ISSN (O): 2582-6646
Summer 2021
Volume 2 Number 1

JOURNAL OF INTERNATIONAL LAW AND COMITY

WEERAMANTRY CENTRE FOR PEACE, JUSTICE AND INTERNATIONAL LAW

Journal of International Law and Comity (JILC) is published by Weeramantry Centre for Peace, Justice and International Law (Weera Centre). It is a double peer-reviewed, open-access, biannual journal; welcoming submissions related to the pressing issues of international law that carry high human and non-human impact.

For further details, email at:

weeracentre@gmail.com | weerajilc@gmail.com
URL: https://weeracentre.org/issues/

Weera Centre
Chi 3, Greater Noida,
Gautam Buddh Nagar,
Uttar Pradesh, India – 201310.

Cite as:

[Volume:Number] J. Int'l Law & Com. [Page] [Year]

Journal of International Law and Comity
Volume 2 |Number 1
Summer 2021

ADVISORY BOARD

Journal of International Law and Comity
Volume 2 |Number 1
Summer 2021

TEAM

EDITOR IN CHIEF

Sahana Reddy

EDITORIAL BOARD

Sheela Rai
Harisankar Sathyapalan
Deepa Kansra
Mohammad Umar
Moumita Mandal
Niteesh K. Upadhyay
Thamil Venthan Ananthavinayagan
Anwar Sadat
Nizamuddin Siddiqui
Neha Chauhan
Anirudha Choudhury

ASSISTANT EDITORS

Naasha F. Anklesaria
Matthew Shuck

Journal of International Law and Comity
Volume 2 |Number 1
Summer 2021

CONTENTS

ARTICLES

Modern Day Slavery in the Tea Gardens of Bangladesh: Abolished in Law, Persisting in Fact
FATEMAA WAARIITHAH AHSAN & PRIYA AHSAN CHOWDHURY 1-28

The Nigeria Correctional Service Act, 2019 and the Right to Diversion: An Appraisal in the Light of CRA and CRC
SYLVESTER TERHEMEN UHAA 29-51

Immunity Passports and the Necessity of Human Rights Compliance by States: A Normative Critique
KAVYA SALIM 52-77

Grand Ethiopian Renaissance Dam and the Nile: International Legal and Political Implications
MENNA KHALED & MICHAEL MULLIGAN 78-97

Domestic and International Legal Evaluation of the Dwindling Space for Dissent in Sri Lanka
PULASTHI HEWAMANNA 98-120

CASE COMMENT

The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (ICC-AC, 31 March 2021)
LUÍS BARTILOTTI MATOS 121-130

BOOK REVIEW

I Am the People: Reflections on Popular Sovereignty Today- *Partha Chatterjee*
MOHAMMAD UMAR 131-134

DOMESTIC AND INTERNATIONAL LEGAL EVALUATION OF THE DWINDLING SPACE FOR DISSENT IN SRI LANKA

Pulasthi Hewamanna†

Abstract

This article considers Sri Lanka's jurisprudence with regards to restrictions relating to subversive speech and the offence of sedition. Before looking into the international legal obligations of Sri Lanka vis-à-vis free speech, the article explores the value of dissent in a democracy and the influence that Indian authorities have had on Sri Lanka's more recent judgments relating to dissent. The recent advancements of free speech contours through authoritative judgments, as well as the executive directives which have a stifling effect on free speech are juxtaposed against international standards to evaluate if Sri Lanka complies with recognised indicators. The objective of the article is to assess whether Sri Lanka's free speech culture meets the threshold set by international norms. From a broader outlook on recent events and trends, the article emphasises the need to realise the value of dissent within constitutional and other legal parameters to achieve a functional democracy.

Keywords: dissent, free speech, jurisprudence, international law, functional democracy.

---

† Attorney-at-Law, Sri Lanka. ✉ chambers.hewamanna@gmail.com

The author is indebted to Ms. Fadhila Fairoze for her assistance in preparation of the first draft. All remaining errors are of the author alone.

I. Introduction

The exercise of fundamental human rights, such as the freedom of speech and expression, is not absolute. They may be restricted as prescribed by the Constitution. However, a question arises as to whether such restrictions conform to Constitutional safeguards and indeed international norms or whether the restrictions go beyond what is prescribed by the law. In the backdrop of the State's inclination to censor information, public views and lawful dissent that contradicts their narrative, this short article evaluates the measures taken by the executive against Sri Lanka's existing free speech culture, and its recent developments as well as international standards on freedom of expression.

The article commences with a brief discussion of some of the key cases that shaped free speech jurisprudence in Sri Lanka as well as the constitutional framework which protects speech. Chapter III considers the value of dissent in a democracy. Chapter IV thereafter discusses in more detail where dissent has been quashed by executive action but subsequently upheld by the judiciary in older established case law. This is followed by Chapter V where recent decisions of the Supreme Court are discussed, along with their reliance on certain Indian authorities, and briefly discusses more recent authorities ignored by the court. In such a free speech backdrop, Chapter VI discusses certain executive actions which can be seen as having a chilling effect on the existing free speech culture. Chapter VII thereafter evaluates the free speech culture of Sri Lanka and restrictions thereon against established international standards to evaluate how far they are compatible.

II. Freedom of Speech in Sri Lanka

If Justice Brandeis was correct in his observations, and liberty *is* the secret of happiness, and courage the secret of liberty,[1] then Sri Lanka's First Republican Constitution in 1972 epitomises these fundamental principles, and positions free speech as a political duty and fundamental

[1] Whitney v. California, 274 U.S. 357 (1927).

principle of governance.[2] Adopting the text of this Constitution was a momentous occasion and a significant departure from the erstwhile colonial impositions.

