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A Case of Competing Interests:
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Introduction

Multicultural democracies, simultaneously committed to the principles of equality and respect for cultural diversity, must confront scenarios of competing interests between these two principles. Religious personal law regimes that govern family matters, in both India and Israel, are examples of ‘special’ collective rights accorded to different religious groups within a broadly liberal-democratic framework. These laws disadvantage women in numerous ways violating legal norms of sex equality, thereby creating a dilemma between multicultural and feminist commitments in each polity. Such cases of competing interests are fiercely contested in domestic judicial courts. This paper analyses, through a comparative study between India and Israel, how these competing interests between individual and collective rights as well as religious non-interference and gender equality are handled in civil and constitutional courts.

Specifically I ask: 1) Does judicial recourse against sex discriminatory religious personal laws in the ‘private’ sphere of the family favor non-interference in family norms and religious matters, or do domestic courts favor claims of sex equality? 2) Does the presence of a secular constitutional framework (as in India) provide better protection of individual (human) rights for women when constitutional sex equality laws conflict with religiously determined personal law? This investigation sheds light on the broader question of the articulation, interpretation and impact of rights-based strategies in different democratic contexts.

I start by discussing different theoretical debates that are implicated in the issue. Following this, I present the comparative framework highlighting the relevant legal, political and constitutional considerations for each polity. I then map judicial trends in
each context and present some comparative observations. I conclude with an attempt to explain the trends observed.

I) Multiculturalism, Legal Pluralism and the Limits of Liberalism

Over the past two decades, the increasingly multicultural social reality of democracies worldwide has prompted the emergence of different theories and proposals under the banner of “multiculturalism”. The rise of this multicultural discourse has marked a shift from assimilation, previously considered an expectation of liberal democratic citizenship, to the respect and encouragement of cultural diversity. According to Will Kymlicka, a prominent defender of group rights within a liberal framework, group rights imbue their members’ lives with meaning across “the full range of human activities...encompassing both public and private spheres.”¹ The expression of respect for group integrity in policy, however, can assume different forms, which question in varying degrees, liberal-democratic theoretical assumptions. If equal and uniform treatment that are fundamental tenets of liberal thought cannot guarantee the necessary self-respect required for individual autonomy, and cultural or group membership is necessary to realize a richer notion of true equality, this implies the legitimization of different treatment to groups in a polity.

The question then raised is: how different can this treatment be? Respect accorded to groups, as a prime example, may require the recognition of different customs or usages of the group, which exist outside of formal state law. Religious personal laws that govern different communities in family matters according to their faith, in democratic regimes with liberal-universalistic commitments, such as India and Israel, represent examples of this legal pluralism. Within a democratic framework, thus, can

¹ Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Oxford University Press, 1995), 76
multicultural realities be articulated through legal pluralism, despite tensions with liberal universalism? This encounter with legal pluralism represents a classic case of liberalism’s test of multicultural or multi-religious accommodation. As Rudolph and Rudolph suggest, “legal universalism has been associated with liberal and nationalist ideas about equal, uniform citizenship.” Congruous with liberal assumptions, hence, legal universalism posits individuals as the fundamental unit of society and the state, imagining “homogenous citizens with uniform legal rights and obligations.” Embodied within this ideal of homogeneity is that of identical treatment, which defenders of group rights suggest is limited in its scope to realize “true equality.” Legal pluralism, on the other hand, “posits corporate groups as the basic units, the building blocks, of a multicultural society and state,” which defies the liberal-democratic commitment to individualism.

II) Multiculturalism-Feminism Dilemma

Thus, while we see that a concern for group rights may stem from a desire for equal respect for diversity, or a commitment to protection against majoritarian tendencies, “multiculturalism resists easy reconciliation with egalitarian convictions.” A prominent site of this tension between collective or group and individual rights lies in the issue of sex equality, which is guaranteed in some form or the other by most liberal democracies, but might not be guaranteed in cultures or religions accorded group rights. The political theorist Susan Okin raises this concern pointing out “virtually all the world’s cultures have distinctly patriarchal pasts” and their “central focus” lies in their concern with “personal, sexual and reproductive life” that broadly fall in the realm of the

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3 Lloyd and Lloyd, 36
4 Lloyd and Lloyd, 37
family. Granting rights to groups even with a liberal intent to allow “justice between groups”, in light of intra-group gendered inequalities, presents the possibility that these inequalities may severely limit women’s capacities of achieving equality outside the group. Will Kymlicka, in his response to Okin’s skepticism of minority group rights from a feminist perspective acknowledges the importance of “a more subtle account of internal restrictions...that reduce freedom within groups.” Moreover, he insists that multiculturalism and feminism both share common concerns in highlighting the limitations of formal individual rights prescribed by liberalism, arguing for a “more inclusive conception of justice” that recognizes the insufficiency of identical treatment.

Unlike Okin and Kymlicka, then, whose normative liberal position supports women’s (individual) autonomy upon conflict with religious or cultural freedom, Martha Nussbaum suggests a theoretical approach that is more forgiving of religious freedom. Okin’s criticism of illiberal practices in the context of religion are particularly significant since, according to Nussbaum, the freedom of religion is “one of the liberties...most deserving of protection by the liberal state.” Nussbaum critiques Okin’s disregard for the profound role of religion in shaping an individual’s moral values and quest for meaning. She argues Okin’s “comprehensive liberalism” with a blanket preference for individual autonomy as the state’s ultimate goal “disregards plurality for comprehensive doctrines of the good, prominent among which are religious conceptions.” She claims that interfering in “practices internal to the conduct” of a religion to align it with a distinctly liberal conception of the good is itself “illiberal” and a justice-oriented approach requires balance between the burdens imposed on religious practice and those

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6 Okin, “Is Multiculturalism Bad for Women?”, 12-13
7 Will Kymlicka, “Liberal Complacencies” in Okin, 32
8 Okin, 13
9 Kymlicka, 32
10 Kymlicka, 34
11 Martha Nussbaum, “A Plea for Difficulty” in Okin, 107
12 Nussbaum, 109
imposed on women as a group. The protection of sex equality should not, as a principle, 
triumph guarantees of religious freedom for Nussbaum.

