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## DOMESTIC IMPLEMENTATION OF INTERNATIONAL LAW ON ARTISTIC FREEDOM: A STUDY OF SRI LANKA

Sachindri Piyahasie Dias<sup>†</sup>

### Abstract

*An artist is anyone who 'creates art' and 'considers his artistic creation to be an essential part of his life. International law recognizes artistic freedom as a human right. The International Covenant on Civil and Political Rights 1966 secures the concept of artistic freedom as a subset of freedom of expression. By agreeing to undertake the obligations of international treaties relating to creative expression, national governments have committed themselves to enact appropriate legislative and administrative actions to safeguard creative freedom. However, continuous human rights violations and shortcomings at implementation show that State parties often fail to fulfill their binding obligations to protect freedom of creative expression. The objective of this paper is to analyze the international safeguards on artistic freedom that require domestication to strengthen their effectiveness. Further, this paper focuses on the examination of challenges faced in upholding the international law on artistic freedom with Sri Lanka serving as a case study. Specifically, the arrest of Shakthika Sathkumara is discussed to illustrate how states employ justifications such as counter-terrorism, culture, and religion, to evade responsibility towards safeguarding artistic freedom. The analysis underscores the challenges faced in safeguarding artistic freedom under international law and calls for stronger enforcement mechanisms to address these failures.*

**Keywords:** Domestication, artistic freedom, ICCPR, ICCPR Act.

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*The views expressed in this paper are personal and do not represent that of any other authority.*

## I. Introduction

*“One man’s vulgarity is another’s lyric.”*<sup>1</sup>

Artistic freedom is the liberty to imagine and create diverse cultural expressions free of governmental censorship, political interference, or the pressure of non-state actors.<sup>2</sup> Every individual has the right to exercise their freedom of expression and creativity through different media such as painting, literature, theatre, cinema, public art.<sup>3</sup> International treaty law embodies artistic freedom as a specific human right serving as a guarantee for the right to freedom of expression.<sup>4</sup>

However, artistic freedom is not limitless or absolute. When artistic expression articulates messages, they may encounter restrictions driven by political, religious and cultural interests.<sup>5</sup> These restrictions are necessary to ensure that artistic freedom does not infringe upon the rights of others. In fact, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005 emphasizes that diversity of cultural expression can be promoted only when human rights and fundamental freedoms are safeguarded.<sup>6</sup> Similarly, art.19 of the International Covenant on Civil and Political Rights, 1966<sup>7</sup>, acknowledges that artistic freedom can be subjected to limitations for the respect of rights, national

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<sup>1</sup> Cohen v. California, 403 U.S. 15, 20 (1971).

<sup>2</sup> UNESCO, *Artistic Freedom* (2019). 5. [hereinafter UNESCO].

<sup>3</sup> Farida Shaheed, (Special Rapporteur in the Field of Cultural Rights), U.N. Doc. A/HRC/23/34 (Mar. 14, 2013).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 2, Oct 20, 2005, 33 C/23

<sup>7</sup>International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171 [hereinafter referred as ICCPR].

security, and public health.<sup>8</sup> However, restrictions on artistic expression should only be imposed for the purpose of promoting the general welfare and not to arbitrarily silence people.<sup>9</sup> The issue arises when States deliberately neglect or misinterpret international standards (art. 19 of ICCPR) leading to wrongfully apprehension of citizens.

## PART A

### II. Human Rights and Protection of Creative Expression

International law establishes obligations for the civilized States which are fundamentally decentralized as it is alien to the supreme authority of one subject over another.<sup>10</sup> In cases where power is centralized, the sources of law can trace back to the State consent of the states and the principle of *pacta sunt servanda*.<sup>11</sup> The International Court of Justice Statute<sup>12</sup> recognizes (a) international conventions; (b) international customs; (c) general principles; and (d) judicial decisions and teachings of the most highly qualified publicists as the primary sources of international law.

#### A. Universal and Regional Human Rights Instruments

Although the Universal Declaration of Human Rights is not considered a treaty law, art. 27 of the Declaration guarantees the right freely to participate in the cultural life of the community and

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<sup>8</sup> Shaheed, *supra*, n. 3.

