Secularism In India And Israel: A Study In Judicial Attitudes

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Abstract

This paper seeks to compare the judicial trends with respect to secularism in India and Israel. Despite obvious similarities, it is found that the Indian court is decidedly less progressive than its Israeli counterpart when it comes to going against the dominant religious group. It is suggested that the composition of the judges in Supreme Courts of both the countries is perhaps the explanation. The political structure of Israel has also been proposed as a probable cause, with political parties in Israel wielding more power than is the norm in other jurisdictions. This circumstance has led the political elite in Israel to insulate the Judiciary from politics with great fervor, which has now translated in the Judiciary actively opposing the political group wielding the most power. This is also the most powerful religious group in Israel today. It has further been proposed by the researcher that a realist explanation of the Indian Apex Court being constituted almost exclusively by Hindu judges at any given time must also be kept in mind. The insistence of essentially secular judges to deal with religious matters has resulted in a very broad discretion being conferred upon itself by the Supreme Court in India - a discretion that has not always been exercised in an unbiased manner. It is thus concluded that while the Israeli Judiciary faces its own set of problems, Indian courts would do well to be inspired by them to adopt counter-majoritarian stands. The first step would be to acknowledge a bias, and then work towards erasing it.

Introduction

The similarities and differences in the legal systems of India and Israel have often caught the attention of scholars. Both nations are fairly young- while the creation of Israel dates back to its Proclamation of Independence (1948),[1] India became independent in 1947, and adopted its Constitution in 1950. The formation of both countries is heavily linked to the majority religion, albeit in very different ways. Those studying India will find it hard to ignore the Partition of 1948 that divided the land controlled by the British Empire into two countries, India and Pakistan. This was a direct result of the threat perceived by Muslim activists at the time of independence who, under the leadership of Muhammad Ali Jinnah, demanded a homeland of their own and refused to be governed by the largely Hindu Congress Party of that time. As far as Israel is concerned, the Proclamation itself describes the State of Israel as a "Jewish State."[2] What is interesting is

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1 Proclamation of Independence (1948) [hereinafter Proclamation].

2 *Id.*

that both States have nonetheless avowed themselves to the establishment of secularism in their respective jurisdictions.

The aim of this paper is to explore the different manners in which the Supreme Courts of India and Israel have dealt with religious conflicts despite being similarly situated in many respects. One finds that while the Indian Supreme Court has been ambivalent at best, and anti-secular at worst, the Supreme Court of Israel has proved itself to be resilient against the ultra-orthodox religious right. The first part of this paper analyses the premises on which secularism has been based in both countries. The second part explores the similarities in the legal and religious landscape and the third and fourth parts deal with litigation surrounding religious issues in Israel and India respectively. The fifth part compares the two attitudes and analyses the reasons for the same and the sixth and final part is the conclusion.

It would be prudent to indicate here, that, while extensive reliance has been placed on Supreme Court decisions from both countries, the researcher was constrained by a lack of knowledge of Hebrew and hence could not refer to the original text of Israeli judgments.[3] In the case of India, while most of the verdicts referred to are from the Supreme Court, the occasional High Court judgment has been referred to for two reasons. One, it is the joint responsibility of both the High Court and Supreme Court to secure fundamental rights (including the right to freedom of religion) for the people.[4] Two, the strong doctrine of *stare decisis* in India, along with a unitary judiciary, ensures at least a basic level of consistency between the judgments pronounced by the Supreme Court and High Courts.

I. Theories of Secularism

The concept of secularism is multifaceted as well as flexible. The classical "Western" theories have emphasised on the "Wall of Separation" model of secularism. This model was best summarised by Donald Eugene Smith as encompassing three relationships- between the individual and religion (freedom of religion), the state and the individual (citizenship) and the state and religion (separation of church and state).[5] This is still the case in countries such as France where the policy has always been to say "no" to expression of religious affiliations in public. But this model has come under severe strain following increased migration from former European colonies and intensified globalisation.[6] In particular, it has been challenged in both India and Israel, where the understanding of secularism is influenced heavily by local factors.

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3 The author has referred to available secondary sources, particularly ones accessible through online database Westlaw.

4 Constitution of India, Articles 32 and 226.

5 Ronojoy Sen, *Legalising Religion:The Indian Supreme Court and Secularism*, *available at* http://www.eastwestcenter .org/sites/default/files/private/PS030.pdf [hereinafter Ronojoy Sen].

6 Rajeev Bhargava, *States, Religious Diversity andthe Crisis of Secularism, available at* http://www.opendemocracy.net/ rajeev-bhargava/states-religious-diversity-and-crisis-of-secularism-0 (last visited Mar. 22, 2011). [hereinafter Bhargava].

When it comes to talking about the adaptability of western secularism to India, it has been said that, "religious and secular life are so pervasively entangled [in India] that a posture of official indifference cannot be justified."[7] Some authors have taken this observation even further and claimed that *any* secular model is bound to fail - and rightfully so-in a society that is, by its nature, as religious as Indian society. This author has however premised her research on the existence of an "Indian" theory of secularism.

The Indian theory of secularism is one of equal respect to all religions. This means that while the Indian State is secular, it is not irreligious, and maintains a principled distance from all religious groups. Looked at another way, the antonym of "secular" in Indian society is not "religious" but is "communal".[8] The three strands of religious freedom, celebratory neutrality and reformatory justice are the core elements of Indian secularism. The idea of social reform is deeply entrenched in Indian society, and the separation between state and religion is not enough to secure this end. Removal of inequalities between religious groups implies that the state has broad powers to assist, financially or otherwise, in the celebration of all religious groups, to allow them to stand by not just religious beliefs, but also practices and rituals. It implies reform wherever it is necessary.[9]

However, it has also been suggested that the Indian understanding of secularism is greatly influenced by ideas of Hindu nationalism, which in turn means that the emphasis is on secularism as a means to obtain national unity. This was best reflected in the recognition of secularism as an aspect of the basic structure of the Indian Constitution in a landmark case to justify the imposition of an Emergency in various states so that the unity of the nation as a whole did not suffer.[10] The problem arises when the line between national unity and homogenisation of the nation is crossed, leading to an imposition of majority perspectives. This may be one reason why the rights of minorities have taken a backseat in the modern day discourse surrounding secularism.[11]

Israel presents a different story. Herzl, the father of political Zionism, was determined that the Zionist project would "keep our priests within the confines of their temples."[12] Modern day Israel is not reflective of these aspirations. The Jewishness of Israel today is undisputed, though complex.[13] The specific attitude to Judaism itself varies, but the central focus on Judaism is something that seems to pervade all discussions

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7 Ronojoy Sen, *supra* note 5.

8 Thomas Pantham, *Indian Secularism and Its Critics: Some Reflections*,The Review ofPolitics, Vol. 59, No. 3, Non-Western Political Thought, pp. 523-54, at p. 525 (1997).

9 Bhargava, *supra* note 6.

10 Annette Grossbongardt, *Unholy Conflict in the Holy Land,* Jul. 3, 2007, *available at* http://www.spiegel.deinternational/0,1518,469996,00.html [hereinafter Grossbongardt].

