CONSTITUTIONALISM, RELIGION AND INEQUALITY: PERSPECTIVES FROM ASIA

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Constitutionalism, Religion and Inequality: Perspectives from Asia

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There is no doubt of the importance of religion to constitutional life and politics in Asia. The array of articles in this Special Issue indicates the long-standing and often highly contested relationship between religion and constitutions in the region. Many of the articles are concerned with disputes over religion that arise in the context of majority-minority claims, as well as intra-religious tensions. The articles address a diverse range of majority-minority religious contexts. By population, there are Buddhist majorities in Thailand, Myanmar and Sri Lanka; a Catholic majority in the Philippines; an Islamic majority in Pakistan, Afghanistan, Malaysia, and Indonesia; a Confucian majority in Singapore; and a Hindu majority in India. The reason for comparing these diverse contexts is because, regardless of which religion is the majority or minority, there are patterns and trends in how majorities use law against minorities, and how minorities wield law in defense of their religious and social claims to justice.

There are no neat divisions or classifications to describe the relationship between constitutional law and religion in the region, nor of legal traditions more broadly. The common law animates the legal systems of Pakistan, Bangladesh, Malaysia, Singapore, Myanmar, and India, while civil law systems characterize Thailand and Indonesia; and mixed systems exist in Afghanistan. Structuring these legal systems are vastly different constitutional systems and multiple ways of recognizing, or relegating, religion in public and private life. Some constitutions recognize a religion, others acknowledge several religions, and others adopt secularism as a core principle. Yet, there are core themes and ideas that run through and unite these jurisdictions, regardless of differences in constitutional form or religious make-up.

To identify some of these common themes, I reflect on this important and timely collection of contributions in light of the work of the late Professor Dan S Lev (1933-2006). Based in the United States, Lev was a political scientist who primarily spent his career devoted to understanding law and politics in Indonesia, at a time when it was neither particularly popular, easy nor fashionable.[1] In many respects, the field of law and religion remains oriented to the United States and Europe. It is only in more recent decades that Islamic law has become an area of scholarly interest, although again this body of scholarship usually privileges the Middle East rather than Asia. Fields such as Buddhism and law are only now gaining momentum,[2] and so in this respect, scholarship that builds theory from the perspective of Asia remains on the margins of the field of law and religion.[3] This Special Issue demonstrates that despite the marginality of Asia in the field of law and religion, the relationship between constitutionalism and religion from the perspective of Asia can make an important contribution in theory building and advancing empirical understanding.

Lev was particularly interested in the politics of law and religion. Today, countries in the region range widely from liberal to authoritarian constitutionalism. For most of Lev's career, Indonesia was under the rule of Suharto and steeped in authoritarian legality. And yet, he took law seriously and sought to understand where and how law was at work. In particular, he wrote extensively about how advocates for reform and for the rule of law tried to use law and legal institutions to challenge the status quo and to address the large-scale social injustices they were confronted with every day. In the same way, the absence of liberal democracies in many parts of Asia is no reason not to take the study of constitutionalism and religion in the region seriously. I begin by reflecting on Lev's

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1 See Nick Perry, 'Dan S Lev, Scholar, Friend of Indonesia' (*Seattle Times*, 1 August 2006) <http://old.seattletimes.com/html/obituaries/2003166510_levobit01m.html> accessed 5 February 2018; Sebastian Pompe 'In Memoriam, Daniel S. Lev (1933-2006)' (2012) 93 Indonesia 197;

2 Ben Schonthal and Tom Ginsburg, 'Setting an Agenda for the Socio-legal Study of Contemporary Buddhism' (2016) 3 (1) Asian Journal of Law and Society 1; Ben Schonthal, 'Formations of Buddhist Constitutionalism in South and Southeast Asia' (2017) 15(3) International Journal of Constitutional Law 705-733; on Buddhism and law in Myanmar, the key scholar is the late Professor Andrew Huxley, see Melissa Crouch (2014) 'Remembering the work of Professor Andrew Huxley' 8 Dec, New Mandala.

3 Two recent notable contributions include Matthew Erie, China and Islam: The Prophet, the Party, and the Law. (Cambridge University Press 2016), and Michael R Feener, Sharia as Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia (Oxford University Press 2013).

approach to constitutionalism as a legal process, and the relationship between constitutionalism and power and inequality as a timely reminder of both the perils and promise of constitutionalism for achieving social justice.

