“Going to Law”: Reflections on Law, Religion, and Mitra Sharafi’s Law and Identity in Colonial South Asia

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This essay explores religion’s need for law, comparing the story told in Mitra Sharafi’s Law and Identity in Colonial South Asia (2014)—about the virtual hijacking of British colonial law to serve the communal religious needs of Parsis in colonial India—to other contexts in which secular and religious legal systems have built symbiotic relationships, including in the United States and Thailand. It concludes by urging a reweaving of religious and legal histories after the critique of secularism and its shadows, separationism, and antinomianism.

The rich interdisciplinary nature of Mitra Sharafi’s Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947 is generously on display in this symposium; each of the varied contributors expresses delight with Sharafi’s work while gleaning insights for her own work and her own field. We see the landscape of sociolegal studies today in all its complexity. For my part, as a scholar of law and religion in the United States, I see, in addition to confirming parallels and pointed reminders, the ways in which the sometimes oddly antinomian study of the intersection of law and religion, particularly in the United States, does or does not participate in these other conversations. I will return to these broader disciplinary and methodological concerns after I elaborate a comparative example from the United States.

In a recent decision finding a ministerial exception implied in the religion clauses of the First Amendment to the US Constitution, US Supreme Court Justice Samuel Alito explains, with apparent approval, in a concurring opinion, that the reason for Cheryl Perich’s dismissal from her position as a fourth-grade teacher at Hosanna-Tabor Evangelical Lutheran Church School was that her threat to go to court to enforce her rights under the Americans with Disabilities Act contravened “Lutheran doctrine that disputes among Christians should be resolved internally without resort to the civil court system and all the legal wrangling it entails” (Hosanna-Tabor 2012, Alito, J., concurring, 8). Judicial deference to Missouri Synod Lutheran doctrine was necessary in this case, he said, because a pretextual inquiry into the actual reasons for her firing would threaten the religious autonomy

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guaranteed to religious communities by the First Amendment. “Going to law,” as he further explained in a footnote, is viewed among some Christian communities as a violation of Paul’s admonition in his first letter to the Corinthians to decide matters within the community rather than being judged by unbelievers (I Corinthians 6:1–7). In other words, good Christians do not sue each other.

In this remarkable unanimous decision, inquiry into a claim of retaliatory dismissal by a disabled woman is precluded by her religious employer’s assertion of jurisdictional independence, particularly with respect to those it chooses to call ministers. Effecting religious doctrinal aims is possible, the Court implies, only by separation from the regime of secular law. “Legal wrangling,” as Alito puts it, is irreligious; the Court should protect religious folks from such taint.

There are various ways to read the *Hosanna-Tabor* decision. There is no question that in part it reflects the success of the US church autonomy movement, a relatively recent coalition of law professors and religious communities bent, at its most extreme, in establishing the sovereignty of “the” church as a self-governing institution independent of state law (Horwitz 2009). In the decision, the Court recognized for the first time in US constitutional law the ministerial exception, giving priority to the rights of self-definition and self-governance of a religious community over hard-won protections for employee rights in US federal law, but it also committed itself more broadly to a separatist and corporatist understanding of religion and its rights.

US Lutherans are, of course, not the first religionists worried about the corrosive effect of the application of secular state law to their communities. Negotiation between religious communities and national governments intent on ruling citizens directly through establishing a uniform rule of law has been ongoing since at least Napoleon’s summoning of the Jewish Notables in 1806 (Schwarzfuchs 1979); these “negotiations” have resulted in a patchwork of arrangements for qualified minority self-rule across the globe (Mahmood 2015). The United States is distinctive in that constitutional disestablishment has been understood (since *Everson*, at least) to prohibit state legal recognition for religious organizations or communities in the manner of the state churches of northern Europe or of the minority communities of...
the Ottoman Empire or British India. But religion _qua_ religion, does, of course, through a myriad of laws, including tax and zoning laws, enjoy a privileged legal space in the United States. That privilege is simply differently organized and has different effects.