11 Ronojoy Sen, *supra* note 5.

12 Grossbongardt, *supra* note 10.

13 Jonathan Marcus, *Secularism v. Orthodox Judaism,* Apr. 22, 1998, *available at* http://news.bbc.co.uk/2/hi/events/israel_at_50/israel_today/81033.stm.

on secularism.[14] Even "progressive" measures and judgments often make concessions only to make the Zionist project more acceptable to various religious groups, while never advocating the outright divorce of religion from politics.[15]

Thus the understanding of secularism varies as per the society in which the theory is discussed. As can be gathered from the above discussion, it is mostly ameliorative in Indian society, but visionary in Israel.[16] This would mean that while secularism always connotes a reference to the relationship between state and religion, the motivations that have led to the evolution of this relationship vary from one society to another. In India, secularism is grounded in attempts to mitigate the social inequalities that result from religion. In Israel, secularism is meant to ensure that even though Israel remains a Jewish state, commitments to preserve religious liberties and cultural autonomy are not compromised. The central role of Judaism is openly acknowledged, and secularism serves to ensure that alternative systems of faith get minimum guarantees.

While both India and Israel are intensely religious societies, it is to be noted that the State of Israel makes the assumption of religiosity for all its people. For example, secular marriages are impossible in Israel. Religious courts govern several personal law matters in Israel. In India, parties have the option of being governed by secular law, even if the dispute is marital. It is the law and not the forum that varies with religion. In short, both models recognise the inevitable failure of any attempt to "privatise" [17] religion, as well as the social tensions that a Western model is likely to lead to. Both India and Israel realise that exact equality in treatment of religions is not going to further the brand of secularism they seek to promote. While in India this is based on how much intervention is required to make society as a whole just, in Israel there is an intrinsic acceptance of inequality that can be sourced to the object of the formation of Israel itself.[18] Multiple religions in India are not "extras", [19] in Israel, they are.

This ties in deeply with the subject of this paper. Both the subject matter and phraseology of judgments dealing with religion in India are concerned with securing rights for the disadvantaged religious class (the questions of whether the courts take forward the theoretical concept of "ameliorative secularism" is one that has been explored in-depth in the remainder of this paper). In Israel, the role and understanding of Judaism is what informs judicial discourse in general. The extent to which other faiths are

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14 *Secularism in Society and Culture*, Dec. 14, 2008, *available at* http://www.idi.org.il/sites/english/events Other_Events/Pages/SecularisminSocietyandCulture.aspx.

15 Narendra Subramanian, *The Wheel of Law, India's Secularism in Comparative Constitutional Context, by Gary Jeffrey Jacohbson,* Sept., 2003, *available at* http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Jacobsohn03.htm.

16 *Id.*

17 Rajeev Bhargava, *India's Model: Faith, Secularism and Democracy*, Nov. 3, 2004, *available at* http://www.opendemocracy.net/arts-multiculturalism/article_2204.jsp [hereinafter Bhargava II].

18 Bhargava, *supra* note 6.

19 Bhargava II, *supra* note 17.

considered is confined to minimising collateral damage when it comes to retaining the essentially Jewish nature of the Israeli state.

II. The Indian and Israeli Frameworks

In India, secularism has now been pronounced by the Supreme Court of India[20] to be a part of the basic structure of the Constitution and cannot be done away with even by a constitutional amendment.[21] Articles 25 to 28 guarantee individuals as well as groups the right to freedom of religion. However, Article 25 restricts the exercise of this right in the interests of public order, morality and health and all *other rights* enumerated in Part III of the Constitution. Therefore, it is constitutional for the legislature to place social welfare and reform over and above religious interests. In fact, Article 17 of the Constitution is a rare example of a penal constitutional provision which criminalizes untouchability; a practice that can essentially be traced to Hinduism. Article 25, itself specifies that the freedom of religion cannot be used to restrict access to Hindu places of worship to upper castes. This relatively lower position that has been accorded to the freedom of religion in the Constitution is starkly different from the manner in which this has been played out in courts and political arenas in India. Many recent constitutional controversies in India have focused on religious rights.

The State of Israel is particularly interesting in this regard since its foundational document itself specifies a Jewish basis, a provision that has no parallel in India. But, this does not mean that Israel is a theocracy. No doubt, it is a State established as a homeland for the Jews but it remains to be seen what it means to be a Jew in Israel. The Proclamation refers to the "*spiritual, religious and political identity*" of the Jewish people and their "*natural and historic right*" to the land of Israel (as opposed to their religious right).[22] The Proclamation seems to suggest Judaism as a way of life, and not simply as a religion. This debate is both massive and heated in Israel, and forms the epicenter of most religious controversies. But there is no doubt that at least theoretically, Israel has committed that "it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations."[23] (emphasis supplied) The right to the freedom of religion in even the "Jewish" State of Israel has been recognized by the Supreme Court of Israel[24].[25]It must also be remembered that Israel was established in the wake of World War II, where the notion of a "Jew" had expanded beyond the

20 Hereinafter SCI.
21 S. R. Bommai v.Union of India, AIR 1994 SC 1918 (1994) [hereinafter *Bommai*].
22 Proclamation, *supra* note 1, at ¶11.
23 Proclamation, *supra* note 1, at ¶12.
24 Hereinafter Supreme Court.
25 Israel Theatres v. Municipality of Netanya, 47 (3) PD 192 (1991).

contours of a religious identity and was identified with distinctive cultural and ethnic traits.

The situation in Israel has much to do with the Status Quo Agreement that was signed between Ben Gurion (the first Prime Minister of Israel) and the ultraorthodox Jewish political party of Agudat Yisrael under which the observance of fundamental Jewish religious practices was not to be disturbed even under the secular State of Israel. The Status Quo Agreement refers to a letter that was written by Ben Gurion to the Agudat Yisrael in order to present a joint proposal to the United Nations to deal with the problems that were likely to face the emerging State of Israel. It marks the compromise that was entered into by the ultraorthodox and liberal, secular Jews of the time who needed each other's support to form the coalition government. It is essentially a codification of the customary practices that had been followed all the way through the Ottoman Empire as well as the British Mandate.[26]

The dominant religion in India is Hinduism with 80.5% of the population identifying themselves as Hindu.[27] In Israel, 75.5% of the population is Jewish.[28] Of these, 42% are secular, 8% are ultraorthodox or *haredi* while the remaining are religious, traditional or religious-traditional.[29]

An important fact to note here is that religious conflicts in India have been found to be inter-religious rather than intra-religious, although the danger posed by the latter must not be undermined. This is in contrast with Israel where the tension is most intense between ultraorthodox and secular Jews.[30]For a variety of historical and political reasons, the numerical minority of ultraorthodox Jews in Israel are known to wield a disproportionate amount of power.[31] They operate through many political parties that have, especially in recent years, been politically influential. As will be further explored, the need for coalition government increases the bargaining power of ultraorthodox political parties manifold.[32] Another key difference is the presence of a singular ecclesiastical organization in Israel, which is lacking in India for the majority religion Hinduism. The Chief Rabbinate in Israel was initially established by the British as an overarching religious

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26 Federal Research Division of the Library of Congress, *The "Who is a Jew?" Controversy* (1988), *available at* http:/countrystudies.us/israel/46.htm.

27 Government of India, *Census Data* (2001), *available at* http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx

28 Central Bureau of Statistics, State of Israel, *Press Release* (2008), *available at* http://www.cbs.gov.il/mifkad/mifkad_2008/hod6_2_e.pdf.

29 YNet News Service, *Israel 2010: 42% of Israeli Jews are Secular*, May. 18, 2010, *available at* http://www.ynetnews.com/articles/0,7340,L-3890330,00.html.

30 Marc Gallanter and Jayant Krishnan, *Personal Law and Human Rights in India and Israel*, 34 Isr. L. Rev. 101 (2000).

31 Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 Tex. L. Rev. 1819, 1820-34 (2004) [hereinafter Hirschl].

