

# Freedom of Expression in Cyber Space: Protecting Right to Privacy and Public Security in Sri Lanka

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**Abstract** - Cyber space has become the most prevalent medium to express ideas in this digital age. Freedom of expression is guaranteed and secured under the Sri Lankan Constitution as a fundamental right. Right to privacy and public security are conflicting with freedom of expression in most instances. Considering online media, this conflict is severe due to the unlimited opportunities available for public to express what they feel and share it throughout the world within a short time frame. Right to privacy has not been given sufficient attention under the Sri Lankan law whereas no specific definition provided for the term “privacy”. Public security legislations contain vague terms which act as inappropriate to address the issues which connected with security of the state. In some occasions freedom of expression violates the individual privacy due to the less protection awarded to privacy rights. Public security laws are conflicting with liberty to express ideas in cyber space in most occasions where the government has to take immediate steps by strictly limiting freedom to express ideas. Right to privacy should be guaranteed as a fundamental right in Sri Lanka. Public security laws should be reasonable and special legal rules should be established to the protection of public security from the threats emerging from cyber space. This study attempts to discuss how to balance the conflict between expression, privacy and public security in cyber space as appropriate to Sri Lanka.

**Keywords—** *freedom of expression, privacy, public security*

## I. INTRODUCTION

The Constitution of the Democratic Socialist Republic of Sri Lanka guaranteed the “freedom of speech and expression including publication as a fundamental right in its Article 14 subjected to several restrictions. Cyber space has become an essential platform in this 21<sup>st</sup> century, opening millions of opportunities for people to express their opinions and share it throughout the world instantly. Even though the Sri

Lankan legal system provides strong protection for freedom of expression, the privacy rights and law relating to public security are granted lack of attention in order to address the novel issues arising due to online freedom of expression. The legal provisions available on right to privacy and public security are not sufficient to answer the issues emerging with the new developments in cyber space. Freedom of expression (FOE) is secured as a fundamental right (FR) in Sri Lanka (SL), including expression in online media while privacy rights and law relating to public security do not have sufficient protection under Sri Lankan law. This research will focus on the situations where online freedom of expression restricts the right to privacy and public security in SL while attempting to provide recommendations to overcome these situations through legal reforms for balancing the conflict among these rights.

## II. METHODOLOGY

‘Black letter approach’ and ‘empirical data analysis’ are the main methodologies used in this study. The black letter approach applied to evaluate the existing legal provisions in SL and concepts related to the area of the research. The constitutional provisions related to freedom of expression, privacy and public security are examined. The method of empirical analysis is followed to examine and analyze the identified legal provisions with the intention of examining the adequacy of these provisions in order to address the practical issues in online media.

### A. Data Collection

1) *Qualitative and Quantitative Data:* Since this study is a library research, primary attention in data gathering is given to collect qualitative data. Legal provisions included in the constitution, Acts and ordinances, case law, international conventions and declarations were followed under data gathering in order to find out the governing law in the research area. Gathered legal provisions are separated into

several areas for the purpose of comparing those with each other. Finding out the conflicts in existing legal provisions in the research area is conducted by applying them into the practical issues in the society.

2) *Primary and Secondary Data*: This research is based on the data gathered using primary and secondary sources. As primary sources Constitutional provisions, statutes, Acts, case laws are mainly referred under SL context. For the purpose of discussing public security laws, several regulations are taken into consideration. International legal provisions such as conventions are analyzed for providing recommendations.

3) *Data Collection System*: Books, articles in printed journals are used to gather legal provisions and criticisms on the research area. Online websites, journals and publications are referred in this research. In order to gather practical issues, online and offline newspapers, news websites are used. Attending to seminars and forums conducted under legal institutions also used under data collection.

### III. RESULTS AND DISCUSSION

#### A. The Existing Legal Framework in Sri Lanka

1) *The legal background of freedom of expression in cyber space*: “Freedom of speech and expression including publication” is protected under Article 14(1) (a) of the Sri Lankan Constitution as FR, and “shall be respected, secured and advanced by all the organs of the government and shall not be abridged, restricted or denied” as specified in the Article 4(d) of the Constitution. FOE secured by Article 14(1) (a) is restricted by provisions of Article 15 of the constitution itself. Under Article 15(2) it stated that FOE may be limited by the boundaries prescribed by law “racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence”. Article 15(7) stated that even though freedom of expression has given a large scope to operate, it is “subjected to such restrictions as may be prescribed by the law in the interest of national security, public order and the protection of public health or morality, or the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the just requirement of general welfare of a democratic society”.

