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CONSTITUTIONALIZING RELIGION: THE PYRRHIC SUCCESS OF RELIGIOUS RIGHTS IN POSTCOLONIAL SRI LANKA

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ABSTRACT

This article argues for a different reading of the history of law and religion in independent Sri Lanka, one that does not associate the persistence of religious tension with the failure of law, but, somewhat counterintuitively, with the legalization of religion in the first instance. I argue that it is not law's failure that adds to the intensity of religious tensions on the island, but its pyrrhic success. Sri Lanka's success in drafting, ratifying, and deploying legal regimes of religious rights has led to the further ossification of the very conflicts they were intended to arbitrate. Through a condensed overview of the history of debating, drafting, and adjudicating constitutional religious rights in Sri Lanka, this article demonstrates how, in turning to law to resolve religious disputes, Sri Lankans have deepened and hardened the very lines of conflict that those laws were meant to resolve.

KEYWORDS: Sri Lanka, Buddhism, law, constitution, religion

Since the violent end of Sri Lanka's thirty-year-long civil war in May 2009, a growing number of politicians, human rights activists, and scholars have pinned their hopes for a peaceful future on the revision, reinterpretation, or restoration of law. In spite of the government's recent heavy-handed manipulations of legal process on the island,[1] experts nonetheless remain confident in the capacity of legal instruments and procedures, if properly constructed and deployed, to mollify the problems of political disenfranchisement and communal strife that led to the outbreak of civil war.

Of the many goals that a reformed legal order is projected to realize, one of the most appealing is the promise that "good" laws adequately enforced will enhance religious freedom and mitigate religious tensions on the island. Since independence, Sri Lankans have witnessed significant social strife, in which religious divisions have played a prominent role.[2] Most recently, this includes the simmering tensions between Buddhists and evangelical Christians, which have been escalating since the 1990s, and

1 These interventions include a successful, executive-led campaign to impeach the Chief Justice of the Supreme Court and choose her successor, to abolish presidential term limits in the constitution, to expand the statutory power of central government vis-à-vis provincial governments, and other measures.

2 This violence includes not only the island's well-known civil war but also a series of large riots that led up to it, as well as the horrific violence stemming from two abortive Marxist insurgencies and the state-led counterinsurgency campaigns that followed. It should also be noted that religion's involvement with civil violence in Sri Lanka is also intertwined with language and ethnicity.

numerous, alarming incidents of anti-Muslim violence, which seem to be occurring with disturbing regularity as this article goes to press. Many inside and outside Sri Lanka read this violence as a breakdown of law: the implementation of discriminatory laws, the failure to enforce fair laws, and the general lack of accountability by the government to "the rule of law." Therefore, by reforming law and redeeming legal institutions, it is argued, Sri Lanka might promote religious freedom and avert religious conflict.

This attempt at legal reformation may seem urgent at the present moment, but it is certainly not new. Since the 1940s Sri Lankans have engaged regularly in the writing, contesting, amending, and debating of laws designed to produce religious freedom and religious harmony on the island. While the perceived failure of law to solve religious strife is frequently blamed on the chauvinism of lawmakers and the failure of legal processes, the history of legislating religion in Sri Lanka cannot be read simply as a story of bad-faith lawmaking and faulty legal institutions. Sri Lanka's religious freedom laws emerged within popularly elected assemblies and were interpreted by a Supreme Court that, despite its acknowledged faults and dramatic fall into disrepute of late, has often been seen as relatively impartial towards religion.[3] Sri Lanka's laws governing religion were designed with reference to United Nations' covenants, and they have been invoked within a legal culture in which public law remedies and protocols of judicial review are not only available, but widely accessible. The World Justice Project ranked Sri Lanka as first among all South Asian countries in its 2014 Rule of Law index.[4]

In this article I argue for a different reading of the history of law and religion in independent Sri Lanka, one that does not associate the persistence of religious tension with the failure of law, but, somewhat counterintuitively, with the legalization of religion in the first instance. I argue that it is not law's failure that adds to the intensity of religious tensions on the island, but its pyrrhic success. Sri Lanka's success in drafting, ratifying, and deploying legal regimes of religious rights has led to the further ossification of the very conflicts they were intended to arbitrate. Through a condensed overview of the history of debating, drafting, and adjudicating constitutional religious rights in Sri Lanka, I demonstrate how, in turning to law to resolve religious disputes, Sri Lankans have deepened and hardened the very lines of conflict that those laws were meant to resolve.

I do not intend to suggest that legal reform takes corrosive forms in all contexts and all places. Indeed, one can point to many examples where lawmaking has succeeded in producing progressive social change or has helped to ameliorate conflicts among individuals and groups. Instead, I insist that religion presents a particularly troubling object of regulation for law, on account of the secularist assumptions at the foundation of the modern legality, on account of the hazy institutional, social, and phenomenological boundaries of religion, and on account of the fact that the "freedom" of religion appears to connote different things for different people.[5] Disagreements over the nature

3 While not seen as exercising independent judgment in all issues, when it comes to decisions involving individual fundamental rights and religion, Sri Lanka's courts, particularly its Supreme Court, have been seen as relatively neutral arbiters. Deepika Udagama, "The Sri Lankan Legal Complex and the Liberal Project: Only Thus Far and No More," in *Fates of Political Liberalism in the British Post-colony: The Politics of the Legal Complex*, eds. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (New York: Cambridge University Press, 2014), 232–41; Marga Institute, *The Social Image of the Judicial System in Sri Lanka* (Colombo: Marga Press, 2004), 41–43; Viveka S. De Silava, *An Assessment of the Contribution of the Judiciary Towards Good Governance: A Study of the Role of the Supreme Court of Sri Lanka* (Colombo: Sri Lanka Foundation/Friedrich Ebert Stiftung, 2005), 96. This must be read alongside International Bar Association, *Justice in Retreat: A Report on the Independence of the Legal Profession and the Rule of Law in Sri Lanka* (2009), http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Enews/HRIEnews_SriLanka_Aug09.aspx.

4 World Justice Project, *Rule of Law Index 2014* (2014), 40. The data is also available through the World Justice Project's interactive online tool: http://data.worldjusticeproject.org/#/index/LKA.

5 On the first point, see generally Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo, eds., *After Secular Law* (Stanford, CA: Stanford University Press, 2011).

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of religion and religious freedom appear particularly deep in postcolonial contexts like Sri Lanka where the push for legal independence (self-rule) coincided quite closely with the widespread condemnation of the cultural and institutional damage done to local religions by colonial administrators and missionaries. Thus, for much of the twentieth century, in Sri Lanka, as in India, Burma, and elsewhere, the idea of freedom of religion has been applied not only in reference to the usual set of individual rights of belief and worship generally associated with liberalism but to the imagined liberation-*cum*-rehabilitation of local religious communities and traditions—Buddhism, Hinduism, or Islam—from the perceived depredations of colonialism.

In constitutionalizing religious freedom, Sri Lankans have tended to espouse two arguably irreconcilable goals: the special restoration and protection of the majority religion, Buddhism, and the equal protection of individual religious beliefs and worship practices for all Sri Lankans. Those who designed Sri Lanka's constitutional religious rights imagined themselves as representing and reconciling both demands, holding the two goals together in the "productive ambiguity" of legal rhetoric. Sri Lanka's lawmakers were certainly sensitive to the tensions between the two visions of religious rights when they crafted the most significant statement of religious rights on the island, chapter 3 of Sri Lanka's constitution, entitled "Buddhism" (drafted first in 1972 and then altered in 1978), which states in Article 9:

> The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).[6]

Rhetorically, the prerogatives for Buddhism do not trump fundamental religious rights but stand in a kind of tense traction. The first part of the chapter elaborates governmental obligations to give Buddhism a privileged status ("the foremost place") and "protect and foster" the religion's teachings, institutions, and adherents (the Buddha *Sasana*). The second part conditions the state's commitment to supporting Buddhism with the guarantees that all individuals will have "freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice" (Article 10) and that they will have freedom to "manifest" religion in "worship, observance, practice or teaching" in a group or alone, in public or private (Article 14(1)(e)).[7] Neither part is given any distinct legal priority: the state's duties to protect Buddhism and the state's duties to guarantee religious rights are both entrenched sections of the constitution and very difficult to amend. Both parts are invoked frequently in political and legal argumentation, although claims regarding fundamental religious rights are justiciable directly by Sri Lanka's Supreme Court.