32 Margit Cohen , *Women, Religious Law and Religious Court in Israel* (2004), *available at* http:/www.enelsyn.gr/papers/w14/Paper%20by%20Prof%20Margit%20Cohn.pdf.

institution who enjoyed the patronage of the State authorities,[33] in exchange for encouraging loyalty to them. It has no counterpart in India. How these circumstances have helped evolve markedly different theories of secularism in both places has been discussed in the next segment of this paper.

III. The Indian Supreme Court- A Position Of Ambivalence or Bias?

The SCI has been known to be an extremely activist court in most respects. The power of judicial review of legislation is provided for explicitly in the constitution even though it has been observed time and again that this is merely "abundant caution"[34] because judicial review is inherent to the institution of the Judiciary. There is, hence, no doubt at all that all laws in the country must comply with Part III of the Constitution wherein lie enshrined the fundamental rights of the people, including the right to freedom of religion.

The controversy around religion in India has been marked by a general hesitation on the part of the SCI to intervene in matters of religion. One of the earliest cases in this regard is the case of *Narsu Appa Malli*[35] wherein the statutory prohibition on polygamy among the Hindus was questioned as contravening the right to freedom of religion. The Bombay High Court ruled that this was a constitutional measure of reform and upheld the impugned provision as valid.

The Court went on to add that even though this was valid as a reform measure (and hence not violative of the freedom of religion enshrined in Article 25) personal law does not have to comply with Part III of the Constitution at all. Even though "customs" are a part of the laws that are required to comply with the fundamental rights provisions of the Constitution, personal law is distinct from custom and falls beyond the pale of constitutional rights review. As an aside, the Court added that since polygamy had economic, religious and social justifications, it could not be regarded as discrimination "only" on the grounds of sex (as is required by the Indian Constitution) and if reviewed, could not be held to be unconstitutional. This case is important because several judgments from the SCI have used it as a point of reference subsequently.

The *Narsu Appa Malli* case[36] illustrates two important tendencies that have been reflected in judicial discourse in the following years. The reflex of courts in India, when it comes to discussing matters of religion is to staunchly follow a policy of non-intervention. If for some reason they find it in themselves to intervene, it is mostly to uphold the religious practice, even if it is blatantly in contravention of the fundamental rights. This last point is specifically important from the point of view of the cited judgment.

33 Elkan D. Levy, *History of the Chief Rabbinate*, Office of the Chief Rabbi, *available at* http://www.chiefrabbi.org/about-us/history-of-the-chief rabbinate/#.T6oMn-iit98.

34 AK Gopalan v. State of Madras, 1950 SCR 88 (1950).

35 The State Of Bombay v. Narasu Appa Malli, AIR 1952 Bom 84 (1952).

36 *Id.*

The Court describes two seemingly contradictory positions - one, that the law is valid on grounds of Article 25 since reform of religious practices has been brought about by it. Two, if the institution of polygamy were to be reviewed, it could not be regarded as discriminatory under the Constitution, casting doubt on the assertion that doing away with it was reform in the first place. Simply put, if the institution is not discriminatory, why does it need reform?

This inconsistency has little bearing on the judgment because in this case the question of constitutionality of polygamy (as opposed to the constitutionality of the statute prohibiting polygamy) was not raised before the Court and hence must be regarded as *obiter*. However, the almost obsessive deference and reluctance it brings out it are certainly typical of the attitude that is reflected by Indian Courts when it comes to testing the constitutionality of religious practices. It is also notable that both the arguments, as well as the judgment focus on the ameliorative role of the State when it comes to laws relating to religion.

In a plethora of cases that followed, the truism that personal laws are not subject to Part III of the Constitution was posited. No rationale was given. Repeatedly, personal laws were given blanket immunity in spite of the explicit constitutional exceptions to the right to freedom of religion.[37] Initially no distinction was made between statutory and non-statutory personal law.

The situation got complicated with cases such as *Githa Hariharan v. Reserve Bank of India*[38] wherein the constitutionality of Hindu guardianship laws was in question. The case involved a statutory provision wherein the "father and after him, the mother" was declared to be the natural guardian of the Hindu child. Review was carried out, but only lip service was paid to the right to equality. The SCI held that if this provision was read down, it could be given a constitutional interpretation and hence refused to strike it down. The interpretation given by the SCI was that the father was the default guardian but in case of his absence the mother became the guardian. The SCI further claimed that if the phrase "after him" was used to connote death, it would become discriminatory but the understanding given by the SCI was harmonious with the constitutional guarantee of equality. This is absurd considering the father still remains the default guardian and the mother is only given the second preference.

This case can at least be understood as including written personal law within the ambit of law subject to judicial review but in different cases, without even discussing the cases that accord a special status to personal law *vis-à-vis* constitutional review, the SCI has gone on to test the validity of non-statutory religious law also. The position of the SCI

37 Krishna Singh v. Mathura Ahir, AIR 1980 SC 707 (1980); Maharshi Avdhesh v. Union of India, 1994 Supp (1) SCC 713 (1994); Ahmedabad Women Action Group & Ors. v. Union of India, 1997 3 SCC 573 (1997).

38 Githa Hariharan v. Reserve Bank of India, 1999 2 SCC 228 (1999).

has thus been exceedingly ambivalent.[39] The case of *Saumya Ann Thomas v. State of Kerala*[40] is one of the most recent cases to have pointed out this dichotomy. The Kerala High Court held that in the light of SCI observations all statutes must be subject to judicial scrutiny based on Part III while non-statutory personal law, as per precedent, need not. In the same case, even though it was *obiter*, the legality of carving out a personal law exception in a secular State was questioned and it was suggested that this position be reviewed by larger bench strengths than have so far dealt with the issue. The case is pending in appeal before the SCI.

This ambivalence moves towards bias when it comes to cases which have both religious and secular elements, and where the SCI has more flexibility. Take, for instance, the case of *Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte & Others*,[41] wherein the election of a candidate was impugned on grounds of having appealed to voters on religious grounds of *Hindutva*. In a stunning observation, the SCI held that *Hindutva* was a way of life, rather than a religion and an appeal based on *Hindutva* did not thus qualify as an appeal based on religion. In doing so the SCI universalized the experience of a majority and swept under its general umbrella, the experience of even minorities living in the same geographical regions.

The SCI also absolved one candidate on account of the fact that even though he spoke of establishing a state along religious lines (the "Hindu" state of Maharashtra) as part of his manifesto, he did not seek votes on this ground. It is strange that even statements made during the course of an electoral speech were somehow construed not to be appeals to vote. It is true that the ancient Greeks regarded "Hindu" as both a secular and religious term, as did counsel for the accused in the *Hindutva* case, but other examples of people who have perceived the term "Hindu" as not having any religious connotations are few and far between.[42]

Ultimately, the election was struck down for all the hateful speeches that were spewed as a part of the campaign but the SCI failed to realize that by giving the narrow definition to the word "religion" that they did, they were going up a slippery slope. Any religion, by its nature is a way of life, and by attributing this fundamental characteristic of religion solely to Hinduism, the SCI created an artificial inequality among equals. At the other end of the spectrum you do have the SCI going out of its way to keep in check fundamentalism among the Hindus. The case of *S.R. Bommai*[43]comes to mind where the

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39 Mihir Desai, *Flipflop on Personal Laws* (2005), *available at* http://www.indiatogether.org/combatlaw/vol3/issue4/flipflop.htm.

40 Saumya Ann Thomas v. State of Kerala, (2010) 1 KLT 869 (2010).

41 Dr. Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte & Others, 1996 SCC (1) 130 (1996).

42 V.M. Tarkunde, *Supreme Court Judgement: A Blow to Secular Democracy, Jan.* 19, 1996, *available at* http:/www.pucl.org/from-archives/Religion-communalism/sc-judgement.htm.

