

JUDICIAL ACTIVISM AND RELIGION-BASED TENSIONS IN INDIA AND ISRAEL

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I. INTRODUCTION

Contemporary democratic reality is characterized by the growing role of courts in politics, as social activists regularly utilize the judicial process in an attempt to secure their values and interests as law. Observers of constitutional politics generally explain this phenomenon in the recent constitutional transformations worldwide, manifested primarily in the enactment of bills of rights accompanied by judicial review powers. These constitutional transformations enabled and simplified the ability of those with limited access to the majoritarian-led parliamentary process to challenge governmental policies through the courts.¹ As a result, law has come to be perceived as a compelling mechanism to effectuate progressive change and facilitate authoritative resolutions to conflicts.² In societies divided along religious lines, the appeal of litigation has been particularly strong, with secular and religious groups increasingly viewing it as a principal opportunity to mold the public sphere in accordance with their political and moral preferences.³

This paper seeks to evaluate the efforts to achieve these perceived goals—of effectuating change and managing conflict—through the judicial

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Editor's Note: A number of the sources cited in this article are available exclusively in Hebrew. Such sources have been labeled with a pound (#) sign, and have not been reviewed for accuracy by the editors of the *Arizona Journal of International and Comparative Law*.

1. This age of new constitutionalism has been observed worldwide. See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY 214 (2004); HENIZ KLUG, CONSTITUTING DEMOCRACY 9-10, 65-67 (2000); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); NEAL C. TATE & TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER (1995).

2. F. James Davis, *Law as a Type of Social Control*, in LAW AND CONTROL IN SOCIETY 17 (Ronald L. Akers & Richard Hawkins eds., 1975).

3. See, e.g., HANS. J. HACKER, *Defending the Faithful: Conservative Christian Litigation in American Politics*, in THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON (2d ed. 2005); GREGG IVERS, TO BUILD A WALL: AMERICAN JEWS AND THE SEPARATION OF CHURCH AND STATE (1995); THOMAS L. KRANNAWITTER & DANIEL C. PALM, A NATION UNDER GOD?: THE ACLU AND RELIGION IN AMERICAN POLITICS (2005).

process, by examining its effects in the context of the religion-based conflicts of India and Israel. By way of an empirical comparison the paper considers: (i) the judicial impact on the realization of fundamental rights, the rectification of existing discriminatory practices, and the advancement toward a more pluralist and egalitarian society; (ii) the judicial contribution to generating authoritative resolution to religion-based conflicts; and (iii) possible long term social and political implications stemming from judicial intervention in policy questions concerning hotly disputed religion-based conflicts.

Several reasons dictate the choice of India and Israel for this study. Obvious differences aside, these states share historical and geo-political resemblances. Both states emerged from British rule roughly at the same time, experiencing difficult independence wars that left both of them deeply divided along ethnic and religious lines.⁴ In time, both states became nuclear powers that remained susceptible to regional religio-political conflicts. India and Israel belong to the common law tradition, bestowing legal development primarily in the hands of courts. Judicial activism by the Indian and Israeli supreme courts evolved from a phase of initial restraint into extensive engagement in politically charged policy questions.⁵ Finally, the political attempt to define the role of religion for these democracies has been a grueling task since their inception. The complex multicultural realities in both states effectively negated the possibility of separating religious and state affairs, but the ongoing attempt to demarcate this relationship resulted in a deeply polarizing social conflict.

The paper consists of four parts. A survey of the theoretical framework on the judicialization of political conflicts will be followed by two separate empirical analyses of how judicial activism has played out in the context of religion-based tensions in India and Israel. The final part examines the surveyed data on India and Israel in relation to the three parameters of this study, namely: law's contribution to progressive change, its success in managing conflict, and possible implications for democratic politics when religion-based tensions are addressed within the judicial sphere.

4. Mark Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 *ISR. L. REV.* 101, 102 (2000) (“[India and Israel] [e]ach emerged as a nation state in the first wave of de-colonization through a partition process that reduced the presence of its largest minority and increased the preponderance of its largest religious group.”).

5. The Indian Court developed “Public Interest Litigation” (PIL), transforming the legal process to be more accessible. *See generally* Parmanand Singh, *Protection of Human Rights through Public Interest Litigation in India*, 42 *J. INDIAN L. INST.* 263 (2000). *See also* P.P. VJAYAN, *RESERVATION POLICY AND JUDICIAL ACTIVISM* 39 (2006); SATYARANJAN PURUSHOTTAM SATHE, *JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS* 4, 6 (2002). Similarly, the Israeli Court has been relaxing standing and justiciability requirements. Ruth Gavison, *Constitutions and Political Reconstruction?: Israel's Quest for a Constitution*, in *CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION* 69, 81 (2007).

II. DEBATING THE JUDICIALIZATION OF POLITICAL CONFLICTS

Societies with deep religion-based divisions experience a constant struggle over the public sphere. The classic liberalist antidote for these conflicts has been to separate the spheres of political and religious affairs.⁶ Separation, argues the liberalist, best maintains neutrality among competing ideas. If we separate the spheres of religion and politics, “engaged citizens, religious and secular, [will] be prevented in *exactly the same way* from achieving anything like total victory” of their views.⁷ In contrast, accommodationists advocate the inclusion of religious interests in the public realm, emphasizing the resentment felt by religious people over their silencing.⁸ A third group, most notably represented by Fish, attempts to expose the alleged fallacy of this debate.⁹ Fish describes the separationists’ call for neutrality as a disguised political attempt to control the public sphere, and declares the accommodationists’ claim for fair inclusion futile. Accommodationists, he argues, overlook the fact that boundaries between religion and state are routinely shaped by the strongest view in a social system resulting in legal arrangements that only appear to manifest a common ground.¹⁰

Politically-charged disputes over religion-state relationships have increasingly been played out in the judicial sphere, with social activists attempting to effectuate a change in unfavorable governmental policies through the courts.¹¹ Judicial recourse seems to be sought for two main reasons. First, law is viewed as a mechanism of social reform. The legal process is perceived as enabling the

6. JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689).

I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will always be arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men’s souls, and on the other side, a care of the commonwealth.

7. Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 613, 633 (1999).

8. Stephen L. Carter, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 25 (1993); Nicholas Wolterstorff, *Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons*, in RELIGION AND CONTEMPORARY LIBERALISM 162 (Paul J. Weithman ed., 1997).

9. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

10. *Id.*; see also Veit Bader, *Religious Pluralism: Secularism or Priority for Democracy*, 27 POL. THEORY 597, 603, 607 (1999).

11. See generally GERALD M. ROSENBERG, THE HOLLOW HOPE 2, 430 (2d ed. 2008); CAROL HARLOW & RICHARD RAWLINGS, PRESSURE THROUGH LAW (1992).

possibility for progressive change, to which society will defer.¹² Second, the legal process is perceived as capable of resolving social conflicts authoritatively in a way that advances social peace. A decision by a professional and supposedly impartial judiciary asserting constitutional principles should be more persuasive than a similar advancement by partial politicians.¹³ These perceptions are ever more prevalent in societies with deep religion-based divisions, which typically involve passionate, clashing moral disagreements. With political compromise often a distant possibility, the litigation process becomes particularly attractive, since it entails the prospects of achieving the desired reform as well as ensuring the compliance of those who do not necessarily share the same values.

Acutely aware of these expectations, judges around the world have become pivotal players in the policy-making scene.¹⁴ Different theories have been offered to explain this judicial empowerment phenomenon. Dworkin characterizes this trend as an inevitable development in an age of human rights advancement generated by the effects of WWII.¹⁵ Shapiro explains the prominence of constitutional judicial review as “a manifestation of a global distrust” of bureaucratic governmental and corporate power, endowing the legal process with the task of protecting individuals.¹⁶ Hirschl argues that judicial empowerment should be understood as an attempt by threatened governing elites to delegate power to the courts as a hegemony-preservation mechanism.¹⁷

12. John Colombotos, *Physicians and Medicare: A Before-After Study of the Effects of Legislation on Attitudes*, 34 AM. SOC. REV. 318 (1969); Yehezkel Dror, *Law and Social Change*, 33 TUL. L. REV. 787 (1959); Lawrence M. Friedman, *General Theory of Law and Social Change*, in LAW AND SOCIAL CHANGE 17 (Jacob S. Ziegel ed., 1973).

13. GEORGE C. CHRISTIE, LAW, NORMS, AND AUTHORITY 176 (1982); PHIL HARRIS, AN INTRODUCTION TO LAW 140 (1997). See also SHARYN L. ROACH ANLEU, LAW AND SOCIAL CHANGE (2000).

14. Brice Dickson, *Comparing Supreme Courts*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 1, 2 (Brice Dickson ed., 2007) (“Judges who serve in national top courts around the world are acutely aware of the opportunities they have to make an individual and collective mark on the way their society is regulated.”).

15. RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN (1990); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). See also ANDRAS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM (1999).

16. INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA (Arend Lijphart & Carlos H. Waisman eds., 1996); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981). See also DESIGNS FOR DEMOCRATIC STABILITY: STUDIES IN VIABLE CONSTITUTIONALISM (Abdo I. Baaklini & Helen Desfosses eds., 1997); Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 45-50 (1993).

17. Hirschl, *supra* note 1, at 49. For a discussion of the U.S. context, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 27 (2007). See also THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); ROBERT ALAN DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

This judicial empowerment phenomenon has generated ample debate over what is or should be the proper role of courts in the political system and over how far courts can intervene in political matters. Proponents of judicial activism emphasize the advantages of a system armed with strong judicial review. Courts, they argue, provide a system of checks and balances on governments that are otherwise free to do as they please. They can respond to political problems that would remain unsolved by the executive or legislative arms and protect minority concerns regardless of majoritarian political trends.¹⁸

Critics of judicial activism raise conceptual arguments and empirical evidence against judicial empowerment. Conceptual criticism emphasizes the undemocratic nature of judicial review, where an unelected and unaccountable body can veto the popular statutory or executive choice.¹⁹ Others point out the damaging effect of judicial activism on the political culture of persuasion, as the incentive to turn to judicial solutions detracts from the importance of compromise and consensus-building characteristic of the political process.²⁰ The principal empirical argument against judicial activism revolves around the assertion that “judicial review does not make much difference one way or the other,” because courts are “regularly being more or less in line with what the dominant national coalition wants.”²¹ This view is supplemented by comments about implementation deficiencies and work overload impairing the ability of the judicial process to provide fast and efficient solutions to conflicts.²²

This study approaches the debate from its empirical side with an attempt to expand and shift its current rationale. The next part examines the impact of the rulings by two of the most activist courts in the world on effectuating progressive change in the context of religion-based tensions as well as their contribution to the resolution of these conflicts.

18. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

19. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006).

20. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

21. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 153 (1999). See also Rosenberg, *supra* note 11, at 31 (arguing that courts can produce significant social reform only when political, social and economic conditions have become supportive of such change).

22. Ruth Gavison, *Public Involvement of the Israeli High Court of Justice*, in RUTH GAVISON, MORDECHAI KREMNITZER & YOAV DOTAN, *JUDICIAL ACTIVISM: FOR AND AGAINST: THE ROLE OF THE HIGH COURT OF JUSTICE IN ISRAELI SOCIETY* 69-164, 98-100 (2000).[#]

III. JUDICIAL ACTIVISM IN INDIA

A. Introductory Background

In the aftermath of India's partition, the framers of the Constitution faced the daunting task of defining the role of religion in the new state amid severe communal tensions and the growing social resentment toward the religion-based caste system. The Constituent Assembly, aspiring to transform India into a modern democratic state, tackled these challenges by adopting a distinct concept of secularism, significantly different from the liberalist "wall of separation" model.²³ Secularism in the Indian Constitution entails two concurrent and seemingly contradictory objectives:²⁴ (1) State neutrality towards religion, protecting all religions equally as an antidote to communal divides, and (2) State intervention in religious affairs for the purpose of uplifting the disadvantaged groups and accelerating their social integration. This duality was manifested in constitutional guarantees to religious freedom coupled with an attempt to eradicate traditional religious practices by offering special protections to India's Scheduled Castes ("SCs") and Scheduled Tribes ("STs"), also known as dalits or Untouchables.²⁵

Religious freedom is defined in the Constitution as an individual as well as a collective right, which can be limited by interests of "public order, morality and health," as well as the State's economic and political attempts to integrate the lower sections of society.²⁶ The Constitution outlaws the status of

23. This phrase was coined by Thomas Jefferson in a letter to the Danbury Baptist Association dated January 1, 1802, articulating his interpretation of the First Amendment of the U.S. Constitution. DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 48 (2002). See also Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* 37 AM. J. COMP. L. 495, 515 (1989) (observing that "one of the most striking aspects of the Indian legal system is the extent to which formal legal arrangements exist in almost metaphysical isolation from social reality").

