



Narratives on the International Covenant on Civil and Political Rights (ICCPR) in Sri Lanka:

Deconstructing its Implementation and Impact



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Lanka:**

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Advisors: Saman Senadheera AAL, Samantha Jayamanne AAL, Indika Perer AAL

Researchers: Viranjana Herath AAL, Dulmini Sarashika Ekanayake

Table of Contents

Executive Summary	5
Chapter 01	8
1.1. Introduction	8
1.1.1. The ICCPR: A Landmark in the Story of Human Rights.....	8
1.1.2. Key Elements of the ICCPR.....	9
1.1.3. The accession of Sri Lanka to the ICCPR.....	9
1.2. Background of the Study.....	11
1.3. Problem Statement.....	12
1.4. Objectives of the Research	122
1.4.1. Main Objective	122
1.4.2. Sub-objectives.....	13
1.5. Scope and Limitation.....	144
1.5.1. Scope:.....	144
1.5.2. Limitations:.....	144
Chapter 02	166
2.1. ICCPR and Sri Lanka: A Historical Overview	166
2.2. Analysis of legislative and administrative steps taken	19
2.3. Reality of Enacting ICCPR Law in Sri Lanka.....	22
Chapter 03	233
3.1. Overview of relevant domestic and international Mechanisms.....	233
3.1.1. International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007	233
3.2. Approaches of Various States towards the Implementation of the ICCPR.....	28
3.2.1. The United Kingdom's Approach to Implementing the ICCPR Convention	28
3.2.2. The Australia's Approach to Implementing the ICCPR Convention	29
3.2.3. The India's Approach to Implementing the ICCPR Convention	30
3.3. Comparative analysis of specific sections of the ICCPR Act of Sri Lanka and ICCPR Covenant	311
3.4. International Approach of the Article 19 & Article 20 of the ICCPR	38
3.5. Exploring the Doctrine of Freedom of Expression and Its Limitations in International and Regional Mechanisms	42
3.6. Exploring Domestic Judicial Bodies' Definitions and Interpretations in Relation to ICCPR Act	51
3.6.1. Human Rights Commission's guideline over Section 03 of ICCPR	51

3.7. Assessment of Judicial Proceedings: Domestic Courts’ Responses to Cases Involving the ICCPR Act.....	55
3.7.1. <i>Thissa Attanayake Case</i>	55
3.7.2. <i>Shakthika Sathkumara Case</i>	57
3.7.3. <i>Abdul Raheem Case</i>	58
3.7.4. <i>Ramzi Razeek Case</i>	59
3.7.5. <i>Natasha Edirisooriya Case</i>	59
Chapter 04	62
4.1. Strengthens of the ICCPR Act of Sri Lanka	62
4.2. Identifying Shortcomings and Gaps in the International Covenant on Civil and Political Rights (ICCPR) Act of Sri Lanka.....	65
4.2.1. Adequacy and Completeness of the ICCPR Act.....	65
4.2.2. Impact of Hierarchy in Human Rights	66
4.2.3. Absence of Non-Derogable Rights:	66
4.2.4.. Misuse of Section 03	66
Chapter 05	71
5.1. Challenges in Implementing the ICCPR in Sri Lanka.....	71
Chapter 06	74
6.1. Key observations.....	74
6.2. Recommendations	77
6.2.1. Short-term Strategic Plan.....	77
6.2.2. Long-term Strategic Directions	80
Table of Cases.....	83
Table of Legislation.....	84
Bibliography	85

Executive Summary

This is an action-research report that comprises case studies and legal analysis of the enactment, operationalization, and impact of the United Nations' International Covenant on Civil & Political Rights Act No. 56 of 2007 of Sri Lanka. Action-research combines the analysis and systematic addressing of a specific problem in society and ecosystem.

The ICCPR Act of Sri Lanka is intended as the International Covenant's enabling enactment passed by the Parliament of Sri Lanka in order to fulfill the State's obligations undertaken by the country after its ratification of the UN Covenant in 1980, rendering the Covenant enforceable within the country. The GoSL had failed to implement an enabling framework for decades. The ICCPR Act of 2007 was introduced as a response to the Sinharasa Judgment of 15th September, 2006, in the case of SC/SP(LA) 182/99 by the Supreme Court of Sri Lanka. The Sinharasa judgment prompted international pressure for Sri Lanka to clarify the State's position on its commitment towards the ICCPR. The Supreme Court advised the Government to enact implementing legislation and frameworks in order that the ICCPR could be enforced.

Faulty Application: Subsequent practice of enforcing the ICCPR Act, however, has created the impression that the ICCPR Act itself has failed to adequately capture the genuine essence of the ICCPR.

The ICCPR adopted by the UN provides a progressive and comprehensive framework for civil and political rights in a country. When Chapter III on 'Fundamental Rights' of the Sri Lankan Constitution is compared with the ICCPR, there is a noticeable gap in the scope of rights enshrined in the Constitution. The ICCPR Act of 2007 fails to fill that gap.

Constitutional lacuna: The Sri Lankan Constitution appears incomplete and structurally disjointed when compared with the global standards, the primary objective of the UN Covenants being the preserving, and enhancing of human rights. The absence of a well-defined conceptual foundation within the Constitution, aimed at optimizing the realization of human rights for Sri Lankan citizens, presents challenges in coherently interpreting and applying the Bill of rights. Thereby it has become an additional complicating barrier to the protection and promotion of fundamental rights in Sri Lanka.

Continuous Misapplication of Act: An examination of implementation of the ICCPR Act in Sri Lanka brings up instances of its sustained misuse due to the lack of safeguards for the normative rights within it. The misapplication of the ICCPR by Sri Lankan authorities not only casts doubt on the State's commitment to upholding human rights but also undermines the core principles embedded in the ICCPR itself. The ICCPR's essence lies in safeguarding the rights and liberties of individuals, particularly guaranteeing the full exercise of civil and political rights belonging to the people. Regrettably, the contentious enforcement of the Act has cultivated an atmosphere characterized by apprehension and repression. The faulty application of the Act has shown that rights, such as rights of free expression, assembly, and of association, can be severely impeded through the enforcement of the Act.

Misuse of Incitement provisions: The most frequent illogical implementation of the ICCPR Act is the use of Section 3 of the Act dealing with prohibition of incitement to violence and war and, advocacy of hatred that results in discrimination, hostility, or violence. The provisions of Section 3 are very similar to the principles elucidated in Article 20 of the Covenant. Article 20 is introduced as a qualification of Article 19 of the ICCPR where it functions to counter hate speech. However, in international human rights law, it is imperative to interpret Article 20 in conjunction with Article 19.

It is universally accepted that when a state party acts on Article 20, it has to take into account Article 19. This entails refraining from enacting legal measures that exclusively shield any one belief, religion, or any institution from fair critique or criticism. Through the faulty enforcement of Section 3 of the ICCPR Act, the State has deviated from its international obligation. There has been a continued misuse of powers derived from the ICCPR Act.

HRCSL Guideline: Recognizing this recurrent issue, the Human Rights Commission of Sri Lanka introduced a guideline based on the Rabat Plan of Action created by the UN Office of the High Commissioner for Human Rights (OHCHR) to determine the types of advocacies that qualify as incitement within the purview of Article 20. This test comprises six essential elements:- context, speaker, intent, content and form, extent of the advocacy and, imminent harm. This HRCSL guideline offers clarity on the appropriate utilization of the Act within the ICCPR's overarching principles.

Politically selective application of Act: In spite of the guidelines of the Human Rights Commission, arrests have persisted under the lens of the ICCPR Act's misapplication. The utilization of the ICCPR Act has displayed a discernible pattern of selectivity, often driven by political, ethnic and religious considerations.

The arrest of parliamentarian and senior politician Tissa Attanayake in 2015 marked the beginning of the Act's apparent illogical enforcement. Despite alternative legal provisions being available, the authorities invoked provisions of the ICCPR Act with the dubious intent of detaining Attanayake without the option of bail. This kind of practice shows the current tendencies behind the use of ICCPR Act by the authorities: to advance particular political objectives rather than to curtail hate speech.

This selective political application of the Act to press charges against citizens who express their opinions in various forms has become a very frequent practice. If the Act is allowed to be manipulated in this manner, particularly in the misuse of Section 3, there may become entrenched a general encroachment of the right of free expression. Paradoxically, although the Article 20 of the ICCPR is introduced to safeguard rights of disempowered groups in society, in Sri Lanka, there is the probability of transforming that same legal provision into a suppressive instrument against citizens.

Act as instrument of social dominance: This diverse use of the Act indicates an undesirable reality: it is harnessed to uphold the status quo and consolidate the dominance of the

powerful. Rather than serving as a mechanism to protect individual rights and promote inclusivity, the Act veers towards advancing specific partisan agendas.

Recent positive application of Act: However, a recent judgment by Judge Aditya Patabendi in the Colombo High Court in relation to the bail application sought by stand-up comedian Natasha Edirisooriya has reverted the application of the domestic ICCPR law to a more appropriate direction. This judgement balances the whole complex of international and domestic legal frameworks, including the Act's original purpose, its alignment with the right to freedom of speech, international guidelines like the 2020 UN General Assembly action plan on hate speech and the Rabat Action Plan, as well as provisions in the Penal Code and law enforcement powers. This landmark judgment not only brings the ICCPR Act in line with the right to freedom of speech but also emphasizes the convergence of domestic and international norms in addressing hate speech issues.

Lack of binding precedence by judiciary: It is crucial to emphasize that this High Court bail order solely carries the weight of a singular decision rather than establishing a binding precedent (*stare decisis*). It is essential to underscore that this High Court ruling, though instructive, may not necessarily chart a judicially positive course for forthcoming legal proceedings.

Recommendations: In conclusion, there are both short term and long term approaches to establish a stable mechanism for safeguarding civil and political rights in Sri Lanka and preventing the future misuse of the ICCPR Act.

In the short term, fostering awareness among law enforcement personnel and, exploring alternative legal avenues are vital steps toward rectifying the current situation. The utilization of the Natasha Edirisooriya case as a legal precedent is a valuable resource.

In the long term, a comprehensive amendment process for the ICCPR Act of 2007 is imperative to bridge its existing gaps and enhance its effectiveness. The incorporation of specific provisions, inspired by international guidelines, will highlight the State's commitment to proportionate responses to hate speech while fostering a progressive and equitable legal framework.

Additionally, the inclusion of fundamental rights within Sri Lanka's Constitution reaffirms the nation's dedication to safeguarding human rights without succumbing to hierarchical classifications. The holistic approach followed in this study aims to establish a balanced and enduring solution while ensuring that civil and political rights in Sri Lanka are not only protected but also promoted in accordance with international standards and principles.

Chapter 01

1.1.Introduction

1.1.1. The ICCPR: A Landmark in the Story of Human Rights

The International Covenant on Civil and Political Rights (ICCPR) is a crucial human rights treaty that sets out the basic civil and political rights that individuals are entitled to. ICCPR is a part of the International Bill of Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Universal Declaration on Human Rights (UDHR). ICCPR was specially drafted with the aim of enshrining the fundamental rights of individuals that protect their physical integrity, due process and non-discrimination¹. It ensures the meaningful involvement of individuals in the political sphere of their society. The ICCPR includes pivotal rights such as freedom of expression, freedom of assembly and association and right to vote.² On December 19, 1966, it was adopted by the United Nations General Assembly and entered into force on March 23, 1976, ten years after ratification by thirty-five countries. Countries that have ratified the ICCPR are obligated to protect and preserve basic human rights and legislative measures in order to protect the rights enshrined in the Covenant and to provide and effective remedy.³ Currently, 74 countries are signatories and 168 parties to the ICCPR.⁴

There are two Optional Protocols associated with the ICCPR. The First Optional Protocol establishes a mechanism for individual complaints, enabling individuals to file complaints with the Human Rights Committee regarding Covenant related violations.⁵ This has resulted in the development of a comprehensive body of legal decisions on the interpretation and implementation of the Covenant. Member States are permitted to make reservations if the matter is being or has already been examined by another international specialized body.⁶As of September 2019, the First Optional Protocol has been ratified by 116 parties.⁷

The Second Optional Protocol aims to abolish the death penalty.⁸ One of the notable approaches of the protocol is countries have been allowed to make reservations permitting the use of the death penalty for the most serious crimes of a military nature committed during times of war. As of June 2022, the Second Optional Protocol had been ratified by 116 parties.⁹

¹ Joseph, S., Schultz, J., Castan, M., ‘*The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, Oxford’ Oxford University Press, 2000.

² *ibid.*

³ CCLA, <<https://ccla.org/privacy/surveillance-and-privacy/summary-international-covenant-on-civil-and-political-rights-iccpr/>> accessed 26 June 2023.

⁴ *ibid.*

⁵ ICCPR-OP1, Article 1.

⁶ ICCPR-OP1, Article 5(2).

⁷ United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=en#3> accessed 23 June 2023.

⁸ OP2-ICCPR, Article 2.1

⁹ OHCHR Dashboard, <<https://indicators.ohchr.org/>> accessed 24 June 2023.

1.1.2. Key Elements of the ICCPR

The ICCPR consists of a preamble and 53 articles, which are divided into six parts.

The preamble to the ICCPR sets out the purpose and guiding principles of the treaty, emphasizing the inherent dignity and equal rights of all persons. It recognizes the importance of promoting universal respect and observance of human rights.

Part I of the ICCPR focuses on the right to self-determination.¹⁰

Part II addresses the fundamental principle of non-discrimination and equal protection of rights and the adoption of necessary provisions to protect rights,¹¹ equal rights of men and women to the enjoyment of all civil and political rights,¹² derogation in the public emergency time,¹³ and restriction or derogation from human rights that are recognized or exist by a state.¹⁴

In Part III of the ICCPR, there are provisions that encompass civil and political rights. They are right to life,¹⁵ the prohibition of torture,¹⁶ prevention of slavery,¹⁷ right to liberty and security,¹⁸ right to inherent dignity of the human person,¹⁹ freedom to choose the residence,²⁰ equality before courts and tribunals,²¹ freedom of expression and opinion,²² right to recognition everywhere as a person before the law and right of peaceful assembly.²³

Part IV of the ICCPR emphasizes on the establishment of the Human Rights Committee.

Part V of the Covenant focuses on the interpretation in accordance with the UN Charter and the definitions of specialized agencies, as well as the inherent rights of all individuals.

Part VI of the concluding section of ICCPR encompasses the significance, ratification, and accession processes undertaken by countries, the conditions for the treaty to enter into force, responsibilities of federal states, and amendments to the ICCPR.

1.1.3. The accession of Sri Lanka to the ICCPR

Sri Lanka became a party to the International Covenant on Civil and Political Rights (ICCPR) in 1980, and subsequently, in 1997, it acceded to the First Optional Protocol, which established

¹⁰ International Covenant on Civil and Political Rights 1966, Article 1, 2, 3,4,

¹¹ International Covenant on Civil and Political Rights 1966, Article 2

¹² International Covenant on Civil and Political Rights 1966, Article 3

¹³ International Covenant on Civil and Political Rights 1966, Article 4

¹⁴ International Covenant on Civil and Political Rights 1966, Article 5

¹⁵ International Covenant on Civil and Political Rights 1966, Article 6

¹⁶ International Covenant on Civil and Political Rights 1966, Article 7

¹⁷ International Covenant on Civil and Political Rights 1966, Article 8

¹⁸ International Covenant on Civil and Political Rights 1966, Article 9

¹⁹ International Covenant on Civil and Political Rights 1966, Article 10

²⁰ International Covenant on Civil and Political Rights 1966, Article 12

²¹ International Covenant on Civil and Political Rights 1966, Article 14

²² International Covenant on Civil and Political Rights 1966, Article 19

²³ International Covenant on Civil and Political Rights 1966, Article 21

an individual complaints mechanism. However, there are doubts regarding the genuine intention of the rulers of Sri Lanka to safeguard the civil and political rights of its citizens when they ratified the ICCPR in 1980. Sri Lanka's decision to ratify the ICCPR seems to be primarily motivated by the desire for international recognition within the global community.

The *Nallaratnam Singarasa*²⁴ case stands out as a prime example where this was best demonstrated. The decision of the Supreme Court in the case of *Nallaratnam Singarasa v. Attorney General*²⁵ held that while the accession of Sri Lanka to the ICCPR was legal, valid, and bound the State at international law, it created no additional rights as recognized in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation, proved to be hugely controversial.²⁶ The Supreme Court further ruled that the accession to the First Optional Protocol to the ICCPR, which enables individuals to bring complaints regarding violations of ICCPR rights to the Human Rights Committee, was deemed invalid and unconstitutional.²⁷ This ruling demonstrates that even when confronted with a clear violation of universally recognized human rights, the Sri Lankan judiciary lacks the ability to enforce the provisions of the ICCPR effectively. This decision has brought discredit to Sri Lanka in the eyes of the international community. However, the ICCPR Act had not been enacted when this matter was heard by the judiciary.

In 2005, Sri Lanka, with the aim of gaining GSP Plus benefits, made a declaration that it had ratified and effectively implemented all Human and Labour Rights Conventions, which included important treaties such as the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child (CRC). The annual report submitted by Sri Lanka regarding the GSP Plus benefits indicated that the government had committed to upholding the enforcement of these conventions.²⁸ In order to access the benefits of the GSP Plus scheme in 2007, the Sri Lankan government was required to pass legislation to implement the ICCPR effectively.

As a result, the International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007²⁹ was introduced in Sri Lanka. This legislation consists of 11 sections and its preamble specifies that its purpose is to implement the ICCPR, recognizing the need for the Sri Lankan government to enact appropriate laws that give effect to the Civil and Political Rights outlined in the Covenant, which had not yet received sufficient legislative recognition.

However, the implementation of the ICCPR in Sri Lanka has been a matter of debate and concern, with human rights organizations and the international community raising concerns about Sri Lanka's compliance with the ICCPR. The Sri Lankan police's utilization of the International Convention of Civil and Political Rights (ICCPR) Act during a series of arrests

²⁴ Nallaratnam Singarasa v. Attorney General [2006] S.C. Spl. (LA) No. 182/99.

²⁵ *ibid.*

²⁶ Edrisinha, R & Welikala, A, "Gsp Plus' Privileges: The Need for Constitutional Amendment", (2009) <http://www.cpalanka.org/wpcontent/uploads/2009/5/Article_on_ICCPR.pdf> accessed 24 June 2023.

²⁷ Nallaratnam Singarasa v. Attorney General [2006] S.C. Spl. (LA) No. 182/99.

²⁸ Edrisinha, R & Welikala, A, "Gsp Plus' Privileges: The Need for Constitutional Amendment", (2009) <http://www.cpalanka.org/wpcontent/uploads/2009/5/Article_on_ICCPR.pdf> accessed 24 June 2023.

²⁹ International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007

sparked significant public attention and garnered criticism from various groups, including artists, academics, civil organizations, politicians, students, and trade unionists. The controversial application of the Act raised concerns and drew dissent due to its perceived misuse by the authorities.

1.2. Background of the Study

The misuse of the ICCPR by the Sri Lankan authorities not only raises questions about the nature of government's respect towards basic human rights but also undermines the fundamental principles enshrined in the ICCPR. The purpose of the ICCPR is to protect the rights and freedoms of individuals, especially minorities, and to ensure the enjoyment of civil and political rights. However, the controversial application of the Act has created a climate of fear and repression that hinders the enjoyment of freedom of expression, assembly and association.

The concerns raised by a broad spectrum of stakeholders in Sri Lanka, including academics, civil society organizations, politicians, artists, students, and trade unionists, highlight a significant research problem related to the effective implementation of the International Covenant on Civil and Political Rights (ICCPR) in the country. There is widespread worry about the misuse of the ICCPR Act to target and suppress dissenting voices, exemplified by the arrests of individuals like writer Shakthika Sathkumara, activist Dilshan Mohamed, ordinary woman Abdul Raheem Mazahina, and comedian Natasha Edirisooriya. These incidents not only undermine public confidence in the government's commitment to human rights and the rule of law but also negatively impact Sri Lanka's international reputation. The nation's compliance with the ICCPR is already under scrutiny by various human rights organizations, civil groups, and other nations, raising concerns about potential adverse effects on foreign relations, trade agreements, and international cooperation.

Therefore, it is essential to conduct research that investigates the extent in which the ICCPR implements and evaluate the impact of these arrests on human rights protection particularly relating to freedom of expression, with the overall perception of Sri Lanka's compliance with its international obligations. There is a dearth of comprehensive assessment of Sri Lanka's implementation of the ICCPR. This research helps identify gaps, shortcomings and challenges in the implementation process. It will also shed light on the extent to which Sri Lanka adheres with its international human rights obligations and will provide recommendations to improve compliance and address concerns raised by various stakeholders.

By addressing the issue of implementation of the ICCPR, Sri Lanka can restore public confidence, strengthen human rights protections, and demonstrate its commitment to uphold civil and political rights.

Finally, strong and effective implementation of the ICCPR will contribute to the promotion of a just and inclusive society, where the rights and freedoms of all people, regardless of their background or beliefs, are respected.

1.3.Problem Statement

The research problem aims to prevent the misuse of the ICCPR Act in Sri Lanka and to establish the purpose of the ICCPR in the country. Currently, abuse of Article 3 of the ICCPR Act leads to civil and political prosecutions rather than their protection.

To improve this situation, the research proposes a comprehensive approach to improve the ICCPR Act as a formal instrument to promote civil and political security of the people, connecting with the original purpose of the ICCPR Act. As this Study points out this can be achieved through adopting a specific and narrow interpretation of Article 3 of ICCPR Act and make the legal community aware of the use of it in Sri Lanka.

This study will look at various instances and patterns of abuse of the ICCPR Act, looking at how it leads to referrals to civil and political authority. By analyzing data on such abuses of individuals and communities, the research aims to shed light on the need for a more precise interpretation of Article 3 to ensure legal urgency and rights are protected as findings.

Additionally, the underlying factors and findings contributing to the misuse of the ICCPR Act in Sri Lanka are investigated. Identifying the major challenges and obstacles to the proper implementation of the ICCPR Act will be a crucial part of this study.

The proposed legal area and specific interpretations of Article 3 will be assessed to determine the final potential position to prevent abuse and uphold the modern intentions of the ICCPR Convention. Recommendations are made to establish a stronger framework for civil and political security in Sri Lanka.

