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**Religion, State, and a Conflict of Duties:  
A Constitutional Problem in Sri Lanka**

By

**Sindhu De Livera**

A Thesis

Submitted to the Faculty of Graduate Studies  
through the Faculty of Law  
in Partial Fulfillment of the Requirements for  
the Degree of Master of Laws  
at the University of Windsor

Windsor, Ontario, Canada

2019

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A Constitutional Problem in Sri Lanka**

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## ABSTRACT

Both of Sri Lanka's post-independence, autochthonous, republican constitutions have contained within their pages a directive which declares that "Buddhism shall have foremost place". The framers of Sri Lanka's constitution insisted that this was simply an acknowledgement of the "special" place of Buddhism in the fabric of Sri Lanka's history. However, recent history has shown this provision being used directly and indirectly to deny portions of Sri Lankans their fundamental rights. The victims of this provision belong both to the majority and minority religions. The question this thesis attempted to answer was: does Sri Lanka's duty to Buddhism under Article 9 of the Constitution conflict with its duties to its citizens under fundamental rights provisions? This thesis argues that (i) such a conflict does exist and (ii) where it arises the state has time after time prioritized the promotion and protection of Buddhism over protecting its citizens' fundamental rights, and that this has in turn affected the state's ability to deal neutrally with its citizens. Four instances of this conflict are examined in detail: the restrictions placed on proselytization, the *Deeghavapi* case, the child monk and the re-imposition of a ban on women's ability to purchase alcohol. This thesis further argues that legal and political protections afforded to religious minorities, such as personal laws and special laws are insufficient to protect the rights of vulnerable groups within those minorities and instead serve to promote communalism.

*Key words:* religious states, preferred religions, endorsed religions, state-religion relationships, human rights, constitutional duties, conflict of duties, constitutional law, freedom of religion, state neutrality, child monk, personal laws, minority rights, Sri Lanka.

# DEDICATION

I dedicate this thesis to  
my husband, my parents and my brother,  
with love.

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# RELIGION, STATE, AND A CONFLICT OF DUTIES A CONSTITUTIONAL PROBLEM IN SRI LANKA.

## Chapter 1

### Introduction

Both of Sri Lanka's autochthonous, republican constitutions have contained within their pages a directive to grant Buddhism "foremost place". The framers of Sri Lanka's constitution insisted that this directive was simply an acknowledgement of the "special place" of Buddhism in Sri Lanka's history. However, recent history has shown Article 9 (which grants Buddhism foremost place) being used as justification, directly and indirectly, to deny portions of Sri Lankan citizens their fundamental rights. The citizens affected belong both to the majority religion and to minority religions. For example child monks, periodically recruited for temples by the state, are forced to give up joy and childhood. This illustrates a complex constitutional problem: the exceptionalism and harm that a conflict of duty breeds when a state is duty bound to both a religion and human rights. The child monk is only one example of this conflict of duties created by the Constitution of Sri Lanka. The central question this thesis attempts to answer is: does Sri Lanka's duty to Buddhism, as privileged by Article 9 of the Constitution, conflict with its duties and responsibilities to its citizens under fundamental human rights provisions? In this thesis I argue that where Sri Lanka has faced this conflict the state has often prioritized the promotion and protection of Buddhism over protecting human rights, and that this has in

turn affected the state's ability to deal neutrally with its citizens. Although Sri Lanka, *on paper* appears to subscribe to a kind of substantive neutrality because of the personal law system in Sri Lanka that permits minority religions and ethnic communities' autonomy on certain topics like marriage, this autonomy, combined with community based politics, has cultivated communalism, which has in turn weakened protection for groups such as women within minority religions.

This question is examined in three parts: Part One (Chapter 1) contains an introduction and a brief literature review to provide an orientation to the problem. Part two (Chapter 2 and Chapter 3) contains an analysis of conflicts within the constitution of Sri Lanka and why Sri Lanka's constitution promised Buddhism foremost place. Part two also looks at Sri Lanka's colonial legal history and laws following that time, and at the history and conditions that led to conflict in Sri Lanka. This part contains an examination of four legal situations where the conflict between the dual obligations and duties that human rights and Buddhism place on Sri Lanka occurs. The third part of this thesis (Chapter 4) examines how the dominant religion and minority religious communities have carved out political power.

This thesis will focus mainly on states that give a religion preferential treatment and states that give a specific religion state support.<sup>1</sup> I use the term "religious states" as shorthand to

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<sup>1</sup> Jeroen Temperman. "The Neutral State: Optional or Necessary?: A Triangular Analysis of State-Religion Relationships, Democratisation and Human Rights Compliance" (2006) 1:3 Religion & Human Rights at 277-278. Temperman's spectrum of state-religion relationships offers a clear and workable categorisation. Temperman expands on the model originally put forward by Cole Durham in Cole Durham, "Perspectives on Religious Liberty: A Comparative Framework" in Johann Van der Vyver & John Witte, ed, *Religious Human Rights in Global Perspective*, ed (Martinus Nijhoff Publishers, 1996) at 12. I have chosen Temperman's spectrum as opposed to Durham's continuum because Temperman further expands Durham's categorisations into several more distinct regimes. This thesis focuses only on some of those regimes.

refer to this group of state-religion relationships. I annex the adjective “religious” to the noun “state” to simply denote a connection between religious organizations and the state.<sup>2</sup> It is important to note that I exclude theocratic states from this thesis for the reason that theocratic states generally do not claim to uphold liberal democratic values within their territory. In theocratic states, the religious laws *are* state laws; religious doctrine and state doctrine are one. Generally, the only kind of conflicts in such systems are conflicts internal to the religion, and as such are excluded from this thesis. I also exclude an analysis of states that possess a strict, substantive, structural and constitutional separation between state and religion.

Accompanying this conflict are the national battles on the world stage. The genocide of Rohingya Muslims, Bangladeshi anti-Hindu violence, Sri Lanka’s Buddhist extremist riots – these events and the sudden emergence of others like them around the world have renewed discussions about the role of religion within the state. An important feature of these events is accusations of state involvement in the violence. Given these accusations and the level of violence and suffering that religious extremism can spawn in a state within hours, it is important to define the role of the state in respect to religion, and the mechanisms in place to prevent violence in the name of religion. Although this thesis focuses on Sri Lanka, the analysis contained in this thesis has significance globally, especially for post-colonial, multi-ethnic, multi-religious states such as Myanmar and India

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<sup>2</sup> I use an Oxford English Dictionary definition of “religious”: “of a thing, a place, etc.: belonging to or connected with a monastic order”. Oxford English Dictionary, *religious*, ed (Oxford University Press).

which have been struggling to come out of their pre-democratic identity and colonial history while trying not to sink into communalism.

### *Context*

The UN Special Rapporteur on Freedom of Religion and Belief recognized that

a global study of religious restrictions and social hostility motivated by religion or belief illustrated a strong correlation between the degree to which a Government is entangled with religion and its propensity for protecting or violating freedom of religion or belief and/or combating religious intolerance. Some 24 (58.5 per cent) of the 41 States with an official State religion in that study imposed “very high” or “high” levels of restrictions on religious practices, while 11 (27.5 per cent) of the 40 States with favoured religion(s), imposed such restrictions in the period 2014–2015. Moreover, only 5 (4.9 per cent) of the 102 States that did not identify with religion engaged in these levels of interference with the prerogatives of religious communities, while all 10 of the States that had a negative view of the role of religion in public life in these studies imposed “high” or “very high” restrictions.<sup>3</sup>

States that endorse a religion, by their nature, give primacy to one religion above others.<sup>4</sup>

These religions usually have a history of political and social hegemony within those states and the specification of a state religion is often an effort to preserve such a state’s historical identity. Meanwhile for various reasons such as international pressure, or demands by their citizenry, states also desire to move towards being modern democratic liberal states. However, implementing the mechanisms of the modern democratic state also means giving effect to human rights (the implementation of which is associated with a “successful” modern liberal democratic state). Most early international human rights documents largely

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<sup>3</sup> UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, 37<sup>th</sup> Sess, UN Doc A/HRC/37/49 (28<sup>th</sup> February 2018) citing Pew Research Center, “Global Restrictions on Religion Rise Modestly in 2015, Reversing Downward Trend” (Washington, D.C., April 2017).

<sup>4</sup> Jeroen Temperman, *supra* note 1 at 273. Temperman notes that a “state can be considered *defacto* non-secular in case a single church or religion has a (profound) privilege position in practice.”

have their roots in enlightenment principles and documents birthed during and out of European revolutions.<sup>5</sup> These contained civil liberties such as the right to equality, the freedom of expression, the freedom of thought, conscience, and religion, and the right to life. According to Paul Gordon Lauren, these values (human rights) “came from many sources, and religious belief provided only one of these. Others came from ethical values originating in moral and political philosophy, derived not so much from divine revelation but from secular inquiry and human reason.”<sup>6</sup> The evolution of human rights on secular grounds, independent of its former tethers to religion may conflict with the values, requires, and structures of religions.

Further complicating this conflict is the extra-legal position that religion occupies in politics, society and culture. Religious institutions enjoy privileges such as tax exemptions. Religious institutions often enjoy powers that enable them to control their congregations free from state interference. Additionally, some contemptible religious practices go unquestioned,

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<sup>5</sup>Jack R Censer & Lynn Hunt. “The Enlightenment and Human Rights”, *Liberty Equality, and Fraternity: Exploring the French Revolution*, online: <<http://chnm.gmu.edu/revolution/exhibits/show/liberty-equality-fraternity/enlightenment-and-human-rights>>. Censer and Hunt observe that “The lasting importance of the *Declaration of Rights* [the French *Declaration of the Rights of Man and Citizen* 1789] is immediately evident: just compare the first article from August 1789 with the first article in the *Universal Declaration of Human Rights* passed by the United Nations after World War II, on 10 December 1948. They are very similar, though the UN document refers to “human beings” in place of “men.”” Also: Shami Chakrabarti, “Magna Carta and Human Rights”, (9 February 2015), *The British Library*, online: <<https://www.bl.uk/magna-carta/articles/magna-carta-and-human-rights>>: The UDHR also drew upon the Magna Carta 1215 and the English Bill of Rights 1689.

<sup>6</sup> Paul Gordon Lauren, *Oxford Encyclopaedia of Human Rights*, ed (Oxford: Oxford University Press, 2009) under the topic “History of Human Rights”. Also see: J D van der Vyver, “The Concept of Human Rights: Its History, Contents and Meaning” (1979) 1979 *Acta Juridica* 10. Van der Vyver credits John Locke with “the first theoretical design of human rights” and sees his efforts “to define and to justify the so-called natural rights of man... as a direct outcome of the seventeenth-century constitutional crises in England surrounding the despotic rule of the Stuart kings.” Van der Vyver goes on to note that “in its historical context, the doctrine of human rights was therefore intimately related to the problem of excessive governmental powers.”

especially if a particular religion is the established religion of a state. For example, Sri Lanka has ratified the Convention on the Rights of the Child but child monks are ordained at a very young age and kept in monasteries that are not comparable to homes.<sup>7</sup> Sexual abuse at monasteries are described as “rampant”.<sup>8</sup> In these circumstances is Sri Lanka fulfilling its obligations under the CRC by enabling child ordination? Is Sri Lanka’s duty to “foster” and “protect” Buddhism interfering with its obligations arising under human rights provisions?

While some religious states have managed to balance and mediate tensions between the demands of a preferred or endorsed religion and duties arising under human rights provisions, there are other states which cannot or will not do so. The latter category of states contain in both their constitution and politics a conflict of priorities that urgently needs resolution. In states that have not found a balance, the scales have tipped in favour of the interest of the majority religion and has produced state sponsored oppressive action against minorities and in some states, genocide. It must be noted that the existence of a secular constitution, or the lack of an official state religion does not preclude violence against religious minorities. However, an analysis of reasons for such violence in secular states lie outside the scope of this research.

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<sup>7</sup> CRC, (2017), online: *Childwomenmingovlk* <<http://www.childwomenmin.gov.lk/si/institutes/dep-probation-and-child-care-services/child-rights/crc>> :The website of the Ministry of Women and Child Affairs of Sri Lanka states that Sri Lanka ratified the Convention on the Rights of the Child 1989 on the 12th of July 1991.

<sup>8</sup> Saroj, Pathirana. “Sri Lanka's hidden scourge of religious child abuse”, (1 June 2012), online: *BBC News*<<https://www.bbc.com/news/world-south-asia-15507304>>

## *Literature Review*

While some countries appear to manage the state-religion relationship with minimum fuss, in other states the state-religion relationship fuels anger and violence. What is it that separates the former from the latter? Is there a common thread connecting these problematic nations? According to the literature, the debate regarding the role of religion and God in matters of law and the state is rooted in a conflict between two main theories of law: (i) that God and religion are a necessary part of the development of the law and its legitimacy (for example, the Aquinian natural law theory that saw God as the penultimate source of law); and (ii) that laws are a thing produced by humankind alone (for example, the Austinian conception of law as commands of the sovereign).<sup>9</sup> Even though on the surface it looks like the literature treats law and morality as separate entities there are those who believe that laws should be moral, for example, Austin, Hart and Raz.

The bulk of academic debate in general regarding the establishment of a state religion surrounds the “free exercise clause” and the “establishment clause” in the USA.<sup>10</sup> Michael W. McConnell discussing the history of the free exercise clause, observes that in the US context “more often, the church and the state were independent powers, supported by

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<sup>9</sup> See Thomas A. Cowan, “Law without Force” (1971) 59:3 California Law Review 683 at 687: “...natural law theorists admit that any law that is not in accordance with the will of God or of right reason is not law at all; therefore an immoral positive law is not law... Legal positivism and analytical jurisprudence emphatically deny to natural law the quality of being law-lawyer's law. These jurisprudential systems hold natural law to be part of religion or of morality, but not part of legal law. This radical secularization of law completes its emancipation from religion, erecting a wall of separation that legal positivism and analytical jurisprudence mean to preserve intact.”

<sup>10</sup> Ira C Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion" (1989) 102:5 Harvard Law Review. Lupu notes that Constitution of the United States of America. amendment I states that "Congress shall make no law..., prohibiting the free exercise [of religion]."



different claims of authority, acting in varying degrees antagonistically or cooperatively one with the other.”<sup>11</sup> The view that religious beliefs and human rights (the product of the liberal democratic state) are independent of each other is also observable in Asian states. Knut Asplund seemingly elaborates this dichotomy by noting that in Indonesia human rights “often tend to be portrayed and perceived in such a manner that they appear as a quasi-religion or an alternative belief system” and that “human rights emerge as a competitor challenging existing belief systems, ideologies and religions.”<sup>12</sup> It appears that legally and politically, religion and the state (along with their founding ideologies) as entities are separable institutions that possess their own ideologies and tools to maintain power. Interestingly George Letsas argues that religion is irrelevant to law and uses Dworkin’s argument to show that religion is derived from the concept of ethical independence, which is considered by Dworkin to be the “true moral right”.<sup>13</sup>

According to Ahdar and Leigh, “the prevailing view” towards establishing a state religion is that it is “unfair.”<sup>14</sup> Similarly, Temperman argues that

the absence of a considerable degree of state neutrality has a detrimental effect on human rights compliance. Under states which identify themselves strongly with a single religious denomination as well as under states which identify themselves negatively in relation to religion, there is no scope for human rights compliance.<sup>15</sup>

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<sup>11</sup> Michael W McConnell, "The Origins and Historical Understanding of Free Exercise of Religion" (1990) 103:7 Harvard Law Review at 1513.

<sup>12</sup> Knut D Asplund, "Resistance to Human Rights in Indonesia: Asian Values and beyond" (2009) 10:1 Asia Pac J HR & L 27 at 28.

<sup>13</sup> George Letsas, "The Irrelevance of Religion to Law" in Cécile Laborde & Aurélie Bardón, ed, *Religion in Liberal Political Philosophy*, ed (Oxford University Press, 2017) 46.

<sup>14</sup> Rex J Ahdar & Ian Leigh, *Religious Freedom in the Liberal State*, ed (Oxford: Oxford Univ. Press, 2009) 127.

<sup>15</sup> Jeroen Temperman, "The Neutral State: Optional or Necessary?: A Triangular Analysis of State–Religion Relationships, Democratisation and Human Rights Compliance" (2006) 1:3 Religion & Human Rights at 269.

Durham shares a similar sentiment, observing that “...both strong positive and strong negative identification of church and state correlate with low levels of religious freedom. In both situations, the state adopts a sharply defined attitude toward one or more religions, leaving little room for dissenting views.”<sup>16</sup>

Many academics like Durham, Temperman, Brugger, note that state-religion relationships rather than being a dichotomy between the secular or non-secular occur along a continuum (Durham), a spectrum (Temperman) or fit into one of a number of models or types (Parsch, Brugger).<sup>17</sup> Parsch recognizes that

mainly four types of relationships between the state and religious communities: states where the civic community and religious community are identical and law is based on and reflects religious beliefs; states where the state and religious community are formally separated but where one creed dominates the public philosophy; states where the population belongs to more than one religion or confession (and some to none at all), and religious freedom is fully recognized with the separation of state and religion a reality; states where atheism is the official policy but religion is more or less tolerated.<sup>18</sup>

Brugger, according to Nieuwenhuis, classifies state-religion relationships into six models: in the first model “the state is completely opposed to religion”, the second “is characterized by a “wall of separation” taken seriously not only in theory but in practice as well. Barring all religious signs from public education belongs here”, in the third the “government may neither advance nor obstruct religion”, the fourth “combines separation with some kind of

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<sup>16</sup> Cole Durham, "Perspectives on Religious Liberty: A Comparative Framework" in Johann Van der Vyver & John Witte, ed, *Religious Human Rights in Global Perspective*, ed (Martinus Nijhoff Publishers, 1996) at 18.

<sup>17</sup> Temperman, supra note 6 at 273. Durham, supra note 7 at 12.

<sup>18</sup> Parsch, Karl Josef. “Freedom of Conscience and Expression, and Political Freedoms” in Louis Henkin, ed, *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed (New York: Columbia University Press, 1981) 209.

cooperation”, the fifth is “characterized by a more formal unity of state and church in the form of an established church”, and the in the sixth “state and church actually converge in a theocracy”.<sup>19</sup>

It is fairly easy to identify states at the extreme ends of the state-religion spectrum as theocratic states or secular states. In the literature, states that identify fully with a religion are usually referred to as theocracies, states that do not constitutionally identify with a religion are usually referred to as “secular”. Yet, there appears to be no uniformity in the way states that fall in between the two extremes of the spectrum of state-religion relationships are defined or the way in which the boundaries of in-between states are delineated. The Pew Research Centre refers to these in-between states as states that possess a “preferred or favored religion”.<sup>20</sup> For Durham, between “positive identification” and “negative identification” lie “some identification between church and state” and “separation of church and state”. Temperman refers to these in-between states as “virtual coincidence”, “preferential treatment”, “supported church or religion”, “joint ventures”, “regimes of

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<sup>19</sup> A. J. Nieuwenhuis, “State and religion, a multidimensional relationship: Some comparative law remarks” (2012) 10:1 *International Journal of Constitutional Law* 153 at 155-156. I have relied in Nieuwenhuis’s translation/ interpretation of Brugger since Brugger’s original work is in German: Winfried Brugger, *Von Feindschaft über Anerkennung zur Identifikation. Staat-Kirche-Modelle und ihr Verhältnis zur Religionsfreiheit* [From antagonism via recognition to identification], in *Säkularisierung und die Weltreligionen* [Secularization and world religions] 257 (Hans Joas & Klaus Wiegand eds., 2007).

<sup>20</sup> Pew Research Center. *Many countries favor specific religions, officially or unofficially* (Pew Research Center, 2017) <[https://www.pewforum.org/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/pf\\_10-04-17\\_statereligions-02/](https://www.pewforum.org/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/pf_10-04-17_statereligions-02/)>.

tolerance” “regimes of indifference”, and “regimes of separation”.<sup>21</sup> Adhar and Leigh refer to in-between states as a whole, referring to these states as “hybrid models”.<sup>22</sup>

According to the UN Human Rights Committee in General Comment No. 22,

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 a population, shall not result in any impairment of the enjoyment of any rights under Covenant, including articles 18 and 27, nor in any discrimination against adherents to 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.<sup>23</sup>

This paragraph is a useful indicator of the perspective of the United Nations regarding the harms that could befall those belonging to minority religious communities. Paragraph 9 also sets out the position of the UN regarding a possible conflict between a state’s obligations to a state religion (or endorsed religion or preferred religion) and its human rights obligations.

Running parallel to discussions regarding secularism and the degrees of separation between the state and religious institutions are analyses of what it means for states to be “neutral”

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<sup>21</sup> Jeroen Temperman. “The Right to Neutral Governance, Religion, the State & the Question of Human Rights Compliance” (2017) 12:24 *The Journal of Human Rights* 17 at 21.

<sup>22</sup> Rex J Ahdar & Ian Leigh. *Religious Freedom in the Liberal State*, ed (Oxford: Oxford Univ. Press, 2009) at 68: “Between the extremes lie various intermediate or hybrid models where religion and state cooperate together.” See page 69 for a useful table laying out the differences in structure, beliefs, legal stance and regulation between models that unify religion and state, models that separate the two, and hybrid models.

<sup>23</sup> UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18) U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) at paragraph 9.

towards religions and whether it is an ideal worth aspiring to.<sup>24</sup> Katz, in one of the earliest analyses of the concept of “state neutrality” in 1953 observes that the Establishment Clause of the United States’ Constitution requires not only neutrality between religious groups, but also neutrality between “religious believers and non-believers.”<sup>25</sup> Galeotti observes that the term state neutrality is fairly new.<sup>26</sup> Much of the literature discusses what neutrality means in application and as a standard, and identifies types of neutrality.<sup>27</sup> Discussions regarding state policies on accommodations afforded to religion are also common. Micah Schwartzman attempts to answer the question of “what if religion is not special?” by classifying state attitudes to the free exercise of religion based on two key ideas: *accommodation* and *nonaccommodation*.<sup>28</sup> According to Schwartzman, “inclusive accommodation and exclusive nonaccommodation both take inconsistent positions on whether religion is special. Inclusive accommodation says that religion is special for purposes of accommodation but not for purposes of justifying the law. Exclusive nonaccommodation takes exactly the reverse positions”.<sup>29</sup> Schwartzman notes that “those

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<sup>24</sup> Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion" (1990) 39:4 DePaul L Rev 993.

<sup>25</sup> Wilber G Katz, "Freedom of Religion and State Neutrality" (1953) 20:3 U Chicago LRev 426.

<sup>26</sup> Anna E. Galeotti. *Toleration as Recognition*, ed (Cambridge, UK: Cambridge University Press, 2005) at 26.

<sup>27</sup> Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality toward Religion" (1990) 39:4 DePaul L Rev 993. Ronan McCrea. "Rights as a basis for the religious neutrality of the state: Lessons from Europe for American defenders of non-establishment" (2016) 14:4 International Journal of Constitutional Law 1009. Javier Martinez-Torron, "Institutional Religious Symbols, State Neutrality and Protection of Minorities in Europe" [2013] 171 L & Justice - The Christian L Rev 21. Levine, Samuel J. "Review Essay: The Challenges of Religious Neutrality" (1996) XIII Journal of Law and Religion 531.

