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*Securing the Sasana through Law: Buddhist constitutionalism and Buddhist-interest litigation in Sri Lanka**

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Abstract

This article examines the history and effects of Buddhist constitutionalism in Sri Lanka, by which is meant the inclusion of special protections and status for Buddhism in the island's 1972 and 1978 constitutions, alongside guarantees of general religious rights and other features of liberal constitutionalism. By analysing Sri Lankan constitutional disputes that have occurred since the 1970s, this article demonstrates how the 'Buddhism Chapter' of Sri Lanka's constitution has given citizens potent opportunities and incentives for transforming specific disagreements and political concerns into abstract contests over the nature of Buddhism and the state's obligations to protect it. Through this process, a culture of Buddhist legal activism and Buddhist-interest litigation has taken shape. This article also augments important theories about the work of 'theocratic' or religiously preferential constitutions and argues for an alternative, litigant-focused method of investigating them.

Introduction

Despite its reputation as an ascetic religion, unconcerned with worldly power, Buddhism remains deeply entangled with constitutional law throughout southern Asia. With the exception of socialist Vietnam, the constitutions of all Buddhist-majority states in South and Southeast

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Asia accord Buddhism special status or recognition. At the same time, these texts also acknowledge the existence of other religions and grant to citizens general rights to religious freedom in a framework inspired by liberal constitutional paradigms.[1] For example, Thailand's 2007 Constitution requires that the head of state—the king—is a Buddhist (Section 9) and obliges the state to 'patronise and protect Buddhism as the religion observed by most Thais for a long period of time [as well as] other religions' (Section 79). It also grants to all citizens the liberty to profess, observe, and worship their religion (Section 37). Myanmar's 2008 Constitution recognizes 'the special position of Buddhism as the faith professed by the great majority of the citizens' (Article 361), while also 'recognizing Christianity, Islam Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution' and specifying religious rights for all citizens (Articles 362, 34). Cambodia's 2008 Constitution declares Buddhism to be the 'the state religion' and requires the state to 'disseminate and develop the Pali schools and Buddhist institutes' and also enshrines rights to freedom of worship and belief (Articles 43, 68). In this way, one can identify in southern Asia a rough template, if not a fully elaborated prototype,[2] for a form of constitutional law that one might call Buddhist constitutionalism.[3]

[1] Lerner, H. (2013), Permissive constitutions, democracy and religious freedom in India, Indonesia, Israel and Turkey *World Politics* 65(4): pp. 609–55. As in other contexts, religious rights in the Buddhist-majority world are often limitable for reasons of public order, public morality, national security, etc.

[2] In recent years, scholars have observed fully elaborated paradigms of 'Islamic constitutionalism' in other parts of the world involving, for example, a standard set of clauses making sharia 'a' or 'the' source of law. Among others, see: Lombardi, C. B. (2013), Designing Islamic constitutions: Past trends and options for a democratic future, *International Journal of Constitutional Law* 11(3); Brown, Nathan J. (2002), *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*. Albany: State University of New York Press.

[3] I use the term 'constitutionalism' in a narrow sense to refer to the practices of drafting and adjudicating constitutional law, rather than in the broader sense of government limited by law (which scholars sometimes have in mind). It should be said that the shared features of Buddhist constitutionalism apply only at a very general level. Certain constitutions (e.g. Cambodia) seem to privilege Buddhism to a greater degree than others (e.g. Myanmar). A broader ranking of constitutional privileges for Buddhism would depend heavily on what criteria one uses. For example, would one consider Thailand's constitutional requirement that the head of state (the king) is Buddhist exert a more preferential impact than Sri Lanka's constitutional requirement that Buddhism be given a 'foremost place'? Laos' constitution moves the farthest from the principles described above in that it places the state in a managerial role over all religions. Nevertheless, Laos' most recent constitution does give Buddhists

This article examines the legal, religious, and political impacts of Buddhist constitutionalism in the context of Sri Lanka. Like the constitutions above, Sri Lanka's supreme law includes special prerogatives for Buddhism as well as general religious rights. It awards to Buddhism the 'foremost place' and obligates the state to 'protect and foster' the Buddha's legacy in the world, the Sasana,[4] while also assuring rights to freedom of religious belief and practice (Chapter 2). Although Sri Lanka's constitution appears to give the state legal responsibility for the well-being of Buddhism, equally important are the ways in which it empowers citizens to make broad and diverse constitutional claims in the name of Buddhism. Buddhist constitutionalism in Sri Lanka has enabled a climate of Buddhist-interest litigation, public legal battles over what Buddhism is, who should speak for it, and how it ought to be protected.

Buddhist constitutionalism and the work of constitutional law

As a type of constitutional law that privileges a country's most populous religion, Buddhist constitutionalism looks very similar to the constitutional traditions of many other countries.[5] For example, Egypt, Tunisia, Malaysia, Israel, and Denmark all have basic laws

special recognition vis-a-vis 'other religious followers' in that it mentions Buddhist adherents and clerics specifically: 'The state respects and protects all lawful activities of the Buddhists and of other religious followers, mobilises and encourages the Buddhist monks and novices as well as the priests of other religions to participate in the activities which are beneficial to the country and people. All acts of creating division of religions and classes of people are prohibited' (Article 9). Aside from Bhutan (and possibly the Tibetan government-in-exile), Buddhist constitutionalism appears to be a phenomenon that applies to Theravada (rather than Mahayana) countries. On Bhutan, see: Whitecross, Richard W. (2014), 'Buddhism and Constitutions in Bhutan' in R. French and M. Nathan (eds) *Buddhism and Law: An Introduction*. New York, New York: Cambridge University Press, pp. 250–68.

[4] On the meanings of Sasana, see below.

[5] In some cases, these constitutional arrangements are not just similar but identical. For example, the special status accorded to Buddhism in the 2008 Constitution of Myanmar—and which was included originally in the Constitution of the Union of Burma of 1947 (Section 21[1])—is modelled deliberately on the 1937 Constitution of Ireland. Section 44(2) of that charter reads: 'The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.' Aung San had initially wanted a secular constitution. The provision on Buddhism was added by Ne Win after his assassination. Crouch, M. (Forthcoming), 'Personal Law and Colonial Legacy: State-Religion Relations and Islamic Law in Myanmar' in M. Crouch (ed.) *Islam and the State*

that combine special prerogatives for the majority religion with rights and (sometimes) recognition for other religions. These types of constitutions are by no means marginal. By some estimates, approximately 40 per cent of all constitutions explicitly favour a particular religion while also guaranteeing general religious rights[6] and as much as half of the world's population live under constitutional arrangements of this sort.[7]

The only comprehensive study of these types of constitutions has been done by the scholar of comparative constitutional law, Ran Hirschl. In his ambitious volume, *Constitutional Theocracy*, Hirschl considers the effects of drafting constitutions that combine special endorsement for one religion with general features of liberal constitutionalism. These general features include the separation of political and religious authority, protocols of judicial review, and appeals to general religious rights. Hirschl concludes that by giving religion special constitutional status, states contain and weaken religion's influence on political life because they make religion a legitimate object of state regulation:

> Granting religion formal constitutional status ... neutralizes religion's revolutionary sting, coopts its leaders, ensures state in-put in the translation of religious precepts into guidelines for public life, helps mutate sacred law and manipulate religious discourse to serve powerful interests, and, above all, brings an alternative, even rival order of authority under state control and supervision ... As a result, constitutional law and courts in virtually all such polities have become bastions of relative secularism, pragmatism, and moderation, thereby emerging as effective shields against the spread of religiosity and increased popular support for principles of theocratic governance.[8]

For Hirschl, then, constitutions of this type diminish the force of religion in politics by bringing religious ideas, agents, and institutions within the routinized world of law and under the control of government elites, particularly judges, who, he asserts, tend to share 'an inclination toward secularism and modernism'.[9]

in Myanmar. Delhi: Oxford University Press. I am grateful to Melissa Crouch along with one of the anonymous reviewers for calling my attention to this.

[6] Email communication with Dr Jonanthan Fox based on his RAS Dataset, January 2011.

[7] Hirschl, R. (2010). *Constitutional Theocracy*. Cambridge: Harvard University Press, p. 46.

[8] Ibid., p. 13.

[9] Ibid., pp. 162–3.

Interpreted in light of the evidence he provides, Hirschl's conclusions are illuminating and persuasive. However, they are also the product of his particular approach to studying constitutional law. Hirschl's analysis, like many comparative accounts, tends to read the life of law primarily through the decisions and dicta of its most powerful agents, particularly the benches of apical courts. This is the story of law told by official legal documents themselves: as a top-down procedure through which national rules, generated by political elites and interpreted by expert professionals, are applied to the disputes of those who come *under* its jurisdiction. Constitutional law, in this story, descends into society to order and regulate religious life in a manner similar to the way in which it orders political, familial, and economic life.[10]

Descent is one way that constitutional law works—but it is not the only way. In addition to viewing constitutionalism as a top-down process of official legal interpretations and dicta, one can also view constitutional practice as a bottom-up process of popular mobilization whereby people appeal to constitutional language in order to elevate the status and legitimacy of their concerns.[11] Constitutional clauses about religion give state agents the authority to pronounce on matters of religion, but they also give citizens the opportunity to transform claims about religion into matters of public importance. To look at the work of constitutional law in this bottom-up way is to see constitutional litigation not as a process that relocates pre-legal conflicts into courtrooms, but as a process that produces for courts claims that fit the authorized categories of law. Viewed in this way, courts and constitutions appear less as institutions that wait around to resolve or regulate already-existing religious grievances than as enabling partners in generating and publicizing specific types of grievances using specific categories. That is, constitutional protections for religion (and, in the analysis that follows, Buddhism) do not simply

[10] Benjamin Berger refers to this as the 'conventional account' of law. See: Berger, B. L. (2015), *Law's Religion: Religious Freedom and the Constitutional Rule of Law*. Toronto: University of Toronto.

[11] Examples of this sort of perspective include, among others: De, Rohit (2013), Rebellion, dacoity, and equality: the emergence of the constitutional field in postcolonial India *Comparative Studies of South Asia, Africa and the Middle East* 34(2): pp. 260–78; Agrama, H. A. (2012), *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt*. Chicago: University of Chicago Press; Lev, L. (2007), 'Secularism IS a human right!' in M. Goodale and S. Merry (eds) *The Practice of Human Rights: Tracking Law Between the Global and the Local*. New York: Cambridge University Press, pp. 78–113.

enable judges to intervene in matters of religion, they also create opportunities for citizens to bring claims about religion to the courts in the first place.

Examined from this perspective, the most important questions to ask about the intersections of religion and constitutional law are not 'What did the highest courts decide?' but 'How did appeals to constitutional principles and litigation serve to make particular claims about religion persuasive and/or publically visible?' To look at legal action in this way is to see constitutional law not simply as an institution for ordering and managing social life, but as a mode of practice that provides incentives for the translation of various types of grievances and concerns into constitutional terms.

Such a view of law is not so unfamiliar. Scholars regularly point to these features of legal practice in cases of public-interest litigation and 'test cases'. For most observers, public-interest litigation differs from regular litigation in that, when it comes to these cases, litigants and lawyers seem less concerned with winning a favourable verdict than with using legal action as a platform for calling attention to a particular set of issues. It is a transparent fact that in instances of public-interest litigation constitutional court cases do not sit above or outside of politics, but function equally as venues for political action. Also visible in test cases is the often-unacknowledged relationship between the procedural rules of constitutional law and the way in which constitutional law works on the ground: the very same legal protocols and principles that ensure widespread access to courts and legal rights—for example, broad rubrics of standing and justiciability—can also provide avenues, even encouragements, for citizens to bring legal action.

