

LST REVIEW

Volume 14 Issue 191 September 2003



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RELIGION, POLITICS AND THE LAW

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- Samith de Silva

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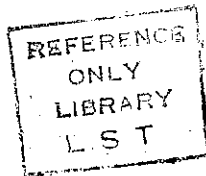
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ISSN - 1391 - 5770

CLASS NO:	
ACC. NO:	JL 0186



Editor's Note

Debates involving judicial reasoning of the Sri Lankan Supreme Court in challenges made to three bills relating to the incorporation of particular religious institutions have been vested with a particularly emotive significance in recent times.

In the most recent determination of the Supreme Court, (SC Determination No 19/2003, SCM 25.07.2003), the Court found a private members ^{Determ} Bill seeking to incorporate a Roman Catholic order, inconsistent with not only Article 10, (freedom of thought conscience and religion) of Sri Lanka's Constitution but also Article 9, (giving Buddhism the foremost place in the country).

Notably, the Court declared that while, what is guaranteed under the Constitution is the manifestation, observance and practice of one's own religion, the propagation and spreading of Christianity would not be permissible as it would impair the very existence of Buddhism and the Buddha Sasana.

This Determination follows previous judicial reasoning in S.C. Determination No. 2/2001, (SCM, 24.05.2001) and S.C. Determination No.2/2003, (SCM, 29.1.2003), where the linking of what was referred to as commercial and economic activities with the observance and practice of a religion, was held as being contrary to constitutional norms.

In the interests of generating informed debate on these themes, thereby putting the question of forcible conversions in its proper perspective as a concern to all religions and religious institutions in Sri Lanka, the Review publishes the Determinations together with the Written Submissions of the Intervient Petitioner in S.C. Determination No.2/2003.

In order to further place the issues discussed within a broader context, this Issue also includes a commentary, written by a member of Sri Lanka's judiciary on invitation by the Review, on the general theme of Religion and Politics in South Asia, with particular reference to Sri Lanka, India, Bangladesh and Pakistan.

Kishali Pinto-Jayawardena

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

A Bill titled "Provincial of the Teaching Sisters of
the Holy Cross of the Third Order of Saint Francis in
Menzingen of Sri Lanka (Incorporation)."

In the matter of a petition under Article 121 of the
Constitution

**S.C. Special Determination
No. 19/2003**

Present : Shirani A. Bandaranayake – Judge of the Supreme Court
H.S. Yapa – Judge of the Supreme Court
Nihal Jayasinghe – Judge of the Supreme Court

Anula Irangani Fernando,
No. 41 A, Kassapa Road
Colombo 05

Petitioner

Counsel : Manohara R. de Silva with G.W.C. Bandara Thalagune and
W.D. Weeraratne for the Petitioner.

P.A. Ratnayake, Additional Solicitor-General with
S. Balapatabendi, State Counsel, for the Attorney-General.

Court assembled at 10.00 a.m. on 25.07.2003

A Bill titled "Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)" has been presented to Parliament as a Private Member's Bill. This Bill was placed in the Order paper of Parliament on 09th July 2003 and the petitioner has challenged its constitutionality by papers presented to this Court on 14th July 2003. The petitioner has thereby invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution. Hon. Attorney General has been given due notice of the petition.

This Bill seeks to incorporate an organization called the 'Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka' for the purpose of carrying out the objects that have been set out in the Bill. The general objects of the organization sought to be incorporated are set out in clause 3 of the Bill. The objections raised by the petitioner relate to the constitutionality of clause 3 and clause 5 of the Bill. The petitioner contended that clause 3 should be read with the Preamble to the Bill and clause 5 should be read with clause 3 of Bill.

The Preamble to the Bill and clause 3 of the Bill are in the following terms.

Preamble

"WHEREAS the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen in Sri Lanka have established themselves as a Congregation for the propagation of Religion by establishing and maintaining catholic schools and other schools assisted or maintained by the State and engaged in educational and vocational training in several parts of Sri Lanka and in establishing and maintaining orphanages and homes for children and for the aged:

AND WHEREAS it has become necessary for the aforesaid purposes to be more effectively prosecuted, pursued and attained to have the incorporation of the Provincial of the Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka:

AND WHEREAS it has become expedient to have the said Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka duly incorporated:"

Clause 3

"3. (1) The general objects for which the Corporation is constituted are hereby declared to be –

- (a) to spread knowledge of Catholic religion;
- (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;

(f) to bring about society based on love and respect for one and all; and

(g) to undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation.”

The contention of the petitioner is that the preamble read with clause 3 of the Bill make provision not only to propagate the catholic religion, but to allure persons of other religions by providing material and other benefits which include medical facilities, education to children and also providing care for the infants, aged, orphans, destitutes and the sick and thereby converting them to the faith that is sought to be spread. This is carried out, according to the petitioner, by taking advantage of the young age, inexperience and or the physical and mental disability of such persons. The petitioner contended that the Bill therefore provides facilities to the organization to convert children of other religions attending state and private schools, the sick undergoing treatment in hospitals and other medical institutions, orphans and destitutes in refugee camps and other institutions, elders in homes for the elders and members of the public through conducting mobile clinic, by providing them with material and other benefits and taking advantage of their young age and other infirmities.

The petitioner further contended that, Clause 5 of the Bill, which gives the authority to the organization to receive and hold property both movable and immovable acquired by virtue of purchase, gift, grant, testamentary disposition or otherwise, shall be held possessed and enjoyed by the Corporation for the purposes set out in this Bill.

In support of his contention the petitioner relied on clause 3, which refers to the general objects of the Corporation. Clause 3 referred to earlier, includes 7 sub-clauses. Clause 3, read with the preamble to the Bill, clearly set out that the intention of the corporation is to 'propagate the religion.' This propagation is carried out through the establishment and maintenance of catholic schools and other schools that are maintained or assisted by the State. Furthermore, it was submitted that sub-clauses (c), (d) and (e) of clause 3 would give a statutory right to the corporation to provide assistance to persons, which would be economic or financial in nature, and would be quite distinct from the observance and practice of a religion, which is a fundamental right guaranteed by Article 14(1)(e) of the Constitution.

It was further submitted that when a statutory right is given to impart religious, educational and vocational training to youth, to teach in Pre schools, Schools, Colleges and Educational institutions, to serve in Nursing Homes, Medical Clinics, Hospitals and Refugee Camps with the object of propagating the Religion, that would necessarily result in alluring or converting of persons of other religions to the faith that is sought to be spread.

Furthermore it was submitted that by establishing and maintaining 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, the corporation is reaching the people who are in distress and or in need and thereby taking advantage of their inexperience, trust, low intellect and naivety. It was therefore argued that freedom of thought, conscience and religion of other persons guaranteed by Article 10 would be infringed.

Petitioner also made the submission that the object enumerated in clause 3 would even violate Article 9 of the Constitution.

Learned Additional Solicitor General, representing the Hon. Attorney General, has supported the grounds that have been urged by the petitioner.

Petitioner referred to the Bills of similar nature that were considered by this Court In re Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill (SC Determination No. 2/2001 and In re New Wine Harvest Ministries (Incorporation) Bill (SC Determination No. 2/2003).

The petitioner relied on several Articles of Human Rights Covenants and the decisions of the European Court which has recognized the unfettered freedom of a person to adopt a religion of his or her choice.

Article 10 of our Constitution reads as follows:

"Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice."

Article 10 could be regarded as an absolute right as there are no restrictions in terms of Article 15 of the Constitution. Therefore every person has a constitutional guarantee that he has the freedom to adopt a religion or belief of his choice.

According to the petitioner it would appear that the main object of the Bill is to propagate a religion while taking advantage of the vulnerability of certain persons. The Supreme Court in India has considered the question of freedom of religion and conversion of persons into one's own religion in *Rev. Stainislaus v. State of Madhya Pradesh and Others* (AIR 1977 SC pg. 908) which was cited with approval in SC Determination No. 2/2001. In this case one of the questions raised for consideration of the Supreme Court was that whether the two Acts in question were violative of Article 25(1) of the Constitution.

Article 25(1) of the Indian Constitution reads as follows:

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

The Indian Constitution spells out the word 'propagate' in Article 25(1). Article 10 and 14(1)(e) of our Constitution do not refer to the word 'propagate' and therefore, it could be said that the provisions in our Constitution are more restrictive than that of Article 25(1) of the Indian Constitution. Ray, CJ. referring to the word 'propagate' in Article 25(1) was of the view that,

"... for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees 'freedom of conscience' to every citizen and not merely to the followers of one particular

religion, and that in turn, postulates that there is no fundamental right to convert another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike."

In such circumstances, as pointed out in SC Determination No. 2 of 2001, the reasoning of Ray CJ, would apply more forcefully with regard to Articles 10 and 14(1)(e) of our Constitution.

During the course of the submissions, our attention was also drawn to several International Conventions in which and freedom for a person to adopt a religion of his or her choice has been recognized. For instance Article 18 of the Universal Declaration of Human Rights states that,

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

Article 18(2) of the International Covenant on Civil and Political Rights which refers to a situation in which there could be subjection to coercion states that,

"No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

The decision of the European Court in *Larissis v. Greece* is a case in point with regard to the circumstances given in clause 3 of the Bill which seeks to 'spread knowledge of catholic religion.' An examination of clause 3(c), (d) and (e) indicate strong relationships that of teacher – student, nurse/doctor – patient, curator – refugee and that of guardian – minor. In the *Larissis's case*, three officers of the Greek Air Force, who were followers of the Pentecostal church were convicted for proselytising three Airmen of a lesser rank. With regard to the proselytising of the Airmen by officers of superior rank, the European Court was of the view that,

"The Commission found that the interference could be justified as ensuring that the three airmen's religious beliefs were respected, in view in particular of the special character of the relationship between a superior and a subordinate in the armed forces, which rendered the subordinate more susceptible to influence in a variety of matters including religious beliefs."

