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Politics of Religious Freedom: Case Studies

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INTRODUCTION

The right to religious liberty has gained particular prominence in international law and human rights discourse over the last two decades. While religious liberty was a foundational principle of the post-1948 U.N. Charter political order, international treaties, and national constitutions, in the 1990s the need to protect and promote religious freedom took on a new importance and urgency.

Freedom of religion and belief was formally recognized in the 1948 Universal Declaration of Human Rights (UDHR),¹ the European and American human rights conventions of 1950 and 1978

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1. Universal Declaration of Human Rights, arts. 2, 18, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

respectively,² the two human rights Covenants of 1976,³ the 1981 U.N. General Assembly Declaration on religious intolerance and discrimination,⁴ and the African Charter on Human and Peoples Rights of 1986.⁵ In 1986, the United Nations appointed its first Special Rapporteur on Religious Intolerance and adopted a second declaration on religious intolerance in 1993.⁶

Despite these guarantees provided by human rights conventions and provisions, religious liberty has emerged as a highly contentious and charged issue in the international human rights community. There are multiple reasons for this, including the increased salience of religious identity in the world, and the intellectual and political resistance posed to secularist assumptions about human flourishing by a variety of social movements. While the larger consequences of such developments are unknown, what is clear is that religious liberty has become a key site of legal and political struggles to negotiate communal relations across lines of religious difference.

In Europe, despite the fact that the right to religious freedom has been part of the European human rights system since 1950, the European Court of Human Rights handed down its first major decision concerning religious freedom only in 1993 in a case involving proselytism directed towards an Eastern Orthodox Christian in Greece.⁷ While there were no doubt cases of religious discrimination in the past that might have been challenged locally, what is distinct about the 1990s is that increasingly struggles between minority and majority religious communities are staged as contestations over the right to religious liberty. As a result, since

2. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222; American Convention on Human Rights art. 12, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

3. International Covenant on Civil and Political Rights arts. 2, 18, 27, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3.

4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief arts. 1, 6, G.A. Res. 36/55, U.N. Doc. A/36/684 (Nov. 25, 1981).

5. African Charter on Human and Peoples' Rights, arts. 17, 18(2), 20(3), June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

6. Commission on Human Rights resolution 1986/20 of 10 March 1986; Declaration on the Elimination of All Forms of Religious Intolerance, A/RES/48/128, 20 December 1993.

7. *Kokkinakis v. Greece*, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) (1993).

2001 far more cases have been brought before the Court involving claims by religious communities (both majorities and minorities), key among them claims to freedom of religion and belief by European Muslims.⁸

In the United States, the U.S. Congress passed the International Religious Freedom Act (IRFA) in 1998 during the second term of the Clinton Administration.⁹ The Act both expressly invoked religious freedom as a human right recognized in U.S. and international law alike and established a Commission on International Religious Freedom to monitor, promote, and protect that right worldwide.¹⁰ The implementation of IRFA has had mixed results and has changed over time. IRFA has been criticized for the disproportionate role American evangelical Christians played in its passage, for its preoccupation with the plight of Christians rather than that of other religious minorities, and the systemic inequality produced by majoritarian religious politics.¹¹ Others have criticized IRFA for being a foreign policy instrument in the service of U.S. strategic interests.¹² The American foreign policy establishment itself has begun to appreciate the complexity of the world religious landscape in which IRFA seeks to intervene. In other words, since its passage, IRFA has been subject to a variety of transformations and critiques from within and without.

Public debate over religious freedom has also intensified over the last two decades in the Middle East, South Asia, and Africa. In these regions, the ascendance of contentious politics that are often described as religious has heightened sectarian tensions, and religious minorities have turned to religious freedom clauses in their national constitutions and international human rights instruments to seek protection from social and state-endorsed discrimination. In India, for example, the wide-scale mobilization and subsequent ascension of right-wing Hindu extremist parties to political power has unleashed attacks on those designated as religious minorities under the

8. See Peter Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663 (2011).

9. International Religious Freedom Act, 22 U.S.C. § 6401 (1998).

10. IRFA specifically refers to the UDHR, the ICCPR, the Helsinki Accords, the 1981 Declaration, the U.N. Charter, and the ECHR: sec. 2(a)(2)-(3). In particular, the Act draws on Art. 18 of the UDHR and Art. 18 of the ICCPR which the U.S. ratified with reservations in April 1992.

