and 2 percent Druze.\textsuperscript{55} The majority of the Jewish population in Israel is not religiously observant, but nevertheless all Israelis are subject to the religious courts of their community.

The origins of the Israeli personal law system lie in the Ottoman Empire, which ruled the area until 1917. Under the Ottoman \textit{millet} system, each religious community constituted a self-regulating jurisdictional unit with substantial internal autonomy to make laws and administer justice. As with the British in India, this pluralist legal system enabled the Ottomans to manage a vast empire made up of a large number of diverse religious communities historically accustomed to living by their own traditions.

The British took over Palestine after the Ottoman Empire’s defeat in World War I, and ruled the area under a League of Nations Mandate until 1948, when Israel became an independent state. The Palestine Order-in-Council of 1922, which served as the constitutional document of the British Mandate, preserved the \textit{millet} system for personal law matters. It retained independent religious courts with jurisdictional authority over personal status questions involving their community members.\textsuperscript{56} Personal status cases were defined as “Suits Regarding Marriage Or Divorce, Alimony, Maintenance, Guardianship, Legitimation And Adoption Of Minors, Inhibition From Dealing With Property Of Persons Who Are Legally Incompetent, Successions, Wills And Legacies, And The Administration Of The Property Of Absent Persons.”\textsuperscript{57} In another

\begin{itemize}
  \item \textsuperscript{53} SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 106 (Springer 1994).
  \item \textsuperscript{54} MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 51 (University Press of Virginia 1994).
  \item \textsuperscript{57} \textit{id.} art. 51.
\end{itemize}
stroke of legal pluralism, the British also formed Bedouin tribal courts to handle disputes among Bedouin tribes in the Negev desert area according to their customs. As was the case under the former Ottoman system, the Muslim courts in Mandatory Palestine had the widest jurisdictional scope, with authority over all personal status matters as defined above, while Jewish and Christian courts had exclusive jurisdiction only over "marriage and divorce, alimony and confirmation of wills of [religious community] members."  

At the time of Israel's independence in 1948, the secular, Zionist, moderately socialist Mapai (Labor) party dominated politics, but it nevertheless sought the support of religious elements of society. Just prior to independence, David Ben Gurion, the leader of the Mapai faction and Israel's first prime minister, had reached a compromise with the Jewish religious parties. Known as the "status quo" agreement, this compromise guaranteed Mapai's support for the Jewish rabbinal authorities' preferences on a number of political issues, including maintaining the personal law courts, establishing religious schools, and respecting the Jewish Sabbath and dietary (kosher) laws in state institutions. Thus, the actual sphere of religious authorities' power, at least for the Jewish community, extends a bit further than the personal law, and is implemented by an officially recognized religious body, the Chief Rabbinate of Israel. The Chief Rabbinate of Israel, established by the British during the Mandate period, has official responsibility for certification of kosher products and supervision of Jewish holy sites, and it plays a role in overseeing the rabbinal court system, for example, by determining the eligibility of rabbinal judges and issuing interpretations of Jewish law, known as halakha.

Although secularists like Ben Gurion dominated the leadership of the Zionist movement, the "status quo" compromise served several important functions for these secular leaders: It gained the political support of religious parties for Mapai leadership in the future government; it avoided provoking conflict and disunity among the Jewish community, a key objective in light of the military and national security dangers posed by Arab opposition to Israel;

58. Id. art. 45.
59. Id. arts. 53-54.
60. EDELMAN, supra note 54, at 51.
61. See חזרה ותחזוקה [Chief Rabbinate's Website], http://www.dat.gov.il.
and it provided enhanced legitimacy for Zionism, which, although primarily a secular-nationalist movement at this time, drew on Jewish history and religious tradition.62

A Constituent Assembly was convened in 1948 and charged with drafting a written constitution for Israel, but a constitution was never adopted.63 Instead, the Constituent Assembly reconstituted itself as Israel's parliament, the Knesset, and the drafting of a comprehensive written constitution was postponed indefinitely in favor of adopting a series of Basic Laws.64 Thus, there is no formal written constitution in Israel, but there are several Basic Laws which outline the state's governmental structures and provide for the rights of citizens. The Knesset has the power to create Basic Laws, and also retains the power to enact a formal constitution at any time.

Israel has been defined as a "Jewish and democratic state" in its Basic Laws,65 but exactly what it means to be a "Jewish state" is unclear. Judaism is not technically considered an official state religion, and private religious freedom is an individual right recognized by the Supreme Court.66 Traditionally, Judaism, in contrast to Christianity and Islam, encompasses elements of a particular national or ethnic identity - the idea of the "Jewish people" - as well as personal faith, beliefs, and ritual practices. Thus, the most general understanding of Israel as a Jewish state is as a homeland for the "Jewish people." Israel is not a theocracy, as religious precepts do not generally enter into governance; the state is governed by the democratically elected legislature. However, given the unique and privileged status of Judaism in Israel, the country can probably best be described as a secular state with a "weak" religious establishment and spheres of religious legal pluralism in personal law.

A series of post-independence Israeli laws have modified the legal authority of the religious courts. In 1953, the Knesset narrowed the exclusive jurisdiction of the rabbinical courts to

62. Id. at 51-52.
63. For further discussion on this point, see Roundtable: Israel Constitutionalism, 6 Yale Israel J. 25 (2005).
64. Id. at 9.
66. See HCJ 5073/91 Israel Theatres v. Municipality of Netanya, 47 (3) PD 192.
questions of marriage and divorce.\textsuperscript{67} The Knesset also reformed the judicial appointments process and the appeals structure of the rabbinical courts to bring them in line with the norms in the civil system.\textsuperscript{68} However, the courts of the other religions were not as significantly modified, and so, for example, the sharia courts of Israel still have the widest jurisdictional scope of all Israeli religious courts, with authority over all personal status questions for Israeli Muslim citizens.\textsuperscript{69}

Although the Knesset preserved the autonomy and integrity of the religious legal authorities and did not undertake wholesale reform of religious law, like the Hindu Code laws did in India, the Knesset did pass several civil laws intended to provide indirect solutions to certain perceived inequities in the religious laws. For example, the Women's Equal Rights Law 1951 and the Succession Law 1965 apply to all citizens and are intended to remedy shortcomings in the personal laws, even though they do not directly apply to those laws. The success of these equal rights laws, and other subsequent laws, upon matters touching the personal law has been somewhat mixed due to the autonomy of the religious court system and the view, internal to that system, that their authority derives from religion and not the state.\textsuperscript{70} As in India, the battlefields where these conflicts between secular and religious legal norms are fought have moved more toward the courtroom and away from the legislative chamber.

II. Secular Judicial Management of Religious Legal Systems in India and Israel

In both Israel and India, the maintenance of the personal law systems by the secular, modernizing, post-independence leadership represented a political compromise necessary to achieve the higher end of national unity to establish the state. In both countries, however, the personal law systems have endured, and have served to reinforce religious identity as an important element of citizenship and to perpetuate certain illiberal outcomes that are dictated by

\textsuperscript{67} Edelman, supra note 54, at 52-53.

\textsuperscript{68} Id.

\textsuperscript{69} Id.

religious law. With personal law reform unavailable through the legislative process due to political deadlock, yet desired by significant segments of society, the secular courts of India and Israel have acted, within limits, to secularize and homogenize the national law by overseeing and restraining the authority of religious law through a variety of mechanisms.

A. India

1. Background: The Indian Judiciary and Constitutional Law

Before delving into India's judicial management of religious law, it is first necessary to understand India's constitutional structure and the powers of its Supreme Court.

During the first two decades of Indian independence, the Indian Supreme Court was highly deferential to the legislature, rarely holding that legislative acts were unconstitutional except in a handful of property rights cases. In the late 1960s, however, the Court began to assert itself more forcefully on questions of fundamental rights. According to Article 13(2) of the Indian constitution, "[t]he State shall not make any law which takes away or abridges" the fundamental rights described in the constitution. Part III of the Indian constitution, comprising articles 13-35, is a bill of fundamental rights, including rights to equality before the law, non-discrimination of the basis of religion, race, caste, sex, or place of birth, freedom of speech, and many others. Article 13 provides the foundation for rights-based judicial review of legislation for constitutionality by the Supreme Court of India.

