



SPECIAL ISSUE ARTICLE

Limitations on fundamental freedoms in Sri Lanka: majoritarian influence of constitutional practice

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Abstract

Sri Lanka's Constitution authorises the state to limit certain fundamental freedoms on the grounds of specific public interests. This article examines how this constitutional limitation regime has become vulnerable to majoritarian influence. It uses a case study approach, supplemented by key informant interviews, to delve into Sri Lanka's constitutional practice with respect to limitations on fundamental freedoms such as the freedom of religion or belief, and the freedom of expression. The article illustrates how organs of the Sri Lankan state have equated notions of 'public interest' with the majority community's conceptions of 'security', 'order', 'health' and 'morals'. It argues that this practice reflects a cleavage between the moral legitimacy and the legal claimability of fundamental freedoms of minorities and satirists in Sri Lanka. It concludes that legal regimes designed to guarantee fundamental freedoms offer very little protection to minorities when the underlying politics driving the application of law is majoritarian.

Keywords: constitutional law; politics; freedom of religion; freedom of expression; Sri Lanka; minority rights

1 Introduction

Sri Lanka's Constitution authorises the state to limit certain fundamental freedoms on the grounds of specific public interests. These interests are broadly framed, and are often open to interpretation. For example, the freedom of religion or belief and the freedom of expression are subject to limitations on grounds such as 'national security', 'public order', 'public health' and 'public morality'. In this article, I examine how the limitation regime contained in the Sri Lankan Constitution has become vulnerable to majoritarian influence. Majoritarian interests often influence the way state officials and judges interpret public interests such as national security, public order, public health, or public morals. The corollary of this constitutional practice is that minorities, including Tamils, Muslims and Christians in Sri Lanka, and satirists who deal with Buddhism and the Buddhist clergy, encounter unwarranted restrictions on their fundamental freedoms.

This article is presented in four sections. The first outlines the scope of the research, and the research method. The second briefly presents Sri Lanka's socio-political context and basic legal framework on limitations on fundamental freedoms. The third section uses a case study approach to delve into the practice with respect to limitations on fundamental freedoms. The perspectives of thirty key informants, including lawyers, researchers, artists, activists, religious leaders and community leaders, form the primary sources of information for these case studies. I aim to illustrate how organs of the Sri Lankan state have equated notions of 'public interest' with the majority community's conceptions of security, order, health, and morals. In the final section of this article, I argue that this practice reflects a major cleavage between the

moral legitimacy and the legal claimability of fundamental freedoms of minorities and satirists in Sri Lanka.¹ I conclude by suggesting that the Sri Lankan experience has broader implications for how we understand constitutional protection of fundamental freedoms; this experience points to how limitation regimes in constitutions often fail to safeguard the freedoms of minorities and satirists when the political dispensation of the state is fundamentally majoritarian.

2 Scope and method

This article relies on the case study method to illustrate the phenomenon of majoritarian influence over a particular aspect of Sri Lanka's constitutional practice. I examine five case studies with the aim of extrapolating a wider phenomenon (Gerring, 2007) indicative of such constitutional practice.

My selection of case studies is based on the questions that this article explores. First, in what ways do Sinhala-Buddhist majoritarian interests influence limitations on the fundamental freedoms of minorities and satirists? Second, do such minorities and satirists actually possess *claimable* rights to certain fundamental freedoms under the current Sri Lankan Constitution? By analysing these cases, I set out to illustrate the main hypothesis of the article, i.e. majoritarianism has influenced the way the Sri Lankan state limits the fundamental freedoms of minorities and satirists.

I selected cases that specifically contained three elements: first, they must involve some formal limitation of a constitutionally recognised fundamental freedom; second, a particular minority group or a person seeking to satirise Buddhism should be directly targeted or affected by the limitation in question; and finally, the conduct that is being restricted must be perceived as a threat to or offensive to Sinhala-Buddhist beliefs, culture, or venerated persons. To avoid generalising based on a single case study (Flyvbjerg, 2006), I have selected a range of recent cases covering a variety of issues within the parameters of the three selection criteria. However, I am aware of the limited scope of my selection. I am focusing only on cases involving a direct conflict between the interests of Sinhala-Buddhists and the conduct of a minority group or satirist. I am not examining a range of other limitations on fundamental freedoms that may or may not be influenced by majoritarian interests. For the purposes of comparison, however, I have also examined some cases where the litigants – the parties claiming a violation of their fundamental rights – come from the majority community, and assess the contrasting approach taken by courts.

I interviewed a sample of thirty key informants, including lawyers, researchers, activists, artists, religious leaders and community leaders directly working on the issues explored in the case studies. These key informants were selected based on their specialty and activism, and their direct involvement in the issues concerning the case studies. These interviews were carried out to gather and triangulate insights into Sri Lanka's constitutional practice with respect to limitations. The interviews were semi-structured, and typically lasted between thirty minutes to one hour. Interviewees were asked about the factual circumstances surrounding a particular case, and how they understood the state's reasons for imposing the limitation in question. The interviews conducted during field visits in 2018 were conducted in person, whereas interviews conducted during 2020 and 2021 were conducted over the telephone due to the Coronavirus crisis in Sri Lanka. It should be borne in mind that there is a culture of state surveillance and reprisals against human rights defenders in Sri Lanka, and the identities of some of the interviewees are kept confidential.

3 Context and legal framework

3.1 Demographic context

Identity in Sri Lanka can be shaped along both ethnic and religious lines, and often along 'ethno-religious' lines. Within the ethnic paradigm, Sinhalese make up around 75 percent of the

¹It should be noted that whenever I refer to 'satirists', I mean specifically writers, filmmakers and artists, who deal with the subject matter of Buddhism, and set out to satirise Buddhism or the Buddhist clergy in Sri Lanka.

population in Sri Lanka, whereas Tamils (including Hill Country Tamils) constitute 15.2 percent and Moors constitute 9.2 percent of the population (Department of Census and Statistics 2012). Within the religious paradigm, a majority of Sinhalese follow Buddhism. Accordingly, around 70 percent of Sri Lanka's population may be identified under the 'ethno-religious' label: 'Sinhala-Buddhist'. Meanwhile, Tamil Hindus, Muslims (adherents of Islam) and Christians constitute 12.6 percent, 9.7 percent, and 7.6 percent of the population, respectively. Christians – comprising Roman Catholics, Protestants, and other denominations – also hold 'ethno-religious' identities, as they simultaneously hold ethnic identities such as 'Sinhalese', 'Tamil' or 'Burgher'.

3.2 Legal framework

The chapter on fundamental rights in Sri Lanka's Constitution recognises a wide range of fundamental rights and freedoms. Article 10 recognises the freedom of thought, conscience, and religion, and article 12 recognises the right to equality and non-discrimination. Article 12(2) provides: 'No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.' Article 14 then lists out some of the typical fundamental freedoms to which a person is entitled. These include the freedom of expression, including publication, the freedom of peaceful assembly, the freedom of association, the freedom to engage in a lawful occupation, the freedom to manifest religion or belief, and the freedom of movement.

