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## Inadequate Legislation on Hate Speech: Critical Analysis of Sri Lankan Context

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*The study explores the idea of hate speech that could be caused serious harm to society. Using the advancement of technology for promoting a bad impression and targeting particular religions or community is a serious threat to the nation that was occurring recently in Sri Lanka. The situation in Sri Lanka should monitor and consider a resolution to avoid further conflict. The legislators should be taken into consideration for adopting adequate provisions for enhancing religious and ethnic harmony. The study aims to analyze the existing legal framework with a critical view of prosecution. It discusses the impact of hate speech on society and how it will be turned into a serious problem with a comparative analysis of the United States of America. The gap in the legislation, the political dynamic in the context of governing hate speech, and the lack of resources are identified as current problems for governing hate speech. Therefore the study recommends the proper legal enactment to the legislature for governing hate speech.*

**Keywords:** *hate speech, conflict, legislation, prosecution, ethnic harmony.*

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### INTRODUCTION

Sri Lanka is a multi-ethnic country that has experienced several religious-ethnic conflicts from the ancient period which resulted in numerous destruction of property, loss of livelihood

of people, and violation of human rights. The latest incidents promoted hate speech among the people which can develop serious crimes that will be disturbed the peace of the nation. Several legislations discussed the concept of hate speech but there is a lack of prosecution under the legal framework and the silence of the government's in the activity of hate speech caused insecurity among the minority people. The post-war experience thought a lesson to Sri Lanka that, hate speech and the consequences of the hate speech should be addressed through the proper legislation to avoid further conflict that has to be prompted peace among the people.

### **DEFINITION AND INTERNATIONAL MECHANISM**

The definition of hate speech has differed from nation to nation. According to the United Nation hate speech is 'any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language regarding a person or a group based on whom they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factors.'<sup>1</sup> Freedom of expression is contradicted by hate speech. The world has experienced all kinds of hate speech that targeting isolates people in the form of xenophobia, racism, and intolerance. Hate speech plays a vital role to commit hate crimes. The experience of civil wars and violent activities including genocide had been conducted as a result of hate speech.

Several international mechanisms handled the hate speech. The Committee on the Elimination of Racial Discrimination (CERD) is the first convention that has addressed the uttering of words that are intended to hurt the individual or community based on religion or language or gender and it suggested establishing the proper regulation for prohibiting hate speech. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is enacted to monitor the implementation of governing legislation of hate speech by State parties. Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup> is restricted

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<sup>1</sup> 'What is Hate Speech?' (*United Nations*) <<https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech> accessed 10 March 2023

<sup>2</sup> International Covenant on Civil and Political Rights 1966, art 19(3)

freedom of expression for the protection of the interest of people. Article 20(2) of the ICCPR<sup>3</sup> prohibits hatred violations which are occurred based on religion and race.

## **EXISTING LEGAL FRAMEWORK IN SRI LANKA**

### **International Covenant on Civil and Political Rights Act 56 of 2007**

Article 20 of the ICCPR<sup>4</sup> “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. It gives effect to this through its section 3 which states that “No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence In the case of *Malcolm Ross v Canada*<sup>5</sup>, the complainant, a teacher, was challenging an order by the New Brunswick Human Rights Tribunal, which was subsequently upheld by the Canadian Supreme Court to transfer him to a non-teaching position because of his anti-Semitic writings. Upon considering whether the restriction on the author's right to freedom of expression met the conditions set out in Article 19(3)<sup>6</sup>, the HRC concluded that “the restrictions imposed on him were to protect the ‘rights or reputations of persons of the Jewish faith, including the right to have an education in the public school system free from bias, prejudice, and intolerance.” The HRC noted that “the influence exerted by school teachers may justify restraints” to not legitimize such discrimination.

### **The Penal Code Ordinance No. 2 of 1883<sup>7</sup>**

The penal code constituted offenses related to religion. Section 291A<sup>8</sup> and Section 291B<sup>9</sup> are concentrated on words that are intended to use for hurting a particular religion, and malicious activity which is affected the religious belief of the person. Section 120<sup>10</sup> deals with the

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<sup>3</sup> International Covenant on Civil and Political Rights 1966, art 20(2)

<sup>4</sup> International Covenant on Civil and Political Rights 1966, art 20

<sup>5</sup> *Malcolm Ross v Canada* Communication No 736/1997

<sup>6</sup> International Covenant on Civil and Political Rights 1966, art 19(3)

<sup>7</sup> Penal Code Ordinance 1883

<sup>8</sup> Sri Lankan Penal Code 1883, s 291A

<sup>9</sup> Sri Lankan Penal Code 1883, s 291B

<sup>10</sup> Sri Lankan Penal Code 1883, s 120

prosecution in the instance of hate speech. Therefore these three provisions are dealing with hate speech.

In the case of *M. S. Abu Bakr, v The Queen*<sup>11</sup>, the accused was charged with his speech in a public meeting. He conveyed his view with the malicious intention to portray the queen negatively by using certain words. The Court held that an attempt to promote feelings of ill-will and hostility between different classes of the Queen's subjects cannot come within the section unless the classes are reasonably well-defined, stable, and numerous" and whether a given class had these characteristics or not was a matter of inquiry for the jury in each case. The Court was guided here by three Indian cases that held that the word 'capitalist' is too vague to denote a definite and ascertainable class.

### **The Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979<sup>12</sup>**

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

### **Police Ordinance (No. 16 of 1865)**

Section 79(2) of the Police Ordinance<sup>13</sup> states that Any person who in any public place or at any public meeting uses threatening, abusive, or insulting words or behavior which is intended to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offense.

