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INTRODUCTION

Manikyamma and Sudarsana, two Hindus, married according to Hindu rites in 1977 and had two children, one of whom died in infancy. In September 1983, the husband, Sudarsana, while still legally married to Manikyamma, married another Hindu woman, Lakshmi, in a religious ceremony. Fearing that Manikyamma, who did not consent to her husband's second marriage, could take legal action – the law prohibits bigamy for Hindus while allowing it for Muslims – Sudarsana and Lakshmi converted to Islam and remarried in February 1984, this time following Muslim rites.

When Manikyamma lodged a complaint under Section 494 of the Indian Penal Code, the trial court convicted the husband and the second wife for the crime of bigamy. In appeal, the Sessions Court, however, acquitted the husband and the second wife and recognized their Muslim marriage on grounds that Manikyamma, the first wife, had failed to produce proof of her 1977 marriage to Sudarsana, even though he never denied that Manikyamma was his wife and that he was the father of her child. Later, the High Court of Appeals also affirmed the acquittals and dismissed Manikyamma's petition, but on completely different grounds. This time the court recognized the validity of the first marriage between Manikyamma and Sudarsana but denied the validity of the Hindu and Muslim marriages between the husband and the second wife. The court held that the couple's conversion to Islam was not "valid" because the couple reportedly did not attend the mosque on Fridays, and the wife continued wearing Hindu symbols such as *mangalasuthram* (a necklace considered as a symbol of marriage among

Hindus), *metlu* (toe rings) and *tilakam* (mark on the forehead), thereby their marriage under the Muslim law was invalid. The court also ruled that the couple's Hindu marriage from September 1983 was not valid, either. Thus, the crime of bigamy never occurred. Even though the court recognized the factual existence of the September 1983 marriage between the husband and the second wife, which took place at a Hindu temple in front of witnesses, the judge eventually dismissed the bigamy charges because the complainant (the first wife) failed to provide evidence proving that necessary formalities such as *homam* (offering made to the fire-god Agni) and *saptapadi* (the taking of seven steps by the bridegroom and the bride jointly before the sacred fire) were actually performed by the husband and his second wife during the ceremony in the temple in order for the court to deem this as a "validly solemnized" marriage under the Hindu law, and thereby convict the accused of bigamy.[1]

The 23-year-old Russian immigrant to Israel, Sergeant Nikolai Rappaport, was a combat soldier in southern Lebanon when he was killed in a Hezbollah ambush in 1998. His family expected their son to be honored as a "martyr" and buried in a military ceremony like other fallen soldiers. But Nikolai's funeral was a bit different. There was no open grave for his comrades to lower the flag-draped casket into, but a military vehicle waiting outside to take his body to the airport for a journey to Russia where he was eventually buried (Schmemann 1998). Sergeant Rappaport could not be interred in a Jewish cemetery in Israel because, according to the state-enforced Jewish law, Nikolai was not considered a Jew as he had not been born to a Jewish mother.

Hala Sidqi, a famous Orthodox Copt actress in Egypt, was married to an Orthodox Copt man. For nearly a decade in the 1990s, she tried to divorce her husband but repeatedly failed to get a divorce under the Coptic Orthodox family laws that the court was applying in her case. Thereafter, her lawyer suggested she try to obtain it under Islamic law by filing for *khulʿ* or no-fault divorce recently made available to Muslim women. The Egyptian law required application of *shariʿa* to Christian couples when each spouse belonged to a different sect and rite. Both Hala Sidqi and her husband were Orthodox Copts. In order to obtain a *khulʿ* divorce under *shariʿa*, Sidqi had to become a member of another

[1] *B. Chandra Manikyamma* v. *B. Sudarsana Rao*, Andhra Pradesh High Court (1988), accessed in May, 2012, from http://indiankanoon.org/doc/686235/.

denomination. So, she migrated to the Syrian Orthodox Church, while her husband remained a Copt. By doing so, she was able to not only get a divorce under the Islamic law, but also obtain permission to remarry in the church, as, unlike the Coptic Orthodox Church, her new church allowed remarriage for people who had been divorced for reasons other than adultery (El-Alami 2001–2002).

