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Balancing Religious Accommodation and Human Rights in Constitutional Frameworks



Mirjam Künkler has been teaching Near Eastern Studies at Princeton University since 2007. Her work focuses on the politics of religion and law in Iran and Indonesia. She has published on religious and constitutional thought, religion-state relations, and legal and political reform in the two countries. Links to her work can be found here:
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Overview

15 November 2014 brought to a close the residence period of the ZiF research group 'Balancing Religious Accommodation and Human Rights in Constitutional Frameworks'. Convened by MIRJAM KÜNKLER (Princeton University), HANNA LERNER (Tel Aviv University), and SHYLASHRI SHANKAR (Centre for Policy Research, New Delhi), the group brought together leading scholars in the fields of political science, law, sociology, history, and religious studies to investigate and compare how different constitutions reconcile—or fail to reconcile—the protection of human rights with the demand for religious accommodation. Fellows included ASLI BÂLI (University of California), NATHAN BROWN (George Washington University), TOM GINSBURG (University of Chicago), BILL KISSANE (London School of Economics), JOHN MADELEY (London School of Economics), DAVID MEDNICOFF (University of Massachusetts, Amherst), TAMIR MOUSTAFA (Simon Fraser University), MATTHEW NELSON (School of Oriental and African Studies, London), BENJAMIN SCHONTHAL (University of Otago), and YÜKSEL SEZGIN (Syracuse University). MARKUS BÖCKENFÖRDE (University of Duisburg), MARK FARHA (Georgetown University, Qatar) and TINE STEIN (University of Kiel) were associate fellows. AARON GLASSERMAN (B.A., Princeton University) served as coordinator.

Seven conferences and workshops took place as part of the group's activities during the six-month residence. These were:

- June 4–6. 'Constitution Writing, Religion and Human Rights' (convened by ASLI BÄLI and HANNA LERNER)
- June 10–11. 'Index Building in Socio-Legal Scholarship' (convened by MIRJAM KÜNKLER and YÜKSEL SEZGIN)
- July 31–August 1. 'Religious Education and Democratic Citizenship' (convened by MATTHEW NELSON, MIRJAM KÜNKLER, and AARON GLASSERMAN)
- August 21–23. 'Boundary Making in the Constitution: Balancing Religion and Human Rights' (convened by MIRJAM KÜNKLER, HANNA LERNER, and SHYLASHRI SHANKAR)
- September 11–13. 'Constitutionalism, Religious Freedom and Human Rights: Constitutional Migration and Transjudicialism Beyond the North Atlantic' (convened by MIRJAM KÜNKLER and SHYLASHRI SHANKAR)
- October 14. 'Constitutionalism and Conceptual Politics' (convened by BILL KISSANE, MIRJAM KÜNKLER, SHYLASHRI SHANKAR, and AARON GLASSERMAN)
- October 23–24. 'Bureaucratization of Islam in Muslim States and Societies' (convened by AARON GLASSERMAN)
- In addition, the group will convene a closing symposium titled 'Inclusiveness, Representation and Religious Accommodation in Constitutions and Constitutionalism', July 15–17, 2015

These events gave fellows the opportunity to work together not only with each other but also with over 60 scholars from Germany, Europe, and all over the world. 17 of the group's guests at conferences and workshops were young scholars who were working on their PhDs or had just completed those. The relatively large number of workshops and conferences enabled the group to address several facets of the larger subject of religion, law and human rights, including constitution writing, education, and bureaucratization. It also multiplied the group's disciplinary toolkit. The workshop on 'Index Building in Socio-Legal Scholarship' (June 10–11), and the workshop on 'Constitutionalism and Conceptual Politics' (October 14) paid particular attention to methodological questions. The former focused on applying quantitative methods for large-N studies of law and religion, while the latter explored the role of conceptual history in the research of law, politics and religion. These workshops enhanced the group's interdisciplinary and collaborative spirit by incorporating voices from, among other fields, anthropology, theology, history and education.