The grounds on which the state may limit fundamental rights and freedoms are set out in article 15 of the Sri Lankan Constitution. This provision essentially governs the question of 'legality', i.e. whether or not the limitation is prescribed by some legal instrument. Article 15(2) provides that the exercise and operation of the freedom of expression 'shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence'. Article 15(7) meanwhile authorises the state to limit the fundamental freedoms found in article 14 on several grounds: including 'the interests of national security, public order and the protection of public health or morality ...'.

There are some doctrinal weaknesses in Sri Lanka's constitutional scheme on limitations that are worth noting. The first is the constitutional recognition of Buddhism as having the 'foremost place' in Sri Lanka. Article 9 of the Constitution clearly elevates Buddhism to a special position, and imposes a duty on the state to 'protect and foster' the Buddha *Sasana*. The term 'Sasana' has a broader meaning than merely the teachings of the Buddha, and can be understood as a reference to 'nation', which includes Buddhist institutions and clergy (Obeyesekere, 2003). Article 9 is both a corollary and accelerant of Sinhala-Buddhist entitlement in the country (Schonthal and Welikala, 2016). In practice, it has shaped the way the state justifies limitations on the religious freedom of minorities, particularly when the impugned conduct is perceived as threatening the status of Buddhism in the country.

Second, the scope of the legal regime by which fundamental freedoms might be limited is quite broad. Article 15(7) of the Sri Lankan Constitution specifies that the limitations in question should be 'prescribed by law'. However, 'law' for the purpose of article 15(7) includes emergency regulations promulgated under the Public Security Ordinance (PSO) of 1947. This specific inclusion means that fundamental freedoms could be restricted by legal instruments that are not enacted by parliament. Emergency regulations are typically formulated by the executive branch of government, i.e. either the president's office or the Ministry of Defence. Although such regulations are subject to parliamentary oversight, they are rarely scrutinised by the legislature, and they are not subject to legislative deliberation or voting. Therefore, effectively, certain fundamental freedoms in Sri Lanka can be limited by executive order on the grounds of 'national security' or 'public order'.

Third, article 16 of the Constitution provides: ‘All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency [with fundamental rights]’. The provision, therefore, validates laws that were in existence prior to the promulgation of the 1978 Constitution, despite any inconsistency with fundamental rights. Many of the laws relied upon to limit fundamental freedoms were enacted during the British colonial period, and the continued validity of these laws is partially dependent on article 16. For instance, ‘public order’ as a limitation ground is found in British colonial legislation such as the Police Ordinance of 1865. Section 77 of the Ordinance, which continues to be in operation today, clearly authorises limitations on the freedoms of expression and peaceful assembly on the grounds of public order. The Quarantine and Prevention of Diseases Ordinance of 1897 meanwhile authorises the minister in charge of health to regulate movement and travel in the interests of ‘public health’, i.e. preventing the spread of infectious diseases. Regulations 62 and 65 issued under the Ordinance in 1925 – which are in force today – specify restrictions on movement and public assemblies. Chapter XIV of the Penal Code of 1883 lists a host of offences concerning ‘decency and morals’. The offences include the sale and possession of obscene material (sections 285 and 286) and singing obscene songs in public places (section 287). Moreover, sections 291A and 291B of the Penal Code criminalises ‘uttering words with deliberate intent to wound religious feelings’, and carrying out ‘deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs’ respectively.

The case studies in the next section offer insights into how these doctrinal weaknesses can enable the imposition of unjust limitations on certain fundamental freedoms. However, these doctrinal weaknesses should not be overstated. Their role in facilitating majoritarianism is mostly cosmetic; they provide the window-dressing of ‘legality’ for limitations that flow from majoritarian political interests as opposed to a strict application of legal doctrine. Therefore, it is on the practice beyond the legal text that we must focus our attention.

4 Constitutional practice

Each of the five case studies I have selected features conduct by a minority or satirist that is perceived as a threat to the dominant status of the Sinhala-Buddhist majority community in Sri Lanka. Prior to delving into these case studies, it may be useful to illustrate the alternative picture of the constitutional practice with regard to fundamental freedoms – where the litigant comes from the majority community, and where a majority interest either underlies the claim, or is not at odds with the claim. This brief discussion serves as a point of comparison to the case studies to follow.

The Supreme Court of Sri Lanka has indeed recognised violations of the fundamental freedoms of litigants where the issue at stake has not clashed with majority interests. In the case of *Ven. Ellawala Medananda Thero v. District Secretary, Ampara et al.* (2009), the petitioner, a Buddhist monk, complained that the decision to alienate approximately sixty acres of land located south of the Deegavapi Raja Maha Viharaya to 500 Muslim families infringed his and others’ fundamental freedoms guaranteed under articles 10 and 12 of the Constitution. Notably, the Viharaya is considered to be one of the sixteen most venerated Buddhist sites in the country. The Supreme Court found that ‘state land is held by the executive in trust for the People and may be alienated only as permitted by law’ (p. 66). It held that the impugned alienation is ‘bereft of any legal authority and has been effected in a process which is not *bona fide*’ (p. 66). The Court concluded that the petitioner’s freedom of thought, conscience, and religion guaranteed by article 10, the right to equal protection of the law guaranteed by article 12(1) and the right to non-discrimination under article 12(2) of the Constitution had in fact been violated. The landmark case serves to illustrate the willingness of courts to recognise violations of the fundamental freedoms of litigants when the interests at stake were not antithetical to those of the majority community. In this case, the litigant

was after all a Buddhist clergyman complaining about an allegedly illegal alienation of state land to members of a minority community. Having weighed the interests at stake, the Supreme Court found a violation of the petitioner's rights.

Two earlier cases involving the freedom of expression are also worth recalling. In *Ven. Ratnasara Thero v. Udugampola* (1983), the petitioner was once again a Buddhist monk, who was the Viharadhipathi of the Sama Vihara in Gampaha. The petitioner had placed an order for printing leaflets containing a statement protesting against the proposed extension of the life of parliament. Upon receiving a complaint, the Gampaha Police entered the printing press and seized and removed around 20,000 leaflets. The petitioner complained that the seizure and removal of the leaflets was unlawful and a violation of his fundamental rights, including his freedom of expression. The Supreme Court observed that the contents of the leaflets were not unlawful, and that the burden lies on the respondent to justify the limitation on the freedom of expression. It found that a 'serious violation' of the petitioner's freedom of expression including publication had occurred, and granted the relief sought. Similarly, in *Channa Pieris et al. v. Attorney General et al. (Ratawesi Peramuna Case)* (1994), the petitioners were participants in a small political movement called the *Ratawesi Peramuna* under the leadership of Ven. Atureliya Rathana, a Buddhist monk. The group met at the Kawduduwa Temple on 27 February 1992 to discuss the country's problems. The police then entered the premises and arrested those present at the meeting for allegedly conspiring to overthrow the government. The petitioners complained that their rights including their freedom of expression guaranteed by article 14(1)(a) of the Constitution had been violated by the police. The Court observed that the 'freedom of speech ensures that minority opinions are heard and not smothered by a tyrannizing majority. It is the only way of enabling the majority in power to have an educated sympathy for the rights and aspirations of other members of the community' (pp. 133–134). Notably, the petitioners were characterised as a 'minority' not due to their ethno-religious identity, but owing to their political status outside mainstream politics. The Court ultimately found that the petitioners' right to freedom of expression had been violated.

