

FREEDOM OF SPEECH AND EXPRESSION IN SRI LANKA: A MULTI-FACETED APPROACH TO SAFEGUARDING THE RIGHT IN THE MODERN ERA

*Linuri Munasinghe **

ABSTRACT

On the one hand, the people of Sri Lanka are entitled to the voicing of opinions, the dissemination of information, the declaration of dissent, and more under the fundamental right to freedom of speech and expression. On the other hand, the exercise of this right is prudently subject to the imposition of lawful, legitimate, and proportionate restrictions under the prevailing legal framework. However, this balance in the law is not reflected in actuality, and the violation, unlawful suppression and threats to the exercise of this right are evident through an examination of case law and reported incidents relating to freedom of expression of the public and the media in Sri Lanka. The article engages in doctrinal legal research with a view to delving into this state of affairs. The research indicates that this is due to the distortion and misapplication of the law, and the shifts in society created by the widespread use of internet and social media. The state catalysed by the latter has explored multiple avenues of reform, which arguably create more issues than they resolve. A multi-faceted approach to safeguarding the right to freedom of speech and expression in Sri Lanka is proposed, in lieu of reform – by the people adhering to the corresponding duties attached to the right by respecting the rights of others, by the government taking measures to safeguard and bolster the right through its actions, and by the judiciary discharging its constitutional duties and functions. The article considers this multi-faceted approach to be the way forward to guarantee the freedom of speech and expression and media freedom in Sri Lanka.

* Attorney-at-Law of the Supreme Court of Sri Lanka, LL.B. (Hons.) University of London, reading for the LL.M. in Public and International Law (University of Colombo).

1. INTRODUCTION

The right to freedom of speech and expression is not a right that can be considered in isolation, as it is intrinsically intertwined with the right to information, peace, sustainable development, and freedom of the media which in itself is a tenet of a democratic society essential to the transparency and accountability of the state.^{1, 2} That is, the right to information is recognised as being a facet of the right to freedom of speech and expression as per the Supreme Court of Sri Lanka in *Environmental Foundation Ltd., v. Urban Development Authority of Sri Lanka (Galle Face Green Case)*.³ In terms of sustainable development, the right to information is critical to ensure a balance of economic and environmental considerations, as this balance can only be achieved upon being informed of all relevant facts. Principle 10 of the Rio Declaration states that individuals should have access to information concerning the environment that is held by public authorities, and the opportunity to participate in decision-making processes.⁴ It is opined that meaningful participation in the decision-making process is only possible in the light of knowledge of all relevant facts. Therefore, the freedom of speech and expression is critical to sustainable development, as the right to information is a facet of the aforementioned right. Further, media freedom cannot exist in an environment that suppresses the freedom of speech and expression, as journalists cannot meaningfully carry out their role of informing the public and expressing opinions without the aforementioned right. Media freedom and freedom of speech and expression are threatened during times of war in the name of national security when security considerations are

¹ Presidents of the United Nations General Assembly, UNESCO General Conference, the United Nations Economic and Social Council and the Human Rights Council, 'Joint Statement on Freedom of Expression as a Driver of All Other Human Rights on the Occasion of the World Press Freedom Day 2023' (*why italics?*, 2 May 2023) <<https://www.unesco.org/en/days/press-freedom-2023/joint-statement>> accessed 16 September 2023.

² United Nations Office of the High Commissioner of Human Rights, 'OHCHR and the safety of journalists and the issue of impunity' (United Nations Office of the High Commissioner of Human Rights) <<https://www.ohchr.org/en/safety-of-journalists>> accessed 16 September 2023.

³ *Environmental Foundation Ltd., v. Urban Development Authority of Sri Lanka (Galle Face Green Case)* SC FR 47/2004.

⁴ Declaration of the United Nations Conference on Environment and Development (Rio Declaration), 1992, August 12, A/CONF 151/26, principle 10.

overzealously given prominence.⁵ Thereby, it is acknowledged that freedom of speech and expression and media freedom are more likely to flourish during times of peace. It is through this lens that the article makes observations on the exercise of the freedom of expression in Sri Lanka.

Sri Lanka is a country with a long and tragic history of censorship with much of it being led by the government through both direct and indirect means.⁶ Politics has also regrettably been a key motivating factor in the suppression of the right during key events in history such as the 1987-1989 'Janatha Vimukthi Peramuna' (JVP)(Peoples Liberal Party) insurrection wherein the JVP political party rose in revolt against the state, and suppressed state-owned media during the course of the insurrection. Further, during the Sri Lankan Civil War of 1983-2009 the 'Liberation Tigers of Tamil Eelam' (LTTE), an armed group, in an insurgency against the state occupied the Northern and Eastern provinces, and only allowed media that directly supported their regime to flourish in those regions. In addition to the insurrectionists, the government also suppressed the media and access to information during the civil war.⁷ Further, governmental suppression of freedom of speech and expression and media freedom has taken place during recent times with incidents of significance including the imposition of a social media blackout at the behest of the Ministry of Defence in April 2022,⁸ and recent controversial legislative developments such as the Contempt of Court, Tribunal or Institution Act,⁹ the Online

⁵ K Stewart and L Marlin, 'Terrorism, War, and Freedom of the Press: Suppression and Manipulation in Times of Crisis' in D Cohen and J Wells (eds), *American National Security and Civil Liberties in an Era of Terrorism* (Palgrave Macmillan, New York, 2005).

⁶ C Boronow, 'Silencing the media in Sri Lanka: how the sri lankan constitution fuels self-censorship and hinders reconciliation' (2013) 53(3) *Virginia Journal of International Law*, 725.

⁷ Article 19, 'An Agenda for Change: the right to freedom of expression in Sri Lanka' (*Article 19*, 27 October 1994) <<https://www.refworld.org/docid/475418a40.html>> accessed 9 October 2023.