In 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.

Executing pressure on people by offering material or social advantage in order to convert into their religion was discussed in the European Court decision in *Kokkinakis v. Greece*. This decision deals with a situation similar to the instances referred to in the Preamble and clause 3 of the Bill.

In that case a Jehova's Witness was convicted for proselytism, when an attempt was made to convert a wife a Cantor in the Orthodox Church by visiting her house to teach their religion. Considering the activities of offering material or social advantage, the Court was of the view that,

"First of all, distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956, under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others."

The provisions in the Bill, viz., the Preamble, clause 3 and also clause 5, which deal with the powers of the organization that includes *inter alia* to be able to receive and hold property both movables and immovables and or to dispose such property, create a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperienced, defenceless and vulnerable people to propagate a religion. The kind of activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in Article 10 of the Constitution. What Article 10 postulates is to adopt a religion or belief of his or her choice and the execution of improper inducement would not be compatible with such a provision.

For the aforementioned reasons we hold that the provisions in clauses 3 and 4 of the Bill are inconsistent with Article 10 of the Constitution.

The petitioner submitted that the objects enumerated in clause 3 also violates Article 9 of the Constitution.

Article 9 of the Constitution reads as follows:

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

The petitioner submitted that the effect of Article 9 is to 'protect and foster' the *Buddha Sasana* 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).' In the Supreme Court Determination No. 2/2001 it was stated that,

"In Sri Lanka the Constitution does not guarantee a fundamental right to 'propagate' religion as in Article 25(1) of the Indian Constitution. What is guaranteed here to every citizen is the fundamental right by Article 14(1)(e) to manifest, worship, observe, practice that citizen's religion or teaching."

In such circumstances, 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 of conscience. (*Rev. Stainislaus v. State of Madhya Pradesh*). Similarly 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*. What is guaranteed under the Constitution is the manifestation, observance and practice of one's own religion and the propagation and spreading Christianity as postulated in terms of clause 3 would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*.

Clause 3(1)(a) and (b) in the Bill referred to earlier, states that the corporation is constituted and declared to be, to spread knowledge of catholic religion and to impart religious, educational and vocational training to youth.

Those sub clauses speak not merely of spreading a religion, but spreading knowledge of a religion.

In these circumstances we are inclined to agree with the submissions made by the petitioner that clause 3 of the Bill, as presently constituted, would be inconsistent with Article 9 of the Constitution.

The petitioner also referred to clause 4 of the Bill which is in the following terms:

"The Provincial of the Teaching Sister of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka shall be appointed according to the Constitutions and Statutes governing the said Congregation of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka which shall be in conformity with the laws and usages of the Roman Catholic Church."

The 'Constitutions' and the 'statutes' which govern the appointments of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka referred to in this clause are

not before Parliament. Learned Additional Solicitor General submitted that there is a possibility of the Constitutions and the statutes to be changed in conformity with the law, and usages of the catholic church. In such circumstance that would amount to an abdication of legislative power by the Parliament which would violate Article 76(1) of the Constitution.

Clause 3 referred to above is the principal provision of the Bill. Since the material contained in this provision is inconsistent with Articles 9 and 10 of the Constitution we make a determination in terms of Article 123(2) of the Constitution that the Bill comes within the purview of Article 83(a) and therefore it is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the People at a Referendum.

We shall place on record our appreciation of the assistance given by the learned Additional Solicitor General and the learned Counsel for the petitioner who made submissions in this matter.

Shirani A. Bandaranayake,
Judge of the Supreme Court.

H.S. Yapa
Judge of the Supreme Court

Nihal Jayasinghe
Judge of the Supreme Court

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

A Bill titled "New Wine Harvest Ministries
(Incorporation)"

S.C. Special Determination No. 2/2003

In the matter of a petition under
Article 121 of the Constitution

Present : Sarath N. Silva Chief Justice
H.S. Yapa Judge of the Supreme Court
T.B. Weerasuriya Judge of the Supreme Court

Counsel : Manohara R. de Silva with W.D. Weeraratne,
G.W.C. Bandara Talagune for the Petitioner.

M.A. Sumanthiran with Viran Corea instructed by S. Balendra Associates for
Interventient Petitioner.

P.A. Ratnayake, D.S.G. with Arjuna Obeysekera, S.C., for the Attorney
General.

A Bill titled "New Wine Harvest Ministries Incorporation" has been presented to Parliament as a private member Bill.

The Bill was placed on the Order paper of the Parliament on 10.01.2003 and the Petitioner has challenged its constitutionality by papers presented to this Court on 16.1.2003. He has thereby invoked the jurisdiction of this Court in terms of Article 121(2) of the Constitution. Hon. Attorney General has been given due notice of the petition.

The person claiming to be the President of "New Wine Harvest Ministries" the body sought to be incorporated by the impugned Bill was permitted to intervene and was heard in respect of the grounds of unconstitutionality that have been urged.

The Bill seeks to incorporate an organization called "New Wine Harvest Ministries" for the purpose of carrying out the objects that have been set out in the Bill. The objects of the organization sought to be incorporated are contained in clause 3. The objects relevant to the grounds of challenge are contained in the following sub clauses of clauses 3. They are –

- (a) to establish and maintain New Wine Harvest Ministries and to organize deliverance meetings, gospel meetings, cottage meetings, youth discipleship meetings, individual meetings, Bible studies;
- (b) to conduct tract Ministry, based on the Articles of Faith in order to spread, promote and make known the message and teachings of Jesus Christ.

- (c) to undertake and try carry on in the Spirit of the Articles of Faith based on the teachings of Jesus Christ and in accordance with the Christian Faith and practice activities that would uplift the socio-economic conditions of the people of Sri Lanka.

.....
.....

- (f) to promote, arrange, organize and hold exhibitions, lectures, seminars, symposia, workshops, classes, debates, conferences, tours, excursions or any other activities in furtherance of the objects of the Corporation;

The contention of the Petitioner is that the objective of the body sought to be incorporated, although seemingly religious in nature, transcends gospel meetings, Bible studies and making known the message and teachings of Jesus Christ to a socio-economic dimension encompassing persons of other religions, faiths or beliefs.

It is therefore submitted that the body would not only provide for the manifestation of a religion or belief or faith in the exercise of the fundamental rights guaranteed by Article 14(1)(g) of the Constitution but also engage in economic activity that will assist in the spread and promotion of the faith.

In this context the Petitioner relied on the powers of the body sought to be incorporated as contained in clause 4 of the Bill. By this clause the body that will be incorporated, will have that power, *inter alia* to raise funds, receive grants, acquire and dispose of movable and immovable property open operate and close bank accounts and to borrow or raise money with or without security. Further the corporation will have the power to invest funds and levy fees.

It is the contention of the Petitioner that the economic dimension of the objects would be strengthened by the powers that are vested in the body which would enhance the financial capacity of the corporation to induce and allure persons of other religions and convert them to the faith that is sought to be spread.

The Petitioner relies on a body of material to demonstrate the ill effects of what is alleged to be unethical conversions of persons of one religion or faith to another. It is contended by the Petitioner that the clauses referred to in the Bill would in effect distort the freedom every person must necessarily have to adopt a religion or belief of his choice and is therefore inconsistent with Article 10 of the Constitution.

Learned Deputy Solicitor General representing the Hon. Attorney General has supported the grounds that have been urged by the Petitioner.

Counsel for the Intervient Petitioner contends that it is a part and parcel of every religion to promote its beliefs, doctrines and practices and the practice of all religions involve "altruistic objectives" to uplift the socio-economic conditions of the people "regardless of their faith or pursuits." On that basis the economic dimension of the objects and powers impleaded by the Petitioner are sought to be justified as being necessary to spread the faith.

In Supreme Court Determination No. 2 of 2001 this Court examined a similar ground of challenge relating to a Bill titled "Christian Sahanaye Doratuwa Prayer Centre (incorporation.)" After an

exhaustive analysis including the reasoning adopted by the Supreme Court of India in a case relied on by the Petitioner, this Court stated in its conclusion as follows:

"... In our view the freedom guaranteed to every citizen by Article 14(1)(e) of the Constitution to practice a religion and engage in worship and observance, by himself or in association with others, should be taken as distinct from the freedom guaranteed by Article 14(1)(g) to engage in a lawful occupation, trade, business or enterprise. A prayer center that seeks special legislative recognition by way of incorporation cannot avail itself of these two freedoms together. If it is sought to be done in that manner there is a likelihood of the fundamental rights guaranteed by Article 10 to every person to adopt a religion or belief of his choice postulates that the choice stems from the free exercise of one's thought and conscience without there being any fetter or allurements which in any way distort that choice."

The endeavour to mix the observance and practice of a religion or belief with economic activity is clearly manifest in the impugned clauses of the Bill. In clause 3 (c) the object to undertake and carry on in the spirit of the articles of faith based on the teachings of Jesus Christ in accordance with Christian faith is directly linked with activities that would uplift the socio-economic conditions of the people in Sri Lanka.

We have to agree with the ground of challenge of the Petitioner that the process of uplifting the socio-economic conditions of the people of Sri Lanka, not restricted to persons who are of the same religious belief or faith as that of the body sought to be incorporated, would necessarily result in an inconsistency with the free exercise of a person's thought, conscience and religion as postulated in Article 10 of the Constitution. The allurements which would result in the process of uplifting socio-economic conditions would distort the freedom which every person should have to observe a religion or belief of his choice as guaranteed by Article 10 of the Constitution.