In the major 1967 case of Golaknath v. Punjab, the Supreme Court held that constitutional amendments themselves, which can be enacted by super-majority vote of both chambers of the Indian parliament, were considered "law" under Article 13(2), and that therefore constitutional amendments were subject to judicial review by the court to make sure they did not take away or abridge fundamental rights guaranteed by the constitution. The idea that the court could limit the legislature's power to amend the

72. Constitution of India art. 13, cl. 2.
74. Sathe, supra note 71, at 65.
constitution itself was seen as a radical expansion of judicial power, and the decision was highly controversial.\textsuperscript{75} The facts of the case in \textit{Golaknath} involved a challenge to amendments that were held to infringe basic property rights. Politically, the Supreme Court was viewed as opposing the redistributive economic policies of Prime Minister Indira Gandhi, Jawarhalal Nehru's daughter and his successor as the leader of the Congress Party.\textsuperscript{76} After the Congress Party won an overwhelming majority in the 1971 elections for the Lok Sabha, India's lower house of parliament, the government challenged the court by introducing the 24th amendment, which was intended to overrule \textit{Golaknath} and reinstate parliament's power to amend the constitution without judicial oversight.\textsuperscript{77} Of course, this amendment too was challenged in court, leading to the landmark 1973 case of \textit{Kesavananda Bharati v. Kerala}.\textsuperscript{78}

In \textit{Kesavananda Bharati}, the court technically overruled \textit{Golaknath}, by upholding the validity of the 24th amendment and overturning the doctrine that amendments were subject to review under article 13(2). Nevertheless, the court preserved its essential power to review constitutional amendments for validity under a different framework.\textsuperscript{79} The court held that amendments and other laws which violated or attempted to change the "basic structure" or "basic features" of the Indian constitution would be held invalid.\textsuperscript{80} The response of the legislature to this ruling was the 42nd amendment, passed in 1976, which attempted to reverse this "basic structure" doctrine. However, the court voided the provisions of the 42nd amendment that contradicted the basic structure doctrine, and the doctrine has since remained established in Indian jurisprudence.\textsuperscript{81} The 42nd amendment also attempted to define specific elements of the basic structure of the Indian state and constitution by reference to the "high ideals of socialism, secularism and the integrity of the nation." The court has since held that

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 66.
\item \textsuperscript{76} \textit{Id.} at 68.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} Kesavananda Bharati v. Kerala, 1973 A.I.R. S.C. 1461.
\item \textsuperscript{79} \textit{See} SATHE, \textit{supra} note 71, at 70.
\item \textsuperscript{80} Kesavananda Bharati, 1973 A.I.R. S.C. 1461, ¶ 315.
\item \textsuperscript{81} SATHE, \textit{supra} note 71, at 87; \textit{see also} Minerva Mills v. India, 1980 A.I.R. S.C. 1789.
\end{itemize}
2. Secularism in Indian Society

The rulings of the Supreme Court of India on the question of personal law have, on the whole, attempted to expand its vision of secularism in Indian law. What secularism means in India, however, is a question that sparks great debate.

When speaking about the meaning of secularism in Indian society and law, it is possible to identify three different visions of secularism. First, there is the "neutral," universalist vision of secularism, which corresponds most closely to the strong secularism concept discussed above in reference to the United States, France, and Turkey. This vision of secularism may also link secularism to social progress, modernization and the unification of the Indian state, as illustrated by Jawaharlal Nehru's statements that "[r]eligion is a hindrance to the tendency to change and progress inherent in human society," and that "the belief in a supernatural agency which ordains everything has led to a certain irresponsibility on the social plane, and emotion and sentimentality have taken the place of reasoned thought and inquiry." According to this brand of secularism, the personal laws in India should be abolished and replaced with a religiously neutral, uniform civil code, as envisioned by Article 44 of the Indian constitution.

Second, there is the populist vision of secularism associated with Hindu right-wing parties, such as the Bharatiya Janata Party ("BJP," or the Indian People's Party). The BJP advocate for a uniform civil code for India, but do so with the understanding that such a code will reflect the perspectives of the dominant Hindu majority. Their ideology is based on the concept of Hinduism, which refers to the idea that "Hinduness" ought to underlie Indian


83. Of course, secularism may not be neutral from the perspective of the religious members of society because it may place burdens on religious practice, as illustrated by the headscarf bans in France and Turkey. However, the relevant distinction in the Indian context is between those who support secularism because they support liberal, universalism and a neutral attitude of the state toward all religions, and those in the Hindu nationalist camp who support secularism because the laws of a majority Hindu state will likely reflect traditional Hindu norms or identity.

84. Mitra, supra note 51, at 765 n.20.

85. See Jacobsohn, supra note 47, at 110.
identity, although they contend that *Hindutva* refers to an idea of Indian civilization that is not religiously exclusive.\textsuperscript{86} This last contention may seem strange, and the genuineness of its proponents has been challenged, but it derives from the idea, internal to Hindu discourse, that Hinduism is non-dogmatic and based on the diverse traditions of the Indian subcontinent.\textsuperscript{87}

Third, there is the "equal respect" secularism of the status quo in India, in which members of different religious communities are afforded some legal recognition and autonomy through the personal law. This vision can be considered consistent with Nehru's statement that "[a] secular state does not mean an irreligious state: it only means that we respect and honor all religions and give them the freedom to function."\textsuperscript{88} In this vision of secularism, the state is generally secular, and personal laws act to protect the minority religion and culture from being subjected to the religiously derived norms of the majority community.

The Indian Supreme Court's decisions have generally endorsed the first vision of secularism outlined above, consistently agitating for a neutral, uniform civil code.\textsuperscript{89} However, some of its rhetoric\textsuperscript{90} and some well-known recent decisions\textsuperscript{91} seem to align the court with the second, Hindu populist version of secularism.\textsuperscript{92} In several rulings involving the personal law, the court appears overtly hostile to the third, pluralist model, casting it as contrary to the principles of secularism and in violation of the spirit of the Indian constitution.

However, the court has been hesitant to strike down personal

\textsuperscript{86} See BJP Manifesto, Chapter 2, available at http://www.bjp.org/manifes/chap2.htm. (stating that "Every effort to characterize Hindutva as a sectarian or exclusive idea has failed," yet at the same time declaring the party's support for the construction of a Hindu temple on a disputed religious site).

\textsuperscript{87} See infra discussion of the *Hindutya* cases.


\textsuperscript{89} See the discussion in part ii below.

\textsuperscript{90} Cf. infra note 116 (court in Hariharan commented that "It is not out of place to mention also that Hindu law being one of the oldest known systems of jurisprudence has shown no signs of decrepitude and it has its values and importance even today); with infra note 95 (the *Bano* court's less than favorable reference to Muslim law).

\textsuperscript{91} See infra the *Hindutya* cases note 109.

\textsuperscript{92} See supra note 88, at 12 (arguing that "there is a significant overlap between the judicial discourse and the ontology of Hindu nationalism").
laws as contrary to the constitution directly, most likely due to the sensitive political nature of questions of religion and personal law in India. In some cases, the court has held that the personal laws are not subject to the fundamental rights in the constitution,93 but several recent cases indicate that the personal laws are subject to fundamental constitutional rights.94 Nevertheless, the court, in cases where it clearly believes fundamental rights are in conflict with the personal law, uses interpretive strategies other than direct judicial invalidation of the law in question to achieve the desired outcome. Despite wielding a power of judicial review that is legally more powerful than in most other countries, the Indian Supreme Court must still act in the shadow of the legislature and public opinion, and in the cases where it has forgotten this reality, it has stoked public controversy and challenges to its legitimacy.

3. The Indian Supreme Court's Personal Law Jurisprudence

The most well-known controversy involving the personal law in India is the case of Shah Bano.95 Shah Bano was a 62-year-old Muslim woman who was divorced by her husband of 43 years through the Muslim practice of talaq, which allows a husband to immediately, unilaterally divorce his wife. Under the Muslim personal law, Shah Bano's ex-husband was only obligated to pay her a small sum of maintenance money during the three months after the divorce, known as the period of iddat. However, lacking the resources to support herself and her five children, Shah Bano sought maintenance payments in the courts. Under Section 125 of India's Code of Criminal Procedure, a husband may be ordered to pay maintenance to his wife or ex-wife if she is unable to maintain herself, but under Section 127 of the same law, this maintenance order is to be cancelled by the court where the woman has received the sum due to her under the personal law.96 Although this case did not directly raise a constitutional conflict between the personal law and the right to equality under Article 14 of the constitution, this concern was obviously on the minds of the Supreme Court justices when the case eventually reached them.

94. See VRINDA NARAIN, GENDER AND COMMUNITY: MUSLIM WOMEN'S RIGHTS IN INDIA 41-43 (2002).
96. Id.
The court ruled in favor of Shah Bano. First, it held that that the right to maintenance under Section 125 was a secular legal right that could be "exercised irrespective of the personal law of the parties," and that "section 125 overrides the personal law, if there is any conflict between the two." It also rejected the husband’s argument that Section 127 was automatically satisfied by his payment of dowry (mahr). Those rulings alone could have decided the case, but the Supreme Court went much further.

In the opening paragraph of the decision, written by Justice Chandrachaud, a Hindu, the court quotes and endorses a nineteenth-century British orientalist’s view that Islam’s treatment of women constitutes the religion’s "fatal point," and suggests that Muslim women are "traditionally subjected to unjust treatment." The court also embarked on its own novel interpretation of the sharia by directly analyzing certain verses from the Quran.

Finally, the court sermonized on the need for a uniform civil code and admonished the state for failing to enact one:

It is also a matter of regret that Article 44 of our constitution has remained a dead letter... There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies... It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so...

Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal Laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

There are other cases in which the Supreme Court has attempted to press the government to abolish the personal laws. For example, in Sarla Mugdal v. Union of India, a 1995 case that involved

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97. Id.
98. Id.
married Hindu men who were converting to Islam in order to practice polygamy, which is legal under the Muslim personal law, Justice Kuldip Singh wrote:

Those who preferred to remain in India after the partition, fully knew that the Indian leaders did not believe in two-nation or three-nation theory and that in the Indian Republic there was to be one Nation – Indian nation – and no community could claim to remain a separate entity on the basis of religion. . . . The Successive Government till-date have been wholly remiss in their duty of implementing the constitutional mandate under Article 44 of the Constitution of India.100

Not surprisingly, the court ruled that the second marriage of a Hindu convert to Islam would be invalid.101 The provocative and politicized judicial pleas for a uniform civil code in this case and in Shah Bano were effective at stoking significant public controversy in India, but were fairly counterproductive in achieving their declared goals of a uniform civil code and national integration.

The ruling in Shah Bano caused an immediate and massive popular furor to erupt in some parts of the Muslim community that interpreted the ruling as an attack on their religious rights. The strident tone of the court's criticism of the personal law, as well as its critical assessment of Islamic practices, and its attempt to interpret the Quran on its own initiative, amplified the backlash from the Muslim community by giving the clear sense that the case was not just about the rights of maintenance for an impoverished divorcee, but a judgment on the whole system of Muslim personal law.

In response to the harsh reaction to the ruling among Muslims, the Congress Party government, led by Rajiv Gandhi, passed the Muslim Women's (Protection of Rights on Divorce) Act 1986, which nullified the ruling in Shah Bano by excluding Muslim women from Section 125. This Act, in turn, served to agitate many Hindus and galvanize support for the Hindu right-wing, which accused the Congress Party of compromising the principles of secularism in order to appease Islamic fundamentalists and get Muslim votes.102 The Act specified that "a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance

100. Id. ¶ 35-36.
101. Id.
102. SATHE, supra note 71, at 192.
within the period of iddat by her former husband . . . "103

Thus, the Supreme Court's effort to hasten the elimination of the religious law created a backlash with the opposite result of further entrenching it in legislation, as well as promoting significant inter-communal tension in society at large. Indeed, many commentators argue that the reaction to Shah Bano and the passage of the Muslim Women's Act contributed both to the ascent of the Hindu right, represented by the BJP, in Indian politics, and to the volatile public atmosphere that led to the notorious destruction of the historic Babri mosque by Hindu militants at a disputed religious site in the city of Ayodhya in 1992.104

A wave of sectarian violence throughout India followed the Babri mosque incident.105 Amid this crisis, the President of India, acting under an emergency provision of Article 356 of the constitution, dismissed several BJP-led state governments.106 These dismissals were then challenged in the Supreme Court. In S. R. Bommai v. Union of India,107 the court ruled that "secularism" was part of the "basic structure" of the constitution, and that the dismissals of the BJP-led state governments could be upheld if there was reason to believe they were not acting in accordance with the secularism inherent in the constitution.108 The court's holding in Bommai did not precisely define "secularism," and some of the dismissals were upheld while others were not, but, ultimately, according to S. P. Sathe, "the declaration that secularism was an aspect of the basic structure of the constitution was a message to the BJP that even a constitutional amendment seeking to tamper with secularism would be vulnerable to being struck down by the court."109

Despite the public uproar and the legislature's reversal of the court's decision in Shah Bano, the Supreme Court did not give up on the issue of divorced Muslim women's rights. Although the court

104. JACOBSON, supra note 47, at 106.
105. Id. at 129.
106. SATHE, supra note 71, at 176.
108. Id; see also SATHE, supra note 71, at 176.
109. SATHE, supra note 71, at 176.
rejected some challenges to the 1986 Muslim Women's Act,\textsuperscript{110} the court ultimately returned to the issue in the 2001 case of \textit{Danial Latifi v. Union of India},\textsuperscript{111} in which the Muslim Women's Act was challenged on various constitutional grounds, including the violation of Article 14 (equality) and Article 15 (discrimination) of the constitution, as well as violating the basic constitutional feature of secularism.\textsuperscript{112} The court upheld the constitutionality of the Act, but did so through a broad, liberal construction of the Act's requirement that the husband make a "reasonable and fair provision and maintenance within the period of iddat."\textsuperscript{113} The court commented that if maintenance could only be authorized for three months alone, that would appear to make the statute violate the constitutional rights provisions on equality and discrimination, and, so, applying the constitutional avoidance canon, the court construed the statute to authorize maintenance orders for "reasonable and fair" sums that may provide support for the divorced wife for much longer than just the three-month period of iddat, so long as the \textit{payment itself} is made during the period of iddat. This ruling, although contrary to the common understanding of the Act's purpose, followed the actions of some lower courts at the state level, which had already been interpreting the statute in this fashion and awarding lump sum maintenance payments to divorced Muslim women.\textsuperscript{114} Thus, the \textit{Latifi} ruling used creative statutory interpretation to dodge constitutional controversy, while still preserving judicial discretion in determining the size of maintenance awards based on the facts of each case. This strategy suggests that the court in the wake of \textit{Shah Bano} has learned to employ greater restraint and diplomacy in advancing their interpretations of the law.

The Supreme Court has used other similar strategies in the

\textsuperscript{110} See \textit{Avadhesh v. Union of India}, 1994 1 S.C.C. Supp. 713 (holding that a petition "to declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Articles 14 and 15 Fundamental Rights and Articles 44, 38, 39 and 39-A of the Constitution of India" represented a matter for legislative, rather than judicial determination).

\textsuperscript{111} \textit{Latifi v. Union of India}, 2001 A.I.R. 3958.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.}

Divine Judgment

attempt to circumscribe the personal law in other cases. In the 1999 case of Githa Hariharan v. Reserve Bank of India, section 6 of the Hindu Minority and Guardianship Act of 1956 was challenged as violating Articles 14 (equality) and 15 (discrimination) of the constitution. Section 6 of the Act states that in the case of a Hindu minor, guardianship should be assigned to "the father, and after him, the mother ..." This statutory text had been understood to mean "award custody to the mother if the father has died," but the court observed that such a reading would make the act violate the equality provision of the constitution. Therefore, applying the constitutional avoidance canon and the understanding that the legislative intent was to promote the welfare of the child, the court construed the word "after" to mean an absence "temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise . . . ." The court declared that "[n]ormal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the state shall have to be in accordance therewith . . . ." In the 1996 case of Madhu Kishwar v. State of Bihar, as in Danial Latifi and Githa Hariharan, the court also negated a personal law provision while avoiding directly striking down the law under the constitution, but it did so through a slightly different technique of statutory (re-)interpretation; it construed a tribal personal law statute in light of certain "general principles" of law discerned from the modernized (and thus more equitable) Hindu and Christian codes of law. In this case, petitioners challenged certain provisions of the Chota Nagpur Tenancy Act, 1908 as violating Articles 14 (equality), 15 (discrimination) and 21 (right to life and personal liberty). At issue were provisions of tribal customary law that excluded women from inheriting property from male relatives.

The court held that general principles of inheritance law,

117. Id.
118. Id.
119. Id.
120. 1996 A.I.R. 1864.
discerned from the modernized Hindu and Christian succession laws, in effect, modified the unmodernized tribal code: ""[T]he provisions of the Hindu Succession Act, 1956, and the Indian Succession Act, 1925 [which applies to Christians] though in terms, would not apply to the Scheduled tribes, the general principles contained therein being consistent with justice, equity, fairness, justness would apply to them."" In its lengthy opinion, the court quoted, in dicta, a scholarly work's conclusion that ""secularization of law is essential to the emergence of the modern Indian state"" and ""the existence of different personal [laws] contradicts the principles of non-discrimination by the State.""  

A final set of cases from the mid-1990s merits discussion here. In these rulings, known as the Hindu tva cases, the Indian Supreme Court considered whether appeals to Hindu identity violated the Representation of the People Act 1951, an election law that prohibits candidates from seeking votes on the basis of religion, or provoking inter-religious enmity. These cases raised the question of whether campaign appeals to Hindu tva by candidates from the BJP and other Hindu nationalist parties were permissible. Hindutva, or ""Hinduness,"" is a vague term associated with a sense of Hindu nationalist identity. 