⁸ G Nawarathne, 'Situation of freedom of expression and the press in Sri Lanka in 2022' *why italics?* (Asia and Pacific, 17 January 2023) <<https://www.ifj.org/media-centre/news/detail/category/press-freedom/article/situation-of-freedom-of-expression-and-the-press-in-sri-lanka-in-2022>> accessed 9 October 2023.

⁹ Contempt of a Court, Tribunal or Institution Act, No. 8 of 2024.

Safety Act,¹⁰ and the proposed Anti-terrorism Bill,¹¹ which could impact freedom of expression in Sri Lanka. Further, as of 2023, Sri Lanka holds a poor ranking of 135 out of 180 on the World Press Freedom Index.¹²

With a view to formulating a response to the aforementioned concerns, this article is presented in three sections. The first section examines the prevailing domestic and international legal framework relating to freedom of speech and expression in Sri Lanka. The second section engages in an analysis of the state's proposals for new laws and recently enacted legislation relating to the freedom of speech and expression, in an effort to reveal how they would fall short of achieving the ideal standard of freedom of speech and expression in Sri Lanka. The third section proposes a multi-faceted approach to realize the ideal standard of the right to freedom of speech and expression in Sri Lanka, - by the people adhering to the corresponding duties attached to the right by respecting the rights of others, by the government taking measures to safeguard and bolster the right through its actions, and by the judiciary discharging its constitutional duties and functions.

2. THE LEGAL FRAMEWORK OF FREEDOM OF SPEECH AND EXPRESSION IN SRI LANKA

Freedom of speech and expression is safeguarded extensively through international human rights law. International standards applicable to freedom of expression in Sri Lanka include Article 19 of the Universal Declaration of Human Rights which is the earliest formulation of the right to freedom of speech and expression embodies the freedom of opinion, access to information, and freedom of expression.¹³ Further, the ASEAN Human Rights Declaration which is also applicable to Sri Lanka recognises the freedom of expression as a human right.¹⁴ However, their effect remains persuasive and non-legally binding, as soft law. Another

¹⁰ Online Safety Act, No. 9 of 2024.

¹¹ Anti-Terrorism Bill, published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 15 September 2023.

¹² Reporters Without Borders 'Sri Lanka' (Reporters Without Borders, 2023) <https://rsf.org/en/country/sri-lanka> accessed 11 October 2023.

¹³ Universal Declaration of Human Rights, 10 December 1948, Article 19.

¹⁴ ASEAN Human Rights Declaration, 18 November 2012.

impactful international instrument is the International Covenant on Civil and Political Rights (ICCPR).¹⁵ The Human Rights Committee in General Comment No. 34 clarifies that the freedom of expression include political discourse, commentary on private and public affairs, canvassing, discussion of human rights, and journalism, cultural and artistic expression, teaching, and religious discourse.¹⁶ The ICCPR has been incorporated into domestic law by the International Covenant on Civil and Political Rights Act, No.56 of 2007 wherein the propagation of war, and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is criminalized.¹⁷ Notably, this remains a legally enforceable provision.

The strongest protection to the right to freedom of speech and expression in Sri Lanka is afforded by the Constitution which provides that every citizen is entitled to the ‘freedom of speech and expression including publication’.¹⁸ In clarification of the fundamental freedom, in *Joseph Perera v Attorney General*,¹⁹ the court held that dissemination of information was within freedom of expression guaranteed under Article 14(1)(a) of the Constitution.²⁰ The court further held that freedom of speech and expression embodies the right to express convictions and opinions through multiple mediums, including but not limited to word of mouth, writing, print, pictures, posters, signs, and banners. The court emphasises that the right encompassed media freedom and the freedom of the circulation of information regardless of whether or not the information in question is political and even critical of the state.²¹ In *Deshapriya v Municipal Council, Nuwara Eliya*, the Supreme Court went so far as to opine that political dissent should be encouraged in addition to being

¹⁵ International Covenant on Civil and Political Rights, 16 December 1966, Article 19 and Article 20.

¹⁶ UN Human Rights Committee (HRC), ‘General comment no. 34, Article 19, Freedoms of opinion and expression’ CCPR/C/GC/34 (HRC, 12 September 2011) <<https://www.refworld.org/legal/general/hrc/2011/en/83764>> accessed 23 August 2024.

¹⁷ *International Covenant on Civil and Political Rights Act*, No.56 of 2007, s 3.

¹⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka Article 14(1)(a).

¹⁹ *Joseph Perera v Attorney General* (1992) 1 Sri LR 199.

²⁰ Nineteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 15 May 2015, art 14A.

²¹ *Joseph Perera* (n 19).

tolerated in a democracy.²² In *Channa Pieris v AG*, the Court even took the view that ideas at that time, which the majority of the people or even the elected representatives believe are false must be protected and not abridged for truth to prevail, evincing the great value and the breadth of freedom of speech and expression of Sri Lanka in the opinion of the Supreme Court. Thereafter, in the *Galle Face Green Case*, the court held the right to information to be implicit within freedom of expression in order to meaningfully give effect to that freedom.²³ At present, the right to information which is a facet of the freedom of expression, has the distinction of being a stand-alone right under Article 14A of the Constitution,²⁴ although it has long been implied into the legal framework of the country.²⁵ The right was further bolstered by the Right to Information Act, No.12 of 2016, which was introduced to assure the transparency and accountability of public authorities.²⁶

Other elements of the domestic legal framework set out permissible restrictions of the right with the intent of preventing the arbitrary, indiscriminate, or unreasonable exercise of the freedom of expression. Article 15(2) of the Constitution makes provision for the imposition of lawful restrictions in the interests of racial or religious harmony, parliamentary privilege, contempt of court, defamation or incitement of an offence,²⁷ while Article 15(7) of the Constitution permits lawful restrictions in the interests of national security, public order, protection of public health or morality, the recognition of the fundamental rights and freedoms of others, and the general welfare of a democratic society.²⁸ The burden of the imposition of restrictions under Article 15(7) of the Constitution is described as being a heavy one by the Supreme Court in

²² *Deshapriya v Municipal Council, Nuwara Eliya*, [1995] 1 Sri LR 362.

