

An Appraisal on Sri Lanka's Freedom of Opinion and Expression with Special Reference to General Comments No. 34 of ICCPR

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Abstract: Human rights are inherent to all human beings and they are primarily stand on protecting human dignity. Among the other human rights, freedom of opinion and expression plays a vital role in order to realization of other human rights effectively and more meaningfully. The ICCPR as the main treaty based mechanism of civil and political rights, general comments on No. 34 is highly important with regard to the effective realization of Freedom of opinion and expression in the domestic level protection of a country. It is very important to ensure the freedom of expression in order to uphold the foundation of the free and democratic values of any society. The Sri Lankan perspective on ensuring this right is highly debatable with regard to its operationalization and application when it comes to the practical situations. Though this right is protected as fundamental right in Sri Lanka, many restrictions are arbitrarily imposed beyond the protection of constitutional safeguard and all the situations of state intervention were justified with the whims and fancies of the authority. This approach is evident by several incidents occurred in the country during the very recent past. The adherence to General comments No.34 is fairly treat on safeguarding inappropriate restrictions of freedom of expression by state party. Therefore, this paper examines the importance of adherence to the general comments no. 34 with regard to the effective realization of freedom of expression based on present stance of Sri Lanka. Further, the author applies and analyzes the drawbacks of Sri Lanka's situation of undermining the importance of freedom of expression.

Keywords: Freedom of Expression, ICCPR, Compliance to International standards, Sri Lankan Situation

I. INTRODUCTION

Human rights derive from the inherent dignity of the human person. They are undeniable and inalienable rights which the international community recognizes as belonging to all individuals by the very fact of their humanity. Therefore, inherent dignity of humans is focal point and crucial factor of granting recognition, enforcement and realization of human rights.

The origin of human rights and human rights law has different perspectives while providing the enforcement of human rights. Many religions, customs, philosophical and revolutionary movements caused give the validity and enforcement of human rights. The human rights law originated after the insufficiency of enforcing human rights in

complexity of the modern society which cannot be only controlled by divine concepts and moral obligations. Therefore, creation of United Nation Organization and Universal Declaration of Human Rights caused to give the positive birth of modern human rights law.

Under United Nation human rights law mechanisms, there are two mechanisms which are identified as Charter based mechanism and Treaty based mechanism. This article focuses on General Comment No. 34 of International Covenant on Civil and Political Rights by Human rights committee from the U.N. Treaty Based Human Rights Mechanism.

The rationalization for discussing the General Recommendation ICCPR has many reasons. One of the aspects is that it receives a high demand and attention on securing recognized human rights with a necessary mandate to the state parties. Thus, state parties are bound to give effect to these civil and political rights as immediate realization rather than progressive realization which identified in the realization of ICESCR.¹ On the other hand, Civil and Political rights are inherently crucial and highly important to build the foundation for a free and democratic society.²

Another aspect is that, this General Recommendation No. 34 of ICCPR rely on several aspects. One of the aspects is this general recommendation is not outdated and has a timely significant validity. It made in 2011 and contains many aspects which highly important to the development of modern society including technology and utilization of global aspects. In substantial manner, freedom of opinion and expression receives high attention in the domestic and international arena considering its application and realization. On the other hand,

¹ Adiele ID, Civil and Political rights vs. Economic, Social and Cultural rights, 2012, Page 07, https://www.researchgate.net/publication/325178149_CIVIL_AND_POLITICAL_RIGHTS_VS_ECONOMIC_SOCIAL_AND_CULTURAL_RIGHTS_ARTICLE

² Democracy s Human Rights: the role of the UN, Report from the International Round Table on Democracy and Human Rights: The Role of the United Nations co-organized by International IDEA, UN Department of Political Affairs and the UN Office of the High Commissioner for Human Rights, 2013, Page 24, <https://www.idea.int/sites/default/files/publications/democracy-and-human-rights-the-role-of-the-united-nations.pdf>

Freedom of opinion and expression are considered together and they are interdependent and interconnected with each other but not only limited to each other as well.³Therefore, inherently it has a debatable characteristic in realization of these rights and it is important to investigate and analyze in this regard.

