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## Introduction

Shortly after Soeharto's resignation in 1998, the Indonesian legislature embarked on a series of constitutional reforms to advance democratic norms and practices in the country. There were twenty-one chapters of revisions and additions on the agenda, but two were particularly important: article 29 on religion and the bill of rights. These items stood out because the proposals for change were considered quite revolutionary at the time. The proposal to amend article 29 involved incorporating a provision that would constitutionalize the implementation of *Shariah* law for Muslims alongside the existing provision which states that the state shall be based on 'the belief in the one and only God'. On the other hand, with wounds still fresh from decades of human rights violations under Soeharto's authoritarian rule, the inclusion of a bill of rights was a matter of great urgency, receiving widespread support both in public and in the constituent assembly. Today, article 29 survives in its original form, and the constitution boasts impressive rights guarantees comparable to international human rights instruments. One important concession, however, was the approval of a last-minute proposal to include 'religious values' as one of the grounds for restricting fundamental rights. The deliberations led to serious disagreements within the constituent assembly, to the point of an imminent deadlock, proving how contentious religious issues are in Indonesian politics.

The outcome of the debates on the constitutional arrangements on religion and religious freedom is unique in the context of a country with the largest Muslim population in the world. This distinctiveness becomes more marked and interesting when we consider the paths that were taken by the two other case studies in this book: Malaysia and Sri Lanka. In Malaysia, the establishment of Islam as the religion of the state is balanced by the guarantee that 'other religions may be practiced in peace and harmony' and that such establishment will not supersede the constitution's fundamental rights

guarantees. As in the Indonesian experience, the process of reaching this settlement stretched over countless debates and negotiations among those involved in the constitution-making exercise, not least because they deeply disagreed on whether a state religion should be constitutionalized at all. In Sri Lanka, the 1972 constitutional reforms introduced a provision obligating the state to ‘protect and foster Buddhism’, but the same provision also provides that other religions are guaranteed the rights expressed in the constitution’s bill of rights. The inclusion of the bill of rights and the religion clause was a significant departure from Sri Lanka’s 1948 independence constitution, which contained neither an establishment clause nor comprehensive fundamental rights guarantees.

Having identified these three distinct arrangements, the next obvious questions are: What are the effects of these different provisions? How do they influence state policies and practices on religion and religious freedom? These questions, which implicate the divergence between theory and practice, are often asked in religious freedom discourses. Indeed, they constitute part of the central inquiries in this book. These questions are not only of interest to practitioners and scholars; they are also relevant for constitution-makers or policymakers contemplating constitutional reforms.

Scholarship on religion-state relations, religious freedom and fundamental rights more generally is extensive. Scholars have written on the philosophical underpinnings and justifications for religious freedom, developed models of religion-state relations and studied their impact on religious freedom and demonstrated the importance of bills of rights in national constitutions. A study by Fox and Flores<sup>1</sup> on constitutional clauses protecting religious freedom and state-religion relations, for instance, focuses on the very question of how practice diverges from theory. In particular, Fox and Flores find that even with the existence of provisions on the separation of religion and state, freedom of worship and prohibition of religious discrimination, most countries inevitably engage in some form of religious discrimination and administer some form of religious regulation. More recently, Cross’s examination of the consequences of state-religion provisions establishes several important findings that are relevant to the analysis in this book: formal constitutional recognition of a state religion leads to less religious freedom, and the existence of provisions guaranteeing religious freedom generally serves to promote religious freedom.<sup>2</sup>

<sup>1</sup> Jonathan Fox and Deborah Flores, ‘Religion, Constitutions, and the State: A Cross-National Study’ (2009) 71(4) *The Journal of Politics* 1499.

<sup>2</sup> Frank B. Cross, *Constitutions and Religious Freedom* (Cambridge: Cambridge University Press, 2015).

Despite these studies, the puzzle of how constitutional commitments operate in societies divided along ethnic, religious, regional, linguistic and/or economic lines, where such divisions are highly salient, and where there is deep conflict over the character of the state has received inadequate scholarly attention, particularly from a comparative perspective.<sup>3</sup> Even less has been said comparatively about how constitutional arrangements on religion were adopted and how they operate over time. In Indonesia, Malaysia and Sri Lanka, ethnic and/or religious fault lines are socially and politically salient, rendering societal consensus on the core values and character of the nation difficult (or sometimes even impossible). In these countries, religious beliefs are not only deeply held as a matter of personal conviction; they are also powerful forces for social and political mobilization.