It would be entirely incorrect to suggest that the Sri Lankan judiciary has consistently deferred to the state when considering the permissibility of limitations on fundamental freedoms. The three cases discussed above clearly illustrate a willingness on the part of the courts to recognise and uphold fundamental freedoms including the freedom of religion or belief, and the freedom of expression. The defining feature of these cases, however, is the petitioners' ethno-religious identity; they came from the majority community and engaged in conduct that cannot be considered a direct threat to Sinhala-Buddhist majoritarian interests.

This article explores the hypothesis that limitations have operated in an entirely different manner when the litigants involved are members of an ethno-religious minority community, or when the impugned conduct is perceived as a threat to the majority community's interests. The case studies I am about to explore reflect this alternative universe in which minorities and satirists reside – where the legal realisation of certain fundamental freedoms is contingent on their compatibility with majoritarian interests.

Each case study deals with one or more of the fundamental freedoms protected by Sri Lanka's Constitution. The first case concerns religious attire of Muslims; the second concerns Hindu, Muslim and Christian worship and practice; the third deals with Christian propagation; the fourth concerns Muslim funeral rites; and the final case study concerns satire targeting Buddhism and the Buddhist clergy. The first four cases essentially concern the freedom to manifest religion or belief, and the final case concerns the freedom of expression. In each case study, I describe the limitation measure and its impact, discuss the legality of the measure, and explore the underlying majoritarian interests behind the measure, relying primarily on the perspectives of key informants. What emerges from this analysis is a fairly clear reflection of Sri Lanka's constitutional practice with respect to limitations on the fundamental freedoms of minorities and satirists. I use the term 'constitutional' as a descriptive term to refer to actual practice carried out under the guise of

constitutional legitimacy. Others, including Rohit De, have explored how constitutional practice is in fact shaped by the daily life of citizens (De 2018). Similarly, I take a descriptive view of constitutional practice, and set out to show how everyday majoritarian beliefs, convictions, and anxieties have influenced Sri Lanka's constitutional practice. The label 'constitutional' should not be taken to denote normative legitimacy. On the contrary, in the final section of this article, I explore how such practice undermines the normative value of fundamental freedoms.

4.1 Religious attire

On 21 April 2019, an Islamist group known as National Thowheed Jama'ath launched simultaneous suicide attacks on three Christian places of worship and three hotels in Colombo. The attacks killed over 250 persons (Gunasingham, 2019). In just over a week after the attacks, the state promulgated new emergency regulations under the PSO. On 29 April, it issued Regulation 32A, which provided: 'No person shall wear in any public place any garment, clothing or such other material concealing the full face which will in any manner cause any hindrance to the identification of a person.' The provision also clarified that 'full face' meant 'the whole face of a person including the ears'.

The seemingly neutral prohibition on face coverings had an obvious disparate impact on Muslim women, as the *niqāb* – a full face covering worn by some Muslim women was consequently prohibited in public places. The practice of wearing *niqāb* or the *burqa*, a full-body and face covering garment, is often associated with the Eastern Province of Sri Lanka (Gunasingham, 2019). The Eastern Province was incidentally the home province of Zaharan Hashim, the alleged leader of the group found responsible for the attacks. Therefore, the new Regulation appeared to target the Muslim community in particular, and was framed as necessary to enable the identification of suspects. The response to the ban was somewhat complex. According to human rights activist Shreen Saroor, some within the Muslim community in fact accepted the ban on face coverings as a necessary temporary measure.² Others including senior lawyer Ameer Faaiz observed that the ban was perceived by Muslims as an infringement on religious freedom and part of a wider discriminatory agenda against them.³ The latter view was eventually vindicated, as the policy quickly unlocked a spate of harassment and intimidation of Muslim women. Ahmed Shaheed, the United Nations Special Rapporteur on the Freedom of Religion or Belief, reported that even Muslim women and girls wearing *hijāb*, which involves head covering but no facial covering, were prevented from entering hospitals and exam halls, and were subjected to verbal abuse at work places (Shaheed 2020).

Regulation 32A falls within article 15(7) of the Constitution, which authorises the state to restrict the freedom to manifest religion or belief on the grounds of 'national security'. Article 15(7) also specifically includes emergency regulations within the definition of 'law'. Hence the new prohibition on face covering ostensibly met the requirement of 'legality' under the limitation regime of Sri Lanka's Constitution. Yet, such 'legality' conceals an underlying majoritarian antagonism towards external symbols of Islam including 'Islamic' attire. This antagonism directly relates to a certain existential fear held by many within the Sinhala-Buddhist community.

There are two aspects to Sinhala-Buddhist existential fear with respect to the Muslim population in Sri Lanka. First, there is a sense that the Muslim population is growing faster than the Sinhala-Buddhist population.⁴ There is in fact a slight statistical increase in the overall population share of Sri Lankan Moors between 1981 and 2012 – from 7 percent to 9.2 percent (Department of Census and Statistics 2012). This particular fear is then reinforced by rumours and propaganda on how Muslim businesses and physicians are systematically mixing 'sterilisation' drugs into the food

²Interview with human rights activist, Shreen Saroor, 27 December 2020.

³Interview with senior lawyer, Ameer Faaiz, 29 December 2020.

⁴Interview with researcher, Mohammed Aaseem, 29 December 2020.

or treatment of their Sinhalese patrons or patients (Wettimuny, 2018a). Second, there is a perception that the Muslim community is becoming ‘radicalised’. Such perceived radicalisation is gleaned from an ostensible increase in the ‘visible manifestations of piety’ among some segments of the Muslim community.⁵ Typical examples of such external manifestations of piety include Muslim women wearing *ijab* (various forms of head covering) and the *burqa*, and men wearing the white *jubba*. This increased visibility has ‘created an illusion of an increase in the Muslim population, adding to the fear and suspicion of the majority towards the motives of the Muslim community’ (Faslan *et al.*, 2015).