The term ‘law’ stands for “regulations made under the law for protecting public security” as per the

Article 16 of the constitution. It upholds the validity and effectiveness of “all existing written and unwritten law notwithstanding any inconsistency with the fundamental rights chapter of the constitution” weakening the protection provided by the constitution towards fundamental rights and as well as to the constitutional supremacy.

Cyber space is becoming a popular instrument in speech, expression and publication. The prevailing legal protection in Article 14 (1) (a) of the constitution should cover speech, expression and publication in the cyber space in order to grant validity to that provision. Even though the legal framework on privacy rights and public security has the objective to be safeguarded by limiting FOE, there is a lacuna of provisions which specifically targeted online FOE. Moreover, the protection afforded in Article 14(1) (a) is limited to SL citizens as it doesn’t apply to all persons.

The constitutional guarantee for the freedom of expressions or for the restrictions upon them are not consistent with international standards and is unable to address the desires expected by International Covenant on Civil and Political Rights (ICCPR). For an example, in ICCPR Article 19 contains “a right to hold opinion without interference, to receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person’s choice”. In Sri Lanka, the constitutional provisions do not have any direct obligation that limitations upon constitutional provisions should be “reasonable” or “necessary” as decided in *Malagoda v AG* (1982) 2 SLR 777 as lacking of ‘reasonableness’ and ‘necessity’ cause absurd results in online freedom of expression.

2) *Privacy Laws v Freedom of Expression in Cyber Space*: “Right to privacy” is not expressly recognized in the SL constitution and also there are no express legislations that is initial for protecting right to privacy. There is no exact definition provided for “privacy” under Sri Lankan law. “Right to privacy” has recognized by SL courts under the application of roman dutch law and common law in specific situations. Oxford Dictionary defined “privacy” as “confidential: not to be disclosed to others/ kept or removed from the public knowledge or observation” (Soyza, 2017). According to Westin (1968) , privacy is “the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their behavior to the

others". The scope of the privacy should be determined carefully according to the society because the same material can be treated as private by one community, whereas it become public to another. The importance of the term privacy is not felt until the cyber space emerged as a threat to it mainly through social media.

Internet and other technologies of information & communication have increased the possibility of information or data being placed in the hands of unintended parties (Marsoof, 2008). Several legislations indirectly attempts to provide safeguard to cyber space users against surveillance and other forms of cyber threats. Even though right of privacy is not protected expressly in the constitution individuals can claim compensation under law of defamation. Criminal defamation has been repealed in Sri Lanka in the 2002, therefore the only remedy available for a defamation can be found under the civil law. In the decided case of *Hewamanne v Manik de Silva* (1983) 1 SLR 1 upholds the view that constitutional provisions for freedom of expression will not restrict the operation of law of contempt even though it included as a fundamental right.

There is no any exact legislation that provide adequate protection for privacy of an individual in Sri Lanka, but *Computer Crimes Act No.27 of 2007* has certain provisions related to privacy and personnel information. Under the Computer Crimes Act any person who had unauthorized access to a network or computer, modifies a computer network unlawfully, deals with data without lawful authority, unlawful discloser of information and committed any offence under that against the national security will be subjected to penalties. *Information and Communication Technology Act No 27 of 2003* establishes Information and Communication Technology Agency which has the main obligation to implement a national policy with regard to the information and communication standards in Sri Lanka. *Electronic Transactions Act No 19 of 2006* also contains provisions for the protection of privacy of consumers. *Parliament (Powers and Privileges) Act No.21 of 1953* as amended permits to penalize any defamatory statement about any parliament member relating to their conduct as a parliament member including activities and speeches or declarations made by them within the capacity as a parliament member. Section 15(1) (a) and (d) of the Sri Lanka Press Council Law No.5 of 1973 disallows publication of any materials which contain obscenity and

profanity. Under *Obscene Publication Ordinance No.22 of 1983*, Section 268B and 268 C of the *Penal Code (Amendment Act No.16 of 2006)* & *Electronic Transaction Act No.19 of 2006* recognizes a publication of any material of obscene in electronic medium as a criminal offence.