In addition to these more or less monthly gatherings, the fellows participated in several programs on a weekly or semi-weekly basis. Over the course of the residence, twelve scholars, six coming from German institutions and six from other European and American universities, participated in the group's Tuesday Speaker Series:

- May 20. JEFF REDDING (Saint Louis University, USA/Centre for Advanced Study of Law as Culture, GER), 'The Rule and Role of Islamic Law: Constituting Secular Law and Governance in Contemporary India'
- May 27. LEIF SEIBERT (Bielefeld University, GER), 'Consociational Belief in an Unjust Peace'
- June 25. HEINER BIELEFELDT (University of Erlangen, GER), 'Religion and Secularism in Post-Soviet Russia, Kazakhstan and Moldova'
- July 8. STEFAN VOIGT (University of Hamburg, GER), 'The Rule of Law and Constitutionalism in Muslim Countries'
- July 15. FABIAN WITTECK (Münster University, GER), 'Paralleljustiz?—The German Experience with (Religious) Non-Official Justice'
- July 22. KATRIN SEIDEL (Max Planck Institute for Social Anthropology, GER), 'Constitutional Recognition of Islamic Law and Sharia Courts in Ethiopia: Towards a Procedural Approach'

- July 30. DALE EICKELMAN (Dartmouth College, USA), ‘Morocco’s 2011 Constitution: The First Three Years’
- August 5. ROCHANA BAJPAI (School of Oriental and African Studies, UK), ‘Secularism and Religion in India’s Constitutional Imagination’
- September 9. BENJAMIN SCHONTHAL (University of Otago, NZL), ‘What Is a Buddhist Constitution?’
- September 16. MATHIAS ROHE (University of Erlangen, GER), ‘Religious Alternative Dispute Resolution in Europe—Blessing or Curse?’
- October 2. EBRAHIM AFSAH (University of Copenhagen, DEN), ‘The Empty Fortress: Pitfalls of Contemporary Constitutional Debates in the Middle East’
- October 28. CHRISTOPHER THORNHILL (University of Manchester, UK), ‘A Sociology of Constitutional Rights—Are Religious Rights Different?’
- November 6. YADH BEN ACHOUR (Tunis, TUN), *Entstehung einer Verfassung in Zeiten der Revolution. Tunesien 2011–2014*

The program began with a talk by the visiting lecturer and continued with intensive discussion among everyone present. Often, papers had been pre-circulated so that attendees were prepared to discuss them in depth. The group welcomed attendees from the Bielefeld University community and sees such events as excellent opportunities to foster collaboration between ZiF fellows and faculty and students just down the hill. On Thursdays, the fellows convened for closed sessions to share and receive feedback on ongoing research or to discuss readings pertinent to upcoming conferences and the broader themes of religion and constitutionalism.

Slow Science

Notwithstanding the intense schedule, it was ultimately ZiF’s unique environment of collaborative ‘slow science’ that enabled the group to be as productive as it was. As discussed later, the fellows are working on four sets of publications that grew out of or benefited from the ZiF collaboration: *Constitution Writing, Religion and Human Rights* (Cambridge University Press, edited by ASLI BÂLI and HANNA LERNER), a special journal issue comprising six articles with the *American Behavioral Scientist*, an edited volume based on the papers of the workshop ‘Religious Education and Democratic Citizenship’, and either an edited volume or a special journal issue based on the papers of the workshop ‘Bureaucratization of Islam in Muslim States and Societies’.

The ZiF experience and the duration of the residence enabled the fellows to generate, discuss, and rethink ideas within the broad but coherent framework of fellows’ individual interests and the group’s collective goals. Working together for six months, the fellows were able to build on previous and ongoing projects and determine and execute a new research agenda, all with enough time to revise their scholarship and explore other directions as new knowledge and perspectives dictated. The following are just a few of the themes the group addressed from different disciplinary approaches and in different regional and country contexts.