In the realms of constitutional law and politics, the challenges faced by the three countries are remarkably similar. The constitution-makers were confronted with the question of striking an appropriate balance for the role of religion in the state against a largely secular constitutional setup. The disagreements were intense, pitting – broadly speaking – those who demanded a more prominent constitutional role for the dominant religion in the respective countries against those who pursued a secular state. These conflicts did not dissipate over time; in fact, under conditions of growing polarization along religious lines, political actors and policymakers have continued to struggle with questions about the appropriate role of the dominant religion in the state – questions that also implicate commitments to protecting and enforcing religious freedom rights, particularly for minorities. The divergences and convergences in how religion factored into constitution-making processes and outcomes and influenced public policy choices in the three countries present important comparative lessons for similarly situated countries elsewhere. In short, this book seeks to fill the scholarly gap by illuminating an understanding of the evolving interaction between constitutional law, religion and politics in a manner sensitive to the contextual intricacies of these three deeply divided societies.

By focusing on the experiences of Indonesia, Malaysia and Sri Lanka, this book demonstrates that constitution-making and the operation and implementation of constitutional commitments on questions implicating religion are shaped by the politics of wider society. Under conditions of weak rule of law

<sup>3</sup> Hanna Lerner has produced a comparative study on the process of constitution-making in Israel, India and Ireland. These three countries are what Lerner calls 'deeply divided societies', that is, societies in which there are deep divisions and conflicts about the foundational norms and values of the state, particularly on issues of national and/or religious identity. See Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011), p. 6.

and intense politicization of religion, constitutional provisions may prove to be malleable and yield unintended (sometimes even perverse) consequences on rights guarantees.

#### THE SIGNIFICANCE OF CONSTITUTIONAL HISTORY

A noticeable void in the aforementioned studies about constitutions and religion is that they do not tell us much about what the examined constitutional clauses on state-religion relations mean. Asking how and why particular provisions on religion and religious freedom were adopted are crucial because, as Chen argues, the substance of modern constitutions is linked to the drafters' choices on the constitutional solutions that would best serve the objectives of the state.<sup>4</sup> Without this information, there is a danger – both as a matter of scholarly inquiry and as a matter of practical, policymaking consideration – that we might draw inaccurate conclusions about the role of constitutional provisions vis-à-vis the protection of religious freedom. For example, the constitutions of Malaysia and Sri Lanka provide privileged positions for Islam and Buddhism, respectively. If these provisions are taken at face value, one might argue that religious freedom violations (particularly against adherents of religions other than the constitutionally recognized religion) are expected – that they are the inevitable consequence of the privileging of one religion over others. Indeed, as this book illustrates and as I shall explain later in this chapter, the constitutional recognition of Islam in Malaysia and Buddhism in Sri Lanka have often been used as a justification to restrict religious freedom. Constitutional history, however, will tell us why such justification is flawed.

This book proceeds on the idea that reliance on the formal legal text alone is not enough to aid our understanding on how constitutional provisions operate or how to contextualize the problems in protecting and enforcing religious freedom. The turn to constitutional history is important to facilitate such understanding, and to that end, this book delves into the issue of constitution-making. There is, to be sure, a burgeoning literature on constitution-making both generally and in deeply divided societies.<sup>5</sup>

<sup>4</sup> Albert H. Y. Chen, "The Achievement of Constitutionalism in Asia: Moving Beyond 'Constitutions without Constitutionalism'" (2015) University of Hong Kong Faculty of Law Research Paper No. 2015/002, p. 5.

<sup>5</sup> See Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001); Yash Ghai, 'A Journey around Constitution: Reflections on Contemporary Constitutions' (2005) *African Law Journal* 122; Andrew Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*

For instance, Elster argues that constitution-making involves a complex web of constraints, diverging interests and goals on the part of constitutional framers and aggregating choices and preferences amongst constitution-makers.<sup>6</sup> Delegating constitution-making to a special body or commission rather than the legislators is thought to be preferable,<sup>7</sup> as is ensuring that the process is transparent and participatory.<sup>8</sup> Horowitz's study of constitutional change in Indonesia tells a story of the distinct processes and choices of reform and constitution-writing in Indonesia's transition to democracy and the resulting institutions that emerged from those processes and choices.<sup>9</sup> Lerner's seminal study of constitution-making in three deeply divided societies – Israel, India and Ireland – illustrates how democratic constitutions can emerge even where societal consensus regarding the fundamental nature and norms of the state is absent.<sup>10</sup> She argues that this was made possible by the drafters' pursuing three different constitutional strategies, which could be formulated as the 'incrementalist approach' to constitution-making.<sup>11</sup>