Counsel for the intervenient Petitioner has referred to several laws that have been enacted incorporating bodies that have the objects of promoting a religion and also have objectives in the nature of social, welfare and educational activity. On that basis, he has urged the court to examine the provisions of the Bill in the light of these laws. On the other hand, Counsel for the Petitioner has referred to several enactments incorporating religious bodies that do not have "obnoxious provisions of the nature included in this bill." In exercising jurisdiction under Article 123 of the Constitution, we cannot examine the validity of past legislation. Nor, can we take their content as a standard of consistency with the provisions of the Constitution. Our task is to examine the provisions of the bill challenged by the Petitioner and to determine whether they are inconsistent or not with the provisions of the Constitution. In that context what Counsel for the intervenient Petitioner commended to us is an exercise in futility, which we shall not engage in.

For the reasons stated above we hold that the provisions of clauses 3 and 4 of the Bill are inconsistent with Article 10 of the Constitution.

The next submission made by the Petitioner is in relation to clause 7(3) of the Bill which states that Articles of Association of the body sought to be incorporated in force on the date preceding the date of the commencement of the Act shall be deemed to be the rules of the corporation. Since these Articles now in force do not form part of the Bill, Parliament would be giving recognition to rules, that content of which is not known. Counsel for the intervenient Petitioner submits that the rules relate to internal matters of the body sought to be incorporated. However, the extent to which it would affect persons can be examined only if its content is known. Therefore, we have to agree with

the submission of Counsel for the Petitioner that this provision is inconsistent with Article 76(1) of the Constitution.

Clauses 3 and 4 referred to above are the principle provisions of the Bill. Since the material content of these provisions are inconsistent with Article 10 of the Constitution, we make a determination in terms of Article 123(2) of the Constitution that the Bill comes within the purview of Article 83(a) and hence is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the People at a Referendum.

Sarath N. Silva
Chief Justice

H.S. Yapa
Judge of the Supreme Court

T.B. Weerasuriya
Judge of the Supreme Court

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of the ordinary exercise of the
jurisdiction of the Supreme Court under Article 121
of the Constitution of the Democratic Socialist
Republic of Sri Lanka

S.C. Special Determination No 2/2003

Indrani Devendra,
Secretary All Ceylon Women's
Buddhist Congress
400, Bauddhaloka Mawatha
Colombo 07

Petitioner

Vs.

The Honourable Attorney General
Attorney General's Department
Colombo 12

Respondent

AND

Victor Norman Jayakody Samathanam
57/5, Thimbirigasyaya Road
Hendala
Wattala

Intervient-Petitioner

**TO: THEIR LORDSHIPS THE CHIEF JUSTICE AND OTHER JUDGES OF THE
SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI
LANKA**

WRITTEN SUBMISSIONS OF THE INTERVENIENT-PETITIONER

Matters set out in the Petition of the Intervient Petitioner

1. The Intervient Petitioner is the President of New Wine Harvest Ministries the Body that is sought to be incorporated by the impugned Bill.

2. The Interventient Petitioner was permitted to be heard by Your Lordships on 29th January 2003 at the hearing of the Petition in terms of Rule 63(iii) of the Supreme Court Rules 1978, as a person interested in the determination of the questions involved to be heard at these proceedings. These submissions are being tendered as per Your Lordships directions.
3. The Interventient Petitioner's position is that the Body sought to be incorporated is a Christian Ministry, which exercises rights guaranteed by Article 14(1)(e) of the constitution. The activities of the said Body enumerated in the Objects fall well within the ambit and scope of the said Article.
4. The Interventient Petitioner states that the basic tenets of the Christian faith demands that the adherents faithfully participate in meeting together for prayer, fellowship and the study of the Bible. It is also an imperative requirement for Christians to spread and promote and make known the message and teachings of Jesus Christ to the whole community in which they live.
5. The Interventient Petitioner further states that the right to manifest his religion in observance practice and teaching includes the right to be involved in the activities of the Body sought to be incorporated as given in the objects of the said body.
6. The Interventient Petitioner states that an exercise of the right guaranteed under Article 14(1)(e) includes the right to erect, build and maintain places of worship and to conduct baptism, marriage and burial services and that no provision of the Bill sought to be incorporated is inconsistent with any provision of the Constitution.

Matters irrelevant to the determination to be made by Your Lordships' Court

7. In view of the matters set out above, it is respectfully submitted that the following considerations warrant cognisance of Your Lordships' Court in making a determination on whether the Interventient Petitioner and the other members of the Body sought to be incorporated have a legitimate right in law to have the said Bill passed by a simple majority in Parliament without any further requirement.
8. It is respectfully submitted at the outset that the vague allegations of 'allurement, fraudulent means of conversion and brainwashing' made by the Petitioner remain unsubstantiated and that Your Lordships' Court is therefore not able to assume that the body sought to be incorporated by the Bill in question, is to engage in any such activities.
9. Hence, it is respectfully urged that Your Lordships must disregard the several allegations of the Petitioner in the process of considering the matters to be determined, in as much as they are wild, vague and unsubstantiated.
10. This is particularly so, in view of the fact the procedure provided under the Constitution does not enable the party/ parties affected by a bill being challenged to vindicate themselves on any facts that are asserted by a Petitioner who challenges its constitutionality. Clearly, what the Constitution has contemplated and provided for is a means by which Your Lordships' Court is required to ascertain and determine the constitutionality of a bill (if challenged) in cognisance of the provisions of the Constitution and Sri Lanka's obligations under international law having due regard to the international conventions treaties protocols etc to which Sri Lanka is a signatory.

11. In this context it is respectfully urged that the matters hereinafter set out are the *relevant* considerations which Your Lordships' Court may be pleased to consider.

The matter relevant to the determination to be made by Your Lordships' Court

12. Article 123 of the Constitution requires as follows:

Article 123(1) The determination of the Supreme Court shall be accompanied by the reasons therefore and shall state whether the Bill or provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.

Article 123(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –

- (a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82: or
- (b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84: or
- (c) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the people at a Referendum by virtue of the provisions of Article 83.

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.

13. The Petitioner alleges that the provisions of the New Wine Harvest Ministries (Incorporation) Bill is inconsistent with Articles 9, 10 and 14(1)(e) and 15(7) of the Constitution.

14. It is respectfully submitted that Article 9 of the Constitution mandates that the Republic of Sri Lanka has two duties.

(1) To give to Buddhism the foremost place and accordingly for the State to protect and foster the *Buddha Sasana*: and

(2) To assure to all religions the rights granted by Articles 10 and 14(1)(e).

15. It is evident that the Constitution places *equal emphasis* on the rights of those of the minority religions in the country under Articles 10 and 14(1)(e) and that those rights should not be impinged upon in the course of giving Buddhism the foremost place and protecting and fostering it.

16. Article 10 of the Constitution reads as follows: "Every person is entitled to freedom of thought conscience and religion *including the freedom to have or to adopt a religion or belief of his choice.*" [*emphasis added*]

17. In this regard it is submitted that it is a **part and parcel of every religion to promote and spread its belief, doctrines and practices.** For instance the Galle Muslim Cultural Association Law No. 21 of 1976 by which the Galle Muslim Cultural Association was incorporated includes amongst its undoubtedly a right exercised by those of the minority Islamic faith in the exercise of their religion. The same right is constitutionally guaranteed to every religion in Sri Lanka.
18. Article 14(1)(e) guarantees to every citizen, *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.*
19. The Interventient Petitioner has stated that the basic tenets of the Christian faith demand that the adherents faithfully participate in meeting together for prayer fellowship and the study of the Bible and that *it is also an imparative requirement for Christians to spread and promote and make known the message and teaching of Jesus Christ to the whole community in which they live.*
20. Your Lordship's Court has held in **Premalal Perera v. Weerasuriya and Others** 1985 2SLR 177 that the Fundamental Right of freedom of thought conscience and religion is by our Constitution cast in absolute terms and it will have to give way only to any law written or unwritten which was in force at the time the Constitution came into operation but only to the extent of any inconsistency as between them. In his judgment. His Lordship Ranasinghe J. (as he was then) has also set out expressly that beliefs rooted in religion are protected and that a religious belief need not be logical, acceptable consistent or comprehensible in order to be protected. Your Lordships' Court has also recognised that courts are not the arbiters of religion and that Court should not undertake to dissect religious beliefs. Your Lordships Court has also held that it is not within the judicial function and judicial competence to inquire into whether the person seeking protection has correctly perceived the commands of his particular faith.
21. In the light of the aforesaid it is noteworthy that the Interventient Petitioner also states in his affidavit that the right to manifest his religion in observance and practice includes the right to be involved in the activities of the Body sought to be incorporated as given in the objects of the said body.
22. It is respectfully urged that if the right of the intervenient Petitioner and other adherents of Christianity who wish to exercise their religion through the Body sought to be incorporated cannot be exercised in the manner set out in the objects of the incorporation Bill, it would occasion a serious denial of their fundamental rights guaranteed by Articles 10 and 14(1)(e) of the Constitution.
23. It is further submitted that *unlike* in the case of SC Determination No. 2/2001 (in which no potentially affected party appears to have sought intervention prior to Your Lordships' Court determination, the provisions of the current bill of incorporation on which your Lordships' Court is required to make a determination are quite different in as much as their general objects do not combine economic and commercial objectives with religious ones.