II. GENERAL OVERVIEW OF GENERAL RECOMMENDATION NO. 34 OF ICCPR

This general recommendation has been adopted on 12 September 2011 at the 102nd session of Human Rights Committee with reference to the Article 19⁴ of ICCPR: Freedom of opinion and Expression. The overview of this general recommendation covers following areas such as Freedom of opinion, Freedom of expression, Freedom of expression and the media, Right of access to information, Freedom of expression and political rights, The application article 19(3) of ICCPR, Limitative scope of restrictions on freedom of expression in certain specific areas, The relationship between article 19 and 20 of ICCPR. Therefore, this overview will contain descriptive outlook and analysis of GR No. 34 pertaining to the above mentioned sub areas.

In the beginning of this GR, it replaces the GR No. 10 of ICCPR which focuses on Freedom of expression.⁵Therefore, it is identified that the substantial interpretation to the article 19 of ICCPR will remain as it is. After that it describes the interconnection of Freedom of opinion and expression for ensuring the foundation of free and democratic society. It is obvious that freedom of expression and opinion cannot be existed without the support of each other. It contains the inherited nature of human rights character of indivisibility and interdependency.

*'Freedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress truth'*⁶

The freedom of expression serves four broad social purposes: it helps an individual to attain self – fulfillment, it assists in

the discovery of truth, its strengthen the capacity of an individual in participating in decision making and it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. Freedom of opinion and expression has a historical value. In the ancient Greece, Aristotle considered that the human as a political animal.⁷ Therefore, human beings as political animal, it is vital to have the freedom of opinion and expression to engage in their political and societal affairs. In the teachings of Islamic religion school, academic freedom of expression originated in the *madrasas* of the 19th century.⁸ In the modern era, John Stuart Mill shapes the part of freedom of expression as to seek, receive and impart information and ideas. Also, he stresses that limitations to this right made by states constitute a direct threat to life in society.⁹ The human rights committee of the United Nations has defined this right as of paramount importance for any democratic society.¹⁰

Freedom of expression plays a vital role in a democratic society to keep it a transparent and accountable manner towards the decision making process of the government entities and the protection and the realization of human rights. Freedom of opinion and expression are integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.¹¹ The responsibility to respect and ensure the enjoyment of this right relies on the bodies of government but duties and compliance extends between private persons or entities as well. The government should ensure the enjoyment of this right in their domestic legal regime, administrative practices and judicial decisions, as well as relevant policy level and other sectorial practices and provide necessary remedies when violations.

Freedom of opinion provides the right to hold opinions without any interference including no restrictions or limitations. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. Therefore, it protects all forms of opinions and criminalization of holding different opinions is incompatible with extend of Article 19(1) of ICCPR.¹² When it comes to the Freedom of expression, it includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. Also the expression and receipt of communications of every form of idea and opinion capable of transmission to

³ The Importance of Freedom of Expression, SALC Litigation Manual Series, Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion 1, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Chapter-2.pdf>

⁴ 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

⁵ General Comment No. 10: Freedom of expression (Art. 19): 29/06/1983. <https://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>

⁶ Coonan, 'China Condemns "Insult" of Award for Jailed Dissident Liu Xiaobo', The Independent, 9 October 2010

⁷ Jones, Human Rights: Group Defamation, Freedom of Expression and the Law of Nations (The Hague: Martinus Nijhoff, 1998) at 34-7.

⁸ Goddard, A History of Christian-Muslim Relations (Edinburgh: Edinburgh University Press, 2000) at 100.

⁹ Mill, On Liberty (London: Watts & Co., 1929) at 92-115

¹⁰ Tae Hoon Park v Republic of Korea (628/1995), CCPR/C/64/D/628/1995 (1998), 20 October 1998; 6 IHRR 623 (1999) at para 10.3.

¹¹ General Recommendation No. 34 CCPR/C/GC/34/ (2011), 12 September 2011; at para 7.

