A CRITICAL CONSIDERATION AS TO THE EXTENT TO WHICH THE FREE SPEECH FRAMEWORK IN SRI LANKA CAN FACILITATE THE PROCESS OF RECONCILIATION

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Abstract

This thesis provides a novel approach to free speech within a reconciliation context. It addresses a gap in the academic literature in terms of how a free speech framework (its construction, improvement, and application) should be approached in practice to achieve the broad goals of reconciliation. Such discussion tends to focus on bringing a speech framework in line with international norms, whilst failing to account for the practical factors and complexities of a reconciliation process (particularly in terms of accounting for ground realities within the State, the need for specific tailoring to the context of reconciliation, and the need for a targeted approach that considers the utility of reconciliation as a concept that can shape a speech framework). This thesis argues for a functional value in conceptualising a free speech framework based on the aims of reconciliation. It presents a purposive method of using the goals of reconciliation to establish a normative basis to critique, improve, and provide solutions for these aims. The focus of this thesis is on Sri Lanka. As a post-conflict society that has faced deep divisions and instability, it serves as a useful example of how these discussions apply in practice. As the thesis focusses on Sri Lanka, much of the discussion will be country-specific; however, it may provide (particularly in terms of the concept of a purposive and functional approach to a free speech framework within a reconciliation context) a useful basis for other States facing similar issues.

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2.

Introduction

1. Introduction to the Thesis

The importance of free speech is widely accepted as essential to the functioning of democracies. However, there is a lack of consideration as to the specific factors in which such norms should be applied within reconciliation contexts. Such contexts include post-conflict situations, countries recovering from deep societal divisions, and countries that are undergoing political/social/legal change in order to promote enduring stability.[1] Whilst on a broad level, bringing free speech guarantees in line with international norms (with free speech guarantees, safeguards from abuse, and mechanisms to address the problem of harmful speech) is a valid aim in a general sense – it fails to take into account some of the complexity inherent in practical application within a reconciliation context. This represents a gap in the academic literature where there is a paucity of specific attention to some of the features of States undergoing a transformative reconciliation process that may shape the efficacy and appropriate approach to formulating a robust free speech framework.[2] This lacuna is particularly emblematic in discussions of free speech in Sri Lanka, where much of the debate is centred on pointing out deficiencies in the framework based on international norms, whilst failing to consider factors

[1] See subsection 3 below for a more specific examination of what is meant by reconciliation and how this applies to Sri Lanka.
[2] For example, see Eric Heinze, 'Viewpoint Absolutism and Hate Speech', The Modern Law Review Vol. 69 No. 4 (2006); Tristan Anne Borer, 'Reconciling South Africa or South Africans? Cautionary Notes from the TRC', African Studies Quarterly Vol. 8 Issue 1 (2004).

that should shape the framework in a way that is conducive to the reconciliation process.[3] This is not to say that international norms are not relevant – they remain the appropriate target – however, the approach of implementation should be considered through the lens of achieving the objectives of reconciliation and accounting for certain ground realities. The intuition of this thesis at this stage is therefore that there may be some functional value in conceptualising a free speech framework through a country specific approach that is tailored to these aims. This thesis will attempt to establish a normative basis for a free speech framework that can help refine appropriate approaches and bridge the gap between general aims and specific implementation. This includes pointing out deficiencies in the current framework, forming a basis to interpret the application of laws, shaping the discussion of required changes or additions to laws, and framing potential solutions. This thesis provides a novel contribution to the academic literature through three main features – firstly, by providing a sustained appraisal of the speech framework of Sri Lanka it contributes substantial attention to features that currently lack adequate academic discussion.[4] Secondly, by considering that speech framework through a normative approach that accounts for reconciliation and country specific factors, it allows for and potentially contributes to the construction of a more robust framework that helps improve and provide solutions in achieving these aims.[5] Thirdly, whilst the focus of this thesis

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[3] For example, Gehan Gunatilleke, 'Limitations on fundamental freedoms in Sri Lanka: majoritarian influence of constitutional practice', International Journal of Law in Context, Special Issue Article 1-18 (2023); Jayantha de Almeida Guneratna, Kishali Pinto-Jayawardene, and Gehan Gunatilleke, 'The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights', *Law and Society Trust* (2014); Ermiza Tegal, *Understanding Rule of Law, Human Security and Prevention of Terrorism in Sri Lanka* (Law and Society Trust 2021); Lakshman Marasinghe, 'Recent Developments in Sri Lanka on the Freedom of Expression', Law and Politics in Africa, Asia and Latin America, Vol. 33, No. 2 (2000). Also see *infra* note 558, 700, 817, 828. Many other examples of academic discussion relating to this are referred to throughout this thesis. Whilst they provide valuable insight and critique as to the current free speech framework in Sri Lanka, this thesis will provide a method of using the aims of reconciliation as a functional basis to provide a pragmatic and purposive appraisal, and potential improvement, of the speech framework in Sri Lanka.

[4] This is in terms of the country and its issues being relatively less prominent internationally, a lack of substantial attention beyond general criticisms, and recent developments that have yet to receive significant academic analysis (particularly in terms of reconciliation). Examples of recent developments include the *Ramzy Razik* judgment and the Online Safety Act, see Chapter Three and Four.

[5] As will be argued through this thesis, in contexts such as Sri Lanka, the efficacy of laws cannot be looked at in isolation and are significantly impacted by domestic factors. This can include – institutional weaknesses, State apathy, historical context and attitudes, and social or ethno-religious divisions. These fundamentally change

is on Sri Lanka, it provides an example of how reconciliation can shape a normative approach in basing a free speech framework – which may have some application in other post-conflict or divided States undergoing a reconciliatory process.[6]

2. Background Context

The historical context of a country can shape its formulation and approach in terms of laws that guarantee and limit rights such as the freedom of expression. For example, the USA's historical background of independence from colonial rule and strong political dissent contributes to it placing particular importance on free speech, and an aversion to content-based limitations.[7] On the other hand, a country like Germany is influenced by its past with the Nazi party which has resulted in a particular wariness of hate speech and willingness to apply strong limitations on

how a speech framework operates in practice. For example, safeguards in legislation regulating speech that may be sufficient in stable democracies with strong institutions, may be inadequate to prevent arbitrary use or abuse in this context. Furthermore, terminological vagueness can in addition to being open to abuse, carry significantly higher chilling effects on a population that has been used to a repressive environment and is especially wary of State overreach.

[6] Such States may have similar aims and challenges. The international approach seems to centre on recommendations to bring laws in such States to conform with international norms and standards. The normative approach and standards presented in this thesis may assist – both in terms of improving a speech framework and providing a reconciliation-based approach. Many examples may exist where this can be useful to varying degrees, and may include challenges in States such as: Myanmar (with issues of ethno-religious division balanced with protecting both the interests of the Buddhist majority as well as the minority groups), Rwanda (where concerns of past violence promotes a relatively restrictive attitude towards speech, with many concerns relating to both the potential harms of inciting speech (particularly through modern technology) and the potential for this to be used to justify undue and disproportionate restrictions on political dissent), South-Africa (which continues a long term reconciliation process healing societal divisions), current conflicts such as in Ukraine (which may have to work on a future reconciliation process healing divisions and restoring democratic norms post-conflict whilst balancing national security interests), etc.

[7] Ronald Krotoszynski Jr, 'Questioning the Value of Dissent and Free Speech More Generally: American Scepticism of Government and the Protection of Low-Value Speech' in Austin Sarat (ed) *Dissenting Voices in American Society: The Role of Lawyers, Judges, And Citizens* (Cambridge University Press 2012) p 219.

speech to prevent harm.[8] Similarly, to understand attitudes towards regulation in Sri Lanka, some historical background may be useful. Sri Lanka's background in terms of stability and democratic norms has been mixed. Widely regarded as Asia's oldest democracy, the country had a relatively peaceful transition to independence from colonial rule and was for some time considered a model for similar States such as Singapore to aspire to.[9] Since then much of its background has been characterised by instability and conflict. Two armed insurrections by Marxist groups in the 1970s and 80s led to widespread violence and instability. Deep divisions on ethno-religious lines between communities that existed prior to independence were exacerbated by policies perceived by minorities as marginalising and eventually led to a brutal civil war that lasted three decades.[10] The LTTE (Liberation Tigers of Tamil Eelam) became one of the most dangerous terrorist groups in the world – highly organised, using child soldiers, pioneering suicide bombing, carrying out devastating attacks on the public, and assassinations including two world leaders – and shaped much of the public attitudes to security up to (and arguably continues to after) the end of the war in 2009.[11] Although the war was decisively concluded, efforts made towards recovery and reconciliation have been challenging. Some challenges include – a lack of engagement with the democratic process by minorities (stemming from the LTTE using threats of violence to prevent Tamils in the north from engaging with democracy), apathy or lethargy on the part of the State as to bringing in

[8] Ronald Krotoszynski Jr, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (NYU Press, 2006) p 94.
[9] Ministry of Foreign Affairs - https://mfa.gov.lk/cool_timeline/universal-franchise-extended-to-all-people/ ; Lee Kuan Yew, *From Third-World to First: The Singapore Story* (Harper Collins Publishing 2000) p 414 - Sri Lanka was viewed by many as the 'model commonwealth country', with high quality education, local civil service, and experience of representative government. However, even then tensions existed foreshadowing the conflict to come, largely due to divisions on ethno-religious lines and a dominant majority.
[10] Tamils were perceived as having enjoyed disproportionate advantages in public and private sectors during the colonial period. Post-independence, majoritarian movements to make Sinhala the national language of government and administration were fuelled by resentment and eventually led to language policies that made the Tamil minority feel marginalised - A. Jeyaratnam Wilson, *Politics in Sri Lanka 1947-1979* (MacMillan Press 1979) p 10.
[11] 'Taming the Tamil Tigers' *FBI Archives* (2008) - https://archives.fbi.gov/archives/news/stories/2008/january/tamil_tigers011008

substantive reconciliatory measures and transitional change, a wariness of the State by the public (particularly minorities) caused by past and continuing acts of repression, and lingering anxieties about the re-emergence of terrorism in the minds of the public. More recently, the Easter bombings in 2019 reignited fears of terrorism within the country. These were carried out by people influenced by extremist Islamist ideology – resulting in suicide bombings targeting three hotels and three Christian churches killing 267 people and injuring over 500 others.[12] This marked a watershed moment whereby the Muslim community faced significant backlash and suspicion. This included violent riots and repressive action by the State.[13] In addition, a series of unfortunate domestic policy decisions and world events led to an economic crisis that brought mass disaffection with the State and widespread protests, resulting in significant crackdowns on protestors and renewed attention on public security issues.[14] This is a brief summarisation of some of the context that has formed State policy and public attitudes and influenced the way in which the rights framework in the country, and challenges to reconciliation efforts, have been shaped. This context is necessary to understand some of the motivations and attitudes that have shaped approaches to limiting rights (and significantly, free speech rights). The violence of armed insurrections and terrorist groups entrenched a mindset (within both the State and sections of the public) that prioritised national security and leaned towards more authoritarian styles of government. Whilst the effects of this lingered in peacetime, this was once again heightened by recent events and instability. A speech framework that facilitates an effective and enduring process of reconciliation will therefore have to account for these challenges. Reconciliation in Sri Lanka will therefore largely be

[12] 'Sri Lanka Attacks' *BBC* (2021) - https://www.bbc.com/news/world-asia-59397642 .
[13] Anbarasan Ethirajan, 'Discrimination and harassment haunt Sri Lanka's Muslims' *BBC* (2022) - https://www.bbc.com/news/world-asia-59900733 .
[14] 'Sri Lanka: End Government Crackdown on Peaceful Protestors' *Human Rights Watch* (2022) - https://www.hrw.org/news/2022/08/05/sri-lanka-end-government-crackdown-peaceful-protesters .

focussed on healing divisions between ethno-religious lines, but will also include wider issues.[15]

3. Key problems underlying the research questions

As much of the discussion of this thesis will be based on methods of achieving the goals of reconciliation, it is worth briefly setting out what these aims may pertain to. This thesis does not necessarily aim to establish significant analysis on the concept of reconciliation itself, but to focus on the potential functional value of free speech in achieving these broad aims in Sri Lanka. Therefore, discussion of the concept of reconciliation will admittedly be somewhat platitudinal, considering it in terms of an overarching goal that enables a purposive approach to formulating a free speech framework. Reconciliation is seen as a key part of the transitional justice process of countries moving forward from conflict and division – yet its meaning is broad and often open to debate.[16] Reconciliation can also influence the application of law and reconceptualise justice (representing a shift from retributive models to focus on healing) to form a transitional basis to bridge divisions between groups whilst maintaining stability.[17] The objectives of reconciliation can mean simply ensuring coexistence and preventing a return to violence – or a wider concept that includes shared vision, justice, healing, forgiveness etc.[18] An effective reconciliation process must also be directly linked to the local context to account

[15] For example, the instability caused by Sri Lanka's economic and political issues go beyond ethno-religious lines, but raise similar issues in terms of how an effective speech framework based on reconciliation can address these problems in the aim of avoiding conflict in the future, and achieving a peaceful, stable society.
[16] Elin Skaar, Reconciliation in a Transitional Justice Perspective, Transitional Justice Review, Vol. 1 Issue 1, 54-102 (2012) p 56.
[17] Patrick Lenta, Transitional Justice and the Truth and Reconciliation Commission, Theoria: A Journal of Social and Political Theory – Trust, Democracy, and Justice 52-73 (2000) p 53, 60.
[18] Skaar, note 16, p 65.

for practical domestic factors.[19] International calls for reconciliation in Sri Lanka have advocated for a comprehensive approach, truth seeking, judicial and non-judicial measures, institutional reform, accountability, and bringing the standards of institutions and rule of law in line with international norms.[20] The Sri Lankan State has expressed in various forms its approach to reconciliation. The focus appears to be on emphasising truth-seeking, reparation, promoting harmony and unity, coexistence, and preventing future violence.[21] Truth-seeking is an interesting aspect of reconciliation that is widely considered to be a key part of the process. This allows for victims to air grievances, for a collective appraisal and acceptance of past mistakes, to create accountability through exposure, for a national healing process, to provide a form of non-retributive justice, and to allow perpetrators to come forward to confess with amnesty. These are all worthy aims to move on from the past. However, its focus is on dealing with the past. Whilst this may benefit future coexistence by allowing victims to move forward, there remains a gap in terms of how a collective truth-seeking effort should be constructed in posterity. The truth-seeking process does not necessarily end at this point – the issues of reconciliation go beyond the occurrence of past violence and abuse, and require open discussion as to the underlying issues so that they are exposed, debated, and prevented from reoccurring, where antithetical to reconciliation. Some of the discussion in this thesis may help bridge that gap. The process of reconciliation is multi-faceted, and a proper examination of its effective implementation is beyond the scope of this thesis. The focus is on establishing a free speech framework that is conducive to reconciliation, whilst using those goals as a general purposive benchmark. It may be necessary at this point to set out why this link between free

[19] Dev Ramiah and Dilrukshi Fonseka, 'Reconciliation and the Peace Process in Sri Lanka' *International Institute for Democracy and Electoral Assistance* (2006) p 7, 11.
[20] UN Human Rights Council Resolution, *Promoting reconciliation, accountability, and human rights in Sri Lanka* (2015) A/HRC/RES/30/1.
[21] Office for National Unity and Reconciliation - https://onur.gov.lk/ ; Press release from Presidential Secretariat (2023) - https://www.presidentsoffice.gov.lk/index.php/2023/12/08/sri-lanka-takes-historic-step-towards-establishing-an-independent-commission-for-truth-unity-and-reconciliation/ .

speech and reconciliation has been chosen for the purposes of this thesis – and to clarify its rationale. As has already been stated in this introduction, the concept of reconciliation is approached in largely platitudinal terms, as a broad overarching aim with which to guide potential reform. However, the reason for the particular focus on the elements of reconciliation that are focussed on in this thesis can be set out here. Whilst the concept of reconciliation is multi-faceted, and includes issues beyond free speech, this issue is particularly relevant to the context of Sri Lanka. For example, the Lessons Learnt and Reconciliation Commission of Sri Lanka in its report highlighted significant concerns relating to the repression of free speech and the need for this to be addressed for effective reconciliation.[22] Similarly, criticisms of the reconciliation process have pointed out that speech related issues and repression have been inimical to the process of reconciliation and hinder the effectiveness of other measures or policies.[23] In this sense, a consideration of the free speech framework in Sri Lanka is tied into the efficacy of the reconciliation project. In addition, not only are there specific deficiencies in the free speech framework of Sri Lanka that need to be addressed, but the stated aims of reconciliation in Sri Lanka relate to free speech issues. Although stated aims such as '…fostering of unity, understanding, and healing amongst diverse communities…lasting peace and harmony', '…co-existing in harmony and unity…', and '…create an empathetic society that mutually respects fundamental rights, freedom, and rule of law, equality, and diversity' – may seem like somewhat axiomatic generalised statements, this thesis presents a case for a normative basis for establishing a free speech framework that supports these ideals.[24] As will be seen in the discussions of this thesis, free speech issues can impact how these goals may be

[22] Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (2011) p 196-198.
[23] Bhavani Fonseka and Naveera Perera, 'Does Sri Lanka Need a Truth and Reconciliation Commission?' *Centre for Policy Alternatives* (2024) p 6, 21, 22.
[24] 'Strategy Framework for Social Cohesion and Reconciliation in Sri Lanka', National Strategic Action Plan for Social Cohesion and Reconciliation, *Office for National Unity and Reconciliation* - https://onur.gov.lk/wp-content/uploads/2023/10/National-Strategic-Action-Plan-for-Social-Cohesion-and-Reconciliation-Full-Document.pdf .

achieved (for example, promoting lasting peace through avoiding the conditions that allow extremism to foment, promoting the legitimacy of the State in enforcing laws, facilitating the transition of minorities to engage with the political process etc.). Thus, perhaps in slightly circular fashion, this thesis suggests both that free speech is important to reconciliation in Sri Lanka (in achieving its stated aims and addressing deficiencies in the framework that may hinder it) – and reconciliation is important to free speech in Sri Lanka (as will be seen in the discussions in this thesis, the purposive nature of assessing what may be conducive to reconciliation can inform the best approach to criticisms of the existing framework and for potential reform).

4. Research questions to be answered

In setting out how the research in this thesis may establish and reach conclusions based on its research objectives – the discussions can be distilled into some key research questions to be answered. These include – i) to what extent can there be a functional role in the formulation and application of a free speech framework to the furtherance of the aims of reconciliation in Sri Lanka? At this point, the intuitions of this thesis are that there may be a purposive approach that can go beyond the general goals of bringing the framework in line with international norms and provide a targeted country-specific approach to free speech within a reconciliation context. ii) What would such an approach look like? Such an approach should be normatively attractive, based on the broad aims of reconciliation, provide benchmarks upon which to assess the effectiveness of the current framework, and provide a practical basis for application. iii) How can such an approach contribute to reform? This should be able to contribute beyond general criticisms of the existing framework and provide a foundation for improvements. This could include legal and non-legal reform, changes to or repealing of legislation, a basis on how laws

should be interpreted, and practical steps that account for realities in the country. Essentially, if the intuitions at this stage are confirmed and a normative framework/approach is proposed – then it should be able to provide suggestions for solutions. This does not need to be decisive nor exhaustive; by applying the findings of the first two research questions a conclusion may be reached that particular laws/aspects of the speech framework do not work, and therefore suggestions for improvement can be based on these findings.

5. Thesis structure and route-map to the chapters

The aims of this thesis are therefore to provide a normative approach that is attractive in terms of formulating a free speech framework that is conducive to these goals of reconciliation. It should be able to identify the types of speech that require the most protection, allow for a benchmark to assess the current framework, account for ground realities specific to the country, and be able to assist in providing solutions and potential improvements. The first two chapters will be largely theoretical, setting out the foundation on which the analysis of the other chapters will be based. Chapter One considers the main justifications for protecting free speech and finds the most appropriate approach for the aims of reconciliation. The most prominent justifications are considered (the arguments from truth, autonomy, and democracy) and the democracy/participation justification is identified as most relevant to the aims of the thesis. Chapter Two identifies the forms of speech which require the most protection and sets out the criteria on which the rest of the thesis will be framed. Political speech is identified as most relevant to the research aims of the thesis and the chapter considers methods and challenges in delineating and identifying political speech. The chapter also looks at hate speech and incitement to consider circumstances where limitations may be necessary. The work of Eric Heinze is considered in terms of how country-specific factors (such as institutional or

democratic weaknesses) can affect the legitimacy/necessity of limitations and the scope of public discourse. The chapter then sets out the criteria which lay the foundation for the analysis in the proceeding chapters. Chapters Three, Four, and Five, apply these findings in practice and look at some of the main areas of speech regulation in Sri Lanka. Key areas are focussed on in these chapters which most relate to the research questions of this thesis: the main statutory limitations, online speech, and emergency laws. Chapter Three applies the findings and normative framework suggested in Chapters One and Two to the main statutory limitations on speech in Sri Lanka. Key aspects of the speech framework, its effects in practice, and recent cases are examined (based on its relation to the themes of this thesis). Similarly, Chapter Four applies this approach to the regulation of online speech in Sri Lanka, with a particular focus on anonymous speech and false statements (i.e., disinformation and misinformation). This is done in order to assess the key features of the recently passed Online Safety Act of Sri Lanka (2024), which includes limitations on anonymous speech and false statements (and as will be argued, contain features important to the discussions of this thesis). Chapter Five considers emergency laws in Sri Lanka, and uses the basis set out in Chapter One and Two (and further expanded on through its application in Chapter Three and Four), to examine features of emergency laws in Sri Lanka and whether sufficient safeguards are in place in line with the arguments of this thesis. Finally, Chapter Six links these issues together to reach and examine the conclusions of the thesis in terms of the research questions. This concluding chapter does not attempt to solve all the issues of reconciliation, but rather ties in the analysis of the previous chapters to present a case for using the approach presented in this thesis (in terms of a purposive approach to formulating and improving a speech framework that is conducive to reconciliation).

6. Methodology

The thesis utilises a process of documentary analysis, and library-based research, using a variety of documents to corroborate analysis.[25] Such a method of drawing on varied evidence assists in lending credibility to arguments and analysis in research and preventing biases.[26] The research in this thesis also attempts to (in line with modern approaches to legal research) base its analysis beyond traditional 'black letter' law to include the law in context and frame the discussion on broader principles and impact in practice. As McConville and Chui put it '…law itself becomes problematic both in the sense that it may be a contributor to or the cause of the social problem and in the sense that whilst law may provide a solution or part of a solution, other non-law solutions, including political and social re-arrangement, are not precluded and may indeed be preferred.'[27] The first two chapters, which set out the theoretical basis on which the rest of the thesis is based draw, on the work of prominent legal theorists to establish the main justifications for protecting speech and approaches to categorising speech. Key approaches are compared and assessed, and then contextualised in terms of how they apply to the research objectives of this thesis. The rest of the chapters apply the findings and criteria established in the first two chapters to the main areas of speech regulation specific to Sri Lanka. The research in Chapters Three, Four, and Five, begins as largely doctrinal, looking at case law and statutory instruments to establish the scope of the current speech framework in the country. It then weighs this framework against the normative basis/criteria established in the theoretical chapters to identify weaknesses and potential law reform. This approach to research can begin with establishing the existing legal framework and then expand analysis to its broader features and impact. This could mean '…a consideration of the problems currently affecting the law and the policy underpinning the existing law, highlighting for example, the flaws in such

[25] Glenn Bowen, 'Document Analysis as a Qualitative Research Method', Qualitative Research Journal Vol. 9 Issue 2 (2009) p 27, 28. This forms a systemic analytical procedure to evaluate documents and gain empirical knowledge - and to incorporate appraisals of information based on documents into research.
[26] *Ibid*. Qualitative research requires multiple sources of evidence to 'seek convergence and corroboration through the use of different date sources and methods.'
[27] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2017) p 1.

policy. This in turn may lead the researcher to propose changes to the law (law reform).'[28] Such research can also collect and evaluate relevant case law to demonstrate how certain laws may not be working and conclude the need and avenues for reform.[29]

One of the main methodological challenges in the process of this research has been that of access to resources. This was, at least relatively, fairly straightforward in the first two theoretical chapters as it largely referenced established ideas to apply it to the research objectives of the thesis. The challenge arose therefore in relation to the specific examination of Sri Lanka, where material was more difficult to find. As some of the issues discussed are current and undergoing change, this presented challenges in terms of a lack of cases or academic discussion relating to effects in practice. For example, the recency of the *Razik* judgment[30] and the newly passed Online Safety Act of Sri Lanka[31], meant that material relating to these that could assist the research process were limited. The approach of this thesis was therefore to critically evaluate their features (particularly in relation to the normative basis and criteria set out in the theoretical chapters) to highlight their potential effects through a speculative and inferential appraisal based on the discussions in those chapters. Finding case law and information relating to them presented separate methodological challenges that reflect some of the difficulties of legal research in Sri Lanka (as opposed to the United Kingdom, for example). Whilst the judgments of the Supreme Court are relatively accessible and in English, the lower courts such as the Magistrate's traditionally operate in Sinhala and their judgments

[28] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) p 22. Dobinson and Johns suggest that this represents the link between doctrinal and non-doctrinal approaches to legal research which can be considered together as part of a research project. Evaluation of policy or law reform takes an empirical approach that may be inferential in nature.
[29] *Ibid*. For example, in Chapter Three, issues in the formulation of the ICCPR Act and Penal Code are identified with criticisms and concerns raised as to its interpretation and effect. This is then assessed by reference to its application in practice, looking at recent cases to demonstrate its issues and potential for reform.
[30] See Chapter Three.
[31] See Chapter Four.

are far less accessible online (if at all). This has meant that most of the substantive analysis of case law has centred on the judgments of the Supreme Court of Sri Lanka, whilst reference to cases in the lower courts are made through indirect sources.[32] Furthermore, Sri Lanka and its speech framework receives relatively limited academic attention compared to more internationally prominent countries. However, this thesis was able to find and utilise valuable contributions by academics (both domestic to Sri Lanka and international), non-governmental organisations, and international organisations that significantly assisted the research of this thesis.[33]

[32] For example, when discussing some of the recent cases of potentially arbitrary limitations on speech in Sri Lanka in Chapter Three, it was necessary to choose some of the cases that received particular public attention and use news sources, academic articles, and statements of organisations (international and NGOs) for information relating to these cases. This represents some limitations of the research in terms of research material, but also supports some of the arguments made that institutional weaknesses affect these laws in practice. Most of the cases do not proceed to the higher courts – the fact that information of these cases is difficult to find (apart from when a particular case receives public attention) and often receives limited substantial judicial consideration (essentially rubber-stamping State direction), reflects issues with the speech framework in country-specific practice.

[33] The work of Sri Lankan academics such as Gehan Gunatilleke are used and provided valuable material for analysis and discussion. Other material was sourced from organisations such as the Centre for Policy Alternatives, the Human Rights Commission of Sri Lanka, the International Commission of Jurists etc.

Chapter One

Justifications for Free Speech

1.1 Introduction

This chapter summarises the main justificatory arguments for free speech and considers how they apply to the creation of reconciliation as defined in the introduction. As mentioned previously, the term reconciliation is often used too imprecisely – so it needed to be defined in the introduction. This area of examination has been chosen as the first substantive chapter in this thesis as a means of setting the groundwork for the overall examination of speech laws in Sri Lanka and potential for reform in later chapters. By establishing the theoretical foundation upon which Sri Lanka's speech framework could be based, this allows the next chapter to delve further into categorising the type of speech that should be protected.

1.2 Democratic Participation

The furtherance of participation in the democratic process is one of the most well-established values underlying the benefits/interests in protecting the freedom of expression. Whilst democracy is regarded in modern times as the most practical system of governance to ensure that sovereignty lies with the people, the justification for its implementation is an ongoing process.[34] Democracy is not an inherent good, but rather it is viewed as a good because it confers on each individual an equal and continuous stake in the State's governance. Every

[34] Joshua Cohen, *Deliberation and Democratic Legitimacy, in The Good Polity: Normative Analysis of the State*, (Alan Hamlin & Phillip Petit eds., 1989).

democratic decision stems from a system that places value on the contribution of each individual who chooses to use their rights to affect the decision-making process. Dahl describes the democratic process as being justified on the grounds that 'people are entitled to participate as political equals in making binding decisions, enforced by the state, on matters that have important consequences for their individual and collective interests'.[35] There are two key points to extrapolate from Dahl's statement in relation to democratic participation; that of i) the notion of political equals and that of ii) the importance of both individual and collective interests.

i) The idea of political equals derives not only from the belief that all individuals should have an equal right to engage in public discourse, but also from the idea that the engagement by all individuals has the potential to contribute value to that discourse.[36] This idea originates from the intellectual shaping of the Enlightenment and Classical Liberal thought which highlighted the principle that every person in society has a moral value equal to that of their peers and that a government, which cannot dilute that worth, must treat individuals with equivalent respect.[37] This view of democracy presupposes that for there to be political equality, each individual must be able to suggest alternatives to governmental policy and the preference of each member holds an equal value: i.e. 'the alternative preferred by the greater number is selected.'[38]

ii) The idea that both individual and collective interests are included in the engagement of political equals with the State, constitutes a recognition of the fact that the individual is not only concerned with that which affects their personal lives and

[35] Robert Dahl, *Controlling Nuclear Weapons: Democracy Versus Guardianship* (Syracuse University Press 1985) p 5.
[36] John Rawls, *A Theory of Justice* (Harvard University Press 2005) p 225.
[37] John Locke, *Second Treatise of Government* (1689) Chapter 2.
[38] Robert Dahl, *A Preface to Democratic Theory* (University of Chicago Press 1956) p 64-67.

> welfare, but rather that their contribution extends to government policies that affect the broader society as a whole. A true democracy with political equals must allow for the individual to utilize their own reasoning to assess the merits of each political proposal – and to appraise which policies benefit them and 'advance their conception of the public good.'[39]

The above points show that each person's contribution can be on matters far beyond what affects their property or personal affairs, and can include a range of political, social, and economic issues. Furthermore, the contribution of each person is of equal political value. For example, a farmer in the countryside has just as much of a stake in their democratic engagement in relation to the State's foreign policy as an academic in London. If this is accepted, then it clearly follows that this right to engage in the democratic process cannot merely be limited to the ballot box.[40] Being able to vote for a policy is an expression of the democratic process, but it is not its entirety. If a person does not have knowledge of the full range of options and alternatives available, then their engagement with the democratic process is meaningless.[41] It is therefore an inextricable part of the right to democratic engagement, that there is a right to education.[42] This right to education is characterized, in part, by a person's ability to have access to speech that can inform their opinion on policies that their vote ultimately expresses. This access must not be limited in a democratic society because it is what allows a voter to educate themselves on the wider human experience and which drives their choices in political decision making. The contributions of science, philosophy, arts, literature, and the diverse range of political opinion can all be relevant to the individual's engagement with the democratic

[39] Rawls, *supra* note 36, p 225.
[40] Frederick Schauer, 'Free Speech and the Argument from Democracy', Liberal Democracy Vol. 25 (1983) p 241, 247
[41] *Ibid*; Rawls, *supra* note 36.
[42] Alexander Meiklejohn, 'The First Amendment is an Absolute', The Supreme Court Review (1961) p 245, 256.

process.[43] An argument could even be made that because the vote is the end result of 'the more fundamental citizen prerogative of expression within public discourse', the inclusion of the individual within that discourse 'surpasses even the necessary procedure of voting as democracy's defining element.'[44] The freedom of speech is, therefore, what ensures the substantive exercise of an individual's right to democratic participation.[45]

1.2.1 Ability to cross-examine State power

A democracy is a system which allows the people, who hold sovereignty, to appoint agents to exercise that power on their behalf.[46] The potentially awesome power that those agents who have been delegated power by the citizens may wield, also necessitates that it should also be limited by the people. The potential for agents who have been delegated power to abuse the trust placed in them, has been a pervasive issue that has concerned humanity through much of history. Classical philosophers have highlighted the threat of political leaders entrenching power for themselves, and the right of the public to reject them.[47] The capacity for free speech to serve as 'a check on the behaviour of incumbents' became particularly pronounced with the development of the newspaper as one of the 'major forces in the politics of the times' in the eighteenth century.[48] To protect people against tyranny, they must be allowed to 'remonstrate the abuses of power'[49] and thus 'the freedom of speech is a principal pillar in a free

[43] *Ibid* p 257.
[44] Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press 2016) p 49.
[45] Schauer, *supra* note 40.
[46] Ibid p 256.
[47] John Locke, *An Essay Concerning the True, Original, Extent, and End of Civil Government* (Peardon ed. Indianapolis: Bobbs-Merrill, 1952) chapter 13-19; Locke, *supra* note 37, Chapter 18.
[48] Vincent Blasi, 'The Checking Value in First Amendment Theory', American Bar Foundation Research Journal, Vol. 2 (1977); Fredrick Seaton Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Controls* (Urbana: University of Illinois Press, 1952) p 289-302, 323-63. The effectiveness of this in practice may not always be consistent, but the point remains that this marked a shift in terms of the increased potential of free speech in this regard.
[49] James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (2d ed. Harvard University Press, 1972) p 25.

government.'[50] This aspect of freedom of speech could be viewed as an extension of the access to education required by a citizen for effective democratic participation. A citizen's franchise would be meaningless if they could not educate themselves on the malfeasance and corruption of those in power and in turn use their vote to remove them. Thus, democratic participation is not limited to the contribution to policy that each individual can make, but each individual also holds a 'veto power to be employed when the decisions of officials pass certain bounds.'[51] This check or balancing effect of free speech is not only limited to a theoretical sense (i.e., a franchise would be meaningless without free speech) but also has a consequentialist impact in practice. It is easy to imagine the temptation of those in power to abuse that power if left unchecked[52], and a society whose education cannot be restricted by those in power is better equipped to be able to check that power. For example, to illustrate the significance of free speech as a checking mechanism, famines have historically cost the lives of many millions of people from ancient to modern times, ravaging communities and destroying livelihoods. However, as Amartya Sen points out – such famines 'have never materialised in any country that is independent…has opposition parties to voice criticisms…permits newspapers to report freely and question the wisdom of government policies without extensive censorship.'[53]

1.2.2 Legitimacy of State policy

An idea, operating as an extension to the democratic participation argument, is that for any State policy to have legitimacy, it must be based on a process in which each individual's effective participation is protected and their voice can be heard. This argument has been

[50] *Ibid* p 181; *supra* note 47.
[51] *Supra* note 47.
[52] *Ibid*.
[53] Amartya Sen, *Development as Freedom* (Alfred A, Knopf Inc, 1999) p 152, 153. A modern example of this may be the Covid-19 pandemic and related issues of free speech as a checking mechanism against overbroad responses.

powerfully stated by Ronald Dworkin who argues that it is illegitimate 'for governments to impose a collective or official decision on dissenting individuals, using the coercive powers of the state, unless that decision has been taken in a manner that respects each individual's status as a free and equal member of the community.'[54] For an individual to be considered equal, they must have the opportunity to publicly express their support or disapproval of a policy if they are to be legitimately beholden to it.[55] He further states that a 'majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action. The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken.'[56] An individual should not be prevented from engaging with a public forum on the basis that they are likely to express dissenting opinions, and this forms a key part of the democratic process.

When a democratic State governs over a populace, it inevitably has to use coercion to implement its laws.[57] These laws, in principle, must be the result of a process of democratic participation and it is that process which gives the State the political legitimacy to enforce those laws. Furthermore, it could be argued that because there is a social contract whereby people are equally granted access to the political process - they are obligated, even if they opposed the

[54] Ronald Dworkin, 'Foreword', in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy*, (OUP 2009) p vii.
[55] This would mean that if a public forum is available, they would not be prevented from participating on the basis that they would likely express dissenting opinions.
[56] *Ibid*.
[57] Christopher Wellman, 'Liberalism, Samaritanism, and Political Legitimacy', Philosophy and Public Affairs, Vol. 25 No. 3 (1996) p 211, 212.

law, to obey it.[58] Studies have shown that the ability to take part in the political process by expressing views and opposition to decisions, and whereby such views are treated with respect, increases the likelihood that those people expressing them will feel that they should obey the law – even if it is a law that they disagree with.[59] Conversely, the denial of the right to voice opposition is more likely to cause disaffection and insult to an individual's moral worth as an equal political being.[60] Whilst this may not make a government illegitimate per se, it contributes to a sense that the governments political legitimacy is diminished, and it is difficult to justify the morality of enforcing that law.

1.2.3. Democratic participation and its place in democracy

The discussion within this subsection has set out the way that this justification is linked to democracy. Free speech is viewed as almost inherently tied to the effectiveness of democratic norms. This part of the subsection will attempt to examine some of the ways in which this argument has been approached and articulated.

Alexander Meiklejohn emphasises the importance of protecting free speech in the interests of self-governance – beyond merely the absence of regulation.[61] Meiklejohn's focus lies primarily on protecting political speech in the interests of democracy and self-governance. The freedom of speech therefore stems from a specific function in terms of types of speech through which

[58] James Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy', Constitutional Commentary 465 (2017) p 465, 534.
[59] Tom Tyler, 'Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities', Law and Social Inquiry, Vol. 25 No.4 (2000) p 983, 995–96, 1007. For example, Tyler refers to studies such as one relating to support for a controversial policy (Federally funded abortions), where perceptions of the fairness of the decision-making strategy (where one group had the opportunity to have someone who represented their position voice their opposition or support for the policy, whilst the other group was not) shaped whether authorities were viewed as legitimate, and the likelihood of support for a policy (regardless of personal views on the issue).
[60] Weinstein, *supra* note 58, p 22, 537, 538.
[61] Meiklejohn *supra* note 42, p 252, 254. Meiklejohn distinguishes regulations on speech from the broader concept of an abridgement of freedom. Political freedom is therefore the ability to self-govern, rather than the absence of government.

the public 'govern' (i.e., contribute to and influence State policy).[62] Self-government requires, not only the ability to freely vote at the ballot box, but access to the range of communication and information that is required for such a vote to be effective. This includes adequate education, access to philosophy and the sciences, literature and the arts, and public discussions of public issues.[63] Although the focus lies primarily on political speech (and its value in facilitating the ability to self-govern), it remains open to wider forms of speech that make up broader education, such as '…novels and dramas and paintings and poems…'[64]

Habermas approaches this with a focus on the discourse aspect of democratic participation. Democracy consists of a deliberative process where citizens are able to engage in reasoned debate. Where a society aims to, through democratic process, organise the common rules of society, such a society must accord a preeminent position for political debate. Such debate must be based on 'pragmatic presuppositions' to assume its effectiveness (for example, that anyone can take part in the debate, challenge others, introduce ideas, treat each other as equals, be able to speak without being forced, etc.) – the political debate is deliberative in practice where these presuppositions are satisfied.[65] These presuppositions are not necessarily hard rules, they are general ideals, where Habermas recognises they may not always be completely fulfilled – but discourse requires that they be sufficiently fulfilled.[66] Habermas also puts forward the concept of a 'public sphere', which is the space where public debate occurs, and opinions are formed. The term public is not to be taken literally - i.e., it does not necessarily mean a group of people *per se,* instead it takes form through the assembly and participation of people, allowed to debate

[62] *Ibid*, p 255.
[63] *Ibid*, p 256, 257.
[64] *Ibid*, p263.
[65] Kevin Olsen 'Deliberative Democracy' in *Jurgen Habermas: Key Concepts* Barbara Fultner (Taylor and Francis 2012) P 140.
[66] Hugh Baxter 'Habermas's Discourse Theory of Law and Democracy', Buffalo Law Review Vol. 50 (2002) p 205, 221.

in unrestricted fashion – manifesting as an almost institutional public body that deals and influences matters of the State. In other words, it is the space and potential impact, where (and how) this discussion takes place.[67] Although the State is required to facilitate this space, it is not part of it – the public sphere operated distinctly from the State itself and serves an adversarial position to criticise and influence.[68] Furthermore, the State derives legitimacy through the communicative power of the public.[69] It is only where there has been open discourse and deliberations that political decisions are legitimate.[70] An outcome, that the public agrees to be bound to, must be subject to robust examination and criticism, that is only possible through reasoned debate that is protected through free speech. The legitimacy of laws, and the State's enforcement of them, is therefore dependent on the communicative power of the people – facilitated through a public sphere that protects free speech and allows for open discourse.[71]

Similarly, Robert Post argues in favour of protecting speech due to its importance to democracy. However, his approach lays more of a focus on the interests of the democratic participation of individuals to author and influence potential law, rather than the broader values of collective decision making and ideas.[72] In addition, he suggests that other theorists (such as Meiklejohn) focus on the interests of the audience (and the value of free speech to their self-governance), whilst his approach places the value on the speakers.[73] The value of public discourse is in allowing for democratic self-governance where individuals are able to exercise

[67] Jurgen Habermas, Sara Lennox, and Frank Lennox, 'The Public Sphere: An Encyclopedia Article', New German Critique No.3 (1964) p 49; see Chapter Two for further discussion of the public sphere and how this concept may be impacted by different contextual factors.
[68] *Ibid*.
[69] Christopher Zurn 'Discourse theory of law' in *Jurgen Habermas: Key Concepts* Barbara Fultner (Taylor and Francis 2012) P 160
[70] Tao Huang, 'Free Speech Capability' Harvard Human Rights Journal Vol. 37 (2024) p 25; Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (William Rehg Translation 1996).
[71] Baxter *supra* note 66, p 266 – 268.
[72] Robert Post, 'Participatory Democracy and Free Speech' Virginia Law Review Vol. 97 No. 3 (2011) p 482.
[73] *Ibid.*

their political autonomy by contributing and influencing public discourse and State policy.[74] Citizens should therefore have equal rights and access to public discourse within the political sphere – which then gives legitimacy to State decisions.