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, art. 4, December 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>10</sup> Jean D'Aspremont, S. Besson, *Oxford Handbook on the Sources of International Law*, 56 (2018)

<sup>11</sup> *Id.*

<sup>12</sup> Statute of the International Court of Justice art.38, April 18, 1946, [Hereinafter ICJ Statute.]



enjoy the arts.<sup>13</sup> Similarly, Art. 15(3) of the International Covenant on Economic, Social and Cultural Rights creates an obligation for the ratified States to respect the freedom indispensable for creative activities and protect the right to freely participate in the cultural life of the community.<sup>14</sup> Further, according to art. 19 (2) of ICCPR, States are obligated to include the freedom to seek, receive and impart ideas in all forms of art.<sup>15</sup> Additionally, art. 31 (1) and (2) of the Convention on the Rights of the Child<sup>16</sup> require ratified nations to recognize the right of the child to freely participate in cultural life and arts.

Regionally, European Convention of Human Rights, 1950,<sup>17</sup> African Charter on Human and People's Rights, 1950<sup>18</sup> and Arab Charter on Human Rights, 1994,<sup>19</sup> all contain provisions that guarantee the right to freedom of expression and active participation in cultural life.

## **B. Impact of Customary Law on Artistic Freedom**

It is argued that the main principles of human rights can be customary in nature.<sup>20</sup> Human rights obligations are primarily owed to people under a specific State's jurisdiction, thus their practice must be intrastate and not interstate.<sup>21</sup> When an international

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<sup>13</sup> Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res 217 A(III) [hereinafter UDHR].

<sup>14</sup> ICCPR, *supra*, n. 7.

<sup>15</sup> *Id.*

<sup>16</sup> Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter referred as CRC].

<sup>17</sup> European Convention on Human Rights, Nov. 4, 1950, C.E.T.S. No.005. [hereinafter ECHR].

<sup>18</sup> African Charter on Human and Peoples' Rights, art. 9; art.17, June 27, 1981, 21 ILM 7

<sup>19</sup> Arab Charter on Human Rights, art. 36, Sept. 15, 1994.

<sup>20</sup> D'Aspremont and Besson, *supra*, n. 10, at 12.

<sup>21</sup> *Id.*

obligation cannot be derived from treaty law,<sup>22</sup> customary international law<sup>23</sup> is often relied upon as the residual receptacle to capture non-treaty normativity.<sup>24</sup> Since creating new conventional instruments or amending existing ones is impractical, the use of international customs is considered to provide better oversight of how international actors protect individuals.<sup>25</sup>

The customary norms could bind all States, including those that have not ratified treaties protecting freedom of expression, unless for the principle of persistent objector.<sup>26</sup> Therefore, the customs of a State are considered as the practice that aligns with the law and *opinio juris*.<sup>27</sup> While treaty law has principally secured the right to creative freedom, the tensions between universalism and cultural relativism persist in intrastate practice.<sup>28</sup>

Given that the customary norms emerge from consistent state practice, disputes often arise when determining the scope of freedom of expression and consequently, the protection of artistic freedom.<sup>29</sup> As a result, often artistic freedom is curbed by constitutional references to customary cultural and religious views. For instance, the Constitution of Ghana guarantees creative freedom through cultural rights.<sup>30</sup> However, this guarantee is often superseded by art.

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<sup>22</sup> Jean d'Aspremont, The Discourse on Customary International Law 129 (Oxford Publications, 2021).

<sup>23</sup> Hereinafter CIL.

<sup>24</sup> D'Aspremont, supra, n. 22, at 10.

<sup>25</sup> Id.

<sup>26</sup> North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v. Netherlands), Judgment, 1969 I.C.J. Rep. 3, ¶ 40 (Feb. 20).

<sup>27</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep 226 (July 1996).

<sup>28</sup> An-Naim, The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts 30, Emory.Int. Law Rev 29 (1997).

<sup>29</sup> Id.

<sup>30</sup> Ghana Const. art 26(1).

