

**CONSTITUTIONAL MIGRATION AND THE MEANING OF
RELIGIOUS FREEDOM**

From Ireland and India to the Islamic Republic of Pakistan

Matthew J. Nelson, Department of Politics and International Studies, SOAS University of London

Abstract

Building on research concerning constitutional migration, I show how constitutional provisions regarding religious freedom ('subject to public order') arrived in the Islamic Republic of Pakistan, not via colonial British or traditional Islamic sources—both explicitly rejected—but via deliberate borrowing from 'anti-colonial' constitutionalists in Ireland and, especially, India. Building on Ernesto Laclau's (1996) notion of 'empty signifiers', however, I also unpack the shifting political circumstances that transformed the *meaning* of Pakistan's borrowed constitutional provisions over time. Even as core texts guaranteeing an individual's right to peaceful religious practice were imported, I trace the political, legal, and conceptual modulations through which certain forms of peaceful religious practice were refashioned as a source of religious provocation and, therein, public disorder. Far from protecting religious freedom, I show how the re-purposing of imported constitutional clauses tied to 'the politics of public order' underpinned the legal derogation of an otherwise explicit right.

Keywords

Constitutional migration, legal transplants, religious freedom, public order, empty signifiers, Pakistan, India, Ireland

This is the accepted version of a forthcoming article that will be published by Cambridge University Press in *Journal of Asian Studies*: <https://www.cambridge.org/core/journals/journal-of-asian-studies/all-issues>
Accepted version downloaded from SOAS Research Online: <http://eprints.soas.ac.uk/25859/>

Introduction

Notwithstanding more than 100 years of British colonial rule, constitutional references to religious freedom in Pakistan are not rooted in the terms of English law. Nor, despite its formation as an ‘Islamic’ republic, are they tied to Islamic law. Instead, Pakistan’s constitutional references to religious freedom are bound up with an attachment to enumerated fundamental rights—an attachment directly inspired by the anti-colonial constitutional politics of Catholic-majority Ireland (1922, 1937) and Hindu-majority India (1950). Like Ireland and, then, India, each of Pakistan’s three postcolonial constitutions (1956; 1962-63; 1973) clearly states that each citizen is free to ‘profess, practice, and propagate his religion’ even as each religious ‘denomination’ is free to ‘manage its own affairs’. These two provisions, however, come with a crucial caveat. Both note that constitutional protections for religious freedom can be derogated in the event of public disorder.¹

1

Notes

See also Frances’ Declaration of the Rights of Man (1789, Article 10): ‘No one shall be disquieted on account of his ... religious views, provided their manifestation does not disturb the public order established by law’ as well as the International Convention on Civil and Political Rights (Article 18) (1966): ‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are ... necessary to protect public ... order [...]’.

What follows is an account of Pakistan's relationship with this peripatetic rights formulation, drawing special attention to longstanding academic debates regarding the degree to which, or the ways in which, laws travel. In one early contribution to these debates, Alan Watson (1974) stressed the relative autonomy of legal *text*, pointing to cases of direct textual transfer stretching all the way from Persia's adaptation of the Babylonian Code to Scotland's engagement with the details of Roman law. Still, Watson was criticized—above all by Pierre Legrand (1997, 2001)—for his failure to appreciate what Legrand called the 'cultural embeddedness' of law.² Moving beyond direct textual transfers, Legrand insisted that legal transplants often 'fail' owing to intersubjective breaks at the level of legal meaning.³

Watson and Legrand were interested in private rather than public or constitutional law.⁴ But, even today, many of those with an interest in constitutional migration continue to stress 'Watson v. Legrand' debates.⁵ In fact, recalling broad trends in linguistic social

(Pakistan accepted the ICCPR in 2010 with reservations regarding Article 18; those reservations were dropped in 2011; see Khan 2015.)

² For summaries of the 'Watson vs. Legrand' debate, see Cohn 2010 and Cairns 2013.

³ See also Berkowitz et al. 2003, Osiatynski 2003, Small 2005, Arvind 2010.

⁴ See Perju 2012, 1306-11. For scholarship focusing specifically on constitutional law, see Choudhry 2006, Hirschl 2014.

⁵ For constitutional migration, see Graziadei 2006; for borrowing and transplants, see Cotterell 2001.

science—trends highlighting the gap between (a) textual ‘signifiers’ and (b) what is actually ‘signified’—particular attention has focused on the relative importance of migrating texts and what those texts are ultimately taken to mean.⁶

This article examines the shifting meaning of constitutional provisions regarding religious freedom as they travel from Ireland, via India, to Pakistan. I focus, in particular, on the link between India and Pakistan, drawing special attention to the ways in which those who import foreign legal texts often engage those texts as ‘empty signifiers’ (Laclau 1996). Seeing the clauses they import as texts with several different possible meanings, they proceed as *political* actors, actively pressing for one.⁷ They do not deliberately mis-read the laws they import.⁸ They simply re-read them in ways that convey new forms of meaning.⁹ Essentially, they recast their preferred interpretation of this or that foreign clause as a statement defining, even *constituting*, their own indigenous legal order. They are not passive recipients of law; having actively imported certain laws, they deliberately re-make their meaning.

As noted above, Pakistan’s constitutional references to religious freedom were drawn, more or less verbatim, from Ireland (via India). Within Pakistan, however, the

⁶ See Saussure 1959, Levi-Strauss 1963.

⁷ This argument was partly developed in conjunction with Aslı Bali, Hannah Lerner, and David Mednicoff (unpublished, 2018).

⁸ See Nelken 2003.

⁹ See Rosenfeld 2001-3, 72; Cohn 2010, 583.

balance of meaning associated with these provisions has slowly but surely changed. In particular, this balance has shifted away from any special focus on the rights of individuals or religious minorities in favour of those associated with Pakistan's Muslim majority. Specifically, the rights of individuals and minorities have succumbed to protracted right-wing claims that *some* religious practices—no matter how peaceful—*offend* Pakistan's Muslim majority in ways that provoke public rioting. These practices—commonly associated with a tiny religious minority known as the Ahmadiyya (less than 1 percent of Pakistan's population)—are not treated as 'peaceful' practices. Since the early-to-mid-1970s, certain Ahmadi practices have come to be seen as a source of public disorder, indeed, a space of formal derogation targeting existing Ahmadi rights.

Self-identifying as 'Muslim', the Ahmadiyya are defined by their attachment to a late-nineteenth-century religious reformer named Mirza Ghulam Ahmad (d. 1908)—a reformer who claimed to receive revelations (like a prophet) even *after* Mohammad. (Typically, Muslims identify the Prophet Mohammad as the final prophet of God.¹⁰) The claims of Mirza Ghulam Ahmad are controversial. But, precisely insofar as Pakistani citizens are entitled to profess, practice, and propagate their religion within the bounds of 'public order', one might expect the state to *protect* those who engage in peaceful forms of religious practice. This is particularly true insofar as Pakistan's 'Irish' and 'Indian' constitutional provisions sought to protect, not merely individuals, but also minorities (as groups). Indeed, as Granville Austin (1966) notes in his comprehensive history

¹⁰ For an account of Ahmadi beliefs and practices, see Friedman 1989.

of constitutional drafting in India, India's constitutional provisions regarding religious freedom—imported from Ireland—were specifically introduced to protect the rights of vulnerable religious 'minorities'.¹¹

Unfortunately, this minority-friendly reading of Pakistan's imported constitutional provisions has not stood the test of time. On the contrary, this reading of religious freedom has slowly faded in the wake of periodic but persistent public rioting—rioting underpinned by right-wing claims that Pakistan's Ahmadi minority should not be construed as peaceful religious practitioners but, rather, as heterodox religious provocateurs. Indeed, since the 1970s, formal legal restrictions targeting the peaceful religious practices of the Ahmadiyya have come to be seen as entirely compatible with constitutional caveats stressing that constitutional protections for religious freedom can and should be derogated in the event of public disorder.

This 're-reading' of Pakistan's imported constitutional provisions reaches beyond a simple account of migrating texts (Watson). It also reaches beyond a narrow account of legal culture insofar as Pakistan's 'Islamic' culture might be thought to produce—almost inexorably—a failure of Irish or Indian law (Legrand). Indeed, Pakistan's late-twentieth-century re-reading of its constitutional provisions regarding religious freedom was not tied to any reading of Islamic law. (In practice, the terms of Islamic law were explicitly ignored.) In the end, Pakistan's re-reading of its imported constitutional provisions grew out of a *politically* nuanced appreciation for public rioting and, ultimately,

¹¹ See Austin 1966, 55.

the Muslim majoritarian claims underpinning it.

To understand these majoritarian political claims, reaching well beyond the specific interventions of violent right-wing activists, I set Pakistan's imported constitutional clauses concerning religious freedom alongside three further constitutional provisions—three further provisions concerning the 'special' rights of Pakistan's Muslim majority. The first of these three provisions, drawn from a portion of the constitution known as the Objectives Resolution, notes that within Pakistan the principles of freedom, equality, and tolerance 'as enunciated by Islam' will be fully observed, even as Pakistani Muslims are enabled 'to order their lives ... in accordance with the teachings and requirements of Islam'. The second of these three provisions notes that Pakistan's head of state must be a Muslim. The third provides for separate Muslim and non-Muslim electorates. Introduced by Pakistan's first Constituent Assembly (CA) between 1949 and 1952, these three provisions sought to distinguish the special rights of Pakistan's Muslim majority—rights that anti-Ahmadi protestors later claimed to defend.

