

RECENT DEVELOPMENTS

LEGISLATIONS

ONLINE SAFETY ACT, NO. 9 OF 2024

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The tendentious “Online Safety Bill” was published in the Gazette on September 18th, 2023,¹ thereby prompting criticism for its alleged draconian nature, especially regarding possible violations of the freedom of expression, and overbroad and vague provisions that could facilitate arbitrary misuse of power. The Bill provides that its objectives are to establish an “Online Safety Commission”; to prohibit the communication of certain factual statements online in Sri Lanka, and the use of online accounts including inauthentic online accounts, for prohibited purposes; and to suppress the supporting of false statements of fact being communicated, including its financing.²

Per Article 121 of the Constitution of Sri Lanka, numerous petitions were filed in the Supreme Court, invoking the sole and exclusive jurisdiction of the Supreme Court to determine whether the Bill or any of its provisions are inconsistent with the Constitution.³ The learned Additional Solicitor General who appeared for the Attorney General presented the policy considerations that underly the Bill to the Court, in order to emphasise the importance of such a piece of legislation. He presented statistics of children who have faced some form of online violence in Sri Lanka, and highlighted that the Sri Lankan domestic legal framework is one out of twenty-five such frameworks that do not have specific legislation governing online violence and harassment of children.⁴ He also submitted statistics to prove that different social media platforms such as Facebook, YouTube, and twitter (X) remove considerable amounts of posts from their

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¹ ‘Online safety bill gazetted: Key concerns raised’ (*NewsWire*, 19 September 2023) <<https://www.newswire.lk/2023/09/19/online-safety-bill-gazetted-key-concerns-raised/>> accessed 2 April 2025.

² Preamble to the Online Safety Act, No. of 2023.

³ Article 120 of the Constitution.

⁴ Online Safety Bill Determination (SC/SD/66/2023) 32.

respective platforms containing *inter alia* sexually explicit content, including child nudity and sexual exploitation, and hate speech, as part of their internal safeguards.⁵ Based on this premise, the learned Additional Solicitor General asserted that there exists an imperative need to regulate access to and dealings within the internet. To further substantiate his argument, he disclosed the fact that many countries having specific legislation to regulate the dissemination of false statements online that would propagate hate was presented in a joint Cabinet Memorandum to the Cabinet of Ministers.⁶ The Memorandum also provided that the proposed legislation merely seeks to regulate false statements being spread, with no intention of covering opinions, satire, criticism, and parody.⁷ It was in this backdrop the Bill was drafted and submitted to Parliament for approval.

Once the Bill was gazetted, it drew widespread criticism across the nation, disapproving of the alleged overbroad and ambiguous nature of the provisions of the bill, that could potentially lead to arbitrary misuse of power, and the possible violation of the freedom of expression of people. (These concerns will be explained one by one below). However, it must be noted that at the hearing, the Additional Solicitor General presented a draft of thirty proposed amendments to the Bill and stated that the said amendments would be made at the Committee Stage in the Parliament.⁸ This was criticised by the petitioners on the premise that those amendments deviate from the merits and principles of the Bill, and thus are in violation of Article 80(3) of the Constitution.⁹ It was submitted that this Article was introduced to ensure that amendments to Bills will not substantially alter the version that was gazetted, and thereby disallowing the legislature from passing a different Bill than the one petitioners are entitled to challenge per Article 121.¹⁰ However, the Court noted that Article 78(3) is applicable only to amendments proposed in Parliament, and not to the Supreme Court's powers under Article 121. Article 123(1)(c) permits the Court to suggest amendments to resolve constitutional inconsistencies which would

⁵ Online Safety Bill Determination (SC/SD/66/2023) 32.

⁶ Online Safety Bill Determination (SC/SD/66/2023) 33.

⁷ Online Safety Bill Determination (SC/SD/66/2023) 33.

⁸ Online Safety Bill Determination (SC/SD/66/2023) 11.

⁹ Article 78(3) of the Constitution: "Any amendment proposed to a Bill in Parliament shall not deviate from the merits and principles of such Bill".