24. Different approaches conceptualize and interpret the idea of secularism in the Indian context. See, e.g., Rajeev Bhargava, *Indian Secularism: An Alternative, Trans-Cultural Ideal*, in POLITICAL IDEAS IN MODERN INDIA: THEMATIC EXPLORATIONS 285, 297 (2006); GARY JACOBSON, THE WHEEL OF THE LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 94 (2003). See generally NEERA CHANDHOKE, BEYOND SECULARISM: THE RIGHTS OF RELIGIOUS MINORITIES (1999); THE CRISIS OF SECULARISM IN INDIA 20 (Rajeswari Sunder Rajan & Anuradha Dingwaney Needham eds., 2007).

25. Robert D. Baird, *Traditional Values, Governmental Values, and Religious Conflict in Contemporary India*, 1998 BYU L. REV. 337, 355 (1998); Kirsten K. Davis, *Equal Protection for Women in India and Canada: An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitutions*, 13 ARIZ. J. INT'L & COMP. L. 31 (1996); William J. Everett, *Religion and Federal Republicanism: Cases from India's Struggle*, 37 J. CHURCH & ST. 61, 64 (1995).

26. Article 25 of the Constitution provides:

Untouchability,²⁷ prescribing equal access to Hindu religious institutions “of a public character.”²⁸ It also prescribes education and employment opportunities for the weaker religious classes through reservation of posts, which in effect perpetuates social categorization along religious lines.²⁹

Faced with the dual challenge of harmonizing constitutional protections to religious freedom with the quest of effectuating gradual social change,³⁰ the Indian Supreme Court has walked a thin line, acknowledging that it is often searching for the “common sense view . . . [to] be actuated by considerations of practical necessity.”³¹ As demonstrated in the following sections, the Court did not shy away from innovative judicial constructions that often produced controversial and conflicting legal results, generating ample applause along with harsh criticism.

(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, practi[c]e and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law . . . (b) providing for social welfare and reform

INDIA CONST. art. 25. Article 26 provides that “[s]ubject to public order, morality and health, every religious denomination or any section thereof shall have the right . . . to manage its own affairs in matters of religion.” INDIA CONST. art. 26(b). A simultaneous reading of these articles highlights these inherent tensions, as reforming discriminatory practices of religion in the context of many religions will necessarily result in the interference with their right to manage their religious affairs.

27. “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of ‘Untouchability’ shall be an offence punishable in accordance with law.” INDIA CONST. art. 17.

28. Defined in Articles 15(2) and 25(2)(b) to include shops, bathing facilities, public restaurants, hotels, and other places of entertainment. INDIA CONST. arts. 15(2), 25(2)(b).

29. Article 15(4) prescribes that “Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.” INDIA CONST. art. 15(4). Article 46 is a Directive Principle calling the State to “promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” INDIA CONST. art. 46.

30. The power of judicial review is vested in the High Courts and the Supreme Court under Articles 32 and 226 of the Constitution. INDIA CONST. arts. 32, 226.

31. *Ratilal v. State of Bombay*, A.I.R. 1954 S.C. 388.

B. Demarcating Religious Minority Rights in a Hindu Society

India's society is known to be highly heterogeneous, consisting of a Hindu majority living alongside many other religious groups.³² This reality has frequently generated judicial interventions in relation to minority practices, including: (i) upholding the right of the Muslim Dawoodi Bohras sect to excommunicate members for religious reasons, concluding that an act intending to reform this practice cannot mean reforming a religion out of existence;³³ (ii) reforming a religious practice under which Muslim Imams were not paid for their services, ordering to pay them basic wages;³⁴ and (iii) protecting the refusal of Jehovah's Witnesses to sing the national anthem in school as part of their religious freedom.³⁵

Obviously, not every minority religious practice has been judicially protected. To address the sharp conflicts concerning religion, the Court developed a self-described "visionary" doctrine, where it distinguished between "essential" and "non-essential" matters of religion when determining whether to uphold the state's intervention in religious affairs. Under this "essential matters" doctrine, the Court afforded constitutional protection only to matters it construed to be the essential components of religion, while authorizing governmental regulation of those matters it characterized as non-essential components. In deciding what constituted the essential part of religion, the Court examined "the doctrines of that religion itself according to its tenets, historical background and change in evolved process."³⁶

Using the essential matters doctrine, the Court allowed the State extensive control of religious denominations and authorized comprehensive interventions in their administration and maintenance, including the appointment of personnel, the management of property, and other economic activities. Although the Court, comprised primarily of Hindu judges, applied the essential matters doctrine in relation to Hindu institutions,³⁷ it was its application in

32. The U.S. Department of State 2008 Religious Freedom Report on India estimates India's population at 1.1 billion, with Hindus constituting 80.5% of the population, Muslims 13.4%, Christians 2.3%, Sikhs 1.8% and others including Buddhists, Jains, Parsis, Jews and Baha's at 1.1%. U.S. DEP'T OF STATE, 2008 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008: INDIA (2008), *available at* <http://www.state.gov/g/drl/rls/irf/2008/108500.htm> [hereinafter RELIGIOUS FREEDOM REPORT: INDIA]. *See also* JOHN MCLEOD, THE HISTORY OF INDIA (2002).

33. *Saheb v. State of Bombay*, A.I.R. 1962 S.C. 853.

34. *All-India Imam Org. v. Union of India*, A.I.R. 1993 S.C. 2086.

35. *Emmanuel v. State of Kerala*, A.I.R. 1987 S.C. 748.

36. *Deekshitulu v. State of A.P.*, A.I.R. 1996 S.C. 1765.

37. *See, e.g., id.* (upholding the State's intervention in the management of a Hindu temple and the appointment of its priest); *Madras v. Swamiar*, A.I.R. 1954 S.C. 255 (upholding the State's administration of the properties and expenses of a Hindu *Math*).

connection to minority religious practices that drew harsh criticism about overreaching.³⁸

Under this doctrine, the State has been authorized to extensively control the activities of a Jain Temple,³⁹ a Sikh gurdwaras,⁴⁰ and a Muslim Shrine.⁴¹ The Court also concluded that cow slaughtering was an “optional” Muslim practice,⁴² and that “a mosque [was] not an essential part of the practice of religion.”⁴³ Moreover, the Court passed judgment on whether specific sects should be recognized as a religion,⁴⁴ and arbitrated whether different denominations are part of the Hindu religion when it meant taking sides in a religious debate.⁴⁵ Regarding the *anand margis* the Court not only ruled that they constituted a religion that was part of Hinduism, but went as far as to prescribe what should (or should not) be part of their religious tenets.⁴⁶ As such, the *tandav* dance performed with a skull and a symbolic knife was ruled not to be part of the Ananda Margis’s faith despite the claim that it had been performed by every sect member for decades.⁴⁷

In the educational context, the Court produced conflicting decisions, stemming from an internal debate between the pluralist approach emphasizing minorities’ right to administer their educational institutions and the assimilationist approach emphasizing public interest in requiring educational institutions to conform to general educational standards. Additionally, the Court has often been concerned with false attempts by different educational institutions to unlawfully

38. See, e.g., J. DUNCAN DERRETT, RELIGION, LAW AND THE STATE IN INDIA, 447 (1968); Rajeev Dhavan & Fali S. Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities*, in SUPREME BUT NOT INFALLIBLE 257, 259 (2000).

39. Ratilal v. State of Bombay, A.I.R. 1954 S.C. 388.

40. Singh v. State of Punjab, A.I.R. 1959 S.C. 60.

41. Durgah Committee, Ajmer v. Ali, A.I.R. 1961 S.C. 1402.

42. Quareshi v. State of Bihar, (1959) S.C.R. 629 (holding that the Muslim practice of sacrificing a cow on Bakr Id Day is not an Islamic requirement, since the sacrifice of goats and camels on this holiday is religiously sanctioned as well). A similar conclusion followed in State of West Benegal v. Lahiri, A.I.R. 1995 S.C. 464. In State of Gujarat v. Jamat, A.I.R. 2006 S.C. 212, the Court narrowed the scope of these rulings by allowing the slaughter of bulls and bullocks when they ceased to breed/produce milk under a public interest rationale and not as a religious freedom issue.

43. Faruqui v. Union of India, A.I.R. 1995 S.C. 605.

44. See, e.g., Mittal v. Union of India, (1983) 1 S.C.R. 729 (holding that the followers of Aurobindo don’t constitute a religious denomination, since their teaching amount to a philosophy short of religion).

45. Yagnapurushadsji v. Vaishya, (1966) 3 S.C.R. 242 (holding that under the “true” interpretation of Hinduism *swaminarayans* should be regarded as Hindus); Patil v. Union of India, A.I.R. 2005 S.C. 3172 (holding that Jainism is part of Hinduism even though it is the reformulation of the philosophy of Lord Krishna with additional new elements).

46. Jagdishwaranand v. Police Commissioner, Calcutta, (1984) 1 S.C.R. 447.

47. *Id.*

secure minority protection. The result was a collection of confused and contradictory decisions affording wide-ranging protections to minority religions to create and administer their educational institutions⁴⁸ while at the same time upholding strong regulatory state control over minority education.⁴⁹

Finally, on the highly volatile issue of conversion, the Court demonstrated clear favoritism toward the Hindu majority. Hindus perceive the act of conversion exercised by religious minorities such as Christians and Muslims as an imminent threat to their existence, particularly since caste-based social inequalities have made conversion especially attractive to the lower castes.⁵⁰ Minority religious groups, on the other hand, regard conversion as an essential manifestation of their religious belief, viewing negative attitudes toward conversion as a clear example of minority discrimination in India.⁵¹ The Court upheld state acts banning conversions, holding that the right to convert was not part of the right to religious freedom.⁵²

C. Reforming Backward Classes

The Court's primary focus in relation to the Hindu majority has been the problem of Untouchability. Dalits, comprising roughly 17% of the Indian population,⁵³ suffer grave discrimination and oppression as a result of low social stratification inflicted upon them by the religio-social caste system.⁵⁴ The judicial attempt to reform their status took two trajectories: (i) opening Hindu temples otherwise closed to dalits, and (ii) facilitating a reservation policy aimed to uplift their social and economic status. The Court's rulings have been sitting uneasily with the constitutional principles of religious freedom and secularism.

In *Sri Venkataramana Devaru v. State of Mysore*,⁵⁵ the Court addressed the inherent constitutional contradiction between the goal of advancing dalits by

48. See, e.g., *Ahmedabad St. Xavier's College Society v. State of Gujarat*, (1975) 1 S.C.R. 173.

49. See, e.g., *Saint Stephen's College v. Delhi University*, A.I.R. 1992 S.C. 1630; *Frank Anthony Public School Employees Association v. Union of India*, (1987) 1 S.C.R. 238. For a survey of the Court's decisions regarding minority educational institutions, see Dhavan & Nariman, *supra* note 38, at 264-70.

50. MUJAHID ABDUL MALIK, *CONVERSION TO ISLAM: UNTOUCHABLES' STRATEGY FOR PROTEST IN INDIA* (1989); Dhiru Shah, *Mother Teresa's Hidden Mission in India: Conversion to Christianity*, INDIA STAR, available at <http://www.indiastar.com/DhiruShah.htm> (last visited Nov. 2, 2009).

51. Paul Marshall, *Hinduism and Terror*, FIRST THINGS, June 1, 2004, at 11-12, available at <http://www.firstthings.com/article/2007/01/hinduism-and-terror--14>.

52. *Stainislaus v. State of Madhya Pradesh*, (1977) 2 S.C.R. 611.

53. RELIGIOUS FREEDOM REPORT: INDIA, *supra* note 32.

54. HERMAN KULKE & DIETMAR ROTHERMUND, *A HISTORY OF INDIA* 32-34 (3d ed. 1998); N.S. SREENIVASULU, *HUMAN RIGHTS: MANY SIDES TO A COIN* 59-71 (2008).

55. *Sri Venkataramana Devaru v. State of Mysore*, (1958) S.C.R. 895.

enabling their access to public institutions⁵⁶ and a denomination's right to administer its religious affairs.⁵⁷ To give effect to both constitutional prescriptions, the Court applied a "rule of harmonious construction,"⁵⁸ subjecting the right of denominations to administer their temples to the duty of opening temples to all Hindu sects.⁵⁹ As such, the temple was to remain open to all Hindus, along with certain designated ceremonies where only Brahmins would participate. This decision amounted to a reformulation of the Hindu religion, since from a Hindu perspective the actual entry of untouchables already resulted in polluting the temple, making the limitation on entry during special occasions effectively futile.⁶⁰ Furthermore, the ruling did not effectuate the desired reformation with regard to Untouchability. Even after it was formally enacted as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, dalit worshippers have been routinely blocked from entering Hindu temples.⁶¹

Reservations are a policy of affirmative measures initiated by the British to further the socio-economically disadvantaged groups by ensuring them a quota of posts in public employment, higher education, and legislative institutions.⁶² Its evolution in India has been linked with ongoing controversy and competition between different groups over: (i) identifying those eligible for reservations; (ii) selecting the services and institutions where reservations would apply; and (iii) determining the size of the quota allocated to each group. With the policies on reservations repeatedly challenged in courts by backward and forward castes, the Court gradually became the principal umpire in conflicts over reservations. As such, tensions between the Court and the other branches of government erupted periodically with the Court's rulings circumvented through constitutional amendments and other delaying tactics employed by the different branches of government. The body of judicial decisions concerning reservations is quite vast and has been surveyed elsewhere.⁶³ Here, the focus is on the major decisions comprising the judicial-legislative tug-of-war on reservations.