When it comes to religion (and, as I will show, Buddhism) the possibilities for constitutional claim-making are wider than they would be for other categories in law. The polysemy of the category of religion permits its invocation in a wide variety of claims about rights and freedoms.[12] Appeals to one's religious rights or to religious freedom accompany all sorts of legal claims: claims about land, education,

[12] As many scholars have shown, religion is a broad and ambiguous category that can be invoked with regard to a vast array of human and superhuman goods: ideas, people, institutions, texts, regimes of exclusion, property, values, sacra, etc. To cite only a few: Smith, J. Z. (1982), *Imagining Religion*. Chicago: University of Chicago Press; Asad, T. (1993), *Genealogies of Religion*. New York: Johns Hopkins University Press; Sullivan, W. (2005), *The Impossibility of Religious Freedom*. Princeton, New Jersey: Princeton University Press.

sound, taxation, incorporation, commercial conduct, and many others. Indeed, in most modern constitutional contexts, legal authorities seem reluctant to pre-judge the bona fides or legitimacy of religious claims out of fear of violating the presumptively secular nature of state legal institutions[13] or encroaching on the authority and autonomy of religious clerics. This reluctance (which is not seen to the same degree when it comes to other constitutional categories) has provided further scope for would-be litigants to make a broad variety of constitutional claims about religion.

Buddhist constitutionalism in Sri Lanka

In what follows, I present an alternative story of how religiously preferential constitutions work, one that approaches the issue from the perspective of litigants.[14] I consider the opportunities for legal action produced by Sri Lanka's constitutional commitments to 'protect and foster' Buddhism contained in the Buddhism Chapter. The Buddhism Chapter first appears in Sri Lanka's 1972 Constitution and endures (with one small change, which I discuss below) in Sri Lanka's 1978 Constitution, which is currently in force. I argue that the constitutional prerogatives for Buddhism contained in the Buddhism Chapter have also had effects other than those suggested by Hirschl and those imagined by those who drafted Sri Lanka's constitution. Constitutional protections for Buddhism have not contained the spread of Buddhist claims on political life nor have they simply authorized the state to act in the best interests of Buddhism. The Buddhism Chapter's more profound effects lie in the way in which it has enabled and incentivized Sri Lanka's citizens—or, at least, those with adequate resources and time—to translate specific disagreements and political concerns into formal contests over the nature of Buddhism and the state's obligations to protect it. Constitutional protections for Buddhism have activated a culture of Buddhist-interest litigation, one that has increased the number and the visibility of grievances about Buddhism,

[13] Regarding the history and criticisms of modern law's claims to secularity, see: Sullivan, W., M. Taussig-Rubbo, and R. Yelle (eds) (2011), *After Secular Law*. Palo Alto: Stanford University Press.

[14] In discussing the activities of litigants, I am discussing complex agents. Litigants are, at once, the agents and products of legal action. They are citizens represented by, and mediated through, the language and arguments of lawyers. I use the term advisedly in this respect.

while also making those grievances matters of national concern. Constitutional protections for Buddhism have, counter-intuitively, amplified and multiplied—rather than allayed—public concerns and frustration over the well-being and status of Buddhism.

While special constitutional safeguards for Buddhism have been critical in incentivizing Buddhist-interest litigation, equally important has been the liberal side of the constitutional equation.[15] A culture of Buddhist-interest litigation has been fortified by two procedural rules for practising constitutional law. Drafters designed the protocols to add efficiency and accessibility to processes of judicial review and constitutional litigation. The first protocol, introduced in the 1972 Constitution, was the introduction of pre-enactment (ex ante) judicial review, which permitted citizens to challenge the constitutionality of legislation prior to its ratification, based on its anticipated (unconstitutional) effects. Although the window for challenging bills was brief (within one week of the bill being placed on the Order Paper of parliament), the incentives to do so were significant: challenges were heard directly by the island's highest administrative court;[16] decisions were final, and bills deemed unconstitutional, while not nullified, were made to undergo very stringent and daunting ratification processes. The second protocol, adopted in 1978, gave the Supreme Court original jurisdiction over all fundamental rights claims against the state. According to this protocol, citizens who alleged that government actors had violated (or were likely to violate) their constitutional fundamental rights, including rights to freedom of religion, could now

[15] I do not mean to insinuate that constitutional law is the only stimulant for Buddhist claim-making. Politics, education, economics, civil society organizations, nationalism, and a variety of other factors have influenced the tendency of Sri Lankan Buddhists to make public claims about Buddhism. There is a large and important literature that illuminates this history. To name only a few works: Tambiah, S. J. (1992), *Buddhism Betrayed? Religion, Politics, and Violence in Sri Lanka*. Chicago: University of Chicago Press; Kapferer, B. (1988), *Legends of People, Myths of State.* Washington, DC: Smithsonian Institution Press; Seneviratne, H. L. (1999), *The Work of Kings: The New Buddhism in Sri Lanka.* Chicago: University of Chicago Press; Deegalle, M. (2006), *Buddhism, Conflict, and Violence in Modern Sri Lanka.* New York: Routledge; Abeyesekara, A. *Colors of the Robe: Religion, Identity, and Difference*. Columbia, South Carolina: University of South Carolina Press, 2002

[16] *The Constitution of the Republic of Sri Lanka of 1972* (ratified 22 May 1972, herein: 1972 Constitution). See Article 54 and sub-parts. Under the 1972 Constitution, the highest court of administrative law was a specially designated Constitutional Court. Under the *Constitution of the Democratic Socialist Republic of Sri Lanka* (ratified 7 September 1978, herein: 1978 Constitution), it was the Supreme Court.

petition the Supreme Court directly without having to wend their claims through an upwards-spiral of higher-court appeals.[17]

The history of Buddhist-interest litigation in Sri Lanka cannot be studied through published court decisions alone. Despite a plethora of claims made by litigants, few published judicial decisions discuss the Buddhism Chapter directly. In addition, unlike other areas of Sri Lankan law, there are no clear jurisprudential pathways of legal precedent for the Buddhism Chapter in Sri Lanka. No single strand of court cases is universally recognized as a guideline for interpretation; no glossing of 'Buddhism' or 'protect' or 'foremost place' has achieved the status of legal doctrine. With some exceptions, it can be difficult to reconstruct the claims made by litigants from reading published court decisions. This article, therefore, draws not only upon the records of court decisions (which are read against-the-grain), but also on a larger and more diverse collection of published and unpublished sources. These sources include judicial opinions, affidavits, written submissions, petitions, newspaper articles, and oral interviews with lawyers and litigants.

The remainder of this article unfolds in two parts. In the first part, I consider two major historical events that formed the salient background of Buddhism Chapter litigation from the 1970s onwards: the joint rise of militant Tamil separatism and 'territorialized' Buddhist nationalism; and a change in the governing ideology of the state from welfare socialism to economic liberalism between the 1970s and 1980s. In the second, longer part, I turn from general historical considerations to a detailed examination of Buddhist-interest litigation, defined here as court cases in which litigants articulated grievances in terms of constitutional duties to Buddhism.[18] I analyse these cases by arguing that litigants have invoked the Buddhism Chapter by way of four distinct 'idioms of litigation', each of which uses constitutional protections for Buddhism to advance and publicize particular claims about what Buddhism is, what or who

[17] 1978 Constitution, Articles 17, 126.

[18] Unlike public-interest litigation in other contexts, the cases I classify as Buddhist-interest litigation in Sri Lanka do not always place Buddhism or the Buddhism Chapter in the foreground of petitions and legal submissions. Buddhist-interest litigation often invokes the Buddhism Chapter alongside other elements of law, such as constitutional fundamental rights of penal code provisions or zoning ordinances, etc. I also distinguish Buddhist-interest litigation from disputes among Buddhist monks over incumbency, succession and temple property, which are collectively referred to in Sri Lanka as Buddhist Ecclesiastical Law. On this distinction, see footnotes below.

threatens it, and how the state should safeguard its well-being. While these idioms of litigation have not always been legally successful, they have been politically influential, giving grievances made in the name of Buddhism—and made by actors who might otherwise lack a public platform—national visibility, importance, and legitimacy.

Through these two discussions—the first oriented broadly around major trends in Sri Lankan political, social, and economic history, and the second oriented more narrowly around Buddhist-interest litigation and legal change—it becomes clear that, thinking from the bottom-up, the work of constitutional law appears differently to the portrait painted by Hirschl. Invoking the Buddhism Chapter in Sri Lanka's courts has come to serve as a very powerful and very public method of making political claims religiously salient and religious claims constitutionally salient.

Sri Lankan history and Sri Lankan law

As with any legal history, the significance of law inside courtrooms reflects broader political, social, and economic debates circulating outside courtroom walls. Sri Lanka's constitutional duties to protect Buddhism have been rendered salient not only in the submissions of lawyers, but in the speeches of opposition politicians, the manifestos of Tamil separatist groups, the rhetoric of hawkish parliamentarians, the preaching of Buddhist monks, and the social and economic policies of prime ministers and presidents. More than others, two historical events, a violent civil war and a shift in state ideology, have made debates about the Buddhism Chapter especially important and fraught. The first shift came with the start of a long and violent civil war between the Liberation Tigers of Tamil Eelam, or LTTE, and the Sri Lankan government. This war gave distinct territorial overtones to constitutional duties to protect Buddhism. Both the LTTE and bellicose groups of Sinhalese Buddhist nationalists came to read the Buddhism Chapter as laying claim to the territory of Sri Lanka for Buddhists alone. For Tamil separatists, this interpretation of the Buddhism Chapter justified demands for an independent state that would be religiously impartial. For Buddhist nationalists, this interpretation justified military offensives to liberate Buddhist temples, shrines, historic sites, and villages from 'hostile occupiers' and to unify the country as a Buddhist island.

The second shift has been the transformation, from 1978 onwards, from a socialistic, managed economy to a liberalized economy, and the broad exposures to international trade, merchandizing, travel, and foreign aid that accompanied it. In this context, the protection of Buddhism came to be associated, in some cases, with the protection of Buddhist temples from the unwanted intrusions of a socialistic government and, in other cases, with the protection of Buddhist laypersons from the purportedly corrupting influences of industrialization and globalization. Before turning to the Buddhism Chapter's uses in legal action, therefore, it is important to consider the influence of these extra-legal conflicts and debates.

Secularizing separatism, territorializing Buddhism

The links between the Buddhism Chapter and Sri Lanka's civil war date back to the mid-1970s, when Tamil separatists began to oppose the policies of Sri Lanka's 1972 Constitution. The document that served as the main manifesto for Tamil nationalism, the Vaddukodai Resolution, explained the need for a separate state of Tamil Eelam (Tamil: *tamiḻīḻam*) in the island's north and east, in part as a response to the fact that Buddhism had been singled out for special privileges in Sri Lanka's newly ratified supreme law:

> Buddhism has been given pre-eminence in the constitution and declared to be the only religion that would enjoy state protection. Other faiths have no right to any protection except the right of being practised, in private. The Tamil nation comprises Hindus, Christians and Muslims, and the constitution has thus placed on them the stamp of second class citizens.[19]

In contrast to the Sri Lankan state, which protected only one religion, Tamil nationalists intended the desired state of Tamil Eelam to be one whose government would be committed to the 'equal protection and aid ... [to] all religions practised by the people in the State'.[20] In Tamil-language texts this meant a state 'that did not bend towards [a specific] religion' (Tamil: *matacārparṟa*).

