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CHAPTER FIVE

The Democratic State and
Religious Pluralism

Comparative Constitutionalism and
Constitutional Experiences of Sri Lanka



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INTRODUCTION

There is no denying that South Asia is one of the most colourful places on the earth. The colours come from the rich diversity of its peoples. The various hues added on by the multi-ethnic, multi-religious, multi-lingual dimensions of its peoples make for a beautiful mosaic, made up of the sum of its individual parts—the parts representing the diversity within the South Asian states. All too often, though, the mosaic is terribly fragmented. The task of keeping it all together, while retaining the integrity of the individual parts, is a huge challenge. The modern histories of the various South Asian countries bear witness to that.

The question then is, how do we keep it all together? As our countries modernize, embracing democracy, the rule of law, protection of human rights, and so on, answers to those challenges are sought through constitutional schemes. So, which constitutional scheme will deliver the magical answer? Can the South Asian constitutional experiences provide answers at all? Should we appeal to a larger overarching set of norms? The questions call for a major comparative study.

This essay, however, focuses on a less ambitious project. It intends to examine the postcolonial constitutional experiences of one South Asian nation—Sri Lanka—relating to religious pluralism, or the lack of it. Despite high social indicators, Sri Lanka, home to a multi-ethnic and multi-religious society, has had a troubled history in dealing with issues of pluralism. That troubled history exploded into a protracted secessionist war in 1983. The fault line of the majority–minority tension and the ensuing armed conflict has clearly been ethnicity, with the issue of language rights being one of the central grievances. Contrary to popular belief, religion has not figured as a factor informing the move for secession.

However, the constitutional provisions in both the Republican Constitutions of Sri Lanka (of 1972 and 1978), which accord to Buddhism—the religion of the bulk of majority Sinhalese—the foremost place, have been a sensitive issue among minority groups, and have certainly added to a larger sense of grievance arising from other issues. The sensitivities are particularly strong as the first republican constitution (1972) discarded the express provision for the protection of religious groups and other communities contained in the Independence Constitution (the Soulbury Constitution).

A more recent development that has aggravated nascent religious sensitivities is the violent opposition to activities of evangelical Christian groups and a consequential move to adopt an anti-conversion law that seeks to criminalize ‘unethical’ conversions. Interestingly, Buddhist and Hindu organizations have joined hands in pushing for this legislation fearing encroachment into their respective flocks by a ‘common enemy’. The tension that surrounded this saga gave rise to fears of a religious fault line developing alongside the violent ethnic divide.

What could be the constitutional responses to these troubling developments? This essay will examine the jurisprudence of the Supreme Court of Sri Lanka on the various provisions relating to religion in the Independence Constitution and the two Republican Constitutions of 1972 and 1978. In recent years, in particular, the apex court has delivered contradictory judgments, some recognizing constitutional protection of religious pluralism, while others have adopted very restrictive views. The examination of those developments in light of comparative South Asian experiences and, at a broader level, of international human rights obligations will, it is hoped,

highlight the constitutional challenges and, indeed, the reforms that ought to be put in place. Some thoughts on the value of comparative constitutionalism, in the context of Sri Lanka’s experiences that are discussed in the essay, will be presented in the concluding section.

RELIGIOUS FREEDOM: SOUTH ASIAN EXPERIENCES AND INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVES

All South Asian states have embraced democracy at present—at least notionally so. One of the major challenges facing democratic states is how to respect and ensure pluralism. The centrality accorded to the concept of the autonomous individual in liberal democratic theory necessarily requires a political environment which guarantees choices—choices not only relating to political thought, but also vis-à-vis cultural and social choices. Pluralism reigns when choices can be made freely and when the choices we make are recognized and respected on an equal footing. One of the most fundamental choices demanded by human society relates to the right of worship. Historically, and also at present times, those seeking freedom from religious persecution have catalysed political reform. That struggle has also deeply influenced the evolution of international human rights norms.

Modern constitutions in heterogeneous societies have grappled with the question of how best to ensure religious pluralism, and continue to do so in view of new challenges. Even mature democracies have not adopted a uniform model, with some embracing secularism, while others still continue to recognize a State religion while assiduously providing constitutional guarantees of freedom of religion. In an era of heightened identity politics, the search for best practices and ideal models has become a difficult task.

Before moving on to examine the South Asian constitutional efforts in this regard, an assessment of international human rights norms is in order. They represent an overarching scheme of values that bind states, and as the Preamble to the Universal Declaration of Human Rights (1948)¹ so eloquently exhorts, amounts to a ‘standard of achievement for all organs of society’. Today, it could be argued,

¹ General Assembly Resolution 217A(III) of 10 December 1948.

that the measure of constitutionalism is determined to a great extent by whether governance comports with universal human rights norms.

International Human Rights Law Perspectives

A thread that runs through all human rights debates and instruments is the Right to Equality and non-discrimination. While the concept of equality has wider connotations, the concept of non-discrimination entails prohibiting discrimination on recognized grounds ('suspect classifications', as US jurisprudence would have it). The United Nations Charter (1945) and all major international human rights instruments (including regional human rights instruments) oppose discrimination on the grounds of religion or belief. Note that the protection is afforded to non-believers as well.

Ensuring religious pluralism is a foundational principle of the United Nations. Promoting respect for human rights of all without discrimination on the basis of race, sex, language or religion is a principle that runs throughout the UN Charter (1945).² Provisions of the Universal Declaration of Human Rights (UDHR) (1948)³, International Covenant on Civil and Political Rights (ICCPR) (1966)⁴, and the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)⁵ outline the core international human rights law norms on freedom of religion or belief. The UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities (1992)⁶ articulates the group rights dimension of, *inter alia*, religious minorities.

The relevant UDHR and ICCPR provisions (Article 18 of each) recognize a broad guarantee of the 'right to freedom of thought, conscience and religion'. The right includes the right to adopt ('change' is used in the UDHR) a religion of one's choice and to

² See, Charter of the United Nations (1945) Articles 1(3), 13(1)(b), 56 read with 55(c), 62(2) and 76(c).

³ See, note 1.

⁴ General Assembly Resolution 2200 A(XXI) of 16 December 1966, entered into force on 23 March 1976.

⁵ General Assembly Resolution 36/55 of 25 November 1981.

⁶ General Assembly Resolution 47/135 of 18 December 1992.

engage in religious practices alone or in association with others. Religious activity in the form of teaching, practice, worship and observance are specifically mentioned as protected conduct. The right to thought, conscience and religion is absolute, meaning that no limitation can be imposed in enjoying these rights. Such rights also cannot be derogated from during periods of Emergency. However, the right of manifestation of religion or belief is circumscribed by the ICCPR when such limitations are prescribed by law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others. It also contains a stricture on the use of coercion that impedes the right to freely have or adopt a religion (Article 18(3)).

The Declaration on Religious Discrimination reiterates the same normative framework. It declares religious discrimination as 'an affront to human dignity' and a disavowal of the principles of the UN Charter. The significant contribution of the Declaration is the definition of 'intolerance and discrimination based on religion or belief'.⁷ Further, it prohibits religious discrimination by both State and private parties. States are required to take legislative action to prevent discrimination and take 'all appropriate measures' to combat religious intolerance.

The above international instruments deal with religious freedom essentially as an individual right. The Declaration on Minorities focuses on the group rights dimensions, articulating rights of persons as members of a minority group. It stipulates both negative (for example, non-discrimination) and positive obligations (for example, creating favourable conditions for the enjoyment of rights of minorities) of States. It recognizes the need to permit minorities to effectively participate in decision-making concerning them, both nationally and regionally. It does so cautiously, adding that such participation shall not be incompatible with national legislation (Article 2(3)). The Declaration has been criticized for being minimalist. But it provides a framework within which the rights regime can be expanded.

⁷ For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction, or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment, or exercise of human rights and fundamental freedoms on an equal basis (Article 2.2).

