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

Tamir Moustafa, Matthew Nelson, Ben Schonthal, and Shylashri Shankar



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School for International Studies
Simon Fraser University
Suite 7200 - 515 West Hastings Street
Vancouver, BC Canada V6B 5K3

Is the ‘Rule of law’ an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom

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Abstract:

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Does the ‘rule of law’ act as a force of moderation and, in matters of religion, serve as a key tool for mollifying or resolving disputes? Drawing on experiences 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, deepening, or sustaining conflict. These case studies highlight four mechanisms that facilitate polarization: the procedural requirements and choreography of litigation (Sri Lanka), the language and decisions of courts (India), mobilization activities around litigation (Malaysia), and violent protest against legal defense of rights (Pakistan). In offering these re-evaluations and alternative narrations of polarization we seek to introduce a new spirit of creativity, modesty and humility among scholars about the ameliorative powers of law.

About the authors:

Tamir Moustafa is Associate Professor of International Studies at Simon Fraser University, Canada.

Matthew Nelson is Reader in Politics at the School of Oriental and African Studies (SOAS), University of London, UK.

Ben Schonthal is lecturer in Asian Religions at the University of Otago, New Zealand.

Shylashri Shankar is a Senior Fellow at the Centre for Policy Research in New Delhi, India.

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Is the ‘Rule of law’ an Antidote for Religious Tension? The Promise and Peril of Judicializing Religious Freedom

For years a particular way of thinking about the relationship between religious strife, law, and legal processes has dominated conversations among scholars, human rights activists and policy makers. This way of thinking sees law as an antidote to religious tensions. ‘Rule of law’, the logic goes, acts as a force of moderation and, in matters of religion, serves a key tool for mollifying or resolving disputes.

One does not have to go far to find examples of this paradigm in action. In a December 2013 speech to the United Nations General Assembly, the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, eulogized the power of law to help resolve chronic patterns of religious violence and hatred. He insisted that

[a]n open constitutional framework that allows free manifestations of existing or emerging religious pluralism on the basis of equal respect for all is a *sine qua non* of any policy directed toward eliminating collective religious hatred by building trust through public institutions. (United Nations General Assembly 2013: 11)

According to Bielefeldt, it is institutions of law—above all constitutions and the courts that interpret them—which serve as bulwarks against religious strife, polarization and hatred. Constitutional law, he insists, is central to resolving conflicts among religious groups.¹ Bielefeldt’s perspective finds considerable support in academic writing on constitutional law and human rights. One influential example of this can be seen in Ran Hirschl’s important book, *Constitutional Theocracy*, in which he writes that constitutional courts exert a tempering effect on the intensities of religious interests in public life such that “constitutional law and courts in virtually all such polities have become bastions of relative secularism, pragmatism, and moderation” (2010: 13).

¹ Bielefeldt explains that religious tensions should not be understood as ‘natural phenomenon’, but rather as the product of identity politics and other political dynamics. In this rendition, courts are imagined as institutions with the unique ability to *rise above* politics rather than being enmeshed in politics.

Although intuitively attractive, this understanding of law as a salve for religious strife belies the *escalation* of religious tensions that often accompanies the judicialization of such disputes in much of South and Southeast Asia. A closer look at the recent history in Sri Lanka, India, Malaysia and Pakistan suggests that religion-related court cases have not always generated the mollifying effects that Hirschl and Bielefeldt describe. Rather than serving as mechanisms to soften religious boundaries and harmonize religious interests, legal processes and institutions frequently produce a hardening of boundaries and sharpening of antagonisms among religious communities. Often, law intensifies religious conflict.

This study examines how and why this intensification comes about. In what follows, we argue that law and courts have played key roles in shaping and encouraging processes of religious polarization. Our exploration of the polarizing effects of legal action on religious communities draws on concrete experiences from four countries: Sri Lanka, India, Malaysia, and Pakistan. In addition to examining the religio-legal encounter in each, these case studies highlight four specific mechanisms through which the process of polarization works. Among other modes, polarization occurs as a result of: the procedural requirements and choreography of litigation (Sri Lanka), the language and decisions of court judgments (India), the activities of partisan activists who mobilize around litigation (Malaysia), and violent actions that take place to protest a legal defense of rights (Pakistan). Each of the four case studies illustrates how legal institutions sometimes exacerbate religious tensions. By focusing on four cases across South and Southeast Asia, we hope to underline the fact that these are not anomalous dynamics, specific to any one case. Rather, they point to a much broader set of mechanisms that extend far beyond the four countries under study. Given this comparative reach, we believe that scholars and policymakers should direct greater attention to the counterproductive dynamics that often accompany the judicialization of disputes related to religion.

