Is the Rule of Law an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious I

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tensions. “Rule of law,” the logic goes, acts as a force of moderation and, in matters of

structures, and instruments can further polarize already existing religious conflicts. The mechanisms include the procedural requirements and choreography of litigation

civil war. By the late 1990s, some Sri Lankans became concerned that these groups were using "unethical" techniques to convert Buddhists, Hindus, and Catholics to evangelical Christianity. The alleged techniques included giving cash or other gifts to new converts, helping them with securing visas to live overseas, employing them within church NGOs, and extending other types of inducements to convert (Berkwitz, 2008; Mahadev, 2014).

In the early 2000s, a variety of religious organizations issued public statements indicating their concern about the possibility of "unethical" conversions. The Catholic Bishops Congress put out press releases expressing their concern over the "the social unrest alleged to be caused by certain activities of the fundamentalist Christian sects" (Daily News, 2003). Hindu groups, including the All-Ceylon Hindu Congress and others, condemned what they saw as the cynical conversion of war-affected Tamils by Christian groups posing as relief organizations. The Hindu author of one Tamil language editorial from 2000 (celebrated and reprinted in the *Hindu Organ*) even called on Hindus to recognize the threat posed by new, foreign, extremist Christian groups, supported by foreign powers who "exploit the situation of poverty and war" to undertake a project similar to colonial-era Christians: inculcate Christianity and destroy local cultural values (*intucātanam*, 2000, p. 26). Most prominently, a variety of Buddhist organizations rallied together to raise awareness about and combat the alleged unethical conversions among poorer urban and village populations.

At the same time, there were also religious groups who were working together to think of ways to allay concerns and propose solutions. In Colombo, several Christian groups met to consider developing a common protocol of "ethical" evangelizing for Sri Lanka. Similarly, representatives from popular Buddhist and Hindu organizations met to discuss the legal limits that could be applied to "forcible" conversions. In fact, in early 2004, this Hindu-Buddhist group even completed a draft bill, which they submitted to the president for consideration in January.[4]

One could summarize the terrain of disputes over religious conversion in January 2004 as one in which a wide variety of religious groups were actively collaborating in deciding how to address allegations about unethical conversions in different ways. Some Hindu and Buddhist groups worked together in pursuing legal measures, while Catholics and certain mainline Protestants—who were empathetic to the concerns of Buddhists and Hindus—were in the process of developing their own "in-house" manuals and protocols of "ethical" conversion.[5]

To look at the situation 6 months later, however, one sees a pattern of radical polarization. From a situation in which a variety of religious communities were involved in interreligious and intrareligious dialogue over how best to deal with the problem of religious conversion, the issue of conversion suddenly split conservative Buddhists from all other religious communities. A major catalyst for this polarization was a large court case involving the preenactment constitutional review of a bill designed to criminalize certain types of proselytizing activities.

Between January and July 2004, during the time that Christian groups were deliberating and while the Hindu-Buddhist draft bill was being considered by the president, another draft legislation purporting to combat "forcible conversion" found its way to

the floor of parliament. Called the "Prohibition of Forcible Conversion Bill," this draft law appeared on parliament's Order Paper in May 2004 as a Private Members' Bill introduced by the newly elected Buddhist nationalist party known as the Jathika Hela Urumaya (JHU). Unlike the bill produced by the Hindu-Buddhist committee described above, the JHU's bill was not the product of extensive discussions. Instead, it was an almost-verbatim copy of a conversion bill that had been introduced (and repealed) in the Indian state of Tamil Nadu. Like the Tamil Nadu bill, it rendered as a criminal offense any attempt to convert a person from one religion to another by means of physical force, financial "allurement" or "fraud."

The introduction of the bill had the effect of pushing previously multifaceted discussions over conversion onto a path of constitutional litigation. Predictably, a variety of evangelical Christian groups opposed the bill and, turning to a form of legal action, invoked constitutional procedures of preenactment judicial review, requesting the Supreme Court to rule that the bill violated fundamental rights to freedom of religion.[6] Equally predictably, the more nationalistically inclined Buddhist groups, led by the JHU, rallied behind the bill and intervened against the judicial-review petitions.

