



# CONFRONTING ACCOUNTABILITY FOR HATE SPEECH IN SRI LANKA

A Critique of the Legal Framework

CENTRE FOR POLICY ALTERNATIVES | September 2018

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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## **Table of Contents**

Acronyms .....	5
Methodology .....	6
Executive Summary.....	7
Introduction.....	12
The International Covenant On Civil And Political Rights Act.....	19
The Penal Code .....	30
Prevention Of Terrorism (Temporary Provisions) Act (PTA).....	42
Conclusion And Recommendations .....	50

## **Acronyms**

ICCPR	International Covenant on Civil and Political Rights
PTA	The Prevention of Terrorism (Temporary Provisions) Act
UNHRC	United Nations Human Rights Council
IPC	Indian Penal Code
UPR	Universal Periodic Review
HRCSL	Human Rights Commission of Sri Lanka
HRC	Human Rights Committee (United Nations)

## **Methodology**

The report is based on desk and field research as well as interviews conducted with a range of stakeholders, from April 2018 to July 2018. The interviews include those conducted with a number of lawyers, government officials, civil society actors and others.

## **Executive Summary**

### **An Adequate Legal Framework, Inadequately Applied**

The report analyses Sri Lanka's existing legal framework with regard to prosecuting hate speech in depth, detailing the various laws that comprise the framework, how they are applied and their shortcomings. The report makes the central argument that the legal framework provides adequate, albeit imperfect, means to prosecute offenders of hate speech. This makes the near complete absence of state action in terms of actually proceeding with indictments and prosecutions over the years even more glaring, and its consequence of providing continued impunity for perpetrators even more pronounced.

Inaction by the state to hold perpetrators to account can be attributed to several reasons, including a lack of political will, institutional inertia, and a lack of awareness of the available legal provisions themselves. The resulting emboldening of hate speech purveyors has seen a rise in incidents of hate speech in the post-war period. The violence in Aluthgama in 2014, in Gintota in 2017 and in Ampara and Digana in 2018 are principal contemporary instances of hate speech, and associated hate crimes, being unleashed on minority communities, particularly the Muslim community. Despite ample footage, statements and evidence available at each instance, the absence of genuine investigations, filed indictments and prosecutions, even years after the fact, fuels the perception that perpetrators are free to continue their activities with no legal repercussions.

In the absence of adequate protection, as evidenced especially in areas in Kandy in 2018, minority communities are fast losing confidence in the state and law enforcement agencies. These communities experience a dual sense of vulnerability, being both exposed to hate speech and hate crimes, and having no recourse or means of justice afterwards.

### **The Legal Framework on Hate Speech**

The lack of prosecution of perpetrators of hate speech is not due to the lack of legislation. In this report, CPA demonstrates the limited steps taken to address accountability despite the existing legal framework. The report accordingly provides a range of recommendations for potential legal, policy and structural reforms. The report reiterates that swift and decisive action is needed by the Government and other stakeholders to prevent future incidents and strengthen the rule of law.

The following laws in Sri Lanka can be used to prosecute hate speech and comprise the legal framework this report analyses:

1. International Covenant On Civil and Political Rights Act 56 of 2007
2. The Penal Code Ordinance No. 2 of 1883.
3. The Prevention of Terrorism (Temporary Provisions) Act No. 48 Of 1979
4. Police Ordinance (No. 16 of 1865)

## **The ICCPR Act**

Article 20 of the International Covenant on Civil and Political Rights (ICCPR) states that “*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*”. The ICCPR Act gives effect to this through its section 3 which states that “*No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”.

The ICCPR Act is the most effective piece of legislation Sri Lanka has in terms of prosecuting offenders of hate speech. However, despite being enacted over ten years ago, there have regrettably been no reported judgements or trials that have been concluded under the Act.

In the course of research, CPA identified that the key reason for the lack of prosecutions under ICCPR Act appears to be the lack of awareness among prosecutors, lawyers and judges regarding the legal provisions of the Act. A number of additional reasons, such as political influence and fears of public backlash also contribute to the Act not being used to advance prosecutions. Conversely, there were concerns by certain sectors that attempts could be made to misuse the ICCPR Act to curtail freedom of expression and crush dissent. As such, an independent judiciary with the expertise and knowledge on the subject matter and legal framework is a vital component in the process of effectively adjudicating cases related to the incitement of hate speech and to ensure there is no misuse of the law.

Though the ICCPR Act is a step in the right direction, the Act in its present form does not adequately represent Sri Lanka’s commitments under the Covenant. The present Act contains only a very few articles that are contained in the ICCPR and is missing key, vital provisions such as Article 19 on the freedom of expression. As such, CPA’s recommendations regarding the Act extend in a number of directions. First, the Act’s section 3 on incitement should specifically be implemented. Second, the Act should be amended to incorporate Article 19 and to explicitly recognise the coherence between Articles 19 and 20 as per international legal jurisprudence. Finally, the judiciary should apply the three-part test of legality, proportionality and necessity contained in Article 19 to hate speech case; and incorporate the threshold of “incitement” enumerated in Article 20 of the ICCPR in deciding cases on hate speech.

## **The Penal Code**

Chapter XV of the Penal Code titled “of offences relating to religion” contains six provisions dealing with offences against religion. Among these, section 291A and section 291B concern the “uttering of words with the intent to wound religious feelings”<sup>1</sup> and “deliberate and malicious acts intended to outrage religious feelings”<sup>2</sup>. Section 120 of the Penal Code has also been used in certain instances to prosecute offenders of hate speech. Thus, Section 291A, Section 291B and Section 120 can loosely be cited as the Penal Code provisions on hate speech.

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<sup>1</sup> Penal Code of Sri Lanka, Section 291A.

<sup>2</sup> Ibid. Section 291B.

Regrettably, there is a lack of reported judgements under these particular provisions, as many of these cases are heard in the Magistrate's Court. However, as these sections reproduce provisions from the Indian Penal Code, the report analyses the corresponding Indian Penal Code provisions in order to ascertain the suitable interpretations and thresholds for the offences specified in these sections.

Though the Penal Code drafted in 1883 has been amended numerous times, CPA is unaware of any comprehensive revision undertaken to amend the sections that are currently used to prosecute hate speech. An attempt by the present government to introduce a new provision on hate speech in 2015 was later scrapped due to the severe criticism it received for being a near-verbatim reproduction of the hugely problematic section 2(1)(h) of the PTA which seriously encroaches upon of the freedom of expression. Despite this, the Penal Code provisions restricting speech in their current form must be revisited in order to meet the needs of contemporary society.

The overall observation made in the course of research is that language in these provisions is vague and overbroad and violates Sri Lanka's obligations under international law, especially under the ICCPR which prohibits the restriction on freedom of expression unless they are necessary and proportionate. Past experiences in Sri Lanka, as well as overseas, demonstrate the unsettling impact legal provisions of this nature can have on freedom of expression. As such, CPA calls for these colonial provisions to be amended in line with international standards or repealed in totality.

## **Prevention of Terrorism Act**

CPA and numerous actors have over the years commented on how the PTA has been used to target minorities, critics of successive governments, journalists and political opponents. Cases such as *J. Tissainayagam*<sup>3</sup> and *Azath Saly*<sup>4</sup> aptly demonstrate this. This report does not offer a comprehensive critique of the PTA as has been undertaken elsewhere<sup>5</sup> but focuses instead on specific aspects of the law relevant to hate speech prosecution.

Section 2(1)(h) of the PTA<sup>6</sup> is the most relevant provision in this regard. It has been severely reproached due to the broad and ambiguous manner in which the offence has been

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<sup>3</sup> Groundviews.org, 'A travesty of justice: The sentencing of JS Tissainayagam' (*Groundviews*, 09th of January 2009) <<http://groundviews.org/2009/09/01/a-travesty-of-justice-the-sentencing-of-j-s-tissainayagam/>>

<sup>4</sup> Colombotelegraph 'Civil Society Condemns Azath Salley Arrest And Detention Under PTA' (*Colombo Telegraph*, 7th May 2013) <<https://www.colombotelegraph.com/index.php/civil-society-condemns-azath-salley-arrest-and-detention-under-pta/>>

<sup>5</sup> 'THE NEED TO REPEAL AND REPLACE THE PREVENTION OF TERRORISM ACT (PTA)' (*Centre for Policy Alternatives*, 9th May 2013) <<http://www.cpalanka.org/the-need-to-repeal-and-replace-the-prevention-of-terrorism-act-pta/>>

<sup>6</sup> Section 2 (1) (h) Any person who— by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups shall be guilty of an offence under this Act.

described, and is a central reason as to why the PTA has and continues to attract criticism by the international community since it was enacted.<sup>7</sup> The report analyses the *Tissainayagam* judgement which turns on section 2(1)(h), as well as corresponding provisions of the Indian Penal Code, which is similar to section 2 (1) (h) in an attempt to question the suitability of the PTA provision as a “reasonable limitation” on the freedom of expression.

CPA in no way endorses the prosecution of hate speech under the PTA and the analysis it undertakes in this report underscores its continued calls for the PTA’s repeal in its present form.<sup>8</sup> Given the Sri Lankan experience, it is of paramount importance that this piece of draconian legislation is repealed and any new law that is enacted in replacement be legislated in a manner that is transparent, inclusive and in line with Sri Lanka’s international obligations.

## Police Ordinance

Though the Police Ordinance does not directly refer to hate speech, the Police are given ample powers under the Ordinance to control and contain situations where there is a threat to public peace and public order. Section 79(2)<sup>9</sup> of the Police Ordinance provides the Police the power to arrest a person without a warrant<sup>10</sup> when any person in a public place or meeting uses “threatening, abusive or insulting words or behaviour intending to provoke a breach of the peace or where the breach of the peace is likely to be occasioned”. Despite these powers, however, the Police were accused of inaction during the violence in Aluthgama, Gintota and Digana.<sup>11</sup>

A number of fundamental rights cases were filed against the Police for their inaction during these incidents. Unfortunately, continuing inaction by the Police contributes to the growing culture of impunity. The Police must accordingly take swift action to utilise the Police Ordinance to promptly arrest offenders of hate speech and conclude investigations within a specific timeframe without unnecessary delays. Further, specialised training should be provided to a team which focuses on incidents of hate speech and related issues. Additionally, better coordination should be established between investigation agencies such

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<sup>7</sup> Available at < [https://www.ohchr.org/Documents/Countries/LK/Sri\\_LankaReportJuly2018.PDF](https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF)>

<sup>8</sup> Centre for Policy Alternatives, Recommendations for Law Reform (Centre for Policy Alternatives, 2015) Available at <<https://www.cpalanka.org/wp-content/uploads/2015/05/CPA-Submission-to-Sri-Lanka-Law-Commission.pdf>>, Centre for Policy Alternatives, “THE NEED TO REPEAL AND REPLACE THE PREVENTION OF TERRORISM ACT (PTA)” 9<sup>th</sup> May 2013 available at <<http://www.cpalanka.org/the-need-to-repeal-and-replace-the-prevention-of-terrorism-act-pta/>>

<sup>9</sup>Section 79(2) of the Police Ordinance- Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour which is intended to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence under this section.

<sup>10</sup> Section 79 (4)

<sup>11</sup> The role of the police in failing to prevent the hate campaign against Muslims in Aluthgama and Digana has been criticised extensively. There were also reports of active participation by police officers in aiding the anti-Muslim riots in the past. See, Groundviews <<https://groundviews.org/2016/11/22/petition-signed-by-over-5000-inaction-of-police-in-face-of-extremism/>> Al Jazeera <<https://www.aljazeera.com/news/2018/03/sri-lanka-muslim-shops-mosques-targeted-buddhist-hardliners-180305165900594.html>>

as the Police and the Attorney General's Department (AG's Department). This report looks into the need for reforms within the Police to restore the public confidence in law enforcement agencies.

### **Recommendations to Relevant Stakeholders**

The report concludes by providing a comprehensive set of recommendations to different stakeholders including to the Government, law enforcement agencies including the police and the Attorney General's Department, the judiciary, independent commissions, the media, civil society actors, religious and political leaders and the international community. The recommendations span both revising and amending the existing legal framework on hate speech, and how it is should be applied by various actors in the legal system. The recommendations also extend to how actors outside of immediate legal processes can engage with how hate speech is identified, reported, conceptualised and ultimately addressed. To truly end the dissemination of hate speech, it is of vital importance that all these stakeholders work together to combat Sri Lanka's culture of impunity and breakdown in rule of law.

## Introduction

Post-war Sri Lanka has witnessed numerous incidents of ethno-religious violence.<sup>12</sup> From Aluthgama in 2014 to Gintota<sup>13</sup> in 2017 to Ampara and Digana in 2018, instances of ethno-religious violence have escalated to the point of property damage, grievous injury, and—in the cases of Aluthgama and Digana—death.<sup>14</sup> Violence of this nature is not restricted to the Buddhist and Muslim communities, as seen in these examples, nor is it a novel phenomenon. Anti-Tamil riots in 1958<sup>15</sup> and 1977,<sup>16</sup> the events of Black July in 1983,<sup>17</sup> the 1915 Sinhalese-Muslim riots,<sup>18</sup> the 2001 Mawanella riots,<sup>19</sup> and numerous other instances, stemmed from festering tensions between ethnic or religious communities. In fact, the incidence of ethno-religious violence in modern Sri Lanka can be traced as far back as the Kotahena riots of 1883, which involved clashes between Buddhist and Christian communities.<sup>20</sup>

This latest bout of ethno-religious violence has prompted demands for the prosecution of both hate crimes as well as the hate speech that is believed to have led to such violence. As pointed out by numerous parties in response to the government's attempts to introduce new hate speech legislation in 2015,<sup>21</sup> Sri Lanka's legal framework already contains a number of provisions addressing hate speech.<sup>22</sup> However, the dearth of prosecutions or convictions under this framework despite the recurrence of these incidences is cause for concern. Inaction by successive governments has also contributed to increasing fears among minorities and strengthened a sense of impunity among perpetrators. The events of the past few years have made it apparent that neither the incidence of hate speech nor the severity of its consequences are likely to diminish without serious and tangible action being taken.

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<sup>12</sup> Zaheena Rasheed, 'In Sri Lanka, Hate Speech And Impunity Fuel Anti-Muslim Violence' (*Aljazeera.com*, 2018) <<https://www.aljazeera.com/news/2018/03/sri-lanka-hate-speech-impunity-fuel-anti-muslim-violence-180310020253272.html>>

<sup>13</sup> 'Gintota Situation Under Control, 19 Arrested' (*Dailymirror.lk*, 2018)

<<http://www.dailymirror.lk/article/Gintota-situation-under-control-arrested-140639.html>>

<sup>14</sup> 'Muslims Killed In Sri Lanka Clashes' (*BBC News*, 2014) <<https://www.bbc.com/news/world-asia-27864716>>

<sup>15</sup> Laavanyan M Ratnapalan. MEMORIES OF ETHNIC VIOLENCE IN SRI LANKA AMONG IMMIGRANT TAMILS IN THE UK. Ethnic and Racial Studies, Taylor Francis (Routledge), 2011, PP (PP),

<sup>16</sup> Jagath P. Seneratne, *Political Violence in Sri Lanka, 1977-1990: Riots, Insurrections, Counter-Insurgencies, Foreign Intervention*. 1998, VU University Press, p. 23-25.

<sup>17</sup> D.B.S. Jeyaraj, 'Black July: Thirty-fifth Anniversary of 1983 Anti-Tamil Violence' (*The Daily Mirror*, 2018) <<http://www.dailymirror.lk/article/Black-July-Thirty-fifth-Anniversary-of-Anti-Tamil-Violence-153018.html>>

<sup>18</sup> P TM Fernando, "The British Raj and the 1915 Communal Riots in Ceylon." *Modern Asian Studies*, (1969, jstore) 245-255. Available at [www.jstor.org/stable/311950](http://www.jstor.org/stable/311950)

<sup>19</sup> 'Police Curfew in Mawanella after clash between two factions' (*The Island*, 2001)

<sup>20</sup> 'History of Ceylon Police: How police tackled the religious riots), (*The Sunday Times*, 1997) <<http://www.sundaytimes.lk/970803/plus10.html>>

<sup>21</sup> Two petitions in SC against Govt. amendments to Penal Code on hate speech ( Daily FT, 2015) ≤ <http://www.ft.lk/article/509053/Two-petitions-in-SC-against-Govt--amendments-to-Penal-Code-on-hate-speech>>

<sup>22</sup> These laws are discussed in detail in the subsequent chapters of this report.