The broad outline of the South Asian story in this respect is well known. A prevailing reading of British colonial rule of religion in India is one of repeated imposition of British colonial legal logics on South Asian religious communities (Sharafi 2014, 195–97). During the period of East India Company rule, and then with the assumption of direct rule by the British in 1858, various legal arrangements were tried to manage the religious matters of the diverse communities of South Asia. As Mitra Sharafi, in _Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947_, summarizes the story, under Company rule, courts consulted but largely ignored designated Indian experts; under colonial rule, British courts relied on compilations of translated legal texts and handbooks of Muslim, Hindu, and Christian law, treatises specifically written for that purpose, but actual decisions were made by common law judges. Much was lost in translation, although an unprecedented consolidation of communal identity was arguably one byproduct (Raman, 1210–1211). The continuing failure to enact a uniform civil code in India testifies to the unfinished legal business created by the system of personal law jurisdictions.

Importantly though, as Sharafi, observes, no special colonial legal arrangement was made for Parsis, immigrants from Persia who adhered to Zoroastrian religious tradition, through the creation of treatises, or otherwise, in part because British rulers believed that Parsis, unlike Hindus and Muslims, lacked a scriptural legal tradition of their own from which to draw such law. But also, significantly, because Parsis themselves seem to have recognized the lack and sought instead to create religious law through capture or “creative appropriation” (Raman) of the colonial legal system, through influencing legislation, and through the creation of new institutions and litigation. As Sharafi explains, “[t]heir mastery of the form of Anglo legalism enabled them to evacuate its contents . . . Parsi lobbyists, legislators, lawyers, judges, jurists, and litigants, de-Anglicized the law that controlled them by sinking deep into the colonial legal system itself” (Sharafi 2014, 5).

Sharafi argues that it was through exploitation of a gap in colonial legal competence that the Parsis, a mercantile community located largely in and around Bombay, avoided legal colonization and seized the law for themselves. Although many Parsis preferred, for various reasons—including theological ones, like their Lutheran counterparts—not to air their dirty linen in the colonial courts, their leaders nevertheless made repeated decisions to “go to law.” Focusing specifically on the law of intestacy, marriage, and charitable trusts, each carefully adapted and applied to the Parsi community over a century and a half beginning at the end of the eighteenth century, Parsi lawyers, judges, and legal scholars effectively engineered a hostile takeover of the Indian courts and legislatures, creating a distinctive

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4. In her contribution to this symposium, Bhavani Raman also recounts this history, setting it very helpfully in the context of the historiography of the study of law in South Asia, but also more broadly in sociolegal studies generally. Raman’s approving nod to Sharafi’s effort to think _nomos_ and narrative together, à la Robert Cover, in her study of Parsi legalism, focuses on the ways in which such an approach reveals “law was central to community making from the inside out” (Raman, p. 1213).
space for Parsi religious law to flourish and creatively reform, updating their marriage and inheritance laws according to evolving Parsi priorities and values. Indeed, Sharafi successfully persuades this reader that being Parsi in South Asia during these years was to be intimately bound up with the law. Among South Asian minority communities, Parsis disproportionately trained in law and became lawyers and judges, looked to law to settle intrafamilial and intrabusiness disputes, and used law to forge new individual and collective religious identities through the writing and sponsorship of legislation and the creation of trusts, as well as through litigation. Being not just Parsi, but being a faithful Zoroastrian, came, in South Asia during those years, to be tied up with being legal in a new way. New theologies were created in the collaborative encounter between Parsis and colonial law.

In particular, in contrast to the experience of other subject religious communities in British India, “Parsi lobbyists refashioned inheritance law to reflect their own vision of the Parsi family” (128). One example of this reinvention was the rejection of the requirements of the English law of property, which, through primogeniture and couverture, concentrated wealth. Instead, “Parsi law spread the wealth,” enabling inheritance across an increasingly broad network of relatives, including wives and daughters (Sharafi 2014, 128). The principal actors in this effort were elite Parsi males. Together they used British colonial law and legal spaces to enforce their own version of Parsi family and collective identity and extend and protect the wealth of their extended families and family business interests (Sharafi 2014, 159–62). Legal innovations during this period also included the creation of a Matrimonial Court that consistently protected poorer females from abuse by men (Sharafi 2014, 159).

