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Prajwol Bickram Rana



Kathmandu School of Law (KSL)

Suryabinayak-4, Bhaktapur, Nepal, Ph: 6634455, 6634663,

Email: info@ksl.edu.np, www.ksl.edu.np

Religion and State: Revisions Needed in Sri Lankan Constitutional Implications

Nishandey Ratnam*

Abstract

The paper compares influence of religion in the Constitutional culture of Sri Lanka and India. The secular nature of both constitutions, the historic relationship between the State and religion, and religious rights is analyzed in detail. Sri Lankan Constitution has provisions of giving special recognition to the Buddhist religion while, the Indian Constitution declares itself as a secular state. However, both nations have similar societies with a lesser degree of secular political culture. An entrenched provision of the Sri Lankan Constitution stands against the good principles of constitutionalism, instrumental in transforming the constitutional culture. The benefits of the maintenance of public order and the wellbeing of all parts of the society for the nation by, allowing real freedom of religion and maintaining no partiality, secular government is yet to be recognized in the Constitutional making history of Sri Lanka and in India as well.

Introduction

Sri Lanka is religiously, linguistically and ethnically diverse island nation. The Sinhalese make up 74.9% of the population, 15.3% of the population is composed of Tamils; Sri Lankan Moors cater for 9.3% of the population, while only 0.5% of the population represents other ethnicities.¹ Most Sinhalese are Buddhist (70.1%) and majority of the Tamils are Hindus (12.6%) and 9.7 % of the population follows Islam. There are 7.6% Christians with a mixed group of Sinhalese and Tamils.²

Sri Lanka was colonized by the Portuguese, the Dutch and the British for about four centuries; and the British had the strongest influence (1796-1948) ever. The First Independent Constitution of Sri Lanka was written by the outgoing British Crown authorities in 1948 and the first Republican autonomous constitution was passed in 1972. Radical changes were brought into the governing system with the third Constitution (1978) with 19 amendments. The current constitutional structure

* Nishandey Ratnam is an Attorney-at-law. She is the Case Management Specialist in a USAID funded project called 'CORE Justice' which seeks to promote the rule of law in Sri Lanka by strengthening core institutions, processes and actors responsible for the administration of justice and the delivery of justice services.

¹ 'Census of Population and Housing, Department of Census and Statistics of Sri Lanka', *Statistics Government*, p.20 available at http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/CPH_2012_5Per_Rpt.pdf, accessed on 30 June 2018.

² *Ibid*, p.21.

is a fusion of the British, French and American constitutional models.³ There is a British parliamentary structure, a strong president, which is influenced by the French executive office, and separation of powers as in the American system. This mixed structure has made it 'uniquely Sri Lankan' with an added flavor of non-secularism.

Several reasons justify the choice of India for this comparative study. India is a quasi-federal nation with a British parliamentary model. India's religious diversity is well described with the following figures: Hindu 80.5%, Muslim 13.4%, Christian 2.3%, Sikh 1.9%, others 1.8%, and unspecified 0.1%.⁴ Irrespective of the differences, Sri Lanka and India share cultural, religious, historical, and geo-political resemblances. Both states are Commonwealth countries that emerged from British rule at the same time. More importantly, both countries/societies are divided based on deep rooted religions - defining the role of the religion in the state affairs has been a risky task since the inception. It is interesting to note that both states legally established their opposite worldviews on secularity roughly at the same time. Sri Lanka constitutionalized Buddhism in 1972 and India declared itself a secular state in 1976.

Historical Background

Distinction between state and religion is a very popular concept in the western constitutionalism. In particular, the United States and France seems very strict in maintaining a wall between state affairs and religion in the recent decades. 'The concept of church and state is different in South Asia where none of the dominant religions - Hinduism, Islam, or Buddhism - have organizations corresponding to the ecclesiastical structures of Christianity.'⁵ Religious identity is more connected with linguistic groups, ethnicities and historical experiences in South Asia.⁶ Unlike the revolutions and intellectual movements in the West, Western Imperialism was the primary triggering reason of secularization in Asia.

Buddhism is a way of life introduced by Buddha (Siddhartha Gautama), who was born into a royal family in Nepal, in 563 BC. His philosophical teachings are called the principles of Buddhism. Out of all the nations where Buddhism is practiced, seven countries (Bhutan, Burma, Cambodia, Laos, Mongolia, Sri Lanka, and Thailand.) have a majority of Buddhist followers, and Sri Lanka, Thailand and Myanmar are among those that give constitutional recognition to Buddhism in different ways. However, these countries can be categorized as hybrid between secular and theocratic states.