43 *Bommai*, *supra* note 21.

state governments were suspended by the President and a state of "Emergency" was declared in these states. The reason for this was the communalism being fanned by these regimes. The SCI was emphatic that secularism is part of the basic structure of the Constitution, and if a government cannot function in accordance with this principle then it cannot be carried out as per the Constitution. The proclamation of Emergency was upheld.[44]

But mostly, we have the SCI being accused of a Hindu bias.[45] The upholding of bans on cow slaughter[46] has been regarded as evidence of such a bias. This is because the cow is regarded as sacred by the Hindus. Although the complete prohibition of cow slaughter has been justified on secular grounds, the SCI has been known to pronounce that the sacrificing of cows is not an essential part of Islam, a custom that used to be carried out on the festival of *Bakr-Eid* by most Muslims in India. Again, evidently, the SCI has tried to project giving precedence to a secular prohibition that favors an agrarian society rather than a Hindu belief but the subtext suggests otherwise. In fact, this comes across even more clearly in the way judgments upholding these prohibitions are perceived by the right-wing Hindu audience.[47] It must also be kept in mind that even the inclusion of the directive principle of state policy regarding the prohibition of cow slaughter was at least in part religious.[48]

The root of this problem is perhaps the dangerous power the SCI has bestowed upon itself to decide what is, or is not "essential" to a religion.[49] So we have instances where even excommunication has been allowed for a Muslim cult as an essential practice[50]

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44 This ruling has remained contentious because of its invocation of the basic structure doctrine. This doctrine was incorporated in Indian constitutional law as a *standard of review* for *constitutional amendments*. The SCI, for the first time used it as a *justification* for *executive action*. It seems that the SCI had resolved to make a bold statement about checking the "saffronisation" of Indian politics, *i.e.*, the percolation of Hindu fundamentalists and their vote-bank politics into Indian polity, and would have achieved this end one way or another. The same result could have been achieved by simply referring to the freedom of religion and the failure of the state governments to guarantee it, but the manner in which the SCI went about reasoning in its judgment reflects resolve to elevate the freedom of religion beyond what it was meant to be treated as by the framers, in a bid to keep check on radical Hindu groups.

45 The Guardian, *Indian Court Accused of Hindu Bias*, Sept. 13, 2002, *available at* http://www.guardian.co.uk world/2002/sep/13/1.

46 State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat & Ors.,(2005) 8 SCC 534(2005).

47 New Kerala News Service, *Cow Slaughter Banned by Kolkata High Court*, Nov. 12, 2010, *available at* http:// www.newkerala.com/news/world/fullnews-82846.html.

48 Take, for example, the speech of Seth Govind Das during the debate surrounding the issue: "The protection of cow is a question of long standing in this country. Great importance has been attached to this question from the time of Lord Krishna. I belong to a family which worships Lord Krishna as Ishtadev. I consider myself a religious-mindedperson, and have no respect for those people of the present day society whose attitude towards religion and religious-minded people is one of contempt.": Constituent Assembly Debates, Volume VII, (Debate dated 24th November, 1948).

49 Also see, Mohd. Hanif Quereshi v. State of Bihar, 1959 SCR 629 (1959).

50 Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, 1962 SCR Supl. (2) 496 (1962).

(never mind that this defeats in most part, the constitutional mandate against other forms of excommunication such as untouchability), but when pitted against the sacred Hindu cow, the religious practices of Indian Muslims are relegated as "non-essential".

Most recently, the SCI was in the line of fire for dismissing petitions challenging the introduction of *Vedic* astrology in state-funded schools since this form of astrology has its roots in the *Vedas*, which are Hindu scriptures.[51] The SCI upheld the constitutionality of this measure holding that just because a discipline traced its roots to a specific religion did not make it a "religious" course *per se*.

While this decision seems to have at least some secular basis, more controversial is the *Aruna Roy* case[52] which came up before the SCI in 2002. This challenged the revision of history textbooks in government high schools as presenting a biased, Hindu view of history.

For instance, *Hindutva* philosophy separates Hindu philosophy (including all religions that originated indigenously) from the "other" religions such as Islam and Christianity that have their roots in foreign countries. The bedrock of *Hindutva* philosophy is the belief that the Aryans, who gave rise to Hinduism, are sons of the soil of the Indian subcontinent and thus have a more legitimate claim to it.[53] If they too are immigrants from parts of Europe (as scholarship has often suggested) then *Hindutva* loses its meaning since then Hinduism is as alien to the land of India as the Abrahamic religions are. In true keeping with this philosophy, the new textbooks focus on the link between the Aryans and the Harappan culture, sweeping aside other theories of the origin of the race, seriously suppressing the spirit of inquiry. A much more serious, allied issue is the constant portrayal of Muslim rulers as vicious, violent and intolerant, which reflects a broader communal agenda.[54]

The SCI upheld these revisions, distinguishing a study of religion from the kind of "religious instruction" that is prohibited by the Constitution. Justice Shah, who delivered the majority opinion for the SCI states, while talking about religion, "Although it is not the only source of essential values, it certainly is a major source of value generation."[55] Rajeev Dhavan rightly asks, "which religion and what values?" Ambedkar, one of the most prominent of the framers of the Constitution of India was adamant that the State cannot

51 P.M. Bhargava & Ors. v. University Grants Commission, AIR 2004 SC 3478 (2004).

52 Aruna Roy & Ors. v. Union of India, (2002) 7 SCC 368 [hereinafter *Aruna Roy*].

53 Best brought out by the stance adopted by the right-wing party, Shiv Sena, in their conversation about the rights of Hindus in Mahrashtra: Adnan Gill, *Who's Who of the Hindutva Army,* Nov. 12, 2008, *available at* http://www.defence.pk/forums/indian-defence/17427-whose-who-hindutva-army.html.

54 Other theories are dismissed as representing a *"biased colonial view"* and a *"myth."* Similarly, in keeping with modern Hindu beliefs, all references to beef eating in the Vedic period have been removed: Atishi Marlena, *The Politics of Hindutva and the NCERT Textbooks* (2004), *available at* http://www.revolutionarydemocracy.org/rdv10n2/ncert.htm.

55 *Id.*

be expected to teach all religions. Indeed, *"the State is not a super theologician for synthesising all faiths"*.[56]

The judgment talks about convergence of religions on one hand, and ignores the polarization between *Hindutva* and other religions as reflected in the textbooks. Historical theories of religions such as Jainism and Buddhism coming up as a retaliation to (and not a continuation of) Hinduism have not even been gone into. Ironically, despite all the rhetoric on convergence of values, the judgment ultimately vindicates the move of the State as an attempt to salvage the soul of the Indian student from the "*negative aspects of Western culture.*"[57]

The field of affirmative action through reservation also presents an interesting case study. The Constitution itself provides for reservation, but entirely in keeping with the orthodox Hindu approach, the SCI has allowed for caste as a relevant factor for the determination of backward classes who can get the benefit of reservation. This has been perceived by many to be anti-secular,[58] more so because Scheduled Castes in India have already been given the status of beneficiaries of affirmative action. But more than the factoring in of castes while deciding on the beneficiaries of reservation, it has been the tenor of the judgments of the SCI that has proven to be most disturbing with the Judiciary insisting, time and again, that the objective is not to ultimately eradicate the caste system but to eliminate discrimination based on the caste system.[59] This aim may seem *prima facie* laudable, but in the context of Indian society it is either hypocritical or naïve. In modern times, there is a concerted effort to ensure that the caste system ceases to have any relation with occupations. At the same time class mobility remains well-nigh impossible. Stripped from its connection with occupations, the only relevance of the caste system remains the hierarchy it imposes. To say that retention of the caste system is permissible is more or less accepting that the hierarchy that goes with it is permissible. Caste blindness may not be the solution, but the tenor of SCI observations seems to lean in favor of preserving an orthodox, Hindu institution that no rule of law society should even think of justifying. Reservations along the lines of caste were never meant to be a permanent measure, and the almost fatalistic attitude of the SCI certainly fails to do justice to the intended impermanence of the measure.