The feminist-multiculturalism dilemma captured in these exchanges presents the 
difficult situation of competing interests, between respect for religious or cultural 
freedom and the individual human right of sex equality, which confronts democratic 
regimes. The practical solution of this dilemma is constantly contested in different 
contexts, whether in parliaments or judicial courts, with differing results.

III) The Public-Private Dichotomy

Okin’s aforementioned concerns about gender inequalities that multicultural 
accommodations could culturally or religiously rationalize in the sphere of the family 
echo familiar feminist critiques of the public/private dichotomy as it exists in liberal 
theory and practice. The social structure underpinning liberal theory presumes a private 
and public dichotomy in which the distinction between the two is fundamental, in the 
very sense that, “the public sphere and the principles that govern it are seen as separate 
from, or independent of the relationships in the private sphere.” While what 
dimensions of social life are categorized in each sphere continue to be debated, there is a 
strong consensus that the family is “paradigmatically private” in the liberal conception of 
social reality. This dichotomy with different rules determining each sphere “obscures 
the subjection of women to men within an apparently universal, egalitarian and 
individualist order.” Women, within the public realm, are thus ‘free’ individuals who 
are equal with their male counterparts, but the same standards of universalism and 
egalitarianism are relaxed within the private sphere, which lies outside of the purview of 
liberal theory’s ‘public’ principles. Feminist scholars, rejecting this dichotomy, have

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13 Nussbaum, 114
15 Pateman, 104
16 Pateman, 105
asserted that the public and private be seen as “inextricably interrelated” and consequently, be subjected to similar standards, if a holistic vision of sex equality is to be attained.\textsuperscript{17}

This liberal socio-legal construction of the family as an essentially private domain, wherein public or legal principles are by and large intrusions, has been instrumental in perpetuating the legal discourse of “nonintervention in the family.”\textsuperscript{18} The terms for the extent of legal intervention in the family revolve around an “ideal of family privacy,” which must only be disrupted in the event of malfunctioning such as neglect or abuse. Olsen has argued that this general presumption of “non-intervention” in the private sphere of family life is an “incoherent” ideal since the state, through its legal regulations, constitutes the institution of the family.\textsuperscript{19} The state with regards the family, she claims, “must make political choices” and so, cannot remain “neutral” or “remain uninvolved.”\textsuperscript{20} Feminist legal scholars such as Olsen and Mackinnon have pointed out the role of this “private” construction of the family in perpetuating the subordination of women in liberal constitutional jurisprudence.\textsuperscript{21} Fudge encapsulates this relationship: “the public/private split is implicit in the notion of formal legal equality and is the cornerstone of liberal democracy and jurisprudence.”\textsuperscript{22}

\textbf{IV) Constitutional Regimes and Possibilities for Rights Protection}

This contest of competing claims between collective rights emblematic of respect for group integrity, and individual rights that represent human rights aspirations of liberal-democracies, is increasingly negotiated in constitutional courts, committed to

\textsuperscript{17} Pateman, 107
\textsuperscript{19} Olsen, 837
\textsuperscript{20} Olsen, 836
\textsuperscript{22} Judy Fudge, “The Public/Private Distinction: The Possibilities of and Limits to the use of Charter Litigation to further Feminist Struggles,” \textit{Osgoode Hall Law Journal} 25 (1987), 497
upholding a polity’s vision of fundamental rights and ameliorating social conditions.

There is much debate in academic circles about the actual impact of a judicially enforced constitutional system of rights on advancing fundamental rights protection. The constitutionalization of rights and the establishment of judicial review are perceived “as power-diffusing measures often associated with liberal and egalitarian values.” Power-diffusing measures entail protection against the majoritarian tendencies that are inherent in democracies. Moreover, an entrenched bill of rights in a codified constitution, under such a view, advances the possibilities for socially progressive changes and the use of a rights-based discourse in creating a culture of respect for human rights.24

This potential of constitutional rights adjudication and discourse has been questioned within the context of the political struggles of socially disadvantaged groups. The role of rights-based discourses on women’s political movements has been viewed favorably by some feminist scholars, unfavorably by others, while yet others have insisted on the need to reconceptualize the role of constitutional rights in aiding feminist struggles.25 Critics of the rights-based discourses have underscored the individualistic, formalistic and abstract nature of rights-claims that compromise on their capacity to effect change.26 Elizabeth Schneider reconceptualizes the vision of rights-based strategies, and argues for a deconstruction of the distinction between law and politics, such that rights claims are seen within the broader context of strategy that operates within a political context.27

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24 Hirschl, 3
27 Elizabeth Schneider, “The Dialectics of Right and Politics: Perspectives from the Women’s Movement” *New York University Law Review* 61(1986), 589. Alan Hunt and Amy Batholomew also argue for the
India and Israel: A Comparative Framework

India and Israel are democratic states with significantly multi-religious populations that stir both intra- and inter-communal tensions in each state. Both modern nation-states emerged in the first wave of decolonization, through a partition process, which left the preponderance of a majority religious and a large religious minority of Muslims. There are historical similarities between the two polities, where each represents the “contemporary vehicle of an old and resilient culture or civilization” that has had an “earlier experience with victorious, expansive Islam” and has “reached an uneasy but flourishing accommodation with the secular, scientific accommodation with the West.”