<sup>28</sup> Micah Schwartzman. "What If Religion Is Not Special?" (2012) 79 The University of Chicago Law Review 1351. Schwartzman analyzes the question by examining American jurisprudence on the Establishment clause and the Free Exercise Clause. Schwartzman uses “secular purpose” here to refer to legal doctrine and secular legal thought.

<sup>29</sup> Schwartzman, *supra* note 28 at 1377.

tensions [created by inconsistent positions on whether religion is special] can be resolved only by moving in the direction of either of the remaining two theories—exclusive accommodation or inclusive nonaccommodation, which treat religion as special for all purposes or for none, respectively.”<sup>30</sup> These attitudes, Schwartzman observes, are contingent on whether the state considers claims made on religious grounds worthy of special considerations and/ or exemptions.

The “in-between status” of states such as Sri Lanka are the result of –among other things – its colonial history. Julian Go observes that since World War II as “[w]estern empires crumbled... a multitude of nascent states [sought] to institute a new constitutional order.”<sup>31</sup> Go writes that “[i]n 1910 there were 56 independent countries in the world. By 1970, after the first major wave of decolonization, the number had increased to 142”. Ivo D. Duchacek writing in 1979 observes that “[o]ver two thirds of the [world’s] existing national constitutions were drafted and promulgated in the last three decades.”<sup>32</sup> As such it is necessary to examine literature on post-colonialism that seeks to dissect the effects of colonialism on a subjugated people and its after-effects.

Several diverse writers from states that were subjected to imperial rule have developed influential theories of the effects of post-colonialism on people, cultures and identity within a colonised state. The most dominant among these are creative writers such as Chinua

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<sup>30</sup> Ibid.

<sup>31</sup> Julian Go. “Modeling the State: Postcolonial Constitutions in Asia and Africa” (2002) 39:4 *Southeast Asian Studies* 558.

<sup>32</sup> Quoted in Julian Go. “Modeling the State: Postcolonial Constitutions in Asia and Africa” (2002) 39:4 *Southeast Asian Studies* 558.

Achebe, and Rabindranth Tagore and more academic writers such Homi Bhabha, Aimé Césaire, Frantz Fanon, Edward Saïd, and Gayatri Spivak. This diversity of form and background is important given that as, stated by Ashfort, Griffiths and Tiffin, “a crucial insistence of post-colonial theory is that, despite a shared experience of colonialism, the cultural realities of postcolonial societies may differ vastly.”<sup>33</sup> Post-colonial theories attempt to provide a possible explanation of the difficulties of states in finding a harmony between the imposition of a foreign culture upon their own.

One of Homi Bhabha’s most recognized contributions to post-colonial theory is his theory of “cultural hybridity”. According to Bhabha “hybridity results from various forms of colonization, which lead to cultural collisions and interchanges.”<sup>34</sup> Bhabha writes that “[t]he trace of what is disavowed is not repressed but repeated as something different – a mutation, a hybrid.”<sup>35</sup> Gayatri Spivak, among her other theories, developed the idea of “strategic essentialism” which described how different minority communities and groups which would not normally work with each other would do so strategically to further a common interest. According to Spivak these groups would come to a temporary “essentialist” position that allowed the groups to work together. Spivak describes strategic essentialism as a political tool that allowed minorities to fight together against imperial powers.<sup>36</sup> For

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<sup>33</sup> Bill Ashcroft, Gareth Griffiths & Helen Tiffin, eds. “Introduction: Universality and Difference” in *The Post-colonial Studies Reader*, ed (London: Routledge, 2003) 55.

<sup>34</sup> Summarised by Juniper Ellis in Juniper Ellis. “Book Review: The Location of Culture”. (1995) 19:1 *Philosophy and Literature* 196.

<sup>35</sup> Homi Bhabha et al. “Signs Taken for Wonders” in *The Post-colonial Studies Reader*, 2d ed (London: Routledge, 2003). Juniper Ellis. “Book Review: The Location of Culture”. (1995) 19:1 *Philosophy and Literature* 196.

<sup>36</sup> Bill Ashcroft, Gareth Griffiths & Helen Tiffin. *Post-colonial studies: the key concepts*, 2nd ed (Hoboken, NJ: Taylor & Francis, 2007) at 17.

example in the Sri Lankan context, Anagarika Dharmapala (a 20<sup>th</sup> century Sinhala Revivalist) successfully advocated for the unification of disparate communities under the banner of a national Sinhala-Buddhist identity.<sup>37</sup> Harshana Rambukwella observes that “Dharmapala repeatedly warns that Sinhala identity is threatened with dissolution” and quotes Dharmapala saying: “[t]hink that you are now surrounded by a host of enemies who encompasseth [sic] your destruction, who is trying to make you a slave in your own land by giving you to drink the poison of alcohol”.<sup>38</sup>

Fanon and Saïd writing on nationalism in the post-colonial context (termed “critical nationalism”) have observed that nationalism is “formed in an awareness that pre-colonial societies were never simple or homogeneous and that they contained socially prejudicial class and gender formations that stood in need of reform by a radical force.”<sup>39</sup> Saïd, writing of Fanon’s notion of nationalism states that “[Fanon’s] notion was that unless national consciousness at its moment of success was somehow changed into social consciousness, the future would not hold liberation but an extension of imperialism.”<sup>40</sup> Fanon also warned that “in the construction of modern post-colonial state” new national leaders in the “passionate search for a national culture which existed before the colonial era finds its

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<sup>37</sup>H. L. Seneviratne *Buddhism, Identity and Conflict*, ed (Colombo: ICES Auditorium, 2002) 13. H. L. Seneviratne credits Anagarika Dharmapala made several speeches campaigning for a national Sinhala-Buddhist identity.

<sup>38</sup>Harshana Rambukwella. “Anagarika Dharmapala: the nation and its place in the world” in *Politics and Poetics of Authenticity: A Cultural Genealogy of Sinhala Nationalism*, ed (London: UCL Press, 2018). Rambukwella quotes from Anagarika Dharmapala & Ananda Weihena Palliya Guruge. *Return to righteousness a collection of speeches, essays and letters of the Anagarika Dharmapala*, ed (Colombo: Ministry of Cultural Affairs & Information, Ministry of Socio - Cultural Integration, Dep. of Cultural Affairs, 1991) at 510. Here Dharmapala was referring to British colonizers.

<sup>39</sup>Ashcroft et al, supra note 34 at 91.

<sup>40</sup>Ashcroft et al., supra note 34 at 92.



legitimate reason in the anxiety shared by many indigenous intellectuals to shrink away from that western culture in which they all risk being swamped” and to “renew contact once more with the oldest and most pre-colonial springs of their people” would mythologize their past and use it to “create the new elite power groups, masquerading as the liberators of whom he had warned.”<sup>41</sup> Fanon’s warning is uncannily accurate in the context of Sri Lanka (given that he is drawing from his experience in post-colonial Algeria) in that this is exactly what took place during the formation of the state of Sri Lanka.<sup>42</sup> Post-colonial analyses such as these, while they examine the consequences of colonialism, focus largely upon the culture of a nation and its effect upon its people. New analyses have emerged applying the spirit of these post-colonial theories and analyses to the legal sphere, including legal principles and concepts such as human rights and legal institutions.

Sally Engle Merry writing about law and colonialism notes that colonialism involved the large-scale transfer of laws and legal institutions from one society to another which resulted in a dual legal system (a phantom of which is seen in Sri Lanka’s personal law system).<sup>43</sup> Merry observes however, that colonialism involved not only a transfer one of laws and legal society to another but an attempt to rule and transformation a society by another.<sup>44</sup> Merry argues that instances where “cases are handled by police or courts are particularly important in introducing the culture of a dominant group. These moments can be analyzed

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<sup>41</sup> Ashcroft et al., note 33 at 92.

<sup>42</sup> Ashcroft et al., note 33 at 92. Also see below “The Roots: A History of Conflict” and “Promises to the Past, Promises to the Future: A Conflict in the Constitution”, particularly sections regarding the influence of the mythological *Mahavansa* chronicle in Sri Lankan nationalist sentiment.

<sup>43</sup> Sally Engle Merry, "Law and Colonialism" (1991) 25:4 Law & Soc'y Rev 889 at 890.

<sup>44</sup> Ibid.

(sic) as cultural performances, events that produce transformations in sociocultural practices and in consciousness.”<sup>45</sup> Merry posits that “law, along with other institutions of the colonial state, transformed conceptions of time, space, property, work, marriage, and the state. The role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness.”<sup>46</sup> Academics such as Binder developed this stream of thought further to draw a relationship between imperialism, the nation-state and cultural relativism. According to Binder, “the nation-state ideal is rarely fulfilled in the post-colonial world.” Binder notes that what the West refers to as “developing states” are states that have not yet developed into nation-states but are “states only superficially attached to political societies that had not yet developed a high level of national integration, mobilization and participation.”<sup>47</sup> Importantly, Binder observes that

the state is often just one cultural structure among many in the developing world, rather than the center from which a national culture radiates. Indeed, there may be no national culture as such. Instead there may be disparate cultural structures, some local and some international.<sup>48</sup>

Binder, like Merry and the post-colonialist thinkers, essentially draws a causal relationship between colonialism and the discomfort post-colonial states feel in what seems like borrowed garb. These thinkers analyse the difficulties of finding a balance between a pre-colonial history and roots, colonial laws and processes, and post-colonial identity formation. However, these writers analyse the effect of post-colonialism on a culture and its people

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<sup>45</sup> Merry, *supra* note 41 at 892.

<sup>46</sup> *Ibid.*

<sup>47</sup> Guyora Binder. “Cultural Relativism and Cultural Imperialism in Human Rights Law” (1999) 5 *Buffalo Human Rights Law Review* 211 at 219.

<sup>48</sup> Binder, *supra* note 47 at 220.

but do not analyse the manifestations of this tension through the subject of religion in post-colonial constitutions. This thesis analyses how the constitution of Sri Lanka attempts to maintain its cultural identity while also trying to live up to modern human rights standards.

## Chapter 2

### Sri Lanka: The Birth of a Religious State

It appears that the combination of Sri Lanka's colonial history with its mish-mash of colonial legal sources, majority-minority dynamics in the country, the ratio and composition of communities, and unresolved communal grievances has given rise to a *proclivity* to communal violence in modern times. This is evidenced by a thirty year long civil war, and the incidence of communal violence following the war.<sup>1</sup> The factors that feed Sri Lanka's proclivity to communal violence can be categorised into the following four broad areas: (i) Sri Lanka's historical roots in Buddhism and a resulting belief that Sri Lanka is a "Buddhist State"; (ii) a fusion of ethnicity, language and religion to create composite identities; (iii) the heritage of colonial politics. Below we see how these same factors also led to and continues to sustain Sri Lanka's relationship with Buddhism.

#### *The Roots: Giving Buddhism Foremost Place*

Sri Lanka's ethno-religious conflict is rooted in the debate over which race first occupied the land now known as "Sri Lanka".<sup>2</sup> Each side has attempted to argue that their ancestors

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<sup>1</sup> By "colonial legal sources" I mean how the laws of colonial powers are still the residual law of Sri Lanka. For example, Roman-Dutch law is the residual law of Sri Lanka for matters regarding property, family law, and delicts. British law of contracts is the law to which Sri Lankan courts refer to when there is a lacuna in the domestic contract law. Similarly, British law applies to matters regarding commercial law, law relating to criminal and civil procedure, the law of evidence and administrative law.

<sup>2</sup> See Part I, Chapter I, particularly pages 3-17 of K M De Silva, *A History of Sri Lanka*, ed (London: C. Hurst, 1981) for a full history of settlement and colonisation in ancient Sri Lanka. Jonathan Spencer, "Introduction: The Power of the Past" in Jonathan Spencer, ed, *Sri Lanka : History and the Roots of Conflict*, 1st ed (Routledge, 1990).

(Sinhalese: Aryans, Tamils: Dravidians) occupied and/or united the country first.<sup>3</sup> These divisive ethno-religious identities were formulated by nationalists within each community and were revived with a vengeance as a response to colonialism and colonial policies. These competing claims to territory have been tied to efforts to gain political power and establish a right to rule by both the Sinhalese and the Tamils. In the periphery of this jostle for power are other ethnicities, such as the Veddhas, Moors, Burghers, Malays, Chetties, and Kaffirs, and those belonging to other religions such as Islam and Christianity. This conflict became more pronounced when Sri Lanka was subjected to colonial rule. Sri Lanka has been under the rule of three colonial powers: the Portuguese, the Dutch, and the British.

### **The Arrival of Buddhism in Sri Lanka**



*Figure 1. A depiction of Sanghamitta Theraniya bringing the Sri Maha Bodhi tree sapling to Sri Lanka, at the Kelaniya Temple in Sri Lanka.<sup>4</sup>*

Buddhism arrived in Sri Lanka around the 3<sup>rd</sup> Century BCE. The Indian Emperor Ashoka (304 BCE – 232 BCE) having “[taken] the Mauryan Empire to its greatest geographical

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<sup>3</sup> A. J Wilson, *Break Up of Sri Lanka: The Sinhalese- Tamil Conflict*, (London: C. Hurst & Company, 1988).

<sup>4</sup> SB Karaliyadda, "Today Is Unduvap Pasalovaka Poya", (2005), online: *Archivesdailynews* <<http://archives.dailynews.lk/2005/12/15/fea06.htm>>.

extent and its full height of power” and having laid waste to many lives, turned penitent.<sup>5</sup> Ashoka turned to Buddhism as a means to expiate his guilt and sought to spread the word of Buddha to others. As part of this mission, he sent his son Arahath Mahinda to Sri Lanka to meet the reigning king Devanampiya Tissa to convert him to Buddhism.<sup>6</sup> Mahinda preached to Tissa who subsequently became a disciple of Buddha and adopted Buddhism as the official religion of the kingdom.

It became a kind of “king’s duty” from there onwards to ensure the survival of Buddhism in Sri Lanka, to preserve relics of religious importance, and to build temples and monasteries.<sup>7</sup> Some examples of this can be seen to this day; the Sacred Sri Maha Bodhi tree in Anuradhapura, the ancient city of Anuradhapura contains the Abayagiri stupa that was built by King Valagamba, the construction of Ruwanweliseya by King Dutugemunu, and Jetavanaramaya and its monastery built by King Mahasena. Sri Lanka was also ruled from time to time by Tamil kings and invaders from India such as King Elara (204 BCE to 164 BCE), who interrupted the rule of Sinhalese Kings, was in power for 44 years, and subsequently earned a reputation for being fair and just.<sup>8</sup>

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<sup>5</sup> Kristin B Rattini. “Ashoka”, (14 June 2019), *National Geographic* online: <<https://www.nationalgeographic.com/culture/people/reference/ashoka/>>

<sup>6</sup> De Silva note 2 at 11. K. M De Silva also observes at page 41 that “Brahmanism was the religion of the ruling elite groups before the conversion of Devanampiya Tissa to Buddhism changed the situation. Despite the rapidity with which the new religion spread in the island in the next few centuries, and despite its status as the official religion, the tolerant atmosphere of a Buddhist society ensured the survival of Hinduism with only a marginal loss of influence. Brahmins retained much of their traditional importance in society both on account of their learning and their near monopoly over domestic religious practices.”

<sup>7</sup> De Silva, supra note 2 at 46: “...pious kings regarded it a sacred duty to divert part of the resources and revenues at their command for the maintenance of the *sangha*.”

<sup>8</sup> De Silva, supra note 2 at 12.

King Elara was deposed as king after a fifteen-year campaign by Dutugemunu that came to a head in a duel between the former and the latter. K.M De Silva observes that this duel “is dramatised as the central theme of the later chapters of the Mahavamsa as an epoch-making confrontation between the Sinhalese and Tamils, and extolled as a holy war fought in the interests of Buddhism.”<sup>9</sup> However, K. M. De Silva notes that

“there were in fact large reserves of support for [Elara] among the Sinhalese, and [Dutugemunu]...had to face the resistance of other Sinhalese rivals who appear to have been more apprehensive of his political ambitions than they were concerned about [Elara]’s continued domination...”<sup>10</sup>

According to Gananath Obeyesekere,

Tamils were also historically allies of the Sinhalese; Sinhala kings sought the aid of Tamil kings in their local conflicts. Some kings fled to India to seek the aid of their Tamil allies while others cemented alliances by marrying Tamil queens. But there was no consistency in this latter project either. In some periods in history the popular imagination records that the offspring of Tamil queens were illegitimate or inferior to Sinhala ones; this is reversed at other times. These marriage alliances were not only a historical reality for both commoners and kings but they also refract back into the foundational myth giving legitimacy to intermarriages for, according to that myth’s proclamation, the union of Vijaya and his followers with the Tamils from Madurapura produced the Sinhalese. Thus Sinhalese have Tamil blood, since “blood” is bilaterally inherited in Sinhala genetic theory.<sup>11</sup>

Deepika Udagama observes that the ethno- religious typology that exists in Sri Lanka appears to be a construct of the historical mythology surrounding the formation of the nation. This instance in the *Mahavamsa* is perhaps the beginning, or at least one of the earliest attempts by nationalist chroniclers to fuse ethnicity and religion (Sinhalese with

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<sup>9</sup> De Silva, note 2 at page 15.

<sup>10</sup> Ibid.

<sup>11</sup> Gananath Obeyesekere. “Buddhism, ethnicity, and identity: a problem in Buddhist history” in Deegalle Mahinda, ed, *Buddhism, conflict and violence in modern Sri Lanka*, ed (London: Routledge, Taylor & Francis Group, 2006) 156-157

Buddhism, Tamil with Hindu) to form a singular identity in Sri Lanka. Udagama explains that

The *Mahavansa*, 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 promotion of that idea at its core agenda and mission. 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 *Mahavansa* has had a powerful influence in shaping the self-identity of the majority of the Sinhala community.<sup>12</sup>

The *Mahavansa's* account of the birth and proliferation of Buddhism remains relevant and important today because of the role the *Mahavansa* plays as source material and justification for Sinhala Buddhist nationalists and extremists.<sup>13</sup>

Discussions regarding the place of Buddhism and religion within the land now known as Sri Lanka are as old as the earliest texts documenting life in Sri Lanka dating to 400 BCE – 300 BCE. Chief among these is the *Mahavansa* (translating into “the Great Chronicle”). Gombrich notes that the *Mahavansa* was “written in Pali by Buddhist monks in several instalments over the centuries... regards the Sinhalese people as the rightful owners and rulers of the entire island of Sri Lanka, and identifies their fortunes with the fortunes of Theravada Buddhism.”<sup>14</sup> A.J. Wilson points out that the translation of the *Mahavansa* by

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<sup>12</sup> Deepika Udagama, et al. “The Democratic State and Religious Pluralism: Comparative Constitutionalism and Constitutional Experiences of Sri Lanka” in *Comparative Constitutionalism in South Asia*, ed (New Delhi: Oxford University Press, 2013) 157.

<sup>13</sup> Bruno Marshall Shirley, *Violence, Identity, and Alterity | Post-War Rhetoric of Sri Lanka's Bodu Bala Sena* (Master of Arts in Religious Studies, Victoria University of Wellington, 2015) <<https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/5106/thesis.pdf?sequence=1>> accessed on 5<sup>th</sup> of January 2019 at page 41.

<sup>14</sup> Richard Gombrich. “Is The Sri Lankan War A Buddhist Fundamentalism?” in *Buddhism, conflict and violence in modern Sri Lanka*, ed (London: Routledge, Taylor & Francis Group, 2009) at 30.



Wilhelm Geiger and its subsequent English translation coincides with the initiation of the Sinhala nationalist Temperance movement and the nationalism of Sinhala Buddhist monks.<sup>15</sup>

## The Fusion of Ethnicity, Language and Religion



Figure 2. A graphic appearing in an English language National newspaper celebrating the birth anniversary of Anagarika Dharmapala “Sinhala Buddhist... par excellence”.<sup>16</sup>

According to the 2011 Census of Sri Lanka approximately 70 per cent of the 20.35 million Sri Lankans are Buddhist, 12.6 per cent Hindu, 9.7 per cent Muslim (mainly Sunnis) 6.2 per cent are Roman Catholic, and 1.4 percent are other Christians.<sup>17</sup> An important feature of the conflict in Sri Lanka is the modern fusion of ethnicity, language and religion to create composite communal identities. It is these composite communal identities that are in modern times at odds with each other. Buddhism is usually practiced by Sinhalese; Hinduism by Tamils and Sinhalese; Christianity by Sinhalese, Tamil, and Burghers; and Islam by Moors and Malays. As a result, Sinhala identity is popularly linked with Buddhist

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<sup>15</sup> A. J Wilson, ‘Break Up of Sri Lanka: The Sinhalese- Tamil Conflict’, (London: C. Hurst & Company, 1988) at 28

<sup>16</sup> Ceylon Today, Twitter (18<sup>th</sup> September 2017), <<https://twitter.com/ceylontoday/status/90964564932218470>>.

<sup>17</sup> Department of Census and Statistics – Sri Lanka. *Census of population and housing 2012: key findings*, ed (Colombo: Department of Census and Statistics, Ministry of Finance and Planning, 2012).

identity, and Tamil identity is linked with Hindu identity. Moor and Malay identity with Islam, Burgher identity with Christianity.<sup>18</sup> However in reality, while most Sinhalese are Buddhists, a modest percentage of Sinhalese are followers of Hinduism or Christianity, while a modest percentage of Tamils are followers of Buddhism or Christianity, and a small percentage of Sinhalese are followers of Islam.<sup>19</sup> The language of the Sinhalese is Sinhala, the language of the Tamils is Tamil, the language of Sri Lankan Muslims is generally Tamil. The language of Burghers is English. English is spoken as a “link language”. Therefore, an attack against one of these elements (ethnicity, language, religion) is perceived as an attack on all three groups. For example, Sri Lanka’s Sinhala Only Act of 1956 which made Sinhala the only official language of the state is widely considered to be a trigger point for Tamil demands for a separate state.

In these circumstances in the interest of securing the best possibility of a peaceful future for Sri Lanka (and states like it), it is imperative that any murkiness and incoherence in the way the relationships between religion and human rights are set out in the constitution is clarified. This is necessary to protect a community, as J. S. Mill describes both from “innumerable vultures” and “minor harpies” who wish to prey upon the community and

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<sup>18</sup> See works by Gananath Obeyesekere for a comprehensive analysis of how Sinhalese identity was fused with Buddhist identity. Berkwitz succinctly summarizes Obeyesekere: “Buddhist historical narratives from texts such as the Mahavamsa helped to form an “axiomatic identity” whereby the Sinhala ethnic identity became inextricably linked with the Buddhist religion, a linkage that was revitalized in encounters with European “others” during colonialism.” in Stephen C. Berkwitz, “Resisting the Global in Buddhist Nationalism: Venerable Somas Discourse of Decline and Reform” (2008) 67:1 *The Journal of Asian Studies* 73 at 74.

