



**Buddhism and the regulation of religion in the new  
constitution:  
Past debates, present challenges, and future options**

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## Introduction

As the Constitutional Assembly and its subcommittees are deliberating on the content of what might become Sri Lanka's third republican constitution, one of the major issues they will have to address is the role of religion in the new constitution. A foremost place for Buddhism – while assuring freedom of religion – has been a central feature of the two republican constitutions since 1972, but also a heavily disputed one.

By all indications, the status of Buddhism will be both a significant and contentious issue in the 2016 process as well. A large number of submissions made to the Public Representations Committee on Constitutional Reform (PRC) addressed the status of Buddhism and the role of religion in the constitution and in public life more broadly. It is our understanding that submission-makers and PRC members disagreed substantially on the matter.<sup>2</sup> Rather than a clear recommendation, the PRC Report offered six rather different suggestions, each endorsed by different members, ranging from the retention of Article 9 (the Buddhism Chapter of the constitution<sup>3</sup>) to a declaration of a secular state.

This Working Paper offers a legal and historical overview of the issue of Buddhism in Sri Lanka's constitution, which, we hope, will help the Constitutional Assembly in its deliberations. We also hope that this Working Paper will help advance discussions beyond the normal terms of public debate that tend to frame the issue. At the centre of most public discussions of the Buddhism Chapter – from both defenders and critics alike – is a concern with the Buddhism Chapter's *expressive functions*, its role in communicating and endorsing a hierarchy of religions. While this function is important, it is not the only important matter to consider. Also vital for constitutional discussions is an awareness of the Buddhism Chapter's history and its *regulatory functions*, its legal effects on society when used as an instrument of litigation. In short, the Constitutional Assembly will be better positioned to undertake meaningful revision of the Buddhism Chapter – or to leave it as it is – if members have a clear understanding of why previous constitution drafters chose the words they did, while also being aware of how litigants and judges have interpreted and deployed those words over the last 40 years.

This Working Paper unfolds in four sections. Sections I and II give overviews of the Buddhism Chapter's history and its uses in litigation, and offers several "lessons" that Constitutional Assembly members might take away. In Section III, we use these lessons to assess the PRC recommendations and to discuss four options available to drafters for

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<sup>2</sup> Schonthal has attempted to obtain the original submissions, so as to consider them directly, but was unable to obtain them.

<sup>3</sup> We use the phrase Buddhism Chapter in this working paper because it allows us to refer both to the chapters entitled "Buddhism" in both the 1972 Constitution (as Section 6) and in the 1978 Constitution (as Article 9).

addressing religion in the new constitution, as well as some of the advantages and disadvantages associated with each option. A short Executive Summary appears at the end of the paper, distilling a number of key points from the Working Paper.

## **I. Contextualising and Learning from the History of the Buddhism Chapter**

Current debates about the Buddhism Chapter are, in many ways, continuations of debates that have been taking place on the island since the 1940s. This section offers a condensed history of the development of the Buddhism Chapter and the gradual distillation of its main provisions – giving Buddhism the “foremost place” and ensuring fundamental rights – from the 1940s to the 1970s.

### ***The Seeds of the Buddhism Chapter in the 1940s***

The Buddhism Chapter is, in many ways, a reaction against the provisions for religion in the 1948 Constitution. These provisions appeared in Section 29(2), which laid out a series of limits on the law-making powers of Parliament, prohibiting it from enacting bills that would:

- a) Prohibit or restrict the free exercise of any religion; or
- b) Make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
- c) Confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
- d) Alter the constitution of any religious body except with the consent of the governing authority of that body; Provided that in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

As one can see, the provisions for religion in Section 29(2) were relatively spare. Religious freedom was elaborated as a series of negative liberties, injunctions *against* laws that would encroach on it. In its approach, the section treated religious freedom as though it was a condition that was already existing among Sri Lanka’s citizens, a *de facto* state of affairs to be preserved through limiting *de jure* encroachments on it.

The problem with this formula was that many political actors on the island did not consider religious freedom to be an already-existing state of affairs. From its earliest

drafts in 1943 and 1944, Section 29(2) was, therefore, targeted by numerous critics from the island's smaller and larger political parties. In 1945, the leader of the All Ceylon Tamil Congress (ACTC), G.G. Ponnambalam, warned the Soulbury Commission of the growing "influence of religion on politics" and the rise of political parties which were organised along religious and ethnic lines and were making "direct appeals...to arouse communal passions."<sup>4</sup> Section 29(2), cautioned Ponnambalam, was not strong enough to protect the freedoms and rights of non-Sinhala communities.<sup>5</sup> Ponnambalam's fears were shared by members of the Communist Party who objected to Section 29(2) for similar reasons and who argued that the Soulbury Constitution should integrate more explicit protections for community and individual rights. In particular, they advocated including provisions that would ban discrimination based on caste, race, community, or religion, and sections that listed positive statutory guarantees for protecting social, economic, educational, political, and religious rights.<sup>6</sup>

Section 29(2) also had its critics among the island's then-largest political body, the Ceylon National Congress (CNC). Many in the CNC echoed the concerns of Ponnambalam's Tamil Congress and the Communist Party, and proposed to resolve them through drafting a new section on individual and community freedoms, one that spelled out (among other things) the government's responsibility to religious freedom. Instead of protecting individual rights through *injunctions against* prejudicial legislation (as had been done in Section 29(2)), certain members in the CNC proposed creating a comprehensive Bill of Rights that would enumerate the state's *positive obligations* to uphold individual and group freedoms. A constitutional draft oriented around the concept of a Bill of Rights was produced and presented to the Board of Ministers by members of the CNC in 1944.<sup>7</sup> The draft outlined a series of fundamental rights, including liberty of person, education, association, freedom of the press, and freedom of religion. The draft articulated the principles of "freedom of religion" in Section 7, saying:

Freedom of conscience and the free profession and practice of religion, subject to public order and morality, are hereby guaranteed to every citizen. The Republic shall not prohibit the free exercise of any religion or give preference or impose any disability on account of religious belief or status.<sup>8</sup>

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<sup>4</sup> CO 54/978/1, No. 96: Letter From GG Ponnambalam to Mr Hall on the Tamil Minority Case, 2<sup>nd</sup> November 1945, in K.M. De Silva (Ed.) (1997) *British Documents on the End of Empire: Sri Lanka* (London: Institute of Commonwealth Studies): p.145.

<sup>5</sup> Ibid: pp.156-7.

<sup>6</sup> Resolutions of the Ceylon Communist Party, 15<sup>th</sup> October 1944, in R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power-Sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: Centre for Policy Alternatives): pp.111-2.

<sup>7</sup> K.M. De Silva & H. Wriggins (1988) *J.R. Jayewardene of Sri Lanka* (Vol.1) (London: Anthony Blond/Quartet): p.169.

<sup>8</sup> J.R. Jayewardene's Draft Constitution, 29<sup>th</sup> November 1944, in M. Roberts (1977) *Documents of the Ceylon National Congress and Nationalist Politics in Ceylon 1929-1950* (Colombo: National Archives): p.2593.

Although the draft proved popular among certain sections of the CNC, the concept of a Bill of Rights was ultimately ruled out, with the agreement of D.S. Senanayake, by Ivor Jennings who insisted that it failed to provide adequate flexibility for governments.<sup>9</sup>

At the same time, many Buddhists in Ceylon, particularly lay Buddhist organisations such as the All Ceylon Buddhist Congress (ACBC), objected to Section 29(2) because it did not redress the injuries that had been done to Buddhism during the colonial period, and because it failed to protect the current interests of Buddhist laymen and monks. In a letter submitted to Ceylon's first Prime Minister, D.S. Senanayake, by the ACBC in 1951, G.P. Malalasekera, the group's President expressed the "disappointment, almost resentment, growing among the Buddhists of Ceylon," and prevailed on the government to "extend to Buddhism the same patronage as was extended to it by Sinhalese rulers of old."<sup>10</sup> When, three years later, Senanayake failed to act upon the ACBC recommendations, the Buddhist Congress created their own Buddhist Commission of Inquiry. The ACBC Commission undertook a two-year investigation to explore the extent of the injuries done to Buddhism during the colonial period and to recommend actions that the state should take to repair them. In 1956 the Commission published its report, which it insisted, among other things, that the government should incorporate a separate Buddha Sasana Council (*buddha śāsana maṇḍalaya*) consisting of elected lay and monastic members, which would guarantee for Buddhism the same "special rights" (*visēṣa ayitivāsikam*) that it enjoyed in the era of Buddhist kings.<sup>11</sup>

### ***1950s and 60s: Politicising Constitutional Reform, Pairing Constitutional Criticism***

During the 1950s and 1960s, both criticisms of Section 29(2) – those couched in the demands for the elaboration of fundamental rights and in the demands for special Buddhist privileges – gained prominence in national politics. During the prime ministership of S.W.R.D. Bandaranaike, these twin criticisms were filtered into two large government initiatives. On one hand, calls to reconsider constitutional protections for minority and individual rights were addressed in a Joint Select Committee for the Revision of the Constitution, which was charged with, among other things, formulating a chapter on fundamental rights. On the other hand, calls to give Buddhism state support and protection were directed towards a newly appointed government body, the Buddha Sasana Commission, which was mandated to investigate the claims and suggestions of

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<sup>9</sup> A. Welikala, "Specialist in Omniscience? Nationalism, Constitutionalism, and Sir Ivor Jennings' Engagement with Ceylon" in H. Kumarasingham (Ed.) (2016) *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (London: Routledge): Ch.6.

