

# HOW TO INTEGRATE UNIVERSAL HUMAN RIGHTS INTO CUSTOMARY AND RELIGIOUS LEGAL SYSTEMS?

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## Introduction

About 80 % of the people in the developing world, particularly in Asia and Africa, are believed to be using informal or non-state legal systems which include traditional, tribal as well as religious jurisdictions. The so-called customary and religious legal systems<sup>1</sup>, which will be the main focus of the present study, can take many forms and shapes depending upon the tradition, locality and prevailing socio-political conditions. Such legal systems have been historically utilized in various areas from fighting against crime to mundane affairs such as setting the price of goods and services in the market place. However, in the modern world, customary and religious legal systems are most commonly used to regulate personal status or family affairs. Thus, the present study will exclusively focus its lenses on so-called personal status systems as quintessential examples of religious-customary legal systems around the world. Against this background, a personal

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<sup>1</sup> There is no such thing as a purely sacred or religious legal system that solely relies upon religious texts, norms and precepts for its source and inspiration. In reality, all religious legal systems are hybrid systems which throughout ages have evolved and taken their present form through fusion and entwinement of competing interpretations of sacred texts, jurisprudence, culture and customs of the people who resorted to them. Thus, throughout the article such jurisdictions will be referred to as “customary and religious legal systems”.

status<sup>2</sup> system can be defined as a system in which members of various ethno-religious communities that are specifically recognized as such by central authorities are subject to the jurisdiction of their own communal norms and institutions in regard to personal matters such as marriage, divorce, maintenance, inheritance and so forth. In other words, in such systems there is often not a unified or a territorial body of family law that is uniformly applied to every citizen of the land irrespective of his or her ethno-religious background but rather a legal order organized as a plural system in which a Muslim is subject to Islamic *Shari'a*, a Jew to *Halakhah*, a Christian to Canon Law, a Hindu to *Dharmashastra* and so forth.

Plural systems of personal status have been historically employed by imperial powers to categorize their colonial subjects according to their racial, religious, sectarian, ethnic and parochial differences (Mamdani 1996; Mirow 2004). Yet, personal status is not solely an antiquated system of legal and political ordering. On the contrary, many postcolonial nations from Indonesia to Morocco, which originally inherited such pluralistic legal systems from their colonial predecessors, still continue to employ variant forms of personal status in their legal systems. In other words, some states continue to compartmentalize their societies into ethnic, religious and racial groupings and forcefully subject their citizens to communal laws which are fully integrated into state's legal system and backed by its enforcement agencies. We can understand why colonial regimes, which often had a 'divide and rule' approach towards their subject populations, may have employed pluralistic personal status systems, but it is not easy to comprehend why modern nation-states, which are often constitutionally committed to uphold universal human rights standards and treat their citizens equally before the law, would ignore their constitutional obligations and discriminate among their citizens on the basis of gender, ethnicity and religion by continuing to recognize archaic personal status laws.

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<sup>2</sup> At the outset it should be noted that in this study I will adopt a narrower definition of 'personal status' which includes only the matters of marriage, divorce, maintenance, and succession. Historically, 'personal status' has been a much broader concept that included all matters of family law and succession as well as religious endowments. Although personal status systems still continue to exist in many parts of the world today, their content varies widely from one country to another. Hence, by narrowing down the scope of the concept, I aim to increase its portability or comparability across the cases analyzed in the article.

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Hence, by closely analyzing the Israeli, Egyptian and Indian legal systems, the article will first address the question of why modern nation-states continue to employ pluralistic personal status systems and differentiate among their citizens despite the fact that they were originally founded on premises of non-discrimination and equal treatment. Secondly, the paper will also explain how pluralistic organization of law and justice affect the fundamental rights and freedoms of individuals living under such systems; how individuals cope with limitations imposed upon their rights by communal institutions; and what tactics and strategies they use to navigate through the maze of personal law. Lastly, after demonstrating what approaches have been successfully used to bring about changes in the context of religious and customary law, the paper will identify key lessons and recommendations for the purpose of helping human rights activists, donors and members of programmatic communities who need to design intervention mechanisms and tools to integrate universal human rights standards into customary and religious systems around the world.

Many scholars have considered the survival and persistence of archaic institutions of personal law as an anachronistic legacy of colonialism or a remnant of a distant past. According to the proponents of the 'colonial legacy' thesis, after independence, many postcolonial governments, despite their strong desire to unify their legal system under an overarching network of law and courts, failed to overcome the resistance of social groups and thereby were forced to continue to recognize communal jurisdictions which were originally installed by their colonial predecessors. By the same token, personal status systems persisted because the disempowered and incapacitated postcolonial governments were unable to overcome the opposition of non-state forces and establish a uniform legal system but rather passively acquiesced in the continuation of colonial institutions of personal law (Benton 2002; Dane 1991; Darian-Smith and Fitzpatrick 1999; Hooker 1975; Larson 2001; Thompson 2000; Vanderlinden 1989; Young 1994).

However, 'colonial legacy' accounts do not suffice alone to explain the reason why variant forms of personal status continue to exist today, as these explanations often neglect the centrality of state and the desire of its leaders to control the field of personal status and turn it into an instrument of their state and nation-building projects. In fact, a close analysis of the experiences of many postcolonial nations reveals that various forms of personal status have come into existence as a result not of historical contingency, but of a dynamic interaction between two powerful centripetal and centrifugal forces: the ruling elite's choice of regime type and ideological orientation on the one hand, and the balance of power between the state

and social forces on the other.

Postcolonial nations, which inherited such pluralistic legal systems from their imperial patrons upon independence, faced more or less the same challenges: what were they going to do with these regimes, which were not necessarily conducive to building a unified and civic sense of nationhood? Were they going to preserve them, or eradicate and replace them with completely new bodies of law and legal institutions? Countries' responses to these challenges were determined by their ruling elites' ideological orientations, and ability to impose their political will upon social forces after overcoming their opposition, and by the capacity of ethno-religious groups to resist the government's interventions in personal status and preserve their political and juridical autonomy. That is to say, governments' differing regime choices, ideological orientations, and varying levels of ability to successfully intervene in societal structures on the one hand, and the ethno-religious groups' varying capacity to resist government interventions, on the other, have led to rise of differing forms and degrees of legal plurality across the postcolonial world. For example, even the countries (*e.g.*, Israel and Egypt), which had exactly the same type of personal status under the colonial rule, have later developed completely different forms of personal status, as the factors (*e.g.*, ideological orientation, and relative balance of power between the state and society), which originally gave rise to formation of personal status systems in question, have changed and continuously evolved over time.

Regardless of the political and social factors which led to their formation in the first place pluralistic personal status systems have been reported to be invariably detrimental to the rights and freedoms of individuals, especially women, children and religious dissidents; and their harmful effects have been reported to be even worse in countries where individuals have been provided with no secular alternatives and forcefully subjected to the jurisdiction of communal norms and institutions without their explicit consent. However, as the present study will demonstrate, in response to grave human rights violations and limitations imposed by communal jurisdictions, many groups and individuals have formed various hermeneutic and self-ruling communities, and pushed for changes in the internal structures of personal status regimes. By doing so, they have directly challenged the legitimacy of states' meddling in personal status; and contested the validity of various categories of subjectivity (*e.g.*, ethnicity, gender) by offering deviant interpretations of officially-sanctioned religious norms and precepts. In fact, the experiences of many postcolonial nations evidence that the ongoing contestations in the triangle of state-community-individual have not only exacerbated existing state-

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society crises, but also caused profound ideological divisions in legally pluralistic societies. That is to say, the field of human rights in many countries has turned into both a site of resistance and a testing ground where the fate of governments' attempts to regulate their personal status systems has been ultimately decided by the people who interacted with these institutions on a daily basis.