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56 Rajeev Dhavan, *The Textbook Case*, Oct. 4, 2002, *available at* http://www.hinduonnet.com/thehindu/200210/04/stories/2002100401011000.htm.

57 *Aruna Roy*, *supra* note 52.

58 Hirschl, *supra* note 31.

59 For instance, Ashok Kumar Thakur v. Union of India, (2008) 6 SCC 1 (2008), opinion of Balakrishnan, J. at ¶187 where the learned Judge refused to uphold that reservation based on caste is time-bound. Earlier on in the judgment, he reiterates, "There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life." Further the argument that "The Constitution never prohibits the practice of caste and casteism…It was argued what the Constitution aims at is achievement of equality between the castes and not elimination of castes." was neither accepted nor rejected by the Chief Justice.

In conclusion, the attitude of the SCI has been inconsistent when it comes to testing laws based in religion against the other rights provided under Part III of the Constitution, even though the Constitution expressly empowers the Court to do so. On the rare occasion that these laws are reviewed, they are almost inevitably found to be constitutional. In fact, as long as the case involves a religious angle, the SCI's judgments tend towards acceptance of the stance of the dominant religious group in India. A number of pretexts have been deployed by the SCI in rationalizing this tendency. These range from artificially carving out Hinduism as a way of life, rather than a religion, to empowering itself through dangerously flexible devices such as the "essential practices" doctrine to rule whichever way it deems fit. In a series of cases (such as the cow slaughter cases) the Court has tried to camouflage its Hindu tendencies with secular facades, but the subtext is strong, and often overwhelming. As has been discussed earlier, most cases involve pitting religion against the public good- perhaps something, which is to be expected- given the ameliorative conception of secularism in India. But, more often than not, the verdict seems to serve the interests of a particular group, rather than mitigation of social evils.

IV. Secularism And The Israeli Supreme Court

Israel does not have an entrenched Constitution yet, but it does have its "Basic Laws" that were drafted by the *Knesset* (the Parliament of Israel). These are akin to a Constitution and have taken their place in the absence of an actual Constitution. The Proclamation has also acquired legal force in Israel, affording many basic rights to the people.

The State of Israel has civil, military and religious courts. All judges in Israel must vow to uphold the laws of the State except the *dayan* (the rabbinical court judge) implying the supremacy of Jewish law over secular law.[60] At the top of the hierarchy is the Supreme Court with both original and appellate jurisdiction. The Supreme Court of Israel first used the Basic Laws of 1992 (the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation) to invalidate a legislation passed by the *Knesset* in 1995.[61] The power of judicial review was limited to laws passed after 1992.

The religious courts are regarded as administrative agencies of the State and their decisions are hence subject to judicial review on the basis of rights enumerated in the "Basic Laws."[62] An illustrative case in this regard is that of *Bavli v. Great Rabbinical Court*[63],

60 Federal Research Division of the Library of Congress, *The Judicial System* (1988), *available at* http:/ countrystudies.us/israel/84.htm.

61 United Mizrahi Bank v. Migdal Coop. Vill., 49(4) P.D. 221 (1995) (Isr.) (1995).

62 Anat Scolnicov, *Religious Law, Religious Courts, and Human Rights within the Israeli Constitutional Structure*, 4 Int'l J. Const. L. 734 (2006).

63 Bavli v. Great Rabbinical Court, [1994] IsrSC 48(2) 221 (1994).

where the Supreme Court held that equal division of marital property must be carried out by rabbinical courts, even though this requirement is not in compliance with *Halakka* (Jewish Law). In this revolutionary pronouncement, the Supreme Court went on to hold that rabbinical courts must conform to constitutional norms.

As discussed above, the focus of a lot of Israeli scholarship has been on intra-religious violence. In recent years, a slight shift has been seen in this trend with an increasing Arab consciousness being created in Israel. For instance, the controversy surrounding the national anthem of Israel, the *Hatikva*, was triggered mainly because of the its Jewishness. The Arabs in Israel don't regard the *Hatikva* as respresentative of the non-Jews.[64] In fact, as a sign of protest one Supreme Court Justice Salim Jubran refused to sing the national anthem at the swearing in ceremony of the new President of the Israeli Supreme Court.[65] But most of the cases that reach the Courts are between the orthodox and secular Jews, as will be demonstrated.

The main reason is that even secular Jews, much to their resentment, are subject to the rabbinical courts (*bet din*) in Israel where only ultraorthodox *rabbis* sit. These courts regulate all cases of marriage and divorce between Jews since there is no 'secular' or 'civil' form of marriage. In doing so, they enforce orthodox Jewish tenets of the *Halakka* a lot more strictly than would others. For instance, a child born from adultery is not counted as a Jew and cannot get married. Anyone whose marriage ends with the disapproval of the rabbinical court cannot get remarried. Some of these people take recourse to getting married abroad and then having their marriage recognized in Israel as per the norms of private international law, but this obviously entails much inconvenience and unnecessary expenditure. Divorces can also get complicated because under the *Halakka* the man must complete the divorce by delivering the wife to the *bet din*. Under civil law, the husband could get jailed for unnecessary stalling a divorce but he may choose to withhold consent despite this.

This is just one illustration of the many complications that can arise between the two parallel judicial regimes. The Supreme Court may choose to be secular in matters of Jewish law but many of these reforms are obstructed because the *bet din* can retaliate by withholding permission to marry and divorce as a symbol of disagreement with the perceived secularization of Jewish law. One of the raging controversies in Israel concerns the Law of Return, 1950, which gives those born as Jews, converts and those of Jewish ancestry the right to migrate and settle in Israel as Israeli citizens. The Supreme Court has ruled that it is they and not the rabbinical courts that have the jurisdiction to decide "Who

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64 Seth J. Frantzman, *Terra Incognita: Falling out of Love with 'Hatikva'*, May 1, 2012, *available at* \http://www.jpost.com/Opinion/Columnists/Article.aspx?id=268311.

65 Gabe Kahn, *Judge Rubinstein: Arabs Need Not Sing Hatikva*, Mar. 1, 2012, *available at* \http://www.israelnationalnews.com/News/News.aspx/153328#.T6oLbuiit98.

is a Jew?"[66] An anomalous situation arises where the Supreme Court gives liberal interpretations to who a Jew is,[67] and grants the concerned people citizenship but the rabbinical court staunchly disentitles them from getting married or divorced within Israel.

Despite stiff opposition by Israel's most powerful religious group, the Supreme Court has an impressive record in doing away with the stringency of ultraorthodox religious traditions where they conflict with universally accepted conceptions of human rights and liberalism. One of the earliest cases in this regard is one involving a prohibition on the import of non-kosher food, one of the four main areas covered by the Status Quo Agreement.[68] A company called Meatreal approached the Supreme Court challenging this prohibition as violative of the Freedom of Occupation enshrined in the Basic Laws. Despite stiff opposition from the ultraorthodox segment of the Jews, this challenge was allowed, and the prohibition stuck down.[69]

Katz v. Jerusalem Regional Rabbinical Court[70] is also an important case in which the Supreme Court held that the rabbinical courts cannot exercise any authority that is not explicitly vested in them. They are hence not entitled to declare as ostracised anyone who chooses not to have a civil matter adjudicated by a religious court. Similarly, in *Amir v. Great Rabbinical Court* [71] took this *ratio* further and posited that parties could not simply enter into an agreement to have their dispute subject to arbitration by a religious court if the law does not permit it.