These are not unusual or peculiar stories, but everyday-life stories of hundreds of millions of people who live under "personal status" or "personal law" systems around the globe. In fact, about one-third of the world population currently lives under such legal systems. In this respect, the three countries under examination – Israel, Egypt and India – belong to a group of (mostly postcolonial or post-imperial) countries which do not have a unified or territorial system of family law, but, instead, a particular system of personal status in which individuals are held subject to jurisdiction of state-enforced religious family laws rather than national norms in regard to such matters as marriage, divorce, maintenance and inheritance. To exemplify, under a personal status system, a Jew will be subject to (state-enforced) *halakhah*, a Muslim to (state-enforced) *shari'a*, a Christian to (state-enforced) canon law, and so forth.

Like most other nations, the three countries under examination had inherited existing pluri-legal (legally plural) personal status systems from their imperial or colonial predecessors. Although personal status systems did not always originate under colonial or imperial rule, most did; and this is particularly true for the three countries analyzed in the study. For instance, the origins of the Israeli and Egyptian personal status systems can be traced back to the Ottoman Empire, while the foundations of the Indian personal law system were laid down by Turkish/Mughal dynasties which controlled the subcontinent from the thirteenth century until the arrival of the British in the eighteenth century. In the past, imperial and colonial rulers employed the pluri-legal personal status systems to compartmentalize their subjects into ethno-religious and confessional groupings, and to distribute goods and services accordingly while denying certain populations the benefits of full membership in the political community. Thus, we can understand why multi-ethnic empires or colonial rulers, which often had a "divide and rule" approach towards their subject populations, may have employed pluri-legal personal status systems in the past. But it is not easy to understand why contemporary nation-states like Israel, Egypt or India, which are all constitutionally committed to treat their citizens

equally before the law,[2] would ignore their constitutional obligations and hold people to different standards and laws by distinguishing on the basis of gender, ethnicity and religion.

Moreover, even though all three countries apply different communal laws to persons with different ethno-religious backgrounds, and hold men and women to different legal standards, the way each country does this varies considerably. In other words, there are systemic (both institutional and procedural) differences across personal status systems. For instance, in Israel, personal status laws are applied directly by state-appointed-and-salaried communal judges in religious courts (e.g., rabbinical courts, *shari'a* courts, Druze courts, etc.) whereas in Egypt and India they are implemented by secular judges in civil courts. Furthermore, while Muslim men in India are allowed to contract polygynous marriages, their coreligionists in Israel are prohibited from exercising the same "right." While a Christian man in Egypt can divorce his Christian wife under Muslim personal status law (through *talaq*) by simply switching to another Christian denomination (because the Egyptian law requires application of Islamic law to Christian couples when spouses belong to different sects and rites), a non-Muslim man in India who is married to a non-Muslim woman cannot enjoy the "benefits" of Muslim personal law (i.e., the ability to contract a bigamous marriage or repudiate a wife by means of *talaq*) even if he willingly and sincerely embraces the Islamic faith.

Therefore, there is an intriguing puzzle here: why do these three countries, as well as many other postcolonial/post-imperial nations, continue to apply different sets of norms to people from different ethno-religious backgrounds, and hold men and women to different

[2] The equal protection clauses in each country's constitutional documents are:

> The Declaration of the Establishment of the State of Israel (1948): "The State of Israel . . . will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex . . ."
>
> The Constitution of the Arab Republic of Egypt (1971), Article 40: "All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed." Article 33 of the new Egyptian Constitution, adopted in December 2012, which replaced Article 40 above, no longer explicitly lists the grounds on which discrimination is prohibited: "All citizens are equal before the law. They have equal public rights and duties without discrimination." Although Article 33 falls short of explicitly stating on what grounds discrimination is prohibited, Clause 5 of the Preamble still prohibits discrimination on ground of sex, and Article 6 on grounds of sex, origin or religion.
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> The Constitution of India (1950), Article 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." And Article 15: "(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

legal standards despite their constitutional commitments to treat everyone equally before the law? Furthermore, when countries distinguish among their citizens on the basis of sex, religion or ethnicity, why do they do it so differently from one another? Why, for example, are religious laws applied by state-appropriated communal courts in Israel but by civil courts in Egypt and India? How can we explain such cross-national variation? Second, how does the state enforcement of religious personal status laws under these pluri-legal systems impact the fundamental rights and liberties of individuals who are subject to their jurisdiction? Finally, what strategies do people use to respond to any restrictions or disabilities of their rights and liberties, if and when they are imposed by state-enforced personal status laws? These are the three main questions the present study aims to answer.