Constitution-Drafting Processes

In light of the number of new constitutions that have been written over the last three decades, it is perhaps unsurprising that constitution drafting has emerged as a topic of interest not only among academics but also for policy-makers, development agencies and a broad array of international organizations. Yet a distinctive feature of the current wave of new constitutional exercises remains relatively understudied: the challenge of constitution-drafting under conditions of deep

disagreement over the state's religious or secular identity. While some attention has been paid to the broader question of constitution-writing in *divided* societies, the distinctive problems raised by religious divisions have not garnered significant attention.

Recent experiences have underscored the degree to which constitution writing can be a high-stakes game. Amid intense polarization between competing visions of the state, drafting a constitution risks undermining fragile forms of political stability and derailing fledgling efforts to democratize. This has been a troubling challenge in the cases of countries such as Iraq and Afghanistan, where constitutional debates have revealed deep divisions over foundational values that have catalyzed renewed conflict instead of contributing to state-building. Equally worryingly, Egypt appears caught in a cycle of constitution promulgation and repeal that reflects deep and unresolved conflicts over the relationship between religion and the state. The divisions that have emerged around constitution drafting in Egypt now threaten either to reproduce authoritarian mechanisms of imposition or to devolve into civil strife.

There can be no question, of course, that the impact of constitutional design on alleviating or exacerbating underlying religious divisions can only be fully appreciated over time. The meaning of any given constitution will necessarily unfold and evolve gradually through interpretation by a wide spectrum of authoritative and popular actors, ranging from constitutional courts, legislatures, executives and even the military to new political parties and movements that seek to reframe the constitution through reinterpretation. While all of this interpretive activity is very important to the operation of constitutions after they have been drafted, to focus exclusively on the evolution of the text without studying its origins risks obscuring the degree to which deliberate design choices by constitution-drafters contribute to constitutional outcomes, for better or worse.

Many of the research group's discussions centered on the constitution-drafting process and the challenges and opportunities of studying the procedural details and recorded debates of drafting committees. At the June 4–6 workshop, which focused on religion and constitution drafting, participants discussed drafting in Egypt, Tunisia, Malaysia, Spain, Poland, Brazil, Kenya and Fiji. Other workshops and talks presented additional opportunities to explore understudied cases of constitution-drafting. Fellow NATHAN BROWN gave a public talk in early June on recent constitutional developments in Egypt. At a Speaker Series talk in July, DALE EICKELMAN assessed the 2011 Moroccan constitution in the context of conflicting commitments to the nation, the region, the continent, and the Islamic ummah.

Fellows found that such investigations yielded important insights into the origins of particular constitutional provisions regarding religion. In Indonesia, for example, a last-minute intervention by the departing Japanese occupiers in 1945 removed from the constitution the so-called Jakarta Charter, a seven-word sentence specifying that Muslim citizens would be subject to Islamic law. The removal left unresolved the question of Islamic law in Indonesia. The case also sheds light on how the status of Islamic law continued to be a bone of contention in Indonesia (after all, the drafting committee had already agreed on the constitution including the Jakarta Charter prior to the Japanese intervention), as well as on how colonial histories shape post-colonial trajectories.

Another insight concerns the methodological approach to studying constitution-drafting processes. The group found that the conventional distinction between elite and popular, or top-down and bottom-up, was less instructive than a more contextual appreciation of the factors impacting both process and outcome. Instead of treating elite-led and representative processes as dichotomous, paying attention to processes that show overlapping approaches or reflect a continuum may be more productive. For instance, in India there was a decades-long period of elite-led

consultation prior to the constitution-drafting process that determined which groups would be included and struck a series of bargains on core areas of disagreement including on matters of religion. When a constituent assembly with elected and appointed representatives was convened prior to the partition of the country, it was broadly representative—in that various component groups of the society were represented and the members were elected by provincial representative bodies. At the same time, the drafting process was to a large extent dominated by elites—in that the members themselves were primarily drawn from the upper-class, urban and educated elite. Particularly after partition, the drafting process was led by prominent figures in the Congress party. The outcome was an innovative solution that was made possible by the forging of a pre-constitutional consensus on key issues amongst an elite, but that nonetheless gained widespread popular acceptance and proved durable.