The demands for a religiously impartial state—as opposed to the perceived pro-Buddhist state chartered by the 1972 Constitution—quickly became a centrepiece of several militant Tamil rebel groups

[19] Tamil United Liberation Front (TULF) (1977), The Vaddukoddai Resolution *Logos* 16(3): pp. 10–25.
[20] Ibid., p. 23.

in the late 1970s and 1980s. The group that would come to dominate the armed struggle for a new state, the Liberation Tigers of Tamil Eelam (or LTTE), publically committed itself to secularism and a repudiation of the Buddhism Chapter. In written propaganda, Tamil Eelam was regularly defined as a 'secular socialist state'. In speeches, the LTTE's leader, Velupillai Prabhakaran, described the group as an areligious force fighting against a Sri Lankan state in which 'Sinhala Buddhist chauvinism was the national doctrine'.[21]

From the late 1970s onwards, Tamil claims for a separate 'secular' state were mirrored in reverse in the claims of a growing number of pro-war Sinhalese politicians, religious leaders, and activists, who increasingly used the legal obligations contained in the Buddhism Chapter to defend and encourage the government's military action against the LTTE. In the discourse of Sinhala Buddhist nationalists, the state's constitutional commitments to Buddhism entailed obligations to defend Buddhist sacred sites in the Tamil-majority north and east of the island from Tamil vandals. In testimonies before a special presidential commission which was convened in the late 1970s to investigate incidents of Tamil-Sinhalese violence,[22] Buddhist witnesses from the Young Men's Buddhist Association blamed hostilities in part on 'the grave situation' endangering Buddhist 'cultural objects':

> [a]ncient Buddhist sites excavated and conserved by the Department of Archaeology have either been unofficially handed over to or allowed to be taken over by the non-Buddhists (Particularly Hindu Tamils) ... several sites in Jaffna Penninsula where ancient Buddhist ruins were found were completely converted to Kovils [Hindu temples] ... At present there is hardly a trace of their Buddhist origin.[23]

These charges built upon earlier accusations, made by Buddhists in the late 1960s, that Tamils in Jaffna and Batticaloa had sought to intimidate Buddhist monks and laypersons living in the area by

[21] Translated from Tamil. Liberation Tigers of Tamil Eelam (LTTE). *Heroes Day Speech 2006* (in Tamil), *Delivered by V. Prabhakaran*. Copy in possession of the author.

[22] Government of Sri Lanka (1980), 'Report of the Presidential Commission of Inquiry into the incidents which took place between 13 August and 15 September, 1977', *Sessional Paper no. VII*. Colombo, Sri Lanka: Government Publications Bureau.

[23] As quoted in n.a. (October 1978), 'Appalling fate of Buddhist antiquities', *The Buddhist*.

building Hindu shrines adjacent to Buddhist temples and by cutting down *bodhi* trees, which are sacred to Buddhists.[24]

By the early 1980s many politicians, activists, and Buddhist groups insisted that protecting Buddhism required protecting Buddhist holy places. Buddhist defence groups formed to mobilize Buddhist laymen and monks in defence of sacred sites. Prominent among these groups was the *Mavbima Surākīma Vyāpāraya* (Sinhala: Movement from the Protection of the Motherland), a collection of Buddhist political leaders (including a former prime minister), professionals, lay Buddhist organizations, and monks. They opposed a government-backed proposal to devolve power to Tamil-majority areas. From 1986 through to the early 1990s, the *Mavbima Surākīma Vyāpāraya* and other similar groups staged rallies, wrote editorials, and lobbied parliament, linking the recognition of Tamil political autonomy with the violation of the state's constitutional duties to protect Buddhism. The movements had militant overtones, calling on monks to take up arms to protect Buddhism through preserving the unity of the island.[25] Buddhist monks, Buddhist activists, and prominent politicians continued to voice these arguments loudly in the public sphere during the 1990s and 2000s, using territorial interpretations of the Buddhism Chapter to oppose attempts by the government to negotiate with the LTTE or to devolve political power to the provinces.

Shifting state ideologies

In addition to the spread of secular Tamil separatism and territorial Buddhist nationalism, competition over state ideology influenced the way in which Buddhists, in particular, read the Buddhism Chapter. From 1970 to 1977, Sri Lanka's government fell under the control of a government, led by Sirmima Bandaranaike's United Front, that was committed to implementing policies of welfare socialism. These

[24] Kemper, Steven (1991), *The Presence of the Past: Chronicles, Politics, and Culture in Sinhala Life*. Ithaca: Cornell University Press, pp. 148–60; Pfaffenberger, Bryan (1990), The political construction of defensive nationalism: The 1968 temple-entry crisis in northern Sri Lanka *The Journal of Asian Studies* 49(1): pp. 78–96.

[25] Schalk, P. (1988), Unity and sovereignty: Key concepts of a militant Buddhist organization in Sri Lanka in the present separatist conflict in Sri Lanka *Temenos* 24: pp. 55–87; Amunugama, S. (1991), Buddhaputra and Bhumiputra? *Religion* 21: pp. 115–39; Abeysekara, A. (2001), The saffron army, violence, terror (ism): Buddhism, identity and difference in Sri Lanka *Numen* 48(1): pp. 1–46.

policies increased state control over many aspects of economic and social life. Bandaranaike's government rapidly extended state control over land, trade, industry, media, education, and religion.[26] Between 1970 and 1976 her government nationalized over one million acres of privately held land, established over 100 state corporations to run vital sectors of the economy, and passed legislation allowing the state to take over many private businesses.[27] The government also introduced policies to manage religion, including laws mandating that all Buddhist monks should be issued with identity cards, that religious education come under closer state scrutiny, and that all religious communities gain government approval before building or renovating places of worship (see below).

Beginning in 1977, a new United National Party-dominated government, led by J.R. Jayewardene, reversed Bandaranaike's policies and began a programme of liberalization aimed at encouraging an open, modern, 'righteous' (Sinhala: *dharmistha*) society. With this reversal came new interpretations of the Buddhism Chapter. Under Jayewardene, the government aimed to reduce the state's reach into industry and family life, making businesses more independent and citizens less reliant on public subsidies. It established free trade zones on the southwestern coast, privatized state cooperatives, encouraged foreign investment, and used international loans to finance large development projects in the island's rural areas. In public addresses, Jayawardene suggested that what was good for the nation's industrial order was good for the nation's religious order. Jayawardene approached the promotion of Buddhism in free-market terms, insisting that '[t]he Buddha never for a moment thought that it was possible to reform society through legislation'.[28] According to Jayawardene, the government could not legislate Buddhist values or practices; the protection of Buddhism had to be undertaken independently, by individual Buddhists.

Both ideologies of government—Bandaranaike's state-centric socialism and Jayawardene's privatizing liberalism—found expression in the legal debates concerning Buddhism from the 1970s onwards.

[26] De Silva, K. M. (2005), *A History of Sri Lanka*. Colombo: Vijitha Yapa Publications, pp. 663–8; Winslow, D., and M. D. Woost (2004), *Economy, Culture, and Civil War in Sri Lanka*. Bloomington: Indiana University Press.

[27] Peebles, P. (2006), *The History of Sri Lanka*. Westport, Connecticut: Greenwood Press, pp. 124–5.

[28] Quoted in: Kemper, S. (1991), *The Presence of the Past: Chronicles, Politics, and Culture in Sinhala Life*. Ithaca: Cornell University Press, p. 176.

Each ideology encompassed a different understanding of what it meant to protect Buddhism. Defenders of these understandings clashed in courtrooms. The managed welfare state of the Bandaranaike government appeared to associate protecting and fostering Buddhism with a paternalistic act of state intervention, of using laws and state agencies to administrate Buddhist monks, sites, and institutions. Jayawardene's liberalism appeared to treat the protection of Buddhism as involving indirect support for Buddhists. Jayawardene gave state money generously to Buddhist causes (for example, for temple upkeep, monastic education, and public Buddhist rituals), yet he was careful to place institutional boundaries between the state and religion, rejecting strenuously the idea of monks influencing politics and refusing to create ordinances that policed Buddhist morality through, for example, restricting alcohol or meat consumption.[29]

Also implicated in the political and ideological contest between the United Front's socialism and the United National Party's liberalism were competing ideas about the costs and benefits to Buddhism of Sri Lanka's integration into broader networks of global capitalism. Interpreted through Jayewardene's ideology, Buddhism benefited from an open economy because exposure to international markets and foreign investment enhanced national prosperity, and that prosperity increased the resources available for promoting Buddhism. At the same time, global exposure also contributed to public anxieties over the malignant effects of foreign influences and organizations on Sri Lankan Buddhism.

Idioms of Buddhist-interest litigation in Sri Lanka

Idioms of litigation

Since the 1970s, in this context of intermittent civil war and economic change, Sri Lankan litigants regularly appealed to the island's courts to enforce the state's constitutional duties to protect Buddhism. Through legal action, Sri Lankans expressed a range of concerns about religion, politics, economics, war, and globalization coopting the language of protecting Buddhism. This Buddhist-interest litigation can be grouped into four types—four 'idioms of litigation'—according

[29] Ibid., pp. 177–80.

to the major assertions made regarding what Buddhism is, how the state ought to defend it, and what or who threatens it. In the first idiom, litigants sought to protect Buddhism's autonomy from unwanted government interventions. In the second idiom, litigants sought to protect Buddhist orthodoxy against what they considered heterodox Buddhist monks. In the third idiom, litigants sought to protect Buddhist places from non-Buddhist interlopers. In the fourth idiom, litigants sought to protect Buddhism against foreign 'profaners'. In all cases, Buddhist-interest litigation, even when it failed to generate an affirmative judgment, provided potent opportunities for expanding the importance of religious claims in public life and potent incentives for litigants to rethink and reclassify complex social realities in terms of constitutional commitments to promote Buddhism.

Idiom one: protecting Buddhist autonomy from the state

Sri Lanka's constitution specifies special protections for Buddhism, but it does not specify the precise relationship between religious authority and civil authority. The language of 'protecting and fostering' Buddhism was chosen because it neither implied nor denied the possibility of state oversight *over* Buddhist institutions and monastic life.[30] In the context of the nationalizing and socialist policies of the Bandaranaike government, litigants used this evasive language

[30] Schonthal, Benjamin (2014), Constitutionalizing religion: The pyrrhic success of religious rights in postcolonial Sri Lanka *Journal of Law and Religion* 29(3): pp. 470–90. This also means that the constitution does not clarify the relationship between Buddhist monastic law (Vinaya) and state law. A number of challenging questions arise as a result of this lack of clarity: to what extent should civil courts treat monastic legal texts or dicta issued by senior monks as sources of law? If monks, alone, have the training and authority to speak for Vinaya, then how can lay Buddhist (or non-Buddhist) judges interpret and apply them? If civil courts are empowered to enforce Vinaya, should constitutional civil rights and guarantees of equality and nondiscrimination be taken into consideration? Despite these questions, there is one area of monastic law that is currently enforced and interpreted by civil courts: matters relating to property (and, relatedly, incumbency and succession in temples). Since the nineteenth century, these matters have been addressed in a special tradition of (secular) common law, called Buddhist ecclesiastical law. This tradition is rooted in Vinaya provisions but adjudicated in civil courts and interpreted with special reference to civil court precedents, which often date back to the British colonial period. A thorough collection and analysis of these decisions is available in Weerasooria, W. S. (2011), *Buddhist Ecclesiastical Law*. Colombo: Postgraduate Institute of Management. For a more general discussion of these and related issues, see: Schonthal, Benjamin (2014), 'The Legal Regulation of Buddhism in Contemporary Sri Lanka' in R. French

to implicate Buddhism in broad debates about the appropriate aims and limits of state regulation. In particular, litigants invoked constitutional protections for Buddhism and for religion-in-general to attack attempts to expand the state's management of religious life.

Constitutional duties to protect Buddhism, along with new protocols of judicial review, figured prominently in two important judicial review cases, from 1973 and 1976. In these cases, litigants sought to compel the island's highest administrative court at that time, the Constitutional Court, to review the policies of Bandaranaike's United Front government. The challenges related to two government bills. The first bill, entitled the 'Places and Objects of Worship Bill', specified a list of registration and application requirements that all religious groups, including Buddhists, would have to fulfil in order to gain official approval to build or renovate a site of religious worship. The second bill, entitled the 'Pirivena Education Bill', gave the government greater control over Buddhist schools (*pirivenas*), where most of the island's monks were educated. An opposition minister of parliament, Prins Gunasekera, an accomplished lawyer and outspoken politician, challenged the first bill.[31] A much larger collection of petitioners challenged the second bill. These petitioners included leaders from Colombo's major lay Buddhist organizations,[32] 11 senior Colombo-area monks, and a senior civil servant.