In light of this, there is a need to evaluate the existing Sri Lankan legal framework which provides for the prosecution of hate speech to determine whether the lack of action on the issue is a product of legal gaps; practical issues of a lack of capacity or resources; or other, more complex reasons stemming from the current political context and dynamics.

Accordingly, the Centre for Policy Alternatives (CPA) has prepared this report to assess the legal framework on hate speech in Sri Lanka. The report identifies gaps in the framework and overbroad provisions that may not curb hate speech, lead to violations of fundamental rights and freedoms and facilitate excessive censorship. The report also fills a gap in the literature by shedding light on the limited number of steps taken to address accountability in this regard despite a broad legal framework addressing the issue. The report accordingly provides a range of recommendations for potential legal, policy and structural reforms. The report reiterates that swift and decisive action is needed by the Government and other stakeholders to prevent future incidents and strengthen the rule of law. The report is, however, not an attempt to document incidents of hate speech as this task has been initiated by others.

The report begins with a brief theoretical discussion on freedom of expression and hate speech in the remainder of this introductory chapter. The following chapters examine the legal framework pertaining to hate speech in Sri Lanka by laying out the key legislation—the ICCPR Act<sup>23</sup>, the Penal Code<sup>24</sup>, the Prevention of Terrorism Act<sup>25</sup> and the Police Ordinance<sup>26</sup>—and examining judicial decisions arising from these provisions. This analysis reveals a number of practical challenges which confront the application of these laws to hold perpetrators to account and thus result in limited prosecutions and convictions. The chapters accordingly provide a number of ideas for action and reform. The concluding chapter collates and summarises these reform proposals to address lacunae in the existing legal framework.

## **Freedom of Expression and Hate Speech**

It is necessary to preface an assessment of a legal framework on hate speech with a brief discussion on the theoretical conceptualisations of freedom of expression and hate speech and their relevance to legislating and regulating hate speech.

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<sup>23</sup> International Covenant On Civil and Political Rights (ICCPR) Act 56 of 2007

<<http://citizenslanka.org/wp-content/uploads/2015/12/International-Covenant-on-Civil-Political-Rights-ICCPR-Act-No-56-of-2007E.pdf>>

<sup>24</sup> The Penal Code Ordinance No. 2 of 1883.

<[http://www.commonlii.org/lk/legis/consol\\_act/pc25130.pdf](http://www.commonlii.org/lk/legis/consol_act/pc25130.pdf)>

<sup>25</sup>The Prevention of Terrorism (Temporary Provisions) Act (PTA) No. 48 Of 1979

<[http://www.commonlii.org/lk/legis/num\\_act/potpa48o1979608/](http://www.commonlii.org/lk/legis/num_act/potpa48o1979608/)>

<sup>26</sup> Police Ordinance (No. 16 of 1865)

<[http://www.vertic.org/media/National%20Legislation/Sri%20Lanka/LK\\_Police\\_Ordinance.pdf](http://www.vertic.org/media/National%20Legislation/Sri%20Lanka/LK_Police_Ordinance.pdf)>

Freedom of expression is identified as a fundamental human right by Article 19 of the Universal Declaration of Human Rights,<sup>27</sup> and was affirmed under international law by Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR),<sup>28</sup> and Article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>29</sup> both of which Sri Lanka is party to. This commitment is reflected in the Sri Lankan Constitution under Article 14(1)(a) which identifies “the freedom of speech and expression including publication” as a fundamental right.<sup>30</sup>

These provisions reflect a broad acceptance of the benefits freedom of expression confers on society as a whole. This is founded on the belief that a ‘marketplace of ideas’—that is, a space where any and all ideas and opinions are allowed to flourish and compete with one another for the public’s belief and attention—is a vital component for collective decision making.<sup>31</sup> The logic here is that that political debate and dissent are essential to a healthy democracy, and freedom of expression may only facilitate debate and dissent if it protects the right to voice opinions and ideas that are looked upon unfavourably by society.

This metaphor, however, falters when considered in the context of hate speech. Many who argue against the regulation of hate speech hold that more speech is the best response to bad speech.<sup>32</sup> Yet engaging in counterspeech may not be realistic for members of marginalised groups, who may not have the resources to do so; who may fear violent retaliation; or who may experience psychological responses that disempower them from responding.<sup>33</sup> This compromises the claim that free speech can impartially preserve dissent from all quarters. It further suggests that hate speech, if allowed to run unchecked, poses a threat to free speech of disadvantaged groups instead, and by extension, to those rights which stem from the freedom of speech itself.<sup>34</sup> Moreover, proponents of hate speech regulation argue that hate speech is not a form of free expression but a manifestation of efforts to marginalise its targets and undermine inclusiveness within society. As they interpret it, hate speech functions as a means of reassuring like-minded individuals that they are not alone in their thinking, and—

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<sup>27</sup> Universal Declaration of Human Rights, available at <<http://www.un.org/en/universal-declaration-human-rights/>>

<sup>28</sup> Article 19(2), International Covenant on Civil and Political Rights, available at <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>

<sup>29</sup> International Convention on the Elimination of All Forms of Racial Discrimination, available at <<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>>

<sup>30</sup> Constitution of the Democratic Socialist Republic of Sri Lanka, available at <<http://www.parliament.lk/files/pdf/constitution.pdf>>

<sup>31</sup> Daniel E Ho & Frederick Schauer, “TESTING THE MARKETPLACE OF IDEAS” NYUL REV, (2015), <[http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-90-4-Ho\\_Schauer.pdf](http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-90-4-Ho_Schauer.pdf)>

<sup>32</sup> Nadine Strossen, *Hate: Why we should resist it with free speech not censorship* (Oxford University Press, 2018)

<sup>33</sup> Katharine Gelber and Luke McNamara, “Evidencing the harms of hate speech.” (2016) 22(3) *Social Identities* 324-341. <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=3288&context=lhapapers>>

<sup>34</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: <<http://www.refworld.org/docid/453883fc22.html>>

most worryingly—of inciting them to act on these beliefs.<sup>35</sup> Framed thus, the case for controlling hate speech rests in preventing the enactment of violence and discrimination against the targets of such speech.

That said, the reservations people hold towards the monitoring of hate speech are understandable given the stakes involved. In absolute terms, restricting hate speech requires restricting free speech, and efforts to selectively restrict some forms of speech—no matter how well intentioned—can have disastrous consequences if executed poorly. At worst, they have the potential to create a slippery slope towards excessive censorship that effectively nullifies the perceived benefits of the initial restriction by providing a legally validated avenue for silencing dissent. Of course, this is not to say that restricting hate speech is fundamentally incompatible with the right to freedom of expression, merely to highlight that striking a balance between the two interests is a complex task.

## Legislating on Hate Speech

The international commentary provides some guidance on how best to achieve the desired balance between the right to freedom of expression and regulating hate speech. Article 19 of the ICCPR guarantees the right to freedom of expression in terms similar to the UDHR.<sup>36</sup> It gives absolute protection to the right to hold opinions<sup>37</sup> and protects the right to seek, receive and impart information and ideas.<sup>38</sup>

However, the ICCPR does allow restrictions to be placed on free speech by law for the protection of competing interests. The permitted restrictions for the purposes of this discussion are (a) the respect for the rights or reputations of others and (b) for the protection of national security or of public order, or of public health or morals.<sup>39</sup> The UN Human Rights Committee has made it clear that these restrictions may not put in jeopardy the right itself.<sup>40</sup> As such, any hate speech laws must themselves fall within these established grounds for

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<sup>35</sup> Richard Delgado and Jean Stefancic, *Must We Defend Nazis?: Why the First Amendment Should Not Protect Hate Speech and White Supremacy* (NYU Press, 2018)

<sup>36</sup> Article 19 of the ICCPR- (1). Everyone shall have the right to hold opinions without interference (2).

Everyone shall have the right to freedom of expression; this right shall include 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

(3). The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>37</sup> Article 19 (1) of the ICCPR

<sup>38</sup> Article 19 (2) of the ICCPR

<sup>39</sup> Human Rights Committee, General Comment No. 34 at pg. 12, available at <[Http://Www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx](http://www.ohchr.org/En/Professionalinterest/Pages/Ccpr.aspx)>

<sup>40</sup> General Comment No. 34 on Article 19 of the ICCPR, available at <<http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx>>

legitimately restricting free speech. Article 20 of the ICCPR<sup>41</sup>—which imposes a positive duty on states to prohibit advocacy of national, racial, religious hatred that constitutes incitement to discrimination, hostility and violence<sup>42</sup>—is designed to be read in tandem with Article 19,<sup>43</sup> with restrictions on expression pursuant to Article 20 being permissible under the Article 19(3) as well.<sup>44</sup>

In Sri Lanka, not only is the fundamental right of free speech itself set out in terms that are narrower in scope to the rights as articulated in the ICCPR, but Articles 15(2) and 15(7) of the Constitution outline a more extensive list of restrictions on freedom of expression in comparison to the ICCPR. Articles 15(2) and 15(7) establish that freedom of expression shall be subject to such restrictions as may be *prescribed by law* in the interests of “racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence”,<sup>45</sup> and “*national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society*”,<sup>46</sup> respectively.

It is also important to note that Article 19 (3) of the ICCPR requires the restrictions placed on freedom of expression to be “*by law*” and “*necessary*”. Yet, the only procedural safeguard provided for by the Sri Lankan Constitution in Article 15 for the imposition of restrictions on fundamental rights is that they are required to be prescribed by law. As the Constitution does not include a requirement that the restrictions need to be reasonable or necessary, the government has considerable leeway in the imposition of restrictions on rights.<sup>47</sup>

Much of what is referred to as hate speech legislation never explicitly mentions or defines the term—due in part to the fact that there is no universally accepted definition of the term.<sup>48</sup> Although understood on an intuitive level, the precise nature of hate speech is hard to pin down, especially in a legal context. Colloquial understandings of the term are significantly more expansive than most legal and academic attempts at a definition. This is likely due to the fact that the subjectivity involved in determining what constitutes hate speech in

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<sup>41</sup> Article 20 of the ICCPR- (1). Any propaganda for war shall be prohibited by law. (2). Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

<sup>42</sup> Article 20(2) of the ICCPR

<sup>43</sup> Tarlach Mcgonagle, International And European Legal Standards For Combating Racist Expression: Selected Current Conundrums, Presentation For ECRI,( 2006 ) 41

<sup>44</sup> Malcolm Ross v. Canada, CCPR/C/70/D/736/1997, UN Human Rights Committee (26 October 2000), available at: <http://www.refworld.org/cases/HRC.3f588efc0.html>; Human Rights Committee General Comment No. 34, available at <<Http://Www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx>>

<sup>45</sup> Section 15(2) Constitution of the Democratic Socialist Republic of Sri Lanka

<sup>46</sup> Ibid.

<sup>47</sup> Rohan Edrisinha and Asanga Welikala, “GSP Plus and the ICCPR: A Critical Appraisal of the Official Position of Sri Lanka in respect of Compliance Requirements”, in “GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues”, CPA and Friedrich Ebert Stiftung, October 2008 pp. 93- 140 available at : <[http://library.fes.de/pdf-files/bueros/sri\\_lanka/08684.pdf](http://library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf)>

<sup>48</sup> Andrew Sellers, ‘Defining Hate Speech.’ (2016) available at <<https://cyber.harvard.edu/publications/2016/DefiningHateSpeech>>

informal settings holds dangerous implications should it be formalised into law, as it gives the state a concerning degree of discretion and control over the types of speech it sees fit to censor. Therefore, most legislation of this nature tends to establish narrowly defined categories of speech that may be legitimately restricted in line with international laws rather than attempting any broad and objective definitions. Even still, a degree of subjectivity remains in setting thresholds, and in interpreting terms including “hatred” and “incitement” that appear in provisions such as article 20 of the ICCPR.

This opens the door to a diverse array of legislation under the umbrella of hate speech legislation. Having established that there *can* be legitimate restrictions on free speech, ascertaining whether hate speech laws are in-line with these restrictions becomes the challenge. Although concerns over poorly executed hate speech laws creating a slippery slope towards excessive censorship may feel exaggerated, the abuse of hate speech laws *has* been documented. Interestingly, a number of these laws restrict speech not because it incites discrimination or violence towards a community, but because it may move a community to respond violently to a perceived offence.<sup>49</sup> Of particular concern is their use of the language of offence, which critics have consistently noted creates more room for the exercise of subjective judgment in determining what speech must be censored.<sup>50</sup> For those interested in abusing the law to go after dissidents or political opponents, this, therefore, offers a simpler route than other types of hate speech legislation. In the case of Sri Lanka, the Penal Code offences discussed in this report exemplify instances of hate speech legislation that move towards this concerning take on hate speech legislation. Although this type of legislation poses the most obvious threat of censorship, the capacity for abuse remains even in those alternatives that seek to restrict incitement to violence and discrimination, and they, too, must be assessed with equal care.<sup>51</sup>

## Hate Speech Online

Hate speech also acquires new dimensions online. As the events in March 2018—and the subsequent government-mandated social media blackout<sup>52</sup>—illustrated, the advent of social media has transformed hate speech’s reach and speed of transmission. Online hate speech is a multifaceted issue, and an in-depth discussion of all its dimensions, the unique challenges they pose, and recommendations for addressing them, is beyond the scope of this report.

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<sup>49</sup> Cherian George, “Regulating “Hate Spin”: The Limits of Law in Managing Religious Incitement and Offense”(2016) International Journal of Communication available at: <http://ijoc.org/index.php/ijoc/article/view/5451/1688>

<sup>50</sup> Nadine Strossen, *Hate: Why we should resist it with free speech not censorship* (Oxford University Press 2018)

<sup>51</sup> Cherian George, “Regulating “Hate Spin”: The Limits of Law in Managing Religious Incitement and Offense”(2016) International Journal of Communication available at: <http://ijoc.org/index.php/ijoc/article/view/5451/1688>

<sup>52</sup> ‘Sri Lanka blocks social media as deadly violence continues’ (*The Guardian*, 7 March 2018) <https://www.theguardian.com/world/2018/mar/07/sri-lanka-blocks-social-media-as-deadly-violence-continues-buddhist-temple-anti-muslim-riots-kandy>

That said, CPA has touched on aspects of this issue in its previous publications,<sup>53</sup> and certain factors discussed herein remain relevant to discussions of hate speech online as well as offline.

It has been reported that the provisions of the ICCPR Act of 2007 have been used to arrest actors spreading hate online,<sup>54</sup> and so social media activity that includes incitement to “discrimination, hostility or violence”<sup>55</sup> could legitimately be regulated under the existing law, in much the same way as an offline activity. Additionally, although the regulation of hate speech on social media remains an important issue, it is vital that conversations on this aspect of regulation do not overshadow debates pertaining to other aspects, with both requiring attention. This is particularly important to acknowledge in light of media reports that emerged in the wake of the violence in Digana this year, carrying statements by state officials that suggested new legislation meant to deal specifically with online hate speech (alongside other concerns such as fake news) was under consideration.<sup>56</sup> Although such legislation should account for concerns specific to the medium, at the bare minimum, the considerations that this report explores in relation to existing legislation will need to be factored into the drafting process to ensure future legislation is in line with international standards from the outset.

Furthermore, introducing new hate speech legislation should always be preceded by an analysis of whether existing legislation is already sufficient to tackle the problem. Although they require slightly different approaches, these are but two manifestations of a single issue that feed into each other. If Sri Lanka is to effectively minimise the incidence of hate speech and hold those responsible to account—with accountability expanding past the perpetrator to include social media providers whose response to such expression plays an integral role in determining its reach—both manifestations must be addressed.