<sup>10</sup> All Ceylon Buddhist Congress (1951), *Buddhism and the State: Resolutions and Memorandum of the All Ceylon Buddhist Congress* (Maradana: Oriental Press): p.3.

<sup>11</sup> All - Ceylon Buddhist Congress, *Bauddha Toraturu Parīkṣaka Sabhāva Vārtāva* (Colombo: visidunu prakāśanayaki, 1956), 371. See also Schonthal, Benjamin (2016), *Buddhism, Politics and the Limits of Law* (New York: Cambridge Univ. Pr.), Ch 1.

the report of the All Ceylon Buddhist Congress and recommend administrative measures to strengthen the position of Buddhism in the country.<sup>12</sup>

Promises to integrate fundamental rights into Sri Lanka's constitution had been a visible theme in S.W.R.D. Bandaranaike's political agenda since he separated from the ruling United National Party (UNP) and formed his own political party, the Sri Lanka Freedom Party (SLFP), in 1951. Shortly after becoming Prime Minister, in November 1957, he introduced a parliamentary motion to establish a Joint Select Commission on the Revision of the Constitution, saying:

In our present Constitution there is no adequate statement of fundamental rights; fundamental rights as affecting all citizens, fundamental rights maybe as affecting the minority sections of the general community. There is no statement beyond Section 29 which itself is not very satisfactory.<sup>13</sup>

The Joint Committee created by Bandaranaike – which included prominent representatives from the SLFP, UNP, Federal Party<sup>14</sup> and the Left parties, many of whom had proposed their own amendments to the Soulbury Constitution in the 1940s – produced a comprehensive list of fundamental rights one year later, one which included political rights, economic rights, “cultural and educational rights of minorities,” rights to enforce fundamental rights, and discrete rights to freedom of religion. Under the rights to freedom of religion, the Committee included provisions for the “freedom of conscience and worship,” “free profession and practice of religion” and the freedom to manage religious affairs. This list was based closely on the Indian constitutional model, reiterating its provisions *verbatim* in many cases.<sup>15</sup>

In order to examine the question of special state protections for Buddhism, Bandaranaike, as noted above, created a Buddha Sasana Commission consisting of ten monks and six laymen.<sup>16</sup> The Commission was formed in 1957 with an aim to evaluate the proposals of the ACBC commission, to recommend measures for effectively managing temple properties and educating the *sangha*, and to formulate a plan for placing all Buddhist monks and temples on a national register.<sup>17</sup> In its report, the Commission confirmed the suggestion of the ACBC commission that the government set

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<sup>12</sup> Sessional Paper No. XXV of 1957: *The Interim Report of the Buddha Sasana Commission* (Colombo: Government Press): p.1.

<sup>13</sup> S.W.R.D. Bandaranaike, 'Revision of the Constitution' (Speech Made As Prime Minister, 7<sup>th</sup> November 1957) in G.E.P. De S. Wickramaratne (Ed.) (1961) *Towards a New Era: Selected Speeches of S.W.R.D. Bandaranaike* (Colombo: Government Press,): p.137.

<sup>14</sup> S.J.V. Chelvanayakam withdrew from the Committee in 1958, following the failure of the Bandaranaike-Chelvanayakam Pact.

<sup>15</sup> Religion was also mentioned in the section on “cultural and educational rights of minorities,” ensuring that state grant aid would not be discriminatory on the basis of language or religion. J.A.L. Cooray (1973) *Constitutional and Administrative Law of Sri Lanka (Ceylon)* (Colombo: Hansa Publishers): p.69.

<sup>16</sup> Sessional Paper No. XXV of 1957, op cit.: p.2.

<sup>17</sup> Ibid: p.1.

up a Buddha Sasana Council, and further specified that the Council should oversee ordaining and registering *bhikkhus*, help supervise a code of conduct for monks, promote the spread of Buddhism, and manage temple donations. The Commission also made suggestions for improving monastic education, setting up Buddhist public schools for laity, creating temple trusts for rural villages, regularising the building of temples, establishing *sangha* courts (*sanghadhikaraṇa*) and drafting a Buddha Sasana Act which would formalise the state's supervisory role over Buddhist monks, property and lay officials.<sup>18</sup>

Both the Committee on the Revision of the Constitution and the Buddha Sasana Commission were dissolved following Bandaranaike's assassination on 26<sup>th</sup> September 1959.<sup>19</sup> However, the agendas of both bodies were taken up by the major political parties and governments that succeeded Bandaranaike. Mrs Bandaranaike, who took over the leadership of the SLFP in 1960, promised in her first election manifesto that she would pursue both initiatives: she would work to create a republican constitution which included a chapter on fundamental rights, and she would implement the suggestions of the Buddha Sasana Commission.<sup>20</sup> By the middle of the 1960s, even the UNP – the party whose founding father, D.S. Senanayake, worked to implement the 1948 Constitution – began to adopt similar language and approaches, promising in their 1965 Election Manifesto:

While restoring Buddhism to the place it occupied when Lanka was free and Kings ruled according to the *Dasa Raja Dharma* (Ten Buddhist Principles) we shall respect the rights of those who profess other faiths and ensure them freedom of worship.<sup>21</sup>

Later that year, at the party's national conference in November, J.R. Jayewardene went further and proposed that a new constitution for the "Democratic Socialist Republic of Lanka is to be established on Feb 4, 1966 [*sic*]" and that it should contain a provision that "Buddhism, the majority religion of the country, where the population is about 75%, being given its rightful place."<sup>22</sup> In 1967, the UNP-led government even reappointed a Joint Select Committee on the Revision of the Constitution to carry on with investigations which began under S.W.R.D. Bandaranaike's government, charging it with investigating the same issues as the 1958 Committee, including the inclusion in the constitution of a chapter on fundamental rights.<sup>23</sup>

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<sup>18</sup> Sessional Paper No. XVIII of 1959: *Budha Śasana Komiṣan Vārtāva (Buddha Sasana Commission Report)* (Colombo: Government Press): pp.277-290.

<sup>19</sup> The Committee on the Revision of the Constitution ultimately made little headway on fundamental rights, concentrating its attentions primarily towards the re-delimitation of electorates.

<sup>20</sup> Warnapala (2005): p.157.

<sup>21</sup> United National Party (1965) *Party Manifesto: The United National Party*.

<sup>22</sup> *World Buddhism* (Nov. 1965), Vol. 14(4): p.17.

<sup>23</sup> *The Joint Select Committee of the Senate and the House of Representatives Appointed to Consider the Revision of the Constitution*, Parliamentary Series No. 30, 3<sup>rd</sup> Session of 6<sup>th</sup> Parliament, 13<sup>th</sup> June 1968, (Colombo: Government Press).



### ***Giving Buddhism the Foremost Place***

In the early 1970s, the talk of a new constitution, which had existed in the political scene since the 1950s finally gave way to actual constitutional change, and in the 1970-1972 Constituent Assembly process, members debated a Draft Basic Resolution on Buddhism (Draft Basic Resolution 3), which read:

In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to all religions the rights granted by Basic Resolution 5(4).<sup>24</sup>

This resolution, entitled “Buddhism,” ties together the two major criticisms of Section 29(2) in the Soulbury Constitution. It refers both to a state obligation to protect Buddhism (here underscored as “the religion of the majority of the people”) and to “assure” certain fundamental rights to all religions. Regarding Buddhism, the passage draws from the language used in SLFP policy statements and manifestos during the 1960s, and it reiterated directly the election manifesto of the United Front from 1970, which promised:

Buddhism, the religion of the majority of the people, will be ensured its rightful place. The adherents of all faiths will be guaranteed freedom of religious worship and the right to practice their religion.<sup>25</sup>

Draft Basic Resolution 3 on Buddhism also made reference to the proposed chapter on fundamental rights, which read:

Every citizen shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and the freedom, either individually or in community with others in public or private, to manifest his religion or belief in worship, observance, practice and teaching.<sup>26</sup>

Unlike the language regarding Buddhism, which was drawn up by the SLFP, the language of Section 5(4) on freedom of religion was imported *verbatim* from Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) which was adopted by the United Nations in 1966.<sup>27</sup>

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<sup>24</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 1/17/72: pp.88-9.

<sup>25</sup> United Front, *Joint Election Manifesto of the United Front of the Sri Lanka Freedom Party, Lanka Samasamaja Party and Communist Party* (Colombo: Government Press, 1970), 12.

<sup>26</sup> Constituent Assembly, *Constituent Assembly Committee Reports*, 1/17/72, pp. 90-1.