### Historical and Political Roots of Modern Personal Status Systems

For analytical purposes this study will introduce three ideal-typical<sup>3</sup> forms of personal status based on their degree of plurality or fragmentation: 1) Low-Degree, 2) Medium-Degree, and 3) High-Degree (Sezgin 2004b). Each category theoretically corresponds to a different prototypical pattern of recognition and incorporation of personal status regimes that can be widely found in the postcolonial world. Moreover, all other things being equal, each category also attests to convergence of a particular type of regime structure or ideological orientation with a particular type and magnitude of counteracting social opposition mounted by ethno-religious communities at a specific time and place.

Many postcolonial nations inherited pluralistic personal status systems, which were used by imperial powers for identifying and categorizing their subjects into racial, ethno-religious and tribal groupings. In other words, after independence each country encountered the very same question: what they were going to do with these highly discriminatory and fragmented systems. Obviously the prolongation of these structures after independence would have not only resulted in further ossification of the colonial categories of race, gender and ethnicity, but also subverted the attempts of postcolonial leaders to redefine the terms of membership of the political community. The responses of postcolonial governments to this very question were first and foremost determined by their choice of regime type and ideological orientation. For example, inclusionary regimes, which are principally committed to the idea of building an egalitarian, homogenous and civic citizenry, have deemed the colonial institutions of personal status inherently inconducive to

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<sup>3</sup> The ideal types used here as well as the regime typologies introduced below, are employed for purely analytical purposes. It is extremely rare for states in real life to fit entirely within a single category and have no common characteristics with another state belonging to a different category. Instead, at different times countries will tend more toward one category than another.

their vision and taken radical steps to reduce their degree of plurality by abolishing and replacing these structures with territorially-unified systems of law and courts. Along the same lines, many governments with secular credentials (*e.g.*, the People's Democratic Republic of Yemen, Ethiopia between 1974 and 1991, India,, Tanganyika, Senegal, and the Socialist Federal Republic of Yugoslavia) have also embraced a similar approach towards religiously-based personal status systems, and aimed to abolish these structures to lessen the role of religious norms and institutions in public life (Bennett and Vermeulen 1979; Carson 1958; Cotran 1965; Creevey 1996; Favali and Pateman 2003; Mamdani 1996; Massad 2001; Prinsloo 1990; Schacht and Layish 1991; Seidman 1978).

In contrast, exclusionary or theocratically-oriented regimes, which propagate the supremacy of a particular race, ethnicity or religion in a society, have viewed personal status systems instrumentally and aimed to conserve, and even reinforce, the pluralistic nature of these structures in order to promote a particular form of subjectivity and turn their vision of stratified citizenry into reality. In other words, exclusionary and theocratically-inclined regimes (*e.g.*, South Africa in the apartheid period, Lebanon, Iran, Pakistan and Israel) have utilized personal status systems to maintain the 'purity' of particular groups by imposing strict rules of endogamy and banning or officially discouraging mixed-blood unions among members of different religious, ethnic, and racial groups (Allott 1980; Allott et al. 1969; Bennett and Peart 1983; Berkes 1998; Brubaker 1996; Burman 1983; Butenschøn 2001, 2000; Chesterman and Galligan 1997; Ghai 1975; Lewis 1968; Marx 1996; Molyneux 1991; Ortaylı 2004; Smith 1963; Smootha and Jarve 2005; Wadud 2005; Yiftachel 1999, 1997).

Unlike these ideologically motivated regimes, some postcolonial governments have been moved by more mechanical considerations in reforming their pluralistic personal status systems. These regimes are bureaucratic-authoritarian regimes that are often characterized by a relative lack of ideological interest in personal status issues. They have rather viewed their pluralistic regimes as an undesired legacy of colonialism and extra-territoriality which, they thought, had to be completely wiped out to achieve full independence. In their eyes, the prolongation of colonial systems of personal status would not only limit the power and reach of the state, but also compromise the national sovereignty. Thus, these regimes (*e.g.*, Egypt, Indonesia) have often intervened in their personal status systems with such motives as a desire to consolidate the power of the central administration, increase its effectiveness, bring an end to the multiplicity of local jurisdictions on national territory for the realization of full sovereignty, and prevent non-state actors

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(especially religious and traditional authorities) from becoming strongholds of political opposition and posing an immediate danger to the government (Sezgin 2009, 2004a).

These various motives for intervention have also influenced the choices and means of reform undertaken by postcolonial governments in regulating their pluralistic personal status regimes. Broadly speaking, in terms of their stated objectives, three distinctive categories of reform have been widely undertaken in the postcolonial world: 1) *Normative Reform*, which seeks to achieve normative unification by unifying personal status laws of various communities under a common civil code that would be applicable to all citizens regardless of their communal affiliations; 2) *Institutional Reform*, that aims to reduce institutional plurality by unifying communal courts under a system of uniform and hierarchically-structured network of national courts; and 3) *Substantive Reform*, that solely aims to change the substance of personal status laws without reducing either institutional or normative plurality (*e.g.*, reforms prohibiting bigamy or underage marriages).

Since each type of reform serves a different purpose, regimes with different ideological orientations would naturally prefer reforms leading to different outcomes. In fact, the evidence from postcolonial governments suggests that, while the institutional reform has been mostly initiated by regimes with mere efficiency or sovereignty considerations (*e.g.*, bureaucratic-authoritarian), normative reform, which requires a strong ideological commitment on the part of reforming governments, has been often attempted by ideologically motivated inclusionary or secular regimes (Bennett and Peart 1983: 147). Substantive reforms, on the other hand, have been undertaken by all governments-regardless of regime type - often as a response to pressures from intrinsic and extrinsic forces demanding change in the field of personal status (*e.g.*, women's right to divorce, minimum marriageable age) (Charrad 2001; Massad 2001).

Reforms in personal status or family law never take place in the absence of social opposition. On the contrary, governments' interference in the field of personal status has always drawn the fierce resistance of ethno-religious communities whose norms and institutions have been targeted by reforms. And the intensity and severity of that resistance seem to be directly correlated with the type of reform in question. For example, a close scrutiny of the experiences of postcolonial nations shows that normative reform has instigated the greatest amount of resistance from social forces while opposition mounted against institutional or substantive reforms

has been less and relatively easier for governments to overcome. By the same token, in order to successfully overcome the strong opposition of religious groups and undertake normative reform, governments must mobilize a greater amount of their resources and fully support the reform process with an unshakable moral and ideological commitment. (Anderson 1958; Cotran 1996; Kahn-Freud 1969; Read 1972).<sup>4</sup> Hence, given these higher standards and requirements for its success, normative reform has been extremely difficult to undertake for many postcolonial governments with limited resources. In this respect, the task for regimes with inclusionary or secular orientations, which often attempted to undertake both normative and institutional reform, has been the most difficult, while regimes with bureaucratic-authoritarian, theocratic or exclusionary orientations had a rather easier job, as they mostly limited the scope of their interventions to institutional and substantive reforms.