3) *Public Security v Freedom of Expression in Cyber Space*: National security laws in SL can be categorized into two main areas; general laws and emergency regulations. In ordinary circumstances the general laws are prevailing until revoked by emergency regulations which only appear in the state of emergencies. Under Article 76(2) and 155 of the Constitution it declares the "powers of the president to make emergency regulations and empower the parliament to enact any laws relating to public security". Emergency Regulations are coming into force under the provisions of *Public Security Ordinance No.25 of 1947* (PSO) empowering the president to make emergency regulations in the state of emergency for the safeguard of public security. Section 2 PSO states, a state of emergency can only be declared by the discretion of the president in special occasions "where the interest of the public security, protection of the public order, maintenance of supplies and services which are essential to the life of the community are under threat". There are no exact offences prescribed but under the emergency regulations, the president can include the offences and punishments. The discretion afforded to the President upon declaring a state of emergency is required the need of life of the nation to be under threat which is consistent with international standards as Walikala (2008) explains.

During a state of emergency, the president has the discretion to make emergency regulations which he considers "necessary, expedient or in the interest of the general public in protecting public security, preservation of public order, suppression of mutiny, riot or civil commotion or for the maintenance of supplies and services essential for the life of the general community" under Section 5(1) of PSO. Emergency Regulations holds the power of "overriding or amending the operation of any law apart from constitutional provisions" as per Section 7 of PSO but under Article 15(2) of the Constitution, it specifically declares that emergency regulations act as a restriction upon several constitutional provisions including Article 14(1) (a) in favour of religious and racial harmony, contempt of court, parliamentary privilege and defamation.

*Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979* (PTA) provide restrictions upon freedom of expression, granting wide powers to the police to search and arrest & keep the suspects in detention. Any person “causes or intended to cause an action of violence by words either spoken or intended to be read, by signs or by visible representations which create any threat to religious, communal or racial harmony or create ill-will among different communities, racial or religious groups will be liable for an offence” under Section 2(1)(h). It is an offence to print/ publish any materials connecting to the commission and investigation of an offence under Section 14(2) of PTA in a newspaper without the approval of the responsible authority which can generate above discussed situations within the community. Section 118 of the Penal Code (PC) of Sri Lanka declared that “whoever contempt the president using insulting or disparaging words whether spoken or intended to be read or by signs or visible representations shall be punishable with simple imprisonment and subjected to a fine” whereas Section 120 makes it an offence that excite or attempt to excite their feelings of dissatisfaction towards the government, inciting hatred or contempt towards the administrative of justice, raising discontent or dissatisfaction among citizens.

*The Profane Publication Act No.41 of 1958* defines “Profane Publication” as “publication of any book, newspaper, picture, film or other visible representation containing any insult to the originator of any religion, any deity, saint or any individual venerated by the followers of any religion or any religious belief or any representation that ridicules any figure, picture, emblem, device or other thing associated with or sacred to the following of any religion” under Section 5. It is an offence “to write, produce, print, publish, sell, distribute or exhibit any profane publication by any writer, publisher, printer or distributor” while fair comment and fair criticism is available as a defense under Section 2.

Section 15(1)(a)(d) of the *Sri Lanka Press Council Law No.5 of 1973* controls the press prohibiting the publication of materials comprising obscenity and profanity as it disallows the publication of official secrets including any information relating to military or police which can be or likely to be injurious to the public security in the country under section 16. *The Official Secrets Act No.32 of 1995* defines “official secrets” in it’s section 27(1) in an extensive nature: containing any information concerning military or

any part of that including any material relating to military forces of the country directly or indirectly.