<sup>27</sup> The ICCPR was adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) on 16<sup>th</sup> December 1966, but only entered into force, in accordance with Article

Members of the Constituent Assembly put forth three amendments to the Buddhism Chapter, which seem to echo the tone and content of submissions to the PRC in 2016. The first amendment accepted the idea that Buddhism should have special recognition, but sought to add to it, explicit recognition for the country's other major religious traditions of Islam, Christianity, and Hinduism. As proposed by A. Aziz, head of the Democratic Workers' Congress (a coalition partner in the United Front), this amendment read:

“In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be given its rightful place and accordingly, it shall be the duty of the State to protect and foster Buddhism, while assuring to **Hinduism, Islam, Christianity and** all religions the rights granted by Basic Resolution 5(4).”<sup>28</sup>

Such an amendment, Aziz insisted, would “give a certain measure of confidence” to Hindus, Muslims and Christians, allowing them to feel equally included and represented in the constitution.<sup>29</sup>

Like some of the submissions to the PRC in 2016, members of the 1970-1972 Constituent Assembly also proposed an amendment designed to strengthen the Buddhism Resolution by incorporating language from the Kandyan Convention. This amendment was proposed by the leaders of the UNP, J.R. Jayewardene and Dudley Senanayake:

In the Republic of Sri Lanka, Buddhism, the religion of the majority of the people, shall be **inviolable and shall be** given its rightful place, and accordingly, it shall be the duty of the State to protect and foster Buddhism, **its rites, Ministers and its places of worship**, while assuring to all religions the rights granted by basic Resolution 5(4).<sup>30</sup>

Jayewardene explained the rationale for his amendment by saying that the expression “rightful place,” or *nisitaena*, was vague and people would not know what was meant by the phrase. In order to further clarify this duty of the government and to make sure that Buddhist interests were protected, particularly the preservation of Buddhist sacred sites, he insisted that language from the Kandyan Convention was appropriate, and so the terms “inviolable” and “its rites, ministers and places of worship” were added to the resolution.

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49, on 23<sup>rd</sup> March 1976. Sri Lanka ratified and acceded to the ICCPR on 11<sup>th</sup> June 1980. Thus at the time its language was used by the Constituent Assembly the ICCPR had no legal force.

<sup>28</sup> *Constituent Assembly Debates* (1972) (Colombo: Ceylon Government Press): Col.640.

<sup>29</sup> *Ibid*: Col.642.

<sup>30</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 2/27/72: Col. 226

Finally, and also like some of those who made submissions to the PRC in 2016, there were members of the 1970-1972 Assembly that proposed an amendment making Sri Lanka a secular state. In a draft amendment introduced to the Constituent Assembly, the Federal Party (FP) argued that the constitution should not privilege a single religion but should include the following clause:

The Republic of Sri Lanka shall be a secular State but shall protect and foster Buddhism, Hinduism, Christianity and Islam.<sup>31</sup>

The Assembly speeches regarding this FP amendment, most of which are preserved in the official record in Tamil,<sup>32</sup> raise a number of concerns that are relevant to the 2016 constitutional deliberations. These concerns, it should be said, exceed the standard, liberal objections to giving Buddhism a special constitutional status. On the one hand, these debates point to the vexed legal implications that follow from giving special protections and status to a particular “religion” (*āgama*) or “dispensation” (*Sasana*). FP assembly members pointed out that, legally speaking, it was unclear precisely what or whom would be the beneficiaries of these legal protections and privileges. On the other hand, the FP pointed to an incommensurability between the draft constitution’s stated privileges for Buddhism and its protections for religious freedom: whereas Buddhist privileges redound to a *religion*, fundamental rights protections apply to individual *citizens*. Therefore, the FP insisted, one provision did not balance the other, as Colvin R. De Silva claimed.

Beyond these issues, one also sees in the debates over the FP’s amendment the important, and often unacknowledged, role played by multiple languages in the constitutional debates – something that the 2016 Constitutional Assembly ought to consider. Most of the Constituent Assembly did not read the FP’s amendment in its Tamil original and this led to some important (and unintended!) miscommunication among assembly members. The English – and Sinhala – language versions used the phrases *a secular state* and *lōkāyatta rājyayak* respectively. However, neither phrase accurately rendered the connotation of the FP’s Tamil original phrase *oru mata cārparra aracu*, which connoted not the active separation of religion from the “worldly” affairs of state (a message incipient particularly in the Sinhala adjective *lōkāyatta*) but the “non-leaning” of the state towards a particular religion (*matam*). Properly understood, it suggested the idea of a government that supported all religions equally.<sup>33</sup>

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<sup>31</sup> Constituent Assembly (1972) *Constituent Assembly Committee Reports*, 2/27/72: pp.225-26.

<sup>32</sup> These speeches are translated and analyzed closely in Schonthal, Benjamin (2016), *Buddhism, Politics and the Limits of Law* (New York: Cambridge Univ. Pr.), Chapter 4.

<sup>33</sup> In fact *matacārparra* is used regularly to translate into Tamil the ethos of Nehruvian secularism in India, namely the ideal of (in Hindi and Sanskrit) *sarva dharma sambhava*, or “[benevolent] neutrality towards all religions.”

(Learning from this, the 2016 Constitutional Assembly should make sure to pay close attention to potential distortions that might accompany of translation among the languages.)

Ultimately the UF majority in the Constituent Assembly voted to accept Basic Resolution 3. However, in the version of the resolution that appeared nine months later in the draft constitution that Colvin R. De Silva presented at a press conference, the language of the chapter on Buddhism had changed slightly.<sup>34</sup> In January 1972, Resolution 3 on “Buddhism”, which became Section 6 of the new constitution, read:

The Republic of Sri Lanka shall give to Buddhism the **foremost place** and accordingly it shall be the duty of the State to protect and foster Buddhism while assuring to all religions the rights granted by section 18(1)(d).<sup>35</sup>

While the current constitution differs very slightly in its wording (replacing the second “Buddhism” with “Buddha Sasana,” the implications of which are discussed below), the main structure of the Buddhism Chapter remains unchanged from the 1972 process.

### ***Three Reflections on History***<sup>36</sup>

**1. The long-standing grievances and demands that gave rise to the Buddhism Chapter in the 1970s are similar to those expressed today; and they emerge initially in reaction to the 1948 Constitution.**

A long history stands behind demands to giving Buddhism its rightful place (*nisitaena*) and to guarantee fundamental rights to religious freedom for all persons. The language of the Buddhism Chapter – and, indeed, the terms of the debate over Buddhism and religion provisions today – remains in thrall to this history and to the struggles for independence, sovereignty, and cultural recuperation that define the period from the 1940s to 1972.

**2. The Buddhism Chapter is not, and was never intended to be, a precise and univocal provision; rather, it was designed purposefully as a vague and multivocal clause in order to avoid and/or bridge the demands of multiple groups.**

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<sup>34</sup> Between May 1971 and January 1972, De Silva and the drafting committee adjusted the resolution to reflect two aspects of the debates. Firstly, the drafters replaced the term *rightful* place with the stronger phrase *foremost* place (*S: pramukhasthānaya*). Secondly, the re-drafted resolution removed the phrase qualifying Buddhism as “the religion of the majority of the people.”

<sup>35</sup> Draft Basic Resolution 5(iv) was incorporated as Section 18(1)(d), although the wording remained identical.

<sup>36</sup> Note: We do not reflect here on the procedures and processes of the 1970-1972 process. Welikala has addressed this in other places.

The Buddhism Chapter, as it exists today, is purposefully multivalent. It is neither the result of unchecked Buddhism majoritarianism nor is it the result of some fully conceived vision of “Buddhist secularism.” Colvin R. de Silva, himself a self-described secularist, designed the provision as a hard-wrought multi-part bargain over religion, in a context of strong and competing political forces, both within the ruling United Front coalition and outside of it.<sup>37</sup> In drafting the language, De Silva sought to broker two types of compromise: an *inter-religious compromise* between those who demanded special prerogatives for Buddhism and those who wanted equal protections for all religions; and an *intra-religious compromise* between Buddhists who wanted greater state supervision over Buddhism and those who wanted to protect monastic autonomy.

### **3. Many of the deepest disagreements regarding the Buddhism Chapter occurred not between Buddhists and non-Buddhists, but among Buddhists themselves.**

One of the main reasons that the Buddhism Chapter adopted the language of “foremost place” was because Buddhists could not agree as to how much influence the government should have over the affairs of Buddhist monks. Disagreements on this issue, which we continue to see today in Sri Lanka (e.g. the recent Kathikavata Bill affair), had been lingering since the 1940s. By the late 1960s, however, two major factions emerged. One faction, led by elite, urban Buddhist lay organisations, such as the ACBC, argued that the government ought to create a central regulatory body, a Buddha Sasana Mandalaya, to oversee Buddhism on the island and, in particular, to help administer the *sangha*. The other faction, led by the chief prelates of the Siyam Nikaya, rejected strenuously any state oversight over monastic life. This faction pressured the government to include in the Buddhism Chapter specific provisions that would declare the *sangha* autonomous.

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<sup>37</sup> De Silva, in fact, had originally drafted a chapter on religion that made no mention of Buddhism.

## II. The Case Law on the Buddhism Chapter<sup>38</sup>

It is difficult to define the jurisprudence of the Buddhism Chapter for two reasons. First, Sri Lanka's courts have, with some exceptions discussed below, been reluctant to offer strong interpretations of the Buddhism Chapter. When compared with other areas of law in Sri Lanka, there is a conspicuous dearth of references to the Buddhism Chapter in reported cases. Second, even in the few published cases, minimal effort is made to respond to earlier decisions and/or systematise interpretations of the Buddhism Chapter as an evolving stream of *stare decisis*. Therefore, in order to understand the legal impacts that the Buddhism Chapter has had on Sri Lankan society, one has to ask another question: How have litigants and judges used the Buddhism Chapter and with what effects? By formulating the question in this (broader) way, one can better take stock of the many ways in which the Buddhism Chapter has affected legal *and* social life in Sri Lanka.