Article 27 of the ICCPR which, unlike the Declarations, is legally binding on States Parties, declares: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

Despite this normative framework, international law is silent on the type of constitutional arrangements or forms of State structures that ought to be put in place to ensure the protection of religious freedom, or for that matter, the larger issue of protecting minority rights. This is not surprising as international law does not prescribe national arrangements, permitting a 'margin of appreciation' in that regard. However, States cannot plead domestic laws as a defence for not fulfilling international obligations.⁸ The expectation of international law is that States will fulfill their international obligations by taking appropriate action as they think fit.

It is significant that international human rights law does not reject the concept of State religion. Instead, what is sought to be achieved is religious freedom for all even where a State religion is recognized. The General Comment adopted by the UN Human Rights Committee (the treaty body established by the ICCPR to supervise its implementation) on freedom of thought, conscience, and religion authoritatively declares that position and delineates protection to be afforded to those who do not belong to the State religion.⁹ The stipulated position of the Committee's interpretation clearly does

⁸ Vienna Convention on the Law of Treaties (1969) Part III, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last accessed on 17 July 2012).

⁹ The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant [ICCPR] including Articles 18 and 27, nor in any discrimination against adherents to [sic] other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under Article 26. (General Comment 22 adopted at the forty-eighth session of the UN Human Rights Committee (1993),

not require the separation of State and religion. This may come as a disappointment to committed secularists, including the author. It is certainly a tall order for any system of government which recognizes a State religion to pay heed to that feature and also to ensure that 'others' get to enjoy all their rights without hindrance. The thrust of the international normative framework is that irrespective of the State-religion nexus in a given system the State is obligated to recognize and protect the religious freedom of all (including non-believers) without discrimination.

South Asian experiences in this regard too, reflect diverse policies and diverse degrees of success, depending on the political history of each country and their social and cultural milieux.

South Asian Experiences

Many great religious traditions emerged from South Asia including Hinduism and Buddhism. The people of South Asia represent almost all the major religions in the world.

Libertarians would maintain that India has shown a great degree of political maturity by embracing secularism as a fundamental constitutional principle. In fact, through judicial fiat secularism is today considered an essential component of the basic structure of the constitution that cannot be changed except through political revolution. However, secularism is not without its critics among the Indian intelligentsia.¹⁰

Jawaharlal Nehru, the first prime minister of India, was a committed secularist. He idealized a secular constitutional order for the newly independent India. However, his vision of secularism was different to the 'wall of separation' theory adopted by US constitutional doctrine. He envisioned a State that would treat all religions equally. He took pains to explain that '[s]ome people think

para 9, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?OpenDocument) [last accessed on 17 July 2012].)

¹⁰ See, T.N. Madan, 'Secularism in its Place', in Rajeev Bhargava (ed.), *Secularism and Its Critics* (OUP: New Delhi, 1998), p. 297. See also, Ashis Nandy, 'The Politics of Secularism and the Recovery of Religious Toleration', in Rajeev Bhargava (ed.), *Secularism and Its Critics*; Ashis Nandy, 'An Anti-Secular Manifesto', *Seminar*, (October 1985), 314: 1-12.

it [secularism] means something opposed to religion. That obviously is not correct. ... It is a state which honours all faiths equally and gives them equal opportunities.¹¹

Similarly, the founders of Pakistan and Bangladesh were both committed to the creation of secular political orders in the countries they helped create. However, the political trajectories of both countries eventually witnessed the adoption of Islam as the State religion, with the State–religion nexus becoming entrenched under military rule.

Despite Pakistan's founder and first Governor-General Muhammad Ali Jinnah's partiality toward secularism, political realities won the day.¹² The Preamble to the Constitution of the Islamic Republic of Pakistan (1956) refers to Jinnah's declaration that 'Pakistan would be a democratic State based on Islamic principles of social justice'. However, no State religion was recognized. All laws (barring personal laws of non-Muslims) had to conform with principles of Islam (Article 198). Religious freedom of all was recognized as a fundamental right (Article 18). This scheme was to change under the Constitution promulgated in 1973 wherein Islam was recognized as the State religion (Article 2). This move, however, was accompanied by strong guarantees of religious freedom for all (Articles 20–22). This trend of incremental strengthening of the State–religion nexus in Pakistan reached its zenith with the entrenchment of military rule in the country in the latter part of the 1970s under the military dictator Zia-ul-Haq when the Holy Qur'an and the Sunnah were declared the supreme law of the land.

The Constitution of the newly formed Bangladesh (1972) was cast in idealistic terms reflecting the revolutionary spirit of the new republic soon after its war of national liberation. 'Nationalism, socialism, democracy and secularism' were declared to be fundamental principles of state policy (Article 8(1)). However, the Fifth Amendment to the Constitution that sought to legitimize military decrees issued by the military regime of President Ziaur Rahman changed those ideals to 'absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social

¹¹ See, S. Gopal (ed.), *Jawaharlal Nehru: An Anthology* (OUP: Delhi, 1980), p. 330.

¹² Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League, and the Demand for Pakistan* (Cambridge University Press: Cambridge, 1985), p. 216.

justice'. A new clause, (Article 8(1A)), declares: '[a]bsolute trust and faith in the Almighty Allah shall be the basis of all actions'. It further introduced the expression '*Bismillah-Ar-Rahman-Ar-Rahim*' ('In the name of Allah, the Beneficent, the Merciful') just above the preamble to the Constitution.¹³

More recently, however, the Fifth Amendment was declared unconstitutional by the Appellate Division of the Supreme Court of Bangladesh. In a historic judgment,¹⁴ a six-judge Bench, presided over by the Chief Justice, pronounced that the amendment was illegal and void *ab initio* as it amounted to an attempt to amend the constitution via military action. It is of significance that, although the Court condoned several provisions introduced through military decrees as necessary in the public interest, provisions of the Fifth Amendment that introduced a State religion were not condoned in that manner and were rejected. Thus, it appeared that the constitutional order would revert back to the initial secular framework. However, that was not to be. The Fifteenth Amendment to the Constitution, rushed through Parliament in July 2011 (in the absence of the boycotting opposition), has introduced a hybrid model recognizing both secularism as a fundamental principle of state policy and Islam as a State religion. How this model would work remains to be seen.¹⁵

It can be observed that gradually most countries in the region have settled for the adoption of a State religion, or have accorded primacy to a particular religion. The strength of legal guarantees of freedom of religion varies. The examination of those practices within the framework of international human rights is essential, in view of the growing convergence between international human rights obligations and constitutionalism.

Although South Asia is viewed as a prime theatre of communal conflict, that view belies a long history of coexistence among the

¹³ In general see, Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers: Dhaka, 2008, 2nd Ed., reprint), Chapter I.

¹⁴ *Khondker Delwar Hossain & Ors. v. Bangladesh Italian Marble Works Ltd., Dhaka and Ors.* (Appeal Nos. 1044 & 1045 of 2009), <http://www.thedailystar.net/images/5thamendment.pdf> (last accessed on 17 July 2012).

¹⁵ See, commentary by N. M. Harun, *Fifteenth Amendment Introduces Fusion of Ideologies*, <http://opinion.bdnews24.com/2011/07/07/fifteenth-amendment-introduces-fusion-of-ideologies/> (last accessed on 17 July 2012).

most esoteric of groups. Many scholars have referred to this tradition. T.N. Madan¹⁶ and Ashis Nandy, for example, reject secularism as a modern and alien concept which has not worked well in India.¹⁷ Nandy calls for reliance on the traditional practices of religious tolerance. Amartya Sen, too, acknowledges the long traditions of religious coexistence, but in a well-argued response,¹⁸ takes the position that there is nothing 'modern' about secularism, if it is taken to mean 'symmetry of treatment' of all religious groups, and that secularism and traditional forms of tolerance are not contradictory. I agree with Amartya Sen. Secularism is not a rejection of religiosity in society; rather, it is a tool for ensuring the pluralist character of religiosity.

On the note of traditional tolerance, I recall the late Sri Lankan constitutional scholar Neelan Tiruchelvam exhorting his young protégés to visit the city of Kochin in Kerala which is a supreme testament to centuries of religious coexistence. Visiting the famed city later, I was amazed to discover more than mere tolerance of the 'other' on the part of the Hindu rulers of Kerala; what appeared was an open welcoming of religions as varied as Judaism and Syrian Orthodox Christianity with the granting of land to build their temples. They have coexisted with Hinduism, Islam, and other faiths for centuries.