There may be numerous and complex reasons for Muslim men and women to assert their religious identity in public. These manifestations are partially driven by increased competition between certain Islamist groups (Gunasingham, 2018); these groups often attempt to outflank each other by insisting that their members adopt particular practices and attire to display piety. They are ‘heterogenous and divergent’ (Klem, 2011) and contest each other for space and financial resources – often from Middle Eastern sources such as Saudi Arabia (Gunasingham 2019). A number of scholars studying intra-Muslim conflict have observed that violence between Islamist groups and other Muslim groups since the early 2000s reflected the emergence of Islamism in Sri Lanka (McGilvray *et al.*, 2007, Faslan *et al.*, 2015). While it is argued that Muslim ‘Arabic’ attire can be less about piety and more about asserting Muslim identity (Haniffa, 2008), some observers note that there is substantial ‘peer, mosque, and community pressure’, and at times ‘coercion’, on Muslim women to wear conservative Arabic attire on the basis that it is stipulated in Islamic teaching.⁶

Within this overarching context, and regardless of the actual motivations behind the attire, Muslim attire has come to symbolise a (perceived) threat to Sinhala-Buddhist demographic and cultural dominance in Sri Lanka. This sentiment is evident among the Buddhist clergy in particular. For example, according to the head monk of a temple in Kandy, certain Muslim attire is regarded by many Sinhala-Buddhists as ‘regressive’ and ‘un-Sri Lankan’.⁷ Such attitudes have manifested in actual harassment and intimidation of Muslims. Ermiza Tegal, a human rights lawyer, observes that there were several reports of harassment and intimidation of Muslim women immediately after the ban on face coverings was announced.⁸ These reports suggest that the ban in some ways aligned with pre-existing prejudices towards Muslim religious attire. Sinhala-Buddhist militant groups such as the Bodu Bala Sena (BBS) have often capitalised on these existential fears, and have run campaigns calling for the ban of the *niqāb* and *hijāb* (Tegal, 2013). Such campaigns resonate with some segments of the Sinhala-Buddhist community, and have helped secure notable electoral legitimacy for these groups. The BBS, for instance, contested the parliamentary election of 2020 as part of a coalition that promised to ban madrasas (Islamic schools) and the *burqa* (The Island, 2020). The coalition secured a parliamentary seat. Therefore, the prohibition on face coverings is in reality a restriction that aligns with pre-existing majoritarian antagonism towards ‘Islamic’ attire. Although the limitation in question seemingly falls within the scope of ‘national security’, it is ultimately a reflection of how majoritarianism influences the state’s conception of ‘public interests’.

4.2 Worship and practice

The physical realm of land, property, and the public sphere has long remained an arena of inter-communal contestation in Sri Lanka. Alongside existential fears with respect to population and cultural space, there is a Sinhala-Buddhist anxiety over minorities encroaching on their physical

⁵Discussion with human rights activist Shreen Saroor and senior lawyer Ameer Faaiz dated 13 January 2021.

⁶*Ibid.*

⁷Interview with head monk of a Buddhist temple in Kandy (who wished to remain anonymous), 3 May 2018.

⁸Interview with human rights lawyer Ermiza Tegal, 28 December 2020.

space. The majority community's anxiety over territory underlies a number of restrictions on expression and religious manifestation. For instance, a recurring restriction since the end of the thirty-year armed conflict between the Sri Lankan state and Tamil separatists (the Liberation Tigers of Tamil Eelam, i.e. the 'LTTE') is the ban on the commemoration of fallen Tamil combatants during *Maaveerar Naal* ('Heroes Day'). Courts in Sri Lanka have consistently upheld bans on commemoration. In 2020, for instance, district courts in the Northern and Eastern Provinces granted prohibition orders at the request of the Attorney General (Srinivasan, 2020).

The armed conflict ended in 2009 with the annihilation of the LTTE, which had engaged in a long and brutal campaign to establish a separate Tamil state. The commemoration of fallen combatants is marked by the lighting of lamps to remember the dead. Incidentally, Tamil Hindus are also prevented from lighting lamps as part of the festival of lights, *Karthikai Vilakkeedu*, which takes place during the same period as *Maveerar Naal* – in late-November each year. According to a Tamil lawyer who wishes to remain anonymous, the police often 'conflate the two events', and general restrictions are imposed on any form of expression or religious manifestation involving the lighting of lamps.⁹

The Sri Lankan state has meanwhile imposed broad restrictions on Muslim and Christian places of worship. A circular issued by the Ministry of Religious Affairs and Moral Upliftment in 2008, and a similar circular in 2013, remain the primary means through which such restrictions are imposed. The circulars, which are currently in operation, require prior permission from the ministry in charge of religious affairs to be obtained when constructing a place of worship or similar institution. According to lawyer Yamini Ravindran, these circulars are 'routinely enforced' by the police and local authorities to prevent construction and maintenance of religious institutions.¹⁰

Under article 15(7) of the Constitution, certain manifestations of religion, such as the construction of places of worship, might very well be restricted on the grounds of certain public interests. Yet the circulars of 2008 and 2013 do not meet the test of 'legality', as they are not 'law' enacted by parliament, and are not regulations issued under the PSO. Therefore, these circulars cannot form a constitutionally-valid basis for limiting the freedom of religion. The 2013 circular, however, was assessed by the Supreme Court of Sri Lanka in *Faril et al. v. Bandaragama Pradeshiya Sabha et al.* (2017). A Muslim group that wished to construct a religious educational institution were prevented from doing so by the local government officials and police in the area. The group filed a fundamental rights application before the Supreme Court complaining that their rights to equality and non-discrimination had been violated. The Court dismissed the application and held that the restriction was lawful. Yet it avoided the question of what 'law' in terms of article 15(7) meant. In fact, it neglected to consider its prior ruling in *Thavaneethan v. Dayananda Dissanayake* (2003), where the Court held that regulations other than those issued under the PSO cannot restrict any fundamental right in terms of article 15(7) of the Constitution.

The text of the judgment in *Faril* points to the underlying motivations behind the restriction in question. Local Buddhist monks and villagers had in fact protested the construction, claiming that a mosque was being constructed as opposed to an educational institution. It was due to these protests that the police and local authority officials ordered the suspension of the construction. The Court upheld the decision of the state officials on the basis that 'due consideration' had to be given to the protests to 'avoid a crisis situation which could spread to other areas of our country' (p. 11). In this case, unlike in other case studies, the limitation in question did not even enjoy the cover of 'legality', as no legal instrument falling under article 15(7) of the Constitution was actually used to prescribe the limitation. Yet the Court is clearly suggesting that a threat to 'public order' might ensue if the construction was not halted. In doing so, it appears to legitimise the

⁹Interview with a Tamil lawyer, 31 December 2020.

¹⁰Interview with human rights lawyer and legal director of the National Evangelical Alliance of Sri Lanka, Yamini Ravindran, 29 December 2020.

majoritarian interests at play. The construction of a Muslim place of worship was perceived as a threat to the Buddhist community in the area, and the limitation was ultimately permitted to appease the majority community and dissuade them from causing unrest.

Contestation over religious space has historical roots that date back to the British colonial occupation of Sri Lanka. Places of worship were in fact highly regulated, and some aspects of worship, such as ‘noise worship’ were subjected to strict control. Shamara Wettimuny points out that early regulation of Buddhist noise worship by British authorities were deeply influenced by British sensibilities around noise (Wettimuny 2018b). As a result, many Buddhist religious acts such as public processions were regulated. The Police Ordinance of 1865, for instance, prohibited certain types of noise worship, such as beating *tom toms* (small drums associated with Buddhist processions) without a license.