Generally speaking, the Buddhism Chapter has been used in litigation in Sri Lanka in four ways, each of which involves different assumptions about what Buddhism is, how it should be protected, and who or what threatens it. In a previous article, Schonthal has described this as four "idioms of litigation." These idioms are summarised and compared below.

### ***Idiom One: Protecting Buddhist Autonomy from the State***

The earliest uses of the Buddhism Chapter date to the 1970s, not long after the 1972 Constitution was enacted. In these cases, litigants used the state's duties to protect and foster Buddhism as part of petitions for judicial review from the newly formed Constitutional Court. In two important cases, the judgments of which were published by the Registry of the Constitutional Court,<sup>39</sup> litigants used the Buddhism Chapter to challenge two government bills. In the first case, from 1973, opposition politician and lawyer Prins Gunasekera opposed "The Places and Objects of Worship Bill," which gave the Director, Cultural Affairs strong powers over the construction and renovation of religious sites. In his petition, Gunasekera warned of "anti-Buddhist" attitudes within the government and warned that the bill might place Buddhism under threat. In the second case, from 1976, three separate groups of petitioners, including Buddhist monks lay organisations, opposed a "Pirivena Education Bill" which aimed to restructure

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<sup>38</sup> This section draws upon but does not reproduce analyses from Benjamin Schonthal, "Securing the Sasana Through Law: Buddhist Constitutionalism and Buddhist-interest Litigation in Sri Lanka," *Mod. Asian Stud.*: 1-43. It also offers new information as well.

<sup>39</sup> Government of Ceylon, "Decision of the Constitutional Court on Places and Objects of Worship Bill," in *Decisions of the Constitutional Court of Sri Lanka* (Colombo: Registry of the Constitutional Court, 1973); Government of Ceylon, "Decision of the Constitutional Court on Pirivena Education Bill," in *Decisions of the Constitutional Court of Sri Lanka (Vol. IV)* (Colombo: Registry of the Constitutional Court, 1976)

Pirivena education in ways that gave the state greater authority over it. They claimed that the bill gave the state powers to interfere perniciously with what were properly monastic institutions.

The Constitutional Court did not uphold either petition.<sup>40</sup> Nevertheless, in its judgments, it indirectly affirmed two claims made by the petitioners. It affirmed the idea that the constitution ought to safeguard Buddhism against unwanted interventions by state, even if it did not agree that the bills in question constituted a threat to Buddhism. It also affirmed the idea that protections for Buddhism were essentially a sub-species of fundamental rights for religion: Buddhism, like all religions, could be bisected into “belief” and “manifestation,” the second of which was limitable under Section 18(1)(d) of the 1972 Constitution.<sup>41</sup>

These early cases also set the groundwork for the litigation to follow. By the late 1970s, it was clear, even if it was not explicit in the constitution, that the Buddhism Chapter was justiciable and that, under the right conditions, it could in fact be used to compel the government to alter its behaviour.

## ***Idiom 2: Protecting Buddhist Orthodoxy***

Starting in the late 1970s, one can see a second way of using the Buddhism Chapter in Sri Lanka’s higher judiciary. In these cases, litigants invoked the Buddhism Chapter in order to prevent what they considered to be gross breaches of monastic comportment. The first case of this type occurred in 1978. In this case, several Colombo-based Buddhist lay organisations filed an objection with the Supreme Court against the fact that a robed Buddhist monk, Ven. Nakulugamuwa Sumana Thero, who had completed his law examinations, was scheduled to make formal application to the bar. The case, which Chief Justice Samarakoon declared to be “the first of its kind in the annals of our Courts”, was heard by a five-judge bench of the Supreme Court.<sup>42</sup> In their submissions, the petitioners insisted that the state had an obligation to stop Ven. Sumana from becoming a lawyer in the name of protecting Buddhism because the codes of Buddhist monastic discipline (Vinaya) forbid monks from doing so. Moreover, were Sumana to become a lawyer, he might encourage other monks to do so, and this, in turn, would lead

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<sup>40</sup> This fact is unsurprising considering the fact that Bandaranaike had appointed the members of the Constitutional Court herself and they were, therefore, unlikely to strike down government bills.

<sup>41</sup> In its early Buddhism Chapter jurisprudence, the Constitutional Court had a third notable feature to its interpretations. The Court borrowed liberally from foreign jurisprudence. In both the 1973 and 1976 cases, the courts gave prominence to US Supreme Court decisions (e.g. *Reynolds v. U.S.*, *Cantwell v. Connecticut*, and *Davis v. Beason*) and Indian Supreme Court Decisions (e.g. *Saifuddin v. Moosaji* and *State of Bombay v. Narasu Appu*). Comparisons were also made between the constitutional provisions of Ireland and Burma and that of Sri Lanka.

<sup>42</sup> *In the Matter of the Application of Rev. Sumana Thero to Be Admitted and Enrolled as an Attorney at Law* (1978) as cited in (2005 3SLR 370).

to the degradation of the sangha on the island. Petitioners used passages from the Vinaya as evidence, along with evidence given by some senior Buddhist monks (from outside of Sumana's fraternity). Ven. Sumana, for his part, also used textual evidence along with letters of support from senior monks from within his lineage.

In deciding the matter, the Supreme Court found itself in a bind. One group of lay Buddhists and senior monks called upon the court to protect monastic orthodoxy. Another group, defending Sumana, called upon the court to preserve monastic autonomy. In a five-to-one split decision, the majority decided in favour of Sumana and insisted that monastic sects must be allowed to govern themselves on matters of monastic discipline. In a long and strident dissenting opinion, however, Justice Wanasundara defended the other position. It is important to note that, today, it is Wanasundara's dissent that seems more influential and widely cited as opposed to Samarakoon's majority opinion.

Since the Sumana case, there have been several other instances in which the courts have been called upon to regulate the behaviour of Buddhist monks.<sup>43</sup> Most recently, in a well-publicised court case that bounced around Sri Lanka's higher judiciary for nearly ten years, the Court of Appeal intervened to prevent Ven. Dr. Paragoḍa Wimalawansa Thero, a senior monk living in Waskaduwa, near Colombo, from obtaining a driving licence.<sup>44</sup> Unlike the Sumana case, it was the monk, Ven. Wimalawansa, who initially filed a writ petition to compel the Commissioner of Motor Traffic to issue him with a driving licencing, after he was denied a licence by an officer at a CMT office. In his petition, Ven. Wimalawansa cited, among other things, the fact that by denying him a licence the CMT was impeding his abilities to fulfil his monastic religious obligations and therefore undermining the protections declared in the Buddhism Chapter. (As in the first idiom of litigation, he used the Buddhism Chapter to protect Buddhist autonomy against an over-reaching state.) In making his submissions, Wimalawansa gathered supporting letters from other Buddhist monks and offered his own interpretations of the Vinaya. However, in a manner similar to the Sumana case, a number of lay and monastic groups intervened against Wimalawansa's petition insisting that monks driving, like monks working as lawyers, contravened the norms of monastic life as outlined in the Vinaya and therefore damaged Buddhism. As in the Sumana case, the court was called upon to rule on a dispute over questions of monastic orthopraxy. This time, however, Justice Gooneratne, speaking for the Court of Appeal, issued a strong judgment rejecting Wimalawansa's petition and insisting that monks driving transgressed the Vinaya and, therefore, constituted a threat to Buddhism. Gooneratne's

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<sup>43</sup> For example Rev. *Warapitiya Rahula Thero v. Commissioner General of Examinations and others* (2000) relating to a monk working as a social worker. See also the debates around the proposed *Kathikavata Bill* in early 2016.

<sup>44</sup> For a complete sociolegal analysis of this case see Schonthal (2016) "The impossibility of a Buddhist State." *Asian Journal of Law and Society* 3 (1): 1-20. The case is *Paragoda Wimalawansa Thero and Others v. Commissioner of Motor Traffic* (2014).



opinion is remarkable for its long excursions into the proper norms of Buddhism and Buddhist monasticism. (It is the most thoroughgoing court opinion on Buddhism since Wanasundara’s dissent.) The opinion is also notable in that, rather than cite the majority opinion in the Sumana case, which considered very similar issues, it uses Wanasundara’s dissent.

### ***Idiom 3: Protecting Buddhist Spaces***

Since the 1970s, litigants have looked to the protections for Buddhism spelled out in the Buddhism Chapter as a way to protect what they consider to be Buddhist spaces from a variety of perceived threats. These threats have included the Liberation Tigers of Tamil Eelam (LTTE), Christian proselytisers, and Muslim settlers. In making these types of claims, litigants pointed to a particular term in the Buddhism Chapter which was added during the 1978 Constitutional reforms, the term “Buddha Sasana.” By replacing the phrase “protect and foster Buddhism” with “protect and foster the Buddha Sasana” – or, in Sinhala, replacing *buddhāgama* with *śāsana* – those who drafted the 1978 Constitution, and those who have subsequently interpreted it, sought to broaden the ambit of state protections for the majority religion.