South Asia has also witnessed the worst forms of religious intolerance and violence, as in the blood spilled during the Partition of India and pogroms witnessed in the various countries in the region. Amidst today's troubled politics of religion and ethnicity in South Asia, examples of coexistence of yore should not be permitted to fade away into the sepia hues of history. It is clear, however, that in addition to appealing to the good senses and traditions of the citizenry, the complexities of modern societies require a more formal foundation for respecting pluralism.

The modern constitutional schemes of South Asia vary regarding the treatment of religion. At present, only the constitutions of

¹⁶ T.N. Madan, 'Secularism in its Place', p. 297.

¹⁷ Ashis Nandy, 'The Politics of Secularism'. See also, Ashis Nandy, 'An Anti-Secular Manifesto'.

¹⁸ Amartya Sen, 'Secularism and Its Discontents', in Rajeev Bhargava (ed.), *Secularism and Its Critics*.

India¹⁹ and Nepal (Interim Constitution, 2007)²⁰ recognize secular forms of government. For Nepal, it is a great leap from the previous constitution's (1990)²¹ recognition of Nepal as a Hindu kingdom. The constitutions of Afghanistan (2004),²² Bangladesh (1972),²³ Pakistan (1973),²⁴ and the Maldives (2008)²⁵ recognize Islam as the State religion. The Constitution of Sri Lanka (1978)²⁶ confers 'foremost place to Buddhism' (Article 9). It should also be noted that customary laws, some based on religion, continue to govern personal laws of South Asian nations, sometimes alongside secular general laws. Not a single country in the region has discarded customary laws in favour of a single uniform civil code.²⁷

The new Constitution of Bhutan (2008)²⁸ has put in place an interesting system whereby Buddhism is recognized as the 'spiritual heritage of Bhutan'. The monarch has to be a Buddhist. However, the monarch is the protector of all religions in the country and separation of religion and politics has to be ensured (Article 3(3)). Freedom of thought, conscience, and religion is recognized towards all (Article 7). It could be best described as a hybrid system, which displays compatibility with the system envisaged in the ICCPR, if effectively implemented.

¹⁹ <http://lawmin.nic.in/coi/coiason29july08.pdf> (last accessed on 17 July 2012).

²⁰ http://www.worldstatesmen.org/Nepal_Interim_Constitution2007.pdf (last accessed on 17 July 2012).

²¹ http://www.nepaldemocracy.org/documents/national_laws/constitution1990.htm (last accessed on 17 July 2012).

²² http://www.afghan-web.com/politics/current_constitution.html#chapterone (last accessed on 17 July 2012).

²³ <http://www.banglaembassy.com.bh/Constitution.html> (last accessed on 17 July 2012). See also, *Khondker Delwar Hossain & Ors. v. Bangladesh Italian Marble Works Ltd., Dhaka and Ors.*

²⁴ <http://www.mofa.gov.pk/Publications/constitution.pdf> (last accessed on 17 July 2012).

²⁵ <http://www.presidencymaldives.gov.mv/Documents/ConstitutionOfMaldives.pdf> (last accessed on 17 July 2012).

²⁶ <http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf> (last accessed on 17 July 2012).

²⁷ Article 44 of the Indian Constitution declares as a directive principle of state policy that the State shall endeavour to secure a uniform civil code. This has not borne fruit yet.

²⁸ <http://www.constitution.bt/html/constitution/glossary.htm> (last accessed on 17 July 2012).

The principle of secularism was not included in the original text of the Indian Constitution. However, extensive provisions relating to freedom of religion were included in the original text (Articles 25–8) including provisions on minority rights (Articles 29–30). The principle of secularism as a feature characterizing the Indian State was added to the Preamble of the Constitution of India by the 42nd Amendment in 1976. Jain points out that it was an exercise in making explicit what was implicit in the Constitution.²⁹ In *Bommai v. Union of India*,³⁰ the Supreme Court held that the principle of secularism is a part of the basic structure of the Constitution. Again, as Jain points out, India's brand of secularism is not aloof from religion. It means that the State does not provide patronage to any particular religion: it is required to respect all religions and belief systems.³¹ Article 28 imposes a stricture that wholly-State-funded schools cannot impart religious instructions. It has been interpreted to mean that the study of religions focussing on philosophy and values are not excluded whereas religious instructions are.³² The State can regulate what are deemed secular matters of religious institutions (Article 25(2)(a)).

We will have to await the finalization of the ongoing Constitution-making process in Nepal to see how secularism develops there. Secularism in India continues to evolve despite scepticism on the part of some. Observed from outside, India's secular constitutional regime, despite its turns and twists, appears to be an attractive arrangement, especially in increasingly tumultuous times.

All South Asian countries, barring Bhutan,³³ have acceded to the ICCPR thereby undertaking binding international legal obligations on, *inter alia*, religious freedom. Maldives and Pakistan have entered reservations to ICCPR Article 18 (guarantee of freedom of thought, conscience, and religion) subjecting its application within their countries to the respective constitutional provisions.

²⁹ M.P. Jain, *Indian Constitutional Law*, 5th Ed. (LexisNexis Butterworths Wadhwa: Nagpur, 2009), p. 1201.

³⁰ AIR 1994 SC 1918; 1994 3 SCC 1.

³¹ M.P. Jain, *Indian Constitutional Law*, pp. 1201–2.

³² *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

³³ For ratification record and reservations entered see, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last accessed on 25 September 2011).

STATE AND RELIGION IN SRI LANKA

The Politics of Religion

Sri Lanka too has unfortunately fallen into the common trap of permitting excessive religious influence over politics and the politicization of religion. Ethno-religious identities that crystallized during colonial rule were further consolidated during the post-Independence period as a means of jockeying for political power and entitlements. The escalating ethno-religious schism between the Sinhala and the Tamils eventually culminated in a nearly three-decade-long fratricidal civil war in the northeast of the country. Those developments are in stark contrast to the centuries old tradition of coexistence and the reality of fluid identities among the various communities in Sri Lanka.

As an island nation situated in close proximity to busy sea routes, Sri Lanka has attracted many settlers and travellers over millennia. It also attracted three colonial powers in succession—the Portuguese (1505), the Dutch (1668), and the British (1796). All these phenomena have left a rich legacy of a multi-ethnic, multi-religious and multi-lingual population. Currently, the approximate percentage of population breakdown according to religion is Buddhist 76.7, Hindu 7.8, Muslim 8.5, Roman Catholic 6.1, and other Christian groups 0.9. The figures are according to the 2001 census which could not cover the districts affected by the armed conflict. Hence, the number of Hindus is reflected as less than adherents of Islam. It is also noteworthy that non-believers are not included in the breakdown.³⁴

Today, most Sinhalese are Buddhist while most Tamils are of the Hindu faith. Both communities have small percentages of Christians of various denominations. However, this ethno-religious typology was not always so. It appears to be very much a construct of the historical mythology surrounding the formation of the nation. The *Mahavamsa*, the historical chronicle of the country, has been central to the idea that Lanka is the land of the Sinhalese who were chosen by the Buddha as guardians of Buddhism. The chronicle, written over many centuries by Buddhist monks, appears to have had the

³⁴ <http://www.statistics.gov.lk/PopHouSat/PDF/Population/p9p9%20Religion.pdf> (last accessed on 17 July 2012).

promotion of that idea as its core agenda and mission.³⁵ Although viewed with scepticism by historians and anthropologists as an elaborately embellished and romanticized construction of historical events to promote a self-serving goal of its writers, this central thesis of the *Mahavamsa* has had a powerful influence in shaping the self-identity of the majority Sinhala community.