Sharafi offers several explanations for why and how what I will call a legaliza-
tion of religion occurred. She suggests first that the massive loss of Zoroastrian texts during invasions of Persia—beginning with the conquest by Alexander the Great in the fourth century BCE—resulted in a diaspora community without significant law texts to support a scripturally based internal legal system of its own, relying instead on what Raman calls “common law.” Given this historic deficit, Parsis came to look to colonial law in India as an opportunity within which to develop a new hybrid law to govern Parsi diaspora life. This move involved a complex negotiation and invention of a new Parsi legal system, part British in genealogy but significantly remade by Parsis to further Zoroastrian religious ideologies and theologies as well as the evolving social needs of the South Asian Parsi communities. The remaking involved significant struggles between factions within the Parsi community, those advocating “orthodox” as well as those advocating reform positions. In contexts as varied as marriage, burial, trade, libel, and property management, new law was forged through an embrace of the rule of law and of the legal professions by Parsis. The result was a significant degree of sophisticated control by Parsis of their own

5. As Assaf Likhovski points out in his contribution to this symposium, comparing them to German Jews with similar active legal engagement, Parsis succeeded economically as well (Likhovski). It would be interesting to add another successful minority, the Amish, to the comparison. The “simple people,” another entrepreneurial minority, were also extraordinarily economically successful through selective consolidation of communal identity combined with engagement with state law, including even capture, most notably in the case of conscientious objection to military service (Kraybill and Nolt 2004).
modernization, including the manipulation of public opinion through the successful selling of a story that Parsis were more egalitarian than the British when it came to women’s rights (Sharafi 2014, 149–58). This last despite the fact that Parsi men preserved well into the twentieth century a right to discipline their wives through domestic violence (Sharafi 2014, 187–91).

Sharafi’s book is partly a story of influential lawyers and judges. Parsis were disproportionately represented in the law, both in India and in London. Others in this symposium compare her story to the legal strategies of other internal minorities in South Asia and elsewhere (Likhovski; Vatuk). What interests me about Sharafi’s account is how it helps in the ongoing revision of modern separationist and antinomian assumptions on the right and left about religion as ideally inherently separate and insulated from law, that is, about religion—at least good modern religion—as being antithetical to law. While Lutherans and others attempt a rearguard action against secular state law through the assertion of an alternate enclave sovereignty, they might learn from the successful effort of Parsis to make colonial law their own. Both Lutheran and Parsi conservatives spoke of the superiority of what Missouri Synod Lutherans call “an amicable settlement of differences by means of a decision by fellow Christians” (Hosanna-Tabor 2012, Alito, J., concurring, n. 5). By embracing law, Sharafi argues, the Parsi legal intellectuals refused such a separatist withdrawal from public life, with impressive results for their own community.

Sharafi’s book adds to a growing body of scholarship that retells the story of law and religion together, or, as she says, citing Robert Cover, nomos and narrative, repairing the lack of attention to religious law by secular academics and a lack of attention to so-called secular law by scholars of religion. Religious legalities are nevertheless still often understood to be of three principal types:

1. Religions that seem self-evidently legalistic in the sense that adherents understand their religious obligations to be explicitly legal in nature. Thus, for example, to be a good orthodox Jew is to obey the commandments of God—as interpreted by the rabbis—to be a good Muslim is to submit to Shari’a. Both positions are understood by many who study law to be premodern, even antimodern, entirely incompatible with the modern rule of law. Indeed Jewish law and Islamic law would be understood by many inside and outside those traditions to be not law but religion (Huxley 2002).

2. Christianity is its own type (Anidjar 2014). It has usually been understood in this frame to be not legal in this sense. Love replaced law in a supersessionist narrative in which Christianity replaced Judaism. To be sure, various churches have developed internal law—such as the canon law of the Roman Church—but this law is primarily the bureaucratic law that governs the institution, not instructions to the faithful. Ideas of natural law as traceable to God’s order have

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6. These assumptions are in part the result of the legal and political pressure of the process, beginning in early modern Europe, of inventing the separation of church and state and religious freedom as regimes for the domestication of religion and the management of religious multiplicity, a remaking of religion that involved both religious and governmental actors (Sullivan et al. 2015).