REFORMING PLURI-LEGAL PERSONAL STATUS SYSTEMS IN THE PROCESS OF STATE- AND NATION-BUILDING

Postcolonial/post-imperial nations which inherited pluri-legal personal status systems upon independence faced more or less the same challenges: what were they going to do with these fragmented legal systems, which were not necessarily conducive to building a modern bureaucratic machinery or a civic sense of national identity? Were they going to preserve them, or eradicate and replace them with completely new bodies of law and legal institutions? A close analysis of the experiences of postcolonial nations which inherited such pluri-legal systems shows that some countries opted for institutional unification (unifying the courts of different religious groups under an overarching system of national courts), some for normative unification (abolishing different bodies of religious and customary or communal laws and enacting in their place uniform territorial laws that applied to everyone equally), some did both and some did neither (see Fig. 1.1).

For instance, both Israel and Egypt upon independence inherited similar "fragmented confessional" personal status systems whose origins can be traced back to the Ottoman *millet* system.[3] Under these fragmented confessional systems, in both countries religious courts of state-recognized ethno-religious communities were granted autonomy to apply state-enforced religious laws in regard to community members' matters of personal status such as marriage, divorce, maintenance and inheritance.

[3] For information on the Ottoman *millet* system, see Boogert (2012).

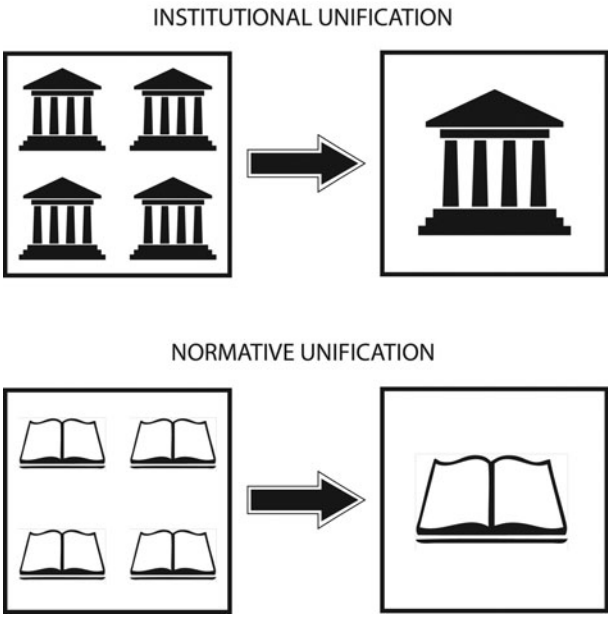

Fig. 1.1 Institutional vs. normative unification

That is to say, as far as family law is concerned, *shari'a* courts applied Islamic law to Muslims, rabbinical courts applied *halakhah* to Jews, and various ecclesiastical courts applied canon laws to Christians. The courts were formally integrated into each country's legal system, and their decisions were directly executed by respective governments. To this day, Israel has more or less preserved this fragmented confessional structure, and refrained from introducing changes that would normatively or institutionally unify its personal status system. As a result, there presently remain fourteen state-recognized religious communities in Israel whose religious family laws and courts (where applicable) are formally recognized and integrated into the country's legal system, and the decisions of these religious courts are directly executed by the government.

Even though Egypt inherited a fragmented confessional system similar to Israel's, its personal status system no longer resembles this ideal type but rather the "unified confessional" model under which different bodies of religious laws are directly applied by civil judges in secular state courts. This is because the Egyptian government during the reign of Nasser abolished all religious courts in 1955 and unified them under an overarching network of national courts; it also placed the application of religious laws in the hands of state-trained secular judges. In fact, this is