Constitutionalism as Legal Process: Lev's approach to Law as Power and Ideology

Throughout his life's work, Lev paid close attention to the relationship between law and politics.[4] Lev was of the opinion that law and politics are closely intertwined: 'legal systems are politically derivative and cannot be understood apart from political structures, interests, ideology and the conflicts they incur'.[5] He conceived of law as a symbolic source of social and political authority.[6] Lev was interested in the legitimacy of law and the legitimacy conferring function of law. His view was that law is not an autonomous force, but intertwined with politics. His concern was with the political and social bases of institutional continuity and change in legal systems.

The articles in this Special Issue underscore this point: that it is necessary to understand the politics of law, and the politics of religion, to be able to shed light on the dynamics of religion and constitutional law. Many of the contributions focus on the issue of how constitutions change and the role of religion in influencing or shaping the process and outcome of constitutional change.

Lev defined constitutionalism as an environment in which the political process displays a close adherence or orientation to openly stated rules and institutions vested with political power. He suggested that constitutionalism, as a concept of broader applicability than the rule of law, generates a context where the locus of state power is hedged in by accepted law and that this known law works to transform the nature of their political power into a legal source of legitimate authority. Drawing on Max Weber's work on bureaucracy, Lev argues that '[i]n Weberian terms, constitutionalism grows out of the rational-legal form of domination, and is no less a means of

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4 A key collection of his works is found in Daniel S Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Kluwer Law International 2000).

5 ibid 3.

6 Daniel Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press 1972).

political domination than any other'.[7] His approach shows concern for the ways in which constitutional law may be used to exert control and domination over particular groups and fields of social life, including religion.

Lev identified 'legal process' as being at the heart of the concept of constitutionalism. Lev argued that constitutionalism 'implies that political process, with or without a written constitution, is more or less oriented to public rules and institutions intended to define and contain the exercise of political authority'.[8] He was quick to acknowledge, however, that this focus on legal process does not mean that it is of primary importance and that little else matters.[9] Rather, he challenged law's centrality, suggesting that we can only understand how law matters by considering it in relation to social and political forces.

Lev's interest in constitutionalism arose directly from his broader concerns about power and ideology. In terms of the relationship between constitutionalism, religion and inequality, Lev argued that 'constitutionalism is meaningless without resources of power, in some form, both to achieve it and to sustain it'.[10] Here, he was pointing to the intersection between constitutionalism and politics, and the necessity for constitutionalism to be upheld and promoted by those in positions of power. This raises a broader question for the papers in this Issue, which is, where does power lie in disputes and debates over law and religion in Asia? Lev's work is replete with concern for power. Drawing on his work, we could reflect on the following questions in relation to law and religion: Who has power – state authorities or religious authorities? How is power mediated by law and legal institutions - the constitution, courts, social movements, and religious authorities? Who dominates the resources of power of the state, and by what conditions of authority? To what extent and why are religious groups, leaders, and authorities vying to dominate resources of state power?

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[7] Daniel S Lev 'Social Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experiences' in Douglas Greenberg et al (eds), *Constitutionalism, Democracy, and the Transformation of the Modern World* (OUP 1993) p 140. [reprinted in Daniel S Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Kluwer Law International 2000)

[8] Ibid p 321.

[9] ibid.

[10] ibid.

Aside from questions of power, another concern evident in Lev's work is his preoccupation with ideology. While he did not articulate his understanding of ideology explicitly, we can gather from his work that he was speaking of the animating discourses and ideas that had a captivating effect on people and institutions. While his earlier work employs the concept of legal culture,[11] he later turns away from the use of this concept in favour of a concern for ideology. From his later writings, he suggests that ideology is a more tangible and concrete concept that animates legal process, while legal culture is often too broad and vague to be of analytical use.[12] We might then ask: Which legal systems in Asia are influenced by, and cement, a particular religious ideology in relation to constitutional law? Are there legal systems that accommodate competing ideologies of religion and constitutionalism and, if so, how? In this Issue, we see at work in the contexts discussed a range of ideologies that animate or challenge constitutionalism – from the ideology of secularism in India to the ideology of a state-led 'belief in one God' in Indonesia. This raises the problem of which legal or religious actors have the power to define the scope of these ideologies and how this is done through the legal process.