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<sup>53</sup> Roxshini Wickremesinhe and Sanjana Hattotuwa, *Voting in Hate: A study of hate speech on Facebook surrounding Sri Lanka's Parliamentary Election of 2015*, (Center for Policy Alternatives 2016) available at: <<http://www.cpalanka.org/wp-content/uploads/2016/03/Voting-in-Hate-1.pdf>>, Shilpa Samarasinghe and Sanjana Hattotuwa, *Liking Violence: A study of hate speech on Facebook in Sri Lanka*, (Center for Policy Alternatives, 2014) <<http://www.cpalanka.org/wp-content/uploads/2014/09/Hate-Speech-Final.pdf>>, Roxshini Wickremesinhe and Sanjana Hattotuwa, *Saving Sunil: A study of dangerous speech around a Facebook page dedicated to Sgt. Sunil Rathnayake*, (Center for Policy Alternatives, 2015) available at: <<http://www.cpalanka.org/wp-content/uploads/2015/10/SS-Final-RW-SH-formatte.d.pdf>>

<sup>54</sup> Interviews conducted by CPA with a senior lawyer on the 15<sup>th</sup> of June 2018

Further see, Suspect who spread hate speech on FB re-remanded (Daily Mirror, March 2018),

<<http://www.dailymirror.lk/article/Suspect-who-spread-hate-speech-on-FB-re-remanded-147557.html>>

<sup>55</sup> Article 20(2) of the ICCPR

<sup>56</sup> ‘Sri Lanka mulls new laws to curb hate speech and fake news on social media’ *Ada Derana* (12 April 2018) <<http://www.adaderana.lk/news/46874/sri-lanka-mulls-new-laws-to-curb-hate-speech-and-fake-news-on-social-media>>

## The International Covenant on Civil and Political Rights Act (ICCPR ACT)

*Section 3(1), ICCPR Act – “No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”*

The International Covenant on Civil and Political Rights Act (ICCPR Act)<sup>57</sup> was enacted by the then Rajapaksa Government to purportedly give effect to the rights recognised by the ICCPR, and incorporate into the domestic law rights that were not already recognised by the Constitution or by existing law.<sup>58</sup>

There was no constitutional amendment to give effect either to the ICCPR within Sri Lanka or to facilitate access to the UN Human Rights Committee in the light of the Supreme Court’s decision in the *Singarasa V. Attorney General*.<sup>59</sup> As a result, the ICCPR Act operates under the Sri Lankan Constitution—which already recognises the right to freedom of expression, however not in identical terms—and cannot be seen as giving direct and complete effect to the ICCPR domestically. While there are many omissions and problematic features of the ICCPR Act as a whole, this report does not offer a comprehensive critique of the ICCPR Act as has been undertaken elsewhere<sup>60</sup> but focuses instead on specific aspects of the law relevant to the prosecution of hate speech.

Section 3(1) of the ICCPR Act makes it an offence for a person to propagate war or to advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>61</sup> It is also an offence under this section to attempt, aid and abet and threaten to commit such an offence.<sup>62</sup> Accordingly, if a person is found guilty of committing an offence under subsection (1) or subsection (2), the High Court can convict the accused and impose a punishment of rigorous imprisonment not exceeding ten years.<sup>63</sup> Furthermore, a person suspected or accused of committing an offence under this section cannot be granted

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<sup>57</sup> International Covenant on Civil & Political Rights (ICCPR) Act No 56 of 2007 available at: <https://www.lawnet.gov.lk/wp-content/uploads/2016/12/INTERNATIONAL-COVENANT-ON-CIVIL-AND-POLITICAL-RIGHTS-ICCPR-ACT-NO-56-OF-2007.pdf>

<sup>58</sup> See for more information on the circumstances that led to the enacting of the ICCPR Act, Rohan Edrisinha and Asanga Welikala, “GSP Plus and the ICCPR: A Critical Appraisal of the Official Position of Sri Lanka in respect of Compliance Requirements”, in “GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues”, CPA and Friedrich Ebert Stiftung, October 2008 pp. 93- 140 available at : [http://library.fes.de/pdf-files/bueros/sri\\_lanka/08684.pdf](http://library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf)

<sup>59</sup> S.C. Spl(LA) No. 182/99

<sup>60</sup> See: Asanga Welikala, “GSP Plus and the ICCPR: A Critical Appraisal of the Official Position of Sri Lanka in respect of Compliance Requirements”, in “GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues”, CPA and Friedrich Ebert Stiftung, October 2008 pp. 93- 140 available at : [http://library.fes.de/pdf-files/bueros/sri\\_lanka/08684.pdf](http://library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf)

<sup>61</sup> ICCPR ACT NO 56 of 2007

<sup>62</sup> Section 3 (2) ICCPR Act

<sup>63</sup> Section 3 (3) ICCPR Act

bail except by the High Court under exceptional circumstances.<sup>64</sup> The trial in the High Court of any person charged under this section is to be held on a day to day basis and can only be postponed for unavoidable circumstances.<sup>65</sup> The Section 3 of the Act gives effect to Article 20 of the ICCPR.<sup>66</sup>

Though the Act was enacted over ten years ago, regrettably there have been no reported judgements or trials that have been concluded under this section. To date, there has been no published literature exploring the reasons for this non-use of the ICCPR Act in the prosecution of perpetrators for hate speech. However, CPA was informed of various reasons for the reluctance to use the ICCPR Act. A key reason for the lack of prosecutions under the ICCPR Act appears to be the lack of awareness among prosecutors and lawyers of the legal provisions of the Act.<sup>67</sup> There are also broader and more political reasons for the Act's non-usage such as, reluctance on the part of some prosecutors to charge certain individuals with hate crime offences for fear of public backlash.<sup>68</sup> Even though reportedly investigations relating to certain incidents have already been completed the Attorney General's Department has delayed filing indictment and prosecutions.<sup>69</sup> These various factors have collectively resulted in the entrenchment of a culture of impunity in prosecuting offenders of hate speech.<sup>70</sup>

The only indictment under section 3(1) of the ICCPR Act so far was in 2016 when the Attorney General indicted the former General Secretary of the United National Party (UNP) Tissa Attanayake for allegedly displaying a fraudulent document to the media during the 2015 Presidential Election with the intention of inciting racial or religious hatred among ethnic communities.<sup>71</sup> The case is currently pending before the Colombo High Court. CPA therefore questions the use of this provision in this case.<sup>72</sup>

There have been a number of reports of persons being arrested under the ICCPR Act after the communal violence in Gintota in 2017<sup>73</sup> and Digana in 2018.<sup>74</sup> However, at the time of

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<sup>64</sup> Section 3 (4) ICCPR Act

<sup>65</sup> Section 3 (5) ICCPR Act

<sup>66</sup> Article 20 of the International Covenant on Civil and Political Rights – (1). Any propaganda for war shall be prohibited by law. (2). Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law

<sup>67</sup> Interviews conducted by CPA with a senior lawyer on the 26<sup>th</sup> of July 2018.

<sup>68</sup> Interviews conducted by CPA with a senior lawyer on 26 July, 2018.

<sup>69</sup> Interviews conducted by CPA with a senior lawyer on 26 July, 2018.

<sup>70</sup> Considering the serious repercussions due to the inaction to take legal action, CPA has written to the authorities inquiring into the status of specific cases and also filed RTI applications to gather further information in this regard.

<sup>71</sup> 'Case against Tissa Attanayake : Fifteen witnesses including President, PM to appear in Court today' (*Daily News*, 20th March 2017) <<http://www.dailynews.lk/2017/03/20/Law-Order/110902/Case-Against-Tissa-Attanayake-Fifteen-Witnesses-Including-President-Pm>>

<sup>72</sup> Interviews conducted by CPA with a senior lawyer on 19 June, 2018

<sup>73</sup> 'Suspects charged under Int'l Covenant on Civil and Political Rights Act Gintota violence' (*Island.lk*, 3rd December 2017) <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=176019](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=176019)>

<sup>74</sup> Interview conducted by CPA with a senior officer of the police on the 7<sup>th</sup> of June 2018.

writing this report, there have been no indictments filed by the Attorney General. Moreover, though investigations of the Aluthgama riots were reportedly concluded some time ago, there seem to be delays in filing indictments against perpetrators even after four years.<sup>75</sup> Given the recent allegations that have come to light regarding the role of some senior counsel in the Attorney General's Department,<sup>76</sup> the establishment of an independent public prosecutor's office is especially necessary and timely. This is in a context where the Attorney General's Department is expected to function both as an advisor to the government and at the same time a public prosecutor.<sup>77</sup>

The issue of when and what type of speech constitutes an incitement prohibited by Article 20 of the ICCPR remains unclear and problematic in the international as well as domestic spheres.<sup>78</sup> Similarly, there is no consensus as to the constitutive components of speech categorised as "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".<sup>79</sup> Further clarification of the ICCPR standards is therefore duly necessary.

There are also concerns if this provision may be misused to curtail freedom of expression and crush dissent.<sup>80</sup> CPA shares this concern in a context where politically influenced legal decisions have been made to target critics of the Government; the ICCPR Act, too, could be used in such a way. As such, an independent judiciary with the expertise and knowledge on the subject matter and legal framework is a vital component in the process of effectively adjudicating cases related to the incitement of hatred and to ensure there is no misuse of the law. Furthermore, CPA notes that any attempts to limit the fundamental right of freedom of expression must remain within strictly defined parameters flowing from the Constitution of Sri Lanka and international human rights instruments.

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<sup>75</sup> Ibid.

<sup>76</sup> CID DIRECTOR REVEALS HOW TOP AG'S OFFICIAL IMPEDED PROBE ON NAVY ABDUCTION CASE (Sunday Observer, August 2018) <<http://www.sundayobserver.lk/2018/08/05/news/cid-director-reveals-how-top-ag%E2%80%99s-official-impeded-probe-navy-abduction-case>>

<sup>77</sup> Centre for Policy Alternatives, *A NEW DEVOLUTION SETTLEMENT FOR SRI LANKA* in Asanga Welikala (eds) (Centre for Policy Alternatives 2016) 19 available at <<http://www.cpalanka.org/a-new-devolution-settlement-for-sri-lanka-proceedings-and-outcomes-conference-of-provincial-councils/>>, Kishali Pinto Jayawardene, *Whither the office of the Attorney General?* (Sunday Times 2008) <<http://www.sundaytimes.lk/081123/Columns/focus.html>>, Danielle Ireland- Piper "Institutional dichotomies: The Solicitor-General in Sri Lanka, (Bond Law Review 2011), available at <<https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1420&context=blr>>, Attorney General's role in defending Sri Lanka must be revisited: Lawyers (Financial Times) <<http://www.ft.lk/article/476705/Attorney-General-s-role-in-defending-Sri-Lanka-must-be-revisited---Lawyers>>

<sup>78</sup> ARTICLE 19 - GLOBAL CAMPAIGN FOR FREE EXPRESSION, 'Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred (Work in Progress 2010) A study prepared for the regional expert meeting on article 20 available at: <[http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/docs/CRP7Callamard.pdf](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/CRP7Callamard.pdf)>

<sup>79</sup> Henry Maina, "The Prohibition of Incitement to Hatred in Africa: Comparative Review and Proposal for a Threshold (Work in Progress, 2011) Study Prepared For The Regional Expert Meeting on Article 20, <<https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Nairobi/HenryMaina.doc>>

<sup>80</sup> Interview conducted by CPA with a senior lawyer on the 21<sup>st</sup> of May 2018

## Balancing Articles 19 and 20

The ICCPR, adopted by the UN General Assembly in 1976, guarantees equality and non-discrimination in the enjoyment of rights in terms similar to the Universal Declaration of Human Rights. Article 19 of the ICCPR guarantees the right to freedom of expression and gives absolute protection to the right to hold opinions<sup>81</sup> and to the right to seek, receive and impart information and ideas.<sup>82</sup> It allows restrictions on these rights only where these are “provided by law” and are “necessary for the (a) respect of rights or reputations of others and (b) for the protection of national security or of public order, or of public health or morals”.<sup>83</sup> Article 20 of the ICCPR stipulates the one clear positive duty imposed upon States as far as restrictions of freedom of expression is concerned.<sup>84</sup>

In the case of *Malcolm Ross v Canada*,<sup>85</sup> the UN Human Rights Committee (HRC) recognised the overlapping nature of Articles 19 and 20, stating that restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19(3), which lays down requirements for determining whether restrictions on expression are permissible.<sup>86</sup> Furthermore, the HRC in a General Comment states the following in relation to the relationship between articles 19 and 20:<sup>87</sup>

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *Lex specialis* with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in

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<sup>81</sup> Article 19 (1) of the ICCPR

<sup>82</sup> Article 19 (2) of the ICCPR

<sup>83</sup> Human Rights Committee General Comment No. 34 At Pg. 12 available at:

<[Http://www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx](http://www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx)>

<sup>84</sup> Dr Agnes Callamard, 'Expert meeting on the Links Between Article 19 and 20 of the ICCPR: Freedom of Expression and Advocacy and Religious Hatred that constitutes incitement to Discrimination, Hostility or Violence' (ARTICLE 19 - GLOBAL CAMPAIGN FOR FREE EXPRESSION, 2008) UN HCHR, available at: <<https://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf>>

<sup>85</sup> *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee 26 October 2000, available at: <http://www.refworld.org/cases,HRC,3f588efc0.html>

<sup>86</sup> Ibid.

<sup>87</sup> Human Rights Committee General Comment No. 34, available at <[Http://www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx](http://www.Ohchr.Org/En/Professionalinterest/Pages/Ccpr.aspx)>

which the State restricts freedom of expression, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.

Tarlach McGonagle elaborates on the close relationship between Articles 19 and 20 of the ICCPR by noting that *“during the drafting of the ICCPR, the draft article that ultimately became Article 20 was realigned so that it would immediately follow Article 19, thereby emphasising the continuity of the two articles”*.<sup>88</sup> He also notes that *“Article 20, unlike other substantive articles in the ICCPR, does not set out a right as such. Instead, it sets out further restrictions on other rights, most notably the right to freedom of expression.”*<sup>89</sup> The drafting history of the two articles, the HRC’s Comment 11<sup>90</sup> and various other HRC Opinions amount to a general acceptance that there is no real contradiction between Articles 19 and 20. This coherence is logical as different provisions of the same treaty must be interpreted harmoniously.<sup>91</sup>

### **Applying the ICCPR in the Sri Lankan Context**

The ICCPR Act does not fully give effect to the ICCPR domestically. First, the ICCPR Act was enacted and came into force alongside a Constitution which already recognises the right to freedom of expression; and second, the ICCPR Act does not recognise the right to freedom of expression as contained in the ICCPR.

When considering the ICCPR Act as operating within the framework of the Sri Lankan Constitution and not the ICCPR directly, the articulation of the right to freedom of expression in the Sri Lankan Constitution is incongruent with that of the ICCPR in a number of ways. Article 19 of the ICCPR is much wider in terms than the corresponding right to speech in Article 14(1)(a) of the Sri Lankan Constitution. Article 14(1)(a) only provides for the freedom of speech and expression including publication and does not include the right to hold opinions and the right to receive and impart information and ideas. The Supreme Court has, however, taken a liberal approach in interpreting what constitutes ‘expression’.<sup>92</sup>

Further, the requirement of necessity in Article 19(3) for the restriction of the right is absent as a whole in the Sri Lankan Constitution. While Article 15(7) of the Constitution articulates the “general welfare of a democratic society” as a restriction, this is not recognised as a distinct ground of restriction in the ICCPR (the other grounds of restriction enumerated in this provision are, however, permitted by the ICCPR).<sup>93</sup> Further, Article 15(1) imposes specific grounds of restriction on the freedom of expression such as the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court,

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<sup>88</sup> McGonagle ( n 43) 41

<sup>89</sup> Ibid.