<sup>19</sup> Deepika Udagama, “The Democratic State and Religious Pluralism | Comparative Constitutionalism and Constitutional Experiences of Sri Lanka” in Sunil Khilnani, Vikram Raghavan & Arun K Thiruvengadam, ed, *Comparative Constitutionalism in South Asia*, 1st ed (New Delhi: Oxford University Press, 2016) at 157.

“the king of the vultures” tasked with protecting the community.<sup>20</sup> It is of paramount importance that the rights and liberties of citizens should be protected and defended vigorously, against any institution that threatens those rights and liberties, including the institution that ensures that the promised rights are granted. However, as we see below, attempts to satisfy rival strains of communalism has resulted in a confused constitution.

### ***Promises to the Past, Promises to the Future: A Conflict in the Constitution***

The conflict within Sri Lanka’s constitution stems from the constitutional duties to Buddhism (as set out in Article 9 of the Constitution) and fundamental rights (such as the right to equality and freedom from discriminations). Although the conflict between these provisions does not appear obvious upon first reading, as will be seen below (especially in Chapter 3), the conflicts between these constitutional provisions and the values they espouse has led to the infringement of the fundamental rights of groups such as minorities, child monks, and women. Incoherent constitutional provisions of the kind analysed in this thesis are the result of a combination of factors such as a tumultuous political history, identity politics, and communalism. In this context a combination of unresolved historical grievances by communities against each other, a lack of trust in legal mechanisms to address these grievances, discrimination (real or perceived), and the inflammation of communal sentiment by religious leaders also lead to the proliferation of communal violence.<sup>21</sup> When and where did these incoherent constitutional provisions originate?

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<sup>20</sup> John M Robson, ed, *The Collected Works of John Stuart Mill, Volume XVIII - Essays on Politics and Society Part I*, ed (Toronto: University of Toronto Press, 1977).

<sup>21</sup> To name a few: the Sinhala Only Act which discriminated against those who spoke only tamils, the Citizenship Act that discriminated against Tamils of Indian descent, Sirimavo Banadaranaike’s education

Since independence Sri Lanka has enacted three constitutions: the Constitution of Ceylon 1948, the First Republican Constitution of 1972, and the Second Republican Constitution of 1978. The constitution currently in effect is the Second Republican Constitution of 1978.<sup>22</sup> The Constitution of the Democratic Socialist Republic of Sri Lanka 1978 possesses nineteen amendments to date.<sup>23</sup> Sri Lanka's two autochthonous constitutions (the first in 1972 and the second in 1978) were created in the backdrop of inter-communal jostling for representation. While Sri Lanka's ethnic conflict can be traced to pre-colonial times (as seen above), conflicts between various ethnic and religious communities were exacerbated by colonial politics, policies, and law. Sri Lanka has been the subject of three colonial powers: first, the Portuguese (1597 – 1658), second, the Dutch (1640 – 1796), and finally, the British (1815 – 1948). After the occupation of Holland by France, in 1796, the Dutch settlements were taken over by the British, and administered by the British East India Company until the conquest of Kandy by the British. The only colonial power to control the entire island of Sri Lanka were the British, who captured the Kandyan kingdom (that had thus far managed to fend off colonial invaders) in 1815 in the Second Kandyan War.<sup>24</sup> The most visible representation of this conflict can be observed in the changing quotas for communal representation through subsequent colonial constitutions.

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policy where the state took over state-aided private school which were run by Christian groups. According to K. M De Silva, De Silva, note 48 at 528: "Thus the Buddhist agitation for state control achieved its objective under Mrs Bandaranaike's S.L.F.P. government, but at great cost to the country in terms of the bitterness and tension it generated between the Buddhists and the powerful Roman Catholic minority. The Roman Catholics, like the Tamils, smouldered with resentment."

<sup>22</sup> The Constitution of Ceylon 1948 is also known as "the Soulbury Constitution of 1948" after its architect Lord Soulbury.

<sup>23</sup> Hereinafter referred to as "the 1978 Constitution of Sri Lanka".

<sup>24</sup> K M De Silva, note 2 at 229.

J. A. L. Cooray lays out in detail the constitutional journey beginning with the 1802 Constitution wherein “[t]he British settlements in the Island were confirmed under the Treaty of Amiens as part of the British dominions.”<sup>25</sup> On June 4<sup>th</sup>, 1806 Sri Lanka (then Ceylon) saw the birth of the first ancestor of the freedom of religion in Sri Lanka in a Proclamation made by Governor North that “recognised liberty of conscience and free exercise of religious worship to everyone.”<sup>26</sup> Writing of the administrative and judicial systems put in place by the 1802 Constitution, J. A. L. Cooray observes that “...at this early stage of British rule though the Government of Britain was prepared to introduce the principle of the independence of the judiciary, it was not similarly prepared to concede even a small measure of representative or responsible government.”<sup>27</sup> Each measure of representative and responsible government would be hard won over the course of British colonial rule and would lay the foundations for Sri Lanka’s modern manifestation of communal disharmony. For example, the Constitution of 1833 declared that the Legislative Council would consist of nine official members and six unofficial members. Half of the unofficial members would consist of Burghers, Sinhalese, and Tamils. After much agitation under the Constitution of 1910, the Legislative Council consisted of 21 members, with ten unofficial members, from this number one member each was selected to represent the

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<sup>25</sup> Joseph A L Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)*, ed (Colombo: Sumathi Publishers, 1995) at 11. Joseph Cooray’s perspective is especially interesting because he was a co-secretary of the Ceylon National Congress that fought for independence against the British, and was also involved in drafting both the First Republican Constitution of Sri Lanka in 1972 and the Second Republican Constitution of 1978, was also subsequently a judge of the Constitutional Court of Sri Lanka and later Vice-President of the UN Human Rights Committee.

<sup>26</sup> Joseph A L Cooray, note 29 at 12.

<sup>27</sup> Joseph A L Cooray, note 29 at 12.

Kandyan Sinhalese, Muslims, two each to represent Low Country Sinhalese and Tamils. This trend of negotiation for communal representatives progressed well into the early 1900s. According to Cooray, the Donoughmore Commission which was set up to create the Donoughmore Constitution of 1931 was against the establishment of a Parliamentary system of government in Sri Lanka (then Ceylon). One of the reasons was a “serious danger that in the formation of Parties obligations of race and caste would be too insistent to be ignored.”<sup>28</sup>

Interestingly, during colonial rule, British administrators acted as the protectors of Buddhism for about two decades after they landed. The Kandyan Convention of 1815, which ceded control of the Kandyan kingdom to the British, placed upon the British the duty to continue the “king’s duty of paying salaries to monks, funding religious celebrations, and making official acts of appointments to recognize high clerical office.”<sup>29</sup> Constitutionally, the latter part of British rule was defined by a series of attempts to determine what exactly constituted fair and equitable representation between the Sinhalese, the Tamils and other minorities. The Soulbury Constitution of Sri Lanka was a parting gift by the British upon Sri Lanka’s independence in 1948. This was the first time a Constitutional document had explicitly addressed the rights of religious and ethnic minorities. These rights were set out in s. 29(2) of the Constitution of Ceylon 1948. S. 29 (2) stated that no law passed by Parliament shall:

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<sup>28</sup> Joseph A L Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)*, ed (Colombo: Sumathi Publishers, 1995) at 25.

<sup>29</sup> Benjamin Schonthal, *Buddhism, Politics and the Limits of Law - the Pyrrhic Constitutionalism of Sri Lanka*, 1st ed (New York: Cambridge University Press, 2016) at 29. The obligation placed on the British was a condition in the Kandyan Convention of 1815 negotiated by the Kandyan aristocracy.

“(a) prohibit or restrict the free exercise of any religion; or  
(b) make person 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, so, however, 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”.<sup>30</sup>

s. 29 (3) declared that laws made in contravention of the above rights were, to the extent of the contravention, void.<sup>31</sup> The most notable feature of the above rights is that they were negative liberties (i.e. freedom from interference or an absence of obstacles, barriers, or constraints). It may be argued that these liberties were a *gesture* of secularism, but not an outright expression of secularism. Many Buddhist organizations objected to s. 29 (2) because they argued that it did not redress damage done to Buddhism during Colonialism.<sup>32</sup> Additionally, there were concerns by Tamil leaders that even at the time of formulation there was a growing “influence of religion on politics” and that the rise of political parties which were organised along religious and ethnic lines were making “direct appeals...to arouse communal passions.”<sup>33</sup>

Although s. 29 (2) laid new ground to provide protections to minorities, it was unable to prevent the injustices of the Citizenship Act and the Sinhala Only Act. The Citizenship Act,

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<sup>30</sup> S. 29 (2) of the Constitution of Ceylon 1948.

<sup>31</sup> Joseph A L Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)*, ed (Colombo: Sumathi Publishers, 1995) at 45.

<sup>32</sup> Benjamin Schonthal & Asanga Welikala, *Buddhism and the regulation of religion in the new constitution: Past debates, present challenges, and future options*, CPA Working Papers on Constitutional Reform (Colombo: Center for Policy Alternatives, 2016) at 5,6.

<sup>33</sup> Schonthal & Welikala, note 71 at 5

formally known as the Citizenship Act No. 18 of 1948 in effect denied citizenship to Tamils of Indian descent. Under the Sinhala Only Act, formally known as the Official Language Act No. 33 of 1956, Sinhala – the language of the majority – was made the official language of the state. This act created immense difficulty for those who were only literate in Tamil and led to communal violence. According to J. A. L. Cooray the rights laid out in s. 29 (2) “did not in practice sufficiently fulfil the expectations of the Constitution makers.”<sup>34</sup> When put to the test in numerous cases, s. 29 (2) failed to provide any real protections to minorities. For example, in *Kodakan Pillai v Mudanayake* the Privy Council held that the amendments and laws “constituted legislation on citizenship and could not be said to be making persons of the Indian Tamil Community liable to a disability to which persons of other communities were not made liable.”<sup>35</sup>

It is in this context that the Constitution of 1972 was created. At a press conference held to announce the coming to being of the Constituent Assembly that would go on to create Sri Lanka’s first autochthonous constitution, the Minister of Constitutional Affairs declared that this would be a historic occasion.<sup>36</sup> Dr. Colvin R. de Silva noted at the time: “this is not an attempt...to create a new superstructure on an old foundation. We are setting out on the task of laying an entirely new foundation for which the people of this country gave us a mandate...”<sup>37</sup> Additionally, the Prime Minister at the time (and the first female prime

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<sup>34</sup> Cooray, note 31 at 47.

<sup>35</sup> Cooray, note 31 at 46; *Kodakan Pillai v Mudanayake* 66 NLR 73 at page 83 per Lord Pearce.

<sup>36</sup> Joseph A L Cooray, *Constitutional and Administrative Law of Sri Lanka (Ceylon)*, ed (Colombo: Sumathi Publishers, 1995) at 61.

<sup>37</sup> Joseph A. L. Cooray, note 31 at 61.



minister and head of state in the world) Sirimavo Bandaranaike stated in a radio broadcast that

the Constitution which a nation such as ours gives itself must be adequate for a twofold task. In a multiracial and multi-religious nation such as ours it has to be the instrument of the development of the nation itself. It must serve to build the diversity imposed on it by history. Though there are among us several races such as Sinhalese, Tamils, Moors, Burghers, Malays and others; and several religious groups, such as the Buddhists, Hindus, Christians and Muslims, we are one nation.<sup>38</sup>

These statements reveal that in developing its first autochthonous constitution, Sri Lanka began with good intentions: an intention to start afresh, to aid in the development of the nation and to build on its diversity. Furthermore, the constitution would be created according to the mandate of the people.

However, the new constitution saw the birth of the predecessor to Article 9. Article 6 of the 1972 Constitution of Sri Lanka declared that “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 religions the rights granted by Section 18 (1) (d)”. According to Joseph A. L. Cooray the manifesto upon which the government won its mandate stated that “Buddhism, the religion of the majority of the people, will be ensured its rightful place. The adherents of all faiths will be guaranteed freedom of religious worship and the right to practice their religion.”<sup>39</sup> However, Cooray notes that the words “foremost place were substituted at a later stage in the drafting of the Constitution”.<sup>40</sup> K. M. De Silva

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<sup>38</sup> Joseph A. L. Cooray, *supra* note 31 at 61–62.

<sup>39</sup> Joseph A. L. Cooray, *supra* note 31 at 72.

<sup>40</sup> Joseph A. L. Cooray, *supra* note 31 at 71.

cites the adoption of the new constitution –especially the provision on religion – as a pivotal moment in the reignition of communal tensions in Sri Lanka.<sup>41</sup> De Silva posits that with the implementation of Chapter II of the 1972 Constitution Sri Lanka “ceased to be a secular state pure and simple, even if it did not become the theocratic state which Buddhist pressure groups would have liked it to be.”<sup>42</sup>

In giving reasons for giving Buddhism primacy in the Sri Lankan Constitution, Dr. Colvin R. de Silva, the Minister of Constitutional Affairs at the time stated that

...Buddhism holds in the history and tradition of Ceylon a special place and the specialness thereof should be recognised 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...<sup>43</sup>

If the “specialness” of Buddhism needed to be acknowledged in the Constitution, the constitution could have merely *recognized* the contribution of Buddhism to Sri Lankan history, tradition, and culture without placing Buddhism at the top of a hierarchy as it does in Articles 6 of the 1972 Constitution and Article 9 of the 1978 Constitution. This raises the issue of why a historically dominant religion needs to be given “special” recognition in the constitution anyway, given that other religions such as Brahminism and Animism predated the arrival of Buddhism in Sri Lanka and the strong presence of various strands of

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<sup>41</sup> De Silva, note 48 at page 550: “the adoption of the new constitution in 1972 was the critical starting-point of a new phase in communal antagonism in the island, especially in regard to relations between the Sinhalese and the indigenous Tamils... The two main points at issue were language rights and religion.”

<sup>42</sup> De Silva note 48 at page 550.

<sup>43</sup> Joseph A. L. Cooray, note 30 at 623.

Hinduism and Islam since before the 1500s. A recognition such as this would only serve to diminish and ignore the contribution and influence of other religions in shaping Sri Lanka. Such a recognition of the “specialness” of only one religion is at odds with the nature of a constitution, which is ideally inclusive and representative of its people. Diminishing and ignoring the role of minority religions in the history of Sri Lanka would only serve to exclude and alienate minorities.

Additionally, a recognition of the place of Buddhism in Sri Lanka’s history and society is very different from the constitution decreeing that Buddhism “*shall* have foremost place” [emphasis added]: an acknowledgement would be a statement of fact, but Article 6 of 1972 Constitution and Article 9 of the 1978 Constitution are authoritative commands that dictate that Buddhism *should* occupy a certain position in the future.<sup>44</sup> The Sinhalese version of Article 9 to the 1978 constitution states: “ශ්‍රී ලංකා ජනරජය බුද්ධාගමට ප්‍රමුඛස්ථානය පිරිනමන්නේය.” The verb “පිරිනමන්නේය” means to “devote”. A direct translation would read “Sri Lanka devotes the foremost place to Buddhism.”

Heeding the demands of Buddhist politicians and portions of the public the two subsequent republican constitutions gave Buddhism foremost place. The two republican constitutions also included a chapter on Fundamental Human Rights in place of Article 29(2).

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<sup>44</sup> This chain of events appears to be a manifestation of Fanon’s warning quoted in the Literature Review.

## Demystifying Article 9

Entering from the elevator doors onto the floor that houses the Supreme Court of Sri Lanka – the highest court of the land – a visitor is immediately greeted by a ten-foot-high sprawling mural of a scene from a Buddhist legend. This may be either gratifying or disturbing depending on whether one believed Sri Lanka to be a Sinhala-Buddhist state or a secular state respectively. According to Article 9 of the Sri Lankan 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 Article 10 and 14 (1)(e).”<sup>45</sup>

The phrase “foremost place” is both obvious and murky. The Sinhala version of the Constitution uses the term “ප්‍රමුඛස්ථානය” which directly translates to “foremost” and is paradoxically just as forthright and ambiguous. According to the Oxford English Dictionary “foremost” is an adverb meaning “before anything else in rank, importance, or position; in the first place.”<sup>46</sup> Examined in isolation the term “foremost” clearly gives Buddhism primacy over other religions.

However the chapter on Fundamental Rights of the constitution, particularly Articles 12 (1), 12 (2), and 12 (3) clearly state “[all] persons are equal before the law and are entitled to the equal protection of the law”, that “[no] citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds” and that “[no] person shall, on the grounds of race, religion, language,

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<sup>45</sup> Article 9, Chapter II of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978. “Buddha Sasana” translates into the institution of Buddhism.

<sup>46</sup> “foremost | Definition of foremost in English by Oxford Dictionaries”, (2019), online: *Oxford Dictionaries / English* <<https://en.oxforddictionaries.com/definition/foremost>>.

caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.” The phrasing of Article 9 muddies the hierarchy of two competing duties: the duty upon the state to “protect and foster” Buddhism versus the duty to ensure to *all* citizens – no matter their religion – “the freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice” (Article 10 of the Constitution of Sri Lanka 1978) and the duty to ensure to all citizens “the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching” (Article 14 (1)(e) of the Constitution of Sri Lanka 1978).

According to Esufally, “Article 9 cannot be read as granting Buddhism ‘the foremost place’ at the expense of the rights afforded to minority groups to practise their beliefs.”<sup>47</sup> Esufally observes that the ‘assurance’ granted under Article 9 that the rights of minorities are protected under Article 10 and Article 14(1)(e) is absolute and that the protection of Buddhism “cannot in and of itself limit the scope of Article 14(1)(e).”<sup>48</sup> However while this may be one reading of the legal relationship between Article 9 and Articles 10 and 14(1)(e), in at least one case (the *Sisters of the Holy Cross case* below) the courts have reduced the

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<sup>47</sup> Sabrina Esufally, *Judicial Responses to Religious Freedom: A Case Analysis* (Colombo: Verite Research | The National Christian Evangelical Alliance of Sri Lanka (NCEASL) | USAID, 2015) at 11

<sup>48</sup> Esufally, note 93 at 11. Esufally continues: “Therefore, a legitimate encroachment of Article 14(1)(e) on the grounds of protecting Buddhism would have to be ultimately assessed on whether it is necessary and proportionate under the law. Unfortunately, the Supreme Court in *Menzingen* neglected to conduct such an assessment.”

scope of minority religious rights supposed to be protected under Articles 10 and 14(1)(e) (i.e. the right to proselytize) because of a threat to the existence of Buddhism in the country.

According to Dr. Deepika Udagama, Dr. Colvin R. De Silva, the Minister of Constitutional Affairs during the creation of Sri Lanka's first autochthonous constitution "was vehement in his denial that Article 6 made Buddhism the State religion."<sup>49</sup> However jurisprudence around Article 9 (its near identical successor) has cast doubt on Sri Lanka's supposed status as a secular state, and shown Article 9 clashing with the rights assured to religious minorities under Articles 10, 12 (1), 12 (2), 12 (3), and 14 (1) (e).<sup>50</sup>

### **Courts and Contradictions**

The Supreme Court of Sri Lanka has not been generally consistent in its analysis of what Article 9 really means. Several major cases stand out. The first of these is the case of the *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* (also known as "the unethical conversion case").<sup>51</sup> Two other cases – S. C Special Determination No. 2/2001 and S. C. Special Determination 2/2003 – were also argued along the same lines (and by the same counsel).<sup>52</sup> This case involved an effort to incorporate a Catholic religious organization through a private member's bill. The bill was challenged under Article 121 challenging the constitutionality of the bill. The bill was found to be unconstitutional because the proposed objectives of the organization included

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<sup>49</sup> Udagama, note 16 at 162.

<sup>50</sup> See Chapter 3 below.

<sup>51</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003.

<sup>52</sup> Udagama, note 16 at 165.

the phrase “spreading the Catholic religion” and an intention to set up schools and nurseries. The objectives were considered by the Supreme Court to provide “material and other benefits” and other social advantages to the convert and thereby interfere with the free exercise of one’s conscience. The judgement in this case interprets Article 9 to mean that the full religious freedom (religious freedom that includes the freedom to propagate one’s religion) of minority religions stops short where it begins to impinge on “the very existence of Buddhism.”<sup>53</sup> The Court noted, inter alia, that

the petitioner submitted that the effect of Article 9 is to “protect and foster” the Buddha Sansana whilst assuring to all religions the rights mentioned in Articles 10 and 14 1) (e) of the Constitution. Therefore, the petitioner contended that a person of other religions could exercise the said right as long as it does not affect the Buddha sasana. It was also submitted that when an institution is established to propagate Christianity by providing material and other benefits and thereby converting such recipients to the said religion, that would affect the very existence of Buddhism.

As referred to earlier, the Constitution does not recognise a fundamental right to propagate a religion. The expression “propagate” has a number of meanings, but according to the shorter Oxford Dictionary it means ‘to spread from person to person, or from place to place to disseminate, diffuse (a statement, belief, practise, etc).’<sup>54</sup>

That same year, a bill sponsored by the Jathika Hela Urumaya (JHU), a political party which is composed primarily of Buddhist monks, was challenged in the Supreme Court.<sup>55</sup>

The bill titled the “Nineteenth Amendment to the Constitution” sought to make Buddhism

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<sup>53</sup> Yvonne Tew, "Stealth Theocracy" (2018) 58:31 Virginia Journal of International Law at 76: Yvonne Tew observes that over the course of the three incorporation cases the Court has gradually asserted a particular interpretation of Article 9, which appears to favor Buddhist prerogatives over fundamental religious rights in a manner that "permits the Sri Lankan state to legitimately limit the activities of non-Buddhists in order to protect the interests of Buddhism." (quoting Benjamin Schonthal, *The Legal Regulation of Buddhism in Contemporary Sri Lanka*, in *Buddhism And Law: An Introduction* 150, 161 (Rebecca Redwood French & Mark A. Nathan eds., 2014).

<sup>54</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)*, note 22.

<sup>55</sup> “Nineteenth Amendment to the Constitution” S. C. Determination 32/2004

Sri Lanka's official religion. However, the Supreme Court ruled the bill unconstitutional, and noted that the bill would violate the rights of minorities. Esufally observes that

This judgment represents a significant departure from the conservative stance of the judiciary vis-à-vis the manifestation of an individual's freedom of religion. Therefore, it is apparent that a legislative attempt to officially entrench Buddhism as the state religion is where the Supreme Court is willing to draw the line.<sup>56</sup>

The court also professed Sri Lanka to be a secular state, noting that "the essence of being a secular state, as Sri Lanka is, is the recognition and preservation of different types of people, with diverse language and different belief, and placing them together so as to form a whole and united nation."<sup>57</sup> The judicial position that Sri Lanka was a secular state was seemingly reaffirmed in *Ashik v. Bandula and Others*, where the Chief Justice at the time Sarath N. Silva posited: "It has to be firmly borne in mind that Sri Lanka is a secular state."<sup>58</sup> However Chief Justice Silva goes on to undermine this statement by quoting a Buddhist teaching on learning in silence as one of his justifications for his decision.<sup>59</sup> As Abeyratne noted: "the Court here draws from the country's majority faith to define the contours of constitutional religious practice and then imposes that definition on a minority faith."<sup>60</sup>

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<sup>56</sup> Esufally, note 93 at 13.