²³ *Environmental Foundation Ltd., v. Urban Development Authority of Sri Lanka (Galle Face Green Case)* SC FR 47/2004.

²⁴ Nineteenth Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 15 May 2015, Article 14A.

²⁵ *Nalin De Silva v Ranil Wickremasinghe* SC FR 308/2015, SCM 22 February 2017.

²⁶ Right to Information Act, No.12 of 2016.

²⁷ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 15(2).

²⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 15(7).

Sunila Abeysekera v. Ariyaa Rubasinghe, Competent Authority and Others. The Court further clarifies that for a restriction to be valid there must be a proximate or rational nexus to the object which is sought to be achieved and held that the question of ‘necessity’ of the restriction invariably involves a review of the proportionality of the restriction to the legitimate aim sought. Thereby the court set safeguards against unreasonable and arbitrary restrictions being placed upon the exercise of fundamental rights and freedoms in Sri Lanka. Further analysis into the constitutional right to freedom of speech and expression is carried out in the subsequent section in reference to the position taken by the Supreme Court in relation to the ambit of the right, and the clarification of responsibilities of state in relation to the aforementioned right.

Other key statutes that make provision for the imposition of restrictions upon the freedom of expression, include the Right to Information Act which provides instances in which the right to information may be denied which is recognised to be a facet of the right to freedom of speech and expression.²⁹ Further, legislation such as the *Penal Code* which contains offences relating to religion,³⁰ and the Prevention of Terrorism Act which similarly criminalizes words causing or intending to cause acts of violence, or religious, racial or communal disharmony, ill-will, or hostility between different communities or racial or religious groups imposes restrictions upon the freedom of speech and expression.³¹

Utilizing the prevailing domestic and international legal framework that impacts the right to freedom of speech and expression in Sri Lanka, the article will proceed to set out in detail the multi-faceted approach proposed to safeguard this right. It is emphasized that the article does not take the view that legal reform would not be welcome. It simply takes the stance that the reform thus envisaged would do more harm than good, and until such time that suitable reform can be implemented through a robust process complete with meaningful stakeholder consultation, this multi-faceted approach can bolster the exercise of the right to freedom of speech and expression in Sri Lanka.

²⁹ Right to Information Act, No.12 of 2016, s 5.

³⁰ Penal Code Ordinance No.2 of 1883, Chapter XV.

³¹ Prevention of Terrorism (Temporary Provisions) Act, No.48 of 1979, s 2(h).

3. THE FAILURE OF THE PROMISE OF LAW REFORM BY THE STATE TO REALIZE THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

The state of Sri Lanka, in the year 2023 proposed a number of new laws that would directly impact the right of its citizens to the freedom of speech and expression – Contempt of Court Bill,³² Anti-Terrorism Bills,^{33,34} and the Online Safety Bill.³⁵ However, despite the massive backlash from the legal community and the public at large, the Contempt of Court Bill and the Online Safety Bill were passed into law in the year 2024. The article will proceed to analyse the legislative spirit of the proposed Bills in addition to the salient provisions of the enacted legislation, in order to demonstrate its unsuitability to realize an ideal standard of freedom of speech and expression.

The Contempt of a Court, Tribunal or Institution Act, No. 8 of 2024 has an impact on the freedom of speech and expression in Sri Lanka.³⁶ For instance, the Act renders the making of statements verbally or in writing that ‘scandalizes or lowers the judicial authority or dignity of a court, tribunal or institution’ an offence.³⁷ Judges are duty bound to handle matters of the utmost serious nature, and must possess the judicial temperament to do so – ‘The behaviors most often cited as evidence of a good temperament – displays of courtesy, patience, level-headedness, and caring - are desirable because they advance procedural justice’.³⁸ Thereby, a judge with the much-needed judicial temperament to mete justice will not possess delicate sensibilities that may be ‘scandalized’. The inclusion

³² Contempt of a Court, Tribunal or Institution Bill, published in the gazette on 27 June 2023.

³³ Anti-Terrorism Bill, published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 17 March 2023.

³⁴ Anti-Terrorism Bill, published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 15 September 2023.

³⁵ Online Safety Bill, published in the gazette on 15 September 2023.

³⁶ Contempt of a Court, Tribunal or Institution Act, No. 8 of 2024.

³⁷ Contempt of a Court, Tribunal or Institution Act, No. 8 of 2024, s 3(2)(c)(i).

³⁸ T Maroney, 'Judicial Temperament, Explained' (2021) 105/2 <Judicature <https://scholarship.law.vanderbilt.edu/faculty-publications/1221>> accessed 23 August 2024.

of such a provision is therefore unnecessary and disparaging towards the judiciary. Further, the Act makes it an offence to scandalize the judiciary with ‘intent to excite dissatisfaction in the minds of the public’.³⁹ This particular offence is overbroad and vague and would stifle fruitful discourse of cases among the legal fraternity and the public at large, as controversial opinions would likely excite dissatisfaction in the minds of the public. Dissatisfaction of this nature is not always an unwelcome feature and has been known to accompany new discoveries such as when Galileo opined that the earth was round and was persecuted for the same. Offences of this nature are overbroad and vaguely phrased as evinced above.