Sasana, the argument goes, applies to more than *āgama*. Where *āgama* implies doctrines and beliefs, sasana also encompasses relics, temples, texts, persons, customs, material objects and even spaces.<sup>45</sup> Buddhist lay organisations, such as the Young Men’s Buddhist Association (YMBA), used this argument about the spatial nature of sasana to petition against the establishment of Provincial Councils in the 1987 Thirteenth Amendment case.<sup>46</sup> By permitting the devolution of political authority to the provinces, the argument went, the state would be placing non-Buddhists (in the North and East) in control of Buddhist sites; and that arrangement would violate constitutional obligations to protect Buddhism. Like the Sumana case, this argument was not validated by the majority opinion. Yet, it was affirmed in an important dissenting opinion by Justice Wanasundara. In recent years, that dissent has become something of a *de facto* jurisprudential doctrine in Sri Lanka and is regularly quoted in court submissions and judgments.<sup>47</sup>

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<sup>45</sup> See, for example, definitions of Sasana as offered by the 2002 Presidential Commission on Buddhism.

<sup>46</sup> In the *Matter of the Thirteenth Amendment to the Constitution and Provincial Councils Bill* (1987) 2 SLR333

<sup>47</sup> This point cannot be overstated. This dissenting opinion regarding the spatial and “compendious” nature of the phrase Buddha Sasana is very influential. Like Wanasundara’s dissent in the Sumana matter, many legal professionals refer to it regularly. For example, in a case from 1994, the Supreme Court selectively validated this interpretation of the Buddhism clause by referring to this *dissenting* opinion rather than the majority opinion. SC(SD) 1/1994 *In the Matter of the Antiquities Ordinance*, Hansard 3 May 1994.

Since the Thirteenth Amendment case, litigants and lawyers have continued to make submissions that emphasise the need to protect Buddhist spaces from non-Buddhist threats. These arguments appear prominently, for example, in the written submissions from cases related to the construction of Christian churches in Buddhist-majority areas. While those who oppose church-building cite a number of legal rationales – including zoning, building codes restrictions, permit violations and other things – they often build into their petitions arguments that such constructions might also threaten the Buddhist space of that particular village. Many of these cases are settled rather than decided; therefore, frequently, one must look to the case files to find evidence of this dynamic.

The defence of Buddhist spaces was prominent in the important Dighavapi case of 2008.<sup>48</sup> In that case, the Supreme Court heard fundamental rights petitions from a number of petitioners, many of them Buddhist monks and lay organisations, who objected to the distribution of houses to predominately Muslim families as part of a tsunami relocation project funded by Saudi Arabian donors. The most influential legal points in the case from the perspective of the court pertained to the protocols of land alienation and distribution. Nevertheless, if one looks at the submissions in the case, as well as the media attention around it, one sees that the Buddhism Chapter played an important role as well: a major narrative in the submissions and journalistic accounts was the fact that this Muslim settlement was too close to the historic Dighavapi temple, and it threatened to divide – spatially – the temple from the Buddhist communities that lived nearby and, through donations and service, maintained the temple. In this case, as in the ones described above, litigants and the public invoked the Buddhism Chapter in order to call upon the state to protect the “spaces” of Buddhism on the island.

#### ***Idiom 4: Protecting Buddhism from Profanation***

In addition to protecting Buddhist autonomy, orthopraxy, and space, the Buddhism Chapter has also been used to protect Buddhism against the effects of “profaning” religion, by which is meant the purportedly improper mixing of things deemed religious with those deemed economic or commercial.<sup>49</sup> In these cases, petitioners call upon the court to prevent other groups from undertaking practices which might damage the reputation or prestige of Buddhism, or the size of the Buddhist community in Sri Lanka. The most prominent cases of this type relate to attempts made by Buddhist groups during the 2000s to prevent “forcible” or “unethical” conversions. In the three incorporation cases from 2000 to 2003,<sup>50</sup> as well as in the JHU bill cases in 2004 and

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<sup>48</sup> SC(FR) 178/2008 *Ven. Ellawala Medananda Thero and others v. Sunil Kannangara and Others*

<sup>49</sup> Schonthal, “Securing the Sasana Through Law: Buddhist Constitutionalism and Buddhist-interest Litigation in Sri Lanka,” 33.

<sup>50</sup> SC (SD) 2/2001 (8 June 2001), *Regarding Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill*. SC (SD) 2/2003 (18 Feb 2003), *Regarding New Harvest Wine Ministries (Incorporation) Bill*. SC (SD) 19/2003 (5 Aug 2003), *Regarding Provincial of the Teaching Sisters of the Holy Cross of the Third Order of*

2005,<sup>51</sup> petitioners and intervenient petitions used the Buddhism Chapter to justify attempts to limit the activities of Christian groups that, they alleged, had improperly mixed proselytism and financial inducements in order to gain converts. During the same period, and extending into the present, one also sees attempts – by way of fundamental rights petitions<sup>52</sup> and criminal charges<sup>53</sup> – to prevent merchandisers, artists, and tourists from defaming the image of the Buddha. Here, as well, petitioners and prosecuting lawyers aimed to protect Buddhism through preventing the improper mingling of Buddhist symbols with commercial practices and with other images that might diminish or violate the perceived sacrality of those symbols. Although the Buddhism Chapter is not the only law invoked in these cases – parties often use Chapter XV of the Penal Code on “offences relating to religion” – the government’s constitutional duties to protect Buddhism are often highlighted as an additional, if not overarching, justification for taking firm and decisive action – particularly in public debate and media commentary surrounding these cases.

### ***Three Reflections on Case Law***

#### **1. When invoked in litigation, constitutional duties to protect Buddhism lead, almost inevitably, to debates over what it means to protect Buddhism.**

The mandate “to protect and foster Buddhism” is by no means self-evident. This fact has been obscured in many debates about the Buddhism Chapter because defenders and critics have concentrated more on its expressive dimensions than on its regulatory dimensions. When one looks closely at how litigants and judges have interpreted and invoked the Buddhism Chapter, however, one sees clearly the broad range of interpretations possible. The mandate to protect and foster Buddhism can mean protecting Buddhists’ autonomy from the state or using the state to neutralise heterodox Buddhist practices. It can mean securing the Buddhist-ness of particular spaces or preventing the improper mixing of Buddhism with commercial activity. It can justify judges’ readings of Buddhist texts or it can give to *bhikkhus alone* ultimate authority to pronounce on Buddhism. (Only in one case, the Menzingen determination, did the Supreme Court affirm the idea that the state’s duties to protect Buddhism could outweigh the religious rights of other groups.) We could extend this further, but the point remains: by including enforceable protections for Buddhism in the constitution,

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*Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill.*

<sup>51</sup> SC (SD) 2-22/2004 *Regarding the Forcible Conversion of Religion Bill*; SC (SD) 32/2004 *Regarding the 19<sup>th</sup> Amendment to the Constitution Bill.*

<sup>52</sup> SC (FR ) 237/2004, *Ven. Kusaladhamm Thero v. Indra de Silva and Others* (2004)

<sup>53</sup> Schonthal, “Securing the Sasana Through Law: Buddhist Constitutionalism and Buddhist-interest Litigation in Sri Lanka,” 36-41.

drafters induce disputes over what it means to protect Buddhism—disputes into which, with a few exceptions, the courts are understandably reluctant to intervene decisively.

**2. Contrary to what many assume, disputes over protecting Buddhism frequently end up deepening and exacerbating existing divisions among Buddhist monks and laypersons.**

In many of cases, using the Buddhism Chapter effects the opposite of what drafters of the Buddhism Chapter intended. Rather than securing the wellbeing and integrity of Sri Lanka's Buddhists it aggravates long-standing lines of fissure within the island's Buddhist community by raising the stakes of debates over the parameters of orthodox Buddhism. To take just one example, in the case of the driving monk, the court was called upon to intervene in a series of contentious questions that have split Buddhists in Sri Lanka for decades, even centuries: Who has the final authority to declare what is orthodox and heterodox? Should monks from one monastic fraternity or chapter or temple have authority to discipline monks from another? What is the state's role in supporting or tempering that authority? What are the limits of monastic participation in worldly (*laukika*) affairs? What is the proper jurisdiction of Vinaya? What happens when Vinaya and state law come into conflict?

When the state and the courts are called upon to enforce the Buddhism Chapter they end up calling attention to, raising the costs of, and (often unwittingly) intervening in these difficult, divisive, and old debates. Moreover, insofar as judges are laypersons, these cases inevitably place lay persons in the morally awkward the position of having to dictate the terms of Buddhism to Buddhist monks.

**3. Rather than serving as an instrument for addressing existing threats to Buddhism, the Buddhism Chapter gives opportunities and incentives to citizens and groups to claim a wide variety of social and political phenomena as threats to Buddhism. It may also heighten a sense of crisis over Buddhism.**

Visible in almost all of the court cases related to Buddhism are the ways in which constitutional mandates to protect Buddhism permit, perhaps even incentivise, the making of legal claims about Buddhism. This can happen in both passive and active ways. Passively, an awareness of the constitutional duties to protect Buddhism may heighten one's awareness of (or anxiety regarding) the condition of the majority religion. Actively, the fact of constitutional protections for Buddhism may lead legally minded persons to thrust Buddhism into a variety of other existing social conflicts. Good examples of this can be seen in the Thirteenth Amendment Case as well as in the Dighavapi case, where litigants invoked the Buddhism Chapter as an additional strategy of contesting the legality of a particular legal or executive action that, in most cases, was not primarily perceived originally as a threat to Buddhism. As Schonthal has argued,

litigation related to the Buddhism Chapter has increased in recent years, in what appears to be a growing culture of Buddhist-interest litigation and legal activism.<sup>54</sup>

### III. Options, Advantages and Things to Consider

Broadly speaking, four options are available to drafters. We outline these below, while reflecting on the advantages offered by each as well as competing factors that should be taken under consideration. Our recommendation will then be discussed.