Sri Lanka’s colonial legacy has shaped the current state’s legal authority to regulate places of worship. However, the focus has changed from Buddhist conduct to minority conduct. As pointed out by researcher Deepanjali Abeywardena, the current Sri Lankan state, unlike its colonial predecessor, is ‘highly sensitive to, if not reflective of, the interests of the Sinhala-Buddhist majority’.¹¹ Therefore, limitations on the fundamental freedoms of minorities in the realm of religious worship and practice are deeply influenced by majoritarian interests in maintaining control over the public sphere. These interests in maintaining control also interact with majoritarian existential fears over the possible loss of territory and cultural supremacy. Many within the Sinhala-Buddhist community see events such as *Maaveerar Naal* as possible precursors to fresh Tamil separatist demands, and thus also support the prohibition of Hindu religious activities that resemble the commemoration of fallen separatist soldiers. Moreover, as intimated by the head monk of a Buddhist temple in Kandy, they see the construction of Muslim and Christian places of worship as indicative of ‘the expanding influence of these minority religions over Buddhist territory’.¹² These fears underscore the protests witnessed in Bandaragama in the *Faril* case. The Supreme Court, in upholding the limitation on religious freedom, appears to legitimise these fears. The case remains another example of how majoritarian interests can infiltrate the application of limitations on the fundamental freedoms of minorities. It also reveals the extent of majoritarian influence over judicial reasoning.

4.3 Propagation

Christian propagation is another area that reflects the tendency for majoritarian interests to influence limitations on fundamental freedoms. The jurisprudence of the Supreme Court clearly differentiates between the ‘freedom’ enjoyed by religious minorities and the Sinhala-Buddhist majority in this respect. This differentiation is influenced by the content of article 9 of the Constitution.

In the case of *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation) Bill* (2003), the Supreme Court assessed the constitutionality of a private member’s Bill to incorporate an institution with the stated purpose of spreading ‘knowledge of the Catholic religion’. This Catholic institution’s stated mandate included providing shelter to orphans, children, and the elderly. The Court found that the Bill was inconsistent with article 9 of the Constitution, which formally guarantees to Buddhism the ‘foremost place’. It held that article 9 restricted individuals of other religions from ‘propagating’ their faith by offering material benefits to those outside their religion. The Court concluded: ‘propagation and spreading Christianity [through the provision of material benefits] would not be permissible, as it would impair the very existence of Buddhism or the Buddha *Sasana*’ (p. 7).

Establishing a new institution for the purpose of spreading knowledge of a religion is within the scope of the freedom to manifest religion or belief under article 14(1)I of the Constitution.

¹¹Interview with researcher Deepanjali Abeywardena, 31 December 2020.

¹²Interview with the head monk of a Buddhist temple in Kandy (who wished to remain anonymous), 3 May 2018.

Therefore, restrictions on the ability to spread knowledge of a religion amount to a limitation on that freedom. The limitation in the *Menzingen* case arguably meets the legality test, as it is based on article 9 of the Constitution. I say ‘arguably’ because article 9 does not specifically set out limitations on the freedom of religion or belief; in fact, it does the opposite – it explicitly mentions that the duty of the state to protect and foster the Buddha *Sasana* should be fulfilled while assuring ‘to all religions the rights granted by Articles 10 and 14(1)(e)’. However, the Court sought to qualify the freedom granted by article 14(1)(e), i.e. the freedom to manifest religion or belief, by suggesting that such freedom cannot extend to converting Buddhists to Catholicism by offering material benefits. This position was upheld in the more recent case of *Karuwalagaswewa Vidanelage Swarna Manjula et al. v. Pushpakumara, Officer-in-Charge, Police Station, Kekirawa et al.* (2018). The case concerned the arbitrary arrest of two Jehovah’s Witnesses for allegedly disseminating religious material in a Sinhala-Buddhist village. While the Supreme Court found a violation of the petitioners’ freedom from arbitrary arrest, it refused to recognise propagation as a constituent element of the freedom to manifest religion or belief, and found that no violation of article 14(1)(e) had taken place.

Restrictions on spreading knowledge of a religion other than Buddhism are connected to another existential fear that exists among many Sinhala-Buddhists in Sri Lanka. Christian propagation is often perceived as a threat to the numerical and cultural dominance of Sinhala-Buddhists. This threat, once again, has historical roots, as the propagation of Christianity is associated with colonial missionary projects through which large numbers of Buddhists converted to Christianity – mostly voluntarily (or opportunistically), but occasionally due to coercion. Present-day propagation also evokes historical memories of physical, non-physical and structural violence by successive colonial administrations targeting Buddhism (Schonthal 2016). For example, historian KM de Silva argues that Roman Catholicism was propagated under the Portuguese through the infliction of ‘tremendous suffering and humiliation’ on the adherents of traditional religions including Buddhism (de Silva, 2005). He refers in particular to confiscation and vandalism of Buddhist temple property under the Portuguese. Buddhists encountered violence under the British as well (Sivasundaram, 2017). For example, the British plundered Buddhist temples following the conquest of the island in 1815. These existential fears are evoked in contemporary socio-political settings due to the continued practice of propagation, particularly by smaller Christian groups (Dewasiri, 2016). Such propagation is often viewed by Buddhist monks and community leaders as forms of ‘exploitation’ and ‘deceit’ perpetrated by Christian groups against unsuspecting Sinhala-Buddhist villagers. This sentiment was clearly expressed during interviews with a Buddhist monk and a community leader in Ampara.¹³ Such antagonism is often legitimised by local law enforcement authorities, who occasionally arrest Christians for engaging in propagation. For example, in the *Jehovah’s Witnesses* case (2018), the police were, in fact, acting on the complaint of a local Buddhist monk and several villagers.

Majoritarian existential fears with respect to propagation underlie contemporary violence targeting Christian groups. According to the National Christian Evangelical Alliance of Sri Lanka (NCEASL), 190 incidents of religious violence against churches and Christians were recorded between 2015 and mid-2017 (NCEASL, 2017). Moreover, as noted by Ravindran, the selective enforcement of regulatory instruments, such as the 2008 and 2013 Circulars, against Christian places of worship, is often ‘driven by fears over conversion’.¹⁴ Such fears propelled efforts in 2003 to introduce legislation modelled on similar Indian laws to prohibit ‘unethical’ conversions. The Bill was opposed by a number of Christian groups, and was eventually abandoned (Hertzberg, 2016). However, the idea of legislation to prohibit conversions through monetary inducements is a recurring political theme in Sri Lanka. The current Prime Minister Mahinda Rajapaksa, for instance, recently discussed plans to introduce such legislation (Svanidze, 2020). Such legislation,

¹³Interviews with a Buddhist monk, and a community leader in Ampara, 19 May 2018.

¹⁴Interview with Yamini Ravindran, 29 December 2020.

if introduced, would crystallise the current restrictions placed on Christian propagation. The legislation would more clearly set out the parameters in which minorities are *permitted* to practice their religion. The underlying driver of such a limitation on religious freedom would be the protection of majoritarian interests in maintaining Sinhala-Buddhist numerical and cultural supremacy.