Ultimately, the research seeks to contribute to the creation of a more just and equitable society in Sri Lanka, where civil and political integrity of the individuals are protected in accordance with the principles of the ICCPR Convention. By addressing the issue of abuse and enhancement of the ICCPR Act, the research seeks to pave the way for stronger protection of human rights and the rule of law in the country.

1.4.Objectives of the Research

1.4.1. Main Objective

- To undertake a comprehensive study on the ICCPR related law reforms in Sri Lanka, with the aim of enhancing the implementation and enforcement of the International Covenant on Civil and Political Rights (ICCPR) within the country's legal framework.

1.4.2. Sub-objectives

1. Analyzing the Acceptance of ICCPR in Sri Lankan Jurisdiction:

This sub-objective entails a comprehensive examination of the acceptance undertaken by Sri Lanka to accede to and ratify the ICCPR. It involves scrutinizing the legislative and administrative procedures adopted by the Sri Lankan authorities to incorporate the ICCPR into domestic law, including any reservations, declarations, or interpretative understandings made during the acceptance process.

2. Identifying Merits and Loopholes in the ICCPR Act in Sri Lanka:

This sub-objective aims to identify the inherent strengths and vulnerabilities present within the ICCPR Act in Sri Lanka. It involves discerning the commendable aspects and advantageous provisions of the Act that align with established international human rights standards. Simultaneously, it seeks to uncover any deficiencies, gaps, or regulatory shortcomings within the Act that may impede its effective implementation and hinder the robust protection of civil and political rights.

3. Analyzing Sections of the ICCPR Law in conjunction with Comparable Legislations and Relevant Judicial Precedents:

This sub-objective involves conducting a comprehensive analysis of the specific sections of the ICCPR Act in relation to analogous legislations and pertinent judicial precedents. It necessitates a meticulous examination of how the provisions of the ICCPR Act correspond or deviate from other domestic laws or international human rights instruments. Additionally, it involves studying significant judgments that interpret and apply the provisions of the ICCPR Act in order to ascertain their legal implications and impact.

4. Identifying Challenges Associated with the Implementation of the ICCPR in Sri Lanka:

This sub-objective aims to identify and analyze the multifaceted challenges, obstacles, and issues pertaining to the implementation of the ICCPR in Sri Lanka. It entails a comprehensive assessment of factors that impede the effective enforcement of the Act, such as institutional barriers, insufficient awareness and understanding, limited allocation of resources, and political constraints. This analysis purposes to gain insights into the factors that hinder the realization of civil and political rights.

5. Formulating an Integrated Approach to Address the Issues Pertaining to the ICCPR Law:

This sub-objective focuses on formulating an integrated approach or strategy to address the issues identified in the previous sub-objectives. It involves developing concrete recommendations, policy measures, or legal reforms aimed at enhancing the implementation and enforcement of the ICCPR Act in Sri Lanka. This may encompass proposal to amend to the existing legislation, strengthening institutional mechanisms which are responsible for safeguarding human rights, raising awareness among key stakeholders, and fostering a culture of accountability to ensure the effective protection of civil and political rights.

By pursuing these meticulously crafted sub-objectives, the research endeavors to contribute substantively to the broader goal of ICCPR law reforms in Sri Lanka. Its aim is to facilitate the development of a comprehensive and robust legal framework that aligns with international standards, ensuring the effective protection and promotion of civil and political rights in the country.

1.5. Scope and Limitation

1.5.1. Scope:

The research focuses on preventing the misuse of the International Covenant on Civil and Political Rights (ICCPR) Act in Sri Lanka and establishing the genuine objective of the ICCPR Convention within the country's legal framework. The study primarily investigated instances and patterns of misuse of Article 3 of the ICCPR Act, which led to violations of civil and political rights instead of their protection. The research encompassed legal, political, and social aspects to understand the underlying factors contributing to the misuse and its implications on human rights and governance.

The scope of the research includes an in-depth analysis of the ICCPR Act, examining its provisions and their interpretations in Sri Lanka. It is also explored relevant case studies and instances of misuse of the Act to illustrate the extent and impact of the issue. The study proposes legal reforms to improve the implementation of the ICCPR Act, including specific and narrow interpretations of Article 3 to ensure its proper application.

1.5.2. Limitations:

However, the research had certain limitations that need to be acknowledged:

1. Availability of Data: Access to comprehensive and accurate data on instances of misuse and its impact was limited due to potential government restrictions and confidentiality issues. As a result, the research relies on available public records, media reports, documented cases, and the facts found in discussions and interviews but not going against privacy, confidentiality and legal issues, which might not have provided a complete picture of the situation.

2. Subjectivity of Interpretations: Interpreting the intention and scope of the ICCPR Act was complex, and multiple perspectives existed on its proper application. While efforts were made to adopt an objective approach, the researcher's interpretations and biases could have influenced the findings to some extent.

3. Time Constraints: Conducting a comprehensive study of the ICCPR Act's implementation and its misuse was challenging within a limited timeframe. The research might not have covered all possible aspects and implications, potentially leaving some perspectives unexplored.

4. Legal and Political Context: The research focuses on Sri Lanka's legal and political context related to the ICCPR Act. However, it might not have accounted for broader regional or global perspectives on human rights issues, which could have had some influence on the subject matter.

5. Policy Implementation: While the research proposes legal reforms to address misuse, the actual implementation of these reforms are depend on various factors, including the political will and administrative capacity. The study might not have predicted the full extent of policy implementation challenges.

Despite these limitations, the research aims to offer valuable insights and recommendations to address the misuse of the ICCPR Act in Sri Lanka. It provides a foundation for further investigation and policy discussions on human rights protection and governance in the country.

Chapter 02

2.1. ICCPR and Sri Lanka: A Historical Overview

In 1980, on June 6, Sri Lanka ratified the International Covenant on Civil and Political Rights (ICCPR). Then, on October 3, 1997, it also agreed to the First Optional Protocol, which allowed individuals to make complaints about human rights violations to the Human Rights Committee. However, Sri Lanka has not yet acceded to the Second Optional Protocol, which aims to abolish the death penalty. The subsequent accession to the ICCPR was largely influenced by the efforts of former Minister of Foreign Affairs, late Lakshman Kadiragamar, who was also a President's Counsel and Member of Parliament.³⁰

However, during the time of Sri Lanka's accession to the ICCPR in 1980, J.R Jayewardene, who held the position of Executive President, did not have bona fide intent to protect the Civil and Political Rights of Sri Lankan citizens though he has led to introduce fundamental rights chapter to the 1978 Constitution. Rather, his actions seemed more directed towards showcasing commitment to both domestic and international communities, while not effectively implementing ICCPR rights within the country's legal framework.³¹

The tragic communal violence of 1983, known as Black July, resulted in the introduction of the sixth amendment to the Constitution of Sri Lanka. Unfortunately, this amendment, focused on public and national security, failed to fully implement the ICCPR. It infringed upon Sri Lanka's obligations under the ICCPR and violated the government's responsibility to safeguard individuals' rights to express political views and engage in political discourse, as outlined in the ICCPR.³²

In 1990, the government led by President Ranasinghe Premadasa proposed amendments to the Constitution's fundamental rights chapter. These amendments seemed to aim at expanding the scope of constitutional protection for human rights, including provisions akin to those recognized in the ICCPR. Despite these proposals, they were never presented to Parliament and thus did not become law, reflecting a failure to fully implement the ICCPR at the domestic level.³³

Following parliamentary elections in August 1994, the People's Alliance government, headed by Prime Minister Chandrika Bandaranaike Kumaratunga, was expected to bring about significant reforms related to freedom of expression, in line with ICCPR principles. Their manifesto emphasized the importance of checks and balances as a restraint on governmental

³⁰ Jayasekera B. K. M. & Edirisinghe A. A., 'Implementation of ICCPR in Sri Lanka: Impediments and Prospects' (2016) < <http://ir.kdu.ac.lk/bitstream/handle/345/1219/law-013.pdf?sequence=1&isAllowed=y> > accessed 24 June 2023.

³¹ *ibid.*

³² *ibid.*

³³ *ibid.*

power, suggesting an alignment with ICCPR principles.³⁴ However, subsequent governments in power, including those that followed, did not take substantial measures to fully implement the ICCPR within Sri Lanka's domestic legal framework.

In a *Joseph Perera v. Attorney-General*³⁵, Chief Justice S. Sharvananda emphasized the importance of narrowly and precisely drawn laws concerning speech and expression. This stance indicated a favorable disposition towards the use of ICCPR principles within Sri Lanka's legal context.

In 2006, a renewed discourse emerged in Sri Lanka concerning the International Covenant on Civil and Political Rights (ICCPR) Convention. On September 15, 2006, Sri Lanka's Supreme Court, in *Singarasa v. Attorney General Case*, consisting of five judges, including the Chief Justice, declared that the International Covenant on Civil and Political Rights (ICCPR) does not have any legal effect within Sri Lanka.³⁶ They said that the rights provided by the ICCPR are not considered rights under Sri Lanka's own laws. The court also ruled that Sri Lanka's participation in the Optional Protocol to the ICCPR, which allows individuals to directly complain to the Human Rights Committee, was against the country's Constitution.

As a result, using Human Rights Committee to defend rights have become worthless in Sri Lanka. The Supreme Court determined to abandon Sri Lanka's responsibilities under these and other international human rights agreements, except for the parts that have been directly integrated in national laws.

The judgment is problematic at least on two counts: first, the recommendations of Human Rights Committee become toothless. It can only issue views on whether there has been a violation of ICCPR rights (Article 5.4 of the Optional Protocol) and make just recommendations. Consequently, one can argue that this dimension of the judgment is wrong in law. Secondly, the question arises as to whether the concept of people's sovereignty in a republic could be used to constitutionally deny people within a State Party in which the broader protection of rights accorded by international human rights law. The irony inherent in such an argument is obvious.³⁷

However, this judgment was based on a mistaken understanding of international law and, in itself, violates Article 2 of the ICCPR. Contrary to the Court's conclusions, there is no requirement for the ICCPR to be made part of Sri Lanka's domestic law, as clarified by the Human Rights Committee in its General Comment 30 on Article 2.³⁸ Moreover, it is a fundamental principle of international law, mentioned in Article 27 of the Vienna Convention on the Law of Treaties,³⁹ that a country cannot use its national laws as an excuse for not fulfilling its international obligations. The adjudication of these cases, coupled with the

³⁴ Jayasekera B. K. M. & Edirisinghe A. A., 'Implementation of ICCPR in Sri Lanka: Impediments and Prospects' (2016) < <http://ir.kdu.ac.lk/bitstream/handle/345/1219/law-013.pdf?sequence=1&isAllowed=y> > accessed 24 June 2023.

³⁵ *Joseph Perera v. Attorney-General*, [1992], S.C. Nos. 107-109/86

³⁶ *Nallaratnam Singarasa v. Attorney General* [2006] S.C. Spl. (LA) No. 182/99.

³⁷ Udagama D., 'The Politics of Domestic Implementation of International Human Rights Law' (2015)

³⁸ Thirteenth session (1981) General comment No. 3: Article 2 (Implementation at the national level)

³⁹ Vienna Convention on the Law of Treaties 1969, Article 27.

egregious human rights violations that transpired during the period of war, has elicited international apprehension concerned the safeguarding of human rights in Sri Lanka. In this particular context, the significance of implementing a mechanism to safeguard civil and political rights in Sri Lanka was underscored. However, it is noteworthy that various economic and political factors exert a more substantial influence on this matter than the mere legal mandate aimed at enhancing human rights protection.

By this time, Sri Lanka had enjoyed the benefits of the General System of Preferences (GSP) scheme (Special Incentives Arrangement for Sustainable Development and Good Governance) of European Union (EU) which was aimed at assisting the developing countries in their exports and development efforts for several years. The scheme had been extended following the tsunami of December 2004. Midway through 2005, the EC unveiled a new 'GSP Plus' (GSP+) to aid in the alleviation of poverty and promote "sustainable development" and "good governance" in low- and middle-income countries. In late 2008, Sri Lanka's beneficiary status was up for renewal once again. The 'GSP Plus' (or 'GSP+') scheme, holds significant implications for the Sri Lankan export sector, particularly in relation to the apparel industry. This scheme is designed for deserving countries that adhere to specified international standards, providing them with favorable trade benefits.⁴⁰

One of the requirements for a country to qualify for the GSP+ scheme, which provides tariff relief, is that the country must commit to officially accepting and fully carrying out certain international agreements listed in Annex III of the European Council Regulation (EC) No. 980/2005 dated June 27, 2005. This regulation outlines the general scheme of giving preferential tariffs. One significant human rights rule that found in Part A of Annex III of this regulation is the ICCPR.⁴¹ On September 22, 2008, the European Commission's GSP Committee made the decision to launch an investigation into Sri Lanka's implementation of three specific human rights instruments: the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture, and the Convention on the Rights of the Child.⁴² Finally the Committee decided to withdraw preferential tariff benefits extended to Sri Lanka due to significant lacunas in the implementation of UN Human Rights Conventions. To be more precise, the escalation of armed conflict since 2006, along with the *Singarasa* judgment, hampered the benefits enjoyed under the GSP+ relief.

It is noteworthy that the ICCPR Convention and its two Optional Protocols are three separate treaties under international law and GSP+ framework only obliges a beneficiary country to ratify and fully implement the ICCPR. However, the decision of the Supreme Court in the case of *Singarasa* held that while the accession of Sri Lanka to the ICCPR was legal, valid, and bound the State at international law, it created no additional rights as recognized in the ICCPR for individuals within the jurisdiction of Sri Lanka in the absence of domestic legislation. The

⁴⁰ Edrisinha, R & Welikala, A, "Gsp Plus' Privileges: The Need for Constitutional Amendment", (2009) <http://www.cpalanka.org/wpcontent/uploads/2009/5/Article_on_ICCPR.pdf> accessed 24 June 2023.

⁴¹ GSP PLUS AND THE ICCPR: A CRITICAL APPRAISAL OF THE OFFICIAL POSITION OF SRI LANKA IN RESPECT OF COMPLIANCE REQUIREMENTS ROHAN EDRISINHA & ASANGA WELIKALA

⁴² GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues, Centre for Policy Alternatives and Friedrich Ebert Stiftung, 2008

first optional Protocol to the ICCPR wasn't among the instruments needed for the GSP Plus benefits. But the Supreme Court's decision that the ratification of the ICCPR itself does not create any justiciable rights under Sri Lankan domestic law created a controversial situation in the international community.

Therefore, there emerged a requirement to enforce the ICCPR Convention in Sri Lanka in order to meet the criteria stipulated to qualify as a beneficiary of GSP+ facility. . Consequently, the government enacted a law known as the International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007. This legislation aimed to enforce rights acknowledged by the ICCPR that were not previously acknowledged in the Constitution or in other domestic legislation. .⁴³

2.2. Analysis of legislative and administrative steps taken

Upon introducing the Bill, the Government referred to the special exercise of constitutional jurisdiction in respect of urgent Bills as per Article 122 of the Constitution. In accordance with Article 122 of the 1978 Constitution of Sri Lanka, in situations involving urgent Bills, the President could request the Chief Justice, through a written reference, to initiate a special review by the Supreme Court. This review was intended to ascertain whether the ICCPR Bill, or any of its provisions, were inconsistent with the Constitution.

In the debate at the Sri Lankan parliament about the ICCPR Bill, Then Foreign Minister Rohitha Bogollagama presented the government's stance. He explained how the government got involved in making the ICCPR Act accepted in Sri Lanka. Minister Bogollagama noted that although Sri Lanka had joined the ICCPR in 1980, there wasn't a full law to include its rules in the country's laws. While some rights in the ICCPR were acknowledged in local laws, they didn't have strong legal backing. According to him, to fix the gap showed in the *Singarasa Case*, the government introduced the ICCPR Act No. 56 of 2007 and aiming to add ICCPR rights that were missing in existing laws. It wanted to meet Sri Lanka's ICCPR commitments and follow the Supreme Court's decision.⁴⁴

According to him, the Act had broader goals, aiming to not only fix human rights issues but also to create a stronger human rights framework in Sri Lanka. He stressed the government's duty to protect people's rights. He explained how the government dealt with each ICCPR Article, considering what was already in the Constitution or other laws, and what wasn't applicable due to Sri Lanka's independent status. This comprehensive approach aimed to bridge gaps and align laws with the ICCPR and global human rights standards.⁴⁵

In the discourse offered by Mr. Rohitha Bogollagama, during the parliamentary discussion regarding the ICCPR Bill, elucidation was presented on how the rights enshrined within the ICCPR are encompassed within the existing legal framework of Sri Lanka, along with

⁴³ Hanzard Volume 171, No. 6

⁴⁴ Ibid.

⁴⁵ Ibid 40.

provisions established in the newly proposed ICCPR draft. However, a critical analysis of these declarations surfaces an underlying concern of a potential dissonance between rhetorical assurances and legal implementation. Of particular note is the notable omission of the right to life, which occupies a fundamental position within international human rights law. This decision seemingly raises questions about the government's dedication to fully embrace the protective ethos of the ICCPR, potentially undermining the commitment to safeguarding human rights. Moreover, the deliberate omission of the right to life, despite its paramount significance within international human rights norms, raises concerns about the depth of commitment to universal rights.⁴⁶

This apparent contradiction between verbal assurances and legislative choices beckons for a meticulous examination of the government's approach. The tendency to selectively adopt and adapt the ICCPR provisions, while neglecting core tenets of the main instrument, requires further exploration into the potential implications for human rights protection of the country. Such omissions and deviations may inadvertently create voids within the legal apparatus that can hinder the effective enforcement of the ICCPR's protective umbrella.

During the parliamentary debate, Joseph Michael Perera, distinguished member of the opposition, scrutinized the provisions outlined in Article 3(1) of the ICCPR Bill.

He said that Article 114 in the Penal Code deals with war, and Article 290 deals with preventing religious hatred. This comparison made Perera suggest that the things mentioned in Article 3(1) of the ICCPR Bill might already be well taken care of by Article 114 and 290 in the Penal Code of 1883.⁴⁷

Expressing his viewpoint, Perera contends that the present bill should not be presented as an urgent bill. His deliberation reflects a measured approach, advocating for a thorough examination of the bill's contents and implications before its passage. However, it is apparent that Perera's assessment of Article 3(1) remains somewhat limited, centered primarily on its alignment within the domestic legal framework. A more in-depth analysis of the potential ramifications of article 3(1) is notably absent from his deliberation.⁴⁸

However, he pointed out that the current version lacks a provision that would allow an individual to seek redress from the Human Rights Committee after trying all possible solutions available within their own country's legal system. Expressing the viewpoint of the opposition party, the United National Party, Mr. Joseph Michael Perera emphasized that if people are not given the chance to approach the Human Rights Committee, the entire effectiveness of the Bill could be compromised.

Consequently, the United National Party believed that the absence of access to the Human Rights Committee might weaken the substance of the Bill. They contended that this might indicate an intention on the part of the government in power to merely satisfy foreign and domestic interests. This perspective suggests that the Bill could potentially be presented as a

⁴⁶ *ibid* 40.

⁴⁷ *ibid* 40.

⁴⁸ *ibid* 40.

way to deceive the international community, creating an impression that the government is committed to following the terms of the ICCPR Covenant while the actual mechanisms for seeking external recourse are limited.

Leader of Tamil National Alliance, Parliamentarian Mr. R Sampandan, has focused primarily on the right to self-determination, the first article of the Convention. R. Sambandan expressed his view during the ICCPR Bill debate, focusing on Article 1(1) of the ICCPR. He emphasized that this article highlighted the right to self-determination, which involves people having the freedom to decide their political status and pursue their economic, social, and cultural development.

In response, then Minister Rohitha Bogollagama clarified that the right to self-determination mentioned by Sambandan is not covered under Article 1 of the ICCPR Bill. He explained that the reference to self-determination in the UN Resolution pertains to the context of decolonization and has limitations. The right of self-determination, according to Bogollagama, cannot be exercised in a way that undermines the territorial integrity or political unity of sovereign states. Additionally, he noted that no human rights body entertains such communication regarding this right.

Sambandan also raised concerns about Article 1(2) of the ICCPR, which addresses the right to subsistence. He questioned whether the creation of high-security zones, displacing people from their traditional areas and livelihoods, deprives them of their means of subsistence.

Minister Bogollagama, in response, emphasized the importance of complying with international obligations and standards. He acknowledged the concept of sovereignty but pointed out that sovereignty should not be invoked to undermine democracy and human rights of the people.

In the perspective of then Minister GL Peiris, the emergency Bill had been introduced to resolve a legal matter that had been highlighted by the Chief Justice in the *Singarasa case*. The intention behind its introduction was to address the issue of validity of first Optional Protocol of the ICCPR which had arisen in that the case. However, during the discussions, then MP Mr. Lakshman Kiriella asked whether the bill would enforce the First Optional Protocol, which had posed challenges in the *Singarasa case*. In response, Minister GL Peiris had stated that everyone was bound by the decision of the Supreme Court and could not act in contrary to it.

Mr. Kiriella and other opposition Members of Parliament, such as Mr Sri Kantha and Ms Renuka Herath, had shared the viewpoint that the emergency Bill had been presented due to the visit of the United Nations Human Rights Commissioner, Louise Arbour to Sri Lanka. They believed that the Bill might have been introduced hastily to attract international attention.

It can be observed that the legislature's approach to the ICCPR lacked a comprehensive and genuine understanding about the Convention. It further reflected a lack of thorough evaluation of the Bill's compliance with the core objectives of the ICCPR.

Furthermore, the observation made by Mr. Kiriella and other opposition Members of the Parliament stressed that the Bill's presentation might have been motivated by the visit of the United Nations Human Rights Commissioner points to political motivation overshadowing the

Bill's true purpose. This political consideration suggests disconnect between the intent of the Bill and the Convention's genuine goals.

2.3.Reality of Enacting ICCPR Law in Sri Lanka

The assertion that the legislature did not adequately fulfill the authentic intent of the ICCPR seems warranted. The legislative process appears to have been influenced by external factors, potentially leading to an incomplete evaluation of the Bill's content and its alignment with the Convention's principles.