The pyrrhic success of religious rights stems from an unavoidable friction between the processes of making and actualizing law in Sri Lanka, and in the context of other religiously divided societies. In such contexts, the very ambiguities of language that are required to bring into nominal (rhetorical) agreement the diverse visions of religious freedom held by drafters come to sanction and strengthen the divisive agendas of interpreters. In the first movement—lawmaking—the drafters of law collude in the submerging or obfuscating of major points of friction between opposing visions of religious rights. In the second movement—litigating—actors use the vague language of legal rules to further legitimate and deepen those very disagreements. As such, constitutionalizing

6 Sri Lanka Constitution, chap. III, art. 9 (amended 1978).

7 Sri Lanka Constitution, chap. III arts. 10, 14(1)(e). The special status of Buddhism is further qualified by Article 12 of the constitution, which guarantees that the state will not discriminate against citizens on the basis of language, race, caste, or religion. Ibid., art. 12(2).

religious rights in divided societies does not so much set the terms for proleptic agreement, as many legal theorists (and Sri Lankan lawmakers) have assumed. Rather, the constitutionalization of religion further entrenches the terms of dispute by reifying and legitimating the fixity of religious identities, concealing the internal heterogeneity of religious communities, and mediating the relationships between these now-static legal subjects through an absolutist and agonistic language of competing rights and duties. Where champions of the rule of law insist upon law's ability to sublimate social strife—transmuting clashing bodies into clashing arguments—in the case of religious freedom in Sri Lanka, law demonstrates an opposite effect, making arguments clash such that bodies are inclined to follow.

ANTI-COLONIAL RELIGIOUS FREEDOM: THE 1948 CONSTITUTION AND ITS DISCONTENTS

Perhaps the most common law-related diagnosis for religious conflict in Sri Lanka is that both visions of religious freedom described above are not equally legitimate. That is, the awarding of special protections and status for the majority religion is understood to be inherently unfair and therefore incompatible with a just legal order. While principles of secular liberal constitutionalism require that the state remains neutral toward the differing religious convictions of its citizens, such principles tend to downplay the deep impact of colonialism on religious and political life in postcolonial states. Colonial occupation, while not the only threat to Buddhism prior to 1948, constituted a major challenge to Buddhist life on the island. New protocols for the administration of Buddhist temples, the alienation of temple property, changes to the island's traditional structures of political power, and tacit support for Christian missionizing all worked to undercut structures of support that sustained Buddhist monks and laity. By the nineteenth century, Buddhist monastic institutions had lost much of the political influence and revenue they had once enjoyed; these losses were publically condemned by Buddhist monks and laity, who, by the mid-nineteenth century, had begun to form organizations and political lobbying groups with the goal of reviving Buddhist life on the island. By the 1930s, these Buddhist revivalists regularly asserted their claims in the form of demands for special state protections or rights for Buddhists and Buddhism. They also began mixing demands for legal protections with demands for self-rule, linking certain important strains of the anti-colonial movement in Sri Lanka to the rehabilitation of Buddhism.

If the restoration of Buddhism provided one major type of demand for religious rights in the late-colonial period, a second type was characterized by the demand for "fundamental rights" for all religions. This type of demand also had an anti-colonialist flavor to it. Sri Lanka's independence constitution was not the product of a popular constituent assembly or constitutional congress, as in India. Rather, the document that would become the guiding charter for self-rule in 1948 was definitively influenced by outgoing Crown administrators, who, in missives to the island in the early 1940s, specified a series of conditions and audiences (including British administrators) that the new charter would have to "satisfy" in order to be accepted as the basis for the transfer of power.[8] Although not explicitly stated, it was understood by British legal specialists at the time

8 Government of Ceylon, Reform of the Constitution, Sessional Paper XVII-1943 (Colombo: Ceylon Government Press, 1943), 5; see also Asanga Welikala, "The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' Led to Constitutional Revolution," in *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*, ed. Asanga Welikala (Colombo, Sri Lanka: Centre for Policy Alternatives, 2012), 1:150–59.

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that, when it came to the protection of citizens' rights, including rights to religious worship, the Crown would look unfavorably on the integration into new constitutions of American-style lists of (fundamental) rights.[9] As one influential British constitution-maker of the period put it, "[An] English lawyer . . . is apt to shy away from [fundamental rights] like a horse from a ghost."[10] Beginning in 1943, a duumvirate consisting of a powerful Sinhalese politician and a British constitutional lawyer began to draft what would become the island's independence constitution, deliberately omitting a bill of rights. In response, several of the island's younger, more nationalist politicians scribed their own shadow constitution, which conspicuously included eight distinct paragraphs of fundamental rights, including "freedom of religion."

The demand for Buddhist rights and the demand for fundamental religious rights both rejected an assumption implicit in what would become the 1948 Constitution. The 1948 charter implied religious freedom as a naturally occurring state, a kind of de facto condition that one arrived at if one could simply strip away government influences from the religious lives of citizens. Thus religious freedom was to be protected by restricting the actions of politicians. Section 29(2) dictated that Sri Lanka's new parliament "Shall make no law" that will

(a) Prohibit or restrict the free exercise of any religion; or
(b) Make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
(c) Confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
(d) Alter the constitution of any religious body except with the consent of the governing authority of that body:
Provided that in any case where a religious body is incorporated by law no such alteration shall be made except at the request of the governing authority of that body.[11]

Here religious rights were negative rights, prohibitions on the actions of parliamentarians so that they did not encroach on religion. As intended by its drafters, Section 29(2) tried to remove religion from governance, so that each would flourish in the absence of the other.

Proponents of Buddhist rights and general fundamental religious rights both rejected this premise that religious freedom was a negative liberty, a naturally occurring condition, provided one could guarantee religions' freedom *from* intervention by the state. For the advocates of Buddhist rights, the independent state had an obligation to actively intervene in the rehabilitation of the majority religion and to provide a regime of affirmative action that would lead to the repair of Buddhist monasteries, monks, and temples and would restore Buddhism's prestige among the laity. Buddhism, they argued, did not exist in a state of de facto freedom but a state of de facto decay, which was the direct result of four hundred years of colonial damage. These demands were laid out systematically, first in a letter to the island's first prime minster, and later in a report, both of which were produced by the All-Ceylon Buddhist Congress (ACBC), a lay Buddhist activist group that, by the early 1950s, had gained prominence as the island's leading organizational body

9 Charles O. H. Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (London: Oxford University Press, 2007), 28.

10 Ivor Jennings, *Some Characteristics of the Indian Constitution* (Madras: Oxford University Press, 1953), 48, quoted in S. A. de Smith, *The New Commonwealth and Its Constitutions* (London: Stevens & Sons, 1964), 165.

11 The Ceylon Constitution Order in Council, 1946, 29(2) (as amended by the Ceylon Independence Order in Council of December 19, 1947), quoted in Amos J. Peaslee, *Constitutions of Nations*, vol. 2, *Asia, Australia and Oceania*, 3rd ed. (The Hague: Martinus Nijhoff, 1966).

lobbying for Buddhist interests.[12] In these documents, the ACBC elaborated a list of constitutional and statutory provisions that the state ought to integrate into the newly independent legal system to positively improve the condition of Buddhism. These included provisions to help monastic fraternities gain legal recognition as religious organizations and the establishment of a government Buddha Sasana Council that would organize and coordinate state efforts to "extend to Buddhism the same patronage as was extended to it by Sinhalese Rulers of old."[13]

Advocates of fundamental rights, who came from all of the island's religious communities, viewed the arrangement of religious rights in Section 29(2) as expressing far too passive a relationship between the state and the enforcement of religious and civil rights. What was needed, they argued, was a discrete list of rights that would enunciate the state's positive obligations to uphold individual and group freedoms, to enhance religious liberty through government action. In their shadow constitution, religious freedom was defined as follows:

> Freedom of conscience and the free profession and practice of religion, subject to public order and morality, are hereby guaranteed to every citizen. The Republic shall not prohibit the free exercise of any religion or give preference or impose any disability on account of religious belief or status.[14]

This alternative draft constitution amplified the range of religious liberty by treating religious expression, belief, and practice as positive rights to be guaranteed by the government and by prohibiting all representatives of "the Republic"—not just the legislature—from discriminating on the basis of religion or from limiting the free exercise of religion.