4.4 Funeral rites

Funeral rites form an essential part of the religious manifestation of many communities. In Sri Lanka, the act of burial is ordinarily associated with the Muslim and Christian communities, whereas Buddhists and Hindus usually dispose of the dead through cremation. Following the outbreak of COVID-19 in Sri Lanka, the government introduced policy measures that regulated the disposal of corpses. On 11 April 2020, the Minister of Health and Indigenous Medical Services issued Regulation 61A under the Quarantine Ordinance of 1897, and declared that ‘the corpse of a person who has died or is suspected to have died, of Coronavirus Disease 2019 (COVID-19) shall be cremated’ (Gazette Extraordinary No. 2170/8, 11 April 2020). The new Regulation had a direct bearing on the religious rites of Muslims, as the cremation of deceased persons is understood by many Muslims as contrary to Islamic teaching (Hizbullah *et al.*, 2020). Incidentally, the World Health Organisation (WHO) Guidelines on the issue clearly stated that cremation should not be made mandatory, and that the deceased could be either cremated or buried (WHO, 2020). However, the government persisted with the policy, and justified it on the basis that cremation was a safer means of disposing corpses and mitigating the spread of infection.

The restrictions introduced through Regulation 61A of the Quarantine Ordinance no doubt amount to a limitation on the religious freedom of Muslims in Sri Lanka. Article 15(7) of the Constitution permits limitations on the freedom to manifest religion or belief and the right to non-discrimination on the grounds of ‘public health’. The prevention of the spread of COVID-19 could very well be framed as necessary in the interests of public health. Yet, a *regulation* issued under the Quarantine Ordinance may not fall within the ambit of ‘law’ in article 15(7), as only laws enacted by parliament, and emergency regulations issued under the PSO, meet the conditions of ‘law’. In this context, there are serious doubts as to whether Regulation 61A under the Quarantine Ordinance is a legally valid means of restricting the freedom to manifest religion or belief. In any event, section 3(1)(i) of the Quarantine Ordinance itself only refers to ‘prescribing *the mode* of burial or cremation of any person dying of disease’ (emphasis added). The provision does not in and of itself prohibit burials.

Several petitioners challenged Regulation 61A on the basis that it violated the fundamental rights to non-discrimination and the freedom to manifest religion or belief. The Supreme Court, in a split decision, dismissed the petitions. According to one of the lawyers appearing for the petitioners, Viran Corea, no reasons were offered for the decision,¹⁵ apart from the indication that the Court did not find even a *prima facie* case against Regulation 61A.

Asif Hussein, the head of the outreach division of the Centre for Islamic Studies in Sri Lanka, notes ‘cremation has a negative effect on the Muslim psyche, because fire is an element of hellfire according to Islamic belief, and subjecting a dead body to it is looked at with aversion’.¹⁶ Therefore, mandatory cremation – even if framed as a neutral policy – has a disparate impact on Muslims. The question then emerges as to whether this limitation on religious freedom for the ostensible purposes of protecting public health is in reality concealing a deeper majoritarian antagonism towards Muslims. The limitation needs to be viewed within the broader socio-political context, where Muslims were continuously portrayed on social media as vectors of COVID-19. During this period, hate speech targeting Muslims permeated social media, and among such

¹⁵Interview with lawyer Viran Corea, 26 December 2020.

¹⁶Interview with head of the outreach division of the Centre for Islamic Studies Asif Hussein, 27 December 2020.

speech was the accusation that Muslims were conducting public religious gatherings to dispose of their deceased.¹⁷ Such hate speech has often portrayed Muslims as insular, living in large communes and engaging in poor hygiene practices. Mainstream politicians capitalised on this anti-Muslim narrative. For example, Mahindananda Aluthgamage, a government minister, claimed on national television that a majority of those who violated lockdown regulations in a particular area were Muslim, although there was no verifiable basis for this claim (Bazeer, 2020). Within this overarching context, the mandating of cremation, and therefore the prohibition of burials – particularly where there was no established WHO advice mandating cremation – appeared to be designed to appease anti-Muslim sentiment prevalent at the time. The limitation served to demonstrate the state's willingness to take a strong stand against a seemingly unpopular minority group during a public health crisis. According to one lawyer and political analyst, the government was motivated to retain the discriminatory policy because reversing the policy would have harmed its approval ratings among its core Sinhala-Buddhist voter base.¹⁸ The government did eventually reverse the policy on 25 February 2021, but only due to increasing international pressure (Fonseka, 2021).

Similar to restrictions on minority religious worship and practice, the Sri Lankan state was prepared to dispense with rigorous constitutional compliance to restrict the funeral rites of a minority group merely to appease majoritarian sentiment. The case study accordingly reflects the Sri Lankan state's inclination to exploit certain public interests such as 'public health' to impose unjust limitations on the religious freedom of minorities.

4.5 Offending Buddhism and the clergy

The final case study that I explore in this article concerns the satirising of Buddhism and the Buddhist clergy in Sri Lanka. On 1 April 2019, writer Shakthika Sathkumara was arrested for writing and publishing a short story that was allegedly offensive toward Buddhism (English Pen, 2019). The story appeared on Sathkumara's Facebook page, and traced the recollections of a fictional character who was previously a Buddhist monk, but had subsequently disrobed. In the story, the character relates a piece of writing, which makes the claim that the Buddha was disinterested in women, thereby implying that he might have been homosexual. The story also goes on to allude to an abusive homosexual relationship between the main character and a senior Buddhist monk in the temple that he had left. Following the publication of the fictional short story, a complaint was lodged by the Buddhist Information Centre's director Ven. Agulugalle Siri Jinananda Thera claiming that the story violated both the ICCPR Act of 2007 (a Sri Lankan law that incorporates certain provisions of the ICCPR into domestic law) and the Penal Code of 1883 (WSWS, 2019). The police thereafter arrested Sathkumara citing section 3 of the ICCPR Act and section 291B of the Penal Code. Section 3(1) of the ICCPR Act provides: 'No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' Section 291B criminalises 'deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs'. The writer was released on bail several months after the arrest and eventually discharged.

The arrest and prolonged detention of Sathkumara amounted to a stringent limitation on his freedom of expression. Arguably, this limitation falls within the parameters of article 15(2), as it may be framed as being in the interests of 'racial and religious harmony'. Moreover, article 15(7) authorises limitations on the grounds of 'public morality', which arguably may include the moral sensibilities of the Sinhala-Buddhist majority. In the absence of clear interpretation that constrains these very broad, and often archaic, 'public interests', far-reaching limitations on the freedom of expression can appear to have a legal basis.

¹⁷Interview with researcher Deepanjalie Abeywardena, 31 December 2020.

¹⁸Interview with a lawyer and political analyst (who wished to remain anonymous), 23 December 2020.

In this particular case, a distinction may need to be made between the ICCPR Act and the Penal Code. The ICCPR Act prohibits advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Nothing in Sathkumara's fictional short story suggests that he sought to advocate hatred. In any event, his expression can scarcely count as a form of incitement to discrimination, hostility or violence towards a national, racial or religious group – namely the Sinhala-Buddhist community. Therefore, reliance on the ICCPR Act to limit his expression may lack a legal basis. By contrast, the formulation found in section 291B of the Penal Code is broadly and subjectively framed, and prohibits written content that insults the religion or religious beliefs of a community. Arguably, a short story that insults Buddhism may fall within the parameters of this offence, and the state could claim to be acting within these parameters when arresting and detaining a satirist. Sathkumara was eventually discharged following a decision by the Attorney General not to pursue an indictment. His claim that his freedom of expression was violated due to his arrest and detention is yet to be evaluated by the Supreme Court.