It is beyond the scope of this book, however, to develop a grand theory about the constitution-making experiences in Indonesia, Malaysia and Sri Lanka. Instead, the goal is to explicate the extent to which religion influences the socio-political dynamics in the countries under study and clarify the role and meaning of the religion provisions in relation to the framers' broader visions of protecting religious freedom and maintaining pluralism in nation-building. Is the constitutional recognition of Islam and Buddhism a mere symbolic and psychological exercise, or are these provisions intended to have practical effect on state practices and policies? With respect to

(New York: Oxford University Press, 2002); Arend Lijphart, 'Constitutional Design in Divided Societies' (2004) 2 *Journal of Democracy* 15; Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management* (Cambridge: Cambridge University Press, 2001); Donald L. Horowitz, 'Democracy in Divided Societies' (1993) 4 *Journal of Democracy* 18; and Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (Chicago: Chicago University Press, 2013).

<sup>6</sup> Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364–96. See also Justin Blount, Zachary Elkins and Tom Ginsburg, 'Does the Process of Constitution-Making Matter?' in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012), pp. 31–66.

<sup>7</sup> See Elster, 'Forces and Mechanisms', *ibid.*

<sup>8</sup> See Vivien Hart, 'Democratic Constitution Making', *United States Institute of Peace (USIP) Special Report No. 107* (Washington, DC, July 2003) and Jill Cottrell and Yash Ghai, 'Constitution Making and Democratization in Kenya' (February 2007) 14 (1) *Democratization* 1.

<sup>9</sup> Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge: Cambridge University Press, 2013).

<sup>10</sup> Lerner, *Making Constitutions*. <sup>11</sup> *Ibid.*, pp. 6–11.

Indonesia, what does ‘the belief in the one and only God’ mean? Why were these provisions enacted?

This book answers these questions by drawing on archival documents, parliamentary records, as well as memoranda and letters exchanged among individuals and bodies involved in the constitution-making process. Its analysis differs, to some extent, from the exercise of describing the processes and debates that led to the current constitutional arrangements implicating religion and religious freedom. The works of Hosen, Fernando and Schonthal are instrumental in explaining the origins and formulation of the religion clauses in the Indonesian, Malaysian and Sri Lankan constitutions, respectively.<sup>12</sup> This book draws on these studies and goes into more detail: it teases out and compares the social contexts and political compromises that shaped those arrangements. Given the deep ideational conflicts and competing visions about the state in deeply divided societies, the process of constitution-making becomes a risky affair: it can exacerbate conflicts, trigger political instability and, in worst-case scenarios, lead to territorial partition.<sup>13</sup> This book illustrates how constitution-makers responded to competing demands from different groups in the society. It also discusses the ways in which the roles and ideologies of key political figures involved in the constitution-making process influenced the outcomes. The historical approach, therefore, uncovers not just the framers’ intentions and the purpose for which the provisions were enacted but also the principles and negotiations underpinning those provisions.

The Malaysian experience provides an instructive example. The constitutional commission (Reid Commission) tasked to draft the independence constitution had, at the beginning of the constitution-making process, rejected the idea of establishing Islam as the state religion. The proposal was instead advanced by the Alliance – a coalition consisting of political parties representing the Malay, Indian and Chinese communities. Yet, despite the Commission’s resistance, the provision was included in the final draft of the constitution. Why did the Alliance make the proposal, and what did the leaders want to achieve from this? More importantly, why did the Commission eventually agree? The book provides answers to these questions and gives similarly detailed treatment to the Indonesian and Sri Lankan provisions.

<sup>12</sup> Nadirsyah Hosen, *Shari’a & Constitutional Reform in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2007), Joseph M. Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur: Malaysian Branch of the Royal Asiatic Society, 2001) and Benjamin Schonthal, *Buddhism, Politics, and the Limits of Law* (Cambridge: Cambridge University Press, 2016).

<sup>13</sup> Lerner, *Making Constitutions*, pp. 33–4.