In a broader context, ICCPR encompasses a more progressive and comprehensive framework for recognizing civil and political rights compared to the Chapter III on fundamental rights within the Sri Lankan Constitution. This distinction also holds true when comparing it with the somewhat insufficient ICCPR Act of 2007.

It is evident that the provisions of ordinary law often cited by the Government do not adequately consider the implications for safeguarding human rights as envisioned by the ICCPR.

When evaluating against the global standard for designing constitutional rights with the primary objective of ensuring, preserving, and enhancing human rights, the Sri Lankan version of ICCPR Bill appears incomplete and structurally disjointed. The absence of a well-defined conceptual foundation underlying the Constitution, aimed at optimizing the realization of human rights for the citizens of Sri Lanka, makes it challenging to interpret and apply the ICCPR in a coherent manner.

In essence, the disparity between the ICCPR's comprehensive approach to civil and political rights and the Sri Lankan Constitution's framework, along with the lack of a unified theoretical basis, contributes to create uncertainty and unpredictability in interpretation and implementation of fundamental rights in Sri Lanka.

Chapter 03

3.1. Overview of relevant domestic and international Mechanisms

3.1.1. International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007

The International Covenant on Civil and Political Rights (ICCPR) Act No. 56 of 2007 was a significant legislative development introduced in Sri Lanka. Comprising a concise framework of 11 sections, this Act serves as a crucial instrument for the implementation of the principles enshrined in the ICCPR. The preamble of the Act underscores its pivotal purpose, “*to bridge the gap between international human rights standards and domestic legal provisions*”.⁴⁹ It outlines the pressing need for Sri Lanka's government to establish an appropriate legal framework that aligns with the Civil and Political Rights outlined in the ICCPR. Section 1 of the Act contains the short title of the Act. Section 9 states that Minister may make regulations for the purpose of giving effect to the principle and provisions of the Act. Section 10 deals with the interpretation and Section 11 states that the Sinhala text shall prevail in the case of inconsistency. Sections 2, 3, 4, 5, 6, and 7 encompass various rights, with Section 7 specifically acknowledging jurisdiction, while Section 8 delineates the right appealing to the Supreme Court. The provisions established by Sections 2,3,4,5,6,7,8 are elaborated in the following section.

➤ **Section 2 - Right to be recognized as a person before the law**

Section 2 of the (ICCPR) Act, No. 56 of 2007, which states: “*Every person shall have the right to recognition, as a person before the law.*”

This section emphasizes the fundamental principle that every individual, regardless of their background, identity, or any other characteristic, possesses the inherent right to be acknowledged and treated as a legal entity, entitled to the protection and benefits of the law. This right is essential in ensuring that each person is not only subject to the law but also accorded the rights and privileges that come with legal recognition.

1. Equality and Non-Discrimination - This deal with the principle of equality before the law. It ensures that no one can be denied legal recognition based on factors such as race, ethnicity, gender, religion, social status, or any other characteristic. This helps prevent discrimination and ensures that all individuals are treated fairly under the legal system.

2. Legal Standing and Capacity - Being recognized as a person before the law confers legal standing and capacity upon every individual. This means that individuals have the right to enter into contracts, own property, participate in legal proceedings, and enjoy all the rights and responsibilities that come with legal personality.

⁴⁹ ICCPR Act No. 56 of 2007

3. **Protection of Rights** - The right of recognition before the law is a foundational element for the protection of other civil and political rights. It ensures that individuals have the ability to assert their rights, seek legal remedies, and have access to justice.

4. **Access to Justice** - This provision is closely tied to access to justice, as individuals must be recognized as legal entities to bring forth claims and seek redress for any injustices or violations they may experience.

5. **Dignity and Identity** - The recognition of every person as a legal entity acknowledges their inherent human dignity and identity. It affirms that each individual's rights are valid and must be respected by the legal system.

6. **Prevention of Statelessness** - This provision helps to prevent situations where individuals may be rendered stateless or without legal recognition, ensuring that everyone is protected by the law of a state.

➤ **Section 3 - No person should propagate war**

Section 3 of the ICCPR Act, No. 56 of 2007, addresses the critical issue of prohibiting the propagation of war and the advocacy of hatred that leads to discrimination, hostility, or violence. This section reflects Sri Lanka's commitment to maintaining social harmony, preventing conflicts, and safeguarding human rights within its jurisdiction.

1. Prohibition of War Propagation - Subsection (1) establishes a clear prohibition against propagating war, which underscores the importance of maintaining peace and stability in the nation. This provision aims to prevent any individual from engaging in activities that could incite or promote violence, conflict, or hostility.

2. Anti-Hate Advocacy - Subsection (2) goes beyond mere war propagation and extends to advocating hatred based on national, racial, or religious grounds. It acknowledges that promoting hate speech can lead to discrimination and violence against particular groups, thereby endangering social cohesion.

3. Criminal Offense and Liability - Subsection (2) specifies that anyone attempting, aiding, abetting, or threatening to commit the prohibited actions in subsection (1) will be considered guilty of an offense under this Act. This demonstrates the seriousness with which Sri Lanka addresses such matters and holds individuals accountable for their actions.

4. Penalties and Judicial Process - Subsections (3) and (4) outline the penalties for those found guilty of violating the prohibition. Convictions can result in rigorous imprisonment for

up to ten years, emphasizing the gravity of the offense. The unbailable nature of the offence highlights the importance of preventing potential harm and maintaining public safety.

5. Fair and Expedited Trials - Subsections (5) and (6) highlight the commitment to swift justice and fair trials. Ensuring that trials for offenses under this section take precedence and are conducted without undue delay aligns with the urgency of preventing the spread of conflicting perceptions.

➤ **Section 4 - Entitlement of an alleged offender**

Section 4 of the ICCPR Act, No. 56 of 2007, safeguards the rights of individuals facing criminal charges and convictions. It ensures that the principles of fair trial, defense, and due process are upheld, aiming to protect the rights and dignity of alleged offenders.

1. Right to a Fair Trial - Subsection (1) emphasizes that the right of a person charged with a criminal offense is entitled to have a fair trial. This encompasses the right to be present during proceedings, allowing the accused to understand and respond to the charges against them on time.

2. Right to Legal Assistance - This section recognizes the importance of legal representation. Subsection (1) (b) permits the accused to defend themselves personally or through chosen legal assistance. Additionally, if the accused cannot afford legal assistance, they have the right to assigned legal representation at no cost.

3. Witness Examination and Assistance - Subsection (1)(d) ensures that the accused can examine witnesses against them and call witnesses on their behalf, fostering transparency and bringing more fairness in the trial process. Moreover, subsection (1)(e) provides an interpreter for those who may face language barriers, guaranteeing that language differences do not hinder justice.

4. Protection against Self-Incrimination - Subsection (1)(f) prevents compelling an accused to testify against themselves or confess guilt. This ensures that individuals are not coerced or forced into self-incrimination.

5. Right to Appeal - Subsection (2) allows any person convicted of a criminal offense to appeal to a higher court against their conviction or sentence. This protects against potential errors or injustices in the initial trial.

6. Protection against Double Jeopardy - Subsection (3) safeguards individuals from being tried or punished multiple times for the same offense after having been convicted or acquitted in accordance with the law.

➤ **Section 5 - Rights of a child**

Section 5 of the ICCPR Act emphasizes the rights and well-being of children, while highlighting Sri Lanka's commitment of protecting and promoting the rights of its youngest citizens.

1. Birth Registration and Identity - Subsection (1)(a) ensures that every child has the right to have their birth registered and to be given a name from their date of birth. Birth registration is crucial for establishing legal identity and accessing various rights and services.

2. Nationality - Subsection (1)(b) emphasizes that a child's right to acquire nationality. This safeguards a child's legal connection to the country they are born in and ensures they are not stateless.

3. Protection from Harm - Subsection (1)(c) reinforces the right of children to be protected from maltreatment, neglect, abuse, or degradation. This provision aims to create a safe and nurturing environment for children's growth and development.

4. Legal Assistance for Child Defendants - Subsection (1)(d) guarantees that children involved in criminal proceedings have the right to legal assistance provided by the State if there's a risk of substantial injustice. This ensures that child defendants receive a fair trial and appropriate legal support.

5. Best Interests of the Child - Subsection (2) highlights the principle that in all matters concerning children, their best interests should be given paramount importance. This principle guides decisions made by social welfare institutions, courts, administrative authorities, and legislative bodies to ensure that children's rights, well-being, and development are safeguarded in everywhere.

➤ **Section 6 - Right of access to benefits provided**

Section 6 emphasizes citizens' participation in public affairs and their right to access essential services provided by the State. This section aligns with democratic principles and ensures that citizens have a voice in governance and equitable access to public resources.

1. Participation in Public Affairs - Subsection (1)(a) guarantees that every citizen has the right to engage in the conduct of public affairs. This includes the ability to participate directly

or through chosen representatives in various aspects of governance, policy-making, and decision-making that largely impact the public.

2. Access to State Services - Subsection (1)(b) ensures that citizens have access to services provided by the State. This encompasses public services such as healthcare, education, infrastructure, social welfare, and more. This right reflects the government's responsibility to ensure equitable access to essential services for all citizens.

3. Limitation on Exclusive Authority - Subsection (2) clarifies that the term "conduct of public affairs" doesn't extend to matters exclusively entrusted to specific authorities by written laws. This means that while citizens have the right to participate and access services, there may be certain specialized areas where decision-making is reserved for specific authorities.

➤ **Section 7 - High Court to exercise jurisdiction over the enforcement of the human rights recognized under this Act**

Section 7 outlines the legal mechanisms through which individuals can seek redress for violations or potential violations of their recognized human rights under the ICCPR Act, emphasizing the role of the High Court in safeguarding these rights.

1. Petition for Relief - Subsection (1) allows any person to file a petition with the High Court if they believe their human rights under sections 2, 4, 5, and 6 of the Act are being infringed upon or are about to be infringed due to any executive or administrative action. Such person can seek relief or redress through the High Court.

2. Timeliness - Subsection (2) outlines a time constraint, allowing the person to invoke the jurisdiction of the High Court within three months of the alleged infringement or imminent infringement.

3. Limitation on Jurisdiction - The "Provided however" clause in subsection (2) clarifies that the High Court's jurisdiction does not extend to fundamental rights or language rights already protected under the Chapter III or Chapter IV of the Constitution.

4. Referral to Human Rights Commission - Subsection (3) empowers the High Court to refer matters to the Human Rights Commission of Sri Lanka for inquiry and report, suggesting collaboration between the court and the commission.

5. High Court's Power - Subsection (4) grants the High Court the authority to grant requested relief, as well as additional remedies that the Court deems just and fair in the given circumstances.

6. Inclusion of Children - Subsection (5) specifies that the term "person" includes children, ensuring their right to seek relief from human rights violations.

➤ **Section 08 - Right of appeal to the Supreme Court**

Section 8 outlines the appellate process available to individuals who are dissatisfied with the decisions made by the High Court in petitions filed under Section 7 of the ICCPR Act:

1. Appellate Right - This section provides that individuals who are "aggrieved" by an order issued by the High Court with the right to appeal. In essence, if a person is not satisfied with the decision made by the High Court in response to their petition related to the enforcement of human rights recognized under the ICCPR Act, they have the option to challenge that decision through the appeal process.

2. Appeal to Supreme Court - The venue for this appeal is the Supreme Court. Individuals who wish to challenge a High Court order can do so by lodging an appeal with the Supreme Court within the prescribed time. The Supreme Court, being the highest judicial authority, serves as the final appellate forum of Sri Lanka.

3.2. Approaches of Various States towards the Implementation of the ICCPR

In examining the approaches of various States towards the implementation of the ICCPR, it is insightful to delve into the experiences of countries that, like Sri Lanka, adopt a dualistic legal system. This comparative exploration will shed light on how India, Australia, and the United Kingdom navigate the intricate path of harmonizing rights of ICCPR with their domestic legal frameworks. As dualism underscores the requirement for specific domestic legislation to give effect to international treaties, we can gain valuable insights into the strategies employed by these States to uphold the principles enshrined in the ICCPR while addressing the unique challenges posed by their respective legal systems.

3.2.1. The United Kingdom's Approach to Implementing the ICCPR Convention

The United Kingdom of Great Britain and Northern Ireland follows a distinct approach in dealing with international treaties and conventions, including the International Covenant on Civil and Political Rights (ICCPR). Although monist countries directly incorporate international treaty obligations directly into domestic law, subsequent to ratification, the UK adopts a process that involves enacting enabling legislations in the Parliament to align its laws with treaty obligations as the UK adopts fundamentally a dualist approach concerning international treaties.

In the UK, when amendments to the domestic laws are required to comply with an international treaty or convention such as the ICCPR, the government has to introduce an enabling legislation aimed at incorporating relevant treaty articles. These legislations in their proposal stage undergo the standard parliamentary procedures, allowing for debate, scrutiny, and amendments. Additionally, there exists a prima facie presumption that Parliament intends to act in accordance with international law, including treaty obligations. This presumption serves as

a guiding principle when interpreting a legislation, favoring interpretations that align with treaty commitments.⁵⁰

A landmark case, *Salomon v. the Commissioners of Customs and Excise*,⁵¹ emphasizes the UK's approach to treaty obligations. This case established that if a legislative provision can reasonably be interpreted in a manner that aligns with treaty commitments, that interpretation is preferred by the judiciary. This underscores the UK's commitment to harmonizing its domestic laws with its international obligations.

The UK's departure from the European Union (EU) introduces constitutional uncertainties that could severely impact the protection of human rights, including those guaranteed by the ICCPR. The EU Charter of Fundamental Rights, which provided additional rights protections, has been removed from domestic law through the EU Withdrawal Act. This removal may result in a potential weakening of rights protections.⁵²

The UK's commitment to the Human Rights Act 1998 (HRA) remains uncertain in light of recent plans to establish a new institution called the Constitution, Democracy and Rights Commission. This move could have implications as to how the ICCPR rights are protected and enforced within the UK's legal framework.

While certain ICCPR rights are safeguarded under the HRA, some rights may not be covered adequately. Moreover, provisions of the Equality Act 2010⁵³ (EA) that could enhance the ICCPR rights protection are not yet enforced. Furthermore, the UK has not ratified the ICCPR's Optional Protocol I, which permits individuals to file complaints with the UN Human Rights Committee. Additionally, the UK maintains reservations against specific provisions of the ICCPR.⁵⁴

The United Kingdom's approach to implement the ICCPR Convention is characterized by its unique legislative process and the guiding principle of harmonizing domestic laws with international treaty obligations. Despite this approach, challenges arise from Brexit-related uncertainties and the evolving landscape of human rights protection within the UK also play a decisive role in this regard.⁵⁵

3.2.2. Australia's Approach to Implementing the ICCPR Convention

Australia ratified the ICCPR on August 13, 1980. Additionally, Australia ratified the First Optional Protocol on September 25, 1991, and the Second Optional Protocol on October 2,

⁵⁰ Core Document Forming Part of the Reports of States Parties: United Kingdom of Great Britain and Northern Ireland, U.N. GAOR, Hum. Rts. Comm., addendum, 142, U.N. Doc. HRI/CORE/1/Add.5/Rev.2 (1997).

⁵¹ [1967] 2 QB 116

⁵² Core Document Forming Part of the Reports of States Parties: United Kingdom of Great Britain and Northern Ireland, U.N. GAOR, Hum. Rts. Comm., addendum, 142, U.N. Doc. HRI/CORE/1/Add.5/Rev.2 (1997).

⁵³ Equality Act 2010 c 15

⁵⁴ Core Document Forming Part of the Reports of States Parties: United Kingdom of Great Britain and Northern Ireland, U.N. GAOR, Hum. Rts. Comm., addendum, 142, U.N. Doc. HRI/CORE/1/Add.5/Rev.2 (1997).

⁵⁵ *ibid.*

1990.⁵⁶ But in Australia, the ICCPR does not automatically become part of domestic law. However, human rights treaties, including the ICCPR, hold significance as "a relevant source of guidance in the statement of the common law."⁵⁷

While the ICCPR is not directly enforceable in Australia as Australia follows a dualist approach with respect to domestication of international law, the Australian Human Rights Commission plays a vital role in advocating for its incorporation within the domestic context. The commission holds the government responsible for upholding the criteria stated in the international agreements. Particularly, the Commission's efforts in protecting the human rights in Australia reflect the commitment to align Australia's legal landscape with international human rights standards, even if the Covenant itself is not directly binding.⁵⁸

On the other hand, Australia's Constitution provides a foundational framework that guarantees certain fundamental rights and freedoms for its citizens. This structure empowers the Australian Parliament to enact laws that uphold and safeguard human rights. The country's commitment to ensure the rule of law and human rights protection is deeply embedded in its system of governance.⁵⁹

3.2.3. India's Approach to Implementing the ICCPR Convention

India ratified to the International Covenant on Civil and Political Rights on 10 April, 1979⁶⁰, albeit with a reservation pertaining to the application of Article 19 (3) of the ICCPR.⁶¹ India, characterized by its multicultural and multi-religious composition, has frequently utilized the ICCPR as a tool to safeguard the religious and cultural rights of its populace while also promoting equality.⁶² India is also a dualist country in which international treaties must be implemented thorough a law by Parliament. However, India's record is not without shortcomings in terms of addressing and upholding all the rights outlined in the ICCPR. Scrutinizing India's human rights history reveals an inadequacy in translating the safeguards enshrined in the Indian constitution, criminal law, and court orders into effective practice. State-sanctioned protections provided to human rights violators, particularly in times of armed conflicts, and legislative enactments such as the Armed Forces (Special Powers) Act of 1958,

⁵⁶ OHCHR, < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN > accessed 24 June 2023.

⁵⁷ OHCHR, 'Australia's Breach of its Obligations under the International Covenant on Civil and Political Rights to Protect the Rights of Women'

<https://www2.ohchr.org/english/bodies/hrc/docs/ngos/IUSLI_Australia_HRC95.pdf > accessed 24 June 2023.

⁵⁸ Australian Human Rights Commission, 'Information concerning Australia's compliance with the International Covenant on Civil and Political Rights 2007' < [https://humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-international-covenant-civil#:~:text=Australia%20has%20passed%20legislation%20in,with%20article%20\(2\)](https://humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-international-covenant-civil#:~:text=Australia%20has%20passed%20legislation%20in,with%20article%20(2)) > accessed 24 June 2023.

⁵⁹ *ibid.*

⁶⁰ OHCHR, < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN > accessed 24 June 2023.

⁶¹ B. K. M. Jayasekera & A. A. Edirisinghe 'Implementation of ICCPR in Sri Lanka: Impediments and Prospects' < <http://ir.kdu.ac.lk/bitstream/handle/345/1219/law-013.pdf?sequence=1&isAllowed=y> > accessed 24 June 2023.

⁶² *ibid.*

which bestow extensive powers upon the armed forces for arrest and use of lethal force, obstruct the compliance and reinforcement of the rights enshrined in the ICCPR.⁶³

Furthermore, it is noteworthy that India has not ratified the First Optional Protocol of the ICCPR nor signed the Second Optional Protocol.⁶⁴ This divergence signals that India lags behind its global counterparts in terms of advancements in human rights treaty protection envisaged in the ICCPR.

3.3. Comparative analysis of specific sections of the ICCPR Act of Sri Lanka and ICCPR Covenant

➤ Article 01

Sri Lanka's stance on self-determination rested on its status as an independent sovereign state, viewing self-determination is applicable primarily to colonial states to attain their independence. It was emphasized that the concept of self-determination should not infringe upon the sovereignty and territorial integrity of a sovereign nation. This perspective aligns with the Declaration of Principles of International Law outlined in UNGA Resolution 2625 (XXV).⁶⁵ Conversely, Article 1 of the 1978 Constitution declares Sri Lanka (Ceylon) as a Free, Sovereign, Independent, and Democratic Socialist Republic.⁶⁶

➤ Article 02

Article 2 of the ICCPR Covenant holds significant importance as it forms the bedrock of the comprehensive treaty regime encompassing the ICCPR. These pivotal provisions entail the affirmative commitments made by State Parties to the ICCPR, obligating them, where existing legislative or other measures are lacking, to take the requisite actions within their constitutional processes to actualize the rights enshrined in the ICCPR.

It is pertinent to mention that the Sri Lankan government's stance on Article 2 of the ICCPR Covenant diverged from incorporating this provision into the ICCPR Act. This divergence was based on the government's assertion that the provisions of Article 2 were adequately covered under Sri Lankan Constitution.

However, a challenge arises from the fact that Sri Lanka's adoption of the ICCPR Act or other domestic laws do not encompass the entirety of the rights stipulated in the Covenant, nor are the adopted rights consistently aligned with the Covenant's provisions. While the ICCPR Act was intended to bring the nation's legal framework into harmony with the ICCPR, it remains imperative for Sri Lanka to address the gaps and ensure that all recognized rights are fully and uniformly integrated into its domestic laws and practices.

➤ Article 03

⁶³ *ibid.*

⁶⁴ OHCHR, < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN > accessed 24 June 2023

⁶⁵ UN < <https://digitallibrary.un.org/record/202170?ln=en> > accessed 29 June 2023

⁶⁶ Constitution of Sri Lanka 1978 Article 1

Article 3 of the ICCPR affirms the commitment of States Parties to ensure the equal enjoyment of all civil and political rights delineated in the Covenant for both men and women. In the Sri Lankan context, these rights find resonance in the provisions of Article 12(2) and 12(3) of the constitution.⁶⁷ The government's perspective aligns with the notion that these rights are already safeguarded within the domestic legal framework.

Consequently, the inclusion of ICCPR Article 3 in the ICCPR Act was deemed unnecessary, given the government's stance and the existing constitutional safeguards. The rationale behind this approach lies in the belief that Sri Lanka's legal and constitutional architecture adequately upholds the equal rights of men and women to the enjoyment of civil and political rights, negating the imperative to explicitly replicate Article 3 of the ICCPR Covenant in the Act.

➤ **Article 04**

The implementation of Article 4 of the ICCPR Covenant in Sri Lanka presents a complex scenario marked by certain inadequacies and deviations from the standards set forth in the Covenant. Article 4 pertains to the measures that State Parties can undertake during times of public emergency, allowing derogations from their obligations under the Covenant to the extent strictly required by the exigencies of the situation.