11. See, e.g., Melani McAlister, *US Evangelicals and the Politics of Slave Redemption as Religious Freedom in Sudan*, 113 S. ATLANTIC Q. 87 (2014).

12. See, e.g., Peter Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 35 (2002).

Tolerance model,¹³ particularly against Muslims and Christians. In response, not only the religious minorities but their supporters (both religious and secular) have mobilized religious freedom discourse as a shield from sectarian violence.

In Iraq, Nigeria, and Iran, the persecution of non-Muslim and Muslim minorities has increasingly come to be seen as a clarion call for institutionalizing international protocols for protecting the religious rights of minorities. In Egypt, Coptic Christians, who comprise the largest resident Christian population of the Arab world, have been systematically discriminated against by the Egyptian state. Recent political changes in the country, the overthrow of the Mubarak regime and subsequent rise of the military rule, have not improved their condition but have made Copts more vulnerable to various forms of discrimination and violence. As a result of this discrimination, Coptic Christians have increasingly turned to IRFA to put pressure on the Egyptian government to change the discriminatory laws of the country and bring their plight to the world stage. They have also made important alliances with American evangelical networks to mobilize U.S. churches to advocate on their behalf.¹⁴

Elsewhere in Africa, we see a different kind of politics emerging around religious freedom. In South Africa, for example, the post-apartheid constitutional order explicitly incorporates the full array of international human rights norms regarding self-determination, minority rights, freedom of religion, and substantive equality. This has generated new and intense debates on questions of legal pluralism and the tensions between individual and group rights and identities. For the first time, intensive law reform efforts are underway to recognize the claims of and redress past discrimination against different religious communities, including tribal groups living under customary law and religious minorities with their own family and personal status laws. While South Africa is a liberal democratic state, it is striking how the norms and assumptions underpinning this debate differ markedly from engagements involving the claims of religious communities in Europe and North America today.

13. See CASSIE S. ADCKOCK, *THE LIMITS OF TOLERANCE: INDIAN SECULARISM AND THE POLITICS OF RELIGIOUS FREEDOM* (2014).

14. See Saba Mahmood, *Religious Freedom, the Minority Question, and Geopolitics in the Middle East*, 15 *COMP. STUD. SOC'Y & HIST.* 418 (2012).

In all these places, and in many others in the world today, multiple narratives of religious freedom are being mobilized. Numerous versions are being created that often sit at odds with dominant European, American, and even U.N. protocols that exist on the issue. It is important to ask what is taking place under the rubric of religious freedom that overlaps with, but is also distinct from, authoritative discourses circulated in Europe, the United States, and the United Nations.

It is these and related questions that led us to initiate a four-year, multidisciplinary research project funded by the Henry Luce Foundation in New York to study how religious freedom is being transformed through legal and political contestations in the United States, the Middle East, South Asia, and the European Union.¹⁵ The project has been both global and historical in scope and its object has been to generate a body of research and writing on the global history and politics of religious freedom that can serve scholars, teachers and researchers, contemporary policy debates, international human rights circles, and local civil society organizations involved in this issue. Premised upon the assumption that religious freedom exists in the plural and not the singular, it has undertaken a collaborative international study of the concept and practice of religious freedom as it has taken shape in different contexts, past and present, and in different countries.

In the course of the project, two critical trajectories in particular have emerged: one which reexamines early modern European and post-Enlightenment histories and anthropologies of the right to religious liberty and seeks to make visible both their provincial character and contingent relationship to rival religious and political projects;¹⁶ and another which analyzes the development of the concepts of religion and religious liberty in non-European histories and contexts during the colonial and post-colonial periods in order to re-think the normative and prescriptive accounts of religious liberty often found in international law and human rights debates.¹⁷

15. POLITICS OF RELIGIOUS FREEDOM: CONTESTED NORMS AND LOCAL PRACTICES, <http://politics-of-religious-freedom.berkeley.edu/> (last visited June 28, 2014).

16. See, e.g., Nehal Bhuta, *Two Concepts of Religious Freedom in the European Court of Human Rights*, 113 S. ATLANTIC Q. 9 (2014); Ian Hunter, *Religious Freedom in Early Modern Germany: Theology, Philosophy, and Legal Casuistry*, 113 S. ATLANTIC Q. 37 (2014).