This uneasiness is reflected in both societies where there remain tensions between modernized, “secular” elites and revivalists on one side and religious nationalists and fundamentalists who “seek to restore an indigenous religious society” on the other. This manifestation of religious particularism co-exists with each state’s liberal-universalist aspirations of their national foundation, as embodied in foundation documents – the constitution of India and the Declaration of Independence for Israel.

The common legal system in both states is based on the British common law model, which entrusts the task of legal development in the hands of the courts. The contests of religiously-charged policy issues are played out in the constitutional courts of

situating rights within political contexts and not as outside of them in “What’s wrong with rights?” (1990) Law and Inequality 9(1990).


29 Galanter and Krishnan, 271

30 Jayanth and Krishnan, 271
both countries, where these fora have assumed the role of significant political actors as
judicially active courts.\textsuperscript{31}

One such charged issue of secular-religious disagreement is the historical-
colonial legacy of legal pluralism within their territories that now exists as “truncated
systems” of religious personal law that govern family matters.\textsuperscript{32} Both civil and religious
laws exist side by side, and matters concerning personal status such as marriage, divorce,
support, guardianship and so forth are determined according to the religion of the
parties involved.

In Israel, the rule of religious personal law in family matters is written in the
Palestine Order-in-council (1922-1947) that continues to be in force today.\textsuperscript{33} The
regulation of family affairs through religious law predates the foundation of the Israeli
state, and originated in the Ottoman rule in Palestine through the millet system. The
Ottoman regime considered family matters as private affairs to be governed by religious
law, and while only Muslims were allowed to be governed by Shari’a law, other groups
regarded as “nations” were left to be governed by their own religious laws.\textsuperscript{34} Upon the
foundation of the modern state, religious personal laws for family matters were given
statutory recognition by the Zionist government as a political compromise for the new
“Jewish and democratic” state between Zionist liberal aspirations and the religious-
nationalists’ ideal of the Jewish state.

\textsuperscript{31} Ofrit Liviatan, “Judicial Activism and Religion-Based Tensions: The Case of India and Israel” 2008).
\textsuperscript{2} Jacobsohn describes how The Indian judiciary has been considered an “arm of social revolution” from the
earliest days of independence. (Jacobsohn, \textit{The Wheel of Law}, 232)
\textsuperscript{32} Galanter and Krishnan, 271
\textsuperscript{33} Asher Maoz, Enforcements of Religious Courts Judgments Under Israeli Law, Journal of Church & State,
Vol. 33 Issue 3, 473
\textsuperscript{34} Ruth Halperin-Kaddari, \textit{Women in Israel: A State of their Own} (Philadelphia: University of Pennsylvania
Press, 2004), 228.
Despite a constitutional commitment to secularism, India too maintains a similar system of religious personal laws.\(^{35}\) Like in Israel, the plural legal system in India was a colonial legacy, one not restrained from, but developed and consolidated through colonial intervention, which was subsequently retained as a political compromise in the communally volatile partition process out of which the Indian state emerged.\(^{36}\) While the secular, egalitarian Nehruvian framers of the constitution envisaged a uniform civil code (UCC) that would govern all citizens regardless of religion, in line with their liberal-democratic commitments to uniform and equal citizenship, this principle was written into the constitution as a non-justiceable directive principle of state policy.\(^{37}\) Sixty years after independence, however, India still lacks this uniform civil code.

While religious personal laws are not explicitly mentioned in the constitution, with exception to their mention in Entry 5, Legislative list III of Schedule VII granting states power to legislate in the matters of personal status, the secular commitments of the Indian constitution have been used by both pro and anti-UCC factions.\(^{38}\) The rights to religious freedom as embedded in the constitutional guarantee of secularism in Articles 25-28 of the constitution contain both individual and collective rights. While some scholars have seen this simultaneous commitment as an instance of “principled eclecticism” and “legal balance”\(^{39}\) others have dismissed it as an inherent contradiction in

35 It is important to note, though, as Galanter and Krishnan have how the religious personal law systems in both countries are administered differently. “In Israel, personal laws are administered by qualified religious institutions. By contrast, in India, personal law is applied by common-law trained judges in regular state courts.” (Galanter and Krishnan, 284)

36 Rudolph and Rudolph trace the historical development of legal pluralism in pre-partition India, and how, while the Nehruvians, who dominated India’s constituent assembly at Independence were against such a provision were compelled to grant in an attempt to quell Muslim apprehensions.

37 Article 44 of the Indian Constitution: ‘Uniform Civil Code for the citizens’ states: ‘The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.’


the principle of secularism.\textsuperscript{40} Article 25 contains a clause giving power to the state to regulate and restrict economic, financial, political or other secular activity that may be associated with religious practice. Article 26(b), on the other hand, grants religious communities the right “to manage its own affairs in matters of religion.” Despite strong constitutional commitments to individual human rights embodied in an otherwise liberal constitutional text, the presence of collective or group rights provisions, foster a situation of competing interest that are adjudicated in courts.\textsuperscript{41}