In using the Buddhism Chapter to petition for judicial review, petitioners framed their concerns about the centralizing ambitions of the Bandaranaike government in terms of the state's powers over Buddhist life. One can infer the importance of petitioners' political interests from the fact that the very people and organizations that argued most fervently in favour of the state's supervisory powers over Buddhism during the constitution-making process, now offered equally passionate arguments against such powers in court.[33] The petitioners argued that the proposed government bills violated the

and M. Nathan (eds) *Buddhism and Law: An Introduction*. Cambridge: Cambridge University Press, pp. 150–67.

[31] Gunasekera was elected on the United Front ticket, but crossed over to the opposition in October 1971. Ceylon Daily News (1978), *Ceylon Daily News' Parliament of Sri Lanka, 1977*. Colombo: Associated Newspapers of Ceylon, p. 79.

[32] The YMBA, ACBC, BTS, Mahabodhi Society, and Sasana Sevaka Samithiya of Maharagama.

[33] The YMBA, ACBC, and Mahabodhi Society had all been advocates of a creating a new government-run Buddhist council to oversee Buddhist affairs on the island.

terms of the Buddhism Chapter because they subordinated Buddhist institutions to non-Buddhist (secular or anti-Buddhist) state authority.

In the first case, concerning the Places and Objects of Worship Bill, the petitioning politician from the opposition argued that requiring Buddhist groups to gain approval from the Ministry of Cultural Affairs to build a Buddhist temple would be to destroy 'a historical right and freedom that has been enjoyed by Buddhists for over 2500 years, of freely practising and propagating the Buddha Dhamma'.[34] He argued that the bill, in its requirement that Buddhists gain government approval, would subject Buddhism itself to 'subtle, anti-religious, anti-cultural' influences.[35] This, he asserted, was because 'anti-Buddhist' Trotskyite and Communist ministers (key coalition members in the United Front government) controlled the relevant ministries.

The collection of petitioners in the second case, concerning the Pirivena Bill, made similar arguments regarding the proposed controls over monastic education. Any attempts by the state to extend regulatory powers over Buddhist schools, they argued, would be to 'interfere with the autonomy of Buddhist institutions', to 'usurp' monastic property and to 'take over effective control' of Buddhist education.[36] In making these arguments, petitioners deployed a capacious definition of Buddhism, which encompassed places, practices, people, values, teachings, and customs, all of which, they insisted, thrived solely in the absence of government involvement. The protection of Buddhism, they urged, required the withdrawal of the state from a broad zone of Buddhist institutional autonomy.

In two public and reported decisions, judges of the Constitutional Court, many of them sympathetic to the government and appointed by Bandaranaike herself,[37] defended the legality of the government's bills and, in so doing, offered differing definitions of Buddhism and how the state ought to protect it. In the first case, the court behaved in a manner consistent with Hirschl's predictions. It dismissed Buddhists'

[34] Government of Ceylon (1973), 'Decision of the Constitutional Court on Places and Objects of Worship Bill' in *Decisions of the Constitutional Court of Sri Lanka*. Colombo: Registry of the Constitutional Court, p. 28.

[35] Ibid. Bandaranaike's United Front coalition had, at that time, a strong Trotskyite and Communist Party presence.

[36] Ibid.

[37] Jayawickrama, N. (2012), 'Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective' in A. Welikala (ed.) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory, Practice*. Colombo: Centre for Policy Alternatives, pp. 43–122.

religious concerns, rejecting claims that government ministers might execute an anti-Buddhist agenda. The court pointed out that the bill, which had been drafted in order to regulate *all* religions, did not especially disadvantage Buddhism per se. However, although it rejected Gunasekera's petition, the court unwittingly gave credibility and visibility to important aspects of his argument. Aside from the publicity generated by the petition, the petitioner gained an important affirmation of sorts. In the detail and length of the judges' arguments (discussed below) about why Buddhism was not damaged by the Places and Objects of Worship Bill, the court found itself indirectly affirming the need for Sri Lanka's judiciary to look closely at the effects of government policies on Buddhism. Therefore, even though the Constitutional Court ultimately rejected the specific rationale behind Gunasekera's claims, it validated publically one of his larger claims: that the state had a special obligation to safeguard Buddhism, and that obligation could override and challenge the government's policies of nationalizing the island's institutions.[38]

The decision in the first case not only (re)affirmed the necessity of protecting Buddhism, it led the court to advance a particular definition of Buddhism. To make the case that the bill did not offend Buddhism, judges interpreted Buddhism through the lens of First Amendment jurisprudence in the United States of America. Citing the American Supreme Court decisions involving the religious 'free exercise' rights of polygamous Mormons in Idaho and proselytizing Jehovah's Witnesses in Connecticut,[39] the Sri Lankan Constitutional Court insisted that, notwithstanding its privileged place in the country, Buddhism could be analysed like any other religion, and therefore could be divided into two separate aspects: 'religion' which the court glossed as religious conscience, and 'religious practice' which the court glossed as an 'expression' of religion 'by overt acts'. While the state must not impede the first, it could justifiably limit the second. Relying on American jurisprudence, the court advanced the argument (a specious one for many Buddhists) that building places of Buddhist worship was simply a *form* of religious practice rather than 'religion' and could therefore be limited without impinging upon 'Buddhism'.

[38] Government of Ceylon (1976), 'Decision of the Constitutional Court on Pirivena Education Bill' in *Decisions of the Constitutional Court of Sri Lanka (Vol. IV)*. Colombo: Registry of the Constitutional Court, pp. 6, 8.

[39] *Cantwell v. Connecticut* [310 U.S. 296 (1940)], *Davis v. Beason* [133 U.S. 333 (1890)] (incorrectly cited as '*Davies v. Beason*').

In the second, Pirivena Bill case, the Constitutional Court bisected Buddhism in a similar way to respond to petitioners' claims. In this case, the court majority invoked an almost identical contrast between a primary religious belief (which they termed 'religion') and a secondary religious 'manifestation'. However, the relevant question here was not whether *pirivena* education should be classified as either religious belief or religious manifestation, but if *pirivena* education should be viewed as *religious* at all: did Buddhist monastic schools constitute a 'manifestation' of 'the Buddhist religion'? In a split opinion, the two-justice majority relied on another act of bisection to insist that Buddhist schools were not, in fact, part of Buddhism. It argued that one's religious beliefs were completely distinct from the creation and maintenance of religious institutions:[40] the first was a protected 'religious right', the second was not.

In these early cases concerning the Buddhism Chapter, petitioners invoked constitutional duties to Buddhism as part of an effort to challenge the government and its policies. Arguments about Buddhism merged with, and served as proxies for, conflicts over political commitments and governing ideologies. Petitioners harnessed legal arguments about protecting Buddhism as part of a broader aim to resist the Sirimavo Bandaranaike government and its managerial approach to governance. By using constitutional law, petitioners blended ideas about protecting and fostering Buddhism with political calculations; and they cast broader disputes as specific questions about what Buddhism was and how the state should conduct itself towards it: did the state's constitutional duties to Buddhism permit or even require the government to actively intervene in the administration and oversight of Buddhist institutions, or did they require the state to carve out for Buddhism a zone of autonomy from state actions? Did Buddhism refer to a broad range of people, places, properties, teachings, and institutions or to a narrower core of essential beliefs (leaving a penumbra of less essential practices upon which the state could legitimately intrude)?[41] Was protecting Buddhism the same as protecting 'religion'?

Answers to these questions not only implicated opposing conceptions of Buddhist temples and *pirivenas*, they coalesced into larger opposing

[40] Government of Ceylon, Decision on Pirivena Education Bill, p. 10.

[41] There is a doctrine of 'essential practices' in Indian jurisprudence on religion. Sen, R. (2010), *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*. New Delhi: Oxford University Press.

visions of religious governance, religiosity, Buddhist identity, and religious difference. Where petitioners rejected the binary splitting of religion into belief and practice, judges affirmed it. Where petitioners valorized the importance of religious autonomy, judges valorized the importance of formal neutrality. Where petitioners resisted the homology of Buddhism to other 'religions', judges assumed it. Where petitioners advanced a broad glossing of Buddhism, (most) judges chose a much narrower belief-centric definition. Arguments about Buddhism made political divisions religiously salient, and made religious divisions politically salient. In their invocation of the Buddhism Chapter, judicial review cases drew litigants and judges into asserting rival visions of Buddhism as part of challenging or supporting the constitutionality of the Bandaranaike government's policies. By invoking the Buddhism Chapter in the context of constitutional review, litigants required the country's highest administrative court to deliberate on—and to that extent, publically affirm—the state's constitutional duties to protect Buddhism as well as to judge the 'Buddhist-ness' of the Bandaranaike government. Therefore, even if the petitioners' own vision of protecting Buddhism did not prevail, the use of constitutional law elevated their assertions about Buddhism (which were also assertions about politics) to matters of national concern. As such, those assertions would be recorded in official documents, publicized through newspapers, and discussed by legal experts around the island.[42] As the petitioning lawyer in the first case explained to me, the goal was not so much to win the case; it was to 'create public opinion on the issue'.[43]

Idiom two: protecting Buddhist orthodoxy

If some litigants invoked the Buddhism Chapter as a way to contest the Buddhist-nature of government policies, other litigants invoked it to compel the state to enforce Buddhist orthodoxy. In 1977, at the fulcrum moment between the welfare socialism of the Bandaranaike years and the economic liberalism of the J. R.

[42] Interestingly, these two cases continue to appear prominently in many textbooks on Sri Lankan constitutional law. See, for example, Goonesekere, R.K.W (2003), *Fundamental Rights and the Constitution: A Case Book*. Colombo, Sri Lanka: Law and Society Trust.

[43] Interview with Prins Gunasekera by phone, 5 September 2014.

Jayawardene government, Sri Lanka's highest court took up the case of Ven. Nakulugamuwa Sumana Thero.[44] Ven. Sumana was a Buddhist monk who, having completed his law degree in Colombo, decided to submit the necessary documents to enrol as an attorney. As a matter of procedure, Ven. Sumana's name appeared in the newspaper along with other candidates who had made application to take their oaths as lawyers. Upon discovering that a Buddhist monk was preparing to become a lawyer, several Buddhist lay organizations in Colombo lodged formal objections with the Supreme Court, which had jurisdiction over application to the bar, requesting that his application to the bar be refused.[45]

The Buddhist groups' challenge initiated a highly public and controversial Supreme Court case. Noting the novelty of the matter, the chief justice referred it to a full, five-justice bench, declaring the case 'the first case of its kind in the annals of our Courts'.[46] Two groups of litigants appeared before the court, supporting and opposing Ven. Sumana's right to apply to the bar with equal vehemence. Ven. Sumana's application was opposed by virtually the same constellation of Colombo-based Buddhist lay organizations that had challenged the Pirivena Bill, including the Young Men's Buddhist Association, the All-Ceylon Buddhist Congress, and the Buddhist Theosophical Society. Ven. Sumana's application was supported by the same lawyer-politician who had challenged the constitutionality of the Places and Objects of Worship Bill, Prins Gunasekera. Gunasekera, in turn, had the support of several senior Buddhist scholars and monks, including the prelates from Ven. Sumana's monastic fraternity. If, in the earlier cases, Buddhist groups had united in criticizing the government, the question of monks in secular employment provided an occasion for new alignments, showing that the idea of protecting Buddhism could be used to support many different agendas and coalitions.

Although the matter before the court pertained to the specific activities of one monk, litigants used the case to advance much broader visions of Buddhism and the state's obligations to it. Those who opposed Ven. Sumana contended that protecting Buddhism required

[44] 'Ven.' refers to 'Venerable', which is the honorific title used to refer to Buddhist monks in Sri Lanka.