Thailand has established the Thai identity based on the principles of Buddhism. Buddhism has been the main element of Thai identity from the beginning, and

³ 'It is a hybrid, a cross between the French and British styles of government with a little bit of the United States thrown in.' A. Jeyaratnam Wilson, *The Gaullist System in Asia*, Macmillan, London, 1980. p. 13.

⁴ India Demographics Profile 2014 based on 2001 census, *Index Mundi* available at http://www.indexmundi.com/india/demographics_profile.html, accessed on 7th July 2018.

⁵ Ainslie T. Embree, 'A South Asian Dilemma: The Role of Religion in the Public Sphere', *The Brown Journal of World Affairs*, 1997, p.138.

⁶ Ibid.

Thailand has never been colonized. Contrary is true in Sri Lanka and Myanmar: with the British Colonial rule, Buddhist identity was imposed more as a response to the humiliation and exploitation of imperialism.⁷ A sense of nationalism emerged during the colonization, and the special function of the dynamic center of nationalism was taken by religion of the majority.⁸ In Sri Lanka, this triggered Sinhala Buddhist nationalism.

Though Buddhism was originated in Nepal, it did extend over the globe. Sri Lankan Buddhists had the unique privilege of writing down the Buddha's teachings first and created the first Buddhist historical record.⁹ The Sri Lankan Buddhism was connected to Kingship from ancient history.¹⁰ 'In Sri Lanka, the Buddhist king is not answerable to a 'god', but elected by the Sangha, Buddhist order of monks and nuns, (Buddhist monastery) and other high ministers, and was required to patronize the Sangha and enforce social stability.'¹¹ Buddhist Sangha in Sri Lanka before the British colonization had the power to be the mediators, negotiators in the political matters, between the King and the subjects. This strong link between the Buddhist philosophers and the government was interrupted when the British introduced the secular government.

The independent constitution of Sri Lanka was a pre-condition for the transfer of power from the British Crown. The constitution enshrined secularism, and no religion was given priority. The anti-colonial nationalism, soon after independence, targeted the rehabilitation of Buddhism and bringing Buddhism back to its former/rightful place. The first homegrown constitution reflects this trend of giving privilege to Buddhism. 'By this time, the influence of religion in the government was not only stamped into the constitution, it had also become part of everyday political symbolism.'¹²

Very similar to the Sri Lankan majority at the time of independence, the Indian majority had a strong attitude of creating a Hindu nation in India. Moreover, when compared with the Indian independence struggle, anti-colonial movements against the British in Sri Lanka had been 'relatively secular.'¹³ However, the founding fathers of the Indian Constitution feared hegemony by the majority and tried to

⁷ Bruce Matthews, 'The Problem of Communalism in Contemporary Burma and Sri Lanka', vol. 34, *International Journal*, 1979, p. 453.

⁸ Embree (n 5).

⁹ Richard Lester, *Theravada Buddhism in Southeast Asia*, University of Michigan Press, 1973, pp. 66-77.

¹⁰ 'Kings approach the influential monks for their advice on social matters and when there was disagreement in the Sanga, King is considered to be the overseer.' Urmila Phadnis, *Religion and Politics in Sri Lanka*, Manohar Books, 1976, p. 24.

¹¹ Yarina Liston, 'The Transformation of Buddhism during British Colonialism', vol. 15, *Journal of Law and Religion*, 1999, p. 189.

¹² Charles R.A. Hoole, 'A Reassessment of Sinhalese Utopia: Explorative Essay on the Sri Lankan Political Crisis', *Journal of Church and State*, 1991, p. 108.

¹³ W.Howard Wriggins, *Ceylon: Dilemmas of a New Nation*, Princeton University Press, 1960, p.171.

safeguard minorities with special protection in the Constitution. Some criticize¹⁴ this as an 'imposed identity which did not suit the people or the country.' The sporadic communal clashes between the majority Hindus and minority Muslims since independence and the rise of powerful parties based on religion such as BJP (Bharatiya Janata Party) in India are two developments supporting the criticism. However, India still remains a religiously neutral state within its own interpretation of secularism. Secularism in Indian constitution entails two objectives.

