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Critical Junctures, Religion, and Personal Status Regulations in Israel and India

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The article aims at advancing our understanding of critical junctures in the evolution of religious/secular regulations, referring to those moments in history when one particular arrangement is adopted among several alternatives, establishing an institutional trajectory that is resistant to change in the following years. It traces the regulation of personal status laws in Israel and India, which, despite attempts by political leaders at time of independence to defer clear choices regarding the role of religious law, became generally entrenched in later decades. Based on the Israeli and Indian cases, and in contrast with common approaches, the article demonstrates how decisions made by influential political actors during the foundational stage of the state appear difficult to reform, regardless of the content of these decisions—whether they introduce a radical change or maintain existing practices—or the level of decision making—whether constitutional or ordinary parliamentary legislation.

I. INTRODUCTION

In March 2010, following a two-year political battle, the Israeli Knesset (Israeli parliament) passed the Spousal Covenant for Persons Having No Religious Affiliation Act. The bill was initiated by Israel Beiteinu, the third largest party in the Knesset, to legalize civil marriage in Israel and, more particularly, to resolve the problem of more than 300,000 immigrants from the former Soviet Union who cannot marry under the existing Israeli pluri-legal personal status system since they are defined by the state as "lacking a religion." During early stages of the legislation process, the bill was celebrated by many as a "revolutionary step in the history of legislation in Israel" and as a "first crack in the religious monopoly over personal status law" (Haaretz 2009, 1) established in 1953. However, eventually, the Spousal Covenant Act did not represent significant reform of Israeli marriage and divorce regulations. The final version of the bill allowed only couples who are *both* considered as nonmembers of any religion to register formally as couples and to have equal legal rights and obligations as a married couple. The parallel institution of family relations it created, termed "registration of couples," is also not entirely analogous to legal marriage as it is currently recognized by the religious

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establishment. For example, the legislation proposes that the state recognize the rights and duties of a registered couple (similar to those of a married couple) only eighteen months after they have formally registered as a couple (Section 13c).[1] Moreover, the new bill maintained the authority to define the couple's religious identity in the hands of Orthodox rabbinical authority and it did not allow for interfaith marriage. Critics of the bill estimated that the new law would be helpful for only seventy couples a year, less than 4 percent of all those currently unable to marry (Golan 2009; Zarchin 2010). Rather than introducing a genuine reform of Israel's religious personal status regulations, the new legislation demonstrated the persistence of the existing regulations, which were established six decades earlier.

Israel is not the only democracy where religious regulations that were formed during the early years of the state appeared resistant to change in the following decades. India is another case in which the pluri-legal structure of family laws, which was formalized during the first decade after independence, was difficult to reform despite growing criticism of its inegalitarian nature. While Israel and India differ in many respects (size, geopolitical conditions, culture, and social composition, to name just a few), both countries represent cases of path dependency in which the institutional trajectory in the area of personal status was established at critical historical junctures.

What makes a particular historical moment a "critical juncture" in the evolution of religious or secular regulations? In recent years, a growing number of social scientists have attempted to theorize the nature of critical junctures in institutional development. Critical junctures have been understood as moments in history when one particular institutional arrangement is adopted from among several alternatives. Such junctures are considered "critical" because once a particular option is selected, an institutional path dependence is generated and the institutional arrangements become increasingly resistant to change (Mahoney 2000; Pierson 2000; Page 2006; Capoccia and Kelemen 2007; Soifer 2009; Slater and Simmons 2010). Interestingly, however, none of these studies addressed critical junctures in the field of religious/secular regulations. Similarly, a growing number of works in the sociolegal research of religion rely on a path-dependency approach to explain variations in policies toward religion in modern democratic states. Some even utilize the terminology of "critical junctures" (Kuru 2007, 2009; Madeley 2008; Kuru and Stepan 2012). However, as I demonstrate below, the conception of critical junctures that has emerged in this literature is generally limited and undertheorized. The purpose of this article is to address this gap and to advance our understanding of the nature of critical junctures in the evolution of religious/secular regulations.

By tracing the regulatory path of the most controversial issues in the conflict over religion in Israel and India, namely, personal status laws, I argue that both cases deviate from the standard perception of critical junctures underpinning many historical, institutional, or constitutional accounts in the realm of religion. According to this common

1. Another example of the difference between "registration as couple" and state-recognized marriage is that in the case of death of one of the partners, such registration will be nullified (Section 10). This means that the status of the surviving spouse will become "single" rather than "widower/widow."

view, critical junctures generally represent a revolutionary moment of radical institutional change, resulting from an intentional victory of one of the competing sides in a fundamental ideological struggle over the public role of religion. Critical junctures are usually associated with moments of constitution writing, in which the new approach toward religion is entrenched in a formal constitution.[2] By contrast, in both Israel and India, if we, as Paul Pierson suggests, "go back and look" for the critical juncture that initiated their institutional paths in the area of personal status law (Pierson 2000, 264), these junctures are found in the period of democratic state building; yet, they are not associated with the process of constitution writing, do not represent moments of radical change in the existing regulations, and are not the products of intentional, one-sided ideological victories.

Based on parliamentary and constitutional debates, as well as minutes of internal party meetings, memoirs of political actors, and other primary and secondary materials, the analysis of the Israeli and Indian experience presented in this article suggests, first, that the foundational stage of the state is a critical historical moment during which the religious/secular character of state regulations is defined for later generations. Decisions made by political leaders during this moment of "new beginning" are difficult to alter, regardless of the content of these decisions—whether they introduced a radical change or maintained existing practices—and the level of decision making—whether on the constitutional level of "higher law making" or on the level of "normal law making" of parliamentary decision, or even informal arrangements. Second, this study reveals that in both Israel and India, an institutional path was created at the foundational stage of the state despite attempts made by the political leadership to defer clear and decisive choices regarding the role of religious law. In both cases, instead of formalizing a "critical juncture" in religion-state relations through written constitutional provisions, political actors preferred to transfer decisive choices in the conflict over the religious character of the state to the more flexible arena of ordinary politics by adopting ambiguous constitutional formulations or provisionary political compromises. Ironically, despite certain reforms in later years, the regulatory framework that was created in the early years of the state, and that was designed as a temporary arrangement based on short-term political/coalitional considerations, appears resistant to change.

A better understanding of the nature of critical junctures in the evolution of religion-state institutions is important not only for theoretical, but also for practical, reasons. Many democratizing states, particularly predominantly Muslim-majority states such as Egypt, Turkey, and Tunisia, are currently going or had most recently went through a process of constitution writing in which questions of religion play a central role. While this article recognizes the idiosyncratic elements in the history of Israel and India and does not suggest that their experience necessarily represents a model for other societies divided over religious identity issues, it does presume that a better understand-

2. Ahmed Kuru is one of the few who explicitly employs the term "critical junctures" in context of comparative institutional research of religion, but many other works in sociolegal scholarship of religion share a similar perception of critical junctures as revolutionary moments of constitutional change, or moments of victory for one side in an ideological struggle. See, for example, in Europe: Madeley and Enyedi (2003); in Turkey: Özbudun and Genckaya (2009) and Bali (2011); in Lebanon: Farha (2010); in India: Bhargava (2008), Jacobsohn (2003), and Acevedo (2012); in Indonesia: Hosen (2007); in Tunisia: Stepan (2001); in the United States: Wald and Calhoun-Brown (2006), among many others.

ing of the influence of constitutional provisions and parliamentary decisions on the evolution of religion-state relations would be constructive to contemporary debates, especially in Muslim democratizing states, where the issue of religious law, not only religious symbols, is at the heart of the debate.

In what follows, Section II first situates the evolution of personal status laws in Israel and India in the broader theoretical debate over the nature of critical junctures in comparative historical analysis and demonstrates how these case studies provide an opportunity to link together areas of research that are rarely discussed in tandem: the methodological scholarship on historical institutionalism, theoretical and empirical studies on constitutions and constitutional drafting, and sociolegal research on religion-state relations. Sections III and IV present a process-tracing analysis of the Israeli and Indian cases, respectively (George and Bennet 2005; Tarrow 2010). Section V concludes.

Before continuing, however, some preliminary remarks regarding the choice of case studies are warranted. Significant differences exist between Israel and India in terms of geographic size, population, and cultural and religious composition. Nevertheless, the great similarities between their internal political, legal, and social characteristics are conducive for comparative analysis (Galanter and Krishman 2000; Shankar 2002; Jacobsohn 2003; Barak-Erez 2009; Liviatan 2009). Both countries emerged from British rule at the end of the same decade—India in 1947 and Israel in 1948. Both adopted the common law tradition and based their political systems on the Westminster parliamentary model. Both countries experienced territorial partition at the time of independence. In both cases, elected representatives in the constituent assembly simultaneously served as members of the first parliament.[3] What is most relevant to this investigation is that in both cases, independence brought forth intense internal tensions between competing visions of the state and most particularly around issues related to the state's religious or secular identity. The question of personal laws, especially marriage and divorce, were at the center of these tensions. Although some gradual reforms have been introduced to the personal law systems in both India and Israel over the years, as Sections III and IV show, the regulatory framework established in the critical historical moment of state formation created an institutional path that was difficult to change. Both cases are thus conducive to advancing our understanding of critical junctures in the evolution of religion-state relations.