***Option 1: Declare in the constitution a principle of equal status for religions, religious neutrality, or secularism, while omitting special treatment for Buddhism.***

Today, as in the past, numerous constitutional submissions call for the inclusion of a clause that announces the state's impartiality towards religion. This impartiality might take several forms: equal state patronage towards all religions, strict neutrality/non-discrimination with respect to religion, or a statement of separation or non-establishment between state and religion (as one sees in many countries throughout the world).

The PRC process yielded a number of recommendations to this effect. Some of these recommendations appear in Section 4, on religion, while others appear in other sections. In Section 4, one finds the following: "Sri Lanka shall be a secular state" (4(iv)), "Sri Lanka shall be a secular state while recognising the role of religion in the spiritual development of the people" (4(v)), "the Republic of Sri Lanka will give all religions equal status" (4(vi)).

**The Advantages:** In terms of the expressive functions of the constitution, announcing a principle of impartiality towards religion would give a clear signal that the constitution aims to be more inclusive than previous constitutions. The Constitutional Assembly will be well aware of the tremendous expressive significance of such a signal for non-Buddhists in Sri Lanka. The regulatory effects of such a change would depend upon the wording of the clauses in question (see below) and whether those principles would be explicitly justiciable.

**Important Things to Consider:** Secularism, as a legal principle and term, is no less contested or multivalent than Buddhism. For example, the secularism (*laïcité*) of France

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<sup>54</sup> Ibid., 38-41.

and Turkey are entirely different from that of India and the U.S.<sup>55</sup> Furthermore, interpretations of the meaning of secularism can be just as polemical and exclusionary as protections for Buddhism. Consider, for example, the fact that, in India, ideas of secularism have been used by Hindutva groups to advance anti-Muslim agendas.<sup>56</sup> The point is that declarations of secularism do not always lead to greater inclusion and impartiality on the part of the state. The rubric of secularism, too, can be used illiberally.

In the light of Sri Lanka's history and culture, it can also be hypothesised that better results in terms of recognition might be achieved if the constitution were to foreground the value of *pluralism* rather than a rigid notion of *equality* (in the formalistic sense of identity, uniformity or isomorphism among religious traditions) in approaching the issue of religion(s) in the constitution and public life more broadly.<sup>57</sup> That is, an alternative approach might be to emphasise the rich diversity of religious traditions and the concomitant tolerance, syncretism, cross-fertilisation, and co-existence that have long characterised the practice and enjoyment of religions among peoples on the island.

Putting aside the expressive implications of a constitutional declaration of secularism, for the moment, some important points also pertain to the regulatory implications: Where constitutions attempt to declare equal status for major religions – such as is suggested in 4(vi) – clear regulatory problems may result. Most obviously, the courts will be called upon to rule on which particular dispensations count as “religion” and are therefore worthy of equal status: is Mahayana Buddhism a separate religion and therefore deserving of equal status? Is secular humanism? One can easily see the problems.

Taking the Sri Lankan case, in particular, it seems to matter less what the constitution says and more what the judiciary does. That is, the most effective ways to use law to create neutrality towards religion may be through judicial decisions and common law. In this regard, however, as the PRC also has noted, Sri Lanka's higher judiciary has recognised a common law principle of secularism on multiple occasions. This principle may be better strengthened and clarified through the courts than through changing the substance of the written constitution.

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<sup>55</sup> Kutu, Ahmet T.. 2007. "Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies Toward Religion," *World Politics*, 59(4): 568-9. Bhargava, Rajeev. 2008. "Political Secularism," in *The Oxford Handbook of Political Theory*, edited by John Dryzek, Bonnie Honig & Anne Phillips. New York: Oxford University Press.

<sup>56</sup> Cossman, Brenda & Ratna Kapur. 1996. "Secularism: Bench-Marked by Hindu Right," *Economic and Political Weekly*, 31(38): 2613-2617, 2619-2627, 2629-2630. Sen, Ronojoy. 2010. *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*. New Delhi: Oxford University Press.

<sup>57</sup> We stress that we are here not impugning legal and political equality between *individuals* as a liberal constitutional value.

### ***Option 2: Reconfigure Buddhism's special status and special protections.***

A second option is to maintain legal protections for Buddhism in the new constitution. This option does not appear very prominently in the PRC document; however, it does appear prominently in public opinion polls<sup>58</sup> and media coverage. Broadly speaking four options predominate under this rubric: (1) The new constitution could declare Sri Lanka to be a “Buddhist state.” (2) It could declare Buddhism to be “the state religion” (e.g., as is done in Cambodia). (3) It could create special administrative bodies for administering Buddhism (such as the “Supreme Council” proposed in the Kumaratunga government’s 2000 Draft Constitution).<sup>59</sup> (4) It could retain the basic architecture of Article 9, while playing with the adjectival modifiers (e.g. including a phrase that specifies that Buddhism is “the religion of the majority of the people” as appears in the 2008 Constitution of Thailand).

**The Advantages:** Giving special status to Buddhism in Sri Lanka’s constitution has long been a popular demand among Buddhists on the island. Although linked in some cases to exclusionary forms of ethno-religious nationalism, requests for a special place for Buddhism in the constitution have also reflected bona fide desires to recognise the important role that Buddhism has played in Sri Lankan history. There are liberal and inclusively-minded citizens from all religious backgrounds who accede to the idea, in more or less enthusiastic ways, that the constitution might recognise Buddhism. Evidence for this can be seen in the results of a 2010 poll conducted for the APRC committee by Colin Irwin and CPA.<sup>60</sup>

By including carefully-worded protections for Buddhism in the new constitution one might simultaneously satisfy the desires of Buddhists from across the political spectrum – and thereby enhancing popular buy-in for the constitution as a whole – while also helping insure that the language for expressing those desires is framed in the most inclusive way possible. More pressingly, even for committed secular liberals, giving Buddhism a special status may be a necessary point of compromise or concession

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<sup>58</sup> See the very helpful polling done at CPA here: <http://www.cpalanka.org/opinion-poll-on-constitutional-reform/>; <http://www.cpalanka.org/democracy-in-post-war-sri-lanka-april-2016/> ; <http://www.cpalanka.org/democracy-in-post-war-sri-lanka-dec2015/>

<sup>59</sup> The 2000 Constitution Bill proposed changing Article 9 as follows:

7.(1) 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 giving adequate protection to all religions and guaranteeing to every person the rights and freedoms granted by paragraphs (1) and (3) of Article 15.

(2) The State shall, where necessary, consult the Supreme Council, recognized by the Minister of the Cabinet of Ministers in charge of the subject of Buddha *Sasana*, on measures taken for the protection and fostering of the Buddha *Sasana*.

<sup>60</sup> Irwin, Colin. “War and Peace’ and the APRC Proposals.” May, 2010. Available at <http://www.peacepolls.org/cqi-bin/documents>.

necessary for ensuring that constitution succeeds in the enactment process, both in the parliamentary and referendum stages.

**Important Things to Consider:** There are some heavy costs to giving Buddhism special constitutional protections. Some of these come from the *expressive* functions of such clauses: no matter how carefully one words these clauses, they cannot help but signal in some way that other religions have a lesser status on the island. This, in turn, weakens constitutional commitments to individual equality, citizenship, and ultimately, even national identity and solidarity in a plural society.

Equally concerning for Buddhists, however, are the *regulatory* disadvantages that come from implementing Buddhist protections in the courts. As has been indicated above, Buddhist solidarity and monastic autonomy have themselves been harmed through the legal implementation of Article 9. Moreover, in its enforcement of Article 9 protections, the courts have been placed in the morally challenging and, in many cases, *a-sāsanka* position of dictating Buddhist norms to monks. There are, therefore, also significant *religious costs* to giving the state authority to protect (and therefore manage) Buddhism.<sup>61</sup> For this reason, naming Buddhism as “the state religion” or to making Sri Lanka a “Buddhist state” could be particularly hazardous choices for constitution drafters; we strongly recommend against this.

We note that some representations to the PRC suggested that a distinction be drawn between “Buddhism” and “the Buddha Sasana” in an effort to take the sangha out of the purview of the state.<sup>62</sup> However, such a distinction may be legally untenable. Take, as just one example, the matter of Buddhist temples: Are they part of “Buddhism” and therefore well within the ambit of state control or “Buddha Sasana” and therefore properly objects of monastic control? Many other examples might also be adduced.

### ***Option 3: Join together Options 1 and 2.***

A third option also exists, one which holds more closely to the current constitutional dispensation. Rather than enhancing *either* constitutional commitments to secularism *or* Buddhist supremacy, the Constitutional Assembly might attempt to express both commitments in the same section, as is already done under the existing terms of Article 9. A variety of options have been proposed by the PRC:

- i. Retain Article 9 (Chapter II) of the current constitution with no change.
- ii. Change the title of Chapter II of the current constitution to ‘Religions’ (rather

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<sup>61</sup> Interestingly, James Madison made a similar observation about the dangers of Christian establishment clauses in the context of the U.S. Constitution and Bill of Rights. See his “Memorial and Remonstrance Against Religious Assessments” (1785).