¹² Communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, Views adopted on 26 March 1986; No.414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994 expresses that the harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1

others, subject to the provisions in article 19(3) and article 20. Freedom of expression ascertains all forms of expression¹³ and the means of their dissemination.¹⁴

In this GR No. 34, pays a special attention to the relationship between freedom of expression and media. It determines that a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society.¹⁵ Even in the present scenario, media plays a crucial role to gather information and enlighten the public about the actions and inactions of government entities while engage in their mandate of the media sector. Therefore, it is bit difficult to express one's expressions and enjoy the freedom of expression without the support of media sector. This aspect highly requires the protection of the rights of media users and media stations. Hence, States parties should take particular care to encourage an independent and diverse media. It is the responsibility of state parties to adopt modern information and communication technologies in to their systems. States parties should take necessary actions to foster the independence of these new media and ensure the individual access. Also, Public media should be operated without the interference of the government to ensure the independence of the media.

The right of access to information is one of key features in this GR No.34. It determines that state parties should enact necessary legislations¹⁶, rules and a system to ensure the right to information in their domestic legal regime. Under those measurements, citizens should be able to receive the information which has the custody of public bodies including the private institutions which acts as a form of public purposes. The states parties should take appropriate attempts to provide that information in proactively for the easy access of public and remedies should be available when violations of this rights under an independent manner.

III. LIMITATIONS TO FREEDOM OF EXPRESSION

The limitative areas of restriction to freedom of expression based on main two aspects as mentioned in article 19(3) of ICCPR. These restrictions are to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. It is noted that these may not put in jeopardy the right itself. When imposing restrictions, states parties should be

mindful not to impose those limitations as a manner of destruction of the enjoyment of rights.¹⁷ The limitations should be imposed as provided by law¹⁸ that described under article 19(3) while adhering to the tests of necessity and proportionality. Also laws must not violate the non-discrimination provisions of the covenant. All state parties are bound by adopting special measurements to protect those who get attacked when enjoying freedom of expression. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.¹⁹ All such attacks should be thoroughly investigated and perpetrated prosecuted. The first legitimate ground for restricting this right is that of respect for the rights of reputation of others.²⁰ The second legitimate ground is that of protection of national security or of public order (*ordre public*), or of public health or morals. State parties should be mindful to ensure treason laws and provisions relating to the national security. State parties should be refrain from suppress or withhold those information which has legitimate public interest.

This GR No. 34 concentrates limitative scope of restrictions on freedom of expression in certain specific areas such as political discourse, public figures in political discourse, regulation of mass media with the development of new communication technology, Journalism and freedom of journalists, Counter terrorism measurements, defamation laws, prohibition of displays of lack of respect for religions or other beliefs and laws that penalize the expression of opinions of historical facts. In these all aspects, state parties should not go beyond the limitations made under article 19(3) of ICCPR and they are bound by the conventional obligations to give the fully realization and enjoyment of this right under commonly accepted grounds. At the end of the GR, it expresses the relationship between article 19 and 20 as a limitation that is justified on the basis of article 20 must also comply with article 19(3).

Specific application of GR No. 34 in the Sri Lankan context in progressive implementation of ICCPR

Article 14(1) (a) of the Constitution of Sri Lanka recognizes that "Every citizen is entitled to the freedom of speech and expression including publication". Accordingly, the right to

¹³ Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art according to communication No. 926/2000, *Shin v. Republic of Korea*

¹⁴ Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions according to communication No. 1341/2005, *Zundel v. Canada*, Views adopted on 20 March 2007, communication No. 1009/2001, *Shchetoko et al. v. Belarus*, Views adopted on 11 July 2006, communication No. 412/1990, *Kivenmaa v. Finland*, Views adopted on 31 March 1994 and communication No. 1189/2003, *Fernando v. Sri Lanka*.

¹⁵ Communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005

¹⁶ Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994))

¹⁷ Article 5(1) of ICCPR

¹⁸ Law may include laws of parliamentary privilege and laws of contempt of court as mentioned by communication No. 633/95, *Gauthier v. Canada* and communication No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008.