II. THE CRITICAL JUNCTURES DEBATE AND RELIGION-STATE RELATIONS

Causal explanations in historical institutionalism have commonly been presented in a dualist perspective of institutional development. According to this perspective, institutional development consists of relatively long and stable phases of path

3. In Israel, the constituent assembly, elected in 1949, designated itself as the first Knesset. From that point it maintained two roles, as both constituent assembly and ordinary legislature. In India, the elected constituent assembly, which began drafting the constitution in 1946, functioned after independence as the first Indian Parliament.

dependence followed by brief periods of institutional flux—termed critical junctures. During these critical junctures, one particular institutional arrangement is selected by political actors from a variety of alternative options and thus an institutional path is created (Mahoney 2000; Pierson 2000; Page 2006; Capoccia and Kelemen 2007). In recent years, a growing number of studies have attempted to theorize the nature and mechanisms of critical junctures and have analyzed path-dependency cases from a variety of areas, ranging from labor and welfare policy to democratization and regime change (Capoccia and Kelemen 2007; Soifer 2009; Slater and Simmons 2010). However, that theoretical discussion rarely referred to examples in the area of religious or secular regulations. The purpose of this section is to address this gap by situating the analysis of religious personal status regulations in Israel and India within the general debate on the nature of critical junctures. This contribution rests on the assumption that broadening the comparative framework to include a variety of cases not only contributes to existing debates on the nature of critical junctures, but also highlights features of critical junctures that have received limited theoretical attention in comparative institutional analysis. Most particularly, the analysis of critical junctures in the realm of religion-state relations is valuable in tackling three theoretical issues: (1) the question of contingency versus divergence as a defining feature of critical juncture, (2) the impact of antecedent institutional conditions on the outcomes of critical juncture, and (3) the role of formal written constitutions in setting institutional trajectories, compared with ordinary legislation or, in other words, the question of "higher law making" versus "normal law making" in determining an institutional path.

First, one of the ongoing debates on the definition of critical junctures revolves around the question of whether they should be understood in terms of divergence or contingency. Most studies of critical junctures tend to equate them with moments of significant change, or divergence, in which a new and different institutional trajectory is created (Collier and Collier 1991, 30; see also Abbot 2001, 241–60; Pierson 2004; Mahoney and Thelen 2009; Soifer 2009). Yet others contend that heightened contingency, that is, the potential for significant change, should be seen as the central trait of critical junctures. In other words, critical junctures are not necessarily defined by change, but by the possibility of change. Thus, some critical junctures may result only in re-equilibration of the already existing institutions and the entrenchment of the status quo (Capoccia and Kelerman 2007, 352). As Cappocia and Kelerman argue: "If an institution enters a critical juncture, in which several options are possible, the outcome may involve the restoration of the pre-critical juncture status-quo" (2007, 352).

In the area of religion-state relations, perhaps more than in other areas of state regulations, political leaders of newly independent and still-fragile polities may prefer to adopt a conservative, rather than a revolutionary, approach in order to stabilize the political system and achieve other, more urgent, national goals such as maintaining security and political stability, advancing economic development, or other special national projects (e.g., absorbing massive immigration in Israel). This was the case in India and Israel, where the constitutional drafters preferred to circumvent the inflammation of internal conflicts over the religion-state issue. In both countries, personal law regulations that were established after independence were not significantly different from the institutional arrangements that existed in the preindependence era. In Israel,

the first Knesset adopted the prestate Ottoman *Millet* system that recognized the legal autonomy of all religious traditions in personal status law. In India, the parliament enacted a reformed Hindu Code and preserved legal pluralism, which applied traditional personal law systems to different religious communities. Both cases, thus, challenge the equation of critical junctures and change and strengthen the perception of critical junctures as moments of institutional contingency and retrenchment, rather than institutional divergence.

The second point of theoretical disagreement on the nature of critical junctures concerns the degree to which antecedent conditions restrict the choices made by agents at particular critical junctures. On the one hand, critical junctures are viewed as moments of high contingency and extraordinary choice, in which "previous constraints on belief and action erode" (Katzenelson 2003, 277) and thus much of the literature examining critical junctures looks at "decisions by influential actors—political leaders, policy makers, bureaucrats, judges—and examine[s] how during a phase of institutional fluidity, they steer outcomes toward a new equilibrium" (Capoccia and Kelemen 2007, 354). On the other hand, some researchers believe that even in moments of critical juncture, political agents may be significantly constrained by antecedent conditions (e.g., Mahoney 2000; Pierson 2004; Soifer 2009). Slater and Simmons (2010), for example, developed the analysis of "critical antecedents," as factors or conditions that carry part of the causal explanation for the outcome of critical juncture (Slater and Simmons 2010, 908). In their words, "critical junctures share their causal significance once critical antecedents are brought into the analysis" (2010, 911).

The latter view is represented in Kuru's (2007) comparative analysis of religion-state relations in the United States, France, and Turkey, which suggests that the variation in state policies toward religion—whether assertive secularism such as in France and Turkey or passive secularism as in the United States—depended on the outcome of an ideological struggle at the state-building period between the two opposing approaches to religion during the secular state-building period. At this critical historical moment, he claims, "the secular state replaced the old types of state-religion regimes and left an ideological and institutional legacy that has persisted ever since" (Kuru 2007, 585). According to Kuru, the outcomes of the ideological struggle over the role of religion in the secular state depended on the institutional preconditions that existed prior to the critical period of state-building: "The absence or existence of an *ancien regime* that combines monarchy with hegemonic religion" was the determining factor that led to the dominance of either assertive or passive secularism in the three countries examined (2007, 584).

Unlike Kuru's emphasis on the decisive effect of preexisting structural conditions (such as the presence or absence of *ancien régime*) on outcomes of critical junctures, the Israeli and Indian cases suggest a more intricate understanding of "critical antecedents" and their influence on the outcomes of critical junctures.[4] In particular, these cases reveal varieties among two different types of institutional antecedent conditions that may

4. Clearly, one difference between this study and Kuru's is the scope of the analysis. This article focuses on a particular set of religious institutions, namely, personal law arrangements. Nevertheless, since personal laws stand at the heart of the conflict over the secular/religious character of the state, the analysis of their evolution provides an important general lesson regarding critical junctures in the religious realm.

constrain political choices: governmental institutions (e.g., the presence or absence of particular governmental structures, strong judiciaries, or entrenched constitutional rules) and legal traditions (e.g., personal law regulations during the colonial era). As demonstrated in the following sections, Israeli and Indian institutional constraints stemming from existing governmental structures had little effect on decisions concerning the religious character of the state. The existence or absence of *ancien régime*, which is crucial to Kuru's account, does not play an important role in explaining decisions made by Israeli or Indian political leaders concerning personal law regulations.

In the decade following independence, the governing political parties in both India and Israel enjoyed supermajorities in their parliament or in their constituent assembly[5] and thus theoretically could use this majoritarian power to advance regulations in accordance with their worldviews. Moreover, the early years of statehood were characterized by institutional fluidity—not the "institutional stickiness" (Pierson 2000) that emerged in following decades—in two additional respects: first, political choices during democratic state building were not limited by written constitutional rules, which were still being deliberated and drafted during this period (Lerner 2011). Second, judicial interventions, which would develop and deepen in later decades, were relatively less constraining during the formative stage of the state (Baxi 1999; Gavison, Kremnitzer, and Dotan 2000; Sathe 2002; Hirschl 2004).