Although these two types of demands for religious rights had their roots in different anticolonial movements and had their basis in differing assessments of religious freedom, both demands enjoyed a certain degree of popularity among prominent public figures for much of the 1950s and 1960s, expressing as they did widely held sentiments about the nature of religion and the government's ideal relationship to it. Key among public figures was Sri Lanka's third prime minister, S. W. R. D. Bandaranaike, an Oxford-educated lawyer who had deep sympathies both with Buddhist populism and liberal human rights.[15] Like many politicians at the time, Bandaranaike presented the reform of religious rights as an anticolonial proposition: to replace the 1948 Constitution was to eliminate from Sri Lanka all traces of colonial influence, insofar as the key drafters' work had been tainted by colonial collaboration. Once in office, he parlayed the two alternative visions of religious rights into two large government initiatives. On the one hand, he convened a Joint Select Committee for the Revision of the Constitution, which he charged with, among other things, generating a constitutional chapter on fundamental rights, including religious rights.[16] On the other hand, he appointed a government Buddha Sasana

12 See All-Ceylon Buddhist Congress, *Buddhism and the State: Resolutions and Memorandum of the All-Ceylon Buddhist Congress* (Maradana: Oriental Press, 1951); Buddhist Committee of Enquiry, *The Betrayal of Buddhism* (Balangoda: Dharmavijaya Press, 1956).

13 All-Ceylon Buddhist Congress, *Buddhism and the State*, 3.

14 J. R. Jayawardene, "J. R. Jayawardene's Draft Constitution, 29 November 1944," in *Documents of the Ceylon National Congress and Nationalist Politics in Ceylon 1929–1950*, ed. Michael Roberts (Colombo: Department of National Archives, 1977), 3:2593.

15 James Manor, *The Expedient Utopian: Bandaranaike and Ceylon* (Cambridge: Cambridge University Press, 2009), 114–19.

16 Government of Ceylon, *Draft Second Report (together with the Minutes of Proceedings) of the Joint Select Committee of the Senate and the House of Representatives on the Revision of the Constitution* (Colombo: Government Press, 1958), 3.

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Commission and mandated that it investigate the demands made by the All Ceylon Buddhist Congress for special Buddhist legal privileges.[17]

Although the Select Committee on the Constitution and the Buddha Sasana Commission both produced a list of recommendations for legal change, Bandaranaike was unable to leverage either in the form of discrete legal initiatives. By the time the reports were completed, Bandaranaike's leadership within his coalition was being challenged; in 1959 he was assassinated. Nevertheless, Bandaranaike's initiatives produced an important milestone in the development of religious rights in Sri Lanka, insofar as it was during his government that the call for fundamental religious rights and the demand for special legal Buddhist prerogatives became mainstream political demands, such that in the 1960s, the agendas of both commissions were taken up by the island's two major political parties, Sri Lankan Freedom Party (SLFP) and the United National Party (UNP). Bandaranaike's widow, Sirimavo Bandaranaike, who took over the leadership of the SLFP in 1960, promised in her first election manifesto that she would pursue fundamental religious rights and Buddhist prerogatives: she would work to create a republican constitution that included a list of fundamental rights, and she would implement the suggestions of the Buddha Sasana Commission.[18] She reconfirmed this in the SLFP policy statement from November 1964, but folded the two objectives into one:

> In addition to steps taken by the late Mr. S.W.R.D. Bandaranaike's Government of 1956, and by the present Government to give Buddhism its proper place in the country as the religion of the majority and at the same time guaranteeing complete freedom of worship to all religions, my Government proposes to place before you legislation which will guarantee this proper place to Buddhism.[19]

Similarly, the UNP, the island's major opposition party, insisted in its election manifesto from 1965,

> While restoring Buddhism to the place it occupied when Lanka was free and Kings ruled according to the Dassa Raja Dharma (Ten Buddhist Principles), we shall respect the rights of those who profess other faiths and ensure them freedom of worship.[20]

In 1967 the UNP-led government even reappointed a Joint Select Committee on the Revision of the Constitution to complete the investigations that had begun under Bandaranaike's government, including the drafting of a constitutional chapter on fundamental rights.[21]

During the 1950s and 1960s, while the topics of religious rights and religious freedom were increasingly common foci for political discourse, the protections for religion listed in Section 29(2) were not major instruments of litigation.[22] This fact reflects (perhaps in equal measure) the

17 *Interim Report of the Buddha Sasana Commission, Sessional Paper XXV—1957* (Colombo: Government Press, 1957), 1.

18 W. A. Wiswa Warnapala, *Sri Lanka Freedom Party* (Colombo: Godage International, 2005), 157–58.

19 Government of Ceylon, *House of Representatives (Hansard)* (Colombo: Government Press, November 20, 1964), 8.

20 United National Party, *Manifesto 1965* (1965), 5.

21 Government of Ceylon, *Second Report from the Joint Select Committee of the Senate and the House of Representatives Appointed to Consider the Revision of the Constitution, (Parliamentary Series No. 30, Third Session of the Sixth Parliament)* (Colombo: Government Press, June 13, 1968), 20.

22 Two important cases did appear before the courts that challenged legislation on the basis of discrimination against communities, but not with reference to religion. See Kodakkan Pillai v. Mudanayake, 54 *New Law Reports* 433 (1953) (challenging the Ceylon Citizenship Act of 1948) and Attorney General v. Kodeswaran, 70 *New Law*

perceived weakness of Section 29(2) as an instrument for making religious claims and the inability and/or refusal of the courts to use Section 29(2) to prevent the passing of discriminatory laws. During this period, when questions of Buddhism did enter the courts, they did so in the form of disputes between Buddhist monks, generally over succession to the office of chief incumbent of temple or over control of monetary property and assets.[23] Tensions between the two views of religious freedom were certainly manifest in politics; however, the relationship between Buddhist protections and general religious rights remained very much in question, subject to negotiation, contest, and debate. Politicians and religious leaders on all sides debated the precise relationship between (proposed) Buddhist prerogatives and (proposed) fundamental rights.[24] Moreover, and more interestingly, advocates of both visions of religious freedom engaged in heated debates within their own camps regarding precisely what Buddhist rights and fundamental rights should entail, with deep lines of fissure emerging particularly within the Buddhist side. This is not to say that tensions did not exist among religious communities; indeed they did. Yet, the absence of a religious-rights-friendly legal and judicial context meant religious rights and religious freedom were not used in courts as instruments for legitimating or contesting claims about the relative status of Buddhism vis-à-vis other religions or the necessity of equal religious rights vis-à-vis special Buddhist protections.

CONSTITUTIONALIZING RELIGIOUS FREEDOM: THE FIRST REPUBLICAN CONSTITUTION OF 1972

For many Sri Lankans in the late 1960s and early 1970s, implementing a legitimate rule of law and a legitimate scheme of religious rights and freedoms implied the replacement of the island's colonially derived 1948 Constitution with a new, "autochthonous" one, composed by elected officials and consisting of clauses that were drafted exclusively by Sri Lankan politicians. Indeed, there was tremendous public support when the (SLFP-led) coalition government, the United Front, having won a landslide victory in parliamentary elections of 1970, convened the elected parliament as a Constituent Assembly and announced its intent to draft a constitution that would "build a nation ever more strongly conscious of its oneness amidst the diversity imposed on it by history."[25] The revision of religious rights was high on the agenda, and by January 1971 the drafting committee had presented to the Constituent Assembly its most succinct statement of religious policy, Draft Basic Resolution Three (DBR 3). It read as follows:

Reports 121 (1967) (challenging the Official Language Act No. 33 of 1956). See also C. F. Amarasinghe, "The Legal Sovereignty of the Ceylon Parliament," *Public Law* (1966): 73–81.

23 For a helpful survey of these cases see Wickrema Weerasooria, *Buddhist Ecclesiastical Law: A Treatise on Sri Lankan Statute Law and Judicial Decisions on Buddhist Temples and Temporalities* (Colombo: Postgraduate Institute of Management, 2011).

24 See, for example, Government of Ceylon, *Joint Select Committee (Parliamentary Series No. 30, Third Session of the Sixth Parliament)*, 92–93, 118.