7. Assaf Likhovski’s piece in this symposium describes the complicated diversity in the ways in which Jews in mandatory Palestine, Israel, and other places used law either to enhance autonomy or negotiate participation in ways reminiscent of the Indian Parsis Sharafi describes (Likhovski, p. 1225).
explicitly and implicitly been necessary to support state law in many majority
Christian nations but Christianity has not usually been understood to be a legal-
istic religion (Sullivan, Yelle, and Taussig-Rubbo 2011).
3. Finally, Buddhism has been conventionally understood legalistically only with
respect to the monastic community. To be a good monk means conformity to
the *vinaya*, a monastic code founded in the teachings of the Buddha. Buddhist
lay persons in Buddhist majority countries have been governed by royal law and
state law deeply inflected by Buddhist anthropologies and cosmologies but that
social fact has not inhibited many from seeing Buddhism as distinctively
untainted by practical law and politics (French and Nathan 2014). 8

But, once one discards a more extreme secularist position, and the more one
knows about the history of any religious community and its historical contexts, the
more intertwined religious community life seems to be with both adjacent religious
communities and with various imperial and host state legalities, giving the lie to
these types as contained legal worlds or even ones that correspond historically with
particular world religious traditions, all religious traditions having examples of all
types (Masuzawa 2005; Sullivan, Yelle, and Taussig-Rubbo 2011). The rabbis had
an eye out for Roman law and their law was modified and adjusted accordingly
(Dohrmann and Reed 2013). Today, they are in conversation with Christian moral-
ists. The law of majority Muslim societies has interacted with diaspora common law
and civil law systems (Asad 2003). Some Christian churches do see observance of
law as salvific. Buddhist majority societies display a wide range of religiolegal
arrangements and ideologies. One can also, as Raman underlines, see minority
communities as not simply the passive receptors of imperial or state law, but as
active appropriators, contributing to a more complete understanding of the ways in
which “colonial legal culture left its enduring imprint on postcolonial under-standings of the tragedy, promise, and power of modern law” (Raman, 1214).

British colonial authorities in South Asia attempted to domesticate and insti-
tutionalize religious legal knowledge in various ways, as Sharafi discusses, through
the use of experts as well as through the publication of texts and codes. This is a
well-rehearsed story. What I take Sharafi to be suggesting, if I can express it at its
strongest, is that the religious life of South Asian Parsis came during these years to
be transformed by and even dependent on the rule of law, British style, even while
Parsis made that law their own. As she says, “Parsi law did reflect Parsi models of
the family, but these models did not have their roots in Zoroastrian antiquity. Parsi
law emerged out of colonial culture clash, not from the ruins of Persepolis” (313).
And, she says, “legalism itself became a subcultural trait . . . using law became part
of what it meant to be Parsi” (315).

While the details of Sharafi’s story are fascinating in themselves, what is
intriguing to the scholar of religion and law is the important illustration of the

8. I here engage conventional understandings within the comparative study of religion and law. If one
were to speak more broadly across the immense diversity of human society, the intertwining of religious and
legal social facts would be seen to be pervasive and the types less wedded to the structures of state and
empire. Legal anthropologists have been pioneers in this understanding (e.g., Evans-Pritchard 1937; but
also for nonstate societies more broadly, Miller 1990).
ways in which religion is somehow incomplete without law, either internal or external; law and religion are inevitably entangled.9 When religious communities lack internal legal rules and institutions, they will seek to hijack available ones,10 and law will always depend on religious cosmologies and anthropologies. I am reminded of the work of Mary Anne Case concerning opposition to gay marriage in the United States (Case 2011). Case sought to understand why many conservative Christians said that their own marriages were threatened by the expansion of U.S. marriage law to include same-sex marriage. She came to her research with the assumption that religion was essentially a matter of private belief so that those Protestants who objected were free to believe anything they wanted about their own marriages. She was puzzled as to why it should matter to them whether others believed differently about theirs.

Case’s conclusion, published in various places (see, e.g., Case 2011), was that Protestants, or at least some Protestants, gave up the law of the church during the Reformation and after, giving those functions over to the state.11 Comparing US Protestant attitudes toward same-sex marriage with those of Catholics and Jews, she found studies showing the latter to be much less likely to object to gay marriage than conservative Protestants were. The explanation she offered was that these Catholics and Jews still had their own intact legal systems so did not need to depend on the state to regulate marriage and divorce. Following on her work one might suggest that various new trends within conservative churches in the United States suggest an effort to invent their own law, such as the new statutes defining covenant marriage, now that, after the liberalization of marriage law, they can no longer depend on state law to serve their needs or to be adapted to their needs.