24. It is respectfully submitted that the practice of *all* religion involve 'altruistic objectives' to uplift the socio-economic conditions of people, regardless of their faith or persuasion and to distinguish on the basis of religion would be serious discriminatory treatment which is inconsistent with Article 12 of the Constitution. Article 14(1)(e) guarantees to every citizen *the freedom* to do so either *by himself or in association with others*, in the observance and practice of his religion.
25. Thus, it is submitted respectfully that the general objects and other provisions of the Bill of Incorporation challenged by this petition are in no way inconsistent with the rights guaranteed by Articles 9, 10 and 14(1)(e) of the Constitution. It is also clear from a plain reading of Article 15(7) of the Constitution that the issue of fan inconsistency therewith, does not arise.
26. It is pertinent that Your Lordships' Court has observed in SC Determination No. 2/2001 that "Any legislative measure which places one religious group at an advantage ... would indeed result in social disturbances." This situation could certainly arise where the rights of minority religions are suppressed or denied by the type of 'chauvinist, majoritarian approach' advocated by the Petitioner. The said observation of Your Lordships' Court indeed recognises that adherents of all religions should enjoy the right to practice promote and spread their faith and beliefs in keeping with the Constitutional guarantees set out above.
27. Your Lordships' attention is respectfully drawn to the fact that nearly all the incorporated religious bodies have as their objects the dissemination of the principles of their faith and the social uplifting of the poor. A few examples are given below:

Nugegoda Young Men's Buddhist Association Ordinance No. 54 of 1947. Section 3:

- (a) the study and propagation of Buddhism;
- (b) the performance of social welfare work;

Galle Young Men's Buddhist Association Act No. 3 of 1954. Section 3:

- (a) the study, observance and propagation of Buddhism;
- (b) social service;

Kuliyapitiya Young Men's Buddhist Association Act No. 39 of 1980. Section 3:

- (a) the study, practice and propagation of Buddhism;
- (b) social service in general;

Piliyandala Young Men's Buddhist Association Law No. 30 of 1976. Section 3:

- (a) the promotion of the study and propagation of Buddhism;
- (b) the advancement of the practical observance of Buddhism;
- (c) the engagement in social services;

Young Men's Buddhist Association Dehiwala-Mount Lavinia Act No. 34 of 1961. Section 3:

- (1) the encouragement of the study and practical observance of Buddhism;
- (2) the propagation of Buddhism;
- (3) the advancement of the social, cultural and educational welfare of the residents of Dehiwala-Mount Lavinia;

Young Men's Buddhist Association Mahiyangana Act No. 40 of 1980. Section 3:

- (a) to study, follow promote and propagate the principles of Buddhism;
- (b) to engage in general and social welfare activities;

Young Men's Buddhist Association. Wadduwa Act No. 19 of 1970. Section 3:

- (a) the study, observance and propagation of Buddhism;
- (b) social and public welfare work;

Chilaw Buddhist Association Law No. 22 of 1978. Section 3:

- (a) to encourage members to adjust their ways of life in accordance with Buddhist principles and also to encourage and set examples for others to achieve that end;
- (b) to encourage members to adjust their ways of life in accordance with Buddhist principles and also to encourage and set examples for others to achieve that end;
- (c) to engage in social and general welfare activities;

Panadura Public and Local Government Service Buddhist Association Act No. 22 of 1970. Section 3:

- (a) to encourage the study and practice of Buddhism and aid its propagation;
- (b) to engage in educational, cultural and social activities;
- (c) to assist the poor and destitute

Ratnapura Sri Sumana Buddha Sangamaya Law No. 26 of 1975. Section 3:

- (a) to advance the interests of the Buddha Sasana;
- (b) to undertake educational and other social welfare projects

Dharmavijaya Foundation Act No. 62 of 1979. Section 3:

- (1) The general objects of the Corporation shall be to promote the total development of man, both spiritually and physically with the application of Buddhist principles to economic development and thereby establish a Dharmavijaya Samajaya:
- (2) The Dharmavijaya Samajaya shall comprise of all persons who accept, and endeavour to act according to the principles set out hereunder --
 - (a) to be of service to the community;
 - (b) to dedicate one's efforts towards the development of the nation;

Section 4(1):

The Corporation shall have the power to do all things necessary for or conducive or incidental to the carrying out of the objects of the Corporation.

Saiva Paripalana Sabhai Ordinance No. 17 of 1931 Section 3:

- (a) to promote and propagate the Saiva religion;

- (b) to establish, maintain and manage crematorium and hospitals and to take charge of such establishments as are handed over to their management.

All Ceylon Young Men's Muslim Association Act No. 31 of 1968. Section 3:

- (a) to spread the virtues of Islam and its culture;
- (b) to promote the cause of education generally and of adult education in particular;
- (c) to arrange sports meets, picnics, camps and educational tours in Sri Lanka and abroad;
- (d) to initiate assist co-ordinate and conduct youth activities

Galle Muslim Cultural Association Law No. 21 of 1976. Section 3:

- (a) to spread the virtues of Islam and its culture;
- (b) to promote the cause of education generally and of adult education in particular

Rifai Thareeq Association Law No. 29 of 1976. Section 3:

- (a) The study and the promotion of Islamic culture and religion and the development of the Rifai Thareeq;
- (b) The engagement in any religious or charitable acts as may be found to be necessary in the opinion of the General Committee of Management

Galkisse Thapodhanarama Vihara Wardhana Samithiya (Incorporation) Act No. 42 of 1984. Section 3:

- (a) to ... foster the study of and research into Buddhism in its totality of theory, practice and insights (Pariatti, Patipatti and Pativedha);
- (b) to provide and maintain the necessary buildings and material for the social and cultural well-being of its members and the general public.

28. It is respectfully submitted that no religion anywhere in the world would advocate that charitable deeds should be confined to their adherents only. It is the fundamental and basic feature of all religions to be involved in acts of charity towards all people, while propagating their faith.
29. As for the rule making powers conferred by the Bill of Incorporation currently under consideration by Your Lordships' Court, it is respectfully submitted that they are powers relating to the conduct and exercise of *internal* matters of the body sought to be incorporated by Statute, and it is hence respectfully urged that the rule making powers to be conferred on the body do not in anyway impinge the provisions of the Constitution in any way.
30. Furthermore, Your Lordships' attention is drawn to the fact that the provisions conferring rule making powers are identical (if not ad verbatim) to such powers conferred in virtually every Statute of Incorporation. There are 172 statutes in Volume XV (Title XXX) of the LEC 1980 Revision and many more thereafter. Your Lordships' attention is kindly drawn to the fact that in almost every one of those incorporation statutes, the rule making power is conferred on the respective corporation.

31. It is evident that the rule making powers to be conferred by the Bill under Your Lordships' consideration is not in any way inconsistent with the Constitution. Those rules would not affect any outsider (as in the case of the 18th Amendment to the Constitution) but for internal regulation. Even the Petitioner has not, in any event, stated that this power is inconsistent with the Constitution, though Learned Counsel for the Petitioner made submissions to that effect when this matter was taken up on 29th January 2003.
32. In addition to the foregoing it is respectfully urged that the several unsubstantiated matters set out by the Petitioner in her petition and affidavit are unwarranted, malicious, chauvinistic and unrelated to the matters arising for consideration by Your Lordships' Court in this determination.
33. It is further submitted that apart from the fact that the provisions of this Bill are easily distinguishable from the one concerned in the determination contained in SC SD 2/2000. Your Lordships' will also consider that fact that in that instance the Attorney General concurred with the Petitioner with the result that there was no one who defended the Bill at the hearing before Your Lordships. There were no arguments for the provisions of the Bill that were considered by Your Lordships' Court.
34. It is submitted with respect that the facts placed by the Petitioner before your Lordships' Court, although entirely irrelevant to the determination, demonstrate the vituperative nature of the intolerance shown by a section of the majority religion toward the minority religions. It is submitted with respect that Your Lordships' Court being the guardian of *all* peoples in Sri Lanka will not lend a hand to such endeavour.
35. Finally, it is submitted with respect that no person can be converted from Religion A to Religion B by the 'allurement' of money. If anyone changes the label from A to B for monetary considerations, he is only revealing his affiliation to materialism and not to Religion B. His true religion was and continues to be money and Religion A ought to be glad that such a fraudulent person has left its ranks.

Attorneys at Law for the Interventient -- Petitioner

Settled by:

Viran Corea Esqr ...

M.A. Sumanthiran Esqr ...

Attorneys at Law

On this 3rd day of January 2003

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

S.C. Determination No. 2/2001

In the matter of the Application under
Article 121(1) of the Constitution.

Present : Sarath N. Silva Chief Justice
Shirani A. Bandaranayake Judge of the Supreme Court
Ameer Ismail Judge of the Supreme Court

Counsel : Monohara de Silva with Prasan Gunasena for Petitioner.
Y.J.W. Wijayathilake, D.S. G., for Attorney-General

**Court assembled
at** : 10.00 a.m. on 24. 05.2001

A Bill titled "Christian Sahanaye Doratuwa Prayer Centre (incorporation) has been presented to Parliament as a Private Member's Bill. The Bill was placed in the Order Paper of Parliament on 10th May 2001 and the Petitioner has challenged its constitutionality by papers presented in this court on 16th May 2001. He has thereby invoked the jurisdiction of this Court in terms of Article 121(2) of the Constitution. Due notice of the petition that has been filed was given to the Hon. Attorney-General.

The preamble to the Bill states that the association which is sought to be incorporated has been in existence and has carried out and transacted several objects for which it was formed. The objects of the Corporation that is to be constituted by the Bill are set out in Clause 3 and its powers are set out in Clause 4. The rules of the Corporation are referred to in Clause 6. Clause 14 refers to the validity of the provisions of the Bill in relation to the rights of the Republic or any body politic or corporate or any other person.

The objections raised by the Petitioner relate to the Constitutionality of the Provisions referred to above:

The Petitioner submitted that the Corporation that is being constituted is a religious body of a particular denomination and that the objects read with the powers of the Corporation provided for in clauses 3 and 4, offend Article 10 of the Constitution.