25 Transcript of radio broadcast by Prime Minister Sirimavo Bandaranaike, June, 1970, quoted in Joseph A. L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Colombo: Hansa Publishers, 1973), 76. For a recent, authoritative treatment of the making of the 1972 Constitution, see Nihal Jayawickrama, "Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective," in *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*, ed. Asanga Welikala (Colombo: Centre for Policy Alternatives), 1:43–124.

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> In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place, and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to all religions the rights granted by Basic Resolution 5(iv).[26]

According to DBR 3, the demand for Buddhist rights was to be addressed by placing positive obligations on the state to "protect and foster" Buddhism and by awarding Buddhism a special status, one glossed in the locative idiom, the "rightful place." At the same time, demands for positive fundamental religious rights were to be acknowledged by including in DBR 5(iv) guarantees that

> Every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[27]

If the rights for Buddhism were made to echo the election manifestos of the SLFP, the scheme of general religious rights and freedoms was borrowed verbatim from section 18 of the 1966 International Covenant on Civil and Political Rights of the United Nations, to which Sri Lanka was a signatory.

In the minds of the new constitution's lead draftspersons, the intent behind DBR 3 was simple. The resolution sutured together the two dominant demands regarding religious rights emerging from Sri Lanka's citizens: the demand for special rights for Buddhism and the demand for fundamental religious rights. The architect of the Constitution, Colvin R. De Silva, summarized it as follows:

> It was after very careful consideration that the particular mode of reference to religions and Buddhism in particular was arrived at in respect of Basic Resolution 3. It is intended, and I think in all fairness it should be so stated, that the religion Buddhism holds in the history and tradition of Ceylon a special place, and the specialness thereof should be recognized in the Resolution. It was at the same time desired that it should be stressed that the historical specialness, the traditional specialness and the contemporary specialness which flows from its position in the country should not be so incorporated in the Constitution as in any manner to hurt or invade the susceptibilities of those who follow other religions in Ceylon or the rights that are due to all who follow other religions in Ceylon. It is for that reason that, first of all, into the Resolution stating the place being assigned to Buddhism there was incorporated the reference to fundamental rights, Basic Resolution 5(iv) . . . [which] ensures as a fundamental right to all religions those rights which they should have, namely, the complete freedom of observing one's religion and taking it to others also . . . . *It is after very careful thought* that every single word has been introduced into the Resolution, and, much as I would like to state that I yield to none in my respect for all religions which all peoples in this country and elsewhere follow, I would earnestly urge that any efforts to change the language or the content of what is a very carefully expressed Basic Resolution may result in, shall I say, some kind of unanticipated unbalancing of what is a *very balanced* Resolution.[28]

Although it exhibited the silver-tongued confidence of a long-time parliamentarian and senior legal practitioner, De Silva's statement was not cynical political salesmanship. As a declared secularist, criminal lawyer, historian, critic of fundamental rights theory, and prominent member of the anti-colonial Left in Sri Lanka, De Silva was a known critic both of Buddhist rights and fundamental

26 Constituent Assembly, "Draft Basic Resolutions Submitted by the Minister of Constitutional Affairs to the Steering and Subjects Committee," *Constituent Assembly Committee Reports*, January 17, 1971 (Colombo: Government Press, 1972), 87.

27 Constituent Assembly, "Draft Basic Resolutions," *Constituent Assembly Committee Reports*, January 17, 1971 (Colombo: Government Press, 1972), 90.

28 Constituent Assembly, *Constituent Assembly Debates*, March 29, 1972 (Colombo: Government Press, 1972), 643–44 (emphasis added).

religious rights, and he could not be impugned for his lack of sensitivity to popular demands. Indeed, a review of the drafting documents only confirms his good faith effort to represent and reconcile these positions. De Silva deliberately rejected the more pointed demands that the constitution include a clause requiring that the island's prime minister and heads of the armed forces would be Buddhists. He also conceded that the constitution could not declare Sri Lanka a secular state, on account of the broad support for Buddhist protections among Sri Lankan citizens.

Despite the fact that the Constituent Assembly was popularly elected and despite the fact that the drafting committee calibrated their draft charter to reflect public demands, the debates over the language of DBR 3 and DBR 5(iv) seemed only to evade important questions about the relationship between Buddhist rights and general religious rights and, in particular, to avoid scrupulously those issues that would "unbalance" the equivocal language of DBR 3, by either amplifying Buddhist prerogatives or fundamental rights protections. Despite calls by assembly members for greater clarification regarding the scope and relative priority of Buddhist protections and general religious rights, the imperatives of legal production—namely, the need to appeal to a majority of legislators—prevented serious investigation into the nature of the proposed relationship.

In general, the debates on DBR 3 were focused on three proposed amendments to the clause. Each proposed a particular clarification, which was in turn opposed by members of the United Front, especially De Silva. The opposition UNP insisted that the first part of the resolution be strengthened so as to render plainly the state's commitments to Buddhism. They therefore proposed that DBR 3 be amended as follows:

> In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be *inviolable and shall be* given its rightful place, and accordingly, it shall be the duty of the State to protect and foster Buddhism, *its rites Ministers and its places of worship*, while assuring to all religions the rights granted by basic Resolution 5(4).[29]

Adding these words, the UNP leaders argued, would give greater specificity and legal force to the Buddhist prerogatives listed: Buddhism would be further distinguished as not simply one religion out of many similar ones, but as a tradition with a unique historical and institutional legacy. The added words, taken from a treaty signed between the last Buddhist kingdom and the British,[30] would signal the state's aims of restoring to Buddhism the status that it enjoyed during the ancient kingdoms on the island.

A second proposed amendment came from a Muslim member of the ruling United Front coalition who requested that DBR 3 be disambiguated so that it was clear that Buddhism was not the only religion given recognition by the state:

29 See Constituent Assembly, *Constituent Assembly Committee Reports*, February 27, 1971 (Colombo, Government Press, 1972), 226; Constituent Assembly, "Draft Basic Resolutions," *Constituent Assembly Committee Reports*, January 17, 1971, 87. The italicized text reflects the new language as it would be added to DBR 3.

30 These phrases were taken from the Kandyan Convention of 1815. This treaty, signed between Kandyan nobles and British officials, made certain provisions for the protection of Buddhism, while ceding sovereignty of the kingdom to the King of England. The amendment invokes parts of paragraph 5 of the convention, which reads: "The Religion of the Boodhoo professed by the Chiefs and inhabitants of these Provinces is declared inviolable, and its Rites, Ministers and Places of worship are to be maintained and protected." "The Kandyan Convention [Proclamation of 2 March 1815]," in *The Colebrooke-Cameron Papers: Documents on British Colonial Policy in Ceylon 1796–1833*, ed. G. C. Mendis (London: Oxford University Press, 1956), 2:228.

> In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to *Hinduism, Islam, Christianity and* all religions the rights granted by basic Resolution 5(iv).[31]

In this version, Buddhism's special status was modulated by the assertion that Hinduism, Islam, and Christianity also had important roles in national life. Thus, what was emphasized was Buddhism's status as primus inter pares, the most protected in a group of equally protected religious traditions.

The most significant objections, however, came from the largest Tamil party on the island, the Federal Party, who represented Tamil-speaking Hindus and Christians and who, in the context of the Constituent Assembly, claimed to speak for all major Tamil political groups.[32] For the Federal Party, DBR 3 appeared to be not a balancing of Buddhist priorities with general religious rights, but a privileging of Buddhism plain and simple:

> If the constitution is constructed [like this] . . . no one will be able to change the fact that there is a place for only one religion in this country . . . Buddhism. Some may think that because they have spoken about other religions in Resolution 5(4), no objection should be voiced. I want to point out the fact that except for the rights that have been applied to individual persons, there are no rights which have been allocated to religions . . . [E]xcept for Buddhism, and Buddhism alone, no place is given to all other religions.[33]

According to this, DBR 3 had a more dubious logic undergirding it. The privileges accorded to Buddhism, the Federal Party argued, were not offset with protections for all religions in DBR 5 (on fundamental rights) because of a deliberate linguistic misfit: DBR 3 gave rights to the country's dominant faith, Buddhism as a religion (*matam*); however, DBR 5 enumerated rights for individual persons (*taṉippaṭṭa maṉitarkaḷukku*).[34] Thus Buddh*ism* could claim legal status, protections and privileges that Hinduism, Islam, and Christianity could not. Therefore the only appropriate amendment to DBR 3 was to rewrite it to make Sri Lanka a "secular" state or—in a more literal translation of the Tamil term used, *matacārpaṟṟa*—"a state that did not bend towards a particular religion":

> The Republic of Sri Lanka shall be a secular State but shall protect and foster Buddhism, Hinduism, Christianity and Islam.[35]

Through the course of debates on these amendments, one can see two antithetical processes at work. On the one hand, members of the Constituent Assembly, particularly opposition politicians,

31 See Constituent Assembly, *Constituent Assembly Debates*, March 29, 1971, 640 and Constituent Assembly, "Draft Basic Resolutions," *Constituent Assembly Committee Reports*, January 17, 1971, 87. The italicized text reflects the new language as it would be added to DBR 3.