<sup>57</sup> Justice Shiranee Tilakawardene, Nineteenth Amendment to the Constitution, S.C. Determination No. 32/2004.

<sup>58</sup> *Ashik v. Bandula and Others* SC FR 38/2005 (*the Noise Pollution case*).

<sup>59</sup> *Ashik v. Bandula and Others* SC FR 38/2005 at para 220: "Much respected Piyadasi Thero in his work titled "The Buddhas Ancient Path" has stated as follows (at page 17) that benefit could be derived only, "by listening intelligently and confidently to paritta sayings because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings." Thus there must necessarily be a close proximity between the person chanting and the person who is listening. Blaring forth the sacred suttas and disturbing the stillness of the environment, forcing it on ears of persons who do not invite such chant is the antithesis of the Buddha's teaching."

<sup>60</sup> Rehan Abeyratne, "Rethinking Judicial Independence in India and Sri Lanka" (2015) 10 Asian Journal of Comparative Law at 126.



## **“Good” Constitutions and Good Governance**

Of course, there are no such things as perfect constitutions. Even the very best of constitutions are fully capable of being warped, amended, being intentionally misunderstood or misinterpreted to legitimize non-democratic, illiberal ideas and actions. For example, Hitler used the Enabling Act of 1933 to suspend civil liberties in the Weimar Constitution and effectively transfer power to himself. Loewenstein observes that “the preamble of the act [the Enabling Act] contains the explicit statement that the vote on the statute ‘complied with the requirements of legislation amending the Constitution’” and that “by a few printed lines in the statute book the government not only monopolized the regular legislative function but also seized the amending power which the Weimar constitution had reserved to qualified majorities of both houses of the legislature acting together with, under certain conditions, the electorate.”<sup>61</sup> This example is a warning that “a few printed lines” can drastically alter the protections afforded to a community. It is the Sisyphean task of every community to ensure that every provision and law is tested for weakness and capacity for exploitation, and that loopholes are closed as they appear. Therefore, it is a fundamental principle of rule of law that laws must be both just and clear.

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<sup>61</sup> Karl Loewenstein, "Dictatorship and the German Constitution: 1933-1937" (1937) 4:4 U Chicago L Rev 537 at 541. Loewenstein goes on to say that “ Since the National Socialist "movement" had officially proclaimed after the abortive putsch of 1923 that power would be sought and gained only by "legal" methods, the juridical doctrine of the Third Reich incessantly stresses the fact that the seizure and exercise of power were wholly conformable to the Weimar Constitution, then still in force.”

## Chapter 3

### Duties to Human Rights vs. Duties to Religion

In order to assess whether religious freedoms are protected, it is necessary to understand what duties, obligations and responsibilities fall upon the state in relation to the protection of the religious freedoms of its people.

The European Court of Human Rights has defined the role of the State vis-à-vis religion thusly:

The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs...this role is conducive to public order, religious harmony and tolerance in a democratic society...the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed and that it requires the State to ensure mutual tolerance between opposing groups. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.<sup>1</sup>

It is also important to understand the point of origin of these duties, obligations, and responsibilities to assess the legal force of those provisions. Human Rights obligations and duties are bestowed onto states and are also enforced through two primary systems: (i) the domestic legal system; and (ii) the international legal system. Under the domestic legal system, state duties regarding human rights are primarily set out in the constitution of a state, usually in a chapter regarding fundamental human rights. In some states, besides the

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<sup>1</sup> *Leyla Sahin v Turkey* 44774/98 [2005] ECHR 819 at paragraph 107.

constitution, human rights are set out in a “Human Rights Act” or a “Charter of Rights and Freedoms” (as in Canada).

The provisions contained in these instruments are buttressed by other constitutional provisions and laws that set out the ways in which these rights become justiciable. It is through justiciability that human rights are given their power and force. If laws granting human rights were not justiciable, these laws would have all the power and force of a “Dish of the Day” recommendation made by a server in a restaurant. This was an issue faced by the international community after the implementation of the Universal Declaration of Human Rights (UDHR), which appeared to be resolved when justices of the International Court of Justice opined that the UDHR was part of customary international law and as a result, was binding.<sup>2</sup> As such the strength and binding factor of a provision relating to human rights is extremely important. The strongest, most insistent human rights provisions are found in the constitution of a state. In Sri Lanka, these provisions are found in the chapter on fundamental human rights. Obligations, duties, and responsibilities are also placed upon states by the international legal system. These duties are derived from a myriad of sources including (but not limited to): treaties, international covenants, decisions of committees, decisions of regional and international adjudicative bodies, and customary international law.

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<sup>2</sup> In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* at 76. Judge Ammoun observed that ‘the affirmations of the Declaration ... can bind States on the basis of custom ... because they constituted a codification of customary law ... or because they have acquired the force of custom through a general practice accepted as law’.

### *What Laws Bind Sri Lanka to Human Rights?*

According to Udagama, “there seems to be a firm recognition by the judiciary and the political system that the post-independence Sri Lankan legal system was, and continues to be, dualist in nature.”<sup>3</sup> The effect of Sri Lanka’s dualism is that international conventions and treaties that Sri Lanka signs and ratifies have no legal effect within the territory of Sri Lanka unless Sri Lanka incorporates those commitments into its national law. Udagama cites several cases such as *Leelawathie v Minister of Defence and External Affairs* where the Supreme Court held that the UDHR “...has no binding force as it is not a legal instrument and forms no part of the law of this country”<sup>4</sup>. The dualist nature of Sri Lanka was further endorsed more broadly in the *Sepala Ekanayake case* where the Supreme Court held that Sri Lanka’s ratification of international treaties and conventions could not be acted upon without domestically enacted enabling legislation.<sup>5</sup> Udagama cites *Singarasa v Attorney General* as the latest case (as of 2014) that endorsed Sri Lanka as a dualist state.<sup>6</sup> In this case a five-judge bench of the Supreme Court stated that the rights recognized by a ratified treaty “could not be directly invoked under domestic law in the absence of incorporating legislation.”<sup>7</sup> Only two ratified treaties have been incorporated through legislation in Sri Lanka: the ICCPR and the Convention Against Torture (CAT).<sup>8</sup> It appears

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<sup>3</sup> Deepika Udagama, "The Politics of Domestic Implementation of International Human Rights Law" (2015) 16:1-2 Asia Pac J HR & L 104.

<sup>4</sup> *Leelawathie v Minister of Defence and External Affairs* (1965) 68 NLR 487, 490. Udagama, note 82 at 110 notes that the UDHR “does not impose legal obligations as would a treaty; however, it could be argued that several of its provisions are binding on States as customary international law”

<sup>5</sup> *Ekanayake v Attorney General* (1988) 1 Sri L R 46.

<sup>6</sup> Udagama, note 82 at 111.

<sup>7</sup> Udagama, note 82 at 111. *Singarasa v Attorney General* S.C. SpL (LA) No. 182/99

<sup>8</sup> The International Covenant on Civil and Political Rights Act No. 56 of 2007. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Act No. 22 of 1994

then that the human rights contained in the domestic legal system have the strongest grip on the Sri Lankan state.

The primary provisions and mechanisms relating to human rights are contained in Sri Lanka's constitution, specifically Chapter III, titled "Fundamental Rights". Chapter III provides the foundation upon which all other laws and mechanisms function. Chapter III guarantees, inter alia, the freedom of thought, conscience and religion (Article 10), freedom from torture (Article 11), the right to equality (Article 12), freedom from arbitrary arrest, detention and punishment, and prohibition of retrospective penal legislation (Article 13), and freedom of speech, assembly, association, occupation, movement etc. (Article 14). As stated above in Chapter 2, Sri Lanka may derogate from these rights under the grounds set out in Article 15.

The Sri Lankan legal system also contains several penal code provisions meant to supplement the freedoms above. The Sri Lankan Penal Code contains a chapter (Chapter XV) relating to offences against religion.<sup>9</sup> These penal code provisions focus on protecting religious feeling and protecting the sanctity of places of worship and religious symbols. The Penal Code of Sri Lanka through s. 290 makes it an offence to injure or defile a place of worship with the intent to insult the religion of any class of persons. This offence attracts either a prison term which may extend for up to two years, a fine, or both. S. 290A of the Penal Code makes it an offence to "[do] any act, in or upon, or in the vicinity of, any place

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<sup>9</sup> *Sri Lanka: Penal Code* [Sri Lanka], Chapter 19, 1 January 1885, available at: <https://www.refworld.org/docid/4c03e2af2.html>.

of worship or any object which is held sacred or in veneration by any class of persons with the intention of wounding ... religious feelings...with the knowledge that [those persons are] likely to consider such act as an insult to their religion.”<sup>10</sup> S. 291 makes it an offence to voluntarily cause a disturbance to a religious assembly.<sup>11</sup> S. 291A makes it an offence to utter words, make any sound in the hearing of a person, or make a gesture in the sight of a person, or places any object in the sight of a person that would wound the religious feeling of that person.<sup>12</sup> Under s. 291B, it is an offence to deliberately and maliciously “[outrage] the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults or attempts to insults or attempts to insult the religion or the religious belief of that class.”<sup>13</sup> According to s.292 of the Penal Code, it is an offence to trespass “in any place of worship or on any place of sepulture or any place set apart for the performance of funeral rites...with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby.”<sup>14</sup> Each of these provisions carry a minimum sentence either of one or two years of imprisonment or a fine. These laws are essentially laws against blasphemy. Although the laws religious feelings in general (and not Buddhist religious feelings alone), in practice these provisions have been used against persons who have “offended” Buddhist sentiment. For example, in 2014 a British tourist was held in an immigration detention camp and then

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<sup>10</sup> S. 290A, Penal Code of Sri Lanka 1885 (as amended).

<sup>11</sup> S.291, Penal Code of Sri Lanka 1885 (as amended).

<sup>12</sup> S. 291A, Penal Code of Sri Lanka 1885 (as amended).

<sup>13</sup> S. 291B, Penal Code of Sri Lanka 1885 (as amended).

<sup>14</sup> S. 292, Penal Code of Sri Lanka 1885 (as amended).

deported for “hurting others' religious feelings” because she had a tattoo of Buddha on her arm.<sup>15</sup> It appeared not to matter that the tourist was a practicing Buddhist.<sup>16</sup>

Article 3(1) ICCPR Act is another important provision that appears to supplement the constitutional provisions on fundamental rights. Article 3(1) of the ICCPR Act states that “[n]o person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>17</sup> A person found guilty under Article 3(1) of the ICCPR Act is punished with rigorous imprisonment not exceeding ten years.<sup>18</sup> This offence is also cognizable and non-bailable.<sup>19</sup>

However, while the penal code provisions and Article 3(1) of the ICCPR Act may *appear* to support the protection of religious sentiments and religious symbols of all religious communities, these provisions have largely been used to restrict freedom of expression and to prosecute persons who supposedly insult Buddhism. It is a deeper question whether religious freedom can be interpreted as the state's duty to give religions the assurance that their truth is the ultimate truth. However, in a country as religiously diverse as Sri Lanka, trying to give everyone an assurance that their idea of truth is the only truth would result in never-ending religious warfare. Therefore, the only workable interpretation of religious freedom in Sri Lanka can be giving everyone the freedom to practice one's religion without

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<sup>15</sup> BBC. “Sri Lanka to deport Buddha tattoo British woman”, (22 April 2014), online: *BBC News*<<https://www.bbc.com/news/world-asia-27107857>>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Article 3(1) ICCPR Act No. 56 of 2007. The ICCPR Act does not give effect to all the provisions of the ICCPR but selects

<sup>18</sup> Article 3(3) ICCPR Act No. 56 of 2007.

<sup>19</sup> Article 3(4) ICCPR Act No. 56 of 2007.

infringing on another's right or committing a criminal act. In this context weaponizing the ICCPR Act is unjustifiable.

According to Gehan Gunethilleke, in the 12 years since the enactment of the ICCPR Act “not a single person who has incited violence against a minority group in Sri Lanka has been convicted under the Act; this is despite four major incidents of mob violence against the Muslim community in the past five years: Aluthgama in 2014, Gintota in 2017, Digana and Teldeniya in 2018, and Kurunegala and Gampaha in 2019.”<sup>20</sup> In April 2019, award-winning author and poet Shakthika Sathkumara was arrested and remanded under s. 291 of the Penal Code and Article 3(1) of the ICCPR for writing a book that depicted a gay monk.<sup>21</sup> The arrest was condemned by other Sri Lankan writers, academics, legal commentators, and film directors for violating the freedom of expression of the writer.<sup>22</sup> Additionally, people wearing or selling garments that depict a “*dharmachakraya*” (a Buddhist religious symbol) or even a ship's steering wheel (which is identical in appearance to a *dharmachakraya*) have been prosecuted for insulting Buddhism as recently as May 2019.<sup>23</sup>

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<sup>20</sup>Gehan Gunethilleke. “Focus continues on Sathkumara's arrest and ICCPR Act ”, online: *Sri Lanka Brief*<<http://srilankabrief.org/2019/06/misuse-of-iccpr-act-in-sri-lanka-in-suppressing-freedom-of-expression-rights/>>

<sup>21</sup>Aanya Wipulasena. “Abuse of ICCPR Act has 'chilling effect' on fundamental freedoms”, (19 June 2019), online: *Sunday Observer* <<http://www.sundayobserver.lk/2019/06/19/news-features/abuse-iccpr-act-has-'chilling-effect'-fundamental-freedoms>>

<sup>22</sup>Daily Mirror Features Desk. “Arrest of writer Sathkumara sparks debate on freedom of expression”, (12 April 2019), online: *Daily Mirror*<<http://www.dailymirror.lk/news-features/Arrest-of-writer-Sathkumara-sparks-debate-on-freedom-of-expression/131-165392>>

<sup>23</sup>Chaturanga Pradeep. “60 shoes with Dharmachakra-shaped buckle”, (30 September 2014), online: *Daily Mirror* <<http://www.dailymirror.lk/53142/60-shoes-with-dharmachakra-shaped-buckle>>.





*Figure 3. A Muslim woman wearing a garment depicting a ship's steering wheel (deemed by the police to be a representation of the dharmachakraya) was arrested and detained in 2019.<sup>24</sup>*

Abdul Raheem Masaheena, the woman detained for wearing a garment that supposedly contained an image of the *dharmachakraya* (seen in Figure 3.) filed a fundamental rights petition in court for being unjustly remanded.<sup>25</sup> Masaheena in her petition states that her arrest, detention and the conduct of the police was “arbitrary, malicious, and did not follow due process or the law.” Masaheena’s petition further states that “it appears she had been singled out and subjected to hostile inimical discrimination based on both grounds of race and religion in violations of Article 12(2) of the Constitution” and that her arrest and detention are in “violation of [her] fundamental rights guaranteed under Articles 13(1) and/or 13(2) and/or 13(3) and/or 13(5) of the Constitution.”<sup>26</sup> At time of writing this thesis, Masaheena’s case is still at the preliminary stages before the Supreme court. Shakthika

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<sup>24</sup> Daily Mirror. “A 'symbolic' arrest”, (24 May 2019), online: *Daily Mirror* <<http://www.dailymirror.lk/news-features/A-'symbolic'-arrest/131-167764>>.

<sup>25</sup> Sunday Times. “Woman who was arrested for wearing a dress with ship's wheel files FR petition”, online: *Times Online - Daily Online Edition of The Sunday Times Sri Lanka* <<http://www.sundaytimes.lk/article/1091518/woman-who-was-arrested-for-wearing-a-dress-with-ships-wheel-files-fr-petition>>.

<sup>26</sup> Aanya Wipulasena. “Abuse of ICCPR Act has 'chilling effect' on fundamental freedoms”, (19 June 2019), online: *Sunday Observer* <<http://www.sundayobserver.lk/2019/06/19/news-features/abuse-iccpr-act-has-'chilling-effect'-fundamental-freedoms>>

Sathkumara (the imprisoned author) also petitioned the Supreme Court alleging a violation of his fundamental rights.<sup>27</sup> These arrests raise important questions regarding how laws meant to protect religious freedom are misused and are in reality used hyper-sensitively to defend Buddhist sentiments. When laws meant to protect minorities and religious sentiments are misused in this way, the mechanisms that enable independent bodies to judge and decide upon the application and realisation of laws become especially important.

Several key mechanisms exist to ensure the realisation of the rights in Chapter III. The first among these is provided for by Article 17 of the Constitution of Sri Lanka which states that “[every] person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of [the Fundamental Rights Chapter]” of the Constitution.<sup>28</sup> According to Article 126(4) the Supreme Court “shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference...or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.”<sup>29</sup> This includes the power to grant monetary compensation. For example, the Supreme Court granted SLR 100, 000.00 as

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<sup>27</sup> Aanya Wipulasena. “Abuse of ICCPR Act has 'chilling effect' on fundamental freedoms”, (19 June 2019), online: *Sunday Observer* <<http://www.sundayobserver.lk/2019/06/19/news-features/abuse-iccpr-act-has-chilling-effect-fundamental-freedoms>>. No news source has reported which specific fundamental rights Sathkumara has cited in his petition to the Supreme Court.

<sup>28</sup> Article 17 of the Constitution of Sri Lanka 1978 (as amended).

<sup>29</sup> Article 126(4) of the Constitution of Sri Lanka 1978 (as amended).

compensation to two Jehovah's Witnesses who were deemed to have been illegally arrested and detained.<sup>30</sup>

A second mechanism is made available by the Human Rights Commission of Sri Lanka which was established in Sri Lanka in 1996 to "promote and protect human rights in the country".<sup>31</sup> The Human Rights Commission of Sri Lanka (HRCSL) is an independent commission empowered to investigate and report on human rights violations.<sup>32</sup> Under section 12 of Act No. 21 of 1996, "the Supreme Court may refer any matter arising in the course of a hearing of an application made to the Supreme Court under Article 126 of the Constitution to the Commission for inquiry and report" and "the Commission shall inquire and report to the Supreme Court on the matters referred to it."<sup>33</sup> Additionally the HRCSL may investigate on its own instigation or on a complaint made by an aggrieved party or on a complaint made by a person on behalf of an aggrieved party.<sup>34</sup> If an investigation by the HRCSL *does not* disclose an infringement or an imminent infringement of human rights, the complainant is informed of this within thirty days.<sup>35</sup> If an infringement or an imminent infringement of a fundamental human right by executive or administrative action *is* found the HRCSL may refer the matter to conciliation or mediation.<sup>36</sup> Where conciliation or mediation is inappropriate or rejected by the parties involved the HRCSL may recommend

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<sup>30</sup> S. S. Selvanayagam. "SC awards Rs. 100,000 compensation for wrongful arrest and detention", (20 July 2018), online: *FT Online* <<http://www.ft.lk/news/SC-awards-Rs-100-000-compensation-for-wrongful-arrest-and-detention/56-659425>>

<sup>31</sup> Human Rights Commission of Sri Lanka. , online: *About Us*<<http://hrctl.lk/english/about-us/>>

<sup>32</sup> Human Rights Commission of Sri Lanka Act, No.21 Of 1996.

<sup>33</sup> Section 12, Human Rights Commission of Sri Lanka Act, No.21 Of 1996.

<sup>34</sup> Section 14, Human Rights Commission of Sri Lanka Act, No.21 Of 1996.

<sup>35</sup> Section 15, Human Rights Commission of Sri Lanka Act, No.21 Of 1996.

<sup>36</sup> Section 15 (2), Human Rights Commission of Sri Lanka Act, No.21 Of 1996.

prosecution or that proceedings be initiated in court.<sup>37</sup> The HRCSL may also make specific recommendations to the authority or persons concerned to prevent or remedy the infringement.<sup>38</sup> A third mechanism is created by Article 156 of the Constitution of Sri Lanka which

[provides] for the establishment of the office of the Parliamentary Commissioner for Administration (Ombudsman) charged with the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions.<sup>39</sup>

The Ombudsman too possesses powers of investigation. Upon the conclusion of the investigation the Ombudsman must report his or her determination together with reasons to the head of the institution concerned, and the minister to whom the department, public corporation, local authority or other institution concerned has been assigned.<sup>40</sup> The Ombudsman also submits an annual report to parliament detailing the complaints received and recommended action.

These three mechanisms are several key means through which the state is bound to human rights. These mechanisms make reference to and use the laws that bind the state to human rights in their investigations to bring about the realisation of rights promised in the constitution. Ironically, these mechanisms, especially the Supreme Court, in addition to binding state action to human rights, may also reinforce the state's obligations to Buddhism.

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<sup>37</sup> Section 15 (3), Human Rights Commission of Sri Lanka Act, No.21 Of 1996.

<sup>38</sup> Section 15 (3)(c), Human Rights Commission of Sri Lanka Act, No.21 Of 1996

<sup>39</sup> Article 156 (1), Constitution of Sri Lanka 1978. The Parliamentary Commissioner for Administration Act, No. 17 of 1981 was consequently passed by the Parliament of Sri Lanka to set up the office of the Ombudsman.

<sup>40</sup> Section 17 (2), Parliamentary Commissioner for Administration Act, No. 17 of 1981 (as amended).

In the next section, we see how the Supreme Court chose to restrictively interpret the constitutional provision that grants citizens the freedom of religion in favour of “protecting” and “fostering” Buddhism.

### ***Case: Restrictions on Proselytization***

The question of how far a state should interfere with the private affairs of the individual has been a perennial concern. Drawing the boundaries on legitimate conversion is inherently difficult because religious belief is an internal phenomenon that concerns the conscience, heart and mind of an individual. There exist instances of conversion for monetary gain, material benefit, and for the purposes of marriage. In cases regarding proselytization—internationally and nationally—the question of when and why should a state interfere in these instances has been largely focused on forcible conversion and undue pressure. Therefore, the state’s role in regulating conversion is murky. As such, an analysis of the ethical nature of spurious conversions such as these is beyond the scope of this thesis.

In international law, paragraph 3 of General Comment No. 22, the Human Rights Committee decisively stated that the freedom of conscience, thought and religion are “protected unconditionally.”<sup>41</sup> It follows from this that the freedom of thought, conscience, and religion grants individuals the freedom to convert to another religion if one so desires. Tied closely to this is the freedom to proselytize. According to the Special Rapporteur “proselytism is itself inherent in religion, which explains its legal status in international

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<sup>41</sup> UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18) U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), para 3. Also, Owens, note 149 at 46.

instruments and in the 1981 Declaration.”<sup>42</sup> The UN Office of the Commissioner for Human Rights (OHCHR) observes that “many human rights instruments stipulate and the Human Rights Committee hold that the right to manifest one's religion includes carrying out actions to persuade others to believe in a certain religion” and cites article 6(d) of the 1981 Declaration (which states that the practice of the freedom of religion includes the freedom, "to write, issue and disseminate relevant publications..."), Resolution 2005/40 of the Commission on Human Rights (where the Commission on Human Rights urged States "[t]o ensure, in particular... the right of all persons to write, issue and disseminate relevant publications"), and General Comment No. 22 (where the Human Rights Committee held that "the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs [and]...the freedom to prepare and distribute religious texts or publications").<sup>43</sup> It is thus clear that it is an international norm and standard of law that the freedom of thought, conscience and religion includes the freedom to proselytize and the freedom to convert to a religion of one's choosing.