One prominent issue where this conflict between individual rights and equality commitments and collective or group provisions for religions arises, in India and Israel, is that of gender equality. Legal and feminist scholars have strongly criticized the subordination of sex equality, implicitly or explicitly, to the appeasement of religious group interests, in the continued presence of religious personal laws, despite their discriminatory provisions for women.\textsuperscript{42} The criticism derives from the fact that these laws that are based on religious sources often reflect traditional, patriarchal values that are problematic to the legal equal status of women – whether through unilateral provisions of divorce by men, inadequate maintenance provisions or unequal property divisions upon dissolution. Religious personal laws disadvantage women in the private sphere of the family, where the liberal state is reluctant to impose ‘public’ principles. This conflict between religious personal laws and sex equality continues to be contested in the civil and constitutional courts of both nations, wherein the judiciary becomes a site where battle for women’s emancipation from discriminatory provisions plays out. The

\textsuperscript{40} Rudolph and Rudolph quoted in Larson, 3

\textsuperscript{41} Ruma Pal, in her discussion of the constitutional permissibility of religious personal laws within the provisions of Art. 25-28 states: “While recognizing the need of ethnic and religious group to affirm their distinctive religious identities, the Constitution does not treat personal laws as religion though they may have been derived from it.” (Ruma Pal, “Religious Minorities and the Law” in Larson, 24-35)

\textsuperscript{42} For examples of this feminist critique in India see Flavia Agnes (1999), Brenda Crossman and Ratna Kapur (1996) and Archana Parashar (1992). In Israel, Frances Raday (1991) and Halperin-Kaddari (2000, 2004) are prominent critics of religious personal laws sex discriminatory provisions.
constitutional courts are therefore called upon to protect human rights in the form of equality for women, and resolve competing claims of the theoretical multicultural-feminism dilemma between individual rights and group allowances.

Relevant Considerations

Before analyzing how the dilemma has been resolved by constitutional courts in each state, it is important to contrast relevant legal, political and constitutional differences between them. The three main areas of distinction between the two states are in the areas of: 1) formal constitutional framework; 2) sex equality framework; 3) nature of religion-state relations.

India

India has a single, comprehensive written constitution framework with an extensive provision of judicial review. The foundations of the Indian Constitution were laid out by the Indian Independence Act, 1947. The Indian Constitution envisioned progressive ideals for a society that was rife with caste, religious and gender inequalities at the time of independence. As Austin writes, “The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.”

These progressive ideals are reflected in the constitutionally entrenched formal and substantive sex equality measures in Part III, Fundamental Rights section of the constitution. Article 14 guarantees equal protection of the laws, Article 15 prohibits “discrimination on the grounds only of religion, race, caste, sex, place of birth” with Article 15(3) allowing the state to make “special provision for women” embodying a

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43 Austin quoted in Parashar, 217
substantive ideal of positive discrimination that acknowledges the historic subordination of women.

The preamble to the constitution declares India to be a “secular” state; the nature of Indian secularism is, however, quite distinctive from the liberal “separation” model between religion and state. Jacobsohn characterizes India’s constitutional secularism as an “ameliorative model” that “embraces the social reform impulse of Indian nationalism in the context of the nation’s deeply rooted religious diversity and stratification.”44 This legitimization of intervention in religion so as to render it a progressive social force can be seen in Article 25(b) which explicitly states that the article for freedom of religion cannot restrict the state in “providing for social welfare and reform.”45 Within the framework of collective rights for religious groups, the constitution’s reformist idealism permits state intervention in religion to render it a socially progressive force. One such reformist endeavor in the mid-1950s soon after the establishment of the constitution was the reform of Hindu personal laws, through a process of codification, which though did not create full gender equity nonetheless established the state’s “authority to regulate the hitherto unchallenged religious law.”46

Israel

Israel, unlike India, did not adopt a written constitution upon its establishment. The promise of the Declaration of Independence to “a Constitution, to be drawn up by the Constituent Assembly” was not lived up to.47 The impasse resulted from the

45 Article 25, in entirety reads: (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) 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.
46 Parashar, 139
47 Jacobsohn, 45
opposition to the idea of a formal, written constitution by both religious parties who did not acknowledge an authority other than the Torah for the Jewish state, while left-wing socialists were opposed out of the concern that an emergent constitution would not reflect their Marxian vision for the state.\textsuperscript{48} While the failure to adopt a constitution is the result of many factors, the tension resulting from a dual commitment to public identification with a religion and the official policy of religious freedom that Israel’s Zionist founders envisioned, was a dominant one. In the absence of compromise on a constitution, the Knesset (Israeli Parliament) gradually enacted Basic Laws that were supposed to act as the basis for a future constitution. The first nine Basic Laws adopted following independence dealt with governmental powers and did not, at the time, include any provisions for fundamental rights or judicial review.\textsuperscript{49} In these circumstances, the Israeli Court from the time of independence has assumed the task of creating and protecting fundamental rights.\textsuperscript{50} It established the constitutional status of certain rights and freedoms, although restricted by the power of the Knesset to override them through legislation.\textsuperscript{51}

Even though a full, written constitution with entrenched fundamental rights, as is the case in India, is absent, it “would be incorrect to say that Israel functions without a constitution.”\textsuperscript{52} Israel enacted two “Basic Laws” in 1992, which have been interpreted by many jurists, the most renowned of whom is Chief Justice Aharon Barak, as heralding a “constitutional revolution” in Israel and advancing the judicial review process in Israeli

\textsuperscript{49} Liviatan, 18
\textsuperscript{50} Dalia Dorner, “Does Israel Have a Constitution,” 43(4) \textit{Saint Louis University Journal} 1325-1335, 1326 (1999).
\textsuperscript{52} Jacobsohn, 46
These two Basic Laws are seen as having granted the Israeli Courts the power of judicial review over primary legislation even though neither law explicitly specifies this power. The two basic laws address ‘Human Dignity and Liberty’ and ‘Freedom of Occupation’. As is evident, the right to equality does not explicitly feature in these laws, but Justice Barak has argued that the concept of human dignity should be interpreted broadly to include equality.\(^{54}\)