The Court found a governmental policy reserving admission into engineering and medical colleges for certain castes to be a violation of the

56. INDIAN CONST. art. 25(2)(b), discussed *supra* note 26.

57. INDIAN CONST. art. 26(b), discussed *supra* note 26 (specifically in this case the right of a Brahmin sect to administer its temple).

58. *Devaru*, *supra* note 55, at 918.

59. *Id.* at 918-19.

60. MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* 239 (1989).

61. SREENIVASULU, *supra* note 54, at 64.

62. See Kevin Brown, *Affirmative Action in the United States and the Reservation System in India: Some Comparative Comments*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT* 252-59 (Gerald James Larson ed., 2001); Susanne Hoeber Rudolph & Lloyd I. Rudolph, *Living with Difference in India*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA*, *supra* note 62, at 45-47 (discussing reservations in India).

63. *Sawhney v. Union of India*, A.I.R. 1993 S.C. 477; VIJAYAN, *supra* note 5, at 23.

constitutional prohibition in Article 29(2) against caste discrimination in admission to state-aided schools.⁶⁴ In response, Parliament nullified the ruling by adding Art. 15(4) to the Constitution, allowing reservations “for the advancement of *any* socially and educationally backward classes of citizens”⁶⁵ This expanded the scope of reservations to include Other Backwards Classes (“OBCs”), namely, disadvantaged groups other than the SCs and STs whose rights were recognized at the enactment of the Constitution.

Four decades later, with public demand for reservations on the rise, the government decided on an increase of reservations quotas for backward classes in the public service. This step led to violent demonstrations, including self-immolation by forward castes protesting the government’s decision. The Court then stepped in delineating a comprehensive legal arrangement on reservations:⁶⁶ (i) reaffirming past judgments, which fixed the upper limit for reservations at fifty percent of available spots and asserting that backwardness for reservation purposes should not be categorized solely on the basis of caste, since economic disadvantage may also be a predominant factor for backwardness;⁶⁷ (ii) determining that the reservation policy should be applied only at the first hiring stage and did not extend to the promotion level; and (iii) upholding that “the creamy layer,” the already advanced members of backward classes, was excluded from the benefits of reservations and directing the government to fix criteria defining the creamy layer.

Parliament reacted to the ruling with two overriding constitutional amendments. First, Parliament amended Schedule Ninth of the Constitution to enable the State of Tamil Nadu to continue its existing quota of sixty-nine percent, protecting it from judicial review.⁶⁸ Second, Article 16 was amended to include reservations for SCs and STs at the promotional level.⁶⁹ This landmark ruling was circumvented further in 2000, when Article 16 of the Constitution was amended once more to overrule the Court’s fifty percent limit, using “backlog vacancies,” namely, vacancies reserved for the SCs and STs, that had not been filled. Sub-Article 4B now permits that unfilled vacancies be carried forward to succeeding years without surpassing the Court’s fifty percent limit on reservations.⁷⁰

64. *State of Madras v. Dorairajan*, (1951) S.C.R. 525.

65. INDIA CONST. art. 15(4): amended by the Constitution (First Amendment) Act, 1951 (emphasis added).

66. *Sawhney*, *supra* note 63.

67. *Chitralakha v. Mysore*, (1964) 6 S.C.R. 368; *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649.

68. INDIA CONST. sched. 9: amended by the Constitution (Seventy-Sixth Amendment) Act, 1994.

69. INDIA CONST. art. 4A: amended by the Constitution (Seventy-Seventh Amendment) Act, 1995. These Amendments were held constitutional in *Nagraj v. Union of India*, A.I.R. 2007 S.C. 71.

70. INDIA CONST. art. 16: amended by the Constitution (Eighty-First Amendment) Act, 2000.

Additionally, States found creative ways to circumvent the Court. The State of Kerala declared that its backward classes had not socially advanced to the point where they could compete with forward classes.⁷¹ Similarly, Bihar and Uttar Pradesh legislated creative criteria for identifying the “creamy layer,” enabling the evasion of the requirement to exclude the advanced sector of the backward class from consideration.⁷² These attempts generated repeated judicial challenges, requiring the Court to reassert its past rulings and direct states to rewrite their exclusion of the creamy layer.⁷³ Finally, following the Court’s ruling that reservations could not be implemented in private unaided (running without government funding) educational institutions,⁷⁴ the Constitution was amended once more to include Article 15(5), which effectively reversed the Court’s ruling by allowing the central and state governments to enact laws providing for reservations in such institutions.⁷⁵

D. Secularizing the Political Process

Hindu nationalism has been a permanent feature of Indian politics,⁷⁶ but the establishment of the Bharatiya Janata Party (“BJP”) in 1980 advanced it to the center of the political stage. *Hindutva*, BJP’s primary political manifesto, advocates Hindu supremacy for the purpose of achieving national unity that is supposedly threatened by unabashed appeasement policies toward minority groups.⁷⁷ Employing *Hindutva*, BJP’s rise to power nourished as much as it was nurtured by the exacerbation of the Hindu-Muslim conflict. The conflict heightened during the 1990s following the Hindu demolition of the Babri Masjid mosque at Ayodhya, leading to widespread communal violence throughout India.⁷⁸ To reinstate order, the President dismissed three BJP-led state governments, a move which was upheld by the Court.⁷⁹ The Court accepted the President’s position that BJP actively participated in the communal conflict and

71. The Kerala State Backward Classes (Reservation of Appointments of Posts in the Services Under the State) Act of 1995. For a survey of the events, see VIJAYAN, *supra* note 5, at 76.

72. VIJAYAN, *supra* note 5, at 122.

73. Thakur v. State of Bihar, A.I.R. 1996 S.C. 75; Indira Sawhney II, A.I.R. 2000 S.C. 498.

74. Inamdar v. State of Maharashtra, A.I.R. 2005 S.C. 3226.

75. INDIA CONST. art. 15, § 5: amended by the Constitution (Ninety Third Amendment) Act, 2005.

76. Most notably represented by groups like Rashtriya Swayamsevak Sangh (RSS) and Vishwa Hindu Parishad (VHP).

77. For information on the Hindutva movement, see TAPAN BASU ET AL., KHAKI SHORTS AND SAFFRON FLAGS: A CRITIQUE OF THE HINDU RIGHT (1993).

78. Smita Gupta, *India: From Consensus to Confrontation*, 5 CONTEMP. S. ASIA 5, 14 (1996); Chhotebhai, *Religion in India’s Future*, 7 INT’L POL’Y REV. 55, 59-60 (1997).

79. S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918.

was therefore incapable of governing neutrally according to the principle of secularism identified to be a basic feature of the Constitution.⁸⁰ This ruling has been widely criticized as overtly impartial since the Election Commission had approved earlier that BJP met election law prerequisites.⁸¹ Nevertheless, it manifested the zenith of secularism in the Court's approach, proclaiming that "the Constitution does not recognize, it does not permit, mixing religion and state power," and that "under our Constitution, no party or organization can simultaneously be a political and a religious party."⁸²

Indian elections have often been filled with attempts to secure votes by appealing to religious and communal sentiments. To tackle this problem, Indian law prohibits such appeals when they intend to affect the electoral process or promote enmity or hatred between different classes on religious grounds.⁸³ The Court has continually been called upon to decide whether methods used as part of election campaigns, including speeches,⁸⁴ appeals to symbols,⁸⁵ posters,⁸⁶ candidates' promises to voters,⁸⁷ and different forms of publications⁸⁸ amount to such prohibited political advantages. The *Hindutva* ideology came under the Court's review in a series of cases challenging speeches made during the 1987-1990 elections.⁸⁹ Equating *Hindutva* with Indianization, the Court concluded that *Hindutva* should be "understood as a way of life or a state of mind and it is not [to] be equated with . . . religious Hindu fundamentalism."⁹⁰ As such, an appeal to vote for Hinduism could not, in itself, constitute a prohibited appeal.

Hindu nationalists viewed this ruling as a judicial seal of approval of the *Hindutva* ideology and a rebuttal of its depiction as sectarian and discriminatory.⁹¹ The rival secularists, however, fervently criticized the ruling, viewing it as

80. The constitutional supremacy of secularism was originally pronounced in *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 146, however, secularism was not a central issue to the facts of that case.

81. Venket Iyer, *The Supreme Court of India*, in JUDICIAL ACTIVISM, *supra* note 14, at 121, 154-55; Sathe, *supra* note 5, at 175-76.

82. Bommai, *supra* note 79, at para. 310.

83. Representation of the People Act, No. 43 of 1951, § 123(3)(A).

84. *See, e.g.*, *Sait v. M.C. Muhammad*, A.I.R. 1980 S.C. 354.

85. *See, e.g.*, *Sidhanti v. Daulta*, A.I.R. 1965 S.C. 183.

86. *Deshmukh v. Nanasahbhadam*, A.I.R. 1996 S.C. 391.

87. *See, e.g.*, *Achar v. Singh*, A.I.R. 1977 S.C. 587; *Chawda v. Joshi*, A.I.R. 1976 S.C. 271.

88. *Singh v. Singh*, A.I.R. 1985 S.C. 236; *Verma v. Nath*, (1970) 3 S.C.C. 783; *Patel v. Fulsinji*, A.I.R. 1965 S.C. 669.

89. The *Hindutva* judgment consists of ten separate cases, whose major ones are *Prabhoo v. Kunte*, A.I.R. 1996 S.C. 1113; *Kaspe v. Singh*, A.I.R. 1996 S.C. 817; and *Joshi v. Patil*, A.I.R. 1996 S.C. 796.

90. *Prahboo*, *supra* note 89, at paras. 39, 42.

91. Ronjoy Sen, *On the Road to Pluralism? Courts Reflect Savarkar's View of Hinduism*, TIMES OF INDIA, June 1, 2005, available at <http://timesofindia.indiatimes.com/articleshow/1128272.cms>.

contradictory to the Court's earlier secularist rationale. For them, the *Hindutva* decision entailed the judicial sanctioning of Hindu majoritarianism, effectively negating the constitutional commitments to religious neutrality and protection of minority rights.⁹²

E. Toward a Uniform Civil Code?

As part of a political compromise, India delayed the enactment of a uniform civil code at the time of its establishment. Such a civil code was supposed to replace the separate systems of personal law that regulated family matters (including marriage, divorce, guardianship, and inheritance) according to the religious doctrines of each faith. The recent partition required political sensitivities, leading the framers to declare the uniform civil code as a directive principle for state policy. This entails that such a principle is unenforceable in courts, but, nevertheless, should guide future legislatures and administrations in performing their duties.⁹³

In 1954-56 the Nehru's government acted on this mandate, enacting a series of laws known collectively as the "Hindu Code."⁹⁴ These laws homogenized the Hindu religious laws by subordinating the Hindu community along with Buddhists, Jains, and Sikhs to a uniform system of secularized personal law with religious underpinnings.⁹⁵ In the interest of communal peace, Muslims, Christians, Parsees, and Jews continued to follow their own personal laws as a

92. See Geeta Chowdhry, *Communalism, Nationalism, and Gender: Bhartiya Janata Party (BJP) and the Hindu Right in India*, in *WOMEN, STATES AND NATIONALISM* 98, 101 (Sita Ranchod-Nilson & Mary Ann Tetreault eds., 2000); Sanghamitra Padhy, *Secularism and Justice: A Review of Indian Supreme Court Judgements*, in *INDIAN JUDICIARY AND POLITICS* 288, 293 (B.D. Dua, Mahendra P. Singh & Rekha Saxena eds., 2007); Badrinath Rao, *Religion, Law, and Minorities in India: Problems with Judicial Regulations*, in *REGULATING RELIGION* 381, 395 (James T. Richardson ed., 2004); Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 *HARV. INT'L L.J.* 113, 152 (1997).

93. INDIA UNIF. CIV. CODE, art. 44, states: "The State shall endeavor[] to secure for the citizens a uniform civil code throughout the territory of India."

94. This reform included four major enactments: The Hindu Marriage Act of 1955, Hindu Succession Act of 1956, Hindu Adoptions and Maintenance Act of 1956, and Hindu Minority and Guardianship Act of 1956.

