



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October – 3 November 2005

VIEWS

Communication No. 1249/2004

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| <u>Submitted by:</u> | Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (not represented by counsel) |
| <u>Alleged victims:</u> | The authors |
| <u>State Party:</u> | Sri Lanka |
| <u>Date of communication:</u> | 14 February 2004 (initial submission) |
| <u>Document references:</u> | Special Rapporteur's rule 97 decision, transmitted to the State party on 26 February 2004 (not issued in document form) |
| <u>Date of adoption of Views:</u> | 21 October 2005 |

* Made public by decision of the Human Rights Committee.

Subject matter: Determination by Supreme Court that incorporation of religious order inconsistent with Constitution

Procedural issues: Exhaustion of domestic remedies – Substantiation, for purposes of admissibility

Substantive issues: Freedom of religious belief – Manifestation of religious belief – Freedom of expression – Permissible restrictions – Equality before the law - Discrimination on basis of religious belief

Articles of the Covenant: articles 2, paragraph 1, 18, paragraph 1, 19, paragraph 2, 26 and 27

Article of the Optional Protocol: articles 2 and 5, paragraph 2(b)

On 21 October 2005, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1249/2004. The text of the Views is appended to the present document.

[ANNEX]

ANNEX*

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-fifth session

concerning

Communication No. 1249/2004

Submitted by: Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (not represented by counsel) (not represented by counsel)

Alleged victims: The authors

State Party: Sri Lanka

Date of communication: 14 February 2004 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2005,

Having concluded its consideration of communication No. 1249/2004, submitted to the Human Rights Committee by Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, initially dated 14 February 2004, is Sister Immaculate Joseph, a Sri Lankan citizen and Roman Catholic nun presently serving as Provincial Superior of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka ('the Order'). She submits the communication on her own behalf and on behalf of 80 other sisters of the Order, who expressly authorize her to act on their behalf. They claim to be victims of violations by Sri Lanka of articles 2, paragraph (1); article 18, paragraph (1); article 19, paragraph (2), article 26 and article 27 of the Covenant. The Optional Protocol entered into force for Sri Lanka on 3 January 1998. The authors are not represented by counsel.

Factual background

2.1 The authors state that the Order, established in 1900, is engaged, among other things, in teaching and other charity and community work, which it provides to the community at large, irrespective of race or religion. In July 2003, the Order filed an application for incorporation, which in Sri Lanka occurs by way of statutory enactment. The Attorney-General, who the authors maintain is required by article 77 of the Constitution to examine every Bill for consistency with the Constitution, made no report to the President. After the Bill was published in the Government Gazette, an objection to the constitutionality of two clauses of the Bill, when read with the preamble,¹ apparently by a private citizen ('the objector'), was filed on 14 July 2003 in the original jurisdiction of the Supreme Court.

¹ The contested clauses of the Bill were clauses 3 and 5, read with the preamble. These provided:

Preamble.

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

AND WHEREAS it has become necessary for the aforesaid purposes to be more effectively prosecuted, pursued and attained to have the incorporation of the [the Order]:

AND WHEREAS it has become expedient to have [the Order] duly incorporated"

Clause 3.

- (a) The general objects for which the Corporation is constituted are hereby declared to be –
- (b) to spread knowledge of the Catholic religion;
- (c) to impart religious, educational and vocational training to youth;
- (d) to teach in Pre-Schools, Schools, Colleges and Educational Institutions;
- (e) to serve in Nursing Homes, Medical Clinics, Hospitals, Refugee Camps and like institutions;
- (f) to establish and maintain Creches, Day Care Centres, Homes for the elders, Orphanages, Nursing Homes and Mobile Clinics for the infants, aged, orphans, destitutes and sick;
- (g) to bring about society based on love and respect for one and all; and
- (h) to undertake and carry out all such works and services that will promote the aforesaid objects of the Corporation.