39 of the Constitution, which mandates the adaptation of customary and religious practices.<sup>31</sup>

### C. General Principles of Law

General principles of law are used by the courts to address the gaps in treaty law and CIL.<sup>32</sup> These principles can regulate substantive conduct and apply to both individuals and States. In the context of human rights, the European Court of Human Rights<sup>33</sup> has invoked the fundamental principles of law<sup>34</sup> and generally recognized standards.<sup>35</sup> Furthermore, UDHR draws heavily from general principles derived from domestic rules.<sup>36</sup> Hence, many of the rights under discussion are considered fundamental, inalienable and inherent to all persons. ECHR refers to the principle of *nullum crimen nulla poena sine lege*<sup>37</sup> to prevent unjustified censorship of artists.<sup>38</sup>

### D. Jurisprudence

Judicial decisions are used as subsidiary rules that are utilised for the determination of rules of law.<sup>39</sup> While decisions of the ICJ only bind the parties involved in a specific case according to art. 59 of the ICJ Statute, courts still often follow previous judgements as a measure of certainty within the process.<sup>40</sup> Domestic courts are restricted to

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<sup>31</sup> *Id.* art.30

<sup>32</sup> John H. Currie, *Public International Law* 205 (2014).

<sup>33</sup> Hereinafter ECHR.

<sup>34</sup> *Golder v United Kingdom*, para. 35 18 Eur.Ct. H.R. (1975)

<sup>35</sup> *Murray v. United Kingdom*, 1996 Eur.Ct. H.R. (1991)

<sup>36</sup> Shaw, *supra*, n.39, at 12

<sup>37</sup> *Id.* at 17. art. 7.

<sup>38</sup> *Id.*

<sup>39</sup> Malcolm N. Shaw, *International Law* 1 (2017).

<sup>40</sup> *Id.* at 25-26.

interpreting laws, whereas the judgments of the ICJ actively contribute to the formation of the law.<sup>41</sup>

The case of *Karataş v. Turkey App*<sup>42</sup> where a Turkish national was sentenced to imprisonment for publishing a volume of poems which were deemed detrimental to the unity of the Nation. While the relevant national law provided sufficient grounds for the conviction, the European Court of Human Rights<sup>43</sup> revised its restrictive attitude towards freedom of artistic expression.<sup>44</sup> In contrast, there are instances where the ECtHR recognized the limitations on creative freedom. For example, in the case of *Muller and Others v Switzerland*, the Court acknowledged that artistic expression in art. 10 could be limited by the state to safeguard public morality or the rights of others.<sup>45</sup> Similarly, in the case of *Otto-Preminger-Institut v. Austria*, the ECtHR accepted that protecting the freedom of expression should not insult religious sentiments.<sup>46</sup>

### E. Soft Law on Artistic Freedom

Soft law refers to any written international instrument other than a treaty that contains principles, norms and other statements of expected behaviour.<sup>47</sup> It lacks the power to adopt binding measures. The UNESCO Recommendation Concerning the Status of the Artist also acknowledges the government's responsibility in creating an environment that encourages freedom of artistic expression in spheres of education, labour rights and intellectual property rights.<sup>48</sup>

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<sup>41</sup> Anglo-Norwegian Fisheries Case (*United Kingdom v. Norway*) Judgment, 127, 1951 I.C.J. Rep.116; ¶.86. (Jan. 6).

<sup>42</sup> *Karataş v. Turkey*, para. 7, 1999-IV Eur.Ct. H.R. (1999).

<sup>43</sup> Hereinafter referred as ECtHR.

<sup>44</sup> *Turkey*, *supra*, n. 42.

<sup>45</sup> *Müller v Switzerland*, 133 Eur.Ct. H.R. (1991)

<sup>46</sup> *Otto-Preminger-Institut v. Austria* 295 Eur.Ct. H.R. (1994).

<sup>47</sup> Dinah L. Shelton, *Soft Law in Handbook of International Law* (2008).

<sup>48</sup> UNESCO, *Recommendation concerning the Status of the Artist* (1980).

Additionally, it is recommended that efforts to censor art or impose unjustified restrictions on the right to artistic expression result in cultural, social and economic losses and thereby create an unsafe environment for both artists and their audiences.<sup>49</sup>

### III. Integration of Sources

Integration of these sources of international law is determined by two approaches. The dualist approach, derived from positivism,<sup>50</sup> posits a discontinuity between international law and domestic law. Therefore, international treaties as sources do not directly apply to the national order. It needs to be transformed into domestic law by means of legislative enactments.<sup>51</sup> This transformation can involve substantive modifications, as seen in the Human Rights Act of 1988. Alternatively, when international laws are not incorporated into domestic law, the judiciary can still adopt sources of international law in national courts.