What is notable is that the Catholic Bishops, Hindu groups, and more centrist Buddhists—all of whom had previously voiced sympathetic concern for popular anxieties about "unethical" conversions—were now in a bind. With the arrival of a litigious framework, they found themselves pulled toward the inflexible position of taking one side (that of the nationalist Buddhist JHU and its bill) or the other side (that of opponents calling for preenactment judicial review to prevent legal limitations on conversion) in response to an issue that, for them, was much more complex. Those who opposed legal limits on conversion, even if they were deeply concerned about conversion practices, felt compelled to oppose such a harsh and inflexible law. At the same time, those who favored a legal solution felt that, even if they did not approve of the terms of this particular bill, they should at least intervene on its behalf to ensure that the court would not rule unconstitutional the very idea of a legal limitation on religious conversion. The result was that the same Hindu and Christian individuals and groups that had been involved with designing other creative types of solutions to the "conversion problem" petitioned against the bill, while conservative Buddhist groups that had previously worked alongside Hindu organizations to draft their own bill joined the JHU in their legal defense.

In interviews conducted in 2008 and 2009, representatives from all sides indicated how unsatisfactory and frustrating this shakedown was. One Buddhist member of the Buddhist-Hindu working committee characterized the experience of committee members as follows:

> [S]ome people felt, what is the point in this [JHU Conversion] bill, it is bloody useless we will not have this bill. But most of the people felt, "well half a loaf is better than none, let us at least have this . . . "[7]

Similar appraisals were made by members of Christian and Hindu groups that were interviewed, many of whom referred to the fact that, with the turn toward litigiousness,

all other attempts at dealing with the issue of unethical conversion (either through

qualify for affirmative action benefits. These benefits include quotas reserved in government jobs, political constituencies, and educational institutions. However, the ini-

within the caste structure) to retain the benefits of affirmative action after conversion, it is not surprising that the Hindu Right has backed anticonversion bills as being the most effective route to stopping the exodus. In the wake of the Stainislaus's decision, India's courts have given Hindu nationalists new ways to express and legitimize their

included prominent human rights organizations, including the All Women's Action Society, the Bar Council of Malaysia, the National Human Rights Society (HAKAM), the Malaysian Civil Liberties Society, Sisters in Islam, Suara Rakyat Malaysia (SUARAM), and the Women's Aid Organization. The Article 11 coalition also included the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism, and Taoism (MCCBCHST), an umbrella organization representing the concerns of

The political spectacle accompanying these cases exacerbated the dilemmas that attorneys, judges, and everyday citizens encountered in their efforts to maneuver through the Malaysian legal system. In the past, attorneys had found pragmatic ways of helping Malaysians change their official legal status, in spite of lacunas in the law. Malaysians had been able to secure state recognition of conversion by affirming a statutory declaration before a commissioner of oaths and registering a new name in the civil court registry through a deed poll.[27] With these two documents, an individual could then secure a new identity card reflecting the name change, which signified one's new, non-Muslim status. For most purposes, including marriage, one could then go on with life as one wished (Ahmad, 2005). In other words, workable solutions were available for individuals and couples attempting to negotiate their way between the two personal status regimes.[28]

But once Lina Joy and other cases became the object of intense public debate, intense pressures engulfed both the shariah and the civil courts. This politicized environment made it difficult even for sympathetic shariah court judges to facilitate state recognition of conversion out of Islam. Likewise, intense political pressure made it difficult for civil court judges to intervene when fundamental liberties were in jeopardy. Ironically, the tools and institutions that we instinctively turn to for justice—law and courts—had become a principal source of political tension in Malaysia. Instead of resolving legal questions, the court system produced legal controversies anew. Rather than simply arbitrating between contending parties, court rulings exacerbated ideological cleavages. And, instead of assuaging uncertainties, courts repeatedly instilled a tremendous degree of uncertainty, indeterminacy, and anxiety around the meaning and content of "religious freedom."

Pakistan: Polarizing Protests

When Pakistan was created in 1947, constructions of the Muslim "nation" incorporated both Sunni Muslims as well as Shi'a and Ahmadi figures like Mohammad Ali Jinnah (the Father of the Nation) and Foreign Minister Zafarullah Khan. Religious minorities often crossed over into a broadly secular mainstream; sectarian boundaries were blurred to make space for new political alliances; and doctrinal boundaries were enlarged to facilitate the process of nation building.[29]

Over time, however, this framework changed as minority groups like the Ahmadis came to be excluded. This exclusion was often legitimized by means of broad *legal* rubrics that remain absolutely central to most liberal constitutional regimes—above all, the view that religious freedom is protected "subject to public order." It was, in many ways, via the manipulation of these legal rubrics that heterodox groups like the Ahmadis came to be excluded. At the level of religious self-identification, the Ahmadis did not actively convert away from Islam; their self-identification as Muslims was, rath85.0701 Tg9 Tw Tarba2 -1.1 Tic