[45] Although referring to the state's constitutional duties to protect and foster Buddhism, the objections were filed under the terms listed in the Administration of Justice Act of 1973.

[46] *In the Manner of the Application of Rev. Sumana Thero to be Admitted and Enrolled as an Attorney-at-Law* (2005) 3 NLR 370.

the state to ensure that monastic life remained aloof from worldly concerns. If one monk were to become a lawyer, they argued, this would encourage other monks to do so. This could lead, in turn, to widespread violations of the Pali code of monastic discipline, the Vinaya Pitika, and that would threaten the 'larger interests of Buddhism'.[47] Those who supported Ven. Sumana's admission—including Ven. Sumana's monastic superiors and a leading Buddhist academic—also claimed to protect Buddhism. Protecting Buddhism, for them, meant securing the autonomy of head monks to supervise the conduct of the less senior monks in their fraternities. To protect Buddhism, they argued, the Supreme Court must accept the decision made by prelates in Ven. Sumana's own monastic fraternity to permit his admission to the bar.

These competing visions of Buddhism split the judges on the court. A three-justice majority supported Ven. Sumana's application and affirmed the idea that the ultimate evaluator of monastic conduct ought to be the prelates of individual monastic fraternities, rather than state-court judges' interpretations of Pali texts or the opinions of monks from outside of that fraternity. In this case, they insisted, Ven. Sumana's direct monastic superiors must be regarded as 'final arbiters' whose dicta 'can hardly be questioned by this court and must be accepted by us ... [as] the only evidence before us'.[48] As with the cases above, Supreme Court justices justified their ruling according to a particular definition of Buddhism. In this case, the court majority divided Buddhism into a core set of 'doctrine and belief' that are 'immutable', and a secondary system of 'discipline and administration [that] are naturally subject to modifications'.[49] Norms of monastic conduct—and even the Vinaya Pitaka itself—fell into the second category because, the majority insisted, different monastic fraternities used different redactions of the Vinaya and thus followed slightly different sets of rules.[50] The majority reasoned that because standards of monastic conduct changed from fraternity to fraternity (unlike Buddhist doctrine), devolving disciplinary authority over monks to those fraternities could not be avoided nor would it 'ruin' Buddhism as a whole. The majority also declared that the lack of a single source-text for assessing monastic comportment made any attempt to audit monks' behaviours a matter that was 'purely ecclesiastical in

[47] Ibid., pp. 370–1.
[48] Ibid., p. 373.
[49] Ibid., p. 374.
[50] Ibid.

nature' and 'outside the pale of civil law'. As 'secular' authorities, they asserted, judges must not present themselves as religious experts.

Through their petitions, opponents and supporters of Ven. Sumana made public claims about the importance of protecting Buddhism in the form of two competing ideas about what threatened Buddhism: supporters claimed that by assessing the piety of Buddhist monks, the state risked violating the autonomy of the *sangha* (the community of Buddhist monks). It also risked improperly arrogating for itself 'ecclesiastical' authority. Opponents claimed that by refusing to intervene in disputes over orthodoxy, the state risked a gradual degradation in monastic discipline and, thus, over the long term, a more general damaging of Buddhism. Like the petitioners against the government bills in the first idiom of litigation, petitioners against Ven. Sumana's application recruited the country's highest court into debates over the nature and valid sources of Buddhist authority. In discussing the ostensibly singular act of 'protecting and fostering' Buddhism, litigants made questions over Buddhist orthopraxy and authority matters of state concern. In the years that followed, litigants would continue to do so in court cases involving, among other things, monks working in salaried employment as social workers and monks who wanted to drive cars.[51]

Looking only at official legal documents, like court decisions,[52] one might conclude that the court ruling resolved the matter. (The court ruled that monks could, in fact, apply to become lawyers.) Viewed from the perspective of the litigant, however, these petitions appear to have had a different effect. Through litigation, petitioners raised the profile of debates over Sumana's conduct and the need to protect Buddhism. That is, they brought difficult, divisive questions into a highly visible and public arena. This had important consequences for Sumana himself. Although a majority of the Supreme Court affirmed his right to make application to the bar, ultimately negative public

[51] See *Warapitiya Rahula Thero v. Commissioner General of Examinations and Others* (2000) 3 SLR 344; *Paragoda Wimalawansa Thero and Others v Commissioner of Motor Traffic* (2014), unreported judgment with the author.

[52] In three years of trying, I was unable to locate the file for Ven. Sumana's case in Sri Lanka's Supreme Court archives. Filing challenges, along with the recent destruction of files from a variety of higher judiciary cases (for reasons of insufficient storage space), have made the submissions from court cases from the 1970s difficult to locate. This case proved particularly challenging insofar as the judges' opinion lists only the number of Ven. Sumana's application to the bar and not a standard record number.

attention generated by the court case seems to have swayed things in the opposite direction. When Ven. Sumana returned to the Supreme Court to take his oaths as a lawyer, the same bench denied him entrance on account of technical, sartorial requirements: even if a monk could be admitted to the bar, the chief justice asserted, a saffron robe could not substitute for the customary black and white suit of an advocate.[53]

Idiom three: protecting Buddhist places

One can see certain trends in the Buddhist-interest litigation cases examined so far: by invoking the Buddhism Chapter in court, litigants translated specific concerns into broad, public, consequential claims about Buddhism. Through the use of constitutional language and litigation, litigants conflated opposition to government policies with contests over the state's duties to secure Buddhism, and they joined together opinions regarding the conduct of Buddhist monks with public disputes about the state's duties to conserve Buddhist orthodoxy. One can extend these observations further by looking at a third genre of cases. In these cases, litigants interpreted the state's duties to protect and foster Buddhism as a requirement that the state would intervene to defend Buddhist temples, archaeological sites, buildings, properties or villages against non-Buddhists who, they insist, might harm them. These cases have roots both in the context of Sri Lanka's civil war in the 1980s and in the context of increasing exposure to transnational agencies and actors in the 1990s and 2000s. In these cases, litigants treated the protection of Buddhism as a requirement to protect purportedly Buddhist spaces. Litigants' definitions of Buddhism in these instances, therefore, directly opposed those offered by the Constitutional Court in the first idiom: true Buddhism was not primarily a collection of doctrines, beliefs, and states of conscience, nor was it a combination of distinct beliefs

[53] According to the chief justice: 'if [Ven. Sumana] appears before us, he must be clad in the correct attire. Otherwise we refuse to see him. Likewise if a lawyer comes here in a bush shirt we won't tolerate him in our Courts. Now that there are many members of the fair sex functioning as Attorneys-at-Law do you want us to allow them to sit at the Bar Table in bell-bottoms and tight skirts?' Amerasinghe, A. R. B. (1986), *The Supreme Court of Sri Lanka: The First 185 Years*. Colombo: Sarvodaya Book Publishing Services, p. 92. I am grateful to Dr Wickrama Weerasooria for directing me to this passage.

and manifestations. Buddhism, as a religion, depended equally upon temples, shrines, *bodhi* trees, gifted properties, and villages of Buddhist patrons—in other words, on the spaces inhabited and visited by Buddhist laypersons and monks.

In these cases, litigants rendered constitutionally legible and made politically salient different types of conceptual, legal, and political boundaries. Rather than using constitutional protections for Buddhism to advance the interests of a particular political bloc or a particular group of Buddhist monks, in these cases litigants used constitutional litigation to reify a stark distinction between Buddhism and other religions. They not only introduced to the country's apical courts arguments about the superior status of Buddhism vis-à-vis other religions, they advanced arguments about the incommensurability of Buddhism with other religions. This line of argument assumed that even the terms 'Buddhism' and 'religion', along with their Sinhala approximations (*buddhāgama* and *āgama*), should not be used to name the Buddha's dispensation because those terms suggested equality and isomorphism among all traditions.[54] By using those terms, Buddh-*ism* (Sinhala: *buddha - āgama*) appeared analogous to Hindu-*ism* (S: *hindu-āgama*) and Christian-*ity* (S: *kristiyāni-āgama*).

The idea that the Buddha's dispensation was more than simply a form of religion (*āgama*), in fact, influenced those who drafted Sri Lanka's Second Republican Constitution of 1978.[55] In the 1978 Constitution, a United National Party-dominated select committee of parliament made one small but salient change to the Buddhism Chapter at the last possible moment: it altered the phrase 'it shall be the duty of the state to protect and foster Buddhism' to read '... to protect and foster the Buddha Sasana (Sinhala: *buddha śāsanaya*)'. Choosing 'Buddha Sasana' rather than Buddhism (Sinhala: *buddhāgama*) highlighted the distinctiveness of the Buddha's

[54] Malalgoda, K. (1997), 'Concepts and Confrontations: A Case Study of Agama' in Michael Roberts (ed.) *Collective Identities Revisited*. Colombo: Marga Institute Press, Vol. i, pp. 60–3.

[55] The 1978 Constitution introduced an executive president (in a mixed executive, Gaullist-style system), introduced proportional representation, strengthened fundamental rights, and other changes. Minimal alterations were made to constitutional policies towards religion, other than the procedures of justiciability relating to fundamental rights for religion. Among the important works on the 1978 Constitution, generally, see: Wilson, A. J. (1980), *The Gaullist System in Asia*. New York: Macmillan. Welikala, A. (ed.) (2015), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*. Colombo: Centre for Policy Alternatives.

dispensation; everything else was simply 'religion'.[56] Choosing 'Buddha Sasana' also supported those who favoured a territorialized definition of Buddhism because *buddha śāsanaya* implicated not only the Buddha's teachings but his entire legacy, which included properties, shrines, statutes, temples, other material objects, and geographic spaces.[57]

Litigants rendered this view of protecting Buddhism—as explicitly including the protection of Buddhist spaces—nationally visible and legally influential in three cases from 1987, 2003, and 2008. In each case, Buddhists petitioned the Supreme Court, requesting that it require the government to guard Buddhist places (temples, historic sites, villages) from threats by Hindu Tamils, Christians, and Muslims, respectively.

One of the most important instances of constitutional action of this type occurred in 1987 in a Supreme Court case that one justice referred to as 'the most important and the most far-reaching that had ever arisen in the history of our courts'.[58] In a climate of deepening political rifts[59] and escalating hostilities between the government and the LTTE (including a recent LTTE attack on Buddhist monks), a number of lawyers, politicians, and Buddhist groups submitted judicial review petitions to the Supreme Court contesting the constitutionality of two pieces of legislation designed to give greater political autonomy to Tamil-majority regions of the island in the north and east.[60] Among the Buddhist petitioners, the Colombo-based lay organization of the Young Men's Buddhist Association filed a substantial petition. It argued that in order to fulfil its obligations to protect Buddhism, the

[56] This is unlike the Thai constitution's use of the term, for example, which uses the vernacularized version of the Pali term *sāsana* to apply to all religions. Thank you to David Engel for pointing this out.

[57] On the meanings of *śāsana* see: Carter, J. R. (1977), A history of early Buddhism *Religious Studies* 13(3): pp. 263–87.

[58] *In the Matter of the Thirteenth Amendment to the Constitution and Provincial Councils Bill* (1987) 2 SLR 333 (Wanasundera J. dissenting).

[59] These rifts primarily involved the role of the Indian government in brokering a peace deal between the government and the LTTE. By 1989, India would have 100,000 peacekeepers on the island acting as mediators in the conflict between the LTTE and the Sri Lankan government. For more on the complex history of this era see De Silva, K. M. and Wriggens, H. (1988), *J.R. Jayawardena of Sri Lanka*. London: Anthony Blond Quartet, Vol. II, pp. 656–60; Shastri, A. (1992), Sri Lanka's provincial council system: A solution to the ethnic problem? *Asian Survey* 32(8): pp. 723–43.