Although these approaches may contain some differences, they are largely based on similar overarching themes that emphasise the importance of protecting free speech in the interests of democracy. They place value in its relation to people's ability to contribute to State decisions through public discourse, and the legitimacy of those being enforced on them.

1.3. Autonomy

The argument that the freedom of speech should be protected because interferences with it invade individual autonomy differs from most of the other justifications for free speech. It is not necessarily an argument that speech must be protected because of the consequences to truth (the argument from truth is discussed in the next subsection) or democracy that restricting it would cause – but that it must be protected as a good in and of itself. It is a deontological as opposed to a consequentialist argument. It does not derive its justification from the value of the effects on society that speech can produce but posits that the speech itself is of value. The nature of communication that is tied with freedom of speech is viewed as an intrinsic good in the pursuit of individual identity and should be respected and valued by the State as part of

[74] This is distinct from the argument from autonomy, discussed in the next subsection – Post talks about autonomy in terms of the individual's relationship with the State, specifically in terms of democratic self-governance, *ibid*, p 479, 484.

equal respect. [75] Liberty should be viewed as both an ends and a means which the State has a continuing obligation to facilitate by allowing individuals to develop their faculties and self.[76] A person's autonomy can be described as 'her capacity to pursue successfully the life she endorses—self-authored at least in the sense that, no matter how her image of a meaningful life originates, she now can endorse that life for reasons that she accepts'.[77] Whilst it is impossible for a State to ensure that this is fulfilled completely, the obligation should be for the State to ensure that both the opportunity to do so, and the ability to endeavour to do so – is not limited.

What separates the argument from autonomy from others is that because it is based on the intrinsic morality of free speech (rather than the consequential benefits), the scope of its relevance can be wider. The argument from democratic participation, for example, focuses on the benefits to democracy and therefore is strongest in relation to the forms of speech that are most relevant to political discourse. Arguably, the value placed on the speaker in the democratic argument only makes sense if there is a recognition of the importance of the individual mind and the value of its distinct features, which then mandates that it is deserving of equal respect by the State.[78] The speaker's expression is vital to democracy precisely because of a recognition of their individuality. The autonomy argument goes beyond considering the value of the individual to the wider public and considers the intrinsic value to each person in having the ability to become a distinct individual. Each person has a right to utilize their capabilities to engage with all aspects of life that allow them to assume and distinguish their individual personalities from that of others'. Such authorship results in the wide range of individual features and perspectives that form separate personhood.[79] As Shiffrin argues, a

[75] *Supra* note 48, p 545.
[76] *Whitney v. California*, 274 U.S. 357 (1927) p 375.
[77] Edwin Baker, 'Autonomy and Free Speech', Constitutional Commentary 27 (2011) p 251, 253.
[78] Seana Shiffrin, 'A Thinker-Based Approach to Freedom of Speech', Constitutional Commentary, Vol. 27 Issue 2 (2011) p 283, 288.
[79] *Ibid*, p 289.

justification for speech based on protecting the autonomy of an individual from an approach centred on the thinker (I.e., the ability to develop individuality from both speaking and hearing) – supports the moral argument for a wider range of speech protection without having to indirectly justify how that speech relates to political discourse.[80] Each form of expression would therefore not be reliant on how much it can be claimed to be relevant or of value to political discourse. If the focus is on the speaker, then it is easier to justify the protection of non-political speech, art, music, private conversation, diaries, material for private consumption etc. without there having to be a 'lexical hierarchy of value between them'.[81] Furthermore, speech is the only proper means by which to effectively make oneself known as an individual to others. It is through communication that an individual can present their self-authored personality to other individuals and to in turn understand that of others. Respecting one another as equals is based upon understanding the individuality of each person which is not possible without communicating their beliefs and motives. It is only through this mutual understanding of the perspectives of others and respect of their unique characteristics, that an individual can foster their moral agency, allowing them to participate in society.[82] To prevent this communication between autonomous people is to effectively isolate them.[83] Even if superficial communication is possible, the inability to express the facets of personhood that constitute an independent mind, would be to imprison a person within the confines of their own head.

1.3.1 Attacks on autonomy

[80] *Ibid* p 285.
[81] *Ibid*.
[82] *Ibid* p 291.
[83] *Ibid* p 293-294, Shiffrin compares this to the extreme effects solitary imprisonment has on prisoners; Craig Haney, 'Mental Health Issues in Long-Term Solitary and "Supermax" Confinement', Crime and Delinquency Vol. 49 Issue 1 (2003) p 124, 130–32.

The effect of hate speech on individuals can be wide ranging, and a criticism of the autonomy argument may be that certain forms of speech that attack someone's personhood, can affect their autonomy.[84] Hate speech has the potential to have detrimental effects on the psyche of groups and individuals. When hateful speech aims to attack and delegitimize certain groups of people, portraying them as less than human, unequal and unwelcome – it can have a detrimental impact on a person's autonomy and ability to live their lives as individuals and may be deemed to 'silence' them. [85] If the freedom of speech is important because of the right to individual autonomy, then how can speech which affects the autonomy of another individual be permitted? The harm caused by hate speech reduces the very thing that justifies free speech- i.e., the respect for autonomy. Those in favour of hate speech bans could argue that even though there is a certain amount of autonomy lost by the speaker of hate, such measures are justifiable in relation to the risk to the autonomy and well-being of minorities that hate speech could cause. When balancing the competing rights, it would be preferable to protect the right of minorities to not fear discrimination, exclusion from society and the harm to individual development that accrues from this - by limiting the right of the hate speaker.[86]

The above argument portrays the issue that hate speech can potentially cause harm. If the basis of the argument is that the harm caused by hate speech is what justifies the restriction of speech, then it is not clear why this should be limited to hate speech. If the harm that is to be prevented is the potential of hate speech to affect autonomy or prevent an individual from feeling able to freely engage with the public, then the restriction of other forms of speech that potentially could have similar effects may become warranted. For example, many religions contain highly

[84] Hate speech is briefly considered here for the purposes of explaining some of the criticisms and justifications for this argument for protecting speech. A more substantial examination of the wider issues relating to the regulation of hate speech is considered in Chapter 2.
[85] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) p 160.
[86] *Ibid*.

misogynistic ideals and promote the idea that women should assume a diminutive role in society, dress modestly, speak modestly etc.[87] Often, these ideals are framed in such a way as to not only encourage people to follow them, but also on the basis that non-observance is sinful and will result in punishment.[88] This could clearly have an impact on a person's willingness, confidence and ability to engage with society as an equal autonomous individual. If it is worth qualifying the right to freedom of speech in the interests of protecting people from the harm from hate speech, then perhaps it would also be worth limiting religious speech that could potentially carry similar risks of harm. Obviously, this would be an unsatisfactory resolution to the problem. The exercise of autonomy will inevitably result in situations where speech is expressed that does not respect the autonomy of others. In a sense, that disrespect is in itself a manifestation of that autonomy. The obligation of the State is to ensure that it respects each individual as autonomous beings and to allow them the right to pursue knowledge and development to that end. In doing so, it must balance the sometimes-competing interests of protecting the expression of autonomy and protecting autonomy from expressions that can harm.

In reconciling those competing interests, Ed Baker puts forward one of the most attractive approaches in support of an autonomy-based free speech justification. He distinguishes autonomy into a formal conception of autonomy and a substantive one.[89] Formal autonomy in his view is the authority to make one's decisions and utilize their resources in relation to their

[87] Sarah M. Stitzlein, 'Private Interests, Public Necessity: Responding to Sexism in Christian Schools, Educational Studies', Educational Studies, Vol. 43 Issue 1 (2008) p 45-57; https://www.secularism.org.uk/news/2017/11/islamic-faith-schools-endorsing-misogyny-dossier-reveals.
[88] Rosemary Bennett, 'It's ok to beat your wife, says Islamic schoolbook', *The Times* (2017) https://www.thetimes.co.uk/article/it-s-ok-to-beat-your-wife-says-islamic-school-book-vll3jdjw7; Siobhan Fenton, 'Christian fundamentalist schools teaching girls they must obey men', *Independent* (2016) https://www.independent.co.uk/news/education/education-news/accelerated-christian-education-christian-fundamentalist-schools-are-teaching-girls-they-must-obey-a7066751.html.
[89] Edwin Baker, 'Autonomy and Informational Privacy, or Gossip: The Central Meaning of The First Amendment', Social Philosophy and Policy, Vol. 21 Issue 2 (2004) p 215.

actions and individuality. Substantive autonomy is the capacity to successfully pursue their conceptualization of individuality.[90] A person cannot use their formal autonomy to exercise power over another person to invade their formal autonomy. However, their formal autonomy includes all aspects of self-expression including those that may affect another person's substantive autonomy.[91] A person can use their expression to convince another and negatively affect the realization of their aims. However, they cannot exercise their formal autonomy to use violence or manipulation to harm another person's autonomy.[92] Such actions are intrinsically disrespectful of the other person's autonomy and aims to undermine it – it is not the expression of a view, but a coercive attempt to destroy another individual's agency.

If we were to apply this to a hypothetical scenario – imagine a situation where someone decides to start a cult/religion that believes that blue-eyed people should not talk about politics. This person would be able to exercise their formal autonomy by expressing their disdain at the thought of blue-eyed people talking about politics. A blue-eyed person hearing this may feel that their views on politics are unwelcome or may be convinced by the person and decide that they do not want to participate in politics. This does not necessarily affect the blue-eyed person's formal autonomy. They still retain the authority to express their alternative view and reject the argument. However, the blue-eyed person's substantive autonomy is affected because they may become less likely to talk about politics because of the cult/religion's ideology. The solution to this is not for a State to restrict the autonomy of either party, but it arguably has a moral duty to bolster the substantive autonomy of blue-eyed people. This could be done effectively without speech laws. A State could release statements in favour of blue-eyed people in politics, allocate funds for political education and awareness in blue-eyed communities,

[90] Baker, *supra* note 77.
[91] *Ibid*, p 254.
[92] *Ibid*, p 256.

provide and promote platforms for blue-eyed people to publicly engage in politics etc. Furthermore, the State would be able to intervene if the cult/religious leader attempts to maliciously impede a blue-eyed person's formal autonomy. It would not be a justified expression for them to threaten blue-eyed people who choose to talk about politics with violence, physically block them from leaving home on voting days or lie to them by saying that a voting centre is closed. This solution would preserve the formal autonomy and individual expression of both parties' individual perspectives but allow the State to promote the substantive autonomy of the discriminated party.

1.4. Argument from truth

The argument for protecting speech for the purpose of facilitating the attainment of truth can largely be attributed to the seminal work of John Stuart Mill in his highly influential writing in 'On Liberty'.[93] Mill's theory for justifying protecting free speech derives from a strong belief that progress in society is dependent on the search for truth. The benefits of truth, and the pursuit of truth, makes it a worthy societal goal.[94] It is only through a diversity of opinion that one can assess whether a received opinion is true or false; and it is only when differing and incomplete ideas face each other in the public sphere, that a better and more complete picture can be attained.[95] Furthermore, it is often the most eccentric of ideas and individuals who may be of most use for society; and they in turn face the most societal pressure for conformity.[96] The individualistic ideas of contrarian thinkers may be the impetus for new discoveries that

[93] John Stuart Mill, *On Liberty, reprinted in On Liberty and Other Essays* (John Gray ed., 1998) (1859).
[94] Irene M. Ten Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defences', Yale Journal of Law and the Humanities, Vol. 22 p. 35 (2010), p 35, 39.
[95] Mill, note 93, p 83, 36.
[96] Cate, note 94, p 84, 50.

can improve people's lives or reiterate the importance of established values.[97] There is therefore an interest in society to promote a context that is conducive to free thinking and which stimulates the development of free thinkers. As Blasi puts it, 'by tolerating unorthodox opinions and inquiries a community encourages creativity both by valuing it and by enabling creative persons to achieve visibility and interact'.[98]

The benefits of a diversity of ideas leads to a marketplace of ideas where the differing arguments challenge one another, eventually leading towards the truth. Alternatively, some have placed the value of the marketplace of ideas not necessarily on the end result of truth itself, but an almost Darwinian adaptation to context, where interests continually compete against each other in a form of natural selection of ideas where the best option for the present situation will prevail.[99] The argument against unfettered free speech in this context is that there is often 'gross inequality among communicators in the marketplace of ideas'[100], which means that in practice differing opinions are not heard in equal measure.[101] If minorities do not have the ability to challenge hate speech on the same level as the other groups, that affects the attainment of truth by tilting the marketplace of ideas in favour of dominant groups.

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[97] *Ibid*, p 51.
[98] Vincent Blasi, 'Free Speech and Good Character', UCLA Law Review 46 (1999) p 1567, 1577.
[99] Vincent Blasi, 'Holmes and the Marketplace of Ideas', Supreme Court Review Vol. 2004 p. 1 (2004) p 31, 32.
[100] Kent Greenwalt, 'Free Speech Justifications', Columbia Law Review 89 (1989) p 119, 134.
[101] Further criticisms of this argument are explored in Peter Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar, 2021), p 142, 147. Of particular note, within the context of this thesis, are the criticisms that there is not necessarily a causal link between free expression and the discovery of truth (particularly with regard to online speech and issues of disinformation/misinformation that proliferate the online space – for example with the narratives surrounding the Covid-19 virus), and that the marketplace of ideas may be subject to inequalities resulting from the medium used (for example, online posts reaching a greater audience with more immediacy that traditional print media). Although these are valid points, they do not necessarily invalidate this argument. There is a fair basis to suggest that some of these issues represent, not a deficiency in the argument from truth/marketplace of ideas, but rather an example of issues resulting from novel methods of communication that can be reconciled with this argument. For example, whilst issues of fake news online may be alarming, they may still form part of public discourse, and end up revealing truth as envisioned by this argument. Furthermore, new methods of communication, whilst outcompeting traditional media, provide a stronger marketplace of ideas by reducing the barriers of entry for individuals to public discussion. See Chapter Four for a more detailed consideration of these issues (and discussion relating to these criticisms), particularly in regards to the effects of novel forms of communication, online speech, and false information/fake news.

Whilst this is a serious issue, the problem is not necessarily with free speech, but with an unequal access to modes of speech. For example, if certain viewpoints are disproportionately prevalent in the media, banning that speech would not be an effective solution. As discussed previously in the autonomy argument, the State has many avenues by which to promote minority engagement with public discourse without banning speech. If minorities do not have the resources to challenge hate speech, a State can actively promote non-discrimination policies, publicly challenge hateful ideologies, support minority voices, give them avenues to public exposure etc.

Another issue is, how do we fairly determine which minority voices are to be protected without the State passing moral judgment as to which forms of speech to protect[102] – effectively stifling the marketplace? If the argument against unfettered free speech is the inequality amongst communicators, it should follow that the unpopular ideologies are potentially the most disadvantaged. The fringe nature and unpopularity of their views would mean that they have less resources to combat the more prevalent narratives. This would put States in a difficult position. For example, a reasonable claim can be made that the majorities in most States in the West agree that racism/discrimination is bad. So, when a minority group argues in favour of policies to curb discrimination, although their identity may be that of a minority, the view they are presenting is actually one that is agreed on by the majority. In this situation, the minority view is actually that of the hate speaker (with the content of their expression contrary to the

[102] One of the issues that is raised in relation to free speech guarantees is the effects of inequality in society, particularly in relation to minorities (who may lack equivalent power compared to the majority, or face issues such as discrimination, lack of resources, political marginalisation, lack of education etc., that render their voices less able to compete with established majorities) – for example, see Nadine Strossen, 'The Interdependence of Racial Justice and Free Speech for Racists', Journal of Free Speech Law 1: 51 (2021) p 53, 56. Another issue is that of the silencing effect of hate speech on minority voices, that may inhibit their ability to contribute to the marketplace – which raises issues of how to protect expression from these groups (see subsection 2.4.4, Chapter Two).

majority view), and the unpopularity of their viewpoint means that they are the ones that suffer from the inequality in the marketplace. If a truth is reached without being contested, then it will find itself in a very frail position. Minorities will find it even more difficult to defend a position which has not been attained through challenge and will hold those views just for the sake of it, without a true understanding of why it is true. Challenges to one's beliefs help reiterate them and keep them alive because it forces a person to strengthen the foundations of their belief by understanding its merits, weaknesses and grounds on which it is based on.[103] Even speech that is gratuitously offensive can have much value in challenging established narratives. O'Reilly refers to Ayaan Hirsi Ali who employs highly critical speech against Islam to bring attention to women's rights issues in Islamic communities such as female genital mutilation.[104] Whilst the way in which she attacks the religion may be offensive, the shock value can be a useful vehicle for bringing attention to a pressing issue or challenging dogmatic ideas, forcing people to reconsider their ideological positions.

1.5. Conclusion

This chapter has so far provided a brief overview of the main theories supporting the protection of free speech. It will now consider how these may be tied in with reconciliation and which principles may be most relevant in this process. It is evident that reconciliation in Sri Lanka is a priority that requires significant attention. For the purposes of this thesis, it is worth considering the goals referred to in the introduction that are being pursued so that an assessment of how legal speech frameworks can affect these goals can be achieved. The pursuit of

[103] Cate, *supra* note 94, p 84, 41.
[104] Aoife O'Reilly, 'In Defence of Offence: Freedom of Expression, Offensive Speech and the Approach of the European Court of Human Rights', Trinity College Law Review 19 (2016), p 234, 237.

reconciliation in Sri Lanka is 'an enormous task' which requires action on many levels.[105] This is often further complicated by the differing attitudes and approaches of different governments in addressing these issues.[106] The concept of reconciliation itself has been open to much interpretation as to its meaning, with differing views as to its definition – often open to vague platitudes.[107] However, as previously mentioned in the introduction, for the purpose of this thesis, the wider context of reconciliation (and broader substantive challenges in implementation) is less relevant as the main focus is on how this relates to speech. To this end, it is useful to consider some key aspects that have gained consensus as important factors – open and inclusive dialogue, effectiveness and trust in institutions and systems, sustainable peace, and a shared stake in the nation and its political process.[108] These factors would all benefit from a robust speech framework. Applying the previously discussed main theories in support of free speech will allow for a basis in which to approach the rest of this thesis.

It would initially be tempting to consider the argument from truth to be the most applicable to reconciliation. In fact, the process of reconciliation is often linked to the search for truth, with commissions titled under the banner 'truth and reconciliation' almost becoming the norm.[109] Although the degree to which truth should be given importance has been debated, the fact is that it is widely accepted as deeply linked with reconciliation.[110] This is arguably a different type of truth (or at least a specific subset of it) than that envisaged in the free speech justification. In the context of reconciliation, the search for truth is usually based on

[105] 'Reconciliation in Sri Lanka: Harder than Ever', *International Crisis Group Asia*, Report No. 209 (2011), p 34.
[106] Samatha Mallempati, 'Reconciliation in Sri Lanka: Possible Implications', Indian Foreign Affairs Journal, Vol. 14 No. 1 (2019) p 17.
[107] Tristan Anne Borer, 'Reconciling South Africa or South Africans? Cautionary Notes from the TRC', African Studies Quarterly, Vol. 8 Issue 1 (2004), p 23.
[108] Dharshana Weerasekera, Chapter 21 'An Interview with the Head of The Office of National Unity and Reconciliation', in Sarath Wijesinghe (President's Counsel) and Amila Wijesinghe (eds), *Peace and Reconciliation* (The Ambassadors Forum 2022); *supra* note 67, *International Crisis Group*, p 34.
[109] Borer, note 107, p 21.
[110] *Ibid*.

commissions that examine past crimes and abuses, allowing for a platform for grievances and past crimes to be aired. It provides for the opportunity for those affected to come forward, for past perpetrators to confess, and for the State to accept mistakes and provide amnesty. The argument from truth could still be useful, in providing the circumstances for open dialogue and allowing for a more long-lasting peace where ideals are contested and challenged. Autonomy-based justifications may also be useful in the sense that part of the reconciliation process is in encouraging people from minorities to receive and express speech that allows them to develop themselves. Indeed, calls for rights to self-determination that eventually lead to conflict can be linked to past inabilities to self-author their journeys, both on an individual and collective level.

However, whilst the other justifications remain relevant, democratic participation seems to be the most applicable justification, at least for the purposes of this thesis. There are elements of reconciliation where there is an intuitive link with this justification, such as the need for open dialogue – but it is possible to apply this further. Some commentators have suggested that the practical reality of reform in Sri Lanka is limited by the entrenched issues within its institutions and constitutional order.[111] Effective reform is stymied by the deep politicisation of institutions and engrained culture that is resistant to change. A shift in culture is perhaps too much to ask for from legal reform, but a democracy-based approach may help lay the foundations for a context in which it is possible. The ability of citizens to hold the State to account and cross examine the application of State power, encourages a check of sorts against abuse and excess. This can help assuage fears of a public that has experienced repression by the State and is wary of future overreach. Furthermore, the idea that reconciliation requires people to feel that they are a valued part of the nation ties in with democracy-based ideas of citizens having a stake in

[111] Gehan Gunatilleke, 'The Structural Limits of Depoliticisation in Sri Lanka', The Commonwealth Journal of International Affairs, The Round Table Vol. 108 No. 6 (2019) p 622.

the process. Reconciliation itself requires the State imposing its authority on both minorities that may have been aggrieved or felt left out in the past, and those resistant to change. For long-lasting and sustainable reconciliation, the legitimacy of the exercise of State power should be based upon the people's ability to affect and contribute.[112] Such a context based on democracy helps prevent those that feel left out of the equation (in terms of having a say in public life/ State policy), from turning to undemocratic means.

This chapter has set out the justificatory account for free speech most applicable to reconciliation in Sri Lanka. It does not necessarily exclude the other justifications, but sets out democratic participation as the most relevant to the aims and objectives of reconciliation. Whilst it has set out why the argument is appealing for this objective; the next chapter will consider the question of how to delineate which categories of speech (particularly in relation to political speech) should attract protection in order to establish a normative basis upon which Sri Lanka's current free speech framework and potential reform can be appraised.

[112] Subsection 1.2.3. looked at some of the different approaches to this justification by different theorists. Although these are taken into account, a specific one is not prioritised over the others (for the purposes of this thesis). The general views of the importance of free speech to democracy is useful as a starting point, whilst various aspects of the different approaches are useful for the discussions of this thesis. For example, the concept of the public sphere, the importance of political speech, the interests of the audience in having access to a range of speech, the interests of the speaker in political self-governance, and free speech legitimising State policy. Whilst the approaches may differ, they are reconcilable in a more general sense when applied to the discussions of this thesis.

Chapter Two

Categorising Speech

2.1. Introduction

The previous chapter looked at the theoretical basis and justifications for speech and reached the conclusion that democracy and participation-based justifications are the most relevant for the purposes of this thesis. Reconciliation requires a robust framework within which people are able to engage with public discourse and feel that they are able to affect and contribute to policy decisions. This is necessary for democratic legitimacy. This is even more so in the context of reconciliation where transformative changes in legal, social, and political areas are required, likely attracting significant debate. A process that is effective and enduring requires this basis of legitimacy. It is worth noting at this point that the use of the word reconciliation is used broadly, admittedly being a lofty goal. It is not expected to be used as a distinguishing mechanism for adjudicating speech. A distinction must be drawn between establishing a normative basis that is conducive to reconciliation in effect, as opposed to it being a basis in and of itself. The aim is not necessarily for courts to consider whether certain types of speech will benefit or hinder reconciliation when deciding on speech related cases (such a metric would be far too vague and subjective), but to promote a speech framework that will protect public discourse and enable the conditions for reconciliation to be possible.[113] Reconciliation

[113] Although, as will be seen in the discussion of the *Razik* case in the next chapter, it is possible for the Court to consider reconciliation when determining the intentional of legal instruments and State obligations in

therefore may not fundamentally change aspects of speech theory, but guides areas of focus that would be most beneficial – hence the focus on democratic participation and public discourse (with a view to shaping the courts approach to speech cases and legislative frameworks).

Considering the discussion so far on the aspects of democratic participation and reconciliation that guide the approach to free speech in this thesis – it is likely that the most relevant considerations of speech will relate to political speech. The transformative agenda required for reconciliation and tensions between varying groups of society will inevitably mean that there is a need for people to feel that they have a stake in the process and for the state to be able to justify their legitimacy in implementing policy. Political speech is a core part of the ability to effectively contribute to public debate and influence public discourse. This is not to exclude the importance of other types of speech, but by focussing on political speech, some of the most relevant issues to reconciliation (and the type of speech that warrants the most protection) will be able to be considered. Whilst the last chapter looked at the theoretical basis for protecting speech, this chapter will first delve into the practical considerations of implementation – namely delineating protected speech. In doing so, it provides the foundational basis for the succeeding chapters covering reconciliation and the speech framework in Sri Lanka.

enforcement – confirming the intuitions of this thesis that there can be a purposive link between a free speech framework and the broader goals of reconciliation.

2.2. Identifying political speech

In applying the higher standard of free speech to political speech,[114] it is necessary to have a mechanism with which to distinguish political speech that attracts this protection from other types of speech.[115] Without this, the possibility of such protection being granted to the wrong type of speech, or including too wide or narrow protection, or lacking clear division (making the distinction meaningless) – would dilute the effectiveness of such protection.[116] It is therefore worth considering how courts have approached this question. The question of what constitutes political speech can often seem straightforward. People will generally have some intuitive concept of what counts as political and be able to distinguish it from that which has little to no relevance to the political process. Most people would agree that criticism of government policy by an opposition politician or a newspaper article clearly falls within political speech. The US courts and European courts have adopted categories of high value and low value speech as a method of distinguishing speech which should be accorded different

[114] In terms of a 'hierarchy' of speech, political speech should attract more protection relative to other forms of speech. This is particularly important in terms of this thesis (see subsequent Chapters for discussion on how political speech forms an important part of the reconciliation process – and how undue restrictions can stifle this), and the argument from democratic participation. Political speech represents the most important aspects of contributing to public discourse (particularly within the reconciliation context where issues need robust discussion, attempts are made to strengthen democratic norms, and minorities are encouraged to reengage with the political process).

[115] See subsection 2.2.1 (and further discussion in this Chapter) which explains the scope of what may be intended by the term political speech (i.e., its relation to wider public discourse beyond strictly what is directly expressed in political terms).

[116] See Tamas Szigeti, 'The Right to Political Speech and the Ban on Hate Speech', DPhil Thesis (Oxford) p 83, for a detailed overview and novel approach to the bridge question.

levels of protections.[117] High value speech is political speech considered to be that which is of most relevance and value to public discourse and therefore receives the most protection from restrictions - low value speech on the other hand, can receive little to no protection from restrictions.[118] This could include things such as pornographic material, obscenities, gratuitous insults, and hate speech. [119] This approach can be attractive in its simplicity and ability to set out a system where particular importance and protection can be given to speech that may be of most value for democracy, whilst allowing for limitations on speech not conducive to public debate. However, this does raise some issues in practice. The concept of distinguishing what is political speech most relevant to public discourse may seem straightforward at first, but in practice such categorisation is not as intuitive or obvious.[120] The categorisation of high value speech confers strong protections on that speech, which should therefore mean that the criteria for such distinction should be clear. It also means that what is deemed low value receives minimal protection, which should mean that a clear basis is needed so that valuable speech is not miscategorised into this bracket. As Rowbottom notes, 'The value of the expression is often cited as a factor in art.10 decisions, but it is not always evident what role it plays in deciding the outcome of the case.' [121] Whilst categorising speech in this way has value in protecting democracy by protecting political speech, a lack of transparency would diminish its effectiveness by reducing the foreseeability of where types of speech will lie on the spectrum. This also affects the consistency of its application in practice. The ECtHR has held that the freedom of political debate is worthy of high protection and value, being vital to democratic

[117] Genevieve Lakier, 'The invention of low-value speech', Public Law and Legal Theory Working Paper No. 448 (2014) p 6.
[118] *Ibid*.
[119] See Jacob Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online', Public Law, Vol. 2014 (2014) p 491, 493.
[120] Lakier, *supra* note 117, p 45.
[121] *Ibid* p 493.

society.[122] It also gives narrow scope for such speech to be restricted.[123] It also recognises that such speech may be formed through hyperbolic, satirical, informal or emotional language.[124] However, it has not always been consistent in its application of this principle, with instances of political speech receiving different judicial treatment.[125] Another concern is that of judges passing value judgments on speech, essentially deciding what speech is acceptable based on subjective metrics. There would be likely to be a tendency for the censor to apply their own intuitions and justify it by their own interpretation of its value.[126] A State wishing to restrict speech, will also be likely to deem that speech low value. This poses a problem with issues such as hate speech, which often will be unappealing to the majority and classed as low value.[127] Hate speech, however, often relates to issues that are most political in nature. Issues such as immigration, race, religion, sexuality etc. will attract the most political attention and inevitably such discussion will be formulated through hate speech. Restrictions on such forms of speech by classing it as low value and so of no use to public discourse (as European courts have in some cases) limits participation and democratic legitimacy.[128]

The above points do not necessarily mean that the classification of speech to low and high value cannot work but highlights the need for clear criteria for distinguishing political speech. Courts will often look at factors such as content and context to indicate where political speech exists. The next section will consider some of the methods of identifying political speech.

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[122] *Lingens v Austria* App No. 9815/82 (1986) p 42.
[123] *Wingrove v The United Kingdom* App No. 17419/90 (1996) p 58.
[124] Jacob Mchangama and Natalie Alkiviadou, 'Hate speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?', Human Rights Law Review, Vol. 21 Issue 4 (2021) p 1008, 1029.
[125] *Ibid* p 1031; *see Feret v Belgium* App No. 15615/07 (2009) and *Le Pen v France* App No. 18788/09 (2010) for cases where politician's speech was restricted.
[126] Jeffrey M. Shaman, 'The Theory of Low Value Speech', SMU Law Review, Vol. 48 Issue 2 (1995), p 297, 337.
[127] A distinction may be drawn here between merely offensive speech, and speech that clearly falls within the scope of hate speech laws – however, for the purposes of the point being made here, the issue is how the State may attribute value to different forms of speech and the problems that this raises.
[128] Mchangama and Alkiviadou, *supra* note 124.

2.2.1 Identifying through content

Political speech can be considered to be that which is most pertinent to political issues, discussion, and public interest.[129] One way in which to interpret this would be to take a very narrow approach and limit political speech to that which is 'explicitly political'.[130] This would recognise a particularly distinctive feature in such speech that differentiates it from other speech. It relates only to matters that are closely related to matters of government and formulating policy. This form of speech would receive preferential treatment as it is uniquely separate to other forms of speech in that it makes up human interaction with government. Such speech would need to be 'explicitly and predominantly political'.[131] Speech relating to government policy, politicians, legislation etc. would fall within its protection. This would be particularly narrow and exclude a vast majority of other speech. In Robert Bork's view, privileged protections for political speech are limited to how people are governed in a literal sense and would not include wider speech such as science, literature, education etc. which does not form an immediate link to government policy.[132] This interpretation seems far too restrictive to be practical. Whilst it may be easier to see the political nature of speech that explicitly relates to policy, to limit the parameters so constrictively would exclude a large amount of speech that should warrant protection. Political speech is not only framed through that which relate directly to policy, but the idea of protecting speech which contributes to public discourse and therefore legitimises democracy must include wider speech that forms attitudes

[129] Identifying what this means in practice can sometimes be unclear or difficult to gauge with consistency – which is why this subsection considers various approaches to what this may mean in practice by looking at different approaches to identifying these types of speech.
[130] Robert H. Bork, 'Neutral Principles and Some First Amendment Problems', Indiana Law Journal, Vol. 47 Issue 1 (1971), p 26.
[131] *Ibid*.
[132] *Ibid* p 28.

to policy. Both people's ability to contribute and to receive information is necessary within a broader scope, as political discussion can be framed in varying forms. Rendering the parameters of what constituted political speech to wide would render the concept meaningless, but similarly, so too does making it too narrow.

Alexander Meiklejohn, whilst also believing that such protection would be for matters relating to how people are governed, recognised the need for a broader range of speech to be considered political for such a distinction to be practical. This would recognise that 'there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express.'[133] Whilst explicit discussions of politics and policy are easier to identify as ostensibly political, the political process requires inclusion of a variety of forms of speech that inform and make up the process. This would include areas such as education, philosophy/science, literature/arts, and the spread of information and opinion on public issues.[134] This would be a more realistic account, recognising the diversity of ways in which public discourse is shaped. It would make sense for political speech to consist of 'the free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country.'[135] This method of looking at the content of speech helps to set out a basis upon which political speech is indicated and protections can be conferred. However, it does not necessarily solve the question of delineating speech in a consistent and objective manner. Courts may not always interpret what counts as relevant to public discourse with uniformity. This leads to a lack of foreseeability as

[133] Alexander Meiklejohn, 'The First Amendment is an Absolute', The Supreme Court Review Vol. 1961 (1961) p 245, 256.
[134] *Ibid* p 257.
[135] *Campbell v MGN Ltd* UKHL 22 (2004), p 148. This case also recognised that the contribution to this public discourse includes intellectual and artistic expression that make up democratic life.

to what speech will be considered political. State power is also likely to conform to majoritarian narrative when interpreting what is relevant and this leaves room for difficult or unappealing aspects of public discourse to be discounted. This seems to particularly be the case with hate speech. Hate speech almost always relates to matters that are political in nature and is therefore almost inherently political.[136] Whilst the US courts may accept this perspective, European courts may be likely to count it as beyond the parameters of political speech.[137] This is difficult to reconcile with the political nature of hate speech, but may be accounted for due to a greater willingness to accept justified exceptions to free speech guarantees, as in Art 17 ECHR.

Another factor that may be relevant is considering the intellectual features or characteristics of the expression. This is not to do with whether it is expressed well, but rather relates to whether it has cognitive characteristics.[138] Cognitive speech is where there is an intention or results in imparting knowledge – something which has also been described as reason as opposed to passion. This approach has been criticised as disregarding speech that may appeal to passion (such as artistic expression) but still carries much value to public discourse.[139] It also does not take into account the diversity with which people may express their contributions to political discourse, which can range from the intellectual to emotional. Considering that the goal is to protect public discourse, perhaps a more preferable approach would be to consider if there is a

[136] See discussion of hate speech later in this chapter. This matters on two levels. Firstly, hate speech can be viewed as an essential part of political discourse itself, an intrinsic aspect of the political discussion that although expressed in vulgar or extreme manner – still forms an important part of that discourse. Secondly, by its very nature, hate speech will tend to be political. Issues of the most political significance (for example, immigration, religion, culture, affirmative action etc.) will be the most likely to attract such speech. Hate speech often represents a manifestation of societal discontent and a reaction to the political landscape – hate speech criticising religion may reflect attitudes to integration or societal values, speech against immigration may reflect concerns relating to immigration policies and their impact, such speech may also represent discontent over affirmative action policies viewed as unfair etc. It may therefore be argued that hate speech is often likely to be political by its very nature, because issues that are not political are unlikely to attract this type of attention.
[137] See for example, *Brandenburg v Ohio* 395 US 444 (1969) for the US approach, and *Vejdeland and Others v Sweden* App No. 1813/07 (2012) and *Norwood v UK infra* note 189, for the European approach.
[138] Cass Sunstein, 'Pornography and the First Amendment', Duke Law Journal Vol. 1986 No. 4 (1986), p 603.
[139] Shaman, *supra* note 126, p 335.

discursive element to the speech. This could mean a message or idea that forms part of a conversation and therefore could be included in the public debate. Speech that forms part of the conversation can be critiqued or rebutted, and it forms the expression of an idea or viewpoint.[140] For example, a statement made by a person saying that they dislike a minority religion can be distinguished from a threat to harm them. Expressing this dislike may be more impassioned than intellectual, but still contains a message that could form part of a public conversation.[141] A threat or call to violence or harm does not carry this discursive element. This would not be enough to categorise speech as political on its own (speech may contain a message and be discursive in nature without relating to political speech), but it may serve as a factor.

2.2.2 Contextual considerations

If it is not clear that speech is political purely from its content, then it may be useful to look at context. Using context or circumstance to delineate political speech can encompass a broad range of factors, and courts may choose which aspects to focus on. One method that has been suggested is to focus on the intention of the speaker. Cass Sunstein has suggested that a person intending to communicate a message should be treated more favourably in terms of protection than would otherwise be the case.[142] This contextual factor places the speech within the speaker's intention to contribute to the public discourse, the fact that they intend to do so can suggest the speech falls within those parameters. This may seem somewhat broad in the sense that it could apply to too wide a range of speech - almost all forms of speech may intend to convey something. However, Sunstein has further refined this to be a question of 'whether speech is intended and received as a contribution to political deliberation, not whether it has

[140] See Szigeti, *supra* note 116, p 102.
[141] *Supra* note 137.
[142] Sunstein, *supra* note 138, p 603-604.

political effects or sources.'[143] This provides a better basis, where the intention of the speaker is not just to communicate a message, but for it to be part of public discussion. It also benefits from not focussing on value decisions as to what constitutes political issues or issues of public interest. It would be near impossible to set out an exhaustive list of what these are, and there will inevitably have to be some level of subjectivity in the decision. By focussing on the speaker, this takes away attention from what topics make up the public discussion and considers the speakers intention to contribute to it instead. It may be worth however, considering separating intention and receipt. It is possible to imagine situations where only one of those is fulfilled, whilst still being part of public discussion. For example, hate speech, controversial speech, or unpopular ideas – may be intended to contribute to political discussion, but those receiving the speech may not perceive it in the same way. Alternatively, it may be possible that speech was not intended as political but ends up being received as such. For example, a song or work of art that later becomes a symbol or inspiration for a protest movement.

2.2.3 Nature of the speaker

A relevant consideration to identifying political speech is to consider the identity of the speaker. Speech from an elected representative is more likely to attract protection since that person is representing the electorate and the inherently political nature of their role is also relevant.[144]

[143] Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993) p 153, 154.
[144] Victor Ferreres Comella 'Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights' in Sadurski Wojciech (ed.), *Political Rights Under Stress in 21st Century Europe* (Oxford, 2006, online ed 2012), p 84-84; *Castells v Spain* App No. 11798/85 (1992). This is particularly important in relation to prominent and controversial politicians that face calls for their speech to be censored – see discussion of the censorship of President Donald Trump in Chapter Four, subsection 4.2.1.

Expressions made by a political actor, or someone who is involved in public debate, are likely to be viewed as political. This does not only relate to people directly in the political space (elected officials) but extends to those whereby the nature of their role there is a reasonable presumption of political speech. For example, journalists and the press will be likely to receive protection for their speech to allow them to report on issues of public interest.[145]

2.2.4 Circumstances of speech

Similar to (and as an extension of) the context of an expression, the circumstances surrounding when or where expression takes place may be a factor in identifying political speech. Political discussion can be more recognisable when it occurs in contexts that are clearly relevant to the process of political debate. For example, speech occurring during a protest may be easier to identify as being likely to be political as it takes place within the context of a process that makes up political debate. The distribution of leaflets containing information on parliamentary candidates and their voting records or stances on policy has been recognised by the ECtHR as political speech, used to affect the political debate.[146] Speech that occurs during and relating to ongoing electoral campaigns near elections has been recognised as particularly important to shaping the public debate.[147] As methods of communication evolve through technology this may make identifying speech more difficult. For example, as established in *Bowman,*[148] posting

[145] *Lingens v Austria, supra* note 122. Despite this, a distinction may be drawn between how this applies in theory and practice. Although there may be a presumption that journalistic speech should receive protection (or at least higher levels of protection relative to many other forms of speech) this may not always mean it is effectively applied in practice. For example, the Supreme Court in Sri Lanka sets out clear protections for such speech in its landmark judgments on free speech, yet in practice the State has been able (and willing) to restrict and target such speech – see Chapter Three.
[146] *Bowman v the United Kingdom* App No. 141/1996/760/961 (1998).
[147] *Ricardo Canese v Paraguay Inter-American Court of Human Rights* (2004), p 88-90.
[148] *Supra* note 146.

leaflets with political information can be considered political speech, but with social media becoming the predominant method of communication this may take a different form. Making a post on a political page or group may be easier to identify as political, but a general post on a person's social media page may be more difficult to identify as political.[149] Memes posted online could be viewed as forms of satire, bringing attention to political issues and criticising state policy and elected representatives. Furthermore, the role of the press has become blurred as news becomes more likely to be received online, often through sources outside of traditional media.[150] An individual can now have a substantial following as an imparter of political information through a variety of levels. These changes highlight the need for courts to be sensitive to the different levels and contexts in which such speech may present when considering contextual factors to determine political speech.[151]

2.2.5 Social context

Eric Heinze takes a different approach and highlights that the boundaries of public discourse can vary depending on a variety of factors – the margins of public discourse can differ in different countries, time periods, social practice etc. and the determination of what counts as political speech can be affected by this. 'Such line drawing complexities may differ from one democracy to another, and indeed from one situation to another but in no way diminish the

[149] See Chapter Four for further discussion on the implications of online speech.
[150] This may present significant challenges in identifying when and how protections may be necessary. The shift of news to the online space to keep pace with modern trends in media consumption may leave the law struggling to adapt, and traditional sources of information are rapidly being replaced with new sources where yet again the law may fail to recognise its role within the modern context. See Chapter Four for an extensive consideration of these issues – in particular: subsection 4.2.1 , the potential effects of journalism online Peter Coe *infra* 517 , how new mediums such as podcasts often far surpass the audience and reach of traditional journalism and media *infra* note 520, the change in habits of news consumption and ways in which technological innovation has transformed what such content may look like - subsection 4.4.4 , how traditional media forms and institutions may receive relatively privileged treatment and protections to the detriment of novel forms of journalism/media *infra* note 482.
[151] Rowbottom, *supra* note 119, p 495.

core proposition that…there must remain some genuine public sphere within which citizens may speak without fear of viewpoint-selective penalties imposed by the state, hence upon and individual as a citizen.'[152] Heinze takes the focus away from the outer edges of delineation where social context may be blurred and vary – and brings attention to the genuine public sphere. This may be understood to be the core area of political speech which is required for political legitimacy. This approach does not clarify a basis upon which to identify political speech – the genuine public sphere is perhaps seen to be relatively self-evident – but recognises that the differences between social contexts means that an objective basis for delineation may not be practical to apply with uniformity. A minimum guarantee for the genuine public sphere may require protection for overtly political speech where the question of identification is more obvious, whilst more marginal cases can benefit from reference to social context.