It is observed that the Act has the potential to create a culture within the country that does not allow the expression of so much as a hint of dissatisfaction or disrespect towards the judiciary. The beginnings of such a phenomenon may be illustrated by the arrest and suspension of a lawyer in March 2024 for making submissions before the Supreme Court, in contravention of a directive of the court. In addition to the suspension, an order was issued to subject the Attorney-at-Law to a psychiatric evaluation subsequent to his refusal to retract his earlier position.⁴⁰ Although the critical demonstration of due respect towards court is acknowledged and ardently carried out by the legal community, casting aspersions on the mental state of an individual for failure to do so, with all due respect, is rather an imaginative leap.

The Anti-terrorism Bill gazetted in March 2023 was also subject to criticism. Significantly, the Human Rights Commission of Sri Lanka expressed concern for the overbroad definition of terrorism under the Bill.⁴¹ ‘The bill appears designed to...make vaguely defined forms of speech a criminal offense’.⁴² Despite revision of the Bill being a welcome

³⁹ Contempt of a Court, Tribunal or Institution Act, No. 8 of 2024, s 3(2)(e).

⁴⁰ L Sooriyagoda, ‘Lawyer remanded for contemptuous behavior before Supreme Court’ (Colombo, 20 March 2024) <<https://www.dailymirror.lk/breaking-news/Lawyer-remanded-for-contemptuous-behavior-before-Supreme-Court/108-279241>> accessed 22 March 2024.

⁴¹ Anti-Terrorism Bill, published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 17 March 2023.

⁴² Human Rights Watch, ‘Sri Lanka: Reject New Counterterrorism Bill, Proposed Law Breaks Government Pledge to End Abuse’ (*Human Rights Watch*, 7 April 2023) <<https://www.hrw.org/news/2023/04/07/sri-lanka-reject-new-counterterrorismbill#>:

step, the Human Rights Commission of Sri Lanka and the Centre for Policy Alternatives reports on the Anti-terrorism Bill gazetted in September 2023,⁴³ note that the offence of terrorism remains overbroad, and that the law if operational would result in human rights abuses, including the right to freedom of speech and expression.^{44 45}

In stark contrast to the legislative objective of the Online Safety Bill to provide a safe online space for the freedom of speech and expression, the Bill was described as being an ‘assault on freedom of expression, opinion, and information’.⁴⁶ The Bill was challenged before the Supreme Court, and the court held that no less than thirty-one clauses of the Bill were inconsistent with the Constitution as it appeared in the Bill. In addition to the offences under the Bill being numerous and overbroad, the court in the Special Determination on the Online Safety Bill noted that certain offences in the Bill are already prevailing in the Penal Code either directly or indirectly, with the offences contained in the Bill imposing harsher punishment without justification.⁴⁷

~:~text=The%20bill%20appears%20designed%20to,organizations%20without%20meaningful%20judicial%20oversight.> accessed 31 January 2024.

⁴³ Anti-Terrorism Bill, published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 15 September 2023.

⁴⁴ Human Rights Commission of Sri Lanka, ‘Observations and Recommendations on the Revised Anti-Terrorism Bill’ (Human Rights Commission of Sri Lanka, 26th October 2023) <<https://www.hrcsl.lk/wp-content/uploads/2023/10/HRCSL-letter-to-Minister-of-Justice-with-HRCSL-observations-recommendations-on-revised-ATB.pdf>> accessed 22 August 2024.

⁴⁵ Centre for Policy Alternatives, ‘Commentary Comparing the Proposed Anti Terrorism Bill to the Prevention of Terrorism Act’ (Centre for Policy Alternatives, 6 October 2023) <<https://www.cpalanka.org/wp-content/uploads/2024/03/ATA-Table-Complete-v1.2.pdf>> accessed 22 August 2024.

⁴⁶ International Commission of Jurists, ‘Sri Lanka: Proposed Online Safety Bill would be an assault on freedom of expression, opinion, and information’ (International Commission of Jurists, 29 September 2023) <<https://www.icj.org/sri-lanka-proposed-online-safety-bill-would-be-an-assault-on-freedom-of-expression-opinion-and-information/>> accessed 30 January 2024.

⁴⁷ Penal Code Ordinance (No.2 of 1883) s 290, s 290A, s 291, s 291A, s 291B, s 292.

3. A MULTI-FACETED APPROACH TO SAFEGUARDING THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION – THREE LIMBS

The analysis of recent legal reform relating to the right to freedom of speech and expression reveals that these new enactments may not be capable of achieving the aim of bolstering this right. In light of the above, the article opines that exclusive reliance on new legislative enactments is not a viable way forward to guarantee the right to freedom of speech and expression in Sri Lanka. Therefore, Sri Lanka must draw from the rich framework of international human rights standards, domestic law, and prevailing research in order to safeguard and bolster the right to freedom of speech and expression. In so doing, a multi-faceted approach to safeguarding this right can be taken by focusing on actors relating to the freedom of speech and expression, namely, the people, the state, and the judiciary. Therefore, the article proposes the achievement of the ideal standard of freedom of speech and expression in Sri Lanka through focused attention on the following - the people performing duties and fulfilling obligations corresponding to the exercise of the right, the government taking action to foster an environment conducive to the exercise of the right, and the judiciary fulfilling its role of acting as the interpreter and staunch defender of the right. The limbs of the multi-faceted approach and the justification for the same are delved into in the subsequent sections to evince the manner in which they may bolster and ensure the realisation of the right to freedom of speech and expression of the people of Sri Lanka.