The objects of the Corporation out in clause 3 are:

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

- g) to rehabilitate persons who are addicted to drugs or any other misconduct or involved in criminal activities;
- h) to train person in various industries to enable them to engage in self-employment;
- i) to accommodate the requests made by any person to conduct religious and customary rights and rituals at a birth, marriage, death or any such occasion.”

The powers of the Corporation to which reference is made by the Petitioner are set out in clauses 4 (a) and (b), which are:

- “ (a) to borrow or raise money for the purposes of the Corporation;
- (b) to draw, accept, discount, endorse, negotiate, buy, sell and issue bills of exchange, cheques, promissory notes and other negotiable instruments and to open, operate, maintain and close bank accounts in Sri Lanka and elsewhere;”

The submission of the Petitioner is that although the association is being incorporated as a prayer centre, the objects referred to and its powers transcend the observance and practice of a religion. To support this submission the Petitioner relies on the objects stated in sub paragraphs (f) and (h) in clause 3 referred to above. This would give a statutory right to the Corporation to provide assistance to persons to secure job opportunities and to provide training in industries to enable persons to engage in self-employment. These are economic and commercial activities as distinct from the observance and practice of a religion which is a fundamental right guaranteed by Article 14(1)(e) of the Constitution.

It was further submitted that when the legislature incorporates a prayer centre of a particular denomination and invests that Corporation with the right to engage in economic and commercial activities referred to above with the powers relating to finance in clauses 4(a) and (b), that would necessarily result in the conversion of persons of other religions and faiths to that of the prayer centre which is being incorporated through allurements or other subtle means. Thus, the freedom of thought, conscience and religion of other persons guaranteed by Article 10 would be infringed.

Alternatively, the Petitioner submitted that when the prayer centre is incorporated with the objects of an economic and commercial nature as referred to above with the power to raise money, the legislature would thereby place the prayer centre in a more favourable position than persons and groups of persons, who are engaged in the observance and practice of other religions. It was submitted that this would infringe Article 12(1) of the Constitution which mandates that all persons are equal before the law and are entitled to the equal protection of the law.

We have given careful consideration to the submissions of the Petitioner in view of the particular sensitivity which attaches to issues of freedom of thought, conscience and religion and the freedom to practice and observe a religion. The free exercise of these rights is of high emotive significance in a pluralistic society. Any legislative measure which places one religious group at an advantage or which directly or indirectly would permit the conversion by allurements or other subtle means of a person of a particular religion to another would indeed result in social disturbances. The Petitioner has relied on a significant body of material with regard to the conversion of persons of one religion to another by such means. In our view, it is unnecessary to examine this material, which may be of social and political content but does not have a direct bearing on the questions of law that arise for consideration. We have confined our deliberations to the strict legal issues that are involved.

The freedom of thought, conscience and religion is a fundamental right guaranteed by Article 10 of the Constitution. In terms of Article 83(a), any Bill which is inconsistent with Article 10 would become law only if it is passed by a two-third majority and approved by the People at a Referendum.

Article 10 of the Constitution reads thus:

"Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice."

It is seen that the freedom of thought, conscience and religion is not only declared as a right to which every person is entitled to, but also that the right is defined to include the freedom to have or to adopt a religion or belief of a person's choice. It follows therefore that there should be no fetter in the path of any person in the choice he makes to adopt a religion or belief. The Constitution guarantees to every person that the basic choice he makes with regard to his religion or belief would be taken with complete freedom without being exposed to any undue influence, allurements or fraud.

In India, there has been State legislation in Madhya Pradesh (1968) and Orissa (1967) that prohibit the conversion of persons of one religion to another by force, fraud or allurement. The Supreme Court of India in the case of *Rev. Stainislaus v. State of Madhya Pradesh* (1977 AIR S.C. page 908) considered the validity of the penal provision where a conviction had been entered against the appellant. The submission of the appellant was that the State legislation was invalid since it was inconsistent with Article 25(1) of the Constitution which guarantees to every person the freedom to 'profess, practice and propagate religion.' This argument was rejected by the Supreme Court which held that 'there can be no such a thing as a fundamental right to convert any person to one's own religion' The basis of the judgement was stated by A.N. Ray C.J. as follows:

"It has to be remembered that Article 25(1) guarantees 'freedom of conscience' to every citizen and not merely to the followers of one particular religion and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike. " (at page 911)

In Sri Lanka, the Constitution does not guarantee a fundamental right to "propagate" religion as in Article 25(1) of the Indian Constitution. What is guaranteed here to every citizen is the fundamental right by Article 14(1)(e) to manifest, worship, observe, practice that citizen's religion or teaching. Further, Article 10 referred to above guarantees to every person the freedom of thought and conscience including the freedom to adopt a religion of his choice. The Constitution permits no restriction of the fundamental rights guaranteed by Article 10. Hence the reasoning of A.N. Ray C.J. would apply with greater force to the relevant provisions of our Constitution.

The submissions of the Petitioner is that when a prayer centre which is dedicated to a particular denomination is incorporated by statute and invested with a statutory right to provide assistance to persons through economic measures such as securing job opportunities and training in industries and other skills to engage in self-employment with the power to raise money for those purposes, persons of another religion or belief who come to the prayer centre would be allured to adopt the religion of the prayer centre. This submission is fortified by the inclusion of provisions with regard to commercial and economic activities in the objects of the Corporation together with the practice and

observance of religion. In our view, the freedom guaranteed to every citizen by Article 14(1)(c) of the Constitution to practice a religion and engage in worship and observance, by himself or in association with others, should be taken as distinct from the freedom guaranteed by Article 14(1)(g) to engage in a lawful occupation, trade, business or enterprise. A prayer centre that seeks special legislative recognition by way of incorporation cannot avail itself of these two freedoms together. If it is sought to be done in that manner there is a likelihood of the fundamental right guaranteed by Article 10 being infringed. The freedom guaranteed by Article 10 to every person to adopt a religion or belief of his choice postulates that the choice stems from the free exercise of one's thought and conscience without there being any fetter of allurements which in any way distorts that choice.

In the circumstances we are inclined to agree with the submissions made by the Petitioner that clauses 3 and 4 of the Bill as presently constituted would be inconsistent with Article 10 of the Constitution.

The next submission made by the Petitioners is in relation to clause 6 of the Bill. This clause empowers the Corporation to make rules for the matters provided therein. Clause 6(3) states that the rules of the prayer centre in force on the day preceding the date of the commencement of this Act shall be deemed to be the rules of the Corporation made under this Act. It is submitted that by virtue of this provision, these rules acquire the force of law. Since the rules now in force do not form part of the Bill, it is submitted that there is an abdication of legislative power by Parliament, which is violative of Article 76(1) of the Constitution.

We uphold the submission of the Petitioner that rules of the centre which do not form part of the Bill cannot be given the force of law in the manner it is sought to be done by clause 6(3). That, Parliament cannot give the force of law to any rules that have not been placed before it. This provision would therefore be inconsistent with Article 76(1) of the Constitution.

Furthermore, clause 6(2) empowers the Corporation to alter, add or amend the rules. Thereby the Corporation would be empowered even to alter, add, amend, or rescind the rules that are sought to be given the force of law by clause 6(3). This too would amount to an abdication of legislative power, inconsistent with Article 76(1) of the Constitution.

The final submission made by the Petitioner is in relation to clause 14 of the Bill which reads as follows:

"Nothing in this Act contained shall prejudice or affect the right of the Republic or of any body politic of corporate or of any other persons except such as are mentioned in this Act, and those claiming by, from or under them"

It is submitted that the provision as presently worded would have the effect of the matters in respect of which specific mention is made in the Bill prejudicing the right even of the Republic or of any other corporate body or person.

It is to be seen that the marginal note of this clause states that it is intended to save the rights of the Republic and others. However, the manner in which the clause has been drafted would lead to the inference being drawn that the right of the Republic and other corporations and persons are superseded by the provisions of the Act.

In our view, the inconsistency with the Constitution, thus submitted could be avoided if the provision is limited to the first two lines and would read as “nothing in this Act contained shall prejudice or affect the rights of the Republic or of any body politic or corporation.”

Clauses 3 and 4 are the principal provisions of the bill. Since these two provisions are inconsistent with Article 10 of the Constitution, we make a determination in terms of Article 123(2) of the Constitution that the Bill comes within the purview of Article 83(1) and hence is required to be passed by the special majority as provided for in Article 84(2) of the Constitution and approved by the people at a Referendum.

Sarath N. Silva
Chief Justice

Shirani A. Bandaranayake
Judge of the Supreme Court

Ameer Ismail
Judge of the Supreme Court

Religion and Politics in South Asia; Current Dilemmas Confronting Sri Lanka, India, Pakistan and Bangladesh

*Samith de Silva**

1. Introduction

This paper proposes to examine the manner in which nationalist movements that fought together for freedom from the British, ended up creating turmoil in post colonial South Asia due to their advocating separatism based on religious and ethnic divisions as opposed to espousing territorial nationalistic ideologies.

Given space limitations, it will briefly outline the historical and individual context of these struggles in four countries in particular on the sub-continent and attempt to define common dilemmas confronting their peoples in which context, an increasingly strident religious divisiveness plays a major role.

As witnessed in the history of South Asia, religion and politics have often had a harmonious relationship.¹ In South Asian political societies, the leader was often from the main ethnic group and followed a popular religion of that group. The subjects sometimes willingly² or perhaps due to compulsion³ changed over to the religion of their leader. A fairly recent example of this is the embracing of Buddhism by millions of Indian oppressed caste Hindus in 1930's and 1940's, following the example of Dr. Baba Saheb Ambedka whom they treated as their leader.⁴

It is of note that the Indian Kings observed secularism during a major part of its history, while acting as the guardian of the main religious faith of the country. The European colonization of South Asia introduced Christianity with a small percentage of followers of the major religions in then Ceylon and India,⁵ Buddhists and Hindus, converting to Christianity.