In brief, postcolonial governments have often viewed personal status systems instrumentally and attempted to manipulate these pluralistic structures in order to implement a particular ideological vision and program, while ethno-religious communities have fiercely resisted the government meddling in personal status and have tried to preserve their political and juridical autonomy. In the end, these continuous interactions between various governments and ethno-religious communities across the postcolonial world have given rise to one of the three above-mentioned ideal-typical forms of personal status in each country. Each of these categories attests to the convergence of a particular type of regime structure with a particular type and magnitude of counteracting societal opposition. For example, personal status systems with low degree plurality (LDP) have been mostly observed in countries with strong inclusionary and/or secular inclinations that have already achieved considerable levels of unification in their systems, but their attempts at further unification have somewhat stalled in the face of strong resistance from specific ethno-religious groups. Compared to nations in other categories, these countries possess the most centralized and unified legal systems,

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<sup>4</sup> Perhaps another reason why normative reforms have been more difficult to undertake is that this type of reform is actually a process of double reform, in the sense that it subsequently entails the undertaking of institutional reform, too. Particularly in pluralistic regimes where communal laws are directly applied by communal courts, normative reform cannot be undertaken alone. It has to be done in tandem with institutional reform, as there cannot be a system in which communal courts will continue to exist and apply provisions of the same uniform civil code to members of different ethno-religious communities.

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as they are just one step short of achieving complete legal unification.

Of the cases analyzed in this study, India would best exemplify this ideal-typical category. Despite its inclusionary and secularist proclivities and strong desire to enact a Uniform Civil Code (UCC) that would be applicable to all citizens irrespective of their religious affiliations, the Indian regime has only partially succeeded in its goal of normative unification; moreover, it completely dropped the idea of a common civil code after repeatedly failing to surmount the muscular opposition of the Indian Muslim community. As a result, today the country still remains as a pluralistic system, albeit to a much lesser degree than six decades ago.

On the other hand, personal status systems with high degree plurality (HDP) have been frequently found in regimes with theocratic and exclusionary inclinations. As such regimes have predominantly viewed pluralistic legal structures as instruments for realizing their vision of building ethno-religiously stratified societies and augmenting the role of religious norms and institutions in public life, they have often preserved and reinforced plural systems of personal status. Nations in this category have the most fragmented and decentralized legal systems of all, as they are characterized by high levels of communal autonomy and substantial degrees of normative and institutional pluralization in the field of personal status.<sup>5</sup> Among the cases that best epitomize this category is Israel, in which fourteen state-recognized ethno-religious communities run their own communal courts that are staffed with their own communal judges applying religious laws of their own communities. Israel has maintained a highly pluralistic legal system that it inherited from the Ottomans and the British. As shown below, this archaic system was retained because the founding fathers of the country had deemed it ideologically useful for preserving the ‘purity’ and ‘supremacy’ of the country’s Jewish citizens while differentiating and relegating non-Jewish groups to a second-class status (Sezgin, n.d.).

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<sup>5</sup> For pure theoretical interest it must be noted that, in some very rare circumstances, HDP may come about as a result of a balance of power tilting strongly in favor of societal organizations. For example, in cases of total state failure, some dominant segments within the society may well take over the state’s functions and impose a religiously-oriented and highly-pluralized legal system over the rest of the population in concordance with their ideological objectives (e.g., Somalia).

In between these two prototypical forms exist the personal status systems with Medium Degree Plurality (MDP). This type has been frequently found in bureaucratic-authoritarian regimes that have been primarily motivated by such mechanical considerations as achieving bureaucratic efficiency, establishing control over widely scattered non-state jurisdictions, and weakening the independent political vigor of religious institutions. In order to succeed in these objectives, bureaucratic-authoritarian regimes have extensively resorted to institutional measures to unify the communal courts of various communities under an overarching network of national courts, while shying away from normative reforms that were usually undertaken by ideologically motivated governments which sought to facilitate a secular or inclusionary transformation in their societies. Although they have usually aimed for institutional reform, bureaucratic-authoritarian regimes have still encountered the stiff resistance of some small but powerful groups who opposed the institutional measures employed by the state. Bureaucratic-authoritarian regimes have usually succeeded in achieving their institutional objectives to the extent that they have skillfully managed and overcome the resistance of these groups. Many countries in this category have inherited highly fragmented personal status regimes, but later drastically reduced the plurality of legal systems by means of institutional reform.

Of the three cases analyzed in this article, Egypt can be considered a textbook example of this latter category. Especially, during the reign of Nasser, the Egyptian regime, largely moved by mechanical considerations, abolished the religious courts of both Muslim and non-Muslim communities and transferred their jurisdiction to national courts without undertaking an accompanying reform for normative unification. In the final analysis, the Egyptian regime, after successfully overcoming the opposition of communal leaders who were suddenly deprived of their traditional privileges with the abolition of religious courts, eventually succeeded in cutting its degree of plurality nearly in half by utilizing institutional measures.

### A Comparative Analysis of Israeli, Egyptian and Indian Personal Status Systems

Israel inherited the old *millet*<sup>6</sup> system under which the Ottoman and British

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<sup>6</sup> For more on the Ottoman *millet* system, see Goffman (1994); Braude (1982); and Karpát (1982).

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imperial authorities granted juridical autonomy over matters of personal status (*e.g.*, marriage, divorce, succession, maintenance and alimony) to eleven<sup>7</sup> ethno-religious communities in Palestine. Since its inception as an independent nation, Israel has more or less maintained this highly pluralized and decentralized legal system, and further extended its limits to include three more communities whose jurisdictions were not previously recognized under the Turkish or British rule.<sup>8</sup> Israel has never attempted to put an end to the multiplicity of religious courts and unify them under a network of national courts, as Egypt did in 1955. Nor has it ever attempted to abolish the religious personal status laws and enact a secular and uniform civil code in their place, as India did in the 1950s. Rather, it has maintained a highly pluralistic system of personal status in which the religious courts of fourteen state-recognized communities, staffed with their very own communal judges who apply religious laws of their own communities, are granted exclusive jurisdiction over matters of marriage and divorce and concurrent jurisdiction with the civil courts in regard to issues of maintenance and succession.

The adoption and utilization of the old *millet* structure came as a logical extension of Israel's exclusionary and theocratically-inclined ruling ideology in which religion has been allowed to play an exceptionally pivotal role in the determination of the rights and duties of the citizen vis-à-vis the state. According to the ruling ideology, Israel was first and foremost the state of the Jewish people. Everyone else was a second class citizen. Against this background, the archaic system of *millet* with its strict rules of endogamy has been viewed by the Israeli leaders as a useful tool for the preservation and homogenization of the Israeli-Jewish identity and the differentiation of non-Jewish communal identities by building a

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<sup>7</sup> According to the Second Schedule to the Palestine Order in Council, as amended in 1939, the following communities were officially recognized by the Mandatory regime in addition to the Sunni Muslim community: the Eastern (Orthodox) Community, the Latin (Catholic) Community, the Gregorian Armenian Community, the Armenian (Catholic) Community, the Syrian (Catholic) Community, the Chaldean (Uniate) Community, the Jewish Community, the Greek Catholic Melkite Community, the Maronite Community, and the Syrian Orthodox Community (Wright 1952: 127).