32 Constituent Assembly, *Constituent Assembly Debates*, May 14, 1971 (Colombo: Government Press, 1971), 905–06.

33 Ibid., May 14, 1971, 929–30 (original source in Tamil; author's translation).

34 Dharmalingam raised the issue of the incoherence of Buddhist privileges and religious fundamental rights, as well, during the debates on DBR 5 (chapter on fundamental rights). Here the argument took a slightly different shape. Dharmalingam pointed out that, as currently worded, the protections for religion in resolution 5(iv) were rendered as protections for citizens, rather than for all persons living on the island. Such a provision would not protect the many Tamil tea estate laborers who lived in the upcountry of the island but who had not been granted formal citizenship by the government. Dharmalingam argued "does that mean that this Government thinks that it is not the duty to give constitutional guarantee [of religious freedom] to the ten lakhs of Tamils and Hindus who are stateless today?" Ibid., May 20, 1971, 1157.

35 Constituent Assembly, *Constituent Assembly Committee Reports*, February 27, 1971 (Colombo: Government Press, 1972), 225–26.

fought hard to disambiguate or strengthen the particular types of religious rights being described in the resolution and to press the question of coherence between Buddhist prerogatives and general religious rights. On the other hand, members of the majority United Front fought hard to avoid any alterations to DBR 3, so as to maintain its ambiguous rhetoric, a rhetoric carefully calibrated by De Silva to appeal to all parts of the ruling coalition (which had a two-thirds majority in the Constituent Assembly) and to as many other opposition parliamentarians as possible (Buddhists and non-Buddhists, religious nationalists and secularists, liberals, Leftists, and others). In this sense, the success of DBR 3 lay in the fact that its language expressed popular demands regarding religion, while holding in abeyance potentially contentious questions about the specific content or relative priority of those demands. In the end, only two small amendments—both of which were suggested at a later, semi-closed committee stage—were integrated: the phrase "religion of the majority of the people" was dropped and the phrase "foremost place" rather than its "rightful place" was selected.

> The Republic of Sri Lanka shall give to Buddhism the *foremost place* and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d).[36]

ADDITIONAL CONSTITUTIONAL POLARIZATIONS: THE SECOND REPUBLICAN CONSTITUTION OF 1978

In May 1972, with the ratification of Sri Lanka's First Republican Constitution, Sri Lankans constitutionalized special religious rights for Buddhism and general religious rights for citizens. For some, this seemed a victory: demands for religious freedom that had been gestating for decades were now recognized in the highest law of the land. Although there continued to be frustrations with the shape of that law, and suggestions that its provisions for religion were incoherent or ill conceived, some steps were ventured to lessen the dissatisfaction of those who had wanted stronger Buddhist protections as well as those who demanded stronger fundamental religious rights. The only successful attempt came in 1978 with the redrafting of the country's constitution by the UNP.[37] Unlike the process of 1970–1972, the 1978 Constitution was not drafted through the mechanism of a Constituent Assembly, but through a group called the Select Committee on the Revision of the Constitution, consisting of nine members.[38]

The changes made to religious rights were small, but pregnant with significance. The 1978 Constitution changed a single word in the Buddhism chapter. In the second clause of the sentence, the word "Buddhism" was replaced with "Buddha Sasana." As had been pointed out by some of the deputations, the term "Buddha Sasana" referred directly to the language used by

36 Sri Lanka Constitution of 1972, chap. II, art. 6 (emphasis added). Draft basic resolution 5(iv) was incorporated as section 18(1)(d) of the 1972 Constitution, although the wording remained identical. See ibid., chap. VI, art. 18(1)(d).

37 On the politics and content of the 1978 Constitution, which, among other things, introduced proportional representation and an executive presidency see A. Jeyaratnam Wilson, *The Gaullist System in Asia: The Constitution of Sri Lanka (1978)* (London: Macmillan, 1980); Rohan Edrisinha and Naganathan Selvakkumaran, "Constitutional Evolution of Ceylon/Sri Lanka," in *Sri Lanka's Development Since Independence: Socio-Economic Perspectives and Analyses*, eds. Weligamage D. Lakshman and Clement A. Tisdell (Huntington, NY: Nova Science Publishers, 2000), 95–112.

38 Government of Sri Lanka, *Report from the Select Committee of the National State Assembly Appointed to Consider the Revision of the Constitution (Parliamentary Series No. 14)* (Colombo: Government Press, June 22, 1978), 139.

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Bandaranaike's Buddha Sasana Commission Report and the All Ceylon Buddhist Congress.[39] Furthermore, the term referred to a much wider range of Buddhist phenomena, not only the teaching and practices introduced by the Buddha, but also monks, temples, relics, temple lands, and lay devotees. In Sinhala, the rewording has another implication: the term usually translated as Buddhism (*buddhāgama*) is a compound formed from two words, *buddha* and *āgama*, and the term *āgama* connotes religion in a very particular sense: it stresses creed, belief, and doctrine, rather than the larger institutional frame in which religion is practiced, consisting of buildings, organizations, and lands owned by a religious community. It also underscores the comparability of one religious doctrine with another, indirectly referring to the commensurability of Buddhism (*buddhāgama*), for example, with Hinduism (*hindu āgama*) and Christianity (*kristiyāni āgama*).[40] Moreover, when used by itself, the term refers to Christianity: *eyā āgame* means "that person is a Christian."[41] Thus, using the term *buddhasāsana*, rather than *buddāgama*, in the second part of the revision not only widened the range of possible institutions that the government undertakes to "protect and foster" but it also subtly asserted Buddhism's non-commensurability—and, by implication, its preeminence—when compared with other religions.

The 1978 Constitution also strengthened the position of Buddhism in two other ways. Responding to the recommendation of certain monastic deputations and incorporating the suggestions of Bandaranaike's Buddha Sasana Commission, the Select Committee included in the new constitution a provision for the creation of separate monastic courts to adjudicate disputes between Buddhist monks.[42] The Committee on the Revision of the Constitution in 1978 further enhanced the status of the Buddhism chapter by making it an entrenched clause of the constitution that could not be changed without a two-thirds majority in parliament plus a referendum of the people (Article 82). Referring to these measures to further fortify Buddhism, the UNP-led Committee on the Revision of the Constitution of 1978 boasted that the chapter on Buddhism had now been made "inviolable."[43]

At the same time the 1978 Constitution further buttressed the position of Buddhism in Sri Lanka, it also deepened the reach of fundamental rights and particularly rights to "freedom of thought, conscience and religion." As a whole, the section on fundamental rights was lengthened and strengthened. A provision for freedom from torture was added and rights to freedom from discrimination and arbitrary arrest were further specified. Regarding enforceability, the 1978 Constitution also stated that the island's Supreme Court would have original jurisdiction over—and hear directly—all cases involving the breach of fundamental rights (Art. 126). Regarding religion, the 1978 Constitution further bolstered the section that guaranteed "every person is entitled

39 On the meanings of *sāsana*, see John Ross Carter, "A History of *Early Buddhism*," *Religious Studies* 13, no. 3 (1977): 266–70.

40 Kitsiri Malalgoda, "Concepts and Confrontations: A Case Study of Agama," in *Collective Identities Revisited*, ed. Michael Roberts (Colombo: Marga Institute, 1997), 1:60–63.

41 Literally, "He is in the religion [Christianity]." This second aspect was suggested to me by a former senior civil service official and assistant to multiple presidents and prime ministers, Mr. Bradman Weerakoon. Mr. Bradman Weerakoon, in discussion with author, August 6, 2009.

42 Sri Lanka Constitution, chap. XV, art. 105(4). Although the provision "provide[s] for the creation and establishment" of monastic courts, attempts to create such courts have met with opposition from members of parliament and from parts of the sangha. In October 2013, the government did open a separate court building in Kandy in which state-appointed judges will hear civil cases involving disputes among Buddhist monks. However, there remain no national monastic courts with powers to intervene in disputes over monastic conduct or discipline.