'(1) State neutrality towards religion, protecting all religions as an antidote to communal divides, and (2) State intervention in religious affairs for the purpose of uplifting the disadvantaged groups and accelerating their social integration.'¹⁵

Constitutional Framework on Secularity

Two elements that decide a country's secular nature are the relationship between the State and Religion and the right of people to believe in a religion as well as freely exercise their religious beliefs. These two aspects are explored below within the context.

Relationship between the State and Religion

The date of the enactment of the Constitution as per Buddhist calendar refers to 'tenth day of the waxing moon in the month of Vesak in the year two thousand five hundred and twenty-one of the Buddhist era', as stated in the preamble of Sri Lankan Constitution. What is significant is the Article 9 of the Sri Lankan Constitution which reads as follows: '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).'¹⁶ This is entrenched in the constitution; and in order to repeal the provision, a two-third majority vote is required in parliament as well as the approval of the people at a referendum.¹⁷ In contrast, the framers of the Indian constitution adopted secularism in a contextually different method from the American strict 'wall of separation'¹⁸ model.¹⁹ The Indian constitution does not have a non-establishment clause. In 1976, the 42nd constitutional amendment added the word 'secular' to the preamble and made India 'a sovereign, socialist, **secular** democratic Republic.' The overall reading of Articles 14 to 17 and 25 to 30 of the Indian constitution suggests a collective non-establishment clause.

¹⁴ Amalendu Misra, 'Hindu Nationalism and Muslim Minority Rights in India', *International Journal on Minority and Group Rights*, 2000, p. 12.

¹⁵ Offit Liviatan, 'Judicial Activism and Religion-Bases Tensions in India and Israel', vol. 26, *Arizona Journal of International and Comparative Law*, 2009, p. 588.

¹⁶ *Constitution of Sri Lanka*, 1978, art 9.

¹⁷ *Constitution of Sri Lanka*, 1978, art 83.

¹⁸ 'Thomas Jefferson used this term when interpreting the First Amendment of the U.S. Constitution.'

¹⁹ The First Amendment of the United States constitution provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."

Freedom of Religion

The religious freedoms of the individual may be divided into two components: (i) freedom of conscience and thought (*forum internum*) and (ii) the right to manifest one's religious beliefs (*forum externum*). The Sri Lankan Constitution deals with these two aspects in separate Articles.²⁰ Article 10 of Sri Lankan constitution refers to 'freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of choice.' This is considered to be an absolute right which cannot be limited under any circumstances. Article 14(1) is an umbrella provision for the rights on freedom of speech, assembly, association, and movement in Sri Lanka. Article 14(1) (e) specifically reads, 'Every citizen is entitled to the freedom, either by himself/herself or in association with others, and either in public or in private, to manifest his/her religion or belief in worship, observance, practice, or teaching.'²¹ This provision is amenable to restrictions. Article 25(1) of the Indian Constitution provides these rights together as 'subject to public order, morality and health' and to the other provisions of this part read that all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.²²

Implications and Outcomes

Sri Lanka and India are structurally different in terms of secularism. It is interesting to see the implications and outcomes of this difference in selected issues that are common to both countries.

Religious Minority Rights

The provision of 'first among equals'²³ in Sri Lanka makes the other religious minorities feel secondary within a unitary structure. Buddhist law of Sri Lanka is not completely self-sufficient to be a social framework, and secular law is needed to order the society. However, the rationale behind recognizing Buddhism as a privileged religion is to establish a hegemonic standing that Buddhists are the majority population of Sri Lanka.

Hinduism, Islam and Christianity are the other major religions observed in this tiny nation. However, Buddhist nationalism is so strong that all the other religions have been facing threats in Sri Lanka when conflicted with Buddhism. The long standing ethnic war between the Sinhalese and the largest minority group Tamils was based more on linguistic and ethnic identity and cannot be described as a religious struggle. However, ethnic conflict has intensified Buddhist nationalism and increased the influence of extreme Sinhala Buddhists in Sri Lankan politics, which resulted in

²⁰ Anton Cooray, 'The Protection and Promotion of Religious Rights: A Commonwealth Survey', vol. 12, *Sri Lanka Journal of International Law*, 2000, p.165.

²¹ *Constitution of Sri Lanka*, 1978, art 14(1) (e).

²² *Constitution of India*, 1950, art 25(1).

²³ Tessa Bartholomeusz, *First among Equals: Buddhism and the Sri Lankan State, Buddhism and Politics in Twentieth Century Asia*, Lan Harris(ed), Pinter, London; New York, 1999, p.173.

an 'added sense of religious polarization.'²⁴ The clear defeat of separatist movement in the three decades and the whole constitutional culture of the majority have left the Tamils, who are also predominantly Hindus, with no hope of equal status in the country. Post war Sri Lanka witnessed many anti-Muslim riots; and statistics²⁵ show that religious violence is a continuous Problem in Sri Lanka.