17. See, e.g., Ratna Kapur, *A Leap of Faith: The Construction of Hindu Majoritarianism through Secular Law*, 113 S. ATLANTIC Q. 109 (2014); Saba

An important component of the project has been to publish translations of and commentaries on key legal (not simply judicial but also legislative) cases from around the world involving claims to and contestation regarding religious freedom. This Special Issue of the *Maryland Journal of International Law* is the first result of these efforts and it includes case studies from the United Kingdom (the *Jews' Free School* case), India (the *Ayodhya* case), Malaysia (the *Lina Joy* and *Shamala v. Jayaganesh* cases) and South Africa (the Recognition of Muslim Marriages Bill). We hope to publish further case studies and commentaries, especially in relation to recent judicial decisions in Egypt, in forthcoming volumes of the journal.

The primary motivation in publishing these case studies is to make available English-language analysis of legal cases from various parts of the world that invoke a claim to religious freedom. The reasons for this *lacuna* are various, key among them access to regional languages and networks. In many instances, legal cases also involve public education or civil society campaigns that have changed public perceptions of key issues (such as minority religious rights). Our aim therefore has been not only to make the legal judgments available, but to provide a narrative context for each case.

In particular, our hope is that these case studies will be of interest to teachers and scholars across the disciplines—religious studies, anthropology, critical theory, sociology, international relations, law schools—and to legal practitioners in various parts of the world. We have found that the majority of case books on the topic of religious freedom, especially those used in law schools, focus on the legal arguments and judgments in the cases and are concerned mainly with Euro-Atlantic jurisprudence. By contrast, our objective has been to focus on critical discourses, materials, and interviews with prominent activists and lawyers from parts of the world that are usually excluded or absent in the extant literature.

While the *Politics of Religious Freedom* project has benefitted from the insights offered by these different studies and approaches to religious liberty, it has also been distinct in that it asks whether

Mahmood and Peter Danchin, *Immunity or Regulation? Antinomies of Religious Freedom*, 113 S. ATLANTIC Q. 129 (2014). See also *Symposium: Re-Thinking Religious Freedom*, 29 J. L. & RELIGION 358 (2014) (A special issue, co-edited by Winnifred Fallers Sullivan and Elizabeth Shakman Hurd); *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood & Peter Danchin eds., forthcoming 2015).

religious liberty can indeed be treated as a singular or stable principle aimed at achieving shared goals and objectives given the diversity of historical and political contexts. American and UN discourses on religious freedom tend to conceive of freedom of conscience in individualist terms, often assuming, in addition, that the presence, or not, of religious liberty can be objectively assessed. This tendency further reinforces the sense that there exists a global yardstick of sorts for measuring religious liberty, and categorizes state practice as free, un-free, or somewhere in between.¹⁸ An impartial observer can, it is implied, pick up this measuring stick and readily discern what religious freedom is and what it is not.

As our own experience and work in this project confirms, religious freedom cannot be so easily defined or readily measured. It is not possible to define religious freedom in the singular. In an era of increasing pluralization and globalization, and a time of great conflict and misunderstanding involving religion and religious difference, it is not clear that the various enforcers, political and judicial, of international laws protecting religious freedom have the tools available at their disposal to make their jobs conceivable and possible.

Accordingly, the case studies in this Special Issue explore different understandings of religious freedom in an attempt to de-center conceptualizations that have dominated the discussion in the U.S. and international policy circles. The authors each discern and engage with a broader and more diverse field of practices than conventionally designated and defended as “religious freedom” in mainstream debates. By making these narratives available, the case studies each thus provide new templates for thinking about the question of religious freedom and its relation to the politics of human rights and the politics of religious difference.

While it is apparent that the last two decades have witnessed an ascendance of claims for and against religious liberty, the case studies reveal that it is far from clear what exactly governments, human rights activists, religious groups, and religious minorities actually mean when they claim protection of religious rights. All this

18. Under IRFA, for example, the Commission on International Religious Freedom is required to submit an annual report to the President, the Secretary of State, and Congress setting out its findings with respect to the presence or not of religious freedom in every country in the world with the exception of the United States and policy recommendations for the U.S. government with respect to various categories of violation of international religious freedom: sec. 203.

is further compounded by the fact that unlike binding international treaties that exist on a range of issues (such as genocide, torture, racial discrimination, children's and women's rights, etc.), no such treaty exists on the issue of religious freedom. The most comprehensive statement remains the 1981 Declaration of the UN General Assembly on religious intolerance and discrimination, but this is non-binding on states under international law. It is further challenged by competing declarations, such as the 1990 Cairo Declaration of Human Rights in Islam,¹⁹ which implicitly criticize the UDHR and subsequent instruments for failing to take into account the variety of cultural and religious contexts. Thus, perhaps more than in other areas of human rights, there is broad disagreement over norms pertaining to the right to religious liberty and how competing conceptions of this right (as an individual or group right, for example, or regarding the sources or philosophical foundations of the right) are to be settled. What we can see instead is that most such conflicts tend to be settled either by judicial casuistry and federal regulation (legal formalism) or through political disputes and settlements.