2.2 Without advice of the objection or hearing to the Order, the Supreme Court heard the objector and the Attorney-General on the matter. The authors state that the Attorney-General, who was technically the respondent to the proceedings, supported the objector's arguments. On 1 August 2003, the Supreme Court handed down its Special Determination upholding the application, for inconsistency with articles 9 and 10 of the Constitution. The Court held that the challenged provisions of the Bill "create a situation which combines the observance and practice of a religion or belief with activities which would provide material and other benefits to the inexperienced [sic], defenseless and vulnerable people to propagate a religion. The kind of [social and economic] activities projected in the Bill would necessarily result in imposing unnecessary and improper pressures on people, who are distressed and in need, with their free exercise of thought, conscience and religion with the freedom to have or to adopt a religion or belief of his choice as provided in article 10 of the Constitution." The Court thus considered that "the Constitution does not recognize a fundamental right to propagate a religion". In reaching its conclusions, the Court referred to article 18 of both the Universal Declaration of Human Rights and the Covenant, as well as two cases decided by the European Court of Human Rights.²

2.3 The Court went on to examine the application in the light of article 9 of the Constitution, which provides that: "The Republic of Sri Lanka shall give Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the *Buddha Sasana*, while assuring all religions the rights granted by articles 10 and 14(1)(e)." The Court held, "the propagation and spreading Christianity as postulated in terms of clause 3 [of the Bill] would not be permissible as it would impair the very existence of Buddhism or the *Buddha Sasana*". In addition, subclauses 1(a) and (b) of clause 3 concerned spreading knowledge of a religion, and were thus inconsistent with article 9 of the Constitution.

2.4 The authors point out that in reaching these conclusions the Court referred to decisions in two previous cases where similar bills for the incorporation of Christian associations had been found to be unconstitutional. The result of the decision, against which no appeal or review was possible, was that Parliament could not enact the Bill into law without a two-thirds special majority and approval by a popular referendum.

The complaint

3.1 The authors claim that the above facts disclose violations of article 2, paragraph 1, read with article 26, article 27, article 18, paragraph 1, and article 19, paragraph 2. As to article 2, paragraph 1, read with article 26, the authors argue that the Attorney-General's submissions in opposition to the Bill and the Supreme Court's determination violated these rights. The Attorney-General, not having recognized any constitutional infirmity under article 77, was obliged as a matter of equality of law to take the same position before the Court, doubly so given that the Order, although the affected entity, was neither notified nor heard. The determination that Clause 3 of the Bill was incompatible with article 9 of the Constitution was moreover so irrational and arbitrary as to breach fundamental norms of equality

Clause 5 gave the authority to the corporation to receive, hold and dispose of movable and immovable property for the purposes set out in the Bill.

² Kokkinakis v Greece Appln. 14307/88, judgment of 19 April 1993, and Larissis v Greece Applns. 23372/94, 26377/94 and 26378/94, judgment of 24 February 1998.

protected by article 26. With reference to the Committee's decision in Waldman v Canada,³ the authors argue that to reject the Order's incorporation while many non-Christian religious bodies with similar object clauses have been incorporated violates article 26. In support, the author provides a (non-exhaustive) list of 28 religious bodies that have been incorporated and their statutory objects, of which most have Buddhist orientation, certain Islamic, and none Christian.

3.2 In terms of article 27, the authors invoke the Committee's General Comment 22 to the effect that the official establishment of a State religion should not impair the enjoyment of others' Covenant rights. The Court's reliance on the Buddhism primacy clause in article 9 to reject the Bill's constitutionality thus violated article 27. The authors emphasize that, like the lengthy list of other religious bodies receiving incorporation, the Order combined charitable and humanitarian activities (labeled social and economic activities by the Court) with religious ones, a practice common to all religions. To require a religious body's adherents to limit good works would be discriminatory, and contrary also to the objects of the other religious bodies that received incorporation. Propagation of belief, moreover, is an integral part of professing and practicing religion; indeed, all major religions in Sri Lanka (Buddhism, Hinduism, Islam and Christianity) were introduced by propagation. In any event, the authors state that in the seventy years of the Order's existence in Sri Lanka, there has neither been evidence nor allegation of inducements or allurements to conversion. This aspect of religious practice is thus protected by the rights of the Order's members under article 27 Covenant.