¹⁰ Online Safety Bill Determination (SC/SD/66/2023) 30.

subsequently be incorporated at the Committee Stage. The Court clarified that since Article 80(3) does not make provisions for post-legislative judicial review, a tradition has emerged allowing the Attorney General, counsels, or petitioners to propose amendments during the Court's review. Regardless of the Court either accepting or rejecting these amendments, the Court concluded that the suggested amendments did not alter the Bill's merits and principles.¹¹

The main issue taken up by the petitioners was that the provisions of the Bill violated their freedom of expression guaranteed by Article 14 of the Constitution as a fundamental right. The absolute significance of every person being entitled to the freedom of expression lies in the fact that it is considered the cornerstone of constitutionalism and constitutional democracies.¹² The freedom of expression is considered an 'enabling right', in that most other human rights could not be enjoyed without it, and exercising such interdependent freedoms liberally devoid of unlawful interference is the foundation of modern democracy.¹³

The Constitution of Sri Lanka guarantees the freedom of speech and expression, including publication, to every citizen as a fundamental right.¹⁴ International human rights law also places significant emphasis upon the preservation and promotion of the freedom of expression. The International Covenant on Civil and Political Rights¹⁵ confers on everyone the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹⁶ Sri Lanka ratified the ICCPR and has thus taken on the obligation to

¹¹ Online Safety Bill Determination (SC/SD/66/2023) 30-31.

¹² Aniceto Masferrer, 'The Decline of Freedom of Expression and Social Vulnerability in Western democracy' [2023] *International Journal for the Semiotics of Law* 1443, 1444.

¹³ Emily Howie, 'Protecting the human right to freedom of expression in international law' [2018] *International Journal of Speech-Language Pathology* 12, 13.

¹⁴ Article 14(1)(a) of the Constitution.

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁶ Article 19 of the ICCPR.

protect and promote the rights it contains.¹⁷

With the advancement of technology, digital spaces grew, and issues emerged as to whether traditional laws continue to apply there. This is especially important vis-à-vis the freedom of expression as both the media landscape and the relationship between citizens and the State have changed as a consequence of the internet and the transformation of the digital landscape: social media has steadily replaced traditional media as the more dominant method of dissemination, and the internet, through its perpetual stream of resources, has bridged the gap between the citizens and the knowledge on State affairs.¹⁸ This bridge results not merely in access to information on the State, but also to the existence of a platform through which citizens could publicly express their views on State matters. Therefore, it is significant that the Human Rights committee, in its General Comment No. 34, clarified that the freedom of expression extends to ‘electronic and internet-based modes of expression’.¹⁹

Neither the Constitution of Sri Lanka nor the ICCPR, however, guarantees the freedom of expression as an absolute right. The former allows it to be restricted in the interests of ‘racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence’;²⁰ and the latter allows it to be restricted ‘for respect of the rights or reputations of others; for the protection of national security or of public order, or of public health or morals’.²¹

The Court found that the Bill in question aims to regulate the internet in relation to ‘racial and religious harmony, contempt of court, defamation or incitement to an offence’.²² Instead of prohibiting freedom of expression,

¹⁷ ‘Ratification Status for CCPR - International Covenant on Civil and Political Rights’ United Nations Treaty Database <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en> accessed 25 August 2023.

¹⁸ MN Momen, ‘Myth and Reality of Freedom of Expression on the Internet’ [2019] International Journal of Public Administration 1, 1.

¹⁹ UNHRC, ‘General Comment No 34: Article 19: Freedoms of Opinion and Expression’ (12 September 2011) UN Doc CCPR/C/GC/34, para 12.

²⁰ Article 15(2) of the Constitution.

²¹ Article 19(3) of the ICCPR.

²² Online Safety Bill Determination (SC/SD/66/2023) 38.

it stated that the Bill strives to introduce regulatory measures intended to shield individuals from the harmful effects of certain communications and to preserve judicial integrity and impartiality.²³ The Court then highlighted how both the Additional Solicitor General and the petitioners' counsels acknowledged that many of the offences outlined in the Bill are already established under existing legislation.²⁴

This, however, sheds light on the relationship between a constitutionally guaranteed right and its permissible limitations, and its inherent delicacy, and how it must be approached with the utmost care, especially within a democratic society. A considerable number of international conventions addresses the conflict between right and restriction. The ICCPR, whilst guaranteeing the freedom of expression, allows its restriction as examined above. However, it must be noted that the provision on its restriction was clarified by the ICCPR General Comment No. 34, stating that when a State Party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself, and that the Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.²⁵ While the principle outlined in ICCPR General Comment 34 emphasizing that restrictions on freedom of expression should not jeopardise the right itself is commendable, there are concerns about the practical implementation and enforcement of this principle. Without clear guidelines on what constitutes 'jeopardizing the right itself', there is room for interpretation and abuse by governments, and therefore it is essential to strike a delicate balance between protecting legitimate interests, such as national security, and safeguarding the right to freedom of expression. Without a more concrete framework for assessing whether a restriction crosses the line into jeopardizing the right, there is a risk that governments could justify overly broad and restrictive measures under the pretext of protecting public order or other interests. Furthermore, the statement does not address the potential chilling effect that vague or ambiguous restrictions may have on individuals who fear legal