On the other hand, the monist approach, derived from natural law, views law as a unified fabric extending from international to domestic spheres.<sup>52</sup> In monist states, international treaties are commonly declared as a constituting part of the national law unless it is not self-executing.<sup>53</sup> Further, monist states often provide concrete references within their domestic order to give legal force to international treaty law.<sup>54</sup> In the current context, States have evolved from pure monism and total dualism. Many States have often embraced a moderate version of monism with special treatment

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<sup>49</sup> Id.

<sup>50</sup> Kal Raustiala, The Domestication of International Commitments, Working Paper, IIASA, (November 1995).

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Albania Const. art 122.

<sup>54</sup> U.S.C., Chapter 113B.

reserved for international human rights treaties.<sup>55</sup> Thus, the power to conclude and incorporate international law into the domestic sphere often rests with the Executive or the Parliament.<sup>56</sup>

### **A. Implementation and Shortcomings of International Law**

The basic principle for the domestic application of laws on creative expression is that States have a necessity to submit themselves to legal order for “common good.”<sup>57</sup> For example, there is no requirement for the ICCPR should be incorporated into domestic law. However, the bona fide obligation to adhere to art. 19 of ICCPR generates a duty for States to cooperate with the Human Rights Committee.<sup>58</sup>

While many constitutions expressly protect the right to artistic freedom,<sup>59</sup> others make implicit references to cultural creativity through the rights to freedom of expression and the right to participate in cultural life.<sup>60</sup> Despite the international standards being set by sources of international law, domestic lawmakers and Courts often do not delve into a profound analysis when considering artistic creation.<sup>61</sup> Artistic expression is often given derivative and second-class status in the view of protecting other rights, with priority often

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<sup>55</sup> S. Neudorfer, & C. Wernig, ‘Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System.’ 411 Max Planck Yearbook of United Nations Law Online, (2010).

<sup>56</sup> U.S. Const. art. II.

<sup>57</sup> U.N. Committee on Economic, Social and Cultural Rights General Comment No. 9: (Dec. 3, 1988).

<sup>58</sup> Vienna Convention on the Law of Treaties, art.26, May 23, 1969, 1155 U.N.T.S. 331.

<sup>59</sup> Montenegro Const. art.76

<sup>60</sup> Bulgaria Const. art.39-41; *See also* Norway Const. art. 100.

<sup>61</sup> *Id.* at. 3

given to political and religious expression.<sup>62</sup> The right to creative expression is sometimes sacrificed in favor of protecting the morals and rights of others.<sup>63</sup>

a. Question of Treaty Ratification

States such as Bangladesh, Burma, Pakistan and Singapore have not ratified the ICCPR and ICESCR. Additionally, twelve States have made reservations to art. 19 of ICCPR. As a result, possible international protection for creative freedom in these countries is limited. For instance, in Pakistan, the arts have only developed to the extent it is not critical and incompatible with conservative constructions of Sharia law. This has made the Human Rights Council unable to monitor the protection offered under domestic law.<sup>64</sup>

b. Conflicts between International Human Rights Treaties and Constitution

The choice of which approach to be integrated is reserved for the States themselves.<sup>65</sup> Irrespective of the approach, States are often found to be incompatible with international standards. Such limitations can be resulted due to religious prescriptions, ethnic conflicts, and the political nature of the State. Constitutions of Muslim and Sharia-compliant States are extremely restrictive of artistic freedom.<sup>66</sup> However, under art. 27 of the Vienna Convention on the Law of Treaties, 1969, a State Party cannot invoke the

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<sup>62</sup> Sheldon H. Nahmod, Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment, 222 Wis L Rev 221 (1987).

<sup>63</sup> Steel and Others v. the United Kingdom 1998 Eur.Ct. H.R. (1998).

<sup>64</sup> Freemuse, Annual Report 2015: Art Censorship on the Rise 79 (2016).