95. See Flavia Agnes, *The Supreme Court, the Media and the Uniform Civil Code Debate in India*, in *THE CRISIS OF SECULARISM IN INDIA* 294, 295-96 (Anuradha Dingwaney Needham & Rajeswari Sunder Rajan eds., 2007); Marc Galanter and Jayanth Krishnan, *Personal Law Systems and Religious Conflict*, in *RELIGION AND PERSONAL LAW IN SECULAR INDIA*, *supra* note 62, at 273 (discussing the changes in the legal arrangements achieved by the Hindu Code).

transitory arrangement “expected to be replaced by an all-embracing uniform civil code as envisaged under article 44 of the Constitution.”⁹⁶

A uniform civil code is yet to be achieved. However, in India’s volatile reality, the probability of such reform grew increasingly divisive. Calls for the enactment of a uniform civil code are grounded in claims for legal uniformity and national integration,⁹⁷ as well as equal protection, particularly of women who often suffer discrimination under India’s religious personal laws.⁹⁸ The critics, primarily Muslims, emphasize the futility of such a quest, which would override their constitutional guarantees to religious freedom as well as India’s commitment to multiculturalism.⁹⁹

The Court got involved in the debate over a uniform civil code in the *Shah Bano* case,¹⁰⁰ where it effectively subordinated Muslim personal law to the general law, thereby securing the maintenance of an otherwise ineligible Muslim divorcée. The Court commented:

it is also a matter of regret that Article 44 of our Constitution has remained a dead letter A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have any meaning.¹⁰¹

The ruling provoked a strong backlash from Muslims who perceived the judgment as a direct attack on their minority status and an interference in their religious liberty.¹⁰² To appease the Muslim constituency, the Government enacted the Muslim Women (Protection of Rights on Divorce) Act 1986, which circumvented the Court’s judgment, exempting Muslims from the general law.¹⁰³

The next judicial plea for a uniform civil code came shortly thereafter when the Court faced a legislative barrier in dissolving a marriage between a

96. Virendra Kumar, *Uniform Civil Code Revisited: A Juridical Analysis of John Vallamattom*, 45 J. INDIAN L. INST. 315, 330 (2003).

97. Ruma Pal, *Religious Minorities and the Law*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA, *supra* note 62, at 27 (“The underlying assumption of Article 44 is that a uniform civil code would create a sense of ‘Indianness.’”).

98. Jyoti Rattan, *Uniform Civil Code in India: A Binding Obligation under International and Domestic Law*, 46 J. INDIAN L. INST. 577, 578 (2004).

99. Kumar, *supra* note 96, at 333.

100. *Khan v. Begum*, (1985) 3 S.C.R. 844.

101. *Id.* at 866-67.

102. PANNALAL DHAR, INDIA AND HER DOMESTIC PROBLEMS: RELIGION STATE AND SECULARISM 197 (1993); Danial Latifi, *Muslim Law, in FIFTY YEARS OF THE SUPREME COURT IN INDIA* 269 (Shashi K. Verma & K. Kusum eds., 2000).

103. Muslim Women (Protection of Rights on Divorce) Act, No. 25, Acts of Parliament, 1986.

Christian and a Sikh, since the law governing the marriage did not include as grounds for divorce the irretrievable breakdown of marriage or mutual consent. Surveying the lack of uniformity in India's personal laws, the Court made a strong plea for an immediate legislative intervention in the form of a uniform civil code.¹⁰⁴

The popular practice of Hindu men to circumvent the ban on polygamy by converting to Islam¹⁰⁵ provided the subsequent opportunity for the Court to reiterate and intensify its urgent call for a uniform civil code.¹⁰⁶ First, the Court sharpened its criticism of the government for its reluctance to implement the Constitutional ideal of Article 44:

[The] unequivocal mandate under Article 44 . . . seeks to introduce a uniform personal law—a decisive step towards national consolidation It appears that even 41 years thereafter, the rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it is lying since 1949. The Governments—which have come and gone—have so far failed to make any effort towards “unified personal law for all Indians.”¹⁰⁷

Second, while reiterating the theme of *Shah Bano* on the uniform civil code as a vehicle for national integration, the Court here singled out the Muslim community as the primary obstacle to achieving such integration.¹⁰⁸ The Court concluded with a formal request to the Government to “secure for the citizens a uniform civil code throughout the territory of India.”¹⁰⁹

This ruling regenerated both sides of the debate. Muslim Conservatives interpreted it as a confirmation of the Court's prejudice on religious affairs and an abrupt intervention in their internal religious affairs.¹¹⁰ In contrast, the Hindu nationalists led by BJP employed the ruling as ammunition in their push for a Hindu nation.¹¹¹ The concurring opinion was much more cautious in discussing the need for a uniform civil code, proclaiming that a uniform civil code could

104. *Diengdeh v. Chopra*, A.I.R. 1985 S.C. 935.

105. Muslims in India are entitled to take a second wife under the Muslim Personal Law (Shariat) Act, 1937, a practice which is forbidden for Hindu, Buddhist, Jain, and Sikh men under the Hindu Marriage Act, 1955 (HMA) and is an offence of bigamy under Section 494 of the Indian Penal Code. This generated a popular practice primarily among Hindu men to convert to Islam for the sole purpose of taking a second wife and evading the duty to pay the first wife maintenance.

106. *Mudgal v. India*, (1995) 3 S.C.C. 635.

107. *Id.* at 639.

108. *Id.* at 650.

109. *Id.* at 651.

110. Latifi, *supra* note 102, at 269.

111. JACOBSOHN, *supra* note 24, at 114.

“concretize only when social climate is properly built up . . . to accept the change.”¹¹² This position seemingly took the lead within the Supreme Court in the following year, when the Court’s sharp rhetoric was replaced by a more guarded approach on the suitability of advancing the call for a uniform civil code. When religious freedom and equality challenges were brought against the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987,¹¹³ the Court held that a uniform civil code “in a pluralist society like India . . . may be counter productive to unity and integrity of the nation.”¹¹⁴

This cautious trend continued in the following year when a women’s group challenged different Hindu, Muslim, and Christian provisions of personal law as violating constitutional guarantees of equality and anti-discrimination.¹¹⁵ The Court exercised restraint, refusing to decide the case on its merits, stating that since the issues involved state policies, the remedy lay with the legislature.¹¹⁶ The Court, however, took the opportunity to clarify that its earlier position on “the desirability of enacting the Uniform Civil Code were *incidentally made*.”¹¹⁷ This was indeed a remarkable statement considering the prominence of such advocacy in the Court’s earlier decisions.

Islamic conversion to circumvent the ban on polygamy came under judicial review again in 2000.¹¹⁸ While the Court reaffirmed its early rationale invalidating the second marriage, it completely deserted its unequivocal call for a uniform civil code. Rather, the Court continued the cautionary line. Rattan attributes this shift to the court trying to avoid another *Shah Bano* type backlash, and not wanting “to take a lead to bring about any change in the situation.”¹¹⁹ This trend was reinforced once again when the Court reviewed the constitutionality of the Muslim Women (Protection of Rights on Divorce) Act of 1986, enacted to overrule the *Shah Bano*’s rationale.¹²⁰ Upholding the constitutionality of this Act as providing sufficient guarantees of maintenance to Muslim divorcees, the Court this time around remained completely silent on the issue of a uniform civil code.¹²¹

112. *Mudgal*, *supra* note 106, at 652.

113. *Pitti v. State of A.P.*, (1996) 2 S.C.C. 498.

114. *Id.*

115. *Ahmedabad Women’s Action Group (AWAG) v. Union of India*, A.I.R. 1997 S.C. 3614. These provisions included the right of Muslim men to marry multiple wives and give unilateral talaqs, as well as gender-discriminatory provisions that are part of the Hindu Code and the India Divorce and Succession Acts.

116. *Id.*

117. *Id.* (emphasis added).

118. *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650.

119. Rattan, *supra* note 98, at 583.

120. *Latifi v. Union of India*, (2001) 7 S.C.C. 740.

121. Rattan, *supra* note 98, at 585 (“Strangely, by upholding different laws for different communities, [the Court is] thereby belying the claim of a uniform civil code.”).

However, in 2003 the Court suddenly reversed course yet again, renewing its advocacy for a uniform civil code. The Court invalidated section 118 of the Indian Succession Act of 1925 as discriminatory against Christians, limiting their ability to bequeath their property for religious or charitable purposes.¹²² Then Chief Justice Khare chose to conclude the ruling as follows:

It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.¹²³

Kumar notes that this call for a uniform civil code was independently initiated by the court with “no reference whatsoever” from the parties to the case.¹²⁴ Naturally, these inconsistencies in the Court’s rulings were met by harsh criticism, pointing to the Court’s primary role in the instigation and exacerbation of the polarizing debate over a uniform civil code.¹²⁵

IV. JUDICIAL ACTIVISM IN ISRAEL

A. Introductory Background

Upon its establishment, Israel was proclaimed a “Jewish” and a “Democratic” state. As subsequent political compromises led to a growing convergence of state and religious affairs, this aspiring duality became highly contested, generating deep and enduring social tensions.¹²⁶

As far as the Jewish majority is concerned, a robust Jewish establishment has been set up to enforce an Orthodox monopoly on Jewish life in Israel. Despite the limited numerical size of Orthodox Jews within the Jewish population,¹²⁷

122. *Vallamattom v. Union of India*, 2003(5) S.C.A.L.E. 384.

123. *Id.* ¶ 44.

124. Kumar, *supra* note 96, at 316.

125. Agnes, *supra* note 95, at 298-99.

126. The primary example is the “Status Quo Agreement” reached during Israel’s establishment, which included concessions to Orthodox political factions in exchange for their support of the Zionist national endeavor. Gideon Sapir, *Religion and State – A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579 (1999). Such concessions have been routinely offered to Orthodox parties in exchange for political support generating great resentment among secular Jews.

127. The Jewish majority in Israel (76% of the population) is comprised of 8% Haredim (ultra-Orthodox), 9% Orthodox, 39% describing themselves as “traditionally observant,” and 44% percent describing themselves as “secular” Jews, but with many of them observing different Jewish traditions. For Israel’s religious demography, see U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2007: ISRAEL AND THE

Orthodox Jewish norms regulate matters of personal status for all Israeli Jews regardless of their actual religious identification. This situation increasingly polarized the relationship between the Ultra-Orthodox and Orthodox communities on the one hand, and the secular and non-Orthodox Jewish communities on the other, portrayed by a growing number of scholars as a *kulturkampf*.¹²⁸ Deep tensions have also characterized the inter-religious relations in Israel, deriving from the ethnic and national identification of the Arab-Palestinian minority¹²⁹ with Israel's worst enemies.¹³⁰ Since the 1990s the non-Jewish population in Israel increased tremendously as a result of immigration from the Former Soviet Union.¹³¹ This group has been sharing the Arabs' sense of alienation, ensuing from the State's comprehensive attempt to maintain its Jewish character.¹³²

Following the establishment of Israel in 1948, steps were taken to draft a formal constitution for the new state. This task was never completed as political conveniences delayed the undertaking of defining religion's role in the new state. Instead, the Israeli Parliament ("Knesset") gradually enacted Basic Laws,

OCCUPIED TERRITORIES (2007), available at <http://www.state.gov/g/drl/rls/irf/2007/90212.htm> [hereinafter RELIGIOUS FREEDOM REPORT: ISRAEL].

128. Ilan Peleg, *Israel's Constitutional Order and Kulturkampf: The Role of Ben-Gurion*, 3 ISR. STUD. 230 (1998); Eliezer Schweid, *The Multifrontal Cultural War in Israel*, 3 DEMOCRATIC CULTURE 187 (2000);[#] Z. Shlenger, *Towards Kulturkampf*, 15 ALPAYIN 209 (1998);[#] Avi Weitzman, *A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious-Secular Kulturkampf*, 15 EMORY INT'L L. REV. 1 (2001); Aviezer Ravitzki, *Religious and Seculars in Israel: Kulturkampf?*, ISR. DEMOCRACY INST. (1997), available at <http://www.idi.org.il/sites/english/PublicationsCatalog/Documents/PP1EReligiousandSecularJewryinIsrael.pdf>; Yedidia Z. Stern, *State, Law, and Halakhah—Part Two: Facing Painful Choices*, at 43, ISR. DEMOCRACY INST. (2003), available at <http://www.idi.org.il/sites/english/PublicationsCatalog/Documents/PP4E.pdf>.

129. The Palestinian-Arab population is comprised of roughly 16% Muslims, 2% Christians, 2% Druze and an additional 4% unclassified. STATISTICAL ABSTRACT OF ISRAEL 2002, available at <http://www.cbs.gov.il/shnaton53/shnatone53.htm> (last visited Nov. 23, 2009).

130. NADIM N. ROUHANA, PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT 36-40 (1997); As'ad Ghanem & Nadim M. Rouhana, *Citizenship and the Parliamentary Politics of Minorities in Ethnic States: The Palestinian Citizens of Israel*, 7 NATIONALISM & ETHNIC POLITICS 66 (2001); Sammy Smooha, *The Model of Ethnic Democracy: Israel as a Jewish and Democratic State: Response to Danel*, J. OF ISRAELI HISTORY 475, 484-88 (2002).

