

USING LEGISLATION TO PROTECT AGAINST UNETHICAL CONVERSIONS IN SRI LANKA

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INTRODUCTION

The year 2006 marked the twenty-fifth anniversary of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. In her recent report to the United Nations General Assembly, Asma Jahangir, the U.N. Special Rapporteur on freedom of religion or belief, stated that despite the time that has elapsed since the Declaration was drafted, it “seems evident that contentious religious issues have not only evolved but also become more acute in many societies.”¹ In a report submitted to the Commission on Human Rights in late 2004, the Special Rapporteur listed “the continuing violations of human rights of members of certain religious minorities, as well as the still widely applied practice of forced conversion” among the main concerns in the area of freedom of religion.² Jahangir said that she considers that “such a practice breaches the strongest and most fundamental part of freedom of religion or belief and should be given greater attention by the international community.”³

In May 2005 the Special Rapporteur made an *in situ* visit to Sri Lanka⁴—a country where the issue of unethical conversions has fueled

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1. Asma Jahangir, *Elimination of All Forms of Religious Intolerance*, Interim Report of the Special Rapporteur of the Commission on Human Rights on Freedom of Religion or Belief, submitted in accordance with General Assembly resolution 59/199, at ¶ 3 U.N. Doc. A/60/399 (Sept. 30, 2005).

2. Asma Jahangir, *Civil and Political Rights, Including the Question of Religious Intolerance*, Report submitted by Special Rapporteur on freedom of religion or belief to the Commission on Human Rights, at ¶ 74 U.N. Doc. E/CN.4/2005/61 (Dec. 20, 2004).

3. *Id.*

4. Asma Jahangir, *Civil and Political Rights, Including the Question of Religious Intolerance: Mission to Sri Lanka*, Addendum to the Report submitted by the Special Rapporteur on freedom of religion or belief to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/5/Add.3 (Dec. 12, 2005).

religious tensions in recent years. Approximately 69% of Sri Lanka's population are Buddhists, followed by Hindus (15%), Christians (8%), Muslims (7%) and others (1%). Despite such a majority, the ethnic conflict which has affected Sri Lanka for decades, and which began to escalate again in December 2005 and throughout 2006-07, has been largely devoid of a religious element: relations between the different religious groups have for some time been relatively peaceful.⁵ This religious co-existence has, however, begun to deteriorate, due largely to the issue of unethical conversions and a desire to protect the majority religion.

The Special Rapporteur has stated that "questions related to change of religion are at the very heart of the mandate on freedom of religion or belief."⁶ It is indeed this issue that has formed the basis of religious tensions in Sri Lanka. The question to which this article turns is how a state, in the face of mounting claims of unethical conversions, can use the law to try to protect freedom of religion for all. The need to protect against forced conversions is not disputed, and as the Special Rapporteur has commented, there are indeed situations in which "certain actions aimed at converting people go beyond conventional forms of missionary activities or propagation of religion . . . [and] cannot be considered as a 'manifestation' of religion or belief" deserving of protection.⁷ Although this issue has been prevalent in Sri Lanka for some years, it is particularly true in the post-tsunami context, where allegations of improper activity by some faith-based organizations have been numerous.⁸ The question, Jahangir says, "is how the State should address such actions."⁹

In Sri Lanka, there has been a series of attempts to pass legislation to protect against unethical conversions. The perception over recent years of continued threats against Buddhism by minority religions led to the preparation of two bills prohibiting unethical conversions. In June 2005, the Sri Lankan government announced that it was enacting the legislation, which had been the center of discussions since 2003, so as to

5. See e.g. United States Department of State (Bureau of Democracy, Human Rights and Labor), *International Religious Freedom Report for 2005*, <http://www.state.gov/g/drl/rls/irf/2005/51622.htm> (Nov. 8, 2005) (accessed Mar. 21, 2007).

6. Jahangir, *supra* n. 1, at ¶ 40.

7. *Id.* at ¶ 64.

8. *Id.* at ¶ 56. See also Asma Jahangir, *Special Rapporteur on Freedom of Religion or Belief Ends Visit to Sri Lanka*, U.N. Press Release, <http://www.unhcr.ch/hurricane/hurricane.nsf/0/CDBB51F178AD696EC1256FFF0038D065?opendocument> (May 12, 2005) (accessed Mar. 21, 2007). See Jahangir, *supra* n. 4, ¶¶ 48-51, 115 (for the Special Rapporteur's assessment of the complaints of unethical conversions).

9. Jahangir, *supra* n. 1, at ¶ 65.

“ward off threats” faced by Buddhism from certain other religious groups.¹⁰ The then-Minister of Buddha Sasana, Ratnasiri Wickremanayake, stated that people must “accept the reality” that Buddhism is under threat, and that the protective legislation is in no way intended to harm or undermine other religions.¹¹ The Jathika Hela Urumaya (“JHU”), a minor political party composed of Sinhala nationalists and represented in Parliament by a group of Buddhist monks has also introduced an unethical conversion bill. The JHU Bill was subsequently challenged before the Supreme Court and was held to be unconstitutional for violating the right to freedom of religion.¹² In order to circumvent this ruling, the JHU then attempted to amend the Constitution itself¹³ to proclaim Buddhism as the State religion and prohibit the conversion of Buddhists outright. The Supreme Court also held this to be unconstitutional.¹⁴

The introduction of “protective” legislation raises Nowak and Vospernik’s question: “[a]t what point does the state have a right or even a duty to intervene in order to protect freedom of thought and religion?”¹⁵ Tad Stahnke has described the task facing states in this regard as “an admittedly fine line between securing minimum conditions for a free choice of religion or belief and protecting against the erosion of the ability to maintain the religion or belief that has been chosen.”¹⁶ Even a cursory glance at the draft legislation shows that the line being walked in Sri Lanka is far from one that secures and protects fundamental rights.

10. *Legislation to be introduced to implement Buddhist Commission recommendation—Buddha Sasana Minister*, Daily News 3 (June 1, 2005) (available at <http://www.dailynews.lk/2005/06/01/>).

11. *Id.*

12. *Prohibition of Forcible Conversion*, S.C. Determination No. 4/2004 (T.B. Weerasuriya, N.E. Dissanayake, Raja Fernando JJ). This is an unreported judgment. No official page numbers or paragraph numbers for pinpoint referencing are provided (copy in author’s possession).

13. *Nineteenth Amendment to the Constitution Bill*. Published in the Gazette on Nov. 1, 2004, <http://www.srilankachristians.com/legislation.html> (accessed Mar. 21, 2007).

14. *Nineteenth Amendment to the Constitution*, S.C. Determination No. 32/2004 (Weerasuriya, Shiranee Tilakawardane, Raja Fernando JJ). This is an unreported judgment. No official page numbers or paragraph numbers for pinpoint referencing are provided (copy in author’s possession).

15. Manfred Nowak & Tanja Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, in *Facilitating Freedom of Religion or Belief: A Deskbook* 147, 149 (Tore Lindholm et al. eds., Martinus Nijhoff Publishers 2004).

16. Tad Stahnke, *The Right to Engage in Religious Persuasion*, in *Facilitating Freedom of Religion or Belief: A Deskbook*, *supra* n. 15, at 619, 649.