Frances Raday argues that one of the significant tensions within secular-religious divide in Israel has been the issue of gender equality and equal status of women under the law in a “Jewish state.”\(^{55}\) This contention surrounding women’s equal status is traced to family law falling under the rule of religious law, which compromises any comprehensive aspiration to sex equality. The Women’s Equal Rights Act of 1951 is Israel’s foremost sex equality legislation, which lacks constitutional force and is an ordinary statute.\(^{56}\) Women’s Equal Rights Law was amended in 2000 but the inclusion of marriage and divorce from the equality provision was withheld, however, highlighting the subordination of sex equality to religious values.\(^{57}\)

Personal law in Israel is enmeshed in the contested issues of religion-state relations, which is defined as a State of Jewish People, and as a Jewish and Democratic State in its founding document. Religion holds a significant place in the Israeli polity, and the one of most significant manifestations of this deference to religion in the democratic polity is in the area of religious personal law. This “position-taking” in the formal status to religion in Israel according to Halperin-Kaddari “clearly prefers the preservation of patriarchal culture at the expense of violation of individual rights and

\(^{54}\) Liviatan, 19-20
\(^{56}\) Halperin-Kaddari, 26
\(^{57}\) Women’s Equal Rights Law (Amendment No. 2), 2000, S.H 167
liberal values in general, and violation of women and of gender equality in particular."

The conventional multicultural-feminist dilemma is problematized in the Israeli context, given the state does not make any claims to separate itself from religion. Raday remarks of the complexity of the Jewish nature of the state, however, as “the recognition given to religious authority is both conceptual and institutional: the idea of Jewish values has been incorporated as a basis of constitutional human rights and there is institutional promotion of religion, not only for the Jewish majority but also for the Moslem and Christian minorities.”

Keeping in mind the legal and political peculiarities of each context, I review how the conflict between women’s equality and religious personal law is handled, highlighting broad judicial trends that emerge.

**Judicial Trends**

**India**

The conflict of sex equality and plural religious personal laws was one anticipated prior to independence in India. In the 1940s the National Planning Committee recommended the enactment of the UCC as a measure to attain women’s equality, recognizing the discriminatory provisions of family law that were at odds with the progressive reform agenda of the Indian state. Later, during the Constituent assembly debates shortly after independence in 1947, the focus of UCC related debates, however, shifted from gender equality to national integration. The nationalist preoccupations sought to integrate diverse communities through uniformity and legislative reform of

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59 Halperin Kaddari, *Women, Religion and Multiculturalism*, 343
60 Frances Livingstone Raday, "Women's Human Rights: Dichotomy between Religion and Secularism in Israel," *Israel Affairs* 11, no. 1 (2005), 78
61 Flavia Agnes, *Law and Gender Inequality: The Politics of Women’s Rights in India*, (New Delhi: Oxford University Press, 1999), 192
family laws. It was not until the onset of the feminist movement in the 1970s that the focus shifted to gender justice once again.

The Supreme Court has not developed a uniform approach to dealing with personal laws and their conflict with equality, and there exists “no uniformity of decisions as to whether personal laws can be challenged on the touchstone of fundamental rights.” Whereas legal scholars have insisted that under the existing constitutional guarantees, discriminatory provisions of religious personal law must be read down as unconstitutional, the Supreme Court and different states’ High Courts have been generally reluctant to intervene and apply constitutional measures to personal law cases. This reluctance runs contrary to the progressive text of the Indian constitution. As Mihir Desai notes, “Women not being natural guardians, talaq, polygamy, absence of coparcenary rights for women under Hindu undivided family, etc. should all have been declared as void by now as they all discriminate against women. But surprisingly that has not happened.”

The three predominant reasons that have been presented for this lack of intervention in family law to reform its gender discriminatory aspects have been:

1) *Fundamental Rights not applicable since personal laws are not ‘laws in force’*:
The applicability of Part III (Fundamental Rights) of the Constitution to religious personal laws was first considered in 1952 by the Bombay High Court in the case *State of

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63 This is not to imply, however, that there have not been cases where the courts have intervened favorably and upheld sex equality provisions. I am only arguing that this has not been the dominant trend, as might be expected of a progressive text like the Indian Constitution. Parashar observes this trend as well, as she writes “courts have been reluctant to accept the proposition that personal laws, to the extent that they conflict with the constitution, become void *ipso facto* at the commencement of the constitution.” For cases where the courts has taken a sensitive stance to gender discrimination in personal law systems, see Swapna Ghosh v. Sadananda Ghosh A 1989 Cal 1. (Section 10 of Indian Divorce Act, 1869 for Christians is deemed discriminatory to women). Sareetha v. Vekata Subbaiah A 1983 AP. (Section 9 of the Hindu Marriage Act, 1955 is read as discriminatory to women).
Bombay v. Narasu Appa Mali. The defendant, on being prosecuted under the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 argued that the Act was unconstitutional because the provisions discriminated against Hindus, who were criminally charged for polygamy, while Muslims were not subjected to the same, thereby violating the provision of non-discrimination under Article 15. According to Article 13(1), all laws in force before the commencement of the constitution are void if they conflict with fundamental rights guarantees. The Bombay High Court ruled that personal laws are not ‘laws in force’ and thus, are not rendered void even upon conflict with equality provisions of the Constitution. The ruling in “obtaining the short-term gain of defending the provision of monogamy for Hindu males” established a precedent that “erected an insurmountable obstacle for gender equality within personal laws” by disallowing a test of constitutionality against personal laws. In Krishna Singh v. Mathura Ahir, this non-reluctance to intervene was echoes by a two-bench Supreme Court that, disagreeing with the decision of the lower court, stated:

"In our opinion, the learned judge failed to appreciate that part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he (the High Court judge) could not introduce his own concepts of modern times but should have enforced the law as derived from recognized and authoritative sources of Hindu laws, i.e. Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or abrogated by statute."