Migration of Constitutional and Judicial Ideas

The migration of constitutional and judicial ideas pertaining to religion was another focus of the group's investigations. How does the concept of religious freedom when adopted in different constitutions translate across borders? In new as well as long-standing democracies, questions regarding the status of religious freedom are increasingly negotiated in the constitutional arena. In such instances, some constitutional designers and interpreters look beyond national borders to assess how their peers tackle similar challenges. What meaning or meanings does religious freedom acquire in new settings, and who reframes their content? Over the course of the residence, the fellows (and other workshop participants) drew on a range of case studies to address these questions.

There remains a lacuna in the relevant literature on the methodology of constitutional migrations and the normative underpinnings of this enterprise. Most extant literature either compare constitutional language without considering migration or emphasize the constitutions of the United States, France, and other Western models as the most important 'exporters'. The field is still largely un-mined because most of the debate has focused on the US experience, where borrowing from foreign cases is low and considered illegitimate by many judges. Given current developments and the fellows' expertise, the group was able to go beyond conceiving of the North Atlantic context as the pivot and analyze the evolution of constitutional migration of the concept of religious freedom particularly in Asian, African and Latin American cases. In the workshop 'Constitutionalism, Religious Freedom and Human Rights: Constitutional Migration and Transjudicialism Beyond the North Atlantic', fellows and other participants examined the process and consequences of constitutional and jurisprudential migration in cases ranging from the Philippines and Turkey to China and Iran. At other times during the residence, fellows theorized about different modes of constitutional migration, and the different meanings assigned to similarly worded clauses on religious freedom in the constitution. This collaboration yielded several important insights, including the distinction between explicit and implicit constitutional borrowing, the awareness of negative borrowing (i.e. the rejection of particular foreign clauses and models), the use of foreign judgments to assign legitimacy to controversial domestic rulings that contracted the space for religious freedom, and the tension between whether the concept of 'religious freedom' has an inherent meaning that is amenable to translation or whether the concept has no such meaning, making its usage infinitely flexible and ultimately hollow. These ideas inspired additional research and writing by the fellows and are already the basis for planned future collaborations.

The fellows' and other workshop participants' language expertise enriched the discussions of migration and translation. Of particular interest was the range of meanings and connotations different languages ascribe to 'religion', 'religious freedom', 'essential practices of religion', 'public

order', 'the state' and other related concepts. China, Japan, and Indonesia all present cases in which lawmakers and constitution drafters defined and deployed 'religion' to exclude and delegitimize traditions they perceived as socially harmful or politically dangerous. India, Pakistan and Malaysia present cases where the concept of 'essential practices of religion' travelled but did not translate in the same manner or have similar outcomes.

Religion as a Unique Category

The aforementioned inquiries and indeed the group's entire research program seek to elucidate the relationship between religion, constitutionalism, and human rights, and whether and how constitutions can reconcile liberal commitments with religious demands. All this begs the question: Is religion unique?

Based on the fellows' extensive research across numerous and diverse cases, the answer is a qualified 'yes'. The qualification of the answer stems, first and foremost, from the empirical difficulty in defining the boundaries between religious conflicts and other related societal, ideational or political conflicts. There is often an overlap between religious divisions and other axes of tension, including those with ethnic, linguistic, class or regional characteristics.