<sup>8</sup> These three communities recognized after the establishment of the State of Israel are: the Druze Community (1957), the Evangelical Episcopal Church (1970), and the Bahai Community (1971) (Abou Ramadan 2003: 255; Edelman 1994: 51; Goldstein 1992: 145; Shava 1981: 239, 247).

hierarchically stratified form of subjectivity that would fully correspond to their ideological vision.

In brief, the old *millet* system has been preserved to serve two major objectives: 1) the protection and homogenization of Israeli-Jewish identity, and 2) the differentiation of non-Jewish identities. That is to say, the *millet* system was further modified by the Israeli government with these two goals in mind. The primary objective was to create and secure a monolithic Israeli-Jewish national identity by drawing a single, visible ethnic boundary that would encompass all Jewish inhabitants of Israel notwithstanding that they differed among themselves along ethnic, sectarian, linguistic and ideological lines (Woods 2008). The first step in this direction was taken with the recognition of the jurisdiction of rabbinical courts along with the religious courts of other communities over matters of marriage, divorce, maintenance and inheritance in 1947. Judaism has very strict rules of endogamy. Marriage is permissible only between a man and a woman who are both halachically regarded as Jewish. In other words, marriage to non-Jews or Jews whose Jewishness is not vetted by rabbinical authorities is prohibited (Edelman 1994: 61). In this regard, with its recognition of the monopoly of rabbinical authorities over marital affairs, the Israeli government aimed to maintain the purity of the Israeli Jewish-identity and prevent its dehomogenization through mixed marriages (Friedman 1995: 61). In 1949, the Israeli government further fortified its position against exogamy by officially declaring that it would not introduce a provision for civil marriage and divorce that could potentially open the door to interreligious marriages, and thereby lead to degeneration of the Jewish identity (Abramov 1976: 194; Segev and Weinstein 1986: 252).

Four years later, in 1953, the government took a much more radical step towards homogenization of the Israeli-Jewish identity with a new law that abandoned the earlier principle of voluntary association and forcibly imposed the jurisdiction of Judaic law and courts on all Jewish residents of the country. Now the jurisdiction of non-conformist Jewish communities (*e.g.*, Karaites, Samaritans etc.) which had enjoyed wide legal autonomy under the colonial rule was completely terminated and the state-run, rabbinical courts, which applied only the Orthodox version of *Halakhah*, were elevated to the position of government-backed, status-conferring institutions to determine the privileges and disabilities of the Jewish citizens of Israel. In other words, with the passage of the 1953 Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, Israeli authorities aimed to replace the internal plurality of Jewish law with a uniform legal structure which, they hoped, would help create a unified Jewish identity by removing the barriers to mixed marriages

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between Jews with different ethnic, sectarian and theological backgrounds who migrated to Israel from the four corners of the world. After all, for the success of the Zionist nation-building project, an Oriental Jew from Yemen and an Ashkenazi Jew from Eastern Europe had to be able to marry one another without wondering whether his or her future spouse was a 'proper' Jew. And this was precisely what the Israeli leaders set out to achieve through their interventions in the laws of personal status during the first decade of statehood (Bentwich 1964: 244; Chigier 1967: 156; Rubinstein 1967: 386; Strum 1989: 488).

The process of homogenization among Israeli Jews logically necessitated the invention and conservation of non-Jewish identities. In this regard, Israeli leaders also exploited the existing *millet* system as an instrument of exclusion and differentiation. In their eyes, differentiation of non-Jewish identities was not only necessary to ensure the purity of the Israeli-Jewish identity but also highly desirable to further divide the native population of Palestine along sectarian, tribal and ethnic lines for the establishment of an effective regime of control and domination (Lustick 1980: 133-135). In fact, the number of recognized religious communities which are legally entitled to run their own religious courts, has soared from 11 to 14 under Israeli rule. Among these newly recognized communities, the case of Druze community is particularly indicative of the Israeli state's exclusionary purposes in its preservation and modification of the old *millet* system. As Ben-Gurion once put it so eloquently, the main objective of the creation of Druze religious courts was to "foster among the Druze an awareness that they are a separate community vis-à-vis the Muslim community" (Firro 1999: 94). In the final analysis, the old *millet* system was utilized by the Israeli state not only to guarantee the homogeneity of its Jewish population, but also to prevent the Druze, Christian and Muslim Arab communities from forming an overarching Arab or Palestinian identity by officially discouraging mixed marriages between their members.

At the time of its independence, like Israel, Egypt, too, had inherited the very same *millet* system from the Ottomans and the British in which the government recognized the jurisdiction of fifteen ethno-religious communities<sup>9</sup> in the field of

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<sup>9</sup> These communities are: the Muslims, the Copts, both Orthodox and Catholic, the Melkites, the Greek Orthodox, the Maronites, the Armenian Gregorians, the Armenian Catholics, the Syrian Orthodox, the Syrian Catholic, the Chaldeans, the Roman Catholics, the Anglican Protestants, the Karaite Jews and the Rabbanite Jews.

personal status. With the passage of Law No. 462 in September 1955, however, the Egyptian government took a radical step towards institutional unification, and drastically lowered plurality of its personal status system. The new law abolished all communal courts including the courts of the Muslim community and transferred their jurisdiction to national courts where civil judges were now put in charge of applying the religious laws of parties in matters of personal status (Abécassis and Le Gall-Kazazian 1992). Yet the institutional reform was not accompanied by normative reform that would unify the laws of various communities under a common civil code which could be uniformly applied to all Egyptian subjects irrespective of their religious affiliations.

The reason for the abstention of the Nasserite regime from normative reform is that it was primarily moved by such motives as the wish to increase the efficiency of its central administration and reinstate the sovereignty of the Egyptian state by terminating non-state jurisdictions, rather than such ideological considerations as secularizing the public sphere or redefining the provisions of membership in the political community. In fact, concerns of bureaucratic rationality and sovereignty were so central to the process that the memorandum explaining the motives for the promulgation of Law No. 462 read more like a Weberian manifesto than a document prepared by a military government (Hajjar 1956; Safran 1958).

Although it was not explicitly stated in the memorandum for obvious reasons, another objective of Law No. 462 was to subjugate the Egyptian *ulama* and bring al-Azhar under the firm control of the government (Crecelius 1966: 35). In fact, by abolition of *Shari'a* courts, the government was able not only to strip the members of *ulama* of their traditional privileges, but also to “break the independent political power of Islamic institutions so it could use them for its own [political] purposes” (Crecelius 1980: 65). Since government did not directly intervene in religious laws of communities by means of normative reform, the opposition to its measures mainly came from a relatively small group whose vital interests were endangered by the abolition of communal courts. Most notable among those who opposed Law No. 462 were members of *ulama* and leaders of Christian communities who lost their traditional privileges and status. However, the Egyptian government successfully neutralized the opposition by co-opting religious leaders who in turn helped the government carry on its program uninterrupted by publicly throwing their support behind the regime. Thus, in the eyes of the Nasserite regime, there simply was no need for normative reform. Not only did it lack ideological motivation and commitment to undertake such a costly and troublesome process but also the need for it never occurred as institutional

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unification achieved through Law No. 462 was deemed sufficient to attain the regime's initial political and bureaucratic goals.