²³ Online Safety Bill Determination (SC/SD/66/2023) 38.

²⁴ These include the Penal Code, the Computer Crimes Act No. 24 of 2007, the Payment Devices Frauds Act No. 30 of 2006, and the Personal Data Protection Act No. 9 of 2022.

²⁵ UNHRC 'General comment No. 34 - Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34, 5.

repercussions for expressing their opinions, ultimately hindering the free exchange of ideas and information.

Most treaty bodies, such as the United Nations Human Rights Committee, apply the ‘proportionality test’ when evaluating restrictions on rights. This test comprises of four limbs:²⁶ the State must have a legitimate purpose that serves a compelling interest when restricting the right;²⁷ there must be a rational connection between the specific measure used to limit the right and the legitimate interest;²⁸ the measure must be necessary to advance or prevent setbacks to the legitimate interest; and the measure must be ‘strictly proportionate’. This involves a balancing of the benefits gained by the public and the harm caused to the right due to the means selected by law to achieve the proper purpose.²⁹ This concept of proportionality was well explained by the UN Human Rights Committee in *Robert W. Gauthier v Canada*,³⁰ where it was held that restriction must be necessary and proportionate to the goal sought to be achieved, and that it is a determination not in the exclusive prerogative of the State. It was further clarified that the State must specify and justify the precise nature of the threat posed by the exercise of freedom of expression by an individual.³¹ The UN expert on freedom of expression has also highlighted that many governments impose restrictions on expression that fail to meet the standards of legality, necessity, and proportionality, and that these restrictions often target journalists, bloggers, government critics, dissenters, and various minority groups, which eventually curb civil

²⁶ Gehan Gunatilleke, ‘Justifying limitations on the freedom of expression’ [2021] Human Rights Review 91.

²⁷ M Kumm, ‘Constitutional rights as principles: On the structure and domain of constitutional justice’ [2004] International Journal of Constitutional 574.

²⁸ Y Arai-Takahashi, ‘Scrupulous but Dynamic - the Freedom of Expression and the Principle of Proportionality under European Community Law’ [2005] Yearbook of European Law 247.

²⁹ J Rivers, ‘Proportionality and Variable Intensity of Review’ [2006] Cambridge Law Journal 174.

³⁰ Communication No. 633/1995, UN Human Rights Committee, CCPR/C/60/D/633/1995.

³¹ Michael O’Flaherty, ‘Freedom of expression: article 19 of the international covenant on civil and political rights and the human rights committee’s general comment no 34’ [2012] Human Rights Law Review 627.

society's ability to engage freely in public discourse.³² This is especially important in a context where one of the central concerns raised by the petitioners during the Bill Determination was that the Bill is a draconian instrument designed to suppress public criticism of the government and could be used as a political tool.³³

The delicate balance between safeguarding public interests and preserving fundamental freedoms must be handled with extreme caution. A law that tips this balance too far in favour of control, without robust safeguards, transparent enforcement mechanisms, and judicial oversight, risks silencing voices and shrinking civic space. In a functioning democracy, the cure for harmful expression cannot be a retreat into censorship or arbitrary power, but rather, a commitment to principled regulation, accountability, and the protection of the right to speak freely, even, and especially, when that speech is inconvenient to those in power.

The Court concluded its determination stating that over thirty clauses in the Bill and certain omissions in the Bill were inconsistent with Article 12(1), and in some cases, Article 14(1)(a) of the Constitution, and therefore it could only be enacted by Parliament with a special majority, unless the recommended amendments by Court were introduced to the Bill in Parliament, in which case it could be enacted by Parliament with a simple majority.³⁴ The Bill was subsequently passed in Parliament with a majority³⁵ and thus the Online Safety Act, No. 9 of 2024 was enacted.