<sup>90</sup> United Nations Human Rights Committee, General Comment 11

<sup>91</sup> McGonagle ( n 43) 41

<sup>92</sup> Right to vote (*Karunathilaka v. Dayananda Dissanayake* (No.1) (1999) 1 SLR 157) and non-speech forms of political protest (*Amaratunga v. Sirimal* (1993) 1 SLR 264) have been held to be within the ambit of freedom of expression. The Court has also held on occasion that freedom of expression includes the freedom to receive and disseminate some forms of information

<sup>93</sup> Edrisinha & Welikala (n 47) 53.

defamation, or incitement to an offence. Excepting defamation and incitement to an offence, covered by ICCPR Articles 19(3)(a) and 20 respectively, none of these other grounds for restriction are recognised by the ICCPR.<sup>94</sup>

It is unfortunate then that Article 19 of the covenant has not been incorporated to the ICCPR Act, given the acceptance that domestic implementation of Article 20 must not overstep the limits on restrictions of the freedom of expression set out in Article 19.<sup>95</sup> This is especially essential in the Sri Lankan context, where past experience has shown hate speech legislation being used as a tool by governments to crush dissent against them and silence minority communities from promoting their culture and identity or from expressing concern about discrimination against them than to prosecute actual perpetrators of hate speech.<sup>96</sup>

While there appears to be a lack of judicial decisions going into the contours of balancing hate speech with freedom of expression, the Supreme Court has in the past looked at the need to balance the Constitution's Article 14(1)(a), containing the freedom of speech and expression, with Article 15, which denotes restrictions on fundamental rights.<sup>97</sup> It appears that the Supreme Court has generally displayed a tendency to favour the state in fundamental rights challenges in this respect.<sup>98</sup> In practical terms, this has meant the affirmation of restrictions on fundamental rights. Accordingly, it is essential that the use of the ICCPR Act in the domestic sphere should strike a careful balance between the protection of freedom of expression on the one hand, and the requirement to prohibit advocacy of national, racial, religious hatred that constitutes incitement to discrimination, hostility and violence on the other. Here, the focus should be on whether acts of hate speech were committed and if their prosecution would unjustifiably curtail the freedom of speech or not while being vigilant of the possibility that provisions on hate speech can be used as a means of extending state power.

At the third cycle of the Human Rights Council's Universal Periodic Review (UPR) held in November 2017, the Government delegation emphasised that the current Government maintains a zero tolerance to hate speech and religious violence. They also stated that the

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<sup>94</sup>Ibid.

<sup>95</sup> Callamard (n 84)

<sup>96</sup> RUKI FERNANDO, In support of religious minorities, rule of law and Lakshan Dias,(ground views , 2017) available at < <https://groundviews.org/2017/06/18/in-support-of-religious-minorities-rule-of-law-and-lakshan-dias/>>

'Sri Lanka: Halt Harassment of Media' (Human Rights Watch , 2012) < <https://www.hrw.org/news/2012/07/03/sri-lanka-halt-harassment-media> >, Clare Boronow, 'Freedom of Expression in Sri Lanka: How the Sri Lankan Constitution Fuels Self-Censorship and Hinders Reconciliation' (University of Virginia School of Law, May 2012 ) 31 available at < <https://humanrightsstudyproject.files.wordpress.com/2012/07/boronow-free-speech-in-sri-lanka-may-2012-1.pdf>>

<sup>97</sup> See, Sunila Abeysekera V. Ariya Rubasinghe, Competent Authority And Others [2000] 1 Sri LR 314 , Mahinda rajapaksa v. Kudahetti and others 1992) 2 Sri L. R. 223, *Joseph Perera alias Bruten Perera Vs. The Attorney General and Others* (1992) 1 Sri L. R. 199, Malalgoda V. Attorney-General and Another [1982] 2 SLR 777,, Siriwardena And Other V Liyanage And Other [1983] Sri L.R

<sup>98</sup> Edrisinha & Welikala (n 47) 53.

*National Human Rights Action Plan (NHRAP) 2017–2021* contained a firm commitment to enforce section 3(1) of the ICCPR Act. It further noted that in June 2017 a circular had been issued instructing stern action against hate speech, requiring all police officers to take immediate action whenever hate speech was reported.<sup>99</sup>

While the present Government has made some limited progress in making arrests and awarding compensation to those affected in Aluthgama and Digana, it was widely reported that there were significant delays and inaction on the part of the Government in taking necessary action and controlling the mobs during the recent incidents of ethno-religious violence in March 2018 in the Kandy district.<sup>100</sup> Despite some progress with certain reforms, there is a great deal of disillusionment and anger among many in Sri Lanka, particularly as (piecemeal) arrests and compensation have not progressed to actual prosecutions of hate crimes.

Thus, the Government must take tangible steps to give effect to its undertaking to address hate speech by arresting, investigating and prosecuting individuals responsible for incitement of violence in adherence to the legal framework without any prejudice.

### **The Use of the ICCPR for the Prosecution of Hate Speech**

There is an ongoing challenge of clarifying the threshold of Article 20.<sup>101</sup> The contours of a universal standard on this threshold are yet to develop from jurisprudence at the international, regional and national levels.<sup>102</sup> In such a context, the question of what will give rise to incitement of hostility and violence under Article 20 is at present difficult to ascertain. This difficulty also stems from the fact that there is a lack of reference and ignorance of Article 20(2) of the ICCPR by state authorities, including the judiciary.<sup>103</sup>

An overview of Human Rights Committee (HRC) jurisprudence related to Article 20 indicates that the threshold is evaluated in conjunction with Article 19 in most cases, demonstrating its close nexus with the freedom of expression.<sup>104</sup> A few of these cases are examined below.

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<sup>99</sup> Report of the Working Group on the Universal Periodic Review\* Sri Lanka at para 39  
<<http://www.mfa.gov.lk/wp-content/uploads/2018/03/37-1.pdf>>

<sup>100</sup> 'Digana mayhem: law enforcement failures' (The Sunday Observer, March 2018)  
<<http://www.sundayobserver.lk/2018/03/11/features/digana-mayhem-law-enforcement-failures>>

'Lessons from Digana' (Daily News, March 2018)  
<<http://www.dailynews.lk/2018/03/07/editorial/144799/lessons-digana>>

<sup>101</sup> Nazila Ghanea, 'Articles 19 And 20 of The ICCPR' prepared for The UN Office of the High Commissioner for Human Rights Expert Seminar: Freedom of Expression and Advocacy of Religious Hatred That Constitutes Incitement to Discrimination, Hostility or Violence, 2-3 October 2008, Geneva, available at  
<<https://www.ohchr.org/documents/issues/expression/.../seminar2008/paperghanea.doc>>

<sup>102</sup> *ibid.*

<sup>103</sup> Maina (n 79)

<sup>104</sup> Ghanea (n 101)

*J. R. T. and the W. G. Party v. Canada* challenged a Canadian Human Rights Tribunal order<sup>105</sup> to remove a telephone message service that broadcast messages warning that “*the white race is under attack by an international conspiracy of communist agents originally financed by the New York Jewish Banking House*” and advocating against racial mixing.<sup>106</sup> The HRC noted that the messages “*clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) of the Covenant to prohibit.*”<sup>107</sup>

In *the case of Malcolm Ross v. Canada*,<sup>108</sup> the complainant, a teacher, was challenging an order by the New Brunswick Human Rights Tribunal, which was subsequently upheld by the Canadian Supreme Court to transfer him to a non-teaching position because of his anti-Semitic writings.<sup>109</sup> Upon considering whether the restriction on the author's right to freedom of expression met the conditions set out in Article 19(3), the HRC concluded that “*that the restrictions imposed on him were for the purpose of protecting the ‘rights or reputations’ of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.*”<sup>110</sup> The HRC noted that “*the influence exerted by school teachers may justify restraints*”<sup>111</sup> in order to not legitimise such discrimination.

*Robert Faurisson v. France* concerned an author and professor of literature who was convicted under the Gayssot Act for making assertions denying the existence of gas chambers used by Nazis.<sup>112</sup> In considering the complaint that this violated his right to freedom of expression, the HRC concluded that the restriction of the right was permissible under Article 19(3) as Faurisson's statements “*were of nature as to raise or strengthen anti-Semitic feelings*” and “*the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism*”.

Further, in supplementary individual opinions of the said case, Committee members state that “*Every individual has the right to be free not only from discrimination on grounds of race, religion and national origins but also from incitement to such discrimination*” and that Article 20(2) places an ‘implicit’ obligation on State parties to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

They also note that there may be circumstances where “*a narrow, explicit law on incitement that falls precisely within the boundaries*” of Article 20(2) may not “fully protect” persons

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<sup>105</sup> Canada (Human Rights Commission) *V. Taylor*, [1990] 3 S.C.R. 892, available at: <<https://Scc-Csc.Lexum.Com/Scc-Csc/Scc-Csc/En/Item/697/Index.Do>>

<sup>106</sup> *J. R. T. and the W. G. Party v. Canada* (1984) Communication No. 104/1981 available at <<Http://Hrlibrary.Umn.Edu/Undocs/Html/104-1981.Htm>>

<sup>107</sup> *ibid.* para 8

<sup>108</sup> *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee, (2000) , available at: <http://www.refworld.org/cases/HRC.3f588efc0.html>

<sup>109</sup> *Ross. New Brunswick Sch. Dist. No. 15*, [1996] 1 S.C.R. 825 (Can.) Available At <<https://Scc-Csc.Lexum.Com/Scc-Csc/Scc-Csc/En/Item/1367/Index.Do>>

<sup>110</sup> *Ibid.* para 11.5

<sup>111</sup> *Ibid.* para 11.6

<sup>112</sup> *Robert Faurisson v. France*, Communication No. 550/1993 , U.N. Doc. CCPR/C/58/D/550/1993(1996) available at <<Http://Hrlibrary.Umn.Edu/Undocs/Html/VWS55058.Htm>>

from the right to be free from incitement to discrimination on grounds of race, religion or national origins. Moreover, such incitements which evade the strict legal criteria of incitement can nevertheless “*be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.*”

The HRC further interprets the ICCPR as stipulating that the purpose of protecting one of the values mentioned in Article 19(3) is not sufficient reason to restrict expression by itself and that a restriction must also be necessary to protect the given ‘value’.<sup>113</sup> The requirement of necessity also accordingly implies an element of proportionality and “*the scope of the restriction ... must not exceed that needed to protect that value.*”<sup>114</sup> The HRC concludes that the restrictions placed on the author “*were intimately linked to the value they were meant to protect—the right to be free from incitement to racism and anti-Semitism*”.<sup>115</sup> Accordingly, the value could not have been protected by less drastic means, and the necessity of the restriction under Article 19(3) was established by reference to the ‘value’ of protecting from incitement.<sup>116</sup>

Though the jurisprudence developed by the HRC regarding article 20(2) of the ICCPR does not shed much light on the definition and the threshold of acts of religious hatred that constitutes incitement to discrimination, hostility or violence,<sup>117</sup> they provide much-needed clarity to a certain extent. Here, a distinction must be made with regards to those acts that only amount to criticism of a religion and those that would lead to incitement to discrimination, hostility and violence.<sup>118</sup> Moreover, a certain amount of caution needs to be exercised keeping in mind the ability of governments to abuse the restrictions set forth in Article 20(2).<sup>119</sup>

## **Recommendations for better implementation of the ICCPR Act**

It is necessary that certain changes are made to supplement the ICCPR Act in order for the effective implementation of section 3 in the prosecution of hate speech in Sri Lanka. However, CPA recognises that broader reforms are necessary as the ICCPR Act in its present form does not fully represent Sri Lanka’s commitments under the ICCPR.<sup>120</sup> The Act

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<sup>113</sup> Ibid. Para 8

<sup>114</sup> Ibid. Para 8

<sup>115</sup> Ibid., Para. 10

<sup>116</sup> Ghanea (n 101)

<sup>117</sup> Mohamed Saeed M. Eltayeb, “*The Limitations On Critical Thinking On Religious Issues Under Article 20 Of ICCPR And Its Relation To Freedom Of Expression*”(2010) available at:

[https://www.researchgate.net/publication/233509216\\_The\\_Limitations\\_on\\_Critical\\_Thinking\\_on\\_Religious\\_Issues\\_under\\_Article\\_20\\_of\\_ICCPR\\_and\\_its\\_Relation\\_to\\_Freedom\\_of\\_Expression](https://www.researchgate.net/publication/233509216_The_Limitations_on_Critical_Thinking_on_Religious_Issues_under_Article_20_of_ICCPR_and_its_Relation_to_Freedom_of_Expression)

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> For a detailed critique of Sri Lanka’s international obligations in terms of the ICCPR and its existing legal framework, See: Rohan Edrisinha and Asanga Welikala, “GSP Plus and the ICCPR: A Critical Appraisal of the Official Position of Sri Lanka in respect of Compliance Requirements”, in “GSP+ and Sri Lanka: Economic,

incorporates only a very few of the ICCPR's Articles and is missing key, vital provisions.<sup>121</sup> The Act states that its purpose is to give effect to only certain articles of the ICCPR and that a substantial part of the civil and political rights referred to in the ICCPR have been already given legislative recognition in the Constitution of Sri Lanka, as well as in other legislation enacted by Parliament. This is not an accurate representation of the law as has been discussed extensively in CPA's previous publications.<sup>122</sup> In making the following recommendations regarding the ICCPR Act, this paper is also not precluding discussion on other more fundamental constitutional-level reforms to Sri Lanka's entire free speech framework. Such discussion should consider more broadly and deeply the right to freedom of speech in the Constitution, and its nexus with other rights such as the right to assembly and to equality and non-discrimination.

For the better implementation of section 3 of the Act, CPA makes the following recommendations:

1. The Act must expressly recognise "incitement" as provided by Article 20 of the ICCPR, and incorporate robust definition of key terms like hatred, discrimination and violence.<sup>123</sup>
2. The Act must incorporate Article 19 on freedom of expression as contained in the ICCPR and recognise the coherence between Article 19 and Article 20.
3. Responsibility for the obligations flowing from ICCPR must be placed on the judiciary as well as the executive and the legislative organs.<sup>124</sup>
4. The judiciary must ensure the three-part test of legality, proportionality and necessity applies to incitement cases.
5. Adopt the Seven-part threshold test as put forward by "ARTICLE 19 – Global campaign for free expression" in deciding incitement cases under Article 20 of the ICCPR:<sup>125</sup>

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Labour and Human Rights Issues", CPA and Friedrich Ebert Stiftung, October 2008 pp. 93- 140 available at : [http://library.fes.de/pdf-files/bueros/sri\\_lanka/08684.pdf](http://library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf)

<sup>121</sup> Ibid.

<sup>122</sup> CPA and Friedrich Ebert Stiftung "GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues", , October 2008 available at [http://library.fes.de/pdf-files/bueros/sri\\_lanka/08684.pdf](http://library.fes.de/pdf-files/bueros/sri_lanka/08684.pdf)

<sup>123</sup> Eltayeb (n 117)

<sup>124</sup> Maina (n 79)

<sup>125</sup> For the detailed test see, Henry Maina , "The Prohibition of Incitement to Hatred in Africa: Comparative Review and Proposal for a Threshold (Work in Progress) Study Prepared For The Regional Expert Meeting on Article 20, Organised by The Office of The High Commissioner for Human Rights,Nairobi"( April 6-7, 2011) <https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Nairobi/HenryMaina.doc> and further, <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>

- i. **Severity** – consider closely the severity of what is said, the harm advocated, and the magnitude of its intensity.<sup>126</sup>
- ii. **Intent** – there must be an “intent” to cause incitement and it is not sufficient for an act to be an offence merely for negligence and recklessness.
- iii. **Content** – consider the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.<sup>127</sup>
- iv. **Extent** – consider the reach of the speech, its public nature, its magnitude and size of its audience. Furthermore, whether the audience had the means to act on the incitement, and whether it is widely accessible to the public.<sup>128</sup>
- v. **Imminence** – The courts must determine on a case-by-case basis whether the immediacy with which the acts (discrimination, hostility or violence) called for by the speech are intended to be committed.<sup>129</sup>
- vi. **Likelihood or probability of action** – The courts must if there was a reasonable probability that the speech would succeed in inciting actual action, recognising that such causation should be rather direct.<sup>130</sup>
- vii. **Context** – Context it may have a direct bearing on both intent and causation. The analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made.<sup>131</sup>

The incorporation of the above-mentioned proposals and reforms is of paramount importance to ensure the effective use of the ICCPR Act for the prosecution of hate speech. This would also prevent the provision being exploited for the purpose of crushing dissent and suppressing criticism, as there are clear standards and tests that need to be met in order to prosecute.

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<sup>126</sup> Rabat Plan of Action (2013) - 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 -) 11 available at: [https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)

<sup>127</sup> Ibid. 11

<sup>128</sup> ibid

<sup>129</sup> ibid

<sup>130</sup> ibid

<sup>131</sup> Ibid.