The Government and JHU Bills remain to be enacted,¹⁷ though they have, in part, already been ruled unconstitutional. This article is, therefore, an examination of violations of rights that at present exist only in theory. However, an analysis of their content nevertheless seeks to add weight to the numerous calls in Sri Lanka for a non-legislative solution to the issue,¹⁸ as well as to contribute to the broader discussion in the international arena on the issue of proselytism. For while Sri Lanka needs to find a balance between freedom to manifest a religion and numerous other rights, including freedom from forced or unethical conversions, the issue is not unique to that country. Nowak and Vospernik's study from various jurisdictions shows "the difficulties of striking a fair balance between manifestations of freedom of religion on the one hand and the protection of public interests as well as human rights of private persons on the other."¹⁹ Finding this balance is a complex and difficult task in practice,²⁰ and the Sri Lankan example of using anti-conversion legislation to attempt to achieve it certainly supports the Special Rapporteur's opinion that "the adoption of laws criminalizing in abstracto certain acts leading to 'unethical' conversion should be avoided"²¹

FREEDOM OF RELIGION IN SRI LANKA

The push for anti-conversion legislation in Sri Lanka is explained by reference to the country's Constitution, recent case-law relating to freedom of religion, and vague accounts of unethical conversion activity. Buddhism is not the official state religion in Sri Lanka, though it is accorded a special position under the Constitution. Article 9

17. This article is current as of Nov. 6, 2006. On Apr. 5, 2006 the Parliamentary Speaker, W.J.M. Lokubandara, announced the names of a 19-member Standing Committee on the Prohibition of Forcible Conversion of Religion Bill (the JHU Bill). The JHU Bill has apparently passed the Second Reading and is being considered by the Standing Committee. In relation to the general progress of anti-conversion legislation in Sri Lanka, the Special Rapporteur notes that the adoption process has remained relatively slow, and that the Government Bill has been delayed numerous times, probably due to "reluctance on the part of Sri Lankan society" and "the outcry from the international community." Jahangir, *supra* n. 4, at ¶ 57.

18. Discussion has mainly centered on the creation of an Inter-Religious Council. It has been suggested that the Council be composed of religious leaders, with part of its function to investigate and report on allegations of unethical religious conversions and practices. The Special Rapporteur considers this alternative to be advantageous. See Jahangir, *supra* n. 4, at ¶¶ 107, 123, 129.

19. Nowak & Vospernik, *supra* n. 15, at 172.

20. Stahnke, *supra* n. 16, at 619.

21. Jahangir, *supra* n. 1, at ¶ 68. See also Janangir, *supra* n. 4, ¶ 105 (where the Special Rapporteur described the proposed legislation as "not an adequate response to existing religious tensions.").

provides that the Republic of Sri Lanka “shall give to Buddhism the foremost place” and that, therefore, the State is under a duty “to protect and foster” it.²² However, Article 9 further provides that the State must do this while also assuring to all religions the rights to freedom of religion and freedom to manifest a religion. This is undoubtedly a difficult balance to achieve, and the draft legislation in question reveals the complexities involved in protecting and fostering a majority religion while simultaneously guaranteeing the rights of minority groups.

CONSTITUTIONAL PROTECTIONS

Various basic human rights, referred to as “Fundamental Rights,” are protected in Sri Lanka’s current Constitution, adopted in 1978. These rights are found in Chapter III and include, for example, the right to equality and non-discrimination,²³ and the right to freedom of speech, assembly, association, occupation and movement.²⁴ The provisions of Chapter III regarding freedom of religion are found in Articles 10, 12 and 14, which relevantly provide as follows:

Article 10:

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

Article 12:

(1) All persons are equal before the law and are entitled to equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds . . .

Article 14(1):

Every citizen is entitled to—

. . .

22. Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 9. The Buddha Sasana involves all aspects connected to the practice of Buddhism.

23. *Id.* at art. 12.

24. *Id.* at art. 14.

(e) 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 or teaching; . . .²⁵

Not all fundamental rights guaranteed in Chapter III of the Constitution are absolute. While the freedoms of thought, conscience and religion in Article 10 are unrestricted freedoms,²⁶ Articles 12 and 14 are subject to Article 15(7):

such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.²⁷

As stated above, Buddhism also receives special protection under the Constitution. Article 9 states:

The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).²⁸

Such a provision is filled with inherent complexities, particularly in relation to its practical application. While guaranteeing freedom of religion for all may be simple on paper, in reality this is difficult to achieve.

In fact, the breadth of protection of religious rights and freedoms in Sri Lanka is limited by the law itself. While the Constitution provides for the enforcement of fundamental rights by individuals against the State, judicial review of any law that has been successfully enacted by Parliament is not allowed.²⁹ So although the Supreme Court has sole and exclusive jurisdiction respecting infringement or imminent infringement of a person's fundamental rights by executive or administrative action,³⁰ it cannot review any enacted legislation, even if it is clearly inconsistent with the fundamental rights provisions of the Constitution.³¹

25. *Id.* at arts. 10, 12(1, 2), 14(1)(e).

26. Subject only to written or unwritten laws in force at the time the Constitution came into operation. *Id.* at art. 16(1).

27. *Id.* at art. 15(7).

28. *Id.* at art. 9.

29. *Id.* at art. 80(3). See Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (Navrang 1996) and R.K.W. Goonesekere, *Fundamental Rights and the Constitution: A Case Book* (Law & Socy. Trust 1988) (for a discussion of the history of the fundamental rights provisions of the Constitution).

30. Constitution of Sri Lanka, at art. 17, 126(1).

31. *Id.* at art. 80(3).

Certain constitutional safeguards do exist; however, they provide only minimal comfort to those whose rights are threatened. A bill can be challenged before the Supreme Court for being unconstitutional before it is passed by Parliament,³² yet this does not necessarily prevent its enactment.³³ Also, the Constitution allows only a seven-day window within which to commence such a challenge.³⁴ The Supreme Court can then rule that the bill is inconsistent with the Constitution and must be passed by a special majority of Parliament.³⁵ Further, if the bill is inconsistent with, *inter alia*, Articles 9 and 10, it must also be approved at a referendum.³⁶ This may seem like a form of protection, though it must surely be of concern that fundamental rights can be violated if a majority agrees. The lack of any legitimate safeguards is especially worrying in relation to the protection of the rights of religious minorities where an overwhelming majority adhere to one religion, as is the case in Sri Lanka.

THE INCORPORATION CASES

Since 2001, there have been three successful challenges in the Sri Lankan Supreme Court (“Supreme Court”)³⁷ to Private Members’ Bills seeking to incorporate Christian organizations (“the incorporation cases”).³⁸ No specific behavior that had actually led to unethical conversions was at issue—rather, the challenges were focused on the potential of unethical conversion. The arguments and court decisions in all three cases were largely the same: that combining religious objectives with economic/commercial activities (providing assistance and uplifting the socio-economic conditions of those attending the center, for example by providing job training) would necessarily result in a distortion of the

32. *Id.* at art. 121(1).

33. *Id.* at art. 82, 83, 123.

34. Objections must be lodged with the Supreme Court within seven days of the Bill being placed on the Order Paper of Parliament. *Id.* at art. 121(1).

35. Not less than two-thirds of the whole number of Members (including those not present). *Id.* at art. 123(2), 84(2).

36. *Id.* at art. 83, 84, 123.