Given a spectrum between inevitability and choice, both Israel and India made political decisions regarding personal law arrangements during state formation that seemed to stem from the choices of political agents rather than allowing these arrangements to be determined by the constraints of existing governmental institutions. Ironically, the choice made by these influential political actors at that formative stage was to avoid *decisive* choice in the conflict over religious state regulations such as in the area of personal laws. In both Israel and India, decisions concerning religious personal law were seen as provisionary and were grounded in the hope that more liberal regulations would be drafted in the future. Furthermore, based on short-term political compromises and sociological predictions regarding the future modernization and liberalization of their societies, political actors viewed the regulations they created as temporary arrangements. Such was the decision to include the Uniform Civil Code in a nonjusticiable section of the constitution. Likewise, the Israeli regulation in the 1953 Rabbinical Tribunals Act served as the backdrop to the nonadoption of a written constitution. As the following sections illustrate, advocates of these compromise regulations perceived them as temporary arrangements and did not foresee the way in which the arrangements would become entrenched. Indeed, the same political leaders later expressed regret regarding the choices they made during the foundational stage of their states.[6]

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5. In Israel, Mapai was the largest party in the constituent assembly/first Knesset, holding forty-six of the 120 seats. Over all, only sixteen members of the Knesset were representatives from religious parties. In India, the Congress Party enjoyed a large majority within the constituent assembly, holding 208 out of 296 seats even before partition. After the partition with Pakistan, the influence and power of the Congress Party increased. See Austin (1999).

6. A few months before his death in 1973, David Ben-Gurion expressed regret for supporting the Rabbinical Court Jurisdiction Law in 1953. He expressed this regret to Haim Cohn, the Supreme Court Justice. Cited in Strum (1995). See also note 38.

In contrast to the limited influence of governmental structures in Israel and India, the second type of institutional antecedent conditions—namely, preindependence legal regulations—had a more substantial impact on the outcome of critical decisions made about the regulation of personal law. Since the decision made by India's and Israel's leadership was to avoid radical change of existing religious institutions, the existing regulations, which were developed during the colonial period, did carry part of the causal explanation for the outcome of critical junctures in India and Israel. Since the political leadership preferred to avoid critical decisions and circumvent potentially explosive conflicts, maintaining the existing regulatory system seemed to be the easiest (temporary) solution. Moreover, the regulatory preconditions explain the difference between the types of legal pluralism maintained in Israel and in India. In Israel, personal law is applied in separate religious courts for the different religions as it had traditionally been under Ottoman *Millet* system. In contrast, India maintained the unified confessional system developed under British rule, in which personal laws of the various communities were applied by judges in civil courts (Sezgin 2010).

To be clear, the term "antecedent conditions" used in this discussion focuses on *institutional* preconditions, particularly governmental structure or existing regulations. The term excludes other preconditions that may affect political decisions at any historical moment, such as cultural or religious traditions (e.g., the heritage of a particular religion) or political preferences, interests, or struggles between particular groups (e.g., political pressures by minority religious groups such as Muslims in India or Orthodox Jews in Israel). Although explanations based on cultural heritage may risk conclusions along the lines of cultural determinism, political circumstances should not be regarded as mere institutional constraints because they describe the core contours of the political dispute to be decided.

The third question regarding the nature of critical juncture concerns whether or not a heightened level of decision making—constitutional rather than ordinary politics—is a defining characteristic of those historical moments in which state institutions are being shaped. Scholars of comparative politics have not yet systematically addressed this question, and even constitutional scholarship rests by and large on theoretical discussion of higher law versus ordinary law, yet refrains from empirically questioning whether critical junctures entail a heightened level of decision making—constitutional rather than ordinary legislation (Ackerman 1991; Waldron 1999; Bellamy 2007, to name just a few examples).[7]

Constitution making is viewed by most institutional historians as a classic critical juncture. The perception of constitutions and constitutional law as critical tools in shaping state institutions is shared by many studies of religion-state relations, which by and large view critical junctures in the evolution of democratic institutions in constitutional terms (Pierson 2000, 259; Capoccia and Kelemen 2007, 245).[8] Constitutions are expected to establish the supreme principles that guide legislative and democratic procedures at the level of ordinary politics. Similarly, the superiority of constitutions is presumably preserved through mechanisms of entrenchment; that is,

7. A rare exception to this rule is the Dixon and Ginsburg (2011). See also Lerner (2011).

8. Examples from studies of the US Constitution include Ackerman (1991) and Balkin and Levinson (2001).

their amendment requires special, more rigid procedures than those required by "normal law making" for ordinary legislation (Ackerman 1992; Levinson 1995). Scholars of religion-state relations pay particular attention to the establishment of constitutional arrangements in their analysis of religion's public role in democratic systems. Although rarely explicitly using the term "critical junctures," most studies tend to view the process of constitution writing as the moment at which the path of church-state relations is determined. Decisions made at the constitutional level are regarded as determining levels of separation or collaboration between religious demands and state institutions in democratic countries (see, e.g., Madeley and Enyedi 2003; Hosen 2007; Bhargava 2008; Hirschl 2010). New opportunities to write or rewrite constitutions are perceived by academics, as well as by political activists, as occasions for redefining the relationship between religion and the state. The prominent place of religious issues in recent constitutional debates in Israel, Turkey, Egypt, and Tunisia are only a few examples of this phenomenon (Lerner 2009; Özbudun and Genckaya 2009; Brown forthcoming; Marzouki forthcoming).

However, the presumption that long-term rigidity of religious/secular institutions has been the result of decisions made on the constitutional level of "higher law making" and thus might have been avoided if decisions had been made on the lower level of political "normal law making" may be challenged by empirical evidence from countries in which constitutional drafters attempted—intentionally—to evade the constitutional entrenchment of controversial choices regarding the religious identity of their state. This was the case in India and in Israel. The political leaders at the time of foundation preferred to avoid clear-cut decisions at the constitutional level and to defer these choices to the future by adopting ambiguous constitutional provisions (in the case of India), or by refraining from drafting a formal constitution altogether (in the case of Israel). Nevertheless, religious policies and institutions that evolved during the early years in these states have been resistant to change in the decades that followed.

The following two sections trace the evolution of personal status regulations in Israel and India, respectively, and the critical impact of choices made by their political leaders at the foundational stage of the state. Despite vast geopolitical, cultural, and socioeconomic differences between the countries, the analysis will demonstrate great similarities in the nature of critical junctures in the evolution of marriage and divorce regulations, which is the most controversial issue in the conflict over religion-state relations in both countries.

III. ISRAEL: CONSTITUTIONAL AVOIDANCE AND THE PERSISTING RELIGIOUS MONOPOLY ON MARRIAGE AND DIVORCE

The core structure of legal pluralism in Israeli personal status laws and the monopoly of religious courts on matters of marriage and divorce have been maintained in Israel for nearly six decades, since its formal establishment in the early years of the state. At independence in 1948, the Israeli Knesset decided to preserve the Ottoman *Millet* system and recognized the legal autonomy of all religious traditions in the area of

personal law.[9] Religious monopolies over marriage and divorce were maintained with respect to eleven recognized religions in Israel.[10] In one important respect, the application of the *Millet* system after independence differed from the way it operated under the British Mandate: Under British rules, rabbinical courts could apply Jewish law in personal status issues only to those who were officially registered as members of the Jewish religious community. However, the State of Israel ceased to maintain such official registration of communal membership. Consequentially, thousands of Jews who immigrated to Israel after 1948 were unable to marry or divorce.[11] Five years after independence, the Knesset was thus required to resolve this "regulative vacuum" (Knesset Records 1953, 1408–09) and proposed the Marriage and Divorce (Rabbinical Tribunals) Bill, later renamed the Jurisdiction of Rabbinical Tribunals (Marriage and Divorce) Bill.

During the Knesset debates on the proposed bill, representatives of religious parties claimed that a unified system of marriage and divorce dictated by Halachic rule would be essential in preserving unity among the Jewish people. Otherwise, they argued, religious Jews would not be able to marry the descendants of those who had married without a ceremony according to Halachic provisions.[12] As member of Hapoel Hamizrachi (Religious Zionists) stated: "I hereby call on the Members of Knesset, don't divide the people into two separate camps. There should not be two nations in Israel. . . . The original Israeli law . . . [traditional religious] law is the basis of Judaism and symbolizes our being a unified, special people."[13] In contrast, many in the secular-liberal camp argued against the proposed bill because the bill would eliminate civil marriage in Israel and entrust matters of personal status to the Rabbinical Authority. The Rabbinical Authority, it was argued during the debates, does not recognize gender equality and follows "medieval traditions."[14] Others opposed the tacit prohibition on interfaith marriage[15] and the infringement on the "freedom of

9. The *Millet* system was maintained under the British Mandate. Based on the Palestine Order in Council 1922, Paragraph 83 in Drayton, *Laws of Palestine*, vol. iii, 2587.

10. Today, Israel has recognized fourteen religions. Given the Jewish nature of the State of Israel, the "religion and state" debate is usually perceived in terms of a "synagogue and state" debate. For a revealing analysis of the interplay between the Arab-Jewish tension and the religious-secular conflict in Israel, see Karayanni (2007).

11. Israel's first Minister of Justice Pinchas Rozen claimed that this issue was problematic not only for the religious Jewish population but also for the secular Jews, since no civil regulations of marriage and divorce existed either. Government Meeting Minutes (1953, 25 August, 5).