<sup>62</sup> PRC report, 16



- than 'Buddhism')
- iii. Rewrite Article 9 as follows: "The Republic of Sri Lanka shall give all religions equal status. The State shall protect and foster Buddhism and the Buddha Sāsana while assuring to all religions the rights granted by Articles 10 and 14(1) (e) of the current Constitution.

**The Advantages:** By creating a constitutional clause that suggests both the special status of Buddhism and the general rights of all religions, the Constitutional Assembly may be more successful in satisfying a broader swathe of politicians, interest groups, and the public. Historically, this was the strategy of all previous constitutional revision exercises after the 1940s, including those undertaken in 1957-8, 1967-8, 1970-2, 1978 and 2000. Suggestions (ii) and (iii) try to 'rebalance' Article 9 in ways that will soften the exclusivity of the provision.

**Important Things to Consider:** The major disadvantage of Option 3 is that it leaves in place a number of legal contradictions and inconsistencies, which may, under certain circumstances, prove troubling. As it stands now, neither the text of Article 9 nor its case law gives a clear indication as to the intended balance between Buddhist prerogatives and fundamental rights. Some believe that Article 9 permits religious rights to be limited in the interest of protecting Buddhism (as in the Supreme Court's *Menzingen* determination). Others believe that fundamental rights should take precedence (which seems to be the dominant position). Adding to the ambiguity is another semantic inconsistency, referred to above in Section I: Article 9 mentions that Buddhism will be protected while "assuring" that "all religions" are granted fundamental rights to freedom of religion; yet the rights to which it refers accrue not to religions but to *individuals*. At the same time, there are disagreements over whether and/or how Article 9 should be enforced by courts. If one leaves these ambiguities unaddressed, it leaves open the possibility that an activist judiciary – or a very active public interest litigation campaign - might disrupt what is a very precarious balance.

***Option 4: Join together Option 1 and 2 while clarifying questions of balance and justiciability.***

There may be ways to make small clarifications to Article 9 and/or to the other PRC suggestions listed in Option 3, which have beneficial regulatory effects. Two clarifications stand out as most productive.

First, the Constitutional Assembly might further clarify the relationship between Buddhist prerogatives and fundamental rights. For example, could be done through replacing the language of "assuring"<sup>63</sup> with more precise language such as "subject to," meaning that the Buddhism Chapter would read:

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<sup>63</sup> **Art. 9.** 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

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, *subject to* the rights to granted by Articles 10 and 14(1)(e) to all.

This formula would clarify the relationship between promoting Buddhism and protecting general religious rights guaranteed by the chapter on fundamental rights to individuals, which moreover are enforceable by the Supreme Court under Article 126 as a special constitutional jurisdiction. Incidentally, those individual religious rights would also apply to Buddhists, thus ensuring that state actions to promote Buddhism do not infringe upon the religious rights of individual Buddhists or Buddhist groups.

Second, the new constitution could clarify the mechanism of enforcement for the Buddhism provisions. This could be done in multiple ways. The first is to render the Buddhism clause non-justiciable and more a guiding principle by moving it to the chapter on directive principles of state policy. While this is perhaps the most appropriate way to give expressive recognition to Buddhism, the opinion poll data cited above suggests little public support for such a reform, and it is likely Buddhist opinion would be as outraged by this seeming ‘demotion’ as if the Buddhism clause was removed altogether from the constitution.

If therefore the Buddhism clause should remain justiciable, then there are other ways of ensuring that it is not invoked except in significant cases where there is a clear and justifiable need for judicial intervention. This aim could be achieved by establishing a special leave to proceed requirement being met prior to any pleading of or on the Buddhism clause before the courts. Likewise, if a Constitutional Court is introduced by the new constitution (which would not be a final court of appeal but only hear cases of grave constitutional significance<sup>64</sup>), then exclusive jurisdiction for the interpretation of the Buddhism clause could be vested exclusively in this court and, perhaps, to an identified group of specially qualified judges with requisite expertise in Buddhism.

**Advantages:** Some advantages of clarifying the language have been mentioned above, namely specifying a proper balance between Buddhist prerogatives and religious rights. Yet, there are also – somewhat counter-intuitive – benefits to clarifying and/or limiting justiciability of protections for Buddhism in the constitution.

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granted by Articles 10 and 14(1)(e).

<sup>64</sup> See Written Submissions of CPA to the Subcommittee of the Constitutional Assembly on the Judiciary, available at: <http://www.cpalanka.org/written-submissions-by-the-centre-for-policy-alternatives-to-the-subcommittee-of-the-constitutional-assembly-on-the-judiciary/>

Making protections for Buddhism advisory or aspirational – or specifying the parameters of justiciability for it – preserves the expressive importance of the provision, while curbing its regulatory downsides. To put it simply, it ensures that Buddhism is not a matter to be dealt with through normal legal procedures. After all, these bodies are populated by laypersons who are, with a few exceptions, non-experts in Buddhism, particularly *vis-à-vis* members of the sangha. Taking Buddhism out of the competence of judicial authorities opens up the possibility for it to be more productively supported by other government and non-government bodies, such as the Ministry of Buddhist Affairs and the sangha itself. These bodies may have the authority, experience, and expertise to assist Buddhism in targeted and specialised ways. Taking the mandate to protect Buddhism out of the courts also avoids the conundrums described in Section II above, whereby a variety of monastic and non-monastic actors fight over who has the authority to speak for Buddhism (see, also, Section II and Option 3 above).

It is important to note that the approach of giving special constitutional protections to Buddhism, which are non-justiciable is common among other Theravada Buddhist countries in the region, such as Thailand and Myanmar. In those countries, support for Buddhism tends to be channelled mainly through government offices (like the Ministry of Buddhist Affairs), *dāyakas*, and the sangha itself, rather than through court orders and writs. Legally speaking, Buddhists would continue to be protected under general religious rights provisions, Penal Code provisions, and other laws and regulations, and Buddhism and the Buddha Sasana would be supported in more useful ways by executive and legislative action.

**Important Things to Consider:** In the 1970s, Colvin R. De Silva was adamant that no change should be made to the ambiguous rhetoric of the Buddhism Chapter, which he saw as a productive ambiguity designed to satisfy a highly polarised population. Attempts to tweak Article 9 may give rise to fierce political competition and possibly aggravate the very lines of fissure that the article was designed to sidestep. This is a not a small risk.

## Summary: Lessons Learned and Reform Options

### *Three Lessons from History before the Constitutionalisation of the Buddhism Chapter (Art. 9)*

**Lesson 1:** The long-standing grievances and demands that gave rise to the Buddhism Chapter – and its parallel provisions for promoting Buddhism and protecting fundamental rights – are similar to those expressed today. These demands emerged initially in reaction to the 1948 Constitution, which was felt to be inadequate in regard to the state’s role in the protection of Buddhism and other religions. Even today, debates over these provisions bear the imprints of these struggles for independence, sovereignty, and cultural recuperation that define the period from the 1940s to 1972.

**Lesson 2:** The Buddhism Chapter is not, and was never intended to be, a precise and univocal provision; rather, it was designed purposefully as a vague and multivocal clause in order to avoid and/or bridge the demands of multiple groups. The formulation adopted by the 1972 Constitution, and with a slight amendment the 1978 Constitution, seeks to reflect two types of compromise: first, an *inter-religious compromise* between those who demanded special prerogatives for Buddhism and those who wanted equal protections for all religions; and second, an *intra-religious compromise* between Buddhists who wanted greater state supervision over Buddhism and those who wanted to protect monastic autonomy.

**Lesson 3:** Many of the deepest disagreements regarding the Buddhism Chapter occurred not between Buddhists and non-Buddhists, but among Buddhists themselves. One of the main reasons that the Buddhism Chapter adopted the language of “foremost place” was because Buddhists could not agree as to how much influence the government should have over the affairs of Buddhist monks. These disagreements continue into today.

### *Three Lessons from the Case Law after the Constitutionalisation of the Buddhism Clause*

**Lesson 1:** When invoked in litigation, constitutional duties to protect Buddhism lead, almost inevitably, to debates over what it means to protect Buddhism, because the mandate “to protect and foster Buddhism” is by no means self-evident. This fact has been obscured in many debates about the Buddhism Chapter because defenders and critics have concentrated more on its *expressive* dimensions than on its *regulatory* dimensions. But the case law reveals both the wide range of interpretations that are possible and, consequently, the scope for major disagreement. By including enforceable protections for Buddhism in the constitution, drafters induce disputes over what it

means to protect Buddhism; disputes into which, with a few exceptions, the courts are understandably reluctant to intervene decisively. No constitutional Buddhism clause can therefore be a conclusive settlement of the issue.

**Lesson 2:** Contrary to what many assume, disputes over protecting Buddhism frequently end up deepening and exacerbating existing divisions among Buddhist monks and laypersons. Rather than securing the wellbeing and integrity of Sri Lanka's Buddhists, it aggravates long-standing lines of fissure within the island's Buddhist community by raising the stakes of debates over the parameters of orthodox Buddhism. Who has the final authority to declare what is orthodox and heterodox? What is the state's role in supporting or tempering that authority? What is the proper jurisdiction of Vinaya? What happens when Vinaya and state law come into conflict? When the state and the courts are called upon to enforce the Buddhism Chapter they end up calling attention to, raising the costs of, and, often unwittingly, intervening in these difficult, divisive and old debates. Moreover, it also places judges as laypersons in the morally awkward the position of having to dictate the terms of Buddhism to Buddhist monks.