43 Government of Sri Lanka, *Report From the Select Committee of the National State Assembly (Parliamentary Series No. 14)*, 146.

to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice" (Article 10). This was done in three ways: "freedom of thought, conscience and religion" was listed first among the fundamental rights, making it, by implication, the most primary; it was given the status of an entrenched clause (like the Buddhism chapter) and was therefore difficult to amend or repeal; and it was made an absolute freedom, not subject to the limitations imposed on other fundamental rights.[44]

Ironically, the 1978 Constitution attempted to resolve frustrations over religious rights by further strengthening Buddhist prerogatives and religious rights, adding to their perceived antimony rather than clarifying the links between the two. Since 1978, a number of lawmakers, religious organizations, and lobbyists have proposed further alterations of the Buddhism chapter, which have largely taken the same approach. In 1997 and 2000, the Chandrika Bandaranaike Kumaratunga administration (unsuccessfully) proposed a draft constitution that sought to address both concerns by extending and strengthening the language regarding Buddhism and fundamental rights:

> 7(1) The Republic of Sri Lanka shall give to Buddhism the foremost place and, accordingly, it shall be the duty of the State to protect and foster the Buddha *Sasana* while *giving adequate protection* to all religions and *guaranteeing to every person the rights and freedoms* granted by paragraphs (1) and (3) of Article 15; 7(2) *The State shall, where necessary, consult the Supreme Council, recognized by the Minister of the Cabinet of Ministers in charge of the subject of Buddha* Sasana, *on measures taken for the protection and fostering of the Buddha* Sasana.[45]

In this proposed change, a whole second paragraph is added to the article, specifying the creation of a Supreme Council of high-ranking Buddhist monks who will advise the government on issues relating to the health of Buddhism in the country. In addition, the language regarding fundamental rights is rendered more explicit in the first paragraph (the section that was Article 9), such that the government is charged with giving "adequate protection" (rather than "assuring" as it was rendered in Article 9) to all religions and "guaranteeing" freedoms to "every person" (rather than every citizen).

Since 1972, Sri Lanka's lawmakers have responded to popular demands for Buddhist prerogatives and general fundamental religious rights by making space for both in the island's constitution. At the same time, for reasons of political expedience, they have left the relationship between the two underdetermined. In the constitutions of 1972 and 1978, as well as the proposed constitution in 2000 (although it was never ratified), lawmakers succeed in entrenching and deepening the legal foundation for Buddhist protections and religious rights in Sri Lanka, while leaving in place a "carefully balanced" ambiguity as to how two commitments ought to coincide.

ARGUING ABOUT RELIGIOUS RIGHTS IN COURT: THE CONVERSION BILL CASE

So what effects have constitutional religious provisions had on the adjudication of disputes in the courts? Since 1972, following the structure of the chapters on Buddhism and fundamental rights,

44 These limitations included "the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society." Sri Lanka Constitution, chap. III, art. 15(7). A similar list can be found in the Sri Lanka Constitution of 1972, chap. VI, art. 18(2).

45 Article 7(2), "Draft Bill (No. 372) to Repeal and Replace the Constitution of the Democratic Socialist Republic of Sri Lanka Aug 3, 2000," in Kītapoṉkalaṉ, Es Ai, *Conflict and Peace in Sri Lanka: Major Documents* (Colombo: Kumaran Book House, 2009), 212–13 (emphasis added).

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Sri Lankans have increasingly made legal claims about Buddhist prerogatives and religious rights.[46] Looked at in one way, then, constitutional reforms in Sri Lanka have succeeded because they have encouraged citizens to bring street-level religious disputes into the judicial arena. Taking this view, one might interpret as a positive trend the increased frequency of religious rights litigation during periods of increased religious acrimony: greater social tensions give way to greater needs for (assumedly ameliorative) legal activity. Indeed, the highly litigated period since 2000 coincides with a period of significant social and political upheaval on the island resulting from the escalation of the civil war between the Sri Lankan Army and the Tamil Tigers, the growing influence of foreign governments and human rights organizations, and the rapid liberalization and globalization of Sri Lanka's economy. In this context—which was punctuated by the 2004 Boxing Day Tsunami—a number of Buddhist groups on the island became increasingly anxious about perceived threats to Buddhist religious life: they worried about the "cultural" effects of global consumerism and the political power wielded by foreign "Christian" states (such as Norway[47] and the United States); they voiced concern about the social influence of non-governmental organizations (such as World Vision and the United Nations) on the lives and habits of rural Buddhists; and they feared that Buddhist Sri Lankans were becoming the targets of a concerted conversion campaign by Christian missionaries who have come to the island under the guise of humanitarian aid workers responding to the island's civil war and tsunami.[48]

When it comes to religion, however, I propose that the relationship between social strife and legal claims is more complex. Rather than a one-way dynamic of religious tensions giving way to legal action, one finds in Sri Lanka a negative feedback cycle of religious tensions giving way to religious rights litigation which then, recursively, deepens religious tensions. Social strife does indeed lead to legal action. However, recoded in the language of religious rights, popular disputes become more intractable, not less. When placed in the broader history of constitutional law on the island, this means that the very constitutional principles that Sri Lankans designed to arbitrate interreligious conflicts have, in fact, worked to harden divisions between Buddhists and non-Buddhists, and to generate or deepen disagreements over the proper meanings of religious freedom. The bitter irony is that, in many cases, litigants reproduce the very same disputes that constitution-drafters attempted to evade through cautious wording in the 1972 and 1978 constitutions—a kind of constitutional return of the repressed. And just like Sri Lanka's past constitution drafters, the island's contemporary judges routinely refuse to clarify the precise meaning of religious freedom, and the precarious balance between Buddhist prerogatives and rights granted to "all religions."

To see how this works, to understand the pyrrhic success of religious rights in Sri Lanka, one must look to the micro-mechanics of religion litigation as it unfolds in the island's courts. How do the procedures, languages, and outcomes of religious rights litigation serve to amplify disagreement? In what follows I put aside a more general overview of recent religion cases[49] in favor of

46 Benjamin Schonthal, "The Legal Regulation of Buddhism in Contemporary Sri Lanka," in *Buddhism and Law: An Introduction*, eds. Rebecca French and Mark Nathan (New York: Cambridge, 2014), 159.

47 Norway was heavily involved in attempting to monitor a ceasefire and to negotiate a peace process between the Liberation Tigers of Tamil Eelam (commonly known as the LTTE or Tamil Tigers) and the Sri Lankan government from 2002 to 2008.

48 Two of the most important figures and groups include a monk, Venerable Gangodawila Soma, and a monastic political party, the Jathika Hela Urumaya. For more on these individuals and groups, see, generally, Stephen C. Berkwitz, "Resisting the Global in Buddhist Nationalism: Venerable Soma's Discourse of Decline and Reform," *Journal of Asian Studies* 67, no.1 (2008): 73–106; Mahinda Deegalle, "Politics of the Jathika Hela Urumaya Monks: Buddhism and Ethnicity in Contemporary Sri Lanka," *Contemporary Buddhism* 5, no. 2 (2004): 83–103.

49 For a more general overview, see Schonthal, "The Legal Regulation of Buddhism in Contemporary Sri Lanka."

identifying how this negative feedback dynamic works in one of Sri Lanka's most prominent recent Supreme Court cases, known popularly as the Forcible Conversion Bill case.