The Supreme Court concluded that appeals to Hindutva were permissible. The court held that Hindutva, and Hinduism, were not narrow ""religious"" concepts, but reflected concepts of Hindu or Indian culture and national development: 

[N]o precise meaning can be ascribed to the terms 'Hindu', 'Hindutva', and 'Hinduism'; and no meaning in the abstract can confine it to the narrow limits of religion alone, excluding the content of Indian culture and heritage .... the term 'Hindutva' is related more to the way of life of the people in the subcontinent ... the word Hindutva is used and understood as a synonym of Indianisation, i.e., development of uniform culture by obliterating the differences between all the cultures co-existing in

121. Id. Emphasis added.
122. Id. (quoting Donald Eugene Smith).
124. See Representation of the People Act, No. 43 of 1951, § 123(3); see also SATHE, supra note 71, at 182.
125. JACOBSOHN, supra note 47, at 193-94.
Curiously, the court did not refer to its holding in *Bommai* that secularism is part of the basic structure of the constitution, despite the fact that this ruling was issued only a few years earlier and was seemingly very relevant. By attempting to define *Hindutva* and Hinduism, the court, as in *Shah Bano*, appeared to tread into the treacherous territory of religious interpretation. Although the court's decision in the *Hindutva* cases can perhaps be defended on the basis of certain liberal principles, many defenders of secularism in India saw the *Hindutva* cases as a betrayal of secularism, because the court seemed to bless the Hindu right's assertions that an appeal to *Hindutva* is not an impermissible appeal for votes based on religion. While the *Hindutva* cases are perhaps not as far removed from the rest of the Indian Supreme Court's secularism jurisprudence as some suggest, they do signal at least an apparent retreat from the court's staunch judicial defense of "neutral" secularism in the *Bommai* case.

A likely explanation for this retreat is the impact of majoritarian pressure due to the rise of the Hindu right in Indian politics. Indeed, in 1996, the year the court decided the *Prabhoo* case, the BJP became the largest political party in parliament, and briefly appointed a prime minister. Although the court had upheld the dismissal of Hindu nationalist state governments in *Bommai* in 1992, this time, rather than waging a countermajoritarian struggle against the clear will of the public by reversing the elections of winning candidates, the court instead reached an accommodation with the rise in political power of the Hindu right. It blessed *Hindutva* as a valid political platform, but reinterpreted it as benignly as possible to mean something like "Indian civilization."

Several conclusions emerge from this brief survey of the Indian Supreme Court's jurisprudence on the personal law and religious-

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126. *Prabhoo*, supra note 123, at 159; see also id. at 200.
127. For example, freedom of expression or democratic majoritarianism. *See id.* at 191-97.
128. JACOBSOHN, supra note 47, at 198.
129. See generally supra note 88 (arguing that *Hindutva* judgments fit into a pattern of Supreme Court judgments which can be said to overlap with "the ontology of Hindu nationalism").
130. *Prabhoo*, supra note 123.
secular questions. First, as indicated in the court's lectures on secularism and Article 44 of the Indian constitution, the court has a preference for greater secularism in law, including the establishment of a uniform civil code and the elimination of the personal law. Second, the court's pleas for the state to fulfill Article 44 are ineffectual and primarily have served to provoke controversy. Third, in the aftermath of the uproar triggered by the Shah Bano decision, however, the court appears to prefer rule in a somewhat more economical and less inflammatory fashion, avoiding unnecessary interpretive steps that are likely to provoke heightened scrutiny and criticism of the court. It appears to do so by resorting to creative legal interpretations, relying in particular on two doctrinal tools: (1) A broad understanding of the constitutional avoidance doctrine, which it invokes to sustain tenuous re-interpretations of the personal law in order to eliminate conflicts with fundamental rights; and (2) the "general principles" doctrine, which allows reinterpretation of religious laws in light of relevant general principles "consistent with justice, equity, fairness, [and] justness." The court appears to have learned to exercise its authority on religion-state matters with greater subtlety. Finally, as illustrated by the Hindutva cases, the court's support for secularism may not be immune to the major trends in majoritarian politics, and it may have subtly switched its support from a more neutral version of secularism to the more Hindu-leaning version that gained popularity in the political arena during the 1990s.

B. Israel

1. Background: Secularism and the Israeli Judiciary

While both Israel and India have religious-based personal law systems, these laws function differently under Israel's constitutional structure. As noted above, in Israel, the religious laws are not applied by the civil courts; instead, independent religious courts apply religious law to members of their religious community. Jewish rabbinical courts have exclusive jurisdiction over marriage and divorce among Jews, while Muslim sharia courts have jurisdiction over most personal status cases for Muslims. There

131. The sharia law applied in Israel, like the sharia law applied in India, may differ from classical sharia law in certain aspects, as its application has evolved in the local context. Israeli sharia law, for example, has been impacted by the Ottoman codification of Islamic law, its place within the state of Israel, and the lack of a body
are no legal appeals from the decisions of the highest religious courts, and thus these courts remain the final arbiters of their own religious law. Because the religious courts are considered administrative agencies of the state, however, their rulings are subject to review by the Israeli Supreme Court under the rubric of judicial review of administrative action and compliance with constitutional human rights norms embodied in the Basic Laws. Conflicts between secular legal principles of gender equality and tenets of religious law have created many controversies, as in India, and the rabbinical requirements for marriage, which are deemed onerous by many non-Orthodox Israeli Jews, are another common flashpoint for conflict in Israel.

Questions involving the role of religion in society and Israel's status as a Jewish state come before the Israeli Supreme Court with relative frequency, and the court's jurisprudence can be described, generally, as secularizing, in the sense that it has usually functioned to reduce the influence of Jewish rabbinical law and scope of rabbinical authority on the Israeli legal system as a whole. For example, under the Israeli Law of Return, passed in 1950, Jews are entitled to immigrate to Israel. In a series of cases over the decades since 1950, the Supreme Court has determined eligibility for immigration under that statute using definitions of who is a "Jew" that differ from the definitions that obtain under traditional Jewish law. The decisions in these cases, and others, have earned the Supreme Court a reputation of hostility to religion in fervently Orthodox circles in Israel. The ultra-Orthodox community has convened large public protests against the court, and issued calls for

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132. See Scolnicov, supra note 70, (citing HCJ 232/81 Vilozni v. Rabbinical Court 36 (2) PD 733) (review of administrative of action); see also HC 1000/92 Bavli v. Great Rabbinical Court, 48(2) PD 221 (review based on constitutional norms)).

133. See, e.g., HC 72/62, Rufeisen v. Minister of Interior 16 PD 2428 (1962) (a Catholic monk, although Jewish under Jewish law, may not immigrate under the Law of Return); HC 58/68, Shalit v. Minister of the Interior, 23(2) PD 477 (1969) (individuals may be identified on government identity cards as Jews by nationality with no religion); HC 230/86 Miller v. Minister of Interior 40(3) PD 436 (1986) (non-Orthodox converts to Judaism may qualify as Jews under the Law of Return).

Secular judicial power in Israel received a significant boost in the mid-1990s following the enactment of two new Basic Laws in 1992. As described above, Israel does not have a constitution in the form of a single, written document as in India and the United States, but rather a series of basic laws that outline the basis of the political order. The 1992 Basic Laws - Basic Law: Freedom of Occupation and Basic Law: Human Dignity - purport to provide Israel with a formal, judicially enforceable Bill of Rights, although the Israeli judiciary already enforced many human rights prior to 1992. The laws also defined Israel as a "Jewish and democratic state." The 1992 Basic Laws have been interpreted to enable the Supreme Court to exercise judicial review of Knesset legislation by striking down laws that are incompatible with the rights under the Basic Laws. This development has been termed a "constitutional revolution" in Israel.

In an early case that illustrates how judicial review functions in Israel, a private company, Meatrael, that sought to import non-kosher meat appealed to the Supreme Court against the government’s refusal to allow the importation. The company claimed a violation of its rights to freely pursue an economic initiative under the Basic Law: Freedom of Occupation, while the government argued that Israel’s status as a Jewish state, enshrined in the Basic Laws, permitted it to forbid the importation. The court ruled in favor of Meatrael. The Knesset, responding to pressure from religious parties, thereafter amended the Basic Laws to allow modification by the Knesset, and then modified the law specifically to forbid non-kosher meat importation.

140. Hirschl, supra note 11, at 1837.
141. Id.
142. Id. at 1838.
subsequent case, the Supreme Court ruled against Meatrael, citing the new meat law.143

This episode demonstrates the Israeli judiciary's role as a key player in resolving the religious-secular controversies that frequently arise in Israeli society. Although the Israeli court lacks the powers of the high courts in the United States and India, where the courts, rather than the legislature, can have the "final say" on certain constitutional matters, there are often high political costs for the legislature to overturn a decision of the Supreme Court, especially when controversial claims about rights are at issue, and so the Israeli court still has significant power to influence many questions of public policy. Yet this episode also illustrates the limits and the fragility of the court's power to make decisions in this realm, because its decision was not only reversed by the Knesset, but provoked the Knesset to reduce the court's overall legal power.