Importantly, these case studies explore the variety of norms and claims made in the name of religious liberty not so much to reveal an unstable essence or document its various valences and meanings, but rather to map out the nodal points around which disagreements over religious freedom tend to occur in a variety of national and political contexts. This is critical because in order to reach any sort of agreement in the human rights and international communities, it is important first to understand analytically what the conceptual and practical stakes are in the battle over religious freedom. It is further important to ask whether *religious* freedom, given its manifold deployments and limitations, is the best way to achieve co-existence across manifold differences for the variety of actors involved.

Rather than reduce such differences to a lowest common denominator, the case studies map out the nature of these differences and consider what their implications would be at the policy level, both at national and international levels. They thus implicitly raise the question whether, if indeed religious freedom is not one thing, the variety of forms it takes is commensurable with a global project that seeks to implement shared protocols and norms for its adjudication? What sorts of institutional and practical structures would such

19. Cairo Declaration on Human Rights in Islam, 24, 25, U.N. GAOR, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1990).

implementation require? For whom, under what conditions, and under which terms?

Viewed together, the case studies reveal that disagreements about what religious freedom might mean often unfold around certain themes. These themes, while specific to certain historical and political contexts, also cut across this specificity and reveal the structural tensions that haunt the debate around religious freedom. Some of the key themes around which such conflicts occur include: religious freedom conceived as an individual versus a collective right; the proper “source(s)” or philosophical basis of religious freedom as a human right; the place of minorities in a democracy and the protections accorded to them; the proper boundary between religion and state; the relation of religious freedom to global politics; and what religion is imagined to be in struggles over religious liberty.²⁰

The tension between individualist and collective conceptions of rights is especially acute in the case of religious freedom. The tension emerges along two dimensions: first, regarding the subject of the right; and second, regarding the nature and scope of the claim itself. Does the claim, for example, include notions of the collective good or collective identity? In much Anglo-American law and philosophy, it has often been assumed (without much debate) that the individual is the proper subject of rights, and that the claim to religious liberty is a claim to freedom of conscience and to free exercise of religion—subject only to general limitations by the state. While champions of this position often ground it in the First Amendment of the U.S. Constitution, others argue that such a conception is difficult to uphold in practice or in theory not only in other parts of the world (including in many modern liberal democracies) but also in American history. Indeed, this is not how religious freedom is codified in international law which includes explicit provisions on national self-determination, the rights of national, ethnic and religious minorities, and the rights of indigenous peoples.

Ratna Kapur’s case study on the *Ayodhya* case, for example, shows that in India religious freedom consists in the state granting various religious groups juridical autonomy over family affairs in the

20. These themes were the subject of a multidisciplinary course on Religious Freedom and the Rights of Religious Minorities taught by the project team at the European Inter-University Centre for Human Rights and Democratization in Venice in July 2011. See <http://politics-of-religious-freedom.berkeley.edu/course/> (last visited June 28, 2014).

form of family or personal status laws. Thus various religious groups, including Hindus, Muslims, Sikhs, Christians, Buddhists, Jains, and Parsees, are legally recognized as both the addressees and bearers of claims of right. These claims are recognized as extending to individual and collective aspects of freedom of religion and to the protection of separate (majority and minority) religious and cultural identities. Such a conception of religious freedom is not without paradoxes, as exemplified in politically charged battles over the status of family law: feminist critics often assert that these laws privilege group rights over the rights of women as individuals. Others argue that instituting a uniform civil code for adjudicating family affairs would compromise the autonomy accorded to religious minorities. Such contestations illustrate the contested and polyvalent nature of claims to religious freedom in situations where the collective aspects of the right are legalized.