12. For example, Moshe Una (Hapoel Hamizrahi): "Similarly to any other legislation, this law includes limitations on individual liberties, yet the larger and holy goal or national unity certainly justifies it." See also Knesset Records (1953, 1410, 1460, 1466–69).

13. Refael Yizhak, Knesset Records (1953, 1467). All translations from Hebrew in this article (including Knesset debates, government meeting minutes, and Mapai Party minutes) are by the author.

14. Beba Idelson (Mapai): "We should remember that we live in 1953 and not in the Middle Ages." Knesset Records (1953, 1460–61). See also Knesset Records (1953, 1454, 1464); Ada Maymon, Coalition Board Meetings (1953, 17 August).

15. David Bar-Rav-Hai (Mapai): "I may agree that [interfaith marriage] is an unwelcome phenomenon given the current conditions of the state of Israel, yet I cannot perceive in the 20th century a state that would prohibit such an option . . . it conflicts with the development of the world, with our connections with other societies, with mutual recognition agreements with other countries. I would have liked to see what the Knesset members would say if another state were to forbid the intermarriage of Jews and non-Jews by law" (Knesset Records 1953, 1458).

conscience the law would impose on the non-religious, who would be forced to act against their world view."[16]

Eventually, a majority of Knesset members, led by David Ben Gurion (Israel's first prime minister) and the Mapai Party (the leading party in the Knesset), voted for the 1953 Rabbinical Tribunals Act, which established that "matters of marriage and divorce of Jews in Israel, being nationals or residents of the state, shall be under the sole jurisdiction of the rabbinical tribunals" (Section 1) and that "marriage and divorces of Jews shall be held in accordance with religious law" (Section 2). The rabbinical courts have concurrent jurisdiction with the family civil courts in claims for maintenance and additional claims related to divorce (Section 4).[17] As demonstrated below, the legislation became a critical juncture in the evolution of Israel's religion-state relations.

Why would the secular socialist leadership of Mapai support such religious legislation in the area of personal law? Many of Mapai's leaders were known to hold anticlerical views and publicly denounced Jewish religious practices.[18] Civil marriage was common among members of Mapai (e.g., Prime Minister Ben Gurion and Golda Meir, who later became Israel's prime minister, were each married in civil ceremonies).[19] In his private writings and conversations, David Ben Gurion frequently expressed his intolerance toward religious traditions (Zameret 2002). During internal Mapai discussions, most members announced that voting for the bill conflicted with their personal secularist ideology and some of them refused to speak in support of the bill at the Knesset plenum.[20] For example, Shmuel Dayan stated:

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16. Moshe Sneh (Mapam Party), Knesset Records (1953, 2549).

17. Deputy Minister of Religious Affairs, Zerach Verhaftig, who presented the bill to the Knesset, described it as a compromise proposal: "On the one hand, by canceling the requirement of official registration in 'knesset Israel', the proposed bill expands rabbinical courts' authorities in matters of marriage and divorce to be applied to all Jews in the country. In contrast to this extension in scope, the proposed bill limits the rabbinical court's authorities in content, as they could only address issues of marriage and divorce, but not issues that concern other aspects related to family law, such as financial agreements" (Knesset Records 1953, 1410).

18. The Mapai Party was not a monolithic party in its approach toward religion. As Zvi Zameret shows, some of Mapai's leaders were antireligious and atheist, while others were religious or traditionalists. The most dominant group in Mapai, led by Ben Gurion, viewed Israel as a Jewish democracy and hoped that an "old-new" people would evolve in Israel and that Israel's national identity would gradually overcome its religious identity. See Zameret (2002).

19. Referring to religious practices such as *Halitza* and *Gett*, Golda Meir said during one government meeting: "I think that our religious friends—and excuse me for saying this—do not understand the conditions under which we live and what the atmosphere is like around them and how they could, in my view, save many good things in religion and tradition. They propose good things alongside savage things, which I'm not sure have been even practiced during the Middle Ages. I think that any wise person, even religious person, would not assume that such things can be enforced. . . . I know that many Knesset members, including myself, are facing a conscientious dilemma: how to vote for this law?" Government Meeting Minutes (1953, 23 August, 20–21).

20. During the government meeting one day before the final Knesset vote on the bill, Minister of Justice Pinchas Rosen (Mapai) asked to be excused from voting in favor of the law. His request was denied by a government decision, yet it was also decided in the meeting that "abstention is allowed only if it does not risk the passing of the bill" (Government Meeting Minutes 1953, 25 August, 21–22). Similarly, in the Mapai Party meeting on the day of the vote it was decided to enforce voting discipline on party members: "Under the current situation, we cannot allow some members to appear 'conscientious' and leave other to be 'responsible for the government'," said the Chair Ami Assaf (Mapai Meeting Minutes 1953, 26 August, 10).

> It seems to me that never, in the Knesset's existence, has a law been passed with such discontent. I feel contaminated, as if I will get filthy if I vote for this law. I think it insults half of the population. I imagine that if the bill included physical offenses toward men—such as obligatory visit to Mikveh, etc.—we would have fought against it with all our might. (Mapai Meeting Minutes 1953, 26 August, 9)

Further, Beba Idelson asked during the Mapai meeting:

> What about those men and women who voted for us, who have an opinion in this matter? Could Mapai accept such provision and agree that the bill should be passed in the Knesset? If we transfer all these issues to the rabbinical courts what would our voters think of us? (Mapai Meeting Minutes 1953, 1 June, 7–8)

Why did Ben Gurion and members of his party, Mapai, support religious institutions that conflicted with their personal ideology and with the commitment to religious freedom and equality stated in the Declaration of Independence? The question is even more puzzling given the fact that, at the time, only twelve members of the Knesset, out of its 120 members, represented religious parties.[21] Clearly, a majority vote would have allowed the establishment of civil marriage.[22]

The reasoning behind the 1953 legislation is the subject of intense historiographic debate. Some scholars analyze the legislation's passage in the context of the coalitional agreement between Mapai and the religious parties leading to the establishment of a compromising consociational arrangement known as the "religious status quo" (Don-Yehiya 1999; Cohen and Susser 2000; Harris 2002; Friedman 2005). The "status quo" included de facto nonseparation between religion and state in areas such as *Kashrut* (dietary rules) in governmental institutions, autonomy for state-funded religious schools, and exemption of religious students from military service. Alternatively, other scholars analyze the 1953 legislation in context of the national conflict over the state's identity and the political leadership's attempt to exclude non-Jews from Israeli nationhood (Shapira 1996; Shafir and Peled 2002; Triger 2005). According to this approach, the religious monopoly on marriage and divorce was designed to promote the homogenization of Jewish identity on the one hand, while differentiating non-Jewish identities on the other.

In both explanations, the religious regulation of personal status in Israel is viewed as an intentional attempt to define the role of religion in the emerging Jewish state. However, I suggest that the 1953 vote on the Rabbinical Jurisdiction Bill may be viewed

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21. In the 1951 elections, out of 120 seats in the Knesset, Mapai received forty-five seats, General Zionists—twenty, Mapam—fifteen, Herut—eight, Maki (Communists)—five, Progressive—four, Democratic list of Israeli Arab—three; fifteen seats were held by four religious parties (Hapo'el Hamizrahi, Agudat Israel, Po'aley Agudat Israel, and Hamizrahi), five additional seats were held by four small parties. See Knesset official Web site: http://knesset.gov.il/description/eng/eng_mimshal_res2.htm.

22. As noted by Meir Wilner (Maki, the Israeli Communist Party) during the Knesset debates: "It is ridiculous that most Knesset members object to the bill, yet it will be passed with almost no reservations. Representatives of the two largest parties speak against the bill, yet it is supported by the government. This is weird and puzzling" (Knesset Records 1953), 1462).

as part of the overall approach of the political leadership to *avoid* critical decisive choices regarding the religious/secular character of the state.

The 1953 legislation should be understood against the backdrop of the Knesset's general attempt to avoid critical choices in controversial religious issues. This approach was exemplified most explicitly in the decision, three years earlier, in 1950, to avoid enacting a formal constitution altogether. The deep disagreement between religious and secular views regarding the definition of the Jewish state was one of the central obstacles to the drafting process. Ben Gurion was the leading voice against drafting a constitution under the fragile conditions of the newly independent state. Given the urgent tasks of state building and immigrant absorption, he wished to refrain from a prolonged ideological dispute over constitutional provisions and, particularly, over the role of religion in Israel's political life. "At this period we are required to follow the rule of compromise . . ." he wrote, "we must not bring the big questions in the domains of society and spirit and regime into final decision these days" (Ben Gurion 1953, 56–57). Thus, instead of writing a constitution, the Knesset decided to enact it in a gradual manner through a series of individual Basic Laws that were intended eventually to be assembled into a formal constitutional document (Lerner 2011).