The situation is complicated by the presence of a Chief Rabbinate Council, which is the supreme spiritual, and *Halakkic* authority for all Jews in Israel and decides, *inter alia*, the eligibility of people to serve as judges of the religious courts or as *rabbis*.[72] They also have the ability to certify food as kosher. Now according to Jewish beliefs, every seventh year is the *shmita* or the sabbatical year. This is a year of rest in which all land is to be left fallow and whatever grows naturally is the common property of all. Food as a product of deliberate cultivation is hence non-kosher. In order to work around this, for the past one hundred and twenty years or so, an innovative tool called *hetermechira*, or sales permit is being used. Under this, the land is nominally sold to a non-Jew so that the produce from it does not remain non-kosher. After the year is over, the land reverts to the Jew owner.

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66 Brother Daniel Rufeisen v. Minister of the Interior, (1962) 16 P.D. 2428 (1962).

67 Ron Hirschl, *Symposium: A New Constitutional Order? Panel IV: Towards Juristocracy: The Origins And Consequences Of the New Constitutionalism: The New Constitutionalism And the Judicialization Of Pure Politics Worldwide*, 75 Fordham L. Rev. 721 (2006).

68 The Status Quo Agreement, as has been more fully described in the Introduction, refers to four main areas- *Shabbat* (day of rest in Orthodix Judaism), *Kashrut* (Jewish dietary laws), family laws and education.

69 Meatrael Ltd. v. Prime Minister & Minister of Religious Affairs [1993] IsrSC 47(5) 485 (1993) [hereinafter *Meatrael*].

70 Katz v. Jerusalem Reg'l Rabbinical Court [2000] IsrSC 50(4) 590 (2000).

71 Amir v. Great Rabbinical Court, HCJ 8636/03 (2003).

72 *Chief Rabbinate of Israel Law* (1980), available at http://www.israellawresourcecenter.org/israellaws/fulltext chiefrabbinateisrael.htm.

In 2007, under pressure from the ultraorthodox factions, the Chief Rabbinate left the decision of whether to certify the produce from a *shabbath* year as kosher or not in the hands of the local rabbis. Some of them issued certification of the produce as kosher but others did not. The Chief Rabbinate was dragged to the Supreme Court in *Produce Production and Marketing Board v. Chief Rabbinate of Israel*,[73] wherein it was ordered to return to the previous, centralized policy of kosher certifications. The Supreme Court was careful enough to specify that they did not claim to be interpreting religious law, but the Rabbinate, being an administrative body was bound by principles of administrative law, including norms of fairness, reasonableness and non-arbitrariness. The new policy of the Chief Rabbinate had not relied on adequate data analysis and deliberation. Due notice had not been given of this change in policy. The policy was unreasonable in its failure to balance the interests of the farmer against those of the general public. On all these grounds, the new policy was struck down.

It is also heartening to see the dominant role that has been played by the Supreme Court in eliminating gender inequalities. Even before the 1992 Basic Laws, the 1987 *Poraz* case[74] involved a challenge to the Municipality of Tel Aviv, which refused to appoint women to the committee that selected the city's chief rabbis. This was obviously an attempt to appease the ultraorthodox representatives who constituted roughly two-thirds of the appointment committee. The Supreme Court struck this down as it contravened the foundational tenet of gender equality. This line of reasoning has been adhered to consistently.[75]

Though the Israeli Supreme Court is largely intrepid in the manner in which it stands up to the ultraorthodox elements of Jewish societies, the political power wielded by the *haredis* is such that these verdicts are not always as efficacious as one would want them to be. For example, the *Knesset* responded to the *Meatrael* case[76] by immediately amending the Freedom of Occupation clause on which the judgment was based, and the next time round, in a post-amendment challenge, the Supreme Court had no option but to uphold the validity of the prohibition.[77]

The ruling regarding equal division of marital property was also opposed vehemently by rabbinical courts that, in many instances, refused to follow it. This controversy was given a new dimension in the *Yemeni* case[78] where an innovative loophole was sought to be introduced by the religious courts. The civil statute regarding equal division of marital property was to apply *unless* the parties consented to apply religious

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73 Produce Production and Marketing Board v. Chief Rabbinate of Israel, HC 7120/07 (2007).

74 Poraz v. Municipality of Tel Aviv, 42(2) P.D. 309 (1988) (Isr.) (1988).

75 Shakdiel v. Minister of Religious Affairs, 42(2) P.D. 221 (1988) (Isr.) (1988).

76 *Meatrael*, *supra* note 69.

77 Hirschl, *supra* note 31.

78 Yemini v. Great Rabbinical Court, HCJ 9734/03 (2003).

law. The rationale put forward by the rabbinical courts was that once both the parties consented to the jurisdiction of the religious court it was implied that they had both consented to the adjudication of the case based on religious principles. Once again, the Supreme Court had to intervene and overrule the religious court, holding that the consent for the application of religious tenets was to be explicit and clear and could not be inferred merely from contesting the suit before a rabbinical court.

V. A Comparison of Judicial Attitudes

The above survey of both legal systems reveals that in spite of all the similarities between the two nation States, judicial attitudes in the two countries are vastly different. The attempts by the religiously dominant groups in both countries to assert their hegemonic view over everyone else is met with vastly different reactions. In India, SCI rulings regarding the constitutionality of religious practices or laws have been confused, and are incredibly inconsistent for a country that is so committed to the doctrine of *stare decisis*. Cases with religious undertones present an even bleaker picture with the Hindu perspective seeming to guide most decisions of the SCI. *Au contraire*, the Supreme Court in Israel has adopted a critical, liberal attitude, governed not by the experience of the dominant religious group (the *Haredi* Jews) but by ideas that resist the hegemony of the ultra-orthodox.

Hirschl attributes this tendency to advance a secularist agenda to the composition of the Supreme Court in Israel.[79] Judges are selected by a nine-member appointments committee that consists of the President of the Supreme Court, two other Supreme Court Justices, two practicing lawyers who are members of the Israel Bar Association, two members of the *Knesset* elected in a secret ballot by majority vote, and two ministers, one of whom is the Minister of Justice (who also chairs the committee and must approve the appointments). In practice, however, since the establishment of the State, almost all of the appointments committee's members have been representatives of the secular elite. Furthermore, all nine political figures (representing four different political parties) who served as justice ministers until at least 2009 were among the main instigators and supporters of the 1992 constitutional revolution in Israel. It will be interesting to see how far the record of the Supreme Court will be affected in future by a committee that may not be so secular in its approach. Already, the incumbent Minister of Justice has been in the eye of the storm for claiming that Jewish law should eventually become binding in Israel, and that "the Torah has the complete solution to all of the questions we are dealing with." This stance was greatly watered down once opponents accused him of the "Talibanisation of Israel."[80]

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79 Hirschl, *supra* note 31.

80 Haaretz Service and Yair Ettinger,*Justice Minister: Rabbinical Courts Should Support, Not Replace Civil Courts*, Dec. 8, 2009, *available at* http://www.haaretz.com/news/justice-minister-rabbinical-courts-should-support-not-replace-civil-courts-1.2611.