### *B. Conflict of Privacy v Freedom to Express in Cyber Space*

Primary intention of the law is to maintain democracy and also decency of the country. Mere recognition of privacy as a right will not provide justice. The changes brought by 19<sup>th</sup> amendment to the constitution on Article 14(1) (a) attempts to provide protection to right to privacy, but it’s not sufficient. The introduction of Right to Information as a FR can act as a restriction to right to privacy when the public interest is higher than protecting individual privacy. Under Section 18 of the *Computer Crimes Act*, it grants power to a police officer or an expert during investigations “to obtain any subscriber information or traffic data from a service provider” and it can cause violation of privacy rights as it can permit to obtain the private call details. This option can be used against protection on right to privacy due to lack of recognition provided in SL context.

Its popular nowadays to use online medium for insulting or humiliating another one. Most of the victims are famous characters in the country. This issue is common to the world and each government should establish mechanisms to track down these offenders and punish them. Under law of defamation we can find a remedy to that, but tracking the unknown offenders who have published those in social media and the web is weakening the process. ‘Public humiliation’ is not considered as a serious offence under cyber law and lack of code of ethics to govern this area can cause violation of individual privacy by FOE. Even though the institutions like Sri Lanka Computer Emergency Readiness Team (CERT) attempts to safeguard people from potential attacks in cyber security matters, inadequacy of law related to privacy rights weakening the process. There is no specific penalty to the offenders even if they get caught under the law against public humiliation. Dual victimization of the victims can occur due to unrestricted FOE over their privacy rights.

Defaming people through online media is the modern method of destroying the reputation of a person as not like in offline media, there are several resources such as social media sites, facebook live, blogs, websites etc. and it can be spread all over the world within a second. Absence of “criminal defamation” to punish the offenders in this context is felt as a

weakness as reputation has paramount importance to a person. Defamation is a serious injury to a person, therefore providing compensation is not sufficient rather than imposing penalties. In news reporting, some online websites and gossip channels provide threats to individual privacy using their FOE by publishing sensitive information and fake news. Facebook commenting option and facebook live option is also using rapidly against privacy rights. Under civil defamation publication for “national interest” is not an accepted defense and it doesn’t need intention or knowledge of the harm, but solely compensating for a serious injury will not fulfill justice as the offenders have to undergone a huge psychological trauma. Protecting individual privacy can be difficult in this digital age, but not providing sufficient protection to right to privacy will cause absurd results.

### *C. Conflict of Freedom of Expression v Public Security*

When it comes to the conflict between freedom of expression as a fundamental rights and power of emergency regulations, courts tend to make favourable approach towards the state, upholding the national security over the cost of constitutionally protected rights. This view was questioned in the case of *Joshep Perera v AG* (1992) 1 SLR 199 and it was decided that restrictions on rights declared by the Constitution must be ‘reasonable and necessary’ and should be implemented only for acquiring the necessary objectives where it is essential. Emergency Regulations, PTA provisions and other national security laws have been subjected to criticisms upon their inadequate connection with the objectives of those provisions and over comprehensive nature. Still the courts in Sri Lanka do not provide a strong opinion on how these provisions are applicable in online medium. Legislations on national security have some common issues such as unclear nature of the scope, linking with the matters that are not sufficiently related to national security and imposing strict penalties.

The government is monitoring the activities of facebook users such as incidents of insulting individuals and spreading untrue statements criticizing the government using the service of special teams under Telecommunication Regulatory Commission of Sri Lanka (Kuruwita, 2010). Access to social media including facebook is a right as a part of freedom of expression, therefore blocking websites and social media with the intervention of government can act as a restriction to the free

enjoyment of these rights and will decrease the reputation of the country.

In *Amaratunge v Srimal* (1993) 1 SLR 264 it was decided that every citizen has a right to criticize or compliment the government or its agendas according to their political views as FOE is secured as a FR in Sri Lanka. Expression of the ideas cannot be limited to offline methods in this 21<sup>st</sup> century, so there should be an opportunity for general public to express their ideas through any medium. Banning and blocking access to websites or to social media will restrict the free enjoyment of those constitutionally protected rights. The government of SL blocked the access of the “Tamilnet.com” website from June, 2007 during the last part of the war as it stands for the Liberation Tigers of Tamil Eelam (LTTE) and it can be justified as it’s a necessary step against terrorism. Moreover, the websites such as ‘TamilCanadian.com’, ‘Nidahasa.com’ and ‘Lankaenews.com’ were blocked by the government for the protection of national security of Sri Lanka (David, 2010). As BBC (2010) reported, where the presidential elections are taking place, the government block websites including news sites as occurred in 2010.