[60] The legislation included a parliamentary bill and a constitutional amendment designed to create nine provincial councils, including an Eastern and Northern Provincial Council.

state must guarantee the preservation, maintenance, and restoration of Buddhist historical sites and temples in the northern and eastern parts of the island. By proposing to devolve political authority to provincial governments, the group argued, the state was not only reneging on that duty, it was proposing to place control over those sites in the hands of non-Buddhists who had been engaged in a 'studied and sedulous campaign ... to obliterate all traces of places of ancient Buddhist worship'.[61] The Young Men's Buddhist Association's reading of the Buddhism Chapter failed to persuade a (narrow) four-justice plurality. However, it did find approval in two prominent dissenting opinions, one of which recognized explicitly the territorial implications of 'Buddha Sasana', the new term added in the 1978 Constitution:

> The expression 'Buddha Sasana' was advisedly substituted for the word 'Buddhism' which was used in the corresponding Article of the 1972 Republican Constitution. *The new expression is a compendious term encompassing all ancient, historic and sacred objects and places which have from ancient times been or are associated with the religious practices and worship of Sinhala Buddhists* ... (emphasis mine).[62]

This interpretation of the Buddhism Chapter gave public expression and validation to the Young Men's Buddhist Association's territorial definition of Buddhism. This definition and the text of the dissent continue to influence legal specialists and politicians in Sri Lanka.[63]

In recent years, litigants have used the courts as forums for giving new inflections to this territorial understanding of Buddhism. These inflections stress the protection of Buddhist places while also imagining those places as threatened by Christian proselytizers (not only Tamil militants) and as including Buddhist villages (not only temples and archaeological sites). Since the late 1990s, litigants have used territorialized interpretations of the Buddhism Chapter to challenge the building of Christian prayer centres in rural, predominately Buddhist areas. Even through the critical legal questions often pertain to zoning regulations, litigants foreground in their petitions appeals to protect the Buddhist demography and culture of villages. For instance, in one case, representatives

[61] Written Submissions on behalf of Young Men's Buddhist Association of Colombo, SC (Spl.) 15/1987, Paragraph 9. Copy with YMBA, Colombo, Borella Branch Library.

[62] 1987 2 SLR 312.

[63] In my discussions with Buddhist groups and lawyers in Sri Lanka, I have found that this dissent is referred to frequently. Moreover, one sees this (dissenting) definition affirmed in subsequent legal judgments such as SC(S.D.) 1/1994 *In the Matter of the Antiquities Ordinance.* Hansard, 3 May 1994, 1–5.

from the lay Buddhist organization, the Secretariat for Upliftment and Conservation of Cultural, Educational and Social Standards of Sri Lanka (SUCCESS), challenged the building of a new church near the town of Polonnaruwa, insisting, among other things, that the construction was 'obnoxious and/or repugnant' to the state's obligations to protect Buddhism, because 'the objective of the construction and occupation of said building [is] the spreading and /or propagation of a religion other than Buddhism in the predominately Buddhist District of Polonnaruwa amidst villages that comprise about 97% Buddhists'.[64] According to the petitioner, the protection of the Buddha Sasana required the state to protect Buddhist villages against non-Buddhists' attempts to build competing places of worship because this might lead to the spread 'a religion other than Buddhism'.[65] In the logic of these submissions, general concerns for the protection of Buddhism extend even to the demography of remote villages.

Through Buddhist-interest litigation, Buddhist organizations in the island's major urban areas of Colombo or Kandy claimed a legitimate interest—and legal standing—in the religious lives of agrarian communities dozens or hundreds of kilometres away. Protecting Buddhism, in these cases, assumes a further spatial dimension. Litigants use constitutional protections for Buddhism to argue not only for the necessity of state actions, but to pursue formal judicial recognition that Buddhists from one part of the country have a legitimate interest in the affairs of Buddhists in other parts of the country. That is, in the very framing of their petitions, particular Buddhist groups presented themselves as acting for 'the advancement and protection of economic, social and cultural standards of the *Sri Lankan Buddhists* (emphasis mine)'.[66] Moreover they implicitly maintain the idea of the whole of Sri Lanka as a single, continuous space for Buddhism.

Court cases such as the one described are often invisible in the official, public archive of constitutional law because they do not leave published judicial decisions. (In many instances, Christian or Buddhist litigants withdrew their petitions before any official decision was given, in order to avoid an anticipated unfavourable judgment.)[67]

[64] Written Submissions of Petitioner S. G. De Silva (1 November 2004), CA 2022/2003, *S.G. De Silva v. Lankapura Pradeshiya Sabha and others*, p. 2.
[65] Ibid., p. 11.
[66] Ibid., p. 3.
[67] Interview with Rev David Beiling, 1 April 2009; interview with M.A. Sumanthiran, 4 February 2009.

However, despite the lack of published records, cases like these frequently become vehicles for rallying public attention. According to Christian and Buddhist religious leaders and activist groups that I spoke with, as well as the lawyers who represented them, building non-Buddhist worship sites in Buddhist-majority areas remains a highly incendiary issue in modern Sri Lanka. Conflicts over church building, in particular, have led to arson and vandalism against churches and physical attacks on churchgoers. In these cases, legal appeals to the Buddhism Chapter enable litigants to treat local conflicts among religious communities as grand constitutional contests over Buddhism. Disagreements that emerge from contextual circumstances or local, personal acrimonies come to be interpreted in the framework of broad questions over how the state ought to act with respect to Buddhism: should the state take measures to control the building of non-Buddhist religious sites in areas with large Buddhist majorities, in the interest of 'protecting Buddhism'?

A lack of published rulings on these questions has not stopped litigants from provoking them. In 2008, the island's apical court heard a fundamental rights petition involving the protection of Buddhists living near a particularly important temple in the east of Sri Lanka, the *Digavapi* (sometimes transliterated *Deeghawapiya*) *Raja Mahavihara*. In the opinion of the chief justice (and many others), the case had special 'sensitivity ... from the perspective of Buddhists, not only in that area but in the entire country'.[68] While the Supreme Court's decision did not mention violations of the Buddhism Chapter, arguments about Buddhism's 'foremost place' were prominent in written submissions and courtroom arguments and were absolutely central in the media attention surrounding the case.[69] The case involved the building of 500 homes to house victims of the December 2004 tsunami. The homes were financed by the Saudi Arabian government and earmarked for Muslim displaced persons. While other housing settlements had been

[68] Determination SC (FR) 178/2008, V*en. Ellawala Medananda Thero and others v. Sunil Kannangara and others* (copy obtained from Office of the Attorney General). The temple is an important pilgrimage and holy site for Buddhists.

[69] Interview with lawyers involved in the case: M.A. Sumanitharan, 4 February 2009 and S. Aziz, 27 April 2009. The legal bases for the judgment are complicated. The settlements were built on land alienated through executive order from the state government and not through the usual procedures of land acquisition and distribution, which normally involve a land alienation committee plus oversight by the Provincial Council. In addition, the court found that the process of determining beneficiaries violated Articles 12(1) and 10 of the constitution insofar as it deliberately preferred Muslims.

built for Tamils and Sinhalese in other parts of the island,[70] the Muslim dwellings were located 13 kilometres south of the Digavapi temple, in a location halfway between the temple and a community of Buddhists who frequented the temple. In 2008, Ven. Ellawala Medhananda Thero, a Buddhist monk and senior member of the *Jathika Hela Urumaya* (or National (Sinhala) Heritage Party)—a political group well known for its pro-Sinhalese, pro-Buddhist politics—filed a petition to the Supreme Court claiming that, among other things, 'the settlement of such a large number of Muslims within close proximity to the Raja Maha Viharaya would block further expansion of Sinhala Buddhist residents who are now living close to the Viharaya'. This, in turn, would threaten the vitality of Buddhism and the existence of the temple in the area.[71] The petition acquired the support of approximately 20 intervening petitioners, including Buddhist monks (among them, the chief incumbent monk of the Digavapi Mahavihara), government servants' associations, and Buddhist lay organizations, many from Colombo.[72]

Most of the petitions submitted by Buddhists included a clear demand that the court should find the Muslim settlements illegal, in large part because they violated the state's obligation to protect Buddhism. In a key interpretive move, petitioners associated protecting Buddhism with preserving the links between the temple and the surrounding Buddhist community. According to one petitioner, the settlements threatened to 'encircle the *Deeghvapiya Bauddha Janapadaya* [Digavapi Buddhist region] with Muslim settlements' and, in so doing, to squeeze out Buddhists living in the area.[73] The petition argued, 'it is the duty of the State to protect and foster Buddha Sasana [and] the Buddha Sasana cannot

[70] Interview with M. A. Sumanthiran, 4 February 2009.

[71] Determination SC (FR) 178/2008, *Ven. Ellawala Medananda Thero v. Sunil Kannangara and others.*

[72] A number of major lay Buddhist organizations from Colombo intervened as petitioners, including: Dharmavijaya Foundation (Colombo), the Centre for Buddhist Action (Kotte), the Jathika Sanga Sammelanaya (Colombo), Government Servants Buddhist Association (Colombo), Buddhist Resource Centre (Colombo), Lanka Bauddha Sanrakshana Sabha (Colombo), the ACBC (Colombo), SUCCESS (Colombo and Kandy)

[73] Written Submissions, P. Dayaratne (4 August 2008), SC (FR) 178/2008 *Ven. Ellawala Medananda Thero v. Sunil Kannangara and others*, paragraphs 6–9. Dayaratne was a parliamentarian and government minister at the time (minister of 'plan implementation'). He was president of the *Deeghavapi Prathisanskara Sabhawa* (the Digavapi Reconstruction Council).

be protected if the appertaining village (*Goduru Gammanaya* [on this phrase see below]) is not maintained and preserved'.[74] In the words of another submission offered by the head of a Colombo-based Buddhist foundation:

It is our respectful submission that as aforesaid the said 500 houses are constructed and/or are being constructed in Deegawapiya Bouddha Janapadaya which is in the proximity of the most sacred place of worship of Buddhists. Further it is as clearly established [that] the said area consists of various historically and archeologically valuable and important places of Buddhists and the other communities. Further your Lordship's Court be pleased to take in to consideration the fact that the temples in the said Bouddha Janapadaya [Buddhist administrative region] including the connected institutions and the Buddhist monks survives and/or are being looked after by the members of the Buddhist community in and around the said Janapadaya. Therefore, the arbitrary colonization of the said areas with non Buddhists, undoubted[-ly] would cause severe prejudice to such institutions and would cause severe harm to the archaeological and historical values of the Non-Muslims specially to Buddhists.[75]

In the arguments of the petitioners then, to protect Buddhism the state must protect Buddhist places, and to protect Buddhist places the state must protect the networks of lay Buddhists who tend to the temple, donate money for its upkeep, and offer support to the monks who live there. The arguments suggested that protecting the Buddha Sasana required defending broader social geography, a *goduru gammana,* or 'prey village', upon which local monks can rely for food, work, and material support:

[A] Buddhist place of religious worship of the magnitude of Deeghavapiya cannot be maintained without a considerable segment of the population living close to the Vihara. It is respectfully submitted that historically every place of Buddhist religious worship had a *goduru gammana* ... It is the Petitioners most respectful submission that any decision taken in violation of the said policy is a violation of Article 9 and 10 of the Constitution.[76]

Litigants in the Digavapi case, as in the church-building cases, construed the state's duties to protect and foster Buddhism as duties

[74] Ibid., paragraph 20.

[75] Written Submissions, Dharmavijaya Foundation (24 November 2008), SC (FR) 178/2008, *Ven. Ellawala Medananda Thero v. Sunil Kannangara and others*, paragraphs 13–14.

[76] Written Submissions of Ven. Nannappurawe Buddharakkitha Thero (24 November 2008), SC (FR) 178/2008, Vihāradhipathi of Deeghavapiya Raja Maha Vihāraya, *Ven. Ellawala Medananda Thero v. Sunil Kannangara and others*, 'Conclusion' (no paragraph number indicated).

not only to secure places of worship but to preserve the broader (Buddhist) community in which those places of worship were situated. In this sense, they used constitutional law to present non-Buddhists as a particular kind of threat: by threatening to alter the religious demography of a particular area, they posed a risk to the existing reciprocity between Buddhist temples and lay devotees.