Sri Lanka's constitutional framework, particularly the reference to Article 15 (7) of the Constitution,⁶⁸ has been deemed insufficient in adequately addressing the comprehensive regulatory framework envisioned by Article 4 of the ICCPR. Article 15(7) is designed in very broader manner that the exercise of individual rights can be curtailed in the name of collective rights. It is noteworthy that, Sri Lankan government did not identify the conceptual distinction between 'limitations' (to be understood as an attenuation, or a partial and temporary disability imposed on the exercise of a fundamental right) and 'derogations' (a temporary but complete suspension of some fundamental rights that may be allowed under states of emergency) in the constitutional text.

Because of that it can be observed that Article 15 (7) of the Constitution, which outlines restrictions on fundamental rights during states of emergency, does not fully align with the substantive legal standards laid out in Article 4 of the ICCPR.

➤ **Article 05**

The Government declared that the rights in Article 5 of the Covenant are already covered by the ICCPR Act.

However, no local document mentions Article 5(2), which states that *'nothing in the present Covenant may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms*

⁶⁷ Sri Lanka Constitution 1972, Article 12

⁶⁸ Sri Lanka Constitution 1972, Article 15(7)

recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

Accordingly, Article 5 states the obligation of states to protect civil and political rights. However, when observing the legal context of Sri Lanka, it is important to consider the implications of Article 16 of the Constitution. This Article, which is incongruously part of the chapter on fundamental rights (Chapter III), states that *all existing written and unwritten law shall be valid and operative notwithstanding any inconsistency with the fundamental rights declared and recognized by the Constitution* (Article 16 (1)). By ensuring the continuation of existing laws inconsistent with constitutionally declared fundamental rights, this provision undermines not merely the protection of the limited number of fundamental rights that the Constitution recognizes, but also the principle of constitutional supremacy. Accordingly, it can be argued that although the Covenant aims to protect civil and political rights, Article 16 of the Constitution of Sri Lanka has worked to narrow the application of fundamental rights within the domestic law. While this provision might not be very relevant to Sri Lanka's current context, it's still a valid provision to counter other legislations that protect the human rights.

➤ **Article 06**

The right to life, protected by Article 6, has been supported. It's considered an absolute and unbreakable right according to Article 4(2) of the ICCPR. Surprisingly, the government didn't try to include the right to life in the ICCPR Act. They justified this by referring to the existing legal interpretation of this right and the fact that it's safeguarded by Article 11 and Article 13(4) of the Constitution.⁶⁹ However, an opportunity to firmly and consistently establish the right to life was missed.

The Supreme Court has acknowledged the right to life in cases like *Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Payagala and Others*⁷⁰ and *Rathnayake Tharanga Lakmali, Moraketiya, Embilipitiya vs. IP, Niroshan Abeykoon Officers in Charge (OIC) Police Station*.⁷¹ Yet, to enhance human rights protection, it's an international best practice to explicitly recognize the right to life in the constitution.

Even though the death penalty remains a part of Sri Lanka's laws, the country hasn't signed the Second Optional Protocol to the ICCPR, which is about ending the death penalty.

For the ICCPR Article 6 (4), Sri Lanka invokes Article 34 (1) of its Constitution⁷² and Section 312 of the Code of Criminal Procedure.⁷³ These outline that a person given the death sentence can ask for a pardon or a less severe punishment. However, it's essential to note that these Sri Lankan legal provisions focus on the President's authority to grant a pardon or change the

⁶⁹ But this was incorporated in the 1972 Sri Lanka Constitution, Article 15(7)

⁷⁰ *Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Payagala and Others* [2000] SC NO. 471/2000 (FR)

⁷¹ *Rathnayake Tharanga Lakmali, Moraketiya, Embilipitiya vs. IP, Niroshan Abeykoon Officers in Charge (OIC) Police Station* [2010] SC/FR Application 577/2010

⁷² Sri Lanka Constitution 1972, Article 34 (1)

⁷³ Code of Criminal Procedure 1979, s. 312

sentence, not necessarily from the perspective of the person sentenced to death. Per contra, the material difference in the ICCPR Article 6 (4) is that it establishes a non-derogable right for such a person to seek a pardon or commutation of such sentence.

➤ **Article 07**

Article 7 of the ICCPR deals with the freedom from torture. Article 11 of Sri Lanka's Constitution ensures protection against torture, cruel treatment, and degrading punishment. Moreover, Sri Lanka became a party to the UN Convention against Torture.⁷⁴ This right is considered a fundamental right that can be enforced, and it's important to note that it's not limited or restricted by any conditions outlined in Article 15.⁷⁵ This reflects the status of this right as an absolute, non-derogable right, in line with Article 4 (2) of the ICCPR.

➤ **Article 08**

Article 8 (2) of the ICCPR also mentions the prohibition of servitude, and Article 8 (3) establishes detailed requirements with regard to forced or compulsory labour in countries, where imprisonment with hard labour is a criminal punishment. While drafting the Act, Article 8 of the Convention has been excluded saying that it does not relevant to Sri Lanka. Abolition of Slavery Ordinance, No. 20 of 1844⁷⁶ has abolished the specific practice of slavery in Sri Lanka. The prohibitions on slavery and servitude in Articles 8 (1) and (2) are non-derogable rights under Article 4 (2) of the ICCPR.

➤ **Article 09**

The right established by Article 9 of the ICCPR is protected by Article 13 of the Constitution of Sri Lanka that protects freedom from illegal detention. But the ICCPR does not set specific limitations or derogations on the provisions of its Article 9. However, Article 15, Sections 13 (1), (2), (5) and (6) of the Constitution of Sri Lanka permits limitations to be imposed on the right. Accordingly, it may be noted here that the essential elements considered by the ICCPR have not been considered here.

➤ **Article 10**

Article 11 of the Constitution, which more properly corresponds with ICCPR Article 7, is in compliance with the ICCPR Article 10. The ICCPR includes two separate rights in Articles 7 and 10 for a specific purpose. Article 7 ensures non-derogable protection against torture, which cannot be waived under any circumstances. On the other hand, Article 10 focuses on the humane treatment of persons deprived of their liberty.

A similar law can be noticed in the Human Rights Commission Act.⁷⁷ Section 11 (d) of this Act deals with one of the Commission's powers. It allows the Commission to monitor the welfare of persons detained either by a judicial order or otherwise, by regular inspection of their places of detention, and to make such recommendations as may be necessary for

⁷⁴ OHCHR, 'Sri Lanka: 3rd and 4th Periodic Report on the Implementation of the Convention Against Torture' (2011) < https://www2.ohchr.org/english/bodies/cat/docs/ngos/LRWC_SriLanka47.pdf > accessed 27 July 2023

⁷⁵ Sri Lanka Constitution 1972, Article 15

⁷⁶ Abolition of Slavery Ordinance, No. 20 of 1844

⁷⁷ Human Rights Commission of Sri Lanka Act No. 21 of 1996

improving their conditions of detention. However, this is distinct from what Article 10 of the ICCPR outlines. Article 10 establishes a positive right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. Such a positive right is not expressly recognized in the Sri Lankan legal provisions.

On the other hand, Chapter IV, Part A, of the Code of Criminal Procedure,⁷⁸ within which Sections 24 – 30 are located, provides the rules for arrest generally. Lastly, ICCPR Article 10(3) includes a directive stating that in countries that are parties to the ICCPR, the primary and fundamental goal of the prison system should be the correction and reintegration of inmates into society. However, this guiding principle is not reflected in the Sri Lankan Constitution and the applicable laws.

➤ **Article 11**

The legislature has stated that Article 11 of the Covenant was not included in the Act as it conflicts with Section 278 of the Code of Civil Procedure of Sri Lanka.⁷⁹ However, it is special that Article 11 remains in the Convention as non-derogable right.

➤ **Article 12-**

Article 12 of the ICCPR has been left out stating that it is protected by Sections 13 and 14 of the Constitution while making the ICCPR Act. But, Article 14 (1) (i) of the Constitution only guarantees the right to return to Sri Lanka, whereas Article 12 (2) of the ICCPR also includes the freedom of a person to leave any country, including his own.

The freedom of movement and choice of residence may be restricted under Article 15 (6) of the Sri Lankan Constitution in the interests of the national economy, for which there is no corresponding provision in the ICCPR.

In the case of *Rodrigo v. SI Kirulapone and Others*,⁸⁰ the Supreme Court, decided that keeping permanent security roadblocks in Colombo city went against people's important freedom to move around. The court gave an official direction to remove these roadblocks. Freedom of movement has also been protected by this judgment. But the ground reality of the implementation of this provision is different from the stipulated provision. .

➤ **Article 13**

Article 13 of the ICCPR Covenant which recognizes the grounds for expulsion of an alien, has been avoided on the ground that it does not apply to Sri Lanka. However, it can be recognized as a baseless and politically motivated argument.

➤ **Article 14**

The rights protected under Article 14 (3) (a) of the ICCPR on administration of justice is protected by Article 24(2) of the Constitution, but it is protected in a narrower scope than the right of convention. And also, Article 4 (1) (e) of the ICCPR Act states that a person charged

⁷⁸ Code of Criminal Procedure 1979

⁷⁹ Code of Criminal Procedure 1979, s 278.

⁸⁰ *Rodrigo v. SI Kirulapone and Others* [2007] SC (FR)No. 297/2007

of a criminal offence shall be entitled to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted.

The ICCPR Article 14(3)(e), (f), and (g) closely match Sections 4(1)(d), (e), and (f) of the ICCPR Act. Article 14(4) of the ICCPR, which talks about how to handle criminal cases involving Children, is also a part of Section 5(2) of the ICCPR Act.

Articles 127 and 139 of the Constitution, along with the relevant parts of the Code of Criminal Procedure, align with the needs of the ICCPR Article 14(5), (6), and (7). These cover the general right of appeal according to procedure established by law against both conviction and sentence in criminal cases, delictual remedies and principles of double jeopardy.

➤ **Article 15-**

The Legislature has taken the view that Article 15 of the Covenant which prohibit the retroactive application of Criminal Law, is protected by Article 13(6) of the Constitution and therefore was not included in the Act. However, the ICCPR contains no limitation on this right under 4(2), whereas Article 13 (6) of the Constitution is subject to restrictions in the interests of national security under Article 15 (1) of the Constitution.

➤ **Article 16**

The right to be recognized as a person before the law is established in Section 2 of the ICCPR Act, No. 56 of 2007. Article 16 of the ICCPR is considered as a non-derogable right as it is not subject to any limitations

However, the ICCPR Act can be set aside by emergency regulations in times of a state of emergency. As a result, the effectiveness of Section 2 of the ICCPR Act might be limited or temporarily suspended, which means it doesn't fully align with the ICCPR's non-derogation principle.

➤ **Article 17**

Article 17 of the ICCPR protects the right to privacy. However, the right to privacy is not guaranteed as a fundamental right by the Constitution of Sri Lanka and it is pertinent to argue that it is a serious omission not to include it in the ICCPR Act.

➤ **Article 18**

Article 18 (1) of the ICCPR deals with freedom of thought, conscience and religion, for which the corresponding provisions in the Sri Lankan Constitution are Articles 10 and 14 (1) (e). It should also be noted that the ICCPR Article 18 in its entirety is a non-derogable right. Article 10 of the Constitution is also not subject to any restrictions.

But Article 14 (1) (e) of freedom to manifest the religion may be restricted under Article 15 (7) of the Constitution. Accordingly, there are differences in the acceptance of freedom of thought and religion and manifestation of religion in Sri Lankan context with the international standards.

On the other hand, the rights protected by 18(2), 18(4), are not protected in the same way in Sri Lanka.

➤ **Article 19**

Article 19 of the ICCPR protects the right to free speech. This is protected under Article 14 of the Constitution of Sri Lanka. On the other hand, Article 19 also establishes the right to information. In Sri Lanka, the 19th constitutional amendment has activated this right in Sri Lanka. Except defamation and incitement to an offence covered by the ICCPR Articles 19 (3) (a) and 20 respectively, none of the other grounds for restrictions imposed in Sri Lankan Amendment are recognized by the ICCPR.

Further, in Sri Lankan context, 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, defamation, or incitement to an offence.

Accordingly, there are differences with international standards.

➤ **Article 20**

Article 20 of the ICCPR has envisaged prohibition of propagation of war and hate speech. Section 3 of the ICCPR Act, No. 56 of 2007 has enabled this right into Sri Lankan context.

➤ **Article 21**

Article 21 of the ICCPR concerns the right of peaceful assembly, as does the corresponding Article 14 (1) (b) of the Constitution.

However, this right has been incorporated in Sri Lanka in a narrower way than the ICCPR covenant.

➤ **Article 22**

Article 22 of the ICCPR deals with the freedom of association, including the right to form and join a trade union. Similar notions are found in Articles 14(1)(c) and (d) of the Sri Lankan Constitution. Grounds for restriction set out in Articles 15 (4) and (7) of the Sri Lankan Constitution, over and above those recognized by the ICCPR, are the interests of racial and religious harmony or national economy, and the just requirements of the general welfare of a democratic society.

➤ **Article 23**

According to the parliamentary debates, Article 23 of the ICCPR which deals with the recognition of family and marriage is not included in the ICCPR Act, because of the potential conflicting nature with the fundamental values of personal laws.

➤ **Article 24**

Sections 5 of the ICCPR Act, now put into action the notion laid down in Article 24(2) and (3) of the ICCPR, along with additional child rights. Section 5(2) of the ICCPR Act intends to address these issues with a more modern approach to safeguard the notion of the best interest of the child.

But the most suitable way to acknowledge child rights would be by enshrining them in the fundamental rights chapter of the Constitution itself for an effective implementation.

➤ **Article 25**

According to the legislature, Article 25 and the rest of the provisions of the Covenant are covered by local legislations and the Constitution of Sri Lanka. Article 4 of the Constitution sets out the ways in which sovereignty is exercised and enjoyed. Article 4(e) of the Constitution states that *the franchise shall be exercised at the election of the President, Members of Parliament, and at referenda by every citizen over the age of eighteen years who is a qualified elector.*

However, Article 25 of the ICCPR is an important provision concerning the rights of political participation in governance. The chapter on fundamental rights of the Sri Lankan Constitution (Chapter III) does not identify the right to vote as a fundamental right. In contrary, Article 25 (b) of the ICCPR provides that *every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.* In light of these disparities, it can be claimed that Sri Lanka's version of this provision is too restrictive when compared to international standards.

➤ **Article 26**

The ICCPR Article 26 establishes the fundamental right to be treated equally under the law without any form of discrimination. This aligns with Article 12 of the right to equality provision of Sri Lanka's Constitution.

➤ **Article 27**

ICCPR Article 27 introduces a significant group right, especially vital in diverse societies like Sri Lanka. This provision ensures that individuals from ethnic, religious, or linguistic minorities in such countries have the freedom, alongside fellow group members, to embrace their cultural heritage, practice their religion, and communicate in their own language.

However, the Constitution of Sri Lanka lacks an equivalent provision that explicitly recognizes the collective rights of minority groups, akin to the terms outlined in Article 27 of the ICCPR.

3.4. International Approach of the Article 19 & Article 20 of the ICCPR

Freedom of expression stipulated in Article 19 of the ICCPR stands as one of the most esteemed and fundamental rights, widely acknowledged across international bodies. This recognition is exemplified by various prominent institutions, such as the UN Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights, all of which have underscored the paramount importance of the right to freedom of expression in a democratic society.

The UN Human Rights Committee has explicitly stated that "The right to freedom of expression is of paramount importance in any democratic society." Likewise, the European Court of Human Rights has affirmed that freedom of expression serves as a cornerstone of

democracy, constituting one of its essential foundations and a fundamental condition for societal progress and the development of individuals.⁸¹

Furthermore, the Inter-American Court of Human Rights has emphasized that freedom of expression is indispensable for the existence of a democratic society. It serves as the bedrock upon which democratic principles are built, fostering the formation of public opinion, facilitating the activities of political parties, trade unions, scientific and cultural societies, and enabling informed civic engagement. In essence, it is the means through which a community, can be sufficiently enlightened expressing its views⁸²

The democratic significance of freedom of expression extends far beyond its foundational role. It is essential to the democratic process itself, forming a central pillar within the democratic framework that promotes and safeguards all rights while guaranteeing the full exercise of citizenship. This robust democratic framework, in turn, contributes to societal stability, fostering peaceful and prosperous development.

Freedom of expression unlocks the potential for unfettered and constructive political discourse, allowing citizens to advocate for their basic rights, such as the right to health, a clean environment, and in broader sense to engage with effective poverty reduction strategies. It imbues electoral democracy with meaning and fosters public trust in governance. Access to information strengthens mechanisms that hold governments accountable for their commitments and actions while enhancing public knowledge and participation. It also provides external checks on state accountability, thereby thwarting corruption that thrives in secrecy and closed environments.⁸³

On the other hand, the free flow of information enhances the capacity of all individuals to participate actively in the life of their nation or community and in the policymaking process. To realize development, people must have the freedom to engage in public life, propose ideas that can be translated into action, and demand that governments fulfill their obligations without fear of reprisal or discrimination. Freedom of expression empowers individuals to engage in the development process.

Consequently, when freedom of expression is unduly restricted, it jeopardizes and undermines the realization of numerous other rights. As such, the protection and promotion of freedom of expression are essential components of a just and democratic society.

International law places a distinct duty on states when it comes to limiting freedom of expression, as outlined in Article 20 of the UN Covenant on Civil and Political Rights. This duty focuses on the prevention of war propaganda and hate speech, and it is expressed as follows:

1. "Any form of propaganda for war shall be prohibited by law."

⁸¹ No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000).

⁸² Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, 13 November 1985, Series A, No 5, para 70.

⁸³ ARTICLE 19 1988 World Report, Information, Freedom and Censorship, introduction by Kevin Boyle, 1988.

2. "Any advocacy of national, racial, or religious hatred that incites discrimination, hostility, or violence shall be prohibited by law."

This is the only duty that States must abide by, as far as restricting freedom of expression is concerned. However, it's important to note that there is no universally agreed definition of propaganda or hate speech in international law. Instead, different regions and countries have adopted their own approaches to restricting these forms of expression.⁸⁴

Balancing Approach of Article 19 & Article 20

Recognizing the imperative of striking a delicate equilibrium between rights and preventing their misuse as tools to infringe upon the rights of others, Article 5 of the International Covenant on Civil and Political Rights (ICCPR) articulates this principle:

"In no way shall the provisions of the present Covenant be interpreted as implying for any State, group, or individual any entitlement to engage in activities or commit acts aimed at undermining the rights and freedoms established herein or at curtailing them beyond the limits delineated in the present Covenant."

The task of balancing competing rights is inherently challenging, particularly on the international stage. It is generally accepted that such balance can only be achieved on a case-by-case basis, considering the unique circumstances and consequences of each situation.

In cases where conflicts arise between rights and interests, courts tend to adopt a judicial approach that seeks to "harmonize" the relevant rights and interests, taking into account the specific circumstances of each case. This process of ad hoc balancing is more of an art than a science since the particular facts of each case ultimately determine which norm should prevail.⁸⁵

It's important to note that there is no formal hierarchy among fundamental rights at the core of this balancing act. Most thoughtful analyses of the relationship between freedom of expression and the prohibition on discrimination aim to strike a balance between the right to express oneself and the pursuit of racial, religious, and communal justice and harmony.⁸⁶ This equilibrium seeks to minimize interference with freedom of expression while safeguarding individuals from discrimination.

⁸⁴ Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, UN HCHR, October 2-3, 2008, Geneva

⁸⁵ Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, UN HCHR, October 2-3, 2008, Geneva

⁸⁶ The compilation Sandra Coliver, Kevin Boyle and Frances D'Souza, *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination (ARTICLE 19 and Human Rights Centre, University of Essex, 1992)*

There is a strong coherence between Article 19 and Article 20 of the ICCPR. While a potential conflict between these two can be seen at a glance a closer look reveals a correlation⁸⁷ between these two articles rather than a conflict. During the drafting of the ICCPR, Article 20 was strategically positioned immediately after Article 19, underscoring their interrelated nature. Article 20 can be perceived as an extension of Article 19, emphasizing the need to interpret them in tandem. It's noteworthy that Article 20 differs from other substantive articles in the ICCPR as it doesn't establish a standalone right but rather introduces additional limitations on existing rights, notably the right to freedom of expression. This coherence is expected as different provisions within the same treaty should be harmoniously interpreted.

The obligations outlined in Article 20(2) of the ICCPR closely align with the permissions granted in Article 19(3), leaving little room for additional restrictions on freedom of expression beyond what is defined in Article 20(2). Furthermore, the opinions of the Human Rights Committee reaffirm this stance. It underscores the requirement that any legislation seeking to implement the provisions of Article 20(2) of the ICCPR must adhere to the established boundaries on restrictions to freedom of expression as delineated in Article 19(3).⁸⁸

Article 19(3) of the ICCPR establishes a 'three-part test' for the validity of restrictions on freedom of expression. Efforts to curb hate speech and its impact on freedom of expression must be meticulously crafted to advance equality and guard against discrimination. As is the case with all limitations on freedom of expression, such measures must pass the rigorous three-part examination established in Article 19 of the ICCPR. This test mandates that any interference with freedom of expression can only be deemed legitimate if it fulfills the following criteria:

- (a) it is provided by law;
- (b) it pursues a legitimate aim; and
- (c) it is "necessary in a democratic society".