## The Penal Code

The Penal Code of Sri Lanka was drafted in 1883. It is based on the corresponding Indian law which was a codification of the existing English Criminal law at that time.<sup>132</sup> Sections 291A, 291B and 120 can be classed as the provisions on hate speech within the Penal Code.<sup>133</sup>

Though the Penal Code has been amended numerous times, there has never been a comprehensive revision undertaken to amend the sections currently used to prosecute hate speech. The present government did attempt to incorporate a new provision on hate speech to the Penal Code in December 2015, however, the amendment was later scrapped as it came under severe criticism,<sup>134</sup> including legal challenge by CPA, for being a near-verbatim reproduction of the hugely problematic Section 2(1)(h) of the PTA.<sup>135</sup>

Nevertheless, the Penal Code provisions restricting speech must be revisited in order to meet the growing challenges of the present context.

### I. Section 291A

*Section 291A – Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*

There is a lack of reported judgements in Sri Lanka on section 291A. In order to fully scrutinise the section, therefore, this report analyses cases determined in India and Singapore under corresponding Penal Code provisions. Section 291A replicates a provision from the Indian Penal Code and is present in a number of other jurisdictions, including Singapore:

- Section 298, Indian Penal Code – Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing

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<sup>132</sup> 'Indian Penal Code', The Indian Express <<https://indianexpress.com/article/opinion/columns/indian-penal-change/>>

<sup>133</sup> 'BASL issues severe indictment on IGP, AG, govt over attacks on minorities', (The Island,) ≤ [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=166041](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=166041)>

<sup>134</sup> Human Rights Commission, <<http://hrcls.lk/english/wp-content/uploads/2015/12/Proposed-amendment-to-the-Penal-code-on-Hate-Speech.pdf>> 'TNA urges the govt to withdraw hate speech bill' (The Sunday Times) <<http://www.sundaytimes.lk/90686/tna-urged-the-govt-to-withdraw-hate-speech-bill>> Joint Civil Society statement <<https://www.slguardian.org/joint-civil-society-statement-on-amendment-to-penal-code-criminalizing-hate-speech/>>

<sup>135</sup> The Centre for Policy Alternatives Vs. The Attorney General (Amendment to section 291 of the Penal Code) (SC SD 28/2015) available at <http://www.cpalanka.org/the-centre-for-policy-alternatives-vs-the-attorney-general-amendment-to-section-291-of-the-penal-code-sc-sd-28-2015/>

of that person or makes any gesture in the sight of that persons or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

- Section 298, Singaporean Penal Code – Whoever, with deliberate intention of wounding the religious or racial feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, or causes any matter, however, represented to be seen or heard by that person, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.<sup>136</sup>

Notably, the difference in the Sri Lankan and Singaporean Penal Code provisions is the inclusion of ‘racial feelings’ in the Singapore provision alongside religious feelings. Additionally, the Singapore Penal Code provision is broader as it adds the phrase “or causes any matter, however, represented to be seen or heard by that person” as well as imposing a stricter punishment of imprisonment which may extend up to a term of three 3 years.

The identical elements in the Sri Lankan Penal Code and the Penal Code provisions of Singapore and India are as follows:

- Deliberate intention of wounding the religious feelings of any person,
- Utters any word or makes any sound in the hearing of that person, or
- Makes any gesture in the sight of that person or places any object in the sight of that person

### ***Deliberate intention of wounding the religious feelings of any person***

What qualifies as ‘any person’ and what amounts to ‘deliberate intention’ of ‘wounding religious feelings’ was extensively discussed in the Singaporean case of *Amos Yee*<sup>137</sup> where a young teenager was prosecuted under section 298.

The Court rejected the argument that the Penal Code only meant to criminalise words, gestures or representations that are directed at a person and not at the entire religious community, holding that as per Singapore’s Interpretation Act, “words in the singular include the plural<sup>138</sup> and words and expressions in the plural include the singular.”<sup>139</sup>

The Court thereafter states that to wound religious feelings simply means to give offence to any person. It notes that there need not be actual ‘proof’ that Yee’s words were offensive, rather it is Yee’s ‘intent’ that matters. In the given instance, Yee knew his words would be offensive to Christians and therefore naturally he did ‘intend’ to ‘offend’. Thus it appears that

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<sup>136</sup> George Baylon Radics & Yee Suan Poon, *Amos Yee, Free Speech and Maintaining Religious Harmony in Singapore*, [2016] 12 U. PA. ASIAN L. REV 186, available at; <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1019&context=alr>

<sup>137</sup> *Public Prosecutor v. Amos Yee Pang Sang* [2015] SGDC 215 <<http://thir.st/wp-content/uploads/2018/04/Public-Prosecutor-v-Amos-Yee-Pang-Sang-2015-SGDC-215.pdf>>

<sup>138</sup> The Interpretation Ordinance of Sri Lanka also clarifies under S2 (mm) that “words in the singular number shall include the plural

<sup>139</sup> *Amos Yee* (n 137) at page 210

the courts disregarded the actual effect of the words articulated or the nature of the words articulated, finding instead that ‘knowledge’ of the possibility of words causing offence was sufficient to ascertain an ‘intention’ to offend.<sup>140</sup>

With regard to intention, the Indian High Court of Orissa has observed that “*the essence of the offence consists in the “deliberate intention” of wounding the religious feelings of other persons*” and that “*a mere knowledge of the likelihood that the religious feeling of other persons may be wounded would not suffice nor would a mere intention to wound such feelings suffice unless that intention was deliberate*”.<sup>141</sup>

This much stricter approach to determining intent requires going beyond ‘knowledge’; even where there is an intention to wound, it must be shown to be ‘deliberate’. The Court further cites the Penal Code’s authors in order to substantiate this distinction between ‘knowledge’, ‘intent’ and ‘deliberate intention’:

*“where the intention to wound was not conceived suddenly in the course of discussion, but premeditated, deliberate intention may be inferred. Similarly, if the offending words were spoken without good faith by a person who entered into a discussion with the primary purpose of insulting the religious feelings of his listeners, deliberate intention may be inferred. If, however a party were to force himself upon the attention of another, addressing to him, an involuntary hearer, an insulting incentive against, his religion, he would, we conceive, fall under the definition, for the reasonable inference from his conduct would be that he had a deliberate intention of wounding the religious feelings of his hearer.”*

The relatively stricter approach adopted by the Indian Courts is more desirable in the Sri Lankan context as this provision should not be interpreted in a manner that it can be abused to restrict free speech.

The Indian High Court has also noted that while emphasis must be given to the intention of the alleged offender, the intention must be adduced from the ‘words spoken’, ‘the place they were spoken’ and the ‘persons to whom they were addressed’ as well as the ‘surrounding circumstances’. Thus, it appears that strict guidelines on what truly amounts to an offence under the provision cannot be put in place as much depends on the circumstances surrounding the case since it is those circumstances that can shed light on the ‘intention’ of the alleged offender.<sup>142</sup>

Accordingly, ‘deliberate’ intention must be firmly established and the performance of an act knowing it may wound religious sentiments yet still choosing to do so does not necessarily establish ‘deliberate’ intention. The prosecution would also need to show that there was a premeditated primary aim to wound such religious sentiments in order to satisfy to the

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<sup>140</sup>Amos Yee (n 137) *ibid* at page 210

<sup>141</sup> Narayan Das and Anr. vs State (1952) AIR Ori 149 available at: <https://indiankanoon.org/doc/575567/>

<sup>142</sup> See further, Behera and Ors. vs Balakrushna that took a similar view.

courts that the acts of the alleged offender amount to ‘deliberate intention’ to wound religious feelings.

### ***Utters any word or makes any sound***

The crucial question underlying this element would be as to what words come within the purview of this provision. In *Amos Yee*, the uttering of words such as ‘power hungry’, ‘malicious’, ‘deceptive’, ‘full of bull’; and Yee’s representations that Jesus’ legacy will not last, that Christians have no knowledge of the Bible and that Christians are being manipulated by a multitude of priests; were deemed by the Court as clearly derogatory and offensive to Christians.<sup>143</sup>

The Indian High Court of Gujarat in the case of *Shalibhadra Shah*<sup>144</sup> clarified that the section does not apply to published articles<sup>145</sup> but rather to words said ‘orally’. The Court further stated that it is irrelevant that the article was written in the presence of any person.<sup>146</sup> Thus, the Court emphasised that the section is applicable only in instances where oral words were uttered in the presence of a person with the intention of wounding his religious feelings, or with similar intention makes any sound in the hearing of that person. (The Court does not specifically analyse the latter part of section 298 which includes “*makes any gesture in the sight of that person or places any object in the sight of that person*”.)

The Indian High Court of Orissa in the case of *Narayan Das*<sup>147</sup> took into consideration the following observations of Phillimore, J. in *Rex v. Boulter* (1908) which notes that “*A man is not free in [public] places to use coarse ridicule on subjects which are sacred to most people in the country.*”<sup>148</sup> It concluded that “deliberate intention” was required for the offence under Section 298.

In another case, the Indian High Court observed with regard to the utterance of ‘words’ that “*the words alleged to have been uttered by the accused must be something touching the religious faith of the complainant. Mere abusive words or statement will not by itself constitute the offence.*”<sup>149</sup>

From the above dicta, it can be concluded that the Indian courts as a principle will first look as to whether the nature of what was said does directly touch the ‘religious’ feelings of the complainant. Thereafter the courts will look to establish as to whether the words said amount to the ‘wounding’ of religious feelings and for this purpose the courts will analyse the circumstances in which the words were uttered.

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<sup>143</sup> Amos Yee (n 137) 210

<sup>144</sup> *Shalibhadra Shah and Ors. vs Swami Krishna Bharati And Anr.* on 18 January, 1980 1981 CriLJ 113 available at; <https://indiankanoon.org/doc/1082316/> at para 7

<sup>145</sup> *ibid*

<sup>146</sup> *ibid*

<sup>147</sup> Narayan Das 1951 AIR 1952 Ori 149 available at <https://indiankanoon.org/doc/575567/>

<sup>148</sup> Quoting page 221 of the book Russell in Crime

<sup>149</sup> *Revision vs by Advs. Sri. M.Ramesh Chander*, order dated 3<sup>rd</sup> June 2014, available at <<https://indiankanoon.org/doc/49818442/>> at para 5

### ***In the hearing of that person***

In *Narayan Das*, it was affirmed that “A man is not free in a public place where passers-by who might not willingly go to listen to him knowing what he was going to say might accidentally hear his words, or where young people might be present.”<sup>150</sup> This clearly establishes that regardless of whether an individual was targeted specifically or not, if the words were uttered within the hearing of the complainant the courts will take such words into consideration.

The majority of cases heard on section 298 in India, and cases under the corresponding provision in other jurisdictions typically, are with regard to the utterance of words. On rare occasions, however, it has been discussed as to whether a particular ‘gesture’ does amount to the wounding of religious feelings.

In the case of *Chakra Behera*,<sup>151</sup> it was questioned whether the gesture of worshipping of two deities on an inauspicious day fell within the scope of the provision. The case held while the act of the accused did wound the religious feelings of the complainant, it was not done with the deliberate intention to wound. The Court asserted that such “*gestures or words or statements must be something touching the religion or religious faith*” and that “*mere invasion of civil rights ... or even an attempt to change the mode of performance of the rituals does not amount to an offence ... unless it can be inferred either from the [acts performed, words uttered or by other means] that their intention was to wound the religious feelings of other persons.*”<sup>152</sup>

Thus, even for ‘gestures’, a complainant must establish that the gesture does, in fact, touch their religious feelings. Thereafter, the Court will scrutinise how the gesture was performed to determine whether it was done with the required deliberate ill intent. In this case, the Court specified that the performance of a religious ritual in a manner distasteful to other followers or in an unusual manner does not in itself amount to an offence, particularly if it was done bona fide even if the accused knew at the time that others may find the gesture to be offensive.

### **Section 291A in Summary**

In summary, the threshold in Indian jurisprudence for the proof of ‘deliberate intention’ appears to be those acts which are premeditated and done with the primary intention to wound religious feelings. This contrasts with the Singaporean jurisprudence in which intention is present where there is knowledge to offend. Indian courts further require that ‘words’, ‘sounds’, ‘gestures’ or ‘object’ complained of must touch the ‘religious feelings’ of the complainant. Finally, the courts will look into the context in which the words were spoken or representations made in analysing whether the words or representation were ‘offensive’.

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<sup>150</sup> *Narayan Das* (n 147) at para 8

<sup>151</sup> *Chakra Behera and Ors Balakrushna Mohapatra* AIR 1963 Ori 23, available at <  
<https://indiankanoon.org/doc/280327/>>

<sup>152</sup> *Ibid* at para 5

It is also important, however, to be cautious against attempts to misuse this provision in a way which prevents legitimate criticism and debate of religion and religious beliefs. In the absence of any deliberate or ulterior racist motives, hatred or incitement, it should be possible to legitimately criticise religious beliefs. There have been increased calls to repeal or amend section 298 in India as it considered to be too broad, outdated and an unreasonable restriction on freedom of speech.<sup>153</sup> Accordingly, CPA urges the Government to review section 291A and consider its suitability in our statute book.

## II. Section 291B

*Section 291B – Whoever, with the deliberate and malicious intention of outraging the religious feelings of any class or persons, by words, either spoken or written, or by visible representations, insult or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years or with a fine, or with both.*

Sri Lanka also inherited certain blasphemy provisions from Britain into its Penal Code.<sup>154</sup> Though the term ‘blasphemy’ is not frequently used to describe the penal provisions here, they are considered as a variant of the blasphemy law.<sup>155</sup> Barring a few minor differences, section 291B is substantially similar to section 295A of the Indian Penal Code, which holds that:

*Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

Accordingly, the identical elements between the two provisions are that:

- The accused must insult or attempt to insult the religion or religious beliefs of any class
- The insult must be with a deliberate and malicious intention of outraging the religious feelings of that class of citizens.
- The insult must be by either spoken or written words, by signs, by visible representation or otherwise.

Regrettably, there is lack of reported judgements in Sri Lanka on this particular provision as many of the cases are heard in the Magistrate’s Court. However, one of the well-known instances, where section 291B came into consideration, was in the recent case of *Naomi*

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<sup>153</sup> ‘Little reason to restrict the freedom of speech’ (Researchgate , 2010)

<<https://www.thehindu.com/todays-paper/tp-opinion/little-reason-to-restrict-the-freedom-of-speech/article5169173.ece>>

<sup>154</sup> ‘Blasphemy and Related Laws in Selected Jurisdictions January 2017, The Law Library of Congress, Global Legal Research Center’ available at <<http://www.loc.gov/law/help/reports/pdf/2017-014533.pdf>>

<sup>155</sup> Gautam Bhatia, The Constitutional Case against India’s Blasphemy Law, (THE WIRE , Jan. 18, 2016), available at <<https://thewire.in/19508/the-constitutional-case-against-indias-blasphemy-law>>

*Michelle Cokeman*.<sup>156</sup> While the proceedings or the judgement of the Negombo Magistrate's Court Case No. B 354/14 are publicly unavailable, Gooneratne J in the Supreme Court judgement on the fundamental rights petition filed by Ms Cokeman refers to section 291B, noting that *"it is stated that the Petitioner had no intention to outrage such feelings. A charge relating to Section 291 B of the Penal Code cannot be maintained i.e. "outraging the religious feelings of any class by insulting its religion or religious beliefs."*<sup>157</sup> Thus, for a conviction under this section to be maintained it is necessary that the person had deliberate and malicious intention of outraging the religious feelings of any class or persons.

A Similar approach was taken in the recent Indian Supreme Court judgement of *Mahendra Singh Dhoni* which notes that the provision *"penalises only those acts of insults to or those varieties of attempts to insult the religion or religious belief of a class of citizens which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class of citizens."*<sup>158</sup> This excludes *"insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class."*

Section 291B of the Indian Penal Code has been widely interpreted and subjected to many judicial pronouncements. Despite numerous judgements holding that the section cannot be used to target a person for unintentionally hurting religious sentiments, the provision is unrestrainedly being misused.<sup>159</sup> In India, the majority of hate speech laws are justified by the 'public order' exception contained in Article 19(3) of the Constitution.<sup>160</sup>

The constitutionality of section 295A was questioned before the Supreme Court in *Ramji Lal Modi*.<sup>161</sup> The Supreme Court upheld its validity on the ground that it was a 'reasonable restriction' upon the freedom of speech made "in the interests of public order" under Article 19(2) of the Constitution. The reasoning of the Court was that the section did not penalise any and every act of insult to religion or the religious belief of a class of citizen but was directed to acts perpetrated with the deliberate and malicious intention of outraging the religious feeling of a class of citizens.