3.3 In terms of article 18, paragraph 2 and 19, paragraph 2, the authors argue that the Court's restrictions on social and economic activities of the Order breach its members' rights under these provisions. The right to propagate and disseminate information about a religion is similarly covered by these articles, and is not limited to a State's "foremost" religion. None of the Order's activities are coercive, and thus paragraph 2 of article 18 has no application to the Order's legitimate activities. Invoking article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief as a guide to Covenant interpretation, the author goes on to argue that the inability to hold property in the name of the Order sharply limits its effective ability to establish places of worship and charitable and humanitarian institutions. The Attorney-General's submissions and the Supreme Court's ascription to the Order of potentially coercive activities as a result of incorporation were wholly unsubstantiated and unfounded in fact.

The State party's submissions on admissibility and merits

4.1 By submissions of 15 April 2004 and 21 March 2005, the State party contested the admissibility and merits of the communication. At the outset, the State party described its understanding of the allegations as three-fold: a) that the author was not afforded an opportunity of being heard before the Supreme Court prior to the Court making its determination, b) that the Attorney-General supported the petitioner's submissions before the Supreme Court, and c) that the Supreme Court's determination itself violated the author's Covenant rights.

4.2 As to the allegation that the authors were not afforded an opportunity of being heard before the Supreme Court prior to the Court making its determination, the State party

³ Case No 694/1996, Views adopted on 3 November 1999.

explains that under article 78 of the Constitution, any Bill shall be published in the Government gazette at least seven days before being placed on the Order paper of Parliament. The Constitution then lays down the procedure to be followed when a Bill is placed on the Order paper in Parliament. The Supreme Court is vested, under article 121 of the Constitution, with sole and exclusive jurisdiction to determine whether a Bill or any provision thereof is inconsistent with the Constitution. This jurisdiction may be invoked by the President by written reference to the Chief Justice, or by any citizen addressing the Court in writing. Either application must be filed within a week of the Bill being placed on the Order paper of Parliament.

4.3 When the Court's jurisdiction has thus been invoked, no Parliamentary proceedings may be held in relation to the Bill until three weeks have elapsed or the Court has determined the matter, whichever occurs first. The Court's proceedings take place in open court, and any person claiming to be interested in the determination of the question can make an application to the Court for intervenor status. The Court communicates its determination to the President or the Speaker within three weeks of the application. In the event that the Court finds an inconsistency, a special majority of two-thirds of all members of Parliament must pass the Bill, while if the Bill is in relation to articles 1 to 3 or 6 to 11, a people's referendum must also approve the Bill. The members of Parliament are aware when any Bill has been placed on the Order paper in Parliament.

4.4 The State party explains that the current Bill was presented as a Private Member's Bill. As such, it had not been examined by the Attorney-General under article 77 of the Constitution, and the Attorney-General expressed no view on it. If the authors had wished to intervene in the proceedings, they should have been vigilant to check with the Court's Registry if any application had been filed with the Registry within a week of the Bill being placed upon the Parliamentary Order paper. Had such due diligence been exercised and an intervenor application been made, there is no apparent reason why the Court would have refused the application, which would have been unprecedented. Rather than being a situation of denial of an opportunity to be heard therefore, it was a clear case of an author not taking proper steps to avail herself of the opportunity and the authors are now estopped from claiming otherwise.

4.5 As to the allegation that the Attorney-General supported the petitioner's submissions before the Supreme Court, the State party observes that when article 121 of the Constitution is invoked, the Constitution provides for the Attorney-General to be notified and to be heard. At that point, s/he is expected to consider the objections raised to the constitutionality of the item under reference and assist the Court in its determination. While the Attorney-General had not previously expressed a view on the Bill's constitutionality, the Bill being a private Bill, even if s/he had, it would be manifestly wrong and untenable to suggest s/he would be bound by that earlier determination when addressing the issue in article 121 proceedings.

4.6 As to the contention that the Supreme Court's determination itself violated the authors' Covenant rights, the State party argues that the Supreme Court is not empowered to change the Constitution but only to interpret it within the framework of its provisions. The Court considered the submissions made, took into consideration previous determinations and gave reasons for its conclusions. In any event, the authors, having failed to exercise due diligence to secure their right to be heard, are estopped from contesting the Court's determination in

another forum. As a result, with respect to all three allegations, the State party argues that the authors have failed to exhaust domestic remedies.