Any measures, whether civil, criminal, or administrative, that infringe upon freedom of expression must meet specific criteria. They must be established by law, have a legitimate purpose according to international law, and be essential for achieving that purpose. This necessitates clear and precise definitions of such measures, independent bodies to enforce them free from undue influences, and non-arbitrary and non-discriminatory application. These measures should also include safeguards against misuse, including access to an independent court or tribunal. Without these safeguards, there is a substantial risk of misuse, especially in environments lacking respect for human rights and democracy. In such cases, laws intended to combat hate speech can be turned against those they were designed to protect.⁸⁹

⁸⁷ Tarlach McGonagle, International and European legal standards for combating racist expression: selected current conundrums, presentation for ECRI, 2006

⁸⁸ Toby Mendel, Does International Law Provide Sensible Rules on Hate Speech?, Forthcoming, 2008

⁸⁹ Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, UN HCHR, October 2-3, 2008, Geneva

The experts further outlined the following principles in line with international and regional legal standards:

- No one should face penalties for making truthful statements.
- Penalization for disseminating hate speech should only occur when there is clear evidence of intent to incite discrimination, hostility, or violence.
- The autonomy of journalists in choosing how to convey information and ideas, especially when addressing racism and intolerance, should be respected.
- Prior censorship should not be imposed.
- Court-imposed sanctions should strictly adhere to the principle of proportionality.⁹⁰

It was also emphasized that governments should avoid enacting legislation that criminalizes actions solely aimed at exacerbating social tensions. While it is legitimate to sanction advocacy that incites hatred, it is not legitimate to prohibit offensive speech. In many countries, broad rules in this regard have been misused by those in power to suppress non-traditional, dissenting, critical, or minority voices, as well as discussions on challenging societal issues. Furthermore, resolving tensions rooted in genuine cultural or religious differences should not involve suppressing the expression of these differences but rather engaging in open debates. Therefore, free speech is not an obstacle to tolerance; rather, it is a prerequisite for fostering tolerance in society.

In conclusion, it is imperative that any restrictions on freedom of expression are carefully crafted to serve the singular purpose of safeguarding individuals who hold specific beliefs or opinions, whether rooted in religion or not, from encountering hostility, discrimination, or violence. These measures should not be aimed at shielding entire belief systems, religions, or institutions from critique or criticism. The essence of the right to freedom of expression necessitates that we retain the ability to critically examine, openly discuss, and constructively criticize belief systems, opinions, and institutions, including those of a religious nature. However, it is crucial to underscore that this freedom must not be abused to propagate hatred that incites hostility, discrimination, or violence against any individual or the community.

3.5. Exploring the Doctrine of Freedom of Expression and Its Limitations in International and Regional Mechanisms

In the context of safeguarding human rights through international and regional mechanisms, a balanced approach is consistently upheld by the judiciary with regard to the complex interplay between hate speech and the fundamental right to freedom of expression. The subsequent cases aptly demonstrate the practical application of this equilibrium.

- *Ross vs. Canada*⁹¹

⁹⁰ *ibid.*

⁹¹ No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000).

A author worked as a remedial reading teacher in a New Brunswick school district from 1976 to 1991. During this time, he wrote books and gave interviews expressing controversial religious opinions on topics like abortion and conflicts between Judaism and Christianity. His writings received local media attention and caused controversy in the community. It's important to note that his publications didn't violate Canadian law, and he was never prosecuted for his views. These writings were produced in his personal time and were not part of his teaching.

Starting in 1979, his in-class teaching was monitored due to some concerns raised in the school. In 1988, the School Board reprimanded him and warned that further public discussion of his views could lead to dismissal. However, he was allowed to continue teaching, and the disciplinary action was removed in 1989. In November 1989, he was again reprimanded after a television appearance.

In April 1988, a Jewish parent named Mr. David Attis filed a complaint with the Human Rights Commission, alleging that the School Board's failure to take action against the author condoned his anti-Jewish views and violated the Human Rights Act by discriminating against Jewish and other minority students. This complaint ultimately resulted in sanctions against the author.

Despite Ross's appeal, the Supreme Court ultimately affirmed the Board of Inquiry's determination of discrimination by the school board. Subsequently, Ross lodged a complaint with the U.N. Human Rights Committee, asserting that the school board's denial of his religious expression rights contravened Article 19 of the ICCPR.

In the assessment of the case, the Committee identified three issues for analysis. Initially, the Committee had to determine whether Ross's freedom of expression was indeed limited by his job termination. The Committee stated that since losing a teaching position was a "significant disadvantage," and this loss resulted from expressing his views, it indeed constituted a restriction under Article 19 of the ICCPR.

The second matter revolved around whether the limitations on Ross's freedom of expression adhered to the conditions outlined in Article 19, paragraph 3: that they were established by law and aimed to safeguard the rights and reputation of others or maintain national security, public order, or public health and morals. The Committee drew guidance from the Supreme Court regarding the adequacy of the legal framework for the charges against Ross. It observed that the Court had found a sufficient basis in domestic law to support Ross's job removal order.

Concerning the purpose of these restrictions, the Committee concluded that they were devised to protect the rights and reputations of individuals of the Jewish faith, particularly ensuring "the right to receive an education in the public-school system free from bias, prejudice, and intolerance."

The final issue in *Ross v. Canada* focused on whether the limitations on Ross's freedom of expression were essential to safeguard the rights and reputations of individuals belonging to the Jewish faith. The Committee highlighted that Article 19 of the ICCPR entails specific obligations and responsibilities regarding the right to exercise freedom of expression, which were particularly relevant in a school system involving young students. Given that the Supreme Court had deemed it as reasonable to expect a cause-and-effect relationship between the

authors' anti-Jewish publications and the "poisoned school environment" experienced by Jewish students in the district, the Committee determined that Ross's job termination could be considered a necessary restriction to freedom of expression.

- *Baldassi and Others v. France*⁹²

The applicants, who were part of a local group supporting the Palestinian cause as part of the international campaign "Boycott, Divestment and Sanctions" (BDS), got in trouble for urging shoppers in a big store not to buy products from Israel. They were charged under a part of the Freedom of the Press Law that forbids encouraging discrimination against a group based on factors like their origin or nationality. Initially, they were cleared of charges because the specific part of the law used against them didn't apply, but on appeal, they received a suspended fine of one thousand euros and were ordered to pay damages to certain civil parties involved in the case. The supreme civil court, the Court de cassation, upheld their convictions on October 20, 2015, concluding (without giving reasons) that the convictions were "necessary in a democratic society" under Article 10(2) of the European Convention on the Human Rights (ECHR)

The central question in front of the European Court of Human Rights was whether the significant interference with the applicants' freedom of expression (penalties for their actions) was "required in a democratic society" to safeguard the "rights of others." The Court started by noting that a boycott is a way of expressing dissenting views. A call to boycott, which aims to convey these views while urging specific actions related to them, generally falls under the protection of Article 10.

Nonetheless, a call to boycott involves expressing a protest while also encouraging different treatment, which implies it could be seen as urging discrimination against others. Calling for discrimination is a type of urging intolerance, akin to calling for violence or promoting hatred, and these are boundaries that should not be crossed when exercising freedom of expression. However, it's important to note that encouraging different treatment doesn't always equate to inciting discrimination.

Claimants of this case were not found guilty of making racist or anti-Semitic remarks, nor were they charged with inciting hatred or violence. They didn't engage in violence or cause any harm. Instead, their conviction stemmed from advocating for a boycott of products from Israel.

The Court also pointed out that, as understood and applied in this situation, French law forbids any call to boycott products solely because of where they come from, regardless of what the call says, why it's made, or the situation surrounding it. It seems that consumer boycotts related to geographic origin were generally accepted in France, except in the case of Israel, which might have raised concerns under Article 14 when combined with Article 10 of ECHR. However, the French courts didn't demonstrate that, the given circumstances, convicting the individuals for urging a boycott of Israeli products was necessary in a democratic society to achieve the valid goal of safeguarding the rights of others.

⁹² No 15271/16, IHRL 4252 (ECHR 2020)

The Court has stressed on numerous occasions that Article 10(2) leaves very little room for restrictions on freedom of expression in the area of political discourse or questions of general interest.

As the Court reminded us in the *Perinçek v. Switzerland* case, it was decided that political discussions are inherently contentious and can sometimes get heated. However, they remain to highlight the matter of public interest, as long as they don't turn into calls for violence, hatred, or intolerance. That's the line that should never be crossed. This is also something emphasized by the United Nations Special Rapporteur on freedom of religion or belief in his report regarding a call to boycott.

The Court disagreed with the French Government's argument that the applicants' actions could be seen as statements promoting hate, violence, discrimination, or intolerance. To compensate for the violation of Article 10, the Court ordered France to pay each applicant 7380 EUR.

- *Ceylan v. Turkey*⁹³

The applicant, who was at that time the president of the Petroleum Workers' Union, wrote an article entitled "The time has come for the workers to speak out tomorrow it will be too late" in the 21-28 July 1991 issue of *Yeni Ülke* ("New Land"), a weekly newspaper published in Istanbul in which he spoke about the "State terrorism" against the Kurdish people.

He also talked about the challenges experienced by the Kurdish people, describing it as a "genocide in Turkey." Specifically, he brought attention to the Prevention of Terrorism Act and how it seemed to be targeted at repressing both the Kurdish people and the working class. Consequently, he urged the working class to resist the government's laws and terrorism.

On September 16, 1991, the public prosecutor filed charges of "non-public incitement to hatred and hostility" against the applicant under Article 312 §§ 1 and 2 of the Turkish Criminal Code. The applicant argued that he had no intention of promoting separatism and asserted that as a trade-union leader, he should have the right to speak about human rights violations in Southeast Turkey in a democratic society. However, on May 3, 1993 the National Security Court found him guilty and sentenced him imprisonment for one year and eight months, along with a fine. They claimed he had incited hatred and hostility by creating divisions based on ethnicity, region, and social class.

The applicant's Appeal to the Court of Cassation was unsuccessful on December 14, 1993, and he had to serve his full sentence. Additionally, he lost his position as president of the Petrol Workers' Union and several civil and political rights were revoked as per Article 312 of the Criminal Code, which stipulated that a convicted individual could no longer establish associations or trade unions, serve on their executive committees, form or join political parties, or run for parliamentary elections.

On February 10, 1994, the applicant lodged a complaint with the European Commission on Human Rights, alleging violations of his rights under Articles 9 (Freedom of thought, conscience, and religion) and 10 (Freedom of expression) of ECHR. He also claimed

⁹³ No. 23556/94

discrimination based on his political views, which he argued that it breached his Article 14 right (Prohibition of discrimination) in conjunction with Article 10 of the ECHR.

The Court reaffirmed the fundamental principles that underlie its judgments concerning Article 10 in the *Zana case*⁹⁴ and in *Fressoz and Roire v. France*.⁹⁵

- (i) Freedom of expression is the cornerstone of a democratic society and a fundamental prerequisite for its advancement and the self-realization of each individual. It applies not only to "information" or "ideas" that are well-received or considered inoffensive or neutral but also to those that may provoke offense, shock, or disturbance. These principles are essential for the existence of a "democratic society," emphasizing the importance of pluralism, tolerance, and open-mindedness. As outlined in Article 10, this freedom is subject to limitations, but these restrictions must be narrowly interpreted, and the necessity for any constraints must be convincingly demonstrated.
- (ii) The term "necessary" as defined in Article 10 § 2 implies the presence of a compelling societal requirement. While Contracting States have some leeway in determining the existence of such a need, this is coupled with European oversight, which covers both the legislation itself and the judgments implementing it, even those issued by an impartial court. Consequently, the Court is vested with the authority to make the ultimate judgment on whether a "restriction" or "penalty" aligns with the principles of freedom of expression safeguarded by Article 10.
- (iii) When exercising its supervisory role, the Court is obliged to consider the interference in the broader context of the case. This encompasses evaluating both the content of the challenged statements and the circumstances under which they were made. Specifically, it must ascertain whether the interference at hand was "balanced in relation to the legitimate objectives pursued" and whether the justifications presented by the domestic authorities are "pertinent and adequate." In this process, the Court must ensure that the national authorities adhered to standards consistent with the principles enshrined in Article 10 and also grounded their decisions on a reasonable evaluation of the pertinent facts.

However, the Court noted that the applicant was writing in his capacity as a trade-union leader, who acted as an active participant in the Turkish political landscape, and that the article in question, despite its strong language, does not promote violence, armed resistance, or insurrection. The Court regards this as a crucial factor to consider.

Furthermore, the Court acknowledged the harshness of the punishment imposed on the applicant – a sentence of one year and eight months in prison and the fine of 100,000 Turkish liras (as described in paragraph 11 above). It also takes into account that due to his conviction,

⁹⁴ *ZANA v. TURKEY*. (69/1996/688/880)

⁹⁵ *FRESSOZ AND ROIRE v. FRANCE*. (21-Jan-1999) 29183/95

the applicant lost his position as the president of the Petroleum Workers' Union, along with several political and civil rights (as outlined in paragraphs 14 and 17 above).

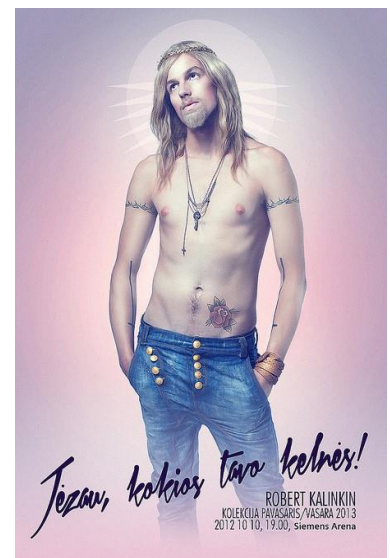
In this context, the Court underscores that both the nature and severity of the penalty inflicted should be taken into consideration when evaluating the proportionality of the interference made by the State.

In summary, the Court finds that Mr. Ceylan's conviction was disproportionate to the stated objectives and, therefore, not "required in a democratic society." Consequently, the Court decided that there has been a violation of Article 10 of the Convention.

- *Sekmadienis v. Lithuania*⁹⁶

During the autumn of 2012, Sekmadienis Ltd., an advertising agency, initiated a promotional campaign for a clothing line designed by a Lithuanian fashion designer, aiming to generate buzz for his upcoming fashion show. The campaign included the creation of three posters, which were prominently displayed in public areas and on the designer's official website. These advertisements depicted Jesus and Mary donning denim jeans and a pristine white dress, accompanied by radiant halos above their heads and a few distinctive accessories, including tattoos. The posters featured the following captions: "Jesus, what trousers!", "Dear Mary, what a dress!" and "Jesus [and] Mary, what are you wearing!" (The below are the pictures of these posters)

As the year drew to a close in 2012, the State Consumer Rights Protection Authority (SCRPA) found itself fielding five separate complaints related to the advertisements, igniting an extended period of legal proceedings.



After receiving the complaints, the SCRPA initially sought guidance from the Lithuanian Advertising Agency (LAA), which determined that "the advertisements were potentially in violation of Article 4 § 2 (1) of the Law on Advertising, as they appeared to contravene public

⁹⁶ No. 69317/14

morals." Notably, the SCRPA then reached out to the Lithuanian Bishops Conference, which voiced its concerns that the advertisements appeared to promote "a frivolous attitude towards the ethical values of the Christian faith" and advocated for "a lifestyle incongruent with the principles of a religious individual." The Conference also received a letter of complaint from approximately one hundred devout individuals regarding the advertisements. Consequently, the SCRPA found that the Law on Advertising had been breached and imposed a fine of 2000 Lithuanian litai (equivalent to around 580 euros) on the applicant company.

In response, Sekmadienis Ltd. lodged a complaint against this decision with the Vilnius Regional Administrative Court. The lower court, in its initial judgment, dismissed the complaint, affirming that all relevant factors had been properly evaluated. The court further noted that the advertisements were prohibited because they distorted the core purpose of a religious symbol. Subsequently, the Supreme Administrative Court of Lithuania (SACL) rejected the appeal, upholding that the advertisements were "undeniably in contradiction with public morals."

The European Court of Human Rights considered several legal aspects in this case. They examined the Lithuanian Constitution, the decisions made by the Constitutional Court of Lithuania, the national Law on Advertising, the Code of Advertising Ethics, and the Law on Religious Communities and Associations.

Additionally, the Court took into account important international documents, such as the International Covenant on Civil and Political Rights (specifically, articles 19 and 20) and the UN Human Rights Committee's General Comment No. 34. This comment emphasizes that laws should not favor one religion or religious believers over others or non-believers.

The Court also referenced a report by the Venice Commission, highlighting the importance of allowing criticism of religious ideas, even if it may be offensive to some individuals.

During the proceedings, the Lithuanian Government argued that their actions were lawful, even though the national law was amended to explicitly prohibit expressing contempt for religious symbols in advertising. They also presented arguments related to protecting public morals and the rights of religious individuals, the margin of appreciation, and the absence of international or European consensus on moral standards. The government noted that a significant portion of Lithuania's population, approximately 77 percent, identified as Christian.

Regarding whether the interference was prescribed by law, the Court noted that not every use of religious symbols in advertising would violate public morals. They observed that the applicant company's case was the first instance in which domestic courts applied the concept of public morals to the use of religious symbols in advertising.

The Court emphasized that in this case, the primary concern was not whether the interference was prescribed by law but rather the necessity of the measure. They had reservations about whether the interpretation by the domestic courts in this case was reasonable, especially considering that the national authorities found that it is necessary to amend the Law on Advertising to explicitly prohibit advertising that expressed "contempt for religious symbols" while the applicant company's case was ongoing. The Court noted the applicant company's

argument that such an amendment wouldn't have been required if the prohibition of inappropriate use or contempt for religious symbols had been clearly established in the law with sufficient predictability.

The Court acknowledged that the interference pursued two legitimate aims: the protection of morals stemming from the Christian faith and the right of religious individuals not to be insulted based on their beliefs.

Regarding the margin of appreciation, the Court recognized that there is limited room for restricting political speech or discussions on matters of public interest. However, in cases involving matters that could offend deeply held personal convictions, especially in the realm of religion, and in the regulation of speech in commercial matters or advertising, states generally have a broader margin of appreciation. Nevertheless, this margin is not without boundaries.

The Court determined that the advertisements in question resembled religious figures, served a commercial purpose, and did not contribute to any significant public debate on matters of general interest. It pointed out that not every use of religious symbols in advertising would violate Lithuanian law, implying that some explanation for why the applicant company's specific expression was contrary to public morals was required by domestic law. However, the Court did not find the reasons provided by the domestic courts and other authorities to be relevant or sufficient. They considered such statements to be declarative and vague and felt that they did not adequately explain why the reference to religious symbols in the advertisements was offensive.

The Court also observed that the authorities accorded significant weight to a letter from approximately one hundred religious individuals who expressed their grievances about the advertisements. However, the Court reaffirmed the principle that freedom of expression encompasses ideas that may offend, shock, or disturb. It reiterated that in a pluralistic democratic society, those who choose to exercise their freedom to manifest their religion cannot reasonably expect to be shielded from all criticism. They must tolerate and accept dissenting viewpoints and even the dissemination of doctrines hostile to their faith. Consequently, the Court concluded that the domestic authorities had failed to strike a fair balance between, safeguarding public morals and the rights of religious individuals from one hand and upholding the applicant company's right to freedom of expression on the other.

Judge De Gaetano concurred separately, agreeing that there had been a violation of Article 10 of the Convention. However, he emphasized that the Court's findings were tailored to the unique circumstances of this case and should not be construed as a blanket endorsement of unrestricted use of religious symbols. The judge also expressed the view that if the advertisement had been considered inappropriate, it might have been more effective for those with religious concerns to engage in a boycott of the company rather than resorting to litigation.

- *Lehideux and Isorni v. France*⁹⁷

The first applicant, Lehideux, held positions as an administrator and later as a director of multiple companies. He also served as a Minister in the government of Marshal Pétain from September 1940 to April 1942 and was a member of the Economic and Social Committee from 1959 to 1964. The second applicant, Isorni, was a former lawyer practicing in Paris. He was officially designated as Marshal Pétain's defense counsel during his trial before the High Court of Justice.

On July 13, 1984, the daily newspaper *Le Monde* published a one-page advertisement with the title "People of France, you have short memories" in prominent large print. Beneath this, in small italics, were the words "Philippe Pétain, 17 June 1941." The content of this advertisement, authored by the two applicants and Mr. M., concluded with an invitation for readers to contact the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association. The text was organized into several sections, each introduced by headings in large capital letters that stated, "People of France, you have short memories, if you have forgotten...". These sections outlined key events in Philippe Pétain's public life from 1916 to 1945, portraying his actions in a positive manner.

On October 10, 1984, the National Association of Former Members of the Resistance filed a complaint and an application to participate as a civil party in legal proceedings. They directed their complaint against Mr. L., who served as the publication manager of *Le Monde*, alleging that he had publicly defended crimes related to collaboration with the enemy. Additionally, they targeted the first applicant, who held the position of president in the Association for the Defence of the Memory of Marshal Pétain, the second applicant, responsible for the text in question, and Mr. M., the president of the National Pétain-Verdun Association, for allegedly assisting and abetting the public defense of crimes associated with collaboration with the enemy. Following the exhaustion of domestic remedies, the applicant proceeded to the European Court of Human Rights.

The Court determined that the publication did not intend to justify the heinous actions of the Nazis but rather aimed to seek a reconsideration of Philippe Pétain's conviction. Consequently, this constituted protected speech, leading to the Court's conclusion that Article 10 of the ECHR had been violated.

The Court clarified that expressions endorsing a pro-Nazi policy, akin to any remarks undermining the fundamental values of the Convention, could not benefit from the protection granted by Article 10. However, in the present case, the applicants explicitly expressed their disapproval of "Nazi atrocities and persecutions" and criticized "German omnipotence and barbarism." Their objective was not so much to endorse a policy but to support a person, with the specific purpose of seeking a revision of Philippe Pétain's conviction. The relevance and legitimacy of this objective, if not necessarily the means employed to achieve it, had been acknowledged by the Court of Appeal. Consequently, the Court determined that this case did

⁹⁷ No. 24662/94

not fall under the category of clearly established historical facts, such as the Holocaust, the denial or revision of which would exclude the protection of Article 10 under Article 17.

Furthermore, the Court took into consideration that the events referenced in the publication had transpired more than forty years prior. While statements like those made by the applicants tend to reignite controversy and memories of past suffering, the passage of time made it inappropriate to treat such remarks with the same level of severity as would have been warranted a decade or two earlier.

In summary, within the sphere of international and regional mechanisms for safeguarding human rights, a careful balance is consistently upheld when confronting the intricate dynamic between hate speech and the cherished principle of freedom of expression. The preceding cases serve as compelling illustrations of the effective implementation of this equilibrium.