¹⁹ Communication No. 1353/2005, *Njaru v. Cameroon*, Views adopted on 19 March 2007

²⁰ The term "rights" includes human rights as recognized in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights article under 17 as mentioned by communication No. 927/2000, *Svetik v. Belarus*, Views adopted on 8 July 2004.

vote and non-speech forms of political protest have been held to be within the ambit of freedom of expression²¹, right to dissent²² as well as right to organize, hold and conduct meetings as an aspect of the Freedom of Speech and Expression²³. The court has also held on occasion that freedom of expression includes the freedom to receive and disseminate some forms of information²⁴. Therefore, it is notable that constitutional and judicial recognition has been given to this right as a fundamental right. Article 15(2) states the restrictions in enjoyment of freedom of speech and expression. It provides that

“The exercise and operation of the fundamental right declared and recognized by Article 14(1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence”.

It is clear that the restrictions provided in article 15(2) are similar to the article 19(3) of ICCPR. Hence, the specific application of GR No. 34 in the Sri Lankan context in progressive implementation is highly relevant since GR No. 34 provides extend of four corners of Freedom of opinion and expression.

It should be noted that the right guaranteed by article 14(1) (a) is available to citizens only and not all persons within the territory and subject to the jurisdiction of the Sri Lankan state as required by Article 2 (1) of the ICCPR. The freedom of expression has been particularly vulnerable under circumstances of emergency, with prior censorship being imposed during times of acute crisis through emergency regulations. The Supreme Court has generally demonstrated a tendency to favor the state in fundamental rights challenges in this respect and it can be seen in the case of *Sunila Abeysekera Vs Ariya Rubasing he & Others*²⁵.

²¹*Amaratunga Vs. Sirimal and Others*, S.C. Application No. 468 of 92 (1993) In this case Justice Mark Fernando observed: ‘Speech and expression extend to forms of expression other than oral or verbal placards, picketing, the wearing of black arm bands, the burning of draft cards, the display of flags, badges, banners or devices, the wearing of a jacket bearing a statement etc.....’

²²*Deshapriya and another Vs. Municipal Council, NuwaraEliya and Others*, (1995) 1 Sri LR 362

²³*Joseph Perera v Attorney General*, (1992) 1 Sri LR 199. In this case Sharvananda CJ observed that ‘Freedom of speech and expression means the right to express one’s convictions and opinions freely by word of mouth, writing, printing, pictures or by any other mode. It includes the expressing of one’s ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes the freedom of the press and the Propagation of ideas; this freedom is ensured by the freedom of circulation. The right of the people to hear is within the concept of freedom of speech. There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of the Government and expose its weaknesses. Debate on public issues should be uninhibited, robust and widely open and that may well include vehement, caustic and sometimes sharp attacks on Government. Such debate is not calculated and does not bring the Government into hatred and contempt.....’

²⁴*Wimal Fernando Vs. SLBC* (1996) 1 Sri LR 157

²⁵ S. C. APPLICATION No. 994/99, Decided on 15th May 2000

Right to information Act No. 12 of 2016 as a progressive step to ensure freedom of expression

With regard to the GR No. 34, it is a great development of Sri Lankan legal regime that recognizing right of access to information as a fundamental right²⁶ through the 19th amendment to the constitution. The other substantial and procedural laws have been enacted through the Right to Information Act No. 12 of 2016 and it covers many aspect of right of access to information as a part of freedom of speech and expression. This attempt can be considered as a successful response and compliance to the recommendations made under GR No. 34. After enacting this piece of legislation Sri Lankan state party has given the opportunity to its citizens to obtain information which has in the possession, custody and control of public authorities and even in the private entities which accordance with the public interest.