What follows is an account of Pakistan's politically motivated re-reading of the constitutional provisions it imported from Ireland via India—a politically motivated re-reading shaped by these three majoritarian provisions and the violence deployed to defend them.¹² In Part I, I focus, primarily, on text, tracing the migration of constitutional provisions regarding religious freedom from Ireland, via India, to Pakistan. In Part II, I

¹² Gary Jacobsohn 2006 compares articulations of 'constituional identity' in Ireland and India; whereas I stress similarities, Jacobsohn highlights differences.

track Pakistan's re-reading of that text, turning away from Ireland and India to the majoritarian politics of public order and, therein, politically motivated efforts to conjure up new constitutional meanings.

I. Religious Freedom in the Constitution of Pakistan

In 1922, the Irish Provisional Government published a detailed compendium entitled *Select Constitutions of the World* to inform the constitutional drafters of the Irish Free State. Containing eighteen up-to-date constitutions—including, *inter alia*, those of Weimar Germany, the United States of Mexico, and the Russian Socialist Federal Soviet Republic—this book was republished by B. Shiva Rao in 1934 to assist those addressing constitutional debates in India. Already, activists with ties to home-rule campaigners in both Ireland and India had begun to share constitutional provisions highlighting enforceable rights. In 1925, for instance, the anti-colonial theosophist Annie Besant published her famous 'Commonwealth of India Bill' containing an explicit declaration of enumerated rights in terms 'practically identical' to those previously defined in Dublin.¹³ Indeed, constitutional developments in Ireland were closely watched in South Asia. When the Irish Free State gave way to the Republic of Ireland after 1937, for instance, constitutional provisions concerning individual freedoms were combined with a new appreciation (drawn from the experience of Eastern Europe during World War I) for the rights of minority groups. This change later resurfaced in the Constitution of India (1950)

¹³ Sorabjee 2004, 115; also Austin 1966, 54.

and, later still, in Pakistan (1956, 1962-63, 1973). What follows is a brief account of this constitutional migration—this migration of legal text.

A. *From Ireland to India*

With specific reference to fundamental rights, the link between Ireland and India is unmistakable. When, following the forty-third annual meeting of the Indian National Congress in Madras (1927), Motilal Nehru responded to a British delegation known as the Simon Commission that was dispatched to consider new forms of shared governance in India, for instance, he simply copied key portions of Annie Besant's earlier 'Common-wealth of India Bill' to frame a notion of Indian *swaraj* or self-rule.¹⁴ Indeed, the fundamental rights of the so-called *Nehru Report* 'were in several cases taken word for word from ... [Besant's] Bill', with Granville Austin noting that these rights were 'a close precursor' of those that later surfaced in the Constitution of India. Ten out of nineteen sub-clauses, Austin explains, 're-appear[] materially unchanged', with those concerning 'the free profession and practice of religion' motivated, in particular, by an interest in

¹⁴ Compare Ireland (1922): '[T]he free profession and practice of religion are, subject to public order and morality, hereby guaranteed to every citizen'; Besant (1926, 212): '[T]he free practice of religion, subject to public order or morality, [will be guaranteed to every person]'; and *Nehru* (1928, 101): '[T]he free profession and practice of religion are, subject to public order and morality, hereby guaranteed to every person'.

minority rights.¹⁵

Of course this focus on the rights of minorities also reflected intervening developments in Ireland. Between 1922 and 1937, for instance, constitutional reformers in Ireland had already sought ways to build on the ‘March’ (1921) Constitution of Poland (Article 113) in the course of their efforts to address the competing interests of (majority) Catholics and (minority) Protestants, supplementing earlier provisions protecting each individual’s right to ‘profess’ and ‘practice’ his or her religion with a further appreciation for rights allowing each ‘community’, ‘association’, or ‘denomination’ (both majority and minority) to ‘manage its own affairs’.¹⁶

These developments, originating in Eastern Europe before migrating to Ireland, were also accepted in India. In fact, shortly before India’s CA met for the first time in December 1946, three further volumes reflecting constitutional developments around the world were published to support the CA’s deliberations. Compiled by B.N. Rau, these

¹⁵ Austin 1966, 55.

¹⁶ In Ireland, this adaptation of the Polish constitution emerged in ‘dueling drafts’ between late 1936 and March 1937; see Keogh 2007 154, 389, also *Constitution of Poland* (March 1921), Article 113: ‘Every religious community recognized by the state ... may conduct independently its internal affairs; it may possess and acquire movable and immovable property, administer and dispose of it; it [also] remains in possession and enjoyment of its ... religious, educational, and charitable institutions. No religious community may, however, be in opposition to the statutes of the state’.

volumes were collected under the title *Constitutional Precedents*, with specific sections devoted, *inter alia*, to fundamental rights and the rights of religious minorities. Volume I, for instance, included two sections focused on minority ‘safeguards’ with examples drawn from the ‘Polish Minorities Treaty’ (1918) and the most recent Constitution of Ireland (1937). The most important illustrations were drawn from the experience of Ireland, with all three of Rau’s volumes citing Ireland’s newly revised clauses concerning religious freedom:

- (a) ‘[...] the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen’ (Article 44[2]-1)
- (b) ‘[e]very religious denomination shall have the right to manage its own affairs, [to] own, acquire, and administer property, movable and immovable, and [to] maintain institutions for religious and charitable purposes’ (Article 44[2]-5).¹⁷

Indeed, recalling forms of constitutional borrowing pioneered by Annie Besant, these provisions were subsequently embraced, more or less verbatim, by India’s own CA.

Initially, India’s CA was supposed to be drawn from its provincial assemblies following elections in January 1946. Throughout the latter half of that year, however, elected members of Mohammad Ali Jinnah’s pro-Pakistan Muslim League worried that the provinces in which they held a majority would not be permitted to veto provisions they

¹⁷ For an account of the redrafting process in Ireland (1935-1937), see Keogh, 150-73.

considered unacceptable. In fact, as a reflection of their concerns, they opted to boycott the CA.¹⁸ Still, the CA carried on, with Congress Party leaders meeting in January 1947 to nominate a special sub-committee focused on fundamental rights. This sub-committee met for the first time in February 1947 and, within just two months, it had completed most of its work.¹⁹ As such, India's constitutional provisions concerning religious freedom (drawn from Ireland) were agreed by India's CA even *before* India and Pakistan were partitioned in August 1947.²⁰

B. *From India to the Islamic Republic of Pakistan*

Pakistan's CA met for the first time on 10 August 1947—four days before the creation of Pakistan itself. Seventy percent of its members were affiliated with the Muslim League; in fact its membership was composed of all those who had won seats during the elections of 1946 but now belonged to so-called 'Pakistan' districts. (Additional members were later added to accommodate refugees from India as well as those in various princely states.²¹) Of course Pakistan's CA did not proceed from scratch. The provisions already

¹⁸ See Rau, xxxi-lxx.

¹⁹ Austin, 61-68.

²⁰ Austin, 63 (fn48).

²¹ Within Pakistan's CA, East Bengal held 44 seats, Punjab 17 (plus 5 for refugees), Sindh 4 (plus 1 for refugees), Balochistan 1, and NWFP 3, with the princely states and tribal areas holding 4 (Callard 1957, 78-85; Binder 1961, 121-23).

drafted by India's CA were readily available. But, even beyond this, the Secretary of Pakistan's CA sought to provide his colleagues with India's version of Ireland's *Select Constitutions of the World* as well as a further compilation entitled *Constitutions of Eastern Countries* (1951).

Featuring eleven further constitutions including those of the Republic of China, the Empire of Japan, and the Republic of the United States of Indonesia, this new volume also added a detailed appendix with clauses drawn, *inter alia*, from the Republic of Turkey and the Kingdoms of Egypt, Iraq, and Iran.²² In his brief Introduction, the Secretary of Pakistan's CA explained that, although there had been 'a general tendency to draw inspiration from the West in political and constitutional matters', the aim of his new compilation was 'to place before the [CA] ... the constitutional practice in Islamic States' as well as 'some Muslim and non-Muslim countries of the East'.²³

Scholars of constitutional law have long argued that the best predictor of any constitutional text lies in the constitution immediately preceding it.²⁴ With reference to

²² The Second Series (Second edition) of Rau's *Constitutional Precedents* also included the constitutions of Japan and the Republic of China.

²³ CA member Abul Kasem Khan argued that '[i]t would be idle to think that ... institutions borrowed from any of the advanced countries ... will meet our requirements'. 'If you want to transplant any political institution [from the West]', he added, 'I am dead sure ... this plant will not take root'. *CA Debates*, 21 October 1953, 276.

²⁴ See Ginsberg et al. 2010.

religious freedom, however, the experience of India and Pakistan is different. Indeed, neither India nor Pakistan inherited its constitutional appreciation for religious freedom as an enumerated fundamental right from Britain; specifically, neither inherited its appreciation from the proto-constitutional language of colonial Britain's departing 'Government of India Act' (1935). Closely reflecting British constitutional traditions, that Act continued to see enumerated and enforceable rights as a constraint on the unfettered power of parliament.²⁵

Of course constitutional provisions regarding religious freedom are often treated as a distinctive legacy of Europe. Peter Danchin (2007-8), for instance, treats the emergence of these protections *outside* of Europe as either non-existent (in the case of individual freedoms) or derived from European intervention—what he calls 'projection[s]' of '*jus publicum europaeum*' in a wider globalizing world.²⁶ But, again, this focus on Europe, or European colonialism, is impossible to reconcile with the anti-colonial politics of Ireland, India, and Pakistan, each of which arrived at its own appreciation for religious

²⁵ See Austin, 58 (fn30).