3.6. Exploring Domestic Judicial Bodies' Definitions and Interpretations in Relation to ICCPR Act

3.6.1. Human Rights Commission's guideline over Section 03 of ICCPR

The ICCPR Act was introduced in 2007 with a specific focus on addressing hate speech in Sri Lanka. However, from 2015 onward, there has been a concerning trend of misusing the ICCPR Act. Recognizing the recurring misuse of Section 3, the Human Rights Commission of Sri Lanka took note and engaged in discussions regarding the interpretation and application of Article 20 of the ICCPR.⁹⁸ In response to this issue, the Commission issued a guideline pertaining to Section 3 of the Act in Sri Lanka. This guideline aimed to provide clarity and direction on the appropriate use of the Act within the context of the ICCPR principles.

The Sri Lanka Human Rights Commission has cited the advisory opinion and ICCPR general comment No.11⁹⁹ issued by the United Nations Human Rights Committee (UNHRC) regarding Article 20 of the Covenant and stated that Article 20 should be understood with Article 19 of the Covenant which protects freedom of expression.¹⁰⁰ Accordingly, the Human Rights Commission points out that the restrictions in Article 20 must coexist with the protection of freedom of expression in Article 19.

UN Office of the High Commissioner for Human Rights (OHCHR) has introduced a test known as the Rabat Principle to determine the forms of advocacy that constitute incitement that fall

⁹⁸ HRCSL, 'Legal Analysis of the Scope of Section 3 of the ICCPR Act, No.56 of 2007 and attendant recommendations' < https://www.hrcsl.lk/wp-content/uploads/2020/02/legal-analysis-of-the-scope-of-section-3-of-the-iccpr-act-no.56-of-2007-_-english.pdf > accessed 10 august 2023

⁹⁹ General Comment 11, United Nations Human Rights Committee, 29 July 1983.

¹⁰⁰ HRCSL, 'Legal Analysis of the Scope of Section 3 of the ICCPR Act, No.56 of 2007 and attendant recommendations' < https://www.hrcsl.lk/wp-content/uploads/2020/02/legal-analysis-of-the-scope-of-section-3-of-the-iccpr-act-no.56-of-2007-_-english.pdf > accessed 10 august 2023

within the scope of Article 20.¹⁰¹ The test comprises six elements, namely; context, speaker, Intend, Content and form, Extent of the advocacy and imminent harm.

- **Context:**

Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.¹⁰²

- **Speaker:**

The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed.¹⁰³

- **Intent:**

Article 20 of the ICCPR anticipates the intention. Negligence and recklessness are not sufficient for an act to be an offence under Article 20 of the ICCPR, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.¹⁰⁴

It's important to note that Article 20 does not encompass all types of incitement. According to the Rabat Plan of Action, a pivotal factor in identifying incitement under Article 20 is the element of intention.

In this context, the Human Rights Commission elucidated this point by referencing the extent of intent outlined in the Rome Statute of the International Criminal Court (ICC), which was adopted during the United Nations Conference of Diplomatic Plenipotentiaries on July 17, 1998.

Article 30 para. 2 of the Rome Statute states:

- a. In relation to conduct, that a person means to engage in the conduct;
- b. In relation to a consequence, that a person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Therefore, *mens rea* that is less than intent would not, meet the threshold of Article 20(2).

¹⁰¹ Istanbul Process ‘Rabat Plan of Action’ <[¹⁰²ibid.](https://www.istanbulprocess1618.info/rabat-plan-of-action/#:~:text=The%20crux%20of%20the%20Rabat,dialogue%20rather%20than%20through%20censorship.> accessed 10 august 2023</p></div><div data-bbox=)

¹⁰³ibid.

¹⁰⁴ OHCHR ‘One-pager on “incitement to hatred”’ <[>](https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/SeminarRabat/Rabat_threshold_test.pdf) accessed 10 august 2023

- **Content and form:**

The content of the speech constitutes one of the key foci of the court’s deliberations and is a critical element of incitement. Content analysis may include 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.¹⁰⁵

- **Extent of the speech act:**

Extent includes such elements as the reach of the speech act, its public nature, its magnitude and the size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used,, for example, by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, quantity and extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.¹⁰⁶

- **Likelihood, including imminence:**

Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting an actual action against the target group, recognizing that such causation should be rather direct.¹⁰⁷

As outlined in the Human Rights Commission's Guideline, they propose of adopting the six-part threshold test from the Rabat Plan of Action. This approach helps to identify the types of advocacy covered by Section 3. Additionally, the Human Rights Commission suggests that Section 3 should only restrict advocacy of hatred if it leads to intentional incitement toward discrimination, hostility, or violence.

The Human Rights Commission also suggests that Section 3 shouldn't be seen as an isolated provision. Instead, the commission declared it should be understood in harmony with the Freedom of Expression safeguarded by the Constitution of Sri Lanka.¹⁰⁸

The Commission also provided guidance that any expression safeguarded by Article 14 (1) (a) of the Sri Lankan Constitution cannot be prohibited under Section 3 of the ICCPR Act.

¹⁰⁵ *ibid.*

¹⁰⁶ OHCHR ‘One-pager on “incitement to hatred”’

<https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/SeminarRabat/Rabat_threshold_test.pdf > accessed 10 august 2023

¹⁰⁷ *ibid.*

¹⁰⁸ HRCSL, ‘Legal Analysis of the Scope of Section 3 of the ICCPR Act, No.56 of 2007 and attendant recommendations’ < https://www.hrcsl.lk/wp-content/uploads/2020/02/legal-analysis-of-the-scope-of-section-3-of-the-iccpr-act-no.56-of-2007-_-english.pdf > accessed 10 august 2023

Furthermore, the Human Rights Commission offered examples, clarifying that expressions causing "shock, offense, or disturbance" to a specific nationality, race, or religion alone cannot be restricted.

The Human Rights Commission also explained that for a Government-imposed restriction under Section 3 to be valid, it must fulfill a three-pronged test: legality, proportionality, and necessity. This three-part test is already a part of domestic fundamental rights legal discourse in Sri Lanka.¹⁰⁹

The Human Rights Commission stressed that the scope of Section 3 should not be limited to instances where a group of individuals are acting in concert with a common intention. Even if an individual engages in hate speech with the intention of inciting discrimination, hostility, or violence, and is aware that such acts would follow, they should still be held accountable.

Furthermore, the Commission clarified that under Sections 3 (3) and (4) of the Guidelines, a peace officer can arrest a person suspected of committing a Section 3 offense without a warrant. Such an arrested individual cannot be released on police bail or anticipatory bail. Only under exceptional circumstances, the High Court may grant bail.¹¹⁰

The Human Rights Commission highlights the state's responsibilities under the ICCPR Act. It emphasizes that the government is obligated to shield individuals from incitement to discrimination, hostility, or violence originating from third parties. Simultaneously, the state must also abstain from participating in such acts to safeguard rights and uphold equal legal protection for everyone.

The Human Rights Commission additionally states that if there is reasonable suspicion that an individual is involved in an offenses prescribed in Section 3, and public officials empowered to initiate actions under the ICCPR Act neglect or fail to enforce the law, such omission would be considered as state inaction. This inaction would be seen as a breach of fundamental rights (as per Article 12 (1) of the Constitution of Sri Lanka), implying implicit state endorsement of hate speech.¹¹¹

In conclusion, the Human Rights Commission has taken a significant stride in addressing the potential misuse of Section 3 of the ICCPR Act by issuing comprehensive guidelines. These guidelines, rooted in the principles of Article 20 of the ICCPR, serve as a vital tool to prevent the improper application of Section 3. By incorporating the Rabat Plan of Action's threshold test, the Commission has provided a framework that aligns with international standards while taking into account the specific context of Sri Lanka. The Commission's proactive approach

¹⁰⁹ (2000) 1 SLR 314

¹¹⁰ HRC SL, 'Legal Analysis of the Scope of Section 3 of the ICCPR Act, No.56 of 2007 and attendant recommendations' < <https://www.hrcsl.lk/wp-content/uploads/2020/02/legal-analysis-of-the-scope-of-section-3-of-the-iccpr-act-no.56-of-2007--english.pdf> > accessed 10 august 2023

¹¹¹ HRC SL, 'Legal Analysis of the Scope of Section 3 of the ICCPR Act, No.56 of 2007 and attendant recommendations' < <https://www.hrcsl.lk/wp-content/uploads/2020/02/legal-analysis-of-the-scope-of-section-3-of-the-iccpr-act-no.56-of-2007--english.pdf> > accessed 10 august 2023

underscores its commitment to safeguarding fundamental rights and ensuring that the principles enshrined within the ICCPR are upheld diligently. This step is not only instrumental in maintaining a just and equitable society but also demonstrates the Human Rights Commission's dedication to promoting responsible expression, while striking a balance between freedom of speech and the imperative to prevent incitement to discrimination, hostility, or violence.

3.7. Assessment of Judicial Proceedings: Domestic Courts' Responses to Cases Involving the ICCPR Act

3.7.1. *Thisa Attanayake Case*

Tissa Attanayake, a Member of Parliament, etched his name in Sri Lankan history by becoming the first individual to face accusations under the ICCPR Act in the High Court.

Tissa Attanayake, formerly the General Secretary of the United National Party (UNP), was apprehended and detained on allegations of presenting a counterfeit document to the media during the Presidential Election in 2015. It was alleged that the purpose of this statement was to create discord among nations.

The charges brought against him were based on Section 3(1) of the ICCPR Act No. 56 of 2007, focusing on the ICCPR.

The prosecution, led by the Attorney General, contended that Tissa Attanayake had made a public declaration on December 22, 2014, asserting the existence of a concealed document which have signatures of the Common Opposition Candidate Maithripala Sirisena and UNP Leader, Ranil Wickremesinghe.¹¹²

The Attorney General further argued that Tissa Attanayake had violated Section 3(1) of the ICCPR Act No. 56 of 2007 by inciting hatred along religious and ethnic lines.

In addition, the prosecution claimed that Tissa Attanayake had committed offenses punishable under Sections 454 and 459 of the Penal Code¹¹³ by fabricating a document and presenting it to the public as genuine. Moreover, he was accused of violating Section 80-C of the Presidential Election Act¹¹⁴ by disseminating a forged document before an election, with the intent to influence the election's outcome by tarnishing a candidate's personal character or conduct. Accordingly, the High Court refused to grant bail. After a 45-day remand, bail was granted on the basis of continuing the case. Nonetheless, over a span of almost four years, the case remained dormant due to the court's stance that it couldn't proceed without the essential testimony from the primary witnesses—the former Prime Minister Ranil Wickramasinghe and the former President Maithripala Sirisena.

¹¹² T. Farook Thajudeen, 'Case against Tissa Attanayake attenuated' <<https://www.dailymirror.lk/Front-Page/Case-against-Tissa-Attanayake-attenuated/238-164488>> accessed 12 august 2023

¹¹³ Penal Code (Ordinance No. 2 of 1883)

¹¹⁴ Presidential Election Act No. 15 of 1981.

In April 2019, a Sri Lankan court could make a significant development in the case. The former UNP General Secretary, Tissa Attanayake, was released from his charges, as both the plaintiffs and the defendant had reached a settlement.¹¹⁵

During a hearing presided over by Colombo High Court Judge Vikum Kaluarachchi, President's Counsel Kalinga Indatissa, representing Tissa Attanayake, conveyed his client's apologies if the dissemination of the document that underpinned the case had caused any inconvenience or harm to the plaintiffs—Prime Minister Ranil Wickremesinghe and President Maithripala Sirisena.

Kalinga Indatissa reassured the court that Tissa Attanayake would refrain from engaging in such actions in the future. The legal representatives of Prime Minister Ranil Wickremesinghe and President Maithripala Sirisena did not oppose this statement.¹¹⁶

Deputy Solicitor General Dileepa Peiris, representing the Attorney General, informed the Court that it is imperative for individuals in positions of responsibility to comprehend the seriousness of their statements made to the media. Nonetheless, he indicated that there was no objection to closing the case at the court's discretion, considering the reconciliation between the defendant and plaintiff parties, along with the defendant's expression of remorse.¹¹⁷

Subsequently, the law suit was concluded in accordance with the provisions of the Code of Criminal Procedure. The High Court Judge ordered the release of the defendant from the charges.

During the period of Tissa Attanayake's indictment under the ICCPR Act, it is essential to contextualize the political environment in Sri Lanka.¹¹⁸ Tissa Attanayake, a prominent figure who had held the position of General Secretary of the UNP for an extended duration, made a pivotal decision during the 2015 presidential election cycle. Notably, he crossed over his allegiance to the United People's Freedom Alliance (UPFA), led by Mahinda Rajapaksa.¹¹⁹ This political maneuver had a profound impact on the UNP and marked a significant shift in the country's political dynamics.

The repercussions of Tissa Attanayake's party switch reverberated strongly within the UNP, casting it into a challenging period. However, the subsequent events unfolded after the transfer of power following the 2015 presidential election.¹²⁰ It was in September 2016 that Mr. Tissa

¹¹⁵ Colombo Page 'Tissa Attanayake discharged from the forged document case after parties reach settlement' <http://www.colombopage.com/archive_19A/Apr24_1556122103CH.php> accessed 13 august 2023

¹¹⁶ Colombo Page 'Tissa Attanayake discharged from the forged document case after parties reach settlement' <http://www.colombopage.com/archive_19A/Apr24_1556122103CH.php> accessed 13 august 2023

¹¹⁷ *ibid.*

¹¹⁸ "Tissa Attanayake Charged under ICCPR Act." *The Sunday Times* (September 4, 2016)

¹¹⁹ News.lk 'Thissa gives to shivers to NP Mahinda takes lead from nomination' <<https://www.news.lk/fetures/item/5080-tissa-gives-shivers-to-unp-mahinda-takes-lead-from-nomination-day>> accessed 13 august 2023

¹²⁰ BBC 'Sri Lanka's Rajapaksa suffers shock election defeat' <<https://www.bbc.com/news/world-asia-30738671>> accessed 13 august 2023

Attanayake found himself facing charges under the ICCPR Act, which occurred against the backdrop of these political developments.¹²¹

The central focus of this legal case revolves around examining the documents presented by Tissa Attanayake. The key question is whether these documents had the potential to stir up racial or religious tensions, and whether Tissa Attanayake intended to provoke such feelings through them. Furthermore, there's a notable perspective that Thissa Attanayake might have become a political prisoner as a result of his cross-over. This suggests that his situation could be driven by a need for revenge due to political reasons, adding an extra layer of complexity to the case.

3.7.2. *Shakthika Sathkumara Case*

Delankage Sameera Shakthika Sathkumara, a 34-year-old Sri Lankan national, is an acclaimed writer and poet known for his various literary works. Additionally, he served as an Economic Development Officer in the Polgahawela Divisional Secretariat, holding a civil servant position.

On February 15, 2019, Sathkumara posted a short story titled "Ardha" on social media, depicting the life of a former young monk transitioning into a new phase. The story, written in a post-modern literary style, contained themes involving homosexuality and a possible instance of sexual abuse, embedded within a creative narrative structure.¹²²

Following this publication, a Buddhist organization lodged a complaint against Sathkumara, alleging that his story defamed Buddhism and violated legal provisions such as Section 291B of the Penal Code of 1885 and section 3(1) of the ICCPR Act.¹²³

In March 2019, a group of Buddhist monks visited Sathkumara's workplace to raise objections against his story and demanded an inquiry. Sathkumara explained his artistic intent, emphasizing that the story was part of a broader tradition in Sinhalese literature and that it was not intended to harm the sentiment of any religion.¹²⁴

On April 1, 2019, Sathkumara was arrested at the Polgahawela Police Station, following a discussion with the monks. The Chief Inspector, initially inclined to settle the matter with an apology, later informed Sathkumara of his arrest under sections 291B of the Penal Code and sections 2(1) and 3(1) of the ICCPR Act.¹²⁵

He was subsequently taken to the Polgahawela Magistrates' Court, where the police requested his detention until April 12 for further investigation. Despite his lawyer's arguments and prior

¹²¹ Colombo Page 'Tissa Attanayake discharged from the forged document case after parties reach settlement' <http://www.colombopage.com/archive_19A/Apr24_1556122103CH.php> accessed 13 august 2023

¹²² Human Rights Council Working Group on Arbitrary Detention [Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020], [Opinion No. 8/2020 concerning Delankage Sameera Shakthika Sathkumara (Sri Lanka)]

¹²³ *ibid.*

¹²⁴ Humanists International, 'Case of Concern- Shakthika Sathkumara' <<https://humanists.international/case-of-concern/shakthika-sathkumara/>> accessed 13 august 2023

¹²⁵ Human Rights Council Working Group on Arbitrary Detention [Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020], [Opinion No. 8/2020 concerning Delankage Sameera Shakthika Sathkumara (Sri Lanka)]

apologies, Sathkumara was held in pretrial detention until April 9th. Efforts for his release on bail were denied, with the magistrate ordering his continued detention until April 23rd.¹²⁶

Over subsequent months, Sathkumara's detention was extended through multiple hearings, despite limited progress in the investigation. On August 5, 2019, the Kurunegala High Court granted his release on bail, contingent upon strict conditions, after spending 127 days in detention.¹²⁷

While Sathkumara was released on bail, he still faced the prospect of arrest and further detention, as formal charges had not been brought against him. Additionally, he was under conditions on bail and encountered various challenges in resuming his government employment.

3.7.3. Abdul Raheem Case

After the Easter Attack on 17 May 2019, an incident occurred that sheds light on the prevailing situation that arbitrary detentions of Muslims. Abdul Raheem Mazahina, a Muslim woman from a working-class background, was arrested by the police. She had just returned home after completing some tasks in the provincial town of Hasalaka when the police took her into custody. This arrest followed a complaint lodged by a group of Sinhalese Buddhists who alleged that Mazahina was wearing a dress with a design that they believed was derogatory to Buddhism.¹²⁸ The design in question was later revealed to be a depiction of a ship's wheel, as shown in media footage. However, the complainants insisted that the design resembled the dharma-chakra, a significant Buddhist symbol representing the 'revolving cycle'. Subsequently, Mazahina was charged under the ICCPR Act and detained without bail.

During her 17-day confinement, prison guards repeatedly referred to Mazahina as a 'terrorist'.¹²⁹ International observers, including Amnesty International, criticized the arrest, deeming the charge as "absurd" and accusing the police of misusing the ICCPR and the Penal Code of Sri Lanka. These observers demanded Mazahina's release and appropriate compensation.

After spending a month in remand custody, Mazahina took legal action in June 2019 by filing a fundamental rights petition. Her petition sought compensation from the state and called for the punishment of the police officers involved in her arrest.

The importance of this occurrence pertains solely to the act of wearing an attire adorned with a depiction resembling a ship's wheel, positioned in proximity to the Dharma Chakra emblem. The central matter revolves around whether donning a garment featuring an image resembling

¹²⁶ *ibid.*

¹²⁷ Human Rights Council Working Group on Arbitrary Detention [Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020], [Opinion No. 8/2020 concerning Delankage Sameera Shakthika Sathkumara (Sri Lanka)]

¹²⁸ Lisa Fuller & Rukshana Rizwie 'Muslims 'targeted with arbitrary arrests' after Easter massacre', <<https://www.aljazeera.com/features/2019/6/16/muslims-targeted-with-arbitrary-arrests-after-easter-massacre>> accessed 13 august 2023

¹²⁹ *ibid.*

the Dharma Chakra emblem gives rise to an offense as delineated in Section 3(1) of the aforementioned statute.

Upon close scrutiny through the prism of established legal notions, it becomes evident that her conduct does not amount to an instigation of racial or religious animosity. When examined through the lens of Rabat principles, it becomes apparent that the apprehension in question is characterized as arbitrary detention and a transgression of fundamental rights. Accordingly, it can be stated that Mazahina's arrest was based on the attitudes of the society and she was not arrested on any rational legal basis.

3.7.4. Ramzi Razik Case

Ramzi Razik was apprehended by the police under the ICCPR Act on April 09, 2022, allegedly due to his involvement as a social activist and his expression of views against extremism and racism on social media platforms. The arrest stemmed from a Facebook post he made on April 3rd. These arrests were made on the premise that legislation designed to safeguard human rights was misused, leading to limitations on freedom of speech and its exploitation for purposes of repression.

He shared the following post in Sinhala on his personal Facebook timeline.

“Sri Lankan Muslim society is facing an ideological war which is subtly handled by racist groups. The Muslims are surrounded on all four sides so they are unable to resist this ideological warfare. The Muslim society is looking at it stunned, unable to act against the powerful psychological warfare that is being fought. Racist opponents are successfully achieving their targets whereas Muslims are losing. Muslims must immediately prepare for an ideological jihad (ideological struggle), taking it as a religious responsibility on behalf of the entire Sri Lankan society and all of its citizens. It is time to prepare for an ideological struggle using the pen and the keyboard as tools. At this time, Muslims should pay more attention to making the people aware of the truth, making use of every available space, including the mainstream media and social media vis-a-vis the hate propaganda carried out against Muslims”.

Upon a closer examination of his previous Facebook posts, it becomes evident that he has consistently advocated for harmony, equality, and justice. However, his arrest appears to have been triggered solely by the use of the term "ideological Jihad" in one of his posts. The authorities did not seem to take into account the actual content of the post but rather focused solely on this particular term.

3.7.5. Natasha Edirisooriya Case¹³⁰

Nathasha Edirisooriya, a Sri Lankan standup comedian, was taken into custody by the Computer Crime Investigation Division of the Criminal Investigation Department (CID) on May 27, 2023, at Katunayake's Bandaranaike International Airport. This action was prompted by allegations that she had made offensive remarks about Buddhism during her performance

¹³⁰ HCEBA/1335/2023

in the show "Modabhimanya" (Fool's Pride) in April 2023, which had been posted on YouTube on May 24.

She appeared before the Magistrate's Court in Colombo on May 28, 2023, and was formally charged under the provisions of Section 3(1) of the ICCPR Act No. 56 of 2007, along with Sections 291A and 2918 of the Penal Code. These sections deal with intentionally hurting the religious sentiments of individuals and intentionally offending the religious sentiments of a group, respectively.

During her initial court appearance, the Magistrate decided to keep her in custody without bail. However, she was later granted conditional bail by the Colombo High Court Judge, Aditya Patabendi, on July 5, 2023. In this case, the grant of conditional bail represented a significant decision within the broader context of arrests carried out under the ICCPR Act.