2. The Israeli Supreme Court's Personal Law Jurisprudence

The Israeli Supreme Court's rulings, like those of the Indian court, display a clear tendency to take the side of secularism in religious-secular conflicts. In the arena of the personal law, the court's rulings operate to homogenize and regularize the operations of the religious courts, and to extend secular, civil rights and principles into the religious courts. However, the so-called "constitutional revolution" in Israel would not, at first blush, appear to affect questions of the personal law and the power of religious courts deeply. Because the power of judicial review of legislation under the 1992 Basic Laws does not allow the court to strike down laws or parts of laws that were previously enacted, the Supreme Court cannot directly invalidate or circumscribe any of the legislation setting up the religious courts - because all of this legislation predates 1992.144 Indeed, for example, the legislation authorizing the Christian religious courts in Israel remains the British Palestine Order-in-Council of 1922, which is still in effect where it has not been superseded.145 Rather than invalidating legislation, however, the court, much like its Indian counterpart, generally uses other tools and norms of legal interpretation to accomplish the same result.

143. Id.
144. See Scolnicov, supra note 70.
145. See Shetreet, supra note 53, at 106.
Two gender equality cases illustrate how the human rights norms embodied in the Basic Laws can be applied to limit inequalities in Jewish law, and the challenges of such an approach. In the first case, Bavli v. Great Rabbinical Court from 1994, the Supreme Court instructed the rabbinical courts to apply the principle of equal division of marital property – which does not accord with halakhah.\textsuperscript{146} The basis for the decision rested on the court's interpretation of a civil law – the Women's Equal Rights Law 1951 – as applying in religious courts as well as civil courts. The court's decision went on to add that religious courts must follow general principles and norms of constitutional law, as defined in the Basic Laws, thus expanding the court's power of judicial review over the religious courts.\textsuperscript{147} This judicial approach – that religious law must be applied in harmony with transcendent general principles of secular law – is similar to the one taken by the Indian court in Madhu Kishwar.

Not surprisingly, the rabbinical courts have opposed the Bavli ruling, in some cases refusing to follow it, on the grounds that they are bound to apply halakhah.\textsuperscript{148} The issue of equitable division of marital property arose again in the similar 2003 case of Yemini v. Great Rabbinical Court, in which the Supreme Court again ruled that religious courts must apply an equitable distribution.\textsuperscript{149} In Yemini, the decision turned on the court's interpretation of another civil statute, the Spouses (Property Relations) Law 1973, which is to apply in all courts unless the parties have agreed that religious law should apply.\textsuperscript{150} The Rabbinical Court argued that by submitting a case to the jurisdiction of the religious court, when concurrent jurisdiction also existed with civil courts, the parties had agreed to be bound by Jewish law and not the Property Relations Law.\textsuperscript{151} The Supreme Court, however, interpreted the statute to require the explicit consent of both parties to be bound by religious law rather than the Property Relations law, regardless of the forum of

\footnotesize{146. HCJ 1000/92 Bavli v. Great Rabbinical Court [1994] IsrSC 48(2) 221.}
\footnotesize{148. See Scolnicov, supra note 70, at 732-33.}
\footnotesize{149. HCJ 9734/03 Yemini v. Great Rabbinical Court [2003].}
\footnotesize{150. See Scolnicov, supra note 70, at 733.}
\footnotesize{151. Id.}
Thus, Bavli and Yemini illustrate how the Supreme Court constrains the authority of the religious courts by employing statutory interpretation and by requiring them to comply with general constitutional and legal principles derived from Basic Laws and other statutes. Yet these cases also illustrate the difficulty of the secular courts in successfully achieving religious law reform; the rabbinical courts may disregard the principles underlying the Supreme Court's controversial rulings because they regard halakha as the source of legal authority, while the Supreme Court lacks authority to actually rule on matters of halakha.

The cases of Katz v. Jerusalem Regional Rabbinical Court (2000) and Amir v. Great Rabbinal Court (2003) illustrate another mode by which the Supreme Court attempts to rein in the religious courts: by enforcing (or circumscribing) the borders of their jurisdictional authority. In Katz, the Supreme Court ruled that rabbinical courts lacked the authority to ostracize an individual who refused to have a civil matter adjudicated by the rabbinical court. According to the decision, the rabbinical courts, as legally constituted organs of the Israeli government, could only exercise those powers explicitly vested in them by law. In Amir, the Supreme Court applied the same ultra vires logic in the arena of arbitration. In that case, both parties had consented to an arbitration in the rabbinical courts over a dispute stemming from a divorce agreement that originated in the rabbinical court, but the Supreme Court held that the religious courts, as state organs, have not been granted the legal authority to act as arbitrators.

A recent religious controversy involving the Chief Rabbinate of Israel and the sale of agricultural produce also illustrates many of the techniques used by the Israeli Supreme Court in reviewing the action of religious authorities. Although the Chief Rabbinate is a

152. Id.
153. See id.
155. HCJ 8636/03 Amir v. Great Rabbinal Court [2003].
156. See Hirschl, supra note 11, at 1841.
157. Id.
158. This ruling would not apply to religious courts that are not organs of the state. See Scolnicov, supra note 70, at 735 n.14.
separate state institution from the religious courts, both are considered administrative bodies subject to the same type of judicial review by the Supreme Court.

The recent controversy arose due to a change in the Chief Rabbinate's regulations for produce grown during the Jewish sabbatical, or shmita, year. According to Jewish law, every seventh year shall be a sabbatical year in which debts shall be forgiven, farmland shall be left fallow, and any produce that grows naturally on the land is considered public property so that the poor can take it.159 Produce that is farmed by Jews during the sabbatical year is, therefore, not considered kosher, making it difficult to market in Israel, where many institutions have kosher food requirements. However, since halting all agricultural production for an entire year is a difficult proposition in a modern economy, rabbinical authorities developed a legal artifice, known as a sales permit, or heter mechira, to cope with this challenge.

Under this halakhic loophole, introduced over 120 years ago, land owned by Jews is nominally "sold" to non-Jews just for the period of the sabbatical year. Since the restrictions of the sabbatical year do not apply to non-Jews, the sales permit allows farming to continue uninterrupted. Since before Israel's founding, the Chief Rabbinate has certified produce grown under the sales permit arrangement as kosher. However, for the Jewish sabbatical year that began in October 2007, the Chief Rabbinate, under pressure from ultra-Orthodox factions who wanted challenge the validity of the sales permit concept, decided to reverse its longstanding policy of giving kosher certification to farmers using the permit. Instead, the Rabbinate deferred the question of kosher certification to municipal rabbis. Some of these local rabbis certified the produce and some did not, thereby creating substantial confusion, hardships for the farming industry, and an increase in the price of food.160

The issue promptly came before the Supreme Court. In Produce Production and Marketing Board v. Chief Rabbinate of Israel,161 the Supreme Court ruled against the Rabbinate, ordering it to return to

161. HC 7120/07 Produce Production and Marketing Board v. Chief Rabbinate of Israel [2007].
its traditional, centralized policy and issue kosher certifications for produce grown under the sales permit. The court's ruling illustrates many of the methods it typically employs in overseeing religious authorities, including religious courts. The court noted that while it gives deference to the Rabbinate and does not itself interpret halakha, the Rabbinate, as a state administrative body, must adhere to norms of administrative law, including reasonability, proportionality, and procedural adequacy in decision-making.162

Applying these "general principles" of administrative law, the court held that the administrative process used by the Rabbinate in its decision to change its policy was inadequate because it relied on a telephone poll, did not engage in sufficient data analysis and deliberation, and failed to give sufficient advance notice of its new policy.163 The court also held that the policy change was unreasonable in its failure to balance the interests of farmers and the general public against the interests supporting the policy change.164

The concurring opinion of the President of the Court, Justice Dorit Beinisch, also found a disproportionate infringement of certain rights articulated in the Basic Laws, including the rights of farmers to property and freedom to pursue their occupation.165 Justice Beinisch also held that rights of equality and non-discrimination were violated by the Rabbinate's policy because of the serious harm to farmers and to the poor, due to the increase in produce prices (because only imported produce would be available).166

Although the specific procedural defects that the court pointed to in this case might not often arise in the religious court context, the court's approach – applying general norms of administrative law and constitutional law – is typical of its review of religious courts. These norms – like the rule that an infringement of a basic right must be "proportionate" or that a decision must reflect a "reasonable" weighing of interests – are open to substantial judicial interpretation, thereby allowing the Supreme Court significant discretion to review decisions of the religious authorities.

The court generally uses this discretion to ease the burden of religious coercion perceived by many in Israel's secular majority.

162. Id. ¶25 (opinion of Justice Rubinstein).
163. Id. ¶¶25-27.
164. Id. ¶28.
165. Id. ¶3b (opinion of Justice Beinisch).
166. Id.
Nevertheless, the religious population is growing proportionally larger, is politically influential in the Knesset, and has mobilized vast public protests against the Supreme Court due to "antireligious" rulings in the past, particularly at times when the Israeli-Arab tensions are at a low ebb.\textsuperscript{167} Therefore, the court attempts to be as accommodating as possible with religious interests— for example, in the sales permit case, the Justices' opinions are at pains to cite the "many great rabbis" who supported the sales permit— while ruling in favor of secular interests in the end.