Consequently, a fresh set of controversies emanated from this enactment, stating that certain provisions of the Act do not comply with the Supreme Court Determination on the Online Safety Bill. One such instance was when it was noted by the Court that the inclusion of a clause criminalising

³² Emily Howie, 'Protecting the human right to freedom of expression in international law' [2018] *International Journal of Speech-Language Pathology* 12, 13.

³³ 'Sri Lanka: Online Safety Act major blow to freedom of expression' (*Amnesty International*, 24 January 2024) <<https://www.amnesty.org/en/latest/news/2024/01/sri-lanka-online-safety-act-major-blow-to-freedom-of-expression/>> accessed 24 April 2025.

³⁴ Online Safety Bill Determination (SC/SD/66/2023).

³⁵ 'The Online Safety Bill passed in Parliament with a majority vote with amendments' (*parliament.lk*, 24 January 2024) <<https://www.parliament.lk/en/news-en/view/3859?category=6>> accessed 2 April 2025.

the ‘communication of false statements’ with the intention of causing mutiny or committing offences against the State, which was examined above in detail, was excessively broad and not closely aligned with the core purpose of the proposed law.³⁶ The Human Rights Commission of Sri Lanka observed that the Court noted this provision shifts the focus toward broader national security and public order issues, thereby diverging from the Act’s primary objective of protecting internet users and the public from online harm, and therefore, the overall implication of the Court’s observations is that this clause should have been removed.³⁷ However, it has nonetheless been retained as Section 19 of the Act.

The fact that such omissions and inconsistencies exist within the present Act posits that not all the Supreme Court’s recommendations, especially those necessary to ensure constitutional compliance, have been fully incorporated during the legislative process. Consequently, it is apparent that the Act has not fulfilled the conditions that would permit it to be passed with a simple majority and should have instead been passed with a special majority for its lawful enactment in the absence of full compliance. Proceeding to pass the Act with only a simple majority despite this non-compliance raises serious constitutional concerns and calls into question the legality and legitimacy of the Act, as it may be inconsistent with safeguards required under the Constitution to protect fundamental rights. In light of these issues, it is imperative to critically re-evaluate the Online Safety Act to ensure that it upholds constitutional safeguards and does not compromise the rule of law under the guise of regulation.

³⁶ Online Safety Bill Determination (SC/SD/66/2023) 53.

³⁷ ‘HRCSL Press Notice 08 02 2024 on Observations on the Online Safety Act, No. 9 of 2024’ (HRCSL, 9 February 2024) accessed 2 April 2025.

ENFORCEMENT OF FOREIGN JUDGMENTS ACT, NO. 49 OF 2024

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THE CONTEXT

The legislative sources of private international law are derived from multiple frameworks in Sri Lanka including the Civil Procedure Code (1889), Companies Act, No. 7 of 2007, Arbitration Act No. 11 of 1995 and Intellectual Property Act, No. 36 of 2003. The Reciprocal Enforcement of Foreign Judgments Ordinance No. 41 of 1921 (REJO), and the Enforcement of Foreign Judgements Ordinance No. 3 of 1937 (EFJO) were the most relevant in the sphere of reciprocal recognition, registration and enforcement of foreign judgments. Yet, these statutes, which were enacted during the British colonial era, were limited in their application as they applied only in judgments relating to commercial matters.

In December 2023, the Court of Appeal raised this stagnating *lacuna* in the Sri Lankan legal regime created by the absence of statutory direction with regard to the status and recognition of foreign judgments in matrimonial matters, particularly relating to divorce, annulment and separation of spouses. This matter, which had arisen on several earlier occasions, arose in *Champika Harendra Silva v. M.B. Weerasekaram Registrar General and Others*, where a Sri Lankan-born couple who had registered their marriage in Sri Lanka and migrated thereafter to England, had obtained a divorce decree from a competent court in England. The divorcee man applied to the Registrar General (RG) of Sri Lanka to register the divorce, but it was rejected on the basis that the divorce was obtained from a British court, which according to the RG, was not a ‘competent court’ under the Marriage Registration Ordinance of Sri Lanka. Upon rejection by the RG, the divorcee filed for a writ of certiorari pleading the court to quash the RG’s rejection, and a writ of Mandamus recognizing the decree of divorce granted by the English court. The court made headlines when, through judicial interpretation, it granted both writs declaring that a foreign decree of dissolution of a marriage contracted in Sri Lanka is valid and effectual in Sri Lanka subject to three guidelines. (a) Such Court must be in law vested with the jurisdiction in respect of the dissolution of a marriage and be the ‘Competent Court’ in the foreign country; (b) the Parties must have been residents of the foreign country for a reasonable period of time; and (c) the parties must have been properly represented and participated in the

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legal proceedings according to the laws and procedures of the foreign country. The decision was progressive and timely, and reiterated the necessity and urgency of legislative intervention in addressing this issue of recognizing foreign judgments especially with regard to matrimonial matters.