Incidents from the very recent past which undermining the values of freedom of expression and intervention of the authority

However, in the very recent period, freedom of expression faced many challenges in Sri Lankan context due to many incidents such as social media ban after the Easter attack in 21st of April 2019 while imposing emergency regulations. In this situation, emergency was extended for a third month on 22nd June 2019 and over 100 people are reportedly in custody in connection with the attacks. In the last few months, a number of individuals have been arrested and charged under the International Covenant on Civil and Political Rights (ICCPR) Act of 2007 – a law meant to protect human rights - for the peaceful expression of their views. Further, contempt of courts proceedings have been brought against academic and activist Sarath Wijesuriya and an intelligence office linked in the killing of a journalist has been reinstated. Following the April 2019 attacks, social media was blocked temporarily.²⁷ The Sri Lanka government decided to block social media sites and several messaging apps. According to the digital rights group Net Blocks, the

²⁶ 14A(1) Every citizen shall have the right of access to information as provided by law, being information that is required for the exercise or protection of a citizen’s right held by:- (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law; (b) any Ministry of a Minister of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council (c) any local authority; and (d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph. (2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary. (3) In this Article, “citizen” includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

²⁷<https://monitor.civicus.org/updates/2019/07/05/iccpr-act-and-judicial-system-being-misused-stifle-freedom-expression-sri-lanka/>

authorities blocked Facebook, Facebook Messenger, Instagram, Snapchat, Viber, WhatsApp and YouTube. The Tunnel Bear Virtual Private Network (VPN) was also blocked. This was justified as to prevent "false news reports were spreading through social media and prevent speculative and mischievous attempts to spread rumors".

One of crucial case was that a poet and a writer named Shakthika Sathkumara was charged and detained for a short story²⁸ mentioning that he is liable under the International Covenant on Civil and Political Rights (ICCPR) Act of 2007, which among other provisions criminalizes the advocacy of "national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". If convicted, he faces a maximum of up to ten years' imprisonment. No credible evidence has been presented to substantiate any of these charges.²⁹ Therefore, CIVICUS and the Asian Human Right Commission (AHRC) determined that the arrest and detention of Shakthika is a clear violation of freedom of speech and expression mentioning that

*"This is a clear misuse of the law, which was enacted to protect human rights recognised by the international community including fundamental freedoms such as freedom of speech. We also call on the authorities to ensure that writers and artists may work freely and without fear of retribution for expression critical opinions or covering topics that the government or others may find sensitive or offensive."*³⁰

Another instance of cut off and restraining the enjoyment of this right in the very recent past is that arresting KusalPerera, A senior journalist was investigated under the ICCPR Act for a column he wrote on 17th May 2019 in the *Daily Mirror* newspaper over the anti-Muslim violence following the Easter Sunday terror attacks.³¹ It is reported that the police's crime unit had filed a case against him for inciting racial hatred. The Free Media Movement (FMM) pointed out that these kinds of acts are serious threat to the media freedom and to the independence of journalism and clear violation of freedom of speech and expression. After that KusalPerera filed a FR petition against to the Crime Prevention Division based on Articles 10, 12(1), 13(1), 13(2), 14(1)(a) and 14(1)(g) of the Constitution.

Another incident was reported on arresting a researcher named Dilshan Mohamed under the repressive Prevention of Terrorism Act (PTA) and section 3(1) of the ICCPR Act. The ICCPR Act charges were later dropped and he was released from custody on bail on 7th June 2019 after spending 34 days at the Negombo remand prison. However, the investigation under the PTA continues.

IV. CONCLUSION

It is visible that Sri Lankan government in various incidents of limiting the enjoyment of freedom of speech and expression using the tool article 3 of ICCPR Act No 56 of 2007. Sometimes it is difficult to justify several incidents based on the tests of proportionality, non-discrimination and necessity as stipulated by GR No. 34. Shakthi kasath kumara and Kusal Perera's cases are live examples for those violations. However, enacting of right to information act no. 12 of 2016 is a great compliance with regard to GR No. 34. However, it should be noted that compliances are lesser than non-compliances. Therefore, Government institutions should be careful and mindful when restricting freedom of expression while giving fully realization in progressively.

²⁸<http://www.dailymirror.lk/news-features/Arrest-of-writer-Sathkumara-sparks-debate-on-freedom-of-expression/131-165392>

²⁹ Section 3 of ICCPR Act No.56 of 2007

³⁰<https://www.forum-asia.org/?p=28640>

³¹<https://srilankamirror.com/news/14490-senior-journalist-kusal-perera-under-threat>