Lev's work also has a particular methodological orientation. He suggested that understanding the struggle for constitutionalism in particular contexts necessitates a grounded approach: 'as the political contentions that bracket constitutionalist demands are local matters, fed by local issues, interests, values and historical circumstances, the outcomes…are comprehensible essentially only in local terms'.[13] His own work pioneered empirical legal studies in Indonesia, based on extensive field work in an age without the internet. All the contributions in this Special Issue are empirically rich and based on a deep understanding of the local context. Lev would have deeply appreciated this methodological rigor and approach, as he was critical of the 'vacuity of studies of law in new states that take statutory provisions and legal structures at face value'.[14]

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[11] Daniel S Lev, 'Judicial Institutions and Legal Culture in Indonesia' in Claire Holt (ed), *Culture and Politics in Indonesia* (Equinox Publishing 2007) 246.

[12] Daniel S Lev, 'Conceptual Filters and Obfuscation in the Study of Indonesian Politics' (2005) 29(4) Asian Studies Review 345.

[13] Lev, 'Social Movements, Constitutionalism, and Human Rights' (n 7) 323.

[14] Lev, *Islamic Courts in Indonesia* (n 5) 1.

Constitutional Law as a Resource to overcome Social Inequality

Let us first consider Lev's sobering, if not caustic, comments on the issue of whether, and if so how, constitutional law can address social inequality. In response to this dilemma, Lev was clearly realistic about his expectations for what constitutionalism can or should achieve. In contemplating the injustice and abuse of power in the world, he suggested that constitutionalism does not offer a ready solution to the pressing social challenges of our times. He argued:

> [C]onstitutionalism is *not* an obvious solution to many of the most serious, compelling problems that humanity has to deal with… It does not eliminate economic poverty, or social discrimination, or political abuse, or the incompetence, greed, or stupidity of political leadership… for all these miseries, the only sensible solutions remain relevant knowledge, clearly articulated ideology, and effectively organised power in whatever kind of political structure exists.[15]

While Lev acknowledges in his writings that constitutionalism, at its core, is designed to limit power, he is also concerned with the reality that the poor often fare no better under a constitutional regime than in a non-constitutional one. This is far too evident in a world where the gap between the rich and poor continues to increase dramatically. At the very least, Lev suggests that constitutionalism is something of a neutral device. It is not intrinsically pro-justice. It does not necessarily have inherent capabilities to adequately address the most severe issues facing humankind. Again, he draws his analysis back to the question of power, reflecting that: 'groups without power fare little better in constitutional than non-constitutional regimes'.[16] He goes on to add that the 'human rights (however we conceive of them) of the poor are vulnerable in all types of political orders'.[17]

Several of the articles in this Special Issue address concerns of social inequality, particularly when brought about by religion, and the ability of constitutional law to address these issues. In

[15] Lev, 'Social Movements, Constitutionalism, and Human Rights' (n 7) 324.

[16] ibid 335.

[17] Lev, 'Social Movements, Constitutionalism, and Human Rights' (n 7) p 150.

Alfitri's article on Indonesia,[18] the hope is that state regulation of *zakat* (Islamic tithe) will enhance equality by ensuring a fairer social redistribution of resources. Likewise, in India, the Constitution and the courts offer hope to those who seek to rally against some of the injustices caused by religion and caste. As Lev has suggested, it is important to identify and carefully consider the hopes that are vest in courts and the constitution.[19] The contributions in this Issue address how constitutions, the courts, and the bureaucracy are used as part of efforts to generate change in social practices and hierarchy.

Reflections from India and South Asia

Several articles address the constellations of religion and constitutionalism in South Asia, including Pakistan, Sri Lanka, and India. Holding the conference in Sri Lanka at a time when constitutional debates are ripe was a reminder of the reality and importance of constitutional reform. The debates over fundamental rights and the religion clause in the Sri Lanka Constitution, in particular, whether the special provision on Buddhism should remain, be expanded or abolished, brought alive the contested relationship between constitutionalism and religion.[20]

Rehan Abeyratne's contribution covers a wide historical time period and a range of constitutional cases that showcase the complexity of arguments at the intersection of rights, ethnicity, and religion in India.[21] Some emphasise the liberating potential of constitutionalism, while others offer a more skeptical view. This article has the difficult task of intervening in a deep body of scholarly literature that has prompted significant debate on law and religion in India. The necessity of this approach contrasts with some of the other papers presented in the conference that

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[18] Alfitri, 'Religion and Constitutional Practices in Indonesia: How Far Should the State Intervene in the Administration of Islam?', this Special Issue.