According to the popular *Mahavamsa* account, the Sinhala were founded by the progeny of Prince Vijaya and his entourage, described as Indo-Aryans from north India, around fifth century BC. In the third century BC, the Sinhala King Devanam Piyatissa was converted to Buddhism by Arahata Mahinda, a kinsman of Emperor Asoka. Then onwards, Buddhism spread rapidly among the people and became the State religion with the unification of the country by the great Sinhala King Duttagamani (Dutu Gemunu) who defeated Elara, the Dravidian king who ruled the north. As de Silva points out, the duel between the two '...is dramatized as the central theme of the later chapters of the *Mahavamsa* as an epoch-making confrontation between the Sinhalese and the Tamils, and extolled as a holy war fought in the interests of Buddhism'.³⁶

The Dravidian people from South India are often viewed as alien invaders who challenged the authority of Sinhala kings. The advent of Hinduism in the country much later is attributed to Dravidian settlers. Hence comes the typology of the Sinhala as protectors of Buddhism and Tamils (a generic term to describe all Dravidian groups) as adherents of Hinduism.

However, scholars have consistently pointed out the fallacy of this neat classification, noting that historically there were not only Sinhala Buddhists but also Tamil Buddhists, with shifting and overlapping ethno-religious identities.³⁷ Obeyesekere points out, for example, that King Kirti Sri Rajasinghe (1747–82), who interestingly was from Madurai in South India, served as one of the last kings of the Kandyan kingdom predominantly inhabited by the Sinhala. He was both a Buddhist and a Saivaite, and a speaker of Tamil, Telugu, and

³⁵ K. M. de Silva, *A History of Sri Lanka* (Vijitha Yapa: Colombo, 2005), pp. 6–8.

³⁶ *Ibid.*, p. 16.

³⁷ *Ibid.*; G. Obeyesekere, 'Buddhism, Political Violence and the Dilemmas of Democracy in Sri Lanka', CSDS occasional paper (April 2009), pp. 14–16.

Sinhala. He initiated a great revival of Buddhism that lasted all the way up to the nineteenth century.³⁸

This reality has been obfuscated not only by the historical account of the *Mahavamsa*, but also by a major Sinhala nationalist discourse that arose in the latter part of the nineteenth century in opposition to British colonial rule, which remains very influential among the Sinhala to this day. The discourse owes its origins to the movement launched by Anagarika Dharmapala in his effort to bring about a Buddhist cultural revival in the face of onslaughts on Buddhism by Christian missionaries and what he perceived as corrosive cultural influence of the West. The Anagarika's call for a Buddhist revival, however, ended up drawing a firm nexus between the Sinhala identity and Buddhism resulting in a strong articulation of Tamil 'otherness'.³⁹ As Obeyesekere observes:⁴⁰ 'Dharmapala's reform entailed the notion of both Sinhala and Buddhism in opposition to Tamils as aliens. This oppositional dialectic could take the form of Sinhala versus Tamil in political discourse.'

It has to be noted, however, that the Tamil nationalist discourse which accompanied the militant separatist movement of the past several decades did not place emphasis on religion: rather, the objective of the Tamil nationalist project was the construction of the Tamil nation mostly along linguistic lines and gaining political recognition for it as such. Even though most Tamils are adherents of Hinduism, it is commonly believed that some of the major protagonists of Tamil nationalism were non-Hindus. Religion, therefore, has come into play not as the cause of tension between communities, but more in the form of a reluctant component of politically constructed ethno-religious identities. However, as we shall see below, the use of religion as an ethnic marker was to have serious constitutional and political ramifications under the two republican constitutions of Sri Lanka.

THE CONSTITUTIONAL FRAMEWORK

As pointed out above, the dividing line of the recent armed conflict in the northeast of the country is ethnicity, and not religion.

³⁸ Obeyesekere, 'Buddhism, Political Violence', p. 13 and endnote 8.

³⁹ H.L. Seneviratne, *The Works of Kings: The New Buddhism in Sri Lanka* (Chicago and London: University of Chicago Press, 1999), p. 26.

⁴⁰ Obeyesekere, 'Buddhism, Political Violence', p. 37.

If religion mattered, it did so as a marker of ethno-nationalist identity as in Sinhala–Buddhist, Tamil–Hindu, or Muslim identity. Religious tensions did arise in the recent past, however, because of the opposition to activities of evangelical Christian groups by both Buddhist and Hindu religious organizations. The Buddhist groups included a political party, the Jathika Hela Urumaya, which was organized around an ideology of Sinhala–Buddhist nationalism. This rather unusual alliance pushed for the adoption of an anti-conversion law that would criminalize ‘unethical’ religious conversions. The alliance between the Buddhist and Hindu groups was significant in the context of the armed conflict in the northeast of the country. In this instance, it was apparent that the alliance viewed Christian evangelical activity as a common threat to its respective flocks.⁴¹

During the lengthy colonial experience of Sri Lanka, which spanned four and a half centuries, the local populace found converting to Christianity to be a quick path to obtaining patronage of the colonial authorities.⁴² As was the case elsewhere in the Empire, the British played on the tensions among the various ethnic groups to their political advantage. By the time independence was on the horizon, the colonial authorities came to realize that the communal fissures within the native polity could prove to be incendiary.⁴³

The Soulbury Constitution of Sri Lanka, which came into effect at independence in 1948, had a provision to safeguard the interests of persons belonging to the various communities and religious groups. Article 29(2) provided that no law shall be made prohibiting or restricting the free exercise of any religion or any legislation that discriminates against persons of any community or religion. Article 29(2)(c) specifically stipulated that no privilege or advantage could be conferred by law on persons of any religion or community that others were not entitled to; and Paragraph (d) assured that legislation could not interfere with any religious body except with the consent of

the governing authority of that body. Further, Article 29(3) stipulated that any law made in contravention of Clause (2) will be void to that extent. The necessary implication was the recognition of judicial review of legislation, a constitutional principle largely unfamiliar to the traditional British constitutional framework. The overall tenor of Article 29 suggested a secular constitutional framework.

This scheme was dramatically altered by the republican constitution adopted in 1972. The irony about the first autochthonous constitution was that, while it was adopted in the glorious republican spirit of vesting sovereignty in the people, its overall majoritarian bent, coupled with the elimination or dilution of checks and balances inherent in the Soulbury Constitution, further deepened the ethnic divide.⁴⁴ In fact, the Federal Party representing the interests of a large section of the Tamil population boycotted deliberations of the Constituent Assembly after a while. The remaining parties too failed to reach consensus on several key issues, and eventually the new Constitution was adopted by a divided vote of 119 to 16 with one abstention.⁴⁵

From a minority rights point of view, the failure to include a provision comparable to the previous Article 29 was the major cause of discontent. That sense of grievance was amplified by the recognition of Sinhala as the only official language and the inclusion of Article 6 (‘Buddhism Clause’) which required that ‘[t]he Republic of Sri Lanka shall give to Buddhism the foremost place’.⁴⁶ All of this was compounded by the overall scheme of the Constitution that centralized power in the National State Assembly (in the name of people’s power and parliamentary supremacy) and removed many checks and balances found in the Soulbury Constitution. One of the most problematic features was the removal of judicial review

⁴¹ See, report of UN Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, UN Doc. E/CN.4/2006/51 Add. 3, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05166/64/PDF/G0516664.pdf?OpenElement> (last accessed on 17 July 2012).

⁴² K. Jayawardena, *Nobodies to Somebodies: The Rise of the Colonial Bourgeoisie in Sri Lanka* (Social Scientists’ Association: Colombo, 2000), pp. 250–3.

⁴³ See, de Silva, *History of Sri Lanka*, pp. 531–53.

⁴⁴ K. Loganathan, *Sri Lanka: Lost Opportunities* (CEPRA: Colombo, 1996), Chapter 3; de Silva, *History of Sri Lanka*, pp. 668–80.

⁴⁵ J.A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi Publishers: Colombo, 1995), pp. 59–95; Loganathan, *Lost Opportunities*, Chapter 3; Constituent Assembly of Sri Lanka, Official Report, Vol. 2, pp. 950–9.

⁴⁶ 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) [freedom of religion clause]. —Article 6 of the 1972 Constitution of Sri Lanka.

of legislation. A small window of opportunity was given for pre-legislative review. A chapter on fundamental rights and freedoms was introduced. However, no specific constitutional remedy for violations of rights was recognized.