1. Sri Lanka: Polarizing Procedures

To say that law generates conflict might appear obvious, even mildly tautological. Among other things, law serves as a formalized system for framing disputes in public settings; its defining function, in part, involves the ordered presentation of competing claims. However, in

ordering these claims and presenting them for adjudication, legal processes do not simply take social disputes as they are, in all their complexity. Rather, legal institutions produce *for* the court certain types of disputes that can be resolved *by* the court: disputes between two parties, over specific and well-circumscribed matters of law (e.g. over particular rights or duties). In many cases this process of translating conflict from social-political domains into a legal domain unwittingly and unknowingly serves to further *sharpen* the interests that gave rise to conflict in the first place.

The polarizing effects of constitutional litigation can be seen clearly in the context of popular and legal contests over religious conversion—particularly conversions to Christianity—in Sri Lanka.² From the late 1990s until 2004, one sees in civil society and the media a vigorous debate over the proselytizing activities of new, evangelical Christian organizations. These organizations had come to the island in recent decades, and had set up churches in rural and urban areas that were badly affected by poverty and civil war. By the late 1990s, some Sri Lankans became increasingly 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.

In the early 2000s, a variety of religious organizations issued public statements indicating their concern about the possibility of ‘unethical’ conversions taking place. 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.”³ 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 upon 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

² For more detailed analysis of these dynamics in the Sri Lankan case, see Schonthal (2014).

³ “No links with fundamentalist sects, say Catholic Bishops,” *Daily News* December 19, 2003.

to colonial-era Christians: inculcate Christianity and destroy local cultural values.⁴ Most prominently, a variety of Buddhist organizations rallied together to raise awareness about and combat the alleged unethical conversions among poorer urban and village population.

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 for consideration to the president in January.⁵

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 sympathetic to the concerns of Buddhists and Hindus—were in the process of developing their own ‘in-house’ manuals and protocols of ‘ethical’ conversion.⁶

Looking at the situation six months later, however, one sees a radical pattern of polarization. From a situation in which a variety of religious communities were involved in inter- and intra-religious 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 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 government, 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

⁴ “*Matamārrattil īṭupaṭuvōr Maṇṭanēyamarravarkaḷ*” (trans. ‘Those who engage in Conversion Have no Compassion for Humanity’) Reprinted in *intucāṭaṇam*, November 12, 2000, 26.

⁵ This bill was never taken up by parliament.

⁶ Interview with a Methodist church leader, May 6, 2009.

Paper in May 2004 as a Private Members' Bill introduced by the newly elected Buddhist nationalist political 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'.

Despite obvious substantive and procedural problems with the JHU's bill, 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 pre-enactment judicial review, requesting the Supreme Court to rule that the bill violated fundamental rights to freedom of religion. Equally predictably, the more nationalistically inclined Buddhist groups, such as 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 over the 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 pre-enactment judicial review to prevent legal limitations on conversion) in response to an issue that, for them, was much more complex. The same Hindu and Christian individuals and groups that had been involved with designing other types of solutions petitioned against the bill; 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 shake-down 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 abruptly halted.

This is not to say that there were no attempts to communicate the complexity of the issues at play; some petitioners did. Yet these suggestions of complexity were ultimately drowned out or obscured in the gross logic of a more powerful litigiousness, which presented the debate—to both the court and, significantly, to the public-at-large who followed these proceedings with interest in newspapers and on TV—as an agonistic battle between two parties: opponents and supporters of the bill, or, even more starkly, as opponents or supporters of formal, state-based, legal limits on ‘unethical’ conversion. That is, the logic, choreography and procedural requirements of constitutional review—which remained ‘hard wired’⁸ to present the debate as a contest between two opposing parties, petitioners and intervening petitioners—worked to dilute and even cover over the many creative solutions that had been proposed previously by groups and alliances representing a variety of religious organizations and denominations. For example, there had been serious discussions about the development of an interreligious committee to investigate allegations of conversion.