²⁶ Danchin 2007, 467-8. When the Universal Declaration of Human Rights emerged in 1948, Danchin writes that 'most African and Asian states were [still] European colonies', 529-30. He ignores the role that newly independent states like India and Pakistan played in drafting this Declaration—especially, Article 18 regarding religious freedom; see Bhagavan 2010, Waltz 2004, Kelsay 1988.

freedom after prevailing norms in Britain were *rejected*.²⁷

When Pakistan's CA took up the issue of fundamental rights after 1951, they did not turn to Britain. They turned to India. In fact they scarcely altered the provisions concerning religious freedom that India had adopted from Ireland.²⁸ Whereas India noted that 'subject to public order, ... all persons are equally entitled to ... the right freely to profess, practice, and propagate religion' (Article 25) (with a proviso that this right would not prevent any legislation promoting social reform), the Interim Report submitted to Pakistan's first CA by its Fundamental Rights Committee stressed that, in Pakistan, 'the right to profess, practice, and propagate religion' was similarly 'guaranteed, subject to public order' (Article 10) (again, with a very similar proviso that this would not prohibit any legislation restricting 'activity of a secular nature').²⁹

In fact, moving beyond this reference to the rights of individuals, India's

²⁷ See also Schonthal 2015.

²⁸ Many CA members stressed that Pakistan's approach to fundamental rights should reflect principles found in the UN's Charter of Fundamental Human Rights (see Barma and Chakravarty, *CA Debates*, 9 March 1949, 30-31, 36); however, others dismissed this, noting that Pakistan should not 'borrow ... from a Charter which we do not know will last long'. 'Our constitution', they boasted, 'will last longer', Qureshi, *CA Debates*, 10 March 1949, 60.

²⁹ This 'Article 10' was retained as Article 10 in Pakistan's first Constitution (1956); it was recast as Article 10(a) in 1963 and, then, Article 20(a) in 1973.

Constitution went on to stress—once again following Ireland (following Poland)—that ‘subject to public order, ... every religious denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious ... purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer [that] property in accordance with [the] law’ (Article 26). Pakistan’s Fundamental Rights Committee simply reiterated that, ‘subject to public order, ... every religious denomination or any section thereof’ would be entitled to ‘freedom in the management of its religious affairs including the establishment and maintenance of religious ... institutions and the acquisition of movable and immovable property for that purpose’ (Article 11).³⁰

Initially, Hindu CA members sought to postpone any discussion of this fundamental right to religious freedom until a report from Pakistan’s Committee on Minority Rights had been published. But their colleague, Abdulla-al-Mahmood, deflected their concerns, noting that there was no cause for alarm because Pakistan’s approach to religious freedom had been drawn, directly, from India. (After all, protections for religious freedom in India had been associated with an appreciation for minority rights since at least 1928, when Motilal Nehru’s report was published.) ‘Clause 10 has provided the same thing but on a little wider scale than what has been provided in Clause 35 [*sic*: 25]’ in India, noted al-Mahmood. Clause 11 addresses ‘on a much wider scale the principles ... [of India’s]

³⁰ This ‘Article 11’ was retained as Article 11 in Pakistan’s first Constitution (1956); in 1963, it was recast as Article 10(b) and, in 1973, as Article 20(b).

Clause 26'.³¹

Previously, Hindu CA members had complained about the phrasing of Pakistan's Objectives Resolution, arguing that any reference to the principles of equality 'as enunciated by Islam' should be qualified as 'not inconsistent with the [UN] Charter [of Fundamental Human Rights]'.³² But, even then, Muslim CA members sought to downplay such concerns, drawing special attention to the logic underpinning their decision to import key provisions concerning fundamental rights from India: 'We [Muslims] thought ... our [imported] approach towards the rights of minorities would ... create a better feeling' after Partition, noted Sardar Abdur Rab Khan Nishtar, 'and they [Hindus] would be considerate towards us also'. '[U]nfortunately', Nishtar complained, this sense of reciprocity was missing: in the end, he argued, 'they deny ... us even this much'.³³

Clearly, an appreciation for both individual and group-based freedoms was present in both India and Pakistan. But, within Pakistan, the relative status of different groups emerged as a bone of contention. Accommodating Hindus with constitutional clauses imported from India, for instance, did not extend much beyond Articles 10 and 11. In fact, Pakistani Hindus *failed* to persuade their Muslim colleagues to adopt Indian articles in two areas with direct implications for notions of religious 'equality': the first concerned the religious identity of Pakistan's head of state; the second concerned

³¹ Abdulla-al-Mahmood, *CA Debates*, 4 October 1950, 78.

³² Barma and Chakravarty, *CA Debates*, 9 March 1949, 30-31, 36.

³³ Sardar Abdur Rab Khan Nishtar, *CA Debates*, 10 March 1949, 60.

the preservation of separate 'communal' electorates.³⁴

C. Religious Freedom in a Muslim-majority Republic

The decision to specify that Pakistan's head of state must be a Muslim did not originate in Pakistan's CA. Instead it reflected the views of Muslim religious elites serving on a separate advisory board known as the Talimat-e-Islamia Board (Board of Islamic Education). (This Board was convened alongside the CA by a sub-committee known as the Basic Principles Committee [BPC].) Initially, the views of the Talimat-e-Islamia Board, pressing for an 'Islamic' state in Pakistan, were rejected. But, in due course, these views were re-articulated in an ambitious 22-point manifesto submitted to Pakistan's CA by a wider group of ulema (religious scholars) and lay religious activists.³⁵ This 22-point manifesto, completed in 1951, was not rejected out of hand; this time, seeking to co-opt Pakistan's elite religious opinion, the members of the BPC chose to respond more

³⁴ In India, Muslim (minority) CA members argued *for* separate electorates; see Bajpai 2011, Chapter 4. In the end, Austin notes that Muslim CA members agreed to drop their demand for separate electorates 'to ingratiate themselves with the Congress', 151.

³⁵ At full strength, the Talimat-e-Islamia Board included Sunni and Shi'i ulema (particularly, Sunni Deobandi ulema from both Pakistan and India) as well as Muslim scholars teaching in Europe (for example, at the Sorbonne). The 22-point manifesto submitted in 1951 was formulated by a larger group, including the lay Muslim leader of Pakistan's Jama'at-e-Islami, Syed Abul ala Maududi; see Binder 1961, 156-58, 213-15.

carefully. First, they explained that most of the manifesto's key points were already covered by the terms of Pakistan's (preambular) Objectives Resolution; second, they claimed that many of the remaining points (for example, a call for strengthening fraternal relations with Muslim countries while discouraging sectarian sentiments) could be accommodated in a set of 'directive principles'. (These principles—once again reflecting constitutional innovations in Ireland and India—were non-justiciable. Their purpose lay in providing a set of guidelines for subsequent legislation or policy-making.) Still, having set aside most parts of the manifesto, the BPC returned to a single exception. That exception, noting that Pakistan's head of state should be a Muslim (Point 12), was put to a vote within the BPC, and accepted, in August 1952.³⁶

The second area pertaining to the relative status of Muslims and non-Muslims in Pakistan concerned the preservation of separate 'communal' electorates. This issue came to a head during the spring of 1952 when, despite their dominant position in the CA, several members of the Pakistan Muslim League faced serious intra-Muslim electoral challenges in the province of East Bengal. Briefly, the League intervened to prevent Pakistani Hindus (roughly 25 percent of East Bengal's population) from positioning themselves as 'kingmakers', ensuring that, although Hindus were entitled to vote, they were only entitled to vote for Hindus. Hindu CA members objected, seeing this push to preserve communal electorates as a pernicious colonial anachronism. But, in the end, a

³⁶ Binder 1961, 226.

separate electorate for ‘non-Muslims’ was adopted by the larger CA.³⁷

On their own, these provisions concerning a Muslim head of state and separate Muslim and non-Muslim electorates sought to demarcate a special place for Pakistani Muslims. But, together, they also set the stage for a number of changes in the meaning of Article 20—changes in which, slowly but surely, ‘religious freedom’ came to mean different things for Pakistani Muslims and non-Muslims. The key distinction did not involve those who saw themselves as ‘non-Muslims’ (e.g. Hindus). The key distinction, as noted above, emerged between Pakistan’s Muslim majority and a tiny heterodox minority whose pattern of religious self-identification (as ‘Muslim’) was treated as a source of controversy.

D. Religious Freedom in Pakistan: 1956, 1962-63, 1973

Pakistan’s first Constitution (1956) was cut short by a military coup in 1958 led by General Ayub Khan. The so-called Constitution Commission convened by General Ayub to prepare Pakistan’s *second* constitution, however, retained all of the articles concerning religious freedom that Pakistan had imported from India—in this case, renumbering Articles 10 and 11 as Articles 10(a) and 10(b). ‘In the constitution[s] of Eire, India, and the late Constitution [of Pakistan]’, noted Ayub’s Constitution Commission, ‘fundamental rights are specific and protected’.³⁸ ‘The question’ was simply whether these rights should

³⁷ *CA Debates*, 19 April 1952, 220.