<sup>65</sup> Swedish Engine Drivers' Union v Sweden 20 Eur.Ct. H.R. (1976)

<sup>66</sup> Freemuse, "Article 19: Unveiled: Art and Censorship in Iran" 23 (2006).

provisions of its national law to justify its failure to adhere to international obligations.<sup>67</sup>

Further, it is possible to recognize an overlap of the rights. The American Convention on Human Rights prohibits prior censorship of freedom of expression except in cases of moral protection of adolescents.<sup>68</sup> Contradictorily, the Constitution of Chile permits prior censorship using their laws on contempt. (*Lees de desacato*)<sup>69</sup> The Constitution of Ghana guarantees creative freedom through cultural rights.<sup>70</sup> Yet, it is often overruled by art. 39 of the Constitution that mandates customary and religious practices.

This leads to the concern of what prevails in case of incompatibility or when it overlaps. Under a monist system, the common issue becomes the hierarchy of the law. Principally, the treaties prevail over inconsistent state law.<sup>71</sup> States such as Guatemala have referred to the primacy of international human rights treaties over domestic law.<sup>72</sup> When it is not explicitly declared, the written rules and customary law along with the domestic judiciary determine what prevails under which conditions.<sup>73</sup>

Yet, some States have even prohibited ratifying treaties that contradict the Constitution to prevent such conflicts.<sup>74</sup> Further, few States have attached conditions to the ratifications precluding ICCPR from being a source of domestic law.<sup>75</sup> Even the US instrument for

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<sup>67</sup> Vienna Convention, *supra*, n. 58.

<sup>68</sup> American Convention on Human Rights, art 13.4, Nov. 22, 1969.

<sup>69</sup> Chile Const. art.19(12).

<sup>70</sup> *Id.* at 30, art.26.

<sup>71</sup> U.S. Const. art. VI, cl. 2.

<sup>72</sup> Guatemala Const. art. 46.

<sup>73</sup> Venice Commission, "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts", 10 (2014).

<sup>74</sup> Armenia Const. art. 6.

<sup>75</sup> Jack Goldsmith, Should International Human Rights Law Trump US Domestic Law?, 12, I Chicago Journal of International Law 2 (2000).



ratification includes a declaration stating that the substantive articles of the treaty are not self-executing. Private litigants cannot invoke non-self-executing treaty provisions to trump inconsistent state law.<sup>76</sup> Since the USA has not ratified ICESCR, in matters of cultural rights, the litigants are restricted and the Constitution shall prevail.<sup>77</sup> This eludes the legal obligation entirely and thereby could cause a void in the law relating to the rights of the citizens.

c. Issues with the Enabling Enactments

Under dualism, when the laws are transformed into domestic law, rewriting can cause problems of interpretation when the actual commitments are altered. While the judges generally attempt to reconcile the domestic and international language, a controversial Domestic court could follow the domestic and not international languages, which can result in a failure to comply with a treaty commitment.<sup>78</sup> In the case of *Turkey*, where the Constitution grants artistic freedom,<sup>79</sup> it is followed by excessive limitations in need for the security of the State.<sup>80</sup>

## IV. Recommendations

### A. Establishing Strong Monitoring Bodies in Implementing International Standards

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<sup>76</sup> David Sloss, Domestication of International Human Rights; Non-Self-Executing Declaration and Human Rights Treaties, 132, 24 Yale Journal of International Law 126 (1999).

<sup>77</sup> Hirst v. UK, Eur. Ct. H.R. (2005).

<sup>78</sup> International Federation for Human Rights, *Sri Lanka's Supreme Court decision undermines human rights protection*, (Oct. 17, 2006) <https://www.fidh.org/en/region/asia/sri-lanka/Sri-Lanka-s-Supreme-Court-decision>

<sup>79</sup> Turkey Const. art. 27.

<sup>80</sup> Freemuse, 'The State of Artistic Freedom 2020' 10 (2020).