The Court also held that 'in the interests of' as required by Article 19(2) has a very wide ambit, and allowed the State to make laws if they bore some relation to maintaining public order as *"the calculated tendency of this aggravated form of insult is clearly to disrupt the public order."*

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<sup>156</sup>JC Weliamuna 'Unlawful Arrest & Deportation of British Tourist' ( slguradian, 2014) <<https://www.slguardian.org/unlawful-arrest-deportation-of-british-tourist>>

<sup>157</sup> S.C (FR) Application 136/2014

<sup>158</sup> Mahendra Singh Dhoni v. Yerraguntla Shyamsundar and Anr NO 23 of 2016 available at <<https://drive.google.com/file/d/0BzXilfcxe7yuMHY1bEI0UnluZnM/view>>

<sup>159</sup> 'Not all 'insults' to religion are offences: Supreme Court' (Indian Times, 2017) <[economictimes.indiatimes.com/articleshow/58309763.cms?utm\\_source=contentofinterest&utm\\_medium=ext&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/58309763.cms?utm_source=contentofinterest&utm_medium=ext&utm_campaign=cppst)>

<sup>160</sup> Jain Y , "MUFFLED FREE SPEECH: CONSTITUTIONALITY OF BANS DUE TO HURT RELIGIOUS SENTIMENTS National Law University, Delhi available at < <https://iclrq.in/editions/jan/6.pdf>>

<sup>161</sup> Ramji Lal Modi vs The State Of U.P on 5 April, 1957 available at <<https://Indiankanoon.Org/Doc/553290/>>

In this case, the Court also considered if reasonable restriction upon freedom of expression should only be limited to situations where there was a degree of proximity between the prohibited speech and the possibility of public disorder.<sup>162</sup> The Court rejected this argument and held that *“if certain activities have a tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction “in the interests of public order” although in some cases those activities may not actually lead to a breach of public order.”*

Gautam Bhatia finds that the flaw in the decision lies in the fact that courts focused exclusively upon the scope of the phrase ‘in the interests of’ in Article 19(2) while ignoring the qualifying constraints placed by the term ‘reasonable restrictions’.<sup>163</sup>

However, the Court provided a more progressive interpretation of the ‘public order’ exception in the case of *Superintendent, Central Prison, Fatehgarh v Ram Manohar Lohia* where it emphasised that the state would have to show a close degree of proximity between the speech and public disorder if it wanted to regulate it. Here, *“restrictions must have reasonable relation to the object which the legislation seeks to achieve and must not go in excess of that object. The restriction made “in the interests of public order” must also have reasonable relation to the object to be achieved, i.e., the public order.”* Furthermore, *“the limitation imposed in the interests of public order to be a reasonable restriction should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order”*.

Subsequent to *Lohia*, there were a series of cases that applied the proximity test to determine the constitutionality of various laws.<sup>164</sup> Though the case did not specifically refer to section 295A of the Indian Penal Code, the recent judgement of *Shreya Singhal vs Union of India*<sup>165</sup> is considered a landmark judgement on freedom of speech and expression in India. The Supreme Court, in this case, distinguished between ‘advocacy’ and ‘incitement’, and held that laws restricting free speech would have to be narrowly construed under a strict standard of “incitement”. The Court also upheld the proximity test as was enumerated in *Lohia*, and also discussed in detail *“clear and present danger test”* propounded by the US Supreme Court and the manner it has been incorporated in the case law of India, quoting *S. Rangarajan v. P. Jagjivan & Ors*.<sup>166</sup>

*“Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger ... should have proximate and direct*

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<sup>162</sup> Bhatia (n 155).

<sup>163</sup> *ibid.*

<sup>164</sup> Sarvejit Singh and Parul Sharma, ‘Public Order’ and the Indian Constitution’, available at <[http://commoncause.in/publication\\_details.php?id=499](http://commoncause.in/publication_details.php?id=499)>

<sup>165</sup> *Shreya Singhal vs Union of India* March, 2015 available at <<https://indiankanoon.org/doc/110813550/>>

<sup>166</sup> *S. Rangarajan v. P. Jagjivan & Ors*, (1989) 2 SCC 574 available at <<https://indiankanoon.org/doc/341773/>>

*nexus with the expression ... In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg"*

The Indian cases discussed here demonstrates that the Courts have raised the threshold of "public disorder" required to justify restricting free speech, by virtue of laying down certain standards and thresholds. If the correct test to be adopted is one of incitement and "proximity" then it is apparent that the language of Section 291B of the Sri Lankan Penal Code and 295A Indian Penal Code is far too broad<sup>167</sup>. Therefore, it is of vital importance that in using this provision, a distinction is made between speech inciting violence against a particular religious group from other forms of speech.

This provision can have a chilling effect on freedom of speech if misused to stifle and crush dissent. Therefore, CPA urges the Government to review and consider the repeal of this provision. Until such legal reforms, the judiciary can be guided by Indian judgements in interpreting the section and ensuring that the section is limited only to situations where there was a degree of proximity between the prescribed speech and its possibility of causing public disorder.

### **III. Section 120**

*Section 120 – Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the queen or to her government in Ceylon, or excites or attempts to excite hatred to or contempt of the administration of justice, or attempts to excite the Queens subject to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection among the Queen's subjects to promote feelings of ill-will and hostility between different classes of such people, shall be punished with a simple imprisonment for a term which may extend to two years.*

There are recorded cases of arrest being made under section 120 of the Penal Code in instances where statements made by individuals could lead to disharmony among communities.<sup>168</sup> Section 120 is similar to the offence referred to as "Sedition" in the common law.<sup>169</sup> The final limb of the provision that states "*attempts to raise discontent or disaffection among the Queen's subjects to promote feelings of ill-will and hostility between different classes*

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<sup>167</sup> Bhatia (n 155).

<sup>168</sup> Interviews conducted by CPA. See further, 'Sri Lanka: Halt Harassment of Media' [,https://www.hrw.org/news/2012/07/03/sri-lanka-halt-harassment-media](https://www.hrw.org/news/2012/07/03/sri-lanka-halt-harassment-media), 'Penal Code Fraudulently used to arrest protestors' (Daily Mirror, 2012) <<https://www.pressreader.com/sri-lanka/daily-mirror-sri-lanka/20120223/293861664049907>>, 'Four arrested for circulating harmful SMS' (Daily Mirror, 2014) <http://www.dailymirror.lk/50702/tech>

<sup>169</sup> Nivedita Saksena and Siddhartha Srivastava, An Analysis of the Modern Offence of Sedition, available at ≤ <http://docs.manupatra.in/newsline/articles/Upload/37E592F0-BE2A-475F-AF99-2F6909F3CF11.pdf>>, Peter MacKinnon, 'Conspiracy and Sedition as Canadian Political Crimes', available at ≤ <http://lawjournal.mcgill.ca/userfiles/other/2803069-mackinnon.pdf> >, Review of Sedition Laws (Australian Law Reform Commission) < <https://www.alrc.gov.au/sites/default/files/pdfs/publications/DP71.pdf>>

*of such people*” is relevant to the scope of the present study and will be discussed in detail below.

The language in the overall provision is vague and overbroad and violates Sri Lanka’s obligations under international law, particularly under the ICCPR which prohibits restrictions on freedom of expression unless they are strictly construed and proportionate. A number of commenters have noted that the section provides a “broad definition of sedition as an offence” and is “*interpreted in a very loose manner for the purpose of suppressing the expression of views against those with Governmental and bureaucratic power*”.<sup>170</sup>

Section 120 can be and has been, abused to crush dissent<sup>171</sup> and defeat peaceful criticism of the government.<sup>172</sup> For instance, it was used in a 1992 case involving the editor of the *Rajaliya* newspaper to suppress information about allegations of government involvement in death squad killings.<sup>173</sup>

The corresponding section in the Indian Penal Code is section 124A:

*Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with 1 [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.*

In *M. S. Abu Bakr, v The Queen*,<sup>174</sup> the Court of Criminal Appeal discussed in detail ‘classes’ as stated in section 120’s last limb. The charge against the accused was that during a speech at a public meeting, he attempted to promote feelings of ill-will and hostility between different classes of the Queen’s subjects using certain words. The Court ruled that “*an attempt to promote feelings of ill-will and hostility between different classes of the Queen’s subjects cannot come within the section unless the classes are reasonably well-defined, stable and numerous*” and whether a given class had these characteristics or not was a matter of inquiry for the jury in each case. The Court was guided here by three Indian cases that held that the word ‘capitalist’ is too vague to denote a definite and ascertainable class.<sup>175</sup>

Additionally, Sri Lankan and international judgments on sedition have emphasised the importance of interpreting it in a manner that ensures ‘intention to incite people to violence’ or ‘create public disorder’ form an essential constituent element of it. For example, in the

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<sup>170</sup>William Crawley, David Page, Kishali Pinto-Jayawardena, *Embattled Media: Democracy, Governance and Reform in Sri Lanka* (2015 Sage publications)

<sup>171</sup> Penal code fraudulently used to arrest protesters: JVP (Daily Mirror , 2012) available at <<https://www.pressreader.com/Sri-Lanka/Daily-Mirror-Sri-Lanka/20120223/293861664049907>>

<sup>172</sup> ARTICLE 19, “An Agenda For Change The Right To Freedom Of Expression In Sri Lanka “(October 1994) 26

<sup>173</sup> Ibid

<sup>174</sup> M. S. Abu Bakr, V The Queen (1953) 54 N.L.R 566

<sup>175</sup> Ibid at Pg. 570

judgment of SC FR/768/2009,<sup>176</sup> Gooneratne J held that “*Whatever comments and strongly used words against the government which does not excite feelings and cause public disorder by acts of violence cannot be a basis to prosecute a person under Section 120 of the Penal Code.*” He further found that the essence of section 120 “*is whether the words in question incite the people to commit acts of violence and disorder and not whether the words are defamatory or not.*”

In the Indian case of *Kedar Nath Singh*,<sup>177</sup> the Supreme Court discussed in detail the ambit of section 124A as there were conflicting decisions on whether or not ‘incitement to violence’ is a necessary ingredient.<sup>178</sup> The Court held that section 124A aims at “*rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence*”. It also sought to go beyond mere literal meanings of the words in the section to consider “*the antecedent history of the legislation, its purpose and the mischief it seeks to suppress*” in light of which it limited the section’s application to “*acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence.*”<sup>179</sup>

In the widely quoted Canadian seditious case of *Boucher v. the King*<sup>180</sup> the Supreme Court held that the mere publishing of critical statements, without any intention to incite violence against the government, could not be seditious libel and that a ‘seditious’ intention must be founded on evidence of incitement to violence, public disorder or unlawful conduct.<sup>181</sup>

Sedition laws have come under much scrutiny in the past decade, as they seek to limit and control freedom of expression far beyond what is permissible under international law.<sup>182</sup> CPA notes that revisiting and repealing those provisions that are outdated and can be misused is always timely.<sup>183</sup> Laws such as section 120 must be viewed alongside the fundamental freedom of expression and the purpose of the restriction. CPA questions the need for the offence of sedition in a modern democracy, as it does not serve a pressing social need and can be used by governments in an arbitrary manner, in bad faith, in order to crush

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<sup>176</sup> SC FR /768/2009 available at: [http://www.supremecourt.lk/images/documents/sc\\_fr\\_768\\_2009.pdf](http://www.supremecourt.lk/images/documents/sc_fr_768_2009.pdf)

<sup>177</sup> *Kedar Nath Singh v State of Bihar* ( 20 January 1962) available at: <  
<https://indiankanoon.org/doc/111867/>>

<sup>178</sup> While the federal Court had held that words, deeds or writings constituted an offence under section 124A when they had the intention or tendency to disturb public tranquillity to create public disturbance or to promote disorder, the Privy Council had taken the view that it was not an essential ingredient of the offence of sedition under s. 124A that the words etc., should be intended to or be likely to incite public disorder.

<sup>179</sup> *Kedar Nath Singh*, At Pg. 22-23 of the Judgment

<sup>180</sup> *Boucher v. the King* [1951] S.C.R. 265

<sup>181</sup> *Ibid*

<sup>182</sup> Siddharth Narrain, *Sedition and the death of free speech*, *Agenda The limits of freedom* ( Infochange News & Features, Centre for Communication and Development Studies, 2011) 8-11available at, <  
[http://www.infochangeindia.org/downloads/agenda\\_22.pdf](http://www.infochangeindia.org/downloads/agenda_22.pdf)>

<sup>183</sup> Centre for Human Rights Sri Lanka, (2010) <  
<http://chr.srilanka.com/assets/images/uploads/101129111146Report%20%23%2021%20CHR%20REPO RT%20ON%20POSTERS%20AND%20HANDBILLS%20 ENGLISH %20final%20Nov.%2030th.%202010.pdf>> , ‘The ‘chilling’ of free expression in Sri Lanka’ (The Sunday Times, 2012) <  
<http://www.sundaytimes.lk/120708/columns/the-chilling-of-free-expression-in-sri-lanka-5383.html>>

dissent. As Lord Denning noted of sedition, “*The offence of seditious libel is now obsolescent*” but its definition “*was found to be too wide. It would restrict too much the full and free discussion of public affairs*”.<sup>184</sup>

Past experiences in Sri Lanka, as well as India, demonstrate the unsettling impact a section of this nature can have on freedom of expression.<sup>185</sup> Over the years, successive governments have been accused of abusing this law to target people who speak against them.<sup>186</sup> This was common practice in particular during the time of the previous Sri Lankan government where a number of journalists<sup>187</sup> and persons with dissenting opinions<sup>188</sup> were arrested under section 120. An unnecessary colonial hangover, the law of sedition is overboard and a great danger to the fundamental liberties of the people today. It is thus critical that the Government repeal section 120.

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<sup>184</sup> Lord Denning, *Landmarks in The Law* (London: Butterworths, 1984) at 295

<sup>185</sup> See for more information on this, ‘It’s high time to change India’s sedition laws available at <<https://www.hrw.org/news/2016/03/14/its-high-time-change-indias-sedition-laws>>, SEDITION LAWS & THE DEATH OF FREE SPEECH IN INDIA, available at<[https://www.nls.ac.in/resources/csseip/Files/SeditionLaws\\_cover\\_Final.pdf](https://www.nls.ac.in/resources/csseip/Files/SeditionLaws_cover_Final.pdf)> ,

<sup>186</sup> Centre for Human Rights Sri Lanka, (2010) <<http://chrsrilanka.com/assets/images/uploads/101129111146Report%20%23%2021%20CHR%20REPO RT%20ON%20POSTERS%20AND%20HANDBILLS%20 ENGLISH %20final%20Nov.%2030th,%202010.pdf>> ‘Penal Code fraudulently used to arrest protestors: JVP’ (Daily Mirror, 2012) <<https://www.pressreader.com/sri-lanka/daily-mirror-sri-lanka/20120223/293861664049907>>, ‘Four arrested circulating harmful SMS (Daily Mirror, 2014) <<http://www.dailymirror.lk/50702/tech>> , ‘Azath Salleys arrest’ (The Sunday Leader , 2013) <<http://www.thesundayleader.lk/2013/05/05/azath-salleys-arrest/>>

<sup>187</sup> ‘Sri Lanka: Halt Harassment of Media’ ( Human Rights Watch, 2012)

<<https://www.hrw.org/news/2012/07/03/sri-lanka-halt-harassment-media>>

<sup>188</sup> ‘Azath Salley’s Arrest’ (The Sunday Leader, 2012) <<http://www.thesundayleader.lk/2013/05/05/azath-salleys-arrest/>> CHR, Using outdated laws to prevent the displaying of posters Over one Dozen Arrested by Police: Even Obituary Notice banned

<<http://chrsrilanka.com/assets/images/uploads/101129111146Report%20%23%2021%20CHR%20REPO RT%20ON%20POSTERS%20AND%20HANDBILLS%20 ENGLISH %20final%20Nov.%2030th,%202010.pdf>>

## Prevention of Terrorism (Temporary Provisions) Act (PTA)

### **Section 2(1)(h).**

*Any person who—(h) by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups shall be guilty of an offence under this Act.*

The Prevention of Terrorism (Temporary Provisions) Act (PTA) was a special law enacted in 1979 to deal with terrorist threats in Sri Lanka and was intended to be a temporary provision.<sup>189</sup> Nearly 40 years after its enactment and following the conclusion of the ethnic conflict, however, the PTA still remains in force.