India also inherited a similar model of personal status by the time of its independence in 1947. However, in terms of the form and degree of its plurality, the Indian system was already at the point where Egypt ended up after its reforms in 1955. In other words, thanks to British colonial rule, secular Indian judges at the national courts were already applying the personal laws of various religious communities<sup>10</sup> in matters of family law as of 1947. Yet, especially in the aftermath of partition, the persistence of colonial institutions of personal law was considered a serious impediment to the achievement of national unity by the leaders of independent India. National unity, Gandhi and Nehru believed, was to be achieved only through the establishment of a secular state (Galanter and Krishnan 2000). In such a state, they envisioned, communal and sectarian differences had to be wiped out and the people of India had to learn to think of themselves, first and foremost, as members of a composite nation, not as members of a particular religious group or caste. In this regard, the application of different bodies of law to citizens with different ethnic and religious backgrounds was simply not helping the cause of national unity. Hence, the next logical step for the new government was to end the normative plurality of its field of personal status by enacting a UCC. That desire of the founding fathers was embodied in Article 44 of the 1950 Constitution which stipulated that "the state shall endeavor to secure for the citizens a uniform civil

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<sup>10</sup> The laws of following communities were applied in personal status matters of their members by the courts of British India: Hindus, Muslims, Christians, Jews and Parsis. Sikhs, Jains and Buddhist can be also added to this list. Yet, the issue of whether these communities had historically their own religious precepts and norms that stood as independent legal systems in their own right is a matter of great controversy and debate in the literature (Goswami 1994; Jain 2004; Kharak 1998; Mitra 1913,49-82; Singh 1995). Nonetheless, it must be also remembered that during the colonial period, the laws of these communities were usually accommodated and applied as part of the customary law and usage in accordance with the rulings of the Privy Council in London and several high courts in India. Moreover, some of these communities even came close to being recognized as independent legal communities and granted certain privileges. In this respect, the 1909 Anand Marriage Act, which legally recognized a particular form of marriage that had long been exercised among the Sikhs, and the earlier Punjab Laws Act IV (1872), which had granted formal recognition to customary laws of Punjabi communities, including that of Sikhs, are particularly worth mention.

code throughout the territory of India.”

However, today, nearly six decades after the promulgation of the constitution, India still does not have such a common code applicable to all citizens irrespective of their religion. This is because Indian leaders have not been able to overcome the opposition of religious minorities to the idea of a common civil code (especially the Muslim community), and unify the law once and for all. Instead, they have carried out a limited version of normative reform that they originally planned by bringing Hindus, Sikhs, Jains and Buddhists under the purview of a single territorial law with a hope that it would encourage other communities to follow the course so that one day the entire country could be brought under the purview of a UCC. Even though the resultant Hindu Code Bill (HCB) reform of 1955-56 significantly reduced India's degree of plurality, it was still far from satisfying the ideological expectations of the secular regime as it was still a communal legislation in its essence. For instance, under the HCB it was not possible to solemnize a marriage between a 'Hindu', as defined by law, and a non-Hindu.<sup>11</sup> That is to say, the law was not really serving the regime's secular or inclusionary objectives. Therefore, the problem before the government was that if India was to be truly a secular and democratic nation, then it had to allow interfaith marriages and provide citizens with an alternative civil code of marriage, divorce, and succession, at least in the interim. In the end, all these considerations led the government to enact the Special Marriage Act (SMA) in May 1954 while the HCB was already under consideration in the parliament (Menski 2001). Yet, the question remains whether the availability of the 1954 SMA and other secular remedies (*e.g.*, Sections 125-128 of the CrPC of 1973) have really provided Indian citizens with a protection against the encroachments of communal laws; and more importantly whether Indian citizens who were presented with these so-called secular alternatives were any better off than citizens of Israel and Egypt who were forcefully subjected to laws of their communities without an alternative like the 1954 SMA of India. The next section will answer these questions, while shedding light upon the impact of personal status laws on human rights in these three countries.

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<sup>11</sup> Persons professing Hinduism, Sikhism, Jainism, and Buddhism were declared to be 'Hindus' for the purposes of the HCB. In subsequent amendments, the definition of 'Hindu' was further expanded to include any person who was not a Muslim, Christian, Jew or Parsi by religion (Elst 2002).

## Impact of Personal Status Systems on Individual Rights and Liberties

It would plainly be wrong if matters of personal status were merely analyzed from an angle of judicial consolidation or nation-building, as they are intimately related to the rights and freedoms of the individuals who live under such systems. In other words, questions of who can marry whom or whether one could obtain a divorce are not just questions of identity or ‘border stones’ demarcating communal boundaries. For a Coptic Orthodox woman who needs to change her denomination to be able to divorce her husband in Egypt, for a Russian Jew forbidden to marry within Israel because not considered a ‘proper’ Jew by the rabbinical authorities, or a Muslim woman in India who is stripped of her legal entitlements to maintenance by an unholy alliance between self-proclaimed leaders of her community and the government, these questions are of utmost significance, as they often turn the lives of millions of people upside down and cause years of suffering and tragedy.

Regardless of their form or degree pluralistic personal status systems may be said to be invariably detrimental to the rights and freedoms of individuals who are subject to their jurisdiction. This is because personal status systems institutionalize the discriminatory patriarchal structures and gender inequalities of major religious traditions by giving them formal recognition and state-sanctioned backing. Particularly, in countries where citizens are forcefully subjected to the jurisdiction of religious courts and norms without their clear consent, and where no alternative civil or secular procedures are made available for citizens who do not want to make use of the religious channel, the impact of formal plurality in personal status on rights and freedoms of citizens are usually reported to be even more severe.

The impact of personal status laws on some groups tend to be much harsher. These usually include women, children, religious dissidents, secular individuals, and people who do not belong to a ‘recognized’ community (*e.g.*, the Baha’i in Egypt or Protestants in Israel). For example, in the case of women’s rights, many religious traditions discriminate against women by explicitly favoring men in familial matters such as marriage, divorce or inheritance. Under the Islamic law in Israel, Egypt and India, Muslim women’s right to divorce is severely truncated vis-à-vis Muslim men who have a relatively easier access to divorce. The situation is no different for Jewish women who need to bribe or beg their husbands to receive a divorce writ (*get*) to be formally released from the bond of marriage or for the Hindu women who have been traditionally denied an equal share in the allocation of joint family property.

As they exercise their jurisdiction, communal courts also function as status-conferring institutions that determine the rights and disabilities of the majority of the citizens who are subject to their purview. In personal status systems, an individual's religious affiliation is more than a matter of personal conviction, but is rather an issue of public law, as it singlehandedly determines what set of norms should apply to his particular case. In this regard, authorities who are in charge of communal laws first need to determine what community a person belongs to. This often leads to the problem of defining who is a Jew; who is a Muslim; who is a Hindu and so forth, as authorities often need to investigate whether people truly belong to the community they say they belong to on the basis of religious law. For example in Israel, rabbinical authorities refuse to marry individuals whose Jewishness according to halachic criteria is in question. Given the fact that there is no civil marriage in Israel, rabbinical authorities' refusal unmistakably means that these individuals will be permanently banned from marriage in the country. In fact, the problem has recently reached worrisome levels. The number of Israeli Jews who are denied a right to marry and establish a family is reported to be well over 300,000 (Rosenblum and Tal 2004: 5).