The above anecdote serves as a powerful illustration of the ways in which institutional structures work to determine not only the types of social boundaries formed but the rigidity or ‘brightness’ of the lines that are drawn. In this case, constitutional frameworks and the protocols and procedures they impose on articulating and managing conflict worked to transform what were previously multi- and interreligious groups into a stark ‘Buddhist v. others’ binary. In addition, the many possibilities for realignment and border-crossing that presented themselves prior to the JHU-bill case, seemed to disappear: once processed through the authorized

⁷ Interview with a committee member, May 17, 2009.

⁸ See Moustafa 2014, and below here.

mechanics of constitutional litigation, Sri Lankans found it difficult to reclaim or recover the terms and creativity of a more fluid pre-litigation state.

2. India: Polarizing Judgments

The use of religion for political mobilization in India can be attributed to constitutional and legal interpretations that have, in some cases, circumscribed access to affirmative action benefits and, in others, curtailed specific forms of religious freedom (e.g. the right to propagate one's faith). Contrary to the Hirschl thesis that court rulings defuse or at least moderate the dark side of religion in the public sphere, law and judgments have played a key role in creating the ammunition that has been subsequently used by socio-religious groups, particularly the Hindu Right, to polarize discourse and deepen discord.⁹

About 80% of the 1.21 billion Indians are Hindus, a religion hierarchically constructed through the caste system; 13% are Muslims and 2% are Christians.¹⁰ Most conversions in independent India occur among scheduled castes (SC) and tribes (indigenous peoples) who want to improve their low social standing by converting to Islam and Christianity, which promise 'equality' to their congregants. In a bid to deliver social justice, the Indian Constitution limits affirmative action benefits (quotas reserved in government jobs, political constituencies and educational institutions) to scheduled castes and scheduled tribes. However, by confining the legal definition of a scheduled caste to Hinduism, the constitution inadvertently installs *barriers to conversion from Hinduism*, prompting religious minorities to call the state 'pro-Hindu'. Judges have to decide whether the right to propagate, which is part the right to profess and practice religion enshrined in Article 25, can involve conversion.

⁹ Hindu Right is the term used to characterize the Hindu social, religious and political organizations that cluster under the umbrella of Sangh Parivar. The Bharatiya Janata Party (BJP) is part of this group. Their ideology is Hindutva, which a founder (Savarkar) defines as "embracing all the departments of thought and activity of the whole Being of our Hindu race."

¹⁰ Caste is a complete system that impacts every aspect of a Hindu's existence determining the social status, occupational and economic roles (especially in rural areas). At the top are priests (Brahmins), warriors/princes (Kshatriyas), then traders (Vaishyas) and farmers (Sudras). The untouchables (scheduled castes) are on the bottom most rung.

These contradictory impulses in the constitution's directives have led to a situation where the judiciary has directly curtailed the ability of a scheduled caste convert to access affirmative action benefits, while indirectly encouraging re-conversions to Hinduism, usually carried out by the Hindu Right. An analysis of 80 religious conversion cases in the High Courts and the Supreme Court clearly reveal the pro-Hindu bias of India's judiciary. The cases, which pertain to personal law (38%), affirmative action benefits (42%) and propagation (15%), deal with reconversions to Hinduism (36%), and conversions to Islam (23%) and Christianity (28%). In over half of the cases dealing with affirmative action, scheduled caste converts to Islam and Christianity were stripped of their welfare benefits. But on re-conversion to Hinduism, the court allowed the scheduled caste re-convert to regain the privileges as long as he could prove that the caste had accepted him into its fold on grounds that affirmative action is a group right (*S. Anbalangan v. B. Devarajan*, 1984 AIR 411). Christian litigants were less likely to win cases that challenged anti-conversion laws and the circumscribed nature of affirmative action benefits.

The link between court judgments and the polarizing forms of religious mobilization is evident in two sets of cases: in those cases dealing with anti-conversion bills passed in several regional states; and in cases pertaining to the classification of 'Hindutva'.