Due in part to the strains caused by the colonial policies of 'divide and rule' in South Asia, movements based on religious and ethno nationalism thereafter gained ground in the post independence period.

* High Court Judge, Panadura. This paper is based on studies currently engaged in by the author while/reading for the M.A. (International Relations), University of Colombo.

¹ In ancient India, the kings were either Buddhist or Hindus, who often did not disturb the religious beliefs of their subjects.

² Examples can be cited from the history of ancient India and Sri Lanka where the subjects embraced the religion of their leader. Two such examples are the Hindus embracing Buddhism during King Asoka's regime around 247 B.C. in India and followers of religions in ancient Sri Lanka during the same period embracing Buddhism following Devanampiyatissa, as explained very eloquently in the Mahawansa

³ Conversions of Hindus and Buddhists to Islam, during the Mughal Empire from 1200's to early 1700's

⁴ Vide 'Thus Spoke Ambedka on Renunciation of Hinduism and Conversion of Untouchables' by Bagawan Das, Ambedkar Sahitiya Prabashana, Bangalore, India 1980.

⁵ then British India

Currently, South Asia sees an increase in religious divisiveness, spurred in certain instances, by the failure of the law and legal institutions in those countries, to respond to the need for religious unity rather than disunity.

2. Religion and Politics in ancient India and Western Europe

2.1 Ancient India

Rakthahari Chatterji⁶ points out that in ancient India, unlike in Western Europe, politics and religion had a harmonious relationship.⁷ She identifies five doctrinal positions⁸ up to the period of Mauryas,⁹ which contributed towards greater progress of secular politics as contrasted to its predecessors. The five doctrinal positions identified by Chatterji are Vedas, Brahmanas, Buddhism, Arthashastra writings and Kautiliya's Arthashastra.¹⁰

According to Chatterji, Vedas and Brahmanas placed the king in a position of godly pre-eminence and a near sovereign character¹¹ while the Buddhist perception added a new dimension by discouraging royal equation to divines and propagating a liberalistic view that the king's role was to restrain crime and protect the property of its subjects and that the king's right to taxation was not based on birth or succession but on the fulfillment of his obligations.¹²

The Arthashastra writers whom Ghosal¹³ refers to as predecessors of Kautilya, Manusmithi and Mahabharath saw the king as a deity of the Lord in human form who took birth to protect mankind.

Kautiliya's¹⁴ approach was more scientific than that of Arthashastra in that, he upheld the supremacy of the science of politics based on Philosophy, Social Canons, Economics and Dandanim, (Danda being the principle of politics).¹⁵

2.2 Ancient Western Europe

The significant influence of civilization was firstly manifested in ancient Western Europe through the impact of Greek civilisation that was based on a city state system.¹⁶

⁶ Professor of Political Science at Calcutta University.

⁷ Religion, Politics and Communalism, Rakthahari Chatterji, South Asia Publishers (Pvt) Ltd; New Delhi 1994, page 5

⁸ *Ibid*

⁹ from 323 B.C. the Chandragupta period to mid 6th century A.D.

¹⁰ op.cit.7 Chatterji, page 5

¹¹ *Ibid*

¹² op.cit. 7 Chatterji pages 6 & 7

¹³ U.N. Ghosal, A History of Indian Political Ideas (London & Oxford), page 49, cited by Chatterji, op.cit.7, pages 6 & 7

¹⁴ Professor C.G. Weeramantry, in his paper on 'Indo - Sri Lankan Relations: A study of the present problems in the light of international law' (ANCL Commercial Printing Dept), refers to Emperor Asoka's rejection of the Kautilyan tradition which taught the course of expediency.

¹⁵ op.cit. 7, Chatterji, page 8

¹⁶ City States were built in honour of the gods or goddesses whom the Greeks worshipped.

Roman civilization that followed the Greek civilization, evidences a constant struggle between Religion and the State.¹⁷ After the fall of the Roman civilization in the medieval era,¹⁸ during the periods of renaissance and reformation¹⁹ a trend towards the limitation of the authority of the Church and a move towards secularism was witnessed with the emergence of modern Europe. Chatterji²⁰ opines that this is as a result of the influence of great thinkers and reformers such as Copernicus,²¹ Galileo,²² Machiavelli²³ and Bodin.²⁴

The conclusion that can be drawn from Chatterji's account²⁵ is that South Asia, since early on, had a secular form of government due to the philosophical trappings linked to the Sovereign, (seemingly in the said five doctrinal positions linked to religion), whereas Western Europe recognized secularism much later, primarily as a result of the burgeoning of political philosophy and science.

2.3 Secularism, Modernization and Communalism

Jeff Haynes²⁶ quoting Moyser (1991: 14) states that:

"Secularization implies the loss of political power of religion and the refocusing of societies away from concerns with the sacred and the divine."

For Haynes,²⁷ modernization has led to the separation of religion and politics and hence is closely associated with secularization. Chatterji,²⁸ making a comparison between communalism and secularism, states that secularism is referent to a society or the State. In political parlance, the antonym of secularism is theocracy. Communalism²⁹ is referent to an individual and hence, a State or a society cannot be referred to as 'communal'.

2.4 Nationalism, Religion and Ethnicity

The European influence in South Asia³⁰ was evidenced since 1497.³¹ The Portuguese and the Dutch dominated³² the Maritime Provinces of India and Sri Lanka from the 16th to the 18th centuries, until

¹⁷ The struggle between the Pope, the head of the Church and Ceaser, the head of the State

¹⁸ 5th century A.D. to 14th/15th century A.D.

¹⁹ 14th - 16th centuries A.D.

²⁰ op.cit 7 Chatterji, page 2

²¹ 1473-1543; Vide 'On the Revolutions of the Celestial Spheres', (1543).

²² 1564-1642; As is commonly known, he was warned by the Church that his theories were contrary to the teaching of the Church. Nearly 342 years after his death, the Church accepted his theories and pardoned him.

²³ The Prince, 1513

²⁴ The Republic, 1576

²⁵ op.cit 7, Chatterji

²⁶ Vide 'Politics & Religion in the Third World: Continuity and Change', in 'Religion in the Third World' published by The Open University Press, Buckingham and Philadelphia, 1993 Chapter 6, page 146

²⁷ *Ibid*

²⁸ op.cit 7, Chatterji, page 11

²⁹ op.cit 7, Chatterji, page 72;

³⁰ Following Portuguese Navigator Vasco de Gama's discovery of the sea route around Cape of Good Hope in 1497.

³¹ Vide. Compton's Encyclopedia

the British took control of the East India Company from the Dutch and the French in 1757.³³ Finally the British took control of India³⁴ and Sri Lanka³⁵ and thus brought almost the entire of South Asia under the rule of the British Crown.³⁶ Relatively speaking, Nepal and Bhutan escaped the impact of British political rule as contrasted to other parts of South Asia.³⁷

Movements for independence from the British in Sri Lanka and in India were basically founded on religious nationalism or ethno nationalism (or both) and not on territorial nationalistic ideology. This factor, taken together with the recognition by the British of the ethnic and religious grouping in their different constitutional formations introduced prior to the Independence Constitutions in British India and Sri Lanka³⁸ are seen as causes that influenced the divergence by movements in those countries, from a territorial nationalistic ideology, focussing instead on separatism based on religious and ethnic divisions.

The best examples of these are the moves for the separation of British India by Muslim nationalists at the time of independence³⁹ and the proposals for balanced representation by Sri Lankan⁴⁰ Tamil political leaders.⁴¹ Today both India and Sri Lanka suffer due to the lack of 'common nationalistic sentiments' among different races in those countries.

Appadorai⁴² observes that nationalism being a powerful sentiment, whether it is virtuous or evil depends upon the ability to use and organize it for constructive ends. Appadorai highlights the greatest defeat of 'nationalism'; that the source of its non-destruction is within it.

3. Religion & Politics in South Asia

3.1 India

The Indian Constitution upholds principles of secularism, although the secularist identity of India has been under constant challenge despite these constitutional guarantees.

³² Except Deccan under the French from 1751-1757

³³ Vide Chapters 1 and 2 of Constitutional Government in Sri Lanka, L.J.M. Cooray, Lake House Publishers Colombo 1984 for a detailed account relating to Sri Lanka

³⁴ British India

³⁵ Vide the rule in *Campbell v. Hall* 1774 (2) Cowper, 204 - A concurred or a ceded country became a dominion of the King in the right of the Crown; Sri Lanka, in 1815, became a ceded colony.

³⁶ India was brought under the British Crown in 1876

³⁷ Vide Compton's Encyclopedia.

³⁸ Vide 'Constitutional and Administrative Law of Sri Lanka', J.A.L. Cooray (Part 1), Sumathi Publishers 1995; and 'Constitutional Government in Sri Lanka', L.J.M. Cooray, (op. cit, 33, Chapters 1 & 2 for an account of the successive constitutional formulations in pre-independence Sri Lanka

³⁹ Mohamed Ali Jinnah who fought for independence of British India with Hindu leaders and successfully staged a struggle for the separation of Muslim dominated Pakistan at the point of independence.

⁴⁰ then, Ceylon

⁴¹ op.cit. 38, J.A.L. Cooray, page 36, the proposal by the Tamil Leader G.G. Ponnambalam for a balanced representation between the ethnic minority Tamils and majority Sinhalese, later popularly known as the Fifty-Fifty demand

⁴² The Substance of Politics, A. Appadorai, Eighth Edition, 1957, Oxford University Press, page 149

Chatterji⁴³ is of the view that Nehru was unable to maintain his secular commitment, on account of his contradictory conduct, perhaps due to a conflict of interests. Chatterji gives four instances⁴⁴ of Nehru's contradictory policies⁴⁵ that led to his decline and prompted a rise of Hindu and Muslim communalism after independence.