The examples of methods of identifying political speech/the public sphere, are not exhaustive. However, they lay out the main ways in which courts may approach this question. It is important for a country undergoing the process of reconciliation to protect the public sphere and political discussion – and therefore this will require satisfactory clarity in applying how such speech is identified. It seems likely that the methods discussed so far may be used as a combination, applied where situations require. There may be cases where looking at the content alone will suffice, where the political nature of the speech is relatively obvious. In more borderline cases, the other factors may provide a basis of analysis to assist identification. Of particular use may be considering the discursive element of the speech. This not only relates to the content i.e., was there an idea being conveyed, but also intent and characteristics of public speech. Speech contains public characteristics when it is expressed in open forum and can be rebutted. A distinction can be drawn between anonymous threatening letters targeting an

[152] Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP 2016), p 85.

individual, compared to a public post on a person's social media expressing their view. A question that may be worth asking at this point is whether there should be any distinctive or functional difference when operating within the context of reconciliation? The idea that has been previously discussed about social practice and context influencing the parameters of public discussion may be relevant here. The social context of one country can differ from another – where parameters of what constitutes political speech and public debate is situationally distinct based on individual context. For example, currency or urgency of a political issue may be different between different countries – discussions relating to Buddhism are far more relevant and political in the Sri Lankan context, compared to the West where perhaps things like gender issues have gained greater prominence in public debate. Issues relating to the country's civil war, religion, minority rights, armed forces, and even the process of reconciliation itself are more likely to have broader scope for political speech within the Sri Lankan context. Although it may seem that such topics would fall within political speech anyway, this approach would give it further relevance and possibly encourage courts to adopt a more permissive attitude to include a broader variety of speech. What may have ordinarily been deemed low value speech, may now be more likely to receive protection. Furthermore, greater weight may be given to contextual factors to determine political speech, when occurring within reconciliation. In *Lingens* a political issue being related to a current topic made pertinent speech more likely to be within public discourse, and in *Ricardo Canese*, the fact that speech was made during a democratisation process, transitioning from dictatorship was recognised as a relevant consideration.[153] Perhaps the circumstantial factor that speech that occurs within an election period may be political can be extended to include speech during the reconciliation period. This transformative period requires significant social, cultural, and legal change, which

[153] *Supra* note 145 and note 147.

means that the importance of these issues to public debate is more so than usual and can extend beyond the election period.

2.2.6 Conclusions

This chapter so far has looked at indicators for distinguishing speech which contributes to public debate. There are a range of speech, particularly political and high value speech, that need protection, to ensure democratic participation and legitimacy. The next section of the chapter will now look at hate speech. Having looked at what makes up public discourse, it seems likely that there will be overlap with hate speech. As mentioned previously in this chapter, genuine contributions to the public discussion can take many forms – sometimes framed with emotionally charged or hyperbolic language. Furthermore, the topics most relevant to the public interest, will also tend to attract the most intense debate. In the context of reconciliation where the objective is to promote a speech framework that is conducive to open dialogue and democratic participation, the other goal of reconciling social, religious, and ethnic division necessitates consideration of how the State deals with hate speech.[154]

2.3. What is hate speech? Analysing hate speech: the position in post-conflict societies

This subsection will consider hate speech and the issues with applying limitations (particularly in the context of reconciliation). As combatting hate speech will form an important part of a post-conflict free speech framework, it is necessary to examine some of the key issues in relation to this issue. As discussed previously in this chapter, political speech (that requires protection in terms of the themes this thesis) will likely include strongly formulated expressions

[154] This issue is examined in further detail in the next subsection, and will be relevant to the discussions of Chapter Three and Four where limitations on speech (and hate speech) must be considered in terms of the broader themes of this thesis (i.e., a speech framework conducive to reconciliation).

and intense debate that overlap into areas of hate speech. Thus, a consideration of these issues at this point will help set a groundwork and understanding of the key problems that will be examined in Chapter Three and Four (where there are limitations on speech, including hate speech).

2.3.1 Defining hate speech

Defining what exactly hate speech is, can be a difficult task in itself. Even though it is a term that is widely known and used in general conversation, the ambiguities surrounding what exactly constitutes hate in relation to the application of law, makes it arguably impossible to arrive at a conclusive legal definition.[155] The use of the word is influenced by a wide spectrum of subjective, regional and societal factors which means that it is a term that can be applied to a broad range of speech. What is hate in one country, may not be in the next - what was hate a few decades ago, may be the opposite today.[156] Despite this, most people will believe that at least at an intuitive level there will be forms of speech that are hateful. Concerns regarding such speech are often particularly seen as an important issue in States undergoing reconciliation. Tensions between groups and minorities, as well as transformative change in the socio-legal system – means that there will be concerns that the intense debate that surrounds this can attract hate speech, and that the reconciliation process requires this to be addressed.

[155] Ineke Boerefijin and Joanna Oyediran 'Article 20 of the International Covenant on Civil and Political Rights' in Sandra Coliver, Kevin Boyle and Frances D'Souza (eds*), Striking a balance: Hate Speech, Freedom of Expression and Non-Discrimination* (University of Essex 1992). Attempts have been made to define what is meant by hate speech (see for example, the UK Online Harms White Paper CP 354, p 7.16, '…hostility on the grounds of…race, religion, sexual orientation…' etc.) however, these may often prove unsatisfactory when applying the law, particularly when considering criminal sanction and limitations on speech. This subsection sets out some key issues with attempts to define hate speech. These issues are not merely theoretical – they present problematic issues in practice (see for example, Chapter Three discussing the ICCPR Act in Sri Lanka which incorporates the ICCPR definition that includes terms such as hostility etc. yet has proven open to interpretation far beyond what would presumably have been expected in its drafting).

[156] For example, criticism of religion may be perceived as hateful in religiously conservative countries and criticism of LGBT people may be more accepted – which is in contrast with attitudes in Western liberal countries. Attitudes in the West to these issues themselves reflect a marked shift in attitudes from recent history.

This presents the law with a significant problem because it requires a method of (at least attempting) to ensure consistency in its application.[157]

The word hate can be defined as an 'intense' or 'extremely strong' dislike towards someone or something according to the dictionary.[158] However, it should be clear that the word is not to be taken in its literal sense when given legal meaning. It would be absurd if voicing an extreme dislike for a certain type of food was punishable by law – and equally, hate towards inequality and injustice should be welcomed rather than prevented.[159] Furthermore, true political and ideological discourse could not exist if opposing parties could not hate each other's policies, and invariably their attacks may be laced with hyperbole and extreme dislike. As noted previously in this chapter, public discourse can take many forms, often in emotional terms. Hate itself, therefore, should not be viewed as inherently bad, but rather the use of the word is merely a tool for describing what is to be avoided and suggests a line which demarcates that which becomes an unacceptable form of hate.

If we look at the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which prohibits speech that 'justify or promote racial hatred and discrimination in any form' and the International Covenant on Civil and Political Rights (ICCPR) which prohibits 'any advocacy of national, racial, or religious hatred that constitutes

[157] The issue of determining the scope of hate speech restrictions represents a significant problem in terms of the discussions in this chapter. As an example, the ECtHR is clear in that Art 10 rights should include protections for offensive speech, but UK law restricts 'grossly offensive speech' (see section 127 (1) of the Communications Act 2003), which poses practical issues in terms of how the law may be applied clearly in line with these rights. To contextualise this more directly in terms of this thesis, such issues of deciphering the scope of hate speech law applicability in practice are even more difficult in Sri Lanka. For example, the Supreme Court clearly sets out that offensive speech is to be protected under Sri Lanka's Constitutional Fundamental Rights guarantees, yet laws (such as those contained in the Penal Code) frame the scope of restrictions in terms of offence (i.e., speech that outrages or hurts feelings) – see Chapter Three for an in-depth analysis of these issues.

[158] https://en.oxforddictionaries.com/definition/hate; https://www.collinsdictionary.com/dictionary/english/hate.

[159] Robert Post, 'Hate Speech' in Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (eds) (OUP 2009), p 123 – 126.

incitement to discrimination, hostility or violence' – it is clear that there is a purposive element that seeks to prevent the promulgation of certain types of speech which specifically targets or endangers the rights of groups of people (often those who have traditionally suffered marginalisation). This goes back to the issue of what hate is in terms of hate speech because the purposive approach of legal regulation shows that there is some sort of threshold after which acceptable levels of dislike becomes hate speech. Thus, in addition to speech which contains dislike, there is an 'additional element' that when present, warrants legal action. This could be either how something is said or what impact it can have. For the latter, the ICCPR for example mentions 'incitement' to discrimination, hostility or violence and therefore considers a causation or intent between the speech and its risks. In terms of the former i.e., how something is said – this could be the way in which speech is constructed or presented which puts it beyond what is an expression of acceptable dislike. Things may be presented in open and constructive debate which pertain to religious and racial groups even if they are offensive, but its form and presentation may need to adhere to certain social conventions, as discussed below.

2.3.2 Societal conventions/ cultural norms and 'hate'

Given the ambiguities surrounding establishing what actually constitutes hate speech, many have turned to the source of what shapes hate speech laws in order to ascertain the threshold at which speech becomes hate. Societies consist of cultural ideas and community which develop into the framework of the public ethos based on shared views on morality. Hate speech laws may be seen as an attempt to bring together these shared values into a legal context where a 'common morality' exists and 'the bondage is part of the price of society.'[160] This suggests that an inherent aspect of society is a consensus in terms of certain values and morality which should

[160] Patrick Devlin, *The Enforcement of Morals* (London OUP, 1965), p 10.

be reflected in the law. If these commonalities are integral to the makeup of society, then it can be said that speech falling outside of this ends up becoming extreme. One aspect of these values is that it often relates to the 'dignity' of the individual which relies on shared moralities to command respect within society. Groups and individuals can expect certain civilities and respect accorded to them from other people within the society, as a part of their participation in the society. The development of this ethos would mean that speech which falls into the category of extreme in relation to these values impinges upon their respect within the society. This becomes almost a requirement of one's citizenship[161] from which rights of individuals and groups originate from – necessitating civilities and respect within the bounds of social convention when interacting with the public.[162] This focus on factors such as respect suggests that whilst free speech should be protected, it should be expressed within the boundaries of societal respect and the speech which goes beyond that and denigrates dignity should not be tolerated. It is therefore more about how something is said rather than its content that determines what hate speech is.

Another aspect of these core values is that most democracies will be based upon liberal and democratic ideologies. These nations will have accepted many components of these ideologies as positive ideals to strive towards, and as an essential part of its society. This relates to the idea of requiring civility in democratic participation as speech that falls outside of these core values would be seen to impinge on much of the rights that the society values, such as equality, non-discrimination of minorities etc.[163] Such ideals are justified by societal acceptance of the importance of these values and speech which threatens them or seek to limit them should be restricted.

[161] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996) p 496-97.
[162] Abigail Bright, 'Hate Speech and Equality' UCL Juris Review 12 (2005) p 112, 117.
[163] Abigail Levin, The Cost of Free Speech (Palgrave Macmillan 2010) p 21.

The problems with relying on societal considerations in this way are that:

i) they are based on a constantly evolving concept and is decided upon by majority opinion, and ii) they are based upon ideals that may not always achieve the aim in practice.

i) The establishment of social norms are determined through social arguments which are contested through society and the interplay between contrasting views is what makes up the culture itself.[164] They are therefore constantly in a state of flux whereby new social norms are born, and old ones fade away based on public discourse. It is something very difficult to officiate and regularize. It is perhaps worth noting that racist and bigoted views towards Jewish, Black and minority people that were a relatively accepted part of European cultural norms in the past – are generally abhorred today.[165] In fact one of the arguments against Jewish communities in Britain was that they would not be able to assimilate into liberal Western culture based on their Old Testament values.[166] Similarly, what is accepted today may be perceived completely differently in the future, in ways impossible to predict. Some of the most relevant social values can be deeply contested in society. In fact, it is only through those that are publicly contested that an answer can be reached as such norms cannot be taken as a given. This creates a significant issue when determining what hate is through legislation because such determination is

[164] Sally Engle Merry, 'Law, Culture and Cultural Appropriation', Yale Journal of Law and the Humanities, Vol. 10 Issue 2 (1998) p 575, 582.
[165] See in particular, Onder Bakircioglu, 'Freedom of Expression and Hate Speech', Tulsa Journal of Comparative and International Law, Vol.16 Issue 1 (2008) p 4.
[166] Didi Herman, 'An Unfortunate Coincidence: Jews and Jewishness in Twentieth Century English Judicial Discourse', Journal of Law and Society, Vol. 33 Issue 2 (2006) p 277, 284.

based on a governmental decision as to which cultural norms to accept.[167] What could happen in practice is that this could affect minority voices who do not have as much influence in shaping the cultural norms – in effect meaning that the majority views are imposed on speech through regulation. This is exactly what the regulations would have in theory been trying to protect against, but by deciding what is culturally acceptable and what is not based on popular opinion, it is enforcing a certain viewpoint. The intuitions of the hegemonic class will thus become entrenched in the legal system at the expense of any voice to the contrary.[168] This could possibly affect the development of future social morality, when any speech that differs from the morality imposed by the current day majority is deemed hate.

ii) Following from the above, such consensus is generally accepted in western nations as being derived from liberal and democratic principles. This in itself places a certain viewpoint above others at the expense of speech that falls outside of it. It means that hate is that which does not conform to these values - values that have been decided to be ideal at this point in time. As Malik points out, the use of liberal democracy can be misused as a 'chimera for exercising hegemony over individuals and groups.'[169] This is not to say that these values are not positive ideals for nations to strive towards and support; but only shows the risks of criminalizing speech that does not conform, by deeming it hate. These values are viewpoints in themselves and must not be taken as norms just because that is what we strive towards. Basing

[167] Post, *supra* note 159, p 130.
[168] Robert Post, 'Democratic Constitutionalism and Cultural Heterogeneity', Australian Journal of Legal Philosophy, Vol. 25 Issue 2 (2000) p 185.
[169] Maleiha Malik 'Extreme Speech and Liberalism' in Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (eds) (OUP 2009), p 118.

> hate as that which falls outside of what is acceptably liberal silences many groups by establishing a viewpoint or ideal as a universal truth, thus protecting the power of the majority that rule today.

2.3.3 Risks from lack of conclusive definition

The difficulty surrounding the definition of hate is a significant barrier to hate speech regulation and can often be a concerning factor in terms of free speech. For the reasons that have been stated above, hate speech has proved to be an 'elusive concept'.[170] There is no clear definition that has enough credibility to be held up as a benchmark upon which all forms of speech can be assessed, globally. Hate speech has often been formulated through vague and broad terminology that attempts to target forms of speech based on potential harms to groups.[171] This in itself poses a large question mark as to what comes within its scope. Something that is so subjective is very difficult to uphold as a legal threshold. What the legal system will end up having to do is decide on what is acceptable based on metrics that do not allow for objective distinguishing. For example, courts and governments may be find it difficult to balance the interests of LGBT groups who are offended by speech against them and perceive it as hateful, with conservative religious minorities – who may equally oppose the views and expression of the other side. How does a court even adequately measure the level of offensiveness or potential harm of a statement? What if a shift in current events suddenly changes how hateful a statement might be to the public, how will the general public be aware of the legal repercussions if even

[170] Bakircioglu, *supra* note 165, p 4.
[171] Samuel Walker, *Hate Speech: The History of an American Controversy* (2nd ed. OUP, 2000), p 8.

the lawyers and scholars aren't sure? People may become too afraid of raising valid criticisms or commenting on controversial current issues for fear that it would be too offensive (ending up being deemed hateful) and thus worthy of criminal sanction. Hate is entirely subjective and means different things to different people.

The purpose of highlighting these issues here is not to disregard hate speech, but to note that some level of caution is needed when addressing the issue. It may be tempting for States undergoing a process of reconciliation to cast all hate speech outside the realms of political speech or public discourse – however, as seen from what has been discussed in this section, such a broad response may not be practical nor conducive to free speech. For the purposes of this thesis, all forms of hate speech will not be considered and may not necessarily be relevant. Such a scope would be too broad for analysis. What will come within the scope of this thesis are forms of hate speech that may fall within the parameters of public discourse, and that which falls between the margins – requiring identification and clarification as to whether or not it falls within political speech which requires protection.[172] Such expressions would be political speech expressed as hate speech or hate speech which contains political characteristics – and therefore limitations (and their safeguards) must be considered whilst taking this into account for the purposes of considering potential reforms to the speech framework in Sri Lanka, as discussed in Chapter Three and Four.

[172] The main basis for identifying hate speech specifically to the Sri Lankan context will be through the definitions provided for in the Constitution and ICCPR Act (other legislative instruments such as the Penal Code will also be relevant) - see Chapter Three.

2.3.4 Are hate speech laws justified?

As discussed in this chapter, there is likely to be significant overlap between hate speech and political speech. The most relevant topics within public discourse attract wide ranges of political discourse. Hate speech will tend to relate to public discourse, and to restrict it would be to restrict a population's ability to contribute to the debate, and therefore affect democratic legitimacy.[173] However, in the context of reconciliation the problem of hate speech will be a significant concern to the public and in the formulation of policy, with the aim of preventing instability and the risk of violence. The US approach to this tends to recognise the inherently political nature of hate speech and to prevent viewpoint restrictions on such expressions to ensure public discourse.[174] The ECtHR tends to recognise the importance of political speech but balances this with other rights and interests.[175] This has led to inconsistent rulings in cases relating to political speech, and accusations of a lack of transparency - in cases where hate speech is present, but is clearly political, it is difficult to ascertain why different outcomes are reached and how these standards apply.[176] This has led to legal uncertainty and the risk of abuse by states to silence political dissent under the guise of fighting hate speech.[177] Taking into account the risk of contributions to the political discussion being excluded through hate speech laws, it may be worth considering whether hate speech laws themselves are valid.

[173] This does not necessarily mean that such speech will be of particular value to public discourse nor that it necessarily relates or contributes to it directly – however, the point that is made in this subsection is that such speech will often relate to matters that are of significance to public debate. For example, a statement by an individual that they dislike X group of people may be viewed as of low value to public discourse – yet it represents issues of political debate (such as immigration policies, attitude to religion, socio-economic dissatisfaction, etc.) and therefore implies a political nature. Issues that attract hate speech are therefore often related to political issues and discourse.
[174] *Supra* note 137.
[175] For example, see *Feret* and *Le Pen, supra* note 125.
[176] See in particular, Stefan Sottiaux, 'Conflicting Conceptions of Hate Speech in the ECtHR's Case Law', German Law Journal, Vol. 23 Issue 9 (2022) p 1193, 1195.
[177] *Ibid*, p 1193-1194.

2.3.4.1 Hate speech laws in longstanding, stable prosperous democracies

Eric Heinze approaches this question from a democracy-based free speech centric perspective by categorising States; 'longstanding stable prosperous democracies' (LSPDs) are distinguished from others. LSPDs will have a solid democratic framework based on a variety of factors such as electoral process, functioning of government, liberties, and political culture that provide it a stable basis to combat violence and discrimination.[178] They are by nature of their mature and stable institutional protection of democracy capable of protecting vulnerable groups without resorting to hate speech laws. They will be equipped to ensure a plurality of opinion whilst enabling counter speech to hate speech and scrutiny of hateful ideologies.[179] Within this category of States, where there is a presumption of free speech or protection of public discourse, viewpoint selective hate speech bans are not justified. In States that do not meet this criterion (i.e., non-LSPDs), the lack of functioning institutional processes that guarantee protection means that some hate speech laws may be necessary or legitimate in ensuring democratic legitimacy.[180] Such States are not able to fulfil the wider criteria for protecting democratic legitimacy and discourse, and therefore are susceptible to the effects of hate speech leading to violence. This approach recognises that there may be states where a lack of institutional protection allows communal tension to spread and result in violence.[181] An example may be the genocide in Rwanda, where political apathy or tolerance for such ideology allows it to descend into violence.

A criticism of this approach could be that it considers a State's deficiencies (compared to LSPDs) and concludes that factors such as the lack of institutional protections, processes, frameworks etc., in non-LSPDs means that hate speech laws may be legitimate or necessary in

[178] Eric Heinze, *supra* note 152, p 70-71.
[179] *Ibid*.
[180] *Ibid* p 71-72.
[181] The effects of such institutional weaknesses are further considered in Chapters Three, Four, and Five.

those contexts to protect democracy – without enough focus on these factors' potential effects on the hate speech laws themselves. Heinze does indeed recognise that even in non-LSPDs hate speech bans may not always be justified; he recognises that these states may abuse the bans and utilise them against groups to silence political opposition or minority groups.[182] However, it may be possible to take this even further. If the social and structural political process of a state is inadequate to effectively protect legitimatising criteria and public discourse (i.e., the institutional and social capacity to counter hate speech), then it may follow that such states are also, by nature of these deficiencies, unable to protect against the ill effects of hate speech bans. There may be an argument to be made that while states may not be sufficiently equipped to protect vulnerable groups, the same social and political context could also have an impact on the likelihood of a functioning framework for hate speech bans. It is possible that a non-LSPD state, due to these issues, would be more likely than an LSPD State to be susceptible to the abuse of hate speech laws. If the political process is flawed in the sense that it does not have the institutional commitment and ability to protect vulnerable groups, it seems unlikely that hate speech bans would be able to work effectively within it. Such States may be more likely to abuse the bans to stifle political dissent and may apply such laws selectively according to majoritarian intuitions.[183] Viewpoint selective bans and penalties would confer power over speech to States that may not have the ability or commitment to use them effectively.[184] Despite these practical considerations, it seems easier to justify the existence of some hate speech bans

[182] *Ibid* p 71. Heinze does recognise that hate speech bans may become a sham without a strong presumption of free speech, and the potential for abuse, but justifies this risk in the interests of protecting vulnerable groups.
[183] This issue is apparent in how hate speech laws have been used in Sri Lanka (see Chapter Three and Four). Not only have they been largely ineffective in practice despite conferring considerable powers to restrict hate speech, but they have been utilised to stifle dissent, protect majoritarian attitudes, and to target minorities. Many other examples exist to suggest that the efficacy of these laws (and potential for misuse) is dependent on the factors that have been discussed in relation to non-LSPDs. Some examples may include: blasphemy laws (or hate speech laws utilised as effectively blasphemy laws) in countries such as Pakistan, restrictions on dissent in countries such as Singapore (despite being prosperous and stable, lacking the institutional will/political culture to protect speech), and countries such as Rwanda (where past instability may contribute to a restrictive attitude, and potential justification, for stifling dissent).
[184] This is particularly relevant to the Sri Lankan context – see in particular Chapter Three.

in non-LSPD countries when taking into account the higher risk of violence faced by vulnerable groups in these states. However, the risk that these States will use hate speech bans ineffectively or abuse them means that there should be much caution in how they are framed. Arguably, for these bans to be effective there is an even greater onus to strengthen the free speech framework and public discourse to prevent political speech from being stifled. Political speech that may fall within hate speech (but still may make a legitimate contribution to public discourse) will need to be carefully considered to prevent illegitimate restrictions.

The discussion here will be followed in the next subsection by consideration of arguments in favour of hate speech laws, with particular application to the Sri Lankan context.

2.4. Arguments supporting hate speech laws

This thesis has so far considered the particular importance of political speech and identifying political speech to establish the conditions for public discourse than enable democratic legitimacy. In the process of reconciliation within the post-conflict society of Sri Lanka, there may be further need to protect a wide variety of political speech to aid in political discussion during a transformative process. Hate speech will often overlap with political speech which will present issues in maintaining effective public discourse. Hate speech bans may be justified in the absence of institutional capacity to protect vulnerable groups, but this carries risks of abuse. Political speech which may potentially come within the ambit of hate speech laws may still need to be protected. Although the overlap between hate speech and political speech may be accepted, there may still be objections to allowing such speech, particularly with the focus on protecting vulnerable groups that reconciliation entails – therefore the next section of this chapter looks at some of the arguments for restriction these types of speech. These are non-

exhaustive but are relevant points particularly in relation to democracy-based justifications for free speech.

2.4.1 Hate speech laws are limited to the most vituperative expression

Jeremy Waldron argues that whilst democratic legitimacy is derived from the opportunity to voice opinions in public discourse, restrictions on hateful speech should only be directed towards the most extreme and vituperative forms of expression.[185] These forms of speech are beyond the norms of useful discourse, and therefore they can be justifiably restricted because the target of the restriction is not the viewpoint behind the expression but the form. The claim that hate speech laws will be limited to only the most vituperative expression and should not affect the ability to engage in public discourse, alludes to the idea that such restrictions can be justified as less of a viewpoint-based restriction – but rather one based on the manner, tone or context.[186] Such a justification for hate speech bans would in theory still allow for the public debate of ideas, but limit particularly extreme speech based on the manner in which it is expressed. The effect caused to public discourse would therefore be relatively minimal as an open discussion can still take place without the more extreme versions of speech. However, this approach may face issues in practice where the process of deciding what meets an extreme or vituperative level placing such speech beyond acceptable parameters, required applying subjective standards and intuitions which may be biased against unpopular opinions. There may be a need for value judgments about different types of speech which would end up being viewpoint selective. For example, a law which bans extreme speech which stirs up racial

[185] Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) p 191.
[186] Rebecca Ruth Gould, 'Is the 'hate' in hate speech the 'hate' in hate crime? Waldron and Dworkin on political legitimacy', Jurisprudence, Vol. 10 Issue 2 (2019) p 171-187, 176.

intolerance does not do the same for speech which advocates for tolerance. Furthermore, the claim that only particularly virulent forms of speech are affected would run into certain inconsistencies.[187] Someone who opposes immigration and refers to immigrants with hateful language would be affected – but someone who opposes those with anti-immigration views and refers to anti-immigrant people as a group in similar language, would not. It is therefore not solely an appraisal of whether or not the language used was vituperative but a viewpoint-based decision that such language cannot be used in relation to certain ideas. It is also not clear whether, in practice, the effects of such laws may have a broader effect than intended (i.e., limited to vituperative expression). Aside from the argument that hate speech laws are in practice viewpoint-based, it may also be argued that although the original intent of hate speech laws (at least in the way conceptualized above) is to limit a certain form of especially vitriolic forms of speech, they often end up being applied in cases where the expression is presented in a temperate manner.[188]

In *Glimmerveen & Hagenbeek v. Netherlands*[189], Johann Glimmerveen, the leader of a Dutch political party that campaigned against immigrants and racial mixing was convicted on the charge of inciting racial discrimination. This was in regard to possessing leaflets aimed at white Dutch people that called on authorities to remove what they called guest workers from the country. The leaflets said that 'the authorities as servants of our people merely have to see to it that these undesired aliens leave our country as soon as possible. As soon as the Nederlandse Volks Unie will have gained political power in our country, it will put order into business and,

[187] James Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy', Constitutional Commentary 465 (2017) p 545. Also consider the example of the UK racial hatred provisions which do not apply to those that use threatening or abusive language to stir up hate against those who do not support a racial group (although other criminal offenses could apply) – see CPS prosecution guidelines, https://www.cps.gov.uk/legal-guidance/racist-and-religious-hate-crime-prosecution-guidance.
[188] *Ibid* p 552.
[189] *Glimmerveen and Hagenbeek v. Netherlands*, App No. 8348/78 and 8406/78 (1980); also consider *Norwood v United Kingdom* (2004) ECHR 730, where speech was restricted even though it was accepted that the speech may be unlikely to promote violence.

to begin with will remove all Surinamers, Turks and other so-called guest workers from the Netherlands.'[190] Glimmerveen's conviction was upheld and his appeal to the European Commission on Human Rights was rejected, with the Court relying on Article 17 of the European Convention on Human Rights to justify an Article 10 restriction. [191] As unpleasant as those views may have been, they could be regarded as a legitimate issue (i.e., immigration) which many people would have a political interest in- i.e., political expression. The text of the leaflet was not necessarily vitriolic in form, but merely stated the aims of their party in a relatively matter of fact manner. This could have the effect of diminishing the legitimacy of any immigration policy implemented by a government that has effectively criminalized the expression of opposition to immigration.

In *Hammond v Department of Public Prosecutions*, a preacher (Harry Hammond) was convicted for preaching in a public space whilst holding up signs that contained slogans such as 'stop homosexuality', 'stop immorality' and 'Jesus is Lord'.[192] The courts deemed this to be 'beyond legitimate protest'.[193] What is interesting is that the courts also admitted that the messages on Hammond's signs did not contain 'intemperate language'.[194] This calls into question the assertion that speech restrictions do not affect political legitimacy because they only affect the most extreme and vituperative forms of expression. The basis of the court's conclusion seems to suggest a subjective standard and resulted in it determining what constituted legitimate protest. If the law was applied equally to all political views, then a sign that said 'stop homophobia' or 'homophobia is immoral' would also be beyond legitimate

[190] *Ibid,* p 368.
[191] See Fenwick and Fenwick *infra* note 786, for how courts may choose to utilise Article 17 in response to particularly extreme speech.
[192] *Hammond v. Department of Public Prosecutions*, (2004) EWHC 69.
[193] Weinstein, *supra* note 187, p 556.
[194] James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from the Masses', in Ivan Hare & James Weinstein (eds), *Extreme Speech and Democracy*, (OUP 2009) p 30-37. The language was found on appeal to be 'insulting'. The 'insulting' clause has subsequently been removed from the Public Order Act 1986, but the point still stands that such restrictions can easily end up being applied beyond the intended scope.

protest. Both outcomes are undesirable; either one side of opposition is not allowed to express protest even with relatively mild language, or neither are able to. The issue of religion and homophobia presents an unpleasant conflict in societal discourse. Whilst members of the gay community have suffered significant discrimination throughout history, many people harbor deep held opposition to homosexuality due to their religion and personal beliefs. Whilst the importance of ensuring that the law protects vulnerable members of the gay community remains important – it makes it arguably all the more important that the enforcement of the laws in place to protect them are politically legitimized by allowing opposition to them.

Other examples of this conflict include publicly stating that homosexuals are 'going to hell'[195] and for preaching about 'sexual immorality'.[196] Mike Overd was convicted and fined for preaching about homosexuality and referring to the bible passage in Leviticus 20:13, calling homosexuality an 'abomination'. Whilst Overd did not call for the death penalty for gay people, the passage in Leviticus does – and this was the basis on which he was convicted.[197]

These issues raise some serious challenges. Are certain passages in religious texts particularly vituperative and discriminatory towards groups? This may be the case if the text is taken at face value, but all the more so for certain groups of people that it affects. However, restricting the expression of that would stifle the right to religion and the manifestation of that religion.[198] A person's religious beliefs can play a substantial part in defining their perceived morality and attitude to policies – which means that stifling the expression of those genuinely held beliefs renders their voice silenced. An opposition to homosexuality is present in all three major

[195] Mark Hennessy, 'Street preacher fined for 'Homosexuals going to hell remark', *The Irish Times* (2010) https://www.irishtimes.com/news/street-preacher-fined-for-homosexuals-going-to-hell-remark-1.646036.
[196] Heidi Blake, 'Christian preacher arrested for saying homosexuality is a sin', *The Telegraph* (2010) https://www.telegraph.co.uk/news/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html
[197] John Bingham, 'Preacher accuses judge of redacting the bible', *The Telegraph* (2015) https://www.telegraph.co.uk/news/religion/11505466/Preacher-accuses-judge-of-redacting-the-Bible.html.
[198] Article 9, European Convention on Human Rights (1950)

Abrahamic religions. Another issue is that a section of minority ethnic and religious communities will often come from more conservative cultural and religious backgrounds.[199] Their views and beliefs may lead them to be more likely to oppose homosexual activity.[200] If they are prevented from voicing their opposition to laws, it is possible that minority voices in particular are discouraged from engaging in the political process. This has resulted in claims that hate speech laws can result in a two-tiered system whereby the democratic participation of one minority is favored over the other.[201] A religious Muslim, Jew or Catholic may feel that their deeply held views are not considered equal to secular views. Similar issues have arisen over references to the Prophet Mohamed's marriage to a child and the killing of sheep during religious festivals.[202] Considering the fact that religious views can have a wide-ranging impact on public views and morality – which can then shape support for public policies – it should follow that the criticism of religion also falls within speech that contributes to the voice of opposition in public discourse.

What the above examples demonstrate, is that it is difficult to argue that the application of speech laws are limited to only the most vituperative of epithets in practice. It is also not applied in a viewpoint neutral manner. As Weinstein points out, not only does this suggest to the public that they must self-censor their speech even in a temperate, non-vituperative form – the fact that some of these cases may be overturned is not enough to prevent the chilling effect on speech that such prosecutions can have.[203] There are more than enough publicized cases of speakers being sanctioned for expressing their views that people would reasonably caution

[199] Patrick Mcaleenan, 'Homophobia taints the British Asian community', *The Telegraph* (2014) https://www.telegraph.co.uk/men/thinking-man/11290475/Homophobia-taints-the-British-Asian-community.html.
[200] https://www.theguardian.com/commentisfree/2010/jul/05/gay-south-asians.
[201] Thomas M. Keck, 'Hate Speech and Double Standards', Constitutional Studies, Vol. 1 Issue 1 (2016) p 95, 100-103.
[202] Weinstein, *supra* note 187, p 558.
[203] *Ibid*, p 561-562.

themselves against speaking their mind on contentious issues for fear of facing the same trouble. Due to the points raised above, framing hate speech bans in this way does not seem to be a persuasive approach.

2.4.2 Vituperative language is unnecessary for public discourse.

This argument is an extension of the previous one. It goes further than arguing that hate speech bans are not based on viewpoint restrictions are only limited to a limited yet extreme section of speech but argues that vituperative language is unnecessary for public discourse and does not provide a genuine contribution to political discussion. These forms of speech are particularly egregious and extreme in how they are expressed, and it would not be necessary for them to be expressed in such manner for the message to still be conveyed. Waldron argues that the law will 'bend over backward' to allow a 'safe haven' for the 'propositional content' to be expressed in a milder form – and therefore minimally affect political legitimacy.[204] This would mean that not only is this form of speech unnecessary, but there is ample opportunity to contribute to public discourse without its use. This may be appealing in the sense that it puts forward a case for some degree of civility in public discourse, whilst not being at the expense of allowing for political discussion. However, it may not be so easy in practice to divorce a message from the way in which it is expressed. Arguably all viewpoints are intrinsically linked to the manner of their expression.[205] If a viewpoint is to be expressed with the intention of conveying an ideological message, a restriction on the form that the speech can be made in, invariably puts a strain on the ability of the speaker to express it. It is not clear that formulating an expression in a less offensive way can preserve the substantive meaning and impact it was

[204] Jeremy Waldron, 'Hate Speech and Political Legitimacy' in Michael Herz & Peter Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press 2012) p 335.
[205] Gould, *supra* note 186, p 177.

meant to deliver. In treating the manner of speech as merely 'verbal wrapping paper',[206] it fails to address the difficulty in distinguishing the 'manner and matter'[207] of a statement - a burden which is then placed on the speaker. In *Cohen v California*, the wearing of a jacket that displayed the words 'fuck the draft' was ruled by the US Supreme Court to be protected speech.[208] This shows a recognition of the fact that the substantive meaning of the expression could not be separated from the manner in which it was expressed. To require it to be toned down, would be to require the expression be made obsolete. It is rather clear that if the jacket had instead said 'the draft is bad' or 'the draft is not good', it's impact would be severely diminished – to the extent that it would prevent the speaker from adequately conveying their opposition to the policy. For this reason, the attempt to distinguish between form and substance to support hate speech bans on political speech is an insufficient justification.[209]

2.4.3 The argument is settled/ issues have already received a broad level of discussion and agreement

This argument suggests that in the interest of upholding settled principles of justice such as racial equality, restrictions on hate speech are acceptable because those fundamentals of justice are already 'settled' and do not need to be contested.[210] They have reached such a broad level of agreement that the threat to political legitimacy is negligible when banning this type of speech because the discussion has already ended and no longer needs to be debated. It could

[206] Peter Jones, 'Blasphemy, Offensiveness and Law', British Journal of Political Science, Vol. 10 No. 2 (1980) p 129, 141-143.
[207] Ibid.
[208] *Cohen v. California*, 403 U.S. 15, 25 (1971).
[209] Eric Heinze, 'Taking Legitimacy Seriously: A Return to Deontology', Constitutional Commentary 319 (2017) p 631, 632, 639-643. This of course should not include speech which clearly intends to incite violence against groups (which would be directly at odds with the aims of reconciliation and preventing future violence) - however such speech does not necessarily have to be vituperative in order to achieve that end. Inciting language is not necessarily always vituperative, it may well be expressed in milder terms, with results that are equally as dangerous.
[210] Waldron, *supra* note 185, p 195; Waldron, *supra* note 204, p 336.

be argued that in the context of reconciliation, the fact that a state is engaged in this process suggests such debate has been resolved and needs no further public discussion. However, the alternative view would be that as it undergoes that transformational process, a variety of views are all the more necessary. The fact that a person wishes to express opposition (particularly in the sort of form that hate speech would take) to a popular idea indicates that the issue is not settled, and the argument is not over – at least to that person or group.[211] Political legitimacy in democratic process is not an end result, it should be a continuous process. It relies on a system where the public are able to voice their views, not a system where there is a temporal limitation to topics of discussion. However popular a policy or idea may be, what maintains the political legitimacy in that situation is the 'continuous hope that government actions might be swayed by changes in a public opinion to which persons are given full and open access.'[212] It could also be argued that it is the minority view (i.e. the one that opposes the settled view and is therefore less settled) that is the most contested and thus banning that speech would result in greater risk to political legitimacy.[213] A State that wishes to maintain its legitimacy should be most wary of banning the views that are put forward by the minority. Furthermore, if an issue is entirely settled, the risk of harm from allowing oppositional speech would therefore be minimal. If an argument has succeeded, then there should not be a harm to that argument in allowing the defeated idea to be aired.[214] In fact, it would bolster both the validity of the successful argument as well as legitimizing the enforcement of policy that results from the successful argument.

[211] Robert Post, 'Legitimacy and Hate Speech', Constitutional Commentary, Vol. 32 (2017) p 651, 657.
[212] *Ibid*; See also Eric Heinze, 'Viewpoint Absolutism and Hate Speech', The Modern Law Review Vol. 69 No. 4 (2006), p 543, 569.
[213] Gould, *supra* note 186, p 179.
[214] *Ibid*.

2.4.4 The silencing effect on participation

This is perhaps the most concerning argument against hate speech in relation to public discourse. As democratic participation and political legitimacy is reliant on all individuals having the ability to express their voices in public discourse, it is important that all sections of society feel able to contribute. Some argue that hate speech can 'jeopardize people's sense of their equal civic dignity'[215] and affect political legitimacy by rendering them less willing to participate in the democratic process. The argument is that certain types of hate speech could contribute towards a feeling within minorities and sections of society that they cannot participate in public discourse.