[19] Daniel S Lev, 'Comments on the Course of Legal Reform in Modern Indonesia,' in Tim Lindsey (ed) *Indonesia: Bankruptcy, Law Reform, and the Commercial Court* (Desert Pea Press, 2000).

[20] Ayesha Wijayalath, 'Constitutional Management of Religion in Sri Lanka' (Religion and Constitutional Practices in Asia Conference, Colombo, November 2017); see also Ben Schonthal, *Buddhism, Politics and the Limits of Law* (CUP 2016); Dian A H Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia, Sri Lanka* (CUP 2017).

[21] Rehan Abeyratne, 'Privileging the Powerful: Religion and Constitutional Law in India', this Special Issue.

address jurisdictions that are rarely studied and so offer significant empirical insights that will no doubt form the basis of future scholarly debates.

Abeyratne's article features three cases to suggest that the courts' efforts to overhaul religious practices that have a negative impact on minorities have in fact done so at the cost to other minority groups. This highlights an important frame of reference for many of the articles in this Issue, which is the lens of majority-minority interests in the approach to constitutions and religion. Who identifies as a majority or minority depends on the context. There are many different variations on majority-minority relations in the region – Islam-Christian, Christian-Islam, Hindu-Muslim, Muslim-Hindu, Buddhist-Muslim, Christian-Muslim. Yet, the pressing issues raised by intra-religious tensions are now rivaling the more traditional focus on inter-religious relations.

Abeyratne, however, is interested in yet another angle – minority-minority relations, or more specifically, how state institutions weigh up the claims and interests of one minority against another. He explores the challenge of balancing multiple minority interests, which is often complicated by tensions between self-identification and state or court-determined means of religious identification. He also highlights how the courts deal with claims to the right to education, and women's rights in relation to family law in a seminal court case banning the practice of triple *talaq*. He shows how the position of judges themselves can often be an influential factor in the outcome of a case, for example, with an entirely Hindu bench not hesitating to make determinations on aspects of Islamic law and practice. We need to not only remain attentive to power differentials between minority groups, but find new ways of discerning the potential impact of judicial religious backgrounds on their decision-making in cases concerning religion.[22] This might also be a fruitful line of comparative inquiry, in terms of whether there are patterns in a judge's decision-making and their religious background across the region. What is striking about the Indian case, in contrast to many of the other countries discussed in this Issue, is the willingness of judges to not only make determinations regarding which practices are essential to a particular religious faith, but to openly disparage a minority religion.

While this Issue cannot do justice to the wealth of constitutional crises on religion in South Asia, other articles are important for the ways they contrast with the Indian example. In Pakistan,

[22] For one example in the context of Indonesia, see Nadirsyah Hosen, 'The Constitutional Court and Islamic Judges in Indonesia' (2016) 16(2) Australian Journal of Asian Law 1.

Matthew Nelson demonstrates that the courts uphold an ideal of religious deference in which Islam is preferred as the established religion.[23] In Sri Lanka, it is the Muslim minorities that often lose out in legal battles over religion.[24] The example of the ongoing constitutional reform process in Sri Lanka also demonstrates that there are opportunities to reconsider and reconstitute the balance between religious authority and state authority, between religious power and constitutional power. Fierce reactions to proposed changes to the Buddhism clause by those who either sought to weaken its power or abolish it entirely may instead see the status quo special recognition of Buddhism maintained in Sri Lanka.

Reflections on Indonesia and Southeast Asia

Islamic law and legal pluralism has been a primary focus of much socio-legal scholarship in Southeast Asia,[25] particularly through the pioneering work of M B Hooker.[26] In Alfitri's article, he questions the scale and scope of state and judicial intervention in the administration of Islam in the post-Suharto era.[27] As is evident from the article, zakat is a topic that has become increasingly significant in Indonesia, the world's largest, Muslim-majority democracy and an emerging economy. It focuses on the *lucrative* dimension of law and religion – the monetary benefits. This raises questions of who stands to gain from the financial benefits of using law to regulate religious practices and what role the state and the courts play in ensuring the fair distribution of these financial gains.