The failure or unwillingness of the state to protect the rights and freedoms of individual citizens against the encroachment of communal authorities in many countries have led individuals to take matters into their own hands and attempt to bring about desired changes within the system through various means. One of the tactics frequently used by individuals to navigate through the maze of personal law is known as forum-shopping.<sup>12</sup> Forum-shopping usually occurs in pluralistic legal systems in which there are multiple normative orderings with parallel jurisdictions. In such systems, litigants alter their strategies accordingly and tend to move their cases from one jurisdiction to another in pursuit of legal gains by exploiting their inherent inconsistencies and loopholes of pluralistic jurisdictions. Among the cases analyzed in this paper, forum-shopping is most visible in Egypt, where Christians frequently convert to Islam or migrate between different churches in order to escape disabilities imposed upon their rights by their own communities. For example, members of churches which do not allow divorce, may migrate to another denomination which permits divorce and remarriage in the church. Similarly, people have often exploited a loophole left by Law No. 462 of 1955.

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<sup>12</sup> Forum shopping can be briefly defined as “a litigant's attempt to have his action tried in a particular court” of his choice where he thinks “he will receive the most favorable judgment” (Black et al. 1979: 590).

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According to the law, non-Muslim couples who belong to a different sect (*ta'ifa*) and rite (*milla*) are subject to Islamic law.<sup>13</sup> This has encouraged non-Muslim litigants who want to divorce their spouses but were unable to do so under their communal laws to move to another church other than their spouses' so that they can obtain a divorce under Islamic law, which has a more liberal stance on divorce than some Christian communities.

Some individuals and groups also respond to violations of their rights by forming hermeneutic or interpretative communities that challenge the officially-sanctioned restrictive and discriminatory interpretations of religious precepts, and offer their own 'progressive' or 'deviant' interpretations in the hope of advancing their rights and reforming the communal structures from within. Groups seeking to alter communal practices employ a great variety of tactics. But hermeneutic communities especially resort to moderate means to induce desired changes through reform from within. In order to get the conservative communal authorities to agree to reform, they also seek the support of external actors (e.g., government representatives, judiciary, politicians and intellectuals), build coalitions with like-minded groups, and lobby for judicial and legislative interventions in communal practices.

Such groups are best exemplified by women's organizations in Egypt, Israel and India that challenge the hermeneutic monopoly of religious institutions and offer alternative women-friendly reinterpretations of religious norms in order to advance their rights to divorce, maintenance and inheritance. As mentioned above, in doing so such organizations could resort to a range of tactics from seeking intervention of judicial and legislative authorities to building coalitions to change policy and influence public opinion. The particular strategy or tactic that a hermeneutic group eventually adopts is usually determined by a number of factors including the strategic objectives of the group, the political and legal culture of the country, institutional constraints, opportunities, and the existence of a broader support structure (i.e., allies, financial and legal resources, etc.) or lack thereof.

For a number of reasons, legislative tactics seem to be heavily favored by Egyptian women's organizations, which ran a very successful grassroots campaign from the mid-1980s until the enactment of Law No. 1 in 2000 (the so-called *Khul* Law) which expanded Muslim women's right to divorce in Egypt. Apparently,

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<sup>13</sup> Although Law No. 462 of 1955 was abrogated and replaced by Law No. 1 of 2000, this still holds true today under the Egyptian case law.

Egyptian women's organizations drew very important lessons from the failure of the 1979 Jihan's Law (No.44) that attempted to expand their rights through unpopular top-down processes (Hatem 1992). The important lesson taken by women was that, as evidenced in the Egyptian Supreme Constitutional Court's 1985 ruling, which struck down the 1979 Law as unconstitutional, a solely liberal or secular approach to personal status was likely to backfire and do more harm than good to their cause. Thus, any change in the personal status laws had to be firmly rooted in the historical sources and tradition of *Shari'a*. Indeed, for the next two decades, this is what the Egyptian women's organizations did. They adopted the "strategy of engaging religious discourse, based on the women's reading of their [own] rights under the principles of *Shari'a*" (Singerman 2005: 161). In doing this, they successfully reinvented the Islamic tradition and expanded the scope of their rights after the discovery of a lesser known *hadith*, which eventually opened the door to the 2000 *Khul* Law (Sonneveld 2007).

Another tactic most commonly employed by women's organizations is legal mobilization, or instrumental use of the courts to challenge the legitimacy of patriarchal norms, raise awareness within the community, and lay the groundwork for long-term institutional changes from within using the threat of external judicial intervention. India has been a fertile ground for this type of legal work with its vigorous tradition of judicial activism and public interest litigation (Desai and Muralidhar 2000). In fact, since the 1980s the women's rights organizations have increasingly resorted to this strategy, and with the help of some sympathetic judges have pushed for some important changes in the personal laws of the country. Especially, in the aftermath of the infamous 1986 Muslim Women (Protection of Rights on Divorce) Act, women's organizations launched a judicial campaign through which they aimed to defeat the ill-famed legislation's minimalist interpretation at courts that could further attenuate Muslim women's right to post-marital maintenance. Their campaign reached its culmination in 2001 with the Indian Supreme Court's *Danial Latifi* case in which the court overruled the restrictive interpretations of the legislation while upholding an expansionist interpretations that eventually extended the Muslim women's right to postnuptial maintenance beyond the religiously-sanctioned *iddat* period (Subramanian 2005).

As they strive for legislative and legal changes in personal status systems, hermeneutic communities often reach out to other groups who share a similar sense of deprivation and victimization, and build coalitions with them to fight against the oppression of personal status laws and institutions. These coalitions, which often take a cross-communal form, include a large variety of human rights

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organizations from different religious, sectarian, ethnic and ideological backgrounds. This trend has been particularly visible among the Israeli women's and civil rights groups which have come together to build a united front against patriarchal and religious oppression by transcending their communal boundaries. An example of these successful alliances is ICAR (International Coalition for *Agunah* Rights) that brings together 27 women's organizations, from North America and Israel in search of a solution to the problem of *agunot*<sup>14</sup> (anchored women, plural of *agunah*). ICAR is a diverse array of organizations that includes women's organizations from Orthodox, Conservative and Reform streams as well as representatives of secular women's groups. In recent years ICAR has devoted a considerable part of its efforts to influence the process through which the *dayanim* (religious judges, plural of *dayan*) are appointed to the Israeli rabbinical courts. In fact, in December 2002, after an energetic lobbying campaign by ICAR members, Sharon Shenhav, an ICAR attorney, was successfully elected as one of two representatives of the Israel Bar Association to the ten-person commission that appoints rabbinical court judges (Shenhav 2004).<sup>15</sup> Even though according to the law, only Orthodox Jewish men who are specialized in *Halakhah* can be appointed as *dayanim*, during her two consecutive terms on the nomination committee Shenhav had worked hard to influence the process of selection, by making sure that only those candidates who were familiar with the problems of women under the religious law and willing to work around these problems, got appointed to the courts.<sup>16</sup>

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<sup>14</sup> A woman denied a *get* (divorce writ) by her husband is technically called *mesurevet get* in Jewish law, yet the term *agunah* is much more commonly used. An *agunah* cannot get married to another man or have a child with a man other than her husband until her *get* is properly issued. Otherwise, her relationship will be deemed adulterous and her children will be stigmatized as *mamzerim* (a Biblical term referring to the offspring of such relationships and subsequent generations) whose offspring will not be allowed to marry other Jews for ten generations. The Ministry of Interior Affairs maintains a list of certified bastards or *mamzerim* in Israel. As of 2004, the list contained the names of 92 Israeli citizens (Rosenblum and Tal 2004: 39). For further information on legal consequences of bastardy in Israel, see Gross (2001) and Feldblum (1997-1998).