Colvin R. de Silva, widely recognized as the architect of the 1972 Constitution, was vehement in his denial that Article 6 made Buddhism the State religion. In the course of a public lecture fifteen years after the adoption of the Constitution, he made the startling revelation that the contested Article was a compromise reached to assuage the demands of hardline members of the Constituent Assembly that drafted the Constitution. He referred to a proposal made by a committee of the Constituent Assembly to include a provision to ensure that both the president and the prime minister be Buddhist or Sinhala Buddhist.

At de Silva's urging the committee members settled for the position that 'if you must work for religion, then Buddhism is in fact a religion which holds the foremost position in this country; hence, it was not necessary to have the most powerful political offices in the country reflect the supremacy of Buddhism. It was that formula that eventually found its way into Article 6. He then went on to state that as a secularist, he would have been happy just to have the 'freedom of religion clause' (Article 18(1)(b)) in the Constitution, but observed that 'constitutions are made by Constituent Assemblies, they are not made by the Minister of Constitutional Affairs'. He was comfortable as long as a State religion was not established. He went on to assure, '[b]ut there is nothing here, and I repeat NOTHING, in Section 6 which in any manner infringes upon the rights of any religion in the country'.⁴⁷

Another reason advanced by de Silva for moving away from the Article 29 formula of the Soulbury Constitution was scepticism about judicial review of legislation. Perhaps his socialist convictions caused him to recognize no authority over the legislature, the repository of people's sovereignty.

[W]hy then did we not bring Section 29 in that form into the 1972 Constitution? For the simple reason, as I said at the outset, if you put Section 29 in that form into the 1972 Constitution then Parliament's

⁴⁷ Colvin R. de Silva, *Safeguards for the Minorities in the 1972 Constitution* (A Young Socialist Publication: Colombo, 1987), pp. 9–17.

laws would become subject to decisions of the Supreme Court or other Courts of the land as to their validity. That was completely contrary not only to the principles of the Constitution, but also to the principles [sic] that people are sovereign.⁴⁸

The unfortunate circumstances that led to the 1972 Constitution's inability to create a scheme that entrenched pluralism as a constitutional principle were accentuated by the reality that politicians of de Silva's caliber—avowed Leftists representing progressive viewpoints on minority rights—were then powerful coalition partners of the ruling United Front government. Somehow, apparently without much protest, powerful political ideals were compromised. Some ideals, such as the supremacy of the legislature, proved to be a misguided romanticization of republicanism that resulted in the dilution of democratic safeguards. The Tamil community, in particular, felt alienated from the new republic, and that sentiment, together with accumulated grievances, fuelled the violent political storm that engulfed the country for decades.

The second republican constitution adopted in 1978 on the whims of the United National Party headed by J.R. Jayawardena unfortunately perpetuated the ills of the 1972 Constitution and added some more in the form of the all-powerful executive presidency. Article 9 of the 1978 Constitution reproduced the contested Article 6 of the 1972 Constitution: '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).' The chapter on fundamental rights guarantees freedom of thought, conscience, and religion as an absolute right (Article 10): 'Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.' It is an entrenched clause that requires for its amendment a two-thirds majority in Parliament and a referendum (Article 83). A novel feature is the recognition of a specific constitutional remedy for infringement of fundamental rights (Articles 17 and 126). However, judicial review of legislation was once again done away with except the possibility of pre-legislative review of Bills. Furthermore, as

⁴⁸ *Ibid.*, pp. 15–16.

per Article 16, all existing statutes, whether in compliance with fundamental rights or not, were to continue, permitting problematic customary personal laws to also continue.

Despite de Silva's assurance that the Buddhism clause in the 1972 Constitution did not establish a State religion, the tenor of the provision, and Article 9 of the 1978 Constitution that followed, were to have negative constitutional implications for religious freedom, as the discussion below on constitutional jurisprudence will establish.

Article 9 has had an impact at policy and institutional levels too. Since the late 1980s, successive governments have created ministerial portfolios on religious affairs. From time to time, there have been specific ministries to foster the *Buddha Sasana* and also to promote Muslim, Hindu, and Christian religious affairs. Sometimes, all religious affairs have been dealt with under one ministry. There are also separate governmental departments to deal with the affairs of the four major religions observed in Sri Lanka.

At present, there is a ministry of *Buddha Sasana* and Religious Affairs. According to the gazette notification that describes its duties and functions,⁴⁹ 'implementation of appropriate programmes and projects to protect and foster the *Buddha Sasana* as provided for in Article 9 of the Constitution, while ensuring to all religions the right granted by Articles 10 and 14(1)(e) of the Constitution' is a principal function. At the same time, the implementation and monitoring of programmes with respect to Hindu, Christian, and Islamic religious and cultural affairs is also stipulated as a function. A predominant number of other items on the list exclusively pertain to promoting and fostering Buddhism—for example, 'assisting the propagation of the *Buddha Dhamma*', 'administration of the *Buddha Sasana* fund', 'activities connected to international Buddhist centres'.

Similarly, the duties and functions of the Ministry of Higher Education contained in the same gazette include the following: 'higher education for Bhikkus in the relevant fields of study', 'promotion of Buddhist and Pali studies'. The Ministry of Education lists 'promotion of Buddhist and Pali studies in achievement of relevant Millennium Development Goals' and 'pirivena [Buddhist seminary] education and religious education at school level' as functions. There is no reference to educational activities pertaining to other religions in any of the lists.

Constitutional Jurisprudence

Cases Relating to the Incorporation of Religious Bodies

A string of Supreme Court judgments delivered in quick succession between 2001 and 2003 has given rise to grave concern for the constitutional protection of religious freedom in Sri Lanka.

All three judgments stemmed from petitions challenging the constitutionality of legislative Bills which sought to incorporate charitable institutions set up by certain Christian denominations. The main bone of contention of the petitioners was that freedom of religion of non-Christians will be adversely affected by the establishment of Christian charitable bodies that would facilitate unethical conversions. All three petitions⁵⁰ were supported by the same counsel and the legal averments were more or less identical. In two of the cases, judgment was given in the absence of submissions defending the respective Bills. Significantly, in all three cases, the Attorney-General agreed with the submissions of the petitioners.

The first case⁵¹ concerned the incorporation of an entity, 'Christian Sahanaye Doratuwa Prayer Centre'. Among its objectives were providing relief through prayer, assistance to secure jobs, and training of persons to engage in self-employment. It was those objectives that drew the ire of the petitioners. What was averred was that through such 'economic and commercial' activity, 'persons of another religion or belief who come to the prayer centre would be allured to adopt the religion of the prayer centre'. Such efforts, therefore, would amount to unethical conversions through allurements which would result in a violation of the rights of non-Christians to freely profess their religions. That would be a violation of Article 10 ('freedom of religion' clause). The Attorney-General agreed. No submissions had been made to defend the Bill.

In response, the Supreme Court made a distinction between the right to practise one's religion in association with others (Article 14(1)(c)) and the right to engage in an occupation, trade, business, or enterprise (Article 14(1)(g)). The latter, the Court pointed out, did not come within the ambit of religious freedom, and therefore,

⁵⁰ SC Special Determinations Nos. 2/2001, 2/2003, and 19/2003.

⁵¹ SC Special Determination No. 2/2001, SC Minute of 24.05.2001, reproduced in *LST Review*, (2003), 14(191): pp. 21–5.

⁴⁹ Gazette Extraordinary No. 1681/3 of 22 November 2010.

'[a] prayer centre that seeks special legislative recognition by way of incorporation cannot avail itself of these two freedoms together'. Doing so infringes others' right to freedom of religion under Article 10. The Court found that the Bill, therefore, had to be passed by a two-thirds majority in Parliament and be approved at a referendum.

With due respect to the Court, the reasoning of the judgment is very problematic. The Court proceeded on the assumption that charitable activities of religious bodies—it termed them as 'economic and commercial' activities—would necessarily result in conversions through allurements; or perhaps, the suggestion is that such mischief is inherent in Christian charitable bodies, if not in other religious bodies. The Court's position that charitable services relating to self-employment, vocational training, and the like cannot be viewed as religious practice is clearly based on such an assumption. Otherwise, there was no legal basis to reach the conclusion drawn by the Court.