4.7 The State party goes on to argue that the Supreme Court's determination does not prevent the authors from carrying on their previous activities in Sri Lanka. The State party argues that the Court's determinations in article 121 proceedings do not bind lower courts, and thus lower courts will not be compelled to restrict their right to engage in legitimate religious activity. Nor, for its part, does the Supreme Court's determination do so.

4.8 Moreover, the Court's determination does not prevent Parliament from passing the Bill, which, while inconsistent with articles 9 and 10 of the Constitution could still be passed by a special majority and referendum. Alternatively, the constitutionally impugned provisions of the Bill could be amended and the Bill resubmitted.

Authors' comments on the State party's submissions

5.1 By letter of 30 May 2005, the authors argue that the State party has confined itself to responding to three incidental allegations which do not form the core of the author's case. The authors argue that the issue is not whether the Court's determination prevents her from carrying on her activities, but rather whether there was a violation of Covenant rights, for the reasons detailed in the complaint. There is no remedy in domestic law against the Supreme Court's determination, which is final and thus the merits thereof are appropriately before the Committee.

5.2 As to the State party's response concerning the opportunity of being heard, the authors emphasize that only the Speaker and Attorney-general receive mandatory notice of an article 121 application, with there being no requirement to notify affected parties such as, in the present case, those involved in a Bill to incorporate a body. In some cases of Private member's Bills, the Supreme Court has adjourned the hearing and notified the concerned member of Parliament if s/he wishes to be heard.⁴ In the present case, neither the relevant member of Parliament nor the authors were notified, amounting to a violation of article 2, paragraph 1, in connection with article 26 of the Covenant.

5.3 The authors argue that if the Attorney-General could deviate, in article 121 proceedings, from constitutional advice earlier provided, the whole purpose of the earlier advice would be rendered nugatory. The ability to change such opinions at will would leave room for gross abuse and undoubtedly affect the rights of individuals, contrary to article 21, in connection with article 26 of the Covenant. The authors go on to argue that the State party's response to the Covenant challenge to the Supreme Court's determination, to the effect that the Court made determination within the applicable legal framework, is insufficient answer to her complaint.

⁴ The authors cite the example of a Bill entitled "Nineteenth amendment to the Constitution" presented by a private member inter alia to make Buddhism the State's official religion as an example.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 With respect to the exhaustion of domestic remedies, the Committee notes the State party's argument that the authors did not exercise due diligence with respect to confirming through the Parliamentary order paper and then Supreme Court's registry whether an application under article 121 of the Constitution had been lodged, and accordingly filing a motion wishing to be heard. The Committee considers that, exceptional *ex parte* circumstances of urgency apart, when a Court hears an application directly affecting the rights of a person, elementary notions of fairness and due process contained in article 14, paragraph 1, of the Covenant require the affected party to be given notice of the proceeding, particularly when the adjudication of rights is final. In the present case, neither members of the Order nor the member of Parliament presenting the Bill were notified of the pending proceeding. Given not least that in previous proceedings the Court, on the information before the Committee, had notified members of Parliament in such proceedings, the authors thus cannot be faulted for failing to introduce an intervenor's motion before the Court. The Committee observes that there may in any event be issues as to the effectiveness of this remedy, given the requirement that complex constitutional questions, including relevant oral argument, be resolved within three weeks of a challenge being filed, the challenge itself coming within a week of a Bill's publication in the Order paper. It follows that the communication is not inadmissible for failure to exhaust domestic remedies.

6.3 As to the claim that the authors' rights under articles 2 and 26 of the Covenant were violated by the Attorney-General contesting the constitutionality of the Bill before the Court in circumstances where s/he had previously expressed no view of constitutional infirmity, the State party has explained without rebuttal that the Attorney-General's duty to pass on the constitutionality of Bills at the initial stage does not apply to Private member's Bills such as the present. Accordingly, the Attorney-General's views expressed in the article 121 proceedings were his or her first formal views on the matter and were not precluded by a previously taken view. As a result, the Committee considers that this claim is insufficiently substantiated, for purposes of admissibility, and is accordingly inadmissible under article 2 of the Optional Protocol.