³⁸ *Report of the Constitution Commission* (1961), 101.

be, as in Ireland and India, ‘incorporated in the new Constitution’ or left, ‘as in the United Kingdom, to the fundamental good sense of the legislature and the [periodic] operation of the ... courts’.³⁹

A public-opinion survey conducted by General Ayub’s hand-picked Constitution Commission revealed that the ‘[p]reponderance’ of public opinion (98 percent) still favored a special constitutional chapter explicitly devoted to the enumeration of enforceable rights.⁴⁰ Unfortunately, this preponderance was not sufficient to prevent General Ayub from relegating these rights to an entirely new set of (non-justiciable) ‘Principles of Law-Making’ when he unveiled his constitution during the summer of 1962.

Enormous protests, however, soon erupted, and within a year a suite of constitutional amendments had been promulgated to restore Pakistan’s fundamental rights to their original (justiciable) position. In fact, reporting from Islamabad, Ralph

³⁹ *Report of the Constitution Commission* (1961), 101. It is worth noting that, even within Pakistan’s first CA, the introduction of enumerated and enforceable rights was not a foregone conclusion. Already in 1953, Ahmed E.H. Jaffar anticipated the opposition articulated by General Ayub’s Commission: ‘I do not share the views of the framers ... that it is necessary to enunciate the fundamental rights’, he declared (adding, with reference to religious elites, that he also opposed the elevation of any authority that might ‘limit the authority of ... Parliament’), *CA Debates*, 13 October 1953, 117.

⁴⁰ *Report of the Constitution Commission* (1961), 101. For the composition of General Ayub’s Commission, see Newman 1962, 360.

Braibanti found that no feature of General Ayub's 1962 constitution 'provoked greater opposition than [its] elimination of [fundamental] rights and the power of the courts to enforce them'.⁴¹

When Pakistan's *third* constitution emerged in 1973—following a brutal civil war, war with India, and the separation of East Pakistan as Bangladesh—every indication suggests that Pakistan's new regime was familiar with the lessons of its predecessors. Specifically, with the end of martial law and the restoration of Pakistan's National Assembly (doubling as a Constituent Assembly), Prime Minister Zulfikar Ali Bhutto opted to retain the religious-freedom provisions that Pakistan had adopted from India. He simply renumbered them: Article 20(a), focusing on 'individuals'; 20(b), focusing on 'groups'.

By 1973, the history of Pakistan's constitutional articles regarding religious freedom could easily be read as a case of textual consolidation, or convergence, targeting global (even 'liberal') norms.⁴² Indeed, as they passed from Ireland (44[2]-1; 44[2]-5), via India (25; 26), to Pakistan (20[a]; 20[b]), the stability of these provisions is remarkable. But again, the challenge does not lie in tracking constitutional text; the challenge lies in grasping the *political* motivations that press pro-active constitutional actors to produce new strains of *meaning*—new strains of meaning *within* a legal space underpinned by traveling texts.

⁴¹ Braibanti 1965, 79.

⁴² On convergence, see Finnemore and Sikkink; Risse, Ropp, and Sikkink; and Tushnet. On the limits of convergence see Dixon and Posner; Goldsworthy.

II. Religious Freedom and the Constitutional Politics of Pakistan

Turning to an account of constitutional politics, I do not ask what a (traveling) right to religious freedom ‘truly’ means. Nor, turning to an account of legal culture, do I ask what religious freedom might mean in an ostensibly ‘Islamic’ culture. Instead, moving beyond Alan Watson (traveling texts; stable meanings) and Pierre Legrand (traveling texts; shifting cultures), I turn to ‘empty signifiers’ and the politics of textual ‘re-signification’ in the work of Ernesto Laclau (1996). In particular, I ask how a deeper understanding of Pakistan’s political landscape might help to explain, with reference to religious freedom, how *one* strain of meaning (linking the terms of public order to a common defense of peaceful religious practice) might give way to *another* (wherein specific forms of public disorder are used to achieve a targeted derogation of rights). What were the political factors that drove this re-reading of Pakistan’s imported constitutional provisions? What were the ‘majoritarian’ factors that, stable constitutional provisions notwithstanding, drove Pakistan’s experience with constitutional ‘re-signification’ over time?

A. *Religious Freedom and the Politics of Public Order*

Initially, some expected specific references to ‘Islam’ in Pakistan’s Objectives Resolution to undercut Pakistan’s constitutional commitment to the enforcement of basic rights (Lau 1996), pulling Pakistan away from a colonial approach to minority governance via religious personal laws toward a new approach in which the terms of Islamic law might

be used to define, or delineate, the rights of individual citizens—up to and including an assessment of who should be seen as a Muslim entitled to (a) serve as Pakistan’s head of state and (b) vote in its Muslim electorate. Until 1985, however, the terms of Pakistan’s preambular Objectives Resolution were not enforceable. In fact it quickly emerged that any state-based effort to define who was (and who was not) a Muslim would require either formal legal recognition for individual religious self-identification or some type of legal reform.

Even before Pakistan’s first Constitution emerged in 1956, conservative religious activists sought to clarify the boundaries of Pakistan’s Muslim community—focusing, specifically, on the status of Pakistan’s Ahmadiyya. As noted above, the Ahmadiyya identify themselves as ‘Muslim’, but this identity is contested owing to claims attributed to the group’s founder, Mirza Ghulam Ahmad, that he was not merely a religious reformer but a prophet—indeed, a prophet *after* Mohammad. Some activists argued that, given the heterodox nature of this claim, Pakistan’s Ahmadiyya should be defined as ‘non-Muslim’, barred from serving as the head of state, and relegated to Pakistan’s separate non-Muslim electorate. In fact, after 1952, some of those previously involved in drafting the 22 points pressing for a Muslim head of state turned to anti-Ahmadi pogroms and public violence to make their opinions known.⁴³

The political history is somewhat complex. But, to begin, it is important to understand that many of the religious activists seeking to formalize a non-Muslim identity

⁴³ See Binder 1961, 259-96.

for the Ahmadiyya had opposed the Pakistan Movement led by Mohammad Ali Jinnah.

They opposed this Movement as an articulation of territorial Muslim nationalism threatening to divide South Asia's Muslims between India and the two wings of Pakistan; in short, they opposed Jinnah's nationalism as a threat to the cohesion of the *ummah* (that is, the worldwide Muslim community).

Following the creation of Pakistan in August 1947, however, many of these activists actually shifted to Pakistan seeking to rehabilitate their patriotic credentials. Initially, they sought to influence Pakistan's CA via the 22-point manifesto mentioned above. However, moving well beyond this, some sought to ingratiate themselves within the public at large by highlighting what they saw as a key point of consensus within Pakistan's Muslim majority: specifically, the 'non-Muslim' status of Pakistan's Ahmadiyya. 'We' Muslims are different from 'those' Ahmadiyya, they claimed. 'We' are endowed with special rights and privileges (e.g. access to the presidency). In fact to protect our community 'we' should support those prepared to defend our constitutional rights.⁴⁴

In 1952-3, several activists associated with a broad-based religious-cum-political formation known as the Majlis-ul-Ahrar-e-Islam (Council of 'Free' Muslims), as well as the Jama'at-e-Islami (Party of Islam), took to the streets of the Punjab in a series of violent protests demanding that Pakistan's Ahmadiyya be assigned to Pakistan's non-Muslim electorate. Their protests came to an end with a declaration of martial law. (In fact, key actors like Syed Abul ala Maududi, the leader of the Jama'at-e-Islami, were charged with

⁴⁴ See Kazi 2015, 63-4.

treason for their use of vigilante violence in defiance of state authority.) The state's decision to invoke its emergency powers, however, was not used to derogate the rights of the Ahmadiyya. Instead, hewing much closer to an 'Irish' reading of religious freedom, the army intervened to *protect* those targeted in the course of the riots.

When the dust finally settled, however, Pakistan's CA turned its attention away from any (martial law-based) defense of religious freedom. Pakistan's CA focused, instead, on the need for fresh provisions offering a more robust defense against encroachments on civilian power (e.g. provisions preventing the executive from suspending the country's legislature).⁴⁵ In fact, this focus on civilian power soon reinforced brewing tensions between Pakistan's CA and the country's powerful executive—tensions that came to a head when Pakistan's Governor-General actually stepped in to dissolve the CA in October 1954. A second CA was eventually convened to complete Pakistan's first constitution in 1956. But, as noted above, even this constitution was set aside, two years later, following the coup led by General Ayub. Still, the constitution promulgated by General Ayub in 1962 (as amended in 1963) did not alter the right to religious freedom that Pakistan had imported from India. That right—first tested during the riots of 1952—remained firmly intact.

Finally, during the last eight months of General Ayub's regime, Pakistan's Supreme Court intervened to clarify Pakistan's approach to religious freedom with specific reference to the problem of public order. It did so in a high-profile case known as *A.K.*

⁴⁵ See Binder 1961, 352-9; Choudhury 1963, 48.

Shorish Kashmiri v West Pakistan (1969) reviewing the state's decision to shutter an anti-Ahmadi newspaper known as *Chattan* published by one of the groups involved in the riots of 1952-53.

In this case, the Supreme Court noted that—even apart from the special emergency powers associated with General Ayub's martial law regime—the state was empowered by the constitutional language of Article 20 (known, at the time, as Article 10) to prohibit any derogatory article of a religious nature that might pose a risk to public order. In fact the Court adopted a rather conventional reading of religious freedom: it reiterated its condemnation of any religious vigilante who, acting in defiance of state authority, might aim to restrict the liberty of a fellow citizen, adding that each individual's right to religious freedom was only complicated insofar as it might be said to touch on a further protection for the rights of religious groups—for example, a group-based right to public office or property.⁴⁶ The Court specifically rejected the view that Muslim bullies might be permitted to define the parameters of their religious community unilaterally (that is, via vigilante action beyond the realm of constitutional authority and negotiated parliamentary power).