These financial gains take a number of common forms in Islamic countries, such as the halal certification industry, the hajj pilgrimage,[28] and *shariah* banking. Alfitri points to the lucrative

[23] Matthew Nelson, 'Religion, Politics, and Constitutional 'Basic Structure' in South Asia', this Special Issue.

[24] Gehan Gunatilleke, 'The Constitutional Practice of Ethno-Religious Violence in Sri Lanka', this Special Issue.

[25] Lynette Chua and Melissa Crouch, 'Socio-legal Scholarship on Southeast Asia: Themes and Directions' (2014) 9(1) Asian Journal of Comparative Law 1.

[26] This is exemplified by his work such as *Legal Pluralism*, and *Islamic Law in Southeast Asia*. See also Gary Bell (ed), *Pluralism, Transnationalism and Culture in Asia: A Book in Honour of M B Hooker* (ISEAS 2017).

[27] Alfitri (n 17).

[28] A recent contribution on the history of the hajj for Southeast Asia is Eric Tagliacozzo, *The Longest Journey: Southeast Asians and the Pilgrimage to Mecca* (OUP 2013).

industry of hajj pilgrimage in Indonesia, and the sheer size and scale of this economic enterprise, its religious obligatory dimensions and its state administrative dimensions. This raises questions about who has a monopoly on religious markets and what is the role of law in regulating these markets, bringing us back to Lev's concerns with power and ideology.

Many articles in this Issue focus on constitutional change through formal constitutional amendment or informally through judicial interpretation in the courts. The Indonesian case, as exemplified by Alfitri's article, offers a counterintuitive case. Despite the absence of formal constitutional amendment on religion in the Indonesian Constitution since 2002, it is the change in the political environment and enhanced democratic freedoms that have ironically given greater fuel for religious groups to lobby the government to introduce Islamic law and advocate for state administration of Islamic law.[29]

Alfitri offers a useful summary of the handful of constitutional cases on religion in Indonesia that have addressed questions such as the constitutionality of inter-religious marriage and polygamy, the jurisdiction of the Religious Courts, and the legality of the blasphemy law. This does raise the possibility of considering these developments from a contrary perspective. With the establishment of the Constitutional Court, Muslims can now challenge the constitutionality of the state's intervention in the implementation of *shariah*. Yet, given that there have been so few cases since 2003, does this mean that overall, the state has managed to balance the regulation of religion in a way that is acceptable, at least to the majority? In other words, we do not yet have a useful explanation for why there are in fact a small number of constitutional cases on religion, despite the increasing regulation of religion by the state.

Alfitri offers several ways of understanding the different interventions by the state: interventions on the interpretation of *shariah*; interventions in the administration of Islam or of religion in general. He identifies three key characteristics of Indonesia law and religion: first, there are six officially recognized religions and most have their own traditions of religious law, particularly on family law matters; second, Islam is given preferential treatment and status as the religion of the majority, but specifically in areas such as Aceh;[30] and third, there is also the use of state resources and institutions to regulate religion. It is the third that is the primary focus of

[29] Melissa Crouch, *Law and Religion in Indonesia: Conflict and the Courts in West Java* (Routledge 2014).

[30] The most extensive explanation of the implementation of *shariah* in Aceh is Michael Feener, *Shari'a and Social Engineering. The Implementation of Islamic Law in Contemporary Aceh* (OUP 2014).

Alfitri's article. Using the language of Lev, Islamic leaders advocating for state administration of zakat have gained power and influence in the post-Suharto era. They have successfully promoted an ideology of state administration of religion that incorporates religious authorities in the process, often allowing them to benefit from any financial gains to be had.

Alfitri also shows how the Indonesian Constitutional Court rejected the argument that the state should implement *shariah* fully, such as Islamic criminal law. He refers to the debate on the incorporation of *shariah* in Indonesia, in which scholars like Salim have argued that the contemporary approach in Indonesia in fact mirrors the past 'reception theory' that animated Dutch colonial policy. On this approach, 'the implementation of *shariah* is officially legitimate only if it has been ratified as national positive law'.[31] While this is one characterization, the reception theory does not fully account for the many ways in which informal elements of Islamic law influence legal practice. The primary example is *fatwa* (Islamic legal opinion), which although not recognized as national positive law, has been shown to play a decisive role in court proceedings in blasphemy prosecutions for blaspheming Islam.[32] This reality is not satisfactorily explained by the reception theory hypothesis.