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<sup>42</sup> OHCHR. “International standards - I3f”, online: *OHCHR* <<https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/IstandardsI3f.aspx>>

<sup>43</sup> OHCHR. “International standards - I3f”, online: *OHCHR* <<https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/IstandardsI3f.aspx>>. The OHCHR however is wary of forcible conversions and “situations in which certain actions aimed at converting people go beyond conventional forms of missionary activities or propagation of religion” and “other conversions that are improper in the sense of human rights law, there are many cases which, while not constituting a human rights violation, nevertheless raise serious concern because they disturb a culture of religious tolerance or contribute to the deterioration of situations where religious tolerance is already being challenged.” The OHCHR that these “cannot be considered as a "manifestation" of religion or belief and are therefore not protected by article 18” . The OHCHR does not mention what these specific behaviours or actions are, but acknowledges “cases where missionaries, religious groups and humanitarian NGOs have allegedly behaved in a very disrespectful manner vis-à-vis the populations of the places where they were operating.”

In Sri Lanka, a few notable cases have dealt with proselytization, propagation of one's religion and conversion, with varying approaches. According to Owens "[t]he Supreme Court has...seemingly been inconsistent on the question of the constitutionality of conversions."<sup>44</sup> These varying approaches appear to be the result of different benches granting differing amounts of weight to constitutional provisions. In a situation where the Constitution of a state grants the freedom of thought, conscience, and religion "including the freedom to have or to adopt a religion or belief of his choice", and "the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching", and is silent regarding the explicit right to propagate one's religion, the court has two main choices: either recognize the right to proselytize (the right to propagate one's religion), or recognize that the right to proselytize does not exist. The constitutional recognitions of the right to practice and teach one's religion combined with the right to adopt a religion of one's choice, tip the scales in favour of a judicial recognition of the right to proselytize. Further weighing the scales down in favour of a recognition of a right to proselytize is its recognition under international law as forming a part of the freedom of thought, conscience and religion. Therefore, in the absence of an explicit prohibition on proselytization in the Constitution it was unusual that the Supreme Court in the case of *the Sisters of the Holy Cross case (2003)* created a prohibition based on the absence of an explicit recognition of the right to proselytize. In this case, the Supreme Court denied citizens the right to propagate their religion on two

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<sup>44</sup> Alexandra Owens, "Protecting Freedom of and from Religion: Questioning the Law's Ability to Protect against Unethical Conversion in Sri Lanka" (2006) 1:1 Religion & Human Rights: An Intl J 41 at 42.

main grounds: (i) the absence of an explicit acknowledgement of the right to propagate one's religion in the Constitution of Sri Lanka; and (ii) that providing services to vulnerable groups constituted undue pressure.

The Supreme Court also relied on a paragraph from the decision of the ECtHR, in *Kokkinakis v. Greece* (1993) to highlight that offering material or other social benefits in order to induce conversion constituted undue pressure.<sup>45</sup> One crucial difference between the Greek Constitution and the Sri Lankan Constitution must be observed: Article 13 of the Greek Constitution forbids proselytism in respect of all religions without distinction, while the Sri Lankan Constitution does *not* contain such a prohibition. In the absence of an explicit provision outlawing the propagation of one's religion, the Supreme Court attempted to choose what is morally right from what is morally wrong. The Supreme Court's actions of inserting its own morality into the interpretation of law is an example of Realist understanding of the relationship between law, morality and the court. Even though Realist conceptions of law provide an explanation of how judges apply their morality where the law is vague, Realism does not justify a judge inventing a prohibition where there is none.

The conflict of duties generated by this case was of two kinds. The first conflict was where the court acted as a kind of religious court to determine if the conversion was a "true conversion". Here the justice of the Supreme Court were caught between a duty to their

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<sup>45</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003 at 6. *Kokkinakis v Greece* [1993] ECHR 20.



personal belief (her personal conviction that true belief in a religion is necessary to convert), her duty to protect the freedom of thought, conscience and religion under Article 10, and a duty to protect and foster Buddhism under Article 9. The judgement of *the Sisters of the Holy Cross case* acknowledged Article 9 and stated that “[s]imilarly when there is no fundamental right to propagate, if efforts are taken to convert another person to one's own religion, such conduct could hinder the very existence of the Buddha Sasana.”<sup>46</sup>

In *the Sisters of the Holy Cross case*, the Supreme Court determined that

Although it is permissible under our Constitution for a person to manifest his or her religion, spreading another religion would not be permissible as the Constitution would not guarantee a fundamental right to propagate religion. Even in situations where propagation is treated as a fundamental right enshrined in a Constitution, the entitlement has not extended to convert another person to one's own religion as that would impinge on the 'freedom(sic) of conscience.’<sup>47</sup>

In the statement above the Supreme Court acknowledged that even if propagation of a religion is allowed, one is not allowed to succeed at converting someone. It is bizarre that according to the court, one may *attempt* to convert someone but not *actually* convert someone. The only kind of propagation of a religion allowed by the state would be birthing new members of a religious community. In deciding this case, the Sri Lankan Supreme Court made reference to the UDHR, the ICCPR and decisions of the ECtHR in support of its restrictions of proselytization.<sup>48</sup> The court also cited Indian case law on conversion, a

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<sup>46</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003 at 7.

<sup>47</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003 at 7.

<sup>48</sup> Alexandra Owens, "Protecting Freedom of and from Religion: Questioning the Law's Ability to Protect against Unethical Conversion in Sri Lanka" (2006) 1:1 Religion & Human Rights: An Intl J 41 at 46.

state that has its own controversies and human rights concerns regarding its anti-conversion laws.<sup>49</sup>

In the *Sisters of the Holy Cross case*, the Supreme Court of Sri Lanka referred to the ECtHR cases of *Larissis v. Greece* and *Kokkinakis v. Greece*. In the former case, the Supreme Court relied on the sentiment that “Article 9 [of the European convention on Human Rights, the Freedom of thought, conscience and religion] does not...protect every act motivated or inspired by a religion or belief” and that “it does not protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church”.<sup>50</sup> The Supreme Court also cites Article 18(2) of the ICCPR which prohibits coercion that would impair the freedom of thought, conscience and religion.<sup>51</sup> However, the facts of the case dealt with proselytization by superior officers to subordinate airmen in the military and civilians. The ECtHR found that since the superiors were commanding officers, the airmen being subordinates, would not be able to rebuff their superior and therefore the proselytization amounted to undue pressure. The ECtHR found that the civilians were *not* under a similar obligation to listen to the commanding officers and that the same kind of relationship did not exist between the commanding officer and the civilians (even though one of the civilians suffered from a mental condition). The court found the commanding officers in violation

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<sup>49</sup> Tariq Ahmad. *State Anti-conversion Laws in India*, rep. (Washington, DC: U. S. Library of Congress, Global Legal Research Center, 2018).

<sup>50</sup> *Larissis and Others v. Greece* [1998] 23372/94, 26377/94 and 26378/94, paragraph 48.

<sup>51</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003 at 5.

of Article 9 of the ECHR for the airmen, but that there had *not* been a violation for the civilians.<sup>52</sup> The ECtHR stated that “[t]he Court finds it of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen.” It is this case that the Sri Lankan Supreme Court applied to the *Sisters of the Holy Cross case*, even though the context did not involve military personnel but civilians who were “free to accept or reject” the proselytization. The Supreme Court of Sri Lanka reasoned that

[i]n a situation where toddlers, children, invalids, aged and refugees are concerned, they would be in a similar or a worse position as that of an airman under a superior officer in an air force, and the reasoning of the European Court to the susceptibility of subordinate officers to superiors should apply with greater force. Where there are special relationships that exist, preaching would create a situation where there could be infringement of freedom of thought of the person, who is under authority as there could be compulsion to that effect.<sup>53</sup>

The Supreme Court misrepresented and misapplied the reasoning used by the judges in the *Larissis and Others v. Greece*. The civilians involved in *the Larissis and Others v. Greece* were also suffering from “family problems and psychological distress.”<sup>54</sup> Still, upon the consideration of the circumstances and evidence, the ECtHR determined that there had been no improper pressure applied to the civilians. Essentially, the Supreme Court of Sri Lanka in its judgement attempted to equate offering someone “material and other social advantages” with imposing improper pressure in a hierarchical relationship. However, the

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<sup>52</sup> *Larissis and Others v. Greece* [1998] 23372/94, 26377/94 and 26378/94, paragraph 59: “The Court finds it of decisive significance that the civilians whom the applicants attempted to convert were not subject to pressures and constraints of the same kind as the airmen.”

<sup>53</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003 at 5.

<sup>54</sup> *Larissis and Others v. Greece* [1998] 23372/94, 26377/94 and 26378/94, paragraph 56.

groups that the court identifies (toddlers, children, invalids, the aged and refugees) as being vulnerable to undue pressure are *not bound* to receive services by the Sisters of the Holy Cross. The organization lists its objectives thus:

- (a) to spread knowledge of the Catholic Church;
- (b) to impart religious, educational and vocational training to youth;
- (c) to teach in Pre-Schools, Schools, Colleges and Educational Institutions;
- (d) to serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions;
- (e) to establish and maintain Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics and care for the infants, aged, orphans, destitutes and the sick.<sup>55</sup>

However, all the services offered above (listed in (b), (c), (d) and (e)) were also services offered free of charge (or for a nominal fee) by the Sri Lankan state and other non-profit organizations. Sri Lanka possesses universal healthcare and free education (up to and including university). In this context, making use of the services offered by the Sisters of the Holy Cross would have been completely voluntary. The services would also be only one among many alternatives to state sponsored healthcare and education. For this reason, the Supreme Court's argument that the combination of the provision of these services by a religious organization, availing one's self of the services offered and the unequal relationship between the service provider and service receiver creates undue pressure to convert cannot stand. The court's restriction of proselytization in this instance was not justified. The judgement in this case suffers from insufficient analysis and a tacit acceptance of the position of petitioner. The views of the petitioner regarding the threat to the existence of Buddhism is accepted unchallenged and unquestioned. The term "charity" appears

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<sup>55</sup> *Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003 at 2

nowhere in the judgement. The court does not examine the role of charity in religious organizations. The court does not explain how and why it is undesirable that “material and other benefits” be used in conversion. No distinction is made between a legitimate conversion and an illegitimate conversion. The Supreme Court in this case was attempting to prevent “false conversions” by making it illegal to receive any benefit before, during, or after the conversion as a possible material or social benefit for conversion.

This case was submitted to the UN Human Rights Committee by the Sisters of the Holy Cross, where the Committee was of the opinion that, “it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual’s manifestation of religion and free expression, and are thus protected...”<sup>56</sup> The Committee found the decision by the Supreme Court violated Articles 18(1) and 26 of the International Covenant of Civil and Political Rights, namely the freedom of thought, conscience and religion, and equality before the law, and freedom from discrimination.

The very next year several anti-conversion laws were drafted and subsequently challenged in the Supreme Court. The Supreme Court took a very different approach when it heard a constitutional challenge to a bill titled “Prohibition of Forcible Conversion of Religion”. The bill which was sponsored by the JHU, attempted to criminalise forced conversion. In this case, the court determined that the definition of “allurement” was too broad and that a provision of the bill (that required converts to notify the Divisional Secretariat in the area

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<sup>56</sup>Sister Immaculate Joseph and 80 teaching sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka v. Sri Lanka, UN Doc CCPR/C/85/D/1249/2004, Communication No.

where they lived of the conversion) violated Article 10, but that otherwise the Bill was in compliance with Article 10 and 14(1)(e).<sup>57</sup>

Ultimately, it can be observed that the way in which the pendulum swings is a matter of composition and at least in the Supreme Court, a question of each judge's individual opinion, and the primary issues determined to be the most pressing by the bench hearing the case. Esufally observes that in many cases the Supreme Court decided cases regarding religious rights as a procedural issue – such as due process – rather than through a substantive analysis of the scope of the rights themselves.<sup>58</sup> The Supreme Court trend of deciding recent cases regarding religious freedoms on procedural grounds may be a method of side-stepping the minefield that is the interpretation of Article 9.

***Case: The Deeghavapi Case***<sup>59</sup>

*The Deeghavapi case* (2009) is an example of a case where the Supreme Court used the principles of due process and the rule of law to find that a groups' religious rights had been violated. In *the Deeghavapi case*, “the petitioners [which included Ven. Nannapurawe Buddharakkitha, the chief incumbent of Deeghavapiya Raja Maha Viharaya as an intervenient petitioner] [alleged] that the executive and or administrative action taken to alienate the land - about 60 Acres to 500 Muslim families [infringed] the fundamental rights

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<sup>57</sup> Esufally, note 93 at 12.

<sup>58</sup> Esufally, note 93 at 15: “the appellate court judgments that advanced religious rights have focused on due process rather than on the substantive basis of protecting, promoting and fulfilling an individual's religious rights. In this context, the advancement of religious freedom becomes incidental rather than integral to judicial decision-making.”

<sup>59</sup> Ven. Ellawala Medananda Thero Vs District Secretary, Ampara And Others (2009) 1 Sri L R 54 (the Deeghavapi case).

guaranteed under Article 10, 12(1), 12(2) of the constitution.”<sup>60</sup> The petitioners alleged that arbitrarily settling 500 Muslim families in a large expanse of land close to a Buddhist heritage site and temple was discriminatory to Sinhalese and Tamil residents (who had also requested land) in the area since Sinhalese Buddhists and Tamils would not be able to reside close to the temple. It is interesting that in this case that Buddhist monks relied on fundamental human rights and laws guaranteeing freedom from discrimination to protect the interests of Sinhalese Buddhists, the majority ethnicity and religion. The justices of the court – which included the Chief Justice – rather than analyse the scope of the cited rights and answering an important question regarding the possible right of a religious community to reside close to a religious site instead looked at the case through the lens of administrative law, the principle of ultra vires and due process. It appears that the justices of the Supreme Court were loath to interpret the scope of religious freedom under Article 10, 12(1), and 12(2) even where doing so would benefit the interests of the majority ethnicity and religion. The Chief Justice concludes his judgement thusly:

State land is held by the executive in trust for the People and may be alienated only as permitted by law...I hold that the impugned alienation is bereft of any legal authority and has been effected in a process which is not bona fide. Accordingly, the Petitioners have locus standi to implead such action...under Article 126(6) of the Constitution. On the preceding analysis of evidence, the Petitioners have established an infringement of the fundamental rights guaranteed by Article 12(1), 12(2) and 10 of the Constitution.

The justices take the somewhat circuitous route of using the failure of the respondents to follow due process to determine that the petitioners’ rights were violated instead of directly

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<sup>60</sup> Ven. Ellawala Medananda Thero Vs District Secretary, Ampara And Others (2009) 1 Sri L R 54.

analysing the scope and application of the rights themselves to determine if there was an infringement of the petitioners' rights. It is also noted that Sarath N. Silva, CJ in his judgement acknowledges at the beginning of the judgement that the petitioners are "actively engaged in the protection of the Buddha Sasana". No other mention is made regarding the protection of the Buddha Sasana in the remainder of the judgement. Nor is there any mention at all of Article 9. The wording used by the Chief Justice is reminiscent of Article 9's "duty of the State to protect and foster the Buddha Sasana" and no reason is given for the acknowledgement.<sup>61</sup> It is unclear whether the Chief Justice was referencing Article 9 and it is also unclear what the Chief Justice's intention was in acknowledging the Petitioner's role as protectors of Buddhism in Sri Lanka.

It appears then that *the Deeghavapi case* is just another instance where the Supreme Court was seemingly conflicted over its duties to Buddhism and its duties to human rights, even where the interpretation of the scope of human rights would benefit the Sinhala-Buddhist majority. This conflict is not limited to the courts but is also observable in the socio-religious phenomenon of the child monk.

### ***Case: The Child Monk***

Let us analyse where the conflict occurs in the case of the child monk in Sri Lanka.

Admittedly, the child occupies a special position in law and enjoys more legal protections

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<sup>61</sup> Article 9, Constitution of Sri Lanka 1978: 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). Sarath N. Silva CJ was also the judge that declared Sri Lanka to be a secular state, obiter, in *Ashik v. Bandula and Others* SC FR 38/2005 (*the Noise Pollution case*).



than an adult human being. The case of the child monk (known as “*samanera*” in Sri Lanka) was chosen to highlight how, even with *more* legal protections than an adult human being, the state fails to protect children who are harmed in the darkness of the void created by the conflict of the secular human rights and deferential treatment proffered to a religion by the state.

According to the United Nations Children’s Fund, “the Convention on the Rights of the Child is the most widely and rapidly ratified human rights treaty in history,” with all states in the international community being party to the convention, and only two states having not ratified the treaty.<sup>62</sup> This convention was divided into eight categories, one of which clarified the civil rights and freedom of the child. According to Article 14 (1) of the Convention on the Rights of the Child, “States Parties shall respect the right of the child to freedom of thought, conscience and religion”.<sup>63</sup> The CRC however adds in Article 14 (2) that “States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”<sup>64</sup> Article 14 (3) notes that the “freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”<sup>65</sup> It is crucial to note that under

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<sup>62</sup> UNICEF, "Frequently asked questions", (2019), online: *UNICEF* <[https://www.unicef.org/crc/index\\_30229.html](https://www.unicef.org/crc/index_30229.html)>.

<sup>63</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990), online: <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [CRC].

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

international law, parents and legal guardians are only empowered to “provide direction” and that religious freedom may be limited to protect the health of a child. The provisions of the CRC also refer to the evolving capacities of the child. Through the lens of the CRC the role of parents, legal guardians and societies at large seem to be clear on the boundaries of parental involvement regarding religious instruction in a child’s life.

It is an important and central tenet of human rights discourse that humans gain human rights at birth. Fundamental human rights do not have age limits, are universal, inalienable, are indivisible, interdependent and inter-related. Henkin notes that “[the CRC] convention’s recognition of children as rights holders has created tensions with the authority that parents and other family members have traditionally exercised over children.”<sup>66</sup> Acts of parental authority over a child are sometimes manifestations of religious belief. For example, it is a religious tenet of Judaism and Islam that male children be circumcised. In Sri Lanka, offering a male child to a Buddhist monastery is seen as an act that offers rewards spiritually to the parents of the child. International human rights law (in its strictest sense) may not consider sacrificing a child to an austere and ascetic monastery to be in the best interest of the child, given the child’s right to family life and to a full life.

Several sources grant children rights. Primary among them is the Constitution of Sri Lanka. These basic rights are buttressed by the ICCPR Act of Sri Lanka which in addition to providing more specific civil, political, and cultural rights, contains a section specifically on the rights of the child. The state duty to look after the “best interest of the child” is

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<sup>66</sup> Louis Henkin et al, *Human Rights*, 2nd ed (New York: Foundation Press, 2009) at

recognized under Article 5(2) of the ICCPR Act of Sri Lanka.<sup>67</sup> One year after it ratified the CRC, Sri Lanka adopted a policy document known as the “Charter on the Rights of the Child”, “with a view to ensuring that standards of the Convention would guide law reform and enforcement, policy formulation, and resource allocation.”<sup>68</sup> According to the UN Committee on the Rights of the Child, “[the] Children’s Charter continues to be an important and relevant policy document [in Sri Lanka].”<sup>69</sup> The Children’s Charter is almost identically modeled on the CRC, with one crucial difference regarding religion. Under the Sri Lankan Children’s Charter, a home-grown addition appears in the form of Article 5(2) of the Children’s Charter: “the State shall make it obligatory on every parent or guardian of the child to bring up such child in a proper religious environment by educating the child of the teachings and practices of the religion to which such child belongs with the goal of developing good spirit in the mind of such child.”<sup>70</sup> The Sri Lankan Children’s Charter “obligation” placed on parents to bring up children in a religious environment is markedly different from the “empowering” parents to provide “direction” under the CRC. An obligation is where a person is morally or legally bound to do something. Where an obligation is imposed compliance is not optional. However, when a parent is “empowered”, the parent is merely given the authority to do something. The parent may or may not exercise that authority. It appears that Sri Lanka legally requires that children be brought

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<sup>67</sup> Article 5(2)

<sup>68</sup> CRC, Consideration of reports submitted by States parties under article 44 of the Convention (2017) UN Doc CRC/C/LKA/5-6, Online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/049/09/PDF/G1704909.pdf?OpenElement>

<sup>69</sup> Ibid. The “Charter on the Rights of the Child”, Sri Lanka, 1992 (referred to as “the Children’s Charter” from hereon).

<sup>70</sup> Article 5(2), The Charter on the Rights of the Child 1992, Sri Lanka.

up in religious environment rather than a secular environment. According to a strict reading of Article 5(2) of the Children's Charter, in Sri Lanka, a parent who brings up a child in a secular environment with a secular understanding of good and bad would be in violation of a state mandated obligation.

Theoretically, Article 5(2) of the Children's Charter sets the legal groundwork for parents to submit their children to a monastery to be ordained. The parental act of entrusting a child to a Buddhist monastery would simply be an act that satisfies a state-imposed obligation to ensure that a child is brought up in a religious environment. In Sri Lanka, parents give up children to monasteries for mainly one of two reasons: (i) the parents believe that sacrificing a child to Buddhist monastery is spiritually rewarding; (ii) the parents are in indigent circumstances, are unable to care for the child and believe that the child will be well-looked after at the monastery. Parents of indigent circumstances often give up their children to either a Buddhist monastery or to an orphanage when they are unable to care for the child. Similarly, the children of parents who are financially secure are also sent away to boarding school. One may ask: is there really a difference between the three? In orphanages too children are, not infrequently, sexually and/or physically abused. One could say that in a boarding school a child may be at risk of abuse. One may ask, what is the difference between giving up a child to an orphanage (or even to a boarding school) and giving up a child to a monastery? The clearest difference is that when parents of indigent circumstances submit their children to a monastery, it is not just a question of whether the children are going to be well fed, clothed, and taken care of. Children

submitted to a monastery are submitted to a Buddhist way of life. Sri Lanka is a very generous welfare state with government (and private) orphanages. These institutions fall under oversight institutions to protect children. However, oversight institutions such as the National Child Protection Authority have historically either ignored the plight of children in orphanages, or faced deep resistance to their involvement in protecting child monks.