Similarly, from close readings of the Knesset debates around the 1953 legislation of the Rabbinical Jurisdiction Act, internal Mapai discussions that preceded the Knesset vote,[23] minutes of governmental discussion on this issue, memoirs of participants in these discussions, and newspaper commentary of that time, it seems that the political actors at the time did not view this legislation as a turning point in the institutional evolution of religion-state relations in Israel. During closed and public meetings, it was widely acknowledged within the Mapai Party that the rabbinical tribunals legislation was part of a coalitional agreement that had been signed prior to the formation of government.[24] Indeed, some members of Mapai attempted to justify the legislation by citing the need to maintain Jewish national unity through unified religious marriage. This concern was highlighted by the expected arrival of millions of Jewish immigrants who largely defined their Judaism in religious terms.[25] Yet, the overall tone in these discussions was one in which the 1953 legislation was seen as a required, albeit *temporary*, compromise for the fragile state-building period. It was not seen as an attempt to entrench a particular set of religious or secular institutions, or to set the future religious

23. The Mapai Party held three meetings on this issue. Minutes and coalition board meetings (headed by Mapai) are archived at the Moshe Sharet Israel Labor Party Archives in Beit Berl. Government meeting protocols are at the Israel State Archives in Jerusalem. Israeli newspapers of that period may be found in Beit Ariela, Tel Aviv.

24. As Chaim Cohen, the Attorney General (who also serves as the government's chief legal advisor), stated while meeting the Mapai Knesset members: "Clearly, the bill was not written in accordance with legislative rules neither legally, nor politically. This bill was written because of a previous agreement, and our hands were tied" (Mapai Meeting Minutes 1953,1 June, 6).

25. For example, Moshe Sharet, the Deputy Prime Minister, said he supported the bill because of his concern for the "unity of the Jewish people" and his fear that "a conflict here provokes divisions with various parts of world Jewry" (Government Meeting Minutes 1953, August 25). Another example is Ami Assaf, the Mapai Party Chair, who stated during internal Mapai discussions: "Gentlemen, even if the coalition did not include the religious parties . . . we would not have decided about civil marriage, but rather on an arrangement similar to this bill. This is because there are still large parts in the Jewish people, in Israel and abroad, that we consider their opinions and their feelings" (Mapai Meeting Minutes 1953, 26 August).

character of the state. Knesset members frequently discussed the Rabbinical Jurisdiction Bill in provisional terms. For example, when mentioning that the law should be reformed in the near future, Zalman Aran stated, "we all know that the law is a consequence of coalitional agreement, and that [it may] possibly be reformed during the third or fourth Knesset [i.e., after the next or following elections]" (Mapai Meeting Minutes 1953, 26 August).[26] Jenia Tversky announced that she objected to the religious monopoly on divorce, yet given the political circumstances, she proposed "that first we act according to Jewish religious law and then we move to liberalization" (Mapai Meeting Minutes 1953, 1 June, 10). During the Knesset discussion, Izhar Harari from the Progressive Party, who was also the initiator of the compromise decision to postpone the enactment of the constitution in 1950, explicitly claimed that the Rabbinical Jurisdiction Bill should be seen as provisionary:

> Since the problems that are under discussion here are weighty and eternal, we should not assume that the Knesset—even if reaching an agreement—could have resolved them all. Thus . . . the proposed solution could not be but a temporary solution. Indeed as a temporary solution the only way out was to support the proposed bill but this law could not stay forever within our legal framework. Sooner or later we will need to address all the religious problems that have emerge since the foundation of the state. (Knesset Records 1950, 1463)

The government's support in the Rabbinical Jurisdiction Bill in 1953 was not meant to entrench religious personal status regulations in Israel, but to avoid a critical choice and allow an evolutionary emergence of secular institutions. As historian Zvi Zameret shows, despite his personal atheism, Ben Gurion was afraid that revolutionary steps against religion would create a dangerous rift within the Jewish people in Israel and abroad. Moreover, Ben Gurion was convinced that painful revolutions were not required, since the arc of history was headed in the secular direction. He believed that "evolutionary steps will anyway lead to the creation of new Jewish identity in the state of Israel. In his view, religion and the religious will disappear in the modern world" (Zameret 2002, 243). Like Nehru and many other leaders in his generation, Ben Gurion was a great believer in modernization theory (Aronson 2011). Hence, there is "no need to advance the time and undermine our own existence." Tellingly, when, during a government meeting, one of the ministers criticized the bill as lacking an arrangement for civil marriage, Prime Minister Ben Gurion replied, "one should propose a civil marriage bill," suggesting that he did not believe that Rabbinical Jurisdiction Bill would prove to be immutable (Government Meeting Minutes 1953, April 17).[27]

In retrospect, the hopes for future consensus building in the religious domain did not materialize. The next decades witnessed growing intensification in the religious-secular conflict. The religious authorities' monopoly on marriage and divorce and the

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26. Similarly, Y. Kesse mentioned in an earlier meeting that he assumed "that in the next ten-fifteen years we will not be able to reform the regulations of marriage and divorce that follow a religious law," presuming it would be possible to reform the law when the political climate changed.

27. Ben Gurion's preference for gradual reform is also exemplified in a comment made by Chaim Cohen, the government's legal advisor, who claimed that Ben Gurion purposefully wishes to keep Section 2 of the proposed bill ambiguous, to allow future appointment of Reform rabbis.

failure to enact state-sanctioned civil marriage have been two of the most controversial and divisive issues at the heart of the religious-secular conflict within Israel's Jewish-majority population. The religious regulations have often been criticized for their violation of the individual rights of Israeli citizens, particularly women's rights, since Jewish law gives men the power to deny their wives divorce (Swirski and Safir 1991; Raday, Shalev, and Liban-Kooby 1995; Shiffman 2001; Halperin-Kaddari 2004).[28] Furthermore, formal state recognition is denied for marriages conducted in Israel by non-Orthodox religious rabbis (such as Reform and Conservative Jews) and interfaith couples and people defined by the rabbinical authorities as "barred from marriage" (*psuley chitun*)[29] for various reasons are not allowed to marry in the country.

Despite the growing criticism, the institutional trajectory in the area of personal status established by the 1953 Rabbinical Jurisdiction Law turned out to be very difficult to alter in the following decades by judicial intervention, parliamentary legislation, or constitutional enactment. Indeed, the Israeli legal system developed several alternatives to circumvent some of the limitations set by formal religious marriage, such as the institution of "common-law relationships" (*yeduim betzibur*).[30] Additionally, the Supreme Court has recognized the right of Israelis who were married abroad to register as married in Israel (HCJ 143/62 *Funk-Schlezinger v. Ministry of Internal Affairs* 1963). The Court has also ordered the state to register homosexual couples who married in other countries as married (HCJ 3045/05 *Yossi Ben-Ari & Others v. Director of Population Administration, Ministry of Interior* 2006). Nevertheless, while mitigating some of the effects of basic rights violations caused by religious law, these alternative arrangements have not resolved all the difficulties that have resulted from the Orthodox monopoly on personal law in Israel.[31] For example, rabbinical courts continued to wield sole jurisdiction over marriage dissolution even in cases in which the divorcing couple was married in a civil procedure abroad (HCJ 2232/03, *Roe v. Tel Aviv Rabbinical Court* 2006). Moreover, the separation between religious and secular courts has entailed an inherent clash of authority within the Israeli judicial system. More than once, the Rabbinical Court has refused to accept an authoritative ruling of the Supreme Court.[32]

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28. According to Jewish law, divorce cannot be imposed by court ruling, but requires the husband's decision. According to Israeli law, men who refuse divorce may be sanctioned and even imprisoned (Lotan 2005).

29. For example, the rabbinical court does not recognize the marriage of children born to women who did not obtain a religious divorce from their previous marriage before having a child with another man nor does it recognize a marriage between a man from a priestly family (Cohen) and a divorced woman. In addition, an estimated 300,000 immigrants from the former Soviet Union, who are not considered Jews by the religious law yet are not associated with any other religion, are unable to marry by the religious regulations.

30. The Israeli law does not include a clear definition of "common law marriage," but over the years a series of laws and court decisions recognized equal rights to "common law couples" in issues such as inheritance, taxes, custody of children, adoption, national insurance, and the like (Halperin-Kaddari 2001; Lifschitz 2006).

31. For criticism of the Supreme Court as an agent of political maintenance rather than an agent of sociopolitical change, see, for example, Barzilai (1998) and Hofnung (1997).

32. One of the most famous examples of such a clash was around the case of *Bavli v. Grand Rabbinical Court* (1994). See Scolnicov (2006).