In addressing this issue, it may be possible to make a distinction between the potential consequences to the legitimacy of banning hate speech versus allowing it. The effect of banning hate speech (if political in nature) directly impacts the ability of the speaker to contribute to the public discourse. If the hate speech is political, then there is a guarantee that at least some political discussion will definitely be limited. If being prevented from expressing opposition to policies results in loss of political legitimacy – that effect is directly attributable to the hate speech law, i.e., a direct consequence of it. On the other hand, the effect on minorities that allowing hate speech would have, is a more tangential and potential consequence.[216] Banning hate speech would not necessarily solve the problems of a society where minorities do not feel comfortable to engage in public discourse. Such issues of discrimination in society are a complex and multi-faceted set of problems. It would be too much of an oversimplification to

[215] Alexander Brown, 'Hate Speech Laws, Legitimacy, and Precaution: A Reply to James Weinstein', Constitutional Commentary, Vol. 32 (2017) p 599, 610.
[216] Post, *supra* note 211, p 658.

reduce the issues to an existence of hateful speech. If the issue is that this speech affects minorities because it promotes inequality, then it seems unusual to limit it to ostensibly hateful speech.[217] If racist, exclusionary speech could be expressed in entirely polite, dog-whistle terms or scientific eugenic theories, would that not have the same effect? An example would be using the term 'illegals' to describe immigrants[218] – this is technically mild language, used widely in the mainstream and by politicians, yet it is difficult to distinguish it from the dehumanizing harm that would have been caused from a more outright offensive epithet. Banning the more overt expression of hate would be merely a pyrrhic victory that detracts attention from the real issues affecting minorities. It would be more accurate to say that discrimination is caused by a wide range of factors and context that can be proactively addressed by alternative policies. The harm caused by discrimination that may lead to minorities feeling excluded from participation in public debate could be better addressed through policies relating to access to housing, education, employment, security etc.[219] By focusing on hate speech, the real socio-economic reasons behind discrimination could be ignored. There is not necessarily a basis to say that speech is what causes a silencing effect, this could be caused by other factors. This argument is based on an intuitive perspective that speech carries the potential to silence. Furthermore, there is the risk of categorizing the interests of minorities as a monolith. The attitudes of different sections of minorities are not homogenous and can often take the form of quite conservative religious/cultural viewpoints that would fall under the hate speech laws.[220] This in turn could result in hate speech laws in fact being more likely to dissuade minorities from engaging with the democratic process. For example, minorities coming from majority Muslim or culturally conservative countries may be more likely to have homophobic attitudes due to

[217] Gould, *supra* note 186, p 184.
[218] *Ibid*.
[219] Post, *supra* note 211.
[220] *Supra* note 199; note 200.

deeply held religious or cultural beliefs.[221] It may be presumptive to assume that the interests of minorities converge similarly. As an example, whilst positive discrimination/ affirmative action measures may have been assumed to be good for all minorities, and the opposing of those policies to be bad for them, this has resulted in conflicting problems for different groups of minorities in practice. In *Grutter v Bollinger* the US Supreme Court held that affirmative action-based admissions procedures, where underrepresented minorities were favored, was allowed.[222] Whilst it may have been assumed that this would be beneficial for all minorities, in practice, these policies resulted in widespread complaints by the Asian-American community that they are being discriminated against in the admissions process. As an ethnic group that statistically tends to perform well in academics, they are faced with a situation where college admissions require higher grades from them and attempt to artificially reduce the number of successful applicants in favor of increasing numbers of other minorities such as African Americans.[223] In cases like this, if someone from the minority who is disadvantaged by affirmative action policies wanted to express their opposition to such policies, speech bans would at least limit the full range of what they could say. This could result in particular minorities being uncomfortable with engaging with the public discourse on the issue due to the fear of legal consequences, thus delegitimizing the enforcement of those laws against them. *Grutter v Bollinger* was effectively overturned in *Students for Fair Admissions v Harvard,*[224] where race-based affirmative action admissions policies were deemed to violate Constitutional protections. This reinforces that the debate pertaining to that issue clearly carried legitimate concern and political speech – which in turn raises the possibility of a silencing effect of hate speech laws if people worried about raising criticisms of such policies in case it would be

[221] Mourchid Younes. 'The Dialectics of Islamophobia and Homophobia in the Lives of Gay Muslims in the United States' Counterpoints, Vol. 346 (2010), p 187, 190-193.
[222] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[223] Jeannie Gersen, 'The many sins of college admissions', *The New Yorker* (2019) https://www.newyorker.com/news/our-columnists/the-many-sins-of-college-admissions.
[224] *Students for Fair Admissions v Harvard*, 600 U.S. 181 (2023).

deemed hate.[225] In effect, hate speech laws intended to protect minorities from being silenced, could actually end up silencing minorities.

However, despite these criticisms, the weight that this silencing effect could carry is substantial. A case for protecting political speech suffers a delegitimizing effect if sections of society are excluded from public discourse – in fact, this argument for banning hate speech due to its silencing effect can be framed as a restriction to protect free speech.[226] The frequency and saturation of hate speech in society can also be a relevant factor, particularly in the context of reconciliation.[227] In post-conflict situations, or where there has been a recent history of communal tension, as in Sri Lanka, the silencing effect may be more substantial. This would go beyond the idea that minorities feel unwelcome or not an equal part of public discourse – but silences them with genuine fears of violence. In this sense, there may be a stronger case for restricting some forms of hate speech, particularly in times of heightened risks of violence. This may not have to mean outright bans on hate speech (the force of the argument for protecting political speech even if hateful still stands) but may lend some weight to using a balancing process in times of communal tension.

2.4.5 The problem of violence and hate crimes

A substantial part of the motivation of regulating speech is to address the potential dangers of violence. Incitement to violence is deeply concerning to State's as it represents the potential

[225] Such a potential silencing effect of hate speech laws could extend to many other areas of public debate that are particularly relevant to political speech such as discussions of immigration, gender, religious extremism etc. Furthermore, as will be seen in the discussions of the next chapter, the silencing effect of hate speech laws can be exacerbated in a reconciliation context (particularly with weaker institutions) where the fear of arbitrary use and abuse of hate speech laws can cause a chilling effect.
[226] Szigeti, *supra* note 116, p 153.
[227] *Ibid* p 159.

for direct attacks on individual's rights and safety – as well as potentially contributing to a silencing effect if they do not feel safe in public discussion. This is not an issue unique to Sri Lanka, and it forms a considerable part of general discussions of how to approach speech regulation.[228] However, it can be argued that there are certain features of a reconciliation context (as in Sri Lanka) that contribute to differences that may distinguish in somewhat from other contexts and require separate considerations.[229] This is because not only are there fears of violence in society, but the context of those concerns are different. In more stable democracies, the risk of hateful inciting speech mainly centers on concerns that it could lead to targeted instances of violence. This in itself is not fundamentally different from concerns shared in most countries. However, in Sri Lanka existing deep divisions in society can mean that there is a particular fear of communal violence that goes beyond a general risk of potential incitement. Firstly, violence in such a context can be more likely to reach a level of relatively widespread situations, rapidly descending into situations that the State may struggle to handle. Past experiences demonstrate instances of rioting and communal violence that rapidly reached a level where the State does not have the capacity to control its immediate harms.[230] Such situations have been in a context of heightened inflammatory and inciting speech, and a State's inability to guarantee the protections of individuals and groups is of serious concern. Secondly, this is exacerbated by apathy of State institutions or insufficient guarantees of rule of law that can enable such situations to cause a heightened degree of immediate harm. The response of the police may be lackadaisical, media attention may be limited or non-critical, and the State may aim to downplay the seriousness of the situation. Thirdly, the context of the country, with a history of conflict and recent violence with inadequate accountability, contributes to acute

[228] Antoine Buyse, 'Dangerous Expressions: the ECHR, Violence and Free Speech', The International and Comparative Law Quarterly, Vol. 63 No. 2 (2014), p 491, 492, 493.
[229] Heinze *supra* note 212, p 574 – describing how weaker democracies may require different approaches due to dangers of harm.
[230] See Chapter Five for examples of situations that have led to states of emergency in Sri Lanka.

fears by the public (particularly in vulnerable and minority groups) of communal violence that goes beyond individual offences. The perceived risk of inflamed situations where mobs seek out and attack others based on ethno-religious lines (with the State either unable or unwilling to effectively hold perpetrators accountable) can cause particular fear that silences groups from participating. Thus, the free speech framework of a country in such a context should be able to address this particular risk of communal violence, perhaps not as a distinct approach to speech regulation, but as a key factor to take into account. As an example, disinformation that has been attributed to inflaming tensions that led to riots against minorities (alleging that Muslims were sterilizing non-Muslims) could carry different effects based on the context.[231] A more stable democracy may be more able (and willing) to counter such speech. The societal context may also be such that its effects are less likely to result in widespread violence. Whilst they may still be concerned about its potential to incite incidents of violence the potential for it descending beyond the control of the State is less pronounced, and there will also be a relative view that perpetrators will be held to account. This may be different in a less stable context. The potential for such expressions to incite communal violence is more pronounced in terms of the potential for widespread violence, the perception of violence occurring, and the foreseeability of the consequences on the part of the speaker. The State will have to consider the implications of incitement with the possibility of such speech to spark or contribute to significant harms. The perception of violence will be such that the impact on minorities will be heightened as they perceive the risk of violence on a more immediate and consequential level. The speaker may also be more likely (within the context of divisions and recent conflicts) to be expected to foresee the potential for violence that such expression may contribute to.

[231] See Chapter Four which discusses harmful disinformation.

However, whilst this does mean that the State should pay particular attention to this risk, the regulatory response must also be tempered by situational considerations. The fact that institutions may be less able or willing to combat these harms means that not only does it increase the risks of incitement to violence – but it also means that the risks of arbitrary application or abuse of regulations are more significant. This is reflected in the response of the State to such issues and a background of State overreach in speech regulation. Not only is the potential abuse of speech laws more of a concern (both in terms of a propensity to misapply such laws and its potential wide-reaching impact on an already vulnerable public discourse) but the public will also harbor a wariness of the State and potential for their speech to be arbitrarily restricted. A less stable and established democracy, as in Sri Lanka, is more at risk of State overreach where speech restrictions (and justifying strong measures by pointing to potential violence) can be utilized to stifle opposition, criticism, inconvenient speech, or unpopular speech.[232] This then imperils political discourse by providing a justification for disproportionate response. Some of the political discussion that is necessary for the transformative project of reconciliation will therefore be in a weaker position. The State will be able to trammel inconvenient political speech (which will inevitably relate to controversial issues that the State may argue has some tangential link to potential violence) and people will self-censor out of fears that their speech may be arbitrarily targeted. It is also unclear the extent to which a causative effect can be attributed to individual speech – proving a link between incitement, the intent to cause, and the occurrence of violence will inevitably be based on assumptions. Such presumptive considerations are dangerous without strong democratic norms

[232] See Chapter Three and Four for further exploration of how this issue materialises in practice. Also see Chapter Five which considers emergency and prevention of terrorism laws which have been influenced by national security considerations and the prevention of incitement/violence yet raises significant issues in terms of free speech. Also consider the example of Rwanda where past instability and violence (and institutional weaknesses) may provide a justification and potential for overreach in terms of regulating speech – 'Rwanda: Wave of Free Speech Prosecutions', *Human Rights Watch* (2022) https://www.hrw.org/news/2022/03/16/rwanda-wave-free-speech-prosecutions

and substantial safeguards. Therefore, whilst a speech framework conducive to reconciliation should have regard to the potential of communal violence – it must also have significant safeguards in place to prevent a negative effect on democratic participation.

2.5. Criteria for a speech framework that is conducive to reconciliation

This thesis so far, has considered relevant issues in the regulation of speech and considered its applicability to the context of reconciliation in Sri Lanka. Interspersed in the discussion has been a consideration of how certain factors may distinguish a normative approach by taking into account some of the practical realities of applying a free speech framework to address some of the features of such a context. This may be distilled into the main criteria which can provide benchmarks against which the speech framework may be assessed. This will form the basis of the more specific analysis of the speech framework in Sri Lanka in the subsequent chapters. The features of such a framework must – a) provide adequate protection of political speech and democratic participation. As the most relevant theoretical justification for protecting speech within a transformative period of reconciliation, the speech framework must ensure adequate protection, b) provide for a wider scope based on key issues that relate to the reconciliation process in terms of categorizing political speech that warrants heightened protection, c) account for the potential for communal violence and the need to address/prevent such occurrences, and d) take into account the particular risk of abuse of speech laws in such contexts and ensure strong safeguards to prevent arbitrary use and State overreach. This is both in terms of the potential for the State to stifle legitimate speech, and the potential wider chilling effects on a public that are less secure in democratic participation.

At this point it will be useful to consider why the above criteria provide a distinct normative approach that will be useful in practice. It is easy to imagine a criticism that, whilst providing positive goals, it does not necessarily represent a substantial departure from general protections of free speech. Some may argue that political speech is important in any democracy, so what is the substantive difference in this criteria? Would it not be adequate to just argue for bringing the country's speech framework to be in line with international norms and standards? It is therefore necessary to justify the effect of this in terms of the potential contribution of this thesis as a novel normative framework that goes beyond a basic criticism of the current speech framework and filling a lacuna in the academic literature. This is done by the following:

Firstly, by taking into account ground realities, the criteria proposed will be able to provide practical application of free speech guarantees conducive to reconciliation that are targeted to the context. For example, whilst certain safeguards may be adequate in more stable contexts (with relatively more independent and accountable institutions) – these will be insufficient to guarantee political discourse in this specific context. Therefore, whilst the objective of protecting political speech may be similar in theory, the practical effectiveness of a framework or mechanisms are subject to contextual considerations.

Secondly, by providing a benchmark that takes into account the objectives of reconciliation, this can affect the outcome of restrictive measures and the interpretation of its scope. As an example, in situations relating to speech and religion - States that are more stable with stronger democracies, may be able to argue restrictions based on a framework that places lower value on grossly offensive speech to religion. Although this may be inimical to general issues of free speech, they would at least have a case to exclude it from the strongest of protections accorded to political speech. However, this may not be desirable (under the criteria of this thesis) in a

reconciliation context. A process of reconciliation, particularly within the context of recent ethno-religious division, requires a direct link between religion and political speech – even in situations where the link is not clearly apparent. This goes beyond direct criticisms of the hegemonic tendencies of the majority, and includes wider discussion of religion that may not easily be identified as political in other contexts. A history of violence and harsh retaliation means that such political contributions may be cautious and expressed indirectly. Therefore, in practical terms a decision may be informed by these considerations. For example, consider a piece of art that may be gratuitously offensive to religious sentiment and does not necessarily demonstrate a direct link to a political contribution. States may conclude that there are sufficient safeguards in place to prevent the arbitrary use of blasphemy laws.[233] They may also accept a pressing need to limit gratuitous offence where religious doctrines are disparaged.[234] This may be done without regard to a potential political nature of the expression and assessed as a general free speech issue.[235] Whilst such an approach may be followed in Sri Lanka, an application of the criteria set out here may result in either a different outcome or at least a more robust consideration of the issues.[236] Such expressions may be considered to come within the stronger protections for political speech, as discussions relating to religion form a substantial part of the reconciliation process which therefore necessitates open discussion to ensure legitimacy in both the policies taken and the State itself. Furthermore, such participation may take the form of more tentative expression (through art, pseudonymous speech, broader criticisms etc.), and safeguards may be less effective in practice, therefore requiring a wider scope of protection. What may be a legitimate restriction in other States may therefore be too

[233] *Wingrove v United Kingdom*, *supra* note 123.
[234] *Otto-Preminger-Institut v Austria*, App No. 13470/87 ECHR (1995).
[235] *IA v Turkey*, App No. 42571/98 (2005).
[236] See the next Chapter for examples of similar speech that has been targeted – notably in the case of a Facebook post with a poem implying misconduct by the priesthood.

restrictive at least in terms of encouraging a context in which the objectives of reconciliation may be realized.

Thirdly, in addition to providing a framework through which to interpret the scope of restrictions, these criteria can provide a basis in assessing the current legislation and regulatory mechanisms to consider their specific impact in terms of these aims. Laws that would otherwise not pose significant threats to political discourse may be inadequate in this specific context. Therefore, not only can these deficiencies be pointed out (and interpretation of its provisions informed by the objectives of reconciliation), but it can be an indicator of reform that is necessary to bring it in line with the proposed standards. This could include political pressure to bring reform that would otherwise not be particularly necessary or urgent in more stable contexts. For example, the ICCPR Act of Sri Lanka (discussed in Chapter Three) contains provisions that may be justified as necessary to combat hate speech and its provisions may not have contributed to such a degree of overreach and abuse that it has in practice, if it operated under a context of better democratic norms. However, in practice the Act has been particularly damaging to public discourse being used as a justification for a number of arbitrary arrests. Applying these criteria, the practical issues can be identified and form a basis for future changes to the law.

Fourthly, in addition to interpreting and critiquing existing law, these criteria can assist in identifying practical measures to combat issues such as incitement to violence and hate speech. These can include measures that are beyond the use of legislative instruments such as capacity building, State educational initiatives, and guidelines of application.

2.6. Conclusion

This chapter has built on the democracy-based justification for free speech in a reconciliation process established in the previous chapter. The first part of this chapter considered political speech. Protecting political speech will be an essential part of facilitating the conditions of public discourse necessary for democratic legitimacy. This requires a solid basis upon which this category of speech will be distinguished from other speech and thereby receive heightened protection. There are normative difficulties in applying this process of delineation, but this chapter has outlined some of the main ways (through content and context) that such a process should work. It was noted that the process of reconciliation may require wider scope in allowing political speech, as the transformative process requires continuing deliberation. Such robust and wide-ranging discourse is necessary if reconciliation is to be long lasting. The second part of this chapter looked at hate speech. A State moving forward from a post-conflict context and a history of tensions between groups of society will have to address the issue of hate speech. This chapter concludes that whilst there may be justification for the existence of hate speech bans in a state that may not have the capacity to protect against it – those same factors warrant caution in regards to the abuse of hate speech bans. The silencing effect of hate speech was also considered as particularly relevant due to the delegitimizing effect it could pose. It may be the case that the more there is a risk of violence where communal tensions are particularly apparent and hate speech has reached a substantial level of saturation, the more weight this concern may hold. However, the more ostensibly political a form of speech may be, even if falling within hate speech – the stronger the case for protecting it.

This chapter has expanded on the first chapter and set out a benchmark and a normative basis that if satisfied should be able to assist in establishing the conditions necessary for a free speech

framework that is conducive to reconciliation. This thesis will apply the metrics referred to in this chapter to Sri Lanka's speech framework and see if it satisfies what is required for effective political discourse. This will assist in finding out if there are deficiencies in the framework that can be rectified (through legislative change etc.) and whether there may be wider policies that can bolster protections for political speech.

Chapter Three

Free Speech in Sri Lanka: Background, Limitations, and Recent Cases

3.1. Introduction

The previous chapters have set out various speech theories and benchmarks which may assist in establishing the conditions that would be beneficial for speech guarantees within a reconciliation context. The argument for protecting speech through democratic participation provides the justificatory basis for protecting free expression – and political speech has been identified as of particular relevance in achieving this. The speech framework of a country that aims to promote reconciliation should have in place adequate protection for political speech. In addition to this, the framework should be able to take into account a broader range of political speech and cast a wider net to take into account the transformative process and the range of speech which may come within the definition of political speech and attract greater free speech protections. As discussed in chapter 2, some restrictions on speech may be justified (in particular, hate speech/ incitement to violence laws in countries where the democratic framework is unable or under-equipped to protect minorities); however, as discussed in Chapter 2, such restrictions are also particularly vulnerable to abuse in this context and must be formulated (and implemented) in a way that takes this into account. In applying these standards to the Sri Lankan free speech framework and reconciliation process, this chapter will examine some of the salient issues relating to Sri Lanka's free speech framework through analysis of the main constitutional and statutory instruments, and jurisprudence. This can be done by

identifying where the existing framework conforms to a satisfactory degree with the established standards, where there is some conformity with deficiencies resulting in problematic issues in practice (for example vague/inadequate drafting of the law, or improper implementation), and where the law is outright incompatible with the standards.

3.2. Free speech guarantees and early cases in Sri Lanka

Article 14 (1) of the Sri Lankan Constitution contains the fundamental rights that are guaranteed to the Citizens of Sri Lanka by the Constitution.[237] Article 14 (1) (a) sets out the fundamental right to 'the freedom of speech and expression including publication'. Despite the existence of this right within the text of the Constitution, the protection of free speech has depended on its application by the Courts and the willingness of the State to adhere to its principles in practice. The country has faced a great deal of turmoil in the past with powerful State actors operating under a less than permissive approach towards free expression. Whilst the State has at times been inconsistent in upholding these values,[238] there are many instances that demonstrate the protection and development of the freedom of expression. It is worth examining some of the main cases and principles that the Courts have established in relation to free speech, and particularly political speech, that form the basis of this fundamental right.

[237] The Constitution of the Democratic Socialist Republic of Sri Lanka, revised edition 2015.
[238] Jayantha de Almeida Guneratna, Kishali Pinto-Jayawardene, and Gehan Gunatilleke, 'The Judicial Mind in Sri Lanka; Responding to the Protection of Minority Rights', *Law and Society Trust* (2014) p 252; also see recent cases discussed in the latter part of this chapter.

3.2.1 Cases setting out the foundation for the free speech framework and protection of political speech

The landmark case of *Joseph Perera*[239] concerned members of the 'Revolutionary Communist League' which planned a meeting and lecture to discuss 'Popular Fronts and Free Education'. A leaflet had been distributed two days before the meeting criticising the United National Party (the governing party at the time), calling them the enemy of the students and calling on people to get together and establish their rights. The police were informed of the meeting through complaints by the Principal and Vice-Principal of two schools in the area. These complaints alleged that a meeting was to be held by 'revolutionaries with the view to creating unrest among the students in the area'.[240] The Principal of St. Mary's college Chilaw had also recently received a warning letter signed by the 'Eelam Tigers' threatening to blow up the school and coupled this threat with the proposed meeting when informing the police. The police arrived before the meeting, sent away the audience and took into custody Joseph Perera, his brother Lorenz and L.D Wijegunasinghe who had been scheduled to speak at the event. The petitioners were served with a detention order on 27 June 1986 and held at the police station until 15 July. They were then ordered by the Magistrate to be remanded and then further remanded until 29 July – eventually being released on bail on 7 August. The context of this incident is relevant as it took place during the civil war with the separatist terrorist LTTE group and in the lead up to a second JVP (Communist) insurrection. This context of heightened security fears could have potentially justified a response to shut down a meeting which may have advocated for overthrowing the government through violent means.[241] The majority of the Court decided that the initial arrests were justified as founded on reasonable suspicion of an offence under the

[239] *Joseph Perera Alias Bruten Perera v The Attorney-General and Others*, 1 S.L.R. 199 (1992).
[240] *Ibid,* p 232.
[241] *Ibid,* p 235.

emergency regulations. After investigation it should have been clear that an offence had not occurred, and the petitioners should have been released from detention. The detention was only unlawful after 15 July. However, whilst agreeing with the majority, two justices (Sharvananda CJ and Atukorale J) disagreed with the issue of the first arrest and stated that the leaflets should have been better scrutinized, and it should have been apparent that they did not contain material that would reasonably be considered contrary to the emergency regulations. The judgment in *Joseph Perera* is viewed as the locus classicus for decisions on free speech in Sri Lanka and has been much quoted in subsequent judgments.[242] Sharvananda CJ established a support of the fundamental freedom provided for in Article 14 (1) (a) and expanded on the extent of protection which it provides. Whilst the leaflet was strongly worded, it did not contain language that could reasonably be deemed an incitement to action. The freedom of expression would be 'illusory if the Police can with impunity arrest and detain a person if he does not obsequiously sing the praises of the Government'[243] - and 'is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources, independent of the government, concerning matters of public interest. There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind. Truth can be sifted out from falsehood only if the Government is vigorously and constantly cross examined.'[244] Whilst this case included an examination of wider issues of free speech, it is notable that political speech and its role in democratic participation is given particular importance, as well as the need to protect these forms of speech. These forms of speech are seen as critical to the functioning of a democratic state. The focus in this case seems to be on overtly political speech, where the

[242] Lakshman Marasinghe, 'Recent Developments in Sri Lanka on the Freedom of Expression', Law and Politics in Africa, Asia and Latin America, Vol. 33, No. 2 (2000) p 157, 169.
[243] *Supra* note 239, p 223.
[244] *Ibid*, p 224.

issues relate to circumstances where it is relatively easy to identify the political nature of the expressions.

Other cases have expanded on this right. In *H.P. Shantha Wijeratne Vs. Vijitha Perera, Sub-inspector of Police, Police Station, Polonnaruwa,*[245] the Court also extended these obligations to the executive and to the police – stating that dissent should not only be tolerated but encouraged. It is not enough for the police to refrain from suppressing lawful dissent, but they must respect, secure, and advance the right to dissent.[246] This suggests an onus on the State to not only limit itself from censoring political speech, but to take an active role in protecting it.

In *Visuvalingam and Others v Liyanage and Others,*[247] the petitioners brought a claim that their right to free speech had been violated after a newspaper was banned from publication. This case provides an insight into the Supreme Court's approach to political speech within the context of instability at the time. The newspaper was restricted under emergency regulations, with the State alleging that the paper's sympathetic leanings towards the terrorist movement necessitated restriction in the interests of national security. The speech in question was clearly political in nature (although there was other material of cultural and artistic interest, the focus of the judgment was on the controversial and overtly political speech). The paper was alleged to have eulogised and praised the terrorists and at times, both implicitly and explicitly condoned their cause.[248] The Court reiterates in this case the importance of protecting speech and recognised the importance of political speech. It is described as an 'essential prerequisite for the purpose of successfully preserving democratic institutions' which includes 'a diversity of views and ideas and the right of free and general discussions of all public matters including

[245] Case No. 50 S.C. Application No. 379/93 (1994).
[246] *Ibid*.
[247] *Visuvalingam and Others v Liyanage and Others* 2 SRI LR 311 (1983).
[248] *Ibid* at p 333.

matters not palatable to the government or to the majority of people in the country.'[249] However, despite this recognition, the Court was willing to balance this against the national security interest and consider the restriction justified. There are aspects of the speech contained in the newspaper which should possibly still be protected speech, despite the national security interests (for example, the highlighting of police and army excesses and violence). However, considering the particularly unstable context of the time, the restriction of the speech that supported terrorist groups and activities may have been justified in the interests of national security, regardless of its political characteristics. Interestingly, the Court declined to comment on whether the material contained in the paper would have been justifiably restricted in normal times.[250] This leaves it open as to whether the application of speech protection would be different in the current context for similar material. As it would be speech that is ostensibly political in nature, and the risk of separatist violence is far less imminent – the justification for limiting such speech would be far weaker. In fact, the process of reconciliation may require accommodation for remembrance and memorialising fallen combatants on both sides. The perceived effect of eulogising combatants during war time as opposed to memorialising such persons post-conflict may be different, with the latter likely to be viewed as part of the reconciliation process. Indeed, the role of memorialisation has been described as a relevant part of reconciliation and transitional justice.[251] Applying the standards discussed in this thesis, the need for a wider net for political speech in the reconciliation context would suggest a stronger basis for post-conflict memorialisation to attract speech protection.[252] Furthermore, the need to protect against the abuse of speech limitations would imply a weaker case for undue restrictions

[249] *Ibid* at p 312.
[250] *Ibid* at p 333.
[251] Radhika Hettiarachchi, 'Practice Note 1: Memorialisation and Reconciliation in Sri Lanka', *The Community Memorialisation Project* (2016), p 2-3; Thyagi Ruwanpathirana, 'Memorialisation for Transitional Justice in Sri Lanka: A Discussion Paper', *Centre for Policy Alternatives* (2016).
[252] See the criteria set out in Chapter Two.

in the interests of national security – or at least heightened scrutiny of the justifications of those restrictions.[253]

The right to free expression can link with other rights – in *Sunanda Dehsapriya,*[254] the Mayor of a provincial city ordered the seizure of 450 copies of the newspaper Yukthiya. This publication was known to be a constant voice of criticism against the then government. The Court ruled against the Lady Mayor and ordered her to pay damages, emphasising that the breach of free speech was all the more severe due to the seizure being politically motivated. Interestingly, the Court also viewed this to be a breach of Article 12 of the Constitution and amounted to a denial of equal treatment or discrimination because of political opinion.[255] Article 12 (2) states that 'No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds'.
In doing this, the Court expanded the application of the free speech fundamental right in Article 14 and forged a nexus between that and another fundamental right.[256] It is therefore also possible that this could also apply in a similar instance with another form of discrimination, for example race, sex, religion etc. This case reiterates the importance of political speech, and its position as a justification for protecting the freedom of expression. It also goes further by deeming undue restrictions of these forms of speech as particularly unjustified. The political characteristics of the speech, and by extension the politically motivated restriction of that speech – attracts greater protections and greater scrutiny of limitations by the state.

[253] See Chapter Five on Emergency Laws for more analysis on this subject and the risks of unjustified limitations on political speech through perpetual states of emergency.
[254] *Sunanda Deshapriya v Municipal Council of Nuwara Eliya* SC 519/95 (1995).
[255] Also see *Joseph Perera*, *supra* note 239.
[256] Marasinghe, *supra* note 242, p 163.

In *Channa Pieris,*[257] a meeting was held by members of a political group within the premises of a temple, and statements were made criticising the government and an intention to topple it. The Court held that expressions against the government are not unlawful per se, despite how vehement or unpleasant.[258] A clear separation is evident in determining what makes acceptable political speech in this context, that being political speech which does not call for violence. As seen previously in *Visuvalingam*, implicit and explicit support of a terrorist group could be justifiably restricted in the interests of national security, despite the political nature of the speech. Similarly, the political speech in Channa Pieris, may have been restricted if it advocated for or incited violence. However, in this case the Court held that 'legitimate agitation cannot be assimilated with incitement to overthrow the government by unlawful means' and 'the call to 'topple' the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated.'[259]

In *Amaratunge v Sirimal,*[260] the petitioner had attended a political protest against the government of President Premadasa. The protest took the form of a 'Jana Ghosha' – a vocal protest where demonstrators would create loud sounds through drums, saucepans etc. The petitioner was found beating a drum by the police, who then proceeded to smash the drum to pieces. The petitioner then started clapping his hands after which he was arrested. The Court found that there had been an unjustified restriction of the petitioner's speech. Justice Mark Fernando reiterated that 'the right to support or to criticise Governments and political parties, policies and programmes, is fundamental to the democratic way of life.'[261] The Court also

[257] *Channa Pieris and Others v Attorney General and Others (Ratawesi Peramuna Case)*, 1 SRI LR 01 (1994).
[258] *Ibid* at p 2.
[259] *Ibid* at p 3.
[260] *Amaratunga v Sirimal and Others (Jana Ghosha Case)* 1 SRI LR 264 (SC App No. 468/92) (1993).
[261] *Ibid* p 271.

approved of the view that the Article 14 guarantee of free speech extends beyond verbal and written modes of speech. It includes a wide range of forms of expression.[262] This case presents an instance where the Court begins to expand the scope of political speech. The other cases mentioned so far have related to more traditional forms of political expression, through media and political discussion. By recognising that these protections encapsulate wider forms of political speech, the Court leaves room for protections to apply to a broader range beyond traditionally obvious political speech. However, this is still a relatively limited development, as the speech occurs in the context of a protest by a demonstrator and may be easier to identify as attracting greater protections when compared to the wider net required in the context of reconciliation as discussed in this thesis.

A common theme can be observed during this period of the Supreme Court's jurisprudence. The importance of political speech and its link to democracy is clearly established. However, much of the focus relates to speech that is relatively easy to identify as political speech. The issues often related to State attempts to stifle criticism. This perhaps reflects the circumstances of the time, with instability in the face of terrorism and communist uprisings leading the State to over restrict political speech (as well as providing the guise of national security to justify the stifling of political opposition). In considering how these cases relate to the benchmarks for reconciliation set out in this thesis, they set out a foundation for political speech protection which may be expanded upon. As the cases relate mostly to relatively clear political speech, there seems to be adequate protection and a willingness of the Court to protect the genuine public sphere.[263] However, as reconciliation (as conceptualised in this thesis) requires a wider net that encapsulates a wider form of political speech that attracts protection, it remains to be

[262] *Ibid* p 270.
[263] See discussion of Eric Heinze's work in Chapter Two.

seen how the Supreme Court would approach this. There is a clear indication that the Court will be willing to restrict speech in the interests of national security if there is a reasonable threat of violence. As seen in *Visuvalingam*, the Court has left open how its approach may differ in peacetime. Furthermore, in *Amaratunge*, the Court showed its willingness to accept wider forms of political speech (albeit still within the context of ostensible political protest). These decisions suggest that the normative approach suggested in this thesis may be compatible with the existing jurisprudence. For example, issues relating to the memorialisation of combatants on either side may be approached differently in peacetime, making up part of the reconciliation process. Such speech may be able to come within political speech and the case for restricting such speech in peacetime may be weaker.

As the Supreme Court is yet to consider some of the more fringe cases of political speech (where identifying it as such is less clear), it is worth putting forward this approach as a way to foster a free speech context that protects wider political speech and is conducive to the reconciliation process. As demonstrated by the historical jurisprudence of the Court, there has been a strong consideration of general protections for political speech. What this means for the objectives of this thesis is that there is a solid foundation in terms of protection of political speech upon which to expand on. The effect of applying the findings of this thesis will be to further improve this framework by bringing it in line with a more tailored approach that can address the specific challenges of reconciliation. The main ways in which this can be applied are by considering how the scope of political speech may be widened in terms of reconciliation, how legislation impacts the framework (taking into account that despite the Court's previous jurisprudence they are limited in the sense that the Court is unable to judicially review enacted laws), and by accounting for the practical realities of a speech framework operating within a reconciliation context where institutions may be relatively weak and require stronger

safeguards. The next section of this chapter will look at some of the main current limitations on speech in Sri Lanka provided for in law. As much of the restriction by the State will occur through the utilisation of these limitations, it is necessary to consider how compatible they are with the standards for reconciliation set out in this thesis. The application of these limitations (particularly the ICCPR Act) influences the more recent cases which will be considered at the end of the chapter once some of the main issues of the limitations have been laid out.

3.3. Limitations on free speech in Sri Lanka

The main limitations on free speech are contained in Article 15 of the Constitution, the Public Security Ordinance (which will be discussed in Chapter 5 in relation to emergencies), the Penal Code, and the ICCPR Act 2007. This section will go over some of the limitations provided for in the above and some potential issues based on the wider objectives of this thesis.

3.3.1 Limitations on speech within the Constitution

Article 15 of the Constitution of Sri Lanka contains the limitations on fundamental rights. Article 15 (2) deals specifically with the right to free speech established in Article 14 (1) (a) and states 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.' Article 15 (7) also states that 'The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of

national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.' These constitutional limitations provide for a broad range of restrictions, with Article 15 (7) resembling limitations found in similar clauses found in the ICCPR and ECHR. However, there are some issues that may be worth noting.

The use of the term 'racial and religious harmony' in Article 15 (2) provokes some interesting consideration. Whilst the term 'religious harmony' has previously been referred to in the European Court of Human Rights,[264] such a term being used to limit a Constitutional right would be uncommon in most Western countries. However, the use of the term 'harmony' in relation to Constitutions and human rights law seems to be relatively more prevalent in Asia. Article 51A of the Indian Constitution establishes a fundamental duty on every citizen 'to promote harmony' and the Indian Penal Code criminalises acts deemed 'prejudicial to maintenance of harmony' between race, religion etc.[265] Singapore has the Maintenance of Religious Harmony Act and Myanmar has sought to pass an Interfaith Harmonious Coexistence Law (which has been criticised as threatening religious and free speech freedoms[266]). The prevalence of this term being used in the formulation of speech restrictions may be explained as owing to colonial roots (the Indian Penal Code formed the basis of many of the other colonies' laws), but its continued existence may be due to differing attitudes towards the method in which harmony should be achieved. This may follow an approach

[264] *Lautsi and Others v. Italy*, App. No. 30814/06 (2011), p 60.
[265] Indian Penal Code 1860, 8.153A.
[266] 'Myanmar: Draft Interfaith Harmonious Coexistence Bill continues to endanger fundamental rights', *Article-19* (2017) https://www.article19.org/resources/myanmar-draft-interfaith-harmonious-coexistence-bill-continues-to-endanger-fundamental-rights/ .

where, rather than prioritising individual rights, the interests of societies or communities may justify the utilisation of State power to ensure it. Furthermore, countries such as Sri Lanka, Singapore and India are very diverse (and historically so from inception) with their multi-religious and multi-racial populations, and the avoidance of tensions and upholding of harmony may be a priority for these pluralistic countries. Whilst the pursuit of harmony is not in and of itself a problem (and in a general sense seems to align with the goals of reconciliation), its use as a legal term to limit fundamental rights can pose issues. As a Constitutional norm (and justification for limiting fundamental freedoms), it legitimises State action in this regard and 'tends to prioritize the community (sometimes conflated with the state) over the individual and even groups.'[267] Some commentators argue that it leaves room for adverse effects and that the use of the term harmony has the potential to legitimise coercion and societal control with marginalised groups at particular risk.[268] The term racial and religious harmony is in itself difficult to conceptualise, particularly in a legal sense. What does harmony mean – is it the absence of disharmony? What degree of disharmony is permissible before it can be Constitutionally limited? It is arguable that most forms of speech that would be controversial yet permissible in a free society have the potential to create some discord and therefore disharmony, yet it cannot be a reasonable justification to restrict speech merely because it upsets the status quo – Sri Lanka's case law protects speech that may be unpopular, obnoxious or distasteful.[269] The vagueness of this term leaves too much of a burden upon the Courts to decide on what may be too abstract a concept for its purpose. Furthermore, it is likely that the speech which attracts the most disharmony would be that which offends the majority. If members of an established majority use their speech to attack a marginalised minority, it would

[267] Jaclyn Neo, 'Dimensions of Religious Harmony as Constitutional Practice: Beyond State Control', German Law Journal, Vol. 20 Special Issue 7 (2019) p 966, 968.
[268] Laura Nader, *Harmony Ideology, Justice and Control in a Zapotec Mountain Village* (Stanford University Press 1990) p 2 -10, 66, 220.
[269] *Amaratunge v Sirimal*, *supra* note 260, p 270.

be reinforcing prevalent attitudes and the minority may not have the means or clout to oppose it. On the other hand, if the majority is criticised, the outrage would be far more widespread, and the disharmony caused greater – thereby potentially justifying a restriction. It is difficult to extrapolate from the text of the Constitution and the Courts' jurisprudence, how to interpret the provisions relating to harmony. It is usually referred to in a general sense as justification for State limitation of speech, without specific consideration as to its specific effect.[270] Arguably, the effect of this is less direct and provides a cover for the State to implement speech restrictions on unpopular or minority expression. When applying the normative standards set out in this thesis, it may seem incompatible at first glance. As previously discussed, reconciliation requires a broad range of political speech, and this includes speech that may be disruptive to harmony. Open discussion relating to racial tensions and religious conflict are likely to be part of the national conversation and debate – particularly during a post-conflict period and a time of transformative change. The change that is necessary also requires State legitimacy in order to be enduring – which necessitates the ability to both express opposition to, and to voice unpopular perspectives. It may be the case that speech limitations based on concepts of harmony may result in political speech receiving inadequate protection. It may be possible that a court that is considering a form of political speech that does not present itself as obviously identifiable as political (for example artistic work relating to religious or cultural issues, as opposed to slogans within a protest march), may end up inclined to justify its restriction due to the risk of its effect on racial or religious harmony. Furthermore, the fact that it is expressed in such vague terms, leaves it open to abuse or used to legitimise undue restrictions.

[270] See *Victor Ivan v Sarath N. Silva, Attorney-General and Another* SLR 340 (1998), at p 346. Here the Court refers to disruptions of racial or religious harmony as situations where the state would be justified in imposing speech restrictions. However, it is not clear what that would mean in practice.

Although the term would not necessarily have been intended to apply to reconciliation (with the Constitution predating the current context), it may be worth considering how it may (if at all) apply to it. Part of the objectives of reconciliation is to achieve lasting peace and countering harms/violence. In this sense, perhaps there is some degree of aiming towards harmony between groups – particularly in easing deep divisions in society. In fact, some commentators have suggested harmony as being a possible aspect of the reconciliation process where it represents a return to normalcy and reunion of different groups.[271] However, this also attracts the criticism that such an approach may ignore fundamental differences, erase relevant history of conflict (by avoiding impassioned discussion of it), and discouraging political dissent.[272] One approach to reconciliation is that of harmony where the priority is to overcome disagreements between groups and to bridge divisions, whilst another would be to welcome political argument as a fundamental part of moving towards a healthy society.[273] Considering the arguments raised in the previous chapters, the latter seems to be a more attractive model. In this sense, perhaps harmony could be viewed not as the absence of discord but preventing violent harms and other factors that would prevent participation. Harmony in society could therefore be envisioned as coming within the criteria that have been set out – the ability to openly participate and contribute to political discourse with adequate safeguards to protect from interreference would therefore be indicative of harmony. Such an approach can allow this to be taken into consideration when considering the application and interpretation of speech laws, as well as forming the basis upon which State policy and enforcement of regulation is based.

[271] Adrian Little and Sarah Maddison, 'Reconciliation, Transformation, Struggle: An Introduction', International Political Science Review Vol. 38 No.2 (2017) p 145, 148.
[272] *Ibid*
[273] Tristan Anne Borer, 'Reconciling South Africa or South Africans? Cautionary Notes from the TRC', African Studies Quarterly Vol. 8 Issue 1 (2004) p 19, 31.

3.3.2 The Penal Code

The Penal Code of 1883 in Sri Lanka arguably contains some of the more egregious and outdated limitations on the freedom of expression. Section 291A criminalises 'whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person' and Section 291B criminalises 'whoever with the deliberate and malicious intention of outraging the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class.' A person convicted under these provisions can face imprisonment, a fine – or both. These shockingly repressive restrictions stem from Sri Lanka's Colonial history and similar provisions can be seen in other former Colonies such as in India where the Indian Penal Code 1860 also contains an entire chapter pertaining to offences relating to religion. The Indian Penal Code contains similar language to Sri Lanka's in relation to offences against religions with section 295A referring to 'deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs', and section 298 'uttering words, etc., with deliberate intent to wound religious feelings'. These roots also laid the foundation through the Penal Code for Pakistan's oppressive blasphemy laws.[274] The provisions of the Penal Code impose sweeping restrictions on free speech rights with limitations based on highly subjective terms that are designed to apply to a broad range of forms of speech. Almost any form of speech that discusses religion in anything but the most deferential of terms would have the potential to 'insult' and

[274] 'Pakistan - Use and abuse of the blasphemy laws', *Amnesty International*, AI Index: ASA 33/08/94 2.1, (1994) https://www.amnesty.org/download/Documents/184000/asa330081994en.pdf .

'outrage'. The subjectivity inherent in these terms would dissuade anyone from expressing views about religion that do not conform to a standard of reverence for fear of sanction.