The current (Second Republican) Sri Lankan Constitution,[3] contains a similar clause, giving all citizens, the freedom of expression including that of publication.[4] However, the freedom is subject to restrictions with regards to- racial and religious harmony, parliamentary privileges, contempt of court, defamation or incitement to an offence.[5] These restrictions must be set out by an Act of Parliament.[6] National security, public order, protection of public health or morality, security of the rights and freedoms of others or meeting the just requirements of the general welfare of a democratic society make some of the other grounds which an individual's free speech should not breach.[7] In addition to being enforced by law, these restrictions can also be imposed by specific emergency regulations formulated by the President.[8] But these regulations are not beyond the scope of judicial scrutiny.[9]

Sri Lankan jurisprudence has recognised the importance of free speech whilst accepting that it is not an absolute right.[10] Some cases that shaped the domestic free speech jurisprudence are- *Joseph Perera v. The Attorney General*,[11] *Amaratunga v. Sirimal (Jana Gosha Case)*,[12] *Channa Pieris v. The Attorney General (Ratawesi Peramuna Case)*[13] and *Sunila Abeysekera v. Ariya Rubasinghe.*[14] These cases

[2] SRI LANKA CONST. art 18(1)(g) (1st Rep. Const. 1972).
[3] SRI LANKA CONST. 1978 (2nd Rep. Const. 1978).
[4] Id. art. 14(1)(a).
[5] Id. art. 15(2).
[6] Id. art 15(2) r/w art. 170.
[7] Id. art. 15(7).
[8] Id.
[9] Siriwardene v. Liyanage (1983) 2 FRD 310; Wickremabandu v. Herath (1990) 2 SLR 348.
[10] Joseph Perera alia Bruten Perera v. The Attorney General (1992) 1 SLR 199.
[11] Id.
[12] Amaratunga v. Sirimal (Jana Gosha Case) (1993) 1 SLR 264.
[13] Channa Pieris v The Attorney General (Ratawesi Peramuna Case) (1994) 1 SLR 1.
[14] Sunila Abeysekera v. Ariya Rubasinghe (2000) 1 SLR 314.

acknowledge both- instrumental theories as well as intrinsic value theories as normative justifications for free speech; hence stipulating that free speech is not just the need of every human for attaining personal fulfilment and discovering the truth, but is also a progressive instrument for the establishment of a functional democracy.[15] Speech and expression have been broadly interpreted by Sri Lankan courts in the light of fundamental principles of democracy,[16] and is seen as something not just limited to verbal modes of communication. In one instance, even the beating of a drum in a coordinated nationwide anti-government protest was protected by the Supreme Court under the free speech clause.[17]

Therefore, the threshold of the said freedom is rather high and it includes freedom of the press,[18] and the right to know and receive *diverse* information, ideas and viewpoints.

III. Dissent in Sri Lankan Polity

Sri Lanka is a Socialist Democratic Republic,[19] with an emphasis on socialist democracy.[20] The Supreme Court of the country has explicitly recognised that the citizenry would have a continuing public interest in how government functions. The ruling class must be open to scrutiny so that there is a check and balance on abuse of power.[21] One can find profuse references to American jurisprudence in the decisions to show how hazardous it can be to discourage thought, hope and imagination.[22]

---

[15] Ratawesi Case, supra, at 131-132.
[16] Karunathulaka v. Dayananda Dissanayaka, Commissioner of Elections (1999) 1 SLR 157.
[17] Jana Gosha Case, supra.
[18] Victor Ivan v. Sarath N. Silva, Attorney General (1998) 1 SLR 340.
[19] SRI LANKA CONST. art 1.
[20] Sunila Abeysekera Case, supra, at 331-333.
[21] Ratawesi Peramuna Case, supra, at 134.
[22] Whitney, supra 1 as cited in Ratawesi Peramuna Case, supra, at 43 and in Deniyakumburagedera Sriyani Lakshmi Ekanayake v. Inspector Herath Banda and Others, SC 25/91 (FR) SC Minutes of 11.10.91; Cohen v. California 403 U.S 15

Sri Lanka's constitutional structure, containing freedoms of thought,[23] expression,[24] as well as the right to equality and equal protection of the law, [25] recognises every citizen's right to be different, to think differently, and to express different opinions. [26] The executive is required to respect, secure and advance fundamental rights,[27]including expression, lawful dissent and criticism of the government.[28] When the free circulation of diverse viewpoints is censored and the State intends to regulate what its citizens may know, censorship may even become coercive. As Justice Jackson presciently observed in *Barnette's Case*,[29] coercive elimination of dissent may end in extermination of dissenters and that the 'compulsory unification of opinion achieves only the unanimity of the graveyard'.[30]

Dissent is, therefore, valuable not only because differing views are constitutionally protected, it is also a valuable check on abuse of power. Needless to say, it is a *sine qua non* for successful self-government and for the prevention of any untoward eruption of violence at a later point in time.[31]

IV. Jurisprudential Chronology: Free Speech Upheld

The Sri Lankan Supreme Court has consistently held that criticism of the Government, is a permissible, necessary and highly desirable exercise of the freedom of speech and expression enshrined in the

(1971) and Schenck v. United States, 249 U.S. 47 (1919) as cited in Malalgoda v. Attorney General and another (1982) 2 SLR 777 at 780 and 781.

[23] SRI LANKA CONST. art. 10.