On the legislative level, some reforms have been introduced to minimize the religious control over marriage and divorce.[33] Nevertheless, despite wide public protest, frequent parliamentary efforts to introduce civil marriage have consistently failed due to persistent objections by the religious parties. Between 1963 and 2009, approximately 100 bills concerning the Rabbinical Jurisdiction Act or the issue of civil marriage have been introduced to the Knesset by representatives of nonreligious parties.[34] Among them, less than 10 percent made it to the first round of legislation (preliminary debate) and only three bills (3 percent) passed the first reading and were debated by the Knesset Committee. None reached the final stage of legislation.

On the constitutional level, the question of marriage and divorce regulations was one of the central issues of contention in the 2003–2006 constitution-writing debates in the Knesset Law, Constitution, and Justice Committee. Despite a consensus among committee members that the existing marriage and divorce laws in Israel violate basic individual rights,[35] the proposed draft did not include genuine liberal reform. Eventually, due to deep disagreements between secular and Orthodox views of the constitution, the drafting project was removed from the Knesset agenda (Lerner 2009).

Why are the religious status quo arrangements, which were established during the first years of the state, so resistant to change? Some argue that the religious personal laws are acceptable to most of the Jewish population, yet surveys consistently show majority support for the establishment of civil marriage.[36] Other explanations, more compatible with the path-dependency approach, focus on the increasing institutional constraints that impede reforms of religious personal laws. While a complete account of Israeli high "institutional stickiness" that impedes a substantial reform in the area of personal law goes beyond the scope of this article, two institutional constraints are of particular salience. These also affect additional controversial issues within the "religious status quo" established during the first years of the state, such as prohibition of public transportation on Shabbat and the exemption provided for religious students from the military draft. First, many view the structure of the Israeli electoral system as a central factor in the consistently elevated influence of religious parties on Israeli politics. The one-district system with a low threshold for parliamentary election results in a fragmented political system, which strengthens the bargaining power of small parties, such as the religious parties, in coalitional agreements. Moreover, the transformation of the Israeli political system from one dominant party (Mapai) to a two-camp system (Left and Right) in 1977 created the dependence of coalitional governments on the support of the religious parties (Cohen and Susser 2000). Thus, Jewish religious parties often hold veto power in controversial issues regarding the role of religion.

A second obstacle that impedes a constitutional reform of the existing religious arrangements stems from the overlap between the social and ideological religious-

33. For example, in 2008 the Knesset amended the 1973 Spouses' Property Relations Act so that marital assets registered in the name of one party could be divided before actual divorce was granted.

34. Source for list of proposed bills: The Knesset Research Unit.

35. The committee report stated that "it is inconceivable that people who cannot marry by religious law cannot marry in Israel at all" (Constitution in Broad Consent 2006, 16).

36. In a 2007 poll, 59 percent of the Jewish respondents agreed that the "Israeli government should make sure that life be managed according to Jewish religious tradition." Yet, 54 percent agreed that couples should "marry any way they like" (Arian, Atmor, and Hadar 2007, 66).

secular divide on the one hand, and the institutional tension between Israeli judicial and legislative branches on the other hand. Due to the growing power of the religious parties in the Knesset, the Supreme Court has become the central arena for promotion of the liberal-secular Jewish agenda since the 1980s. This led to the emergence of ongoing tension between the legislature and the Supreme Court (Mautner 1991). This tension particularly escalated in the aftermath of the "constitutional revolution" led by Supreme Court Chief Justice Aaron Barak in the 1990s, when the Court granted itself the power of judicial review (Hirschl 2000; Lerner 2004). One of the direct consequences of the constitutional revolution and of the increasing overlap between, on the one hand, the ideological debate on the role of religion in the state and, on the other hand, the institutional judiciary-legislature tension, was the paralysis of the constitution-making process in Israel: 1992 marked the last adoption of a Basic Law in Israel. The religious parties, which oppose the Supreme Court's liberal and secular worldview, fear any future activist judicial interpretation of the Basic Laws and have blocked any enactment of a new Basic Law (Lerner 2013).[37]

In light of the entrenched religious institutional arrangements, particularly in the area of marriage and divorce, Ben Gurion and other Mapai leaders expressed their regret with regard to decisions made in the early years of the state. In an interview in 1970, Ben Gurion admitted that "the religious parties misused the law . . . the time has come to abolish it . . . we must establish that this is a nation of law and not of Halacha" (*Davar*, 24 July 1970, cited in Rubinstein 1972, 250).[38]

In conclusion, the Israeli system of legal pluralism with regard to personal status was established during the foundational stage of the state and since then has appeared to be by and large resistant to change. Yet the critical moment when this system was established did not represent a revolutionary moment of reform, but rather maintained the overall framework of legal pluralism that existed in the preindependence period. Moreover, the political leaders at the time intentionally attempted to avoid making decisive choices regarding the secular character of state institutions, fearing that such controversial choices would exacerbate societal conflict and destabilize the fragile polity. Consequently, they avoided drafting a formal constitution and adopted religious personal law arrangements at the level of ordinary legislation, perceiving these arrangements to be provisional and relatively flexible compared to a rigid written constitution. While preindependence regulatory tradition affected the critical juncture's outcome (i.e., the maintenance of the *Millet* system), internal Mapai Party debates reveal the marginal role institutional preconditions (e.g., governmental structure, judicial power, constitutional rules) have played. The choices of political leaders at the time were mostly based on short-term political compromises and sociological predictions regard-

37. The liberal-secular philosophy manifested in the court rulings was prominent in Chief Justice Barak's public expressions and publications. For example, his interpretation of the formulation "Jewish and democratic state" attempted to bring the conflicting concepts into line according to a "universal abstraction level" and equated Jewish values with Western democratic principles. Barak stated that "the meaning of the Jewish nature of the state is not in the religious-Halachic sense, and hence the values of the State of Israel as a Jewish state should not be identified with the Jewish Law" (Barak 1992, 30–31). This comment drew intense criticism from the religious camp, including from retired Supreme Court Justice Menachem Elon (1993).

38. See also Safran (1981, 207) and note 6.

ing the future liberalization of society and Jewish religion. However, contrary to expectations, the following decades proved to be characterized by "high institutional stickiness," which prevented substantive reforms in the area of personal law in Israel.

IV. INDIA: CONSTITUTIONAL AMBIGUITY AND THE CONTINUOUS UNIFORM CIVIL CODE DEBATE

The Israeli conflict about personal law was mostly intrareligious (within the Jewish majority population); in India this conflict crossed both intrareligious and interreligious lines (especially between Hindu and Muslim perspectives). Another difference between the cases lies in the fact that Israel refrained from drafting a formal constitution at time of independence, while in India the drafters addressed the question of religious personal status laws during a three-year process of intense constitutional deliberations over the written constitution. However, as we will see, despite the enactment of a formal constitution, the Indian constituent assembly avoided clear constitutional solutions in the area of personal law and left such choices to be decided by the legislator at the level of "ordinary politics," much like the case in Israel. In addition, Israel and India differ in the type of personal status regulations adopted during the foundational stages of their states. While in Israel the pluri-legal system is religious in nature, in India a civic marriage law (1954 Special Marriage Act) accompanies the plural religious system and allows interreligious or secular marriages. Furthermore, in Israel, religious personal law is adjudicated by separate religious courts from each religious community, while in India all types of religious law are adjudicated by the same civic courts.

Despite these differences, important similarities exist between India and Israel concerning the nature of critical junctures in the evolution of personal law. To begin with, like the Israeli case, if we "go back and look," we see that the institutional framework of personal status in India was created during the decade following independence.

Some scholars prefer to identify the critical moment in which personal law in India was established during the colonial era, particularly in the 1920s–1940s, when Hindu and Muslim personal law was codified by the colonial government. According to this view, "postcolonial Indian governments have manifested varying levels of continuity with the policies forged by the British colonial state" (Williams 2006, 8). I agree that antecedent conditions—particularly personal law arrangements that developed in the colonial era—influenced the structure of postindependence religious regulations in the area of marriage and divorce in India, as in Israel. As Rina Verma Williams claims, "the basic discursive and conceptual framework [established by the British colonial rule] remained unaltered" (Williams 2006, 9). However, in this article I argue that within the general discursive and conceptual framework, the concrete decisions made by influential political leaders at the foundational stage of the state concerning the regulation of religious marriage and divorce were by and large enacted in a context of reduced institutional constraints at the moment of "new beginning" of democratic state building. To use the terminology of Capoccia and Kelemen (2007), India's democratic state-building period, particularly in the decade after independence, was a moment of contingency, during which various institutional options were open for choice by political agents.