In 1978, the Madhya Pradesh Freedom of Religion Act (passed in 1968) prohibiting conversion by force, fraud or inducement and prescribing one year's imprisonment and a fine was challenged in the High Court by Reverend Stanislaus on grounds that the definition of inducement was overbroad. The High Court upheld the Act saying it pertained to public order, not religious freedom. The Reverend approached the Supreme Court and lost. In the judgment (*Stanislaus v. State of Madhya Pradesh*, 1977 2 SCR 611), the Chief Justice of India said that "there is no fundamental right to convert another person to one's own religion," and such a right "would impinge on the freedom of conscience guaranteed to all citizens of the country alike." A Hindu right-wing member introduced the Freedom of Religion Bill in December 1978 that sought to prohibit conversion from one religion to another by the use of force or inducement or by fraudulent means, and cited the Stanislaus judgment as legitimizing the Bill. The Bill did not pass because the Prime Minister of the ruling coalition withdrew support after an agitation by Christian groups. Similar bills were passed in Gujarat, Chattisgarh and Himachal Pradesh

(challenges are pending in the courts), and in 2005, the AIADMK-led¹¹ Tamil Nadu government had to withdraw a similar bill after suffering electoral losses in the parliamentary elections. Interviews with politicians in Tamil Nadu suggest that the parties were aware of the court's disinclination to strike down anti-conversion laws.

The contradictory set of judgments on Hindutva highlights how law can deepen religiously infused polarization by blurring the line between religion and ideology, and religion and politics. The Supreme Court's judgments have classified Hindutva as religious rhetoric and banned its use in election speeches (*Bomma v. Union of India*, 1994 SC 1918), and have also said that Hindutva "could not be equated with narrow fundamentalist Hindu religious bigotry" and hence cannot be prohibited from being used for political mobilization (Justice J.S.Verma in *Manohar Joshi v. Nitin Bhaurau Patil*, 1996, 1 SCC). The Hindu Right gleefully used the Joshi judgment to legitimize its use of Hindutva. "I feel extremely gratified about yesterday's verdict principally because the Constitution Bench has lent its seal of Judicial imprimatur to BJP's ideology of Hindutva," said L.K. Advani, the President of the BJP, in a special press statement on the Hindutva case verdict.

Thus, we see a similar process of translation of court rulings by civil society and political actors in India, as in Malaysia, but here the Hindu Right has translated the judgments into a narrative of legitimacy for its stance. The last two decades have seen a growing use of judgments on conversion and on the nature of Hinduism by the Hindu Right to legitimize controversial and polarizing positions on religious freedom and minority rights. The pattern in the 80 cases mentioned above indicates that judgments were more pro-reconversion to Hinduism and anti-conversion to Islam and Christianity during governments led by the BJP (a quarter of the 80 cases). Concerns about the decay of the judiciary, and the growing incidence of charges of corruption of judges, either monetarily or through post-retirement appointments to lucrative government and private sector positions, do not augur well for the impartiality of the courts. Interviews with ideologues of the RSS¹² and other organizations of the Hindu Right also reveal a

¹¹ AIADMK stands for All India Anna Dravidian Progress Federation, a state political party in Tamil Nadu and Puducherry.

¹² RSS is the Hindi acronym for National Volunteer Corps, an organization founded in Maharashtra in 1925 that champions Hindutva, or 'Hindu-ness'.

positive view of the court's judgments on conversion. According to this view, the court tried to "minimize the harmful impact of the constitution" and "balanced" the needs of (the predominantly Hindu) society by handing down judgments against conversion and "upholding Hinduism or Hindutva as part of the national character rather than confining it to a religion on par with Islam and Christianity."¹³ In short, the Hindu Right attributed the rise in religious intolerance to a constitutional right protecting propagation.

In December 2014, the conversion of 350 Muslims in Agra to Hinduism reportedly by the RSS sparked a call for 'anti-conversion' laws. "Now is the Modi government not free to bring a law to ban conversions by inducement and fraud, including Agra conversions?" asks S. Gurumurthy in an editorial article in the *New Indian Express* on December 15, 2014. "It is. If it does, can the 'seculars' oppose it? Cannot. Because if they do then they cannot fault Agra conversions. If they do not, then they cannot oppose a law that will stop millions of Hindus being converted through inducement and allurements." The public performance of Hindu rituals by Prime Minister Narendra Modi during his visit to Nepal, the declaration that all Indian citizens are Hindus, and the renaming of Christmas to 'good governance day' raise the worrisome prospect that public discourse will shift further from one relatively tolerant of diversity to one that conforms to a unifying and homogenising Hindutva. Courts, by further hardening boundaries and sharpening antagonisms among religious communities, will have to share the blame for this shift.