4.1 First Limb – The Fundamental Duties of the People

The people themselves are an invaluable tool to guarantee the right to freedom of speech and expression of the people. That is, in order for a country to have freedom of speech and expression and media freedom the collective citizenry must work towards the same, without placing sole focus upon the exercise of individual rights. In addition to rights and freedoms, duties and responsibilities vest in the collective citizenry of the country. In *Handyside v United Kingdom*, the European Court of Human Rights held that ‘whoever exercises his freedom of expression undertakes “duties and responsibilities” the scope of which depends on his situation and the technical means he uses’.⁴⁸ These duties are fleshed out in the

⁴⁸ *Handyside v United Kingdom*, ECtHR, App no 5493/72, ECHR 07 December 1976

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Article 6 of the same provides that everyone has the right to ‘know, seek, obtain, receive and hold information’ about all human rights and fundamental freedoms including the manner in which the state gives effect to rights and freedoms.⁴⁹ Further, everyone has the right to ‘study, discuss, form and hold opinions’ on all human rights and fundamental freedoms theoretically and in practice.⁵⁰

However, the element of ‘duties and responsibilities’ that are appurtenant to the right to freedom of speech and expression are oft overlooked by people in the name of the exercise of their own rights. The rise of the internet and social media in particular have facilitated the introduction of multiple new media through which people can convey thoughts and ideas. As positive as its impact has been, its negative impact is equally apparent and pervasive. Freedom of speech and expression has a storied history of being abused in online spaces, with the focus being on individual self-expression. However, when exercising the right to freedom of speech and expression one cannot force another to listen and agree or act in a manner that would be an affront to human dignity.⁵¹

In Sri Lanka, Article 28(e) of the Constitution provides that along with the exercise and enjoyment of rights and freedoms comes the duty and obligation to respect the rights and freedoms of others.⁵² Further, Article 28(a) of the Constitution provides that citizens are under a duty and obligation to uphold and defend the Constitution and the law.⁵³ Article 28 of the Constitution may not be legally enforceable,⁵⁴ however it is

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⁴⁹ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Article 6.

⁵⁰ *ibid.*

⁵¹ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 28(e).

⁵² The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 28(e).

⁵³ *ibid.*, Article 28(a).

⁵⁴ *ibid.*, Article 29.

significant in the formulation of law, governance, and the interpretation of the Constitution.⁵⁵ In contrast, Article 15(7) of the Constitution permits restrictions for the purposes of securing ‘respect for the rights and freedoms of others’, and this provision carries with it legally binding rights and obligations.

The courts have remarked upon the fact that the fundamental duties under Article 28 of the Constitution does not only extend to the general public, but specifically to the media as well.⁵⁶ In *Victor Ivan v Sarath N. Silva*, Mark Fernando J described the ‘pen of the journalist’ as being a ‘two-edged weapon which he must wield with care not to wound the innocent while exposing the guilty’.⁵⁷ Mark Fernando J in this statement placed emphasis on the vital duty of a journalist that co-exists with his or her right to freedom of expression.

Duties are an inherent feature of living and participating in a human community.⁵⁸ The challenge lies in the manner in which citizens can be called upon to fulfil their fundamental duties in light of these duties being non-justiciable.⁵⁹ Through an extension of the right to information, each human being is entitled to information and knowledge about the fundamental rights and freedoms he is entitled to. If information relating to this fact was disseminated among the general public, people would not only be empowered in exercising their own fundamental rights and freedoms, but be more receptive in fulfilling their duties in allowing others the enjoyment of their fundamental rights and freedoms. To that end individuals, non-governmental organizations and relevant institutions such as the Ministry of Justice, Prison Affairs and Constitutional Reforms, and the Ministry of Education have an important role to play, and should focus on education, training and research to strengthen ‘understanding,

⁵⁵ *Re Thirteenth Amendment to the Constitution Bill* (1987) 2 Sri LR 326.

⁵⁶ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 28.

⁵⁷ *Victor Ivan v Sarath N. Silva* (1998) 1 Sri LR 340.

⁵⁸ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Article 18(1).

⁵⁹ Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 29.

tolerance, peace and friendly relations among nations',⁶⁰ and within nations. The Ministry of Justice is equipped with the knowledge to create material which would educate people as to their fundamental rights and freedoms, and if this material is formulated in conjunction with the Ministry of Education there is a greater chance of reaching people at different levels of education. Financial and technical support for this endeavour could be garnered from human rights civil societies in order to ensure widespread dissemination of the aforementioned material.

A more ambitious recommendation would be to advocate for the legal reform of Article 28 of the Constitution with a view to rendering it justiciable.⁶¹ The success of this endeavour is unlikely considering the multiple unanswered appeals for amendment of the fundamental rights chapter of the Constitution.⁶² However, the courts have recognised the importance of non-justiciable Directive Principles of State Policy. For instance, *Environmental Foundation Ltd v. Mahaweli Authority of Sri Lanka*, Ratnayake J observed that, 'Courts have linked the Directive principles to the public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers'.⁶³ Further to this point, in *Ajith P. Dharmasuriya, v Mahaweli Authority of Sri Lanka* the court held that the fundamental rights chapter of the Constitution should be interpreted in the context of Directive Principles of State Policy and fundamental duties.⁶⁴

In India, the judiciary has been known to give directions to the Central Government on the legal and non-legal implementation of fundamental duties. However, the Central Government remains unsuccessful even in the endeavour of spreading awareness on fundamental duties.⁶⁵

⁶⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art 18.

⁶¹ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 29.

⁶² *ibid*, Chapter III.

⁶³ *Environmental Foundation Ltd v. Mahaweli Authority of Sri Lanka* [2010] 1 SLR 1, 19.

⁶⁴ *Ajith P. Dharmasuriya, v Mahaweli Authority of Sri Lanka*, SC FR Application No. 330/2015, SCM 09.01.2017.

⁶⁵ A Kumar and H Rao, 'A Scenario of Fundamental Duties in the Indian Constitution'

Nevertheless spreading awareness on fundamental rights, freedoms and duties is critical to fostering a culture of tolerance and respect, with decentralization of the endeavour to Local Governments in Sri Lanka being a potential solution.