The demise of General Ayub's dictatorship later that year, followed two years later by the brutal civil war that liberated East Pakistan, however, dramatically reconfigured the ways in which existing constitutional provisions concerning religious liberty were read. In particular, the departure of East Pakistan followed by a return to civilian rule prompted

⁴⁶ See Saeed 2011, 17.

fresh efforts to shore up the power of parliament while, at the same time, promoting new forms of Muslim nationalism. Framed to offset enduring concerns about the divisive effects of 'provincialism', these efforts culminated in two changes—two *constitutional* changes—that slowly shifted the ways in which Article 10 (later, Article 20) and, thus, the politics of religious freedom were approached, interpreted, and re-read.

B. Indigenizing Imported Text

The first change emerged during the promulgation of Pakistan's third Constitution in 1973. Even apart from this constitution's specification of Islam as Pakistan's state religion (Article 2), a new schedule (Schedule 3) was introduced requiring each President and Prime Minister to swear an oath, not only that he or she was a Muslim, but, to clarify this point, that he or she believed that the Prophet Mohammad was truly 'the last of the Prophets'.

The second adjustment emerged one year later in the form of Pakistan's second constitutional amendment (1974). This amendment modified Article 260, regarding definitions, to declare that, within Pakistan, a 'Muslim' would henceforth be defined as one who 'does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet ... after Muhammad'.

Returning to the underlying politics of constitutional interpretation, these two adjustments set in motion several changes in the meaning of Pakistan's imported provisions concerning religious freedom. A proper understanding of these changes,

however, requires some appreciation for the targeted violence surrounding them. In April 1973, almost immediately after the initial approval of Pakistan's third Constitution, the same religious activists who had challenged Pakistan's approach to the rights of the Ahmadiyya during the 1950s and 1960s—groups like the Majlis-ul-Ahrar-e-Islam (later refashioned, with religious parties like the Jama'at-e-Islami, as a new collective known as the Majlis-e-Amal [Council of Action])—reasserted themselves following another round of anti-Ahmadi skirmishes. Prime Minister Bhutto was unsettled by these skirmishes, but he did not respond with a further round of martial law. Instead, he nominated a high-level judicial commission under Supreme Court Justice Khwaja Mohammad Ahmad Samdani to investigate the clashes, alongside a special parliamentary committee chaired by the Attorney General.⁴⁷ This committee was asked to decide whether, and how, in light of existing provisions concerning religious freedom, the formal legal status of the Ahmadiyya (as 'Muslims' or 'non-Muslims') might be examined in greater depth.

Initially, Bhutto sought to determine whether the status of the Ahmadiyya should be examined by the Supreme Court or Pakistan's Council of Islamic Ideology. In the absence of any claim suggesting that existing laws governing the Ahmadiyya were 'un-Islamic', however, he eventually turned away from these two bodies (empowered to 'review' existing laws) in favour of a fresh inquiry regarding the need for constitutional or statutory reforms—above all, reforms targeting the reach of religious self-identification as

⁴⁷ This committee was aided by a steering committee dominated by parliamentary ulema; see Qasmi 2014, 176-77, 180.

a manifestation of one's (otherwise constitutionally protected) right to religious 'profession'.

Bhutto's focus on the role of parliament was not surprising given Pakistan's recent return to civilian rule after more than ten years of dictatorship. However, with respect to religious freedom, this push in the direction of parliament (and, therein, the pursuit of majority sentiment) was pivotal. Briefly, right-wing religious activists stepped in to reiterate what they saw as a set of 'majoritarian' concerns regarding the ways in which, in describing themselves as 'Muslims', Pakistan's Ahmadiyya actually *diluted* Muslim access to their distinctive constitutional rights (e.g. access to a Muslim presidency and/or a dedicated Muslim electorate). In fact, in their push to defend these rights, the activists in question sought to reverse the onus of responsibility for any violence that might surround their protests: whereas, in the past, the Ahmadiyya had been cast as the victims of right-wing protesters, these protesters now sought to cast themselves as victims—the victims of Ahmadi self-identification (as a form of doctrinal 'provocation') and, turning to Muslim constitutional rights, unlawful forms of 'encroachment'.

Struggling with ruling coalitions tied to right-wing parties in two out of Pakistan's four provinces (Balochistan and Pakistan's Northwest Frontier Province), Prime Minister Bhutto did not resist the purportedly 'majoritarian' arguments put forward by these right-wing activists. Instead, he sought to coopt them, fusing their concerns about Ahmadi 'provocation' with an appreciation for constitutional provisions focused on 'public order'. In fact, with a nod to some of his erstwhile opponents in the Majlis-ul-Ahrar-e-Islam,

Bhutto's parliamentary committee slowly turned its attention to the promulgation of a constitutional amendment—Pakistan's second constitutional amendment—targeting the definition of a Muslim in the context of Article 260.

The leader of an Ahmadi branch known as the Qadiani was invited to defend his community's 'Muslim' identity before those charged with considering this amendment. His remarks, however, were not confined to Pakistan's 1973 Constitution. Instead, recalling some of the views first articulated by Pakistani Hindus during the course of Pakistan's first CA, he couched his defense of religious freedom—and, specifically, religious self-identification—in broad global principles regarding freedom of conscience commonly articulated by the UN.⁴⁸

Unfortunately, National Assembly members like Ghulam Ghaus Hazarwi were broadly unsympathetic to such references. Hazarwi suggested that improved legal guidance was needed, not only to settle the rights of the Ahmadiyya, as citizens, but also—and especially—to prevent any further encroachment on Muslim majority rights.⁴⁹ His logic was simple: if as per the Constitution Pakistani Muslims were endowed with special rights, property, and privileges (e.g. access to the presidency), it followed that the state must be able to identify who, exactly, was a Muslim. 'The state', he noted, 'must be able to ... identify [both] its Muslim and [its] non-Muslim citizens'.⁵⁰

⁴⁸ Qasmi 2014, 185-86.

⁴⁹ Qasmi 2014, 189.

⁵⁰ Qasmi 2014, 195.

To accomplish this, Pakistan's Attorney General did not believe the government was required to prioritize an individual's right to religious self-identification.⁵¹ On the contrary, with a two-thirds majority in both houses, the Attorney General noted that Pakistan's parliament was empowered to amend the constitution, subjecting certain rights to 'limitations'.⁵² As such, Article 260 was amended, with no opposing votes and only a few abstentions, to ensure that—as noted above—a 'Muslim' would be defined as one who did not believe in 'any person who claimed or claims to be a prophet ... after Muhammad'. Politically situated parliamentarians wrestled with the many possible meanings of a concept like 'religious freedom' while, at the same time, actively pressing for one. In effect, they sought to de-contest the meaning of concepts like 'religious freedom', or 'Muslim', placing their meaning beyond the realm of contemporary political debate.

Throughout 1973 and 1974, Pakistan's Attorney General noted that parliament was empowered to guard against any encroachment on Muslim constitutional prerogatives—encroachments that, he argued, might create some form of 'tangible material damage' (e.g. diluted access to the presidency or a separate Muslim electorate) followed, in due course, by popular resistance to such damage in the form of public disorder. To preempt this agitation and, thus, to avoid public disorder (as permitted,

⁵¹ For the ways in which bureaucratic forms of state recognition interact with the practice (and politics) of religious 'self-identification', see Nelson and Shah.

⁵² See Qasmi 2014, 192-93, 196; Kazi 2015, 91.

following both Ireland and India, by Article 20), he simply argued that parliament was entitled to address, by way of constitutional amendments targeting definitions (Article 260) and oaths (Schedule 3), a pattern of religious ‘provocation’ associated with Ahmadi religious practices—practices (however peaceful) construed as a form of ‘false belonging’.

53

C. Ireland/India as an Empty Signifier

Although Pakistan’s second constitutional amendment redefined the Ahmadiyya as ‘non-Muslims’ in 1974, Pakistan’s superior judiciary did not immediately abandon its previous reading of Article 20. In 1978, for instance, the Lahore High Court issued a rather nuanced judgment in the case of *A.R. Mubashir v A.A. Shah*, holding that, although official recognition of the Ahmadiyya as Muslims was constitutionally barred, their fundamental right to peaceful religious practice (as citizens) was not affected. In effect, the Court held that the peaceful religious practices of the Ahmadiyya—focusing, specifically, on practices referring to Ahmadi places of worship as ‘mosques’—were neither a provocation amounting to a public nuisance nor a threat to Muslim ‘property’. Again, recalling *Kashmiri* (1969), the Court reiterated that Pakistan’s Ahmadiyya could only be excluded from ‘Muslim’ matters clearly defined in law—matters of public office, for instance, or exclusive forms of property.

At the same time, however, just across the border in India, the Indian Supreme

⁵³ Qasmi 2014, 193, 224.

Court had begun to reassess its own understanding of group-based religious rights, highlighting, in particular, the power of the state to identify the (constitutionally protected) 'essential' practices of any religious denomination and, by extension, any 'non-essential' practices subject to legal reform.⁵⁴ In fact this 'Indian' notion that states were empowered to regulate the 'non-essential' practices of religion was also in place during Pakistan's first CA (1947-54), wherein a provisional article (Article 12) was included in the Interim Report issued by the CA's Fundamental Rights Committee stipulating that, 'subject to regulations', every denomination 'shall have the right to procure ... articles which are proved as being essential for worship'. This Article, however, was dropped from Pakistan's first constitution in 1956, forcing Pakistani judges to rely on jurisprudence from India (rather than their own constitution) whenever they sought to consider the statutory regulation of religious practices seen as 'non-essential'.