2) Privacy:

In Harminder Kaur v. Harmander Singh Choudhry, the constitutionality of Section 9 of the codified Hindu Marriage Act, 1955 that provides for the restitution of conjugal rights

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66 Agnes, 88-89
67 Krishna Singh v. Mathura Ahir AIR 1980 SC 707
was considered as violating Article 14. The Delhi High Court ruled against the wife who had appealed the decree and brought the constitutional challenge. In rejecting the challenge the court ruled that constitutional law was inapplicable to the ‘family’ realm.

“Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 has any place.”

This reasoning is “a classic statement of the understanding of the family as private and of the public/private distinction.” The family is construed here as private and outside the view of the “cold principles” of constitutional law. The constitutionality of section 9 was once again considered, this time by the Supreme Court, in Saroj Rani v. Sudarshan Kumar. The Supreme Court, while not explicitly invoking an argument of privacy, claimed that Section 9 “serves a social purpose as an aid to the prevention of the break-up of marriage” and without further regard, determined it did not violate article 14.

3) **Judiciary is not the place for reform:**

In Ahmedabad Women’s Action Group v. Union of India, a women’s group challenged the gender discriminatory provisions of Hindu, Muslim and Christian personal laws as violating constitutional guarantees of equality. The Supreme Court exercised restraint on the premise that since the issues involved state policies it was the legislature’s discretion to intervene, and not the task of the court to undertake.

An interesting trend of differential intervention emerges in cases pertaining to Hindu family law, which though unequal across gender lines, but is codified unlike Muslim law. The discriminatory aspects of Hindu personal law are deflected through the

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68 A 1984 Del 66
69 A 1984 Del 66 at 75
70 Crossman and Kapur, 197
71 A 1984 SC 1562
72 Ahmedabad Women’s Action Group & ors. V. Union of India 1997 SC 3614
strong focus given to Muslim (Shari’a) personal law and its backward provisions. As mentioned before, courts have been reluctant to acknowledge the unfair burden placed by Section 9 of the Hindu Marriage Act. Similarly Narashimaha Murthy v. Susheelabai (Smt.) upheld the sex-differential statutory coparcenary division of the Hindu Succession Act. Sons of intestates were allowed to unilaterally block division of property on sale of a dwelling house by living in it regardless of marital status, so daughters would inherit nothing until later, while daughters could live in the house only if they were married. Agnes has attributed this reluctance to reform the discriminatory aspects of a codified Hindu law as resulting from the desire to see the reformed Hindu law as ‘ideal legislation’ for the emancipation of women, when in reality there remain many discriminatory aspects to different laws in the code. This ‘ideal legislation’, she suggests, sets the standard for the Muslim communities who maintain adherence to Shari’a law.

Judicial interventions have scrutinized Muslim personal law and Shari’a law’s purported anti-modern aspects within a discourse of national integration. A prominent example of this was the famous Shah Bano case of 1985 when the Supreme Court ruled that Shariat Law did not adequately address a divorced woman’s right to maintenance, thereby using territorial criminal law to address the matter. The court interpreted Shari’a law in the case, and moreover, integrated the judgment within a theme of national integration. “A common civil code,” he claimed “will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.”

Israel

Gender equality has also been a prominent area of dispute between the two judicial authorities – the secular-civil and religious courts in Israel. According to the 1953

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73 (1996) 3 SCC 644
74 Agnes, 77
76 This analysis of Israel’s judicial trends is based entirely on secondary source materials and not actual court cases, which were not linguistically accessible to the author. I have relied on law review reports and citations of court cases found in articles written on the theme of personal laws in the Israeli courts.
Rabbinical Courts Jurisdiction (Marriage and Divorce) Law rabbinical courts have exclusive jurisdiction in matters of marriage and divorce, which are completely governed by religious law. However, all other matters related to divorce, such as child custody and support through property claims are under the jurisdiction of the civil courts, unless they are properly “attached” to a divorce suit filed in the rabbinical court.77

Civil courts – mainly through the High Court of Justice – have engaged in a gradual and consistent process of narrowing the scope of religious law and jurisdiction, often conscious of the gender inequality that results from their provisions, starting as early as the late 1950s.78 In the early 1990s, following the ‘semi-constitutional revolution’ of Israel, the High Court of Justice began persistently to subject religious courts to the basic norms and principles that govern the civil legal system. Thus, for example, while property claims were originally deemed under the exclusive jurisdiction of rabbinical courts and governed by religious law, they were gradually drawn into civil courts and subject to civil law until a 1995 ruling that subjected rabbinical court to the civil rule of community of property, which gives the husband and wife equal shares in marital property.79 In Yemini v. Great Rabbinical Court80 this ruling was been reiterated.81

Section 2 of the Women’s Rights Law guarantees a married woman the same status and legal capacity regarding her assets “as if she were single” – in Sidis v. The President and The Members of the Rabbinical High Court this was interpreted by the High Court of Justice in 1958 as contradicting the religious rule that grants a husband the right to his wife’s profits from her assets.82 This opened up the move to appropriate the whole subject of family assets and of property distribution as part of the civil-secular