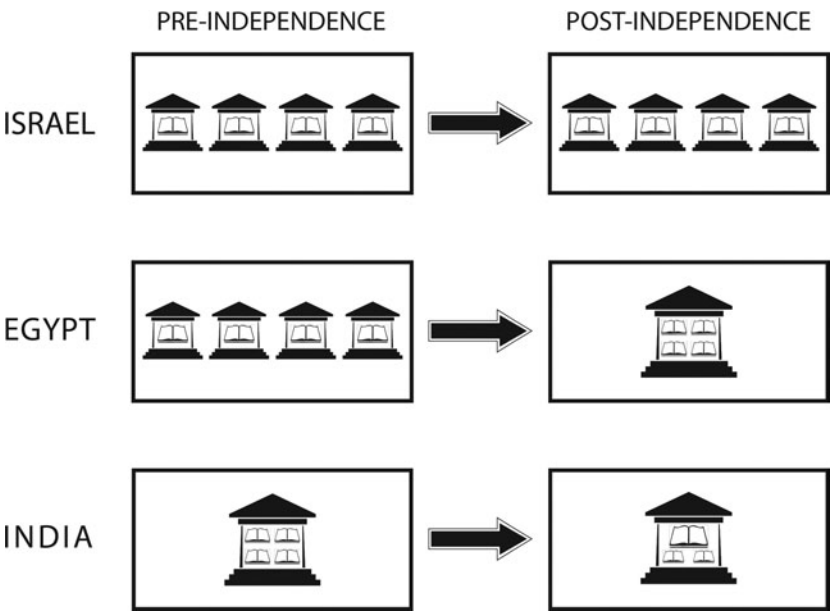

Fig. 1.2 Evolution of personal status systems in Israel, Egypt and India

the very same type of personal status system that Indian leaders found in place when India gained its independence from the British in 1947 (see Fig. 1.2). However, the Indian government under Nehru put forth a drastic agenda for reform, and contemplated complete normative unification in the field of personal status by abolishing all state-enforced religious laws and enacting a Uniform Civil Code (UCC) in their place which would apply to all Indians equally, irrespective of religion. Nevertheless, for various reasons that I elaborate in Chapter 6, the Indian government only half succeeded in its goal of normative unification. As a result, the Indian personal law system today rather resembles the "unified semi-confessional" type under which secular judges at civil courts continue to apply to religious minorities their own communal laws (i.e., *shariat* to Muslims, Christian law to Christians, and Parsi law to Zoroastrian Parsis), and the Hindu law – which was considerably unified across different communities and codified into four separate Acts in 1955–56 – to the rest of the population, which consists mainly of Hindus, Sikhs, Jains and Buddhists, plus anyone else who is not a Muslim, Christian, Parsi or Jew by religion.

The institutional, substantive and procedural differences that we observe across the personal status systems of these three countries give

rise to a number of important questions about different states' responses to the challenges of regulating or reforming pluri-legal personal status systems in the state- and nation-building process. For instance, why do Israel and Egypt have two different types of personal status today, even though after independence they inherited very similar fragmented confessional systems closely resembling the Ottoman *millet* system? How can we explain different motives and strategies that each government adopted in regulating and creating its own personal status system? Why did Israel opt for a fragmented confessional system? Why did Egypt not settle for a similar system but aimed for a unified confessional system by means of normative unification? Why did India set for itself the goal of complete normative unification? By the time India gained its independence, it already had the very same form of personal status system (i.e., unified confessional) that Egyptian leaders had aspired to and attained only after their drastic intervention in 1955. Then why was the Nehruvian government not content with the unified confessional system that it had inherited from the British Raj, but instead desired a complete unification? What was it that set Nehru's India apart from Nasser's Egypt? And more importantly, what impact did these different choices of reform have on state–society relations and the rights and freedoms of individuals in each country? In addition to the three main questions posed above, these constitute a second set of enquiries that the present study aims to engage and answer.

HUMAN RIGHTS UNDER STATE-ENFORCED PERSONAL STATUS LAWS

Personal status laws do not exist in isolation. They not only interact with one another, but also are closely intertwined with the general or territorial laws of the state such as criminal law, domestic violence law, housing law, social security law, welfare law, immigration law, labor law and even the constitutional law (Brown 1997). From this point of view, it can be argued that a government may pursue multiple policy objectives as it attempts to intervene in its personal status system. With this understanding, however, the present study primarily focuses on the ideological and political objectives that post-independence Israeli, Egyptian and Indian governments sought to achieve by means of institutional, normative and substantive interventions into their respective personal status systems in the process of state- and nation-building, and

the implications of these interventions and state-enforced religious family laws on fundamental rights and liberties of their citizens.