The European and Inter-American Court of Human Rights, as autonomous sources of authority, evaluate the compatibility of the national legal order of the ratified states and the judgements issued by the European Court are binding and *res judicata inter partes*.<sup>81</sup> Compared to the European Convention on Human Rights, ICCPR system does not have a judiciary supervisory body.<sup>82</sup> In comparison, Human Rights Council views are hardly enforceable as they do not have a binding force.<sup>83</sup>

### **B. Restrictions Must Comply with Obligations**

While ICCPR and ICESCR both recognize that the limitations must exist<sup>84</sup> there has to be a proportionate relationship between the restriction and its legitimate objectives. Creative expression often subjected to limitations considering the need for national security and order. Therefore, the States must be compelled to follow a similar approach introduced by the ECtHR; the three-part test. The restrictions must be based on legality, legitimacy, and necessity in order to meet international standards.<sup>85</sup>

## **VI. Analysis of Sri Lanka's Situation**

Ratification of international human rights treaties creates implications for all national authorities, not only the executive and legislative bodies but also the judiciary. Sri Lanka taking a dualist approach generally follows the commonwealth practice in

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<sup>81</sup> ECHR, *supra*, n. 17, art. 46(1).

<sup>82</sup> Shaw, *supra*, n.39, at 4.

<sup>83</sup> *Id.*

<sup>84</sup> ICCPR, *supra*, n. 7, art. 19.

<sup>85</sup> Tetiana I. Fuley, The Application of European Court of Human Rights Case Law in the Administration of Justice: A Scientific and Methodological Guide for Judges 11 (2015).

domesticating the treaty law and customary international law.<sup>86</sup> Art. 27 of the Sri Lankan Constitution declares that the State shall endeavour to respect international law and obligations for peace and social order. Yet, it is held that treaty law is not a binding force as it is not a legal instrument of domestic law.<sup>87</sup> Further, no remedy through the Human Rights Council is enforceable within Sri Lanka unless there is an enabling legislation.<sup>88</sup>

### **A. Constitutional and Legal Protection of Creative Expression**

Artistic freedom is not recognized as a specific right. Art. 14(1)(a) of the Constitution of Sri Lanka protects freedom of expression and includes freedom of creative expression. Further, creative opinions are a corollary of the freedom of thought guaranteed by art. 10 of the Sri Lankan Constitution.<sup>89</sup> Public Performance Ordinance No. 7 of 1912 was enacted to ensure the basic standard of creative work in Sri Lanka.

However, the Constitution provides a broad range of restrictions on rights that are permitted under ICCPR. The Sixth Amendment to the Constitution prohibits the advocacy of a separate State.<sup>90</sup> Thereby, any artistic creation that advocates separatism peacefully or violently poses a serious threat to national security and public order. Section 14 of the Prevention of Terrorism Act<sup>91</sup> confers authority to the Minister to make orders to prohibit publications without the approval of a competent authority.

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<sup>86</sup> K.A. Thilakeratne, The of Judiciary in Recognizing and Implementing International Law; A Comparative Analysis with Special Reference to Sri Lanka 132 7 *Journal of Liberty and International Affairs*, 129 (2021).

<sup>87</sup> *Leelawathie v. Minister of Defence and External Affairs* 68 N.L.R. 487 (1965).

<sup>88</sup> *Sinharasa v. Attorney General* SC/SPL/LA/182/99 (2006).

<sup>89</sup> *Fernando v. Sri Lanka Broadcasting Corporation S.C.* Application No. 81/95 (1996).

<sup>90</sup> Sri Lanka Const. art. 157A.

<sup>91</sup> Prevention of Terrorism Act 48 of 1979. [hereinafter referred as PTA].

## **B. The Arrest of *Shakthika Sathkumara***

*Shakthika Sathkumara*, a writer residing in Sri Lanka was arrested on 1 April 2019 in response to complaints made by Buddhist monks regarding a short story he wrote '*Ardha*' which hinted at homosexuality within the Buddhist clergy. He was charged with inciting religious hatred under Section 3(1) of the International Covenant on Civil and Political Rights Act of 2007 and Section 292 of the Penal Code.<sup>92</sup> He was detained for 127 days before being released without indictment. Further, it is reported that a group of Buddhist monks visited his workplace and delivered a petition stating that as a public servant, he could not defame Buddhism. Although he responded that the public servants also had freedom of expression, an inquiry was informed to be held. Referring to the arrest of Sathkumara, the Human Rights Council Opinions that Section 291 of the Penal Code had been used to suppress his legitimate form of expression.<sup>93</sup> It further observes that there is no valid legal basis for his arrest and requests the government to take steps necessary to remedy the situation conforming with international standards.<sup>94</sup>

In addition to the threats Sathkumara encountered, the murder of Richard de Soyza for his involvement in penning a play called *Who is he? What is he doing*<sup>95</sup> and death threats received by Ravi Ranasinghe and Holy Family Convent demanding to stop a play that supported peace and conflict transformation are a few instances. Further, Kusal Perera, a senior journalist was investigated under the

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<sup>92</sup> Penal Code Ordinance No. 11 of 1887 (as amended).