Being a diverse nation, India faces multi-dimensional minority issues and widespread communal violence. The recent trend of religious communalism in India, bring the question of whether secular India has failed. Nevertheless, the federal structure and minority protection provisions in the constitution, place Indian minorities in a better position than the Sri Lankan minorities. Hindu militants argue that minorities in other South Asian states suffer more from the oppressive rule of the dominant majority compared to the treatment of non-Hindu minorities in India by the Hindu majority are undergoing.²⁶

Anti -Conversion Laws

It was felt that there was no serious threat to Christianity in Sri Lanka since Christians are found both in the Sinhalese and the Tamil ethnicities. However, since 1990, there were religious tensions between Buddhist extremists and Christian groups, alleging unethical conversions by the Christian missionary groups.²⁷ Under the slogan that Buddhism was under threat by the minority religions, there were attempts to pass anti-conversion laws. Further, three private member bills to incorporate Christian organizations²⁸ were struck down for potential issues of unethical conversion.

Many states of India have their own anti-conversion laws with the belief that these laws help to promote religious freedom by protecting people from forced conversions. In *Rev. Stainislaus v State of Madhya Pradesh and Others*²⁹; interpreting article 25(1)³⁰ of the constitution, the Indian Supreme Court held that the questioned anti-conversion laws were constitutional. An author³¹ describes this as the Indian courts having been

²⁴ Embree (n 5), p. 147.

²⁵ Janeen Fernando & Sharma Wettimuny, 'Religious Violence in Sri Lanka: A New Perspective on an Old Problem', vol. 5, no. 1, *Verite Insights*, June 2017.

²⁶ Yogendra K. Malik and Dharendra K. Vajpeyi, 'The Rise of Hindu Militancy, India's Secular Democracy at Risk', vol. 29, no. 3, *Asian Survey*, 1989, p.321.

²⁷ 'Soon after the Tsunami in 2004 some Christian missionaries arrived in Sri Lanka offering assistance to the victims of the tragedy. Within a short period, these missionaries were labelled as having unethical conversions and this scenario led to some important political discussions.'

²⁸ Christian Sahanaye Doratuwa Prayer Centre (Incorporation), S.C. Determination No. 2/2001; New Wine Harvest Ministries Incorporation, S.C. Special Determination No. 2/2003; 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

²⁹ *Rev. Stainislaus v State of Madhya Pradesh and Others*, AIR, 1977, SC, p. 908.

³⁰ '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, practice and propagate religion.'

³¹ James Andrew Huff, 'Religious Freedom in India and analysis of the constitutionality of anti-conversion laws', *Rutgers Journal of Law & Religion*, 2009, p.35.

influenced by the interests of 'Hindutva'³² to render this decision.

The approach of maintaining public order by striking a balance between *forum internum* and *forum externum* is followed in Sri Lanka even broadly to protect Buddhism. Article 25(1) of the Indian constitution has the word 'propagate'. In contrast, articles 10 and 14(1) (e) of Sri Lankan Constitution do not spell out the word 'propagate'. On this basis, when deciding on the constitutionality of a 'potentially unethical conversion' bill, the Supreme Court of Sri Lanka referred to the above Indian decision and ruled that '[e]ven in situations where propagation is treated as a fundamental right enshrined in a Constitution, the entitlement has not been extended to convert another person to one's own religion as that would impinge on the 'freedom of conscience.'³³ The interpretation of this bill in the Sri Lankan Supreme Court was more interesting and attracted much criticism. The bill³⁴ aimed to 'spread knowledge of the Catholic religion to impart religious, educational and vocational training to youth.' It was ruled unconstitutional because '[w]hat is guaranteed under the Constitution is the manifestation, observance and practice of one's own religion, and the propagation and spreading of Christianity as postulated would impair the very existence of Buddhism or the Buddha Sasana.' This decision was brought to the attention of the UN Human Rights Committee. The Committee found that the Supreme Court's decision breached Articles 18(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) and stated that '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.'³⁵

The above decision shows that striking a balance between fostering Buddhism and protecting religious freedom is a tough task. Following these decisions, two anti-conversion bills were introduced by Buddhist nationalist parties but did not survive due to the contradictions with religious freedoms enshrined in the constitution (Article 10) thus, were declared unconstitutional.