[24] Id. art. 14.

[25] Id. art. 12.

[26] Wijeratne v. Vijitha Perera, Sub-Inspector of Police, Polonnaruwa (2002) 3 SLR 319 at 326.

[27] SRI LANKA CONST. art. 4(d).

[28] Wijeratne Case, supra.

[29] West Virginia State Board of Education v. Barnette (1943) 319 US 624, 64.

[30] Id.

[31] Jana Gosha Case, supra; Senasinghe v Karunatilleke Senior Superintendent of Police Nugegoda (2003) 1 SLR 172.

Constitution,[32] and even includes overthrowing the government of the day through legitimate means. [33] This has entrenched the idea encapsulated under article 14(1)(a) of the Constitution that affords every citizen the freedom of speech and expression including publication. This would permit rational subjects to speak as they think and listen to diverse viewpoints, and thereby engage effectively in the political sphere to participate effectively in deliberative democracy. However, article 15 of the Constitution provides for restriction on free speech considered necessary in the interest of racial and religious harmony or to prevent incitement to an offence. As aforementioned, the article itself sets out that such restrictions must be set out by laws enacted by the Parliament.[34]

One such law is section 120 of the Penal Code 1887,[35] which contains a colonial-era provision used to deal with what is thought to be subversive speech and sedition. The section makes it an offence to excite feelings of disaffection towards the President or the Government otherwise than by lawful means.

The jurisprudence of the Supreme Court on dissent reveals that the police have often resorted to arresting of individuals for mere criticism of the government and subsequently sought to justify that on untenable grounds.

In *Joseph Perera's Case*, [36] certain individuals had organised a public lecture which was advertised by way of posters and leaflets seeking to preserve the fundamental rights of teachers and students. Before the meeting could commence, individuals were arrested based on complaints that the meeting was arranged by revolutionaries and would create unrest amongst students of the area. Those arrested were charged under emergency regulations of the time, including the ones pertaining

[32] Jana Gosha Case, supra; Ratawesi Peramuna Case, supra, at 142.
[33] Ratawesi Peramuna Case, supra.
[34] SRI LANKA CONST. art. 15(7).
[35] Penal Code Ordinance No. 11 of 1887 (as amended).
[36] Joseph Perera Case, supra.

to the distribution of posters and leaflets without the police's permission. The court considered such prior censorship unconstitutional and quashed the impugned regulation on the ground that the citizens have the right to be critical of the government. It was also pointed out that freedom of speech would be illusory if the police could arrest and detain a person simply because they do not 'obsequiously sing the praises of the Government'.[37]

The following year in the *Jana Ghosha Case,*[38] several political parties organised a nationwide protest encouraging citizens to show their disapproval of the actions of the then government by varied means- from tooting of car horns to banging of saucepans on a predetermined date and time, to let the 'deafening din of disapproval',[39] resound throughout the entire country. A group of protestors chanting slogans calling for the removal of the government was dispersed by the use of tear gas and one particular protestor (who was beating a drum) was prevented from expressing his dissent. The police justified its actions on the pretext of an imminent breach of the peace and incitement of people towards rioting. However, the court lent credence to the view that the protest was dispersed merely because anti-Government slogans were being chanted. It was ruled that the right to question the government was fundamental to a democratic way of life,[40] and expressed the hope that the Inspector-General of Police would issue appropriate directions and instructions to the police that a legitimate dissent is permissible under the Constitution.

In *Wijeratne's Case*,[41] a trade union member was arrested for being involved in organising a protest regarding increment in casual workers' salaries. The posters prepared for that protest were confiscated and the arrest was made on the ground of 'information' received by the president of a rival trade union. Due to this act of intimidation and

[37] Id. at 222-223.
[38] Jana Gosha Case, supra.
[39] Id. at 266.
[40] Id.at 271.
[41] Wijeratne Case, supra.

arrests, the protest was cancelled. The court again found a violation of the citizen's freedom of expression reiterating that dissent or disagreement is a cornerstone of the Constitution.[42] Though Court expressed its displeasure, that five months after the *Jana Gosha Case* no guidelines had been formulated by the police,[43] it refrained from taking the task upon itself.

These cases were followed by the *Ratawesi Peramuna Case*,[44] in which a group of about fifteen individuals was arrested for holding a meeting behind closed doors at a temple allegedly to topple the government. The court evaluated free speech in the light of an individual's desire to discover the truth, her need to achieve personal fulfilment and to fulfil the demands of a democratic regime.[45] It was recognised that free speech has a twofold value. Firstly, it empowers and benefits the individual; and secondly, it is an instrument of a healthy democratic society.[46] A lot of the reasoning was based around the need for there to be even unorthodox, controversial and shocking or offensive ideas included in the free exchange of viewpoints if there is to be intelligent self-government. The court specifically considered section 120 of the Penal Code and concluded that minus incitement to violence, mere vehement or caustic attacks on the government, the President, or elected representatives is not *per se* unlawful.[47] The court remarked that citizens' right to alter or to abolish government and to institute a new one is critical for their safety, fulfilment and happiness.[48] Though the judgment also refers to balancing the social value of the speech with social interest in order and morality,[49] it permits a restriction on an act of speech only if it tenders to overthrow the government by force and violence. A few years later, in *Gunawardena v. Pathirana* a lottery

[42] Id. at 326.
[43] Id. at 327.
[44] Ratawesi Peramuna Case, supra.
[45] Id.at 131.
[46] Id.at 132-133.
[47] Id.at 39.
[48] Id.at 40.
[49] Id.at 140-141.

ticket seller was arrested for having in her possession a pamphlet containing parliamentary speeches by opposition political parties.[50] She (and another) was arrested and charged with criminal defamation for undisclosed 'abuse' of the President.[51] Here too, the Court took the view that the arrest was to stifle criticism of the Government.