The comparative approach adopted in this study of Indonesia, Malaysia and Sri Lanka also illustrates that despite the existence of comparable demands, constraints and conditions in the constitution-making process, the constitution-makers settled for three different formulations of the religion clause. (Indeed, the three countries were selected precisely for this reason.) Against this background, a comparison of the direction that each state has taken in relation to the protection of religious freedom – both on paper and in practice – produces valuable food for thought. The problems and trajectories that are carefully elaborated in this book will also be instructive for other countries grappling with the challenges in managing religious pluralism.

#### CONSTITUTIONS AND RELIGIOUS FREEDOM: UNPREDICTABILITY, EVOLUTION AND PERVERSION

A comprehensive understanding of the constitutional deliberations and settlements that underlie the founding of the three countries provides a departure point for analysing the unfolding trajectories of religious freedom protection. Here, this book asks: What are the different forms of religious freedom violations? What are the common justifications for such violations? To what extent are courts willing to uphold the constitutional settlements and protect religious freedom? With the origins and formulations of the constitutional provisions in mind, this book reveals how the provisions might operate to protect or curtail religious freedom and how, in some cases, the effects of such provisions are unpredictable. In doing so, it provides detailed insights into how religious freedom is conceived and contested within the social and political contexts of the three countries.

We know at this point that the Indonesian, Malaysian and Sri Lankan constitutions provide three distinct religion-state arrangements. These arrangements are also important guarantees of religious freedom, which exist alongside other religious freedom provisions in the bills of rights of the three constitutions. Yet, state-enforced religious freedom violations (manifested, for instance, in the form of limitations on the right to worship, proselytizing and public preaching) have been growing in recent years. Ironically, among the three countries, Indonesia – whose constitution lacks any formal recognition of a state religion – has consistently recorded very high levels of government restrictions on religion, compared to Malaysia and Sri Lanka.<sup>14</sup> The situation becomes more perplexing when we consider other indicators of

<sup>14</sup> This is based on the scores provided by the Pew Forum's Government Restrictions on Religion Index between 2007 and 2012.

the state of religious freedom as a whole, such as the prevalence of religious violence in the society. Social persecution against religious minorities includes acts of intimidation, physical attacks (occasionally resulting in death or serious injuries) and attacks on places of worship. Sometimes these violations are not adequately investigated and punished. This has been particularly serious in Indonesia and Sri Lanka, where vigilante violence against minorities is worsened not only by government inaction but also by alleged state complicity with the perpetrators of violence.

The recognition that constitutions may not always protect the rights contained therein is not new. Sartori developed the term ‘façade constitution’ to refer to constitutions that take the form of a ‘true constitution’ but whose essential guarantees are nevertheless disregarded.<sup>15</sup> In a similar vein, Howard argues that in many countries, constitutions are worthless scraps of paper.<sup>16</sup> Nonetheless, the studies by Fox, Flores and Cross remind us that the value of constitutional guarantees in ensuring religious freedom should not be completely dismissed. This book may contribute to the wider – albeit inconclusive – debate on whether constitutions matter, but its specific significance lies in the illustration of how violations of religious freedom may actually find their roots in the constitutional arrangements of the three countries. In other words, contrary to popular belief, religious freedom violations are not always grounded in any distinctly anti-human rights propaganda; instead, empirical evidence suggests that they are predicated on the clauses that were enacted to safeguard religious freedom in these three plural societies. In other cases, religious freedom restrictions are justified based on the public order limitation or a perverse interpretation of the right to religious freedom.

There are a few instructive examples. In Malaysia, Christians are prohibited from using the word ‘Allah’ as a reference to God in their Malay-language bibles. It is argued that such prohibition protects the sanctity and special constitutional position of Islam spelled out in article 3. Yet, as this book demonstrates, the constitutional provision on Islam was neither formulated nor intended to supersede fundamental rights guarantees in the constitution. In Indonesia, support for the Blasphemy Law, which has been used to curtail non-mainstream Muslim groups like the Ahmadiyah and other religious minorities, is deemed consistent with the principle of the ‘belief in the one

<sup>15</sup> Giovanni Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56 *American Political Science Review* 853.