The case study by Waheeda Amien and Annie Leatt (Dharmameghā) on the recognition of Muslim marriages in post-apartheid South Africa reveals another important dimension of the global complexity of religious liberty. As discussed above, since 1996 South Africa has embarked on an ambitious program to institute the right to religious freedom that combines both individualist and collective conceptions. Given the diversity of South Africa, this is a challenging project, one that puts to test the easy assumption often made in the scholarship on religious freedom that group rights are necessarily antithetical to conceptions of justice and democracy.

South Africa's post-apartheid constitution explicitly recognizes the collective aspects of the right to religious freedom, making it a key element in the transformation of politics between religious communities, and opening new spaces for legal and social reform and contestation. The 1996 Bill of Rights guarantees cultural and religious communities the right to enjoy their culture and practice their religion, and effectively makes both religious-based law and secular law available for the adjudication of family affairs. As in many other countries, South Africa has instituted an ambitious curriculum of primary and secondary religious education to inform and prepare citizens for this complex project. These *curricula* themselves form a part of the global project of religious liberty and deserve to be studied in more detail.

In Europe, the question of the place and protection of religious minorities in European nation-states reveals both similar and different

dynamics. While the European Convention on Human Rights expressly protects the right to freedom of religion and belief, it contains no provisions on minority or group rights (despite a long pre-World War II history of granting group rights). Claims of Muslim and other minority religious communities (such as Roma) involving issues of collective autonomy and identity are thus unsettling existing normative legal categories, and have catalyzed new forms of politics and rethinking of both the historical and theoretical premises of modern liberal political order in Europe.

At a deeper level, the European Court of Human Rights' post-2001 religious freedom jurisprudence has raised anew the question of the relationship between religion and public order. In its reasoning, the European Court has constructed competing normative accounts of notions such as "secularism," "neutrality," "equality," and the "right" either to accept or deny claims to religious liberty while at the same time granting the state a wide "margin of appreciation" to accommodate majoritarian religious sensibilities in the name of public order. In a nation-state system where Christianity has been the dominant religious tradition and where state and state law continue to reflect this heritage and ongoing relationship, various contradictions and tensions with modern accounts of state neutrality and liberal rights have surfaced.

In these cases, a complex historical and normative relationship between Christianity and secularism can be seen to continue to define the modern contours and shape of the public sphere and the right to religious liberty itself. Assertions of claims of right by Muslims and other religious communities have thus made visible both the historical contingency and cultural particularity of these norms and forms of legal ordering in Europe. The case study by Heather Miller Rubens and accompanying article by Peter Danchin and Louis Blond vividly illustrate how these tensions and antinomies both animate and underpin the judgments of the U.K. Supreme Court in the *Jews' Free School* case.

In similar terms, but moving beyond Europe to struggles over religious freedom in Malaysia, Tamir Moustafa's case study on the *Lina Joy* and *Shamala v. Jayaganesh* cases illustrates the complex and often surprising ways that majority and minority groups *both* assert claims to religious freedom and how particular legal and normative arrangements internal to liberal rights discourse often exacerbate rather than resolve the frequency and intensity of these legal dilemmas.

In conclusion, religious freedom, not unlike other fundamental freedoms invented in the last century, is a contested and multivalent historical construct that has taken on new lives of its own in the world. These case studies investigate these lives and raise a host of questions for future thought and inquiry: What models of religious freedom can be identified in a world of plural landscapes of religious co-existence? Who mobilizes them, and toward what ends? How are local practices of religious co-existence being transformed by the introduction of Western discourses on religious freedom? What differences and incommensurabilities may be identified between state-centered notions of religious freedom and forms of religious co-existence practiced by communities? What kinds of religious subjects are presumed and created by the various formulations of religious freedom that have assumed hegemony in past decades? In what ways does religious freedom become intertwined with other regimes of power and knowledge, such as strategic interests, international legal debates, global and regional power politics, and neoliberal economic agendas, and with what effects? And finally, what does international religious freedom signify in a context in which Euro-American understandings of religion have diversified far beyond the protestant forms around which they were originally articulated and institutionalized? Is it possible to imagine forms of religious (or non-religious) freedom that do not become a mode of exercising power through the claim that (Christian or Protestant) secular practices of religious freedom are neutral and universal?

For scholars, researchers, policy-makers, and students interested in understanding the contemporary law and politics of religious freedom, these case studies will stimulate such unfamiliar and, at times, uncomfortable lines of thought and inquiry.