In 2004, in the context of widespread public anxieties (mentioned above) concerning the foreign influences, civil war, and Christian conversions on the island, a Private Member's Bill was introduced to Sri Lanka's parliament with the aim of criminalizing "forcible" conversions from one religion to another. The bill was introduced by the head of the Jathika Hela Urumaya (JHU, or National [Sinhala] Heritage Party), a Sinhala-Buddhist nationalist political party and member of the coalition government consisting almost entirely of Buddhist monks. It drew upon the language of the constitution in order to frame religious conversion both as a violation of the state's special protections to Buddhism and individuals' religious rights. The preamble read:

> WHEREAS, Buddhism being the foremost religion professed and practiced by the majority of people of Sri Lanka, due to the introduction by great Tathagatha, the Sambuddha in the 8th Month after he had attained Buddhahood on his visit to Mahiyangana in Sri Lanka and due to the complete realisation after the arrival of Arahat Mahinda Thero in the 3rd Century B.E.[*sic*]:
>
> AND WHEREAS, the State has a duty to protect and foster the Buddha Sasana while assuring to all religions the rights granted by Article 10 and 14(1)(e) of the Constitution of the Republic of Sri Lanka:
>
> AND WHEREAS, the Buddhist and non Buddhist [*sic*] are now under serious threat of forcible-conversions and proselyzing [*sic*] by coercion or by allurement or by fraudulent means:
>
> AND WHEREAS, the Mahasanga and other religious leaders realising the need to protect and promote religious harmony among all religions, historically enjoyed by the people of Sri Lanka . . . .[50]

In the rhetorical architecture of the bill, conversion and proselytizing were framed both as violations of the state's "historic" duties to Buddhism (posited as extending back to the third century BCE) and as violating the state's obligations to uphold fundamental rights to freedom of religious belief and freedom to manifest one's religion.[51] Shortly after the bill was introduced to parliament, its constitutionality was challenged before the Sri Lankan Supreme Court by twenty-one separate petitioners almost all of whom were associated with non-Buddhist religious groups or non-governmental human rights organizations.[52] Against each of these petitioners, the JHU and other Buddhist activist organizations put forward Buddhist "intervenient petitioners," each of whom foregrounded in their affidavits that they were Buddhists who were concerned about the wellbeing of Buddhism.

What is notable about the Supreme Court case was not just the religiously polarized rosters of petitioners for and against the bill, but that in the process of challenging or defending the constitutionality of the JHU bill, litigants on both sides seemed to reify and confirm the essential incompatibility of the two visions of religious freedom suggested by the bill itself. Those who opposed the bill insisted that general religious freedoms should trump Buddhist prerogatives, insofar as equal rights for all religions was not commensurable with special privileges for a single religion. They

50 "Prohibition of Forcible Conversion of Religion, A Bill" *Gazette of the Democratic Socialist Republic of Sri Lanka*, May 28, 2004, pt. II (Colombo: Department of Government Printing, 2004), 1 (presented by Ven. Dr. Omalpe Sobhitha Thero) (hereafter JHU bill).

51 See introduction for rights listed in Sri Lanka Constitution, chap. III, art. 10 and art. 14(1)(e).

52 These challenges were made under Article 121(1), which entitles citizens to petition the Supreme Court for pre-enactment judicial review of parliamentary bills. Sri Lanka Constitution, chap. XVI, art. 121(1).

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also insisted that freedom of conscience (expressed in Article 10 of the Constitution) entailed a positive freedom to encounter different religious views, to adopt or modify one's own views, and to prevent one's own "internal" beliefs from being the object of state interrogation. In arguing against those claims, supporters of the Forcible Conversion Bill insisted upon the essential coherence of Buddhist privileges with equal religious rights for non-Buddhists, a coherence deriving not from a balancing of religious prerogatives but from the inherent "tolerance" of Buddhism itself.[53] They also offered a view of freedom of conscience as a negative freedom, freedom *from* particular impositions on "sober reflection," "consideration," and "free thinking."[54] In this interpretation of Article 10, freedom of conscience depended upon the "freedom to choose . . . [through] *spontaneous* volition, to make an informed decision which is *not encumbered*, subverted or corrupted in any manner whatsoever by *external* stimulus"; it was, therefore, the duty of the state to make sure that freedom to choose could be "preserved and maintained in its *purest* and *most pristine* form."[55]

Although the legal battle over the bill constituted a dispute between *certain* Sri Lankan Buddhists and *certain* other parties, the language of legal argument soon projected debates over conversion into universalist terms. While some petitioners commented on the exclusionary politics of the JHU as a political party, most arguments against the bill were framed as protests against the bill's violation of broader abstract principles embodied in Sri Lanka's constitution or liberal rights theory more generally, particularly freedom of religion. Similarly, those who supported the JHU bill framed their support as a defense using (and celebrating) those same principles. There were no illiberal arguments, only competing liberalisms—alternative ways of defining religious freedom, conversion, and conscience. The result of this process of upwards abstraction was the reification of two opposing regimes of truth: the positing of distinct, irreconcilable religious and/or cultural *nomoi*—Christian/Buddhist, Western/Sri Lankan—which rendered compromise or agreement on any single set of principles impossible. When refracted through the court, historically situated, politically contextualized contests were recoded as global conflicts over non-negotiable rights and universal freedoms.

Those who opposed the bill accused Buddhist interveners and the JHU of failing to understand that, for Christians, the act of evangelism was not secondary to or derivative from belief, but a spontaneous "witnessing" of divine presence. Therefore, to limit proselytizing was to impinge on one's religious belief, not to curtail a secondary manifestation of that belief. In contrast, Buddhist interveners insisted that the "Western" "Christian" perspective failed to grasp the importance and fragility of conscience within the Buddhist view. As lead council for Buddhist interveners explained to me: "For the West, [freedom of conscience] is freedom of choice. [Choices are] just laid

53 Interestingly, a similar logic was employed by the Italian Administrative Court in the case of *Lautsi and Others v. Italy*. As quoted in the European Court of Human Rights judgment of 18 March 2011, the Italian Administrative Court decision (which preceded the European Court of Human Rights appeal) defended the innocuousness of crucifixes in public school classrooms by arguing, inter alia, that Italy's heritage of Christianity set the foundation for its current secular atmosphere and culture of religious tolerance. Therefore, the court argued, the cross must be seen less as the exclusive and majoritarian symbol of a particular faith than as a general and "passive" symbol of the country's shared value system, of which secularism and tolerance were core features. Lautsi and Others v. Italy, 2011 *European Court of Human Rights (Grand Chamber)* §§ 14–15. (I thank Winnifred Sullivan for pointing out this parallel.)

54 SC (SD) 4/2004, Written Submissions on Behalf of Intervenient Petitioner, Ven. Omalpe Sobhita Thero, 24 (emphasis added). Much of the substance of this submission was duplicated in approximately 80 percent of the other intervenient petitioners' submissions.

55 SC (SD) 4/2004, Written Submissions on Behalf of Intervenient Petitioner Dr. J. M. K. Jayaweera, President of SUCCESS Movement, 2 (emphasis added).

out, like a buffet . . . But, for [Buddhists] . . . if I don't want something creeping into my mind, or impregnating into my mind, I should be able to stop it."[56]

The upshot is that the turn to constitutional law—and the "very balanced" language crafted by De Silva—to arbitrate conflicts over the appropriateness of proselytizing accomplished the opposite of what constitutional designers had hoped for and intended. Rather than providing the terms for a *rapprochement* of views and the gradual reconciling of frictions around a shared commitment to religious freedom, the legalization of religious tensions seemed to further affirm and deepen the assumed lines of conflict between Buddhists and non-Buddhists through a process of reifying opposing notions of Buddhist prerogatives and religious freedom. The process also affirmed and deepened conceptions of religious traditions as fixed, stable, and unchanging. At no point in the course of this court case did lawyers or judges question the reality of Buddhism and Christianity as distinct, internally coherent and naturally opposed communities and religions. Rather, the process further legitimated these cleavages by allowing Christian groups to speak on behalf of "Christianity" and by allowing Buddhist groups to speak on behalf of "Buddhism." In this sense, what is particularly intriguing about the court case was that in no moment was a single, specific case of "forcible conversion" adduced in court, outside of a few indirect anecdotes taken from newspapers. Through constitutional law, then, popular concerns over conversion gave way to polarized battles of reified worldviews, abstract ideas, and hypothetical circumstances: conversion was translated from a site of historical struggle into a normative problem.