CPA and other civil society groups have continuously condemned the PTA's existence, and its use to stifle dissent and to crack down on political opponents.<sup>190</sup> In the past, the PTA has been used to arbitrarily detain an unknown number of people without access to legal recourse and also target journalists,<sup>191</sup> human right defenders,<sup>192</sup> activists and political opponents of the government.<sup>193</sup>

The PTA has been severely criticised by the international community since it was enacted, most recently by the UN Special Rapporteur on human rights and counter-terrorism Ben Emmerson QC. The PTA is reportedly still being used occasionally to arrest suspects<sup>194</sup> and a number of individuals are still detained, awaiting trial, or serving long sentences under it.<sup>195</sup> Most recently suspects of the assassination plot against M.A. Sumanthiran MP were reportedly being indicted under PTA regulations.<sup>196</sup>

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<sup>189</sup> Further for a detailed critique of the PTA see Asanga Welikala, 'A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka', Centre for Policy Alternatives, 2008 accessible at

<[https://www.cpalanka.org/wpcontent/uploads/2009/5/States%20of%20Emergency%20\(30%2010%202008\).pdf](https://www.cpalanka.org/wpcontent/uploads/2009/5/States%20of%20Emergency%20(30%2010%202008).pdf)> ; See also Asanga Welikala, 'States of Emergency: Issues for Constitutional Design, CPA Working Papers on Constitutional Reform no. 5, August 2016, accessible at <https://www.cpalanka.org/wp-content/uploads/2016/08/States-of-Emergency-Working-Paper-5.pdf>

<sup>190</sup> THE NEED TO REPEAL AND REPLACE THE PREVENTION OF TERRORISM ACT (CPA, 2013) available at <<http://www.cpalanka.org/the-need-to-repeal-and-replace-the-prevention-of-terrorism-act-pta/>>

<sup>191</sup> J.S Tissainyagam High Court Case No. 4425/2008

<sup>192</sup> 'Arrest of Ruki Fernando and Father Praveen Mahesan in 2004' ≤ <https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>>

<sup>193</sup> 'Arrest of Azath Sally in 2013'(the Sunday Leader , 2013) ≤ <http://www.thesundayleader.lk/2013/05/05/azath-salleys-arrest/>>

<sup>194</sup> Ibid.4

<sup>195</sup> Ibid.

<sup>196</sup> 'Assassination plot against Sumanthiran indictments be served Colombo high court? (The Sunday Observer, 2018) <<http://www.sundayobserver.lk/2018/07/29/news/assassination-plot-against-sumanthiran-indictments-be-served-colombo-high-court?page=1>>

One of the features of the PTA that makes it the subject of severe criticism is the broad and ambiguous manner in which its offences are prescribed.<sup>197</sup> As a result of the ambiguity surrounding the PTA, critics fear that that PTA can be, and is, used as a political tool to stifle dissent.<sup>198</sup> The PTA demonstrates the fundamentality of legal certainty as a principle for all legislation – its absence in the case of the PTA has heightened abuse.<sup>199</sup>

### **Tissainayagam Case<sup>200</sup>**

J.S. Tissainayagam, the editor of the *North-Eastern Monthly* magazine, was arrested in March 2008 and sentenced by the High Court in August 2009 to a total of 20 years rigorous imprisonment for arousing ‘communal feelings’ by writing and publishing articles that criticised the government’s treatment of Sri Lankan Tamil civilians affected by the war, and for raising funds for a magazine in which the articles were published in furtherance of terrorism”.<sup>201</sup> Tissainayagam’s arrest and sentencing were heavily criticised as an attempt to stifle critical journalistic reporting.<sup>202</sup> Tissainayagam was subsequently pardoned in 2010, partly as a result of this domestic and international criticism,<sup>203</sup> but his case continues to be emblematic of the PTA’s arbitrary and repressive nature and its ready availability for abuse by the state.

The judgment in *Tissainayagam* does not go into detailed discussion or definition on numerous key aspects of the relied-on PTA provisions and is instead riddled with baseless inferences. It primarily argues that Tissainayagam ‘knowingly’ made false claims with the intention of causing communal disharmony without addressing how the alleged offender’s knowledge at the time could be used to establish a deliberate “intention to cause ‘ill will’ or ‘communal disharmony’ or ‘hostility’ amongst ‘different communities’”. The lack of jurisprudential discussion of these phrases by the High Court leaves their interpretation entirely open-ended. In an instance of further judicial negligence, the Court used assertions by Kulasiri Hemachandra of the Human Rights Commission of Sri Lanka—who testified

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<sup>197</sup> ‘Sri Lanka’s draft Counter Terrorism Act: a license for continued state oppression, intimidation and torture’ (*Sri Lanka Campaign for Peace and Justice*, 4<sup>th</sup> May 2017) available at <<https://www.srilankacampaign.org/sri-lankas-draft-counter-terrorism-act-license-continued-state-oppression-intimidation-torture/>>

<sup>198</sup> ‘Locked Up Without Evidence, Abuses Under Sri Lanka’s Prevention of Terrorism Act’ (*Human Rights Watch*, 29 January 2018) available at : <https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>

<sup>199</sup> Ibid.

<sup>200</sup> J.S Tissainayagam High Court case No. 4425/2008

<sup>201</sup> Ibid. further see, Niran Anketell and Gehan Gunatilleke, ‘Emergency Law in the Context of terrorism: Sri Lanka’, South Asia for Human Rights and Venture Associates, available at <[http://www.southasianrights.org/wp-content/uploads/2009/10/SL-Terrorism-and-Emergency-Laws\\_Draft1.pdf](http://www.southasianrights.org/wp-content/uploads/2009/10/SL-Terrorism-and-Emergency-Laws_Draft1.pdf)> at page 24

<sup>202</sup> Mian Ridge, ‘Journalist’s 20-year sentence casts chill in Sri Lanka’ (*the Christian Science Monitor*, 2 September 2009) <https://www.csmonitor.com/World/Global-News/2009/0902/journalists-20-year-sentence-casts-chill-in-sri-lanka>

<sup>203</sup> Sri Lankan president pardons convicted Tamil editor (BBC May 2010) <[http://news.bbc.co.uk/2/hi/south\\_asia/8657805.stm](http://news.bbc.co.uk/2/hi/south_asia/8657805.stm)>

against Tissainayagam's claims that the people in the Vaharai did not have adequate food and medical supplies—to draw the conclusion that Tissainayagam's claims were false.<sup>204</sup>

In order to obtain clarity on the phrases 'intention to cause ill will' or 'communal disharmony' or 'hostility' amongst 'different communities' and to critically examine the PTA, it is useful to examine section 153A of the Indian Penal Code which is substantially similar to the PTA. Such an examination will reveal the shortcomings in both the Tissainayagam case as well as in the PTA itself.

*Section 153A (1) (a) of the Indian Penal Code – by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities shall be punished with imprisonment.*

### **Causes or intends to cause**

Section 2(1)(h) of the PTA expresses the requisite *mens rea* to be 'causes or intention to cause' whilst the *mens rea* under section 153A(1)(a) of the Indian Penal Code (IPC) is 'promotes or attempts to promote'. The defence in *Tissainayagam's* case highlighted the fact that the element of *mens rea* as expressed in section 2(1)(h) of the PTA is of a higher threshold than that expressed by section 153A of the IPC as 'promotion' can refer to the fanning of flames already created, while 'causation' requires the demonstration of a causal nexus between the words spoken and the consequences envisaged.<sup>205</sup>

Similarly, it can be argued that in order to attract section 2(1)(h) of the PTA it must be proved that the 'words' either spoken or intended to be read or 'signs' or 'visible representations' in question were in their entirety calculated to cause acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups.

The importance of establishing *mens rea* has been elaborated upon in the Indian case of *Manzar Sayeed Khan*<sup>206</sup> which held that "*The intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153A and the prosecution has to prove prima facie the existence of mens rea on the part of the accused.*"<sup>207</sup>

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<sup>204</sup> *Tissainayagam* (n 201) 22

<sup>205</sup> Defence written submission para 9 available at; <https://sunandadeshapriya.files.wordpress.com/2009/09/tissa-judgement-eng-translation-written-submission.pdf>

<sup>206</sup> *Manzar Sayeed Khan vs State Of Maharashtra & Anr* on 5 April, 2007, available at <<https://indiankanoon.org/doc/1028094/>>

<sup>207</sup> *Ibid*

## Between ‘different communities’ or ‘racial or religious groups’

In instances where the offence refers to the creation of enmity or ill-will between different groups, those ‘different communities’ or ‘racial or religious groups’ must be clearly articulated by the alleged offender. In the *Tissainayagam* judgement, however, the Court did not acknowledge how *Tissainayagam* did not specifically articulate any differences ‘between’ two ‘stated’ communities or ‘religious or racial groups’ but rather gave a commentary on his perceived observations of the sufferings of the Tamil people of the Vaharai who he alleged had not received adequate assistance from relevant state actors.

In *Bilal Ahmed Kaloo vs. State of Andhra Pradesh*<sup>208</sup> it was held that when considering the “promotion of a feeling of enmity, hatred or ill-will “between different” religious or racial or language or regional groups or castes and communities it is necessary that at least two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group” is insufficient (emphasis added).

Accordingly, it can be argued that failure to show that the alleged offending words made a distinction between two ‘stated’ communities or religious/racial groups should thereby result in a failure to prosecute under section 2(1)(h) of the PTA.

## “Ill will”, “communal disharmony” and “hostility” and the “reasonable man” test

The phrases “ill will”, “communal disharmony” and “hostility” must be interpreted objectively in order to prevent them being misused to target critics and political opponents. In order to achieve this, courts often adopt the “reasonable man test”. The reasonable man test requires an inquiry into how a reasonable man would construe the words said or written, or the signs or representations made. The “reasonable man” test often requires consideration of the “context” in which words, signs or representations were said or made.

The Court in *Tissanayagam* likewise looked into whether the published text as read by an “ordinary reasonable man” would amount to an offence. The Court cited<sup>209</sup> the case of *Morgan v Odhams Press Ltd*<sup>210</sup> which held that “If we take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary man does not formulate reasons in his own mind”. It further cited *Hough v London Express Newspapers*<sup>211</sup> which held that “In the case of words defamatory in their ordinary sense the plaintiff has to prove no more than that they were published, he cannot call witnesses to prove what they understood by the words. The only question is might reasonable people understand them in a defamatory sense?”

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<sup>208</sup> Bilal Ahmed Kaloo Vs. State of Andhra Pradesh [1997] INSC 646, available at; <http://www.advocatekhoj.com/library/judgments/index.php?go=1997/august/13.php>

<sup>209</sup> *Tissainayagam* at pg. 28 of the judgement

<sup>210</sup> *Morgan v Odhams Press Ltd* 1971 2 AER 1156

<sup>211</sup> *Hough v London Express Newspapers* 1940 2 KB 507

The Court was apparently of the view that words that amount to defamation in the eyes of the 'ordinary man' would also qualify as *possibly* having the effect of causing 'ill will', 'hostility' or 'communal disharmony'. One might argue however that the rationale adopted by the Court in the given instance is rather broad as 'defamation in the eyes of an ordinary man' would perhaps suffice to establish a prima facie case of defamation but might not necessarily satisfy the 'offence' of defamation. Additionally, one might also argue that 'ill will', 'communal disharmony and 'hostility' allude to furthermore features such as the intention to stir a particular 'type' of reaction amongst intended readers.

Over time the law has developed to increase the objectivity of the reasonable man test when applied to words said or written. The Indian Supreme Court has stated that "*the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.*"<sup>212</sup>

Accordingly, the courts must avoid encouraging laws that facilitate the notion of seeking 'danger in every hostile point of view' as oftentimes limitations on freedom of speech could also lead to a culture of self-censorship. The law must not be enforced in a manner that may discourage the 'honest agitator'. As *Emperor v Banomali Mahorana* highlights, "*the primary object [of the honest agitator] is to secure redress of certain wrongs, real or fancied, and who is not actuated by the base mentality of a mere mischief-monger. If the writer is expressing views which he holds honestly, however wrong that may be, and has no malicious intention*" they should not fall under criminalising provisions.<sup>213</sup>

The Indian courts have been careful that words aimed at only critiquing are not made illegal by the provision. In *State of Maharashtra v. Ganpate Vasudeo Behera*,<sup>214</sup> where criticism levelled at a religion intending to bring about reform in the religion in keeping with the modern world, was held not to amount to an offence under section 153A.<sup>215</sup> Additionally, the Indian courts have also recognised that "*criticisms are to some extent unavoidable, they are made for the purpose of enlisting popular support, and in considering the effect of such criticisms no serious notice ought to be taken of crude, blundering attempts or of rhetorical exaggeration.*"<sup>216</sup>

The circumstances in which alleged offending words were said has consistently been maintained as important by Indian courts when analysing as to whether the words come within the scope of the provision. As *Valiyathura vs By Advs. Sri. S. Chandrasekharan*<sup>217</sup> holds

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<sup>212</sup> Bhagwati Charan Shukla v. Provincial Government ref

<sup>213</sup> Meredith J as cited in Gaur page 1376 para 2

<sup>214</sup> State of Maharashtra v. Ganpate Vasudeo Behera 1978 Cr LR 178

<sup>215</sup> Krishna Deo Gaur, *Textbook on the Indian Penal Code* (first published in 1992, 4<sup>th</sup> edn, Universal Law Publishing Company Pvt. Ltd. 2011) available at; <https://books.google.lk/books?id=WnnxzkV2mk0C&printsec=frontcover#v=onepage&q=153A&f=false> at page 262

<sup>216</sup> *Debi Soren and Ors. vs The State*, 1954 CriLJ 758 para 18 available at <https://indiankanoon.org/doc/1894387/>

<sup>217</sup> Crime No. 109/2014 of Valiyathura vs By Advs. Sri.S.Chandrasekharan, available at ; <https://indiankanoon.org/doc/33293257/>

*“One cannot rely on stray, isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.”*<sup>218</sup>

Thus in analysing as to whether the allegedly offensive words or representations fall within the scope of the provision, the reasonable man test should be applied objectively giving recognition to the context in which the words were stated. The preceding examination of the *Tissanayagam* case demonstrates an abject failure to articulate objective guidelines that would ensure the application of the PTA in a manner that would put forth “reasonable limitations” on the freedom of expression.

One of the current government’s key promises made in January 2015 was to repeal the PTA in its present form and to introduce replacement legislation in line with international standards.<sup>219</sup> While there has been much discussion and initiative<sup>220</sup> to formulate new legislation, the PTA continues to be used.<sup>221</sup> Though there are reports in the public domain of a draft Counter-Terrorism Act, there is has been an absence of public consultation over the process and clarity regarding the status of drafting.<sup>222</sup> An older draft of the counter-terrorism legislation attracted considerable criticism both domestically and internationally, with pronouncements that it was even more repressive than the PTA.<sup>223</sup> CPA reiterates its calls for the repeal of the PTA and for the introduction of any new laws in adherence to international standards and in a transparent and inclusive manner.

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<sup>218</sup> Ibid at para 4

<sup>219</sup> National Action Plan for the Protection and Promotion of Human Rights 2017 – 2021 see 1:2:1, UNHRC Res 30/1 Para 12, GSP+ requirement (CAT) see for more details Human Rights Commitments made by the Government of Sri Lanka and Ways Forward <<http://www.cpalanka.org/wp-content/uploads/2018/02/HR-Commitments-final-pdf>>

<sup>220</sup> ‘Sri Lanka tells UNHRC progress made on counter Terror act’, (The Sunday Leader , 2018) <<http://www.thesundayleader.lk/2018/03/19/sri-lanka-tells-unhrc-progress-made-on-counter-terror-act/>>

<sup>221</sup> ‘Assassination plot against Sumanthiran indictments be served Colombo high court?’ (The Sunday Observer, 2018) <<http://www.sundayobserver.lk/2018/07/29/news/assassination-plot-against-sumanthiran-indictments-be-served-colombo-high-court?page=1>>

<sup>222</sup> ‘UN rapporteur urges Govt. to repeal PTA’ (Daily Mirror, 2017) <<http://www.dailymirror.lk/article/UN-rapporteur-urges-Govt-to-repeal-PTA--132866.html>>

<sup>223</sup> Ibid.