Discussed next are the more recent authorities of the Supreme Court, which rely on the notable Indian authority *Kedar Nath Singh v. The State of Bihar,* [52] in analysing strong criticisms of Government, especially for arrests under s120 of the Penal Code in relation to sedition.

V. Recent Decisions and Reliance on the Kedar Nath Ruling of India

In *Silva v. Wimalasiri*[53] individuals were arrested for pasting posters calling on the government to stop attacks on media personnel. This was done in the backdrop of attacks on media institutions and the assassination of an editor of a leading newspaper. The police took objection to these posters being pasted over already pasted posters hailing the Sri Lankan military for its victory in the thirty-year civil war and arrested the petitioners in the matter as it was perceived that the posters were 'anti-government'. Petitioners were erroneously charged with criminal defamation (which was repealed more than half a decade back) as well as sedition. The Supreme Court ruled that criticism of the government was permissible, so long as there was no incitement to violence.

[50] Gunawardena v. Pathirana Officer-in-Charge Police Station Elpitiya (1997) 1 SLR 265.
[51] Penal Code, § 118 (now repealed).
[52] Kedar Nath Singh v. The State of Bihar 1962 AIR 955 1962 SCR Supl. (2) 769 (India).
[53] Karunanayake Joseph Benildus Silva v. Chief Inspector P.G. Wimalasiri (unreported) SCFR 63/2009 S.C.M. 22 September 2015.

Similarly, in *Wahalathanthri v. Wickramaratne,*[54] when the opposition party's office was burnt to the ground and the police did not undertake due investigation, the members of the party put up a banner over its burnt office against the government of the day claiming that the ruling dispensation had behaved undemocratically. Several individuals were arrested because the banners were allegedly critical of the government and promoted ill will and hostility among the people. Yet again, the court stressed the importance of any government being open to uninhibited public criticism and emphasised that attempts to curtail this would be an undesirable fettering of freedom of expression. In the banner, the government was targeted through the President by being labelled as 'immensely dirty'.[55] It was ruled that section 120 of the Penal Code does not negate the free speech guarantees in the Constitution and causing mere annoyance or embarrassment to the Head of the State would not trigger a conviction under the section. Like in the previous cases, the court recognised that being critical of the government is essential in any democratic country.

The Supreme Court in both cases referred to the Indian judgment of *Kedar Nath Singh v. The State of Bihar*,[56] and quoted portions from it relating to criticism of the government. The court specifically quoted with approval a portion from the judgment that 'a citizen has a right to say or write whatever he likes about the government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder'.[57] The Supreme Court of India in that case held that such criticism was permissible so long as there is no intention to incite violence. *Kedar Nath Singh* introduced the idea of

[54] Sisira Kumara Wahalathanthri & Dannister Gunasekara v. Jayantha Wickramaratne Inspector General of Police (unreported) SCFR 768/2009 S.C.M. 5th November 2015.
[55] In Sinhala the words used were 'immensely dirty (corrupt) Rajapakse (referring to the President) government'.
[56] Kedar Nath Case, supra.
[57] Wahalathanthri Case, supra.

pernicious tendency,[58] when evaluating public disorder, relying on the earlier case of *Ramji Lal Modi*,[59] which was regarding public disorder caused by outraging religious feelings. The Supreme Court of Sri Lanka while relying on *Kedar Nath* ruling specifically quoted the portion pertaining of the speech and its consequences or incitement to violence. Perhaps, as suggested by some scholars,[60] when evaluating public order and purportedly subversive speech, a better test may be as set out in the *Ram Manohar Lohia Case*,[61] where not only proximity but also proportionality was considered.[62] Indian jurisprudence has evolved even thereafter, to the 'spark in the powder keg' test in *Rangarajan Case*,[63] according to which the speech must be such that there is the immediate possibility of danger to the public order.

In the following chapter, the author discusses the recent trends of the executive to control public discourse by executive fiat. This type of action imposes restrictions on rights without those restrictions being considered by Parliament. This in effect has a chilling effect on the exercise of free speech by citizens who may (rightly or wrongly) perceive that doing so could result in swift arrests by the State.

VI. Encroachments By the Executive

During the ongoing COVID-19 pandemic, the Media Unit of the Sri Lanka Police issued a letter addressed to news editors and authors.[64] The notification (published in Sinhala), was concerned with the

[58] Meaning that court focused on whether the speech act would create public disorder or disturbance of law and order. thereby recognizing the requirement of a link between speech and consequence. In the absence of such, the provisions on sedition would not be violated.

[59] Ramji Lal Modi v. State of Uttar Pradesh AIR 1957 SC 620 (India).

[60] SUJIT CHOUDHRY, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 824-828 (2017).

[61] Superintendent, Central Prison v. Dr. Ram Manohar Lohia AIR 1960 SC 633 (India).

[62] In that the court considered the reasonableness of restrictions imposed on speech specially in the interests of public order when viewed against the perceived threat.

[63] S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574 (India).