**Lesson 3:** Rather than serving as an instrument for addressing existing threats to Buddhism, the Buddhism Chapter gives opportunities and incentives to citizens and groups to claim a wide variety of social and political phenomenon as threats to Buddhism. It may also heighten a sense of crisis over Buddhism. In a passive sense, an awareness of the constitutional duties to protect Buddhism may heighten awareness of, or anxiety regarding, the condition of the majority religion. More actively, constitutional protections for Buddhism may lead some persons to thrust Buddhism into a variety of other existing conflicts.

### ***Options for Reform or Reformulation of the Buddhism Chapter***

It could be very likely that constitution-makers would conclude, on a balance of political costs and benefits, that the best option would be to retain the present Buddhism Chapter intact in the new constitution, without any changes. Indeed, this seems to be the position that has garnered the most support. However, if some change is in fact contemplated, it would seem that the following are the available options. We believe that, *if* a change is to be made, Option 4 is the most preferable.

**Option 1:** Declare in the constitution a principle of equal status for religions, religious neutrality, or secularism, while omitting special treatment for Buddhism.

#### **Advantages:**

- A principle of impartiality towards religion would give a clear signal that the constitution aims to be more inclusive than previous constitutions.

### **Considerations:**

- Secularism, as a legal principle and term, is no less contested than Buddhism. Interpretations of the meaning of secularism can be just as polemical, exclusionary and illiberal as protections for a particular religion.
- In the light of Sri Lanka's history and culture, better results might be achieved by foregrounding the value of *pluralism* rather than *equality* (in its more rigid formalistic sense as uniformity) in approaching the issue of religion(s) in the constitution and public life more broadly.
- A constitutional declaration of equal status for major religions may result in significant regulatory problems. Most obviously, the courts will be called upon to rule on which particular dispensations count as "religion" and are therefore worthy of equal status (e.g. is Mahayana Buddhism, or secular humanism, a separate religion and therefore deserving of equal status?).
- The more effective way to use law to induce impartiality in regard to religion may be through judicial decisions and common law rather than the constitution. Sri Lanka's higher judiciary has recognised a common law principle of secularism on multiple occasions.

### **Option 2:** Reconfigure Buddhism's special status and special protections.

Broadly speaking four options predominate under this rubric: (1) The new constitution could declare Sri Lanka to be a "Buddhist state"; (2) It could declare Buddhism to be "the state religion" (e.g., as is done in Cambodia); (3) It could create special administrative bodies for administering Buddhism (such as the "Supreme Council" proposed in the Kumaratunga government's 2000 Draft Constitution); (4) It could retain the basic architecture of Article 9, while adjusting the adjectival modifiers (e.g. including a phrase that specifies that Buddhism is "the religion of the majority of the people" as appears in the 2008 Constitution of Thailand).

### **Advantages:**

- Some Buddhists request changes in this respect, and this may help secure a referendum majority for the new constitution.
- Although linked in some cases to exclusionary forms of ethno-religious nationalism, requests for a special place for Buddhism in the constitution have also reflected bona fide desires to recognise the important role that Buddhism has played in Sri Lankan history.
- Including carefully-worded protections for Buddhism in the new constitution could simultaneously satisfy the desires of Buddhists while also helping insure that the language for expressing those desires is framed in the most inclusive way possible.

### **Considerations:**

- No matter how carefully a Buddhism clause is worded, it cannot help but signal in some way that other religions have a lesser status on the island. This weakens constitutional commitments to individual equality, citizenship, and ultimately, even national identity and solidarity in a plural society.
- Buddhist solidarity and monastic autonomy have themselves been harmed through the legal implementation of Article 9. The courts have been placed in the morally challenging and, in many cases, *a-sāsanka* position of dictating Buddhist norms to monks. Making Buddhist a “state religion” or Sri Lanka a “Buddhist state” would worsen these issues significantly.
- The a distinction between “Buddhism” and “the Buddha Sasana” some have drawn in an effort to take the sangha out of the purview of the state may be legally untenable: e.g., are Buddhist temples part of “Buddhism”, and therefore within the ambit of state control, or “Buddha Sasana”, and therefore properly objects of monastic control?

### **Option 3: Join together Options 1 and 2.**

Rather than enhancing *either* constitutional commitments to secularism *or* Buddhist supremacy, the Constitutional Assembly might attempt to express both commitments in the same section. A variety of options have been proposed by the PRC, including the retention of Article 9 (Chapter II) of the current constitution with no change, changing the title of Chapter II of the current constitution to ‘Religions’ (rather than ‘Buddhism’), and rewriting Article 9 as follows: “The Republic of Sri Lanka shall give all religions equal status. The State shall protect and foster Buddhism and the Buddha Sāsana while assuring to all religions the rights granted by Articles 10 and 14(1) (e) of the current Constitution.

### **Advantages:**

- A constitutional clause that suggests both the primacy of Buddhism and the equal rights of all religions may be more successful in satisfying a broader swathe of politicians, interest groups, and the public, than one that privileges one or other view.
- May be thought to (re)balance competing demands using ambiguous legal rhetoric.

### **Considerations:**

- Perpetuates a number of legal contradictions and inconsistencies. As it stands, neither the text of Article 9 nor its case law gives a clear indication as to the intended balance between Buddhist prerogatives and fundamental rights. If these ambiguities are left unaddressed, it leaves open the possibility that an activist judiciary – or a very active public interest litigation campaign - might

disrupt what is a very precarious balance.

**Option 4:** Join together Option 1 and 2 while clarifying questions of balance and justiciability.

This is our recommended option *if* Article 9 is to be amended in the present exercise in constitutional reform. There may be ways to make small clarifications to Article 9 and/or to the other PRC suggestions listed in Option 3, which have beneficial regulatory effects. Two clarifications stand out as most productive.

First, the Constitutional Assembly might further clarify the relationship between Buddhist prerogatives and fundamental rights. For example, could be done through replacing the language of “assuring” with more precise language such as “subject to,” meaning that the Buddhism Chapter would read:

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, *subject to* the rights to granted by Articles 10 and 14(1)(e) to all.

This formula would clarify the relationship between promoting Buddhism and protecting general religious rights guaranteed by the chapter on fundamental rights to individuals, which moreover are enforceable by the Supreme Court under Article 126 as a special constitutional jurisdiction. Incidentally, those individual religious rights would also apply to Buddhists, thus ensuring that state actions to promote Buddhism do not infringe upon the religious rights of individual Buddhists.

Second, the new constitution could clarify the mechanism of enforcement for the Buddhism provisions. This could be done in multiple ways. The first is to render the Buddhism clause non-justiciable and more a guiding principle by moving it to the chapter on directive principles of state policy. While this is perhaps the most appropriate way to give expressive recognition to Buddhism, the opinion poll data cited above suggests little public support for such a reform, and it is likely Buddhist opinion would be as outraged by this seeming ‘demotion’ as if the Buddhism clause was removed altogether from the constitution. If therefore the Buddhism clause should remain justiciable, then there are other ways of ensuring that it is not invoked except in significant cases where there is a clear need and justification for judicial intervention. This aim could be achieved by establishing a special leave to proceed requirement being met prior to any pleading of or on the Buddhism clause before the courts. Likewise, if a Constitutional Court is introduced by the new constitution (which would not be a final court of appeal but only hear cases of grave constitutional significance), then exclusive jurisdiction for the interpretation of the Buddhism clause could be vested exclusively in



this court and, perhaps, to an identified group of specially qualified judges with requisite expertise in Buddhism.

### **Advantages:**

- Making protections for Buddhism advisory or aspirational – or specifying the parameters of justiciability for it – preserves the expressive importance of the provision, while curbing its serious regulatory downsides. To put it simply, it ensures that Buddhism is not a matter to be dealt with through normal legal procedures. After all, these bodies are populated by laypersons who are for the most part non-experts in Buddhism *vis-à-vis* members of the sangha. Taking Buddhism out of the competence of judicial authorities opens up the possibility for it to be more productively supported by other government and non-government bodies, such as the Ministry of Buddhist Affairs and the sangha itself. These bodies do have the authority, experience, and expertise to assist Buddhism in targeted and specialised ways. Taking the mandate to protect Buddhism out of the courts also avoids the conundrums described in Section II above, whereby a variety of monastic and non-monastic actors fight over who has the authority to speak for Buddhism (see, also, Section II and Option 3 above).
- The approach of giving special but non-justiciable constitutional protections to Buddhism is common among other Theravada Buddhist countries such as Thailand and Myanmar. In those countries, support for Buddhism tends to be channelled mainly through government offices (like the Ministry of Buddhist Affairs), *dāyakas*, and the sangha itself, rather than through court orders and writs. Legally speaking, Buddhists would continue to be protected under general religious rights provisions, Penal Code provisions, and other laws and regulations, and Buddhism and the Buddha Sasana would be supported in more useful ways by executive and legislative action.

### **Considerations:**

- The current Buddhism Chapter is a productive ambiguity designed to satisfy a highly polarised population. Attempts to tweak Article 9 may give rise to fierce political competition and possibly aggravate the very lines of fissure that the provision was designed to sidestep. This is a not a small risk.