The Court, presided over by the former Chief Justice Sarath Silva,⁵² does not explain how it reached that assumption. The judgment refers to 'a significant body of material' relied on by the petitioner to establish the conversion of persons of one religion to another by allurements. However, the Court goes on to state that it is not necessary to examine the material 'which may be of social and political content but *does not have a direct bearing on the questions of law that arise for consideration*' (emphasis mine). In that case, what was the basis of the assumption that was foundational to the Court's findings? Would the Court have found that charitable activities of Buddhist, Hindu, Muslim, or others religions are similarly suspect?

In the second case,⁵³ the facts were almost identical to the first. The Court's approach was virtually the same. A significant feature of the case, though, was that the Bill was defended by an intervenient petitioner—the President of the New Wine Harvest Ministries, the body that sought incorporation by the impugned Bill. In submissions on behalf of the intervenient petitioner⁵⁴ it was pointed out that a number of religious bodies of Buddhist, Hindu, and Muslim faiths

had been previously successfully incorporated by Acts of Parliament when the incorporating laws had included as their objectives socio-economic activities that were not particularly confined to followers of the respective religion. For example, the Dharmavijaya Foundation Act No. 62 of 1979 includes the following general objectives: 'to promote the total development of man, both spiritually and physically, with the application of Buddhist principles to economic development and thereby establish a Dharmavijaya Samajaya [a society that champions Dharma]'.

The Court was not swayed by the argument that different treatment had been meted out to Christian bodies seeking incorporation. Its response (again delivered by former Chief Justice Sarath Silva) was that in exercising its jurisdiction to review Bills, the Court cannot examine the validity of past legislation, nor take their content as a standard of constitutional consistency. The Court appeared to be determined to stand its ground.

The third judgment under discussion was again delivered in a case in which the Supreme Court reviewed a Bill that sought to incorporate a religious institution through a Private Member's motion.⁵⁵ The religious institution—'Provincial of Teaching Sisters of the Holy Cross of the Third Order of Saint Francis of Menzingen of Lanka'—was based on Catholicism and had as its objectives, among others, the spread of knowledge of the Catholic faith, the conducting of educational activities, engaging in charity by serving in institutions such as hospitals and refugee camps, and the establishment of homes for the elders, orphanages, and the like.

The constitutionality of the Bill was challenged by a private party mainly on the basis that the stipulated objectives of the institution violated Article 10 of the Constitution, in that the objectives could give rise to situations of forcing those of other faiths to convert to Catholicism. As in the previous cases, it was argued that the institution, by engaging in religious teaching, educational activities, and working with the vulnerable, could force recipients to convert to the Catholic faith through allurements. While Article 10 of the Constitution *does* include the right to adopt a religion or belief, it

⁵² Chief Justice Sarath Silva is the chief patron of a prominent Buddhist temple in Colombo. He also appears regularly on television programmes to discuss Buddhist philosophy.

⁵³ SC Special Determination No.2/2003, SC Minute of 29.01.2003.

⁵⁴ Reproduced in *LST Review*, (2003), 14(191): 9.

⁵⁵ SC Special Determination No. 19/2003, SC Minute of 25.07.2003, reproduced in *LST Review*, (2003), 14(191): 1–8.

was pointed out that the right had to be exercised through one's free choice. The scheme in the Bill, it was thought, would deprive vulnerable persons of that choice. The Sisters' Order was not notified of the proceedings and, therefore, had no opportunity of responding to the petition.

What was particularly significant in the 'Sisters of Saint Francis of Menzingen' case was that the Court unanimously accepted the argument that the Bill violated the Buddhism Clause (Article 9) of the Constitution as well. It was thought that the propagation of another faith, combined with altruistic activities, would impact negatively on Buddhism by converting its adherents through force and allurements:

[W]hen there is no fundamental right to propagate [religion] [under the Sri Lanka Constitution of 1978], if efforts are taken to convert another person to one's own religion, such conduct could hinder the very existence of the *Buddha Sasana*. What is guaranteed under the Constitution is the manifestation, observance and practice of one's own religion and the propagation and spreading [of] Christianity as postulated in terms of clause 3 [of the Bill] would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*.⁵⁶

Indeed, the implications of the Court's position could have far-reaching implications. It was almost as if Sri Lanka had become a theocracy with the propagation of 'other religions' being taboo. The Court simply assumes that the propagation of Christianity will necessarily 'impair the very existence of Buddhism'. Again, no reasons are adduced to justify such an assumption. If indeed unethical conversions were to be facilitated by these religious bodies, why did the Court not discuss the impact on non-Buddhist religious groups? After all, Article 9 itself requires freedom of religion to *all* religions. The judgment certainly is at variance with the assurances of de Silva that the constitutional Buddhism Clause would not impact on non-Buddhists in a discriminatory manner.

The Court, as in previous cases, did not refer to any empirical data or experiences that would have justified the position it took. The three petitions, as it were, seemed to be based on speculation and alarmism. As pointed out earlier, the Attorney-General on behalf of the State agreed with the petitioners that the Bills indeed were

⁵⁶ *Ibid.*, p. 7.

in violation of religious freedom, and in the third case that the Bill in question violated the Buddhism clause as well. In all three cases the decisions were reached unanimously. It is also significant that the same senior counsel appeared on behalf of the petitioners in all three cases, perhaps pointing to a concerted effort to prevent the incorporation of such religious bodies. If the Church or adherents of Christianity did respond to the series of judgments in an aggressive manner, another frontier of division in an already divided nation would have opened up.

The Sisters' Order then went before the UN Human Rights Committee complaining of the refusal to incorporate their religious institution. This was made possible by Sri Lanka's ratification of the First Optional Protocol to the ICCPR which permitted individual communications (petitions) to the UN Committee. The Committee, empowered to examine communications and provide views and recommendations, opined that the Supreme Court's decision was in violation of Sri Lanka's obligations under the ICCPR—specifically, obligations under the freedom of religion clause (Article 18) and the equal protection of the law clause (Article 26). The Committee pointed out that Sri Lanka was under a legal obligation to provide a remedy to the religious order.⁵⁷

With regard to the use of comparative law, the petitioners had consistently referred to the judgment in *Rev. Stainislaus v. The State of Madhya Pradesh*⁵⁸ where the Supreme Court of India upheld the constitutionality of the anti-conversion laws of the states of Madhya Pradesh and Orissa which criminalized religious conversions on the grounds of force, fraud, or allurements. Chief Justice Ray drew a distinction between converting of another to one's religion and the right to spread the tenets of one's religion: the former, he argued, was not protected as a fundamental right whereas the latter was. The act of conversion itself was considered to be a violation of the right to freedom of conscience of the converted.

The *Stainislaus* judgment has attracted serious criticism. H.M. Seervai, an authoritative Indian constitutional law scholar, points

⁵⁷ UN Doc. CCPR/C/85/D/1249/2004, <http://daccess-dds-ny.un.org/doc/UNDOC/DER/G05/449/74/PDF/G0544974.pdf?OpenElement> (last accessed on 17 July 2012).

⁵⁸ (1977) AIR SC 908.

out that the judgment has ignored the legislative history of the constitutional freedom of religion clause (Article 25) which intentionally included the right to 'propagate' religion recognizing it to be an essential feature of some religions. Further, he correctly points out that the right to adopt a religion of one's choice is an exercise of freedom of conscience rather than its negation. Conversion through force, fraud or allurement will be caught up in the constitutional limitations attaching to the practice of freedom of religion. Seervai calls for the overruling of the *Stainislaus* judgment arguing that the judgment is clearly wrong and has the potential of causing great 'public mischief'.⁵⁹

The Supreme Court of Sri Lanka cited the *Stainislaus* judgment with approval in two of the cases discussed above⁶⁰ to support its stance against conversions. The Court was emphatic that unlike Article 25 of the Indian Constitution, Article 10 of the Sri Lanka Constitution did not recognize the right to 'propagate' religion and, therefore, would not attract constitutional protection. The Court made light of the fact that the right to manifest one's religion through teaching is guaranteed under Article 14(1)(e) of the Constitution of Sri Lanka. One could argue that the dividing line between teaching and propagation is thin at best. However, the Court did not explore that dimension.