77 Halperin-Kaddari, 233. I could find no English primary sources to substantiate this claim. Halperin-Kaddari provides a summary of religious personal laws contestations with sex equality provisions.
78 Halperin-Kaddari, footnote 19 on 319
79 H.C 1000/92 Bavli V. Grand Rabbinical Court, 48 (2) P.D 6
80 HCJ 9734/03 Yemini v. Great Rabbinical Court
82 HCJ 202/57 12 PD 1528
law thereby putting it out of the scope of religious jurisdiction and limiting the range of
issues in which only religious jurisdiction is permissible.83 Courts seem to be willing to
intervene only when matters can be construed as belonging to a ‘secular’ or civil matter,
bowing down, at least symbolically, to the matters of marriage and divorce in the case of
rabbinical courts.84

A similar trend of civil courts intervening to restrict the scope of jurisdiction of
Shari’a law has also been witnessed though it has been considerably more restrained
than in the case of rabbinical courts.85 In the case of minority religious communities,
intervention has been relatively restrained, and religious authorities in these
communities are granted relative autonomy in determining family matters of personal
status.

Comparative Observations

1) The presence of constitutionally entrenched fundamental rights for equality has
not resulted in better protection of individual rights in India, as the Supreme
Court has maintained a wavering stance on testing the constitutionality of
religious personal laws. The courts have resisted applying equality provisions to
codified Hindu family law, in this case hesitating to apply constitutional
principles in the private realm of the family. The presence of a formal written bill
of rights in a constitutional text has not hence guaranteed an equal status for
women’s position in family law. The absence of a formal written constitution and
explicit equality provisions has not deterred from applying civil-constitutional
principles to the realm of religious personal law in favor of sex equality, and the

83 Halperin-Kaddari, 320
84 This argument of bowing down to symbolic authority in matters of marriage and divorce, even while
simultaneously trying to circumvent it through alternative ‘evasionary’ tactics is made in Pinhas Shifman,
"Family Law in Israel: The Struggle between Religious and Secular Law," Israel Law Review 24, no. 1
(1990), 537-552.
85 Liviatan, 28
court has, through its rulings, attempted to restrict the scope of matters in which it can apply religious personal law, assuming a distinctly secular bias in its rulings.

2) The Israeli court has intervened with the Jewish cases taking on a secular-individualist stance much more than the Indian constitutional court has with discriminatory Hindu family law practices. Israel has been reluctant to rule on Arab-Israeli minority, however. Indian judges have occasionally intervened and commented on discriminatory Shari’a provisions. These judgments invoke discourses of nationhood and the need for the Muslim minority to assimilate into a uniform civil code.

**Explaining the Differential**

*‘Embedded’ Constitutions and ‘Political’ Courts*

Austin accredits the Indian Constitution for “accommodation” of “apparently incompatible concepts.”86 This accommodation, however, has often been a source of inconsistent interpretation in competing claims between the constitutional permissibility of discriminatory religious personal laws, which appear incongruous with India’s foundational nation vision embedded in the constitution.87 Meanwhile, in the absence of a written constitutional document, Israeli courts have maintained greater consistency in their rulings, adhering to a staunchly secular agenda, restricting the scope of religious law and insisting on the application of sex equality provisions. This observation suggests

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86 Austin quoted in Larson, 3
87 Archana Parashar questions the legitimacy of a regime of *discriminatory* religious personal law allowed under the right to religious freedom in light of the justice-motivated reformist aspirations entrusted to the State under the Constitution. She questions the double-standard: “in the case of the Hindu community it would be almost unthinkable for the State to enact or enforce laws to discriminate against the scheduled castes on the ground that the right to religious freedom of (higher caste) Hindus prevents the State from modifying the untouchability rules of Hindu law. Nor can the State easily put forward the argument that since there is no demand for change from the scheduled castes it will not modify the discriminatory rules of Hindu law.” The fact that these explanations have been used by the State to justify the existence of discriminatory personal laws is baffling, and calls to question why gender is a category that is given special considerations. Archana Parashar, *Women and Family Law Reform in India* (New Delhi ; Newbury Park: Sage Publications, 1992).
the presence of a written constitution with entrenched (explicit) fundamental rights does not necessarily guarantee better protection for the individual right to equality (in this case specifically sex equality). In the case of India, it is seen that “even where the law is free of obvious gender bias or is explicitly designed to confer benefits to women,” women cannot always successful avail themselves of the law’s provisions.\textsuperscript{88} It is important to highlight the distinction between the law as \textit{written} and the law as practiced.\textsuperscript{89} As Ran Hirschl argues, “Courts are inevitably influenced by ‘national meta-narratives, prevailing ideological and cultural propensities, and the policy preferences of hegemonic elites.’\textsuperscript{90} The courts are themselves political actors that determine the potentiality for impact of the law, a site where political strategy is played out.

Mark Tushnet suggests “nations vary widely in the degree to which their written constitutions are organically connected to the nation’s sense of itself.”\textsuperscript{91} He suggests that the Indian Constitution is in a certain sense a confrontation with a society organized in accordance with principles opposite those embodied in the document. Baird describes this observation specifically in the case of women’s equality in the constitution and the personal laws, “The Constitution of India is embedded in a social setting in which the inferior status of women is framed. Even among Indians who could not recite a single verse of Manu, and from whatever source this view received its impetus, it is widely held that and practiced that women not only do but should have a place in society which is quite different from men.”\textsuperscript{92}

Crossman and Kapur’s distinction between formal and substantive equality – how it is written in the constitution and how sex equality provisions are interpreted by

\textsuperscript{88} Sylvia Vatuk, “Where will She Go? What Will She do?” in Larson, 228
\textsuperscript{89} Vatuk in Larson, 228
\textsuperscript{91} Tushnet quoted in Jacobsohn, 24
\textsuperscript{92} Robert D. Baird, “Gender Implications for a Uniform Civil Code,” in Larson, 147
the courts – is a pertinent example of how the constitutional text is “embedded.” 93

Within the Indian social milieu judges often construe difference in the women and men’s position, as a legitimate fact of the Indian social order, and consequently deem unequal provisions as justified between two dissimilar parties, as permissible under a formal equality framework.