The capacity of these provisions to stifle speech that should surely be within the ambit of acceptable speech in a free society considerably conflicts with the established norms in both international jurisprudence[275] and Sri Lanka's own case law[276] relating to fundamental rights. It also reinforces the status quo as it provides justification for a State appeasing the anger of the majority in its response. A majority is more likely to have the means and confidence to express their outrage without fear of reprisal and encourage or pressure the State to restrict speech that they find offensive. That which constitutes insulting or outrageous behaviour would also be determined when making arrests by institutions – police etc. – that are comprised of the majority. Whilst the Penal Code does require *mens rea* so that there would be an intention to cause offence or outrage – even this has not prevented the abuse of these limitations as has been borne out in the cases which will be examined later in this chapter. Despite the clear incompatibility with the free speech guarantees of the Constitution, laws existing before the Constitution are, under Article 16, deemed to be valid despite any inconsistency.[277] This provides an avenue for State overreach, based on laws that are at odds with Constitutional rights. The broad and subjective terminology used in these provisions arguably results in a form of blasphemy law, that in practice allows the State to target unpopular speech.[278] Not only is this inimical to general free speech guarantees, but it is particularly concerning in terms of reconciliation. As argued in the previous chapters, religion forms a key part of political discourse – and even more so within a reconciliation context. This is both in terms of minorities

[275] *Handyside v The United Kingdom* No. 5493/72 (1976).
[276] As discussed above – *Joseph Perera* etc.
[277] Gehan Gunatilleke, 'Limitations on fundamental freedoms in Sri Lanka: majoritarian influence of constitutional practice', International Journal of Law in Context, Special Issue Article 1-18 (2023) p 4.
[278] *Ibid*, p 13.

feeling able to participate in the democratic process with an equal stake and being able to criticise dominant beliefs, and also the need for the transformative project of reconciliation and return to democratic norms to be informed by open debate (the implementation of policies and laws should be based on open critique). The effect of such problematic provisions extends beyond its potential arbitrary use. It legitimises an institutional culture of utilising vague provisions to target speech - even if such cases are eventually unsuccessful, the burden on the speaker of being arrested and having to find legal representation due to the ease with which an arrest can be notionally justified by State institutions, significantly affects democratic participation.[279] The threat of criminal sanctions based on ambiguous terminology that can easily be interpreted to cover legitimate political speech, will result in self-censorship that creates a chilling effect. This is exacerbated by low trust in State institutions where people will be wary of the State utilising this ambiguity for arbitrary restrictions of speech, with little to no accountability.

Section 120 of the Penal Code sets out an offence where 'whoever by words, either spoken or intended to be read, or by signs; or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which

[279] This extends further beyond its arbitrary application to influencing the formulation of other laws that are based on these problematic provisions – see Chapter Four, for discussion on the Online Safety Act which further entrenches these laws by using its terminology in the drafting of online speech laws.

may extend to two years.'[280] This offence which sets out restrictions on seditious speech is another example of outdated laws and terminology which impact the speech framework of the country. The first part of the offence setting out the form of communication which comes under this provision ('words', 'visible representations' etc.) seems sufficiently broad enough to be interpreted to cover modern forms of speech such as social media posts. Terminology such as discontent or disaffection, are broad and leave room to include political speech, which will often be framed or intended to provoke such reaction as part of the political process (criticising the State, advocating for change, discussion of controversial topics etc.). Furthermore, ill-will and hostility also carries a substantial degree of subjectivity that poses significant challenges of application. Political speech, particularly within a divided reconciliation context, is likely to both cover unpopular or controversial topics, and often may be expressed in particularly impassioned or acerbic form. This would be likely to attract some amount of contention that then potentially allows the State to claim a justified action under this provision.[281]

3.3.3 The ICCPR Act

The ICCPR Act 2007[282] incorporates provisions from the International Covenant on Civil and Political Rights into domestic law in Sri Lanka. Section 3 (1) of the ICCPR Act states that 'no person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' This applies to any person that '(a) attempts to commit; (b) aids or abets in the commission of; or (c) threatens to commit'[283] an offence

[280] This part of the Penal Code was updated from the original version, replacing terms such as 'Queen' and 'Queens Subjects' with 'President' and 'People of Sri Lanka'.
[281] Judicial interpretation as to the effects of this on legitimate political speech will be considered in the next section of this chapter relating to recent cases.
[282] International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007.
[283] *Ibid*, s 3 (2).

under that section. A person found guilty of an offence 'shall on conviction by the High Court, be punished with rigorous imprisonment for a term not exceeding ten years.'[284] The offences are also non-bailable and 'no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances.'[285] The provisions in section 3 can be boiled down to a two-part test covering a situation where a person propagates war or advocates national, racial or religious hatred and incites to discrimination, hostility or violence. The use of the terms hatred and hostility pose certain risks in its application. In attempting to define the terms 'hatred' and 'hostility', the human rights organisation Article 19 have developed, 'The Camden Principles on the Freedom of Expression and Equality'. Whilst not binding on any Court, this document provides an insight into attempts to define these terms. The principles advise that these terms should refer to 'intense and irrational emotions of opprobrium, enmity, and detestation towards the target group'. This attempt to define these terms again runs into similar issues. In a country that is socially and religiously conservative, wouldn't any criticism of the prevailing ideas or religion be viewed as irrational? And when such views are deeply entrenched in that society, perhaps even reasonable criticism of a dominant religion or ideology usually treated with reverence could be deemed intense. For example, there would be a vast difference in how an individual expressing atheist views would be received in the United Kingdom when compared to Pakistan. The former may view it as perfectly acceptable whilst the majority of the society and State authorities of the latter would view it as a deeply hateful and a hostile threat to the social fabric of their nation.[286] However, these are more general concerns in terms of speech regulation. Criticism of the ambiguity of hate speech laws is not exclusive to Sri Lanka, and the terms used in the ICCPR do not

[284] *Ibid,* s 3 (3).
[285] *Ibid*, s 3 (4).
[286] 'Pakistan's secret atheists' *BBC* (2017) https://www.bbc.co.uk/news/magazine-40580196 ; Kunwar Shahid, 'The defiance of Pakistani atheists' *The Diplomat* (2019) https://thediplomat.com/2019/08/the-defiance-of-pakistani-atheists/ .

necessarily put it at odds with free speech (at least in countries that accept some restrictions of hateful speech as valid, i.e., not the USA). Therefore, in the context of the aims and criteria established in this thesis, what is relevant is how the Act affects political speech in the specific circumstances of the country. This comes down to two main factors, the safeguards or lack thereof in place, and the State's capacity or willingness to apply the Act appropriately.

Ostensibly, the Act does not provide for a general hate speech law, but is more specific, in that it targets incitement. However, the Act does not contain a demarcation distinguishing between different types of potentially inciting speech. By grouping incitement to discrimination, hostility, and violence together, it does not adequately account for the difference in penalties that are required.[287] As Gunatilleke suggests, this weakness represents a flawed and clumsy application of the obligations of the ICCPR treaty, which whilst creating a general obligation to combat those types of speech, does not mean that they should be considered equally.[288] As has been pointed out previously as part of the criteria set out, incitement to violence is a particular concern in a reconciliation context. However, by grouping violence with discrimination and hostility, it significantly expands its scope to forms of speech which should be considered separately.[289] A direct call to violence should attract relatively harsher sanction (perhaps including imprisonment), whilst this would be disproportionately excessive in relation to incitement to hostility. A relatively lighter sanction would likely be more appropriate (such as a fine or removing the expression from an online account).[290] The effect of this is that forms of incitement that contain fundamentally different degrees of potential harm, are treated

[287] Gehan Gunatilleke, 'How a Human Rights Law Became a Tool of Repression in Sri Lanka', *The Wire* (2023) https://thewire.in/south-asia/how-a-human-rights-law-became-a-tool-of-repression-in-sri-lanka .
[288] Gehan Gunatilleke, 'Is Section 3 of Sri Lanka's ICCPR Act Fit for Purpose?', The Bar Association Journal Vol 26 (2021-22) p 156, 157.
[289] *Ibid*.
[290] *Ibid*. Ideally, non-criminal avenues would be better for these as they are more likely to include political speech.

equally, and as a common offence result in similar penalty (rigorous imprisonment up to 10 years).[291] The harsh penalties available to the State are therefore not limited by a clear delineation separating that which causes the most harm – incitement to violence.

Another issue is that the Act sets the offence as '…cognizable and non-bailable, and no person accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances.'[292] The fact that it is a cognizable offence means that an arrest can be made under the Act for an alleged offence without a warrant. The factors that need to be considered in identifying potential incitement are complex and unlikely to receive adequate attention from an arresting officer. Determining potential incitement requires a careful consideration of the nature of the speaker and the probability of imminent harm.[293] It is highly unlikely that a police officer will be able to establish this to an adequate degree when considering a potential offence. They will still be able to make an arrest without providing any evidence to a Judge in order to obtain a warrant. Furthermore, the lack of safeguards in terms of bail are also concerning and further open the provision to abuse. A person can be arrested without a warrant and will not be able to receive bail (except in exceptional circumstances by the High Court). Particularly concerningly, the Act does not contain provisions to mandate that they are to be brought before the High Court within a prompt time frame.[294] Even if the case is eventually found to be without merit, they will have been substantially affected, possibly to increasing degrees if delays (intentional or not) or institutional apathy, prevent expeditious referral to the High Court. In practice these issues have contributed to the Act being arbitrarily used and abused to significantly stifle free speech.[295] People will be aware that the State is able (and has proved

[291] *Ibid*.
[292] ICCPR Act, s 3 (4).
[293] Gunatilleke, *supra* note 288, p 158.
[294] *Ibid*.
[295] See next part of this chapter for recent examples.

willing) to target unpopular speech, a lack of safeguards means that the effect of these restrictions will be substantial notwithstanding the merits of the case, and they will be unlikely to be able to confidently predict what speech will be deemed to be within the scope of the Act. This both directly limits political speech, and also creates a chilling effect on future participation.

3.4. Recent cases – restrictions in practice

3.4.1 Introduction

Having set out some of the background to the main instruments regulating speech and some of the key issues, this part of the chapter will look at recent examples of cases that demonstrate how these apply in practice. The issues they raise show how deficiencies in the current speech framework of the country can result in overreach that is not in line with the objectives of protecting political speech in reconciliation as argued for in this thesis. However, the notable case of *Ramzy Razik,* which will be considered in detail below, provides both better clarity (in terms of setting out the scope of provisions that have been abused) and demonstrating a positive step towards interpreting these restrictions more in line with the criteria of this thesis. One of the issues of the restrictions discussed above have been that they have been utilised without substantial judicial consideration of their scope and applicability. Arrests are made and speakers are unduly burdened – once a case is found to have been without merit in the lower courts a person may be released but has still suffered a form of penalty (being held without bail etc.). This has allowed for a situation where people are both punished and effectively silenced – having been released, they may be unwilling (or not have the means) to risk pushing the issue further by complaining against their arbitrary arrest. This recent case is therefore the first to substantially consider these issues. The next part will first consider some of the other examples

(which demonstrate some of the points raised in this introduction) before looking at the impact of the recent judgment of the Supreme Court which clarifies some of these issues.

3.4.2 Recent cases emblematic of the problems of limitations on speech in Sri Lanka

A short story was published on the Facebook page of a writer, Shaktika Sathkumara in 2019. This story ended up stirring up controversy within the majority Buddhist country of Sri Lanka as it was perceived to be insulting towards the religion. The story described the reminiscences of a fictional character who was a former Buddhist monk and was seen to have insinuated that the Buddha may have been homosexual. It also suggests this fictional character as having had abusive homosexual relations with a senior monk at the temple. Following complaints by Buddhist monks and organisations, the writer was arrested on the 1st of April 2019 and remained in custody for months before being granted bail by the Kurunegala High Court on the 5th of August.[296] The writer was arrested based on Section 291B of the Penal Code and Section 3 (1) of the ICCPR Act.

As one of the few majority Buddhist countries in the world, issues surrounding perceived attacks to Buddhism are highly contentious in Sri Lanka. Buddhism holds significant importance in the history of Sri Lanka and defines much of State policy. Whilst the Constitution guarantees the freedom of religion,[297] to not be discriminated against based on religion,[298] and the freedom to manifest their religion,[299] the Constitution provides a special place for Buddhism. Article 9 of the Constitution states that 'The Republic of Sri Lanka shall give to

[296] Amnesty International Submission to the Special Rapporteur on Freedom of Religion or Belief - AI Index: ASA 37/2487/2020, 6 https://www.ohchr.org/Documents/Issues/Religion/Submissions/CSOs/02.amnesty-international.pdf .
[297] The Constitution of the Democratic Socialist Republic of Sri Lanka, Art 10.
[298] *Ibid*, Art 12 (2).
[299] *Ibid*, Art 14 (e).

Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha Sasana.'[300] The recognition of Buddhism as having the foremost place in the country and requiring the State to protect it, has shaped a significant amount of the Constitutional practice of the country.[301]

In this context, the limitation of rights through clauses relating to public morality are unhelpful, and potentially over-broad. Article 9 not only applies to protecting Buddhism, but also the 'Sasana' – which for lack of an adequate equivalent translation – implies protection of Buddhist teachings, community and nationhood.[302] This inclusion and subsequent legal interpretations of it, have served to broaden the ambit of State protection of religious interests.[303] The Constitutional jurisprudence in the country reflects this obligation to protect these interests.[304] In this context, limitations on free speech that permit public morality considerations carry a likely risk of placing free expression in a perilous predicament. Article 15 (7) permits restrictions on the Article 14 (1) right to free speech based on public morality, and there would arguably be a case for permitting the restriction of Sathkumara's speech when considering that the Article 9 guarantee implies that the Constitutional protection of Buddhism is a part of the country's public morals and confers a duty upon the State to safeguard it.

A conviction under the ICCPR Act would have to demonstrate advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. The Rabat Plan of action, aiming to clarify incitement to hatred, states that restrictions of free speech must

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[300] *Ibid*, Art 9.
[301] Gehan Gunatilleke, 'The Constitutional Practice of Ethno-Religious Violence in Sri Lanka', Asian Journal of Comparative Law, Vol. 13 Issue 2 (2018), p 359, 372.
[302] *Ibid,* p 373.
[303] Benjamin Schonthal and Asanga Welikala, 'Buddhism and the Regulation of Religion in the New Constitution: Past Debates, Present Challenges, and Future Options', *Centre for Policy Alternatives* (2016) p 17.
[304] *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint* - SC Special Determination No 19/2003.

remain an exception and require a high threshold.[305] The lack of imminent harm caused by the post, coupled with the disproportionate and intrusive response suggests that the use of the ICCPR in this instance does not correspond with its purpose and arguably cannot be a justified restriction.[306] However, although warned against in the Rabat Plan, the use of the ICCPR Act in practice, suggests that it has been wielded by State authorities as a form of blasphemy law.[307] The vagueness and subjectivity inherent in the Penal Code (as has been discussed above) means that it provides a broad scope for restrictions of speech. In this case, under Section 291B, there would be a case for the State to argue that Sathkumara's speech had the potential to cause outrage and to insult the religious beliefs of a community. Whilst the State would still have to prove intention – it may be able to argue that one could reasonably foresee the contentious impact of such a story which could easily be construed as insulting. These Penal Code provisions stand as unacceptable restrictions on free speech.

The arrest of a social media activist, Sepal Amarasinghe, under the provisions of the ICCPR Act shows another example of its arbitrary use by the State. Accused of having made disparaging remarks about the Sacred Tooth Relic in Kandy (a particularly significant religious symbol/ object of worship for Buddhists), he was arrested in January 2023 and taken into custody without a warrant.[308] His comments had received widespread controversy and was even discussed in parliamentary debate where calls were raised for his arrest (notably, with even the Justice Minister recommending the use of the ICCPR Act to take action against these comments).[309] In custody, he was denied bail several times (with the Magistrate's Court unable

[305] 'Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred' (Rabat Plan of Action), *UN Human Rights Council*, 11 January 2013, A/HRC/22/17/Add.4, p 18.
[306] *Ibid*.
[307] *Ibid* p 19.
[308] Gunatilleke *supra* note 288, p 160.
[309] 'Sri Lanka MPs set aside differences to break out pitchforks over YouTube comment', *economynext* (2023) https://economynext.com/sri-lanka-mps-set-aside-differences-to-break-out-pitchforks-over-youtube-comment-108420/ .

to provide bail under the ICCPR) without any indication that he would be produced before the High Court.[310] After an extended period in custody, Amarasinghe was eventually released on 21 February after issuing an apology to the Buddhist clergy in court – subsequently all charges against him were dropped.[311] What is striking about this case is that without even any substantive review as to the merits of the case, the actual punitive effect was significant. Not only was he in custody for an extended period, but the effect was such that he was compelled to apologise in court. The Senior Deputy Solicitor General informed the Court that charges would be dropped if Amarasinghe tendered an unconditional apology – not only did he end up apologising to the clergy, but also to State officials of related institutions (the Buddhist Affairs Commissioner and Archaeology Director General).[312] This demonstrates something beyond just the arbitrary use of the Act to target unpopular speech – it shows a mechanism utilised by the State as a show of force to threaten and coerce speech. This not only silences individuals, but also sends a message to the broader public to not attempt to engage in such speech. The inadequacy of safeguards pointed out previously in this chapter have resulted in situations in practice where the State has been able to mete punishment and enforce repression by its abuse.

In another incident, a 47-year-old Muslim woman, R. Mazahima was arrested and detained for three weeks before being released on bail. She was arrested under the ICCPR Act for wearing a kaftan with a symbol in the shape of a wheel that resembled a 'dharmachakra' – which is an important symbol of Buddhist teachings.[313] What the motif actually represented was a ship's wheel. This clearly should not have provided any legal basis for an arrest under the ICCPR, yet

[310] Gunatilleke *supra* note 288, p 160.
[311] 'YouTuber Sepal released after apology in court', *Dailynews* (2023) https://archives1.dailynews.lk/2023/02/22/law-order/297939/youtuber-sepal-released-after-apology-court?page=1#:~:text=Social%20media%20activist%20Sepal%20Amarasinghe,the%20case%20filed%20against%20him.
[312] Ibid.
[313] *Human Rights Commission Sri Lanka* (2019) https://www.hrcsl.lk/hrcsl-tells-acting-igp-make-arrests-on-reasonable-suspicion-not-hearsay/ .

it shows a clear instance of how the provisions have been misused – in this case particularly, it has been implied that it occurred within a heightened context of restriction following the Easter attacks.[314] It is not clear what the case would be if she had been charged under other restrictions. If a restriction were to be justified under Article 15 (7) of the Constitution – in the interests of public morals – perhaps this could have been read in conjunction with Article 9, which safeguards Buddhism, to support a enforcing a restriction.[315] Furthermore, if she had been charged under the Penal Code, the State may have had a stronger case in convicting her if they could demonstrate that it outraged religious feelings – albeit with a likely defence available that there was no intent to outrage religious feelings.

Other related cases include moves to arrest senior journalist Kusal Perera under the ICCPR Act emerged in 2019 after complaints were made referring to an article by him in the Daily Mirror titled 'from Islamic terrorism to marauding Sinhala Buddhist violence.'[316] However, being a well-known journalist with connections, the then-President allegedly personally intervened to prevent the arrest from taking place.[317] Natasha Edirisooriya, a stand-up comedian was arrested for comments during a performance that were allegedly defamatory towards Buddhism.[318]

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[314] *Ibid*.

[315] The case of *Sekmadienis Ltd v Lithuania* App No. 69317/14 (2018) may be relevant to some degree by showing the approach of the European Courts to such issues. The European Court of Human Rights held that Lithuania had infringed the right to freedom of expression by fining a company for its clothing advertisements featuring models that resembled religious figures. The Court held that the public morals limitation was not justified in that instance and that the Lithuanian authorities had failed to demonstrate any incitement to hatred. The Court also highlighted that public morals should not be exclusively derived from the majority tradition. Also see similar opinions by the UN Human Rights Committee - UNHRC General comment no. 34, *UN Human Rights Committee*, Article 19, Freedoms of opinion and expression CCPR/C/GC/34, (2011) at point 32.

[316] 'Sri Lanka misusing UN-backed ICCPR law to supress media, journalists: rights group', *economynext* (2019) https://economynext.com/sri-lanka-mis-using-un-backed-iccpr-law-to-suppress-media-journalists-rights-group-14441/

[317] 'Friends in High Places Saving Columnist Kusal Perera: Unequal and Arbitrary Application of ICCPR', *Colombo Telegraph* (2019) https://www.colombotelegraph.com/index.php/friends-in-high-places-saving-columnist-kusal-perera-unequal-and-arbitrary-application-of-iccpr/ .

[318] Reports also suggested that attendees would also be questioned - Statement on recent arrests, *Centre for Policy Alternatives* - https://www.cpalanka.org/wp-content/uploads/2023/05/ICCPR-Statement-1.pdf .

After being denied bail by the Magistrates Court, Edirisooriya remained in custody for over a month before being granted conditional bail by the High Court.[319]

What is notable about the cases mentioned so far is that they demonstrate both the arbitrary use of speech laws that extend into State overreach, and the practical effects of its application allowing the State to mete punishment without substantive consideration of the issues. In terms of its arbitrary use, the speech laws have been interpreted (when being applied by State institutions) to justify targeting unpopular speech. Much of this has resulted in a form of blasphemy law where discussion of religion has been repressed. As pointed out in this thesis, such discussions form the continuing conversation within reconciliation that arguably brings it within the scope of political speech necessary for effective participation. However, this is not limited to issues of religion. The wide application of such speech laws allows the State to target unpopular speech that should receive stronger protections under this expanded scope of political speech within reconciliation. A particularly pertinent example would be that of memorialisation, where such laws have been used to target remembrance events in areas in the north where much of the violence of the war took place. Not only were overt memorialisation events targeted, but seemingly innocuous actions of commemoration have been repressed.[320] Memorialisation has been recognised as a vital part of the reconciliation process by fostering a healing process, remembering past mistakes, and shining a light on divisions.[321] What constitutes political speech in terms of this should therefore include a wide scope of protection

[319] Chathuranga Samarawickrama, 'Natasha's statement not hate speech under ICCPR Act: Colombo HC', *DailyMirror* (2023) https://www.dailymirror.lk/breaking_news/Natashas-statement-not-hate-speech-under-ICCPR-Act-Colombo-HC/108-262506 .
[320] OHCHR Press Release (2021) - https://www.ohchr.org/en/press-releases/2021/02/sri-lanka-experts-dismayed-regressive-steps-call-renewed-un-scrutiny-and#_ftn19 .
[321] Thyagi Ruwanpathirana, 'Memorialisation for Transitional Justice in Sri Lanka: A Discussion Paper', *Centre for Policy Alternatives* (2016), p 25; Human Rights Commission of Sri Lanka Statement to Human Rights Committee 137th Session (2023) https://www.hrcsl.lk/wp-content/uploads/2023/03/HRCSL-Report_Human-Rights-Committee-137th-session-%E2%80%93-Review-of-the-6th-Periodic-Report-HRCSL-opening-statement-on-06-03-2023.pdf - p 2.

– particularly considering the fact that people will be far more likely to express such speech tentatively (with genuine fears of being targeted, both due to past experiences as well as continuing repression). Although there are significant and justified national security reasons to impose limitations on some forms of this (for example the martyrising of suicide bombers), speech that remembers the past should not be targeted. A recent example of people being arrested under the ICCPR for a commemoration event where 'kanji' (a form of rice porridge) was distributed to the public demonstrates the nuance of what may be considered political speech within the context of reconciliation. Although not explicitly political per se, it carries symbolic value representing tentative steps of democratic participation.[322] The misuse by the State of these speech laws therefore put it at odds with the aims of reconciliation, and an application of these criteria should bolster the argument for stronger protections of similar speech.[323]

3.5. The *Ramzy Razik* case: a more substantial consideration of the issues by the Supreme Court

[322] 'Sri Lanka's Mullivaikal kanji explained', *NewsFirst* (2024) https://www.newsfirst.lk/2024/05/16/sri-lanka-s-mullivaikal-kanji-explained - distributed during a remembrance week commemorating those who lost their lives during the last stages of the war, kanji (a mixture of rice and water) is symbolic as the only meal available to some of the civilians trapped in Mullivaikal during the last stages of the war.

[323] Human Rights Commission of Sri Lanka, letter to Inspector General of Police (2024) https://www.hrcsl.lk/wp-content/uploads/2024/05/HRCSL-Letter-to-IGP-on-20-05-2024.pdf - although the individuals were initially charged under the ICCPR, this was removed from the scope of the proceedings following public backlash. The Commission noted that the ICCPR should not have been used and the event would not be within the scope of the Act. Notably, they point out that the individuals concerned would not have been able to get bail if the scope of the ICCPR had not been removed, and highlighted the concerns raised in this chapter about the practical effects of the potential for abuse under this Act. Another relevant point is that the main action that is recommended is the recirculation of guidance to the police on how to apply the Act and the necessity of protections for peaceful commemoration (in furthering reconciliation). This reflects both the limits of measures to go against enacted laws, and the practical approach of addressing the ground reality where the issues of restrictions are due to lack of capacity or willingness on the part of State institutions.

Whilst the examples provided so far of recent cases have shown how the misapplication of speech laws (and criticisms raised earlier in this chapter) have contributed to negative effects on public discourse and political speech (including wider forms necessitating protection for reconciliation) – they provide limited insight into the substantive issues. This is because of its use as cover to justify arbitrary arrest, extended custody, and a threat to repress further speech. This means that charges were often dropped at later stages ensuring that punishment and limiting of the speech has already been meted out in effect (both by placing an effective punitive burden and compelling apology and retraction) and preventing scrutiny of the actual merits. What this case therefore provides is the first substantial consideration of these issues by the Supreme Court.[324] Whilst much of the case is relevant to the topic of this thesis, this part of the chapter will avoid reproducing too much of the judgment and narrow the focus to the particular issues that relate to the objectives and criteria that have been set out here. The key points will therefore be assessed, and some questions to be considered are – to what degree does the judgment clarify the position of political speech under these limitations, to what extent does it bring the framework into alignment with the criteria that have been suggested, and what areas may still require improvement (and how may the approaches suggested in this thesis assist).

3.5.1 Background to the case

On the 2nd of April 2020, Ramzy Razik wrote a post on his Facebook wall calling for an 'ideological jihad' with 'pen and keyboard' to 'help people understand the truth' about 'hate

[324] This is the case in terms of the interpretation of the ICCPR Act. Although the Penal Code and limitations in the Constitution have been considered previously (see previous discussion in this chapter setting out early cases relating to political speech), this case also provides insight into how they apply in the modern context (i.e., within reconciliation).

propagated against Muslims'.[325] Razik subsequently announced that he would self-censor after facing numerous death threats towards him and his family.[326] Razik reported these threats to the Inspector General of Police; however he was instead arrested on the 9th of April with police citing the ICCPR Act, Penal Code, and Computer Crimes Act.[327] Razik had been active on Facebook posting his views on social, religious, and political issues.[328] The motivations for his post was apparently in response to his belief that an unfounded and unfair campaign was spreading allegations that the Muslim community and their practices were responsible for spreading the Covid-19 pandemic.[329] Razik's post was therefore apparently intended to counter these allegations and encourage the Muslim community to respond through an ideological campaign.[330] Razik maintained (and elaborated on in a subsequent post) that the phrase 'ideological jihad' was not intended as a call to violence, but reflected a call for an ideological campaign to combat these narratives through the 'pen and keyboard'.[331] However, this post attracted significant negative attention and backlash, eventually leading to his arrest, and to his being held in custody for over 5 months.

3.5.2 Features of the arrest

[325] Damith Chandimal and Ruki Fernando, 'Sri Lanka: The truth about the arrest and detention of Ramzy Razeek', *Sri Lanka Brief* (2020) https://srilankabrief.org/sri-lanka-the-truth-about-the-arrest-and-detention-of-ramzy-razeek/ .
[326] 'Health Concerns for Detained Blogger', *Amnesty International* (2020) https://www.amnesty.org.uk/urgent-actions/health-concerns-detained-blogger .
[327] The Computer Crimes Act is considered separately in relation to online speech – see Chapter Four.
[328] *Mohamed Razik Mohamed Ramzy v Chief Inspector of Police and Others*, SC/FR App No. 135/2020 (2023), p 4.
[329] Tensions between groups have been heightened in recent times, with particular divisions in terms of attitudes towards Muslims. This can be attributed in part to heightened feelings of acrimony by Christians and Buddhists towards Muslims following the Easter attacks in 2019 (described as a watershed moment in sparking tensions), and the Covid-19 pandemic where Muslim burial practices were alleged to be unsafe (whilst Buddhists and Hindus tend to cremate the dead, traditionally Muslims require burial). This resulted in a controversial policy where cremations were mandated, some argue as retaliation against the Muslim community and to distract from State failures – see Mohammed Razak and Amjad Saleem, 'Covid-19: The Crossroads for Sinhala-Muslim Relations in Sri Lanka', Journal of Asian and African Studies, Vol 57 Issue 3 (2022) p 529, 536, 537, 538.
[330] The definition of Muslim in Sri Lanka is somewhat complicated and is not always limited to religion. Due to the country's past (particularly with communities of Arab settlers), the identity of Muslim is blurred, encompassing cultural, political, and ethnic factors (as well as of course the religion itself) – *Ibid* p 531.
[331] *Razik*, *supra* note 328, p 18, 19.

Several deficiencies were pointed out by the Court with omissions of statements taken, failure to include investigational findings which would support the arrest, and attempts to mislead the Magistrates Court as to the nature of the alleged crime.[332] This reflects some of the practical realities of a context as in Sri Lanka with weaker institutions, where repression (and fears of minorities and the general public that contribute to an unwillingness to participate due to what may happen and be tolerated by the State beyond the law) is based on institutional weaknesses that leave it open to corrupt practices. This supports the argument that there is a need for particularly stringent safeguards that can protect against such issues.

Two features of the justifications used for the arrest are of interest in relation to the discussions of this chapter. Firstly, there seems to be a broad view of what constitutes incitement. Whilst it was alleged that feelings of anger and hostility had been caused (without evidence to substantiate this beyond the controversy and backlash in response) – it was also alleged to be justified due to the potential to cause violence. The claim that '… it was probable that such sentiments may lead to violence amongst religious groups' seems to have been based on an almost absurd logical conclusion that the threats made against Razik were indicative of his having committed an offence.[333] Part of the evidence was a statement by an airport security guard who had seen the post and made a complaint that people were very angry about the post (particularly following the Easter attacks) and that he was considering to 'do something before they could commit another attack' and '…take necessary steps'. [334] Clearly such an approach would be incompatible with reconciliation. Not only would people be afraid to express political opinions on topics that may attract backlash, but they would end up liable for threats made

[332] *Ibid*, p 48. The arresting officer even avoided admitting arresting Razik, leading to the Court having to look at other material to identify the arrest – p 23.
[333] *Ibid*, p 22.
[334] *Ibid*.

against themselves. Secondly, what is interesting is the reference by the arresting officers to harmony. It was claimed that the posts gave rise to sentiments of racial or religious hatred that could lead to 'disharmony and violence'.[335] Although the Constitutional limitations and inclusion of the word harmony is not explicitly referred to, it can be inferred that this has been used as a justification. This could be both in terms of how the State views its powers or limitations, as well as its duties. Imposing limitations based on maintaining harmony seems to be a legitimate objective for the State based on the Constitution. However, as has already been discussed, the definition of harmony is unclear. An interpretation that is reconcilable with the objectives of reconciliation (or even broader free speech), must mean that it does not mean preventing any disharmony (which would include most forms of political speech that attract vigorous debate) – but to ensure maintenance of democratic norms, rights, protecting from violence, and ensuring a context where open debate is possible.[336]

3.5.3 Political speech and reconciliation

The Court reiterates much of the general free speech principles set out in the early cases discussed previously in this chapter. This includes both the importance of protecting free speech as guaranteed through Article 14 of the Constitution, and the limitation of harmful speech. Most importantly for the objectives of this thesis, particular attention is given to

[335] *Ibid*, p 6, 20.
[336] This would be based on an application of the discussions of this thesis. The judgment itself does not directly consider the effects of the term harmony. However, there is some indirect recognition that 'ethno-social and religious harmony' and 'social cohesion between and within communities' is only possible if citizens are not only '…permitted, but facilitated and encouraged as well' to exercise their Article 14 free speech guarantees – *Ibid*, p 11.

highlighting the importance of political speech and democratic participation in Sri Lanka. The Court sets out significant attention, albeit in obiter, to draw the link between the objectives of maintaining peace, harmony, legitimacy of the State etc. and democratic participation.[337] However, this represents a missed opportunity of sorts. Although it is heavily implied that this is an issue of political speech, the actual determination falls short of directly applying its effect to the outcome of the case. Much of the judgment is based on interpreting whether the language used (jihad) could be linked to a call for violence. Although there is a clear indication that democratic participation requires limitations to be interpreted narrowly, it does not directly consider how political categorisation of an expression may affect the scope of these restrictions. It can however be inferred that considering the Court's attention on democratic participation within the judgment (and on Razik's motives in attempting to combat the alleged targeting of Muslims), that it forms a key part of how it decided to interpret the restrictions. Although the expression may not have been strictly political (relating to State policy), it clearly contained political characteristics in terms of addressing politically relevant issues. The expanded scope for political speech is therefore not necessarily needed in this case (except perhaps to bolster the case for stronger protections for such speech that clearly can be viewed to relate to reconciliation). This leaves room for consideration as to what the Court's approach may be in more borderline cases.

Another feature of the judgment that is particularly relevant to the objectives of this thesis is the discussion of reconciliation. This case represents the first instance of the link between reconciliation and free speech being considered by the Court.[338] Interestingly, even the justification for the arrest was framed on a need to protect reconciliation. The arresting officer's

[337] In fact, the Court provides little to no attention to other theoretic justifications i.e., the argument from truth and autonomy.
[338] This case was decided during the writing of this thesis and affirms the intuitions that a consideration of reconciliation could be normatively relevant to the speech framework of the country.

report indicates a justification of the arrest due to '…published information which affect reconciliation among communities.'[339] The criteria laid out in this thesis links the aims of reconciliation with expanded protections for political speech - however, also recognises the need to prevent harm, particularly in relation to violence (and the threat of communal violence that is more pronounced in these contexts). Therefore, limitations on such speech could be legitimate. Although (as in the Court's opinion), the expression in this case could not be viewed to intend or cause violence – an expression that did would be legitimately restricted. If this had been a call for violent 'jihad', it would clearly be contrary to the goals of reconciliation. Even an expanded scope of political speech would not include this. The Court itself recognised that 'in a multi-ethnic and multi-religious society such as that of Sri Lanka, particularly given historical, socio-economic and political factors, the maintenance of peace and tranquillity among communities, ensuring parity of status, affording equality to all citizens, maintaining public order, and facilitating cohesion between communities, are of utmost importance to national unity, recovery and reconciliation from conflict and tensions, and to achieve social progression and prosperity.'[340] This is framed within the judgment in terms of how the law should be applied and the obligations of the State. This seems to be in line with the argument of this thesis that a link may be drawn between the free speech framework and reconciliation. However, this seems to be framed by the Court as a justification for limitations on speech that may be harmful to reconciliation (preventing sowing division, incitement, targeting minority and vulnerable groups etc.), whilst also recognising the need to prevent arbitrary use of these restrictions. Whilst this suggests compatibility with the criteria of this thesis in terms of the need to prevent harm (particularly incitement to violence), it falls short of expanding on a more robust protection of democratic participation based on a speech framework conducive to

[339] *Supra* note 328, p 23.
[340] *Ibid*, p 37.

reconciliation. If the points raised in this thesis were to be accepted, there would be scope for restrictions to be interpreted (and the legitimacy of their enforcement) through this lens. The obligation of the State should be to ensure protections of political speech and facilitate democratic participation by expanding the scope and safeguards of public discourse within the context of reconciliation.

3.5.4 Offence under Section 120 Penal Code

Part of the charge against Razik was that of an offence under Section 120 of the Penal Code. The Court clarified some of the key elements of this offence. There should be intention to cause the stipulated harm.[341] Furthermore, this is not only limited to actual occurrence, but includes intentional attempts to do so.[342] This chapter has already pointed out some criticisms of the broad terminology used in the offences of the Penal Code – however, as the Court is excluded from reviewing the validity (and compliance with the Constitution) of enacted laws, it is limited to considering its application.[343] The Court does this in two ways – by considering the intent underlying the expression and by (albeit indirectly) attributing safeguards for political speech. Firstly, in terms of intent, the Court was of the opinion that intent could not be attributed to the expression as it had clearly been intended to counter harmful ideology rather than cause it, and a reasonable person (whilst perhaps initially alarmed by the use of the word jihad) would not have concluded an intent to incite harm.[344] Secondly, and of particular relevance to this thesis, the Court interpreted a safeguard for political speech. Although it does not directly refer to it as such, the Court looked at the political characteristics of the expression to justify it being outside the scope of the offence. This provision is seen to be a codification of English laws of

[341] *Ibid*, p 29.
[342] *Ibid*, p 28 – an amendment brought in 1915 added the term 'attempts' to the offence.
[343] Enacted laws and laws that existed before the Constitution are beyond the purview of the Court to review.
[344] *Supra* note 328, p 32.

sedition. Coming from a period of Monarchical and Colonial rule, the Court stated that it must now be enforced bearing in mind the current context (i.e., post-Independence, with sovereign people, and fundamental rights inalienable to such sovereignty).[345]

Arguably, this allows for an approach where enforcement is viewed through obligations to protect democratic participation (and even reconciliation by extension). Furthermore, the chapter that Section 120 is contained within provides an explanation that the scope of the offence does not include pointing out mistakes of the State, defects in the government or administration of justice, intention to affect reform of defects or matters of law through lawful means, or to '…point out in order to their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between different classes of people.'[346] Based on this explanation, the Court has observed that free speech is not negated by this provision.[347] Although not specifically termed as a protection of political speech, it is clear that its effects provide a safeguard to protect legitimate (non-violent/lawful) criticism, debate, public debate etc., that make up political speech and participation. The decision of the Court was therefore that the expression was not intended to incite or cause the specified harm, but to counter it.[348] This interpretation of how Section 120 should be enforced provides a positive step in safeguarding political speech (bringing it more in line with the criteria) and assuaging some of the concerns raised in this chapter. However, this protection (at least based on the explanation within the Penal Code) would not apply to the offences relating to religion which are contained in a separate chapter without these safeguards.[349]

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[345] *Ibid*, p 30.
[346] *Ibid*, p 29.
[347] *Ibid*, p 30 – the Court cites similar views expressed by the Court in *Sisira Wahalathanthri and Another v Jayantha Wickramaratne and Others* SC/FR App No. 768/2009 (2015).
[348] *Ibid*, p 31, 32 – although specifically decided on the last part of the explanation (pointing out matters that have a tendency to produce feelings of hatred or hostility) the rest of the explanation suggests applicability to other forms of political speech.
[349] See previous discussion in this chapter of provisions relating to religion – Section 291, 291A, and 291B.

3.5.5 The Offence under Section 3, ICCPR Act

As discussed earlier in this chapter, the provisions of the ICCPR Act have been interpreted broadly by the State to justify excessive regulation of speech. As the first substantial consideration of this issue by the Supreme Court, this case serves to clarify its scope. The Court was of the opinion that the ICCPR should be viewed through its objectives – i.e., legitimate restrictions to protect vulnerable groups from the consequences of war/violence, and the interests of national unity, recovery, and reconciliation within a multi-ethnic and multi religious society.[350] Such interests require both limitations and narrow interpretations of those laws to prevent persecution. These restrictions should not be viewed as criminalising blasphemy.[351] The Court cites with approval guidelines published by the Human Rights Commission in interpreting the scope of the ICCPR. Key features that clarify its position are that – advocacy of hatred is not necessarily within the scope of the ICCPR and there should be an added element of incitement; a crucial element is intention, incitement must not only be to share an opinion but also to compel others to commit certain actions, and the context, form, and imminence of harm of an expression must be considered to justify an arrest.[352] These serve as useful metrics to clarify the scope of the Act and to narrow its limitations. By setting out the high threshold required for an offence it would provide some degree of safeguard against the broad interpretation of the Act's provisions by the State.[353]

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[350] *Supra* note 328, p 36, 37.
[351] *Ibid*, p 37 – although the Court observes that restrictions should not be used as a blasphemy law, it does not go the further step of pointing out the value (and potential political nature) of discussions relating to religion within reconciliation.
[352] *Ibid*, p 35; 'Legal Analysis of the Scope of Section 3 of the ICCPR Act', *Human Rights Commission of Sri Lanka* - https://www.hrcsl.lk/wp-content/uploads/2020/02/ICCPR-Act-s.-3-Guidelines-English.pdf
[353] This is both in terms of clarifying what is included in the offence (such as incitement being separate from general hate speech), and how it should be interpreted (whilst the domestic legislation does not directly refer to intent, this is a crucial component when read in terms of the treaty).