6.4 In the absence of any other objections to the admissibility of the communication, and recalling in particular that the Covenant guarantees in articles 18 and 27 freedom of religion exercised in community with others, the Committee considers the remaining claims as pleaded to be sufficiently substantiated, for purposes of admissibility, and proceeds to their consideration on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 As to the claim under article 18, the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3.⁵ The authors have advanced, and the State party has not refuted, that incorporation of the Order would better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. It follows that the Supreme Court's determination of the Bill's unconstitutionality restricted the authors' rights to freedom of religious practice and to freedom of expression, requiring limits to be justified, under paragraph 3 of the respective articles, by law and necessary for the protection of the rights and freedoms of others or for the protection of public safety, order, health or morals. While the Court's determination was undoubtedly a restriction imposed by law, it remains to be determined whether the restriction was necessary for one of the enumerated purposes. The Committee recalls that permissible restrictions on Covenant rights, being exceptions to the exercise of the right in question, must be interpreted narrowly and with careful scrutiny of the reasons advanced by way of justification.

7.3 In the present case, the State party has not sought to justify the infringement of rights other than by reliance on the reasons set out in the decision of the Supreme Court itself. The decision considered that the Order's activities would, through the provision of material and other benefits to vulnerable people, coercively or otherwise improperly propagate religion. The decision failed to provide any evidentiary or factual foundation for this assessment, or reconcile this assessment with the analogous benefits and services provided by other religious bodies that had been incorporated. Similarly, the decision provided no justification for the conclusion that the Bill, including through the spreading knowledge of a religion, would "impair the very existence of Buddhism or the *Buddha Sasana*". The Committee notes moreover that the international case law cited by the decision does not support its conclusions. In one case, criminal proceedings brought against a private party for proselytisation was found in breach of religious freedoms. In the other case, criminal proceedings were found permissible against military officers, as representatives of the State, who had proselytised certain subordinates, but not for proselytising private persons outside the military forces. In the Committee's view, the grounds advanced in the present case therefore were insufficient to demonstrate, from the perspective of the Covenant, that the restrictions in question were necessary for one or more of the enumerated purposes. It follows that there has been a breach of article 18, paragraph 1, of the Covenant.

7.4 As to the claim under article 26, the Committee refers to its long standing jurisprudence that there must be a reasonable and objective distinction to avoid a finding of discrimination, particularly on the enumerated grounds in article 26 which include religious belief. In the present case, the authors have supplied an extensive list of other religious bodies which have

⁵ See Malakhovsky et al. v Belarus, Case No 1207/2003, Views adopted on 26 July 2005, and Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Resolution 36/55 of 25 November 1981, which provides: "... the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms: ...

(b) the right to establish and maintain appropriate charitable or humanitarian institutions".

been provided incorporated status, with objects of the same kind as the authors' Order. The State party has provided no reasons why the authors' Order is differently situated, or otherwise why reasonable and objective grounds exist for distinguishing their claim. As the Committee has held in Waldman v Canada,⁶ therefore, such a differential treatment in the conferral of a benefit by the State must be provided without discrimination on the basis of religious belief. The failure to do so in the present case thus amounts to a violation of the right in article 26 to be free from discrimination on the basis of religious belief.

7.5 As to the remaining claim that the Supreme Court determined the application adversely to the authors' Order without either notification of the proceeding or offering an opportunity to be heard, the Committee refers to its considerations in the context of admissibility set out in paragraph 6.2. As the Committee observed in Kavanagh v Ireland,⁷ the notion of equality before the law requires similarly situated individuals to be afforded the same process before the courts, unless objective and reasonable grounds are supplied to justify the differentiation. In the present case, the State party has not advanced justification for why, in other cases, proceedings were notified to affected parties, whilst in this case they were not. It follows that the Committee finds a violation of the first sentence of article 26, which guarantees equality before the law.

7.6 In the Committee's view, the claims under articles 19 and 27 do not add to the issues addressed above and do need to be separately considered.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sri Lanka of articles 18, paragraph 1, and 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy giving full recognition to their rights under the Covenant. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

⁶ Op.cit.

⁷ Case No 819/1998, Views adopted on 4 April 2001.