Child monks are recruited as young as seven and are asked to utter the words “Venerable Sir, I respectfully ask you to ordain me as a novice monk, in order that I may be free from the cycle of existence and attain Nibbana” to begin the process of committing themselves to monkhood.<sup>71</sup> The question arises whether it is ethical to commit children (especially when they are so young) to monkhood when they do not know of Buddhist concepts such as “the cycle of existence” and “Nibbana”. Furthermore, upon entering the monastery the children are asked to bind themselves to the “ten precepts” of Buddhism, which contain the following rules: “I undertake to abstain from taking food after midday” and “I undertake to abstain from dancing, singing, music or any kind of entertainment.”<sup>72</sup> However, according to the World Health Organization (WHO), “the deprivation of food resulting in

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<sup>71</sup> A G S Kariyawasam, *Buddhist ceremonies and rituals of Sri Lanka*, ed (Wheel Publication, 2011) at 47. Buddha Dharma Education Association: BDEA/BuddhaNet. “Ordination Procedure in the Theravada Tradition”, online: *The Buddhist World: Theravada Monks Ordination Procedure*<<https://www.buddhanet.net/e-learning/buddhistworld/ordination1.htm>>. Gananath Obeyesekere. “Child ordinations and the rights of children”, online: <<http://www.infolanka.com/org/srilanka/cult/13.htm>>. Obeyesekere, a Professor of Anthropology at Princeton University has been a vocal critic of child ordination in Sri Lanka.

<sup>72</sup> A G S Kariyawasam, *Buddhist ceremonies and rituals of Sri Lanka*, ed (Wheel Publication, 2011) at 47. Buddha Dharma Education Association: BDEA/BuddhaNet. “Ordination Procedure in the Theravada Tradition”, online: *The Buddhist World: Theravada Monks Ordination Procedure*<<https://www.buddhanet.net/e-learning/buddhistworld/ordination1.htm>>

hunger” is a manifestation of child abuse and neglect.<sup>73</sup> According Article 5(1)(c) of the ICCPR Act “every child has the right to be protected from maltreatment, neglect, abuse or degradation.”<sup>74</sup> The monastic ban on “dancing, singing, music or any kind of entertainment” is a stark and direct violation of the child’s right to leisure, recreation and cultural activities recognized by Article 31 of the CRC and Article 31 of the Children’s Charter.<sup>75</sup> Article 31 of the Children’s Charter states:

31. The State shall –

- (a) recognize the right of the child to have leisure hours to engage in play and recreational activities appropriate to the age of the child to participate freely in cultural life and arts; and
- (b) respect and promote the right of the child to participate in cultural and artistic life and provide for appropriate and equal opportunities for cultural, artistic recreational and leisure activity.<sup>76</sup>

These rights are reinforced by the constitutional guarantee in Article 14(1)(f) of the Constitution that “[e]very citizen is entitled to the freedom by himself or in association with others to enjoy and promote his own culture...”<sup>77</sup> In General Comment No. 17, a legal analysis of Article 31 by the Child Rights Committee posited that “[r]ecreation is an umbrella term used to describe a very broad range of activities, including, inter alia, participation in music, art, crafts...” and that

[t]he Committee endorses the view that it is through cultural life and the arts that children and their communities express their specific identity and the meaning they give to their existence, and build their world view representing

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<sup>73</sup> Kru[g, Etienne G et al, eds. *World report on violence and health*, rep. (Geneva: World Health Organization, 2002) 61 in Box 3.1.

<sup>74</sup> Article 5(1)(c) ICCPR Act No. 56 of 2007.

<sup>75</sup> See Anandajoti. “A Day in the Life of a Sri Lankan Child Monk”, online: *Dharma Documentaries* <<https://dharma-documentaries.net/a-day-in-the-life-of-a-child-monk>> for a glimpse into a day in the life of a Sri Lankan child monk. Observe the lack of scheduled time for play or recreation. Of course, the monastery may have wished to enhance the “religiosity” of feeling in documentary by omitting play time.

<sup>76</sup> Article 31, The Charter on the Rights of the Child 1992, Sri Lanka.

<sup>77</sup> Article 14(1)(f), Constitution of Sri Lanka 1978.

their encounter with external forces affecting their lives. Cultural and artistic expression is articulated and enjoyed in the home, school, streets and public spaces, as well as through dance, festivals... ceremonies, rituals, theatre, literature, music, cinema, exhibitions, film, digital platforms and video. Culture derives from the community as a whole; no child should be denied access either to its creation or to its benefits.<sup>78</sup>

The monastic ban on music, singing, and dancing for child monks, then, is in violation of both international and national law.

Generally, states only actively separate children from parents where there is evidence or suspicion of abuse. There are accusations that sexual abuse against child monks is rampant.<sup>79</sup> However only three Buddhist monks have been convicted of child abuse in recent history.<sup>80</sup> According to the BBC, “research carried out by the BBC Sinhala service has revealed that over the last decade, nearly 110 Buddhist monks have been charged for sexual and physical assaults on minors in Sri Lanka”.<sup>81</sup>

Yet, despite the clear violation of the rights of child monks the Sri Lankan state has periodically actively sourced children for monasteries and monkhood in their thousands. For example, in 2001, Prime Minister Ratnasiri Wickramanayake (who was also the Minister for Buddhist Affairs) attempted to recruit 2000 boys for ordination and again in 2010, another Prime Minister D. M. Jayaratne (who was *also* the Minister of Buddha Sasana

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<sup>78</sup> A(d), A(f), General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)\*  
<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vFw58qKy0NsTuVUIOzAukKtwGqGgFkAgArTuTdZZUuSZObAaHCoPsdppxu9L6un29TyD4Jyrk0F22kRyLCMeCVm>

<sup>79</sup> Saroj Pathirana. “Sri Lanka's hidden scourge of religious child abuse”, (1 June 2012), online: *BBC News*<<https://www.bbc.com/news/world-south-asia-15507304>>

<sup>80</sup> Pathirana, note 108.

<sup>81</sup> Pathirana, note 108.

(Buddhism) and Religious Affairs) planned to ordain 2600 boys within the year.<sup>82</sup> The reason given for the state-sponsored recruitment drives was that there was a danger to the continued existence of Buddhism in the country; monks had complained to the Prime Minister (in 2001) that fewer people were joining the clergy and that this led to the closure of many temples in the country.<sup>83</sup>

Submitting a child to be ordained at a Buddhist monastery is a ritualistic process. The child's head is shaved, normal everyday clothing is replaced by saffron robes. A depersonalisation process takes place. The child is committed to monastic life. The question may arise: do the rituals and the life of a child committed to monastic values violate the child's dignity? Are these violations "serious enough" that it merits state intervention to protect the child? Sri Lanka, in this instance would be under a duty to protect and foster Buddhism under Article 9 of the Constitution, and under a duty to look after the best interest of the child according to its human rights obligations. In circumstances such as these, if a state is caught between its tradition, history and dominant religion on one side, and legitimate fears regarding the safety and well being of its citizens on the other, can a state act neutrally if it contains a constitutional provision that decrees all state bodies to protect and foster the dominant religion?

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<sup>82</sup> Saroj Pathirana. "Sri Lankan activists oppose plan to train boys as monks", (15 October 2010), online: *BBC News* <<https://www.bbc.com/news/world-south-asia-11537305>>

<sup>83</sup> Kyodo News. "Princeton prof. says 'No' to Sri Lanka child monks", online: <<https://www.buddhismtoday.com/english/world/facts/104-notochildmonk.htm>>: "The prime minister told reporters recently that he conceived the plan after receiving thousands of letters from senior Buddhist monks complaining, among other things, that fewer people were joining the clergy. This, he said, had even led to the closure of many temples around the country. "I found there was a problem and this is the solution," he asserted. He believes his plan will strengthen Buddhism in the country and bolster the ranks of a clergy that was in danger of dying out."



### *Case: Alcohol Ban for Women*

Buddhist monks have frequently criticized the government over more liberal policies considered to be at odds with Sri Lanka's (supposed) identity as a Buddhist State. For example, in 2018 when Sri Lanka lifted a decades long restriction on women purchasing alcohol in taverns, Buddhist monks and members of parliament were quick to criticize the government for violating "Sri Lanka's Buddhist values".<sup>84</sup> According to the BBC, "Leading monks in the Buddhist-majority country had criticised the decision to lift the ban, arguing it would destroy Sri Lankan family culture by getting more women addicted to alcohol."<sup>85</sup> The restriction was swiftly re-imposed by the President within days of the ban being lifted. According to Kalana Senaratne, a senior lecturer at the Department of Law, University of Peradeniya, "the president's desired voter base are rural Sinhalese Buddhists who reside outside of Colombo", "this electoral demographic would be inclined to see these acts pertaining to alcohol as the president 'consolidating Buddhist values'".

The restriction on women's ability to purchase alcohol was originally introduced in 1951 shortly after Sri Lanka achieved independence from the British in 1948.<sup>86</sup> The latest

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<sup>84</sup> Sirilal, Ranga & Shihar Aneez. "Sri Lanka reimposes women alcohol ban days after it was lifted", (15 January 2018), online: *Reuters*<<https://www.reuters.com/article/us-sri-lanka-alcohol/sri-lanka-reimposes-women-alcohol-ban-days-after-it-was-lifted-idUSKBN1F41IQ>>: "Officials at the finance ministry said the ban was lifted after repeated requests from the tourism industry to extend bar hours and allow female tourists to buy alcohol. But that move was criticized by opposition parliamentarians who said the move would damage Sri Lanka's Buddhist values."

<sup>85</sup> BBC. "Sri Lanka's president rejects move to allow women to buy alcohol", (14 January 2018), online: *BBC News*<<https://www.bbc.com/news/world-asia-42682526>>.

<sup>86</sup>Excise Notification 417 of Ceylon Government Gazette No 100266 of 5.7.1951: "*(b) Prohibits the possession by any female of any quantity of arrack or fermented toddy [types of alcohol produced in Sri Lanka] in any public place throughout the whole island except under the authority of a permit or pass duly granted under that Ordinance.*" Excise Notification 447 of 29.4.1955: "*Section 12 (c): No liquor shall be sold or given to a woman within the premises of a tavern.*"

manifestation of the restriction was in Excise Notification No. 666 of 31 December 1979 which banned the sale of liquor to women ‘within the premises of a tavern’.<sup>87</sup> Verité Research, a Sri Lankan think tank, noted that the public debate on the sale of liquor to women is misinformed and that according to the law, women are barred from purchasing alcohol “within a tavern.”<sup>88</sup> Verité states that out of forty types of liquor licences there are only two types of licences that apply to taverns in Sri Lanka: toddy tavern licences and foreign liquor taverns, which are a rarity in Sri Lanka. Verité notes that “[t]his restriction has no implication on the purchase of liquor almost anywhere else, which is almost everywhere that liquor is sold.”<sup>89</sup> However, Verité observes that “[p]ast discussions in the press suggest that some sections of the Excise Department have promoted the view that the terminology of ‘taverns’ (in the law) is applicable more generally to any retail outlet that sells liquor (e.g. supermarkets). This view, however, appears to be untenable in law.”<sup>90</sup> Whether the restriction is applied in very limited circumstances or not, any restriction that women are subjected to that men are not would be considered discrimination under Article 12 of the Constitution of Sri Lanka.

While women have been restricted from purchasing alcohol in certain circumstances, the same restrictions have not applied to men. It could be argued that the restriction placed on

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<sup>87</sup>11(c) Excise Notification No. 666 of 31 December 1979. Verité Research. “The Public Debate on the Sale of Liquor to Women is Misinformed | Verité Research | Sri Lanka Law Reports”, online: *Verité Research*<[https://www.veriteresearch.org/publication/verite-research\\_the-public-debate-on-the-sale-of-liquor-to-women-is-misinformed/](https://www.veriteresearch.org/publication/verite-research_the-public-debate-on-the-sale-of-liquor-to-women-is-misinformed/)>

<sup>88</sup> Verité Research. “The Public Debate on the Sale of Liquor to Women is Misinformed | Verité Research | Sri Lanka Law Reports”, online: *Verité Research*<[https://www.veriteresearch.org/publication/verite-research\\_the-public-debate-on-the-sale-of-liquor-to-women-is-misinformed/](https://www.veriteresearch.org/publication/verite-research_the-public-debate-on-the-sale-of-liquor-to-women-is-misinformed/)>

<sup>89</sup> Verité Research, *ibid.*

<sup>90</sup> Verité Research, *ibid.*

women buying alcohol in taverns in 1951 was the product of general, secular, run-of-the-mill sexism and therefore cannot be considered a circumstance where a state acted on its duty towards a preferred religion instead of respecting a fundamental right.<sup>91</sup> Little to no evidence exists that the original imposition, nor the restatement in 1979 was done in the name of Buddhism or Buddhist values. In 1951, Sri Lanka did not possess constitutionally guaranteed fundamental rights, although it did in 1979 (under the Constitution of 1978) when the restriction was restated in Excise Notification No. 666 of 31 December 1979. However, the *re-imposition* of the restriction in January 2018 was done in the name of Buddhist values as evidenced by numerous media reports on statements made by Buddhist monks and Members of Parliament.<sup>92</sup> The re-imposition of the restriction in the name of Buddhist values is especially significant because in 2018 jurisprudence, law, and general discourse regarding equality and human rights had developed rapidly since 1979. Sri Lanka has guaranteed to its citizens the right to equality and freedom from discrimination on the grounds of sex in both autochthonous, republican constitutions since independence. Sri Lanka has also signed and ratified numerous human rights conventions such as the UDHR

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<sup>91</sup> Although it has been reported that the ban “on women buying liquor was likely originally imposed in 1979 to appease the conservative Buddhist hierarchy at the time, a finance ministry official told AFP”: Agence France-Presse. “Sri Lanka reimposes ban on women buying alcohol – days after it was lifted”, (15 January 2018), online: *The Guardian*<<https://www.theguardian.com/world/2018/jan/15/sri-lanka-reimposes-ban-on-women-buying-alcohol-days-after-it-was-lifted>>

<sup>92</sup> Agence France-Presse. “Sri Lanka reimposes ban on women buying alcohol – days after it was lifted”, (15 January 2018), online: *The Guardian*<<https://www.theguardian.com/world/2018/jan/15/sri-lanka-reimposes-ban-on-women-buying-alcohol-days-after-it-was-lifted>>. M. Riza. “Sri Lanka's flip-flop on women alcohol ban slammed”, (17 January 2018), online: *Women's Rights / Al Jazeera*<<https://www.aljazeera.com/indepth/features/sri-lanka-flip-flop-women-alcohol-ban-assailed-180117122249767.html>>. AP. “Asian nation bans women from buying alcohol”, (17 January 2018), online: *CBS News*<<https://www.cbsnews.com/news/sri-lanka-reinstates-ban-women-buying-alcohol-health-minister-culture/>>.

(1955), the ICCPR (1980) and the Convention on the Elimination of Discrimination against Women (CEDAW) (1981) which include a clear requirement from states of a dedication to equality.

Two fundamental rights petitions were filed against the re-imposition of the ban by a group of Sri Lankan women and by the Center for Policy Alternatives on the basis of Article 10 [freedom of thought], Article 12(1) [equal protection of the law], Article 12(2) [non discrimination] and Article 14(1)(g) [freedom to engage in a lawful occupation, profession].<sup>93</sup> The petitions were granted leave to proceed but no further reports have been made of developments in the case to date.<sup>94</sup> Unlike the case of the Child Monk and the cases on the restrictions on proselytization, the (re)imposition of restrictions on women buying alcohol because of “Buddhist values” is rather “cut and dry”. When caught between two duties – the duty to uphold religious values and the duty to human rights (specifically the right to equality and freedom from discrimination on the basis of sex) – the government in this instance chose to uphold religious values at the expense of human rights. It is yet to be seen whether the courts or any party defending the position of the executive to re-impose the ban would refer to Article 9 in buttressing its position.

It is apparent that the Sri Lankan state understands that there is a conflict and has tried to resolve the conflict through laws and amendments. For example, the Nineteenth

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<sup>93</sup> CPA. “Two Fundamental Rights Petitions Challenging Excise Notification No 4/2018”, (19 September 2018), online: *Centre for Policy Alternatives* <<https://www.cpalanka.org/two-fundamental-rights-petitions-challenging-excise-notification-no-4-2018/>>

<sup>94</sup> S. S. Selvanayagam. “SC grants leave on liquor petition”, (10 July 2018), online: *Daily Mirror* <<http://www.dailymirror.lk/article/SC-grants-leave-on-liquor-petition-152470.html>>

Amendment to the Constitution in 2015 amended the Constitution to ensure through Art. 14A(4), “that the Constitutional Council [an independent body that oversees, inter alia, appointments to other independent bodies in Sri Lanka] reflects the pluralistic character of Sri Lankan society, including professional and social diversity”.<sup>95</sup> Additionally, in its most recent effort in June 2019, it was reported that Sri Lanka was readying itself to introduce laws on hate speech.<sup>96</sup> Sri Lanka has leapt hither thither between the two duties and on occasion has tried to contort itself in trying to fulfil both duties at the same time (seen in the above cases). But do the means and systems the state employs to patch up the fissures caused by the conflict resolve problems or do they create new problems?

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<sup>95</sup> Article 4, Nineteenth Amendment to the Constitution of Sri Lanka 1978.

<sup>96</sup> Bharatha Mallawarachi, “Sri Lanka readies laws to curb hate speech, false news”, (6 June 2019), online: *AP NEWS*<<https://www.apnews.com/428835715eb84ad083dafcad23cdecac>>.

## Chapter 4

### How a Religion becomes Political

To understand how religion imposes duties on a state it is necessary to analyse the position of religion within society. To understand how religion works within and outside the state paradigm, we must first situate religion in relation to the state. In the category of states I have analysed the majority religion and the state, seen as two autonomous entities, are in an uneasy alliance. In states with a preferred or endorsed religion religious organizations become increasingly political. In Sri Lanka for example, this has been signified by monks entering politics by forming their own political parties such as the JHU and the Bodu Bala Senawa (Buddhist Power Force, an extremist Buddhist organization allied with the 969 Movement of Burma) requesting special courts to hear cases relating to Buddhist monks.<sup>1</sup> In Chapters 2 and 3 above, we saw how Buddhism was introduced to Sri Lanka and how Buddhism was fostered by the state, but what we did not see was Buddhist organizations vying for power and political influence. At times there were sects that were vying for power, not only over the King, but between themselves as well. In these times, the king allied with one sect and shut down the other. There are accounts of Buddhist monks originating in India attempting to set up sects in Sri Lanka, but being expelled by the reigning king who subscribed to the Theravada Buddhist tradition. For example, when “a number of Indian

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<sup>1</sup> Sandun Jayawardana “Sangha courts mooted to deal with convicted monks”, online: *The Sunday Times Sri Lanka* <<http://www.sundaytimes.lk/180624/news/sangha-courts-mooted-to-deal-with-convicted-monks-299500.html>>

adherents of the Vetullavada sect of Mahayana Buddhism came to Sri Lanka and were allowed to stay at the Abhayagiri-vihara by the monks”, the king Voharika Tissa (269-291) expelled the Indian monks from Sri Lanka.”<sup>2</sup> Similarly, “a group, known as the Sagaliya sect... associated with the Jetavana monastery” had a similar fate at the hands of King Gothabhaya (309CE to 322CE) who “had sixty of the Vetullavada monks arrested, expelled from the order, and deported to India.”<sup>3</sup> King Parakramabahu the First (1123–1186) “provided for the Sangha to be headed by a monk who came to be known as the Sangharaṅga, ‘King of the Sangha’, and ruled by him with two deputies; these officers were appointed by the king on the Sangha’s advice.”<sup>4</sup> Gombrich observes that “such a political organization for the Sangha was something quite new. It has been imitated at times in the Theravadin countries of continental southeast Asia.”<sup>5</sup>

Religions occupy a special position in a society. Religion is at once private and public. Religion is private because religious belief, religious worship and its meaning are intensely personal. However, religion crosses over to the realm of the public when it dictates behaviour. Tension may arise when religion does not tally with the law of the state. This tension is largely a result of two competing value systems fighting to establish their authority

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<sup>2</sup>Akira Hirakawa & Paul Groner. *A history of Indian Buddhism: from Śākyamuni to early Mahāyāna*, ed (Honolulu: Univ. of Hawaii Pr., 1997) 125.

<sup>3</sup> Ibid.

<sup>4</sup> Richard F. Gombrich, *Theravaṅga Buddhism: A social history from ancient Benares to modern Colombo*, 2d ed (London and New York: Routledge, 2006) 159.

<sup>5</sup> Ibid.

over the same set of subjects in the same territory. In this context, religious values can be viewed in two ways: (i) ideological; and (ii) cultural.<sup>6</sup>

### *Ideological Religious Values*

A religion by definition is “belief in and worship of a superhuman controlling power, especially a personal God or gods”.<sup>7</sup> Each religion requires that individuals subscribe to its dogma, or “truth”. These ideologies are carefully curated by religious institutions.<sup>8</sup> However, these ideologies are not uniformly believed or subscribed to by religious congregations. In fact, many major religions have splintered into groups that have separated themselves from a main religion over disagreements over dogma. For example, during the Reformation, Protestants splintered from Roman Catholicism due to disagreements in their belief on the role of the Bible, and the authority of the Church, among others. Protestants believe that the Bible is the only book from God, while Catholics believe in instruction from the Catholic Church and tradition in addition to the Bible.

Religious ideology fuels the outlook and behaviour of its adherents. Religious teaching often instructs its congregations and communities on how to live their daily lives. The clearest example of this are the six axioms of faith in Islam, one of which is belief in the existence of books of which God is the author. The last of these books, the Quran, sets

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<sup>6</sup> Rhys H Williams, "Religion as Political Resource: Culture or Ideology?" (1996) 35:4 Journal for the Scientific Study of Religion at 368.

<sup>7</sup> OED, *Religion*, ed (Oxford English Dictionary, 2019).

<sup>8</sup> For example, the Catholic Church decrees what is and what is not dogma and accepted Catholic doctrine. It is necessary to believe to be true in order to be considered a “practicing” Catholic. An example of dogma would be the belief of the resurrection of Christ. An example of doctrine would be the doctrine of papal infallibility (simply: the idea that the pope cannot err in his teachings on matters of faith or morals).



down prescriptive rules regarding behaviour for the followers of Islam, such as prayer times and the avoidance of certain food items. A fair number of topics that are subjects of religious instruction are outside the purview of the state. For example, Catholicism proscribes the seven deadly sins: lust, gluttony, greed, sloth, wrath, envy, and pride. Even the Ten Commandments are not fully within state purview. While murder and stealing are punished by the liberal democratic state, idolatry, adultery, disrespecting one's parents, and envy are not punished. So far, religious ideology appears to be confined to the private sphere. When then does religious ideology move into the public sphere?

### ***Where Ideology Becomes Action***

The UNESCO Universal Declaration on Cultural Diversity in its preamble defined culture as “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”<sup>9</sup> It follows from this definition that a community of individuals sharing a particular religion would possess its own cultural practices, ways of living, based on common ideology, values, and traditions. These religious and cultural values must necessarily manifest in behaviour, for culture is not confined purely to the mind.