Millenium City Scandal occurred in 2002 can set as a popular example for the conflict of FOE and public security which resulted the exposure of identities of the officials of covert operation unit of SL forces due to widespread media coverage ended as a tragedy. Most recent example for the conflict of public security and FOE in online media is the anti-Muslim struggle which was occurred in March 2019, which made serious damages to the people and to their property adding a black mark to the country in international stage. Government has to block the access to social media and other forms of communication such as Viber and Whatsapp in order to control the situation. It was revealed that some of these groups responsible for conflict are organized through social media reminding the necessity of enacting strong legal provisions which can address these issues.

## **IV. CONCLUSION AND RECOMMENDATIONS**

Balancing the conflict between freedom of expression, privacy and public security in online media is a common sinario faced globally. As far as expression in cyber space protects essential rights of individuals including privacy and security, implementing harsh limitations would provide injustice. Reasonableness and necessity should

include as the base of restrictions upon Article 14(1) (a) of the Constitution. The narrow scope of the Article 14(1) (a) must be altered as like in ICCPR provisions.

Right to privacy should be included as a fundamental right or it must directly link with an existing fundamental right like in India. Sri Lanka as a country upholding the concept of democracy should consider more on implementing a privacy law regime in both online and offline modes. The term privacy should be defined according to the culture and social beliefs of the people in SL as to provide at least a minimum protection. This study suggests the need of granting a constitutional guarantee to right to privacy in this technological era. It's absurd that freedom to express ideas has given wide protection while the right to privacy has not given valuable consideration whereas one right can easily abuse another in that context. The conflict between privacy and expression can be minimized through recognizing both rights in same weight as it will automatically draw the limitations upon those rights. Hate speech and humiliation should have addressed under the legal provisions, as the law of civil defamation alone is insufficient to address these issues. Criminal defamation should available even only for serious instances which causes psychological trauma to victims. Providing monetary compensation for a severe damage to reputation or the enjoyment of privacy would not provide justice.

Obligations of the service providers and authorities who monitor the cyber networks must be increased in order to balance the conflict between privacy and security with expression. News websites must have stronger ethics regarding the limitations upon to what context they have freedom to express and publish the news items without violating the privacy rights and public security by implementing a regulatory mechanism like CERT with the involvement of the government. Cyber defamation should have given a special recognition to address hate speech and humiliation to a necessary extent in order to control it without restricting freedom to express opinions. Penal code should undergo necessary amendments like the amendment made in 1995 in order to address emerging problems through internet. *Computer Crimes Act* should address the new threats such as cyber humiliation and hate speech. Rights granted through traditional offline methods should be applicable in online methods (Davies, 2015) by modifying the legal provisions.

Considering serious issues related to security of the general public, protecting their other rights may be problematic. Every incident which can be possibly occur should be answered with its own merits. Sri Lanka as a developing country should focus more on identifying the threats emerging with technological development and should take necessary measures to prevent them. In Australia, the government use to promote web filters to get rid of unauthorized materials. Websites which act in offensive nature to the monarchy have been banned by the governments in order to protect public security and several other states practice the same policy by blocking the access to unauthorized websites. Some jurisdictions like Russia and China practice a different method by having more power into the hands of the government in determining the websites which can be acceptable within the country and banning all others. International standards and effective legal mechanisms used in foreign jurisdictions must take into consideration when conducting legal reforms.

Law should act as a weapon which guards the rights and security of the individuals whereas law should shield the society from victimization of negative effects of technological development. The main intention of the legislature of including rights is to provide liberty and freedom to people, therefore to achieve those objectives, conflicting rights should be addressed in sensitive manner.

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#### ABBREVIATIONS AND SPECIFIC SYMBOLS

International Covenant on Civil and Political Rights (ICCPR)

Freedom of expression (FOE)

Fundamental Right (FR)

Sri Lanka (SL)

Sri Lanka Computer Emergency Readiness Team (CERT)

Penal Code (PC)

Public Security Ordinance No.25 of 1947 (PSO)

Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA)

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