<sup>15</sup> Ms. Shenhav was reelected for a second term in December 2005 which ended in January 2009.

<sup>16</sup> Personal interview with Sharon Shenhav (Jerusalem, January 2005; New York, April 2010)

Another successful example of such coalitions is the Working Group for Equality in Personal Status Issues, an alliance of various civil rights movements and women's groups representing Muslims, Jews and Christians in Israel. The Working Group was especially instrumental in the passage of the Law of Family Courts Amendment Act (No. 5) of 2001, which equated the legal status of Muslim and Christian women to that of Jewish and Druze women by granting them "the option of recourse in maintenance suits - as well as in all other matters of personal status, except for marriages and divorces - to the new civil family courts" (Shahar 2006: 130).

Nonetheless, some hermeneutic communities adopt more subtle tactics. For example, Kolech, an Israeli Orthodox women's organization that works with other feminist organizations to improve the status of women in Jewish law, embraces innovative methods to change the way *dayanim* interpret the *Halakhah*. Apart from organizing meetings in which both the representatives of women's organizations and *dayanim* participate, they also approach the wives of *dayanim* with a hope that they could influence the thinking of their husbands and help them adopt a more sympathetic stance towards the problems of Jewish women.<sup>17</sup> Like Kolech, many other religious groups, recognizing the urgency of problems people suffer under the personal status systems have begun to offer 'religiously permissible' solutions, some of which are worth mention: prenuptial agreements, *kiddushei ta'ut* (annulment due to a defect or erroneous assumption), and *hafka'at kiddushin* (annulment on technical grounds). Even though they are used to a certain extent among various Jewish groups in Israel, none of them has yet garnered the support of religious authorities and won legal recognition.<sup>18</sup>

Although hermeneutic communities usually adopt moderate means and strive for limited changes from within, some of them may become gradually marginalized and adopt a more radical agenda by demanding complete abolition of pluralistic personal status systems. As evidenced by many examples, as traditional institutions of personal law increasingly fail to respond to demands for change, some hermeneutic groups cease to use mainstream channels of personal status and gradually evolve into 'self-ruling' communities, by setting up their own judicial

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<sup>17</sup> Personal interview with Drorit Rosenfeld (Jerusalem, January 2005)

<sup>18</sup> Phone interview with Dr. Hannah Kehat, former chairwoman of Kolech (New York, April 2010)

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bodies that apply their 'own' version of the law to the members of their self-proclaimed 'communities'.

Self-ruling communities are best epitomized by such secular associations as the New Family in Israel that offers an alternative non-religious mode of marriage and divorce to Jews who do not want to be subject to the jurisdiction of rabbinical authorities, or by such religious organizations as the All India Muslim Personal Law Board (AIMPLB), which, after long years of dissatisfaction with the particular version of *Shari'a* applied by the Indian courts, decided to set up an alternative network of Islamic courts (*Darul Qazas*) and apply its own version of Islamic law in the field of personal status (Mahmood 2001). Governments' responses to the emergence of these alternative bodies of law and justice vary widely from one case to another. For instance, the marriage certificates or divorce 'decrees' issued by the New Family organization in Israel do not have any official standing vis-à-vis the state's legal system, while in India both the government and courts tend to tolerate *Darul Qazas* and even recognize some of their decisions in accordance with the provisions of the 1996 Arbitration Act (Khan 2005; Thomas 2006).

In the final analysis, however, the rise of non-state normative orderings in an already pluralistically-organized legal system can be viewed as a failure of the central administration to regulate the plurality of its personal status field. Moreover, the rise of self-ruling communities would also undermine the authority of central government by directly challenging the theological and political legitimacy of its juridical control over the field of personal status. The same can be also said for hermeneutic communities. When they build cross-communal coalitions or offer deviant interpretations of state-sponsored religious norms, these communities challenge not only the authority of communal norms and institutions, but also the state and its value system that upheld a 'discriminatory' system of personal status in the first place. In this regard, one can argue that in pluralistic societies the field of human rights functions just as another site of resistance where boundaries of political community and hegemonic meta-narratives of gender and subjectivity are continuously contested and redefined by various groups and individuals who interact with the religious norms and institutions on a daily basis.

Yet, the field of human rights also functions as a testing ground where one can observe whether governments have actually attained any of the goals which originally led them to intervene in legally pluralistic structures through means of institutional, normative or substantive reform. For example, the original purpose

of the Israeli government in maintaining the old *millet* system was the preservation and homogenization of the Israeli-Jewish identity. Given the fact that the existing personal status system has caused a serious state-society crisis and profound ideological divisions in the country and further fragmented the Jewish majority by dividing them into two groups as marriageable and unmarried Jews, one can argue that the Israeli *millet* system has, encountered serious challenges arising from its goal of homogenizing and unifying the Israeli Jewish population.

Similarly, the goal of the Nasserite regime in 1955 was to rationalize its legal system and break down the independent political power of the religious authorities. However, the exploitation of the current system of personal status by religious activists to discredit the regime and intimidate secularist forces in Egypt (as shown by the infamous Abu Zayd case) and the continuing use of such tactics as forum-shopping by individuals in pursuit of legal gains have shown that the half-baked reform of 1955 has only half succeeded in its goals (Najjar 2000; Shaham 2006). Likewise, the *Shah Bano* case of 1985 and the ensuing events demonstrated that the Indian leaders have, to a great extent, failed to establish a truly inclusionary and secular regime in which an individual's religious conviction or lack thereof would play no role in determining her rights and freedoms. Considering the rising number *Shariat* courts run by Islamic groups as well as the increasing communal violence across the country it becomes crystal clear that India is still light years away from the secular, democratic society that its founding fathers envisioned.

### Conclusion: How to Integrate Universal Human Rights Standards into Customary and Religious Legal Systems?

As noted earlier, all postcolonial nations responded to the challenges of legal pluralism and attempted to regulate their pluralistic structures in accordance with their ideological orientations and regime choices. Interactions between the central authorities and societal forces opposing the state's interventions in familial and religious affairs have led to rise of differing forms and degrees of personal status in each country. Yet, the current study has shown that, regardless of their form or degree, all personal status systems have impacted on the rights and freedoms of individuals in the same way. In other words, as far as the effect of personal status regimes on human rights is concerned, there has not been much difference between high and low-degree plurality, nor for that matter between an exclusionary/ theocratically-oriented regime and an inclusionary/secular one, as exemplified by the cases of Israel and India.