Pakistan's early constitutional drafters sought to balance a concern for legally defensible fundamental rights (including religious freedom) with a preambular nod to the sovereignty of God ("delegated to the state through its people").[30] This constitution-writing process was notable insofar as it involved lay Muslims seeking to marginalize the influence of Muslim clerics who often claimed an exclusive power to ascertain the will of God (and, thus, to interpret the meaning of God's sovereignty). In effect, Pakistan's lay leaders sought to manage the influence of clerical views in order to

West Pakistan)—Bhutto reconsidered. After a string of skirmishes following what was known as "The Rabwah Incident," Bhutto formed a special parliamentary committee (including a disproportionate number of clerics) to examine the legal status of the Ahmadis. "In making this decision," writes Ali Usman Qasmi (2014), Bhutto hoped that "parliamentary procedures would slow down the course of the agitations" (p. 177).

The constitutional amendment crafted by this special parliamentary committee enjoyed considerable popular support; in fact, it received the *unanimous* support of the legislature in September 1974. In effect, clerical voices seized the moment to reverse a long-standing pattern of legal marginalization—not only during Pakistan's early constitutional debates but also in a series of decisions issued by the superior courts. Combining active participation in a small parliamentary committee with threats of mass mobilization, they intervened to reshape the constitution itself.

Pakistan's second constitutional amendment (withdrawing state recognition of the Ahmadis as "Muslims") was challenged just a few years later as a violation of the Ahmadis's basic rights. However, in the case that followed (*Abdur Rahman Mobashir v. Amir Ali Shah*, 1978), Pakistan's conservative religious forces were frustrated once again. Rearticulating its earlier position, the Supreme Court held that, although the Ahmadis' religious identity had been legally redefined (meaning that, constitutionally, they were no longer seen by the state as "Muslims"), their remaining constitutional rights were still in place (Saeed, 2011). In effect, the court held that peaceful religious practices, including Ahmadi practices, were constitutionally protected from state interference because they did not interfere with the religious practices of others.

This case (*Mobashir*

regulatory measures (stipulating the boundaries of peaceful religious practice) was unfettered. Hewing close to a pattern of Supreme Court jurisprudence privileging the power of parliament-as-a-whole in matters of religion (Nelson, 2015)—a point that also figured prominently in the debates that led to Pakistan's second constitutional amendment—the Court did not intervene to reduce existing levels of legal uncertainty regarding the protection of fundamental rights; it actually *introduced* a measure of uncertainty by highlighting the power of each elected legislature to "regulate" such rights and, therein, to determine which types of peaceful religious practice, under which conditions, might be seen as a "threat to public order" deserving, not protection, but prohibition.

In Pakistan, the formal legal treatment of those using street power to exclude ostensibly heretical citizens changed over time. Initially, they were prosecuted as vigilantes; but, later on, their actions were *protected* as a response to religious provocation. Instead of functioning as a check on religious strife, court-based references to "public order" became an instrument through which the perpetrators of street-level violence got their exclusionary objectives legally authorized by the state. In effect, legal imperatives to protect public order were used to entrench and deepen divisions between mainstream Muslims and Ahmadis—divisions that intensified over time. Before 1986, religious vigilantes were prosecuted as a threat to public order. But, thereafter, violent forms of public protest came to be seen as a tried-and-tested means for restricting the boundaries of Pakistan's Muslim community *within* the terms of the law.

Conclusion

In these vignettes from Sri Lanka, India, Malaysia, and Pakistan, we provide an alternative account of the link between legal processes and religious tensions, one that considers closely the roles played by constitutional law and legal procedure in perpetuating and deepening conflict. While legal institutions did not create these conflicts from scratch or act alone in aggravating them, they did play a role in sustaining and/or sharpening these conflicts. These four cases show how law can work in tandem with political and social forces to amplify deepen, naturalize, entrench, or further polarize already existing religious tensions. More precisely, these cases call attention to four distinct ways in which law and legal procedures can and do increase polarization among groups in South and Southeast Asia: via the procedural requirements of litigation, via the strategic use of legal language and court judgments by socioreligious groups, via the popular representation of court decisions by activists and media, and via the exploitation of "public order" laws in contexts framed by antagonism targeting religious minorities. Moreover, a more extended analysis would likely reveal that multiple modes of polarization were at play in each of the four cases.