Indian and Pakistani judges, however, adopted very different approaches to the notion of 'essential' and 'non-essential' religious practices. Whereas India sought to regulate 'non-essential' religious practices, for instance, Pakistan stressed (a) essential *Muslim* practices (protected from adverse encroachment) as well as (b) essential *non-Muslim* practices construed as a provocation to public disorder and, then, legally

⁵⁴ Ahmad 2014, 13.

restricted as such.⁵⁵

During the dictatorship of General Zia-ul-Haq (1977-88), Pakistani officials facing yet another round of violent religious protests by right-wing anti-Ahmadi activists stepped in to reframe—that is, further restrict—the constitutional meaning of religious freedom. In particular, they stepped in to prohibit Pakistan’s Ahmadiyya from using ostensibly ‘Muslim’ words (e.g. *masjid* or mosque) and ‘Muslim’ practices (e.g. the *azaan* or call to prayer), describing Ahmadi attachments to such words and practices as (a) ‘non-essential’ for the Ahmadiyya in the practice of their faith and, in any case, (b) a provocative form of ‘encroachment’ on the special religious ‘property’ of Muslims.⁵⁶

This notion that Muslim property might include common words like *masjid* or peaceful religious practices like the *azaan* had already emerged in comments made by Pakistan’s Attorney General during the parliamentary debates surrounding Pakistan’s second constitutional amendment (1974).⁵⁷ But, after 1985, General Zia stepped in to reinforce these ideas with further statutory reforms, modifying Section 298 of the Pakistan Penal Code—a colonial law regarding blasphemy that sought to curtail threats to

⁵⁵ On religious freedom restrictions in India, see Osurie (2013); again, public order concerns have been cited to support restrictions on (‘non-essential’) minority practices that offend the sentiments of the majority.

⁵⁶ On the political and ‘public order’ motivations underpinning Zia’s reforms, see Saeed 2011, 88; Kazi 2015, 129.

⁵⁷ Qasmi 2014, 192.

inter- and intra-religious harmony—to ensure that, legally speaking, the Ahmadiyya would no longer be permitted to access words like *masjid* or practices like the *azaan* insofar as these were seen as being associated with the ‘proprietary’ features of Islam.⁵⁸ In short, Zia responded to ongoing pressure on the streets (a.k.a. threats to public order and religious harmony) by (a) emptying existing ideas about ‘essential practices’ or ‘religious property’ of their prior meaning and, then, (b) filling them up again with *new* forms of meaning carefully designed to privilege Pakistan’s Muslim majority.

Zia’s property and public-order-based re-reading of ‘essential’ religious practices was soon taken up in a landmark Supreme Court case known as *Zaheeruddin* (1993). In this case—by far the most important case treating Pakistan’s imported constitutional provisions regarding religious freedom as a basket of ‘empty signifiers’—a group of Ahmadiyya urged the Court to overturn their prior convictions for (a) wearing badges bearing the *kalima* (the Muslim profession of faith) and (b) celebrating an Ahmadi holiday—the centenary of Mirza Ghulam Ahmad’s contested revelations—in the Punjabi city of Jhang.⁵⁹ The Supreme Court, however, turning to Pakistan’s Constitution (Article 20), Pakistan’s (revised) Penal Code (Section 298), and a series of Indian Supreme Court judgments regarding the meaning of ‘essential’ religious practices, upheld their

⁵⁸ Ahmed 2009 describes the colonial roots of Pakistan’s blasphemy law but does not address the ways in which Pakistan’s *religious freedom* laws (as constitutional laws) were explicitly set apart from the British tradition.

⁵⁹ Lau 1995; Mahmud 1995.

convictions.⁶⁰ It upheld their convictions in light of three points directly seeking to empty Pakistan's imported constitutional provisions regarding religious freedom of their prior meaning while, at the same time, filling them up again with politically situated forms of new meaning.

First, turning to the exclusive 'property' of Muslims, the Court re-framed several Indian and American Supreme Court judgments to argue that '[the] Ahmadis, as non-Muslims, could not use Islamic epithets in public [for example, during their celebrations in Jhang] without violating ... [Pakistani] trademark laws'.⁶¹ In particular, the court held that, just as the presidency had been construed as a type of Muslim property, Muslims *alone* held a proprietary claim to certain religious words and practices.⁶²

Second, turning to the matter of peaceful religious practice, the Court drew on a series of Indian Supreme Court judgments to insist that, whenever questions emerged regarding the 'essential' features of a particular faith, the group seeking to avoid regulation was required to prove its essential features within a court of law. Because the Ahmadiyya had, apparently, *failed* to prove that their celebrations in Jhang were essential, the Court explained that those celebrations could be described as 'non-essential' and, then, legally regulated as such (without, the Court held, undermining their fundamental

⁶⁰ See Ahmad 2014, 11.

⁶¹ Khan 2011, 509.

⁶² In Malaysia, the courts adopted a similar view in barring Christians from using Muslim words like 'Allah'; see Neo 2014.

right to practice the essential features of their faith).

Finally, and most importantly, returning to Article 20, the Court held that, within Pakistan, ‘Ahmadi religious practice[s], however peaceful, angered and offended the Sunni majority; ... [so] to maintain law and order, Pakistan would ... need to control [them]’.⁶³

This reading of Article 20’s reference to public order—a nearly ubiquitous feature of religious-freedom provisions over time and around the world—dramatically shifted Pakistan’s approach to the constitutional provisions it had initially imported from Ireland. In particular, Pakistan’s new reading of religious freedom appeared to restrict ‘essential’ and ‘peaceful’ Ahmadi practices (as ‘provocative’) in a *preemptive* bid to avoid the possibility of future violence by Pakistan’s Muslim majority.⁶⁴

⁶³ Khan 2003, 228 and 2011, 509. Specifically, the Supreme Court described the Ahmadiyya faith as ‘a serious and organized attack on [Islam’s] ideological frontiers’ that is ‘bound to give rise to a serious law and order situation’, *Zaheeruddin* 1993, 1765. In particular, the Court noted that Muslims could not be blamed for losing ‘control’ after encountering the ‘blasphemous’ material produced by Mirza Ghulam Ahmad. ‘[I]t is’ they argued, ‘like permitting [a] civil war’, 1777; also Alvi.

⁶⁴ Here, the Pakistan Supreme Court ignored U.S. reasoning noting that, although the state was *not* empowered to ban the peaceful and essential practices of *selected* religious groups, it could, for the sake of public order, legally regulate the practices of *all* religious groups (for example, with an administrative requirement noting that any group engaged in a religious procession would have to obtain a permit, however ‘essential’ the procession

D. Religious Freedom, Public Order, and (Majoritarian) Parliamentary Power

Recalling Pierre Legrand's notions of intersubjective or interpretive 'failure' in the realm of legal transplants, Amjad Mahmood Khan (2011) and Tariq Ahmad (2014) have argued that, in the case of *Zaheeruddin*, Pakistan's Supreme Court actively 'mis-translated' specific foreign laws—both American and Indian constitutional laws as well as international human rights laws. This assessment, however, merely revives a number of questions regarding the link between legal *texts* and the larger *political* contexts within which legal *meanings* are created. What were the domestic political factors that drove the Court's reasoning in *Zaheeruddin*? What were the political factors that shaped Pakistan's approach to the meaning of imported foreign texts?

Focusing on what she calls 'core juridical signifiers' (i.e. fundamental rights), Saadia Saeed (2011) examines the ways in which Pakistan slowly invested specific constitutional principles with new meaning.⁶⁵ In particular, she attributes Pakistan's re-purposing of constitutional provisions concerning religious freedom to the influence of General Zia during the early-to-mid 1980s. This focus on General Zia, however, is difficult to reconcile with the history of Pakistan's legal record—above all, the fact that crucial Supreme Court

may be). In Pakistan, the Court held that the state was entitled to ban, not a particular practice for all religious groups, but almost *all* of the practices of a *particular* group.

⁶⁵ For a similar re-reading of U.S. Supreme Court jurisprudence regarding free speech in Israel, see Jacobsohn 1993.

decisions seeking to protect the Ahmadiyya (e.g. *Mubashir* 1978) were delivered after the coup that brought General Zia to power and, moreover, the fact that key decisions restricting the Ahmadiyya (e.g. *Zaheeruddin* 1993) were delivered after Zia died and, indeed, after Pakistan's 1973 Constitution was restored.

Broadly, Saeed's argument is difficult to reconcile with the fact that much of the political energy driving restrictions on the religious freedom of the Ahmadiyya—for example, Pakistan's second constitutional amendment—emerged *before* the arrival of General Zia via assertions of majoritarian parliamentary power.⁶⁶ Clearly, Zia extended what parliament had begun. But, since 1974, and despite numerous efforts to annul religious ordinances promulgated by General Ayub (regarding inheritance) as well as General Zia (regarding adultery), Pakistan's National Assembly has *not* sought to annul Zia's amendments in the realm of religious freedom.⁶⁷ In fact, as Saeed herself points out, quoting former Supreme Court judge Fakhruddin Ebrahim (who served as lead counsel for

⁶⁶ Saeed 2011, 4, 22.