Politicization of Religion

Buddhism has been used to win elections by political elites irrespective of their attachments to various ideologies in Sri Lanka.³⁶ Indian elections have a similar feature of securing votes by invoking religious and communal sentiments. This

³² 'An ideology seeking to establish the hegemony of Hindus and the Hindu way of life.'

³³ Supreme Court of Sri Lanka, Special Determination No. 19/2003, *Refworld* available at <http://www.refworld.org/pdfid/4be3e7042.pdf>, accessed on 25 June 2018.

³⁴ 'Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzigen of Sri Lanka (Incorporation)', 25 July 2003, *Refworld* available at http://www.refworld.org/cases,SLK_SC,4be3e7042.html, accessed on 15 July 2018.

³⁵ *Views of the Human Rights Committee under art 5, para 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, 85th Sess., concerning Communication No. 1249/2004, CCPR/C/85/D/1249/2004, 31 Oct 2005.

³⁶ A. R. M. Imtiyaz (Ali Riaz ed), 'Politicization of Buddhism and Electoral Politics in Sri Lanka', *Religion and Politics in South Asia*, Routledge, 2010, available at <http://ssrn.com/abstract=1567618>, accessed on 25th June 2018.

‘Hindutva ideology’ was questioned in a series of cases³⁷ challenging speeches made during the 1987-1990 elections. Generally, the court ruled that these approaches are not prohibited and Hindutva should be ‘understood as a way of life or a state of mind and it is not [to] be equated with religious Hindu fundamentalism.’

Jathika Hela Urumumaya (JHU), a political party solely based on Buddhist identity, was founded in Sri Lanka to address the Sinhala Buddhist concerns by some Buddhist monks in 2004. In 2004, it brought a proposal to amend the constitution declaring Buddhism as the state religion.³⁸ JHU could be easily compared with Hindutva movement in India. JHU equates Sinhalese Buddhist identity with Sri Lankan identity. This is similar to the Hindutva argument that ‘all Indians should embrace a Hindu ethos whether or not they are Hindu.’³⁹ The striking difference in India is having a structure to question such extremism on the basis of secularism. In 1990s, when an important Muslim mosque (Babri Masjid) was demolished by Hindu groups supported by a political party (BJP), communal violence between Hindus and Muslims spread throughout the country. The Indian President dismissed 3 BJP-led state governments, and the Supreme Court ruled in favor of the president’s action declaring that BJP significantly contributed in the communal conflict and ‘therefore [was] incapable of governing neutrally according to the principle of secularism identified as a basic feature of the Constitution.’⁴⁰

Conclusion

The above illustrations demonstrate that the majoritarian religion in both states plays the same politics and both societies lack a secular culture. Sri Lankan constitution reflects this ground situation as it is, and Indian constitution tries to transform this nature. The Sri Lankan constitution de-secularizes itself to protect the religion of the majority whereas, India takes a view of being secular to protect the vulnerable.

When there is an over-powering majority, suppression of the religious minority is a common occurrence and there is a question whether secular constitution can stop it. Secularism in India is designed to counter communal politics and respect all religions equally. The Indian approach is ‘to find a happy balance between religious beliefs and conscience on the one hand and the demands of the modern society on the other.’⁴¹ In other words, ‘Indian secularism is primarily a solemn asseverations of the Hindu majority to honor the rights and privileges of minorities and to recognize the composite character of Indian nationalism.’⁴²

³⁷ *Prabhu v Kunte*, AIR, 1996, SC, p.1113; *Kaspe v Singh*, AIR, 1996, SC, p. 817; *Joshi v Patil*, AIR, 1996, SC, p. 796.

³⁸ ‘This proposal was declared unconstitutional by the Sri Lankan Supreme Court in The Case Concerning the Draft 19th Amendment to the Constitution in January 2005.’

³⁹ Neil DeVotta & Jason Stone, ‘Jathika Heia Urumumaya and Ethno-Religious Politics in Sri Lanka’, vol. 81, no. 1, *Pacific Affairs*, spring, 2008, p.51.

⁴⁰ *S.R. Bommai v Union of India*, AIR, 1994, SC, p. 1918.

⁴¹ ‘A Close Look: Where Is the Indian by the Way?’ *Statesman Weekly*, 20 September 1986.

⁴² Badrinath Rao, ‘The Variant Meanings of Secularism in India: Notes Toward Conceptual