The contingent nature of institutional decisions made during the formative stage of the state is evident in the intensity of discussions concerning proposals to entrench within a written constitution uniform secular regulations of personal law regardless of religious affiliation or in the proposal to secularize Hindu personal law and advance more egalitarian regulations (Parashar 1992; Som 1994; Williams 2006). The disputes over the Uniform Civil Code took place during the constitutional drafting, between December 1946 and December 1949. The debate over the Hindu Code began before independence and continued in the constituent assembly and in the legislative discussions of the 1950s.

Jawaharlal Nehru, India's first Prime Minister, viewed secularization of Hindu religious practices under a Hindu Code and unifying family law for all communities as necessary reform measures that fit into his larger vision of national development and were compatible with his personal liberal worldview (Nehru 1989, 384; Khilnani 2007). "I have no doubt in my mind that the real progress of the country means progress not only on the political plane, not only on the economic plane, but also on the social plane. They have to be integrated, all these, but when [they are,] the great nation goes forward," he stated (*Lok Sabha Debates*, IV, cited in Som 1994, 181). Yet, after independence, opposition to this reformist approach arrived from two separate directions. First, conservative Hindu leaders within the Congress Party, such as Rajendra Prasad (who was then the president of the constituent assembly and later India's first president), opposed secularizing traditional Hindu personal status institutions (Som 1994, 172–80). Second, Muslim leaders objected to the Uniform Civil Code, claiming that the proposed reforms represented Hindu hegemonic power and limited their freedom of religion.[39]

Eventually, the constituent assembly addressed the question of whether personal law should be unified in independent India by including ambiguous and ambivalent provisions within the written constitution. Article 44 states that "the state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." The drafters decided to include this provision in the nonjusticiable section of the constitution (titled "Directive Principles of State Policy"), which meant that it could not be enforced by the courts. By including the Uniform Civil Code in the nonjusticiable section of the constitution, the Indian framers created a constitutional mechanism that avoided making a clear choice regarding secularization of personal law.

Nehru and other pragmatic leaders in the constituent assembly and the government acknowledged the divisive effect of radically reforming personal status laws under the fragile conditions of the newly independent India.[40] As Nehru stated in the *Times of India* in 1954, he believed the Uniform Civil Code was an eventual goal, but that the time was not yet ripe (Smith 1958). Thus, he supported the evasive formulation of a nonjusticiable Uniform Civil Code (Article 44) in the constituent assembly. The

39. See, for example, speeches by B. Pocker Sahib Bahadur and Mohamad Ismail, two Muslim League representatives from Madras, in 1948 (*Constituent Assembly Debates* VII 1949, 540–45).

40. For example, B. K. Ambedkar, the president of the drafting committee in the constituent assembly. Ambedkar supported the inclusion of the Uniform Civil Code in the nonjusticiable section of the constitution and defended this evasive approach in his speech in November 1948 (*Constituent Assembly Debates* VII 1949, 551). Yet he was particularly disappointed by the difficulties in enacting the Hindu Code and resigned from his position as India's first Law Minister (Jaffrelot 2005).

constitutional ambiguity in the application of the Uniform Civil Code was intended to pacify the fears of the Muslim minority in India, already traumatized by partition, who continued to struggle for religious and cultural autonomy within the Hindu-majority state (*Constituent Assembly Debates* VII, 1949).[41] Pragmatic considerations and a belief in incremental social reforms underpinned Nehru's support of the diluted version of the Hindu Code passed by the parliament (Som 1994, 198–91). It was clear to the government that these bills were the first step in a long process that would eventually lead to a Uniform Civil Code (Parashar 1992, 164).

The constituent assembly's avoidance of entrenching a Uniform Civil Code in India has been widely criticized as a missed opportunity and even a failure to realize the ideological vision of the secular regime.[42] The decision of whether, when, and under what conditions the recommendation of Uniform Civil Code would be implemented was left to future parliamentarians. In retrospect, the flexibility that the constitutional drafters aimed to secure paved the way for the development of conservative religious institutions that proved difficult to change. Article 44 was never fully and formally implemented. Consequentially, India has maintained a plural system of personal status laws.

As in Israel, the institutional path of personal status in India was established *despite* an explicit decision by political leaders to adopt evasive regulatory strategies in addressing conflicts over the state's religious character. The decision to evade critical choices was made during the constitutional deliberations, that is, at the level of "higher law making." Nevertheless, choices that were made as provisionary compromises on the level of "normal law making" unintentionally created a regulatory framework that was difficult to reform in later years. In the decade after independence, the Lok Sabha (India's parliament) partly reformed Hindu family law by adopting four separate bills, known as the Hindu Code.[43] However the parliament refrained from adopting equivalent measures for other religious communities in India.

Does the trajectory of personal status regulations in India demonstrate rigid path dependency? Some argue that compared to Israel, where religious legislation has become entrenched (i.e., resistant to gender equalizing and other pro-human-rights reforms), the Indian trajectory is characterized by greater flexibility. The legislation of the Special Marriage Act in 1954 is often viewed as an important regulatory attempt to implement a Uniform Civil Code. The Act provided civil marriage, even interreligious marriage, and allowed for contractual marriage and divorce by mutual consent. Further, according to Section 21 of the Act, in matters of succession, couples who opted for

41. The strategy of deferring constitutional choices in order to circumvent internal conflicts in the newly independent India was employed with regard to other issues, such as India's national language. The constituent assembly decided that a parliamentary committee would reexamine the issue in fifteen years (Article 344 of the Indian Constitution). See Lerner (2011).

42. This line of criticism is voiced by both proponents and opponents of the Uniform Civil Code. For example, this was part of the Hindi-nationalist BJP's campaign for national elections in 1996 and 1998. See Khilnani (1999, 189–90), Yildirim (2004), and Mahmood (1986).

43. The Hindu Code includes the Hindu Marriage Act (1955), which outlawed polygamy and dealt with intercaste marriage and divorce; the Hindu Adoption and Maintenance Act (1956), which concerned the adoption of daughters and the rights of wives; the Hindu Succession Act (1956), which dealt with inheritance rights of daughters; and the Dowry Prohibition Act (1961).

secular forms of marriage were governed by the Indian Succession Act 1925, which is more egalitarian compared to the existing religious personal laws (Agnes 2011a, 153).

However, the 1954 Special Marriage Act had little actual effect on the practice of marriage and divorce in India. When enacted, it received little public attention. Indeed, the debate over the bill was fairly pedestrian, unlike the inflamed debate around the legislation of the Hindu Marriage Act of 1955.[44] This was because the Special Marriage Act was viewed as "catering to an urban westernized elite without seeking to impose their liberal values on a conservative populace" (Mody 2008, 93), while the Hindu Marriage Act would cover a large portion of the populace.[45] In practice, for bureaucratic and sociocultural reasons, the Special Marriage Act was utilized by only a small number of couples. The bureaucratic process of marriage registration under the Act is considered substantially more difficult compared to marriage registration under Hindu Law (Mody 2008, 108–25; Agnes 2011b, 96–98). For example, the Act requires a thirty-day notice period before the marriage is registered, while no such requirement exists under the Hindu Marriage Act. Moreover, as Perveez Mody demonstrates, the social legitimacy of civil marriages remains considerably lower than the legitimacy of religious marriage, even half a century after the enactment of the Special Marriage Act (Mody 2008, 110–45). Most Indians choose religious marriages because of social and family pressures. Also, state officials openly discourage secular marriage; these officials often regard civil marriage as "paper marriage" or even "false marriage," representing "nothing more than government interference in a matter best left to the gods of religion and ritual" (Mody 2008, 134).

In the decades since independence, personal law regulations have not remained static in India (Menski 2001; Agnes 2011a, 2011b). Group-specific family laws have been gradually reformed, particularly through judicial mobilization (Subramanian 2008). Some incremental reforms in personal status practices have been initiated by some religious communities, especially Parsis and Christians (Subramanian 2009, 2010). Moreover, application of religious communities' laws by unified civil courts is viewed by some observers as contributing to the growing secularization of Indian personal laws (Menski 2001; Sezgin 2010). Nevertheless, even those observers who reject feminist criticism of India's multicultural system admit that little had changed with regard to Muslim law and that India's overall pluri-legal structure of personal status laws, which was established at time of independence, appears resistant to change. The question of the Uniform Civil Code has continued to be present in India's political, legal, and public agenda for the past several decades. The existing pluri-legal system has been consistently criticized for allowing traditional patriarchal practices to persist, restricting the basic rights of women, Hindu and non-Hindu alike (Raj 1991; Parashar 1992, 144–200; Som 1994; Engineer 1995; Agnes 2000, 77–93; Narain 2001; Vatuk

44. The Hindu Marriage Act allowed for religious marriage, as well as intercaste marriage, between Hindus, Buddhists, Sikhs, and Jains. It also legalized divorce and applied it equally for men and women (Mody 2008, 93).