Alfitri's article and several others in this Issue are examples of the importance of religion and politics in Southeast Asia.[33] There has been a significant focus on Islamic law in Southeast Asia.[34]

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[31] Arskal Salim and Azyumardi Azra, 'Introduction: The State and Shari`a in the Perspective of Indonesian Legal Politics', in Arskal Salim and Azyumardi Azra (eds), *Shari`a and Politics in Modern Indonesia* (ISEAS 2003) 13.

[32] See Melissa Crouch, 'Constitutionalism, Islam and the Practise of Religious Deference: The Case of the Indonesian Constitutional Court' (2016) 16(2) Australian Journal of Asian Law 1; Melissa Crouch, 'Negotiating Legal Pluralism in Court: Fatwa and the Crime of Blasphemy in Indonesia' in Gary Bell (ed), *Pluralism, Transnationalism and Culture in Asia: A Book in Honour of M B Hooker* (ISEAS 2017) 231.

[33] See the review of literature in Kikue Hamayotsu, 'Beyond Doctrine and Dogma: Religion and Politics in Southeast Asia' in Erik Martinez Kuhonta, Dan Slater and Tuong Vu (eds), *Southeast Asia in Political Science: Theory, Region and Qualitative Analysis* (Stanford University Press 2008) 171, although her focus does not include law specifically.

[34] For a review of the literature, see Melissa Crouch, 'Islamic Law and Society in Southeast Asia' in Anver M Emon and Rumee Ahmed (eds), *The Oxford Handbook on Islamic Law* (OUP 2018) 1.

There is also now a growing scholarly interest in Buddhism and law, and Thailand,[35] Myanmar,[36] and Sri Lanka are rich sources of inspiration for this scholarship. In countries with religious majorities in Southeast Asia, there is also a question of the path dependent nature of religion-constitution arrangements that date to the adoption of a constitution at independence. For Indonesia, the adoption of the *Pancasila* ideology over Islam in the Constitution was an early, yet crucial step, in promoting a broad-based religious identity for the state. In Malaysia, the incorporation of Islam in the Constitution has sparked a long-standing controversy over what the provision on 'Islam is the religion of the means and whether Islam is actually the state religion.[37] In Myanmar, the constitutional recognition of Buddhism as having a special status was a point of contention for more conservative monks who wanted Buddhism to be the state religion, while for minorities who ideally preferred secularism saw it as a necessary if not entirely satisfactory compromise. In Singapore, the ruling ideology and its application to religion is, to use Cheesman's phrase, of the rule of law as 'law and order'.[38] That is, executive control reigns supreme and is a primary means of domesticating and controlling religious expression, practice, and affiliation.[39] In Singapore, the institutionalization of religion as a means of social control presents, perhaps, a more extreme version of Indonesia's emphasis on the state administration of religion.

Finally, it is worth noting that the legal battles and contests of the meaning of provisions on religion in constitutions in these articles in fact suggest that there is a growing arena for non-violent forms of religious disputation. Much scholarship in the broader literature on law, religion and politics has devoted energy to debunking the myth of religious violence, particularly in relation to

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[35] Eugénie Mérieau, 'Buddhist Constitutionalism in Thailand: When *Rājadhammā* Supersedes the Constitution', this Special Issue.

[36] Nyi Nyi Kyaw, 'Religion of the State or Religion of the Nation? Religion and Textual and Contextual Constitutionalism in Buddhist Myanmar', this Special Issue. See also Melissa Crouch (ed), *Islam and the State in Myanmar* (OUP 2016).

[37] Dian A H Shah, 'Religion, Child Conversions and Custody Battles in Malaysia', (Religion and Constitutional Practices in Asia Conference, Colombo, 9-10 November 2017). See also, Dian A H Shah, 'Religion, conversions, and custody: battles in the Malaysian appellate courts' in Andrew Harding and Dian A H Shah (eds), *Law and Society in Malaysia: Pluralism, Religion, and Ethnicity* (Routledge 2018) 145.

[38] Nick Cheesman, *Opposing the Rule of Law: How's Myanmar's Courts Make Law and Order* (CUP 2015).