131. Yair Sheleg, *Not Halakhically Jewish: The Dilemma of Non-Jewish Immigrants in Israel*, ISR. DEMOCRACY INST. (2004).[#]

132. Issam Abu-Rya & Ruth Gavison, *The Jewish-Arab Rift in Israel: Characteristics and Challenges*, ISR. DEMOCRACY INST. (1999),[#] available at http://www.idi.org.il/PublicationsCatalog/Pages/PP_13/Publications_Catalog_2013.aspx; Sheleg, *supra* note 131.

supposedly the basis for a future formal constitution.¹³³ The first nine Basic Laws that were adopted all dealt with governmental powers. None dealt with fundamental rights or conferred judicial review powers to the courts.¹³⁴

Having no written constitution to rely on, and functioning in a British-style system of parliamentary supremacy, Israel's High Court of Justice assumed rather early the role of creating and protecting fundamental rights within the Israeli democracy.¹³⁵ By way of precedents, using methods of statutory interpretation and administrative review, the Court established the constitutional status of certain rights and freedoms, including freedom of religion,¹³⁶ and limited the power of the *Knesset* to override them by legislation.¹³⁷ In 1992, thanks to extensive efforts by its liberalist factions, the *Knesset* adopted the Basic Law of Human Dignity and Liberty¹³⁸ and the Basic Law of Freedom of Occupation.¹³⁹ These Basic Laws contained important aspects of a classic bill of rights,¹⁴⁰ including the first formal proclamation of a series of fundamental rights.¹⁴¹ However, due to paramount opposition from the powerful Orthodox parties in the *Knesset*, the right to religious freedom and the right to equality were excluded from these two Basic Laws.¹⁴²

133. On these historical developments, see Gavison, *supra* note 5, at 71-77; Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in an American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 314 (1995); Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259, 268 (1999); Stacie I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and Potential of Violence*, 19 MICH. J. INT'L L. 109, 121-22 (1997).

134. Barak-Erez, *supra* note 133, at 314.

135. *Id.*; Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1326 (1999).

136. The right to freedom of religion was first declared in H CJ 262/62 Peretz v. Local Council of Kfar Shmaryahu [1962] IsrSC 16(3) 2101 (ordering a local authority to rent space for a non-Orthodox synagogue).[#]

137. David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238, 240-41 (1992); Sapir, *supra* note 126.

138. Basic Law of Human Dignity and Liberty, 5752-1992, 60 LSI 150 (1992) (Isr.).

139. Basic Law of Freedom of Occupation, 5752-1992, 11 LSI 90 (1992) (Isr.).

140. Such as supremacy and entrenchment of the rights in the Basic Law of Freedom of Occupation reflected in a limitation clause, which forbids the infringement of declared rights "except by a law befitting the values of Israel, enacted for a proper purpose, and to an extent no greater than is required." The Basic Law of Human Dignity and Liberty does not have such an entrenchment.

141. The following rights are protected by these Basic Laws: right to life, body and dignity; right to property; right to personal liberty; right to leave the country and reenter it; and right to privacy.

142. Kretzmer, *supra* note 137, at 238. Kretzmer explains this opposition of the religious parties as an attempt to prevent a general bill of rights, because they feared

With the enactment of the Basic Laws, legal scholars led by (then) Chief Justice Aharon Barak began advocating the idea that Israel has undergone a “constitutional revolution,”¹⁴³ i.e., that by way of interpretation, the new Basic Laws granted Israeli courts the power of judicial review over primary legislation although neither law specified such power. Barak argued further that the concept of human dignity, protected by the Basic Law of Human Dignity and Liberty, should be interpreted broadly to include the protection of such values as equality, freedom of religion, and freedom of speech.¹⁴⁴

Barak’s advocacy received its judicial seal of approval soon after, as the Court, in a unanimous decision written by Barak, formally declared its ability to invalidate laws that were inconsistent with the two new Basic Laws,¹⁴⁵ including those regulating the relationship between religion and state.¹⁴⁶ These developments, embraced with open arms by secular liberalists, had the opposite effect within the Jewish Orthodox community, which perceived them to be a forthright attack on the Jewish nature of the state. Thus, the late 1990s marked a new height in the already tense relationship between the secular and the religious communities, manifested in public debates, mass demonstrations, violent eruptions, and continuing attempts by each group to impose on the other its version of cultural ideals.¹⁴⁷ The following sections survey these developments through the legal sphere.

that a bill of rights will enable the Supreme Court to exercise judicial review over legislation that was passed because of the strategic position of the religious parties in Israel’s coalition system, but that is anathema to the secular majority in the country. The main examples of such legislation are the laws regarding religious marriage and Sabbath observance.

143. Aharon Barak, *A Constitutional Revolution: Israel’s Basic Laws*, 4 CONSTITUTIONAL FORUM 83, 83-84 (1993); Mandel, *supra* note 133, at 262. This view is not shared by all. *See, e.g.*, Ruth Gavison, *The Constitutional Revolution: A Reality or a Self-Fulfilling Prophecy*, 28 MISHPATIM 21, 32 (1997).[#]

144. Aharon Barak, *Protected Human Rights: Scope and Limitations*, 1 L. & GOV’T IN ISR. 253 (1992-1993);[#] AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (1992). *Cf.* Dorner, *supra* note 135, at 1330.

145. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village [1995] IsrSC 49(4) 221.[#]

146. Gerald M. Steinberg, *Interpretations of Jewish Traditions on Democracy, Land, and Peace*, 43 J. CHURCH & ST. 93, 100-01 (2001) (“Under the influence of Judge Aharon Barak the courts have entered into areas and assumed powers, that had, in the past, been rejected by the secular courts as outside their area of jurisdiction.”). *See also* Yoav Peled, *Will Israel Be a State of all Its Citizens in its 100th Anniversary?* 17(1) BAR-ILAN LAW STUDIES 73, 73 (2001).[#]

147. Barak-Erez, *supra* note 133, at 338; Menachem Mautner, *The 1990s—Years of Reconciliation?* 26(3) TEL-AVIV U. L. REV. 887 (2002);[#] Shmuel Sandler, *The Religious-Secular Divide in Israeli Politics*, 6 MIDDLE E. POL’Y 137 (1999).

B. Demarcating Jewishness

Judaism in Israel, while short of enjoying the status of state religion, has been entrenched in various legal measures. One such measure is the unique legal construction of the Law of Return 1950 and the Nationality Law 1952, providing for the exclusive right of Jews to immigrate to Israel and automatically acquire Israeli citizenship.¹⁴⁸ Defining who is a Jew for the purpose of citizenship and other policy aspects has been one of Israel's primary challenges since its inception.

The Court was first called upon to decide on the matter in 1969. A Jewish father and a non-Jewish mother appealed to the Court, challenging the refusal of the Minister of Interior to register their Israeli-born children as Jews because they did not conform to the Orthodox version of Judaism of being born to a Jewish mother.¹⁴⁹ The Court ruled in favor of the *Shalit* family, ordering the Ministry of Interior to register their children as Jewish. The decision created an uproar within the Jewish community. Secular Jews welcomed the outcome as a victory of liberalism, the Orthodox community gravely condemned it.¹⁵⁰ The aftermath of the *Shalit* case is characteristic of what became the typical response of the *Knesset* to politically charged rulings of the Court on religious matters. Orthodox legislators prompted the amendment of the Law of Return and the Law of Registration to reflect the Orthodox version of Judaism, defining a Jew to be "a person who was born to a Jewish mother or has converted to Judaism."¹⁵¹ This definition entails discrimination against anyone deviating from this traditional version of Judaism, most notably non-Orthodox Jews, as well as many immigrants to Israel who self-identify as Jews under patrilineal descent.

The visibility of the non-Orthodox Jewish communities since the 1970s¹⁵² raised vexed questions about their status in a country where state policy

148. Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.); Nationality Law, 5712-1952, 6 LSI 50 (1952) (Isr.). See also Peled, *supra* note 146, at 73 (noting that the purpose of this right is to preserve the Jewish majority in Israel).

149. The Law of Residents' Registration, 1965, requires Israelis to register their religion and their ethnic group with the Population Registry.

150. See PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 217-20 (1997) (discussing the events following the *Shalit* ruling).

151. Law of Return (Amendment No. 2), 5730-1970, 24 LSI 28 (1970) (Isr.).

152. Since the 1970s the non-Orthodox factions of Judaism, namely the Conservative, Reform, and Reconstructionist streams that comprise a substantial part of the Jewish world in Western countries, have made Israel their home, yet numerically they still remain a very small minority within the Jewish population there. The Reform (Progressive) Movement is estimated to include roughly 20 congregations with about 5,000 members. The Conservative [Masorti] Movement is estimated at 40 congregations with over 12,000 affiliates. EPHRAIM TABORY, REFORM JUDAISM IN ISRAEL: PROGRESS AND PROSPECTS (1998), available at <http://www.ajc.org/site/apps/nl/newsletter3.asp?c=ijTI2PHKoG&b=840313>.

concerning religion has been traditionally decided according to the Orthodox version of Judaism. One of the most volatile of these issues has been the status of conversions performed by these Jewish denominations. The Orthodox hegemonic establishment, which supervises the conversion process, strongly opposes non-Orthodox conversions as too lenient and continually refuses to recognize such converts as Jews.¹⁵³ This gravely impedes on the ability of non-Orthodox Jews in Israel to acquire citizenship and conduct the Jewish cycle of life, including rituals of marriage, divorce, and burial in accordance with their religious tenets. As a result, the non-Orthodox movements have been conducting an ongoing legal battle for official recognition of their conversions.

The Court repeatedly sided with the non-Orthodox movements when conversions were conducted abroad. It stated unequivocally that for immigration purposes conversion conducted *outside* Israel, whether Orthodox or non-Orthodox, is equal to those conducted *inside* Israel, requiring the Interior Ministry to register these converts as Jews.¹⁵⁴ Nevertheless, the Court has thus far stopped short of recognizing the non-Orthodox conversions conducted in Israel as bestowing citizenship and other fundamental rights, stating that this is a matter for the legislature to determine.¹⁵⁵

Judicial interventions on the issue of conversion have met with great outrage on the part of the Orthodox community perceiving them to be unjustifiable interventions in a religious matter. The Orthodox parties, therefore, have used their political leverage to block any recognition of non-Orthodox conversions. In 1997 the government established the Ne'eman Commission, where Conservative and Reform rabbis sat together with their Orthodox counterparts to find a compromise on a single conversion procedure recognized by all factions of Judaism. Following months of deliberations, the Committee proposed to establish a conversion authority, which included an institute for conversion where non-Orthodox rabbis would cooperate with Orthodox rabbis in the conversion process but ultimately Orthodox rabbis would perform the actual conversions in religious courts. The Chief Rabbinate, traditionally controlled by ultra-Orthodox, opposed the Commission outright, refusing to participate in its deliberations, and formally rejected its recommendations. The government nevertheless adopted these recommendations and used its residual powers¹⁵⁶ to establish in the early 2000s the joint Conversion Authority. This was necessitated,

153. See Anti-Defamation League, *The Conversion Crisis: The Current Debate on Religion, State and Conversion in Israel*, available at <http://www.adl.org/Israel/Conversion/intro.asp> (last visited Nov. 23, 2009).

154. H.C.J. 264/87, *Sephardi Torah Guardians-Shas Movement v. Population Registrar* [1989] IsrSC 43(2) 723.[#]

155. H.C.J. 1031/93 *Pesarro (Goldstein) v. Minister of Interior* [1995] IsrSC 49(4) 661 (declining to resolve whether non-Orthodox conversions conducted in Israel would be allowed for the purposes of the Law of Return).[#]

156. Basic Law: The Government, § 32, 2001, S.H. 1780, 158 (Isr.), available at http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm.

inter alia, by the growing problem of roughly 200,000 immigrants from the Former Soviet Union who were facing long delays in their conversion process.¹⁵⁷ Haim Druckman, a renowned Orthodox Rabbi, was appointed to head the new Conversion Authority authorized on behalf of the Minister of Religious Affairs to sign conversions certificates.¹⁵⁸ Druckman's appointment has been an unwelcome development by the ultra-Orthodox establishment, which perceived him as too lenient.¹⁵⁹

In 2002 the Court intervened again to accommodate the claims of non-Orthodox converts in the context of registering them as Jews in the Population Registry.¹⁶⁰ It creatively distinguished between the civil registration of converts as Jews in the Population Registry, which it construed to be a formal/nominal requirement, and the substantive recognition of the conversion for the purposes of granting citizenship and other rights concerning matters of personal status.¹⁶¹ The Court defined the authority of the Registry's clerk as a formality and the registration itself to be for "statistical purposes."¹⁶² As such, concluded the Court, the clerk cannot refuse the registration of non-Orthodox Jews in public records once sufficient evidence for the conversion is provided.¹⁶³ The pressing question whether non-Orthodox conversion in Israel makes a person Jewish for the purpose of acquiring legal rights remained open for future debate.¹⁶⁴ Subsequent judicial intervention in favor of non-Orthodox conversions took place in 2005, when the Court upheld "overnight conversions."¹⁶⁵ This had been a growing practice, primarily among foreign workers and immigrants from the Former Soviet Union. These converts studied for conversion with the non-Orthodox communities in Israel, but conducted the actual act of conversion with a non-Orthodox community abroad, since such a conversion in Israel would not have granted them the status of Jews. The Minister of Interior refused to recognize these conversions, claiming that this was an evasion of immigration laws, since the petitioners were never part of the Jewish community that converted them abroad. The Court, nevertheless, upheld the conversions, stating that to satisfy the term "Jew" for the purpose of immigration under the Law of Return, the Ministry's examination of conversion should focus on whether a convert had undergone a conversion by a recognized

157. Jonathan Rosenblum, *A New Conversion Scandal*, YATED NE'EMAN, May 17, 2006, available at <http://www.jewishmediaresources.com/pfarticle.php?id=956>.