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<sup>9</sup> According to UNESCO, "Refworld | UNESCO Universal Declaration on Cultural Diversity", (2019), online: *Refworld* <<https://www.refworld.org/docid/435cbcd64.html>>, this definition is in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982), of the World Commission on Culture and Development (Our Creative Diversity, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998).

## *Culture and Religious Values*

There is fierce debate regarding the exact relationship between religion and culture. This debate has been spurred on in modern times by radical Islamic movements, questions around head scarves and questions regarding the legality of abortion.<sup>10</sup> Religion and religious ideology are especially invoked as a defense for cultural practices that violate the human rights of women and girl-children.<sup>11</sup> Examples include Female Genital Mutilation (FGM), forcing girls into child marriages, dowry systems, allowing husbands control over land, finances, freedom of movement, and rights over children, male guardianship over women, a husband's right to obedience and the power to discipline his wife, honour killings, compulsory restrictive dress codes, virginity tests, the restriction of women to the roles of housewives or mothers, the prevention of menstruating women, or women in general entering religious buildings or touching sacred scriptures.

Criticism against these cultural practices are often considered attacks against the religion. Religious tenets and ideology are often used to protect cultural practices, like those listed above, that obviously violate the human rights of individuals. However, the UNESCO Universal Declaration on Cultural Diversity in Article 4 states that "No one may invoke

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<sup>10</sup> Oliver Roy, "Islam in the West or Western Islam? The Disconnect of Religion and Culture" (2006) Spring & Summer The Hedgehog Review 127. Hilal Elver, *The Headscarf Controversy: Secularism and Freedom of Religion*, ed (Oxford University Press, 2011) 109. Erin Whitcomb, "A Most Fundamental Freedom of Choice: An International Review of Conscientious Objection to Elective Abortion" (2010) 24:4 St John's J Leg Comment 771.

<sup>11</sup> Frances Raday, "Culture, Religion, and Gender" (2003) 1:4 NYU Intl J Cont L 663: Raday argues that "The clash between religious or cultural autonomy and gender equality is a pervasive problem for constitutional law, one that arises in connection with claims of immunity from gender equality provisions on the grounds of cultural or religious freedom."

cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”<sup>12</sup> Alston and Goodman discussing the UDHR observe that

“The two Covenants [the ICCPR and ICESCR], with state parties from all the world’s regions, also speak in universal terms: ‘everyone’ has the right to liberty, ‘all persons’ are entitled to equal protection, ‘no one’ shall be subjected to torture, ‘everyone’ has the right to an adequate standard of living. Neither in the definitions of rights nor in the limitation clause...does the text of these basic instruments make any explicit concession to cultural variation.”<sup>13</sup>

Most domestic fundamental rights provisions too make use of universalist language. For example Argentina (which supports the Roman Catholic Faith) guarantees in Article 14 of its constitution, that “all inhabitants of the Nation” enjoy rights such as “working in and practicing any lawful industry; of navigating and trading; of petitioning the authorities...of publishing their ideas through the press without prior censorship...of associating for useful purposes; of freely practicing their religion; of teaching and learning.”<sup>14</sup>

Does this mean then that religious cultural practices are capable of being restricted and outlawed on human rights grounds? This kind of restriction is in fact very common. Female Genital Mutilation has been outlawed in the US, Canada, Australia, Burkina Faso, Nigeria, Denmark, and South Africa among many others.<sup>15</sup> However, this kind of restriction engenders resentment by religious communities against the state and the prohibited behaviour continues under the cover of darkness. Additionally, the selective restriction of

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<sup>12</sup> UNESCO Universal Declaration on Cultural Diversity at note 7.

<sup>13</sup> Philip Alston & Ryan Goodman, *International Human Rights*, ed (Oxford: Oxford University Press, 2013) 532.

<sup>14</sup> Article 14, Constitution of Argentina 1853 (reinst. 1983, rev. 1994).

<sup>15</sup> UNFPA, "Female genital mutilation (FGM) frequently asked questions", (2018), online: *Unfpaorg* <[https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#banned\\_by\\_law](https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#banned_by_law)>.

cultural practices particular to certain religions could be used as a tool by governments to discriminate against religions on human rights grounds.

This creates a dilemma: the freedom of religion protects religious communities from external actors seeking to repress their expression of religion and belief. But certain cultural practices and traditions within religions, informed by religious ideology violate the human rights of women and children within those communities. In order to protect those groups, states must legislate against those cultural practices and traditions, thereby infringing the freedom of religion of the larger religious group. The UN Human Rights Committee in General Comment No. 22 notes that Article 18 of the ICCPR “distinguishes the freedom of thought, conscience, religion or belief from the freedom to *manifest* religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice” (emphasis added).<sup>16</sup> General Comment No. 22 goes on to note that “Article 18.3 permits restrictions on the freedom to *manifest* religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”<sup>17</sup> However, it is important to note that the ability to restrict the manifestation of religions also creates a situation that could be misused by governments who wish to restrain certain religious communities.

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<sup>16</sup> UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18) U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), para 3.

<sup>17</sup> UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18) U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) para 8.

## *Conflicting Ideals*

Each religion views its own worldview as “truth” and thereby universal. This is the reason why most religions preach and proselytize “non-believers”. Alston and Goodman observe that to the relativist international instruments such as the UDHR, the ICCPR, the ICESCR and “their pretension to universality” denotes “the arrogance or ‘cultural imperialism’ of the West, “given the West’s traditional urge – expressed, for example, in political ideology (liberalism) and in religious faith (Christianity) – to view its own forms and beliefs as universal, and to attempt to universalise them.”<sup>18</sup>

Henkin observes that like “statehood, sovereignty, nationality, as well as popular sovereignty, democracy, constitutionalism – the idea of human rights grew in and out of “the West” out of a tradition that included the monotheistic religions, Greece and Rome, Europe and its political offspring.”<sup>19</sup> The liberal democratic tradition with its civil liberties may have been heavily influenced by monotheistic religions, especially Christianity, but in modern times its evolution since the Enlightenment has been guided more and more by secular thought. Raday notes that

Human rights doctrine, as we know it today, is a product of the shift from a religious to secular state culture at the time of the Enlightenment in eighteenth-century Europe. The religious paradigm was replaced by secularism, communitarianism by individualism, and status by contract. The modern concept of human rights is the child of secularism.<sup>20</sup>

Liberal tradition as we know it was

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<sup>18</sup> Alston and Goodman, note 15.

<sup>19</sup> Louis Henkin et al, *Human Rights*, 2nd ed (New York: Foundation Press, 2009) at 55. Henkin also notes that “this is not to suggest that their contributions did not draw on other civilizations... or that ideas of justice and the good society were unknown in other traditions, for example in China, India and elsewhere in Asia.”

<sup>20</sup> Frances Raday, "Culture, Religion, and Gender" (2003) 1:4 NYU Int'l J Cont L 663.

articulated in the aftermath of the seventeenth-century European wars of religion. Key liberal notions (toleration, state sovereignty, individual freedom, the rights of conscience, neutrality, public reason) were elaborated as a response to this distinctive experience of politico-religious conflict.<sup>21</sup>

Asplund notes that in Indonesia human rights “often tend to be portrayed and perceived in such a manner that they appear as a quasi-religion or an alternative belief system” and that “human rights emerge as a competitor challenging existing belief systems, ideologies and religions.”<sup>22</sup> This is a view apparently supported by the Roman Catholic Cardinal Malcom Ranjith in Sri Lanka who was quoted saying

“[human] rights have become the new religion of the west as if it's a new discovery, but people in our country have been following religions for centuries...there is no need to talk about protecting any of these human rights if we follow our religions properly, because they take us beyond any of these ideas. It is those who are not following any religion who talk about all these human rights issues. We shouldn't get entangled in this spell, and must act intelligently.”<sup>23</sup>

It appears that legally and politically, religion and the state (along with its founding ideologies) as entities are separable institutions that possess their own ideologies and tools

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<sup>21</sup> Cecile Laborde & Aurelia Bardon, *Religion in Liberal Political Philosophy*, ed (Oxford University Press, 2017) 2.

<sup>22</sup> Knut D Asplund, "Resistance to Human Rights in Indonesia: Asian Values and beyond" (2009) 10:1 *Asia Pac J HR & L* 27 at 28.

<sup>23</sup> CNA. “Sri Lankan cardinal says religion is best guarantor of 'human rights'”, (25 September 2018), online: *Catholic News Agency*<<https://www.catholicnewsagency.com/news/sri-lankan-cardinal-says-religion-is-best-guarantor-of-human-rights-30483>>. In Keerthi, Sudath Pubudu. “People shaped by Buddhist civilization don't violate HR: Cardinal”, (28 September 2018), online: *Daily Mirror*<<http://www.dailymirror.lk/article/People-shaped-by-Buddhist-civilization-don-t-violate-HR-Cardinal-156097.html>> Cardinal Malcom Ranjith was quoted as saying: ““Rights of all people in this country are safeguarded when Buddhist culture is safeguarded. Anti religious ideologies are being filtered into the society today. We have to put them aside and safeguard religions” and that ““Since we have inherited a great culture over the years, there is no need to think about human rights in a special way. Religions are not followed in some countries. Human rights are safeguard in our country much more than what is prescribed by the UN in Sri Lanka because of the Buddhist environment”. These statements are bizarre given that the Cardinal is the leader of a minority religion that depends on human rights for its legal protection. These statements are also bizarre because there are many instances where the rights of Christians have been restricted as a result of an attitude of defensiveness of Buddhist “territory”. The case of Sisters of the Holy Cross is an example of this where Catholics’ right to proselytize was restricted because of a perceived threat to Buddhism.

to maintain power. In fact, this is a common complaint against human rights: that human rights serve as a cover to impose western values and culture on other civilizations and cultures. This is similar to the sentiment of proponents of “Asian Values” and “cultural relativism”. Both Asian Values and cultural relativism begin from the point of insisting that all cultures and civilizations are equal but prioritise differing elements. The volume of cases on religious freedom and the legality of government action limiting manifestations of religion illustrates the push and pull between the values of the state and religious community.

### **Types of Conflict**

According to the Pew Center, one in five countries globally possess a preferred or favoured religion.<sup>24</sup> In the constitutions of states that endorse a single religion above others, the constitutional provision that endorses the religion acknowledges the “specialness” of the endorsed religion and distinguishes it from other religions. For example, the Constitution of Myanmar in Chapter VIII, Article 361 states that “The Union recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.”<sup>25</sup> Superficially a state’s support or preference for a particular religion may appear harmless. However, an ideological conflict occurs within a constitution when a constitution singles out a particular religion for support. There are two types of ideological conflicts: (i) a conflict between the ideology of the endorsed/ preferred religion and the ideology of

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<sup>24</sup> Pew Research Center. *Many countries favor specific religions, officially or unofficially* (Pew Research Center, 2017) <[https://www.pewforum.org/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/pf\\_10-04-17\\_statereligions-02/](https://www.pewforum.org/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/pf_10-04-17_statereligions-02/)>.

<sup>25</sup> Article 361 of the Constitution of Myanmar 2008.

other religions within that territory (ii) a conflict between the ideology of the endorsed/preferred religion and the ideology of the liberal democratic tradition;

A conflict of the first kind occurs if a state is duty bound to abide by the ideology of a particular religion, and at the same time is governed by laws and policies derived from an ideological tradition based in secularism. This is so even if the endorsed/preferred religion is Christianity, for although liberal democratic thought has some of its roots in Christian doctrine, liberal democratic thought has evolved to become increasingly secular. For example, a majority of Christian Churches oppose the legalization of gay marriage which is granted under equality rights provisions. A conflict of the second kind occurs when the state is duty bound to support one religion and also protect the religious freedoms of other religions with differing ideological traditions. It is important to note that ideology is not limited to the mind but manifests itself in action and behaviour.

A second conflict occurs when a state does not begin from a position of neutrality in granting religious freedoms, restricting religious behaviour, and prescribing behaviour. In a country as communally diverse as Sri Lanka it is inevitable for some opinions to trump over others, but where this happens through a democratic process there will be no conflict. The conflict occurs when the constitution has artificially promised a religion foremost place and tries to satisfy that promise, for the freedom to manifest one's religion is not an unlimited, completely inviolable right.<sup>26</sup> For reasons such as national security, public order, matters of public health, among other things, a state may see fit to reduce of the scope of

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<sup>26</sup> UN Human Rights Committee, General Comment 22



the manifestation of one's religion. For example, Sri Lanka places restrictions on all freedoms – including the freedom of thought, conscience and religion – under eight circumstances listed in Article 15 of the Constitution of Sri Lanka.<sup>27</sup> If a state does not begin from a place of neutrality, any restrictions placed on a religious communities may *appear* to target religions not endorsed by the state, even during circumstances when they do not. When ever a restriction is placed on the manifestation of religion, the following questions will always arise: is the restriction placed on a religion/ religions a result of a legitimate, neutral state duty to its citizens, or is the restriction placed on religion/religions in the interest of the endorsed religion as the result of a perceived threat to the endorsed religion? Is the state acting on its duty to protect its citizens or on its duty to protect the endorsed religion?

A state's endorsement of a religion may also create a sense of alienation and "other" religious minorities. McCrea observes that "Sager and Eisgruber, and Nussbaum have spoken of the sense of alienation, exclusion, or inferiority that may be produced when individuals see state endorsement of a faith they do not share but it is not clear whether this sense of alienation or inferiority is itself a rights violation or whether it is problematic for other reasons."<sup>28</sup> The sense of alienation or inferiority McCrea speaks of cannot be a rights violation by itself. State violations of human rights have been acknowledged to be difficult to measure even in situations where states have been found to ill-treat prisoners by

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<sup>27</sup> Article 15 of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978 (as amended).

<sup>28</sup> Ronan Mccrea. "Rights as a basis for the religious neutrality of the state: Lessons from Europe for American defenders of non-establishment" (2016) 14:4 International Journal of Constitutional Law 1009 at 1013

prison officials- an instance which deals with direct action by a state agent.<sup>29</sup> The sense of alienation or inferiority created by a state endorsement of a majority religion by itself is too abstract an emotion or feeling to trace any kind of direct harm to minority religious communities. No direct connection can be drawn between the emotions of alienation, exclusion or inferiority to the violation of any particular human right. The question would arise: which human right would be violated? Additionally, current human rights discourse does not have a clear answer to the question of “whose intentions are important for determining whether actions constitute state violations of a human rights?”<sup>30</sup> Who would be held responsible for the inclusion of the endorsement of the religion in the constitution?

### ***Between State Neutrality and Secularism***

States that do not possess strict separation between the state and religion could argue that an endorsement of a single religion by the state does not equal discrimination of other religions, and that a religious state is capable of *neutrality* to all religions.<sup>31</sup> However the UN Rapporteur on Freedom of Religion and Belief, Ahmed Shaheed observes in his most recent report that “where a State explicitly associates itself with particular religion(s) or truth claim(s), members of unaffiliated groups invariably suffer various forms of discrimination – including direct, indirect, or both – which have a negative impact on their ability to

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<sup>29</sup> Michael Stohl, et al. “State Violation of Human Rights: Issues and Problems of Measurement” (1986) 8:4 Human Rights Quarterly 592 at 594.

<sup>30</sup> Michael Stohl, et al. “State Violation of Human Rights: Issues and Problems of Measurement” (1986) 8:4 Human Rights Quarterly 592 at 595.

<sup>31</sup> Robert Audi. “The Separation of Church and State and the Obligations of Citizenship” 18:3 Philosophy & Public Affairs 259 at 266-267: “...there are kinds of governmental preference [for a particular religion] that are consistent with religious liberty; hence, the neutrality principle cannot be simply derived from the libertarian principle.”

exercise their freedom of religion or belief.”<sup>32</sup> It is unclear in this instance whether the rapporteur by using the term “explicitly associates” is referring only to theocratic states or to both theocratic states and states that endorse or give preferential treatment to religion. The UN Human Rights Committee in paragraph 9 of General Comment 22 observes that the fact that a state recognizes an official religion or that its followers comprise the majority of a population “*shall not* result in any impairment of the enjoyment of any rights under the covenant.”<sup>33</sup> However, the use of the term “shall not” by the committee implies that states are *capable* of denying those belonging to a minority religion or belonging to a religion not endorsed by the state their rights. Paragraph 9 is a directive to these states not to do so. Paragraph 9 is not explicit approval by the UN of state religions, or states giving particular religions preferential treatment. The UN Rapporteur too warns that “[a] State must...ensure that the “purpose” or “effect” of its entanglement with religion does not lead to “the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis”.<sup>34</sup>

Religious neutrality is increasingly considered “a necessary characteristic of contemporary democratic states”.<sup>35</sup> Moon (writing of the Canadian context) observes that “the requirement of state neutrality (that the state should take no position on religious issues)

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<sup>32</sup> See UN Human Rights Council, A/HRC/19/60, para. 62; A/67/303, para. 47; and A/HRC/34/50, para. 32. UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, 37<sup>th</sup> Sess, UN Doc A/HRC/37/49 (28<sup>th</sup> February 2018)

<sup>33</sup> UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18) U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) at paragraph 9.

<sup>34</sup> UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, 37<sup>th</sup> Sess, UN Doc A/HRC/37/49 (28<sup>th</sup> February 2018)

<sup>35</sup> Javier Martinez-Torron, "Institutional Religious Symbols, State Neutrality and Protection of Minorities in Europe" [2013] 171 L & Justice - The Christian L Rev 21.

may be understood as simply a pragmatic recognition that religious issues are difficult to resolve within the political process and may generate significant social and political conflict and so are best removed from political contest.”<sup>36</sup> Is “religious neutrality” a code word for “secularism”? Does religious neutrality mean a strict separation between state and religion? There are those who argue that religious neutrality does not mean strict secularism.<sup>37</sup> Martinez-Torron states that “neutrality cannot be understood as synonymous with strict separation between state and religion”.<sup>38</sup> Henrard observes that “state neutrality is closely related to the separation between religion and state. Nevertheless, these concepts concern different things: while separation between religion and state is mostly concerned with the institutional ties between state and religion, neutrality is rather a substantive ideal, concerning the organisation and content of government policy.”<sup>39</sup> For example Norway in Article 2 of its constitution states that “our values will remain our Christian and humanistic heritage” (a decided endorsement of Christianity and its values) but was also evaluated to be the tenth best country for human freedom in 2018.<sup>40</sup> Denmark, possesses a state religion, but also manage to maintain low levels of communal violence and was evaluated to be the sixth best country for human freedom in 2017.<sup>41</sup> These states appear to be able

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<sup>36</sup> Richard Moon. *Freedom of Conscience and Religion*, (Toronto: Irwin Law, 2014) at 20.

<sup>37</sup> Martinez-Torron, note 35

<sup>38</sup> Martinez-Torron, note 35 at 25.

<sup>39</sup> Kristin Henrard, "Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality" (2012) 5:1 *Erasmus L Rev* 59 at 75.

<sup>40</sup> Article 2, The Constitution of the Kingdom of Norway 1814 (revised 2016). Vásquez, Ian & Tanja Porčnik. *The Human Freedom Index 2018*, rep. (The Cato Institute, the Fraser Institute, and the Friedrich Naumann Foundation for Freedom) at 10.

<sup>41</sup> Part I. Article 4. of the Constitution of Denmark declares that “The Evangelical Lutheran Church shall be the Established Church of Denmark, and) as such, it shall be supported by the State” but ranks fifth on the Global Peace Index. It is important to note that the Global Peace Index counts “the acceptance of the rights

to be neutral regarding matters of religious freedom. It could be argued that states such as Norway and Denmark have managed to maintain high levels of freedom thus far because until very recently these states have been largely ethnically and religiously homogenous.<sup>42</sup> There are instances where religious states, such as Denmark, possess a state religion, but have historically maintained low levels of communal violence but with a recent influx of immigrants belonging to different faiths, creeds, and ethnicities states like Denmark have had their limits of tolerance for the religious practices other than their endorsed religion tested. Denmark has in recent years seen an increase in intolerance and several public policies viewed as discriminatory of minority groups. For example, in February 2014 Denmark banned halal and kosher meat.<sup>43</sup>

Sri Lanka on the other hand has historically been a multi-cultural country and has been grappling with inter-community tensions for centuries. These inter-communal tensions have festered over time and infested the political landscape as well. Relying on a religious state to be religiously neutral is relying on the good faith of the state and of the government of the day. In a state with a robust legal system – with properly implemented checks and balances, low levels of corruption, and a well-oiled justice mechanism – relying on the good faith on the government may not be problematic. In states where unwritten political norms

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of others” and one of the eight pillars of positive peace. Institute for Economics & Peace, *Global Peace Index 2018: Measuring Peace in a Complex World* (Sydney, 2018) at 8, 63.

<sup>42</sup> Part I. Article 4. of the Constitution of Denmark declares that “The Evangelical Lutheran Church shall be the Established Church of Denmark, and) as such, it shall be supported by the State” but ranks fifth on the Global Peace Index. It is important to note that the Global Peace Index counts “the acceptance of the rights of others” and one of the eight pillars of positive peace. Institute for Economics & Peace, *Global Peace Index 2018: Measuring Peace in a Complex World* (Sydney, 2018) at 8, 63.

<sup>43</sup> “Denmark”, online: *Minority Rights Group* <<https://minorityrights.org/country/denmark/>>

and standards of behaviour are aligned with democratic values relying on the good faith of the government would not be as risky. For relying on religious neutrality as a fix for a conflict that exists within a constitution assumes that the government of the day will not exploit the conflict of provisions for its own advantage. This requires a high degree of public trust in state and government officials who have the power to act contrary to political norms if they so wish. It appears that it would be far more transparent and ideologically coherent for the state to be secular. However, secularism by itself is no guarantee of freedom for religious minorities and does not preclude communal violence. For example, India – a multi-cultural, multi-religious secular state – has periodically experienced waves of communal violence. In India in 2017, “Approximately one-third of state governments enforced anti-conversion and/or anti-cow slaughter laws against non-Hindus, and mobs engaged in violence against Muslims or Dalits whose families have been engaged in the dairy, leather, or beef trades for generations, and against Christians for proselytizing.”<sup>44</sup>

As a logical process religious neutrality is the product of a separation between state and religion. Although it is only when a state has no obligation or interests vested in a religion or religions can it truly be neutral or impartial, the mere legal separation of state and religion in the constitution of a state does not mean that a state is neutral towards all religions within its territory. Many states make no mention of a specific religion or do not endorse a religion but show de facto preference to a single religion. The Pew Research Center cites Laos as an example. Noting that

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<sup>44</sup> Dwight Bashir, Elizabeth K Cassidy & Isaac Six. *Annual Report of The U.S. Commission On International Religious Freedom*, rep. (U.S. Commission on International Religious Freedom, 2018) at 37.

the constitution does not explicitly name Buddhism as an official state religion, but says: “The State respects and protects all lawful activities of Buddhists and of followers of other religions, [and] mobilizes and encourages Buddhist monks and novices as well as the priests of other religions to participate in activities that are beneficial to the country and people.” In practice, the government sponsors Buddhist facilities, promotes Buddhism as an element of the country’s identity, and uses Buddhist ceremonies and rituals in state functions. Buddhism also is exempted from some restrictions that apply to other religious groups. For example, the government allows the printing, import and distribution of Buddhist religious material while restricting the publication of religious materials for most other religious groups.<sup>45</sup>

This state behaviour is very similar to the de facto relationship between Buddhism and the Sri Lankan state.