37. Sri Lanka’s apex court.

38. *Christian Sahanaye Doratuwa Prayer Centre (Incorporation)*, S.C. Determination No. 2/2001 (Sarath N. Silva CJ, Shirani A. Bandaranayake, Ameer Ismail JJ); *New Wine Harvest Ministries Incorporation*, S.C. Special Determination No. 2/2003 (Sarath N. Silva CJ, H.S. Yapa, T.B. Weerasuriya JJ); *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)*, S.C. Special Determination No. 19/2003 (Shirani A. Bandaranayake, H.S. Yapa, Nihal Jayasinghe JJ) [hereinafter *Menzingen Incorporation Case*] (copies in author’s possession). For a full analysis of these cases, see Alexandra Owens, *Protecting Freedom of and from Religion: Questioning the Law’s Ability to Protect Against Unethical Conversions in Sri Lanka*, 1 J. Religion Human Rights 41 (2006).

right to freedom of religion given the potential for conversion due to allurements (providing material or other benefits). The decisions received much criticism, most notably by the U.N. Human Rights Committee which recently found one of the judgments to be in violation of various basic human rights.³⁹

The three incorporation cases are a fundamental part of the background to the development of anti-conversion legislation in Sri Lanka. It is only necessary here, however, to give a brief analysis of the decisions to explain the general scene within which the proposed bills surfaced.⁴⁰ These decisions are important, though, in illustrating the extent to which legal institutions have struggled in Sri Lanka to protect freedom of religion for all in practice, which supports calls for a non-legislative approach to the issue.

The first incorporation case occurred in 2001,⁴¹ with two later cases in 2003.⁴² All challenged the constitutionality of a bill introduced before Parliament under the process I have outlined. The bills in question sought to incorporate Christian organizations—something necessary in Sri Lanka to gain corporate legal personality.⁴³ This process was not out of the ordinary for a religious organization in Sri Lanka; in fact, numerous other religious groups with similar objectives have been successfully incorporated. The objectives of the proposed corporation set out in the bill that was the subject of the 2001 decision, which are substantially similar to the objectives in the other two cases, were:

- (a) to encourage the active observance of Christianity;
- (b) to promote the co-operation of the devotees who have faith in the prayer of God;
- (c) to provide assistance and aid to 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;

39. *Views of the Human Rights Committee under art. 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, 85th Sess., concerning Commun. No. 1249/2004, CCPR/C/85/D/1249/2004 (Oct. 31, 2005), [hereinafter *Views of the Human Rights Committee*].

40. For a full discussion of the incorporation cases, see Owens, *supra* n. 38.

41. *Christian Sahanaye Doratuwa Prayer Centre (Incorporation)*, *supra* n. 38.

42. *New Wine Harvest Ministries Incorporation*, *supra* n. 38; and *Menzingen Incorporation Case*, *supra* n. 38.

43. Jahangir, *supra* n. 4, at ¶ 30.

- (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 persons 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 . . .⁴⁴

The legal challenge arose because the 2001 Bill (as with the Bills in the 2003 cases) also sought to provide the organization with the following powers:

- (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 . . .⁴⁵

Many of the already incorporated religious organizations in Sri Lanka also hold such financial powers.⁴⁶

In each case, it was argued that the objectives of the organizations included economic and commercial activities (providing assistance and job training, etc.) in addition to religious ones, and that giving such organizations financial powers would necessarily result in conversions through allurement or other subtle means.

The Supreme Court held on each occasion that the right to freedom of thought, conscience and religion contained in Article 10 of the Constitution should be protected against any fetter of allurement which in any way distorts the choice to adopt a religion or belief of a person's choosing, and that the economic and commercial activities of the organizations would do just that. The Court stated in the first of the 2003 cases that the

allurement 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

44. *Christian Sahanaye Doratuwa Prayer Centre (Incorporation)*, *supra* n. 38 (citing the Private Member's Bill, cl. 3). The Bill was presented by Mr. John Amaratunga, MP for Gampaha District on May 10, 2001, published in the Gazette on Apr. 30, 2001 and placed on the Order Paper of Parliament on May 10, 2001 as a Private Member's Bill.

45. *Id.* (citing the Bill at cl. 4).

46. *Views of the Human Rights Committee*, *supra* n. 39, at ¶ 7.4.

guaranteed by Article 10 of the Constitution.⁴⁷

As a result of this breach of Article 10, if the bills were to be passed, they had to be passed by a special majority of Parliament and approved at a referendum.

The *Menzingen Incorporation* case in 2003 went even further than the other two cases, interpreting the interaction of Article 9 with other fundamental rights provisions relating to freedom of religion. The Petitioners argued that a person of a religion other than Buddhism could exercise their rights to freedom of religion and freedom to manifest their religion as long as it would not affect the Buddha *Sasana*. The prayer center in question had as one of its aims the propagation of Christianity. The Court held that the propagation and spreading of Christianity “would not be permissible as it would impair the very existence of Buddhism.”⁴⁸

The Christian order of sisters whose work was impacted by this ruling took their case to the U.N. Human Rights Committee. The Committee, in finding that the Supreme Court decision resulted in a breach of Articles 18(1) and 26 of the International Covenant on Civil and Political Rights (“ICCPR”), stated that

for numerous religions . . . it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual’s manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.⁴⁹

That is, the limits placed on the freedom to manifest a religion by the judgment needed to be justified, and it had not been shown that these limits were necessary.⁵⁰

The Supreme Court decisions illustrate the struggle the Sri Lankan legal system has had with protecting and fostering Buddhism while simultaneously guaranteeing religious freedom to others. The decisions, together with the anti-conversion bills discussed below, force one to question whether the law can be used in Sri Lanka to achieve a balance between fostering one religion and protecting others.

47. *New Wine Harvest Ministries Incorporation*, *supra* n. 38.

48. *Menzingen Incorporation Case*, *supra* n. 38.

49. *Views of the Human Rights Committee*, *supra* n. 39, at ¶ 7.2 (footnote omitted).

50. *Id.*

THE PUSH FOR ANTI-CONVERSION LEGISLATION

Some politicians initially thought that the decisions in the incorporation cases would set a legal precedent capable of preventing, or at least dealing with, unethical conversions in Sri Lanka. However, as I will show, the idea of legislating to provide greater protection resurfaced in response to continuing and numerous complaints of unethical conversions across the island.

Calls for anti-conversion legislation in Sri Lanka began to surface in the time surrounding the incorporation cases, well before the tsunami. In 2003, both the Buddhist lobby and the-then-Minister for Justice, Law Reforms and National Integration, and for Buddha Sasana, W.J.M. Lokubandara, started a “collective effort” to launch anti-conversion legislation.⁵¹ However, in August 2003, following the Supreme Court decision in the *Menzingen Incorporation Case*, Lokubandara announced: “This is a clear judgment. It has clearly said unethical conversions are illegal. This will give us the legal backing to stop this kind of activity carried out in the name of religion.”⁵² As a result, the Minister said that legislation was no longer necessary given the firm legal position provided by the Supreme Court’s decision.⁵³

The issue of legislation resurfaced despite this ruling, and by December 2003 the Government announced it was exploring the possibility of introducing new laws to curb the rising incidence of unethical conversions. Lokubandara stated:

Thousands of complaints on unethical conversions have been lodged by individuals, organizations and government authorities to the Ministry and the Commissioner of Buddha Sasana. These complaints are from all parts of the island.⁵⁴

Finally, in response to a fast-unto-death campaign led by senior JHU members, Ven. Dr. Omalpe Sobitha Thera and Ven. Rajawatte Vappe Thera, the Minister gave an undertaking on December 30, 2003 that the Government would introduce new laws designed to deal with unethical conversions within sixty days.⁵⁵

51. Frederica Jansz, *Conversion Confusion*, 10 *The Sunday Leader* 16 (Sept. 7, 2003).

52. Chandani Kirinde, *No fundamental right to spread a religion: SC*, 38 *The Sunday Times*, (Aug. 10, 2003) (available at <http://sundaytimes.lk/030810/index.html>).