<sup>93</sup> Shaheed, *supra*, n. 3, at 4

<sup>94</sup> *Id.*

<sup>95</sup> Report of Anthony Heaton, Observer Appointed by the International Commission of Jurists, *Magisterial inquiry into the homicide of Richard de Zoysa* (August 1990), <https://icj2.wpenginpowered.com/wp-content/uploads/1990/08/Sri-Lanka-homicide-of-richard-de-zoysa-fact-finding-mission-report-1990-eng.pdf>

ICCPR Act for inciting racial hatred over a journalistic piece he wrote in 2019 regarding the anti-Muslim violence following Easter Sunday terror attacks.

This formal censorship and the violent approach of the individual groups demonstrate a weakness in the legal regime that is designed to protect citizens. While Sri Lanka has an obligation before the international standards to ensure freedom of expression, its selective application to suit the will of certain groups is problematic.<sup>96</sup> The death threats Sathkumara encountered and the increasing events of violence associated with the exercise of free speech induce self-censorship provoked by fear.<sup>97</sup> When citizens are compelled to be censored, it becomes not just an impediment to freedom of expression but a complete infringement on the right to truth, to know, and to remember.<sup>98</sup>

### C. Limitations and Shortcomings

Under art. 4 of ICESCR, limitations to artistic expression can be determined solely for the purpose of promoting the general welfare of a democratic society. In domestic law, the right to creative expression is restricted in matters relating mainly to national security, religion, and public order. Even though Sri Lanka has consented to the international human rights treaty law in protecting artistic freedom, we are yet to enact new laws and bring the domestic laws in line with our commitments under international standards.

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<sup>96</sup> Verite Research, *Arrest of Writer Sathkumara Sparks Debate on Freedom of Expression*, (May, 2019) <https://bit.ly/43hrBAj>.

<sup>97</sup> Annemari de Silva, *Limits of Expression: Creative Artists and Censorship in Sri Lanka* 1 Int' Centre for Ethnic Studies (2017).

<sup>98</sup> *Id.* 69.

a. Failure to Amend the Existing Laws

The application of the archaic Societal Good Conduct Act No.37 of 1966 for banning radio channels and local satellite channels for promoting anti-social and vulgar material<sup>99</sup> showcases the dire need to repeal the outdated laws to adhere to ratified international standards. Further, The Regulations brought under Section 5 of the Public Security Ordinance<sup>100</sup> broadly define the categories of issues to be subjected to restrictions on freedom of expression and information making no distinction between matters threatening national security and matters that ought legitimately to be placed in the public domain.<sup>101</sup> As a result, when the Emergency Regulations were used to invoke formal censorship over the press, Sri Lanka was established as one of the most dangerous places to exercise free speech.<sup>102</sup>

b. Incompleteness of the ICCPR Act No. 56 of 2007

Art. 4 of the ICCPR permits derogation from the right to freedom of expression in times of public emergency only when it threatens the life of the nation. But the Constitution does not establish the safeguards to ensure that the emergencies are declared only to the extent strictly required by the exigencies of the situations. Further, it fails to specify that the freedom of expression must be protected in accordance with art. 19(3) of the ICCPR.

Under art. 3(1) of the International Covenant on Civil and Political Rights Act 56 of 2007,<sup>103</sup> freedom of creative expression becomes a non-bailable offence if it advocates national, racial, or religious

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<sup>99</sup> Seetha Ranjane, 'Martyrs of the freedom of expression in Sri Lanka' (Translated by Kusal Perera, Free Media Movement) (2011).

<sup>100</sup> Public Security Ordinance No. 25 of 1947. [hereinafter PSO.].

<sup>101</sup> Manusher Jonno, 'Conference on Right to Information- National and Regional Perspectives, Country Paper on Sri Lanka' (2005).

<sup>102</sup> Id. at 95.