4.2 Second Limb: Government Action and Responsibility

What is contemplated in the article under this limb of the multi-faceted approach is not merely supportive government action, but also the responsibility of the government to foster an environment in which the right to freedom of speech and expression is guaranteed. This is more challenging to give effect to in comparison to the first limb, because administrations that enjoy what is close to unfettered power tend to cling to it, and do not welcome tenets of a liberal democracy such as the freedom of expression.⁶⁶ Accusations of the same can be levelled at the executive branch of Sri Lanka given its storied history with the right to freedom of speech and expression, as detailed in the introduction.

However, government action in this area is critical because political dissent should not merely be tolerated but encouraged,⁶⁷ as it is an essential tenet of democracy. Further, it is incidental to the forming of public opinion, which is connected to the widespread dissemination of information.⁶⁸ In fact, ‘...utterances that are perceived as subversive or as undermining national security’ have been described as the litmus test for a country’s protection of the freedom of speech and expression,⁶⁹ and it is this test that the government of Sri Lanka should aspire to pass.

Sharvananda CJ in the case of *Joseph Perera v The Attorney-General*

(2022) 17(1, 2) Vidhigya: The Journal of Legal Awareness <<http://dx.doi.org/10.5958/0974-4533.2022.00002.1>> accessed 30 January 2024.

⁶⁶ O Tkacheva, and others, *Internet Freedom and Political Space* (Santa Monica, RAND Corporation, 2013) 185.

⁶⁷ *Deshapriya* (n 22).

⁶⁸ *Joseph Perera* (n 19).

⁶⁹ Theo Tsomidis, 'Freedom of Expression in Turbulent Times - Comparative Approaches to Dangerous Speech: The ECtHR and the US Supreme Court' (2022) 26/3 *The International Journal of Human Rights* 379 <<https://www.tandfonline.com/doi/full/10.1080/13642987.2021.1928084>> accessed 12 October 2023

stated that, ‘Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode’ and that the government must not become the guardian of the ‘public mind’.⁷⁰ Fulfilling this goal involves not only the negative duty of non-interference with the right to freedom of expression, but the positive duty to take active and effective steps to safeguard the right as well.⁷¹ It is this positive duty that forms the basis of the third limb of the multi-faceted approach proposed in the article. Appurtenant to this positive duty is the duty of the Sri Lankan government to take measures to safeguard other fundamental rights and freedoms collectively, as the effective exercise of the right to freedom of speech and expression is only possible in a country which takes a holistic approach to guaranteeing fundamental rights and freedoms.

4.3 Third Limb - The Role of the Judiciary

This article acknowledges that the citizens of Sri Lanka and its government are by no means perfect instruments by which the right to freedom of speech and expression can be safeguarded. Thus, the article proposes the third limb of the multi-faceted approach which focuses on the role of the courts in the protection of the right to freedom of speech and expression, as ‘Judges remain the ultimate guardians of the Rights of the citizen’.⁷²

Perhaps most significantly, the judiciary has taken pains to flesh out the right contained in Article 14(1)(a) of the Constitution.⁷³ Sharvananda CJ in *Joseph Perera's Case* emphasized that freedom of expression included the freedom of the press and the dissemination of information.⁷⁴ In the same case, and in the case of *Amaratunga v Sirimal (Jana Ghosha Case)* banners, posters, signs, flags, picketing, wearing arm bands, jackets and

⁷⁰ *Joseph Perera* (n 19) 224.

⁷¹ *Centro Europa 7 S.r.l. and Di Stefano v Italy*, Grand Chamber of the ECtHR, App no 38433/09, ECHR 7 June 2012 [134].

⁷² L Marasinghe, 'Recent Developments in Sri Lanka on the Freedom of Expression' [2000] 33/2 *Verfassung Und Recht in Übersee* 157.

⁷³ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978 Article 14(1)(a).

⁷⁴ *Joseph Perera* (n 19) 224.

such were specified to be within the exercise of the right.⁷⁵

A citizen ‘may preach the complete inadequacy of the social order. He may demand its overthrow by armed revolution. He may insist that the political system is the apotheosis of perfection... he is entitled to speak without hindrance of any kind.’⁷⁶ In this vein, the judiciary plays a significant role in creating an environment that permits legitimate political dissent. In *Kurukulasuriya and Jayasekara v Sri Lanka Rupavahini Corporation*, the Petitioner was invited to participate in a TV programme involving a panel discussion. He alleged that the Sri Lanka Rupavahini Corporation abruptly stopped the programme for no reason, violating his freedom of expression. The Respondents maintained that the Petitioner was in violation of the guidelines of the TV programme, which among others prevented political speech, and that he disturbed the other panellists. The Petitioner denied these claims, and the court held in his favour. Aluwihare J with whom Priyantha Jayawardena and Dehideniya JJ agreed, stated that expression of a political nature did not fall within the category of Constitutionally recognized restrictions. The learned judge astutely remarked, ‘If every speech which points out the shortcomings of an incumbent government or politicians were to be interpreted as being a political speech and censored, no legitimate criticism which could promote better governance would ever be made’.⁷⁷ In fact in *Channa Pieris v Attorney-General*, the court held that the truth must prevail, and in order to assure this that the unimpeded flow of thought from ‘diverse and antagonistic sources, however unorthodox or controversial, however shocking or offensive or disturbing they may be’ should be protected.⁷⁸ Mark Fernando J in *Deshapriya v Municipal Council, Nuwara Eliya* emphasized that this approach to freedom of expression is indispensable within a democracy.⁷⁹

While the judiciary acknowledges the power of the executive to make regulations under the law, Sharvananda CJ in *Dissanayake v Sri Jayawardenapura University* held that these regulations should not be unquestioningly embraced - ‘The question is whether the measure is

⁷⁵ *Amaratunga v Sirimal* (1993) 1 Sri LR 264.

⁷⁶ H Laski, *A Grammar of Politics* (George Allen & Unwin, 1948) 120.