3. Malaysia: Polarizing Activists

Over the past decade, the Malaysian courts have stood at the center of heated debates concerning religious freedom. Conventional accounts trace these tensions to the rise of Malaysia's *dakwah* (religious revival) movement, which has been the most dynamic social and political trend since the late 1970s. According to this understanding, legal controversies around religious freedom are the result of a standoff originating *outside* the courts between an ascendant religious movement and a liberal legal order. And, framed this way, the question that naturally

¹³ Interview with S. Gurumurthy, an ideologue of the RSS and a co-convenor of the Swadeshi Jagran Manch, an organization for promoting the awareness of Indian tradition, March 6, 2007, Chennai.

follows is whether the courts have the ability and resolve to uphold religious liberty, or if they will succumb to popular political pressure.¹⁴ This understanding of the root problem (religious revival) and what is at stake (liberty) comes effortlessly because it matches our taken-for-granted understanding of the role of the law and the courts in defending fundamental liberties and sustaining secularism.

But this functional understanding precludes deeper insight into the fact that appeals to religious liberty are invoked by a variety of actors, including religious actors, each working at cross-purposes. Claims to religious liberty, for instance, are often made by religious minority groups (Buddhist, Christian, Hindu, Sikh, Taoist, and heterodox Muslims) vis-à-vis the Muslim majority. But spokespersons for the Muslim majority also deploy ‘rights talk’ vis-à-vis religious minority groups, claiming that the latter should not infringe on the ‘religious freedom’ of the majority. Indeed, claims to religious freedom are not only voiced *across* communal lines; they are also heard *within* religious communities, as individuals assert the right to religious liberty for their own persons, whereas spokespersons of religious communities simultaneously invoke religious liberty in their claim to defend collective norms from state interference.

These dynamics were at work in the most well-known Malaysian court case, *Lina Joy v. Religious Council of the Federal Territories*,¹⁵ which lasted for nearly a decade and became a public spectacle at home and abroad. The case concerned a woman who sought state recognition of her religious conversion. In litigating Joy’s right to religious freedom, her attorneys challenged the personal status laws in force in the Federal Territories, which provide no viable avenue for conversion out of Islam. Joy’s attorneys argued that the laws violated her right to religious freedom, a right enshrined in Article 11 of the Malaysian Constitution, which states (in part) that “*Every person* has the right to profess and practice his religion....” But Joy’s opponents invoked another clause from the same article, which states that “*Every religious group* has the

¹⁴ 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).

¹⁵ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain lain* [2007] 4 M.L.J. 585 (Malay.), affirming *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, [2004] 2 M.L.J. 119 (Malay.).

right...to manage its own religious affairs.[emphasis added].” This second set of attorneys also claimed the right to religious freedom, but they argued that Article 11 is meant to safeguard the ability of religious communities to craft their own rules and regulations (including rules of entry and exit), free from outside interference. It is striking that protagonists on both sides of the controversy invoked religious freedom, and both sides called upon the state to secure these alternate visions. In short, disputes over religious liberty were, to a very large extent, the *product* of law and legal institutions. And, interestingly, there are striking parallels between the judicialization of religious disputes in Malaysia and our other three cases.

While the legal battle raged for over a decade in the Malaysian courts of law, an even greater battle raged in the court of public opinion, with politicians, media outlets, and civil society groups shaping public discourse along two competing frames. Liberal rights groups formed a coalition named ‘Article 11’ after the article of the Federal Constitution guaranteeing freedom of religion. The coalition included the most prominent human rights groups and as well as the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST)—an umbrella organization representing the concerns of non-Muslim communities in Malaysia. The objective of the Article 11 coalition was to focus public attention on the erosion of individual rights and to “ensure that Malaysia does not become a theocratic state.”¹⁶ The coalition produced a website, short documentary videos, and recorded roundtables on the threat posed by Islamic law. They went on to organize a series of public forums across Malaysia.