The Court goes further by setting out its own guidelines for enforcement officers to determine whether an expression comes under the provisions of the Act. These factors include: the content of the speech as a whole, circumstances and context, conduct of the speaker, relationship between the speaker and target group (power or influence), overall motive and specific intention to incite, whether discrimination, hostility, or violence occurred and if there was a causal relationship with the speech, and even if no incident occurred whether there was an imminent danger of such consequence.[354] This also serves to further narrow the scope of the offence and provide a high threshold for limitations. Although this provides a substantially improved framework that assuages some of the concerns raised in this chapter (both in terms of the lack of clarity as to the scope of the Act, and the potential for State overreach in its application), there are two key features that are absent and could have further improved it. This is particularly the case in terms of the criteria that have been set out in this thesis. Firstly, there is arguably a missed opportunity in setting out the position and impact of political speech on the scope of the offence. Although it is indirectly alluded to, there is no clear exposition of how it may affect application in practice. The Court observed the political characteristics of the expression in reaching its decision – mainly that it was a form of counter-speech aimed at urging the community to combat allegation with 'pen and keyboard'.[355] However, this seems to be more focussed on ascertaining intent to incite, without particular consideration of how the political nature of the speech may require stronger protection.

An approach that incorporates the criteria of this thesis may expand the interpretation of how the Act should be enforced (with the Court already recognising the link between reconciliation

[354] *Supra* note 328, p 37, 38.
[355] *Ibid*, p 38.

and limitations) to include consideration of political debate. If the Act (as per the Court) justifies limitations in the aim of reconciliation, then it could also be said to justify stronger participation and protections for wider political speech in the aims of reconciliation (as argued for in this thesis). This could potentially be read into the Court's own guidelines for taking into account the context of the speech. An expression that pertains to an issue relevant to reconciliation (such as religion and minorities) should be considered in terms of its potential political characteristics (taking into account a wider scope where counter-speech may be expressed tentatively in a reconciliation context) and require particular caution on the part of the State/arresting officer when considering enforcement.[356] Secondly, the judgment does not address the concerns raised earlier in this chapter in relation to the lack of clear delineation between the types of harm within the offence (and resultant sanctions). Although the judgment provides clarity in terms of requirements to identify intention and causation in terms of potential harm (incitement), these are considered collectively – i.e., incitement to discrimination, hostility, and violence. Preventing incitement to cause violence is clearly within the parameters discussed in this thesis, with the risk of violence (and need to protect from it) particularly relevant to reconciliation.

Preventing incitement to discrimination, whilst also a legitimate aim of reconciliation, arguably should not be in the same category as violence. Its potential harm is more diffuse and less likely to cause imminent physical harm. The same sanction accorded to inciting violence may therefore not be appropriate. Furthermore, it may not account for some of the complexities of protection and restriction of speech within reconciliation. For example, if a person from a minority claims historic oppression from a majority group and calls for boycotts or to vote for

[356] In practical terms this could imply stronger obligations to provide evidence of imminent harm, expediting application for bail, and requiring the arresting officer to seek advice from the Attorney General's office as to whether the expression comes within the scope of the offence.

minority candidates because others cannot be trusted, that could be deemed intentional incitement to discrimination. It paints a certain group as untrustworthy and aims to cause people to discriminate. Yet in terms of reconciliation perhaps some degree of hatred is representative of the historical context and a desire to carve out a separate identity in their democratic participation. This should be combatted in the aims of a pluralistic society that would better represent reconciliation but should arguably be done without criminal sanction (or at least less sanction than for violence).

This may be even more the case in relation to incitement to hostility. The term is far too subjective for an arresting officer to be able to clearly identify. It is also far more difficult to attribute causality or immediate harm. The vagueness of this term leaves room for it to be applied to a range of political speech. A person may intentionally cause others to be hostile to certain groups, but such expression can be integral to their political expression, and it is not clear what specific harm this entails. Discussions within reconciliation with a history of conflict, can be impassioned and accusatory – and open debate of these issues is part of the healing process. Ridiculing or criticising religious or cultural orthodoxies can cause some degree of hostility (and be unpopular or interpreted as harmful) but it can also form part of the reconciliatory process where entrenched views are subverted and challenged. Limitations should therefore be carefully and narrowly construed to not include speech which may form part of this political process. Perhaps, as per the criteria and arguments raised in this thesis, an incorporation of political speech within reconciliation within the guidelines may assist in narrowing the scope of the offence to prevent inclusion of such speech (and the potential arbitrary use of the Act).

3.5.6 Issues of enforcement of the Act

As has already been noted, the Court highlighted several procedural deficiencies in the arrest. This included failure to include evidence, documentation of the basis of the arrest (statements, results of investigations, and alleged information from State institutions (Ministry of Defence)), attempts to mislead the Magistrate's Court, and even the arresting officer refusing to confirm that they made the arrest. However, the Court in its judgment goes even further by alleging interference in the process. Herein lies some of the practical issues that has been referred to in this thesis that contributes to fundamental issues in applying speech laws within a context of weaker institutions and democratic norms/protections. Often the chilling effect is not due to the law itself, but to issues in its enforcement. The Court observed that '…it has now become common place for this Court to receive Applications alleging the arrest of persons without sufficient cause and in a manner that infringes their fundamental rights. Such arrests are often followed by periods of remand which are also contrary to law. A careful consideration of most such unlawful arrests reveal instances where police officers have not been permitted to exercise discretionary authority conferred on them, and been persuaded by persons in authority to act in a particular manner.'[357] Although faced with insufficient evidence to directly investigate such interference, it is alleged that improper use and weaponization of speech laws are based on political influence.[358] This reflects what has been argued in the chapters so far - that institutional weaknesses can particularly affect the actual outcome of a speech framework. This includes a culture of deference to authority, politicisation of institutions, executive influence, a lack of capacity, education, willingness etc., and patterns of intimidation.[359] The

[357] *Supra* note 328, p 51.
[358] *Ibid*.
[359] As an example, see intimidation of lawyers and attempts to influence judiciary – 'Justice in retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka', *International Bar Association* (2009) p 28, 36, 37, 40; also, institutional lack of willingness to protect minorities – Gunatilleke, *supra* note 301, p 367.

Court reiterates that institutions should be allowed to function independently, and that Magistrates' Courts should not act as mere rubber stamps in approving requests of the police.[360]

3.5.7 Effect on the free speech framework

The judgment in *Razik* provides a substantial degree of clarification of how the speech limitations discussed in this chapter should apply in Sri Lanka. In terms of the criteria set out in this thesis, it seems to bring it, at least to some degree, into better conformity. There is a clear recognition of the importance of protecting political speech, some recognition (confirming some of the intuitions of this thesis) that there can be a link between the objectives of reconciliation and applying speech laws, and (whilst recognising the need to protect vulnerable groups from harm) attempts to narrow the scope of restrictions. As previously discussed, some concerns are yet to be addressed. It may be worth considering how the principles of this judgment may be applied in practice (and whether they may be further improved by the discussions in this thesis so far). For example, how might this affect a consideration of a case where a fictional story is published online depicting abuse by members of the clergy?[361] Constitutional limitations, particularly in the interests of harmony, may be applied by the State. These restrictions should be interpreted narrowly and take into account the importance of protecting democratic participation.[362] Considering the substantial backlash and public anger that such an expression may cause, the Court may be persuaded that there would be a legitimate aim in limiting such speech in the interests of harmony. It may also be

[360] *Supra* note 328, p 47, 51.
[361] Similar to the case of *Sathkumara* discussed previously.
[362] *Supra* note 328, p 24.

less likely to apply a narrow interpretation of such restrictions as the expression arguably does not ostensibly seem political in nature.

However, if the arguments raised in this thesis were to be applied, harmony should be interpreted within a context of reconciliation where the focus is not on the absence of controversy but in protecting democratic participation and facilitating open debate. Furthermore, the scope of what counts as political should be expanded, and could include this expression as it represents discussion of established orthodoxies that make a key part of public debate in reconciliation. This again applies to the application of Section 120 of the Penal Code. It has been accepted that this provision does not negate free speech rights, and that political speech that forms criticism of the State falls outside its scope. Although at first glance this case would not be part of such criticism of the State, the expanded scope for political speech may allow it to be protected. If a history of division has been based on ethno-religious lines, with allegations of majoritarian entrenchment in the State's policies – then such discussion should both form an integral part of reconciliatory discourse, and enforcement should be cognisant of deep fears of State retaliation that means political speech may be expressed tentatively in indirect form. Unfortunately, this protection would not apply to the offences against religion provisions, and it is yet to be seen the degree to which the Court may be willing to interpret safeguards. In terms of the ICCPR Act, the higher threshold established by the Court confers a degree of protection. The State would have to demonstrate that the speaker intended to cause a specified harm. However, in practice the State (and an enforcement officer) may, whilst still claiming to abide by the principles of the judgment, claim that there was an intentional incitement to hostility. Regardless of its success in Court, based on the broad nature of that term and its inclusion in the offence (grouped together with violence and not distinguished as a separate type of harm), the State may be able to justify the arrest. The expression could cause

significant outrage, and such aspersions of abuse could be viewed as potentially inciting hostility towards the religion and members of that group.

3.6. Conclusion

This chapter has applied the findings of the previous discussions in Chapters One and Two, and considered some of the key issues arising in relation to limitation of speech in Sri Lanka. The background to the speech framework in the country was considered by looking at some of the early cases that established jurisprudence relating to the protection of free speech. These cases demonstrated a solid foundation that takes into account the importance of political speech and democratic participation. Some of the main statutory instruments for speech regulation were assessed in terms of how it relates to a framework conducive to reconciliation. In doing so, some key concerns were highlighted. This includes issues such as vague or overbroad terminology and lack of sufficient safeguards. The effects of these deficiencies in practice were considered with examples of cases that demonstrate a concerning trend of the weaponization and misapplication of speech laws by the State to target unpopular speech – particularly in constructing a form of blasphemy law. The case of *Razik* (decided recently during the writing of this thesis) confirms, it is argued, some of the intuitions of this thesis – that reconciliation can form a relevant part in terms of an approach to Sri Lanka's free speech framework. The case substantially improves the position of the speech framework by both providing clarity as to the scope of limitations and narrowing its application.

However, some missed opportunities and omissions were identified. They include issues such as the lack of a clearer link between democratic participation and reconciliation (as argued for

in this thesis - that could shape State obligations, approaches to enforcement, and interpretation of limitations) and concerns such as incitement to discrimination and hostility being grouped with violence without a clear distinguishing of separate harm and sanction. Finally, reflecting the arguments made in the discussions of this thesis so far – recent cases demonstrate that the laws cannot be looked at in isolation, nor through a general lens. It must be considered specifically to the context, taking into account the practical realities of enforcement in Sri Lanka. This is exacerbated by certain inadequate safeguards that allow for people to be arbitrarily arrested and kept in custody for extended periods without bail – essentially allowing the State to exert censorship and punishment without having the merits of the charges reviewed. Institutional and democratic weaknesses translate to heightened concerns of misuse and arbitrary censorship that must be addressed through particularly clear and strong safeguards, and concerted efforts to improve institutions (capacity building, education, accountability, improving independence etc.). The next chapter will take these findings further by applying them to the regulation of online speech in Sri Lanka and recent legislation that has significant implications for its free speech framework and potential impact on participation within the reconciliation context.

Chapter Four

Regulating Online Speech in Sri Lanka

4.1. Introduction

This chapter analyses key aspects of online regulation in Sri Lanka (with particular consideration of the Online Safety Act of Sri Lanka). It will be argued that features of online speech make it particularly important to an examination of a free speech regime (and its relation to reconciliation), and therefore requires separate and substantial examination within this chapter. Furthermore, recently passed legislation (the Online Safety Act) may significantly affect the speech framework in Sri Lanka, and requires substantial discussion within this chapter (through the themes and criteria established within this thesis) to identify its potential effects in terms of the broader themes of this thesis.

The importance of the internet and social media in public discourse cannot be overstated. Both its ability to facilitate greater reach beyond what traditional media could have ever hoped for - and its increasing ubiquity, has helped cement online speech as one of the most powerful tools of expression – thereby potentially attracting similarly powerful censorship. The rise of social media has catalysed, at an unprecedented level, the most profound change to modern media.[363]

[363] Peter Coe, 'The Social Media Paradox: an intersection with freedom of expression and the criminal law, Information and Communications Technology Law', Information and Communications Technology Law, Vol. 24 No.1 (2015) p 16; Peter Coe *infra* note 517; Andras Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere* (Bloomsbury Publishing 2019) p 85 (and Chapter 2 in general).

The advent of these online systems of dissemination of information has resulted in 'a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries.'[364] It is therefore essential for legal systems, when dealing with issues of free speech, to recognise that 'the reality of today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate.'[365] The interconnectivity facilitated by social media has resulted in many positive changes and progress in human interaction – yet this rapid change has also brought significant challenges. The widespread reach, anonymity, and immediacy of online dissemination has meant that there are significant risks of harm online.[366] These exponential advances in technology are accompanied by its potential for misuse through hate speech, fake news, harassment, and extremism/radicalisation/terrorist material.[367]

Concerns in relation to this issue in Sri Lanka have steadily increased, with laws being proposed to curb dangerous speech online.[368] This stems from fears surrounding the propagation of extremist ideology and the potential of hate speech to spark communal violence. There seems to be a significant degree of alarm about the inability to keep up with the rapid proliferation of social media and to control the spread of information in the country (considering the historically significant State control over traditional media), with indications

[364] Human Rights Committee, General Comment 34: Freedoms of opinion and expression, CCPR/C/ GC/34 (GC 34) (2011) p 15.
[365] *New York v Harris* N.Y. Crim. Ct 2012, n 3.
[366] Alexander Brown, 'What is so special about online (as compared to offline) hate speech?', Ethnicities (SAGE Journal), Vol. 18 Issue 3 (2018) p 297, 304; Koltay *supra* note 363 p 175, 190-195.
[367] Matthew Hooker, 'Censorship, Free Speech and Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception', Washington Journal of Law Technology and Arts, Vol. 15 Issue 1 (2019) p 38; Johnny Ryan, 'Countering Militant Islamist Radicalisation on the Internet: A User Driven Strategy to Recover the Web', *Institute of European Affairs* (2007), p 9; Danielle Citron, *infra* note 423, Chapters 1 and 2.
[368] Gehan Gunatilleke, 'Hate Speech in Sri Lanka: How a New Ban Could Perpetuate Impunity' *Oxford Human Rights Hub* (2016) https://ohrh.law.ox.ac.uk/hate-speech-in-sri-lanka-how-a-new-ban-could-perpetuate-impunity/ .

of harsh crackdowns.[369] An exponential increase of internet users in the country has meant that issues relating to speech online have come to the forefront as one of the key considerations in relation to the freedom of expression and political discourse – in fact, increasing numbers of people eschew traditional forms of media with online mediums now becoming their main source of information and communication.[370] However, whilst the impact of social media has radically altered the method and extent of modern communication, the principles behind protecting free speech remain highly pertinent. Laws protecting fundamental rights to free speech should be extended to include technological developments in communication.[371] The fact that the medium of communication has progressed through novel technologies, does not necessarily mean a fundamental departure from the 'mischief' that laws were intended to protect from. As Balkin argues, new digital technologies do not fundamentally alter what freedom of speech is but rather they 'change the social conditions in which people speak' – and by doing so 'bring to light features of freedom of speech that have always existed in the background but now become foregrounded.'[372] The focus should therefore arguably go beyond how different speech in the digital age has become, and extend to how salient free speech principles have become all the more relevant. As with the invention of the printing press, radio and television - technological innovation has expanded the scale of speech to wider audiences and have brought 'features of the system of free expression to the forefront of our concern, reminding us of things about freedom of expression that were always the case, but now have

[369] 'Sri Lanka Cabinet nod for laws against false propaganda online' *economynext* (2021) https://economynext.com/sri-lanka-cabinet-nod-for-laws-against-false-propaganda-online-80943/ .
[370] Sanjana Hattotuwa and Roshini Wickremesinhe, 'Hate Speech and Social Media in Sri Lanka' in *Acts of Media: Law and Media in Contemporary India*, Siddharth Narrain p 141-163 (ed. Sage 2022), p 141, 142; 'Understanding the impact of social media on online news' *OFCOM* (2024) https://www.ofcom.org.uk/media-use-and-attitudes/media-plurality/social-media-online-news/ ; 'America's news influencers' *Pew Research Center* (2024) https://www.pewresearch.org/journalism/2024/11/18/americas-news-influencers/ .
[371] This does not necessarily mean that they should be materially changed or expanded – but that their application must extend to novel technologies. Essentially, the fact that there is a new form of communication should not, at least generally, vitiate the underlying principle of free speech.
[372] Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', NYU Law Review, Vol. 79 Issue 1 (2004) p 2.

become more central and thus more relevant to the policy issues we currently face.'[373] It is relatively uncontroversial to put forth the claim that speech online is becoming rapidly more relevant to public discourse, and such speech will also attract the protections relating to freedom of expression. Changes in technology have allowed for new methods of expression and participation in the democratic space, but it has also resulted in new ways of censorship.

This introduction has set out why a separate chapter on online speech is necessary in the context of this thesis. The rapid change in the methods of distribution of speech has resulted in drastic changes to what constitutes the public square, and the law must catch up to the changing landscape in order to effectively legislate against speech that must be legitimately restricted, whilst providing adequate protections for the freedom of expression. In fact, the use of online speech has become so ubiquitous that in practice, it can be argued that an effective free speech regime that promotes the sort of participatory democracy necessary for reconciliation, is only possible with strong protections for speech online. The next challenge, and what will constitute the substantive part of this chapter, is to set out two main questions to be answered below – a) is there a distinctive or material difference in online speech within the context of a reconciliation setting and what protections should such speech attract? And, b) How does the speech framework relating to online speech in Sri Lanka fit the benchmarks set out in this thesis?

4.2. The distinctive difference in online speech, as opposed to offline/traditional mediums of communication

[373] *Ibid*.

This subsection will consider features of speech online (with particular attention to anonymity and misinformation, due to its significance in relation to the Online Safety Act in Sri Lanka and effect on reconciliation) and how that may affect the requirements of an effective free speech framework based on the key themes of this thesis. Before that, it is worth first considering whether and how speech online would come within the parameters of the research aims of this thesis. As the primary focus is on political speech, the question is whether speech online can constitute political speech. As mentioned in the introduction of this chapter, online speech has vastly changed, both in form and reach, over a short period of time. Whilst it may not have been considered a serious forum for public debate during the initial years of the internet, it has rapidly become a primary source of information and public discussion for many. What is posted and consumed online, may in itself be a political act, and for some years online platforms have provided one of the most important (if not the most important) method of enabling participatory democracy since ordinary citizens can not only receive politically relevant information, but can also participate in political debate in online forums.

4.2.1 Political speech online

A clear example of political speech online would be expressions by politicians. President Trump's social media presence was an integral part of both his successful campaign to become President, and his term in office. The fact that his tweets were required to be archived by the National Archives under the Presidential Records Act shows its significance and the way that social media has expanded its role in society.[374] In fact, US courts viewed the President blocking individuals from his twitter page (so that they would not be able to view or interact with his posts through their blocked accounts), as an infringement of their free speech rights as

[374] Hooker, *supra* note 367, p 41.

it had become a public forum tied to official purposes where policy ideas and decisions were publicised.[375] Whilst this centred on the fact of it being the Twitter account of a sitting president/ public official (thus making the issue somewhat moot after Biden's win), Justice Thomas' comments in the Supreme Court allude to strong arguments for social media sites to be considered as common carriers or places of public accommodation to justify the qualification of tech companies' censoring power.[376]

After the 2020 Presidential election, Trump had his posts removed and was eventually banned from Twitter, YouTube, and Facebook.[377] This set a worrying precedent in terms of political speech. President Trump was a divisive figure in politics and those that opposed him did so with unprecedentedly vociferous opposition. To the left (and indeed some parts of the right), Trump evoked a level of dislike unlike any other US politician in recent history. However, the opposite is also true for his supporters, demonstrated by the fact that despite losing the election, his campaign got the most votes for a Republican candidate in history and far surpassed his Democrat predecessor, Barrack Obama.[378] Regardless of how one views his character or policies, this should raise some serious concerns. The most popular figure in the opposition was barred from engaging with the platforms where most public and political discourse now takes place. This decision was made not by a court of law, nor owing to a breach of law. If he decided to run for office again, he would be prevented from engaging with supporters, contributing to political debate, campaigning, and fundraising on these platforms.[379] This issue was offset somewhat by Elon Musk's acquisition of Twitter (rebranded to X) and subsequent

[375] *Knight First Amdt. Inst. at Columbia Univ. v. Trump*, 928 F. 3d 226 (2019).
[376] *Biden v Knight First Amdt. Inst. At Columbia Univ*, 593 U.S (2021).
[377] Andrew Doyle, 'We Ignore Big Tech censorship at our peril' *Spiked* (2021) https://www.spiked-online.com/2021/01/21/we-ignore-big-tech-censorship-at-our-peril/ .
[378] Natalie Colarossi, 'Donald Trump's 73.6 Million Popular Votes is Over 7 Million More Than Any Sitting President in History' *Newsweek* (2020) https://www.newsweek.com/donald-trumps-736-million-popular-votes-over-7-million-more-any-sitting-president-history-1548742 .
[379] Tom Slater, 'Why Trump's Facebook Ban Still Matters' *Spiked* (2021) https://www.spiked-online.com/2021/05/06/why-trumps-facebook-ban-still-matters/ .

decision to reinstate a number of previously banned accounts, including the former President's. Although the issue initially seemed to concern the role of private companies and their influence on free speech, the release of the so called 'Twitter Files' suggested the role of State actors and political parties in influencing censorship decisions.[380]

Another related issue was the restriction of news relating to emails allegedly linked to Hunter Biden (the then-Presidential candidate Joe Biden's son) which were revealed by the New York Post before the election, suggesting corruption and the receipt of money from a Ukrainian oil company. Facebook and Twitter directly intervened to supress this story, reducing its distribution, blocking people from sharing the story and giving warning messages to anyone who tried to click links already posted.[381] The New York Post's Twitter account was also blocked, with demands from Twitter to remove six posts - and the White House press secretary was locked out of her personal account after trying to share it.[382] Following the election, these allegations persisted, and Hunter Biden was investigated by the justice department over his finances and business dealings abroad.[383] Jack Dorsey, the then CEO of Twitter, has since stated that the decision to block this story was a 'mistake'.[384] The scandal surrounding Hillary Clinton's emails is often attributed to contributing (at least in part) to her electoral loss in the 2016 Presidential election.[385] This raises the question as to whether the outcome may have been different if news about this had been censored by social media companies at the time. This is not to make a partisan point about US politics, but as examples to demonstrate both the

[380] Tom Slater, 'The Twitter Files and the Silence of the Hacks' *Spiked* (2022) https://www.spiked-online.com/2022/12/05/the-twitter-files-and-the-silence-of-the-hacks/ .
[381] Fraser Meyers, 'The tech oligarchs are a menace to democracy' *Spiked* (2020) https://www.spiked-online.com/2020/10/15/the-tech-oligarchs-are-a-menace-to-democracy/ .
[382] *Ibid*.
[383] 'Hunter Biden: What was he doing in China and Ukraine?' *BBC* (2021) https://www.bbc.co.uk/news/world-54553132 .
[384] Noah Manskar, 'Jack Dorsey says blocking Post's Hunter Biden story was a total mistake', *New York Post* (2021) https://nypost.com/2021/03/25/dorsey-says-blocking-posts-hunter-biden-story-was-total-mistake/ .
[385] Mark Murray, '12 Days that Stunned a Nation: How Hillary Clinton Lost' *NBCNews* (2017) https://www.nbcnews.com/politics/elections/12-days-stunned-nation-how-hillary-clinton-lost-n794131 .

possibility of clearly political speech online (as well as its impact on the democratic process), and the potential (and temptation) for State influence in restricting that speech. The greater importance of political speech online (as seen in the discussions in the introduction) means that the temptation for censorship is significant, and therefore require adequate safeguards.

The examples given above (and similar types of speech) are relatively easy to identify as political speech in the sense that they can be viewed to align with the explicitly and ostensibly political type of speech identified by Robert Bork.[386] This would presumably include speech relating to government policy, political campaigns, elections, State corruption etc. However, as discussed in Chapter Two, a wider scope that includes a broader range of speech as political may be required. Identifying these may not be as easy as it initially seems in terms of applying methods relating to traditional media to online speech. Balkin's statement referred to in the introduction highlights the idea that changes in technology and methods of communication do not necessarily alter the underlying free speech principles, but rather bring these to the foreground to be applied to novel methods. This is true in the sense that the principles of free speech themselves remain - and the aim should be for the laws to adapt. There is no fundamental shift in the free speech principles themselves. However, it would also be impractical to expect older frameworks of speech regulation to be sufficient in their original form to cover the complexities of the changes to modern communication. A cut and paste approach would fail to account for features of online speech that pose difficulties in adapting frameworks of speech regulation that were conceptualised to govern issues relating to older forms of communication. An online post written in under a minute can reach an audience of potentially millions within seconds, which is far removed from the limitations of printed media. A short video talking to the camera using a phone can be intended to influence wider discussion

[386] See Chapter Two.

or meant to be seen by a small friend group. A handful of characters in a tweet can be serious journalistic contribution, genuinely intended discussion, or just mere rambling. The act of resharing a post is fundamentally different from the arguably more intentional and relatively laborious process of publishing an article in print media.

Some of the cases already discussed previously relating to Sri Lanka (in Chapter Three) may provide examples of how judicial bodies may have to adapt to changes in technology and online speech. In *Joseph Perera*, the distribution of political leaflets was clearly identifiable political speech and attracted strong protections from State censorship.[387] However, in the modern context the act of distributing leaflets has become relatively outdated and is increasingly replaced by sharing material online. The modern equivalent may include posters and images supporting political policies and criticism of the State/government. It is easy to apply this case to online speech if it was a similar leaflet in online form; however, courts may have to deal with different iterations of similar speech. For example, it could be shared as a meme where a picture with captions may appeal more to short digestible information online, in terms of modern trends in consuming information – but still contain the intent of engaging with political discussion. Furthermore, as previously suggested, the act of 'sharing' or 'retweeting' such content may be viewed differently as opposed to the intentionality of publishing and distributing printed material. In the *Jana Ghosha* case, unconventional expressions of speech could attract protections given to political speech.[388] The beating of a drum during a protest could constitute political speech that required protection, even though it differed from what would traditionally be viewed to constitute such expression such as written articles or chanting.

[387] *Supra* note, 239.
[388] *Supra* note, 260.

This opens up the possibility for online speech protections for novel forms of protest in online speech with videos, images, livestreams etc.

On the other hand, the *Jana Ghosha* case was easier to identify as one concerning political speech because it occurred during the context of a protest. In the case of online speech, it naturally would not benefit from the obviously political indication of physical presence in a protest. However, the presence of such intention could at least be inferred from factors (discussed in Chapter Two) such as content, i.e., relating to current political issues or material that are political in nature – or context, such as whether it occurred during an election period or was posted in a forum or group that geared towards political discussion. Political satire and criticism will inevitably result in people finding novel methods of utilising online spaces for political speech, and courts will have to adapt in order to effectively arbiter the rules regarding such fast developing methods of engaging in public debate. An interesting example of online political speech in the UK would be the infamous ball of lettuce and former short-lived Prime Minister Liz Truss. Drawing inspiration from a joke by a political commentator regarding Truss' low chances of political survival and the likelihood of it being shorter lived than the shelf life of a lettuce, the newspaper the Daily Star, live streamed a ball of lettuce in a blonde wig.[389] In the end, the lettuce did indeed outlast the Prime Minister's tenure and the live stream attracted substantial numbers of viewers. The stunt still remains in public discussion years later.[390] This did not attract any legal challenge, so it only serves as a humorous example of novel forms of political speech online. Traditional free speech frameworks and theories would not have envisaged having to deal with mediums such as a live stream, nor its ability confer such a degree of political significance upon a ball of lettuce.

[389] *BBC* (2022) https://www.bbc.com/news/uk-politics-63334457 .
[390] Kevin Schofield, 'Chris Mason Skewers Liz Truss For Not Lasting Longer Than A Lettuce' *Huffingtonpost* (2021) https://www.huffingtonpost.co.uk/entry/chris-mason-skewers-liz-truss-for-not-lasting-longer-than-a-lettuce_uk_661e1278e4b015646f78d676 .

Somewhat similarly, during the lead up to Sri Lanka's period of economic crisis that led to widespread protests in 2022, a form of political satire became popular in the form of widespread chants likening the ruling party (particularly the former Finance Minister) to crows, and the honking of horns to that tune.[391] The likening of politicians to animals is hardly new or unusual, indeed it is a long-established part of political satire.[392] However, where it differs in the modern context is how such material is shared; in Sri Lanka this included videos of the honking, sound clips, gifs, altered images of crows etc. Perhaps an image digitally altered, caricaturing a politician as an animal shared on a Facebook page may not be held in the same regard as political satire such as George Orwell's Animal Farm, but there is a reasonable case to be made that it could contain some of the same intentions of contributing to political discussion and the principles of identifying and protecting political speech may still apply.

This subsection has so far set out general reasons and examples of how speech online can very well be political in nature, as well as hypothetical ways in which courts may have to adapt to keep in line with changes in technology and communication. There will be cases where it is easier to apply the methods of identifying political speech mentioned in Chapter Two, as there is little in the way of ostensible differences in the nature of speech (for example there seems, at least intuitively, little reason for there to be a marked difference between a leaflet published by a political party as opposed to its electronic version posted online to their official social media pages). However, as suggested above, there are certain features and characteristics of online speech that pose difficulties for the courts when applying laws relating to speech. Courts

[391] Raknish Wijewardene and Yolani Fernando, 'How an anthem about crows became angry Sri Lankans' favourite chant' *Quartz* (2022) https://qz.com/india/2161913/angry-sri-lankans-invoke-crows-to-mock-ruling-rajapaksa-family .
[392] For example, George Orwell's Animal Farm as a critique of politics, and other satire in general through history, *BBC* (2015) https://www.bbc.com/news/uk-england-sussex-35060986.

must be able to adapt existing approaches to the protection of free speech whilst limiting potential harms that may exist or be exacerbated by new forms of communication online.[393] These distinctive differences need to be identified and taken into account when considering political speech online. These distinctive differences will be explored in more detail below.

4.3. Anonymous speech

Anonymous speech has become one of the features of online speech that has both particular relevance to the topic of this thesis, and has constituted a significant part of the challenge of societies dealing with speech online in general.[394] This therefore warrants substantial consideration of what this form of speech is, its relevance as a distinctive feature of online speech, what benefits and challenges it poses to free speech and its regulation, and how this aspect or feature of online speech impacts the application of speech regulation in the context of this thesis.

4.3.1 What is anonymous speech?

[393] Alexander Brown, *supra* note 366, p 298, 308.
[394] The reasoning for why anonymous speech as a key aspect of online speech in general terms will be evident from the discussion in this subsection. Its particular relevance (beyond issues relating to free speech online in general) will be apparent from its specific inclusion as an issue of censorship in the Online Safety Act of Sri Lanka (along with the consequences of the enactment of that law), which will be discussed in detail in the latter part of this chapter. Establishing some of the key points in regards to anonymous speech at this point will allow for a better appraisal of the relevant parts of the Online Safety Act.

Anonymous speech is essentially speech that does not reveal the identity of the author. It could be pseudonymous, utilising a *nom de plume* or pseudonym which masks the identity of the speaker either in full or part.[395] It could also be speech that does not identify a speaker at all. The main feature of anonymous speech is that it withholds disclosure of the speaker's identity (or it is not apparent to the audience), resulting in the identity of the speaker being difficult or impossible to determine by other participants/the audience.[396] Whilst the nature of the internet has brought such forms of speech to the forefront as a particular issue in dealing with free speech issues, anonymous speech is not necessarily a new phenomenon. It has existed through history and has arguably constituted a substantial role in shaping modern history.[397] The motivation behind limiting expression to anonymous methods can be varied. A person may do so out of fear of reprisal when writing about unpopular topics or social ostracization. They may fear for their physical safety or that of those close to them.[398] The choice to write with a pseudonym may also be to avoid detracting from the substance of their writing due to their identity.[399] The societal context may be hostile to certain types of speakers and anonymity may allow them to contribute on more equal footing.[400] The veil of anonymity may provide some with the courage to engage with public discussion or provide a way of engaging with a public forum to air and formulate their ideas and thoughts until they are ready to contribute under their

[395] An example of partial anonymity would be a pseudonym that reveals the author's background or profession whilst hiding their name or specific identifying features– such as 'the secret barrister' writing on legal topics allowing the audience to know that they are a criminal barrister in the UK, but withholding any further personal information https://www.thebookseller.com/rights/the-secret-barrister-writes-first-fiction-for-picador .
[396] Rolph Weber and Ulrike Heinrich, *Anonymization* (Springer London Eds. 2012), p 1.
[397] Chesa Boudin, 'Publius and the Petition: Doe v. Reed and the History of Anonymous Speech', The Yale Law Journal Vol. 120 (2011), p 2140, 2153; Whilst it is not necessary to review in more depth the history of wider forms of anonymous speech, a detailed summary of this history is available in Barendt *infra* note 399, Chapter 1 and 2. This provides examples of anonymous speech through history (at times being the norm) including literature, poetry, theatre reviews, newspaper articles etc.
[398] Alexander Brown, *supra* note 366, p 299.
[399] Eric Barendt, *Anonymous Speech: Literature, Law and Politics* (Ed. Bloomsbury Publishing 2016), p 4, 5.
[400] For example, women such as the Bronte sisters and Jane Austen choosing to publish literature under masculine pseudonyms during periods where women authors would likely not be well received, *Ibid* p 16,17.

own name. The practice of anonymous or pseudonymous speech was in fact once the norm of communication in relation to the arts and political discussion.[401] Whilst its popularity somewhat waned over the years, its relevance is now substantially more important and its use revived with the use of technology and the internet.

4.3.2 Anonymous political speech

With a range of motivations for engaging in anonymous speech and examples through history of anonymous speech, the next question of particular importance to this thesis is that of anonymous political speech. Anonymous speech has arguably been a fundamental part of democratic participation in public debate and, as mentioned, has shaped much public discussion of political issues through modern history.[402]

In the 18th century, a series of essays discussing the protection of liberties and free speech named 'Cato's Letters' were published by pseudonym.[403] These influenced much political discussion and impacted much of the shaping of US history. Its argument for protecting free speech has been credited for significantly influencing how constitutional protections for free speech were formulated subsequently after independence.[404] Much of the debate pertaining to the framing of the US constitution was also carried out through anonymous speech such as the utilisation of pseudonyms such as Publius in the federalist papers.[405] Anonymous speech has

[401] Jonathan Turley, 'Registering Publius: The Supreme Court and the Right to Anonymity', Cato Supreme Court Review 57 (2001-2002), p 57; such practices continue to date, for example, as with *The Economist* - which still publishes anonymously.
[402] Weber and Heinrich, *supra* note 396, p 2.
[403] John Trenchard and Thomas Gordon, *Cato's Letters: or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (Liberty Fund 1995) (6th edition 1755).
[404] David S. Bogen, 'The Origins of Freedom of Speech and Press', Maryland Law Review Vol 42 No 3 (1983), p 429, 445.
[405] Turley, *supra* note 401, p 59, 60.

been recognised as an important, and even fundamental, part of political speech, directly facilitating democratic participation and influencing the formulation of public policy.[406] Anonymous speech and the use of pseudonyms has also been part of wider political speech that has influenced public debate, famously with the example of George Orwell. Much of Eric Blair's work was published under the pseudonym George Orwell, possibly for personal reasons or to protect his reputation and family.[407] His literary work still remains relevant to date with its political satire and defence of free speech and liberties. The probability of such speech being possible without the veil of anonymity is difficult to gauge accurately, however the fact remains that this is a clear example of anonymous speech that contributes immensely to public discussion. The fact that it was intentionally produced under a pseudonym, for whatever reason, at least lends some merit to the idea that the ability to do so facilitated its release.

It should be clear from the above that anonymity and political speech are deeply related, and there is a basis for considering political speech to be possible in anonymous speech. Arguably, there has been a longstanding tradition through history of utilising anonymous speech in the furtherance of political speech and discourse.[408] A question that may be raised in regard to this is what value in terms of political speech may be attributed to anonymous speech. Does anonymous speech make the expression any less political? In the discussions presented in Chapter Two, when identifying instances of political speech, a relevant factor may be its discursive element. Ideally, political speech facilitates participatory democracy and the ability for individuals to engage in public debate. The use of anonymous speech restricts certain aspects of this discussion. The ability of the listener to gauge the authority of the speech (and speaker) is limited and so is their ability to effectively respond. Although *ad hominem* replies

[406] Boudin, *supra* note 397, p 2153.
[407] Barendt, *supra* note 399, p 21.
[408] *Talley v California* 363 US 60 (1960), p 64.

are often viewed as fallacious in terms of the substance of debate, they nonetheless are relevant in the public discussion. It can be a relevant factor that people may take into account, either through attributing authority (or lack thereof) due to the background of the speaker, or whether they have a history or propensity to be mistaken or dishonest. Thus, their ability to evaluate and reply is different when compared to when someone publishes their expression without hiding their identity, allowing for effective counter speech by others and a more effective rebuttal. There is an argument to be made that the reduced accountability of the speaker can provide a basis for according relatively less of the strongest protections accorded to political speech.[409]

4.3.3 Online anonymous speech

So far, the discussion has related to general instances of anonymous speech. As this part looks at online anonymous speech in particular, it is necessary to point out why this topic is relevant to this chapter and the decision to group it as a distinctive feature of online speech rather than include it in wider discussion relating to the freedom of expression in general. As previously discussed, anonymous speech as been a key feature of political discussion and the freedom of expression in general – however, despite its relevance fading over time due to developments in printing and property rights incentivising publicising the identity of the author, the advent of modern technology and new methods of communication has meant that it has resurfaced as a popular method of expression and an important issue in relation to free speech online.[410]

[409] See Szigeti, *supra* note 116, for arguments in support of separating protections for such speech from the strongest protections for political speech – a lack of a right of reply, could make the expression less deserving in terms of its protection for political speech. As part of the key themes of this thesis is applying a wider scope of protections to political speech, this will be a relevant consideration. This is particularly so considering the effect of the Online Safety Act which targets anonymous speech in Sri Lanka, which is discussed in the latter part of this chapter.

[410] Barendt, *supra* note 399, p 122.

Anonymity is often directly attributed as being one of the defining features of issues relating to speech on the internet.[411] Whilst much of the debate relating to wider forms of anonymous speech have received much judicial and academic attention (and can be regarded as relatively resolved), the matter of anonymous speech on the internet 'now provides the context for the most vigorous debate on the pros and cons of anonymous speech.'[412]

Much of the method of engagement on the internet is via online personas. A person's only identifying feature to an online audience may just be their username. It is also possible that they use a display picture that is of someone else, an inanimate object, or left blank. So prevalent was the use of such pseudonymous online personas, that at points it has been viewed as improper to ask for someone's real identity.[413] Not only has anonymous speech online become a norm, but it has also brought new ways of anonymisation. It is easier to achieve anonymity through the medium of the internet using its design (based on usernames, avatars etc.) and anonymising software.[414] This makes the process of anonymisation more accessible to wider groups of people compared to the pre-internet era where anonymous speech would be a more difficult process (for example, printing and publishing a written piece anonymously would require layers of planning and collaboration with different parties such as the publisher). Not only has anonymous speech become easier, but it has also become more sophisticated, with anonymising software and methods of encryption.[415] However, this also has meant that as States adapt to these changes in technology, more ways of censorship and surveillance of this

[411] Turley, *supra* note 401, p 77.
[412] Barendt, *supra* note 399, p 122.
[413] *Ibid*, p 128.
[414] Lisa Collingwood, 'Privacy, Anonymity, and Liability: Will anonymous communicators have the last laugh?', Computer Law and Security Review Vol. 28 Issue 3 (2012), p 328, 329.
[415] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (2015), A/HRC/29/32, p 3.

type of speech has become possible with data collection, surveillance, pressure on service providers etc.[416]

A distinction between a physical 'real life' context and an online space is that there is less in terms of identifying features that make anonymous speech difficult. Such 'self-authenticating' factors mean that there is a greater amount of intentionality and limitation in hiding one's identity in a physical context that may not be the case online.[417] For example, it will largely be relatively self-evident if someone is of a particular ethnicity, or if they are a small child or adult in person, whilst by nature of the online space this is not immediately apparent.

4.3.4 Main issues relating to anonymous speech online

This subsection considers some of the main issues in relation to anonymous speech online. The introduction of new legislation regulating online speech has the potential to significantly impact the speech framework of Sri Lanka (in terms of a framework within a reconciliation context). As a key part of the new law relates to anonymous speech (in ways that affect the wider themes of this thesis in terms of reconciliation), an examination of the main issues at this point will assist in evaluating this law and its effects in the latter part of this chapter.