⁷⁷ *Kurukulasuriya and Jayasekara v Sri Lanka Rupavahini Corporation* SC FR 556 and 557/2008, SCM 17 February 2021.

⁷⁸ *Channa Pieris v Attorney-General* (1994) 1 Sri LR 1, 134.

⁷⁹ *Deshapriya* (n 22) 362.

regulatory or whether it transgresses the zone of possible regulation and gets into the forbidden territory of restriction or abridgment'.⁸⁰ Further, the judiciary has gone so far as to uphold the freedom of speech and expression even when the statements of concern technically infringe government regulations. In *Manohari Pelaketiya v Secretary, Ministry of Education*, the Petitioner (teacher) was subject to the relentless sexual harassment of the eleventh respondent (Principal) and the twelfth Respondent. After making multiple complaints to the relevant authorities to no avail, she finally took her story to the media. She was interdicted on the ground that her interview breached Section 6.2 of the Establishment Code. Nevertheless, the court held in favour of the Petitioner. Gooneratne J humanely acknowledged the physical and mental toll the continued abuse would have had on the Petitioner. His Lordship stated, '[t]herefore, freedom of expression by the Petitioner of sufferings and the harm done to her by a few public servants is normal and natural even if she has made a mistake by acting contrary to the Establishment Code'.⁸¹ This judgment also recognized Sri Lanka's international obligations under Convention on the Elimination of Discrimination against Women,⁸² and bore undertones of protecting the broader Constitutional values of equality, justice, and human dignity.⁸³

The judiciary of Sri Lanka also serves as a strong defender against the misinterpretation and misapplication of the law to unlawfully suppress the freedom of speech and expression to this very day. In the year 2023, the application for bail for the comedian Natasha Edirisooriya who was arrested for making disparaging comments about Buddhism during her comedy set, on the ground that she violated Section 3 of the International Covenant on Civil and Political Rights Act No.56 of 2007,⁸⁴ was heard before the Colombo High Court.⁸⁵ The court acknowledging that section 3

⁸⁰ *Dissanayake v Sri Jayawardenapura University* (1986) 2 Sri LR 254.

⁸¹ *Manohari Pelaketiya v Secretary, Ministry of Education* SC FR 76/2012, SCM 28 September 2016.

⁸² Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

⁸³ The Constitution of the Democratic Socialist Republic of Sri Lanka of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, preamble.

⁸⁴ International Covenant on Civil and Political Rights Act, No.56 of 2007, s 3.

⁸⁵ *OIC, Cyber Crimes Division v Nathasha Edirisooriya* (Bail determination HC

of the Act bore remarkable similarity to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), interpreted the provisions together. His Lordship utilized the UN Strategy and Plan of Action on Hate Speech (2020),⁸⁶ and the Rabat Plan of Action in order to apply the true spirit of the provision.⁸⁷ The latter contains a six-part threshold test to determine whether a statement is violative of the ICCPR, wherein the statement is considered in terms of context, speaker, intent, content and form, extent of the speech act, and the likelihood including imminence of the commission of a crime.⁸⁸ The court held in favour of the Petitioner, stating that a crime would not be committed under Section 3 of the ICCPR Act,⁸⁹ and Section 291A of the Penal Code for merely making a statement that hurt the feelings of a certain race, religion or group.⁹⁰ Further, the court remarked that it is not the duty of an investigator to take a person into custody on the ground that a complaint has been made by a Buddhist monk, another religious leader, or an influential person in society.⁹¹ This is significant because it emphasizes that every citizen is equal before the law,⁹² and is entitled to equal exercise of the right to freedom of speech and expression.

In contrast to the approach taken in Natasha Edirisooriya's case,⁹³ there is evidence to suggest that at times the courts have an inclination to recognize the lawful exercise of fundamental rights and freedoms of citizens when

EBA .1335).

⁸⁶ United Nations, 'United Nations Strategy and Plan of Action on Hate Speech' (United Nations 2020) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf> accessed 14 October 2023.

⁸⁷ United Nations High Commissioner for Human Rights 'Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred' (United Nations General Assembly 2013) <https://www.ohchr.org/sites/default/files/Rabat_draft_outcome.pdf> accessed 9 October 2023.

⁸⁸ *ibid.*

⁸⁹ International Covenant on Civil and Political Rights Act, No.56 of 2007, s 3.

⁹⁰ Penal Code Ordinance No.2 of 1883 as amended, s 291A.

⁹¹ *OIC, Cyber Crimes Division v Nathasha Edirisooriya* (n 85).

⁹² The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31st August 1978, Article. 12(1).

⁹³ *OIC, Cyber Crimes Division v Nathasha Edirisooriya* (n 85).

they reflect majoritarian interests.⁹⁴ In *Ven. Ratnasara Thero v. Udugampola*, the Petitioner was a Buddhist monk who had placed an order for leaflets that would serve as a written protest against state action. Following a complaint, the police seized and removed said leaflets from the printers, and the Court deemed this action to be unlawful and a violation of the fundamental rights of the Petitioner.⁹⁵

Further, the courts have been known to give effect to majoritarian interests to the detriment of interests of the minorities.⁹⁶ In *Ven. Ellawala Medananda Thero v. District Secretary, Ampara et al.* (2009), a Buddhist monk filed a petition challenging the decision to grant land a sizeable extent south of his viharaya to a number of Muslim families on the ground that it infringed his rights under Articles 10 and 12 of the Constitution.^{97,98,99} The court held in favour of the Petitioner.¹⁰⁰ Further in *Karuwalagaswewa Vidanelage Swarna Manjula et al. v. Pushpakumara, Officer-in-Charge, Police Station, Kekirawa et al.* two Jehovah's witnesses were arrested on allegations of disseminating material pertaining to their faith in a Sinhala-Buddhist village.¹⁰¹ Although the court found an infringement of the fundamental freedom from arbitrary arrest under Article 13(1) of the Constitution,¹⁰² the court did not acknowledge the infringement of the fundamental freedom of speech and expression,¹⁰³ or

⁹⁴ G Gunatilleke 'Limitations on Fundamental Freedoms in Sri Lanka: Majoritarian Influence of Constitutional Practice' (2023) 19(3) International Journal of Law in Context <<https://doi.org/10.1017/S1744552323000113>> accessed 23 August 2024.