For instance, Israeli leaders maintained a variant of the Ottoman *millet* system in order to homogenize and preserve the Israeli-Jewish identity while segregating and bolstering communal divisions among the country's non-Jewish inhabitants. Nasser abolished religious courts to centralize and systematize his country's legal system, and reportedly to break down the independent political power of religious authorities who had opposed his revolutionary agenda (Crecelius 1966, p. 35). Likewise, the post-independence Indian government sought normative unification of personal laws to build a secular state and eradicate communal sentiments, and thereby inculcate among Indians a sense of common national identity. These varying motivations (differing regimes' choices and ideological orientations) to intervene in personal status systems, different modes of reform, as well as varying configurations of state–community relations, have led to the emergence of a distinct form of personal status in each country (i.e., "fragmented confessional" system in Israel; "unified confessional" system in Egypt, and "unified semi-confessional" system in India). But what about the effects of these divergent personal status systems on the rights and liberties of people who are subject to their purview? Can any particular system be said to be more favorable to or protective of individual rights and liberties in contrast to others? I shall deal with these questions at great length later in the book; however, at this point it should suffice to note that insofar as their impact on human rights is concerned, as corroborated by empirical findings, I have not observed much significant difference between various forms of personal status systems (e.g., fragmented confessional vs. unified semi-confessional, etc.). In other words, empirically speaking, state-enforced religious family laws – no matter which ideal type they resemble – tend to affect human rights in a similar vein by imposing various limitations and disabilities upon four groups of rights and liberties in particular: *the freedom of religion* (which encompasses: the right to have religion, the right to change religion, the right not to profess any religion, the right to profess religion without government intervention, and the right to be free from religious coercion); *equality before the law*; *marital and familial rights* (including right to marry, right to divorce, right to inheritance, etc.); and *procedural rights* (these include individuals' right to fair trial, due process and the right to seek effective remedy when their rights are violated) (An-Naim, Gort *et al.* 1995; van der Vyver and Witte 1996; Gearon 2002; Runzo, Martin *et al.* 2003;

Temperman 2010; Witte and Green 2012). This is especially true when people are forcibly subjected to the jurisdiction of state-sanctioned religious laws and authorities without their explicit or implied consent, as in Israel or Egypt.

However, as explained in greater detail in Chapter 3, this contention should not mislead the reader to assume that there is an inevitable or irreconcilable conflict between "religion" per se and fundamental rights and liberties. This book is not about the treatment of human rights under certain religious traditions (e.g., Islam, Judaism, Christianity or Hinduism), or "classical" religious laws and precepts derived from ancient scriptural or prophetic sources of these traditions. Instead, the book primarily concerns itself with state-appropriated and enforced religiously inspired family or personal status laws – because in personal status systems the state, which is an innately secular institution (An-Naim 2008), codifies and legislates the so-called religious laws, incorporates institutions of certain ethno-religious communities into its legal system, and takes it upon itself to interpret and enforce these laws through its agencies. In this respect, the findings of my investigation across the Israeli, Egyptian and Indian personal status systems reveal that when the state becomes the interpreter and enforcer of religious family laws this usually results in the erosion of fundamental rights and liberties – particularly affecting the four groups of rights mentioned above. With this in mind, the following chapters identify and analyze common human and women's rights concerns occurring under the Israeli, Egyptian and Indian personal status systems.

Even though state-enforced religious family laws impose similar restrictions and disabilities upon all persons who are subject to their jurisdiction (especially when people do not consent to application of religious laws), their impact tends to be harsher on certain groups. These include women, non-religious people, religious dissidents, individuals who do not belong to a recognized religious community (e.g., Baha'i in Egypt), and last but not least the religious people or the believers. As noted earlier, most personal status-related human rights concerns occur in respect of equality before the law (especially gender inequality in regard to marriage, divorce, maintenance, alimony and inheritance), freedom of religion and marital and familial rights. Since male-dominated political authorities who oversaw etatization processes in the three countries under examination often adopted restrictive and gender-unequal aspects and interpretations of sacred texts, religious narratives and customs, the resultant personal status laws