4.3.4.1 Disinhibiting effect

Whilst the ability for people to express themselves anonymously online can encourage participation and allow for free speech that people may not be comfortable or feel safe enough

[416] *Ibid*.
[417] Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' Harvard Law Review Vol. 113 No. 2 (1999), p 501, 504.

to express without the veil of anonymity – this can also mean that it may result in people being more willing to express unsavoury speech (insulting, mean, hate speech etc.) without the psychologically limiting and civilising nature of face to face conversation.[418] The notable difference in how the internet and the ability to post anonymously has become such a noticeable phenomenon that it has been identified as a particular feature of online speech.[419] People may feel less constrained by societal factors (such as embarrassment, fear of backlash, being associated with unpopular topics, employability etc.), resulting in a significant change in their willingness to speak freely online. This phenomenon does not necessarily automatically result in invective and hateful conduct but promotes a more open willingness to communicate which includes more expression in both good and bad conduct. The disinhibiting effect could be relatively neutral, allowing people to be more outgoing online or seeking medical advice that they may be too embarrassing for them in person.[420] It can also facilitate more positive forms of speech where the veil of anonymity may embolden people to show support for others, share experiences of discrimination or abuse, and speak out against bullying or hate.[421] Of course, the most concerning aspect of this is the potential propensity for the expression of unsavoury speech ranging from unkind comments to outright hateful targeting (cyber-bullying). The disinhibiting effect of online speech may allow or encourage people to engage in speech that is hateful in ways that they would be reluctant to do in person. It could contribute to a belief or feeling that the usual norms of civility in usual life do not apply, resulting in particularly vituperative or abuse speech. Some of the worst aspects of people's natures that are otherwise considered unpalatable in public may be expressed, particularly with a perception of there

[418] Barendt, *supra* note 399, p 128.
[419] John Suler, 'The Online Disinhibition Effect', Cyber Psychology and Behaviour, Vol. 7 No. 3 (2004), p 321.
[420] Adam Joinson, 'Causes and implications of disinhibited behaviour on the internet', in Jayne Gackenback (ed) *Psychology and the Internet: Intrapersonal, Interpersonal, and Transpersonal Implications* (2nd ed Academic Press 2006), p 63.
[421] Suler, *supra* note 419, p 321; also see Collingwood, *supra* note 414, p 329.

being a lower risk of consequence or accountability.[422] Some people may feel encouraged or free to engage with some of the worst tendencies of human behaviour and personality.[423] Even worse, this could extend beyond hateful/unsavoury speech to include particularly dangerous engagement and dissemination with things such as calls to violence, targeted bullying, and support for/ the planning of terrorism.[424] Such potential would be particularly concerning in a context such as in Sri Lanka (see discussion in Chapter Two relating to the heightened risk of violence in such contexts), and therefore requires careful examination in order to protect against factors inimical to the reconciliation process. The reasons for this change in behaviour can be varied.[425] One explanation points to an element of deindividuation. Studies have shown that norms of civility and society may be ignored by individuals when they are part of a group or crowd.[426] The removal of their individual characteristics through anonymisation may lead to them engaging in group behaviour (joining in with abuse etc.) with less regard to consequence. Stemming from social psychology, this theory purports that this phenomenon could result in otherwise normal people acting irrationally or abusively once perceived to be part of a crowd, (when applied to the context of being anonymous online) and feeling compelled or more able to engage in this behaviour through a loss of self-awareness or individual responsibility.[427]

Another explanation is that anonymous speech may affect the degree to which social cues can shape normal human interaction.[428] The absence of the usual social interactivity of conversation such as eye contact, body language, or seeing the immediate reaction of the other person may

[422] Brown, *supra* note 366, p 299.
[423] Danielle Citron, *Hate Crimes in Cyberspace* (Harvard University Press 2014), p 58.
[424] Barendt, *supra* note 399, p 128.
[425] Suler, *supra* note 419, p 322-325.
[426] Citron, note 423.
[427] Katherine Williams, 'On-line Anonymity, Deindividuation and Freedom of Expression and Privacy', Dickinson Law Review, Vol. 110 Issue 3 (2006), p 687, 691.
[428] Joinson, *supra* note 420, p 73.

result in people being desensitised to the nature and consequences of their speech.[429] It may also be the case that when people operate within the online space they end up separating reality from the internet. Their online personas may feel separate to their identity and the people they interact with may feel less real. The perception (even unconsciously held) that the online space is less real, may lead to people treating it like a game and acting beyond social norms, as well as failing to appreciate the real consequences and harm that still applies in the virtual world.[430]

The true extent to which this phenomenon contributes to issues of unsavoury speech online is difficult to objectively gauge. Some suggest that the issue relates less to the feature of anonymity in online speech but a wider problem with the effects of deindividuation. Williams argues that anonymity online does not necessary cause these problematic behaviours, but rather serve as another method of facilitating that behaviour where those inclined to do so choose to utilise it.[431] In addition to the suggestion that there is not always a causative element to anonymity and bad behaviour, it has been suggested that there may also be instances where anonymisation actually reduces the effects of deindividuation.[432]

4.3.4.2 Interests of the participants

As participants in public discourse includes both the speaker and the audience, it is necessary to consider how anonymous speech impacts their interests. For the speaker, anonymous speech can allow them to safely express opinions and engage in public discourse without fear of

[429] Citron, *supra* note 423, p 59.
[430] Suler, *supra* note 419, p 323.
[431] Williams, note 427, p 696.
[432] Williams, *supra* note 427, p 695.

repercussion that may otherwise dissuade them from participating in public debate. As has been mentioned previously, political speech will often cover territory that is controversial and subject to intense heated debate[433] – and the veil of anonymity can provide a form of security for those who wish to participate.[434] This may particularly be the case where the speaker is vulnerable or from a minority within a social context that can dissuade them from participation. For example, a male talking about his experience of being sexually abused, an individual speaking out against religious oppression in a repressive religious country, or speaking about LGBT issues in a country where it is illegal or socially condemned – such cases would benefit from the ability to express anonymously to prevent embarrassment or outright persecution, thus enriching the public debate and allowing individuals to contribute whilst protecting them.[435] In such contexts, the ability to communicate anonymously is almost a precondition for effective democratic participation – the absence of this would deter people from communicating.[436]

Another aspect of anonymous speech in relation to the speaker is that there may be potential for anonymity in itself being part of the expression. Perhaps in some instances, the choice to post anonymously is a specific feature of the expression and to disallow it would be to fundamentally change the characteristics and message of the expression. An anonymous blog talking about political issues (perhaps even from the perspective of someone working in politics, writing under a pseudonym), may rely on its anonymity as a feature of the expression,

[433] See Chapter Two and Three.
[434] See for example, the political website 'Guido Fawkes', referred to by Leveson LJ in 'An inquiry into the culture, practice, and ethics of the press' (2012) - https://assets.publishing.service.gov.uk/media/5a7cb917ed915d63cc65c755/0780_i.pdf p 168; the anonymous political blog 'Night Jack' and issues relating to the removal of anonymity in *infra* note 475.
[435] Barendt, whilst supporting this view, also points out its less appealing aspects – if anonymity promotes the expression of minority viewpoints, this can also be utilised by those engaging in hateful speech. See Barendt, *supra* note 399, p 65.
[436] As technology innovates and becomes widespread, so will novel issues arise relating to this. A hypothetical example would be someone with a significant facial injury or deformation who either omits their face, substantially alters it with editing software, or uses Artificial Intelligence to create a fictional (but realistic looking) avatar. They may not have the confidence to engage in public life or discourse with their real features and may rely on visually pseudonymous ways to do so.

i.e., that it is an anonymous blog, to convey its message. Such expression may be quite different in nature if forced to reveal the speaker, as there may be those who consider an anonymous blog to be a distinctly different way of writing about the topic. Similarly, with the popularity of pseudonyms online, the use of parody accounts as political satire has become increasingly popular as a way of engaging in political speech along with the rise in use of the internet.[437] The State, governmental policies, and the politicians themselves can be subject to satire through this method, and can be a particularly effective method of political speech.[438] Such expression can provide useful contributions to social and political commentary[439] – and would not be effective as such without the use of pseudonyms. If the anonymity itself is a distinct feature of the expression, then the choice to include identifying information or to choose not to, can be argued to be part of the expression itself.[440] Anonymity being a component of the speech itself would mean that compelling the speaker to reveal identifying information would be an interference with their freedom of speech.[441]

On the other hand, it is also important to consider the interests of the audience. The argument from democratic participation, which this thesis has argued is of particular importance to the aims of reconciliation, places particular value on the audience's interests (such as the electorate's access to information).[442] The arguments for how anonymous speech can encourage speakers to contribute to public discourse can also be of benefit to the audience.

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[437] Jon Oram, 'Will the Real Candidate please stand up?: Political Parody on the Internet', Journal of Intellectual Property Law Vol 5 Issue 2 (1998), p 467, 471 ,472.
[438] Jesse O'Neill, 'AOC in a Twitter tizzy, warns followers over a parody account mocking her' *New York Post* (2023) https://nypost.com/2023/05/30/alexandria-ocasio-cortez-warns-twitter-of-parody-account-elevated-by-elon-musk/ - The satirical account portraying Representative Alexandria Ocasio Cortez received substantial public attention and discussion. Notably, the account satirised her threats to take action against them. There are many other examples of parody accounts of politicians and people of note in public discussion – including the owner of Twitter (now X) on his own platform.
[439] Emma Lux, 'Twitter, Parody, and the First Amendment: A Contextual Approach to Twitter Parody Defamation', Loyola of Los Angeles Entertainment Law Review, Vol 41 (2021) p 1.
[440] *McIntyre v Ohio Elections Commission* 514 U.S. 334 (1995), p 342.
[441] *Ibid* p 349.
[442] Barendt, *supra* note 399, p 61.

This would mean that they are more likely to be exposed to a wider range of social and political thought. Their access to this information would be augmented by the fact that there are a greater range of people willing to enter public discourse, thereby making available access to a greater range of opinions. In addition to this, it would also mean that people may be more willing, with the security of anonymity, to engage with particularly controversial and politically relevant topics, therefore meaning that they receive more critical consideration and discussion. Audiences will be able to receive and evaluate opinions on these issues that they otherwise would not have been able to access.

An issue that arises for the audience when dealing with anonymous speakers is their interest in critically appraising the expression. Whilst anonymity may provide them with a broader range of viewpoints – they will be, by the nature of anonymity, limited in the extent that they can gauge the credibility of the speaker. There may be some benefit to assessing a viewpoint on its own based on its individual substance without the distraction of assessing the credibility or biases of the speaker. Participation in public debate benefits from the absence of pre-existing assumptions and taking identity out of the equation may allow people to critically evaluate ideas on its merits rather than its relation to their biases or group identity.[443] For example, a viewpoint made by a minority could be assessed on its individual merits without the recipient consciously or sub-consciously deciding it is motivated by their group identity and dismissing it pre-emptively. Thus, an ideal conception of how public discourse would operate would be without such contextual distractions.[444] However, the fact remains that the audience is deprived of information that they may have particular interest in.[445] The identity of a speaker can inform

[443] Robert Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell', Harvard Law Review, Vol. 103 No. 3 (1990), p 601, 637, 638.
[444] *Ibid* p 639.
[445] Lyrissa Lidsky and Thomas Cotter 'Authorship Audiences and Anonymous Speech', Notre Dame Law Review, Vol. 82 Issue 4 (2007) p 1537, 1545; Barendt, *supra* note 399, p 66.

as to what biases a view may be based on, and the reputation or perceived credibility of the speaker may affect how critically it is received. In situations where anonymous speech is misused to mislead the audience, they are disadvantaged by the limitations on assessing the reliability of the author and the effect of reduced scrutiny may make it easier to be misled.[446] For example, the reception by the audience of political speech will often be based on perceived motivations and biases inherent in partisan interests, advertisements or publications supporting a politician or party are invariably linked to the identity of the speaker[447] – people's perception of the speech can certainly be affected if such speech is linked to a group associated with that politician or party, and the concealing of their identity may lead them to be misled as to the authenticity and motivations of that expression. The effect of such political advertisement guised as general political speech (rather than targeted partisan campaigning) may therefore be viewed as infringing on the rights of the audience and limits their rights to receive information (at least in its fullest form).[448] However, in a more general sense relating to anonymous speech in public discourse, some credit may be given to the audience in that they should be viewed as able to appraise the merits of anonymous speech themselves.[449] They should be able to ascribe what value they choose to that type of speech and in public discourse can be expected to be able to do so. In addition to this, a reasonable expectation can be held that the public can identify and distinguish the value of anonymous speech from speech where the identity of the speaker is apparent. In that sense anonymous speech, whilst important to public discourse, can be viewed as of less value when compared to non-anonymous speech and can be judged through a more critical evaluation by the audience.[450]

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[446] *Ibid*, p 1549.
[447] *Ibid*, p 1550.
[448] *McConnell v Federal Election Commission* 540 U.S. 93 (2003) p 126-129.
[449] *McIntyre, supra* note 440, p 348.
[450] This is not to suggest that all anonymous speech is of less value, in fact there may be many instances where anonymous speech provides greater value. However, the point that is made here is that there is some degree of asymmetry between parties when one is anonymous. The audience is inherently restricted as to the extent that they may critically evaluate an anonymous speaker. The degree of weight that this may be given can depend on

4.3.4.3 Safety of the speaker

As has already been alluded to, the perceived cost to the speaker can be a large part of the motivation for a speaker to decide to express their viewpoint anonymously. This is an important facet of anonymous speech as not only does the ability to contribute in this way promote engagement in public discourse, but also impacts on a practical level the safety and security of the speaker and their freedom of expression. The cost to the speaker can range from more general concerns to direct fears for personal safety and security. On a general level the choice to post anonymously can be influenced by the desire to avoid the social effects of being identified.[451] It can be due to regard for privacy (a personal reason for wanting to avoid publicity), or the social cost of being associated with unpopular views. There can be pecuniary considerations with lines blurring between online and offline personas, as well as increasing tendencies for employers to monitor social media or current and prospective employees.[452] As an individual's online presence has become an increasingly integral part of how they are judged, their employment prospects and status can be substantially affected by it.[453] The potential loss of employment or financial opportunities can affect an individual's security and therefore encourage them to protect this aspect of their lives through anonymity whilst still

the factors of the circumstance (for example, an anonymous article in a well-respected paper assumed to have undergone a satisfactory editorial process or a subject matter (such as whistleblowing or sexual assault) where anonymity may be necessary for the content to be published – as opposed to an anonymous social media account, leaflets, posters etc.). Thus, the impact of this asymmetry may vary, but the fact remains that it places some burden on the audience to assess reliability in a way that is less so with non-anonymous speech, therefore justifying some degree of distinction between these types of speech. This applies even when the audience's evaluation of a speaker may be arbitrary or of low quality. For example, they may be less likely to trust the opinion of a person with blonde hair – despite the nature of this opinion, the fact remains that they are limited from making such frivolous assumptions, which distinguishes anonymous speech (compared to non-anonymous speech) as imposing some degree of limitation on the audience's assessment of the speaker.

[451] Lidsky, *supra* note 445, p 1572.

[452] Kathleen Hidy and Mary McDonald, 'Risky Business: The Legal Implications of Social Media's Increasing Role in Employment Decisions' Journal of Legal Studies in Business, Vol. 18 (2013), p 69, 70.

[453] Elana Handelman, 'The Expansion of Traditional Background Checks to Social Media Screening: How to Ensure Adequate Privacy Protection in Current Employment Hiring Practices', University of Pennsylvania Journal of Constitutional Law Vol. 23 (2021) p 661, 674.

engaging in public discourse. Whistle-blowers may fear retributive action and targeted harassment[454] – and in particular those shining light on State corruption or excesses may be especially wary of retaliatory action by the state (particularly in more restrictive regimes). Most concerning is the risk of facing direct physical harm. These can range from threats of harm to direct attacks, either to punish the speaker or to prevent further speech. Engaging in public discourse carries with it certain degrees of risk, and the nature of political discussion is such that it often covers topics that are particularly sensitive and attracts heightened emotional responses. This means that, whilst a wide range of opinion is vital for particularly sensitive and pertinent issues, it carries a risk of physical harm to the speaker.[455] In fact, often the more politically sensitive and important a topic it, the more likely it is to carry this cost. Therefore, political speech that requires the most protection under theories of democratic participation, is also most at risk of violent backlash (and could potentially benefit from the veil of anonymity).

4.3.4.4 Accountability

Anonymous speech online provides an avenue for expression without disclosing the speaker's identity, which means if this mode of expression is utilised for unsavoury forms of expression it raises a problem of accountability. The difficulty in identifying the speaker makes it more difficult for States to find and hold to account speakers, which is a problem when that expression may be dangerous/illegal. In a more general sense, it also impacts counter-speech as the consequence of engaging in misleading or unsavoury expression in public discourse by

[454] Lidsky, *supra* note 445, p 1571.
[455] There are far too many examples to cite of instances where physical harm has resulted from engaging in public discourse on sensitive topics. Two infamous examples would be the Charlie Hebdo attacks https://www.bbc.com/news/world-europe-30708237, and the attacks on Salman Rushdie https://www.bbc.com/news/entertainment-arts-68739586. Also consider the threat of repressive action by the State (for example being kept in custody for extended periods under emergency laws and potentially facing torture or abuse, see Chapter Five).

being held to account for such speech publicly (not by State censorship but by the weakness of the argument), is removed.[456] Speech made anonymously online that may require State intervention (such as defamation) may be far more difficult to address than in more conventional cases (such as a newspaper article). If a claimant wishes to bring legal proceedings against such speech, they immediately face the issue of identifying the speaker in order to do so.[457] Furthermore, as the method of recourse may have been more straightforward with traditional media (attributing editorial accountability to a published article to the newspaper), it would be far more difficult in an online context.[458] Whilst there is a case for compelling internet service providers to disclose identities in cases involving illegal activity, this should be carefully balanced against the potential for strategic lawsuits that are unfounded but intended to use the system to remove anonymity from an author and to discover their identity. If a claimant can bring a vexatious case (perhaps funded by interested parties if it is a particularly unpopular opinion), resulting in the courts compelling disclosure of their identity – then that would render anonymous speech effectively worthless.[459]

Conversely, it may be possible that online accountability may impact speech in an almost opposite manner. Instead of there being a lack of accountability, there may be potential for there being more accountability (at least in the sense of traceability of the author), than people realise. The nature of the internet is such that States have greater tools of identification and

[456] However, those arguing for a purer form of public discourse may see this as a positive as it encourages arguments to be assessed purely on merit. On the other hand, it could be argued that the merits of the argument can be distinguished from the separate issue of discrediting of the speaker. For example, the work by David Irving described as holocaust denial was a particular free speech issue, whilst counter-speech against him and his credibility (and other similar speakers) has also been an important part of public debate and interest.
[457] Barendt, *supra* note 399, p 138.
[458] This raises significant questions as to the extent to which internet providers and intermediaries may be compelled to divulge the identifying information of an anonymous author. See Barendt, *supra* note 399, p 142; Another issue is whether and if so to what degree service providers and internet intermediaries can be held accountable for such speech and what responsibility can be attributed to them – *Ibid*, p 145. Whilst these are pertinent issues to political speech online and subject to much discussion, in the interests of keeping to the scope of this thesis it should be adequate to point out that these are relevant issues to be taken into account.
[459] Lidsky, *supra* note 445, p 1556.

data of users online, potentially far more than people are aware of. Individual IP (Internet Protocol) addresses, website cookies, and other forms of identification unique to the internet means that there are substantial ways in which to identify an author of anonymous speech online.[460] What this means is that a speaker may mistakenly assume that the use of an anonymous account or pseudonym protects them from identification, whilst they are in reality far easier to identify than they know.[461] This could result in a speaker engaging in public discourse that presents a personal risk to them under the false security of their believed anonymity online. They may criticise an oppressive government or religion without realising the risk this could entail. Furthermore, those that are aware of this feature of the internet will be dissuaded from engaging in public discourse for that reason, knowing that they are unlikely to be truly anonymous. It could therefore be argued that there may be too much potential for the State, particularly in a repressive context and without adequate safeguards, to bypass the protections of anonymous speech.

4.3.4.5 Harm

The internet has facilitated greater amounts of speech and public discourse with anonymity being an enabling factor – however, this has also meant that the more negative tendencies of human nature are present and utilise this feature for anonymous dissemination. Users may engage in hate speech, targeted harassment, cyber bullying etc. The effect that these can have for an individual on the receiving end can be significant. It can lead to emotional distress, psychological harm, and genuine fears for personal safety. [462] Anonymous attacks may result in heightened fear for a person's safety as the impact of threats of violence by a faceless group

[460] Weber and Heinrich, *supra* note 396, p 5.
[461] *Ibid*, p 6.
[462] Danielle Citron and Helen Norton, 'Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age', Boston University Law Review, Vol. 91 (2011), p 1435, 1447, 1448, 1470.

may contribute to a particular degree of unease and fear of violence.[463] The recipient has no way of ascertaining how serious the authors of the threats are (for example, a child being callous compared to a person with a record of harassment and assault), nor their proximity (whether it is a person halfway across the world or from the same town).

Some have argued that anonymous speech online and its relationship to hateful speech is not necessarily quite as impactful as assumed. The distinction between online and offline anonymous hate speech would not be especially different. For example, Brown argues that anonymous speakers online still run the risk of being 'digitally outed', especially with the trail of digital information that still exists.[464] They are not immune from the backlash they could face. Furthermore, anonymous threats, bullying, or hate speech can still be anonymous whether it is physical or online. A person can mask their face and convey such speech whilst still hiding their identity in person.[465] However, this is not particularly persuasive. There is a fundamental difference between a person wearing a mask to go up to a person and verbally abuse them, compared to doing it through an anonymous account. The decision to prepare a mask and go out in the street accosting strangers carries far more intentionality and risk. The individual would have to be particularly motivated and would assume substantial risk – either of capture by the police or physical retaliation. This is markedly different from posting on an anonymous account through, essentially, a few taps and clicks. It is true that both examples can achieve a degree of anonymity, but the process of ensuring that anonymity, and the risk it carries is so different that they should be considered separately (at least in terms of the particular issues relating to speech online).

[463] *Ibid*, p 1449.
[464] Brown, *supra* note 366, p 299.
[465] *Ibid*, p 300.

4.3.5 Is there a right to anonymous speech?

Having discussed some of the motives behind anonymous speech and its potential effects on the freedom of expression online, a question worth considering is whether an individual can claim a right to post anonymously. Whilst the freedom of speech, particularly political speech, receives various degrees of protection, to what extent does that include the protection of anonymous or pseudonymous expression? As will be apparent from the discussions in the latter part of this chapter, the question of whether anonymous speech should be protected forms a relevant part of the wider themes of this thesis in relation to a speech framework conducive to reconciliation.

The position in the United States seems to consider anonymous speech as a right that can receive protection in the interests of free speech. When the US Courts were initially faced with cases relating to this issue they were not necessarily framed as being decided based on a right to anonymous speech – but instead struck down requirements for disclosure that would otherwise limit anonymous speech.[466] This has been regarded as a recognition of both the value of anonymous speech to discourse, and the potential for the compelling to disclose identifying information to negatively affect the freedom of expression.[467] The first case implying a direct constitutional right to anonymous speech was *Talley v California*, where an ordinance requiring the name and addresses of the author, printer and distributor of any handbills was struck down by the court due to its impact on the freedom of expression.[468] The importance of anonymous speech and the direct interest in its protection was explicitly recognised by the court.[469]

[466] Boudin, *supra* note 397, p 2164.
[467] *Ibid*, p 2165; *Thomas v Collins* 323 U.S. 526 (1945); *Lovell v City of Griffin* 303 U.S. 444 (1938).
[468] *Ibid*, p 2166; *Talley v California* 326 U.S. 60 (1960).
[469] *Ibid*.

The clearest consideration of the right to anonymous speech and the basis of its scope was in *McIntyre*.[470] This involved the writing and distribution of handbills by Margret McIntyre in opposition to a referendum on school tax where they were signed under the pseudonym 'concerned parents and taxpayers'. McIntyre was fined for failing to abide by an Ohio law which required disclosure of the name and address when distributing publications pertaining to ballot issues. This was struck down by the Supreme Court on the basis that the decision to express anonymously was directly related to issues of free speech and the protections that they attract. The reasoning for establishing this can be summarised by two strands of reasoning by the Court. Firstly, in recognising anonymity and its value in protecting the freedom of expression, it was described as having value in facilitating this expression as a 'shield from the tyranny of the majority'. The Court referred to the history of anonymous speech through history and its substantial application to political speech and the contribution to public discourse, as well as legitimate motivations for deciding to remain anonymous as a basis for justifying why such speech would attract free speech protection. The second part of the Court's reasoning was that the decision to include or omit the authors identity was part of the content of the speech, and to compel disclosure would be an intrusive requirement that altered the content of the expression. This treats the name of the author and the decision whether to include it as part of an editorial judgment.[471] Notably, the reasoning of the Court made clear that it involved political speech, and McIntyres speech would attract the stronger protections accorded to such expression.[472] Not only was such anonymous speech regarded as political speech, but it was clear that despite the authorship being hidden, it could receive the higher standard of protection

[470] *Supra* note 440.
[471] Lidsky, *supra* note 445, p 1543.
[472] *McIntyre*, *supra* note 440, p 347. This type of political advocacy was viewed as the essence of First Amendment protection and required the highest form of constitutional protection. The interference of this right would therefore face 'exacting scrutiny' requiring the state to prove an overriding interest to limit it.

that political speech warrants. However, this was not a blanket endorsement of all instances of anonymous political speech. This would be considered a qualified right, with the recognition of circumstances where disclosure of the identity of the speaker would be necessary.[473] This would particularly be the case in examples such as in an election context, with anonymous expressions by party supporters where the public would clearly be deprived of key information to appraise the nature of the speech. [474]

The US position of protecting anonymous speech can be in contrast to the UK where such a right to anonymity is not quite as clear. One of the key cases in relation to anonymous speech online in the UK related to an online blog. This involved a police officer who published an anonymous blog that criticised the government and police institutions. Writing under the pseudonym 'Night Jack', it received an Orwell Prize from the Orwell Foundation for its contributions to journalism online.[475] Following investigations by the Times where his identity was discovered, an injunction was sought to prevent his identity form being revealed to the public. This was however rejected by the Court, which was of the view that the claimant would not have a reasonable expectation of privacy.[476] As blogging was viewed as 'essentially a public rather than private activity', by its inherently public nature it would not carry reasonably expectations of privacy protections.[477] Although the Court recognised that much of the speech was political in nature (often criticising senior politicians) and would otherwise attract strong

[473] Part of the Court's reasoning was that the name and address of a private citizen who is unlikely to be known by the recipient is unlikely to be of value to an audience's appraisal of the message – *McIntyre*, *supra* note 440, p 348. This leaves scope for situations where such identity is in fact of value. The identity of a popular politician writing under a pseudonym may be treated differently.
[474] Lidsky, *supra* note 445, p 1544, 1545; speakers should also be held accountable for fraud, unlawful conduct etc.
[475] https://www.orwellfoundation.com/blogger/jack-night/ ; Judith Townend, 'Unmasked blogger NightJack named judge for Orwell Prize 2010' *Journalism* (2009) https://www.journalism.co.uk/news/unmasked-blogger-nightjack-named-judge-for-orwell-prize-2010/s2/a536300/ .
[476] *The Author of a Blog v Times Newspapers Limited* (2009) EWHC 1358 (QB), p 33.
[477] *Ibid*.

protections[478] – the Judge dismissed the Claimant's argument that disclosing the author as an unnamed police officer would be sufficient, and was of the view that there would be a public interest in the specific identity of the individual and their potential personal motivations.[479] This case does not necessarily deny the right to anonymous speech in the UK (people are still allowed to post anonymously and on blogs), but it is influenced by the considerations of public interest and the specific characteristics of the case – the author of a blog criticising police institutions and government ministers (and the fact that it was a serving officer making this content) carried a particularly high amount of public interest which received greater consideration than his privacy.

Considering that the nature of the speech was clearly political and of value to public discourse (such expressions holding the State to account would precisely be of the kind that free speech in a democratic society would especially aim to protect), the result of this case seems inimical to the protection that anonymous speech should offer. The Court seemed quite dismissive of how 'horrified' similar speakers would be knowing that the law would not protect their anonymity and took limited account of the professional and disciplinary implications of being outed.[480] This may especially be the case in an institution such the police force where there is a significant public interest in the criticisms of its policies and practice (with much public debate about corruption and misuse of power), and the issue of a perceived culture and reputation of repressing dissent, whistle-blowing, and exposing of unsavoury practices within the institution (officers may harbour significant concerns about speaking out against issues for fear of backlash from colleagues and professional retaliation from superiors). These factors would strongly contribute to dissuading any further speech by similar authors and deprive

[478] *Ibid*, p 24.
[479] *Ibid*, p 21 and 33, it was suggested that the public may find it useful to know the seniority of the officer or if they 'had an axe to grind' in terms of their personal motivations.
[480] *Ibid*, p 4, 17.

public discourse of a range of political speech. By deciding that the audience may have an interest in the identity of the specific individual, the end result may be depriving the audience of the entirety of the speech altogether. The approach of the Court in this instance may be indicative of a slow adaptation to the social and technological shifts in modern times. Traditional media may be treated more favourably and be viewed as more legitimate in terms of journalistic speech. Somewhat ironically, although the Times had portrayed this discovery of the author of the blog as a legal journalistic endeavour, the Leveson Inquiry revealed that it was obtained through methods that would not have been legal.[481]

The disparity between how a medium such as an online blog and a traditional news publisher are treated has been pointed out by commentators who identify the disconnect between how the privilege not to disclose sources of information would apply. As Barendt points out, such privilege allows the media to collect and provide vital information to the public that would otherwise cease to be available without the privilege, thus negatively affecting public discourse – 'If the contents of the blog had been given to The Times by the claimant for the newspaper to publish in its pages, it would have been able to claim the privilege and would have refused to identify him as its source. Equally, it could have claimed privilege for its source if, say, a colleague of the claimant had leaked his identity to the paper. So The Times was in effect claiming a press freedom to identify the blogger, if it liked, although it would almost certainly have asserted a privilege not to identify him, if it had published the contents of the blog itself.'[482] The arguments for protecting the statutory privilege could also apply in such a case as with the author of a blog when considering its political expression, clear value to public discourse and debate, and high likelihood that forcing disclosure of the identity of the author

[481] Collingwood, *supra* note 414, p 330; https://www.newstatesman.com/politics/2012/04/times-nightjack-hack-leveson .
[482] Eric Barendt 'Bad News for Bloggers', Journal of Media Law, Vol. 1 Issue 2 (2009) p 141, 146.

would effectively end the speech (the blog can no longer function as an anonymous critique of the police and state) and strongly disincentivise further similar speech. [483]

The two examples above demonstrate two approaches to anonymous speech online. The US has a relatively clearer foundation of protecting such speech in the interests of public discourse, and can be viewed as having a right to anonymous speech (albeit qualified). The UK approach does not bar anonymous speech (it is permitted and recognised as valuable to public discourse and political speech), however it does not receive the same degree of protection and it is not clear whether it can be viewed as a free speech right. People intending to contribute and participate in public debate online in the UK can be less confident of the protection that such speech will receive.[484] The next subsection will consider these points in the context of reconciliation in Sri Lanka.

4.3.6 Anonymous political speech in a reconciliation context

Having considered some of the key issues in relation to anonymous political speech online, these will now be applied to the reconciliation context in Sri Lanka. The main matters to be considered are whether the arguments discussed are applicable and whether there may be features of the reconciliation process that should be taken into account in the approach to anonymous political speech online. As has been established in this subsection, anonymous

[483] *Ibid*. This can be contrasted with the decision in *SRJ v Persons Unknown* EWHC 2293 (QB) (2014), where the Court refused to make an order applying for information of an anonymous online blogger (with the blogs allegedly containing confidential information of a corporate entity that believed it may have been an employee). However, this decision was based on the interests of protecting legal professional privilege rather than the interest to public discourse of political speech.

[484] The position in Sri Lanka in regards to anonymous speech online has gone from ambivalent (with little to no statutory or judicial consideration) to outright hostile with the introduction of the Online Safety Bill, examined in more detail later in this chapter.

speech online can be political in nature (thereby warranting greater protection) and be of value to public discourse (enabling and encouraging participation) – however it also carries risks when utilised for less positive intent. Not only does Sri Lanka have a rapidly increasing proportion of its population participating in the online space – but the issue of anonymity has been increasingly relevant with substantial numbers of people choosing to interact online through anonymous or pseudonymous accounts or identities.[485]

The first issue to consider is the disinhibiting effect and its relation to the interests of the speaker. In a general sense, there are the motivations for deciding to post anonymously that have already been discussed. More specifically to the reconciliation context, there may be factors that affect these interests and motivations, arguably making them all the more poignant. Anonymous speech can encourage those that would otherwise be reluctant to participate to engage with public discourse. In a reconciliation context, this reluctance may be magnified when compared to other places. There may be minorities or people from the areas of conflict who have felt (and have effectively been) disenfranchised and are only beginning to reengage into the space of public discourse.[486] For them, engaging in public may be particularly intimidating or relatively unfamiliar, and anonymous speech would help them to transition towards a participatory democracy. Potential speakers may also be reticent to engage as they

[485] Hattotuwa and Wickremesinhe, *supra* note 370, p 152, 153; social media has become the primary method of news consumption in Sri Lanka, accounting for 56% of internet users' consumption habits – 'Digital Outlook Sri Lanka' University of Kelaniya (2023) https://fcms.kln.ac.lk/dep/dmm/media/attachments/2024/02/15/digital-oultlook-sri-lanka-2023.pdf p 10; the younger generations are particularly representative of this shift with 99% using some form of social media 'Online Survey on Youth, Social Media, and Violence in Sri Lanka' *British Council Sri Lanka* (2021) https://www.britishcouncil.lk/sites/default/files/youth_social_media_and_violence_research_report_compressed.pdf p 17.

[486] The population of the north of Sri Lanka would have spent a substantial amount of time effectively disenfranchised whilst the LTTE terrorist group had control of the area. They would have been discouraged from engaging in the electoral process through threats of violence and enforced boycotts. D.B.S. Jeyaraj, 'LTTE's enforced boycott in 2005 led to its downfall in 2009' *DailyFT* (2023) https://www.ft.lk/columns/LTTE-s-enforced-boycott-in-2005-led-to-its-downfall-in-2009/4-752377 . Speaking openly on political issues would not have been possible (without considerable risk to their lives) which contributes to issues of reintegration.

harbour heightened fears of violent backlash. Whilst safety of the speaker is a relevant consideration in general contexts, in a reconciliation situation post-conflict, fears of violence when engaging in public discourse can increase the likelihood that people would feel safer (and only able) to participate anonymously. This can be coupled with an acute awareness of the relatively less permissive views towards race, religion, sexuality etc. leading to an increased perceived need to protect and conceal one's identity to ensure personal safety. Furthermore, a history of being excluded from the political process, issues of corruption, political targeting etc. can lead to people being wary of the State itself. This distrust of the State can manifest in the form of a reticence to openly engage in public discourse for fears of being put on a watchlist, arbitrarily detained or prosecuted, targeted harassment etc. which would further indicate anonymous speech being a necessary facilitator for entry into public discourse.[487]

On the other hand, the audience will also have a strong interest in the sort of public discourse that can be encouraged through anonymous political speech within a reconciliation context. During the process of strengthening democratic norms and participation, the audience would benefit from receiving a wide range of viewpoints, especially in relation to sensitive political topics. As this process will require much reform (making the electoral process a key component of reconciliation – popular support and acceptance of policies being required), the audience has an interest in being informed of a broad range of information and perspectives. They should be able to receive information in the form of these perspectives from those most likely to be affected by reform so that they may draw their own conclusions. This is not necessarily to guarantee that they would support the reforms, but that they will be able to be informed in their decisions thereby adding legitimacy to the democratic process and the reforms themselves.

[487] This can be exacerbated by a history of journalists being attacked or harassed – Mick Stern, 'Attacks on the Press 2009: Sri Lanka' *Committee to Protect Journalists* (2010) https://cpj.org/2010/02/attacks-on-the-press-2009-sri-lanka/ . Also see the discussion relating to the targeted use of emergency/terrorism laws in Chapter Five.

This would enrich the free speech context that would facilitate such reform in the furtherance of democratic norms and reconciliation, and also make it more likely to be lasting. Furthermore, the issues regarding distrust of the State will also be relevant to the audience's interests as perceptions of corruption, abuse of power, mismanagement etc. will also mean that they may have a substantial interest in such speech that holds the State to account exposing such conduct, which may be less likely to be available without the protection of anonymous political speech. For both parties (the speaker and the audience), the online space may be particularly pertinent as they may remain cautious of traditional media for fears of political interference.[488] It may be more difficult to trust traditional media to protect anonymous sources.

In considering the practical applications of these discussions, an example could be made of a potential blogger writing an anonymous political blog critical of the government in Sri Lanka. If they were (as in the UK online blog case discussed previously) a police officer, how should their right to anonymity be considered? If the UK approach was taken, then whilst the speech would clearly be political, there would also be a substantial interest of the public to know their identity. The details of an individual working within the State institutions criticising State policies, and their motivations for doing so (as well as the extent of their credibility), would be of particular interest to the public. The very fact that someone from within was highlighting issues such as corruption, inefficiency, or abuse would be of value to public discourse. However, it could also be argued that within a context of transition to building better democratic norms and rule of law – they would be particularly vulnerable to retribution by State actors or their superiors. Such fears could be as to their profession or livelihood, but when compared to a context such as the UK, they may be able to argue heightened fears for their

[488] Traditional media in Sri Lanka is often viewed as partisan and subject to significant State interference. Sanjana Hattotuwa 'Media and Conflict in Sri Lanka', Consultative Workshop on Managing Ethnic and Religious Conflict in Southern Asia: Role of Education and the Media, *Centre for Policy Alternatives* (2003) p 2, 3.

personal safety. This could potentially make for a stronger argument for protecting their identity, in the interests of protecting their speech (and safety) and well as preventing the likelihood of other similar speakers being dissuaded from participating in discourse. Similarly, if the author happened to be a former member of a terrorist group (such as the LTTE in Sri Lanka), there would be substantial interest in their identity to the public. This would be both for reasons of ascertaining their intentions and credibility – but also a defining aspect of the speech being made (the fact that a former combatant is engaging in such discourse is in itself highly valuable to public discourse). However, this would also mean that the case for protecting their identity would be even stronger, an individual would have substantial reasons for wanting to hide their identity for fear of backlash, harassment from the State, threats, or violence.

Perhaps this could suggest an approach that would be more in line with that in the US in terms of recognising a right to anonymous political speech online. If, however, a more equivocal approach such as in the UK is to be followed, then this should still leave room for comparatively more protection. Whilst in the *Author of a blog* case, the Court did not accept the argument that identifying the position and profession of the officer would suffice (without specifically naming the individual), a proper balancing of the competing interests could result in a strong case for limited disclosure in this context. If some identification is necessary in the interest of the audience, then perhaps limiting it to 'police officer' or 'former combatant' may suffice when weighed against the interests of the speaker and the risks they (and similar other speakers) face.

Another feature of anonymous speech online within a reconciliation context is that of hate speech. Hate speech is a current issue in Sri Lanka, with much of it perpetrated against

individuals and communities by utilising anonymous accounts.[489] As has been discussed previously, the disinhibiting effect of anonymous speech has been associated with issues with hateful speech online.[490] Furthermore, as has been discussed as part of the benchmarks for a free speech context conducive to reconciliation, the potential for violence must be taken into account. Anonymous accounts promoting incitement to violence will therefore be concerning. Anonymous political speech online (and the reasoning behind protecting such speech) seems in line with the aspect of the benchmarks set out in this thesis relating to the idea that a reconciliation context requires scope for wider forms of political speech. For the reasons discussed in this subsection, anonymous speech online helps facilitate such speech and allows for a wider range of individuals and viewpoints contributing to public debate. However, the abuse of such speech (particularly in relation to incitement) will mean there will be instances where protections for anonymous speech online may need to be qualified. Such restrictions should be carefully considered (requiring a strong justification for doing so) and must be subject to adequate safeguards from abuse.[491] Another aspect of this, looking beyond direct legal intervention, is the potential for anonymous online speech to facilitate counter-speech. Whilst people may use anonymity online to spread hateful speech or even incitement to violence, so too is it possible for people to feel more able to rebut such speech. The ability to counter such speech anonymously may allow people (and give them the confidence) to engage in discourse rebutting them and their arguments, without fear for personal safety or retaliation.

[489] Hattotuwa and Wickremesinhe, *supra* note 370, p 152, 153.
[490] However, this is not necessarily causally linked and is arguably indicative of the effects of deindividuation – and it may not be a by-product anonymous speech, but rather a mechanism utilised by those with the intention to post hateful speech – see Williams *supra* note 427.
[491] For example, this legal avenue should not be abused to identify speakers – such as by bringing unfounded proceedings against an individual merely to bypass protections for anonymous speakers - see Lidsky, *supra* note 445, p 1556.

In that sense, perhaps anonymous speech itself can go some way towards addressing some of the issues caused by those utilising it for harmful conduct. [492]

4.4. False Statements (disinformation and misinformation)

4.4.1 Introduction

The issue of false information and its dissemination online has become a significant factor in State attitudes and approaches to speech regulation in modern times. In a general sense, the perception that the online space can enable the spread of false information, and also amplify its potential ill-effects, has meant that this has been an increasingly significant part of discussions relating to free speech issues online. This has been compounded by the politically charged nature of the discussions relating to such speech (such as 'fake news' in an electoral context, or the influence of foreign States), which has led to strong motivations for State action to address it. More specifically to Sri Lanka, this issue has received widespread attention for its alleged propensity to fuel harms such as hateful conduct and incitement to violence. The State itself has also been wary of the spread of false information, with such fears heightened by instances of instability and potential threats to national security. It is useful at this point to consider the main issues and implications of regulating such speech for two main reasons. Firstly, this issue is highly pertinent to the issue of speech online, where it forms part of the

[492] Brown, *supra* note 366, p 299. This may of course end up with anonymous speech countering hate, subsequently being faced with more counter speech against them that is hateful. However, the end result would still mean that hateful speech is more likely to be challenged leading to a more robust debate.

motivations for States to regulate such speech. Considering that regulation will end up affecting (for better or worse) political discourse online, it will form part of a more complete appraisal of the main issues relating to online political speech. Secondly, similar to the issue of anonymous speech online, this has been an issue that whilst widely seen as being an important issue relating to free speech and calls for the regulation of unwanted speech – had not received specific legislative attention. Now with the introduction of the Online Safety Act (discussed in the latter part of this chapter), these two issues bear particular significance for both their impact and the impact of their regulation. Considering the main issues relating to this at this stage will allow for a clearer examination of the effect of the Online Safety Act in relation to these issues later on.