A lot of the key judicial figures in Israel have been openly leftist. Indeed, the likes of Aharon Barak have stuck out their neck and put a lot at stake just to prevent an anti-secular agenda from being advanced.[81] India presents a different story. In India, the appointment of judges is done by the President, generally in consultation with the collegium of the five senior most sitting judges of the SCI. The appearance and reality of deciding the case strictly on merits, and not on political ideology hence becomes very important. So important, in fact, that a lot of the times the SCI might prefer to refrain from adjudicating upon an issue at all, rather than having to take an uncomfortable side. This is perhaps what has happened in cases where the constitutionality of personal laws is at stake.

The political structure of Israel is also a likely cause. Until 1977, the politics in Israel was dominated by the Mapai and the Labor Party, both of whom had a socialist agenda to pursue. Thereafter, the right wing Likud Party has been the key political player. Attention has been drawn before the heightened role played by political parties in Israel. At the time of the inception of Israel, it was mostly political parties that exercised functions of the State, providing important facilities such as health and education to the immigrants that aligned themselves with these parties. As State machinery took over, the role of political parties has diminished but a variety of ancillary services is still provided by political parties to their members. The key political institutions in Israel even today are not formal government structures but political parties. Political parties in Israel today still "*occupy a more prominent place and exercise a more pervasive influence than in any other state, with the exception of some one-party States.*"[82] Given this massive power exerted by political parties, Israelis feel that the courts are the sentinels that protect them from some of the "*more egregious consequences of their highly partisan politics*."[83] The political elite in Israel consciously decided to insulate the Judiciary from an otherwise acutely politicized society as a means of ensuring the rule of law in Israel, a system that is reinforced and protected till today.[84] In recent years, the politics in Israel has become increasingly influenced by right-wing, conservative parties. This rise has been for many reasons, ranging from the growing proportion of Haredis demographically[85] to the growing racism that has come to mar Israeli society.[86] It is natural that the Courts have remained fiercely secular as a reaction. To increase the role of the government, reforms were proposed in 2008, which were

81 Hillel Neuer, *Aharon Barak's Agenda* (1998), *available at* http://www.jewishagency.org/JewishAgency/English/Jewish+Education/Educational+Resources/More+Educational+Resources/Azure/3/3-neuer.html.htm.

82 Martin Edelman, Courts, Politics and Culture in Israel 9 (1st. ed. 1994).

83 Martin Edelman, *The Judicialization of Politics in Israel*, Int' Pol. Sci. Rev., Vol. 15, No. 2, 177-186 (1994) [hereinafter Edelman].

84 *Id.*

85 AP News Agency, *Jerusalem-AP Report: In Rise of Ultra Orthodox, Challenges for Israel*, Jan. 14, 2011, *available at* http://www.vosizneias.com/73474/2011/01/14/jerusalem-in-rise-of-ultra-orthodox-challenges-for-israel/.

86 Phyllis Bennis, *Israel: Rise of the Right* (Feb. 12, 2009), *available at* http://warisacrime.org/node/39750.

heavily opposed by the activist Judiciary.[87]A four year long study by the Regavin Association concluded that the Supreme Court is clearly biased toward left-wing groups and particularly pointed out Chief Justice Dorit Beinisch's role in this regard.[88] The study focused on the bias in procedure, but it is not hard to infer from that, a bias in ideology also.

This is coupled with the decline of faith in the *Knesset* as well as the political parties and a corresponding increase in public support for the institution that keeps their self-serving agendas in check. Especially since the State lacks a Constitution, the Courts' perceived responsibility to safeguard certain fundamental values is heightened. Moreover, all governments in Israel's short political history have been coalition governments, with the several members of the coalition being unable to reach consensus on the nation building policies to be adopted. The Supreme Court has been willing to deliver, where the politicians have dithered and reached stalemates based on their manifestos or party ideologies. This has resulted in a transfer of powers to the Court, and given them more independence and stability to defy the religiously (and politically) dominant groups.[89]

In Israel, as Aharon Barak has pointed out, the Supreme Court also seems to have a more *legitimate* claim to take strong positions on what the Basic Laws stand for, because these laws are not the same as an entrenched Constitution, and even if the Supreme Court were to take an anti-democratic stand, the laws could be much more easily amended than if the State had had an entrenched Constitution (as India clearly does).[90]

In India, the Judiciary's self-imposed restraint might also be sourced to its constant battles with the Executive and those who have dared to dissent have had heavy costs to pay. The dark period of the Emergency has surely done a lot to shake the faith of a Judiciary that dares to express dissent with the Executive. Even as recently as late 2010, an SCI order saying that food in government storehouses should be distributed before it is allowed to rot was met with Prime Minister Manmohan Singh's scathing remarks on how the Judiciary should not meddle with policy making.[91] It is no wonder that the Judiciary chooses time and again to believe that it does not have the power to review personal laws. The weight of precedent and innovative interpretations of the definition of "law" provide the perfect platform to execute this plan.

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87 Ezra HaLevi and Gil Ronen, *Justice Minister Proposes Reform Of the Supreme Court* , Jan. 3, 2008, *available at* http://www.israelnationalnews.com/News/News.aspx/124791.

88 Hillel Fendel, *Study Shows That Beinisch Prefers Left-Wing Groups,* July 11, 2010, *available at* http://www.israelnationalnews.com/News/News.aspx/138523#replies.

89 Edelman, *supra* note 83.

90 Edelman, *supra* note 83.

91 Nirmal Sandhu, *The Grain Drain* (2010), *available at* http://www.tribuneindia.com/2010/20100913/nation.htm#11.

Why the apex court should choose to side with a single religious group is a more troubling question. In part this may be because of the personal bias and orthodoxy of some judges that gets reflected in judgments - Justice Markanday Katju, has been known to refer to the growing of beards by young Muslim men as "Talibanisation"[92] and Justice Krishna Iyer, has been known to suggest that judges must remain insulated "like a Hindu widow."[93] But, there seems to be a systemic bias that cannot be explained by individual instances.

Perhaps the realist explanation is the best one. Majority of the population is Hindu, as has consistently been majority of the bench. It is natural for these judges to view everything through a Hindu lens, not because they are corrupt or anti-secular, but simply because they are Hindu. A Hindu mindset might find it hard to understand the insistence of a Muslim student to grow a beard and might find it much easier to dismiss his claim as "Talibanisation" than someone who actually *does* grow a beard as part of his own religion, or knows what it's like to not have people understand the relevance of their religious traditions because they are unfamiliar to the majority. Without the kind of careful composition that one finds in the Supreme Court in Israel, it is almost expected that the pervasive Hindu ideology is embraced more easily by the SCI unless expressly forbidden by the Constitutional text, and sometimes even then.

This is dangerous ground for a State that insists vehemently that it is secular. India has gone to great lengths to ensure a non-partisan, impartial Judiciary. The jury system has been abolished on the assumption that a trained judicial mind will be more impartial than the layperson. But, a bias seems to be reflected consistently. Whether this is conscious or subconscious remains anybody's guess although the likelihood is that it is a little bit of both.

The differing historical roots of both nations are another key difference. In India, initially, the British relied on the advice of "native law officers" such as *pundits* (in case of Hindus) and *kazis* (in case of Muslims) while dealing with personal law matters.[94] Eventually, suspicious of the natives, in an effort to rationalize the law, the post of native law officers was abolished altogether and the British judges themselves referred to religious texts and scriptures in order to adjudicate upon matters of personal law. Obviously, their understanding of these personal laws was not only imperfect, but also tempered heavily with their common law leanings. In much the same way, Indian courts have taken upon themselves the onus of referring to ancient texts to decide for themselves what does and

92 Express India News Service, *SC Judge Apologises For 'Taliban' Remark On Muslims*, July 6, 2009, *available at* http://www.expressindia.com/latest-news/SC-judge-apologises-for-Taliban-remarks-on-Muslims/485727/2/.