Another difficulty facing any comparative analysis of religion, law, and human rights in different countries stems from the variation in the nature and intensity of religious and legal debates. The nature and intensity of the religious divisions that characterize different societies, and which are reflected in their constitution-drafting debates, vary significantly. Different religious traditions also present different kinds of challenges to the constitutional reconciliation of religious accommodation and human rights: Catholicism raises the question of structuring relations between the state and a hierarchically-organized external authority, the Vatican; Islam raises the question of the relationship between state law and *shari'a*. Religious traditions represent an array of conceptions of authority, bureaucratized clerical institutions and legal systems governing everything from the structure of family to the content of education. Given the variation across religious traditions, there may be no single, universally applicable way of defining precisely how religion is distinctive.

Moreover, any comparative analysis of constitutional debates on religion tackles the difficult challenge of definitions. Terms such as 'religion', 'religious', 'secular' or 'secularism' are often understood differently by different members of the same society, let alone the great variation in their meanings in the context of different societies, cultures or historic periods. Aware that 'religion' is a contested term and that there is a substantial literature addressing such definitional questions, the group opted to take assertions of religious character at face value. That is, if parties in question believe that their disagreements are over questions of religion or have a religious character, then the group took them as such.

Yet the group's broad comparative work also indicates that, regardless of the specific nature of the religious divisions and their intensity across cases, there is something about conflicts over religious questions that cannot be reduced to or conflated with other kinds of material or identitarian conflict. The debates examined during the residence are not just proxies for conflicts over class, geographic, ethnic or linguistic differences. Rather, they reflect conflicts over beliefs, values and normative commitments that have proven to be remarkably durable. Of course, not all societies marked by religious diversity experience such conflicts, but those societies that do share common features that are not present where conflicts are less over beliefs and values than over interests and distributional questions. While it is difficult to isolate the ideational elements of religious divisions from the social structures in which they are embedded, political fragmentation over questions of religion produces distinctive challenges.

Religious conflicts present a special problem from a constitutional perspective for another reason. Both religions and constitutions not only regulate human behavior and activities, but also create the very possibility of social, political and legal practices and institutions. The practices and institutions created by religions often compete with the political/legal institutions brought into existence by constitutions. Historically, the question of the separation of religious and temporal authority has long been one of the central battles of modernization and state-formation, especially in the European context. This was in part because, unlike other identity categories or sources of affiliation, religious authorities make competing demands of obedience on the individuals constituting the state. In some religious traditions, religion is also a competing source of law and invokes a legal tradition outside of the state. Elsewhere, there is a long history of religious political parties that structure political contestation in ways that make religious identity more salient. Further, for societies that are former colonies, colonial governors often used religion to legally define the communities in the territories under their administration. Thus, colonial legacies and the legal patrimony inherited by the post-colonial state are marked by the entrenchment of religion in law. These characteristics of religion continue to have important institutional and ideational implications in religiously divided societies.

Publications and Beyond

Several publications based on these and other collective inquiries are now underway. ASLI BÂLI and HANNA LERNER are editing a volume titled *Constitution Writing, Religion, and Human Rights*, forthcoming (2015) with Cambridge University Press. The book breaks new ground in comparative constitutional scholarship by examining debates over religion during constitution-drafting processes. The wide range of country cases from Asia, Africa, Europe and Middle East—neglected areas in comparative constitutionalism—render the book a timely and important contribution to the field. In addition to an introduction and theoretical chapter, the volume contains expert studies of Egypt, Germany, India, Indonesia, Israel, Japan, Lebanon, Morocco, Norway, Pakistan, Senegal, Sri Lanka, Tunisia, and Turkey. Additional contributing authors include several of the group's members (convenors, fellows, and associate fellows), namely NATHAN BROWN, MARK FARHA, MIRJAM KÜNKLER, JOHN MADELEY, DAVID MEDNICOFF, MATTHEW NELSON, and SHYLAHRI SHANKAR. The group's opening conference 'Constitution Writing, Religion and Human Rights' (June 4–6) featured presentations of several of the volume's chapters and gave the editors the opportunity to learn about other country cases and receive feedback from participants. The editors and contributors continued to work on the project during the summer at ZiF.