⁹⁵ *Ven. Ratnasara Thero v. Udugampola* [1983] 1 Sri.L.R. 461.

⁹⁶ G Gunatilleke (n 94).

⁹⁷ *Ven. Ellawala Medananda Thero v. District Secretary, Ampara et al.* [2009] 1 Sri.L.R. 54.

⁹⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978, Article 10.

⁹⁹ *ibid*, Article 12.

¹⁰⁰ *Ven. Ellawala Medananda Thero* (n 97).

¹⁰¹ *Karuwalagaswewa Vidanelage Swarna Manjula et al. v. Pushpakumara, Officer-in-Charge, Police Station, Kekirawa et al.* (2018) SC (F.R) No. 241/14.

¹⁰² The Constitution of the Democratic Socialist Republic of Sri Lanka, Certified on 31 August 1978 Article 13(1).

¹⁰³ *ibid*, Article 14(1)(a).

freedom of religion of the Petitioners.¹⁰⁴

In terms of the law, perhaps the way forward to ensure the realization of the fundamental rights and freedoms of the minorities in the country would be to amend Article 9 of the Constitution. Article 9 of the Constitution provides that the State shall afford Buddhism the foremost place in the country, and carry out the duty to protect and foster the Buddha sasana.¹⁰⁵ However, the provision qualifies that this must be carried out while assuring rights to all religions under Article 10 of the Constitution,¹⁰⁶ and Article 14(1)(e) of the Constitution.¹⁰⁷ While the legislative intent of the provision is sound, respectfully it is an oxymoron to expect the State to ensure the fundamental freedoms of persons from minority communities, while upholding giving Buddhism the foremost place. However, the success of attempts to amend the provision to ensure the protection of the fundamental rights and freedoms of all citizens of the country, or to remove it in its entirety, given the political backlash that would almost certainly stem from the Sinhala-Buddhist community at large. Therefore, the judiciary should take pains to interpret Article 9 of the Constitution in a manner that balances both majoritarian and minority interests in the country.

Issues notwithstanding, there is strong precedent to indicate that the judiciary remains a staunch defender of the right to freedom of speech and expression. Further, the case of *Manohari Pelaketiya* marks an overlap of the second and third limbs of the multi-faceted approach in the article, wherein the judiciary intervened to ensure that government action upholds the right to freedom of expression.¹⁰⁸ This case serves to support the assertion that the three limbs of the multi-faceted approach must operate concurrently in order to adequately safeguard the right.

¹⁰⁴ *ibid*, Article 10.

¹⁰⁵ *ibid*, Article 9.

¹⁰⁶ *ibid*, Article 10.

¹⁰⁷ *ibid*, Article 14(1)(e).

¹⁰⁸ *Manohari Pelaketiya* (n 81).

4. CONCLUSION

‘From a human rights perspective, the right to life and the prohibition of discrimination are to be balanced against the freedom of expression. To a certain extent, judges and policy makers will always have to navigate between Scylla and Charybdis’.¹⁰⁹ This is the burden which the state has to bear when it comes to safeguarding the right to freedom of speech and expression, and the article recognizes that this is a heavy one. However, it is vital that this burden be discharged in order to safeguard the democratic way of life in Sri Lanka.

The laws prevalent in Sri Lanka concerning the imposition of Constitutional and statutory restrictions upon the right to freedom of speech and expression are by no means perfect. Admittedly the legal framework safeguarding the freedom of speech and expression in Sri Lanka has been ripe for reform for some decades now. However, the attempts made thus far would disillusion even the strongest supporters of the State. While the true impact of recent legislation such as the Contempt of Court Act,¹¹⁰ and the Online Safety Act will not be felt for some time,¹¹¹ it is arguable that their passing has made the threat to freedom of speech and expression all the more acute. Further, the situation is by no means assuaged by the impending passing of the Anti-terrorism Bill.¹¹² The article contends that until such time as proper reform can be implemented following meaningful consultation with all relevant stakeholders, the prevailing legal and institutional framework relating to the right to freedom of speech and expression can and should be utilized to the utmost to safeguard this right.

In view of the above, the article proposes a multi-faceted approach to bolster the right to freedom of speech and expression in Sri Lanka, and successfully defends this approach utilizing international, domestic and foreign legal sources. The first limb concerns taking a collective approach to the defence of the right, by ensuring that people understand and bear the

¹⁰⁹ A Buyse, 'Words of Violence: "Fear Speech" Or how Violent Conflict Escalation Relates to the Freedom of Expression' [2014] 36/4 Human Rights Quarterly 779.

¹¹⁰ Contempt of a Court, Tribunal or Institution Act, No. 8 of 2024.

¹¹¹ Online Safety Act, No. 9 of 2024.

¹¹² Anti-Terrorism Bill, published in the Gazette of the Democratic Socialist Republic of Sri Lanka on 15 September 2023.

duties and obligations appurtenant to the exercise of their rights. The second limb focuses on the negative and positive duty of the government to guarantee the right, which is more crucial than ever given the tragic history that the government of Sri Lanka has in suppressing the right. The third limb emphasizes how crucial the role played by the judiciary is in serving as the interpreter and staunch defender of the right. The article maintains that through the concurrent operation of these three limbs, that the realization of the ultimate ideal of the right to freedom of speech and expression can be guaranteed for all people in Sri Lanka.