9. This observation is not surprising to the sociolegal scholar, I think, but the recourse to religious freedom, in an exceptionalist sense, as the dominant narrative for telling the story of law’s religion in US political science and American religious history makes the need for a belated integration of the study of law and religion more urgent (e.g., Sullivan et al. 2015; Galanter 1997).

10. In her response to our essays, Sharafi, adopting but adapting my hijacking metaphor, develops a comparison between regional and national airlines to illustrate the different strategies of religious groups in segmented as opposed to unified legal fields. She argues that while Protestant Christians in the United States might accurately be described as having hijacked the national airliner of state law, forcing everyone to conform to their ideology of the family, Indian Parsis co-opted state law by creating a regional airline just for their own purposes. She uses the national/regional distinction to elaborate on the ways in which legal change might be attempted at the macro level through a colonization of state law, on the one hand, in a unified legal field—noting Sylvia Vatuk’s description in this forum of the unsuccessful efforts of Indian feminists across communities to hijack Indian civil law (Vatuk)—while, on the other, minority communities might use state law in a segmented legal field primarily for their own purposes. Although a little reluctant to push the airline metaphor too much further, I would note that the various examples offered in this symposium display the hybrid nature of all these efforts. Legal pluralism is everywhere. The legal field in the United States is not in fact unified. This is perhaps most evident with respect to indigenous sovereignties, but all minority communities both transform the national airlines and build regional ones. In the case of the United States, various religious communities have colonized US law largely for their own purposes (e.g., the ways Hasidic Jewish and Amish communities have used law to enable their forms of life) while hijack efforts by minority communities have also changed the practices of the national carrier—with respect to environmental law, for example, in the case of Native American litigation—taking everyone with them. On a more sinister note, one might observe that we no longer have national airlines in the United States. All airlines are entrepreneurs competing in a globalized neoliberal capitalist world, only occasionally able to take the whole country with them. The same might be said of law.

11. This is a US version of this story. The Protestant state churches of northern Europe made other kinds of compromises with state law (Witte 2002).
As US law becomes less indebted to Protestant theologies and theories of the human person and society, US Protestant churches may need to develop their own legalisms to survive (Menefee 1999; Horwitz 2009).

If one backs up a bit, one can, as Case suggests, bring Sharafi’s story back to the United States and see anew the negotiation between Protestants and the various legal regimes of the United States over the last two hundred years or so as being not a story of imposed legal secularization but one of the largely successful Protestant colonization of US law for its own purposes. As Case suggests, lacking a legal system of their own, US Protestants seized the emerging legal orders and made them work to structure their own legal lives. In their book on the regulation of sexuality and reproduction in the United States, Janet Jakobsen and Ann Pellegrini (2004) underline the ways in which US Protestants successfully colonized American law and forced it to serve its own purposes, beyond the marriage laws that interest Case.

Another recent study that retells the story of law and religion together is David and Jaruwan Engel’s *Tort, Custom and Karma* (2010). This is a story of failure rather than of success. As the Engels explain, there has been a decline in the use of the courts to remedy injuries from accidents in Thailand over the last few decades. Drawing on interviews of accident victims in Chiangmai, the Engels argue that there has been a decline in legal consciousness among northern Thai Buddhists as they find nonlegal alternatives to the tort system, alternatives built on separatist modernist Buddhist ideas of karma as well as on forms of Thai Buddhist explanations attributing agency to folk religious spiritual beings. As David Engel explains elsewhere (2015), the failure of Thai law to attend to northern Thai customs in the codification imposed from Bangkok resulted in a legal system unrecognizable and unusable to local inhabitants. Urbanization increased estrangement as villagers moved away from the local systems that compensated victims.

Much writing today on religion and law is focused on the constitutional and international law management of religious minorities through the administration of the right to religious freedom (Sullivan et al. 2015). Rare is the study that tells a horizontal on the ground story of the push-me-pull-you of legal and religious institutions, imaginaries, and opportunities that work to create the hybrid religiolegal orders we all inhabit. Sharafi’s historical reconstruction of the work Parsi lawyers did for their coreligionists is exemplary in its reweaving of the religious and legal needs of a community—and of why “going to law” can be a strategy of survival and reform, not necessarily one of capitulation.

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