In the above cases, invoking the Buddhism Chapter in court worked to generate public visibility for a particular social and religious geography. That geography divided the island into a network of Buddhist spaces. Litigants mapped the Buddha Sasana onto a distinct terrain, the location and boundaries of which corresponded to the sites of Buddhist temples, shrines, *bodhi* trees, and Buddhist communities, sites that were presumed to be physically distinct from other religious and non-religious sites and to be singularly Buddhist properties. Equally pronounced in these cases was the assumption and assertion of the unity of Buddhist persons and practices in Sri Lanka, a unity that was threatened by LTTE separatism and Christian evangelism, and that permitted Buddhists in Colombo to appear in court on behalf of Buddhists living across the island.

Idiom four: protecting Buddhism from profanation

According to a fourth idiom of litigation, litigants appealed to constitutional duties to protect Buddhism as a way to call attention to and to intervene against (what they considered to be) threats posed by globalization and neoliberalism. These cases can be thought to relate to the act of 'profaning' religion, by which I mean the purportedly improper mingling and association of practices, ideas, motivations, and objects deemed religious with those deemed economic or commercial.

In two sets of cases—the first, a series of writ petitions submitted initially in 2005; the second, a collection of three separate judicial review petitions against parliamentary bills, beginning in 2000—Buddhist petitioners used the Buddhism Chapter to call upon the state to curb the profaning of religion. In the first case, the petitioner, a Buddhist monk, worried about the profaning of Buddhism itself and implored the court to prevent domestic and international retailers from selling clothing displaying the Buddha's image. In the second case, litigants used the Buddhism Chapter to demand that the state prevent the activities of Christian groups that threatened Buddhism.

Here, petitioners asked the court to rule unconstitutional three bills that aimed to give legal incorporation to Christian groups which, they claimed, used financial inducements to gain converts. These cases show similarities with the Digavapi and church-building cases above in their concern that foreign agents used their superior wealth and political influence to interfere with local Buddhist practices and people: in the case of Digavapi, it was 'overseas' (particularly Saudi Arabian) Muslim donors; in the case of Buddha images, it was international merchandisers; and in the case of church-building and proselytizing Christian organizations, it was global church networks.

In 2004 the Supreme Court heard the fundamental rights petition of Ven. Daranagama Kusaladhamma Thero, the head monk of a large Colombo temple. The petition requested that the court issue an order to the inspector general of police to arrest anyone involved in selling 'merchandised Buddha images which defiles and defame[s] Lord Buddha'.[77] The merchandise in question included swimwear manufactured by Victoria's Secret containing 'the image of the Buddha displayed on the breasts and crotch areas',[78] a pair of slippers with Buddha images on them, a candle made in the likeness of the Buddha, and a set of 'Buddha Bar' compact discs (on sale in a Colombo music store). In his petition the monk stated that the products would cause Buddhists to be 'emotionally hurt, annoyed and therefore offended', to be 'gravely provoked', and to be made 'emotionally turbulent'.[79] This would, among other things, contravene Buddhism Chapter obligations to protect and foster the Buddha Sasana.

In his submissions, the monk publically affirmed a categorical opposition between Western capitalistic imperatives and local Buddhist sensibilities:

> [I]f the Buddha's image is continuously used publicly on bikinis, on slippers, as candles and on music compact discs etc. it would loose [*sic*] the impact as an image of honour and pilgrimage. Further it would be perceived as a brand like 'Coca Cola', cream soda etc. ... Naturally the children teenagers and youth of such religion who are exposed to religious images in such casual and merchandised manner would loose [*sic*] faith and sincere respect in the philosophy stated by such religious leaders.[80]

[77] Petition, Ven. Daranagama Kusaladhamma Thero (2 June 2004), SC (FR) 237/2004, *Ven. Daranagama Kusaladhamma Thero v. Indra de Silva and others,* p. 7.
[78] Ibid., p. 3. The Sinhala newspaper *Silumina* ran an article on the product in May 2004.
[79] Ibid., pp. 2–3.
[80] Ibid., p. 9.

The petition accused global manufacturers of transforming the Buddha into a symbol for branding and marketing products. Ven. Kusaladhamma saw this as a significant threat to Buddhism. By using religious imagery as a marketing device, manufacturers (and those who sold their products) contributed to the 'decline in worshiping or observing practices on such religious image or symbol ... [and] this would not only affect the individual per se, it would affect his or her religion in observing and worshiping in the long run'.[81] According to Ven. Kusaladhamma's submissions, reproducing the Buddha's image on common items not only cheapened and degraded the image of the Buddha, it lead to the discrediting of Buddhism and therefore to a decline in membership and observance.

The submissions made by Ven. Kusaladhamma invoked the constitutional mandate to protect Buddhism in order to prevent a particular profaning effect of neoliberal commercialism: that of using Buddhist iconography for the selling of commercial products. This, he insisted, was an improper (and unconstitutional) mixing of religion and economics. Similar impulses appear in a second set of court cases. In these cases, litigants invoked constitutional protections to thwart a different kind of mixing between religion and economics. In three cases that were heard by the Supreme Court between 2000 and 2003, petitioners opposed the mixing of economic incentives and religious motives by Christian organizations, arguing that they constituted a threat to Buddhism. Here, however, it was not the commercial degrading of Buddhism that was at issue, but the 'unethical' use of wealth (notably, wealth deriving from foreign sources) to promote conversion to Christianity.

The cases related to attempts by three separate Christian organizations to gain legal incorporation through acts of parliament.[82] (At the time, this was a common procedure for legal recognition of religious groups in Sri Lanka.) In each case, a petitioner, who was affiliated with a Buddhist organization,[83] challenged the proposed incorporation bill, claiming, among other things, that by recognizing the particular Christian group, the government would be contravening its constitutional duties to Buddhism. In 2001, a

[81] Written Submissions, Ven. Daranagama Kusaladhamma Thero (22 August 2005), SC (FR) 237/2004, *Ven. Daranagama Kusaladhamma Thero v. Indra de Silva and others*, p. 8.

[82] In each case, the bill was introduced as a private members' bill.

[83] Nevertheless, these affiliations were not mentioned in the petitions or affidavits but were presented simply by citizens of Sri Lanka.

petitioner challenged the incorporation of an evangelical 'prayer centre' that conducted regular services, faith healing, and charity work.[84] In 2003, two separate petitioners challenged the incorporation of two other groups: one was an independent evangelical ministry whose stated aims included holding 'deliverance meetings', building places of worship, organizing workshops, undertaking social services, and holding religious services;[85] the other was an order of Catholic nuns who ran schools, assisted in medical centres, and undertook other social service activities.[86]

In all of the cases, petitioners advanced a particular argument concerning the links between religion, economic activity, and Buddhism. Take, for example, the first bill, entitled 'Christian Sahayane Doratuwa Prayer Centre (Incorporation) Bill'. The bill aimed at giving legal recognition to an organization in Colombo whose stated aims included the following:

(a) to encourage the active observance of Christianity;
(b) to promote the co-operation of the devotees who have faith in the prayer of God;
(c) to provide assistance and aid to need[y] Christians who seek assistance of the Corporation;
(d) to cure patients through prayer;
(e) to provide assistance to persons in order to solve their problems through prayer;
(f) to assist persons in various ways to enable them to obtain job opportunities.[87]

The bill also specified that the proposed corporation should have the powers to raise and borrow money, to maintain bank accounts and draft cheques, to enter into contracts, to administer trusts, to employ workers, to put money in investments,[88] to create corporate

[84] SC Special Determination 2/2001 (8 June 2001), *Regarding Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill*.
[85] SC Special Determination 2/2003 (18 February 2003), *Regarding New Harvest Wine Ministries (Incorporation) Bill*.
[86] SC Special Determination 19/2003 (5 August 2003), *Regarding Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill*.
[87] 'Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill' (27 April 2001), *Gazette of Democratic Socialist Republic of Sri Lanka*, p. II.
[88] Ibid., Section 4.

funds,[89] and to acquire, hold and sell property.[90] In the challenge to this bill, the petitioner pointed to the presence of both 'material' and 'religious' objectives in proposed articles of incorporation to argue that the Prayer Centre intended to use 'material rewards' and 'economic assistance' to 'induce' people to adopt Christianity:

> The cumulative effect of clause 3(a) to 3(i) is to convert people of other religions to Christianity by fraud and/or allurement. There is nothing objectionable in any institution helping people to find jobs, ease them from their problems or relieve them from any disease or pain quite legitimately, such objectives could be carried out through job agencies, hospitals, banks etc. What is objectionable is to provide material assistance in an attempt to convert the recipients to the Christian faith.[91]

According to the petition, neither the religious activities nor the 'material assistance' specified in the proposed bill alone violated the terms of the constitution. The problem was the mingling of the two. By mixing material and religious imperatives, the petitioners insisted, Christian groups would be able to leverage one against the other, using promises of better jobs, improved health or increased wealth—promises that were underwritten by the perceived wealth and resources of related, international Christian organizations—to draw Buddhists to Christianity. The result was 'unethical' proselytizing.

As with the above cases, litigants associated the profaned (use of) religion with distinct foreign threats. Petitioners pointed out that Christian groups represented not only an alternative faith (to Buddhism), but a different 'culture' and geography as well. The conversion of Buddhists to Christianity, in this view, threatened Sri Lanka's demographic, cultural, and religious uniqueness, and exposed vulnerable local people to powerful 'international' forces.

In 2003, the Supreme Court itself affirmed some of these claims, albeit in terse and evasive language. In the second incorporation case (relating to the incorporation of an evangelical ministry), a Supreme Court majority opinion insisted, without further explanation, that because the ministry seemed to mix economic and religious goals in its charter, its incorporation would be 'inconsistent with the Buddhism

[89] Ibid., Section 7.
[90] Ibid., Section 8.
[91] Written Submissions, P. A. Amarasekera (16 May 2001), SC (SD) 2/2001 *Regarding Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill*, p. 8.

Chapter'.[92] In the third case (relating to the incorporation of an order of Catholic nuns), the Supreme Court argued further that not only was such mixing 'inconsistent' with the Buddhism Chapter, a Christian organization of that type might 'impair the very existence of Buddhism or the Buddha Sasana'.[93] No further explanation was given in this case either.

In the cases above—all of which gained widespread attention in the national media as well as in the reports of human rights and advocacy groups abroad—litigants invoked the Buddhism Chapter in order to compel the state to protect Sri Lanka from global forces, religion from non-religion, Buddhism from the profane. In Ven. Kusaladhamma's petitions against images of Buddha, the division between the two corresponded to the contexts of producing, displaying, and using religious images. In the Buddhist petitioners' objections to incorporating Christian groups, litigants and judges divided religion from non-religion (or, rather, religious from non-religious activity) according to perceived motivations for acting: the first was motivated by 'spiritual' considerations, the second by 'material' ones. In both cases, litigants identified as threats not only individual merchandisers or retailers, or specific Christian social work organizations, but larger global forces: Western capitalists, international industrialists, even Christianity writ large.

Expanding and consolidating conclusions

Invoking the Buddhism Chapter in the courts provided a powerful mechanism for expanding the visibility and political importance of protecting Buddhism in Sri Lankan life. While Sri Lanka's courts have not always affirmed litigants' claims about Buddhism, the very act of legal contestation has elevated into matters of public concern questions about the nature of Buddhism, who is authorized to speak for it, and how it ought to be protected. In pursing these questions, courts and litigants have authorized and publicized certain types of religious divisions: between Buddhists and 'anti-Buddhist' governments, between Buddhist monks and laypersons, between orthodox Buddhists and heterodox Buddhists, between

[92] SC Special Determination 19/2003 *Regarding Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill*.
[93] Ibid.