By contrast, the Israeli Supreme Court's approach to the Muslim sharia courts reflects a more laissez faire attitude, unlike in India where debates over reforming the personal law of the sizeable Muslim minority are the major point of contention. As noted above, the sharia courts have the widest jurisdiction of all religious courts in Israel, with exclusive jurisdiction over most matters of personal status for Muslims. This broad jurisdiction gives the sharia courts a significant role in the Muslim community.\textsuperscript{168} As there are no official ulama or muftis (traditional scholarly interpreters of Islamic law) in Israel, sharia in Israel has developed case by case through the decisions of the qadis, the Islamic court judges.\textsuperscript{169}

Civil laws, like the Women's Equal Rights Law and the Succession Law, theoretically apply to the Israeli Muslim community, but, according to Martin Edelman, the innovations contained in these laws are often ignored in the sharia courts in practice and not vigorously enforced by the government, which tends to have little interest in Muslim social practices.\textsuperscript{170}

The state has pushed through some reforms; it has been particularly insistent on banning polygamy, which is illegal under Israeli law but is permitted by sharia and was also practiced by some Jews who came to Israel from Arab countries. Today, polygamy is mostly confined to Bedouin communities in the Negev region. Other areas of reform have met with more mixed success. Edelman explains that a 1959 amendment to the Women's Equal Rights Law created a penalty of five years imprisonment for divorcing a wife

\textsuperscript{167} See Sontag, \textit{supra} note 135.
\textsuperscript{168} Edelman, \textit{supra} note 54, at 79.
\textsuperscript{169} Id. at 77; see Abou Ramadan, \textit{supra} note 131, regarding the ways sharia as applied in Israel is unique from other applications of Islamic law.
\textsuperscript{170} See Edelman, \textit{supra} note 54, at 80-88.
against her will.\textsuperscript{171} The purpose of this statute was to deter the Muslim practice of \textit{talaq} divorce, the same practice that had initiated the controversy that proved so offensive to the Indian court in \textit{Shah Bano}. According to Edelman, there is some opposition to \textit{talaq} divorce among Israeli \textit{qadis}, and therefore some \textit{qadis} will warn the husband about the criminal penalty before registering the divorce or will urge the wife to file a criminal complaint; other \textit{qadis} simply register the divorce, though.\textsuperscript{172} In other areas, reforms made available under the civil law have had little practical effect on the Muslim community. For example, although the Succession Law provides for concurrent civil court jurisdiction for succession cases and establishes a consent requirement for \textit{sharia} courts to hear the cases, these cases are routinely brought to the \textit{sharia} courts, even though certain parties might benefit from a hearing in the civil courts. In addition, the \textit{qadis} do not always insist on obtaining the required consent.\textsuperscript{173}

Thus, in contrast to the rabbinical courts, there are fewer cases in which the Supreme Court attempts to rein in or secularize the \textit{sharia} courts. The Supreme Court's review of the \textit{sharia} courts tends to be more deferent.\textsuperscript{174} There are many possible reasons for this trend, including that (1) there appear to be few elements in the Israeli Muslim community agitating for greater secularization of the personal law; (2) the Jewish majority sees little to gain by provoking conflicts with Muslim community over religious law, both domestically and vis-à-vis the wider Muslim and Arab world; (3) the concept of community-based religious autonomy has popular support in Israel society, even if many Jews would prefer the content of the personal laws governing them to be updated.\textsuperscript{175}

This survey of the Israeli Supreme Court's religious and personal law jurisprudence suggests several trends. First, the court is very active in adjudicating religious-secular controversies involving Jewish religious courts, generally ruling to minimize the

\textsuperscript{171} \textit{Id.} at 83.
\textsuperscript{172} \textit{Id.} at 83-84.
\textsuperscript{173} \textit{Id.} at 86.
\textsuperscript{174} See Ramadan, \textit{supra} note 131, at 102 (commenting on HCJ 9347/99 Ali Hamza v. The Shari'a Court of Appeals in Jerusalem and Others PD 55(2): "The High Court does not feel at ease in its role as a 'high interpreter' for a shari'a decision. Therefore, it supports its position by referring to the Shari'a Court of Appeals.").
\textsuperscript{175} See \textit{Edelman}, \textit{supra} note 34, at 88.
jurisdictional authority of these religious courts by prioritizing (1) procedural norms of secular law; and (2) the civil and human rights of the individual over claims of religious autonomy or any concept of Israel as a Jewish state in the religious sense. Second, the court's reliance on "general principles" of administrative and constitutional law - including reasonableness and proportionality tests - give it substantial discretionary authority to review religious decisions. Third, specific rulings of the court on religion-secular matters have provoked challenges to its authority from the Knesset, the religious courts, and religious segments of the public, but this resistance appears to affect the court's rulings primarily at the level of rhetoric rather than outcome.

III. Comparative Analysis and Discussion

This paper has shown how major questions about the relationship between religion and state are being answered by the high courts of India and Israel. It will now turn to a discussion of why these foundational political questions have been transferred to the judiciary, the limits of the judiciary's role in answering them, and what this means for other polities that may be considering introducing religious pluralism into their constitutional order.

A. Explanations for Judicial Empowerment

This section will address possible theories about why political questions about religion and secularism are being transferred to the judiciary, how the timing of the transfer of power to the judiciary may illuminate the political reasons for this transfer, and whether normative conclusions should be drawn from the political origins of judicial empowerment.

One possible explanation for the transfer of decision-making power over fractious religious questions to courts is that in deeply fractured societies - i.e., societies with deep ethnic or religious rifts, like Israel and India - leaving certain questions for judicial resolution provides the necessary stability for democratic governance to take hold and function on other fronts. Samuel Issacharoff writes that "constitutionalism emerges as a central

Defining power in these [fractured] societies precisely because of the limitations it imposes on democratic choice."^{178} While this explanation may provide a strong rebuttal to the criticism that judicial decision-making is inherently un-democratic, it remains unclear, as a practical matter, how successful judicial review can ultimately be at permanently mediating the tensions that exist along these social rifts, even if a perceived ability of judicial review to bridge these rifts can explain the judicialization of politics.

A counterpoint comes from Ruth Gavison, who argues that "in rifted democracies, courts should be reluctant to determine specific arrangements and priorities, especially in areas of social controversy, where the grounds of judicial action are not clear," because such judicial determinations may undermine social cohesion.\(^{179}\) The long saga of Shah Bano and its aftermath in India, and the power struggle waged between the Supreme Court and the religious courts in Israel support Gavison's view, but Issacharoff's thesis may represent a valid justification for judicial review in the short-term in post-conflict settings.\(^{180}\)

A more detailed and fact-specific explanation of judicial empowerment in Israel comes from Ran Hirschl, who gives a persuasive explanation of why Israel expanded the judiciary's power via the Basic Laws in 1992. According to Hirschl's thesis, dominant political elites, fearing populist erosion of their dominance in majoritarian arenas like the Knesset, cooperated with legal elites to move certain questions outside the realm of ordinary politics.\(^{181}\) In general, these elites were secular in their orientation, while the more populist forces they feared were associated with more religious sectors of society. Hirschl explains:

[As] the secular bourgeoisie in Israel has faced a continuous decline in its political hegemony and representation since the early 1980s, marginalized groups, such as residents of peripheral development towns and poor urban neighborhoods (mainly Mizrahi Jews and immigrants from the former Soviet Union), Israeli-Arabs from ethnically mixed towns, and lower income

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178. Id.


180. The states upon which Issacharoff's thesis is based are Bosnia and post-apartheid South Africa.

religious groups, have continuously gained political power during this period . . . Well aware of the backlash eroding its hegemony, representatives of the Ashkenazi secular bourgeoisie in the Knesset initiated and promoted Israel's 1992 constitutional revolution in cooperation with economic and legal elites. In this revolution, hegemonic elites and their political representatives transferred the main locus of political struggle from parliament, local government, and other majoritarian decisionmaking arenas to the Supreme Court, where their ideological hegemony faces less of a challenge.182

A version of this "hegemonic preservation" thesis can perhaps also explain the expansion of judicial power in India that occurred during the late 1960s through the mid-1970s. No additional constitutionalization of rights occurred at that time, since the Indian Supreme Court has always had the power of judicial review, but that is the time when the Indian Supreme Court began introducing the doctrines, discussed above, that expanded their powers of judicial review to include constitutional amendments. The dominance of the Congress Party over Indian politics had been secure from independence until 1967, when opposition parties won several state elections. At this time, the Congress Party split into a more conservative faction, tied to established local elites, and a radical faction under Indira Gandhi, which advanced populist, redistributive policies, such as bank nationalization.183 1967 is the same year the Indian Supreme Court produced the Golaknath decision, a decision defending property rights, which first established the Supreme Court's power to review constitutional amendments. Thus, the Supreme Court's expansion of its own power at the expense of the legislature can be seen as a defense of elite interests threatened by populist trends. It is important to note, however, that locating the origin of judicial empowerment in India and Israel in the political attempt of dominant elites to institutionalize their value preferences in light of perceived threats to their hegemony in majoritarian politics is a descriptive account, and does not necessarily embody a normative judgment about the legitimacy of this judicialization.184


183. SATHE, supra note 71, at 68.

184. All constitutions and laws are political documents and reflect the interests
In both countries, the attempt to shift religious questions into the hands of secular-oriented courts may signal an increase in the perceived need of these dominant, and now declining, secular elites to cooperate with specific religious constituencies in order to extend their dominance farther into the future. Because these secular forces increasingly expect to need the support of religious forces to govern, it suits the secularists' interests to have questions of religion removed from ordinary politics as much as possible, in order to hinder their religious allies from pursuing significant changes in the secular-religious framework that would go against their own political preferences.