The limitation on Sathkumara's freedom of expression reflects a tendency within the Sri Lankan state to overreact to majoritarian outrage towards expressions perceived as offensive to Buddhism, and particularly the Buddhist clergy. The fact that it was a Buddhist monk and a formal Buddhist institution that complained against Sathkumara is an important part of the case. Media expert Sanjana Hattotuwa correctly points out that the 'overzealous' response of law enforcement to complaints originating from the Buddhist clergy is a manifestation of real politics.¹⁹ In Sri Lanka, a manifestation of majoritarian entitlement is in fact the exceptionalism of the Buddhist clergy.

Neil DeVotta and Jason Stone observe that 'the historical relationship between Buddhism and the state has ensured that the monks maintain influence' (DeVotta *et al.*, 2008: 32). Buddhist monastic exceptionalism in Sri Lanka does not exist in a political vacuum. It feeds into the decision-making of political actors, and feeds off the patronage of powerful actors within the state (Spencer *et al.*, 2015). It arises due to a symbiotic relationship between the Buddhist clergy and politicians (Uyangoda, 2007). Paying homage to the Buddhist clergy has historically remained a means of entrenching a ruler's legitimacy within the Sinhala-Buddhist polity. Today, state actors, including law enforcement officials, similarly reinforce the exceptionalism of the Buddhist clergy because such exceptionalism is perceived as being embedded in the psyche of many Sinhala-Buddhist voters.

Monastic exceptionalism in Sri Lanka manifests in two forms. The selective application of the ICCPR Act and the Penal Code reflects both these forms of exceptionalism. On the one hand, Buddhist monks who engage in incitement to violence, or physical attacks on others, are exempted from legal accountability. DeVotta and Stone observe that the behaviour of Buddhist monks – even 'wayward' ones – is tolerated by the state when such conduct is ostensibly carried out in the interests of protecting Buddhism (DeVotta and Stone, 2008). For example, the general secretary of the Buddhist militant group BBS Ven. Galagoda Aththe Gnanasara Thera has acted with impunity on numerous occasions. Notably, the state failed to prosecute him for inciting violence in the lead up to anti-Muslim violence in Aluthgama in 2014. The monk made widely documented inflammatory remarks against Muslims at a rally held in Aluthgama following an altercation between a local Buddhist monk and Muslim persons in the area (Haniffa *et al.*, 2014). His statement arguably incited the subsequent anti-Muslim violence that claimed the lives of four persons, and caused damage to over a hundred Muslim homes and businesses. The ICCPR Act and the Penal Code provisions concerning speech restrictions were not invoked to charge Gnanasara Thera.

On the other hand, the state has acted swiftly to investigate the complaints of the Buddhist clergy against individuals who have 'offended' the clergy. Sathkumara's case is the quintessential

¹⁹Interview with media expert Sanjana Hattotuwa, 27 December 2020.

example of this tendency. The state has also acted on similar complaints regarding expressions deemed offensive to Buddhism. For example, in 2018, the Ministry of Buddhist Affairs and Religious Affairs banned the airing of *Kanata Parak*, a radio drama written and directed by Malaka Dewapriya on the basis of a complaint by the Buddhist Information Centre. The radio drama featured a satirical use of Buddhist terminology, and was considered offensive to Buddhism. Also in 2018, the Ministry of Cultural Affairs ordered an investigation into KK Srinath's novel *Budunge Rastiyaduwa* for allegedly containing passages that were offensive to Buddhism (Borham, 2018). Observers, such as media researcher Abeywardena, point out that the suppression of artistic expressions on the grounds that they are offensive to Buddhism is 'a relatively new phenomenon'.²⁰ Such suppression may also coincide with the recent emergence of more critical works of satire dealing with the subject of Buddhism. According to cartoonist Gihan de Chickera, these cases along with the Sathkumara case, exemplify how 'Buddhism has become a terrain that satirists are restricted from entering'.²¹ He observes that the consequences of satirising Buddhism can include arrest and incarceration. The ICCPR Act has thus paradoxically become 'a repressive tool curtailing freedom of thought or opinion, conscience and religion or belief' (Shaheed, 2020).

Restrictions on artistic expressions deemed offensive to Buddhism or the Buddhist clergy illustrate how limitations on fundamental freedoms in Sri Lanka are subject to majoritarian influence. The consequences of this constitutional practice are manifold. For instance, journalist and media expert Nalaka Gunawardene points out that cases such as Sathkumara's case will 'discourage critical thinkers from questioning aspects of Buddhism'.²² Others such as human rights activist Ruki Fernando agree that such cases are likely to have a serious 'chilling effect on the expression of dissent', and can lead to severe self-censorship.²³ But perhaps the most important among such consequences is the normative devaluation of fundamental freedoms held by minorities and satirists in Sri Lanka. In the final section of this article, I will explore this consequence, and argue that there is a serious cleavage between the moral validity and the legal claimability of certain fundamental freedoms in Sri Lanka.

5 The devaluation of fundamental freedoms

Sri Lanka's Constitution clearly recognises certain fundamental rights and freedoms. In this context, it is worth reflecting on what is meant by 'rights' and 'freedoms', and what conditions need to be satisfied for there to be any meaningful realisation of these things. Rights signify something claimable (O'Neill, 1996); a rights-holder has some entitlement to claim (from duty-bearers) the performance of duties (Feinberg, 1970). The *claimability* of rights means that a rights-holder possesses the power – both moral and legal – to control the duties owed to them, i.e. to enforce or waive the performance of those duties (Hart, 1955). Meanwhile, the term 'freedom' in rights discourse is analogous to the concept of individual 'liberty'. 'Freedom' or 'liberty' ultimately concerns non-interference with conduct (Hohfeld, 1919; Berlin, 1969). When we say a person has the *freedom* to express something, or practice a religion of their choice, we mean that others, including the state, cannot interfere with such expression or practice except for carefully justified reasons.

Fundamental freedoms such as the freedom of religion or belief and freedom of expression must be claimable if they are to be meaningfully realised under a constitution. They are 'rights' in the sense that others including the state are *duty bound* to respect these freedoms by refraining from interfering with them. They are also rights because the state has a specific positive obligation

²⁰Interview with researcher Deepanjali Abeywardena, 31 December 2020.

²¹Interview with Gihan de Chickera, 26 December 2020.

²²Interview with Nalaka Gunawardene, 31 December 2020.

²³Interview with human rights activist Ruki Fernando, 30 December 2020.

to protect the rights-holder from undue interference by non-state actors. Crucially, a person entitled to such freedoms must have a meaningful ability to *claim* the performance of these duties.