158. *Id.*

159. *Id.*

160. H CJ 5070/95 Naamat, Working & Volunteering Women's Movement v. Minister of Interior [2002] IsrSC 56(2) 721.[#]

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. H CJ 2597/99 Rodriguez-Tushbeim v. Minister of Interior [2005] IsrSC 59(6) 721.

Jewish community, finding it irrelevant that the convert did not intend to join that specific Jewish community.¹⁶⁶

These developments went too far for the ultra-Orthodox establishment to digest. It retaliated strongly by ousting Rabbi Druckman from the Conversion Authority using its High Rabbinical Court to invalidate the thousands of conversions Rabbi Druckman had performed since taking on the directorship of the Conversion Authority.¹⁶⁷ These developments once again shelved the prospects of reaching a universal policy on Jewish conversion, leaving many converts in complete limbo. The consequences of this current conversion crisis are yet to be determined.¹⁶⁸

C. Advancing Pluralism within the Jewish Community

The Court has always stood out as a principal advocate of pluralism in Israel, stating repeatedly the right of different groups to “express themselves in the areas of culture, religion and tradition, including minorities and repelled groups.”¹⁶⁹ The enactment of the 1992 Basic Laws provided an excellent opportunity to further solidify this approach as Israel’s constitutional foundation. The first case that came under judicial review following the enactment of the 1992 Basic Laws challenged the monopoly of *Kashrut*¹⁷⁰ rules over meat importation.¹⁷¹ The Court legalized the importation of meat on the basis of the Basic Law of Freedom of Occupation. The Orthodox parties in the *Knesset* reacted immediately and intensely to maintain the Orthodox monopoly over meat importation. They orchestrated the passing of an amendment to the Basic Law, which now includes an overriding exemption from complying with the right to freedom of occupation in certain circumstances along with implementing legislation regulating the monopoly of Kosher meat.¹⁷²

Religious institutions in Israel, including religious courts, religious schools, and institutions of social services of all religions are funded by the budgets of the different governmental ministries, approved annually by the

166. *Id.*

167. See Jewish Agency for Israel, *Conversion Controversy 2008*, available at http://www.jewishagency.org/JewishAgency/English/Jewish+Education/Compelling+Content/Eye+on+Israel/Current+Issues/Conversion+Controversy/Conversion_Controversy_2008_3.htm (last visited Nov. 27, 2009).

168. *Id.*

169. HCJ 1438/98 Masorti Movement v. Minister of Religious Affairs [1998] IsrSC 53(5) 337.#

170. Jewish dietary law restricting the consumption of certain meats.

171. HCJ 3872/93 Meatrael v. Prime Minister [1993] IsrSC 47(5) 485.#

172. See Gavison, *supra* note 5, at 82; Gideon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT’L & COMP. L. REV. 617 (1999) (discussing the Meatrael controversy).

Knesset.¹⁷³ Non-Orthodox Jews joined by seculars have repeatedly turned to the Court, successfully challenging the unequal distribution of funds for religious institutions, as well as the misuse of such funds by the Orthodox establishment.¹⁷⁴ Nevertheless, their *de facto* success in alleviating the situation has been negligible. The Orthodox establishment repeatedly secures its funds through the political process of approving the budget. As such, funding for the Orthodox institutions compared to their non-Orthodox counterparts remains extremely high and overtly disproportionate.¹⁷⁵

The non-Orthodox movements also attempted to break the Orthodox monopoly on Judaism in Israel by petitioning the Court to secure representation in Israel's many religious councils, the regional governmental bodies managing religious services.¹⁷⁶ The religious councils, whose members were exclusively Orthodox Jews by tradition, repeatedly refused to comply with a series of Court orders to include non-Orthodox representatives.¹⁷⁷ Finally, an Orthodox member of the *Knesset* initiated a legislative circumvention of the Court's rulings. The law now requires any member of the religious council to pledge to abide by rulings of the Chief and local Rabbinate, controlled by the Orthodox establishment. As such, the Court's repeated orders to sit non-Orthodox representatives on religious councils ultimately resulted in an effective entrenchment of the Orthodox version of Judaism as far as religious councils were concerned, requiring non-Orthodox representatives to surrender to the Orthodox hegemony in their role as council members.

The two issues which define the strained relationship between secular and Orthodox Jews in Israel stem from the Israeli family law system and the compulsory military draft. In matters of family law (primarily marriage and divorce) Israel largely retained the principles of the Ottoman *millet* system, under which family law matters were decided by religious tribunals in accordance with a person's religious affiliation.¹⁷⁸ Religious courts enjoy exclusive jurisdiction on

173. Shimon Shetreet, *State and Religion: Funding of Religious Institutions – the Case of Israel in Comparative Perspective* 13(2) NOTRE DAME J.L. ETHICS & PUB. POL'Y 421-53 (1999).

174. *Masorti*, *supra* note 169; HCJ 47/82 *The Progressive Jewish Movement in Israel v. Minister of Religious Affairs* [1989] IsrSC 43(2) 661.[#]

175. Shimon Shetreet, *Between Three Branches of Government: The Balance of Rights in Matters of Religion in Israel*, FLOERSHEIMER INST. FOR POL'Y STUD. (2001); RELIGIOUS FREEDOM REPORT: ISRAEL, *supra* note 127.

176. There are 134 religious councils in Israel, of which only one is non-Jewish belonging to the Druze community. RELIGIOUS FREEDOM REPORT: ISRAEL, *supra* note 127.

177. *See, e.g.*, HCJ 699/89 *Hoffman v. The Municipal Council of Jerusalem* [1994] IsrSC 48(1) 678;[#] HCJ 2463/96 *Meretz Movement v. Municipality of Jerusalem* [1996] IsrSC 50(4) 837;[#] HCJ 4247/97 *Meretz v. Minister of Religious Affairs* [1998] IsrSC 52(5) 241.[#]

178. The Israeli law recognizes fourteen religious communities in Israel: Jews, Muslims, Eastern Orthodox, Roman Catholics, Gregorian Armenians, Armenian Catholics, Syrian Catholics, Chaldeans (Uniates), Greek Catholics, Maronites, Syrian Orthodox,

matters of marriage and divorce,¹⁷⁹ as well as autonomy to apply religious law in such proceedings, subject to administrative review by the Court.¹⁸⁰ Without the possibility of resorting to a civil procedure, Israelis find themselves coerced to submit to religious proceedings regardless of their actual belief. This has been a source of constant bitterness on the part of secular and non-Orthodox Jews.¹⁸¹

The Court has repeatedly intervened in the rulings of the rabbinical tribunals to alleviate the difficulties of applying a religious system of laws within a secular constitutional system. The outcome, nevertheless, resulted in a collision of legal authority, with the rabbinical courts viewing the Court's administrative reforms as illegitimate interferences in their religious autonomy on matters of personal laws. A primary example of this clash followed the *Bavli* affair,¹⁸² a divorce proceeding in which the wife claimed entitlement to half of the couple's assets, while the husband denied that such right existed under Jewish law. After the rabbinical courts sided with the husband, the Court held that although rabbinical courts enjoyed exclusive jurisdiction on matters relating to marriage and divorce, this jurisdiction was subject to general principles of constitutional law, thereby constructing judicial limitation on the application of Jewish law in matters of personal status. This enabled the application of the Women's Equal Rights Law 1951,¹⁸³ granting the wife equal distribution of the marital assets. The rabbinical courts refused to follow this ruling, perceiving it as an untenable intervention in their internal matters.¹⁸⁴ The Court, on its part, continued to assert that constitutional principles and state law impose limitations on the exclusive jurisdiction of the rabbinical tribunals in personal status matters.¹⁸⁵

The second issue manifesting the tensed relationship between secular and ultra-Orthodox Jews has been the deferments given by the Minister of Defense to full time Orthodox *yeshiva* (Jewish religious seminaries) students from Israel's otherwise mandatory military service. Political maneuvering by the Orthodox

Druze, Episcopal-Evangelicals and the Baha'is. Article 51-4 of the Palestine Order in Council, 3 LAWS OF PALESTINE 2569, 2581-82, was incorporated into the Israeli legal system and remains in force to this day.

179. Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (Isr.) [hereinafter Rabbinical Courts Jurisdiction Law]. In other matters, such as alimony claims, the Rabbinical Courts have concurrent jurisdiction with the civil courts. *Id.* at § 4.

180. The standard of review is that of an administrative review rather than a direct appeal. HCJ 323/81 Vilozni v. The Great Rabbinical Court [1982] IsrSC 36(2) 733.[#]

181. Galanter & Krishnan, *supra* note 4, at 121.

182. HCJ 1000/92 Bavli v. the Great Rabbinical Court [1994] IsrSC 48(2) 6.[#]

183. Women's Equal Rights Law, 5711-1951, 5 LSI 33 (1951-52) (Isr.).[#]

184. Hirschl *supra* note 1, at 174. Following the Court's decision the case was referred back to the Tel Aviv Rabbinical Court, which refused to follow the Court's ruling. Tel Aviv Local Rabbinical Court Case 884/99 Bavli v. Bavli (unpublished).[#]

185. *See, e.g.*, HCJ 9734/03 Yemini v. the Great Rabbinical Court [2004] IsrSC 59(2) 295.[#] For a discussion of the case, *see* Anat Scolnicov, *Religious Law, Religious Courts and Human Rights within Israeli Constitutional Structure*, 4 INT'L J. CON. LAW 732 (2006).

political parties led to a steady growth of military deferments, generating great resentment among the other sectors of Israeli society viewing themselves to be the sole bearers of the burden of military service. A landmark ruling in 1998 proclaimed these military deferments illegal, giving the *Knesset* a year to pass legislation on the matter.¹⁸⁶ Although the government searched for an accommodative solution by establishing a commission on the matter, massive pressure by the ultra-Orthodox parties led to the enactment of the Deferral of Service for Full Time Yeshiva Students Law,¹⁸⁷ which provided a legislative seal of approval for such military deferments.¹⁸⁸ In 2006 the Court once again signaled the unconstitutionality of the Deferral of Service Law.¹⁸⁹ However, the *Knesset's* response was to extend the military deferments for an additional five years.¹⁹⁰

D. Protecting the Non-Jewish Religious Minorities in the Jewish State

A fascinating aspect of the religion-state conflict in Israel has been the lessening effect that the politically charged reality had on the willingness of an otherwise extremely activist Court to intervene in matters of religion pertaining to the Arab-Palestinian population.

Minority religions in Israel are ethnically associated and naturally identified with the State's enemies. This effectuated the political endeavor to guarantee their communal autonomy as opposed to focusing on protecting their right to religious freedom or equality.¹⁹¹ Two primary examples support this

186. H CJ 3267/97 Rubinstein v. Minister of Defense [1998] IsrSC 52(5) 481.[#]

187. Deferral of Service for Full Time Yeshiva Students Law, 5762-2002, S.H. 1862, 521.[#]

188. Under this Law, *yeshiva* students are granted a military service exemption to continue their religious studies that can be renewed on an annual basis until they reach forty. At the age of twenty-two they have the option to defer to community service, learn a trade or enlist for an abbreviated period, if they don't continue their full-time *yeshiva* studies. According to the Religious Freedom Report on Israel, eleven percent of all male candidates for military service received deferments as full-time *yeshiva* students. RELIGIOUS FREEDOM REPORT: ISRAEL, *supra* note 127. The Law was in force for five years, with possibilities for extension. On July 18, 2007, the *Knesset* approved such a five-year extension. Ilan, *infra* note 190.

189. H CJ 6427/02 The Movement for Quality Government in Israel v. The Knesset [2006] Tak-SC 2006 (2) 1559.[#]

190. Shahar Ilan, *Knesset Approves Extension of Tal Law by Another 5 Years*, HAARETZ, Jul. 7, 2007, available at <http://www.haaretz.com/hasen/spages/883607.html>.