53. *Id.*

54. Shanika Sriyananda, *New laws to stop unethical religious conversions*, *Sunday Observer* (Dec. 21, 2003) (available at <http://www.sundayobserver.lk/2003/12/21/new11.html>).

55. Santhush Fernando, *Bill soon in Parliament to curb unethical conversions*, 38 *The Sunday Times* 4 (Jan. 4, 2004).

A Special Committee was established in January 2004 by then-Prime Minister Ranil Wickremesinghe to formulate anti-conversion laws. Meanwhile, the JHU commenced drafting its own legislation. As a result, by mid-2004 two draft anti-conversion bills had emerged. The Government's Bill was submitted to the Cabinet by the then-Minister of Buddha Sasana, Ratnasiri Wickremanayake, and received Cabinet approval on June 16, 2004.⁵⁶ However, it was only gazetted over a year later on June 27, 2005, and remains to be placed on the Order Paper of Parliament.⁵⁷ The JHU's Bill was gazetted on May 31, 2004 and placed on the Order Paper of Parliament on July 21, 2004.⁵⁸ After this bill was ruled unconstitutional in the Supreme Court, the JHU then proposed amending the Constitution itself.⁵⁹

What is not altogether clear in the history of the anti-conversion bills is the extent to which unethical conversions are actually occurring in Sri Lanka. In her report following her mission there, the U.N. Special Rapporteur on freedom of religion commented on the complaints of unethical conversions:

The description of behaviour complained of is not clear . . . It is claimed, in particular, that some groups promise material benefits such as food and medicine, bicycles or even housing. In some cases, assistance was promised with getting a job or an authorization to build a house. . . . After the tsunami, it was reported that in the east of the country many have converted for health reasons because medical assistance and supplies were brought in by Christian non-governmental organizations and groups.⁶⁰

In her assessment of the complaints, Jahangir noted that the incidents "were usually vaguely described and unclear with regard to the circumstances."⁶¹ Despite numerous requests, she did not meet any person who had changed his or her religion due to improper means. Nevertheless, the Special Rapporteur stated that some organizations have demonstrated behaviors that, "while not constituting per se violations of the freedom of religion of others, were very disrespectful

56. U.S. Dept. of St., *supra* n. 5.

57. *Id.*

58. *Prohibition of Forcible Conversion of Religion Bill* [hereinafter *JHU Bill*]. Published in the Gazette on May 31, 2004 and presented before Parliament by the Venerable Dr. Omalpe Sobhitha Thero on July 21, 2004, MP.

59. *Nineteenth Amendment to the Constitution Bill*, *supra* n. 13.

60. Jahangir, *supra* n. 4, at ¶¶ 43, 45.

61. *Id.* at ¶ 48.

and dishonest vis-à-vis the local population.”⁶²

PROPOSED ANTI-CONVERSION LEGISLATION IN SRI LANKA

The introduction of anti-conversion legislation in Sri Lanka is fraught with problems of both a practical and theoretical nature. The Special Rapporteur stated that the draft laws “do indeed raise concern in terms of human rights law.”⁶³ She also highlighted the difficulties pertaining to future implementation of the laws.⁶⁴ Sri Lanka’s incorporation cases illustrated the practical difficulty of striking a fair balance between manifestations of religion and the protection of other human rights.⁶⁵ Further, the introduction of this type of “protective” legislation raises Nowak and Vospernik’s broader question stated earlier in this article: “[a]t what point does the state have a right or even a duty to intervene in order to protect freedom of thought and religion?”⁶⁶

GOVERNMENT AND JHU BILLS

As indicated in their preambles, both bills share similar objectives: promoting the religious harmony that has traditionally been enjoyed in Sri Lanka. The Government Bill is entitled *Freedom of Religion*,⁶⁷ and in addition to prohibiting unethical conversions, the preamble states that it is “an Act to protect the freedom of religion enjoyed by the people of Sri Lanka from time immemorial; to encourage mutual cordiality between peoples of all religions.”⁶⁸

The JHU Bill is titled *Prohibition of Forcible Conversion of Religion*.⁶⁹ Its long title describes it as “an Act to provide for prohibition of conversion from one religion to another by use of force or

62. *Id.* at ¶ 50.

63. *Id.* at ¶ 73.

64. *Id.* at ¶¶ 76-78.

65. See Owens, *supra* n. 38.

66. Nowak & Vospernik, *supra* n. 15, at 149.

67. The Government’s *Freedom of Religion Bill* (see *infra* n. 68) is a revised version of an earlier draft Bill prepared by the Government entitled *Protection of Religious Freedom*. The Special Rapporteur commented that she was not able to ascertain to what extent the various draft bills were public documents, but that she had received a copy of the drafts and noted that they had been widely circulated among the public, including via the Internet. Jahangir, *supra* n. 4, at ¶ 58. It should be noted that the Protection of Religious Freedom Bill was also widely circulated, and received much criticism, especially as it seemed to prohibit all conversions, whether ethical or not: “No person shall convert or attempt to convert another person to another religion, and no person shall provide assistance or encouragement towards conversion to another religion” (cl. 0.2, Protection of Religious Freedom Bill).

68. *Freedom of Religion Bill* [hereinafter *Government Bill*], Preamble. Published in the Gazette on June 27, 2005.

69. *JHU Bill*, *supra* n. 58.

allurement or by fraudulent means and for matters incidental therewith or incidental thereto.” The context in which the JHU Bill developed is evident in the Preamble, which relevantly states the reasons for legislative action:

And whereas, the Buddhist and non Buddhists are now under serious threat of forcible conversions and proselyzing by coercion or by allurement or by fraudulent means:

And whereas, the Mahasanga and other religious leaders realizing the need to protect and promote religious harmony among all religions, historically enjoyed by the people of Sri Lanka⁷⁰

THE PROHIBITION OF CONVERSION BY FORCE, FRAUD OR ALLUREMENT

The objectives of the Government Bill—to protect freedom of religion for all—seem misplaced upon close examination of the actual provisions of the Bill. It provides:

No person shall unethically convert or attempt to unethically convert any other person espousing one religion, or holding or belonging to, one religious belief, religious persuasion or faith, to another religion, religious belief, religious persuasion or faith which such person does not hold or belong to. No person shall abet any such unethical conversion.⁷¹

The Bill defines “unethically convert” as:

(a) to directly or indirectly make, persuade or influence a person to renounce his religion, religious belief, religious persuasion or faith and to adopt another religion, religious belief, religious persuasion or faith which such person does not hold or belong to; or

(b) to intrude on the religion, religious belief, religious persuasion or faith of such person, with the aim of undermining the religion, religious belief, religious persuasion or faith which such person does not hold or belong to,

either by use of any kind of allurement or promise of allurement, or inducement or promise of an inducement, or of moral support or promise of moral support, or of material assistance or promise of material assistance, or by fraudulent means or by coercion or by the use of force or by other means or by taking advantage of such person’s inexperience, trust, need, low intellect, naivety or state of distress.⁷²

70. *JHU Bill*, Preamble, *supra* n. 58.

71. *Government Bill*, at cl. 2(1), *supra* n. 68.

72. *Id.* at cl. 10.