It appears that the reference to, and use of, the *Stainislaus* judgment by the Sri Lanka Supreme Court was for the narrow purpose of giving expression to a limited reading of religious freedom under the Constitution.⁶¹ In any event, one is hard put to understand the relevance of that judgment to the cases under consideration. The Bills that were under review did not necessitate a discussion on the constitutionality of religious conversions if not for the Court's own unsubstantiated assumption that teaching and socio-economic

⁵⁹ H.M. Seervai, *Constitutional Law of India*, 4th Ed., Vol. 2 (N.M. Tripathi Pvt. Ltd.: Bombay, 1993), pp. 1286-9.

⁶⁰ SC Special Determination No. 2/2003, SC Minute of 29.01.2003; SC Special Determination No. 19/2003, SC Minute of 25.07.2003, reproduced in *LST Review*, (2003), 14(191): 1-8.

⁶¹ See also, Alexandra Owens, 'Protecting Freedom of and from Religion: Questioning Law's Ability to Protect Against Unethical Conversions in Sri Lanka', *Religion and Human Rights*, (2006), 1: 41.

activities of the Christian institutions sought to be incorporated would necessarily give rise to unethical religious conversions. This use of comparative constitutional jurisprudence for such narrow ends certainly does not bode well for the progressive development of the law.

Review of Bill Prohibiting Forcible Conversion of Religion

In 2004, the Supreme Court was presented with twenty-one petitions by members of the public challenging the constitutionality of a Private Member's Bill entitled 'Prohibition of Forcible Conversion of Religion'. The petitioners averred that various provisions of the Bill were in violation of religious freedom including the freedom to practice religion, the Right to Equality and non-discrimination, and, interestingly, Article 9 itself. The Bill⁶² was presented by Reverend Omalpe Sobhitha Thero, Member of Parliament (MP), a Buddhist monk representing the Jathika Hela Urumaya. The preamble to the Bill suggests that it had the support of non-Buddhist sections as well:

...WHEREAS, the Buddhist and non-Buddhist are now under serious threat of forcible conversions and proselyzing [sic] by coercion or by allurement or by fraudulent means;

AND WHEREAS, the Mahasanga [Buddhist clergy] and other religious leaders realizing the need to protect and promote religious harmony among all religions, historically enjoyed by the people of Sri Lanka....

It is common knowledge in Sri Lanka that Buddhist and Hindu organizations collaborated on this effort.

The Bill prohibited religious conversions 'directly or otherwise' through 'force or by allurement or by any fraudulent means' (Section 2). Punishment to those who contravene that provision was imprisonment up to five years and fine (Section 4(a)). Those who were found guilty of converting a minor, a woman or persons belonging to categories specified in a schedule would be subject to an enhanced term of imprisonment and fine. Further, it required that those who adopt a new religion and also those who facilitated or participated in a

⁶² Published in Gazette of the Democratic Socialist Republic of Sri Lanka, Part II, 28 May 2004.

conversion ceremony should inform the administrative authorities of the area in which the adoption took place within a stipulated period (Section 3). Failure to do so would be punished with imprisonment of up to five years and imposition of a fine (Section 4(b)).

This effort to criminalize forced conversions ended up with a mixed reaction of the Supreme Court. The Court found⁶³ the requirement to report a religious conversion by the converted and those who facilitated or witnessed a conversion to be a restraint on their freedom of religion and thus violated Article 10 of the Constitution. The Court did not discuss the reasoning underlying the finding. Certain other clauses relating to procedure were found to be in violation of the equality clause. As Article 10 is an entrenched constitutional clause, the Court declared that the Bill should therefore be adopted by the constitutionally prescribed special procedure which included submitting the Bill to a referendum.

Criminalization of religious conversion by force and fraud and through allurement was not found to be unconstitutional, although the Court suggested amendments to narrowly tailor the definition of those terms to fit the objectives of the Bill.

The Court did not elaborate on the scope of Article 10; nor did it explore whether the concept of criminalization of religious conversions—other than through force and fraudulent acts which are already punishable under existing law—is disproportionate and, therefore, constitutionally offensive.

Particularly problematic was the criminalization of conversion through allurement. Allurement was defined in the Bill as an 'offer of any temptation in the form of any gift or gratification, grant of material benefit or grant of employment or promotion in employment' (Section 8(a)). Petitioners unsuccessfully argued that acts of benevolence and charity in obedience to gospel commands may be misconstrued as acts of allurement. The Court found that what is offensive is the 'willful engagement of a deceitful exercise to secure a conversion'.⁶⁴ It proposed that the definition of allurement in the Bill be amended to include the phrase 'for the purpose of converting a person from one religion to another'.⁶⁵

The question remains, however, whether offering allurement even for the purpose of conversion should be criminalized. What if the recipient of such beneficence voluntarily changes religion irrespective of the motive of the giver? Offering allurement to change political opinion or loyalties is not penalized under the law except during election time. Why are religious conversions viewed more rigidly than, for example, change of political opinion or allegiances? The Court did not examine these issues. It is submitted, with due respect, that unless a nuanced approach is adopted in dealing with these important issues, the constitutional rights discourse will remain within very parochial confines.

What is significant for purposes of the present essay is that the Court cited *Kokkinakis v. Greece*,⁶⁶ a case decided by the European Court of Human Rights. There, the Court was presented with the issue of deciding on the compatibility of a conviction by Greek courts of a man for engaging in proselytism in violation of Greek law with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Greece has ratified the Convention.

The Court found the Greek law in question to be in line with the requirements of Article 9 of the Convention (freedom of religion clause). It was stated that the State may have to intervene in manifestation of religion or belief in order to 'reconcile the interests of the various groups and ensure that everyone's beliefs are respected'. However, on examining the facts of the case, the Court found that the petitioner had been convicted of illegal proselytism in violation of the European Convention as there was no proof of him having coerced the complainant or of having exploited her naivety. The Court went on to point out that a balance must be struck between religious freedom and State intervention that are 'necessary in a democratic society'. Freedom of religion includes 'the right to convince one's neighbour, for example, through "teaching", failing which, moreover, "freedom to change one's religion or belief", enshrined in Article 9, would be likely to remain a dead letter'.

The Supreme Court used certain sections of the *Kokkinakis* judgment only to buttress its position that anti-conversion laws that outlaw proselytism through allurement or coercion are compatible

⁶³ SC Determination Nos. 2–22/2004, SC Minute of 9.08. 2004.

⁶⁴ *Ibid.*, p. 11.

⁶⁵ *Ibid.*, p. 15.

⁶⁶ 17 EHRR 397; 260-A Eur. Ct. H.R. (Series A).

with religious freedom. The manner in which the European Court sought to find a balance between a broad interpretation of religious freedom on the one hand and narrowly defined legitimate State intervention on the other were not examined. The use of international or comparative law in this utilitarian manner, without carefully examining jurisprudence in its entirety, certainly cannot enrich constitutional jurisprudence.

Consequent to the judgment of the Supreme Court, so far the Bill has not been presented to Parliament for adoption. Subsequently, a few months after the judgment another MP from the Jathika Hela Urumaya, Ven. Ellawala Medhananda Thero, presented a Private Member's Bill to make Buddhism the 'official religion' of the republic which was also declared unconstitutional.⁶⁷ A few months later, in February 2005, another draft of the anti-conversion law entitled 'Freedom of Religion Act', which had been endorsed by the Attorney-General as being constitutional, was presented to the Cabinet for its approval for presentation to Parliament by former Prime Minister Ratnasiri Wickramanayake in his capacity as the minister of *Buddha Sasana*. It appears that the enactment of the Bill has not been pursued.

The Nineteenth Amendment Judgment

In a positive turn, the Supreme Court found a move to introduce the concept of a State religion to be in violation of the basic tenets of the Constitution. In the review of a Bill entitled the 'Nineteenth Amendment to the Constitution', a unanimous judgment⁶⁸ of the Court found the idea of a State religion to be repugnant to guarantees of freedom of religion, the right to profess one's religion, and the Right to Equality and non-discrimination. Curiously, the judgment found language in the Bill that was very similar to Article 9 of the Constitution to be in violation of the constitutional equality clause.