## Police Ordinance No 16 Of 1865

The Police are the first respondents in situations of racial violence and incitement and are responsible for recording the crime, taking initial statements and conducting investigations. It is thus of vital importance that proper training and guidelines are issued regarding the conduct of the Police in these situations.<sup>224</sup>

The Police are given ample power under the Police Ordinance to control and contain situations where there is a threat to public peace and public order. Section 79(2) of the Police Ordinance<sup>225</sup> provides the Police with the power to arrest a person without a warrant<sup>226</sup> when any person in a public place or meeting uses “threatening, abusive or insulting words or behaviour” intending to provoke a breach of the peace or where the breach of the peace is likely.<sup>227</sup>

Despite these powers, however, the Police were roundly accused of inaction during the communal clashes in Aluthgama, Gintota and Digana.<sup>228</sup> A number of fundamental rights cases have been filed against the Police for this inaction. One of these cases,<sup>229</sup> filed by Mohamed Junaid Mohamed Imran of Dharga town, close to Aluthgama, asserted that the Sri Lanka Police Department failed to uphold the rule of law and to fulfil their duties and obligations specified under the section 56 of the Police Ordinance.<sup>230</sup>

The Petitioner, in this case, has petitioned the Supreme Court to direct the Inspector General of Police to formulate instructions and guidelines to prevent persons engaging in hate speech calculated to cause ethnic and racial disharmony and to prevent the occurrences of racial or ethnic unrest. He also petitioned for a direction to give effective instructions to all Police officers including the Deputy Inspectors General of Police to ensure that prompt and effective action is taken to prevent and suppress any similar violence against any segment of

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<sup>224</sup> Eltayeb ( n 117)

<sup>225</sup> Section 79(2), Police Ordinance – Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour which is intended to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence under this section.

<sup>226</sup> Section 79 (4)

<sup>227</sup> A person found guilty of this offence is liable to a fine not exceeding Rs. 5,000 or to imprisonment of either description for a term not exceeding six months or both – Section 79 (3)

<sup>228</sup> The role of the police in failing to prevent the hate campaign against Muslims in Aluthgama and Digana has been criticised extensively. There were also reports of active participation by police officers in aiding the anti-Muslim riots in the past. See, Groundviews <<https://groundviews.org/2016/11/22/petition-signed-by-over-5000-inaction-of-police-in-face-of-extremism/>> Al Jazeera <<https://www.aljazeera.com/news/2018/03/sri-lanka-muslim-shops-mosques-targeted-buddhist-hardliners-180305165900594.html>>

<sup>229</sup> Petition is available at <<https://www.colombotelegraph.com/index.php/aluthgama-gun-shot-victim-goes-to-sc-full-text-of-the-petition/>>

<sup>230</sup> Section 56, Police Ordinance – Every police officer shall for all purposes in this Ordinance contained be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka, It shall be his duty (a) to use his best endeavours and ability to prevent all crimes, offences, and public nuisances (b) to preserve the peace; (c) to apprehend disorderly and suspicious characters (d) to detect and bring offenders to justice; (e) to collect and communicate intelligence affecting the public peace; and (f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority.

the population or any group of persons based on ethnic or religious grounds among other reliefs prayed in the petition.<sup>231</sup>

As demonstrated in numerous cases, the Police play a critical role in preventing the incitement and spread of violence. The Police Ordinance provides them with the necessary powers to take action against perpetrators without the sanction of the Attorney General's Department.<sup>232</sup> This must be exercised by the Police in future without any fear or fervour and ensure all perpetrators are held to account where there is evidence. Unfortunately, the inaction in past cases by the Police has contributed to the culture of impunity prevailing in Sri Lanka for hate speech and hate crimes. This intensifies the need for reforms within the Police to restore the public confidence in the police.<sup>233</sup>

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<sup>231</sup> Petition (n 230)

<sup>232</sup> CPA highlighted this in the letters sent to the IGP and the AG after the incidents in Aluthgama and Digana calling for the arrest and prosecution of the individuals advocating national, racial and religious hatred

<sup>233</sup> CPA discusses a framework for possible reforms for the police in the "Recommendation" section of this report

## **Conclusion and Recommendations**

### **Conclusion**

This report has mapped the legal framework pertaining to hate speech in Sri Lanka and examined gaps and challenges in terms of its application. While the report has identified the need for reform and provided a number of specific recommendations in this regard, there is no justification for inaction in prosecuting perpetrators of hate speech in Sri Lanka. It is indeed a tragedy that while the country's protracted war ended in 2009, ethno-religious conflict still persists with a spike in ethno-religious violence in post-war Sri Lanka. Digana in March 2018 and the series of incidents of ethno-religious violence preceding it have put Sri Lanka's fragile social fabric under severe strain, consequently robbing ethnic and religious minorities of their rights, dignity, livelihoods and even lives.

The inability and unwillingness to prosecute incidents of hate speech, as captured in this report, has contributed to a sections of Sri Lankan society who live in fear with a waning or entirely non-existent confidence and trust in state structures. Inaction on holding perpetrators to account has also strengthened the perception that some are beyond the reach of the law, exacerbating the culture of impunity already inherent to Sri Lankan society. These are indeed troubling trends in a country that has the potential for genuine reconciliation and coexistence, where pluralism, tolerance and the rule of law could be supreme.

To break this vicious cycle of violence and impunity, swift and decisive action and long-term structural reforms are needed by multiple stakeholders. The ultimate responsibility here is with the government while other stakeholders, such as civil society organisations and international actors, also have important roles to play in initiating conversation and instigating action. The specific recommendations provided by this report, and collated below, are for both action and reform, and CPA sincerely hopes that they are given serious consideration and lead to tangible and timely action.

## Recommendations

### 1) For the Sri Lankan Government

#### *Legislative recommendations:*

- Review and amend sections 291A, 291B and 120 of the Penal Code in order to bring them in line with internationally accepted standards
- Repeal the PTA in its present form and formulate new replacement legislation in adherence to international standards
- Strengthen the ICCPR Act through express recognition of ‘incitement’ as provided by Article 20 of the ICCPR, and incorporate robust definition of key terms like hatred, discrimination and violence. Also, incorporate Article 19 on freedom of expression as contained in the ICCPR and recognise the coherence between Article 19 and Article 20.
- Use the ICCPR Act as the primary legislation in the prosecution of hate speech in the country
- Undertake any future legal reforms in consultation with the Human Rights Commission of Sri Lanka (HRCSL) and other stakeholders in a transparent and inclusive manner.

#### *Procedural Recommendations:*

- Take action to address the dissemination of misinformation that perpetuates hate speech including legal action against perpetrators and actively engage with a range of stakeholders to address campaigns to raise awareness<sup>234</sup>
- Guarantee that persons who have suffered as a result of incitement have a right to an effective remedy, including reparations and remedy for damages.<sup>235</sup>
- Take immediate action to strengthen the legal and procedural framework and provide safeguards to investigators, prosecutors and others involved in investigations and prosecutions.<sup>236</sup>
- Provide the necessary resources to monitor hate speech and trends including online hate and create an early warning mechanism that alerts government officials and other stakeholders on possible tensions and areas to address.
- Work together with different stakeholders such as private companies and Internet Service Providers to introduce zero tolerance over hate speech. This should include

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<sup>234</sup> ‘Plan of action for religious leaders and actors to prevent incitement to violence that could lead to atrocity crimes’ available at:

[http://www.un.org/en/genocideprevention/documents/Plan\\_of\\_Action\\_Religious\\_Prevent\\_Incite.pdf](http://www.un.org/en/genocideprevention/documents/Plan_of_Action_Religious_Prevent_Incite.pdf)

<sup>235</sup> 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 -Rabat Plan of Action (2013) pg. 11 available at [https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)

<sup>236</sup> ‘Guidelines on the Role of Prosecutors’ - Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, (27 August to 7 September 1990) available at <https://www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx>

formulating necessary community standards, campaigns to address incidents and trends, early warnings, legal action and reform.

- Consider the desirability of establishing an independent Public Prosecutors Office, by separating out the prosecutorial function from the Office of the Attorney General and establishing a separate statutory authority.<sup>237</sup>
- Play an active role to promote equality, protect and promote ethnic cultural and religious rights of the communities by conducting awareness programmes and educating the public on concepts of human rights values, multiculturalism, pluralism and intercultural understanding.<sup>238</sup>
- Implement proposed reforms to strengthen the Human Rights Commission as enumerated in the *National Action Plan for the Protection and Promotion of Human Rights (2017-2021)*.<sup>239</sup>
- Take measures to strengthen the framework to protect victims and witnesses.<sup>240</sup>

## 2) For the Attorney General's Department

### **Short term recommendations:**

- Take steps to indict and prosecute cases under the ICCPR Act including incidents where there is evidence of hate speech (such as the incidents in Aluthgama in 2014 and the Kandy district in 2018).
- Review any delays of past incidents where action has yet to be taken (such as in Aluthgama in 2014 where to date no indictments have been filed).
- Conduct specialised training programs for officials of the Attorney General's Department and others regarding the legal framework on hate speech and ensure officials are able to file cases in future without any political interference.
- Issue clear and comprehensive guidelines in the three languages for the investigation and the prosecution of cases on human rights violations and incitement based on international standards.

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<sup>237</sup>Centre for Policy Alternatives, *A NEW DEVOLUTION SETTLEMENT FOR SRI LANKA*' Asanga Welikala (eds) (Centre for Policy Alternatives 2016) 19 available at <<http://www.cpalanka.org/a-new-devolution-settlement-for-sri-lanka-proceedings-and-outcomes-conference-of-provincial-councils/>>, Kishali Pinto Jayawardene, Whither the office of the Attorney General? Sunday Times (2008) <<http://www.sundaytimes.lk/081123/Columns/focus.html>>, Danielle Ireland-Piper Institutional dichotomies: The Solicitor-General in Sri Lanka (2011, Bond Law Review) <<https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1420&context=blr>> . Attorney General's role in defending Sri Lanka must be revisited: Lawyers (Financial Times) <<http://www.ft.lk/article/476705/Attorney-General-s-role-in-defending-Sri-Lanka-must-be-revisited—Lawyers>>

<sup>238</sup> Eltayeb (n 117)

<sup>239</sup> National Action Plan for the Protection and promotion of Human Rights (2017-2021), available at: <[http://www.pmooffice.gov.lk/download/press/D00000000063\\_EN.pdf](http://www.pmooffice.gov.lk/download/press/D00000000063_EN.pdf)>

<sup>240</sup>The Centre for Policy Alternatives, *The Need for a Strong Victim and Witness Assistance and Protection Mechanism* (2014) available at: <<http://www.cpalanka.org/the-need-for-a-strong-victim-and-witness-assistance-and-protection-mechanism/>>

- Undertake a review to understand the delays in filing indictments and prosecuting cases with immediate action taken to build capacity and raise awareness among officials in the Department, recruit any additional staff and introduce other reforms to ensure there is accountability for the cases before the respective counsel in the Department.

### **Medium to Long-term recommendations:**

- Establish a separate specialised unit within the Department comprising of prosecutors who are specifically trained in hate speech and “incitement” cases and are provided with the necessary resources and independence to initiate investigations, indict and prosecute.
- Initiate structural reforms as identified by the Sectoral Oversight committee on Legal Affairs (anti-corruption) & Media<sup>241</sup>
- Develop and implement an effective and efficient case management system and maintain proper filing standards within the department.

### **3) For the Police and other actors involved in investigations**

- Take swift action to promptly arrest offenders of hate speech and conclude investigations within a specific time period to avoid unnecessary delays.
- Ensure necessary training is provided to a team which focuses specifically on incidents of hate speech and related issues.
- Establish better co-ordination between investigators and the Attorney General’s Department with a system established to monitor the progress of investigations.
- Monitor the progress of cases sent to the AG’s department to prevent delays in filing indictments.
- Provide Police officers with the necessary training to institute action at the Magistrate’s Court (since the Police has prosecutorial powers before the Magistrate’s Courts, where most of the offences under the Penal Code are taken up).

### **4) For the Judiciary**

- Incorporate the threshold of incitement as enumerated in the ICCPR in deciding cases on hate speech.
- Interpret hate speech legislation in a manner consistent with Sri Lanka’s international obligations.
- Impose restrictions on freedom of expression only on narrowly defined grounds and in accordance with constitutionally and internationally recognised limits.
- Conduct necessary training and awareness programs for judicial officers and Court staff regarding the legal provisions of the ICCPR Act and the applicable international standards.

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<sup>241</sup>Sectoral Oversight committee on Legal Affairs (anti-corruption) & Media- Recommendations Pertaining to the Expeditious and Efficient Administration of Criminal Justice, available at <<http://www.parliament.lk/uploads/comreports/1510738363068517.pdf#page=1>>

## **5) For the independent commissions**

- The National Police Commission (NPC) should promptly investigate any allegations against Police personnel in terms of incidents of hate speech and take necessary action
- The HRCSL should investigate incidents of hate speech and make public findings in a timely manner.
- Both the NPC and HRCSL should request authorities to provide regular updates pertaining to any action taken in relation to cases of hate speech and other incidents.

## **6) For the media (Print, Broadcast, Digital and Social media)**

- Media organizations and management should take necessary measures to ensure independence from government control and political influence to ensure that propaganda cannot be used to reinforce ethnic division and instigate violence in the country.
- Provide media personnel, journalists and reporters with regular training on ethical reporting on incidents of hate speech and dealing with affected communities.
- For social media platforms, radicalise responses to hate speech through careful interactions with user complaints and content moderations on a regular basis.
- Work together with Government, private companies, internet service providers and social media platforms to formulate necessary community standards and rules of conduct to deal with advocacy of hatred and discrimination online.
- For social media platforms, recruit or source content reviewers proficient in both Sinhala and Tamil in order to effectively identify hate speech being disseminated.
- For social media platforms, incorporate simpler and faster reporting mechanisms in order to make it easier and simpler to report violent hateful content.

## **7) For civil society actors**

- Follow up on cases of hate speech, requesting relevant authorities for further information including any action taken and monitor cases that are being prosecuted.
- Conduct awareness programs and other initiatives to educate and build the capacity of the general public and relevant officials on hate speech, the legal framework and ways of mitigating and preventing recurrence.
- Provide assistance to victims of hate speech, such as legal advice, counselling and financial assistance.
- Pay closer attention to and monitor and report hate speech disseminated via social media platforms and inform the relevant authorities.

## **8) For religious leaders**

- Refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination and speak out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech.
- Engage in inter-faith dialogue to promote religious harmony, co-existence, mutual respect and create awareness on hate speech and hate crimes.

- Conduct training and awareness programs in partnership with the State and others targeting members of the clergy on principles of tolerance, equality and pluralism.

### **9) For political leaders**

- Adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speech
- Prevent attempts by party members to misuse incidents of indictment for political gain.<sup>242</sup>
- Take action against party officials and representatives where evidence demonstrates to inciting hate speech or being complicit in such action.

### **10) For the international community**

- Raise the need to prosecute offenders of hate speech and incitement continuously with the Government.<sup>243</sup>
- Provide financial and technical assistance to the Government to identify early warnings, monitor and control instances of hate speech.
- Closely scrutinise the Government at international fora, particularly at reporting mechanisms for international legal instruments, and hold the government to account on its international legal obligations.

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<sup>242</sup> Rabat Plan of Action, available at

[https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)

<sup>243</sup> Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism Addendum Mission to Sri Lanka at para 55, available

[https://www.ohchr.org/Documents/Countries/LK/Sri\\_LankaReportJuly2018.PDF](https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJuly2018.PDF), Lakshaman Kadiragamar Institute of International Relations and Strategic studies 'International Reactions to Anti-Muslim Riots in Sri Lanka, (LKI 2018) <https://www.lki.lk/blog/international-reactions-to-anti-muslim-riots/>