So what did the Sri Lankan Supreme Court do? In its determination on the bill's constitutionality, the three-justice bench dodged the key points of disagreement. The court agreed with both parties on the question of religious rights, admitting that protecting Buddhism was indeed important, but insisting what was crucially at issue was freedom of religion in the form of "freedom of thought and conscience and religion."[57] The court further insisted that, in principle, converting another forcibly would violate that freedom of conscience by introducing a "fetter" on the "free exercise" of one's mind. However, it also concluded that the measures laid out by the bill to prevent such forcible conversions—particularly its protocols for reporting and laying charges—constituted unconstitutional "restraints" on freedom of conscience and religion. In this way, the court dealt with dispute by resorting to further equivocation: it declared the bill constitutional in spirit, but not in key areas of substance.[58] What is remarkable about the judgment is its studied avoidance of any statement concerning the questions that really mattered with respect to religious freedom and religious rights, most particularly questions about the relative priority of Buddhist protections vis-à-vis fundamental rights as well as any clarification of how freedom of conscience ought to be conceived. Like the members of the Constituent Assembly, the court refused to take steps towards disambiguating the chapters on Buddhism or fundamental rights. This refusal reflects the difficult political context in which the Sri Lankan state and its judiciary found themselves: to assert the priority of Buddhist protections over fundamental rights—or even to admit the necessity of weighing up constitutional duties to Buddhism when considering religious conversion—would be to

56 Interview with lead counsel for Buddhist interveners to JHU bill, February 4, 2009.

57 Determination of the Supreme Court of the Democratic Socialist Republic of Sri Lanka: Prohibition of Forcible Conversion of Religion Bill, petitions 2/2004–22/2004, *in* Government of Sri Lanka, *Parliament Debates (Hansard)*, August 17, 2004 (Colombo: Government Press, 2004), 1194–99.

58 Without going into detail, the court suggested that the bill *would be* rendered constitutional if it were to limit the types of people who can legally accuse another of "forcible conversion," omitting a requirement that proselytizers and converts (or those who participate in conversion ceremonies) report conversions to the government and excising a section on the discretionary powers of ministers to add new categories of "vulnerable" people and to institute new, related rules and regulations. See ibid.

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disenfranchise non-Buddhists, secularists, and liberals on the island, many of whom were important supporters of the government at that time. On the other hand, to assert the priority of fundamental rights over Buddhist privileges would be to alienate certain Buddhist supporters, including the JHU, who had gained significant public support.[59] Interpretations of freedom of conscience became a proxy language for the rival interests of those who favored or opposed the bill: asserted as a negative freedom, freedom of conscience became the rallying cry for groups like the JHU; asserted as positive freedom, it served the bill's opponents. The court carefully sidestepped either interpretation. In the end, by translating religious demands into constitutional language, litigants not only hardened the rigidity of those demands, they translated them into a form which the state refused to arbitrate.

CONCLUSION

Some may suggest that the dilemmas of legalizing religion, which I have just described, testify not to the corrosive effects of legalization in general but to the inadequacy of legal processes in Sri Lanka or to the continuing influence of a Buddhist exclusivism that is yet to be tamed by a commitment to the modern rule of law. Some would suggest that similar processes of ambiguous lawmaking and judicial interpretation characterize the legalization of religion in a variety of countries. That is, one might still posit that the solution to Sri Lanka's religious tensions lies within the apparatus of law. In fact, a variety of international governmental and nongovernmental groups advanced these arguments in the aftermath of the "Anti-Conversion Bill" case. Letters and reports were drafted by groups such as the Becket Fund for Religious Liberty, the US Commission on International Religious Freedom, and the United Nations Special Rapporteur on Freedom of Religion or Belief. In all of these cases appeals were made to the Sri Lankan government to uphold "religious freedom," by which was meant the positive freedom of conscience described above.

However, better laws or legal institutions will not eliminate the fact that, in Sri Lanka as elsewhere, understandings of religious freedom and religious rights are grounded less in philosophical arguments about liberal justice and universal rights than in historical arguments about colonialism and its legacies, sovereignty and its defense, Buddhism and its deprivations, and minority religious communities and their status on the island. In this context, the transnational legitimacy of secular liberal regimes of religious rights (such as those of the International Covenant on Civil and Political Rights), collide with the anti-colonialist legitimacy of law as an index of sovereign independence and the populist legitimacy of law as the embodiment of majoritarian demands: what may appear as a guarantor of religious freedom in one mode appears as religious domination in another. Therefore, to further disambiguate the Buddhism chapter—to further specify the primacy of liberal religious rights, for example—is not to invite a less problematic form of legality by way of a clearer form of legality. It is rather to risk tilting the content of law in a way that would undermine its legitimacy by exposing it to be either an expression of neocolonial Western dominance (in the form of hegemonic human rights norms) or an expression of national majoritarian dominance (in the form of clear Buddhist privileges). The persistence of Sri Lanka's constitutional provisions on religion—or, rather, the reluctance of political and legal authorities to alter or further clarify the meaning of those constitutional provisions—derives precisely from the manner in which they lock together in

59 See Neil DeVotta and Jason Stone, "Jathika Hela Urumaya and Ethno-Religious Politics in Sri Lanka," *Pacific Affairs* 81, no. 1 (2008): 33–34.

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irresolvable ambiguity the competing demands of citizens *while also displaying* those demands as not just authoritative, but "autochthonous."

This brief overview of the political, legislative, and judicial histories of Sri Lanka's constitutional religious rights is both a story about the avoidance and deepening of conflict. It is a story of avoiding conflict, in that it highlights the deliberate reluctance of Sri Lankan lawmakers and judges to weigh up, evaluate, and reconcile competing understandings of religious rights and religious freedom on the island. Those charged with charting and interpreting the contours of religious freedom on the island have not—for reasons of political necessity—arbitrated between these different visions. It is a story of the deepening of conflict in that it shows how, in turning to law, Sri Lankans have transmuted specific lines of tensions into a contest between absolute, non-negotiable "freedoms" and between Buddhism's "foremost place" and other religions' "fundamental rights." In the day-to-day lives of Sri Lankans, the increasing commonness of "rights talk" may therefore lead persons and communities to reconceive and recode what are often particular, historical, situational disputes in the language of universal, absolute legal claims.[60]

There is a price to be paid in this process. By constitutionalizing religion, Sri Lankans have overwritten and ignored the far more porous boundaries between the "religious" and the "non-religious," and between Buddhists, Christians, Muslims, and Hindus. Throughout Sri Lankan history and into the present moment, religious identities, religious worship, and religious sites have not easily been expressed as confined to single, isolated, distinct, religious "traditions." It is common to find "Hindu" deities in Buddhist temples, or to see regular church-goers attend Buddhist festivals. Many holy sites on the island—such as Adam's Peak and Kataragama—are considered sacred by multiple religious groups, and these sites have, for many years, been places of concurrent, plural religious worship, with Muslims, Buddhists, Christians, and Hindus worshipping together simultaneously.[61] Moreover, Buddhism itself—although rendered as a singular, coherent, collective entity in the constitution and court determinations—does not name an undivided religious collectivity, but an amalgam of different (often competing) monastic sects, lay organizations, places of worship, practices, texts, and devotees. Considering this, in Sri Lanka, the language of religious rights does *not* accurately reflect or readily translate the realities of religious life. The antimony of religious freedom in the Buddhism chapter is, in a sense, the product of legal fictions. But if they are fictions, they are nonetheless influential ones. Legal institutions alter social life and reconfigure political incentives. In so doing, they may generate new lines of strife (or reaffirm the old ones), such that the very legal tools deployed to solve a social problem become complicit in the fixing and deepening of the problem itself.

The history of Sri Lanka's Buddhism chapter points to the political, legal, and judicial consequences that flow from the seemingly banal observation that religious freedom means different things to different people. Yet, if we take this observation seriously, particularly in the context of a former colony, it follows that legalizing religious freedom may not produce stable agreement

60 To the best of my knowledge, this line of argument about the "impoverishing" effects of "rights talk" was introduced originally by Mary Ann Glendon in the context of the US. See, generally, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

61 There is a large literature concerning what Jonathan Walters, deliberately avoiding the terms syncretism and pluralism, describes as "multi-religion" in Sri Lanka. Important contributions include Jonathan S. Walters, "Multireligion on the Bus: Beyond 'Influence' and 'Syncretism' in the Study of Religious Meetings," in *Unmaking the Nation*, eds. Pradeep Jeganathan and Qadri Ismail (Colombo: Social Scientists' Association, 1995), 34–60; Richard Gombrich and Gananath Obeyesekere, *Buddhism Transformed: Religious Change in Sri Lanka* (Delhi: Motilal Banarsidass, 1988); John Clifford Holt, *The Buddhist Visnu: Religious Transformation, Politics, and Culture* (New York: Columbia University Press, 2004).

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on shared principles, but fossilized stalemate over opposing principles. If Sri Lanka's religious communities are to have a harmonious future it may be in spite of the law, rather than because of it.

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