[64] Letter was released on 1 April 2020.

malicious content circulated on the internet against the officials leading to the obstruction of their duties. The notice goes on to state that the police have been instructed to strictly implement the law and arrest such individuals and produce them before courts for further legal action. Needless to say, this notice received wide media coverage. As aforementioned, the Constitution permits restrictions on free speech only by law or through an emergency regulation. This notice was neither of these and appears to ignore the rulings of the Sri Lankan apex court. Its reference to 'false' information is worrying as Sri Lanka does not have an incisive, formalised know-how to retrieve and filter the information based on 'truth'. This would anyway be a subjective exercise for any authority across the globe. The only provision Sri Lanka appears to have to deal with false information is limited to false reports which alarm people and create panic.[65] The notice thus seemed *ultra vires* to the available legal framework. It shut down the possibility of a different point of view on the prevailing situation and caused citizens to tread cautiously before criticizing the government. It appeared as the State's blatant attempt to control the narrative by shunning any criticism and regulating the nature of information available to the citizens through social media platforms.

The notice was followed by a series of arrests. A university student,[66] a directress of a dance institute,[67] and five other individuals were arrested.[68] There is very little information in the public domain as to under what provisions of law these arrests were made. The Human Rights Commission of Sri Lanka (HRC) on 25th April 2020 issued a letter to the Acting Inspector General of Police drawing his attention to the dangers of arbitrary and disproportionate arrests.

---

[65] Police Ordinance, No. 16 of 1865, § 98.
[66] Lakmal Sooriyagoda, *University Student Remanded for Uploading Fake News*, DAILY NEWS, Apr. 2, 2020.
[67] *Directress of a Dancing Institute Remanded for Spreading False News About the President*, NEWS WIRE, Apr. 6, 2020.
[68] *Five Arrested for Sharing False Content on COVID-19*, DAILY NEWS, Apr. 2, 2020.

As the notice was addressed to news editors or authors and was followed by several arrests, it had the chilling effect of possible self-censorship. In all probability, the notice seems constitutionally invalid as it is vague and overbroad. But it is yet to be challenged in a court of law.

One particularly sensitive topic that could be subjected to self-censorship due to this notice would be Sri Lanka's COVID times' debate relating to the burying of the deceased when s/he was suspected of having died due to the infection. In around mid-2020, the Sri Lankan Ministry of Health permitted burials under certain conditions to prevent the risk of any infections from the cadaver.[69] However, a few days later these guidelines were amended and a circular,[70] as well as gazetted guidelines,[71] were issued to mandatorily prescribe cremation of bodies who died or were suspected to have died due to COVID. Mandatory cremations requirements were distressing and ignorant of the religious sensitivities of minorities in the country such as the Muslim community. Any open discussion and evaluation of these decisions of the State would potentially come within the ambit of the Police Media Unit's notification as they could be perceived as criticisms. Judgments of the Supreme Court indicate that minority opinions should not be smothered by a 'tyrannizing majority',[72] so that the majority would have an educated sympathy for the rights and aspirations of the minorities.[73] It cannot be the case that the majority or even the elected representatives of the people have a monopoly on ideas.[74] There is a very real possibility that many would engage in self-censorship regarding issues

[69] Provisional Clinical Practice Guidelines on COVID-19 Suspected and Confirmed Patients, Ministry of Health - Sri Lanka (June 30, 2021, 4:45 PM), https://www.epid.gov.lk/web/images/pdf/Circulars/Corona_virus/COVID-19_cpg_version_5.pdf.
[70] Dated 1 April 2020.
[71] Gazette Extraordinary 2170/8, 11 April 2020.
[72] Ratawesi Peramuna Case, supra, at 133.
[73] Id. at 134
[74] Id.

such as these, for fear of arrests and detention, which does not bode well for deliberative democracy.

More recently, in April 2021, the Chinese Minister of Defence visited the country and during his travels, traffic was cordoned off by the police. An individual, however, allegedly protested by tooting his car horn whilst being stopped by the police when the foreign motorcade was passing by. He also encouraged others to do the same. There was no violence instigated or incited by the hornblower. Interestingly, this type of protest was recognised as a free political expression by the sitting Prime Minister, whilst he sat in opposition in 2019.[75] In fact, it was he who organised the public protest that became the subject matter of the famous *Jana Ghosha Case*.[76]

Clearly, the car protest too should have been protected as an expression of dissent and free speech. However, soon after the video of the incident went viral the police arrested the person and put him under the charge of unlawful assembly.[77] The Vienna Convention was also relied upon as an added justification for the arrest, with the police alleging that Sri Lanka has a duty to provide maximum protection to such envoys.[78] As the proceedings are now terminated this position of the police was never clarified regarding the applicability of the Vienna Convention. The author had a chance to have first-hand interaction with fellow lawyers who were present when the accused was brought before the Magistrate's Court before the grant of the bail. It was told that even the Learned Magistrate took the view that the actions of the accused could not be condoned and that he had brought disrepute to the country. The man was asked by the court whether he would plead guilty (even though

[75] *Honking at VIP Convoys Shows Public Anger Towards Govt: MR*, DAILY FT, May 24, 2019.
[76] Jana Gosha Case, supra.
[77] *Anger On The Streets During Chinese Defence Minister Visit as Nandasena Regime Bungles COVID-19 Third Wave*, COLOMBO TELEGRAPH, Apr. 29, 2021.
[78] *Mad King Nandasena Arrests Man For 'Organizing' Honking Protest at Chinese Defence Minister's Motorcade*, COLOMBO TELEGRAPH, May 1, 2021.

no formal charge was read out),[79] and apologize for his actions, which he did, after which proceedings ended.[80]