191. Izhak Englrad, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 189-90 (1987); Ilan Saban, *The Minority Rights of the Palestinian-Arabs in Israel: What Is, What Isn't and What is Taboo*, 26 TEL-AVIV U. L. REV. 241, 275 (2002).[#]

observation. First, the state-funded education system¹⁹² maintains a clear ethnic division between Jewish and Arab schools. The Jewish education system offers a choice between secular and religious education, while the Arab-Palestinian system largely consists of a single education system emphasizing “general Arab culture along with specific subculture of the relevant religious groups.”¹⁹³

Second, the Israeli authorities proved much more hesitant to reform personal status matters administered by the religious authorities of the Arab-Palestinian population compared to reforms implemented in relation to Jewish practices.¹⁹⁴ Although the *Knesset* intervened in limiting the popular Muslim practice of the marriage of minor girls¹⁹⁵ and banned polygamy,¹⁹⁶ these bans have not been sufficiently enforced.¹⁹⁷ Moreover, while the *Knesset* afforded Jewish wives the right to claim maintenance from their husbands and to file child custody suits in civil courts back in 1953,¹⁹⁸ it took almost fifty years for such rights to be legislated for Muslim and Christian women,¹⁹⁹ exposing these women to grave discrimination by their respective religious courts.²⁰⁰

Examining the Court’s approach toward the rights of Arab-Palestinians reveals an uncharacteristic judicial restraint compared to its treatment of the Jewish majority. The Court refused to intervene, for example, in favor of a female Arab student who was declined enrollment in a private Greek-Catholic Malachite school unless she agreed to the school’s policy of baring her head and participating in co-gender physical education wearing gym clothes.²⁰¹ A similar “hands off” approach was employed in the context of inter-group conflicts over the administration of Christian holy sites, finding them unjusticiable.²⁰²

192. The primary legislative acts governing education are the Compulsory Education Law, 5709-1949, 3 LSI 125 (1949) (Isr.) and the State Education Law, 1953, 7 LSI 113 (1952-53) (Isr.).

193. Stephen Goldstein, *The Teaching of Religion in Government Funded Schools in Israel*, 26 ISR. L. REV. 36, 42 (1992).

194. The power of the Muslim and Christian religious courts was established by Art. 52 of the Palestine Order in Council 3 LAWS OF PALESTINE 2569, 2581. The power of the Druze courts was established by the Druze Religious Courts Law, 5723-1962, 17 LSI 27 (1962-3) (Isr.) (continuing the arrangement of the pre-state Ottoman *millet* system).

195. Marriage Age Law, 5710-1950, 4 LSI 158 (1950) (Isr), limits the age of marriage to seventeen.

196. Penal Law Amendment (Bigamy) Law, 5719-1959, 13 LSI 152 (Isr.).

197. Saban, *supra* note 191, at 274.

198. Rabbinical Courts Jurisdiction Law, *supra* note 179.

199. The Court Family Affairs Law, 5755-1995 LSI 1537 enacted in 2001 LSI 1810.

200. See Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154 (2003) (explaining the background and public debate leading to the passage of the anti-discrimination laws).

201. H CJ 4298/93 Jabareen v. Minister of Educ. [1994] IsrSC 48(5) 199.#

202. H CJ 188/77 Orthodox Coptic Patriarchate v. Gov’t of Isr. [1978] IsrSC 33(1) 225#; H CJ 633/05 Armenian-Patriarchy of Jerusalem v. Gov’t of Isr. [2006] (unpublished).#

When the budget allocations of the Ministry of Religious Affairs were challenged as discriminating between the Jewish and Arab-Palestinian communities, the Court rejected the petition as too general and lacking the foundational evidence to substantiate discriminatory practices.²⁰³ A following petition challenged the specific distribution of funds for maintaining religious cemeteries as discriminatory compared to the budget's allocations for the Jewish cemeteries. This time around, the Court was willing to rule that a continual discriminatory practice existed against the Arab-Palestinian minority in the distribution of funds for religious matters, but remained reluctant to remedy the discrimination on that year's budget, ordering the proportional allocation of funding in the state budget for the following year.²⁰⁴ However, the Court's ruling did not generate the required change, since the allocation of funding in the State's budget is among the most politically charged processes in Israel. The Palestinian-Arab religious communities continue to receive only two percent of the Ministry of Religious Affairs' budget, although they comprise more than twenty percent of the Israeli population.²⁰⁵

To summarize, the Court has been actively intervening to alleviate the effects of Jewish Orthodoxy as part of a systematic attempt to create a more pluralist public sphere. However, Karayanni rightly observes a "reluctance to interfere and effectuate change" in the case of the Arab-Palestinians because they were perceived as a "national group, instead of just a group accommodation of a particular Palestinian-Arab religious community."²⁰⁶

V. COMPARING THE EFFECTS OF THE INDIAN AND THE ISRAELI COURTS

The survey of Indian and Israeli judicial interpretations on religious affairs dictates several preliminary observations. First, the Indian and Israeli Courts diverged in their approaches to religious pluralism. Both courts manifested a strong inclination to intervene in the affairs of the majority religion in the interest of protecting the minorities within that religion. In India, the rationale was to advance backward classes, and in Israel the Court attempted to establish the non-Orthodox versions of Judaism as viable alternatives within the public

203. HCJ 240/98 Adalah-the Legal Center for the Rights of the Arab Minority in Israel v. Minister of Religious Affairs [1998] IsrSC 52(5)167.[#]

204. HCJ 1113/99 Adalah-the Legal Center for the Rights of the Arab Minority in Israel v. Minister of Religious Affairs [2000] IsrSC 54(2) 164.[#]

205. See *Arab Religious Leaders and Adalah Urge UN Rapporteur to Exert Pressure on Israeli Government to Cease Discrimination Against Arab Religious Communities in Israel*, ADALAH'S NEWSLETTER (Adalah Haifa, Isr.), Jan. 2008, available at <http://www.adalah.org/newsletter/eng/jan08/6.php> (last visited Nov. 27, 2009).

206. Michael M. Karayanni, *The Separate Nature of the Religious Accommodations for the Palestinian-Arab Minority in Israel*, 5 NW. U. J. INT'L RIGHTS 41, 51, 69 (2007).

sphere. Nonetheless, the Indian Court has shown far greater willingness than its Israeli counterpart to intervene in matters concerning religious minorities. This has been exemplified by its authorization of extensive state control over minority religious groups, the denial of formal status for such groups, and the application of the “essential matters” doctrine, leading to assertions that cow slaughtering and the Mosque were optional elements of Islam. On the other hand, an otherwise activist Israeli Court seems to share the approach of other branches of the Israeli government in relation to the non-Jewish minorities. As exemplified by its rulings on education, inter-religious tensions, and religious funding, the Court has been uncharacteristically restrained when inequality claims have been raised by the Arab-Palestinian minority.

Second, judicial activism seemed to have taken a life of its own in the context of religion-based conflicts in India and Israel. An activist judicial approach has frequently been closely linked to rights-based campaigns by mobilized social movements focusing their efforts on the courts to bypass legislative hurdles and further policy changes.²⁰⁷ However, in the Indian and Israeli examples judicial activism seems to be very much the undertaking of individual judges advancing an independent progressive agenda for social reform and religious pluralism. Civil society, on the other hand, seems to be an overlapping factor rather than an actual trigger for judicial activism in the context of religion-based issues.²⁰⁸

Third, the relationship between the Court in its counter-majoritarian function and the other two branches of government has been strained in both states. This has been manifested through three main interactions: (i) creative state policy circumventing judicial rulings, exemplified by the reservations policies in India and governmental funding of religious institutions in Israel; (ii) outright defiance of judicial rulings by religious institutions, illustrated in the context of Israeli family law proceedings; and (iii) numerous constitutional and legislative amendments enacted by the national parliaments in both states retaliating against judicial attempts at reform and the advancement of religious pluralism.

In India, nevertheless, this clash has been limited primarily to the politically charged *Shah Bano* affair and the contested policy of reservations. In Israel, the power struggle between the Court and the other branches of government evolved into the defining characteristic of their relationship, as illustrated by the many amendments regarding the status of non-Orthodox Judaism in Israel, the military draft, and importation of non-Kosher meat.

One can argue that the Israeli polity is more susceptible to such circumventions for it is lacking a formal constitution. However, this explanation may be countered on two grounds. First, the Court’s self-proclaimed power to

207. See, e.g., MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950* (1987).

208. Cf. PATRICIA J. WOODS, *JUDICIAL POWER AND NATIONAL POLITICS: COURTS AND GENDER IN THE RELIGIOUS-SECULAR CONFLICT IN ISRAEL* (2008) (explaining the role of the Israeli judicial community in judicial activism).

invalidate primary legislation should, at least in theory, act as a deterring mechanism just as it does in states with a formal constitution.²⁰⁹ Second, the events surrounding the importation of non-Kosher meat clearly illustrate that the *Knesset* has not been deterred from changing even a Basic Law, Israel's normatively supreme enactments and supposedly the foundation of its future constitution, when it feels that the Court overstepped its political boundaries.

The focus of analysis turns next to examining the effects of the judicial rulings in relation to the parameters laid at the outset, namely the courts' contribution to effectuating social reform, its ability to manage religion-based conflicts, and the implications of the courts' judicial policy. As far as social change is concerned, the study measures whether the court-mandated policy broadened rights protection for the different social groups, contributed to a change in discriminatory institutional practices, or advanced religious pluralism. Moreover, with recent scholarship viewing judicial interventions not as speedy engines of change, but rather as the contributors to long-term social reform through public mobilization,²¹⁰ specific focus is given to the long-term impact of judicial intervention in both states.

The survey suggests that thus far in India the Court has failed in its attempts to create authoritative legal norms that advance the reconstruction of Indian society. The Court's ruling did not bring about the eradication of the enduring social discrimination on the basis of caste. While formally illegal, oppressive practices against dalits, including routinely banning them from entering temples, remain prevalent, indicating a clear social rejection of the Court-mandated reform.²¹¹ The Court's approach toward reservations as a vehicle to gradually abolish the caste system seem to have backfired as well. Its transformative attempts met fierce institutional resistance that so far seems to have triumphed.

First, rather than generating the advancement of backward classes, reservations perpetuated social backwardness by creating an incentive to cling to backwardness in the interest of guaranteeing eligibility for employment and admission to educational institutions.²¹² Second, the policy of reservations has

209. See also Ofrif Liviatan, *The Impact of Alternative Constitutional Regimes on Religious Freedom in Canada and England*, 32 B.C. INT'L & COMP. L. REV. 45 (2009) (comparing the scope of protection for religious freedoms in England and Canada).

210. See generally Charles R. Epp, *Law as an Instrument of Social Reform*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 595 (Keith Wittington ed., 2008) (summarizing these theories of judicial intervention).

211. Smita Narula, *Equal by Law, Unequal by Caste: The Untouchable Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255 (2008); RELIGIOUS FREEDOM REPORT: INDIA, *supra* note 32.

212. ANIRUDH PRASAD, RESERVATION POLICY AND PRACTICE IN INDIA: A MEANS TO AN END 372 (1991) (concluding that backward classes have not made the expected economic progress, and the aim of advancing their social and economic status has not been fulfilled); see also VIJAYAN, *supra* note 5, at 238.

been breeding constant conflict and resentment as groups continually compete over quotas. Rao observes that “nowadays, the anxiety, of every forward caste is to get into the list of backwards classes.”²¹³ Moreover, the reservation process is by now severely politicized. “Vote-bank politics” emerged, where political participation is determined through caste affiliation and politicians use reservation for political gain, perpetuating castes’ status in return for votes.²¹⁴ Finally, because the idea of caste originated from a distinctively Hindu tradition, it was overwhelmingly Hindu backward groups that have benefited from reservations. This generated discrimination against non-Hindus as well as Hindu converts, who suffer continuous socio-economic disadvantage.²¹⁵

The judicial contribution to the social reconstruction of Indian society is, therefore, quite questionable, if not altogether undermined. A claim can be made, nevertheless, that such a comprehensive goal is too much to ask of a court that enjoys only limited powers. The Court’s contribution to reforming India should therefore be measured in its long term positive impact on social change, by raising the salience of the issue, intensifying political engagements, and speeding an otherwise much slower progress toward social change. However, even from this perspective, the findings seem unpromising. The overt discrimination against lower castes and non-Hindus in India has been persistent over decades and the prospects of any progressive transformation seem quite dim. Moreover, with the Indian reality now replete with deep controversies over reservations, evidence seems to support exactly the opposite, namely, that judicial interventions thus far have worked against the realization of a casteless society in India.

For Israel, the Court’s record on advancing a pluralist vision for the Jewish State and effectuating change in the form of greater rights protection for discriminated groups proved to be just as ineffective. Debates over Judaism in Israel have been fiercely fought, with nearly half a century of systematic victories for the Orthodox. Thus far, the Orthodox establishment successfully countered the Court’s liberal judicial interpretations of who is a Jew; the placement of non-Orthodox individuals on religious councils; the importation of non-Kosher meat; the distribution of funds to non-Orthodox religious institutions; judicial intervention in matters of family law and conversions; and the determination that it is illegal for *yeshiva* students to defer their military commitments.

Moreover, the long-term effects of constitutional adjudication on religious matters have actually worked against a possible gradual change, by

213. Pavani P. Rao, *Affirmative Action Under Articles 15(4) & 16(4) and Minorities*, 15 RELIGION & L. REV. 195, 202 (2006).