[39] The paternalistic language of care and protection is evident from Jacyln Neo and Arif Jamal's paper on Singapore.

Islam.[40] While this is not an explicit theme of the articles, there is an implicit assumption that religious groups and authorities are often willing to use legal process (as Lev would say), rather than resort merely to violence to solve religious disputes. This is not to say there is no coercion and conflict on religion in the region - clearly, there is. But rather, in the modern state, law is now one resource in contestations over religion and state power.

Conclusion

This Special Issue is a significant achievement and leaves us with a rich research agenda to pursue. It has brought together, in conversation and dialogue, scholars whose monographs have made notable impressions in the field of religion and law in Asia, including Dian A H Shah,[41] Benjamin Schonthal,[42] and Matthew Nelson.[43] In a manner characteristic of the Law Faculty of the National University of Singapore, the conference has also shone a spotlight on exciting new research by emerging scholars such as Shamshad Pasarlay's work on Afghanistan,[44] Nyi Nyi Kyaw's work on Myanmar,[45] Pham Huyen's work on Vietnam,[46] Raphael Pangalangan's work on the Philippines,[47] and Shamsul Falaah's work on the Maldives.[48] I congratulate Dian Shah and the National

[40] See for eg, Bruce Lawrence, *Shattering the Myth: Islam Beyond Violence* (Princeton University Press 2000); William Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (OUP 2009).

[41] Shah (n 19).

[42] Schonthal (n 19).

[43] Matthew Nelson, *In the Shadow of Shari'ah: Islam, Islamic Law, and Democracy in Pakistan* (Columbia University Press 2011).

[44] Shamshad Pasarlay, 'Constitutional Incrementalism in a Religiously Divided Society: The Case of Afghanistan', this Special Issue.

[45] Nyi Nyi Kyaw (n 35).

[46] Pham Thi Thanh Huyen, 'Bani (Bàni) in Religious Policies of the Vietnam Government: Perspectives and Reality' (Religion and Constitutional Practices in Asia Conference, Colombo, 9-10 November 2017).

[47] Raphael Pangalangan, 'Relative Impermeability of the Wall of Separation: An Uphill Battle for Marriage Equality in the Philippines', this Special Issue.

[48] Shamsul Falaah, 'Islamic Constitutionalism in the Maldives' (Religion and Constitutional Practices in Asia Conference, Colombo, 9-10 November 2017).

University of Singapore on another landmark publication, which will generate new conversations and research inquiries into constitutionalism and religion in Asia.

The primary focus in this article on India and Indonesia, South Asia and Southeast Asia, offers some clear lines of comparison in terms of the role and function of courts in deciding upon the relationship between constitutionalism and religion. In India, judges may take it upon themselves to determine the essential practices of religion, showing little deference neither for religious authority nor for minority religions. In contrast, in Indonesia, courts are careful to show deference to religious authority and effectively leave questions of essential practice to the national-level religious councils.[49] Courts in India have declined to extend fundamental rights review into the realm of personal law. In contrast, the Indonesian Constitutional Court has been willing to consider fundamental rights claims, although it has primarily relied upon the constitutional provisions on the legitimate limitations on rights to justify state regulation and administration of religion.

I have offered Lev's work on constitutionalism, power, and ideology as one lens through which to explore the law-religion-politics nexus in Asia. Lev's work raises two key questions about how we study the role of the courts in mediating constitutional disputes on religion. First, to what extent have courts *adapted* to shifts in social or political conceptions of religion and the state? Second, to what extent have courts played a *significant* role in encouraging or instigating change in the fundamental relationship between constitutionalism and religion? While Lev can be read as being dismissive of constitutionalism entirely, I think such an approach would miss his point. I suggest, rather, that his argument that constitutionalism does not offer a solution to the critical issues of our time is instead intended as a healthy reality check, and as a dose of realism in terms of what constitutionalism can achieve. In fact, Lev's approach to constitutionalism can also be understood as something of an invitation: an invitation to continue the struggle to ensure that constitutionalism does respond adequately to issues of injustice and inequality, lest those in power use the legal process for their own gain at the expense of minorities, the poor, vulnerable, and marginalized.

[49] Melissa Crouch, 'Constitutionalism, Islam and the Practise of Religious Deference: The Case of the Indonesian Constitutional Court' (2016) 16(2) Australian Journal of Asian Law 1.