Can repression of speech be justified in this manner? The constitutional scheme of Sri Lanka does not brook forcing the citizens to speak or think in a particular manner or decide what views they can hold,[81] but leaves little room for the judiciary to be considered to violate fundamental rights.[82] Can opinions and views be barred because their views are thought to be false or threatening to the State? In the 1800s Dr. John Snow contradicted the widely accepted 'miasma theory' of his time stipulating that certain diseases such as cholera were caused by noxious air. He proposed the changing of a particular water pump handle on a street, which he believed was the cause of widespread cholera in London in 1854. His views that cholera was spread through contaminated water, and not 'miasma' were not accepted by the government officials or the scientific community of the day. But the authorities did replace the pump handle as a precautionary measure and the cholera outbreak was reduced. Today, his work is considered a classic work in epidemiology.[83] One cannot justify the stifling of views merely because they do not conform to the dominant narrative of the day. This destroys the space for adequate deliberation in a participatory and inclusive democracy. Some unorthodox or controversial views can become the accepted norm over time. In another famous instance, Galileo Galilei was forced to recant his treatise that the earth moves around the sun.[84] Unorthodox or controversial views, even the ones

[79] Notes from interviews with Attorneys-at-Law present in the Magistrate Court on file with the author.
[80] *Lawyers Slam 'Disgraceful' Conduct by Additional Magistrate After She Lambasts 'Honking Protestor' In Open Court*, COLOMBO TELEGRAPH, May 7, 2021.
[81] Justice Jackson in Board of Education v. Barnette 319, U.S. 625 (1943).
[82] Article 126(2) of the Constitution limits fundamental rights jurisdiction to violations by executive or administrative action.
[83] Ralph Frerichs, John Snow: British Physician, Encyclopaedia Britannica (June 30, 2021, 4:50 PM), https://www.britannica.com/biography/John-Snow-British-physician.
[84] It is said that at the end of his trial he whispered- 'Eppur Si Muove' (it moves all the same).

conflicting with the States' presumptions, should be expressed and must be allowed to be expressed. These differing viewpoints too may be relevant and may become agents of positive change in the longer run, benefitting a large section of humanity.

When those that govern assume the guardianship of the public mind,[85] and hinder the freedom of propagation of ideas,[86] peoples' ability to properly cope with the exigencies of their time is stripped away.[87] Such abilities are best nurtured by a culture of discussion, based on adequate information drawn from diverse sources.[88] This is because the people have a right to know views other than those thought appropriate by the government.[89] This alone can lead to the discovery of the truth in an era of fake news and propaganda.

VII. International Legal Aspects

The Universal Declaration of Human Rights (UDHR) remains one of the most important articulations of human rights principles, which sets out a common denominator regarding 'the inalienable and inviolable rights of all members of the human family'.[90] The International Covenant on Civil and Political Rights (ICCPR) further elaborated these rights whilst establishing the Human Rights Committee which undertakes the task of monitoring compliance. The ICCPR's protections on free speech are contained in article 19 and include freedom of opinion, expression and information. Information and ideas

[85] Termeniello v. Chicago (1949) 337 U.S. 1.
[86] Romesh Thapper v. State of Madras (1950) S.C. 27 (India).
[87] Thornhill v. Alabama (1940) 310 U.S. 88.
[88] Joseph Perera Case, supra, at 228.
[89] Though the Sri Lankan Supreme Court rejected an argument that the right to information *simpliciter* is contained in the freedom of expression clause, it *did* recognize the right to obtain certain information vide Fernando v. SLBC (1996) 1 SLR 157 at 179. However, since 2016, the right to information has been incorporated as specific protection by a constitutional amendment.
[90] G.A. Res. 217(III)A, Universal Declaration of Human Rights (Dec. 10, 1948).

of 'all kinds' expressed through any media are protected.[91] The right to hold opinions is not subjected to any restrictions.

When Sri Lanka acceded to the ICCPR in 1980, it accepted the obligation to adopt measures necessary to give effect to the rights protected by the treaty,[92] as well as to provide a remedy for violations of those rights.[93] These international instruments and other regional instruments, contain similar protections on freedom of expression and reflect a broad agreement on the fundamental principles of free speech.

Although 'expression' is regulated under the ICCPR, General Comment No. 10 on article 19 indicates that any restrictions imposed should be in the interest of the community as a whole.[94] This position was later confirmed in *Robert Faurisson's Case* by the United Nations Human Rights Committee (UNHRC).[95] Restrictions under article 19(3) of the ICCPR must satisfy a three-tier test to be considered legitimate.[96] They must be provided for by law, serve a legitimate purpose and be necessary.[97] Additionally, article 20 of the ICCPR provides that States must prohibit by law (though not necessarily criminalise)- any propaganda for war, incitement to discrimination, hostility or violence on national racial or religious grounds. However, the aforementioned General Comment specifies that while putting such restrictions, the State party cannot put the right itself in jeopardy.[98] Further, cases from

[91] UNGA, International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171.
[92] ICCPR, art. 2.
[93] Id. art. 3.
[94] CCPR GC No. 10, Freedom of Opinion, 29 June 1983 at ¶ 4.
[95] Robert Faurisson v. France, Communication No. 550/1993 , U.N. Doc. CCPR/C/58/D/550/1993(1996).
[96] The Human Rights Committee's general comment on Article 19 emphasized such requirements. REPORT OF THE HUMAN RIGHTS COMMITTEE TO THE GENERAL ASSEMBLY, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annex VI, General Comment 10.
[97] UDHR, ICCPR, American Convention on Human Rights and African Charter on Human and People's Rights- all broadly follow the same criteria.
[98] GC 10, supra.

the UNHRC such as *Ross v. Canada* indicate that restrictions under article 20 must remain within the contours defined by article 19(3).[99]

For the most part, the freedom of opinion, expression and information is protected by the Sri Lankan Constitution in line with article 19 of the ICCPR.[100] The ICCPR Act too was passed in Sri Lanka, however, only with limited protections. The freedom of expression for example is ignored in the scheme of the Act. Instead, we have seen an upsurge of arrests and detentions based on section 3 of the Act which largely criminalised speech in the situations contemplated by article 20 of the ICCPR.