For the three summer months when most of the research group was in residence at ZiF, the fellows identified and pursued several smaller research agendas within the group's larger research theme of religion, constitutionalism, and human rights. These sub-topics included:

- Role of law in mollifying and exacerbating religious conflicts
- Constitutions and religious education
- Legal pluralism in the area of personal law
- Migration of constitutional models of religion-state relations
- Constitutionalism and conceptual history

The group collectively came up with these themes, laid out a research plan, and organized a workshop (August 21–23) to present their findings. The fellows also found it helpful to break into smaller groups to address them individually. Each subgroup met several times during the summer months to study its topic and related readings in addition to those discussed by the entire group

at weekly meetings. These conversations generated ideas for six new papers: ‘The Migration of Religious Ideas into the Irish Constitution: The Problem of “Church” and “State”’ (BILL KISSANE), ‘Juridical Voyage of “Essential Practices of Religion” from India to Malaysia and Pakistan’ (SHYLASHRI SHANKAR), ‘The Polarizing Effect of Law in South and Southeast Asia’ (TAMIR MOUSTAFA, MATTHEW NELSON, BEN SCHONTHAL, SHYLASHRI SHANKAR), ‘Religion, Education, and Constitutional Stasis’ (NATHAN BROWN, BILL KISSANE, JOHN MADELEY), ‘The (De-) Confession-alization of Law in India and Indonesia: the Limits of Monism’ (MIRJAM KÜNKLER, YÜKSEL SEZGIN) and ‘Rethinking the Migration of Constitutional Models’ (ASLI BÂLI, HANNA LERNER, DAVID MEDNICOFF, MATTHEW NELSON).

The fellows are now revising these papers and preparing them for submission as a special journal issue with the *American Behavioral Scientist*. The issue offers analyses of the ways in which domestic actors—constitutional drafters, judges, political elites, civil society activists—influence the crafting and reception of constitutional concepts and ideas pertaining to religious issues. While varying in the methodology applied by their authors, the articles included in this special issue address a similar question: How do political contestations draw and shape the constitutional and interpretational boundaries between the autonomy of religious practice and the ability of the state to regulate religion? The articles draw on different constitutional settings and different country contexts, highlight the various ways domestic actors—elites, courts, political parties, and civil society groups—influence and shape the boundaries between the domains of religion and the state and its consequences for religious polarization. They examine case studies from the ‘West’ and the ‘East’, featuring such processes in India, Pakistan, Malaysia, Indonesia, Sri Lanka, Ireland, Egypt, Turkey, Norway and the USA. They analyze the implications of the migration of constitutional models of religion-state relations, contestations of constitutional boundaries drawn between or among religious groups, and the impact of choices made on religious personal law and religious education on the balance between religious demands and the protection of human rights. The special issue contributes to the existing literature by challenging the dichotomy between constitutional drafting and constitutional interpretation/reception, highlighting the various ways through which political actors/interests/groups have influenced the capacity of the state to regulate religion through constitution writing, ordinary legislation, judicial adjudication or even informally through civil society.

Group members are also in the early stages of preparing publications based on two other collaborative efforts undertaken as part of the larger ZiF research project. MATTHEW NELSON, MIRJAM KÜNKLER, and AARON GLASSERMAN are planning an edited volume based on the workshop ‘Religious Education and Democratic Citizenship’ they convened July 31–August 1. In addition, AARON GLASSERMAN is preparing prospectuses to publish either a special journal issue or an edited volume based on the papers presented at the workshop ‘Bureaucratization of Islam in Muslim States and Societies’ he convened on October 23–24.

Finally, the fellows are delighted to be able to return to ZiF in Summer 2015 for a two-week residence July 6–20. That residence will include an internal meeting with presentations of fellows’ work relating to the group’s research theme as well as a larger closing conference with guest participants joining the group. The two weeks will be an excellent opportunity for the fellows to reconvene, consider their progress over the previous year, and plan future collaborations on the rich and timely topic of constitutionalism, religion, and human rights.