Under Israel's coalition government system, the larger, secular political parties often cannot attain the necessary parliamentary majority to form a government without allying with smaller religious parties. Religious parties often demand support for policies that reflect their religious interests in exchange for their supporting the governing coalition. Indeed, this dynamic was a key part of the rationale that resulted in the original religious status quo compromise in Israel. In the current Knesset at the time of writing, the governing coalition is led by Kadima, a secular, centrist party, but also includes Shas, a party representing Orthodox Jews of Middle Eastern descent, and Labor-Meimad, itself an alliance between the secular Labor Party and a left-leaning religious party. Without the support of Shas, the government would fall; in such a situation, Shas becomes much more powerful than its simple number of parliamentary seats would indicate. Since this scenario is typical of Israeli politics and since the demographic base of religious parties is growing, it serves the interests of the secular parties to have court-enforced limits on secular-religious issues, so that, in effect, their hands are tied when religious parties seek concessions.

In India, the country's Muslim minority, considered the primary stakeholders in the religious personal law system, numbers and compromises of the political context that created them. That the timing of judicial empowerment occurs not at the time of a revolution, but rather at a time when the post-revolutionary establishment feels that their achievements will be threatened by changing trends in society, does not necessarily make the institutionalization of their value preferences any more or less legitimate. Rather, the legitimacy of this development should be based on an evaluation of the legitimacy of the procedures and substantive values implicated.

185. In the first half of 2008. The coalition also includes a party representing pensioners. Yisrael Beitenu, a party representing immigrants from the former Soviet Union, was in the coalition for a time.
over 150 million people, representing significant electoral power. The Hindu right-wing, exemplified by the Bharatiya Janata Party ("BJP"), frequently accuses the Congress Party of pandering to Muslim interests in order to get votes. The strength of the BJP has grown significantly over the past two decades, and it has led the Indian government and become the major force of opposition to the Congress Party. The BJP has campaigned on the issue of replacing the personal law system, which it sees as an illegitimate concession to the Muslim community, with the uniform civil code. Therefore, it may reflect the interest of Congress Party elites to judicialize religious questions and remove them from ordinary politics, because the less religion is an issue at stake in the political process, the more the Congress Party can immunize itself from the charge that it favors Muslims without having to actually entertain any policies that might anger its Muslim voter base.

Thus, the political dynamics of dominant political forces' attempts to preserve their own power can likely explain the increase in judicialized politics. The more important question, from the perspective of this paper, however, relates to how effectively civil courts can actually protect these value preferences they prioritize. In other words, can the high courts of Israel and India truly safeguard principles of secularism in the face of surging popular support for more religious policies?

B. Evaluating the Effectiveness of Judicial Management of Religious Law

The record of adjudication on questions of religious law in the supreme courts of Israel and India indicates only a limited ability of those courts to safeguard or advance principles of secularism through judicial review. Of course, this conclusion is only tentative, as these issues are continuing to be resolved by courts, and the long-term effects of judicial politics may be difficult to evaluate.

186. See Manmohan Acting Like Aurangzeb, says BJP, EXPRESSINDIA, Mar. 12, 2008, available at http://www.expressindia.com/latest-news/Manmohan-acting-like-Aurangzeb-says-BJP/283567/2/ (accusing the government of "vote-bank politics," the BJP "compared Prime Minister Manmohan Singh with Mughal ruler Aurangzeb claiming the former had said Muslims had the first right over the state's resources.").

Nevertheless, if we assume that certain responses to a judicial decision are indicative of an erosion in judicial power – outbreaks of violence, disregard for the decision, protests, and legislative responses to reverse the decision or limit the power of the court – then it seems that all of these outcomes, either directly or indirectly, can be tied to judicial decision-making on religion questions in India and Israel. Only non-violent protests and legislative responses indicate a healthy democracy is functioning, although if one’s definition of democracy includes substantive guarantees of human rights, like gender equality or lack of religious coercion, or if one prioritizes those substantive values above the value of majoritarian democracy, then even these responses will be unsatisfactory. The experiences of India and Israel suggest that civil courts in a religious legal pluralist polity may not be able to protect secularism and civil rights from religious forces in majoritarian politics. This conclusion has significant implications for debates about the power of courts to effect social change, the “countermajoritarian difficulty” allegedly posed when courts make political decisions, as well as for proposals to introduce pluralism into other democracies.

The Shah Bano decision of the Indian Supreme Court and its aftermath provide a useful illustration of how apex courts can fail in their attempts to secure citizens’ secular legal rights against claims made by traditional sources of cultural and religious authority. As described above, the decision not only provoked a popular Muslim backlash that led to the passage of a law reversing the court’s ruling, but this, in turn, provoked a counter-backlash that strengthened anti-Muslim extremism and, according to some, led to acts of terrorism and civil strife.

Thus, the court’s decision had the effect of diminishing the court’s authority, by the reversal of its decision, and provoked religious tension in society, but did little to advance the secularist goals described in the opinion. The strident tone of the Shah Bano opinion itself, and its lack of judicial economy, indicated by its unnecessary foray into Quranic interpretation, may have had a lot to do with the furor it provoked. The court’s more recent decision in Latifī, which reaches the same functional result as Shah Bano in a more restrained fashion, did not provoke the same controversy. Thus, for now it seems, the court has ultimately achieved the outcome it wanted on the issue of support payments for divorced Muslim women. But 17 years passed between these two decisions, and major chapters in Indian politics, such as the rise of the Hindu
right and a resurgence of sectarian violence, both of which may have been affected by the *Shah Bano* affair, took place in the interim.

Despite the opinions in which the Indian Supreme Court has advocated for a uniform civil code and reminded the government that the constitution advises that one be implemented, there has been no legislative movement in that direction. Furthermore, the Indian Supreme Court appears to have softened its own interpretation of secularism and sided more with public opinion in the *Hindutva* judgments, which were issued at a time when the Hindu right proponents of *Hindutva* were gaining significant political power. Thus, while the Indian Supreme Court has, on the whole, generally ruled in favor of secular outcomes, it has made only a few practical advances in restraining or reforming the personal law; these advances have been hard fought over the course of many years; its jurisprudence on these questions is defensive in that it tends to use canons of construction to avoid raising any overt constitutional conflicts, even where these conflicts might seem readily apparent; and it is not immune from the prevalent forces of public opinion.

The Israeli Supreme Court appears to have had slightly more success than the Indian Court in legally restraining religious authority, but *practically* it has also provoked more frequent challenges to its authority. In *Amir v. Great Rabbinal Court*, the Supreme Court enforced the limits on the rabbinical courts jurisdictional authority, and in the sabbatical year case, the court effected a reversal of the Chief Rabbinate's policy. Yet even though both of these examples appear to impose legal limitations on religious authority, they can also be seen as defensive rulings in which the Supreme Court merely prevented an unauthorized expansion of rabbinical court power into a new arena (as in *Amir*), and protected the status quo with respect to a 120-year-old kosher policy that was under attack from extremely Orthodox factions.

The *Meatrael* case in Israel is similar to the *Shah Bano* affair in India in that it provides an example of how a backlash to a judicial ruling on a religious question can lead to a decrease in the court's power and a reversal of its decision. In that case, as described above, the Knesset reduced the court's power of judicial review by revising the Basic Law to allow for a parliamentary override, and then overrode the court's specific decision with a new law prohibiting non-kosher meat importation.
The reaction to the Israeli court's *Bavli* decision on marital property provides an illustration of a different sort of authority backlash problem than the one in *Meatrael*: Some religious courts simply refused to follow the Supreme Court's legal ruling. This disregard for the general, secular law is also a problem in the Israeli *sharia* courts, where secular principles of equality are sometimes ignored. This authority gap undermines the integrity of the Israeli legal system, but the Supreme Court, lacking powers of enforcement or implementation, can do little but continue to protest and issue rulings in accordance with its jurisprudence. The state government would have to intervene to actually force the religious courts to comply - for example, by replacing judges - but if the government does not do so, the Supreme Court's options are limited.