Other restrictions have also been relied upon by the government to arrest individuals for speech, such as section 2(1)(h) of the Prevention of Terrorism (Special Provisions) Act No. 48 of 1979 (PTA) which criminalised speech causing or intended to cause or incite violence or religious, racial or communal disharmony. This provision, along with the ICCPR Act, has a history of being used multiple times for arresting and detaining individuals found expressing themselves contrary to the dominant State narrative. It has happened under varied pretexts, more specifically of hate speech[101] and fake news.[102] In addition to the PTA and the ICCPR Act, as discussed previously, section 120 of the Penal Code criminalises causing disaffection to the President or the Government. These laws, along with extra-legal executive fiats such as the Police Media Notice (discussed before), create an atmosphere that is not conducive to the inculcation of free speech as a socio-political creed.

The main international instruments such as the UDHR, the ICCPR, the European Convention on Human Rights, 1950 (ECHR), and the

---

[99] Malcolm Ross v. Canada, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000).
[100] SRI LANKA CONST. arts. 10, 14(1)(a) & 14A.
[101] Sri Lanka: Writer Faces Up To 10 Years Jail for Story: Shakthika Sathkumara, Amnesty International (Jul. 29, 2021, 8:00 AM), https://www.amnesty.org/en/documents/asa37/0800/2019/en/
[102] Sooriyagoda, supra.

American Convention on Human Rights, 1969 (ACHR), follow a similar outlook on the issue of free speech control. The first requirement is that the restrictions must be provided by law.[103] The Sri Lankan Constitution also contains such a requirement.[104] However, in relation to several identified aims (namely- national security, public order, protection of public health or morality, securing due recognition and respect for the rights and freedoms of others, and meeting the just requirements of the general welfare of a democratic society) the Constitution extends the definition of law to include regulations made under the law relating to public security.[105] These have been interpreted by the Supreme Court as being limited to regulations promulgated by the President during a declared emergency.[106]

Secondly, the restrictions must serve a legitimate purpose. As per ICCPR, these include- respect for the rights or reputations of others, the protection of national security or of public order (*ordre public*), or of public health or morals.[107] These purposes are largely echoed by the Sri Lankan Constitution as well. However, the thrust on 'general welfare of a democratic society' in the Constitution seems more in line with the ECHR, which sees a restriction as 'necessary in a democratic society'.[108]

Thirdly, the restriction must be necessary. In determining what is 'necessary' the European Court on Human Rights (ECtHR) has considered that the restriction must be more than merely reasonable or

[103] The language used in ICCPR, art. 19.3 is similar to the UDHR's 'determined by law' and other prominent human rights treaties.
[104] SRI LANKA CONST. art. 15(2) permits restrictions on free speech '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'.
[105] Id. art. 15(7).
[106] Thavaneethan v. Dayananda Dissanayake Commissioner of Elections (2003) 1 SLR 74 .
[107] ICCPR, art. 19.3(a) and (b).
[108] ECHR, art. 10 (2).

desirable,[109] and must meet a pressing social need.[110] The ECtHR has gone somewhat further, in instances where the matter concerns an 'undisputed public concern' stating that the restrictions must only be imposed if the State is certain of adverse consequences legitimately feared by the State,[111] and the necessity for it needs to be 'convincingly established' before the ECtHR.[112] However, unlike other international bodies, the ECtHR also gives States a certain margin of appreciation in putting restrictions.

The *Jersild* decision,[113] however, indicates that a State's response can still be judged on the basis of proportionality. Jersild was a Danish journalist convicted for allegedly aiding and abetting three youths who made racist derogatory statements in an interview on a television programme. The programme was designed to describe the racist attitudes of a specific group of youth (called greenjackets). In analyzing the conviction, the court found that the conviction was disproportionate to the State's interests and was unnecessary in a democratic society. Under ICCPR too, the position is similar. *Tae Hoon Park's Case* demonstrates that any limitations on free speech must meet a strict *test of justification*.[114] As far as national standards go, the Supreme Court of Sri Lanka in the *Joseph Perera Case*, whilst commenting on the 'evils' of the chilling effect over-broad restrictions have on the exercise of free speech, has espoused that the State can regulate expression 'only with narrow specificity'. [115] Therefore, in principle Sri Lanka's approach to free speech appears at par with international norms. However, one cannot be sure of the entrenchment of these principles in real functionality of the body politic. .

---

[109] Handyside v. United Kingdom 5493/72, December 7, 1976.
[110] The Sunday Times v. United Kingdom 6538/74 April 26, 1979.
[111] Id.
[112] The Observer and Guardian v. United Kingdom (1991) 14 EHRR 153.
[113] Jersild v. Denmark, (App no 15890/89) ECHR 23 September 1994.
[114]Tae Hoon Park v. Republic of Korea, Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (1998) at ¶ 10.3.
[115] Joseph Perera Case, supra, at 228.