⁶⁷ When Prime Minister Benazir Bhutto suggested blasphemy law amendments in 1994 (e.g. imprisonment for false allegations), her proposals were defeated in parliament. When parliamentarian Sherry Rehman called for such reforms after the assassination of Governor Salman Taseer (who did the same in 2011), she faced death threats. Even today, Zia's reforms remain intact. In 2015, however, the Pakistan Supreme Court upheld the execution of Taseer's assassin in a judgment criticizing vigilante violence; see *Mumtaz Qadri v State* (2015).

the Ahmadiyya during the early stages of *Zaheeruddin*), the judges who decided *Zaheeruddin* were not beholden to Zia; as common political actors, he notes, they were simply 'afraid ... of becoming unpopular'.⁶⁸

Martin Lau (1996) is well known for his assessment of 'Islamization' in the context of Pakistan's courts. But, as an explanation for Pakistan's efforts to 'fill up' imported constitutional provisions with new forms of legal meaning, Lau's focus on 'religious reasoning' *within* the judiciary is difficult to reconcile with the fact that such reasoning was notably *absent* in several key decisions: *Kashmiri* (1969), *Mubashir* (1978), and *Mujibur Rahman* (1988), not to mention *Zaheeruddin* (1993). As noted above, these decisions concerning religious freedom conspicuously avoided any Islamic references, preferring, instead, references to Indian or American judgments regarding the parameters of religious property.⁶⁹ Indeed, as Anser Aftab Kazi (2015) points out, the jurisprudential record in *Zaheeruddin* shows how religious freedom was actually 'translated into, and proscribed within', a secular ('liberal') legal order.⁷⁰ Pakistan's new reading of religious freedom was not a religious reading. It was, by and large, a majoritarian political reading rooted in secular notions of property, provocation, and public order.

Ali Usman Qasmi (2014) does not trace the shifting meaning of religious freedom

⁶⁸ Saeed 2011, 33; see also Mahmud 1995, 83, 96.

⁶⁹ For a similar account of the Federal Shariat Court judgment in *Mujibur Rahman v Pakistan* (1988) PLD (SC) 167, see Kazi 2015, 111, 113.

⁷⁰ Kazi 2015, 123, 126-7.

to the interventions of Pakistani generals or judges. He traces this pattern to religious parties sitting in Pakistan's parliament. Still, Qasmi's focus on religious parties is difficult to reconcile with the fact that, inside parliament, these parties were always greatly outnumbered by those tied to mainstream secular parties like the Pakistan Muslim League (PML) and, especially, the Pakistan People's Party (PPP)—not only in the PPP-led government of 1974 (13 per cent religious parties in parliament), but more generally: 1988, 1990, 1993, 1997, 2008, 2013, even today. The influence of religious parties in parliament is, thus, not unlike the influence of the religious activists who sought to influence Pakistan's CA. In the end, the reach of their 22-point manifesto was bound up with the acquiescence of the larger CA.

Indeed, what accounts for Pakistan's re-reading of its imported religious freedom provisions is not the 'Islamizing' dictatorship of General Zia, the 'religious' reasoning of its courts, or the power of 'Islamist' parties in parliament. What accounts for Pakistan's approach to religious freedom is actually a much wider pattern in which enumerated fundamental rights, imported from Ireland, via India, fueled right-wing protests and, then, within Pakistan's National Assembly, a majoritarian approach to politics in which ongoing efforts to protect the rights of the majority were thought to require new forms of minority religious constraint.

The reach of this perspective, rooted in majoritarian politics underpinned by right-wing protests, emerged again quite recently. In October 2017, Pakistan's National Assembly responded to yet another round of public protests by reversing a set of reforms

in Pakistan's Election Act (2017). Specifically, the Assembly voted to reverse a change in the oath taken by would-be candidates for national and provincial elections, as well as a change in the bureaucratic procedures used to clarify the religion of such candidates. Recalling Schedule 3 of Pakistan's 1973 Constitution, the first change sought to replace an ostensibly religious affirmation ('I solemnly swear') with a simple declaration ('I believe') concerning 'the absolute and unqualified finality of the prophethood of Muhammad'. (Those who refused to sign this declaration were relegated to Pakistan's non-Muslim electorate.) The second change grew out of an earlier effort, led by General Pervez Musharraf (1999-2007), to abolish separate electorates for non-Muslims while, at the same time, maintaining an exception for the Ahmadiyya.⁷¹ When parliament intervened to remove the bureaucratic procedure whereby individual Ahmadi candidates could be exposed, enormous protests erupted—in fact, Islamabad was placed under siege. Shortly thereafter, the National Assembly intervened to address what it saw as the will of the 'majority'. Claiming to defend the special rights of Muslims, it voted (unanimously) to reverse its earlier reforms.⁷²

Again, what accounts for Pakistan's re-reading of its imported constitutional provisions concerning religious freedom is not the 'Islamizing' influence of its dictators, the 'religious' reasoning of its courts, or the power of its 'Islamist' parties. What accounts for this re-reading is a much wider pattern rooted in right-wing protests and the

⁷¹ See *Brief on Ahmadis and Elections*.

⁷² See 'How the Islamabad Protests Happened'.

majoritarian politics of parliament.

Conclusion

Clearly, for those with an interest in constitutional borrowing, mapping textual transfers is no longer enough. On the contrary, the meaning of a borrowed reference only emerges within a particular political context. The challenge lies in tracking the political motivations that underpin the importation (and, then, the 're-signification') of foreign legal texts.

In Pakistan, it was not the religious orientation of judges, the influence of religious parliamentarians, or the formal promulgation of religious laws so much as a growing appreciation for the public's attachment to a restricted sense of Muslim boundaries—and, within this, a growing fear that any encroachment on those boundaries might engender private forms of religious vigilantism or public rioting—that slowly reconfigured the meaning of constitutional clauses initially imported from outside. These imported clauses did not treat a fundamental right to religious freedom as absolute; on the contrary, and from the very beginning, they explicitly noted that the enforceability of any constitutional right to religious freedom was politically contingent—contingent on a constantly shifting official assessment of religious incitement, violence, and disorder.

Drawing inspiration from the anti-colonial politics of Ireland and, then, India more than powerful European states like Britain, Pakistan clearly illustrates the ways in which explicit textual transplants are shaped by the politics of constitutional *meaning*. Over

time, and in different ways, Pakistani judges, politicians, and executive officials slowly adjusted their approach to right-wing patterns of religious-cum-political agitation. Above all, they reversed the onus of responsibility surrounding religious violence, gradually stressing the ways in which they were constitutionally empowered to derogate the rights of any religious practitioner, no matter how peaceful, who might be recast (even preemptively) as a religious ‘provocateur’ and, as such, a driver of public disorder.

In debates regarding the status of foreign law within the United States, the late Supreme Court Justice Antonin Scalia famously noted that American judges must rely on ‘[t]he standards of decency of American society—not the standards ... of the world [or any] ... other countr[y]’.⁷³ In Pakistan, one might argue, the same view prevailed, not only (following Scalia) with respect to ‘domestic’ laws, but also with respect to Pakistan’s domestic reading of imported ‘foreign’ laws. In effect, constitutional actors found new ways to accommodate longstanding debates regarding the dynamics of constitutional borrowing: treating religious freedom as a constitutional ‘empty signifier’, they found new ways to have Alan Watson’s (1974) textual *cake* while, at the same time, following Legrand (2001), *eating* it in a Pakistani way. Departing from both Ireland and India, this ‘Pakistani’ way was no longer sensitive to the rights of individuals or minorities; it privileged efforts within Pakistan’s National Assembly to recast, following periodic bouts of public violence, the rather delicate parameters of Pakistan’s Muslim majority.

⁷³ See Chaudhry 2006, 7.

Bibliography

Abdul Rehman Mubashir v Amir Ali Shah (1978) PLD (Lah.) 113.

Ahmad, Mohammad Bosheer, *Constitutions of Eastern Countries* (Select Constitutions of the World, Volume 1) (Karachi: Governor-General's Press and Publications, 1951).

Ahmad, Tariq 'Defining Religion: The Use (or Misuse) of the "Essential Practices Doctrine" in *Zaheer-ud-Din*' (unpublished manuscript, 2014).

Ahmed, Asad Ali, 'Specters of Macaulay: Blasphemy, the Indian Penal Code, and Pakistan's Postcolonial Predicament' in *Censorship in South Asia*, R. Kaur and W. Mazzarella, eds. (Bloomington: Indiana, 2009), 172-205.

A.K. Shorish Kashmiri v West Pakistan (1969) PLD (Lah.) 289 (Pak.).

Alvi, Ahmad Hasan, 'Qadianis Petition Dismissed by SC', *DAWN*, 5 July 1993.

Arvind, T.T., 'The "Transplantation Effect" in Harmonization', *International and Comparative Law Quarterly* 59:1 (2010), 65-88.

Bajpai, Rochana, *Debating Difference: Group Rights and Liberal Democracy in India* (Delhi: Oxford, 2011).

Berkowitz, Daniel, Katharina Pistor, and Jean-François Richard, 'The Transplant Effect', *American Journal of Comparative Law* 51 (2003), 163.

Besant, Annie, *India: Bond or Free? A World Problem* (London: G.P. Putnam, 1926).

Bhagavan, Manu, 'A New Hope: India, the United Nations, and the Making of the Universal Declaration of Human Rights', *Modern Asian Studies* 44:2 (2010), 311-47.

Binder, Leonard, *Religion and Politics in Pakistan* (Columbia, 1961).