## **CRITICAL VIEW OF PROSECUTION AND CHALLENGES**

The ICCPR Act has governed hate speech-related crimes but that is not reported any kind of judgments or trials concerning hatred crimes. The reason for the lack of prosecution is, there is

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<sup>11</sup> *M. S. Abu Bakr v The Queen* (1953) 54 NLR 566

<sup>12</sup> Prevention of Terrorism (Temporary Provisions) Act 1979, s 2

<sup>13</sup> Police Ordinance 1865

no awareness among the legal professionals and political influences prevent to precede further activities. The prosecution under the penal code also reported a small number of cases in Magistrate court. The Prevention of Terrorism Act has been used to attack minority people in the case of hate speech. Especially, journalists have been continuously arrested for the critics of their press releases. For example, *Tissanayagam*<sup>14</sup> and *Ahnaf Jazeem*<sup>15</sup> cases are explained clearly that is including legal professionals also as indicated in the *Hijaz Hizbullah*<sup>16</sup> case. When considering the Police Ordinance, Police are the legal protectors of the public from any kind of harm. But the police did not take any action in the event of Aluthgama and Digana.

The challenge with the government's action, there is no uniform definition of hate speech in Sri Lanka. It should be identified the perspective of the content and seriousness of language in the form of direct verbal conduct or digital media. There cannot be addressed technical resolution to the problem of social problems. The balance between freedom of speech and hate speech should be considered.

## COMPARATIVE ANALYSIS

The people are protected from hate speech under the First Amendment Constitution of the United States of America (USA). Hate speech. There is no definition of hate speech in the USA. But it covers any ideas which constituted evilness and rudeness considered as hate speech that should be humiliated towards particular people based on religion, community, skin color, gender, and origin.

In *Snyder v Phelps*<sup>17</sup> court held that speech in a matter of public interest should be protected under the First Amendment. Under the current First Amendment hate speech can be punished when it intentionally threatens the existence of a particular group of persons. Hate speech leads

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<sup>14</sup> 'J.S. Tissanayagam, Sri Lanka, Sunday Times' (*Committee to Protect Journalist*, 07 March 2008) <<https://cpj.org/awards/js-tissanayagam-journalist-sunday-times/>> accessed 10 March 2023

<sup>15</sup> Pamodi Waravita, 'TID officers said I'm a terrorist because I didn't own Buddhist books: Ahnaf Jazeem' (*The Morning*, 2022) <<https://www.themorning.lk/articles/185038>> accessed 10 March 2023

<sup>16</sup> 'Sri Lanka: Authorities must review all 'terrorism' cases after granting bail to Hejaaz Hizbullah' (*Amnesty International*, 7 February 2022) <<https://www.amnesty.org/en/latest/news/2022/02/sri-lanka-must-review-terrorism-cases-after-hejaaz-hizbullah-granted-bail/>> accessed 10 March 2023

<sup>17</sup> *Snyder v Phelps* [2011] 562 US 443

to a hate crime that could be conducted against a person or property based on religion, race, ethnicity, gender, and origin. Section 18 and Section 245(b)(2)<sup>18</sup> of the Federal Hate Crime Law of 1968<sup>19</sup> govern the crimes related to hate crimes which are based on race, color, and ethnicity within the federal activity. Local Law Enforcement Hate Crimes Prevention Act, also deals with hate crimes involving firearms. The Hate Crimes Statistics Act was enacted to count hate-related crimes.<sup>20</sup>

Recently, the USA passed the Covid-19 Hate Crime Act to regulate the hate crimes which are occurred against Asian Americans during the Covid-19 pandemic. The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act provided federal authorities to investigate hate crimes investigations.

## RECOMMENDATION

The provisions related to hate speech crimes should be properly implemented and the judiciary should interpret the provisions of the legislation based on legality, proportionality, and necessity regarding hate speech. There should be a multi-monitoring system to develop the coordination to prevent harm from hate speech. The government should establish a regional authority to promote harmony in the community.

The regulation of government should focus on issues which are affected community safety therefore it should promote social equality by way of providing public information. For minimizing hate speech crimes Sri Lanka should expand the accountability for monitoring these issues including social media which has an integral part in deciding social harmony. According to the recommendation of the United Nation, the government should identify the root cause of the hate speech and support the victims of hate speech by way of using technology.

The government should take action to address the dissemination of misinformation that hate speech including legal action against perpetrators and actively engage with a range of

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<sup>18</sup> Federal Hate Crime Law 1968, s 18

<sup>19</sup> Federal Hate Crime Law 1968, s 245(b)(2)

<sup>20</sup> 'Hate Speech and Hate Crime' (*American Library Association*)

<<https://www.ala.org/advocacy/intfreedom/hate>> accessed 05 March 2023

stakeholders to address campaigns to raise awareness. It should guarantee that persons who have suffered as a result of incitement have a right to an effective remedy, including reparations and remedies for damages.

There should be immediate action to strengthen the legal and procedural framework and provide safeguards to investigators, prosecutors, and others involved in investigations and prosecutions. Provide the necessary resources to monitor hate speech and trends including online hate and create an early warning mechanism that alerts government officials and other stakeholders on possible tensions and areas to address. Work together with different stakeholders such as private companies and Internet Service Providers to introduce zero tolerance over hate speech.

## CONCLUSION

Despite there are certain inaction or lack of solutions constituted within the framework of hate speech, Sri Lanka takes a baby step to regulate social media. The “Flower Speech” moment started in Myanmar to control hate speech by way of using Facebook stickers for alarming to the user of the post on Facebook. There are several apps introduced to identify hate speech in this digital era. The important case point to be noted is that Twitter #ImNotaVirus was used by the French Asian to reduce online hate speech recently. In Sri Lanka there is a need arose to monitor this kind of activity to prevent online harm.