45. The amendments of the Special Marriage Act, in 1963 and in 1976, received very little public attention, even though they subordinated it to a certain degree to customary practices, for example, allowing marriage among first cousins and by determining that Hindu couples that marry under the Special Marriage Act were taken out of the purview of the Indian Succession Act and were governed by the Hindu Succession Act (Agnes 2000, 97–98; 2011a, 154).

2008). Despite such criticisms, the overall structure of personal status established in the decade after independence appears difficult to reform by either judicial or legislative means.

The rigidity of the pluri-legal structure of personal law became particularly apparent in the aftermath of the Shah Bano affair. In 1985, the Indian Supreme Court affirmed the rights of a divorced Muslim woman named Shah Bano to receive alimony, based on Section 125 of the 1973 Code of Criminal Procedures, despite the objection of her ex-husband, who relied on Sharia law (*Mohd. Ahmed Khan v. Shah Bano Begum*; see also Engineer 1987). In its ruling, the Court called for implementation of the Uniform Civil Code, stating that "we understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But a beginning has to be made if the Constitution is to have any meaning" (*Mohd. Ahmed Khan v. Shah Bano Begum*). The decision provoked a national crisis. Muslim religious organizations across the country criticized the decision as a Hindu attempt to impose legal uniformity, which would eventually lead to assimilation and the destruction of Muslim identity. Despite the opposition of liberal Muslims, the government, headed by Prime Minister Rajiv Gandhi, introduced in 1986 the Muslim Women (Protection of Rights on Divorce) Act in order to pacify religious Muslim sentiments (Hasan 1989; Jacobsohn 2003). The new Act excluded divorced Muslim women from the purview of Section 125 of the Criminal Procedure Code and circumvented the Supreme Court's judgment in the *Shah Bano* case.

In the aftermath of the Shah Bano affair, the Uniform Civil Code debate was entangled in the wider political controversy between supporters of minority rights and pluralistic traditions on the one side and advocates of national integration and national unity on the other. Against a background of rising Hindu fundamentalism and given the political backlash of the *Shah Bano* case, the Uniform Civil Code debate appeared to pit gender justice against minority rights (Parashar 1992, 201; Menon 1998; Rajan 2003, 147–67). Feminist groups gradually found it necessary to rethink their positions because demands for a Uniform Civil Code were perceived as supporting the Hindu nationalists' agenda for a homogenous public sphere dominated by majoritarian values (Menon 1998, 251–64).

At the legislative level, during the late 1980s–mid 1990s, attempts were made by legal scholars, women's organizations, private parliamentarians, and the National Committee for Women to propose drafts for a comprehensive Uniform Civil Code.[46] However, none of these drafts materialized into an actual bill and eventually the concern for enacting a Uniform Civil Code faded out of the political agenda. Since the mid-1990s, women's rights groups have replaced their demands for gradual Uniform Civil Code reform of family law with calls for intracommunity or local state-led reforms (Solanki 2011, 18–23). Some success had been achieved on this front. For example, the ceiling of Rs. 500 as a maintenance award for divorced women was removed (2001 amendment of Section 125 of the Cr.P.C.) and in 2005, the Protection of Women from Domestic Violence Act was enacted (Agnes 2011a, 171). In Goa, the local government adopted a Civil Code that regulates the personal laws of all religious communities,

46. For a detailed discussion of the various drafts, see Agnes (2011a, 172–83).

including Muslims and Christians. However, the Goan Code is widely criticized for granting recognition to various customary practices, including Hindu polygamy. Moreover, the unique historical background in Goa, with a strong Christian influence and an insignificant Muslim minority population, explains the limited public dispute around the legislation (Agnes 2011a, 171–72).

At the judicial level, the Indian Supreme Court addressed issues related to the Uniform Civil Code in several additional cases but was not consistent in its position toward the realization of the constitutional ideal of Article 44 (Liviatan 2009). The 2001 landmark ruling in *Daniel Latify v. Union of India* is usually viewed as exceptional. Although the ruling was criticized by feminist writers for upholding the constitutionality of the Muslim Women (Protection of Rights on Divorce) Act (Rattan 2004, 582–85), it is considered a step forward toward gender equality since it adopted an expansionist interpretation of the postnuptial maintenance for Muslim women beyond the religiously sanctioned *Iddat* period. The Court determined that at time of divorce, the Muslim husband is required to contemplate the future needs of the wife and make preparatory arrangements in advance in order to meet those needs, including, among other things, residence, food, and clothes (Menski 2001; Hasan 2003; Subramanian 2008; Agnes 2011a, 166–68).

V. CONCLUSION

The political leaders at the foundational period of state building of both Israel and India viewed the religious regulations they adopted in the area of personal law as temporary compromises that would allow for unity in the face of more urgent social, economic, or security challenges that had to be addressed by the government. By refraining from taking decisive action in regard to controversial religious issues, constitutional framers in both India and Israel may have believed that they were transferring decisions into the ostensibly more flexible arena of ordinary politics. Their choices relied on a prediction that liberal reforms of these compromise arrangements would be feasible in the future; the framers wrongfully assumed that it would be easier for future parliaments to introduce liberal reforms. During the constitutional debates in both countries, it was argued that choices would evolve gradually in the political sphere in accordance with changes in societal consensus (*Constituent Assembly Debates* VII 1949, 551).[47] One could argue that the compromises made at the state-building period rested on the political leaders' (particularly Nehru's and Ben Gurion's) perceptions of world history as advancing toward greater modernization. Hence, their actions were based on the conviction that secular reforms would be easier to promote with the passage of time (Nehru 1942; Khilnani 2007; Aronson 2011, 77).

Nevertheless, decisions made in the early years of the state shaped religious regulations in ways that turned out to be difficult to change. In Israel, the religious monopoly on marriage and divorce has proved resistant to political, judiciary, or

47. In Israel, for example, Avraham Hartzfeld from Mapai argued during the debates: "I must believe in evolution . . . and you prefer the way of revolution and force. My conviction is that the state could not be built in a revolutionary way, but only in an evolutionary way" (Knesset Records 1950).

constitutional reform for six decades. In India, while some reforms have been introduced to group-specific family laws, the institutional structure of legal pluralism in personal status law and the application of traditional Muslim personal law have been in place since independence.

The analysis of Israeli and Indian personal status laws reveal a conception of critical junctures in the evolution of religious regulations that differs from most perceptions of critical junctures in the comparative works on religious institutional development. In contrast to the emphasis of previous studies on the role played by structural preconditions, intended ideological victories, and formal constitutional decisiveness, this article has demonstrated how regulatory path dependency in religion-state relations may result from unintended decisions and the absent-minded missing of historical opportunities. Moreover, it suggests that the foundational stage of the state is a critical historical moment during which the religious/secular character of state institutions and regulations is entrenched, even when these decisions are initially viewed as provisionary. In other words, religious/secular institutions that are designed during the decade after state independence create a regulatory path that is difficult to reform, regardless of whether these regulations introduce a radical change or preserve the existing arrangements and whether or not the decision is made at the constitutional level.

On the practical level, the lesson this article proposes for political actors who are involved in constitution-making projects is that incremental change in the area of religion-state relations is not always possible and historical opportunities to entrench particular sets of principles should not be missed. At historical moments such as state-building periods, even when political leaders may try to avoid clear-cut decisions that will affect later generations, their attempts to refrain from shaping long-term institutions in the controversial area of religion-state relations for the long term may fail. The decisions they make—although ambiguous and evasive—generate institutions that are resistant to change in the decades that follow. This is a particularly important lesson for those actors who wish to promote a liberal-secular worldview. Conservative institutional trajectories may be stagnant even if they rest on ordinary legislation, which from a formal perspective may seem more flexible than entrenched constitutional provisions.[48] Thus pragmatic compromises at critical historical moments may generate persistent institutional arrangements that hinder the protection of basic human rights.

Finally, on the theoretical level, the article highlights the need for greater scholarly effort in identifying particular "units of analysis," as Capoccia and Kelemen suggested, in advancing our understanding of historical patterns of institutional evolution (Capoccia and Kelemen 2007, 349). While the recent body of literature on critical junctures has developed a valuable theoretical framework, it is important to remember that different factors will impact different institutions in various ways. This article has attempted to make preliminary steps in advancing our understanding of the evolution of religious regulations by suggesting that institutional paths may result from unintentional decisions and the absent-minded missing of historical opportunities. Yet many more questions, at both empirical and conceptual levels, are left open and invite wider comparative and theoretical research.

48. This may even be true in case of unwritten conventions. For example, in Israel, the prohibition on public transportation on Shabbat was never formally legislated by the Knesset (Cohen 2000).

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