In Israel’s case, the secular biases of the court’s rulings committed to restricting religion’s adjudicative sphere especially post-1992’s implementation of Basic Laws and judicial review cannot simply be read as a simplistic narrative of progressive revolution, but a politically contextualized “strategy on the part of Israel’s [secular neoliberal] ruling elite” to “insulate and enhance” their policy preferences. 94 The Supreme Court of Israel, a forum composed of the same secular elite, with the access of increased power vested in the judiciary post 1992 has handled “crucial questions” of national identity exhibiting its policy preferences, leading to the championing of a secular “modernist” agenda by the court. According to Ran Hirschl’s “hegemonic preservation” reading of the Constitutional court’s behavior, the Supreme Court’s rulings are not apolitical but very much politically motivated actions attempting to entrench “Israel’s contested western, relatively cosmopolitan identity.” 95

Religion, Secularism and Nationalism

The presence of religious personal laws is reflective of a socio-political reality in both India and Israel in which “religious and secular life are pervasively entangled.” 96 The entanglement in India is the “reflection of a thickly constituted religious presence in the social life of a nation” despite the secular aspirations of the constitution. In Israel, this entanglement is representative of “the politics of ethno-religious identification.” 97

93 Crossman and Kapur, 175-177
94 Hirschl, 74
95 Hirschl, 74
96 Jacobsohn, 10
97 Jacobsohn, 10
Religious identity is closely linked to political membership such that even the “secular” Jew is nevertheless, defined by Judaism, which is a foundational characteristic of the modern nation-state. The Declaration of Independence nevertheless “[guarantees] full freedom of conscience, worship, education and culture.” Jacobsohn describes this as the “visionary model” of Israeli religion-state relations that “seeks to accommodate the particularistic aspirations of Jewish nationalism in Israel within a constitutional framework of liberal democracy.” As there is “no Israeli nation separate from the Jewish people” but freedom of religion must prevail, religious minorities need not be assimilated within the Israeli nationalist narrative. The “nonassimilative character of Judaism” facilitates religious freedom for non-Jews, “introducing a political climate in which benign neglect sets terms for religious minority relations with the state.” The reluctance to intervene in the religious personal laws of “national” minorities by the courts is arguably influenced by this stance of “benign neglect”. While the liberal-democratic aspirations of the secular Ashkenazi elite are reflected in the court rulings limiting religious authority, the symbolic “bowing down” to religion in matters of marriage and divorce is the deference to the Jewish nature of the state. The court intervenes whenever matters can be explicitly construed as having a secular or civil purpose.

The “totalistic commitment of thick religion” in India, within the context of a multi-religious constitutionally secular polity, requires the constant negotiation between the communal nature of social life and individual political membership. This distinction between the India and Israel is embodied in the relevant discourses surrounding matters of religious personal law. In Israel, for example, religious personal

98 Jacobsohn, 49
99 “There is no Israeli nation separate from the Jewish people.” (Quoted in Jacobsohn, 48) – This statement is from Shimon Agranat who is a secular Jew Supreme Court justice.
100 Jacobsohn, 230
101 Jacobsohn, 41
laws are seen antagonistic to fundamental religious liberty guaranteed to all, including the freedom to conscience to not be religious. An atheistic defense of the right to not have a religion and be governed by religious personal law, as guaranteed itself by the right to religious liberty, does not feature as a prominent discourse for pro-UCC factions. The debate emphasizes a discourse that views uniformity as a necessary extension of formal equality of different religious groups. This legal uniformity is a prerequisite of the assimilative ideal of Indian nationalism, wherein an Indian citizen, unaffiliated with religious particularity, exists. This meta-narrative of nationhood is recurring in cases such as Shah Bano, and is instructive in explaining the differential intervention between Hindu and Muslim cases in the Indian courts.

Conclusion

Susan Okin’s concerns about gender injustice, owing to gender discriminatory dynamics within groups, are certainly pertinent within the contexts of India and Israel. Moreover, courts in India have been reluctant to use existing fundamental human rights provisions against personal laws, contesting the efficacy of a comprehensive, written constitution in advancing the claims of the socially disadvantaged, and even if they do, the public-private dichotomy has been reinforced. In Israel, similarly, while an activist court has intervened to restrict the scope of religion, symbolic deference to religion has nevertheless compromised women’s equality in the spheres of marriage and divorce. This study highlights, using empirical examples, the theoretical claim of how the meaning of rights is articulated within the social, political, institutional and cultural contexts within which they are embedded. In a practical sense, it raises potential concerns about the efficacy of constitutionally enshrined human rights legal protections in advancing the cause of women’s rights in contest with collective rights-based claims, whether espoused on account of the family or religion. Both supporters of individual
rights, as well as groups demanding group-based protections have picked up rights-based discourses, particularly in India. The challenge of resolving these tensions remains a critical issue for democracies today, and one that requires further theoretical and practical inquiry.
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102 HCJ 202/57 12 PD 1528