Buddhists and non-Buddhists (Hindus, Christians, Muslims, Tamil separatists), and between Buddhism and the corrupting effects of global industry, transnational Christianity, and 'the West'. Litigants and judges have also endorsed the need to protect a variety of objects (for example, temples, educational institutions, practices, monks, texts, archaeological sites, villages, images, and conscience) *from* a variety of threats (for example, government agents, heterodox monks, Tamil Tiger militants, Muslim interlopers, international corporations, foreign governments, and Christian proselytizers).

Since its introduction in 1972, the range of interpretations of the Buddhism Chapter has expanded, keeping pace with and reflecting a growing number of political and social concerns. The very mechanisms designed to expand the availability of public law remedies—protocols of judicial review and fundamental rights jurisdiction inspired by traditions of liberal constitutionalism—have made available channels for making public, constitutional claims about Buddhism. In fact, today one even finds a consistent, almost routinized, legal format for Buddhist-interest litigation. In many cases, litigants use judicial review or fundamental rights petitions to advance specific arguments about how to protect Buddhism: they claim that a certain bill or a certain government initiative contravenes or is likely to contravene the state's duties to Buddhism and/or certain fundamental rights;[94] once the case has been granted leave by the Supreme Court, they then use the hearing to publicize and validate particular visions of Buddhism, threats to it, and the ideal nature of the state's relationship with it. This format has been employed frequently. As a result, Sri Lanka has seen a gradually expanding culture of Buddhist-interest litigation.[95] Among the key actors are Colombo's lay Buddhist organizations, such

[94] The 'other things' referred to frequently include infringements of fundamental religious rights outlined in Articles 10, 12, and 14[1][e].

[95] This culture of Buddhist legal activism relates not only to Buddhist-interest litigation but to the introduction or reformation of laws directly or indirectly relating to Buddhism. One prominent example of this was an attempt by the *Jathika Hela Urumaya* in 2004 to amend the constitution to make Buddhism 'the Official Religion of the Republic'. 'Nineteenth Amendment to the Constitution (Private Member's Bill)' (29 October 2004), *Gazette of Democratic Socialist Republic of Sri Lanka*, p. II. Earlier in 2004, the *Jathika Hela Urumaya* had attempted to introduce another private member's bill which, capitalizing on the momentum gained in the incorporation cases described above, aimed to criminalize 'unethical conversion' throughout the country. Berkwitz, S. C. (2008), 'Religious Conflict and the Politics of Conversion in Sri Lanka' in R. Hackett (ed.) *Proselytization Revisited: Rights Talk, Free Markets and Culture Wars*. London: Equinox, pp. 129–229.

as the All-Ceylon Buddhist Congress and SUCCESS. In all of the cases examined above, except one (the Ven. Kusaladhamma case involving the profanation of Buddhist images), petitioners represented and/or were members of prominent Buddhist organizations based in the island's capital. In certain cases, most visibly in the Digavapi case, Colombo-based Buddhist monks and monastic organizations also served as interveners or primary petitioners. Moreover, at the moment, a growing number of Buddhist groups—such as the recently ascendant *Bodu Bala Sēnā* (or Army of Buddhist Power)—appear to be developing their own legal advocacy departments.[96]

At the same time that Buddhist-interest litigation expands the visibility, salience, and perceived pertinence of Buddhism in public life in Sri Lanka, it also consolidates diverse types of disputes and issues through a particular format and language. In one sense, making legal claims about Buddhism remains an activity whose main participants, including the Supreme Court itself, are based in the country's largest city and capital. In another sense, legal interpretations of the state's constitutional duties to protect Buddhism are projected onto events, politics, and histories which occur in the areas farthest from Colombo: fighting between the Sri Lankan army and the LTTE in the north, the planting of Christian churches in the Dry Zone, the building of Muslim houses in the Eastern Province, the merchandizing of Buddha images in the United Kingdom and the United States of America. Buddhist-interest litigation has, therefore, an expanding ambit but a consolidating logic. It brings together and reframes a wide variety of issues and disputes from around the island through the legal claims of a relatively small number of actors in Colombo. In this process, lawyers, litigants, and judges focus—and recode—complex, situational disputes according to the rigid dialects of rights and obligations, and the adversarial structure of courtroom litigation.

Undoubtedly, Buddhist-interest litigation has succeeded in generating public visibility and legitimacy for particular, often partisan, visions of Buddhism and the potential harms to it. Petitions against Ven. Sumana's application to the bar represent one instance in which invoking the Buddhism Chapter in court generated sufficient public interest that, despite the Supreme Court's initial judgment, Ven. Sumana was ultimately unable to become a lawyer. Media coverage of the Digavapi and the incorporation

[96] Schonthal, B. (2016), Environments of law: Islam, Buddhism and the state in Sri Lanka *Journal of Asian Studies* 75(1).

cases also represent instances in which legal action successfully raised public awareness about the alleged harms to Buddhism posed by Muslims and Christians. The publicity-generating quality of Buddhist-interest litigation was especially pronounced in the case of Ven. Kusaladhamma's petition against profaning Buddha images. What began as one monk's attempt to influence the practices of local retailers and importers eventually fed into to a coordinated government initiative to introduce at UNESCO a resolution (which was eventually passed) on the 'Misuse of Religious Symbols and Expressions', which aimed to curb the 'increasing trend in the use of religious images in commercial items and other non-religious contexts'.[97]

In a self-perpetuating way, then, Buddhist-interest litigation not only publicizes litigants' claims, it also gives greater publicity to the Buddhism Chapter of the constitution itself. This leads to further legal and extra-legal attempts to actualize or defend Buddhism's 'foremost place'. Two interesting examples of this took shape in March 2010, six months after the Digavapi case (involving Muslim settlements near a Buddhist temple). In one case, a Sri Lankan-born Bahraini resident, Sara Malani Perera, was detained at the airport and held for one month at the Mirihana police station following complaints made to the Department of Buddhist Affairs that she had published books that were insulting to Buddhism.[98] In a roughly contemporaneous instance, the Sri Lankan government denied American rap-musician Akon a visa to enter the country on account of the accusation that one of his music videos had insulted Buddhism by showing girls dancing at the side of a pool near a Buddha statute.[99] In a more recent case from 2014, a British woman was detained and deported when two taxis drivers and a plain-clothes police officer registered their offence at the tattoo of the Buddha on her arm.[100] In all three instances, the government's constitutional duties to Buddhism appeared prominently in public and

[97] Interview with Kusaladhamma's lawyer, 4 April 2009. 'The misuse of religious symbols and expressions' (27 August 2004), *Agenda Item 170 EX/36, UNESCO:* http://unesdoc.unesco.org/images/0013/001362/136204e.pdf, [accessed 22 August 2015].

[98] Interview with Perera's lawyer, 18 August 2010.

[99] N.a., 'Akon refused visa after protests' (24 March 2010), *BBC World News*: http://news.bbc.co.uk/2/hi/8584546.stm, [accessed 10 January 2016].

[100] N.a., 'Sri Lanka to deport Buddha tattoo British woman' (22 April 2014), *BBC World News*: http://www.bbc.com/news/world-asia-27107857, [accessed 10 January 2016].

media discourse, even though these cases were dealt with as matters of criminal law, rather than constitutional law.[101] Similar dynamics also apply to national politics where government and opposition politicians have reacted to Buddhist-interest litigation by calling for the creation of subsidiary legislation to secure the well-being of the Sasana.[102] Although Buddhist-interest litigation tends to be centred in Colombo, one also finds constitutional discourse being used to justify and encourage religious and political activism in places far away from the capital. To take one dramatic example, in April 2012, two senior Buddhist monks used the language of the Buddhism Chapter to help rally the sentiments of large crowds of Buddhist demonstrators who had gathered outside of a Dambulla mosque demanding that it, and a nearby Hindu temple, be demolished because they had been built on Buddhist sacred ground.[103]

Giving constitutional privileges to Buddhism has made it an object of elite legal attention. It has given judges and constitutional courts formal authority to pronounce on matters of Buddhism. In practice, the judges of apical courts have tended to be reluctant in exercising that authority fully, for fear of violating the courts' claims to secularity, or encroaching on the ecclesiastical authority of monks, or engaging in conspicuous acts of Buddhist partisanship.[104] Yet, while judicial elites remain cautious, citizens and lawyers appear less reserved in using the authorized language and public forums of constitutional law in claims about Buddhism. In this respect, then, constitutional protections for Buddhism in Sri Lanka have served less as 'shields against the spread

[101] Perera and the British tourist were charged under the Chapter XV of the Sri Lankan Penal Code relating to 'Offenses Relating to Religion'.

[102] For example, in the weeks following the Perera and Akon affairs, parliamentarians called for new statutory protections for the Buddha Sasana. Somarathna, Rasika, 'Acts to protect Buddhism' (31 May 2010), *Daily News*: http://archives.dailynews.lk/2010/05/31/news01.asp, [accessed 10 January 2016].

[103] Groundviews (23 April 2012), 'Bigoted monks and militant mobs: is this Buddhism in Sri Lanka today?', *Groundviews: Journal for Citizens*: http://groundviews.org/2012/04/23/bigoted-monks-and-militant-mobs-is-this-buddhism-in-sri-lanka-today/, [accessed 10 January 2015]; Heslop, L. (2014), On sacred ground: The political performance of religious responsibility *Contemporary South Asia* 22(1): pp. 21–36. For another evocative example see Fernando, O. (2011), 'The Effects of Evangelical Christianity on State Formation in Sri Lanka', PhD thesis, Department of Anthropology, University of California at Santa Barbara, p. 305.

[104] The Supreme Court's decision in the Menzingen incorporation case might be considered an exception. Yet, even in that case, the court refused to pronounce specifically on what protecting Buddhism entailed. The most extensive interpretations of Buddhism's foremost place remain the majority and dissenting opinions of the Rev. Sumana case in 1977.

of religiosity', as Hirschl might have it, than as powerful vehicles for making religiosity public.

This study of Buddhist constitutionalism in Sri Lanka raises two important sets of questions for scholars. On the one hand, do the dynamics seen in Sri Lanka indicate something unique about Buddhist constitutionalism versus other forms of religiously preferential constitutionalism? And are there ways in which constitutional prerogatives for Buddhism give greater opportunities for legal activism when compared with constitutional prerogatives for other religions such as Christianity or Islam? On the other hand, how and why do the dynamics of Buddhist constitutionalism in Sri Lanka differ from the dynamics in other southern Asian Buddhist-majority countries? Why doesn't one see an equally active climate of Buddhist-interest litigation in Thailand, Myanmar or Cambodia, to date?

While the first set of questions requires a broader, more comparative investigation of constitutional practices in other parts of world, one can speculate briefly on the second question. Buddhist constitutionalism in Sri Lanka has encouraged a climate of Buddhist-interest litigation, not only because of the form of its constitutional protections for Buddhism, but also because of the relative accessibility of the public law remedies it offers to Sri Lankan citizens. It is, perhaps, the strong presence of both things—strong constitutional guarantees for Buddhism and a strong culture of public law—that explains why this dynamic has accelerated in Sri Lanka. If this is the case, then one might expect the impacts of Buddhist constitutionalism to become more pronounced in southern Asia as the cultures of public law change in the region. That is, if constitutional remedies become more accessible throughout the Buddhist world, in places like Myanmar or Laos, one might expect a rise in similar sorts of Buddhist legal activism with similarly expanding ambits and consolidating logics.[105]

[105] One already sees intimations of a trend towards Buddhist legal activism in Myanmar, visible, for example, in the activities of the Organisation for the Protection of Race and Religion (*MaBaTha* in its Burmese acronym), and its attempts to introduce new legislation to limit intermarriage, conversion, and Muslim populations. Schonthal, Benjamin and Walton, Matthew (2016) The (New) Buddhist nationalisms? Symmetries and specificities in Sri Lanka and Myanmar *Journal of Contemporary Buddhism* 17(1).