This is the accepted version of a forthcoming article that will be published by Cambridge University Press in *Journal of Asian Studies*: <https://www.cambridge.org/core/journals/journal-of-asian-studies/all-issues>
Accepted version downloaded from SOAS Research Online: <http://eprints.soas.ac.uk/25859/>

Braibanti, Ralph, 'Pakistan: Constitutional Issues in 1964', *Asian Survey* 5:2 (1965), 79-87.

Brief on Ahmadis and Elections in Pakistan (31 October 2009) <<http://www.persecutionofahmadis.org/wp-content/uploads/2011/05/004-Brief-about-Elections.pdf>>.

Cairns, John, 'Watson, Walton, and the History of Legal Transplants', *Georgia Journal of International and Comparative Law* 41:637 (2013).

Choudhry, Sujit, *The Migration of Constitutional Ideas* (Cambridge, 2006).

Cohn, Margit, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom', *American Journal of Comparative Law* 58:3 (2010), 583-629 (584-90).

Constitution of India (1950) <<http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>>.

Constitution of Ireland (1937) <<http://www.irishstatutebook.ie/eli/cons/en/html>>.

Constitution of Pakistan (1973) <www.na.gov.pk/uploads/documents/1333523681_951.pdf>.

Constitution of Poland (1921) <libr.sejm.gov.pl/tek01/txt/kpol/e1921.html>.

Constitutional Precedents, B.N. Rau, ed. (New Delhi: Government of India Press, 1947).

Cotterell, Roger, 'Is There a Logic of Legal Transplants' in *Adapting Legal Cultures*, D. Nelken and J. Feest, eds. (London: Hart, 2001), 71-92.

Danchin, Peter, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered', *Journal of Law and Religion* 23:2 (2007-8), 455-534.

De Saussure, Ferdinand, *Course in General Linguistics* (NY: Philosophical Library, 1959).

Dixon, Rosalind and Eric Posner, 'The Limits of Constitutional Convergence', *Chicago Journal of International Law* 11 (2011), 399.

Finnemore, Martha and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization* 52 (1998), 887-917.

Friedman, Yohannan, *Prophecy Continuous: Aspects of Ahmadi Religious Thought and Its Medieval Background* (Berkeley: California, 1989).

Ginsburg, Tom, James Melton, and Zachary Elkins, *The Endurance of National Constitutions* (Chicago, 2010).

Goldsworthy, Jeffrey, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism, and the Limits of Convergence' in *The Migration of Constitutional Ideas*, S. Choudhry, ed. (Cambridge, 2006), 115-41.

Graziadei, Michele, 'Comparative Law as the Study of Transplants and Receptions' in *Oxford Handbook of Comparative Law*, M. Reimann and R. Zimmermann, eds. (Oxford, 2006), 441-76.

Hirschl, Ran, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford, 2014).

'How the Islamabad Protests Happened', *DAWN* (25 November 2017) <<https://www.dawn.com/news/1372800>>.

Jacobson, Gary, 'Constitutional Identity', *Review of Politics* 68:3 (2006), 361-97.

-----, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton, 1993).

Kazi, Anser Aftab, *The Politics of Blasphemy: Religion and Public Reasoning in Pakistan*

(Cambridge: DPhil Thesis, 2015), 63-4.

Kelsay, John, 'Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights' in

Human Rights and the Conflicts of Culture: Western and Islamic Perspectives on Religious

Liberty, D. Little, J. Kelsay, and A. Sachedina, eds. (University of South Carolina,

1988), 33-52.

Keogh, Dermot, *The Making of the Irish Constitution* (Cork: Mercier Press, 2007).

Khan, Amjad Mahmood, 'Pakistan's Anti-Blasphemy Laws and the Illegitimate Use of the

"Law, Public Order, and Morality" Limitation on Constitutional Rights', *Review of Faith and*

International Affairs 13:1 (2015), 13-22.

-----, 'Misuse and Abuse of Legal Argument by Analogy in Transjudicial Communication:

The Case of Zaheeruddin v State', *Richmond Journal of Global Law and Business* 10:4

(2011), 497-523.

-----, 'Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under

International Law and International Relations', *Harvard Human Rights Journal* 16 (2003).

Laclau, Ernesto, 'Why Do Empty Signifiers Matter to Politics'? in *Emancipation(s)* (Verso,

1996).

Lau, Martin, *The Role of Islam in the Legal System of Pakistan* (Leiden: Nijhoff, 1996).

-----, 'The Case of Zaheeruddin v The State and Its Impact on the Fundamental Right to

Freedom of Religion', *Center for Islamic and Middle Eastern Law (SOAS) Yearbook* v1

(1995) 1.

Legrand, Pierre, 'What "Legal Transplants"'? in *Adapting Legal Cultures*, D. Nelken and J.

Feest, eds. (Oxford: Hart, 2001).

-----, 'The Impossibility of Legal Transplants', *Maastricht Journal of European and*

Comparative Law 4 (1997), 111.

Lévi-Strauss, Claude, *Structural Anthropology* (New York: Basic Books, 1963).

Mahmud, Tayyab, 'Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice', *Fordham International Law Journal* 19:1 (1995), 40-100.

Mumtaz Qadri v State (2015) Crim. Appeal 210.

The Nehru Report: An Anti-Separatist Manifesto (New Delhi: Michiko and Panjathan, 1928).

Nelken, David, 'Comparativists and Transferability' in P. Legrand and R. Munday, eds.,

Comparative Legal Studies: Traditions and Transitions (Cambridge, 2003), 437-66.

Nelson, Matthew J., 'Islamic Law in an Islamic State: What Role for Parliament?' in *Constitution-Writing, Religion, and Democracy*, A. Bali and H. Lerner, eds. (New York:

Cambridge, 2016), 235-63.

----- and Dian A.H. Shah, 'Operationalising and Regulating Human Rights: Apostasy and

Administrative "Reasonableness" in Malaysia and Beyond', *International Journal of*

Constitutional Law V:N (2018), [PAGES](#).

Neo, Jaclyn, 'What's in a Name? Malaysia's "Allah" Controversy and the Judicial

Intertwining of Religious and Ethnic Identity', NUS Law School, Working Paper 2014/008

(2014).

Newman, K. J., 'The Constitutional Evolution of Pakistan', *International Affairs* 38:3 (1962), 353-64.

Osiatynski, Wiktor, 'Paradoxes of Constitutional Borrowing', *International Journal of Comparative Law* 1 (2003), 244.

Osurie, Goldie, *Religious Freedom in India: Sovereignty and (Anti) Conversion* (London: Routledge, 2013).

Perju, Vlad, 'Constitutional Transplants, Borrowing, and Migrations' in *Oxford Handbook on Comparative Constitutional Law*, M. Rosenfeld and A. Sajó, eds. (Oxford, 2012), 1304-26.

Qasmi, Ali Usman, *The Ahmadis and the Politics of Religious Exclusion in Pakistan* (London: Anthem, 2014).

Rau, B.N., *India's Constitution in the Making* (Bombay: Orient Longmans, 1960).

Report of the Court of Inquiry (Punjab Disturbances of 1953) (Lahore: Government Printing, 1954).

Risse, Thomas, Stephen Ropp, and Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, 1999).

Rosenfeld, Michael and András Sajó, 'Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech in New Democracies' in *The Migration of Constitutional Ideas*, S. Choudhry, ed. (Cambridge, 2006), 142-77.

Rosenfeld, Michel, 'Constitutional Migration and the Bounds of Comparative Analysis',

NYU Annual Survey of American Law 58 (2001-2003), 67-83.

Saeed, Sadia, 'The Nation and Its Heretics: Courts, State Authority, and Minority Rights in Pakistan' (2011) <http://web.law.columbia.edu/sites/default/files/microsites/law-culture/files/2011-files/Nation%26Heretics_SAEED.pdf>.

Said, Edward, *The World, the Text, and the Critic* (Cambridge: Harvard, 1983).

Schonthal, Benjamin, 'Ceylon/Sri Lanka: The Politics of Religious Freedom at Empire's End' in *Politics of Religious Freedom*, W. Sullivan, E. Hurd, S. Mahmood, and P. Danchin, eds.

(Chicago, 2015), 149-57.

Select Constitutions of the World (Prepared for presentation to Dáil Eireann by order of the Irish Provisional Government) (Dublin: Constitution Committee, 1922).

Select Constitutions of the World, B. Shiva Rao, ed. (Madras: Law Journal Press, 1934).

Small, Richard, 'Towards a Theory of Contextual Transplants', *Emory International Law Review* 19:3 (2005), 1431-55 (1433-37).

Sorabjee, Soli J., 'Rights and Human Rights in the Modern World: The Experience of Working the Bill of Rights in India' in Robert Fatton, Jr. and R.K. Ramazani, *The Future of*

Liberal Democracy (London: Palgrave, 2004).

Tushnet, Mark, 'The Inevitable Globalization of Constitutional Law', *Virginia Journal of International Law* 49 (2009), 985.

Waltz, Susan, 'Universal Human Rights: The Contribution of Muslim States', *Human Rights Quarterly* 26:4 (2004), 799-844.

This is the accepted version of a forthcoming article that will be published by Cambridge University Press in *Journal of Asian Studies*: <https://www.cambridge.org/core/journals/journal-of-asian-studies/all-issues>
Accepted version downloaded from SOAS Research Online: <http://eprints.soas.ac.uk/25859/>

Watson, Alan, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974).

Zaheeruddin v. The State (1993) 26 SCMR (SC) 1718.