One palpable instance of this was when the Hindu-Muslim conflict, simmering since 1988, dramatically climaxed with the destruction of the Babri Mosque in Ayodhya in 1992 and the consequent reconstruction of the destroyed ancient Rama temple by Hindus on the ruins of Babri Mosque.

Thousands of people were killed and the world was shocked with horror at the reawakening of Hindu religious nationalism.⁴⁶ The subsequent statement of the Indian Prime Minister Atal Bihari Vajpaee in the Lok Saba that the mission is not complete until the construction of a Ram Mandir (Temple of Rama) at the site of Babri Mosque was a clear exposition of the face of Hindu nationalism, backed by Indian Hindu leadership, that had been so far covered with the veil of secularism.

At the time of the destruction of the Mosque in December 1992, the then Indian Prime Minister Narasimha Rao in his address to the nation condemned the destruction but the Prime Minister's absolute inaction to take steps to prevent the destruction which was caused by government back groups and civilian elements was seen as a further endorsement of Hindu extremism.

The other aspect of this is the possible inference from Prime Minister Vajpaee's statement, that the Indian government will have scant regard to the course of justice⁴⁷ if justice stands in its way in a quest for power by the Indian politician, capitalizing on sentiments of religious and ethno nationalism.

The attack on the Golden Temple, the Sikh holy shrine in 1984 by the Indian army on orders of Prime Minister Indira Gandhi,⁴⁸ increasingly severe attacks on Christian Missionaries who continue to be accused by the Hindus of forced conversions, raping of Christian nuns and causing damage to

⁴³ op. cit., 7 Chatterji, page 14

⁴⁴ (i) Expression of the government's commitment to ban communal political parties and his failure to implement it;
(ii) Refusal to ban cattle slaughter;
(iii) His failure to ensure equality before the law to both Muslim and Hindu women by not enacting a common civil code and thereby giving in to Muslim religious orthodoxy in a bid to win the confidence of Muslims and;
(iv) his failure to compel Muslim children to join the mainstream of education as a majority of parents kept their children within the instructions of their faith.

⁴⁵ op. cit. Chatterji, page 14

⁴⁶ Shaheen Akhtar in 'The State of Muslims in India', Islamabad: Institute of Regional Studies, 1996, page 73. It is of note that the Uttar Pradesh Provincial Government allowed nearly 300,000 Hindu militants mostly Kar Sevaks to demolish the Babri Mosque armed with tridents and daggers killing nearly 6000 and uprooting nearly 500,000. This was apart from large scale attacks on religious places.

⁴⁷ The Maharashtra High Court ordered the arrest of Bal Thackeray who led the attack. He was put to trial and later acquitted which spread a new sense of insecurity, fear and threat among Indian Muslims.

⁴⁸ This led to Indira Gandhi's assassination by one of her Sikh bodyguards in October 1984.

Churches, attacks on the followers of other religions such as Buddhists, though not so as gruesome as attacks on Muslims and Sikhs⁴⁹ have caused severe damage to the secular identity of India.

The formation of communal political parties, (which Indian politician wanted to ban at one point, in order to preserve secularism), has become the order of the day as far as both the majority Hindus and the other minorities are concerned. The fear and tension caused in the minds of religious and racial minorities on account of Hindu majority activism, with the backing of the Indian government, has sparked off several separatist movements in India.

Out of some thirty two separatist movements in India, some have been protracted over a long period since independence while some are more recent. Most of these movements are violent and have resulted in armed conflicts. The two most violent separatist conflicts in this regard are the East Punjab Separatist Movement and the Movement for Separation of Kashmir.

It has been the long standing grievance of India that the Kashmiri struggle has been fostered by Pakistan which provides help to the Muslim freedom fighters, (known as the Mujahideens), to liberate Kashmir.⁵⁶

Meanwhile, the liberation movement for the separation of South India by Tamils, (though not aggressively active right now in India), is suspected to have strong links with the Sri Lankan separatist movement, the Liberation Tigers of Tamil Eelam (L.T.T.E.).

3.2 Pakistan

Pakistan was formed on the basis of Islamic religious nationalism⁵⁰ and continues on the same lines today. Bounded by its archrival India on the South and East, the country is in continuous conflict with India, sometimes escalating to the use of arms, (and once to a war in 1965). The Pakistani-Indian conflict that arose in 1947 based on Muslim-Hindu nationalism, is now aggravated for various other reasons.⁵¹

East Pakistani Muslims resisted Muslim fundamentalism in Pakistan and finally in 1971, East Pakistan⁵² separated and formed Bangladesh.⁵³ Shinder Purewal⁵⁴ states that "in order to maintain

⁴⁹ For example, the killing of 36 Sikhs in Chatti Singh Pora during the visit of the President of the United States to India in 2000

⁵⁰ At the time of independence of British India, Pakistan (Pakistani Independence Movement led by Sir Sayed Ahamed Khan and later by Mohomed Ali Jinnah), consisted of present Pakistan and East Pakistan which in 1971 became the independent State of Bangladesh. Bangladesh rejected Islamic nationalism at the point of liberation and its first Constitution founded on secularist principles shifted to extreme Islamic nationalism after Sheikh Mujibur Rahman's assassination under its military leadership in a quest for popularity.

⁵¹ These factors include boundary disputes, the race for regional supremacy and nuclear supremacy in South Asia, inter state migration, the Kashmir issue and divisive international relations policies of the two countries.

⁵² India played a major role by backing East Pakistan

⁵³ It is well known that the Pakistani army made a ruthless- but unsuccessful -attempt to crush the East Pakistani separatist movement.

control over an ethnically diverse population with massive poverty, the political and military leadership of Pakistan took a series of measures to strengthen the Islamic identity.” He cites Prime Minister Bhutto’s introduction of Islamic Socialism in 1973 and General Haq’s declaration to rule Pakistan through ‘Shariat laws’.⁵⁵

Pakistanis are largely a mixture of Indu-Iranian lineage⁵⁶ and consist of four main ethnic groups⁵⁷ and sixteen smaller groups. In addition, in Pakistan there are 3.7 million Afghan refugees and Bihari refugees seeking shelter. A small number of mountain tribes and Muhajrs⁵⁸ are also found in Pakistan.

Out of the Pakistani population 98% are Muslims while there are about one million Hindus and Christians, and a smaller minority of Buddhists and Parsis.

Pakistani Muslims belong to different religious groups and among them the Sunnites are predominant. Religious disharmonies between Sunnites, Shia and Ahamadiyas have led to religious violence and large-scale killings of minority Shias and Ahamadiyas. This, to some extent, has strained Pakistani Iranian relationships while on the other hand it has also strengthened the relationships among the Sunni Arab States.⁵⁹

The United States led Western allies capitalized on this and supported the struggle of the Pakistani Mujahideen forces against Soviet forces in the Afghan war.⁶⁰

The vision of the founding father of Pakistan Mohamed Ali Jinnah was to lead his country to a secular republic under the guidance of Islam. Since Jinnah’s death in 1948, the move towards secularism came to a halt. In 1956, a new Constitution was promulgated and Pakistan became an Islamic Republic. In 1958, it took another turn when the civil administration was taken over by military leadership.⁶¹

The year, 1971 marked another milestone in Pakistani history with the liberation of East Pakistan (Bangladesh) and a non-military leader Zulficar Ali Bhutto taking over the administration from General Agha Khan. Bhutto took a pro-Islamic line and nationalized a large number of industries in a

⁵⁴ Vide ‘Religious Violence and Security In South Asia’, published in the Punjab Journal of Politics Vol. XXV Nov. 2001, page 17.

⁵⁵ *Ibid*

⁵⁶ Vide Compton’s Encyclopedia

⁵⁷ Paktuns, Punjabi, Sindi and Baluchi-Brahu

⁵⁸ Emigrants from India following partition.

⁵⁹ *op. cit.* 54, Purewal.

⁶⁰ *Ibid*

⁶¹ In 1958, General Ayub Khan captured power in a bloodless revolution and ruled until 1969. His term was full of political violence, strikes and economic and political chaos, which forced him to resign in 1969. Thereafter, General Agha Khan took over, suspending the constitution and ruling under military law until 1971.

bid to gain popularity. In 1973 General Zia Ul Haq captured power in a military *coup d'etat*.⁶² General Zia decreed an Islamic legal code to be the sole law. After the demise of General Zia, Pakistan saw the light of civil administration with Benazir Ali Butto coming to power (in December 1988) but Benazir and successive governments thereafter were not stable and ruled under the shadow of corruption and misadministration.

Currently, the military regime of General Pervez Musharraf stands threatened by the rise of Islamic fundamentalism in the context of the US led 'war against terror.' Religious minorities comprising Hindus, Christians and Buddhists, continue to be under attack by Muslim fundamentalists, with blasphemy laws being used to impose severe penalties on Christians in particular.

3.3 Sri Lanka

Sri Lanka's religio-political situation differs from that of India and Pakistan, since the main cause for the unrest in Sri Lanka has been opined by some as not religious hegemony⁶³ but the ethnic conflict between the Sinhalese and the Tamils. It is however undoubted that the course of the conflict has been aggravated at certain historical moments as a result of the emphasis placed on Sinhala-Buddhist hegemony by politicians of the majority Sinhala community.