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However, this should not come as a surprise, since as yet no society seems to have found an answer to the questions of whose rights should prevail if the rights of individuals and communities are in conflict; or to what extent a democratic regime should tolerate communal norms and institutions that exercise illiberal sanctions and restrictions upon their members; or when the state needs to intervene in order to save a citizen from the oppression of her community. In search of an answer to these question, many scholars, from Gutmann (2003), Shachar (2001), Rawls (1999), Kukathas (1992, 1998), Benhabib (2002), Young (2000) and Kymlicka (1995, 1996) to Barzilai (2003, 2004) have offered their own prescriptions and emphasized the importance of individuals' freedom of association and right to exit from their parochial communities. In plain words, they have argued that, if international human rights standards are to prevail, citizens must be completely free to leave the communal track and transfer their disputes to civil courts at will, especially when there is a direct and imminent threat by communal norms and institutions to the constitutionally protected rights and freedoms of individuals.

Yet, like Kukathas (1992), I am of the opinion that an individual's right to exit is usually a hollow right, which exists merely on paper. It can be meaningful only if the community in question grants such a freedom willingly to its individual members and, more importantly, if there is a larger society outside which embraces liberal values and is willing to welcome the person after she has deserted her own cultural community. Unfortunately, individuals are usually not allowed to make their own decisions freely, especially when they dissent from the community's line of thinking; and even when they are courageous enough to raise their voice against the community, they often do not find a broader society embracing liberal values and waiting to welcome and protect them against the possible retaliations of their cultural communities. This is what happened to the seventy-five year old *Shah Bano* when she decided step outside her communal boundary to make use of the so-called secular remedies guaranteed by the Indian state (Engineer 1987; Hussain 1992), and this is what could possibly happen to a Palestinian woman, should she ever dare to leave her own religious community and seek refuge in the larger Jewish polity in Israel.

This is a dire picture. But there is still much to be hopeful about. There is a revolution taking place in the personal status systems of many postcolonial nations. The revolution is spearheaded by hermeneutic communities which offer their deviant interpretations of officially-sanctioned religious norms and precepts in the hope of inducing some change from within. The change introduced through such

means, as noted by the Human Rights Watch in its critique of Law No. 1 of 2000, which was passed as a result of Egyptian women's organizations' two-decade long successful campaign (Deif 2004), may fall short of the so-called universal and secular standards of human rights. Furthermore, the pace of change and the outcome may be criticized for being too slow and insufficient. But these 'limited' and 'gradual' changes are more likely to affect individuals' rights in a positive direction than the so-called secular remedies, which are often forcefully imposed upon non-western societies through top-down processes. Moreover, top-down secular solutions could cause more harm than good by diminishing chances of ever upholding universal principles of human rights in religiously-oriented societies. On the other hand, hermeneutic communities are better positioned to challenge the monopoly of religious authorities to interpret the law and contest the hegemonic narratives of gender and subjectivity by redefining the roles of various groups (i.e. women, children etc.) as rights-bearing individuals in the familial and public space. In other words, reforms spearheaded by hermeneutic groups would come about as a result of a grand bargaining between progressive and conservative forces in each society. Thus, they would better reflect the socio-legal and political realities of non-western societies; and be more likely to be readily adopted by the majority of people.

With this in mind, the main recommendation for the international development agencies and practitioners is to identify these hermeneutic communities and help them build necessary capacity to induce internal reform. Situations vary from country to country or even from one community to another within the same country, and therefore there are no generic templates to be adopted. But a good entry point is always a thorough differential diagnosis through which the existing human rights issues and their underlying causes can be identified in each and every communal system. Then, the next step should involve identification, categorization and mapping of major state and non-state actors and their stake in the communal legal systems. At this stage various rapid assessment tools can be utilized by practitioners to identify hermeneutic communities and determine their level of expertise, genealogy, allies, resources, strengths, weaknesses and needs. Once the due diligence process is complete, then potential partners should be shortlisted and offered customized solutions and capacity-building opportunities. These should include legal, technical, financial assistance but the level of engagement with hermeneutic communities is of critical importance. Excessive engagement or association with international agencies or NGOs might harm the status of hermeneutic communities and alienate them in the eyes of local populations. What makes these groups relatively successful and acceptable in their societies is the

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authenticity of their message and structure. Thus, international agencies should be extra careful not to harm the social standing of these groups and simply make them look as agents or proxies of ‘western organizations’.

Overall, a multipronged strategy has to be developed to induce internal reform in customary legal systems. Identification and support of hermeneutic communities is important but only one of the many possible strategies to be pursued. Although bottom-up or grassroots strategies often seem more promising, international agencies must still continue pressuring governments to meet their obligations under various human rights instruments (*e.g.*, CEDAW, Maputo Protocol) to formally integrate universal rights standards into domestic legal systems. Simultaneously, civil society organizations and governments should be encouraged to educate individuals about their rights and liberties guaranteed by the formal legal system. Many countries have secular legislation setting a minimum age for marriage, and prohibiting bigamy or divorce against the consent of the wife, but traditional and religious courts continue to ignore such restrictions set upon their jurisdiction by secular legislation. In order to prevent that, people should be made aware of their rights, and be encouraged to monitor and pressurize traditional and religious authorities to abide by limitations placed upon them by secular legislation.

At the same time, people should be educated, perhaps by the representatives of hermeneutic communities, about their rights that already exist under the traditional, religious and formal legal systems. For example, Muslim women can normally prohibit their husbands from taking a second wife or exercise a right to self-divorce by inserting provisions to those effects into their marital contracts. But, under societal and patriarchal pressure, most are discouraged from exercising their rights. They often fear that they will be stigmatized as ‘loose’ women if they exercise their ‘God-given’ rights, as husbands fear that their peers will question their ‘manhood’ if they let women insert such provisions into the marital contract. In order to fight against these stereotypes, various legal literacy and awareness campaigns can be organized through media or by directly talking to religious leaders, marriage registrars, lawyers and judges. Particularly, religious leaders’ public support through writings and sermons in favor of exercising these rights can be very helpful for inducing behavioral change. That is to say, before inventing new rights, international agencies and practitioners should make sure that the rights that already exist within the framework of traditional, religious or formal legal systems are being fully utilized.

When I asked a Muslim women’s rights activist in New Delhi in 2005 what the top

five problems the women suffered most from were, she said “poverty, poverty, poverty, poverty and then unequal personal laws which discriminate against women”. Therefore, the practitioner should not lose perspective, and should be constantly reminded that the issue of integrating universal human rights standards into religious and traditional systems is simply a matter of empowerment of marginalized or underserved populations such as women, children and minorities. Hence, legal literacy and awareness programs targeting marginalized populations should always be integrated into various poverty eradication, public health, education and micro-lending programs. It has been repeatedly demonstrated through successful micro-credit projects in South Asia (e.g., BRAC, Grameen Bank) that such empowerment programs can help marginalized groups become more aware of their rights and be more assertive in their dealings with traditional and patriarchal institutions (Shehabuddin 2008).

Lastly, where it is possible, international actors should form partnerships with hermeneutic groups to encourage marginalized groups’ representation and inclusion in the legal system. A woman may be forbidden to become a judge in a *Shari’a* or rabbinical court, but, as the successful example of Sharon Shenhav in Israel shows, women may be part of the committee that nominates the religious judges. Moreover, in countries where religious law is applied by civil family courts, women must be represented on the bench. As frequently observed, female judges tend to interpret and apply the same religious norms much more liberally than male judges. Thus, civil society organizations should press governments to appoint more female and minority judges to family courts. In fact, this may be a better option in the drive to overcome some of the shortcomings of religious and communal norms without engaging in lengthy legislative or judicial battles to reform discriminatory personal status laws.

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