The 2000 Report of The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,[116] identified five problematic trends of States concerning infringements on free speech: (1) negatively characterizing expression as treasonous, (2) legal intimidation or prosecution, (3) repressive measures against the press, (4) harm to media personnel, and (5) actions against academic freedom. Some of these trends are true of the domestic situation in Sri Lanka. This author has discussed elsewhere how the State's usage of the ICCPR Act to curb dissent or a different narrative, does not appear to conform to international principles and most notably appears contrary to the Rabat Action Plan, 2013.[117] More pronounced, however, are the observations of the Special Rapporteur on freedom of religion or belief. A report released in 2020 indicated that the ICCPR Act was 'not fully compatible with article 19', pointing out that it neither contained a guarantee on free speech nor satisfies the tripartite test of legality, proportionality and necessity or the threshold of incitement when determining hate speech.[118] Worryingly, the Special Rapporteur observed: 'The Act has ironically become a repressive tool used for curtailing freedom of thought or opinion, conscience, and religion or belief'. [119] The arrest and detention of writer/poet, Shakthika Sathkumara in 2019 is a classic example.[120] He was arrested and detained, for writing a fictional short story published on social media, hinting at homosexuality and abuse within a temple. The arrest was based on an offence of wounding religious feelings[121] and under section 3 of the ICCPR Act. But the UN Working Group on Arbitrary Detention

[116] ABID HUSSAIN, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROTECTION AND PROMOTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION, U.N. Doc E/CN.4/2000/63 (2000).
[117] Pulasthi Hewamanna, *Social Media and Hate Speech in Sri Lanka: Evaluation in light of the Rabat Action Plan*, 1:2 JILC 36-53 (2020).
[118] AHMED SHAHEED, REPORT OF THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF, U.N Doc A/HRC/43/48/Add.2, at ¶ 4 (2020).
[119] Id. at ¶ 72.
[120] OLD GHOSTS IN NEW GARB: SRI LANKA'S RETURN TO FEAR, AMNESTY INTERNATIONAL, ASA 37/3659/2021, (2021).
[121] Section 291B of the Penal Code.

declared his detention incompatible with international law.[122] The working group found a pattern of abuse in the application of the ICCPR Act which was considered overly broad and vague.[123] Though the charges against him were finally dropped in 2021,[124] his fundamental rights application is currently pending before the Supreme Court, thus giving the judges an opportunity to review executive action *vis-à-vis* the use of the ICCPR Act.[125]

The Report of the Special Rapporteur also notes that the offences set out in section 2(1)(h) of the PTA concerning speech which causes, or intends to cause, or incites, violence or religious, racial or communal disharmony are 'overly broad and ambiguous, leaving no legal certainty as to how an offence is interpreted' and should be repealed.[126] Similarly, section 120 of the Penal Code too (along with provisions relating to religious offences such as offending religious feelings), was found to be lacking in clarity leaving room for misinterpretation.[127] All this is indicative of these laws falling below the internationally accepted standards for permissible restrictions. Amnesty International thus identifies these provisions as instruments of repression of dissent.[128]

It appears that Sri Lankan practices fall short of acceptable international norms. The Police Media Unit Notice is not even a 'law' under domestic standards as the Constitution requires either an Act of Parliament or an emergency regulation by the President to restrict freedom of expression. In 2020, soon after the Police Media Unit Notice, the United Nations High Commissioner for Human Rights raised alarm regarding such steps taken by the executive during the pandemic. She observed: 'This crisis should not be used to restrict dissent or the free flow of

---

[122] Delankage Sameera Shakthika Sathkumara v. Sri Lanka, Working Group on Arbitrary Detention, Opinion No. 8/2020, U.N. Doc A/HRC/WGAD/2020/8 (2020).
[123] Id. at 12.
[124] RP, *AG Drops Charges Against Shakthika Sathkumara*, CT NEWS, Feb. 9, 2021.
[125] SC(FR) 167/2019.
[126] Report of the Special Rapporteur, supra, at ¶ 74.
[127] Id.
[128] Amnesty International, supra, at 120

information and debate. A diversity of viewpoints will foster greater understanding of the challenges we face and help us better overcome them'.[129] She later noted that the space for civil society and independent media in Sri Lanka is now rapidly shrinking.[130]

VIII. Conclusion

The First Amendment to the U.S. Constitution has at times been called the progenitor to Sri Lanka's constitutional free speech clause.[131] It has also found space in the Sri Lankan jurisprudence from time to time. But unfortunately, the Sri Lankan polity, especially with the government as the primary stakeholder, is still far from imbibing the spirit implicit in the idea of free speech.

Regardless of the plethora of free speech jurisprudence, where the Supreme Court has restricted the very scope of free speech restrictions, the State's strategy for managing dissent has not been to encourage diversity in opinions. The cases briefly recounted in the foregoing discussion and the more recent Police Media Unit notification appears to focus more on suppressing dissent. Even the existing laws which have been used to curb dissent, have been found wanting when weighed against international standards on what constitutes a permissible restriction. It appears that regardless of the warnings set out in judicial precedents, the state is yet to embrace a strategy of addressing the crucial gap in its system, otherwise projected as a democracy.

*****

[129] Asia: Bachelet Alarmed by Clampdown on Freedom of Expression During COVID-19, Office of the United Nations High Commissioner for Human Rights (June 3, 2021, 5:00 PM), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920%20.

[130] MICHELLE BACHELET, REPORT OF OHCHR ON PROMOTING RECONCILIATION, ACCOUNTABILITY AND HUMAN RIGHTS IN SRI LANKA, A/HRC/46/20 (2021).

[131] Ratawesi Peramuna Case, supra, at 137.