Clause 9(3) (of the Bill) provides: 'The State shall foster, protect, patronize *Buddha Sasana* and promote good understanding and harmony among the followers of other forms of worship as well as

encourage the application of religious principles to create virtue and develop quality of life.'

This clause, which enjoins the State to patronize the *Buddha Sasana* while ignoring other religions, was found to be inimical to the principle of equality which is enshrined in Article 12 of the Constitution.

As the judgments are brief and not elaborated on, it is very difficult to discern the judicial reasoning underlying the various approaches. For example, Justice T.B. Weerasuriya, who participated in the progressive Nineteenth Amendment judgment, also participated in one of the judgments which struck down a Bill to incorporate a religious institution accepting anti-conversion arguments.

Justice Tilakawardane, who wrote a separate opinion on the Nineteenth Amendment case, found support for her arguments against a State religion in Article 9 itself: 'The assurance given to the state by Chapter II [Article 9] of the Constitution is to give the foremost place to Buddhism, but it explicitly says that this must necessarily be balanced to include the assurance that there should not be any interference to the equality of all religions in the country.'⁶⁹

She emphasized that the Sri Lankan Constitution creates a secular form of governance recognizing the multicultural and plural nature of society.⁷⁰

Pronouncement that Sri Lanka is a Secular State

In a subsequent judgment, Chief Justice Sarath Silva—he had earlier found the incorporation of certain religious institutions to be in violation of religious freedom because of the possibility of unethical conversions—too declared that Sri Lanka is a secular State. The declaration that 'it has to be firmly borne in mind that Sri Lanka is a secular State' came in a case in which the petitioners, trustees of a Muslim mosque, complained that the police had restricted the use of loudspeakers by the mosque in violation of their fundamental rights.⁷¹ The loudspeakers had been used for performing the customary Islamic call to prayers.

⁶⁹ Ibid., concurring judgment of Tilakawardane, J., p. 1.

⁷⁰ Ibid., p. 2.

⁷¹ *Trustees, Kapuwatta Mohideen Jumma Mosque v. OIC Weligama*, SC Application No.38/2005 (FR) SC Minute of 9.11.2007.

⁶⁷ See the next section here for a discussion on the Supreme Court judgment on the Nineteenth Amendment Bill.

⁶⁸ SC Determination No.32/2004, SC Minute of 17.12.2004.

The Chief Justice went on to state that as Sri Lanka is a secular State, no religious group (in this instance, adherents of Islam) could have an advantage over others, especially with regard to the enforcement of environmental protection measures (in this instance to control noise pollution). The Chief Justice's declaration on secularism was based on the argument that under Article 3 of the 1978 Constitution of Sri Lanka, sovereignty lies in the people devoid of any distinction. The judgment does not elaborate on the nexus between equal sovereignty and secularism. There was also no reference to Article 9 (Buddhism clause).

Article 9 still continues to be a source of friction and will remain so either it is done away with in a future amendment, or there is an authoritative judgment which provides clarity and assurances to the 'other' religions.

CONCLUSIONS: THE VALUE OF COMPARATIVE CONSTITUTIONALISM

The Sri Lankan constitutional experience on the State–religion relationship has been confusing, unpredictable and whimsical at best. There is no certainty about the applicable constitutional principles as judicial interpretations and reasoning have varied from situation to situation. The end result is a very confused state of affairs regarding the relationship between religion and the State. The State is to give preference to the religion of the majority, yet it is considered to be secular. The concept of a State religion has been rejected, yet minority religious institutions are enjoined from engaging in religious activities for fear that they may be inimical to the majority religion.

Underpinning that uncertainty is the nebulosity regarding the scope and meaning of Article 9 of the 1978 Constitution. Despite the reassurances of the architect of the Constitution that it will not impinge on the rights of other religious groups, both constitutional jurisprudence and State policy have clearly recognized preferential position of Buddhism as *primus inter pares*. There is no gainsaying that a true Buddhist legacy, with its tenets of compassion and tolerance, will only shore up democracy in a country. But what is at issue here is how the politics of religion and State power mesh together to undermine equality and pluralism in society.

The jurisprudence of the Supreme Court of Sri Lanka on the State–religion nexus has drawn on Indian constitutional jurisprudence and supranational human rights jurisprudence. However, it is clear that such references have been made only selectively, more to buttress the Court's position than to explore new dimensions that would have aided in progressive development of the law that effectively acknowledges and protects religious diversity. As far as South Asian constitutional jurisprudence is concerned, it has to be admitted that the choices available to the Court are quite limited. It is doubtful that the Court would have resorted to jurisdictions which recognize a State religion—and that would cover most of the countries in the region. The new constitutional dispensations in Nepal and Bhutan are as yet unknown quantities. That only leaves Indian jurisprudence for reference. India's constitutional commitment to secularism as an element of its basic structure does not seem to fit in well, not only with the Sri Lankan constitutional scheme, but also with the judicial approaches to the State–religion nexus. If the Sri Lankan judiciary had properly appreciated the experiences of its Indian counterpart, quite possibly the three 'incorporation cases' may have been decided quite differently.

In contrast, Sri Lankan constitutional jurisprudence has very readily drawn on South Asian jurisprudence (almost exclusively on Indian case law) relating to certain other areas of fundamental rights protection. That is so particularly with regard to a wider reading of freedom of expression and equal protection of the law. One gets the sense that an expanded reading of those freedoms is normatively congruent with the thinking of the Sri Lankan judiciary. The New Doctrine on Equality developed by the Bhagwati Court has, after an initial hesitation, now become a staple feature in equality cases;⁷² so also, judicial receptivity to the recognition of economic and social rights via the existing guarantees of civil and political rights.⁷³

⁷² D. Udagama, 'The Right to Equality: The New Frontier in Judicial Activism', in A.R.B. Amerasinghe and S. S. Wijeratne (eds), *Human Rights, Human Values and the Rule of Law* (Legal Aid Foundation: Colombo, 2003), p. 297.

⁷³ D. Udagama, 'Indivisibility of Human Rights as a Fundamental Principle of Constitutional Rule', in A.R.B. Amerasinghe and S.S. Wijeratne (eds), *Human*

However, as we have observed above, issues pertaining to identity have elicited judicial insularity.

One may conclude from the above discussion that, perhaps of all the constitutional tasks, ensuring pluralism in a fragmented polity is one of the most challenging ones. Establishing religious pluralism is perhaps one of the most arduous tasks. It seems to me that comparative constitutionalism can be very useful in strengthening rights, accountability of government and so on when there is a common value base shared between and among comparative jurisdictions. Comparative experiences and jurisprudence can be very useful to provide modalities and reasoning to be employed to achieve shared political ideals, or to catalyze thinking on those ideals that are thought to be sufficiently attractive to contemplate. Whether altogether new ideals can be created through the use of comparative constitutional jurisprudence remains, in my mind, questionable. In other words, the usefulness of comparative jurisprudence generally lies more in informing the exercise of the 'margin of appreciation'—as European human rights jurisprudence would have it—in regard to the implementation of a commonly accepted norm.

Constitutionalism itself is today measured against certain higher values. As a student of international law and as a human rights advocate in the mode of Falk's 'citizen pilgrims',⁷⁴ I would argue that today international human rights norms represent the 'higher values' that inform constitutionalism. Of course, the idea of universal norms has been contested, and will continue to be contested. But at a practical level, their appeal is obvious. The emotionally charged demands for constitutional orders that protect human rights and social justice articulated in the recent 'Arab Spring' protest movements in the Middle East bear witness to that. The cure for constitutional parochialism lies in the appeal to that higher normative order.

If Sri Lanka's constitutional discourse is captive to the limitations within its own Constitution and constitutional jurisprudence,

its international legal obligations to uphold people's rights—as internationally defined and recognized as relevant by the people—will have to trump those limitations at a normative level; that is a truism, both on legal and moral planes. Where comparative constitutional jurisprudence could effectively contribute is in providing the tools—the reasoning and the modalities—to achieve those ideals.

Rights: Theory to Practice (Legal Aid Commission, Sri Lanka, and Human Rights Commission, Sri Lanka: Colombo, 2005), p. 285.

⁷⁴ Richard Falk, *Achieving Human Rights* (Routledge: New York, 2009), pp. 202–7.