93 Judicial Selection Coalition, *Bar To Judgeship*, Feb. 19, 2011, *available at* http://www.judicialselectioncoalition.org/bar-to-judgeship.htm.

94 See for instance, *History of the Uttar Kannada Court*, *available at* http://kar.distcourts.kar.nic.in/aboutCourt kar.

does not qualify as the "essential" part of a religion. This unfettered power is a dangerous thing, since it is the sole discretion of the judge that can declare an age old practice (for instance, the slaughtering of cows by Muslims on *Bakr-Eid*) to be non-essential overnight.

Israel's legal system, on the other hand, is greatly influenced by the Ottoman Empire where the millet system was followed, with different courts for each community, presided by judges from that community. This system was continued throughout the British mandate as well, and persists in large part through Status Quo Agreement in today's system of religious courts.[95] This explains the existence until today of rabbinical courts where the applicable law is strictly Jewish law. However, the jurisdiction of these rabbinical courts has shrunk to cover only marriage and divorce. Thus personal law in India is the forte of common law judges, while in Israel, it is the religious specialists who are the key players.

Most importantly, this is expositive of the approach adopted by the Supreme Courts in both countries. The Supreme Court in India reverts to religion to justify its stance, even when it is ruling against the assertion of some community. To take the aforementioned example forward, the SCI referred extensively to the Holy *Koran* and other Muslim texts before concluding that cow slaughter was not the only way of celebrating *Bakr-Eid* even if it was an option in Islam. This made it non-essential. In Israel, on the contrary, because religion has traditionally been confined to religious courts, when a case comes up before the Supreme Court, there is a high likelihood that it will be decided on secular grounds. Take for instance the case involving the production of kosher food in the *shabbath* year. The Supreme Court decided to rely on norms of administrative law rather than religious law. In order not to completely antagonize the ultraorthodox wing, they did refer to rabbis who had spoken in favor of what the Supreme Court was laying down, but ultimately the basis of the decision was based in administrative, secular law.

This somewhat hesitant, but decidedly secular approach of the Supreme Court is further reflected in the *Women of the Wall* case,[96] where the right of women to worship at the Western Wall was in conflict with the ultraorthodox beliefs restricting it in some areas. Initially, when the matter was referred to the Supreme Court they urged the government to find a tenable solution that balanced interests of both parties but also stated that in case there was a direct conflict, religious mandates would prevail since the matter was an excessively volatile one. The government failed to work effectively towards a solution that was agreeable to both parties and eventually, when the case came up before the Supreme Court a second time, it ruled in favor of the female worshippers.[97]

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95 Josh Goodman, *Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel*, 32 Hastings Int'l & Comp. L. Rev. 477 (2009).

96 Hoffman v. Custodian of the Western Wall, 48(2) P.D. 265 (Isr.).

97 Hoffman v. Gov't of Israel, 54(2) P.D. 345 (Isr.).

The trend in Israel is to secularise, the trend in India is to de-secularise. A case in point is the *Babri Masjid* case[98], which was essentially a property dispute between Hindu and Muslim religious bodies, the former claiming that the property in question is the birthplace of Lord Rama, the latter claiming that it is a mosque. The infant Lord Rama was joined as a party in this "property" dispute, and one third of the property was actually awarded to this Hindu deity![99] Most agreed that this was a workable compromise[100], but lacking any sound legal basis. While some commentators feel that there is no real need to unpack "legal niceties",[101] some eyebrows have certainly been raised at the deliberate introduction and consideration of the religious element in a dispute that should not have been viewed with a religious lens at all.[102]

These differences are also reflected very clearly in the reaction that the introduction of uniform law evokes in both countries. In India, this opposition is headed by the minorities who feel that the enforcement of any uniform code will be driven only by the experience of the majority religion, and the SCI's rulings in the past have not done much to invoke any faith in a truly secular judicial attitude. For the same reason, intense "Hindu" groups have been known to support the cause of a uniform civil code.[103] In Israel, the opposition derives most of its strength from ultraorthodox Jews or *Haredis* who exert a considerable power over the regulation of Jews in Israel through their veto powers in cases of marriage and divorce. If the system of religious courts is abolished, the enforcement of the resulting code is likely to be in a considerably more liberal, secular manner in keeping with the record of the Supreme Court so far.

There are differences resulting from and driving judicial attitudes in both countries, but Indian courts should perhaps review their own performance in the light of Israeli experience to test the depth of their brand of secularism. Indeed, what the countries can learn from each other may as well be the subject matter of a separate study, but the differences in the judicial notion of secularism in both countries are best understood by looking to both the similarities and the differences in the religious, social and legal landscapes of the countries.

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98 Refer to the *Ram Janm Bhoomi-Babri Masjid* Ayodhya Bench ruling (2010), *available at* http://www.allahabadhighcourt.in/ayodhyabench4.html.

99 NDTV, *Ayodhya Verdict: Allahabad High Court Says Divide Land In Three Ways*, Oct. 1, 2010, *available at* http://www.ndtv.com/article/india/ayodhya-verdict-allahabad-high-court-says-divide-land-in-3-ways-56063; Nivedita Menon, *The Second Demolition: Ayodhya Judgement, September 30, 2010,* Oct. 2, 2010, *available at* http://kafila.org/2010/10/02/the-second-demolition-ayodhya-judgement-september-30-2010/.

100 The Hindu, *Intriguing Compromise Could Work,* Oct. 1, 2010, http://www.thehindu.com/opinion/editorial/article804948.ece.

101 Pratap Bhanu Mehta, *The Leap and the Faith* (Oct. 1, 2010), *available at* http://www.indianexpress.com/news/the-leap-and-the-faith/690939/0.

102 Rajeev Dhavan, *A Clumsy Verdict of Doubtful Legality*, Oct. 4, 2010, *available at* http://epaper.mailtoday.in/4102010/epaperpdf/4102010-md-hr-12.pdf.

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VI. Conclusion

This paper has sought to establish that despite being similarly saddled with religious tensions in secular societies, the Supreme Courts in both India and Israel have chosen to adopt different trajectories, with the Israeli Supreme Court being much more progressive in its outlook than its Indian counterpart is. The Indian Supreme Court either has exhibited great ambivalence when it comes to deciding the constitutionality of religious practices. When one expands this area of study to include cases where religion has a dominant role to play, the trend is to support the Hindu perspective over the secular one.

One of the major reasons for this difference is the composition of the Israeli Supreme Court, and the backing of more secular judges by the selection committee. India has never had such a support system. The key functions exercised by political parties and their role as the key political institutions in Israel (overshadowing even the State machinery) make it more natural for the Supreme Court to take a viewpoint that sharply opposes that of the dominant political parties- mostly right wing now- since it becomes all the more important to protect the supporters of an opposition from having to deal with the imposition of a religious or political organization they don't want to affiliate themselves with. With India on the other hand, the hesitation of the Supreme Court can be attributed to a cultural conditioning of deference to the legislature, and its tendency to *Hinduise* due to its composition of mainly Hindu judges. While Israel has had its costs to pay in the form of boycott of judgments and low enforcement levels, India has had to pay in terms of a compromise on its secular tradition, which might prove to be a much heavier cost in the long run.