<sup>16</sup> A. E. Dick Howard, ‘The Essence of Constitutionalism’ in Kenneth W. Thompson and Rett T. Ludwikowski (eds.), *Constitutionalism and Human Rights: America, Poland, and France* (Lanham, MD: University Press of America, 1991).



and only God'. In both these examples, the right to religious freedom is also construed as the right of the majority Muslims to be 'free' from acts that may offend their religious sensitivities. Similarly, in Sri Lanka, objections against Christian organizations and their proselytizing activities are justified on the belief that religious freedom encompasses the right to be 'free' from the influences of other religions. All these arguments have found favour with the highest courts exercising constitutional jurisdiction in these countries.

One might argue that cases like these are not unique – that they are merely part of the broader, ongoing process of constitutional interpretation to shape the dominant norms governing a country. However, while these cases reflect the inevitability of competing interpretations of religious freedom in a plural society or the evolving interpretation of constitutional arrangements over time, they are also part of a growing pattern of utilizing constitutional arrangements in ways that are radically different from their original purpose. Such a pattern becomes especially worrying when they indicate that constitutional guarantees and the exercise of rights are made to yield to majoritarian demands and/or state prerogatives, especially in cases in which an issue or dispute involves – directly or indirectly – a 'contest' between majority and minority interests. All this raises troubling questions about the commitment to principles of constitutionalism and the pluralist visions of the founding fathers. The perverse interpretation and manipulation of the constitutional arrangements has not only served to undermine religious freedom; it also reinforces the hegemony of the religious majority and legitimizes government repression of rights. This book formulates this emergent pattern as a 'constitutional perversion'.

The focus on the three countries facilitates a nuanced evaluation of religious freedom issues that large-*n* studies are, by design, unable to provide. This book does not purport to describe every conceivable type of religious freedom violation that has emerged in these countries. Instead, it focuses on state-enforced violations of the freedom to express, manifest and practice one's religion. These aspects of religious freedom deserve special attention because they are rights that can be qualified. This sets the stage for an evaluation of how governments justify the restrictions on those rights and, as a threshold matter, whether the justifications are warranted. Throughout the book, emphasis will be given to leading cases that highlight both the value and the unique challenges in securing religious freedom in the countries under study: the Blasphemy Law case (Indonesia), the right of Christians to use 'Allah' to refer to God (Malaysia) and the incorporation of Christian organizations (Sri Lanka). These constitutional contests demonstrate the different ways in which the religion clause can adversely affect religious freedom.

More importantly, they illustrate how such courtroom battles may turn into high-stakes, zero-sum games between majority and minority groups.

To provide a more comprehensive picture of the overall state of religious freedom in the three countries, this book devotes a chapter on societal abuses of religious freedom and the role of the state apparatus therein. Admittedly, this falls outside the scope of the conventional understanding of religious freedom as a negative right – that is, the government simply must not encroach on the exercise of religious liberties. Constitutional claims for the right to religious freedom extend only insofar as the government, through its actions, represses such rights. However, an exposé of societal abuses of religious freedom raises several important issues as we evaluate the interaction between constitutions and religious freedom in Indonesia, Malaysia and Sri Lanka.

First, the history of interethnic hostility and the continuing symptoms of socio-political polarization along religious lines in these countries cannot be ignored. In Malaysia and Sri Lanka, this is further complicated by overlapping divisions across ethnic lines. In issues implicating religion, the survival of a religious and/or ethnic group is seen to be at stake. In Indonesia and Malaysia, for instance, hostilities against Christians or minority Muslims (i.e., non-Sunni Muslims) emerge out of the fear that the dominant position of Islam (or Sunni Islam) is threatened by the growing influence of Christianity or other Muslim denominations. Likewise, in Sri Lanka, the spate of violence against Christians and Muslims is fuelled by deep insecurities about the position of Sinhalese-Buddhists and Buddhism in the ‘promised land’. Religious hostilities may inevitably affect the ability of individuals to practice their religion in the public and private spheres.

Maintaining public order is thus an important concern, especially when competing rights claims between hostile groups may trigger conflict. How, then, does the state and the courts balance the right to religious freedom against the protection of public order? Rights limitations are not problematic *per se*. Indeed, many national constitutions and international human rights documents allow restrictions of religious freedom on several specified grounds. One can also expect that the exercise of balancing rights against other interests is inevitably a subjective one. Aside from the proportionality principle, there is no clear and uniform balancing mechanism that applies across all countries. However, what becomes alarming, as this book illustrates, is the abuse of the public order limitation in ways that disregard standards of proportionality.

The second important point concerns religious persecution at the societal level. The government may prevent religious freedom violations by non-state actors, mediate interreligious contests on rights and strike a resolution through