Any claim at religious neutrality by a state that has a legal obligation or duties to a religion or religions is an act of duplicity since the state is feigning a secular or neutral outlook, when in fact it is neither secular nor truly neutral. For this reason, the state of human rights in states that endorse or prefer a particular religion is more precarious than in states that possess an official state religion. Any constitution that requires a government or state to feign neutrality, to pretend to be something it is fundamentally not, is not a transparent, straight-forward document. For example, the Constitution of Sri Lanka guarantees equality to men and women. Women in Sri Lanka believed that they possessed the same rights as men. According to a Ministry of Finance spokesperson (the ministry which originally repealed the ban) “the idea was to restore gender neutrality”.<sup>46</sup> However the ban on

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<sup>45</sup> Pew Research Center, note 43 at 9. The report cites the U.S. Department of State. Aug. 10, 2016. “Laos.” International Religious Freedom Report for 2015 for its information.

<sup>46</sup> AFP. “Sri Lanka reimposes ban on women buying alcohol – days after it was lifted”, (15 January 2018), online: *The Guardian* <<https://www.theguardian.com/world/2018/jan/15/sri-lanka-reimposes-ban-on-women-buying-alcohol-days-after-it-was-lifted>>

women's ability to consume alcohol in a tavern was re-imposed in the name of Buddhist values, values which are seemingly protected by the Constitution. This duplicity is also an obstacle to the public's constitutional literacy and public conceptions of the rights the public believe they possess. However, there are problems in defining the baseline of neutrality as a measure to understand when governments are not being neutral.<sup>47</sup>

### *Flavours of Neutrality*

A state's attitude to religion indicates whether the state will firstly, draw *from* religion and religious ideology to direct its action or secondly, be willing to grant religious practices exceptions. Schwartzman uses two questions to assess a state's attitude to religion in general: (i) Is state action justified by a secular purpose or by a religious belief? (ii) Does religiously motivated conduct receive constitutional exemptions from general laws?<sup>48</sup> These questions may receive fairly straightforward answers in states which are clearly either theocratic or secular. For example, the decriminalisation of homosexuality and the legalization of same-sex marriage in a state would be a good indicator of whether state action in that state is justified by a secular tradition. This would be a good indicator because most major religions across the world are disapproving of homosexuality and same-sex marriage. Of course, an exception to this would be where the major religion of the state has a history and doctrine accepting homosexuality and same-sex unions.

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<sup>47</sup> Levine, Samuel J. "Review Essay: The Challenges of Religious Neutrality" (1996) XIII *Journal of Law and Religion* 531.

<sup>48</sup> These questions were based on observations by Micah Schwartzman, note 89 at 1358.



## Formal, Substantive or a Competitive Market?

Ahdar and Leigh observe that in American religion-state jurisprudence two main models of neutrality have emerged: formal neutrality, substantive neutrality, and the competitive market model.<sup>49</sup> Formal neutrality “or ‘religion-blindness’ holds that the state should engage with the religious believer without ‘seeing’ her faith,” while substantive neutrality “is concerned with the consequences or effect or state action upon religion.”<sup>50</sup> Applying each of these types of neutrality to the same case would yield differing results. Adhar and Leigh give the example of a Sikh motorcyclist wearing a turban required by law to wear a safety helmet. If a state subscribed to formal neutrality, there would be no exception made for the Sikh motorcyclist, while under substantive neutrality an exception would be made for Sikhs who wear turbans.<sup>51</sup> The difference in these approaches is the attitude of the state to religion; under the formal neutrality approach, “religion is to be treated no differently than anything else”, while under the substantive neutrality approach the government minimizes its interference with religion and “strives to leave religion, as far as possible, to individual choice.” Substantive neutrality is essentially protective of religion as a phenomenon. Closely related to the substantive neutrality model is the competitive market model that holds that religion is a matter of individual choice. This sub-model is premised on the idea that “the encouragement of a ‘multiplicity of sects’ was desirable, “for where

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<sup>49</sup> Rex J Ahdar & Ian Leigh. *Religious Freedom in the Liberal State*, ed (Oxford: Oxford Univ. Press, 2009) at 87.

<sup>50</sup> Ahdar & Leigh note 84 at 88 and 89.

<sup>51</sup> Ahdar & Leigh, note 84 at 88 and 90.

there is a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest”.<sup>52</sup>

A question arises: under what type of neutrality are human rights most likely to be protected? Prima facie, it appears that substantive neutrality is the most rights-friendly approach because its fundamental belief is state non-interference in spheres of religion, and its fundamental goal is the protection of religion. It appears this model is the most conducive for full realisation of religious liberty. Under the substantive neutrality approach, the state and religion occupy two spheres of control, and when those two spheres appear to be in danger of colliding, the state gives way to religion. Of course, religion does not get right of way in all matters that fall within area of convergence. There are core areas where the state enforces its authority and precedence – for example matters relating to criminal law. Even though Muslims in Sri Lanka are under Sharia law, the penal laws of Sharia do not apply when it comes to a crime. But what happens when it is the religion that is violating human rights? Why *should* states give way to religion? When religious practices and beliefs interfere with modern, secular, jurisprudence designed to protect populations and communities should state give way to religion, even when it means that some communities and groups go unprotected? Are current constitutional dilemmas a result of treating religion as *special*? Alas, an analysis of whether religion as a phenomenon and entity is special is beyond the scope of this thesis. One may, however, examine the implications and

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<sup>52</sup> Ahdar & Leigh, note 84 at 93 quoting Adams and Emmerich, *A Nation Dedicated*, 15, 47; Cookson, *Regulating Religion*, 86.

outcomes of what happens if a state treats religion as if it were special or treats religion as if it were not special.

### ***Protections for Minorities, Exceptionalism and Communalism***

According to the above definitions it appears that the best way to identify what kind of neutrality a state subscribes to is to identify whether a state makes exceptions for religious communities. Sri Lanka has granted certain religions and ethnicities exceptions under its law. These exceptions are exceptions from the general law wholesale regarding areas such as marriage, maintenance and property. It appears that *on paper* that Sri Lanka, at least partially, subscribes to the substantive neutrality approach due to the personal laws system within Sri Lanka that gives minorities autonomy, the declaration by the courts that Sri Lanka is a secular state, combined with the constitutional pledge to the freedom of religion, equality and freedom from discrimination. However, we have seen in Chapter 3 above that *in reality* Sri Lanka does not subscribe to substantive neutrality. In response to the dilemma caused by the conflict of duties and as attempt at neutrality Sri Lanka created two modes of protections for minorities apart from the protections guaranteed to them under the fundamental rights chapter of the Constitution. The first kind of protection is legal, and the second is political. The first kind of protection was created intentionally while the second kind generated naturally.

### **The Personal Law System of Sri Lanka**

The first kind of protection has created a legal system that allows religious communities autonomy in certain arena, such as marriage, property, maintenance, and custody. These

autonomous systems are considered the “personal laws” of those communities and apply based on how an individual identifies themselves religiously (for example Sharia Law automatically applies to those who identify as Muslim in Sri Lanka), or according to their heritage (Kandyan Law and Tesawalamai Law in Sri Lanka). Legal systems that incorporate personal law systems can be seen in Pakistan, Bangladesh, Singapore, Malaysia, Israel, and South Africa, to name a few.<sup>53</sup> Farrah Ahmed observes that “the personal law system is often cited as a model of toleration and as a model for integrating minorities.”<sup>54</sup> The personal law system in Sri Lanka originated under the colonial rule of the Dutch. According to K. M. De Silva, while,

the laws and customs of the Tamils of Jaffa-patam were codified for the first time in the *Tesavalamai*, and the Muslims had their own Islamic law, the position with regard to the Sinhalese under Dutch rule is less clear. Significantly, no such code of customary laws was compiled for the Sinhalese who formed a clear majority of the people in the territories under the control of the V.O.C. Evidently Sinhalese customary law had not the resilience and cohesiveness of that of the Hindus and the Moors...By the last decade of the eighteenth century the obsolescence of Sinhalese customary law was an established fact; Roman-Dutch law had superseded it.<sup>55</sup>

The lack of a codified customary law system for the Sinhalese may be one reason why Sri Lanka has chosen its constitution as the space in which to pledge its allegiance to Buddhism. Additionally, in 2014 Sri Lanka organized a conference on the theme of “Universalizing Buddhist Jurisprudence”, which sought to make Buddhist readings of among other things, Constitutional Law and human rights; Criminal Law, Family law and Environment Law,

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<sup>53</sup> Farrah Ahmed, *Religious freedom under the personal law system*, ed (New Delhi: Oxford University Press, 2015) at 194.

<sup>54</sup> Ahmed, note 248 at 194. Ahmed here is speaking generally but her analysis centers on the personal law system in India.

<sup>55</sup> K M De Silva, note 48 at 194.

and Commercial Law.<sup>56</sup> However, we see that the personal law system creates a state of exceptionalism for religious communities that are included in the personal law system. The existence of these personal law provides a kind of autonomy to religious communities, shielding their customs and practices from the view of the general law. While these laws may be seen as a product of the religious freedoms granted by the constitution, the shield of complete autonomy also hides the violation of fundamental rights committed against of sections of citizens within those communities. For example, the Muslim Marriage and Divorce Act No. 13 of 1951 (MMDA) governs marriage customs, property rights and custodian rights of Muslim people and unlike the personal laws of other communities does not allow those of the Muslim faith to opt out of the MMDA and opt in to the general law<sup>57</sup>. These rights and duties are different from and sometimes contradict the general law. For example, the age of marriage is 12 (without the permission of a Quazi) under Muslim Law and 18 under the general law. Muslim children below the age of 12 may be permitted to marry if a Quazi approves of it.<sup>58</sup> Quazi court judges in Sri Lanka are exclusively men, although in other states women have been permitted to act as Quazi judges. Muslim women

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<sup>56</sup> Sunday Observer. (May 2014), online: *Conference on Buddhist Jurisprudence* <<http://archives.sundayobserver.lk/2014/05/11/new38.asp>>

<sup>57</sup> General Marriage Ordinance No. 19 of 1907, short title: "An ordinance to consolidate and amend the law relating to marriages other than the marriages of Muslims and to provide for the better registration thereof."; "The Government Information Center", online: *Gicgov.lk* <[http://www.gic.gov.lk/gic/index.php?option=com\\_info&id=352&task=info&lang=en](http://www.gic.gov.lk/gic/index.php?option=com_info&id=352&task=info&lang=en)>: "Everyone other than where both parties are Muslims, can register their marriage under Marriage(general) Registration Ordinance."

<sup>58</sup> S. 23 of the Muslim Marriage and Divorce Act No. 13 of 1951: "Notwithstanding anything in section 17, a marriage contracted by a Muslim girl who has not attained the age of twelve years shall not be registered under this Act unless the Quazi for the are in which the girl resides has, after such inquiry as he may deem necessary, authorized the registration of the marriage."

activists are currently engaged in a struggle to amend the MMDA to provide greater legal protections to women and children in Muslim communities.<sup>59</sup>

Similar special laws exist for a class of property belonging to Tamils, where Tamil women originating in the Northern Peninsula cannot sell, transfer, or gift property they own without their husband's written consent under *Thesawalamai Law*. Additionally, under Thesawalamai Law a married woman requires her husband's consent to enter into contracts.<sup>60</sup> The codification of these special laws are an outcome of the Dutch attitude to colonised legal systems, and the British Colonial Proclamation of 1799.<sup>61</sup> The questions arise: under what circumstances does the government have a duty to protect children in communities shielded by archaic personal laws? Under what provisions is the government empowered to interfere to protect vulnerable communities *within* minority and or religious communities?

According to Udagama, the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Human Rights Committee (HRC), the CRC Committee and the CESCR,

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<sup>59</sup> Smriti Daniel, "In Sri Lanka, Muslim women are fighting back against unfair marriage laws", (2016), online: *Scrollin* <<https://scroll.in/article/817034/in-sri-lanka-muslim-women-are-fighting-back-against-unfair-marriage-laws>>. See "Exceptionalism and Communalism" below for a fuller analysis of the issue.

<sup>60</sup> Swarna Jayaweera & Camena Gunaratne. *Minorities and the Rights of Women and Children*, ed (Human Rights Commission of Sri Lanka, 2003) at 8. Jaffna Matrimonial Rights and Inheritance Ordinances, No. I of 1911, No. 58 of 1947.

<sup>61</sup> L J M Cooray, "The reception of Roman-Dutch law in Sri Lanka" (1974) 7:3 *The Comparative and International Law Journal of Southern Africa* at 303 and 296: "The Dutch were mercenary in their outlook and regarded the colonies as sources of revenue and were not interested in enforcing their laws on such colonies."; "The laws of a conquered or ceded British colony subject to certain qualifications continue in force until changed by the deliberate act of the new sovereign. This principle received statutory recognition by the Proclamation of 23rd September 1799, the Charter of Justice of 1801 and the Kandyan Convention of 1815. The Roman-Dutch law which had been introduced into Sri Lanka during the Dutch period and the communal personal laws therefore continued in force."

have all consistently continued to comment at length on discrimination against women under the existing customary and religious law regimes (the Kandyan, Thesavalamai and Muslim Law regimes) that negate the impact of relatively progressive provisions under the general law of the country. They have all strongly criticized the possibility under Muslim Law of marriage of girls as young as 12 if the parents consent.<sup>62</sup>

Secondly, politically, religions are overseen by separate ministries dedicated to individual religions. For example, Buddhism is overseen by the Ministry of Buddha Sasana and Christianity is overseen by the Ministry of Christian Affairs. These ministries are not stand-alone ministries but are added to the portfolio of a minister who has already received a portfolio based on his or her religion. For example, the minister of sustainable development and wildlife is also responsible for the religious affairs of Buddha Sasana; the minister of prison reforms, rehabilitation, and resettlement is also responsible for Hindu religious affairs; the minister of postal services is also responsible for Muslim religious affairs; and the minister of tourism development is also responsible for Christian religious affairs.

There is doubt regarding how effective these ministries are at protecting the rights of these minorities and whether there is any overlapping and conflicting jurisdiction.

### **Exceptionalism and Communalism**

The Sri Lankan practice of treating different communities differently through mechanisms such as the personal law system has given rise to exceptionalism which in turn leaves groups of citizens without the protection of the state. For example, we saw above how no lower limit applies for the marriageable age of Muslim girls, while under the General Marriages

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<sup>62</sup> Udagama, note 82 at 120.

Ordinance the minimum age is eighteen.<sup>63</sup> Importantly, the MMDA provision permitting child marriage is exempt from s. 363 of the Penal Code of Sri Lanka which states that sexual intercourse with a girl below the age of 16 (with or without her consent) amounts to statutory rape.<sup>64</sup> Why are Muslim girls alone exempt from the protection of the state in this respect? Several commissions formulated to come to a consensus on reforms of Muslim law in Sri Lanka have failed. The report of the latest commission (headed by a retired Supreme Court judge) took *nine years* to be released and was at the last moment converted into *two* reports that were contradictory to each other due to a lack of consensus within the representatives of the Muslim community on the commission. It is clear that Sri Lanka's apparent adoption of a model of exceptionalism has caused harm to a portion of its population and continues to cause harm due to a lack of consensus among communities. By permitting minors to be married Sri Lanka has violated its duties under domestic and international human rights provisions. In Chapter 3 we saw how exceptionalism further affects groups within the majority religion such as child monks. The harms caused by the model of exception raise serious concerns regarding costs of the system versus the benefits of the systems. The question arises: is exceptionalism really the best way to ensure that religious freedom is ensured?

Additionally, this method of looking at ethno-religious communities as separate, self-contained, autonomous units has also given rise to communalism. It is fairly common for political parties in Sri Lanka to be formed along ethno-religious lines. Although Sri Lanka

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<sup>63</sup> S. 15, General Marriages Ordinance of No. 19 of 1907 (as amended).

<sup>64</sup> S. 363, Penal Code of Sri Lanka.



possesses two main political parties, the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP), these parties often do not wield enough seats in parliament by themselves to hold a strong majority.<sup>65</sup> The members of the UNP and the SLFP are largely Sinhalese and Buddhist. The UNP is considered to be more oriented towards the West and liberal values, while the SLFP is considered to be more conservative. Sri Lanka's main parties also have a history of close ties with Buddhist monks. S. J. Tambiah writes that

Buddhist monks belonging to all three *nikaya* [denominations] may band together to form special-interest associations with a political agenda. Their membership is therefore *tri-nikaya*, and they have known links to political parties and may thus be acknowledged as branches or components of the UNP, SLFP, MEP, JVP, and so on<sup>66</sup>

It is also common for victors of elections to call upon the Chief Prelates of the *nikayas* to pay obeisance or to solicit advice or blessings during times of difficulty for the country. These visits are often televised and reported in the media. A visibly close relationship between the Buddhist leadership and “secular” leadership not only exists but is advertised. Also, a less common, but not infrequent sight is political leaders paying their respects at Hindu kovils. However, the relationship between political leaders and Hindu religious leaders appear to be courtesy visits and are not similar to political leaders' relationship with Buddhist monks.

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<sup>65</sup> Refugee Review Tribunal - Australia, *RRT RESEARCH RESPONSE: Sri Lanka – Elections – Police – SLMC – SLFP*, Rrt Research Response (Refugee Review Tribunal - Australia, 2007) at 3: “The general rule has become coalition politics, since neither the SLFP nor the UNP are able to gather parliamentary majorities. Parties such as the SLMC with a smaller but relatively solid vote base are thus very important allies and coalition partners.”

<sup>66</sup> Stanley Jeyaraja Tambiah, *Buddhism betrayed?: religion, politics, and violence in Sri Lanka*, ed (Chicago: University of Chicago Press, 1992) at 82.

Sri Lanka's other major parties are the JVP (a Communist party that possessed a Sinhala nationalist military-wing known as the Deshapremi Janatha Viyaparaya (DJV) [the Patriotic Liberation Organization] involved in the 1987 communal riots), the Tamil National Alliance (TNA), and the Sri Lanka Muslim Congress (SLMC). They are all crucial players in national politics to form coalitions and alliances. Community based political parties that are formed along ethno-religious lines usually act in the sole interest of the communities they represent. While this may assist in bringing minority issues to the fore in parliament and in political discourse, and serve to unify communities, politics along communal lines may ultimately provide an artificial single voice to a community of individuals of diverse views. However, it is possible for groups within communal political parties that disagree with the standpoint of the major party to splinter away and create their own party. For example, the All Ceylon Makkal Congress (ACMC) was created by a group of politicians who decided to separate from the SLMC. However, the separation was a result of internal political disagreement rather than an ideological or policy-based disagreement. Additionally, this division along communal lines also serves to "other" minority representatives from major political parties. Such political parties may also need to form uneasy coalitions to ensure the realisation of their preferred policies. For example, the SLMC sided with Mahinda Rajapakse's Sinhala Nationalist SLFP in 2006.<sup>67</sup> According to

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<sup>67</sup> P K Balachandran, "All for Tamils, nothing for Muslims?", (2006), online: *Hindustan Times* <<https://www.hindustantimes.com/india/all-for-tamils-nothing-for-muslims/story-G2RFJeCjSmWoHWSL4qZZwK.html>>: "The most significant development is that the Sri Lanka Muslim Congress (SLMC), which is currently with the opposition, has decided to give "issue-based" support to the government from outside. In effect, it is going to be an ally. But the consolidation of the Muslims behind the Rajapaksa government is unlikely to result in solutions for the basic issues confronting the community. These

Uyangoda, “one key development that occurred...in Sri Lankan politics is the entry of Buddhist monks into the electoral process.”<sup>68</sup> A group of Buddhist monks formed a political party named the *Jathika Hela Urumaya* (JHU) in 2004 and according to Uyangoda, “[t]heir mandate, as they themselves see it, is to protect the interests of the Sinhalese-Buddhist majority ethnic community. In the broad political spectrum of the country, these political monks represent a particularly militant stream of Sinhalese nationalist mobilization.”<sup>69</sup> There are no signs that this communalism is abating, especially in the wake of the Easter bombings of April 2019, there is increased suspicion, hostility and communal violence between communities.

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issues relate to the political aspirations and the security of the Muslims in the eastern districts of Sri Lanka, namely, Amparai, Batticaloa and Trincomalee.”

<sup>68</sup> Jayadeva Uyangoda. “Sri Lanka: State of Research on Democracy” (2009) 1:1-2 PCD Journal 97 at 114.

<sup>69</sup> Uyangoda, note 241 at 114.

## Chapter 5

### Conclusion

In this thesis I have shown how through the example of Sri Lanka, that a religion becomes dominant through the endorsement of rulers and eventually becomes an institution vying for political power. I have explained how that dominant religion has been used to create a nationalist mythos and use it to oppress minorities. When Sri Lanka was liberated from colonial rule, it found itself in an identity crisis. On one hand there was the modern state it desired to be with the recognition of human rights and on the other hand there was the legacy of a Sinhala Buddhist mythos. I then explored how this led to a conflict of duties when the constitution tried to guarantee people human rights while giving foremost place to Buddhism. I analysed four instances where Sri Lanka's duty to human rights conflicts with its duty to protect and foster Buddhism. I finally investigated how minority religions have competed with the dominant religion for political power and how this has resulted in conflicting legal systems meant for each community.

The duty to protect Buddhism is deeply entrenched in the historical fabric of Sri Lanka. In this context the constitutional mechanisms that place a duty upon the government to protect religious (and ethnic) minorities are a result of years of pushing and shoving to achieve a few compromises. These compromises have generally shown themselves to be inadequate and leave much room for manoeuvring in the courts to the disadvantage of minority religious communities. Even where the state has granted autonomy to ethno-religious

communities to govern their affairs such as instances of personal laws, these laws serve to victimise minority groups within minority groups – with no hope of state support. The crucial questions are: are the current mechanisms enough? Is it merely a question of the implementation of the law? The answer is “no”. The ambiguity of the law means that the implementation of the law is a confusing issue. Significant over-arching reform is necessary to ensure a cohesive framework for the protection of minority rights. One way to begin this is by the state removing ambiguity regarding the status of religious minorities and decisively addressing Sri Lanka’s (supposed) status as a secular state. Article 9 of the Constitution is intentionally ambiguous and misleading. In Chapter 3 we saw how this created difficulties for the Supreme Court and the court’s reticence to rule substantively on religious freedom. However, the act of clarifying the nature of Sri Lanka’s relationship with Buddhism by itself will not solve or heal Sri Lanka’s communal tensions. It appears that Sri Lanka’s actual problem is with how it deals with and compromises with its majority religion and ethnicity, with its minority communities, with liberal democratic values, with the international community, with its history, with its identity as a nation, and with its vision for a way forward.

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