Parallel to this mobilization of liberal rights organizations, a broad array of conservative Muslim NGOs united in a coalition calling itself Muslim Organizations for the Defense of Islam (*Pertubuhan-Pertubuhan Pembela Islam*), or Defenders (PEMBELA) for short. PEMBELA’s founding statement explained that the immediate motivation for organizing was the ongoing court cases which, in their view, challenged “the position of Islam in the Constitution and the

¹⁶ Article 11 Coalition, <http://www.article11.org/> (accessed March 2, 2010). The website has since been closed.

legal system of this country.”¹⁷ PEMBELA organized dozens of public forums and flooded the Malay language press with hundreds more articles and opinion pieces on the need to defend the autonomy of the shariah courts from outside interference.

The abovementioned case of Lina Joy remained largely unknown to the Malaysian public until it was brought into the media spotlight by political activists—liberals and conservatives alike—who advanced competing frames of understanding.¹⁸ Taken from the court of law and deployed in the court of public opinion, however, these legal controversies assumed a different character. Political entrepreneurs, particularly those on the conservative side of the divide, were not interested in the technical details of the cases. Quite the opposite, they mobilized around the cases to advance more expansive rights claims and narratives of injury. Complex legal problems were thus transformed into compelling narratives of injustice and redeployed in the public sphere. The cases gave new energy and focus to variously situated civil society groups, catalyzed the formation of entirely new NGOs, and provided a focal point for political mobilization outside of the courts.

Two factors facilitated the efforts of activists to translate court rulings into compelling political narratives of injustice. First, court rulings and the logics that supported them were not legible to those without legal training. Judicial decisions are “technical accounts” as opposed to “stories” (Tilly 2006) and, as such, they are not easily accessible to a lay audience by their very nature. This inaccessibility affords an opportunity for political entrepreneurs to recast technical matters along stylized and emotive frames, presenting polarized narratives of injustice for public consumption. A second factor that enabled political actors to effectively convey strikingly different messages was media segmentation along ethnolinguistic lines. Although English is the common language for most educated and urbanized Malaysians, the vernacular press is divided among Chinese, Tamil, and Malay language media, each of which carried strikingly divergent coverage of the cases.

¹⁷ Press Release, PEMBELA, “*Pertubuhan-Pertubuhan Pembela Islam Desak Masalah Murtad Ditangani Secara Serious*” [Defenders of Islam Urge More Seriousness in Handling the Apostasy Problem] (July 17, 2006) (on file with the authors).

¹⁸ For a more detailed examination of these dynamics, see Moustafa (2013).

This polarization increasingly constrained both the courts and the government. Moreover, 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.¹⁹

Ironically, the tools and institutions that we instinctively turn to for justice—law and courts—are in fact a principal source of tension in the politics of religious liberty in Malaysia. Instead of resolving legal questions, the court system is hard-wired to produce legal controversies anew. Rather than simply arbitrate between contending parties, the court rulings have tended to exacerbate ideological cleavages. And, instead of assuaging uncertainties, courts have repeatedly instilled a tremendous degree of uncertainty, indeterminacy, and anxiety around the meaning and content of ‘religious freedom’.

4. Pakistan: Polarizing Protests

When Pakistan was created in 1947, constructions of ‘the Muslim nation’ incorporated Shi’a and Ahmadi figures like Mohammad Ali Jinnah (the Father of the Nation) and Foreign Minister Zafarullah Khan. Sectarian minorities were able to cross over into a broadly secular or Sunni mainstream; doctrinal boundaries were blurred to make space for new political alliances; and religious boundaries were enlarged to facilitate the process of nation-building. Many different types of Muslims were encompassed within a Muslim-majority state guided by a broadly inclusive understanding of ‘Islamic ideology’. Over time, however, this framework changed as groups like the Ahmadi (and, more recently, the Shi’a) came to be excluded. The Ahmadi did not actively convert away from Islam; they were unilaterally deemed to be ‘apostates’.

¹⁹ 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. 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).

Pakistan's early constitution-writing efforts sought to balance a concern for fundamental rights (including religious freedom) with a preambular nod to the sovereignty of God ("delegated to the state through its people" through their "chosen representatives").²⁰ This constitution-writing process, however, was notable insofar as it involved *lay* Muslims deliberately seeking to marginalise Muslim *clerics*. In effect, Pakistan's lay leaders sought to exclude clerical views in order to protect a broader understanding of the nation.