Sri Lanka's stand with regard to the choice of law for the recognition of foreign judgments in personal matters, had been subjected to judicial scrutiny on earlier occasions as well, notably in *Le Mesurier v. Le Mesurier*³⁸ and *Ratnasingham v. Tikiribanda Dassanaikie and Others*.³⁹ However, many uncertainties remained unresolved, and the necessity for a clear legal positioning had never felt more acute than in the present social context where outward migration of Sri Lankans has risen to unprecedented levels and inter-country marriages has become normal than exceptional during the *Le Mesurier* time. In this context, the issues raised and conditions laid down by Rajakaruna J. in *Champika Harendra Silva* were quite pertinent. The legislature responded swiftly and positively, and passed the Reciprocal Recognition, Registration, and Enforcement of Foreign Judgments Act, No. 49 of 2024 (RRREFJ). The Act became effective from March 26, 2025 in respect of 53 countries listed in the Schedule. It repeals both REJO and EFJO.

THE RRREFJ ACT OF 2024

The 2024 Act comes in to bridge the gap between global realities and the local legal framework. Its scope is much wider than REJO, as it applies to the reciprocal recognition, registration and enforcement of foreign judgments regarding matrimonial matters, i.e. divorce, annulment and separation, as well as monetary obligations.⁴⁰ It recognizes final and conclusive judgments of Scheduled jurisdictions.⁴¹ An application for recognition, registration and enforcement of a foreign judgment can be

³⁸ [1895] A.C.517, [1895-1899] All E.R. 836

³⁹ (1998) 1 Sri. L.R. 8

⁴⁰ The Act goes beyond matrimonial matters as it extends to commercial transactions as well. Moreover, its application extends to natural persons as well as companies, including Business Process Outsourcing (BPO) companies, which are increasing in the country. The Act does not apply however, to tax, charge, fine or other penalty payable under a judgment of a foreign court.

⁴¹ As at present, they are the 53 Commonwealth countries.

made within a period of ten years from the final judgment, and by way of summary procedure as provided for in the Civil Procedure Code.

LIMITATIONS

The Act applies to a foreign judgment for the dissolution or annulment of a marriage or separation of the parties to a marriage only if such judgment is obtained in respect of marriages entered under the General Marriages Ordinance No. 19 of 1907 (GMO) and where such judgment shall be deemed final and conclusive as long as either party to the marriage was domiciled in such country at the date of the judgement; habitual resident in such country for a period not less than one year before the date of the judgment; was a national of such country at the time of the judgment; or both parties have submitted to the jurisdiction of such country.⁴² This leaves out Muslims who, under Sri Lankan law, are compelled to marry under the Muslim Marriage and Divorce Act 13 of 1951 (MMDA), and the Knadyan Sinhalese who may choose to register their marriages under the Kandyan Marriage and Divorce Act 44 of 1952 (KMDA). While the majority of the population are governed by the General Law and are required to follow the GMO in matters relating to their marriages, a considerable percentage of the Sinhalese population who are recognized as ‘Kandyans’ still opt to marry under the KMDA. The Muslims who constitute 9.7% of the total population of the country have no choice but to contract their marriages under the MMDA. The exclusion of their marriages from the 2024 Act raises multiple concerns including their right to equality before the law, which is a fundamental right guaranteed under the national constitution.

WAY FORWARD

The legislative effort was well-recognized by the apex court of the country when the constitutionality of the RRREFJ Bill was challenged in S.C.(SD) No.80/2024 and S.C.(SD) 81/2024. However, the Act has room to be more democratic in terms of its application, especially in the current social context in which the nation is struggling to overcome socio-economic devastations caused by multiple reasons including ethnicity, race, and religion. With necessary amendments to avoid these obvious racial and

⁴² Section 3(1)(b).

religious exclusions, the Act can strengthen the countries ties with the global village more fully.