These cases indicate that when ruling on questions of religious law, the secular supreme courts face a deficit of what Richard Fallon terms "sociological legitimacy": the support of the public for their rulings. Fallon describes three types of sociological legitimacy: institutional legitimacy (whether the public believes in general that the court is a trustworthy decision-maker); the substantive legitimacy of rulings (whether the public believes a particular ruling is substantively correct); and authoritative legitimacy (whether the public believes judicial decisions should be obeyed). Of course, different elements of the public may hold different views, and overall legitimacy may depend on differing levels of support from different categories of citizens; Fallon cites H.L.A. Hart for the proposition that government officials and lawyers must "embrace shared legal norms... as providing reasons for action" while ordinary citizens usually need only to acquiesce in those norms.

The reactions to the prominent religion-state cases above illustrate significant legitimacy challenges to secular courts ruling on religion-state questions. The primary source of these legitimacy challenges comes from the religious public - Muslims in India, Orthodox Jews in Israel - who believe the ultimate authority of religious law is divine in origin, and therefore, that judicial review

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189. *Id.* This last type is different from substantive legitimacy because in some cases people believe a ruling, although substantively incorrect, should nevertheless be followed.

190. *Id.* at 1828.
based on the supremacy of secular laws has got it backwards. 191 Because the religious interests of this segment of the public are well-represented (perhaps disproportionately represented) in the Israeli and Indian legislatures, and in relevant public institutions, a low enough view of the institutional legitimacy of the court or in the substantive or authoritative legitimacy of its rulings may be translated into a legislative reversal or reduction of the court's power.

It appears that these legitimacy challenges run deeper in Israel than in India. 192 Although the Shah Bano decision clearly had a substantive legitimacy problem, in Israel, the authoritative legitimacy of court decisions is undermined by the noncompliance of religious courts, and there are proposals to alter the framework in which the judiciary operates. Under a draft version of a formal Israeli constitution that has been prepared by the Knessset's Constitution, Law, and Justice committee, the Supreme Court would lose the power of judicial review over religious matters; 193 another constitutional proposal from the Israel Democracy Institute, a prominent think tank, would also take away this power from the court. 194

Another, more substantial challenge to the overall institutional legitimacy of the Israeli Supreme Court has been mounted recently by the Minister of Justice at the time of writing. Israeli Justice Minister Daniel Friedmann, previously a well-known law professor, has proposed reforms restricting the Supreme Court's power by giving the Knesset more control over the selection of justices and removing the court's power to hear certain cases. 195 This challenge has resulted in a bitter public debate between Friedmann and supporters of the Supreme Court, including court President Dorit Beinisch and former court President Aharon Barak, who believes the

191. See Scolnicov, supra note 70.
192. Criticism of the Israeli Supreme Court as overly activist does not just focus on religious matters. National security issues also figure prominently in critiques of the court.
194. Id.
proposed reforms will castrate the court and eliminate the rule of law in Israel. Curiously, Friedmann actually seems to support the court's activism on religious questions, while opposing it in all other areas. This position is curious because, by subjecting the court to greater Knesset control, the reforms would almost certainly lead to greater influence of religious parties on the court. So far, the reforms have not passed in the Knesset.

The institutional legitimacy of the court to engage in judicial review may be less firmly established in Israel because the practice of judicial review has a shorter history there. In addition, judicial review over religion-state questions in Israel may have less institutional legitimacy because of the centrality of the religious-secular rift inside the Jewish majority population (compared to India where the religion-state controversies generally pit Muslims against Hindus).

In sum, in neither Israel nor India has the high court effected a fundamental change in the status of the religious personal laws or the basic components for religion-state accommodation, despite the courts' secular-oriented jurisprudence. The Israeli court appears to have been a bit more activist in its defense of secularism than the Indian court, which at times may have has modified its vision of secularism to reflect trends in line with majoritarian politics, but in so doing, the Israeli court may have provoked greater challenges to its authority.

IV. Conclusion

This conclusion suggests civil courts in democratic states have only a limited ability to advance (or defend) principles of secularism against entrenched religious authorities backed by politically influential segments of society. The fact that courts in a democracy lack strong implementation powers and must fear the reversal of their decisions or the erosion of their powers by the legislature

196. Id.
197. See supra note 192 ("Friedmann's position is that the only issue that makes a constitution necessary, that justifies High Court's intervention, and in which its activism is beneficial, is the religious issue.").
198. See supra note 48 (explaining that the personal law in India is primarily a site of inter - rather than intra - communal conflict). However, Galanter and Krishnan may have overstated this point a bit, because the personal law is also a significant site of intra- Hindu debate over the meaning of secularism.
means that their resources for opposing public opinion, as reflected in the legislature, are limited.

The countermajoritarian difficulty\textsuperscript{199} refers to the argument that court decisions lack democratic legitimacy when unelected judges overturn the decisions of popularly elected legislatures. Expanding the power of the judiciary to make political decisions, such as decisions about religion and state, theoretically compounds this difficulty.\textsuperscript{200} Without delving into the extensive theoretical literature and debates on this question,\textsuperscript{201} I suggest that the experience of the Indian and Israeli Supreme Courts in adjudicating contentious religion-state matters, and the resistance that their rulings have encountered, suggests that, as an empirical matter, concerns about the countermajoritarian difficulty may not be particularly relevant in this context; the checks of majoritarian politics will likely restrain the court into modifying its jurisprudence, or rein it in by reducing its powers or directly reversing its decisions. This conclusion is in line with studies finding that the U.S. Supreme Court’s decisions generally reflect public opinion with a five-year lag time,\textsuperscript{202} and support the argument advanced by Gerald Rosenberg that court decisions are powerless to produce social change without the additional support of public opinion and other institutions of government.\textsuperscript{203}

What does this mean for states that may be considering introducing some form of religious legal pluralism, like the \textit{sharia} arbitration tribunals proposed in Canada? First, that judicial review by civil courts may be an ineffective means of ensuring that the

\textsuperscript{199} See Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} (1962).

\textsuperscript{200} Of course, the legislatures are only an imperfect reflection of public opinion, and often are not truly majoritarian, especially with respect to individual issues. For example, it is possible – and indeed likely – that if a national referendum were held on the personal laws in Israel and India, those systems would at least be reformed, if not abolished, but the dynamics of the legislative system enhance the strategic power of the constituencies that support religious law.


religious legal system respects established civil rights. Dismissing objections to the proposed plan for introducing *sharia* tribunals in Ontario, Dahlia Lithwick writes:

Truth be told, it's pretty hard to tease out a meaningful objection to sharia panels under these circumstances. If participation is indeed purely voluntary, if all agreements are reviewable by civil courts, if parties are already submitting to these panels informally anyhow, and if any provision that violates the Canadian civil rights laws is null and void, what do Muslim and feminist groups find so appalling? At worst, some kind of toothless sharia-lite will govern. At best, a more equitable, kinder, gentler sharia may be forged.204

The application of religious personal law in Israel and India suggests these observations are wrong. In neither country have religious laws been significantly modified due to civil court supervision. Civil court review of religious law or religious tribunals is more complicated than ordinary judicial review of lower courts by hierarchically superior courts because the introduction of the religious element creates a situation in which different sources of legal authority must face off. From the internal perspective of secular law, authority derives from acts of the legislature and the civil courts. From the internal perspective of religious law, authority derives from a higher power. Therefore, even if in theory the human rights norms of the state's constitution or procedural requirements imposed by statutes are the highest law of the land - as in India and Israel - from the perspective of religious law and its supporters, there is yet a higher law, and the demands of secular law may be viewed as less than binding, optional, or even forbidden. In other words, religious law itself operates as a type of constitutional law against which the validity of all other laws may be tested. Putting civil courts in the position of mediating between these clashing sources of authority is problematic because the civil courts' own authority clearly derives from the secular law; their social legitimacy as impartial interpreters on religious questions may be called into question, particularly when they venture directly into religious interpretation, as in *Shah Bano* and the *Hindutva* cases.

Another lesson from the experience of Israel and India is that social groups who see themselves as the primary beneficiaries of the

religious legal system - such as Israeli Orthodox Jews and Indian Muslims - become politically invested in the continued autonomy and preservation of the system. Attempts to reform or restrain the system from the outside (e.g., by the civil courts or the legislature) are likely to be interpreted as attacks on these groups' religious rights. That perception leads to magnified social tension and conflict around civil court cases implicating religious law, and makes outside supervision and management of religious legal systems complex and fraught with potential controversy. This type of fundamental and irreconcilable social tension is not conducive to democracy because the rationale for maintaining a democratic state depends on the state's citizens perceiving some form of a common political-legal identity.

A final lesson may be drawn from the historical persistence of religious law in Israel and India. These pluralist systems of law had their origin as political concessions to local communities being ruled by foreign imperial powers, and have long outlasted the empires themselves. Although the prevailing political and social conditions have changed, and modern India and Israel are in many ways radically different from the Ottoman and British eras, the systems of religious authority persist. Once these legal systems gained the backing of the state as vehicles for the autonomy of certain communities, they have proved remarkably rooted, self-perpetuating, and resistant to reform, surviving changes of government, revolutions, partitions, and wars. Therefore, any secular, democratic state that is considering adopting a version of religious legal pluralism should carefully weigh the costs and benefits of doing so, since that decision may be with them for a long time to come.