Even as the constitution-drafting process was still underway, however, clerics and conservative religious activists sought to reverse this pattern of marginalization. Describing the boundaries of Islam as 'under threat', they set aside the technical niceties of constitution drafting and sought to define the boundaries of the Muslim community on the streets. Attacking Pakistan's Ahmadi minority as 'apostates' in a series of urban riots, they engaged in a cynical ploy to shore up their own position in defining the boundaries of the nation. But, in doing so, they were treated by state officials as vigilantes acting in defiance of state authority. And, in due course, they were demonized by the courts. In some cases they were even tried and jailed for 'treason'.

During the 1950s, one might say, following Hirschl, the fundamental rights of the Ahmadi were prioritised by the courts against a coalition of religious activists who believed that constitutional references to 'the sovereignty of God' meant that the boundaries of the nation should be subject to their own rather specific ideas about 'the limits prescribed by [Allah]'.

In 1969, the Supreme Court decided an important case (*Abdul Karim Shorish Kashmiri v. State of West Pakistan*) to address the country's increasing polarization between (a) clerical ideas about the ulema's privileged position in defining 'the limits prescribed by [Allah]' and (b) lay

²⁰ In Pakistan, questions about religious freedom and the Ahmadi relate to 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).

constitutional ideas regarding the primacy of each citizen's fundamental rights. In practice, however, the court merely recapitulated the marginalization of conservative clerics. It declared that the West Pakistan government would be permitted to close an incendiary anti-Ahmadi publication owing to a constitutional article (Article 20) stating that religious liberties were protected "subject to public order". In effect the court insisted that anti-Ahmadi vigilantes jeopardised public order, and for this reason they must be constrained. The courts did not *resolve* religious disagreements; here again, the process of litigation and the legal language of public order merely *hardened* enduring patterns of religious-cum-political polarization.

After 1973, Pakistan's constitution was re-written. The drafting process retained most of the existing language regarding the sovereignty of God, the role of the state and its elected representatives, 'the limits prescribed by [Allah]', and so on. Some conservative religious leaders sought to introduce a constitutional amendment prohibiting the country's Ahmadis from calling themselves Muslims, but Prime Minister Zulfikar Ali Bhutto demurred. When these religious leaders (largely excluded from the Constituent Assembly owing to their poor showing in the 1970 elections) threatened mass protests in a bid to press their claims, however, Prime Minister Bhutto reconsidered. Their proposed amendment enjoyed considerable popular support. And, in 1974, it received the unanimous support of the legislature. In fact, for the first time, *clerical voices grounded in threats of mass mobilization and public violence found their way into Pakistan's constitutional law*.

After 1974, Pakistan adopted a new legal posture vis-à-vis exclusionary mobilizations undertaken in the name of religion: responding to public pressure, the state shifted its approach to accommodate both the religious views and the political practices associated with religious conservatives.

A few years later, Pakistan's constitutional amendment excommunicating the Ahmadis was challenged as a violation of the Ahmadis' fundamental rights. And, in 1978, the Supreme Court (*Abdur Rahman Mobashir v. Amir Ali Shah*) sought new ways to frame its understanding of such rights, noting that, although the Ahmadis had been unilaterally excommunicated (and, as such, were prohibited by the constitution from calling themselves Muslims), their remaining constitutional freedoms were still in place. In effect, the court held that Ahmadi religious

practices were protected from vigilante interference because they did not interfere with the religious practices of others. Unfortunately, the ‘Mobashir’ ruling did not settle the relevant constitutional, legal, social, or political issues. Instead, it served as a driver of change in its own right. In particular, it prompted yet another group of clerics and conservative religious activists to threaten mass protests if their demands for constraints on peaceful Ahmadi *practices* were not met.