During the early days of the movement, there was no unanimous call by the Tamils for a separate administration.⁶⁴ However, the series of serious blunders made by the majority Sinhala political leaders in the course of wrapping around their little fingers, the concept of the Buddhist hegemony, aggravated by factors such as the use of Sinhala-Buddhist chauvinism to gain political power by S.W.R.D. Bandaranaike in 1956, the proclamation of the majority language, (Sinhala) as the official language immediately after his coming to power,⁶⁵ and the continued activation of Sinhala-Buddhist chauvinism by Bandaranaike and his successors, evidently spurred the growth of Tamil nationalism and eventual demand for separatism.

In this context, it is quite pertinent to refer to what S. Nadesan, Q.C. said⁶⁶ in his address to the Jaffna Youth Council Sessions in 1928. Nadesan stated that:

⁶² General Zia's period was primarily under military rule. But in 1985, Mohamed Khan Junejo became the Prime Minister with Zia as the President. Shortly thereafter, Zia fired Junejo. Zia died in a plane crash in August 1988.

⁶³ 'Ethnic Conflicts in South Asia and Inter State Relations specially in Relation to Sri Lanka', Bertram E.S.J. Bastianpillai, Chapter 5 of South Asia Strategic Issues by Shelton U. Kodikara, Sage Publications, New Delhi, 1990.

⁶⁴ Vide 'The Consociational Democratic Solution to the Sri Lankan Ethnic Conflict', Navaratne Bandara and Sumanasiri Liyanage, in "Sinnathamby Thillanathan - Special Felicitation Volume, 1997", published by the Department of Tamil, University of Peradeniya at page 362. Interestingly, these authors refer to the case of Jaffna Youth Council which took a definite stand in favour of majority Sinhala domination early on.

⁶⁵ It is quite unfortunate that Bandara and Liyanage - *ibid* - do not give a more realistic picture of events. Instead their article highlights moves by politicians who later became political opponents of S.W.R.D. Bandaranayaka, to make Sinhala the medium of instructions in schools. It is well known that the first major split among the Sinhalese and Tamils since independence was Bandaranayaka's language policy in 1958.

⁶⁶ *Ibid*, Bandara & Liyanage, page 362,

*"After long years of being subjected to foreign rule, the chances were that the majority community, at the beginning of self government would use power for narrow and selfish ends; but some years of experience in self government would teach them that strength required national unity....that parochialism would cease and that the people would think of the nation first and that self government would provide the remedy for the ills of the country."*⁶⁷

It is regrettable that Nadesan's aspirations never materialised. The Sinhala politician capitalised on anti-Tamil and pro-Buddhist feelings to gain his electorate in the South and the Tamil politician capitalised on Tamil feelings for a separate administration in the North, which since 1983, turned into a violent armed struggle for a separate State for the Tamils in the Northern parts of the island.

The July 1983 ethnic disturbances⁶⁸ fuelled by highly counter productive statements by the then Head of State,⁶⁹ the subsequent failure by both the Sinhala and Tamil political leadership to resolve the issue and the worsening of it thereafter, proved the spectacular failure of post independent Sri Lanka to define its identity within the parameters of territorial nationalism, in the manner conceptualised by Nadesan.

Other factors that contributed to the mistrust between the majority Sinhalese and the minorities were the removal of Article 29 of the 1948 Constitution, (which gave some protection to minority rights), from future constitutional structures, making Sinhalese the only official language and defining Buddhism as the State religion in the 1972 Republican Constitution,⁷⁰ the repetition of this in the 1978 Constitution and the failure of the Privy Council to interpret certain legal provisions in a manner protective of minority rights.⁷¹

Today, the Sri Lankan Muslim minority which is the major ethnic group in the Eastern Province of the island agitates for separate administration for themselves. It seems that the day is not far when the Indian Tamil population in the central hill country would stake their claim for a separate administration as well.

It is also significant to note that since the 1990's, like most other South Asian Muslims, the Sri Lankan Muslims have also been caught up in the drive for the rejuvenation of Islam, with the Middle East as its centre.

⁶⁷ *Ibid.*

⁶⁸ Vide 'The Rise of Military in Tamil Politics' by Ambalavanar Sivarajah in *Security Dilemma of a Small State*, ed; Werake and Jayasekera, South Asian Publishers, New Delhi, 1995.

⁶⁹ Head of the State, President J.R. Jayawardene.

⁷⁰ Art. 6 & 7 of the 1972 Republican Constitution.

⁷¹ *The Bribery Commissioner v. Ranasinghe* (66 NLR 73), *The Attorney-General v. Kodeswaran* (72 NLR 337.)

Presently, Sri Lanka faces a severe degeneration of its administrative, judicial and social systems, in addition to ethnic and, (increasingly strident), religious disharmony. These problems in Sri Lanka are clearly attributable to divisive tactics of the Sri Lankan politicians across the ethnic divide.

In that sense, Chatterji's reference⁷² to the historical insistence by the Buddhist clergy on founding modern Sri Lanka on the triple identity of 'the land, the race and the faith' is pertinent. However, it must not be forgotten that equal blame for this insistence should be imposed on politicians belonging to the majority community in Sri Lanka, as well as the Buddhist clergy, in the context of the catchphrase 'the land, the race and the faith' being habitually used by both the Buddhist clergy and Sinhalese politicians to rejuvenate nationalistic feelings.

In doing so, the calamitous impact of this catchphrase on the other ethnic and the religious groups in Sri Lanka, has been disregarded. Instead of rejuvenating nationalistic feelings, the common use of such catchphrases has sown seeds of religious and communal hatred.

3.4 Bangladesh

East Pakistanis profess a different religious lineage to Pakistani Muslims and a different cultural identity. The Bengali identity was at cross roads when Urdu was made the Pakistani State Language in 1952. The Bengali independence movement for separation from Pakistan was spearheaded by the Awami League,⁷³ under the leadership of Sheikh Mujibur Rahman.

Following independence from Pakistan in 1971, Bangladesh proclaimed 'secularism' as one of the basic principles of the State in its first Constitution. The founding father of Bangladesh, Sheikh Mujibur and a few other leaders were assassinated in a military *coup d' etat*⁷⁴ and with Major General Zia-ur- Rahman capturing power, Bangladesh came under military rule.

General Rahman and his successor General Hussein Mohamed Ershad crushed civilian opposition in a manner akin to all military dictatorships and in a bid to win public confidence, propounded the strange concept of 'Bangladesh Nationalism' as opposed to Bengali nationalism.

The secular character of the 1972 Constitution was changed by inserting "Bismillahir Rahmanir Rahim" in its provisions and by undertaking massive programmes of Islamization. A large number of persons from the non-Muslim minority of Hindus, Buddhists and Christians felt insecure due to the abandonment of secularism and fled to India.

Thereafter, the military leadership capitalised on Islamic religious sentiments to keep the dissatisfied public under control. On the other hand, the differences between Bangladesh and India escalated due

⁷² op. cit.7, Chatterji, page 18.

⁷³ The Awami Muslim League was later transformed into a secular political party

⁷⁴ 15th August 1975

to heightened religious sentiments. An internal separatist struggle by the Chittagong Hill Tract tribal people resulted in increased violence within the country.

In recent times, these struggles have subsided to some extent with Bangladesh entering into the Farakka Settlement with India to share Ganges water and the settling of the long-standing Chittagong Hill Tract insurrection.

However, Bangladesh continues to manifest severe problems with deterioration of law and order in the country and the rise of militant Islamisation due to the prevalent 'war on terror' engaged in by the United States, which was aggravated by the recent military assaults on Afghanistan and Iraq. Discipline in both public and private sectors still stand depreciated and overall education, health and sanitary conditions throughout the country are still poor.

Conclusion

In comparing and contrasting the relationship between religion and politics in post-colonial South Asian States, the foregoing account would reveal the diverse stances taken by component states in the South-Asian region in the context of religion and politics.

While India and Pakistan capitalized on predominantly religious lines, albeit, to remain in power domestically in the first instance, it employed the same to counter external pressures internationally, (perhaps, providing a semblance of a defensible attitude in the eyes of a conservative school of thought).

Bangladesh initially separated on a secularist philosophy but is now seen as having shifted to a religious platform to preserve its contemporaneous political pursuits, which consequentially must relegate it to the same category to which India and Pakistan fall, with no dichotomy between religion and politics notwithstanding its initial boast.

The Sri Lankan context ⁷⁵ leaves room for conjecture particularly in view of three recent Supreme Court determinations on Parliamentary Bills where the issue of religious conversions surfaced.

In the Bill entitled "Christiani Sahanaye Doratuwa Prayer Centre (Incorporation)"⁷⁶ and the Bill entitled "New Wine Harvest Ministries (Incorporation),"⁷⁷ the Supreme Court struck down the said Bills on the basis that they contained seeds of unconstitutional conversion by economic or related measures directed at allurements.

⁷⁵ With reference to religion

⁷⁶ S.C. determination No. 2/2001, SCM, 24.05.2001

⁷⁷ S.C. determination No.2/2003, SCM, 29. 1.2002

The most recent determination of the Supreme Court⁷⁸ in this regard In respect of a Bill titled "Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka (Incorporation), holds in effect that, in the light of Article 9 of the Constitution of Sri Lanka,⁷⁹ measures and/or initiatives taken by Buddhist organizations to convert adherents of other religions to Buddhism should be conferred a pre-eminent constitutional status. To some, this appears to have struck the (death) knell of secularism in Sri Lanka.

The socio-political cum religious implications of the said determinations remain to be seen in the future. Would Sri Lanka fall into the Indu-Pakistani and/or Bangladeshi consensus? Or would it endeavour to pursue a path that balances constitutional dictates of the past with a strongly felt present day need for religious unity rather than disunity? Only time will tell.

⁷⁸ SC Determination No-19/2003, SCM, 25.7.2003

⁷⁹ which mandates that, "The Republic of Sri Lanka shall give the 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).

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