<sup>103</sup> Hereinafter referred to as ICCPR Act.

hatred that constitutes incitement to discrimination or violence. Since the parameters are not determined, ICCPR Act along with the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 has been misused to restrict freedom of artistic expression and crush dissent. Instead of protecting minorities against incitement, it is invoked to protect religions or beliefs against criticism or perceived insult.<sup>104</sup> The arrest of K.K. Srinath charged under Section 290, of the Penal Code for his book; *Budhunge Rasthiyaduwa* and the arrest of Ahnaf Jazeeem charging his poetry signifies the shortcomings of the domestication of ICCPR.<sup>105</sup>

c. Using Counterterrorism as a Means of Silencing Artistic Expression

Over the course of past 50 years, Sri Lanka has endured a civil war, racial conflicts, and social revolutions. Therefore, the rhetoric of heightened national security measures has been considered a necessity. This has led to the enactment of ill-considered, disproportionate, and unnecessary measures that have impeded the freedom of expression, freedom of thought and association as well as cultural rights. For instance, under the state of emergency, Section 14 of the Prevention of Terrorism Act confers authority to the Minister to make orders in relation to the prohibition of publications without the approval of a competent authority. The Prevention of Terrorism Regulations No. 01 of 202 interprets the publications could be words either spoken or intended to be read or by signs or by visible representations.

## VII. Recommendations and Conclusion

Against the backdrop of the foregoing discussion, the author offers following recommendations:

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<sup>104</sup> Jonno, *supra*, n. 101 at 95.

<sup>105</sup> Ishan Jayawardana, *Exploring Creative Freedom*, Daily News, (Nov. 10, 2020).

- i. State must bring the illegitimate limits of artistic freedom established under sections 3(1) and 4 of the ICCPR Act and Section 291B of the Penal Code<sup>106</sup> into conformity with the commitments Sri Lanka has made under art. 19 of the ICCPR.<sup>107</sup>
- ii. States must be able to justify the restrictions and censorships within the law and establish legitimacy under art. 19(3) of ICCPR.<sup>108</sup>
- iii. The provisions under PTA must not be used for undue restrictions of creative expression as a need to protect the nation and religion.
- iv. Further, in the process of ensuring the fundamental rights of the citizens, Sri Lanka must also review and repeal all the laws which embody discriminatory provisions undermining the rights of LGBTQI communities and enact laws in line with international standards.<sup>109</sup>
- v. Ensure protocols for impartial and effective investigation of violent actions of censorship acted by unofficial religious groups and individual actors.<sup>110</sup>
- vi. Censorship regulations under PSO should be implemented by a collective body. Section 5 of PSO must satisfy the tests of necessity, expediency, and proportionality.
- vii. Censorship regulations under PSO should be implemented by a collective body. Amendment of Section 5 of PSO to satisfy the tests of necessity, expediency, and proportionality.

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<sup>106</sup> Penal Code, *supra*, n. 91.

<sup>107</sup> Jonno, *supra*, n. 101, at 95.

<sup>108</sup> *Id.*

<sup>109</sup> Shaheed, *supra*, n. 3.

<sup>110</sup> *Id.*



- viii. State must ensure all the domestic laws and practices secure an individual's ability to seek, receive and impart information online.<sup>111</sup>

A single rule of international law brings several domestic laws in various interpretations, all aiming to pursue the same end; to implement international law within the domestic framework of States. Yet the arbitrary restrictions imposed on the rights raise the concern- whether the States are incorporating the protection of human rights because of the moral obligation for the common good or is it a nominal attempt to avoid confrontation in the international legal sphere. The caveats in implementation and the loopholes in the domestication of international standards signify how far behind the States are in minimizing the gaps between international protection and domestic protection of creative expression. The incident involving Shakhika Sathkumara warns us how the State's unjustifiable restrictions on the freedom of creative expression could gradually affect the freedom of expression of all citizens. In light of the recommendations for the possible developments, it is hoped that domestic lawmakers shall eventually be able to protect the creative freedom of an artist while legitimately aiming to protect the morals of society.

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<sup>111</sup> H.R.C., The Promotion, Protection and Enjoyment of Human Rights on the Internet, U.N. Doc. A/HRC/38/L/10/Rev.1 (July 4, 2018).