“Allurement” is defined to include “the offer of any gift or gratification either in cash or kind, or the grant of any benefit either pecuniary or otherwise,” and “force” includes “a show of force including threat, harm or injury of any kind or a threat of divine displeasure or condemnation of any religion, religious faith or of social excommunication.”⁷³

Similarly, clause 2 of the JHU Bill is directed at a person who attempts to convert another by the use of force, allurement or other fraudulent means. It states:

No person shall convert or attempt to convert, either directly or otherwise, any person from one religion to another by the use of force or by allurement or by any fraudulent means nor shall any person aid or abet any such conversions.⁷⁴

In the JHU Bill, “allurement” is similarly defined to mean: offer of any temptation in the form of—

- (i) any gift or gratification whether in cash or kind;
- (ii) grant of any material benefit, whether monetary or otherwise;
- (iii) grant of employment or grant of promotion in employment.⁷⁵

Like the Government Bill, “force” is defined to “include a show of force including a threat or harm or injury of any kind or threat of religious displeasure or condemnation of any religion or religious faith.”⁷⁶ The JHU Bill also provides that “fraudulent” means “[misrepresentation] or any other fraudulent contrivance.”⁷⁷

These definitions in both bills are incredibly broad and vague in nature. The terms could no doubt be interpreted to capture an extremely wide range of behavior,⁷⁸ thus restricting many aspects of religious freedom.

CONVERSIONS WHERE THERE IS A RELATIONSHIP OF TRUST AND POWER

The Government Bill also prohibits various acts or behavior committed in relationships by those who hold positions of trust over more vulnerable people. Clause 3 prohibits people in these positions of power (for example, employers, police, teachers, prison officers, etc.)⁷⁹

73. *Id.*

74. *JHU Bill*, at cl. 2, *supra* n. 58.

75. *Id.* at cl. 8(a).

76. *Id.* at cl. 8(c).

77. *Id.* at cl. 8(d). “Misrepresentation” is misspelled in the *JHU Bill* as “misinterpretation.”

78. *See* Jahangir, *supra* n. 4, at ¶ 66.

79. *See Government Bill*, at cl. 10 (definition of “person in a fiduciary capacity”), *supra* n. 68.

from compelling or coercing others to attend prayers or prayer meetings, or attempting to do so. Clause 3 also prohibits these categories of people from discriminating against those who do not attend prayers or prayer meetings, and from denying such people any rights or privileges to which they would otherwise have been entitled.

Further, the Government Bill states that if an offence is committed in one of the places where a fiduciary relationship exists (schools, hospitals, refugee camps etc.), then it “shall constitute an aggravating circumstance which shall be taken into consideration in imposing punishment.”⁸⁰ The usual penalty for offenses under the bill is imprisonment for a period not exceeding five years and a fine not exceeding Rs 100,000.⁸¹ However, where the offense is committed against a minor, the punishment increases to a maximum prison term of seven years and a maximum fine of Rs 500,000.⁸² These penalties are particularly concerning, given the broad nature of conversion attempts and other acts captured by the Bill.

The JHU Bill does not have a specific clause that relates to conduct where there is a relationship of trust or power. It does, however, have a different penalty system that applies to offenses where such a relationship is involved. Contravention of the prohibition against unethical conversions in clause 2 of the JHU Bill is ordinarily punishable by imprisonment for up to five years and a fine not exceeding Rs 150,000.⁸³ However, if the converted person is a minor, a woman or a person referred to in Schedule 1 of the bill (for example, prisoners, inmates of rehabilitation or detention centers, physically or mentally disabled, employees, students, hospital patients, etc.), the penalty increases to imprisonment for up to seven years and a maximum fine of Rs 500,000.⁸⁴

PROHIBITION OF PROSELYTISM

The Government Bill also makes it an offense to accost (“the confronting of a person in a public place or the intrusion into the privacy of a person either at home or at the place of work”)⁸⁵ any other person with a view to converting or attempting to convert that person.⁸⁶ As the

80. *Id.* at cl. 7(2).

81. *Id.* at cl. 7(1). Rs 100 is the equivalent of approximately U.S. \$1.00.

82. *Id.*

83. *JHU Bill*, at cl. 4(a), *supra* n. 58.

84. *Id.*

85. *Government Bill*, at cl. 10, *supra* n. 68.

86. *Id.* at cl. 4(1).

Special Rapporteur commented, this challenges “an aspect of the right to manifest one’s religion.”⁸⁷ The issue concerning the appropriate level of state intervention in the freedom to proselytize is complex. As Sullivan states:

Proselytizing may set the rights of those whose religious faith encourages or requires such activity in opposition to the rights of those targeted to be free from coercion to change their beliefs. The latter right is not a legitimate basis for denying believers the freedom to engage in *non-coercive* forms of proselytizing⁸⁸

As the U.N. Human Rights Committee stated in the *Menzingen* decision for many people, it is a central tenet of their religion to spread knowledge of the religion and to propagate their beliefs. Indeed, it was argued in the constitutional challenge to the JHU Bill (see below) that an attempt to regulate the manifestation and practice of religion as guaranteed in both the ICCPR and the Sri Lankan Constitution in effect negates and nullifies the right to freedom of religion.

CONDITIONS ON THE RIGHT TO CHANGE RELIGION

The JHU Bill does not contain an equivalent prohibition on proselytism. It does, however, place conditions on the right to change religion, by making it an offence to convert to another religion, or to convert someone else to another religion, and not to inform the Divisional Secretary that the conversion took place. Clause 3 states:

(a) Whoever adopts a religion from one religion to another shall within such period as may be prescribed by the Minister, send an intimation to that effect to the Divisional Secretary of the area in which such adoption took place.

(b) Whoever converts any person from one religion to another either by performing any ceremony by himself for such conversion as a facilitator or by taking part directly or indirectly in such ceremony shall within such period as may be prescribed by the Minister, send in an intimation to that effect to the Divisional Secretary of the area in which such adoption took place.⁸⁹

A violation of either of the above subclauses is punishable by imprisonment for up to five years or a fine not exceeding Rs 150,000.⁹⁰

87. Jahangir, *supra* n. 4, at ¶ 74.

88. Donna Sullivan, *Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Tolerance and Discrimination*, 82 Am. J. Intl. L. 487, 494 (1988).

89. *JHU Bill*, at cl. 3, *supra* n. 58.

90. *Id.* at cl. 4(b).

INSTITUTING PROCEEDINGS UNDER THE BILLS

Finally, the enumeration of people who are able to bring an action under both the Government and JHU Bills is surprisingly broad. The Special Rapporteur has noted that the right to change a religion is essentially a “subjective right,” and that any concerns about how the conversion took place should be raised by the alleged victim.⁹¹ Yet, the Government Bill allows an action to be initiated by “a person who has reason to believe that the provisions of the Act have been violated, with leave of Court.”⁹² It is not clear who is anticipated by this clause but the potential for someone with no relationship to the “victim” to interfere in a person’s freedom to have or adopt a religion of their choosing is worrying. As stated by the Special Rapporteur,

the adoption of laws criminalizing in abstracto certain acts leading to “unethical” conversions should be avoided, *in particular* where these laws could apply even in the absence of a complaint by the converted person.⁹³

Similarly, the JHU Bill allows an extremely wide range of people to institute proceedings before a Magistrate. These include a Divisional Secretary or an “officer authorized by him,” the Police (following a complaint made by an aggrieved person, the father/mother/guardian of a minor, or “any other interested person who has reasons to believe that the provisions of the act has been violated, acting in the public interest”), a person aggrieved by the offense, an Attorney-at-Law, and “any person authorised by the Minister.”⁹⁴ As suggested, this law could apply in the absence of a complaint by the alleged victim.