Between 1984 and 1986 these threats set in motion two changes: one in the form of a constitutional amendment recasting preambular references to ‘the limits prescribed by [Allah]’ as a substantive constitutional article (2A); and one in the form of ordinary amendments to Pakistan’s Criminal Procedure Code, noting that any Ahmadi who referenced Muslim terms and practices—for example, describing his or her place of worship as a *masjid*—was guilty of causing a form of religious offense and, thus, disturbing public order. In fact these two reforms, growing out of *mass mobilization inspired by the work of the courts*, turned the legal-cum-political tables around: it was no longer religious vigilantes who were seen, by the law, as disturbing public order; it was rather the Ahmadis who were seen as disturbing public order as heretical or blasphemous provocateurs. The reforms introduced between 1984 and 1986 simply gave the polarization associated with moral vigilantism a certain measure of legal cover.

The constitutionality of these reforms was challenged, first in the Federal Shariat Court (Mujibur Reman v. Federal Government 1985) and then in Pakistan’s Supreme Court (Zaheeruddin v. the State 1993). At this point, important ideas about the formal legal status of ‘fundamental rights’ were challenged. In particular, the court held that the legislature’s promulgation of regulatory measures (*vis-à-vis* various forms of peaceful religious practice) was entirely unfettered. In effect, the court did not use its powers to reduce existing levels of legal uncertainty regarding fundamental rights; it actually *introduced* a measure of legal uncertainty: which types of peaceful religious practice, under which conditions, would be seen by legislators as a ‘threat to public order’?

In Pakistan, the *legal* status of polarizing street power focused on the exclusion of ostensibly heretical religious ‘others’ has slowly changed over time. Before 1986, religious vigilantes were prosecuted as a threat to public order. Since then, public disorder has become a

tried-and-tested political strategy for restricting the boundaries of Pakistan's Muslim community *within* the terms of the law.

Conclusion

In these vignettes from Sri Lanka, Pakistan, Malaysia and India, 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, deepening, or sustaining conflict. We do not propose that law fabricates conflicts *ex nihilo*. In all cases, tensions among religious communities existed outside of law and pre-existed the court cases we examined. Similarly, we do not claim that law works alone to amplify existing social fissures. By integrating four mini-histories, we simply illustrate the complex manner in which law works in tandem with political and social forces. And although each vignette is used here illustrate a different way that law can and does produce polarization, it is important to note that all four modes of polarization are at play in all four cases. A more extended analysis of each case, which was not possible given space constraints, would reveal yet more striking parallels across the four cases.

Among other things, these examples stand as counter-narratives to more standard bottom-up accounts of conversion in Sri Lanka, Ahmadi exclusion in Pakistan, religious politics in Malaysia, or Hindutva in India. 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 Pakistan, courts and constitutions failed to advance ideals of liberal inclusiveness; in Malaysia, poorly conceived legal principles heaped impossible burdens on non-Muslims; and, finally, India's majoritarian bias crept into and subverted constitutional jurisprudence. In this standard account, polarization, conflict, and violence are thought to result not from law's influence, but from law's failure to influence society properly.

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'), however, is to exculpate the real-world institutions and mechanisms that form a centerpoint of strife. This approach reads social, legal, and political history in a millenarian mode: waiting for the saving

power of true law to set things right. The majoritarian slant of Indian courts or the trumping power of ‘public order’ in Pakistan’s courts may well be deviations from an ideal designed in the philosophical ‘clean room’ of political 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 binary and rigid what are often more fluid and flexible religious boundaries. In Pakistan, the powers of apex courts to authorize or de-authorize particular religious boundaries may merge with street-level politics to validate highly polarizing polemical claims about Islam. In Malaysia, court cases served as focal points for political activists to advance starkly different frames of interpretation for public consumption; even compromise-sensitive judicial decisions may undergo discursive polarization in ‘the court of public opinion’. And, in India, the language and opinions of court decisions cannot be fixed within a liberal politics; they may just as easily emerge as political slogans used to justify exclusionary politics.

To see law’s polarizing potentials is not to dismiss law out-of-hand or to call for scholars to abandon the dominant form of institutional organization and dispute resolution in most parts of the world. Rather, we urge scholars to take seriously both the benefits and the costs of law-making and legal institutions, and in doing so to introduce a new spirit of creativity, modesty and humility about the ameliorative powers of law. This may lead us back to a reaffirmation of liberal constitutionalism—“a second naïveté”, as Paul Ricœur would have it—but from a place of scrupulous pragmatism and clear-eyed realism about both the losses and the gains associated with the ‘rule of law’.

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