A limitation on a fundamental freedom must always be justified by those seeking to impose such a limitation. This principle is what some scholars call the ‘fundamental liberal principle’ (Gaus, 1996). According to this principle, freedom is the default position, and the onus of justification is on those who would use coercion to limit freedom. If indeed these freedoms are understood as claimable rights in any meaningful sense, they must be more than mere constitutional ‘standards’. Anthony Langlois observes that the real distinction between a ‘right’ and a ‘standard’ boils down to the ‘the manner in which people properly conceptualise what they have in a [right], and this in turn depends upon the wider form of government in which [rights] are embedded’ (Langlois, 2003, p. 1014). He notes that in an authoritarian system, a so-called ‘right’ is not a right at all, but a ‘condescension, a privilege, a long leash . . . it is a form of charity which may be withdrawn at the whim of the individual or group in authority’ (p. 1014). A ‘right’, therefore, should not be contingent on the permissive will of the majority group in a country. If it were contingent, it would not be claimable in a normatively meaningful sense, and would only be, at best, a ‘standard’ of some kind. Those who appeal to such ‘standards’ would not be in a position to actually secure the performance of duties by others, including the state. They would not, for example, have the ability to secure from the state a genuine commitment to respect and protect their fundamental freedoms. If the normative characteristic of a ‘right’ was to be retained, the scheme through which the right may be justifiably limited should not be subject to the will of the majority.

In Sri Lanka, we can see through the case studies that limitations are imposed on certain fundamental freedoms of minorities and satirists largely in accordance with the will of the Sinhala-Buddhist majority. This predicament may be contrasted with how petitioners from the majority community (and whose conduct does not clash with majoritarian interests) are able to vindicate their fundamental freedoms before the courts. The cases featuring Buddhist monks as petitioners are illustrative in this regard.

There are two observations to make about such constitutional practice. First, minorities and satirists do not appear to enjoy the full gamut of claimable rights in a meaningful sense. Although they are in theory entitled to the panoply of fundamental freedoms recognised in the Constitution, in practice, the exercise of many of these freedoms – including the freedom of religion or belief and the freedom of expression – are subject to the will of the Sinhala-Buddhist majority community. Limitations based on majoritarian interests relating to religious attire, worship and practice, propagation, and funeral rites are common in Sri Lanka. Limitations based on majoritarian hostility towards artistic expressions deemed offensive to Buddhism or the Buddhist clergy are also frequent. These limitations are consistently upheld by courts even when majoritarian interests, rather than genuine public interests, underlie them. In this context, what minorities and satirists actually possess under Sri Lanka’s Constitution are not always ‘claimable rights’, but often mere reflections of constitutional standards. These standards are no doubt morally important; a person whose fundamental freedoms are limited unjustifiably can appeal to their moral entitlement under a constitution even if these freedoms are flouted in practice. Such moral appeal has undoubted value. However, these moral entitlements do not necessarily have meaningful legal claimability.

Second, Langlois’s observations about the political conditions that are common among states that fail to provide meaningful rights appears to be entirely applicable to Sri Lanka. Of course, there are many rights that are claimable even by minorities and satirists, such as the freedom from torture. The absolute prohibition on torture extends to minorities and satirists, and violations of that right are very much considered ‘violations’. By contrast, the realisation of certain fundamental freedoms such as the freedom of religion or belief and the freedom of expression can be withdrawn depending on how the majority community view particular exercises of those freedoms. These

freedoms can be enjoyed only contingently; they are only privileges offered or ‘tolerated’ by the majority community when the conduct in question is not at odds with their numerical and cultural dominance, their control of the public sphere, or their moral sensibilities. This notion of tolerance, or more precisely ‘toleration’ (Spencer, 2018) is paternalistic, and exemplifies what I mean when I suggest that the relevant freedoms are not meaningfully claimable. Therefore, limitations on such fundamental freedoms in Sri Lanka reveal much more than a constitutional practice that is hostile to minorities and satirists. They reveal a deeper normative weakness in Sri Lanka’s constitutional order.

6 Conclusion

Sri Lanka’s current constitutional framework recognises certain fundamental freedoms, and sets out a regime for limiting these freedoms in the ‘public interest’. Yet, in practice, majoritarian interests have influenced the manner and extent of limitations on certain fundamental freedoms in Sri Lanka. In particular, the freedom of religion or belief of minorities, and the freedom of expression of those who wish to satirise Buddhism or the Buddhist clergy are routinely subjected to unwarranted limitations. I have explored cases in a number of areas that demonstrate this pattern. In each case, the state has arguably operated within the legal parameters set out in the Constitution. I say ‘arguably’ because these limitations are often imposed in bad faith. But in reality, they are rarely adjudged impermissible, and have become part of Sri Lanka’s constitutional practice. I then explained that in each of these cases, it is possible to trace the motivations of the state to certain majoritarian interests. Deeply-held existential fears among the Sinhala-Buddhist community about losing their public space, cultural influence, and economic advantage, invariably shape the state’s application of these limitations. Majority fears around population growth and radicalisation within the Muslim community drive restrictions on Islamic attire. Majoritarian anxieties over maintaining dominance over the public sphere often underlie restrictions on worship and the construction of religious institutions. The majority’s existential fears about losing adherents to competing faiths tend to drive restrictions on propagation. General antagonism towards the Muslim community has driven completely irrational and unscientific prohibitions on burials during the COVID-19 pandemic. Finally, the prestige of the Buddhist clergy and their interests in not being offended have prompted restrictions on expressions deemed offensive towards Buddhism and the Buddhist clergy. It is in this overarching context that we can point to a socio-political reality in Sri Lanka: majoritarianism influences the way in which the state imposes limitations on the fundamental freedoms of minorities and satirists. This reality calls into question the meaningfulness of the fundamental freedoms of minorities and satirists. If freedom is only meaningful when a person has a legally claimable right to such freedom, there remains a major cleavage between what is morally owed to minorities and satirists, and what they actually possess under Sri Lanka’s Constitution. This article has attempted to present a sobering but realistic account of what these minorities and satirists are able to claim under the Constitution.

Reforming the Sri Lankan Constitution to address its doctrinal weaknesses – the Buddhism clause, excessive emergency powers, and the preservation of archaic laws that are inconsistent with fundamental rights – is indeed important. Yet if the very nature of the state is shaped by a majoritarian disposition, it seems unlikely that legal and institutional reform alone could deliver for minorities and satirists any meaningful chance to *claim* their rights to certain fundamental freedoms. Legal claimability will ultimately depend on a broader transformative project in which the politics that drive constitutional practice is fundamentally altered. What we learn from the Sri Lankan experience is simple: we learn that legal regimes designed to guarantee fundamental freedoms can offer very little protection to minorities and satirists as long as majoritarian politics govern constitutional practice.

Acknowledgments. The author is grateful to Prof. Sumudu Atapattu, Dr. Andrew Bush, Dr. Mary Elston, Dr. Cynthia Farid, Prof. Heinz Klug, Sanjayan Rajasingham, Prof. Mitra Sharafi, Prof. Kristen Stilt, Dr. Shamara Wettimuny and the editors of this Special Issue for their generous feedback on earlier versions of this article.

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