CONSTITUTIONAL CHALLENGE TO THE JHU BILL

Following the tabling of the JHU Bill in Parliament, twenty-one petitions were filed in the Supreme Court seeking a determination that the bill was inconsistent with various provisions of the Constitution and as a result needed to be passed by a special majority of Parliament as well as in a referendum.⁹⁵

The Court first considered the Petitioners’ argument that the provision prohibiting conversions by force, fraud or allurement (clause 2), read together with the interpretation clause of the bill (clause 8), was

91. Jahangir, *supra* n. 1, at ¶ 65; Jahangir, *supra* n. 4, at ¶ 73.

92. *Government Bill*, at cl. 6, *supra* n. 68.

93. Jahangir, *supra* n. 1, at ¶ 68. *See also* Jahangir, *supra* n. 4, ¶ 73.

94. *JHU Bill*, at cl. 5, *supra* n. 58.

95. S.C. Determination No. 4/2004, *supra* n. 12.

inconsistent with various constitutional rights, including the right to freedom of religion and the right to manifest a religion.⁹⁶ The Petitioners submitted that Article 10, which grants freedom of thought, conscience and religion and the freedom to adopt and to have a religion of one's choice, is absolute and unconditional. They argued that any attempt to regulate manifestation and practice of religion as guaranteed under Article 14(1)(e) would in effect negate and nullify the contents of Article 10.⁹⁷ This claim resembles the argument of the European Court of Human Rights ("ECHR") in *Kokkinakis v Greece* that the freedom to change religion would be "a dead letter" if the right to freedom to manifest religion did not include "the right to try to convince one's neighbour" to convert.⁹⁸ In response, the Intervening Petitioner argued that the bill seeks to prohibit only conversion from one religion to another by the use of force, allurement or fraudulent means and, in fact, gives effect to the freedom of religion guaranteed under Article 10.⁹⁹

In responding to the petition, the Court reiterated that the freedom of religion guaranteed by Article 10 "postulates that the choice [of religion] stems from the free exercise of one's thought and conscience without any fetter which in anyway distorts one's choice."¹⁰⁰ It stated that there was no dispute that the right to freedom of religion includes the right to adopt or change religions.¹⁰¹ What was at issue was the constitutionality of prohibition of conversions by the use of force, allurement or fraudulent means.

The Court then mentioned Article 15(7) of the Constitution and the conditions which must be met before placing any restrictions on the freedom to manifest a religion guaranteed in Article 14(1)(e). Any such restrictions must be:

prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.¹⁰²

96. The Petitioners argued that clause 2 of the JHU Bill is inconsistent with Articles 9, 10, 12(1), 12(2), and 14(1)(e) of the Constitution, all of which are set out under the "Constitutional Protections" section above.

97. S.C Determination No. 4/2004, *supra* n. 12.

98. *Kokkinakis v. Greece*, 17 EHRR 397 (1994) (ECtHR 260-A, 25 May 1993), ¶ 31.

99. S.C Determination No. 4/2004, *supra* n. 12.

100. *Id.*

101. *Id.*

102. Constitution of Sri Lanka, at art. 15(7).

Although it referred to this legal framework for establishing the constitutionality of a provision affecting Article 14, the Court seems to have engaged in a haphazard analysis of the prohibition of forcible conversions provision (clause 2) of the Bill. Clause 2 of the Bill contains three relevant terms: force, fraud and allurement. The Court dealt first with the concept of allurement. It noted that the “essential ingredient” of the offense of allurement as a means of conversion “is the causing of a temptation or an inducement by offering a person a benefit calculated to fascinate him or attract him which may affect his decision.”¹⁰³

The Court considered the Petitioners’ “worthy” contention that acts of benevolence and charity in obedience to the Gospel command may be construed to be acts of enticement within the current definition of “allurement” in the Bill.¹⁰⁴ Relying on the definition of improper proselytism in *Kokkinakis v Greece*, the Court stated that:

It may . . . 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.¹⁰⁵

The Supreme Court then stated that what is improper in this context is “the wilful engagement of a deceitful exercise to secure a conversion.”¹⁰⁶ The Court held that a more restricted definition of “allurement” in the interpretation section of the Bill was necessary. The words “for the purpose of converting a person from one religion to another” were recommended for inclusion in the definition,¹⁰⁷ so that it reads:

“allurement” means “offer of any temptation for the purpose of converting a person from one religion to another in the form of—

(i) any gift or gratification whether in cash or kind;

103. S.C Determination No. 4/2004, *supra* n. 12.

104. This concern appears to be in direct contrast to the Supreme Court’s reasoning in the incorporation cases, where the Court seemingly failed to consider or acknowledge the requirements or demands of the gospel. *See Owens, supra* n. 38.

105. S.C Determination No. 4/2004, *supra* n. 12, citing *Kokkinakis v. Greece, supra* n. 98, at ¶ 48. The Special Rapporteur states that she “is of the opinion that supporters of the draft laws have disregarded the context of the *Kokkinakis* case,” where a violation of the right to freedom of religion of those who wanted to propagate their religion was found. Jahangir, *supra* n. 4, at ¶ 72.

106. S.C Determination No. 4/2004, *supra* n. 12.

107. *Id.* These words were also recommended later in the judgment to be included in the definitions of “force” and “fraudulent.”

- (ii) grant of any material benefit, whether monetary or otherwise;
- (iii) grant of employment or grant of promotion in employment.”

Subject to this amendment, the Court held that clause 2 of the Bill did not offend the various provisions of the Constitution argued by the petitioners, namely Articles 9, 10, 12(1), 12(2) and 14(1)(e).¹⁰⁸

In critique of the Court’s ruling, as stated above, any restrictions on the right to manifest a religion guaranteed by Article 14(1)(e) of the Constitution must be for certain specified objectives. Yet despite specifically ruling that the prohibition on unethical conversions contained in clause 2 of the bill did not offend Article 14(1)(e), there is no discussion in the Court’s judgment as to whether the prohibition amounts to a restriction of the freedom to manifest a religion and, if so, whether the requirements of Article 15(7) were met. In fact, there is also no discussion of how clause 2 interacts with Articles 9, 10, 12(1) and 12(2) despite the Court’s ruling that it does not offend those Articles.

The need to justify any legislative limits on the freedom to manifest a religion also exists in the international arena. The scope of the right to freedom of religion contained in the ICCPR is discussed in General Comment 22, issued by the Human Rights Committee. While freedom of thought, conscience and religion as part of the *forum internum* are “protected unconditionally,”¹⁰⁹ Article 18.3 of the ICCPR permits certain limitations on the freedom to manifest religion (the *forum externum*), as in Sri Lanka. The General Comment explains, however, that any restrictions “may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”¹¹⁰ The Court did not discuss how the JHU Bill met these criteria.

The Court’s judgment is further confusing in that its seemingly all-encompassing conclusion in relation to clause 2 of the Bill appears before a discussion of the force and fraud clause. In relation to these terms, the Court did discuss, albeit briefly, the requirements found in Article 15(7) of the Constitution for placing restrictions on fundamental rights. It found, somewhat confusingly, that given the use of force and the adoption of fraudulent means are offenses already punished by the Penal Code, the restrictions placed on Article 14(1)(e) of the

108. *Id.*

109. *General Comment 22 on Article 18 of the ICCPR*, Hum. Rts. Comm., 48th Sess., U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994), ¶ 3.

110. *Id.* at ¶ 8.

Constitution by the inclusion of those terms in clause 2 of the Bill can be taken to be “designed to ensure public order, morality and for the purpose of meeting [the] just requirements of the general welfare of a democratic society.”¹¹¹ This indicates that the Court did see the prohibition against unethical conversions in clause 2 of the bill (or at least parts of it) to be a restriction on the freedom to manifest religion, yet there is no analysis of this problem in its discussion of the term “allurement.”