It's important to mention that the knowledgeable Senior Deputy Solicitor General representing the Attorney-General didn't oppose the granting of bail. However, they pointed out that according to Section 4 of the ICCPR Act, bail can only be given in exceptional situations. Recognizing that the Attorney General's lack of opposition to bail doesn't automatically justify its approval, the Court needed to verify the presence of these exceptional circumstances. To do so, the experienced High Court Judge emphasized a number of significant factors to satisfy the exceptional nature of her activity..

The beginning of the court decision highlights the words of Rohitha Bogollagama, who served as the Minister of Home Affairs during that period. He spelled out the intention behind introducing this Bill while presenting the ICCPR Act to the Parliament on October 20, 2007. He stressed that the Sri Lankan Government, as a whole, became a participant in the ICCPR in 1980. Although these international commitments weren't directly included in the Sri Lankan Constitution, it's noted that various rights within this Act still hold legal weight within Sri Lanka.

Next, the judgment points out that Section 3 of the ICCPR Act resembles the second part of Article 20 of the International Covenant on Civil and Political Rights. The judge went on to emphasize that it is understood that this particular provision should be understood in a manner consistent with Article 19 of the ICCPR. In simpler terms, the law acknowledges that this provision should be looked at in relation to the freedom of speech and expression stipulated in the ICCPR.

Following that, the learned High Court Judge brings our attention to the United Nations (UN) Strategy and Plan of Action on Hate Speech, established in September 2020. This strategy identifies three levels of hate speech. Specifically, the Judge notes that when deciding whether a statement qualifies as hate speech, certain elements must be present: incitement to discriminate, a person expressing hate, an audience and a group being targeted. In other words, there should be a clear indication of an immediate risk of hostility and intimidation by the audience against the targeted group due to the statement made.

However, in this particular case, the Judge determined that there was no evidence indicating an impending threat of hostility and intimidation by the audience against the targeted group

due to the statement. The judgment also delves into the Rabat Plan of Action, introduced during a session organized by the Office of the United Nations High Commissioner for Human Rights in Rabat, Morocco, in October 2012. This plan considers several factors, including the context in which the statement was made, the status of the speaker in society, the speaker's intentions, the content and style of the speech, the extent of the speech, and the likelihood of incitement, including how imminent it is.

Considering the individual under scrutiny in this bail application, the Judge highlights that the B report didn't mention any conflicts between Buddhists within the society during the time when Edirisooriya allegedly made the statement. Furthermore, when assessing the social standing of the speaker in question, the Judge concludes that the report submitted in this case does not provide clear evidence of the person holding any significant position within society.

Continuing, the judgment underscores that although specific statements might upset particular social, national, religious, or disadvantaged groups, just provoking hurt or offense through a statement made thoughtlessly or recklessly doesn't qualify as a statement made under the scope of Section 3(1) of the ICCPR Act.

When considering the application of Sections 291A and 291B of the Penal Code, the learned High Court Judge turns to Dr. Hari Singh Gour's "Penal Law of India". In that work, it is stated that "*An act can be deliberate without being malicious, and it can be malicious without being deliberate, as it can be reckless without being intentional. The essential factor for constituting the offense is the presence of both.*" In light of this, the Judge firmly states that it's not feasible to categorize such statements under Section 3 of the ICCPR Act or Sections 291A and 291B of the Penal Code solely by virtue of making a statement that cause offense to a specific race, religion, or group.

In the closing remarks, the Judge emphasizes the significant role of an investigator. It's made clear that the investigator's duty isn't simply to arrest someone based solely on a complaint, especially when the complainant holds influence within society. Instead, in cases like these, the investigator must evaluate the case's facts, the present interpretations related to the laws in question, and our country's obligations and responsibilities on the global stage. This emphasizes that law enforcement authorities and adjudicative bodies bear the responsibility to act in a way that aligns with the Parliament's intentions and considers international obligations. This goes hand in hand with highlighting the shared responsibilities of both investigating officers and the Judiciary in their collective pursuit of justice.

Therefore, this conditional bail order can be discerned as a verdict rendered in alignment with the principles delineated by international law and the overarching goal of safeguarding individuals' rights and security. (The complete high court judgment has been appended as an annexure.)

Chapter 04

4.1. Strengthens of the ICCPR Act of Sri Lanka

By explicitly incorporating specific articles from the ICCPR into domestic legislation, the ICCPR Act aimed to bridge existing gaps in the discourse of human rights in Sri Lanka. This part of the study aims to dissect and analyze the strengths and merits of the ICCPR Act by delving into each section separately, highlighting the advantages arising from its provisions, and offering a comprehensive understanding of its implications for human rights protection in Sri Lanka.

➤ **Section 2 - Right to be recognized as a Person before the Law**

The ICCPR Act's first substantive provision asserts the universal and inherent right of every person to be recognized as a legal person before the law. This recognition is foundational to the enjoyment of a range of other human rights and protections. By explicitly codifying this principle, the Act establishes a clear basis for ensuring equal treatment and access to justice for all individuals. This provision represents a fundamental step toward creating an inclusive and just society by granting legal standing and representation to all members of the Sri Lankan population.

Strengths -

Inclusivity and Equal Treatment: The recognition of the right to be recognized as a person before the law ensures that marginalized and vulnerable groups, who may have historically faced discrimination or exclusion, are granted equal legal status as others who enjoy the equality before the law. This is particularly crucial in a diverse and pluralistic society like Sri Lanka, where various ethnic, religious, and social groups coexist.

Protection against Arbitrary Treatment: This provision serves as a safeguard against arbitrary state action that might deny individuals their legal identity or subject them to discriminatory treatment. By mandating that every person is entitled to legal recognition, the Act prevents abuses of power and ensures due process of law.

➤ **Section 3: Propagation of War or Advocacy of Hatred:**

This section addresses the propagation of war or advocacy of national, racial, or religious hatred that incites discrimination, hostility, or violence. While this aims to strike a balance between freedom of expression and protection against hate speech, this provision underscores the state's commitment to maintaining social harmony and preventing the spread of harmful ideologies.

Strengths:

Preservation of Social Harmony: By criminalizing hate speech and incitement to violence, the Act prioritizes the preservation of social harmony and prevents the escalation of conflicts based

on divisive ideologies and beliefs. This demonstrates the government's proactive stance in maintaining peace and stability within the nation.

Protection of Minorities: This provision acts as a shield against hate speech targeted at minority groups. By curbing the dissemination of discriminatory ideas, the Act contributes to safeguarding the rights and dignity of vulnerable communities, promoting an atmosphere of mutual respect and understanding. According to Professor Deepika Udagama, the most critical provision of the Act is Section 3. If any person commits the propagation of war which is a serious non-bailable offense this section provides for the protection of civil and political rights by conferring jurisdiction on the High Court.

➤ **Section 4: Entitlement of an Alleged Offender:**

This section enumerates the rights of a person charged with a criminal offense, emphasizing due process, legal assistance, and the right to defend oneself. By ensuring that individuals accused of crimes are afforded adequate legal protections, this provision safeguards against wrongful convictions and promotes fairness in the criminal justice administration system.

Strengths:

Due Process and Fair Trials: The Act's provisions ensure that individuals facing criminal charges are guaranteed a fair trial and are provided with the necessary tools to mount an effective defense. This helps to prevent miscarriages of justice and wrongful convictions, enhancing the credibility of the legal system.

Protection of Vulnerable Groups: By mandating the provision of legal assistance and interpreters, the Act safeguards the rights of vulnerable individuals, such as those who may have difficulty understanding legal proceedings due to language barriers or other factors. This reinforces the principle of equality before the law.

➤ **Section 5: Rights of a Child:**

This section focuses on the rights of children, emphasizing birth registration, protection from maltreatment, access to legal assistance, and the paramount importance of the child's best interests in all matters concerning them. The Act recognizes the vulnerability of children and seeks to ensure their well-being and protection.

Strengths:

Child-Centric Approach: By prioritizing the best interests of the child in all matters concerning them, the Act aligns with international norms and standards for child protection. This provision empowers Sri Lanka to create an environment where children's rights are upheld and safeguarded.

Prevention of Exploitation: The Act's emphasis on birth registration and protection from maltreatment serves as a crucial safeguard against child exploitation, abuse, and neglect. This proactive approach contributes to breaking the cycle of abuse and protecting future generations.

➤ **Section 6: Right of Access to Benefits Provided:**

This section underscores citizens' right to participate in public affairs and access services provided by the state. By ensuring citizens' engagement in governance and access to essential services, this provision bolsters democratic participation and inclusivity.

Strengths:

Enhanced Democratic Participation: The Act's recognition of the right to participate in public affairs strengthens the democratic fabric of Sri Lanka by enabling citizens to engage in decision-making processes that impact their lives. This provision empowers citizens to have a voice in shaping their society.

Promotion of Social Welfare: The right to access services provided by the state ensures that citizens, especially marginalized and underserved population, can benefit from essential public services such as healthcare, education, and social welfare programs. This contributes to reducing disparities and promoting social equity.

➤ **Section 7: High Court Jurisdiction**

This section grants individuals the right to apply to the High Court against the infringement or imminent infringement of human rights protected by the Act. The High Court is empowered to provide relief or redress, ensuring a swift and effective avenue for individuals to seek remedies for human rights violations.

Strengths:

Access to Effective Remedies: The Act's provision for individuals to seek redress through the High Court demonstrates the government's commitment to ensuring accessible and effective remedies for human rights violations. This mechanism empowers citizens to hold authorities accountable for their actions and inactions.

Protection of Fundamental Rights: By extending the jurisdiction of the High Court to address infringements on human rights protected by the Act, this provision enhances the enforcement of fundamental rights that contribute to a more just and rights-respecting society.

➤ **Section 8: Right of Appeal to the Supreme Court:**

This section grants individuals the right to appeal to the Supreme Court against orders made by the High Court in petitions filed under the ICCPR Act. This appellate mechanism ensures

that decisions made by lower courts can be reviewed and corrected if necessary, enhancing the reliability of the judicial process.

Strengths:

Judicial Oversight: The provision for appealing to the Supreme Court adds an additional layer of judicial oversight, ensuring that legal decisions made under the Act undergo thorough scrutiny of the judiciary. This mechanism promotes accountability and transparency in the judicial system.

Legal Safeguards: The right to appeal safeguards against erroneous or unjust decisions that may be made at the High Court level. It offers individuals an opportunity to present their case before a higher authority, minimizing the risk of potential miscarriages of justice.

Through its comprehensive provisions, the ICCPR Act addresses key aspects of civil and political rights, ranging from due process and fair trials to the protection of children and the right to appeal. Each section of the Act reinforces the broader goals of social harmony, equality, and justice.

4.2. Identifying Shortcomings and Gaps in the International Covenant on Civil and Political Rights (ICCPR) Act of Sri Lanka

The International Covenant on Civil and Political Rights (ICCPR) Act of Sri Lanka was introduced to provide legal recognition and protection for fundamental rights enshrined in the ICCPR. However, a critical examination of the Act reveals several shortcomings, loopholes, and weaknesses that raise concerns about its effectiveness in safeguarding the civil and political rights of Sri Lankan citizens. The ICCPR Act of Sri Lanka was enacted to bring the country's domestic laws in line with the provisions of the ICCPR. However, as with any legal framework, there are strengths and weaknesses in its implementation. This study examines some clauses of the ICCPR Act in Sri Lanka, highlighting shortcomings, lacunae, and weaknesses, focusing particularly on the prohibition of hate speech and its misuse as an anti-blasphemy tool.

4.2.1. Adequacy and Completeness of the ICCPR Act

The ICCPR Act in Sri Lanka is notably distinct from the comprehensive framework depicted in the ICCPR Convention. The development of the ICCPR Act seems to have occurred with a sense of urgency, potentially lacking in-depth examination. It was seemingly introduced primarily to secure Generalized System of Preferences (GSP) relief. The inadequacy of this legal instrument becomes apparent when observing the omissions of the provisions of the first Optional Protocol, the central aspect discussed in the *Singarasa case*. The first Optional Protocol, particularly concerning the right to approach the Human Rights Committee, remains unimplemented.

Furthermore, a thorough examination suggests that the ICCPR Act may be viewed as an incomplete transposition of the ICCPR Convention into domestic law. Notably, fundamental human rights like the right to life and the right to privacy have not been encompassed within this legislative framework. This observation raises valid concerns about the efficacy and comprehensiveness of the ICCPR Act's implementation, leaving certain crucial rights inadequately protected within the domestic legal context.

4.2.2. Impact of Hierarchy in Human Rights

If it was necessary to establish civil and political rights to the extent specified in the convention, there was a possibility of including the right to information as if it were included in the Chapter III on fundamental rights without including rights in an Act. However, the decision not to pursue this approach results in conferring comparatively less significance upon the human rights enshrined in the Act. This divergence in the Act introduces a potential diminution of the value attributed to the safeguarded human rights.

Upon examining the landscape of human rights within Sri Lanka's domestic legal framework, a discernible hierarchy emerges. This stands in contrast to the principle articulated by UNICEF that underscores the indivisible nature of human rights. UNICEF's assertion emphasizes that civil, political, economic, social, and cultural rights, regardless of their nature, all hold intrinsic value to human dignity and are of equal stature as rights. In this perspective, there is no concept of a minor or inferior right, and no hierarchical ordering of human rights exists.¹³¹

However, Sri Lanka's hierarchical arrangement of human rights is introduced through the ICCPR Act. As a result, it becomes evident that the legislative intent may not have been inclined towards enhancing the protection of civil and political rights by incorporating them within the ambit of fundamental rights.

4.2.3. Absence of Non-Derogable Rights:

Unlike the ICCPR, which explicitly outlines non-derogable rights, the ICCPR Act of Sri Lanka lacks a comprehensive list of rights that cannot be derogated even in times of emergency. This omission weakens the protection of certain fundamental rights during states of emergency or crises.

4.2.4. Misuse of Section 03

➤ Failure to recognize the nature of the offence

Section 3 of the ICCPR Act is frequently misused in Sri Lanka, which attempts to be aligned with Article 20 of the Convention. Article 20(2) of the Convention as stated, establishes a broad obligation for States to counteract the propagation of national, ethnic, or religious hatred that fuels discrimination, hostility, or violence. The article amalgamates all kinds of incitement into a single provision, underscoring the state's steadfast commitment to thwarting each category of

¹³¹ UNICEF 'What are Human Rights' <<https://www.unicef.org/child-rights-convention/what-are-human-rights#:~:text=Whether%20civil%2C%20political%2C%20economic%2C,no%20hierarchy%20of%20human%20rights>> accessed 19 November 2009

incitement. However, when translating this obligation into domestic law, each form of incitement necessitates discrete identification, accompanied by an appropriate penalty.¹³²

For instance, penalties for instigating violence may be substantial and encompass imprisonment, whereas sentences for instigating discrimination or hostility could be comparatively lenient, like revoking broadcasting licenses or blocking social media accounts.¹³³ Thus, it's inadvisable to amalgamate Article 20(2) of the ICCPR Convention into a solitary offense.

Nevertheless, within the context of domestic law, Article 3 of the ICCPR Act aggregates all kinds of incitements outlined in Article 20(2) into a singular offense, subject to a unified penalty—rigorous imprisonment for a term not exceeding ten years. Moreover, all such offenses are only bailable by the High Court.

On the other hand, Section 3 of the Act functions as the legal framework governing hate speech in Sri Lanka's domestic jurisdiction. In September 2020, the United Nations Strategy and Plan of Action on Hate Speech categorized hate speech into three strata: the severest form of hate speech, the intermediate level, and the bottom level.¹³⁴ This framework categorization aims to discern the gradation of hate speech severity. In this context, not all forms of hate speech are prohibited. Only those that incite discrimination, hostility, or violence are within the purview of the International law. An example of this distinction is provided by racial slurs, if they do not involve incitement, they fall outside the scope of the ICCPR Covenant. The prohibition aims to prevent acts of discrimination and violence against targeted groups. However, in Sri Lanka, the intent of Article 20(2) of the Convention appears to falter due to the imposition of a uniform penalty without discerning the distinct nature of each offense. Furthermore, this approach potentially provides an opening for the misapplication of Article 3.

➤ **Unwarranted detention**

Section 3(4) of the Act renders the offense 'cognizable', signifying that a police officer can perceive and discern the offense and initiate an arrest without the need for a judicial warrant. This procedural characteristic in Section 3 raises concerns due to the intricate nature of 'incitement'. While some instances might involve observable and identifiable incitement towards acts of violence, many cases entail intricate and multifaceted forms of incitement that aren't immediately apparent.

For instance, incitement to discrimination often demands the speaker's possession of influence over listeners, with an impending likelihood that the listeners would be swayed to discriminate against the targeted group. In such cases, a police officer couldn't instantaneously discern all the facets of the offense without collecting and analyzing evidence. Consequently, a person suspected of inciting discrimination shouldn't be apprehended without presenting the necessary

¹³² Dr. Gehan Gunatilleke Is Section 3 of Sri Lanka's ICCPR Act Fit for Purpose?' The Bar Association Law Journal 2021/22 Vol. XXVI

¹³³ *ibid.*

¹³⁴ United Nations Strategy and Plan of Action on Hate Speech Detailed Guidance on Implementation for United Nations Field Presences SEPTEMBER 2020

evidence before a judge and securing an arrest warrant. However, section 3(4) of the Act empowers the police to arrest such suspects without a warrant.¹³⁵

On other hand, a suspect taken into custody without a warrant might find themselves held in remand custody until they appear before a High Court judge. Remarkably, the Act lacks provisions compelling the police to promptly present the suspect before the High Court, potentially leading to delays in judicial review.

➤ **Non-bailable Offence**

Article 3(4) of the ICCPR Act stands at the center of concern due to its apparent misuse, reading: "*An offense under this section shall be cognizable and non-bailable, and no person suspected or accused of such an offense shall be enlarged on bail, except by the High Court in exceptional circumstances.*"

What has come into focus here is the perceived intent behind the act's application. Primarily, it seems to deny individuals suspected or accused of violating the act the opportunity to seek bail through a magistrate at the earliest convenience. Alarmingly, this strategy has curtailed the magistrates' role in protecting these individuals, a role mandated by ordinary law.¹³⁶

In the Sri Lankan legal framework, magistrates involve in the vital role of safeguarding individuals from unwarranted arrest and unjust detention as swiftly as possible. This isn't just a legal obligation; it's a fundamental cornerstone upon which our legal system, democratic values, and adherence to the rule of law are built. The power vested in magistrates serves as a bulwark against illegal arrest and detention.¹³⁷

The ICCPR asserts that anyone arrested or detained should promptly receive the opportunity for a legal review by an impartial authority guided solely by the dictates of the law. From that perspective, the rights safeguarded by the Covenant according to Article 3(4) have been breached.

The key difference between a judicial officer and other entities – be it a police officer, a CID official, or any non-judicial actor – lies in their decision-making approach regarding the validity of arrest and detention. Judicial officers base their decisions strictly on legal principles, while those operating under executive authority lack the responsibility and competency to make such determinations in the same judicious manner.

Arrest and detention represent the most profound violations of an individual's freedom and liberties. To foster an environment devoid of undue apprehension about arbitrary arrest and detention is a foundational requirement for an open society.

¹³⁵ Dr. Gehan Gunatilleke Is Section 3 of Sri Lanka's ICCPR Act Fit for Purpose?' The Bar Association Law Journal 2021/22 Vol. XXVI

¹³⁶ Basil Fernando 'The Insane use of ICCPR Act' <<https://www.colombotelegraph.com/index.php/the-insane-use-of-the-iccpr-act/>> accessed 19 November 2009

¹³⁷ *ibid.*

In recognition of this paramount principle, the law entrusts magistrates with the responsibility of evaluating the legality of arrest and detention at the earliest possible juncture.

Article 3(4) poses a direct challenge to this cornerstone of individual and collective protection. Consequently, any erosion of this fundamental protection should occur only under exceptionally in rare circumstances and in the most restricted manner conceivable. A close examination of recent cases where the ICCPR Act has been invoked clearly indicates that there was minimal justification for resorting to such an extreme measure to compromise this essential safeguard for the involved individuals.

➤ **Blasphemy Law**

In none of these cases was there any imminent threat or attempt to propagate war or advocate national, racial, or religious hatred, as required under Article 3(1) of the Act. This Article further mandates that such actions must incite discrimination, hostility, or violence. The crux of the issue is the necessity for the elements such as war propagation, which, in all recent cases, was conspicuously absent.

One major concern is the misuse of Section 3 of the Act as a tool against blasphemy, which goes beyond the intended scope of the ICCPR Act. Blasphemy, or insulting religious beliefs, has been targeted using this legislation, although the Act is designed to protect individuals based on their identity, not faith. This misapplication of the Act reflects an infiltration of religious considerations into a secular law. It reveals a departure from the principle of secularism and raises doubts about the state's commitment to upholding this principle.

Examples of such misuse are seen in cases where individuals were arrested for writing fictional stories that were deemed offensive to Buddhism or any other religion or faith. Instead of addressing incitement against specific identity groups, the Act was employed to protect religious sentiments, resembling anti-blasphemy laws. This misuse undermines the original purpose of the ICCPR Act and raises concerns about the erosion of freedom of expression and the rule of law.

Several real-world cases exemplify these weaknesses. The arrest of writer Shakthika Sathkumara for a fictional short story which was critical of Buddhism, the detention of social media activist Sepal Amarasinghe for commenting on a sacred Buddhist relic, and the arrest of M. R. Mazahima for wearing clothing mistakenly believed to be offensive to Buddhism, all highlight the misapplication of the ICCPR Act to curb blasphemy rather than incitement. These cases demonstrate how the Act misplaced the application of rights enshrined in the ICCPR, resulting in unjust arrests, detentions, and infringements on freedom of expression.

Mere allegations of criminal behavior, mainly if driven by misinformed beliefs or, worse, malicious intent, do not warrant arrest or detention when no factual foundation exists for a crime. Thus, endeavors to instigate arrest without substantive details of a crime's occurrence amount to an effort to manipulate and abuse the legal process paralyzing the whole administration of justice.

➤ **Undermining the Right to Freedom of Expression:**

Section 3 of the Act, aimed at curbing hate speech and incitement to discrimination, raises concerns about its potential impact on the right to freedom of expression. The lack of a well-defined balance between protection against hate speech and upholding the right to express dissenting views could lead to disproportionate restrictions.