214. Sathe, *supra* note 5, at 275.

215. Laura Dudley Jenkins, *Personal Law and Reservations*, in RELIGION AND PERSONAL LAW IN SECULAR INDIA, *supra* note 62, at 115-17 (discussing the challenges of reservations and the impact of their denial to Christians and Muslims); Mathew Zachariah, *Positive Discrimination in Education for India’s Scheduled Castes: A Review of the Problems, 1950-1970*, 16 COMP. EDUC. REV. 16, 23 (1972); Saleem Akhtar, *Reservation for Muslim: A Need of Hour*, 10 RELIGION & L. REV. 167 (2001).

further entrenching the Orthodox version of Judaism in the Israeli public sphere. This has been exemplified by the unintended consequences of the Court's repeated ruling in favor of non-Orthodox conversions *outside* Israel that always stopped short of authorizing the non-Orthodox conversions *in* Israel, thereby effectively immortalizing the inability of non-Orthodox Judaism to become a viable option for Jewish life in Israel. The Court's creative interpretation, separating between the formal registration of converts and the substantive determination about their conversion to enable their registration as Jews, did not yield the legitimization of the non-Orthodox existence in Israel. As such, these registered converts are continually prevented by the Orthodox establishment from engaging in a non-Orthodox Jewish public lifestyle, most notably by being unable to marry or divorce in accordance with their religious tenets. In essence, the judicial approach of progressively chipping away from the Orthodox monopoly on conversion has yielded the opposite result, effectively entrenching the Orthodox control on the process of conversion. The current crisis, where previously recognized conversions have been overruled, leaving many converts in a state of flux about their future, exemplifies how far Israel still is from establishing a universal policy on conversion.

Finally, the Court's attempt to uproot discriminatory institutional practices has been just as disappointing. Ongoing disregard of the Court's attempt to alleviate disproportionate funding for non-Orthodox Jews as well as for the Arab religious minorities, is widespread, just as the outright defiance by rabbinical courts of the Court's ruling on personal status matters. Similarly, the Court's ongoing attempt to enlist *yeshiva* students in the military in the interest of equality cemented their deferments from military service. In the end, the Court's rulings effectively undermined the historical purpose of Israel as the homeland for all Jews as well as its endeavor for religious pluralism.²¹⁶

The findings with regard to the other goal of the judicial process, the ability to resolve religion-based tensions, are also discouraging. In both states, religion-based tensions, inter-religious as well as intra-religious, remain salient.²¹⁷ In Israel, the contrast between the Court's strong activism on Jewish matters compared to its evident reluctance to intervene on the part of the Arab-Palestinian minority contributed to its growing identification by the Arab population as a "Jewish" institution. At the same time, recurrent rulings in favor of the non-Orthodox communities have exacerbated the tension within the Jewish community and bred a growing and vocal chorus within Israeli society identifying the Court as a politicized and biased umpire.²¹⁸ Correspondingly, attempts to curb its power

216. See DECLARATION OF ESTABLISHMENT OF THE STATE OF ISRAEL, 5708-1948, Official Gazette 1, available at <http://www.mfa.gov.il/mfa> (follow "Peace Process" hyperlink; then follow "Guide" hyperlink; then follow "establishment in 1948" hyperlink).

217. See RELIGIOUS FREEDOM REPORT: INDIA, *supra* note 32; RELIGIOUS FREEDOM REPORT: ISRAEL, *supra* note 127.

218. See, e.g., Dan Avnon, "The Enlightened Public": Jewish and Democratic or Liberal and Democratic?, 3(2) L. & GOV'T IN ISR. 417-51 (1996);[#] Gavison, *supra* note 5;

have been taking place.²¹⁹ As such, not only has the Court failed to contribute to the resolution of religion-based tensions in Israel, but in the eyes of many it has become one of its principal instigators.

Just like in Israel, the Indian Court's tendency to intervene in religion-based matters has contributed considerably to polarizing social tensions. Under the "essential matters" doctrine the Court often intervened in favor of religious minorities, as illustrated by the excommunication case, the protection of Imam's wages, and the rights of Jehovah's Witnesses. At the same time, its rulings have also entailed stark favoritism towards the Hindu majority, as illustrated by its decisions on conversion, cow slaughter, the Mosque's optional status in Islam, and its phases of strong advocacy for a uniform civil code in the interest of national integration.

Moreover, while the Israeli Court generally employed a systematic liberalist approach to religious matters,²²⁰ the rulings of the Indian Court have often produced contradictory results. This was exemplified by the Court's contradictory decisions on education, reservations, its indecisiveness regarding the place of religion in the political process, and most notably its changing positions on the uniform civil code. An obvious difference between India and Israel is the strong influence former Chief Justice Barak had on the Court compared to a lack of such a public figure in India. Nevertheless, while Barak's long tenure may explain why the Israeli Court has been producing systematically progressive judicial rulings, the rapid turnover of Indian judges cannot be the sole explanation for its zigzag from activism to restraint, since these shifts often occurred during overlapping tenure of judges. As such, the Indian Court's political constraints in producing a systematic policy on religion-based issues remain a valid explanation for its contradictory record.²²¹

Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution Making Tactic in Israel*, 70 ALB. L. REV. 409 (2007).

219. These included: (i) an attempt to substitute the current court with a constitutional court with limited judicial review powers, which failed, Gavison, *supra* note 5, at 83; (ii) the appointment of a Justice Minister that has been a staunch critic of the Court's judicial activism; and (iii) the recent Amendment to the Courts Law (Special Majority for the Appointment of Supreme Court Justices) 2008, passed on July 28, 2008, abolishing the veto power enjoyed so far by Supreme Court justices in the committee appointing them for the position. See Shahar Ilan, *Knesset Authorized the Revolution in the Selection of Supreme Court Justices*, HAARETZ, July 29, 2008 (copy on file with author).[#]

220. *But see* FHCJ 4128/00 The General Manager of the Prime-Minister's Office v. Hoffman [2003] IsrSC 57(3) 289[#] (ruling against the attempt of the "Women of the Wall" to conduct communal prayer at the Western Wall, violently opposed by Orthodox worshippers. The Court designated an area known as Robinson Arch, which is separate from the actual Western Wall for the prayer of the Women of the Wall, effectively deferring to the Orthodox version of Judaism).

221. See Agnes, *supra* note 95; Upendra Baxi, *The Avatars of Indian Judicial Activism: Exploration in the Geographies of [In]Justice*, in FIFTY YEARS, *supra* note 102, at

The legitimacy and prestige of both courts have, therefore, been damaged as a result of their decisions on religion-based matters. Nevertheless, the perception of each court's role in its respective conflict played out differently. The Israeli Court has been increasingly identified with one side of the conflict, the secular/non-Orthodox side.²²² As such, a growing sector of the Israeli society has been distrusting of the Court and questioning its authority.²²³ The Indian Court, on the other hand, seems to have benefited from its failings, as its ad-hoc, often surprising approach, ironically seems to have contributed to preserving its perception as a neutral umpire of religion-based tensions. This is best exemplified in the observation of one commentator, who, when analyzing the recent revival of the Court's call for a uniform civil code, contradicting its previous rationale, found the court to be "apolitical in character," "impartial," and "not motivated by any such considerations as are usually associated with any particular religion."²²⁴

VI. CONCLUSION

Two primary functions have been identified for the law—to effectuate change and to resolve conflicts. As these functions are typically carried out by courts, the purpose here was to draw a distinction between the incentive for employing litigation to achieve these functions and their actual realization through the judicial process.

A lively debate has been taking place over the ability of judicial frameworks to bring about progressive change. Rather than taking a side in this debate, this study attempts to shift its focus. It shows that proponents of judicial activism disregard its problematic legal outcomes, namely, an emerging culture of evasion and defiance exemplified by legislative overrides and institutional circumvention of judicial rulings. In India and Israel this ongoing tug-of-war has damaged the ability of courts to contribute to the protection of fundamental rights, weakened the rule of law, and dented the traditionally strong institutional standing of the courts.

The findings further question the viability of the "refined" literature advocating judicial activism, viewing law's effectiveness in its long-term contribution to legal mobilization that eventually generates policy reform. The

159; Padhy, *supra* note 92, at 294; Ronjoy Sen, *Legalizing Religion: The Indian Supreme Court and Secularism*, 30 POL'Y STUD. 8 (2007).

222. See Ran Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-Conflict States*, 49 WM. & MARY L. REV. 1179 (2008).

223. Gavison, *supra* note 5, at 83; Ilan, *supra* note 190.

224. Kumar, *supra* note 96, at 328-29; Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty*, in THE SUPREME COURT VERSUS THE CONSTITUTION 154, 165 (Pran Chopra ed., 2006) ("It may be the case that Indian courts have acquired much legitimacy and power not because of the clarity and consistency of an underlying constitutional vision, but because of the opposite.").

length, breadth, intensity, and stalemate of the conflict in both states, particularly in the context of dalits in India and Jewish minorities in Israel, illustrate the difficulty in making any claims about possible long-term policy gains initiated by the judicial process.

Although the religion-based conflicts in both states are severe, a possible argument can be raised that the law serves its second purpose, that of managing conflict, since the conflicts in both states are still channeled through the legal system with backlashes against judicial policy manifested in legislative overrides.²²⁵ This claim may be further supported by the view of judicial activism as generating a dialogic relationship between the different branches of government.²²⁶ Yet, the findings call into question the efficacy, efficiency, and capacity for dialogue where the systematic overruling of the judiciary has become the defining pattern of interaction between the different branches of government. In the Israeli case, in particular, it is very difficult to detect any type of dialogic relationship. Moreover, the overruling of the courts' decisions in both states almost always came at the expense of rights protection. While a common legislative justification for overruling a court's interpretation is reasonability,²²⁷ it seems unlikely that a *methodical* undermining of rights through legislative overrides in the context of religion-based tensions would be regarded as a reasonable policy for democratic governance. It is also important to note that the courts' defiance came not only in the form of legislative overrides, but also through outright disobedience of judicial rulings as exemplified by the disregard for judicial decisions in the context of reservations in India and in the contexts of family law, conversions, sitting representatives on religious councils, and budgetary affairs in Israel. These widespread examples of noncompliance point to a high level of institutional distrust, challenging the claims of law's stabilizing powers.

Even as this study lends support to the opponents of judicial activism criticizing the attempt to achieve political goals through judicial scrutiny, it illustrates that the main criticism should lie elsewhere. That is, activist rulings can actually serve as a double-edged sword, positioning the two functions of the law—of effectuating change and of resolving conflicts—in direct contrast with each other. As illustrated, the courts' progressive rulings often heightened and sharpened the depth of the social cleavages, working against the declared goal of

225. Cf. Robert Post & Reva Siegel, *Democratic Constitutionalism & Backlash* 42 HARV. C.R.-C.L. L. REV. 373 (2007) (arguing that legislative backlashes are not a threat to judicial authority but are part of "democratic constitutionalism").

226. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1986) (discussing the development of the Supreme Court in the United States and how the Court interacts with the other branches of the government); see also Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOOD HALL L. J. 75 (1997) (discussing the relationship between the Canadian legislative branch of government and the courts).

227. Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 209 (2008).

the law to devise the means to hold society together. Furthermore, the growing identification of the Israeli Court with the secular and progressive sectors severely damaged its authority among the other sectors of Israeli society, who worked relentlessly to overrule its decision and recently even to curb its powers. The Indian Court, on the other hand, seems to have benefited from its own failings. Its contradictory, often adventurous rulings, while negating a systematic advancement of rights, seem to have helped sustain its aura of neutrality, even as it was criticized on other grounds. These findings imply that a transformation of highly charged religion-based conflicts into the judicial sphere could result in positioning the two goals of the judicial process in direct contrast with each other, defeating the purpose of judicial interventions. That is, when the court consistently produces progressive rulings, it becomes an active participant in a conflict, which in turn negates its ability to function as a neutral umpire in that conflict's resolution. Yet, when the court's primary emphasis is maintaining its legitimacy as a neutral actor, this effectively defeats its ability to act as an engine of progressive change.

The findings further raise a general question about the nature of victories litigants should expect when appealing to courts on deeply contested religion-based issues. Any grand hopes for change or resolution of the conflict should be laid to rest, once and for all. A more pragmatic view would be to utilize the judicial route as merely one among many tactical instruments in the everlasting tug-of-war to control the public sphere.²²⁸ As part of this strategy, litigation could be employed as means to yield possible out-of-court settlements appealing enough to both sides of the conflict, or to validate ideas that already enjoy widespread political support. At the same time, the Indian and Israeli experience bears a stark admonition. In the judicial arena, just like in the gladiatorial matches of Ancient Rome, victories remain ever so momentary.



228. See Jayanth Kumar Krishnan, *Public Interest Litigation in a Comparative Context*, 20 *BUFF. PUB. INT. L.J.* 19 (2001) (discussing activists' participation in the litigation process for reasons such as reputation, publicity and donor concerns).