Among other things, these examples stand as counternarratives to the more standard accounts of conversion in Sri Lanka, Hindutva in India, religious politics in Malaysia, or Ahmadi exclusion in Pakistan. In these standard accounts, law's role is interpreted in the idiom of failure: In Sri Lanka, courts failed to definitively resolve grassroots disputes over conversion; in India, majoritarian bias crept into and subverted

constitutional jurisprudence; in Malaysia, the civil courts failed to uphold religious freedom vis-à-vis the dakwah movement; in Pakistan, courts and constitutions failed to advance liberal inclusiveness. In these standard narratives, polarization, conflict, and violence are thought to result not from law's influence, but from an absence of law's influence.

In each of these cases, one could place the blame with legal draftspersons, constituent assemblies, or higher court judges. One could argue that had elites in Sri Lanka, India, Malaysia, and Pakistan created more sensible laws and legal institutions or exercised more independence in higher court judgments, legal procedures might have successfully resolved rather than augmented the tensions in question. Indeed, this has been an influential way of analyzing the cases described above. However, by jumping to conclusions about the would-be effectiveness of a more perfectly designed law (to read these histories as narratives about "bad law" or "botched law"), one prematurely exculpates law; it ignores the roles that real-world legal institutions and mechanisms do play in deepening religious strife. That is, to read these accounts as stories of (ideal) law's absence rather than as stories of (actual) law's presence, is to approach social, legal, and political history in a millenarian mode: waiting for the saving power of a perfect law to set things right. The majoritarian slant of Indian courts or the trumping power of state-based declarations regarding "public order" in Pakistan's courts may well be deviations from an ideal designed in the "clean room" of philosophical liberalism, but they are certainly not aberrations as the law is lived and practiced in South and Southeast Asia.

In offering these revaluations and alternative narrations, we strive to normalize law's role in sustaining, reshaping, and advancing social strife by shining a light on some of the polarizing mechanisms of law. As seen in Sri Lanka, the protocols of litigation may render more binarynka, rmiqs Thae arofe t a mors -

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11. Previous anticonversion bills in parliament, that were proposed and withdrawn, include the Indian Converts Regulation and Registration Bill (1955) and a similar Bill in 1960.

21. As previously noted, an expansive argument concerning the interface of constitutionalism and increased religiosity worldwide is Hirschl (2010). For an example, of this framing in relation to Malaysia specifically, see Liow (2009).
22. *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain lain* [2007] 4 M. L. J. 585, *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, [2004] 2 M. L. J. 119.
23. Article 11 Coalition, http://www.article11.org/ (last visited March 2, 2010). The website has since been closed.
24. Press release, PEMBELA, "Pertubuhan-Pertubuhan Pembela Islam Desak Masalah Murtad Ditangani Secara Serius" (Defenders of Islam Urge More Seriousness in Handling the Apostasy Problem; July 17, 2006; on file with the authors).
25. For a more detailed examination of these mobilization dynamics, see Moustafa (2013).
26. For contextual details on how and why these cases became the sudden focus of media attention and civil society mobilization, see Moustafa (2013). Briefly, they are (a) a swiftly changing media environment with the rapid proliferation of digital media outlets; (b) the increased capacity and boldness of civil society organizations in the "reformasi" era; (c) the eruption in 2001 of an "Islamic state debate" between the ruling United Malays National Organisation and the opposition Islamist party, Pan-Malaysian Islamic Party; and (d) the strategic decision of liberal rights groups to "go public" about the difficulties that some non-Muslims were experiencing as a result of the contested jurisdiction of the shariah courts.
27. A statutory declaration is the equivalent of an affidavit. A deed poll is a legal statement to express an intention.
28. Attorneys recounted that shariah court judges had regularly facilitated the official recognition of conversion out of Islam when they were called on. Interviews with Latheefa Koya and Fadiah Nadwa Fikri, attorneys in Kuala Lumpur, Malaysia (June 29, 2009).
29. Similar patterns are highlighted by Andreas Wimmer in *Ethnic Boundary Making: Institutions, Power, Networks* (Oxford, Oxford University Press, 2013).
30. In Pakistan, questions about religious freedom and the Ahmadis involve several constitutional provisions. These include provisions regarding (a) freedom of religious belief and practice ("subject to public order"); (b) a prohibition on legislation considered "repugnant to Islam"; (c) "the legislative primacy of parliament" (in light of "advice" from a special council charged with assessing matters of repugnancy); (d) the formation of a Federal Shariat Court (1980) to determine whether laws are "repugnant to Islam"; and (e) ongoing debates about the extent to which, via constitutional amendments or routine legislation, parliament or the executive can make laws (including emergency laws) that do not merely regulate but substantively annihilate fundamental religious rights. See Nelson (2015).

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