While the ICCPR Act was instituted with the prime goal of upholding and preserving civil and political rights, it becomes evident that the genuine essence and purpose of the ICCPR Convention are compromised when it is subjected to misinterpretation. In such cases, the very principles and intentions that the Convention seeks to promote and safeguard can be distorted or undermined, detracting from its intended effectiveness in ensuring the protection of these fundamental rights.

Chapter 05

5.1. Challenges in Implementing the ICCPR in Sri Lanka

The International Covenant on Civil and Political Rights (ICCPR) Act of 2007 represents a milestone in Sri Lanka's commitment to uphold the principles of human rights in the international stage. However, the actual implementation of this Act is marked by many challenges and is influenced by political and social factors.

- **Selective Implementation and Political Interference**

One of the primary obstacles hampering the effective implementation of the ICCPR Act in Sri Lanka is the specter of selective enforcement driven by political agendas. The interplay between the government in power and the Attorney General's Department often intertwines legal proceedings with political considerations, casting a shadow over the impartial application of the ICCPR Act. Article 9 of the Constitution states that "*Sri Lanka shall give to Buddhism the foremost place*". In contrast, the Sinhalese, constituting a significant majority in Sri Lanka, play a distinct role in the country's political landscape. As a result, politically motivated strategies often target the Sinhala voter base, shaping the discourse of Sri Lankan politics. Simultaneously, Section 3 of the ICCPR Act is invoked to justify arrests based on the emotional distress experienced by the Sinhalese community.

Curiously, the application of the law under the Act appears to deviate from its intended purpose. The Act should ideally come into play when there is an assault on a religious object or website belonging to a different religion, belief, or a faith. Surprisingly, the Act hasn't been effectively employed in cases like the 2018 anti-Muslim violence in the Kandy district, where the 200-year-old Masdul Lafir Jumma mosque was destroyed. This underscore highlights how, in Sri Lanka, blasphemy laws have transformed into tools predominantly employed to suppress dissenting or critical opinions. . Furthermore, this mechanism can also be discerned as a strategic approach, gradually gaining the support of the Sinhalese majority for political motives.

- **Inadequate Awareness and Training**

Another notable impediment to the ICCPR Act's effective implementation emanates from a lack of awareness and training within Sri Lanka's law enforcement agencies. A comprehensive grasp of the Act's provisions and their implications is indispensable for its judicious application. However, reports suggest that many law enforcement personnel lack the requisite knowledge to navigate the complexities of the ICCPR Act, resulting in inconsistent enforcement and potential violations of human rights. Under section 3(2), police officers do not have special knowledge to identify whether a person commits an offense compounding the

arrest. On the other hand, incitement to religious hatred is a matter that needs to be explored through a chain of events that cannot be identified from a single incident. Violation of the fundamental rights of individuals cannot be prevented during an arrest without proper investigation. The best example is the arrest of Shakthika Sathkumara, who was held in police custody for nearly 120 days under the ICCPR Act and released without charges.

External observations by international human rights organizations corroborate this assertion. They have highlighted the dearth of training programs for law enforcement personnel regarding the ICCPR Act's nuances. This knowledge gap engenders a climate ripe for misinterpretation and misuse of the Act's provisions, exacerbating the challenges posed by its implementation.

- **Unpacking the Influence and Challenges of Implementing the ICCPR Act through Social Media Platforms and Mass Media**

In today's digital era, where information flows freely through mass media and social platforms, the effects of the ICCPR Act in Sri Lanka are profound and come with a range of possibilities and challenges that unfold in real-time.

For instance, a news headline announces the arrest of a well-known writer under the ICCPR Act. This quickly sparks a frenzy on social media, with hashtags gaining momentum as people passionately share, discuss, and analyze the unfolding situation. Within hours, diverse opinions emerge, creating a digital stage where political viewpoints clash against passionate activism, all framed by the Act's provisions.

In this dynamic digital space, the ICCPR Act's impact takes shape on various fronts. Supporters praise its role in curbing hate speech and violence, aiming to prevent rekindling historical ethno-religious tensions that have troubled Sri Lanka. Online campaigns rally around the Act's honorable intentions, urging unity against hatred and celebration of diversity.

On the flip side, skeptics worry about the Act being misused, a concern that spreads rapidly through memes and viral videos. As a platform for expression, social media becomes a hub of doubt, with a wide range of users dissecting the Act's wording, implications, and execution. Online debates flourish, intensifying skepticism and amplifying voices claiming the Act is being selectively exploited to silence critics.

Challenges also arise within this digital landscape. The Act, acting as a two-edged sword, can discourage free expression. Writers, artists, and comedians might become cautious, fearing the Act's broad definitions. Self-censorship becomes common as creators grapple with potential for arrest, where artistic exploration navigates alongside legal ambiguity.

The virtual realm magnifies the difficulties of impartial enforcement. News articles and opinions scrutinize high-profile arrests, and social media fuels public outrage. Activists demand justice, closely examining each case. Striking a balance between protecting rights and preventing misuse becomes a complex challenge, debated in comment sections and live streams.

The impact extends internationally, affecting how the world views Sri Lanka's human rights situation. Advocacy campaigns span the globe, resonating through Twitterstorms and Instagram stories. Diaspora communities rally for accountability and change. International media, driven by social media's speed, questions the nation's dedication to human rights, influencing diplomatic relations.

In this digital tapestry, the ICCPR Act leaves bold and subtle marks of influence. Its impact stretches beyond courtrooms, shaping contemporary discourse on virtual pathways. The challenges it presents ripple across keyboards and screens, fostering conversations that evolve with each arrest, debate, and hashtag. As Sri Lanka navigates this digital maze, the Act's true impact becomes a changing and challenging narrative woven into the very fabric of the nation's digital identity.

- **International Influences on Sri Lanka through the Lens of the ICCPR Act**

Third-world countries like Sri Lanka have always had undue international intervention due to various factors, including geo-political considerations. When the act established for the protection of civil and political rights is misused especially in a developing or a least developed country, the international community pays close attention to it.

The best example of that is the international response to the incident of Shakthika Sathkumara. The United Nations Working Group on Arbitrary Detention has issued an opinion emphasizing that the Government of Sri Lanka to be in contravention of its international human rights obligations for the four-month pre-trial detention of author Shakthika Sathkumara. Responding to a petition filed by the 'Freedom Now', the UN body concluded that Sathkumara was detained for his lawful exercise of right to expression. "*We welcome the Working Group's determination that Shakthika Sathkumara spent four months wrongfully detained in violation of his fundamental rights,*" the 'Freedom Now Legal Officer, Adam Lhedmat, said in a press statement.¹³⁸

With the reporting of such incidents, Sri Lanka's commitment to the protection of human rights is being questioned before the international community.

¹³⁸ Srilankatwo 'SRI LANKA: UN DECLARES DETENTION OF AUTHOR SHAKTHIKA SATHKUMARA A VIOLATION OF INTERNATIONAL LAW <<https://srilankatwo.wordpress.com/2020/05/20/sri-lanka-un-declares-detention-of-author-shakthika-sathkumara-a-violation-of-international-law/>> accessed 19 July 2023

Chapter 06

Conclusion and Recommendations

This concluding Chapter 6 of the Report synthesizes the findings of OTI's scrutiny of the implementation of the International Covenant on Civil and Political Rights (ICCPR) Act of 2007 and the relevance of its outcome to Sri Lankan needs. The research has yielded some valuable insights that, on the one hand, discern the influence of global human rights standards on Sri Lankan rights and citizenship architecture and, on the other, identify the contextual specificities of that architecture and its problematics. This Report compiles the core findings of the study, delineates their policy and institutional implications, and proffers a series of recommendations. These recommendations aim at enhancing the alignment of the Act with the specific contours of Sri Lanka's legal and political terrain.

6.1. KEY OBSERVATIONS

As explained in Chapter 2, the ICCPR Act has proven to be an incomplete legislative framework, hastily devised to cater to difficult political and economic considerations including international dynamics. This exigency was underscored by the political dissonance arising from the *Singarasa case*, a pivotal litigation that added to existing doubts over the country's proficiency in protecting the rights of its citizens. An added impetus for the Act were the international conditionalities related to foreign economic aid, most immediately, the need to secure the Generalized System of Preferences (GSP) trade concessions by the European Union. The establishment of the ICCPR Act stands evidenced, at the time, an interplay of diplomatic negotiations, national economic needs, and the imperative to refurbish the country's civic rights profile.

The way the ICCPR Act was subsequently used showed a selective approach, often based on political considerations. An example of this were outbursts of anti-Muslim social violence in 2012 linked to ongoing hostile campaigns by certain Sinhala Buddhist activist groups against certain Muslim religio-cultural practices (the call to end 'Halal' labelling practices in the public

economy, hostility to locations of mosques). Despite the potential for the Act to be justifiably applied, it was not used in that situation.¹³⁹

As highlighted in preceding chapters, the first clear instance of the Act being enforced was in 2015 when prominent politician Tissa Attanayake was arrested. Even though there were other laws that could have been used to press charges, the Act was employed specifically for the purpose of keeping him in custody without the option of bail. This demonstrates that the Act was being used strategically as a means to achieve certain political purposes rather than as a straightforward legal measure applied in directly relevant circumstances.

This pattern of selective application of the ICCPR Act highlights its flexibility for diverse political purposes not necessarily aligned to the legislation's substantive goals. Considering both its use and non-use, it becomes clear that the Act is not only a dedicated set of legal rules but also a flexible instrument conveniently and indiscriminately deployed where legal and political factors meet.

The study has found the persistent misuse of the Act, particularly its Section 3, in conspicuous disregard for international benchmarks. By 2019, the Act began to be applied in ways that suppressed the right to express opinions freely. In an unexpected turn, rather than functioning as a safeguard for social minority interests, the Act evolved into an instrument of suppression against these very minorities. Strikingly, its application seems to amplify and justify the influence of the majority by suppressing the voices of the minority.

This multifaceted enforcement of the Act has led to its deployment to perpetuate the political status quo and consolidate the sway of the social majority. There is seemingly a *de facto* protection and advancement of the interests of the majority Sinhala Buddhist community. Instead of being a mechanism for safeguarding individual rights and fostering inclusivity, the Act veered towards serving specific partisan agendas.

Given the persistent misuse of the Act, the Human Rights Commission took a proactive step by offering a set of guidelines specifically focusing on the utilization of Section 3. These guidelines were formulated to align with internationally recognized standards, and aimed to ensure that the core intent of the Act remains intact. The Human Rights Commission

¹³⁹ Razick, A.S. Gafoordeen, N. Mazahir, S.M.M. 'Hate campaigns and attacks against the Muslims in recent Sri Lanka'

guidelines safeguard the original purpose of the Act while addressing the concerns arising from its misapplication.

These guidelines draw on the Rabat Principles that are instrumental in identifying and addressing hate speech, a critical domestic issue in the context of the Sri Lankan Act's application. The Rabat Principles, laid out in the Rabat Plan of Action of 2012 by the UNHRC, provide a comprehensive framework to address the complex nuances of hate speech. The Principles specify criteria supporting enforcement such as identification of context, the intent of the speaker, the societal status of the speaker, the form and content of the speech, and the likelihood of incitement.

By incorporating the Rabat Principles into its guidelines, the Human Rights Commission provides a useful tool for evaluating instances of hate speech under the purview of the Act. This assessment tool acknowledges the various dimensions of communication, prevents enforcement overreach and, better safeguards freedom of expression while helping curb harmful public discourse. The HRCSL guidelines seek to recalibrate the application of the Act to avoid misuse while fortifying its enforcement of international standards and preserving its original intent.

However, the study found that, In spite of the guidelines provided by the Human Rights Commission, inappropriate arrests have persisted under the provisions of the ICCPR Act. Prominent examples of the misuse of the Act are the arrest of popular dissident intellectual Sepal Amarasinghe, the lodging of charges against Christian preacher Jerome Fernando, and the detention of comedian Natasha Edirisooriya.

The study also identified a few exceptions to this practice of mis-application of the Act: exceptional litigation and judicial rulings that countered the seeming general negative usage of the Act. The High Court's issuance of a bail order to Natasha Edirisooriya, was a legal landmark in the application of the ICCPR Act. The Court ruling brought together several strands of judicial consideration, including the stated purpose of the Act, the careful balancing of the freedom of expression against the imperative to curb hate speech envisaged by the UN General Assembly in 2020, the Rabat Plan of Action, the provisions of Sri Lanka's Penal Code and, also, the investigative powers vested in law enforcement officers. The Natasha Edirisooriya case now adds to the positive legal discourse buttressing the use of the Act.

The High Court's ruling not only correctly aligns the ICCPR Act with the right to freedom of expression but also establishes an organic link between domestic and international standards in addressing issues of hate speech. By invoking the Rabat Plan of Action, a framework that emphasizes accurate contextualization of suspected acts of hate speech, the High Court affirmed the importance of discerning the various layers of communication involved. This case imparts a significant precedent for future judicial interpretations of the ICCPR Act.

However, it is essential to note that this bail order, while significant, only holds the status of a specific ruling rather than a binding precedent (*stare decisis*). It is uncertain how far this judgment can serve as a benchmark for future cases.

6.2. RECOMMENDATIONS

Below are the 'Recommendations' coming out of this study, clustered in to 'Short Term' and 'Long Term' proposals. They endeavour to contribute to greater safeguarding of civil and political rights. At the same time, the recommendations also intend to ensure more comprehensive enforcement of the Act while preventing misuse of its provisions and powers.

In the short term, measures are needed to (a) ensure standardized clarity regarding the ICCPR Act's provisions, and, (b) precision and accuracy in the application of provisions for the purposes of enforcement, including preventions and prosecution. New legislative or regulatory or procedural action is needed to further refine understanding of its clauses, thereby enabling more precise application thereby better aligning enforcement with international human rights standards. By this means, the Act can be fortified against potential misinterpretations or misapplications. This approach requires a meticulous review of the Act's language and formulations, in order to eliminate ambiguities and discrepancies that might inadvertently provide room for misuse.

6.2.1. Short-term Action Plan

- **Re-training of all Enforcement Personnel: Ensuring a fresh knowledge of the Act's powers of Investigation & Enforcement**

Technical knowledge and sensitization trainings: These will target all relevant personnel of enforcement and prevention agencies, including investigating officers and police personnel.

Key training subjects include use of Section 3 of the Act. The role of these personnel extends beyond mere arrest procedures. It's crucial to underscore that, as per Section 116 of the Criminal Procedure Code, an investigating officer holds the authority to make an arrest without a warrant, provided the information presented is founded on admissible facts, and the alleged offense is manifestly grave.

Within the framework of the ICCPR Act, an investigator's responsibility transcends the act of arrest. Instead, it revolves around a careful assessment to determine the nature of violations. For example, investigating the occurrence of hate speech in accordance with the provisions of Section 3 of the Act. This assessment must be guided by the principles of international accountability and the obligations of state parties. It must be noted that this obligation pertains to the consideration of a complaint rather than an actual arrest.

On being equipped with such improved capacities, law enforcement personnel can effectively discharge their roles, ensuring that their actions are not driven solely by the complaint but are grounded in a holistic and objective evaluation of the circumstances and context. This recalibration of personnel capacities aligns with the overarching goal of preventing potential misuse of the ICCPR Act and accentuates the importance of upholding both individual rights and the broader principles of justice administration and accountability.

- **Exploring Prosecutory Alternatives: Examining Potential Charges under Different Domestic Laws**

A key recommendation is for the regularized practice of considering options prior to action: **i.e.** exploring the filing of charges under alternative laws where applicable. This practice would be particularly pertinent when an offense can be adequately addressed under the provisions of another relevant law. By adopting this approach, the objective is in two-fold: firstly, to prevent the undue utilization of the ICCPR Act as a tool for detention; and secondly, to ensure a judicious selection of legal avenues that suit the specific circumstances of the case.

Standardisation of such enforcement practices will ensure a well-rounded application of legal provisions, where the choice of statute is driven by the nature and gravity of the offense. By exploring alternative legal avenues, law enforcement and judicial bodies can effectively address the concerns of justice and societal harmony while avoiding the potential

misapplication of the ICCPR Act. This approach safeguards the integrity of the Act while ensuring that its implementation remains in harmony with the broader legal framework and principles of fairness.

- **Utilizing Court Precedent: The Case of Natasha Edirisooriya**

The Natasha Edirisooriya case should be used as a guiding precedent, thereby establishing it as a precedent for future legal proceedings. Though the ruling was not delivered by the Supreme Court, this landmark judgement provides an useful synthesis of multiple critical factors, including the fundamental intent behind the Act's inception, its symbiotic alignment with the right to freedom of speech and expression, the UNGA's 2020 'comprehensive action plan on hate speech', the Rabat Plan of Action, the Penal Code and, the individual official powers vested in law enforcement personnel. Through this precedent-setting ruling, the High Court has effectively erected an encompassing legal framework that encapsulates the complexities of the Natasha Edirisooriya case.

- **Appointment of an independent committee to investigate inappropriate prosecutions and misuse of ICCPR Act provisions for intimidation**

An independent committee or similar body should be tasked with investigation of cases involving misuse of the ICCPR Act. This proactive measure will greatly enhance the institutional framework addressing current serious concerns about the misuse of the Act. Such an independent mechanism would play a crucial role in scrutinizing past prosecutions and allegations of intimidation related to the ICCPR Act, ensuring that these cases are thoroughly reviewed for compliance with international human rights standards. This not only strengthens transparency and accountability but also underscores the government's commitment to upholding the principles of justice and human rights while protecting the rights of the individuals. Additionally, it sends a clear message that Sri Lanka is dedicated to preventing any misuse of this crucial legislation, thereby safeguarding the rights and freedoms of its citizens.

- **Establishing the Rabat Principles as Binding Law in Sri Lanka Under Section 3 of the ICCPR Act**

In the context of enhancing human rights protection in Sri Lanka, the imperative lies in establishing the Rabat Principles as legally binding principles within the framework of Section

3 of the ICCPR Act. This approach is in direct accordance with the recommendation by the Human Rights Commission of Sri Lanka.

The Rabat Principles, stemming from the Rabat Plan of Action, offer valuable guidance in managing the delicate balance between freedom of expression and the prevention of hate speech. By making the Rabat Principles a binding legal standard under Section 3 of the ICCPR Act, Sri Lanka would be taking a decisive step towards harmonizing its domestic laws with international human rights standards.

This initiative is vital not only to adhere to international norms but also to foster a culture of inclusivity and tolerance within the nation as it pursues its goals of development and social peace.

6.2.2. Long-term Strategic Directions

1. Strengthening the ICCPR Act: Comprehensive Amendment to boost Civil and Political Rights Protection

In pursuit of a comprehensive and enduring solution to the problematics raised in this study, the long-term strategic component involves a comprehensive amendment process for the ICCPR Act. The current deficiencies and the absence of firm safeguards for civil and political rights, makes such legislative refinement imperative to bolster the Act's efficacy and relevance within the domestic legal framework.

Given the incompleteness of the Act and the gaps in rights protection, a concerted effort must be made to expand its scope. This expansion should encompass the incorporation of essential rights such as the right to life and the right to privacy, which are intrinsic to upholding individual dignity and human rights.

The strategic actions should include collaborations involving enforcement practitioners, legal experts, policymakers, civil society representatives, and international human rights organizations. Collaborations would involve dedicated research, policy formulations, and training curriculum development for downstream implementation. The goal is to ensure that the proposed amendments and related activity reflect the aspirations for a just and equitable society, where the protection of individual rights is paramount.

2. Fostering Accountability and Precision: Embed Human Rights Commission Guidelines as an Amendment to Prevent Misuse of Article 3 of the ICCPR Act

Curbing the misuse of Article 3 entails the incorporation of specific provisions, akin to the guideline presented by the Human Rights Commission, as an amendment to the Act. This aims to establish a clear and standardized framework that governs the interpretation and application of Article 3, effectively minimizing the potential for misapplication or abuse.

By formalizing the Human Rights Commission's guidelines through legislative amendment, Sri Lanka can institute a definitive reference point for all stakeholders involved in enforcing the Act. This step promotes consistency, clarity, and adherence to internationally accepted standards in addressing hate speech issues. This study provides practical directives, contextual considerations, and nuanced criteria for identifying instances of hate speech that warrant legal action.

By embedding the HRCSL guideline within the Act, Sri Lanka would strengthen the Act's effectiveness as a tool against hate speech while also reaffirming the nation's commitment to respect human rights principles. This strategic amendment process would encourage a harmonious interplay between legislative intent, international standards, and the societal context, ultimately fostering a more equitable and just society.

3. Align Punitive Measures with the Severity of hate speech

The proposed legislative enhancement centres on instituting a proportional correlation between the severity of hate speech and the corresponding punitive measures. By aligning the severity of the offense with the extent of punishment, Sri Lanka can establish a progressive and equitable system of legal response. This framework reflects an overarching commitment to uphold both freedom of expression and the imperative to prevent the propagation of hate speech.

Through this proposed amendment, Sri Lanka underscores its commitment to addressing hate speech in a nuanced and equitable manner. By striking a harmonious balance between individual rights and societal well-being, this approach ensures that punitive measures are proportionate to the gravity of the offense.

4. Community Engagement and Government: Collaborating to Prevent Ethnic Tensions

The government should actively address the current potential for incidents of ethnic tensions through a multifaceted approach. Firstly, there should be robust policies that prioritize diversity and inclusivity across various sectors; such as education, employment, and public services, is crucial. Concurrently, the government should invest in cultural sensitivity education and training programs that foster understanding and respect for different cultures and traditions. Creating safe spaces for open dialogue about ethnic and cultural differences can facilitate constructive conversations and dispel stereotypes. Encouraging responsible and inclusive news media reporting, promoting government leadership and representation from diverse backgrounds, establishing effective monitoring and reporting mechanisms for hate crimes, and engaging communities in these efforts are all integral steps. Importantly, this commitment to building an inclusive society should be viewed as a long-term endeavor, evolving to meet the evolving needs and challenges of the diverse populace in Sri Lanka.

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One-Text Initiative

28, Anderson Road, Colombo 05.

Telephone - 011 2 586106

Web - www.onetext.org

Email - admin@onetext.org

Facebook - <https://www.facebook.com/onetext.org/>