Leaving aside whether the prohibition against unethical conversions could be said to be in the interest of national security, or for the purpose of securing the rights and freedoms of others, or for meeting the just requirements of a democratic society, one of the questions this article raises is whether this proposed law against unethical conversions can actually achieve protection in practice without simultaneously violating other rights.

In light of the difficulties faced by the Supreme Court in securing the rights of all citizens in the incorporation cases, the use of legislation as a means to deal with unethical conversions must be seriously questioned. Even if the Court’s suggested amendments to the definitions of “allurement,” “force” and “fraudulent” are incorporated into the bill, will this ensure that legitimate manifestations of a religion are safeguarded against charges of unethical conversions? It is doubtful whether the mere inclusion of the words “for the purpose of converting a person from one religion to another” can actually serve to prevent acts of benevolence and charity from being construed as acts of allurement, force or fraudulent means. For example, how does one show an act is for the purpose of conversion as opposed to a mere charitable act, especially where the alleged victim need not even make a complaint? The impact of this Bill on religious freedoms in practice is of serious concern.

A clearer case of inconsistency with the Constitution arises in relation to clause 3 of the Bill: the requirement to inform the Divisional Secretary that a conversion has occurred. This obligation results in Article 10 violations of the freedom of both the convert and the facilitator of the conversion.¹¹² The Court held that this provision in the Bill violated Article 10 of the Constitution as “it would be a restraint on [the convert’s] freedom of thought, conscience and religion.”¹¹³ Yet, there is no more detailed explanation of the Court’s reasoning.

111. S.C Determination No. 4/2004, *supra* n. 12.

112. *Id.*

113. *Id.*

In regard to the category of people authorized under clause 5 of the bill to institute proceedings before a Magistrate, the Court made the following statement:

The categorisation of persons authorised by this Clause to institute prosecutions against persons accused of committing any offence under the bill is irrational and arbitrary and therefore violative of Article 12(1).¹¹⁴

Because the requirement to notify the Divisional Secretary of conversions was found to violate Article 10 of the Constitution, the Court held that the bill in its present form must be passed by a special majority of Parliament and by the people at a referendum.¹¹⁵ Even if it is unlikely to happen, it is worrisome that a bill that so drastically violates fundamental rights can still be enacted if a majority agree. Moreover, it is troubling that the general prohibition on unethical conversions set out in clause 2 of the bill was not found to be unconstitutional, subject to the inclusion of the words “for the purpose of converting a person from one religion to another” in the relevant definitions. Given the concerns about the adequacy of these suggested amendments, and about the practical implementation of the prohibition, it is hoped that calls for a legislative solution to the issue will be dropped.¹¹⁶

JHU PROPOSAL TO AMEND THE CONSTITUTION

In an attempt to circumvent the Supreme Court’s decision regarding its anti-conversion bill, the JHU later proposed changing the Constitution itself. The proposed *Nineteenth Amendment to the Constitution (Constitutional Amendment Bill)* was published in the Gazette on November 1, 2004 and then presented in Parliament by the Venerable Ellawala Medhananda Thero, MP, on November 19, 2004.¹¹⁷ As with the JHU’s anti-conversion bill discussed above, the *Constitutional Amendment Bill* was also successfully challenged before the Supreme Court. On December 17, 2004 it was held to be unconstitutional.¹¹⁸ Despite this ruling, the proposal re-surfaced and was again to be the subject of debate and a vote in Parliament on October 4,

114. *Id.*

115. *Id.*

116. United States Department of State (Bureau of Democracy, Human Rights and Labor), *International Religious Freedom Report for 2006*, <http://www.state.gov/g/drl/rls/irf/2006/71444.htm> (Sept. 15, 2006).

117. *Nineteenth Amendment to the Constitutional Bill*, *supra* n. 13.

118. S.C. Determination No. 32/2004, *supra* n. 14.

2005,¹¹⁹ though it did not come to the floor.

The preamble to the *Constitutional Amendment Bill* echoes the fears expressed by the JHU in its anti-conversion bill. It states that “the Buddha Sasana has faced the threat of decline” and that “it is the duty of the Parliament to restore the patronage and protection historically enjoyed by Buddha Sasana.”¹²⁰ The *Constitutional Amendment Bill* then would repeal Article 9 of the Constitution which assigns to Buddhism the “foremost place” in society and replace it with the following clauses:

9.1 The Official Religion of the Republic is Buddhism. Other forms of religions and worship may be practised in peace and harmony with Buddha Sasana.

9.2 All inhabitants of the Republic shall have the right to free exercise of their worship. The exercise of worship shall not contravene public order or offend morals.

9.3 The State shall foster, protect, patronise Buddha Sasana and promote good understanding and harmony among the followers of other forms of worship as well as encourage the application of religious principles to create virtue and develop quality of life.

9.4 The inhabitants of the Republic professing Buddhism are bound to bring up their children in the same.

9.5 To convert Buddhist into other forms of worship or to spread other forms of worship among the Buddhist is prohibited.

9.6 No person may be forced to join a religious community, to conduct a religious act or to participate in religious education.

9.7 The compositions and powers of the Council that advises the President on implementation of this chapter shall be determined by law.

9.8 In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.¹²¹

This *Constitutional Amendment Bill* was challenged in the Supreme Court on the grounds that, as a whole and in part, it is “vague, anomalous and inconsistent” with various Articles of the Constitution¹²²

119. United States Commission on International Religious Freedom, *Sri Lanka: Proposed Constitutional Amendment in Violation of International Religious Freedom Standards*, Press Release, http://www.uscirf.gov/mediaroom/press/2005/september/09302005_sriLanka.html (Sept. 30, 2005). Sufficient support for the Bill was lacking on the day to hold the debate.

120. Nineteenth Amendment to the Constitution Bill, *supra* n. 13, Preamble.

121. *Id.* at cl. 2.

122. See Constitution of Sri Lanka, at art. 3, 4, 9, 10, 11, 12(1), 12(2), 14(1)(a), 14(1)(b), 14(1)(e), 14(1)(f), 14(1)(g), 80(2), 84(2), 85(1).

and that “the clauses of the bill are inconsistent with the spirit of the Constitution, secular state, norms of pluralistic society and international obligations.”¹²³ While a number of the Petitioners’ arguments related to the process for making amendments to the Constitution, this article will focus on the Court’s discussion relating to fundamental rights.

In relation to clause 9.1 of the *Constitutional Amendment Bill* making Buddhism the official State religion, the Court noted that:

by declaring that other forms of religions may be practiced in peace and harmony with Buddha Sasana, this Bill seeks to render the freedom of religion conditional upon being in harmony with other religions. This clause would curtail the freedom guaranteed to other religions under Articles 10, 14(1)(e). It is to be emphasised that Article 10 confers on every person the freedom of religion. This is an absolute right upon which no fetters could be placed.¹²⁴

While the establishment of one religion as a state religion does not necessarily breach the right to freedom of religion, its application in practice can have discriminatory effects.¹²⁵ This is possible particularly given the inclusion of the vague words “in peace and harmony” with Buddha Sasana. Relevantly, paragraph 9 of the Human Rights Committee’s General Comment 22 states that

the fact that a religion is recognised as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant.¹²⁶

The Court then held that clause 9.2 regarding the free exercise of worship is “inimical” to the provisions of Article 14(1)(e) which guarantees the freedom to manifest a religion.¹²⁷ Moreover, the Court noted the bill speaks only of the freedom to “worship” and not the other forms of manifesting a religion which are currently protected under the Constitution.¹²⁸ The requirement in clause 9.3, *inter alia*, that the state must foster and protect Buddhism was held to be contrary to the principle of equality enshrined in Article 12 of the Constitution.¹²⁹ Requiring Buddhist parents to bring up their children as Buddhists was

123. S.C Determination No. 32/2004, *supra* n. 14.

124. *Id.*

125. Stahnke, *supra* n. 16, at 623. See also *Civil and Political Rights, Including the Question of Religious Intolerance, Mission to Sri Lanka*, *supra* n. 4, at ¶ 75.

126. General Comment 22 on Article 18 of the ICCPR, *supra* n. 109, at ¶ 9.

127. S.C. Determination No. 32/2004, *supra* n. 14.

128. *Id.*

129. *Id.*

similarly declared to violate the rights of equality and non-discrimination guaranteed by Articles 12(1) and (2), as parents of other religions are free to decide what religious upbringing should be provided for their children.¹³⁰ The prohibition of the conversion of Buddhists in clause 9.5 was held to deny the freedom of thought, conscience and religion guaranteed by Article 10 by imposing a blanket prohibition even where such conversion is made voluntarily.¹³¹ The Court also stated that the clause treats conversion from Buddhism differently from conversion from other religions, and so is inconsistent with the right to equality guaranteed under Article 12(1).¹³²

Petitioners also claimed that the Bill is inconsistent with Sri Lanka's international obligations referring to Articles 18 and 19 of the ICCPR and Article 13 of the International Covenant on Economic Social and Cultural Rights (regarding the right to education and the right of parents to choose schools for their children).¹³³ In response, the Court cited its decisions in the *Land Reform (Amendment) Bill* and *Re the Surcharge on Income Tax Bill*,¹³⁴ stating that "Bills that are inconsistent with treaties or agreements approved under Article 157 [of the Constitution] can be enacted with a special majority without the necessity of a Referendum."¹³⁵ The Court then observed:

It is true that Article 27(5) requires the state to endeavour to foster respect for international law and treaty obligations among the nations. But this does not affect the sovereignty of the people which are inalienable and where the legislative power is exercised by Parliament consisting of elected representatives of the people and by the people at a Referendum.¹³⁶

However, in a separate opinion, Justice Shiranee Tilakawardane, refers to one of the "basic principles" of the U.N. Charter, namely the "dignity and equality inherent in all human beings."¹³⁷ Justice

130. *Id.*

131. *Id.*

132. *Id.*

133. Sri Lanka became a state party to the ICCPR by accession on June 11, 1980 and acceded to the First Optional Protocol to the ICCPR on Oct. 3, 1997. Sri Lanka is also a State Party to the International Covenant on Economic, Social and Cultural Rights as well as numerous other international conventions. See *Status by Country*, <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=164#164> (accessed Nov. 6, 2006).

134. These decisions are cited in SC Determination No 32/2004 (*supra* n. 14) as Land Reform (Amendment) Bill (S.D 1/1981) and Re the Surcharge on Income Tax Bill (S.D. 4/89). No further citations are provided.

135. S.C Determination No. 32/2004, *supra* n. 14.

136. *Id.*

137. Statement by Justice Shiranee Tilakawardana (Dec. 17, 2004), (attached to S.C

Tilakawardane observed that “all member states have pledged to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”¹³⁸

Justice Tilakawardane’s separate comments are a welcome addition to the debate on religious freedom in Sri Lanka. She stated that

[t]he essence of being a secular state, as Sri Lanka is the recognition and preservation of the different types of people, with diverse language and different belief, and placing them together so as to form a whole and united nation.¹³⁹

Specifically in relation to the JHU’s proposal to amend the Constitution, Justice Tilakawardane observed: “the theoretical content of the amendment remains a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.”¹⁴⁰

Finally, in a statement that reflects the overarching question of the appropriate degree of state intervention in protecting religious freedom, Justice Tilakawardane commented that

[f]reedom of conscience and religion means a notion of the centrality of individual conscience and individual judgement and the inappropriateness of governmental intervention to compel or constrain its manifestation.¹⁴¹

CONCLUSION

Justice Tilakawardane’s statements, and the Supreme Court’s judgment regarding the proposed Constitutional amendment, as the most recent judicial comments on the issue, are a positive sign for religious freedom in Sri Lanka. However, the Supreme Court’s haphazard interpretation of the JHU’s anti-conversion bill, and constant political murmurings on the introduction of anti-conversion legislation and the protection of Buddhism, make one continue to question whether the law will protect religious freedom for all in Sri Lanka.

By contrast to this legislative approach, the Special Rapporteur recommends that

Determination No. 32/2004, *supra* n. 14).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

cases of alleged “unethical” conversion be addressed on a case-by-case basis, examining the context and circumstances in each individual situation and dealt with in accordance with the common criminal and civil legislation.¹⁴²

Through this method, the inherent problems associated with anti-conversion legislation can be avoided. It has not been possible in this article to establish a framework for distinguishing between ethical and unethical conversions because of the paucity of specific examples of unethical conversions brought forward in Sri Lanka. Even if some cases surface, given the inherent difficulties in differentiating between acts of charity and benevolence and acts designed to convert through force, fraud or allurement, it is crucial not to try to develop criminal legislation that proposes to cover all situations, because it will invariably include acceptable manifestations of religion. Moreover, the proposed laws are gravely defective in covering situations where there is no complaint by a converted person.

The Sri Lankan Government and the JHU, in their attempt to introduce “protective” legislation, have strayed far from that “admittedly fine line” between protecting freedom of, and from, religion referred to by Stahnke. Rather than securing and protecting fundamental rights, the proposed legislation and Constitutional amendments outlined above blatantly violate them. Considering the vexing question of state intervention in relation to proselytism, it is difficult to agree that any interference is acceptable if it is in the form proposed by the Government or the JHU.

Judge Marten’s view from *Kokkinakis* stands in stark contrast to the extreme positions adopted by the JHU and the Government:

To allow States to interfere in the “conflict” implied in proselytising by making proselytising a criminal offence would not only run counter to the strict neutrality which the State is required to maintain in this field but also create the danger of discrimination when there is one dominant religion.¹⁴³

Despite the Supreme Court’s ruling against the proposed constitutional amendment to make Buddhism the State religion, and the additional comments of Justice Tilakawardane, this danger of discrimination is still present, especially given the Supreme Court’s difficulty in the incorporation cases of applying the freedom of religion provisions of the Constitution in a manner that maximize protection for

142. Jahangir, *supra* n. 1, at ¶ 68.

143. *Kokkinakis v. Greece*, *supra* n. 98, at ¶ 15 (partly dissenting opinion of Judge Martens).

all. All indicators point, therefore, to a conclusion that the introduction of legislation to curb unethical conversions will increase, rather than eliminate, religious divisions in Sri Lanka.

Part of the Special Rapporteur on Freedom of Religion or Belief's work is to collect information on contentious issues and assess how they should be dealt with under international human rights law.¹⁴⁴ She claims that "best practices" must be identified, and that the "religiously motivated feelings and animosities of all sides" must be respected at the same time, something that is a real necessity in Sri Lanka.¹⁴⁵ This is indeed the case in Sri Lanka. This article does not seek to discredit any claims of unethical conversions across the island, nor to dismiss the fears of many Buddhists concerning their religion. What it seeks to show is that anti-conversion, or "protective," legislation is not the way to achieve religious harmony in Sri Lanka: it will only result in further violations of the very rights to religious freedom it is attempting to protect in the first place.

144. Jahangir, *supra* n. 2, at ¶ 14(e).

145. *Id.*