4.4.2 What are false statements?

This category of speech will be referred to as false statements due it being formulated as such in the domestic legislation of Sri Lanka (the Online Safety Act). In practice, it pertains to speech that encapsulates a category of speech relating to the producing and dissemination of false information framed in terms of categories such as misinformation, malinformation, disinformation, fake news etc. Whilst there may be practical differences in these terms, they can be considered to fall under a similar category of speech, where the term false information or false statements can be used as an 'umbrella term' to cover this category of speech and the objectives behind its regulation.[493]

[493] Peter Coe, 'Tackling online false information in the United Kingdom: The Online Safety Act 2023 and its disconnection from free speech law and theory', Journal of Media Law, Vol. 15 Issue 2 (2023), p 213, 215.

Although the issue of false information is not necessarily new, it has become particularly subject to debate in recent times. This can be attributed to changes in technology that have magnified its potential ill-effects, however its relation to some of the more politically charged issues of modern times have brought it to the forefront of public debate. Most notably, the 2016 US Presidential elections brought this issue to the forefront (particularly that of 'fake news' used by both sides of the political spectrum to allege journalistic bias, foreign election interference, and political manipulation). This has led to it becoming viewed by States as a particularly harmful form of content online (arguably on par with and receiving similar attention as with hate speech and incitement), which has attracted State intervention in the form of policy proposals and legislative instruments.[494] This has revealed some of the practical issues with reconciling a reactionary response with the objective of regulating and protecting speech. Defining the terms and parameters of these types of speech constitutes a key issue in this regard.

For example, the 2016 US election widely popularised the term 'fake news'; however, although it has become a 'buzzword' of sorts, its specific meaning has been vague, potentially being used to discredit legitimate forms of reporting and speech.[495] This difficulty of clarifying definition and scope results in real consequences, affecting the efficacy and validity of regulation, as well as the practical effect of how people differentiate and identify these forms of speech.[496] Fake news has been described as 'information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts' – with part of its defining features being its presentation

[494] Jason Pielemeier, 'Disentangling Disinformation: What Makes Regulating Disinformation So Difficult', Utah Law Review, Vol. 2020 No. 4 (2020), p 917.
[495] Edson Tandoc Jr., Zheng Wei Lim & Richard Ling, 'Defining Fake News', Digital Journalism, Vol. 6 Issue 2 (2018), p 137, 138.
[496] *Ibid* p 149.

or perception as emulating legitimate news.[497] The politically charged association of this term means that not only does it often form the impetus for policy change, but also its objectives. The rush to address the ill-effects of such speech may result in a failure to consider the practical considerations of scope. Part of this issue is that the term itself is 'catchy' and its widespread use in political context has meant that much of the discussion relating to false statements online are inspired or based on this term.[498] The vagaries that may stem from an appealing (for reasons of political relevance and simplicity) yet somewhat nebulous term, results in a malleability of meaning that is unhelpful for legal regulation. Calls for regulation of fake news are often motivated by the perceived need to prevent the effects of particularly extreme examples, and the potential for this term to end up capturing legitimate and valuable discourse within its scope is cause for concern.[499] Whilst some instances of the dissemination of false information may come within the broad meaning of fake news, it is not desirable as a matter of legislative action (most specifically in the context of regulation through criminal law), to address this issue.[500]

The objectives of State action in regards to the spread of false information/statements is generally based on tackling the issues of disinformation and misinformation (as well as the relatively less common term, malinformation). These terms are often used interchangeably in relation to the issue of false statements online, however there are key differences which have a significant effect on how regulation should be applied. Misinformation usually relates to statements or information that is either false/incorrect in part or full but is disseminated without the intent to deceive the audience. Disinformation on the other hand, relates to false information

[497] Tarlach McGonagle, 'Fake news: False fears or real concerns?', Netherlands Quarterly of Human Rights, Vol. 35 Issue 4 (2017), p 203.
[498] *Ibid* p 204.
[499] *Ibid*. McGonagle also points out the risk in the absence of clear definitions for repressive States to abuse fake news laws through arbitrary interpretation to stifle independent media and criticism, creating a chilling effect on public debate. Whilst this is applicable in a general sense, it may be of particular relevance to Sri Lanka in the context of this thesis considering the potential impact to political speech and reconciliation.
[500] Law Commission, *Modernising Communications Offenses: A Final Report*, HC 547 Law Com No 399, p 76.

that is deliberately created and spread to deceive the audience, leading them to believe the falsity or to influence their actions.[501] The key distinction is therefore that of intent.[502] Although misinformation can be regarded as a pressing social issue that needs to be addressed, criminal law and sanctions are unlikely to be appropriate in this endeavour, with other non-criminal options more fitting for State action.[503] Malinformation relates to instances where the information may be true but it is produced or disseminated with the intent to cause harm.[504] To contextualise through an example, if a quote is knowingly fabricated and falsely attributed to a person (such as claiming a politician made a controversial statement so that it would affect their electoral prospects), this would be disinformation because of its intent to deceive the audience. If a person genuinely believes the unfounded claim or misattributed quote and decides to share it, this would be misinformation, as whilst the material is itself untrue, there is a genuine belief in its veracity. A genuine quote taken out of context and/or strategically spread in the context of an election to influence the result would be malinformation – the material is technically true, but it is deliberately utilised to cause harm.[505]

These definitions can be difficult to apply in practice, as it is often challenging to distinguish which category should apply. They are often used interchangeably and there remains an

[501] See also the European Commission's suggested definition of disinformation – 'Disinformation is understood as verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm'. Notably, it clearly sets out that certain types of speech would not be considered disinformation despite its potential effects – 'Disinformation does not include reporting errors, satire and parody, or clearly identified partisan news and commentary.' European Commission, *Tackling online disinformation: a European Approach*, COM 236 (2018), p 3-4.
[502] This feature of intent and knowledge of falsity in regards to false statements is important in terms of the practical aspect of applying regulation – this is also pertinent to the discussion relating to the Online Safety Act of Sri Lanka and its regulation of 'false statements', which will be discussed in more detail later in this chapter.
[503] Law Commission, *Harmful Online Communications: The Criminal Offences A Consultation Paper* Consultation Paper 248 (2020), p 150-151. Initiatives that counter the effects of misinformation by supporting initiatives to educate the public and combat false information can be seen as more appropriate mechanisms to address the issue.
[504] Claire Wardle and Hossein Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making', *Council of Europe* Report DGI (2017) 09, p 20.
[505] *Ibid* p 20, 21, 22. This could also include leaking personal information or using information based on realty as harassment.

element of ambiguity when determining the nature of an allegedly false statement. Identifying intent, or lack thereof, will be difficult when determining if a statement is disinformation – finding and interpreting proof or evidence to attribute intention (or falsity) can be challenging. Furthermore, there is often some overlap and confusion when identifying malinformation. As a large part of the motivations to regulate false information is to address the harm it can cause, there may be concerns that the ambiguity of determining the falsity of a statement leaves room for information intentionally crafted to be misleading but technically true.[506] This raises the possibility of harmful content escaping regulation whilst still causing the harm that is sought to be addressed (as well as vice versa, where statements are improperly categorised as disinformation).

4.4.3 Political speech and false statements

When considering how the issue of false statements may fit in with the research objectives of this thesis, it is worth considering whether this issue involves political speech. One approach to this may be to look at the definitions discussed in the previous subsection. On the face of it, the definitions (particularly that of disinformation) and the potential motivations of States to regulate, suggest the political nature of such speech. The intent to influence public discourse, debate, electoral outcomes etc. are highly indicative of an intention to engage in public discourse and the political characteristic of such speech (which is separate from a value judgment of the speech itself). The objectives and motivations of States seeking to regulate false information will often be based on mitigating the harm caused to the quality of public

[506] Law Commission *supra* note 500, p 86; Coe *supra* note 493, p 216.

discussion and negative effects on the electoral process if people are ill-informed or misled on vital topics. Again, whilst the utility of such speech is a separate issue (whether it decreases the quality of public debate), the fact that a significant motivating factor in imposing restrictions and regulations on such speech is based on a perceived impact on political debate and topics of public interest, suggests its political nature. This seems in line with some of the elements of identifying political speech discussed in Chapter Two; the content itself can clearly relate to pressing patters of policy and politics whilst the context can similarly suggest political characteristics (occurring in the context of an election etc.). Not only can false statements be political, but arguably the sort of topics most prominent in public debate (which attract the most controversy and passionate argumentation) may also be likely to attract more false information. The highly politicised nature of pressing political and social issues may incentivise people to try and influence the debate, which may take the form of false information.

Partisan politics can encourage particularly acrimonious debate, tempting supporters of a party or policy position to use disinformation to bolster their side or discredit the other. Those particularly passionate about a political issue, may be more likely to believe and want to spread and share misinformation that they receive. Malinformation and political speech may be arguably closely linked when considering that much of political speech and canvassing consists of tailoring information to suit a partisan narrative. This of course does not mean that all false information is political – but does suggest that some of it can be, and arguably the propensity for public debate to attract such forms of speech make it highly relevant to issues relating to political speech. As stated previously, this does not speak to the utility or value of such speech to public discourse, but by recognising that it may be political in nature (in addition to demonstrating its relevance to the discussions of this thesis) it should inform as to the approach

of potential restrictions. There is not necessarily any requirement for political speech to be true per se, and the idea behind identifying and protecting political speech is separate from a consideration as to its veracity. Whilst there are potential harms and strong motivations for States to want to address false information, limitations on political speech should attract strong scrutiny to prevent it from impinging on legitimate speech.

4.4.4 Why are false statements particularly relevant online?

The issue of false information is not a completely new problem. Its increased relevance in modern times is both the manifestation and exacerbation of a problem that has been present through history.[507] In ages far pre-dating the internet, the distribution of pamphlets containing false information about political opponents would have been an effective way of tarnishing their reputation. Such methods would have been a widely used and effective form of propaganda, further spread by word of mouth and stories.[508] Technological innovation expanded the possibility and spread of such material, even before the internet. With the printing press, false information could be spread on a far larger scale. Radio broadcasts presented further issues with the immediacy of dissemination allowing for the rapid spread of false information.[509] So too with television and its ability to spread information with even more material, shaping public opinion and narratives.

[507] Paul Bernal, 'Fakebook: why Facebook makes the fake news problem inevitable', Northern Ireland Legal Quarterly Vol. 69 Issue 4 (2018), p 513.
[508] *Ibid* p 517.
[509] See Tandoc *et al, supra* note 495, p 138 – referencing the widespread panic that was caused by the radio broadcast of H .G. Well's 'War of the Worlds' which was portrayed through a radio news format (during a period when the medium was relatively novel), and lead to a significant number of people believing it was true reporting of an alien invasion, and leading to panic.

With technological innovation expanding the scale of informational spread, the immediacy of its reach (being near instantaneous when compared to older forms of communication), and the ability to convey more information (visual and audio) – the ability of false information to shape public opinion has significantly increased.[510] This shows that the issue is not exclusively the product of technology, but that it is compounded by it. Those wishing to spread false information and mislead the public, would find increasingly effective methods to be used.[511] However, it could be argued that the internet and social media have manifested this to such scale and effect, that it needs particular consideration when considering how to address the issues of false information. In fact, a large majority of the debate in recent years relating to the issue of false information has related to its place and impact within the context of online communication and technology.[512]

One factor that magnifies the issue of false information online is that of scale and reach. Whilst technological developments have in the past drastically increased the ability of speakers to reach wider audiences (comparing handwritten pamphlets to printing, the telegraph to radio and so on), the sheer scale of reach that online communication has enabled is arguably one of the most drastic shifts in this regard.[513] Social media in particular has facilitated this shift. Not only do they open up speakers to previously unimaginable scales of audiences as whole, but even individual platforms contain vast numbers of users – Facebook alone counts its user base in the billions.[514] This carries positive benefits for public discourse, allowing for speakers to

[510] Bernal, *supra* note 507, p 518.
[511] The use of the internet to influence the political landscape has adapted to trends in online use to find new and effective ways of influencing the public – for example, even dating apps such as Tinder have been utilised by political activists to influence electoral outcomes – see the use of bots on Tinder by supporters of the Labour Party in the UK, Phillip Howard *Lie Machines* (Yale University Press 2020) p 54.
[512] Coe, *supra* note 493, p 215.
[513] Not only is this the case in terms of an individual's access to a direct audience, but this is further compounded by the potential use of bots and algorithms that can be utilised to spread political content at rapid pace. Bots can even be scripted to engage in political debate with people online, allowing an individual to influence discourse at a disproportionate rate. See Howard *supra* note 511 p 55.
[514] Bernal *supra* note 507, p 519.

engage with not only a large number in terms of audience, but also a broad range of people. However, this also means that for those intending to mislead audiences and manipulate political discourse, this is an attractive mode of communication to be utilised to that end. Furthermore, it also means that the effects of any potential harm caused by false information are exacerbated by the scale of reach. It means that more people receive false information (and may then rely on it), and also means that the effect on political discourse is more profound.[515] With such a substantial audience, it can produce a real effect on an electoral outcome. This is further magnified by the immediacy of online communication. Reaching an audience of millions can be a matter of a few clicks, which is fundamentally different from historical capabilities. Although this can be a positive to public discourse (allowing for rapid dissemination of highly pertinent material and updates or commentary on current events without having to wait for the newspaper issued the next day), this also means that false information is spread at a previously unusually rapid rate. The effects of a false statement can become manifest relatively immediately, and any action to combat this may be unable to keep up in time. This immediacy could also make it less likely for there to be checks on potential false information prior to publishing. For example, the space between writing an article for a newspaper, having it approved by the editor, and being sent for publication, would potentially allow for some time in which false information may be identified and corrected. This may not be the case when sharing online, especially within a context where people are competing against other spreaders of information with an expectation to be amongst the first to report.[516]

[515] This also may result in increasingly low public confidence in journalism and the media – see how trends in declining public trust in traditional media have been influenced by false information online, partisan material, and increasing political division – Peter Idiongo, 'The Impact of Fake News on Public Trust in Traditional Media Outlets', Journal of Communication, Vol. 5 No. 3 (2024) p 45, 48.

[516] This issue may be particularly significant considering the trends suggesting declining levels of trust in traditional media (see Idiongo, *ibid*) – which may mean that as more people turn to online sources for news consumption, this presents both positive and negative effects resulting from this shift. People may have access to a greater range of news sources, which in turn may also be less likely to have gone through editorial oversight.

This issue is not limited to those outside the traditional media institutions. The scale of online communication is such that they have (and arguably must, to survive) adopted online communication as a major, if not primary, method of distribution. Now competing on a wider scale, traditional media may adopt tactics of keeping pace and maintaining interest by using clickbait headlines, less research or checking of the reliability of sources, live reporting, a reliance on subscription models and revenue from advertising, and sensationalist or increasingly partisan reporting.[517] The resultant drop in quality of traditional journalism may also result in more room for false information to be spread by them.

Online communication has also arguably resulted in a democratisation of reporting. Whilst earlier avenues to effective journalism would have been monopolised by traditional established media institutions, the online space has allowed for a shift where consumers have become producers of news, information, and content.[518] By extension, this also means that they have become (and more effectively so), producers and disseminators of false information. This is both in terms of independent journalists (having left traditional news institutions) and the increasing phenomenon of citizen journalists.[519] The internet has allowed for individual citizens to reach vast audiences to a scale that was previously only available to traditional media (arguably even more so – a printed publication, despite its historical dominance, would struggle to have reached the sheer number or range of people that is possible now).[520] Not only do they now have access to such audiences, but there is also very little in terms of a barrier to entry.

[517] Peter Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar Publishing 2021), p 68.
[518] Zoe Adams, Magda Osman, Christos Bechlivanidis, and Bjorn Meder, '(Why) is Misinformation a Problem?', Perspectives on Psychological Science Vol. 18 Issue 6, (2023), p 1436, 1445.
[519] Coe, *supra* note 517, p 53, 68.
[520] The podcast by Joe Rogan has become one of the most influential parts of the modern media landscape with longform discussions on a wide range of topics, and traditional media pales in comparison to its reach, with figures estimated at 11 million listeners per episode and 190 million downloads per month – figures that traditional media likely cannot compete with. https://www.nytimes.com/2020/05/25/opinion/joe-rogan-spotify-podcast.html ; https://utahstories.com/2022/02/joe-rogan-vs-cnn/

There is no longer, broadly speaking, a need to study journalism, be employed by a media institution, go through an editor etc. to be published and reach a significant audience. In theory, all that is required is an internet connection, and in a matter of seconds an individual can reach a vast audience. This has an equalising effect on public discourse where individuals are more able to contribute to public debate with the sort of parity that would have previously been difficult to imagine. The audience is also able to access a greater range and quantity of information and can choose to attribute credibility based on reputation and the information they receive. This also means that there is a wider range of avenues for false information to be spread.

The internet has facilitated a shift in the concept of news and its consumption. Whilst traditionally it would be assumed that news would take the form of something like a newspaper article, the modern concept of news can easily include a tweet consisting of a sentence or two.[521] The internet has expanded the format of what may be produced in this context, with pictures, memes, gifs, animations etc. forming part of the variety in which different formats contribute to public discussion.[522] Such changes make it difficult for States to keep track of and identify potential false information – it may be difficult to keep pace with the rate at which previously innocuous aspects of internet information become influential modes of discussion.[523] The way in which audiences consume news has also undergone fundamental changes. One aspect of this is that traditional media themselves increasingly rely on online information often produced by citizen journalists. Whilst this can enrich public discussion by

[521] The model of Twitter (now called X) of limiting the characters of posts may be part of its popularity, however it has not made it any less influential – it is arguably one of the defining and most popular mode of sharing and consuming information and news in the modern media landscape.
[522] McGonagle, *supra* note 497, p 206.
[523] A meme can be an influential part of public discussion, and it is difficult to identify the potential scope for it to be interpreted factually. Similarly, satire may be more difficult to distinguish online from attempts to mislead when compared to traditional expectations from a satirical publication or column. 'All the Times People Were Fooled by The Onion' *ABCNews* (2015) https://abcnews.go.com/International/times-people-fooled-onion/story?id=31444478 .

broadening the range of information that is shared by such institutions (increasing the reach of ideas and information provided by non-establishment sources and better informing traditional media from a ground level – for example with first-hand accounts by witnesses of a current event), this can also potentially result in cases where there is a 'symbiotic relationship' with institutions ending up relying on false information and recycling it, which then produces a cyclical effect of legitimising the false information.[524]

The other aspect of this is that people increasingly utilise online sources as their primary mode of consuming news – making the consequences of false information online all the more acute.[525] This is particularly the case with younger generations who increasingly turn away from traditional methods of consuming news to online ones through social media.[526] Stemming from this, some of the particular characteristics of social media can impact the effects of false information online. Likes and shares can contribute to a perception of credibility, leading to people believing certain sources based on its popularity rather than its accuracy. Similarly, the algorithms of such platforms are often geared towards encouraging engagement which can end up prioritising material that produces the most controversy and user interaction. False or misleading information may be more likely to garner this attention and end up being more widely distributed creating a cycle that both incentivises and augments the reach of such speech. The algorithms of such platforms, along with their ability to gather and analyse significant amounts of information about their users based on their interaction, can allow for specific tailoring of content to the audience.[527] Those wishing to mislead the public are able to

[524] Coe, *supra* note 517, p 57.
[525] Esma Aimeur, Sabrine Amri, and Giles Brassard, 'Fake news, disinformation and misinformation in social media: a review' Social Network Analysis and Mining, Vol. 13 No. 30 (2023), p 30; OFCOM research suggests that seven in ten adults in the UK (71%) consume their news online, and four out of the top ten news sources are social media platforms (Facebook, Instagram, YouTube, and X) - see 'News Consumption in the UK: 2024' *OFCOM* (2024) p 3; 'Online Nation: 2024 Report' *OFCOM* (2024), p 57.
[526] *Ibid*.
[527] Bernal, *supra* note 507, p 520.

target sections of society most likely to be misled, and the recipients will be increasingly more likely to see their feeds full of that content. For example, people who wish to spread misinformation about the alleged faking of the moon landings can tailor their reach to those most likely to believe it – and in turn the more the recipient interacts with such content, the more the algorithm will work to show them even more similar content.

The nature of the online space provides a low bar for entry for those wishing to contribute to public discourse (and for audiences to consume news and information), and it provides powerful tools to do so. However, it also provides the tools for more effective and novel ways in which to spread false information and to mislead the public. Developments in artificial intelligence technology has led to drastic changes in the way false information can be produced. For example, deepfakes are increasingly becoming difficult to distinguish from reality where visuals and audio can be manipulated to portray a person saying or doing something.[528] Editing software has become easily accessible to the public, where images can be altered to suit a false narrative.

4.4.5 Is there any value in false information?

As stated previously in this subsection, the political characteristics of false statements and its potential utility to public discourse can be viewed separately. Whilst on the face of it, a recognition of it being political in nature can itself imply some value to public discourse, a

[528] These have already resulted in real world consequences. A deepfake audio recording of a high school principal depicting a racist tirade went viral, making headlines in the news. This was later revealed to have been orchestrated and produced through AI software tools by a disgruntled employee of the school who had been investigated by the principal for impropriety. https://www.nytimes.com/2024/04/25/technology/deepfake-recording-principal-arrest.html ; There have also been many instances of politicians being subject to deepfakes. A concerning example would be alleged deepfaked voice calls of politicians used to discourage voters from participating in election. https://www.scientificamerican.com/article/ai-audio-deepfakes-are-quickly-outpacing-detection/

further examination of the issue is necessary – particularly in light of its potential for harm to public discourse. One way of looking at this is to consider that most iterations of justifying protections for political speech do not necessarily predicate such protection on the information being true. The right to free speech is not formulated as the right to correct speech. In some ways, such a formulation would render the protection meaningless.[529] Political discourse is by its very nature largely subjective, and much of it consists of people presenting information to conform with a partisan narrative. People's engagement in public discourse is often motivated and shaped by their personal biases – and in their intention to convince the public of their position and to affect change in line with this, a subjective viewpoint is often an integral part.[530] Two sides on opposite ends of a position or political spectrum may genuinely consider the other side's statements to be false information. This leads to an uncomfortable position where a State would be tasked with categorising what is true. This may particularly be the case with malinformation. It may be difficult to distinguish much of political discourse from instances of malinformation – in fact, malinformation may make up substantial parts of political discourse.[531] Again, pointing to the subjective nature of political debate, taking a politician's

[529] For example, consider the issue of gender which is an issue of particularly vociferous debate in the West. Whilst one side may argue for objective standards of biological reality in terms of gender, the other may be based on more subjective principles of spectrum. If there was a repressive government that was sympathetic to the former view, then they may make a case that those arguing the latter version are not basing it on objective truth. Therefore, a speech regime that imposes limitations on political discourse based on fact, may end up being able to justify restrictions. This would be an undesirable situation as clearly focussing on objective fact for the basis of speech restriction would fail to take into account the subjective nature of political debate and end up restricting legitimate political speech. Another example would be that of religion. An atheistic view and religious one will be opposed to a degree where both sides genuinely believe the other to be false. In a conservatively religious context, this could result in a type of blasphemy regulation of speech where instances of atheist speech (or speech criticising aspects the dominant religious), are branded as false information and subject to censorship.

[530] Even with scientific claims which people may assume are easier to identify because of a perceived ease of applying subjective metrics of truth, this may not be the case in practice with instances of misleading corrections of allegedly false scientific claims – see Nicole Krause, Isabelle Freiling, and Dietram Scheufele, 'The 'Infodemic' Infodemic: Toward a More Nuanced Understanding of Truth Claims and the Need for (Not) Combatting Misinformation', the Annals of the Academy of Political and Social Science Vol. 700 Issue. 1 (2022) p 113.

[531] Taking quotes or statistics out of context and implying different (often subjective) conclusions, is a common political strategy. For example, consider the Labour Party attack ads against then Prime Minister Rishi Sunak using a statistic '4,500 adults convicted of sexually assaulting children under 16 served no prison time' to claim that '…Mr Sunak did not think adults convicted of child sex assaults should go to prison' (despite the statistics referring to a period before he became Prime Minister, or even a Member of Parliament, and where adults were

words out of context to portray them or their positions in a negative or positive light may technically be considered a form of malinformation, yet such speech makes up a substantial amount of public debate and restricting it would have to cover an unreasonable amount of discourse. The tendency to focus on a bifurcation between true and false information (and resultant basis for regulation), fails to account for the nature of societal evaluation of truth and the process in which this is achieved.[532] The process of identifying true information is not always necessarily linear. Even claims that are intuitively considered more objectively verifiable (such as in science), can be subject to change through peer review and scrutiny – such claims may be limited and change with new evidence and the 'scientific possesses of self-correction and falsification.'[533] It can be difficult to apply standards for assessing a claim, and the difficulty in ascertaining the accuracy of a claim can be due to many factors such as limited information at the time, 'fluidity' of evidence during a crisis where new information is fast moving, or the 'fallibility' of expert opinions.[534]

Another way to look at this is to consider the issue of false information in terms of how it relates to theories of free speech and their justifications. False statements (and State motivations to regulate them), can be regarded as relating to a societal aim of the pursuit of truth. In this sense, John Stewart Mill's arguments in support of free speech on the basis of truth seems relevant. To recap some of the reasoning in support of this theory (discussed in Chapter One), four main justifications are put forth by Mill. First of all, pointing to the

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in fact convicted but received community or suspended sentence) 'Rishi Sunak hits back at Labour attack adverts' *BBC* (2023) https://www.bbc.com/news/uk-politics-65253856 , and President Trump's 'fine people on both sides' quote, taken out of context to suggest his expressing support for neo-Nazis and white supremacists 'Left wing fact checker admits Trump never called Charlottesville neo-Nazis 'very fine people' *New York Post* (2024) https://nypost.com/2024/06/23/us-news/fact-checker-admits-trump-never-called-neo-nazis-very-fine-people/ .

[532] Adams *et al*, *supra* note 518, p 1437.

[533] Krause *et al, supra* note 530, p 114.

[534] *Ibid* p 115, 116. Krause *et al* point to the example of the Covid-19 pandemic where the available scientific information and the efficacy of policies to combat its spread were subject to rapid change and uncertainty.

imperfect nature of State (and popular) appraisal of truth, there remains the potential for the suppression of speech that is wrongly identified as false but is in fact true. Second, even in a situation where such speech can be objectively deemed verifiably untrue, it still carries value for society and debate – often containing some form or degree of truth. This could perhaps be considered either as the presence of some grain of truth (even if largely false, the component of truth may be of value), or a subjective truth (a false statistic or quote to justify a position still carries an element of truth in terms of its political intention). The third point relates to the process of the discovery of truth – it is through the collision of opposing ideas that the truth is revealed. As viewpoints compete in the marketplace of ideas, a process of critical debate is enabled where they can be judged on their merits and the truth of an idea can be ascertained by deliberation.[535] The fourth point is that the position of truth is bolstered by critical debate and examination. Despite the objective truth of an idea, an absence of having to justify a position would weaken its basis. People would not understand the reasoning behind it if they were not challenged to defend it. Such dogmatic belief, despite its potential truth, would be weak as people will be unable to convince others of their position or pursue it with effectiveness, and arguably be more susceptible to losing it. Such truths lacking argument would hold a frail position in society and be vulnerable to an erosion of its place in society, particularly when eventually faced with opposition. Clear parallels may be drawn here in relation to the previously discussed aspect of the non-linear process of determining information, and the example of scientific inquiry. As new evidence, discoveries, and research reveal new truths, a dogmatic adherence to established narratives can be detrimental to the process of the discovery of truth.[536]

[535] *Abrams v United States* 250 US 616 (1919).

[536] The example of the Covid-19 pandemic has already been referred to as a pertinent one for recent times. An older example would be that of the harms of smoking. This was historically viewed as not only benign, but even beneficial to health. This established narrative was overturned by research demonstrating its harmful effects. In turn, the more criticism and counter argument such discoveries receive, the more likely they are to be meticulously verified and subject to further research.

There are of course criticisms of the argument from truth, including a possibly faulty assumption of rationality on the part of the audience, and the disparity between different speakers and ideas[537] – however, for the purposes of this chapter, it is worth considering any differences in terms of speech online in relation to false information. Considering the scale of speech online, perhaps the sheer volume of content (and potential volume of false information) could affect, at least to some degree, the likelihood of truth prevailing in public debate. Furthermore, it may be the case that the specific features of the online space may affect the ability of the audience to engage in rational appraisal of information. With credibility often attributed to likes, shares, and number of followers, this could result in even more inequality within the marketplace of ideas. The algorithms of social media could be particularly detrimental to this approach. Such algorithms are not subject to rational and critical evaluation of information and are based on popularity and engagement. Therefore, in the search for truth within the marketplace of ideas online, the audiences may not receive the benefit of the points laid out by Mill; nor will truth necessarily be the outcome. False information may receive undue traction, as the debate (and the triumph of the idea over others) is not based on winning the argument, but its appeal to the algorithm. This issue of online speech coupled with other features such as the scale and rapid distribution online contributes to a problem particularly in the short-term effects during a crisis. For example, the issue of potentially harmful home remedies for Covid-19 during a period of widespread panic, contributed to its exponential spread online. Alarmist messaging and seemingly easy, powerful solutions would have (despite whether it was accurate or harmful) been advantaged over more critical evaluations or counter arguments. People may be less rational during times of panic, and the algorithms of social

[537] Jonathan Weinberg, 'Broadcasting and Speech', California Law Review, Vol. 81 No. 5 (1993), p 1101, 1147,1150, 1162.

media may promote potentially harmful false information as that received the most engagement. Although in the longer term, such claims would be scrutinised and rebutted, the short-term ill-effects are difficult to counter. Despite these criticisms of Mill's argument from truth, it perhaps serves to suggest that there is at least scope for some false information to be viewed as of value to public debate. It may be the case that there are inherent risks with false information online, but it remains that an outright dismissal of the use of such speech is inappropriate.

As this thesis focusses on democratic participation, it is particularly pertinent to consider how this free speech theory relates to false information, and whether it suggests any scope for the value of false information in public discourse. Essentially, this argument posits that people in a democracy have a right to participate in political discourse within a democracy so that they may convince others of their position and also receive the widest range of perspectives so that they may have the capacity to make political decisions. There is value in such robust public discourse to democracy (without which the concept is rendered meaningless; people are not able to effectively participate in democracy if they cannot influence (and be influenced by) public discourse), and this legitimises the authority of the State to enact and enforce laws on a population that is able to influence the formulation, development, and acceptance of policies.[538]

The first thing that may be apparent in terms of how this relates to false information, is that this theory is not necessarily based on a concept of truth. Unlike Mill's argument which is based on a theoretical search for truth (where false or wrong ideas still have a place in terms of facilitating the search for truth), democratic participation bases a justification for protecting free speech on the value of people's ability to participate in public discourse. This may not (at

[538] For a more detailed examination of this argument, see Chapter One.

least upon initial examination) preclude the value of false information in public discourse. If public discourse is understood to encompass matters and political speech relating to issues of public concern, this may leave room for false information to be considered a part of it.[539] The fact that a statement is false, if viewed objectively and if it relates to a pressing matter of policy or politics, does not necessarily make it of less public concern. For example, consider an instance of disinformation relating to immigration policies where a false statistic is used. Whilst verifiably false, it still relates to a particularly pertinent public issue. There is particular democratic interest on the part of the speaker who wishes to influence (albeit intentionally misleadingly) the public debate, and resulting policy, as well as on the part of the audience (supporters may feel validated and point to this as evidence of the strength of their argument, and detractors may be outraged and point to this as evidence of the malicious nature of the other side).The speech still reflects the political sentiment being expressed. A counter argument to this would be that democratic participation is predicated on the existence and facilitation of an informed electorate.[540] If people and their voting decisions are manipulated and influenced by false information, then this could be viewed as negatively affecting their democratic participation.[541] This produces a difficult ontological question of what it means to be informed

[539] See Alexander Meiklejohn's argument (and other related arguments) for what constitutes public discourse, discussed in Chapter One.
[540] Adams *et al*, *supra* note 518, p 1440.
[541] European Commission COM (2018) 236, *supra* note 501, p 1. This issue has presented itself not only in terms of disinformation with false statistics but with what could be identified as malinformation with true statistics. As an example, a German politician was imposed with a criminal sanction for sharing statistics warning of the potential effects of the government's immigration policies. Whilst the State wished to act to remedy a potential incitement to hatred against Afghan immigrants (and the implication made by the politician that they would be disproportionately likely to commit sexual crimes against women and girls) – what is notable about this case is that the politician cited and shared official government statistics. The Courts had described the information as being taken out of context (and with the Appeal Court ruling that it was irrelevant whether it was true or not), resulting in a criminal record and sanction for the politician. This occurred within an electoral context (weeks before federal and state elections) and related to particularly relevant political issues – immigration and the recent announcement of policies to relocate migrant workers. There are also allegations of this approach being part of measures to address the growing popularity of the Alternative for Germany (AfD) party, predicted to make significant electoral gains in the next election. This clearly demonstrates some of the potential ill-effects of regulating false information, potential for politically motivated application, and risk of chilling effects on public discourse. Frederick Attenborough, 'Young AfD politician convicted for publishing gang rape statistics in connection with Afghan migration' *Free Speech Union* (2024) https://freespeechunion.org/young-afd-politician-convicted-for-publishing-gang-rape-statistics-in-connection-with-afghan-migration/ .

within the context of democratic participation. It does not seem right that this should be based on objective metrics of knowledge. People do not have any less of a right to participate in political discourse if they are less knowledgeable about politics. An expert, in theory, has an equal stake in the process compared to anyone else. Furthermore, nor does a belief in untruths or motivation to convince others of it preclude participation in the democratic process. A person believing in a wild conspiracy theory can still contribute to public debate. In theory, less knowledgeable contributions of opinions and ideas are given equal footing within the democratic space.[542] The value of speech within a participatory democracy is not based on an empirical understanding of facts, but more on the resultant good of allowing a wide range of viewpoints to be available.

The concept of an informed public can of course benefit from factors that improve people's ability and competency to participate (for example, literacy rates or basic understanding of politics would improve public discourse), but it is not a precondition to be allowed to participate. As an informed public is more a function of participatory democracy, perhaps it could be argued that its meaning is less to do with the literal knowledge of participants but with their access to it. A democracy where people have access to a wide range of ideas and information can arguably be described as a better-informed electorate as they have the potential to choose and have not been deprived of information that would shape their decisions. Although there are arguments for why false information is particularly harmful to the democratic process because of it leading to people voting for policies that hinder their own prospects and interests,[543] this is more of a separate concern. For example, if a policy (such as choosing to

[542] For example, the speech of extreme religious believers denying the possibility of evolution or the age of the Earth, is still protected because a democratic approach to their speech and ideas is not based on whether they are objectively correct.

[543] Adams *et al*, *supra* note 518, p 1440. It is also pointed out that there are doubts (or at least difficulty to prove) about a direct causal relationship between false information and its actual influence on electoral

completely reject any form of foreign investment) that is clearly inimical to the interests of a State and its population becomes popular and passed – the electorate may have been technically less informed in the sense that they had been misled or are wrong, but if they had access to the competing information and ideas, then they were informed for the purposes of democratic participation. Whilst it may be tempting to draw a distinguishing line between opinion and statement of fact (the latter being more straightforward to verify as false), the above discussion suggests that a democracy-based approach should be careful about excluding false information to prevent restricting parts of public discourse – '…even intentionally false statements of verifiable fact may have value in personal conversation or public discourse'.[544]

Another issue is that allowing States to determine whether information is true or false, carries the risk of State overreach in restricting free speech. The danger of selective or arbitrary prosecution of unpopular speech or speech critical of the State is clearly present when it has the power to decide what constitutes truth.[545] This could be detrimental to a participatory democracy as important parts of public debate that may be controversial or inconvenient to the State are weakened by its ability to arbiter truth, and by extension its free speech protection.[546]

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outcomes. However, the argument still stands as a criticism of false information and its theoretical effects on democracy.

[544] Leslie Jacobs, 'Freedom of Speech and Regulation of Fake News', The American Journal of Comparative Law Vol. 70 Issue Supplement 1 (2022), p 278, 283. Also consider that satire and parody can be interesting examples of instances where there is an intention to deceive, and a basis on false information (often difficult to identify and distinguish from disinformation see *supra* note 523), but which carry important contribution to political speech and public discourse.

[545] *Ibid*; see *supra* note 541 for an example of potentially legitimate political speech being restricted - with allegations of State motivations to restrict unpopular speech, or garner an electoral advantage.

[546] This is similar to the discussion in the previous chapters, which highlighted the issues with the State having the power to arbiter what constitutes legitimate speech in terms of public discourse. The point is that within the context of false information, that problem is particularly acute as it grants the State significant power that is open to abuse or wrongful application. This effect of this problem is particularly magnified within a post-conflict or reconciliation situation where trust in and capabilities of State institutions are vulnerable. Also consider the ECtHR position which suggests that Article 10 does not necessarily prohibit the dissemination of information even if suspected to be false, and that to restrict this would be an unreasonable restriction on free speech – see *Salov v Ukraine* App No. 65518/01 (2005) p 13.

Although the above discussion suggests at least some place for false information in public discourse, it leaves an issue in terms of particularly pernicious forms of disinformation. Disinformation that that can incite violence poses a problem for democratic society. False information can constitute direct calls for violence or foment a context (by stoking hate and fear in the public) in which violence becomes more likely.[547] It is less likely to be considered legitimate contribution to public discourse and there is significant reason for States to endeavour to limit the effects of such speech based on the harm that it causes.[548] In such instances, limitation may be legitimate in a democratic society.[549]

4.4.6 Difficulty in enforcing restrictions on false information to address its harms

As discussed previously in this subsection, the nature of false information can make it difficult to establish clear parameters in practice to identify the scope of regulation. Distinguishing between disinformation and misinformation requires an attribution of intent that may be difficult to establish or prove. A false statement which *prima facie* would indicate disinformation (such as a made-up quote attributed to a politician relating to a key issue in election time), may still pose difficulties. Establishing intent on the part of the speaker would require a substantial degree of proof that could show that they knew its falsity (as opposed to genuine belief) and intended to mislead with it.[550] This would require significant intrusion on privacy to establish, particularly in the online context. Ascertaining the intention of a speaker may require information from their devices pointing to their culpability in originating and

[547] Mathias Holvoet, 'International Criminal Liability for Spreading Disinformation in the Context of Mass Atrocity', Journal of International Criminal Justice, Vol. 20 Issue 1 (2022), p 223, 224.
[548] Also consider the space for some forms of false information that are widely considered to not be legitimate to public discourse, such as fraud or defamation, see Jacobs, *supra* note 544, p 284.
[549] Considering the particular relevance of this issue to reconciliation and the Sri Lankan context, where protecting against incitement to violence is a key concern.
[550] See for example, the criticisms of the UK OSA (2023) by Peter Coe, highlighting some of the difficulties of establishing intent, *supra* note 493 p 19, 20.

producing the content. This could either mean that States may retain access to private information (in order to identify disinformation and take action) which would be a significant intrusion, or they may be the risk of arbitrary enforcement using proceedings to target inconvenient speakers (and justify intrusion into their privacy and online data). This may particularly be the case in terms of anonymous online speech, where such anonymity would have to be circumvented to establish intent.[551] The effect of this could result in a chilling effect on free speech.

Another issue is in identifying the effects of the harm caused by false information. It is difficult to attribute the degree to which (or the presence of or amount of causation), false information affects electoral decisions in practice.[552] However, there are significant concerns about the potential for harm (and violence) with particularly dangerous false information.[553] Although there is general recognition of the potential for such harm, it is far more difficult to identify the specific effects. Whilst other clear calls for violence are potentially easier to identify by their targeted nature, false information can be less clear in terms of both its intent and potential effect. The impact of false information in society is arguably more diffused.[554] The harm that may be anticipated by its effects are based on a broad assumption of its potential. Its intent to mislead or incite are not necessarily targeted on an immediate level and is based on its wider effect on a society. Some isolated instances of false information may be difficult to link with broader groups or targeted action, making it difficult to measure its specific harm or impact.[555]

[551] Previous discussion in this chapter considered the potential for arbitrary proceedings to circumvent anonymity. Similarly, this may provide another avenue for a State to do so.
[552] Adams *et al*, *supra* note 518, p 1440 – '…there is as yet no consensus on how to precisely measure misinformation to determine its direct effects on democratic processes'.
[553] Holvoet, *supra* note 547.
[554] Pielemeier, *supra* note 494, p 923.
[555] *Ibid* p 923, 924.

The effects of false information may be based on exploiting a divided context (such as a politically charged issue) and a general lack of public knowledge, which makes isolating the potential effects all the more difficult.[556] The difficulty in identifying and attributing these aspects may be further exacerbated by the features of the online space. False information distributed anonymously can be difficult to attribute to the speaker without substantial incursions into privacy. The effects of social media algorithms on the dissemination of false information can further hamper the ability to identify the intent and effect of false information. A post that is 'viral' and spread through shares and likes, may end up arguably beyond the foreseeable scope of the speaker. A State may also struggle to prove that an individual liking and sharing a post containing false information had knowledge of its falsity (and even if such evidence could exist, it would likely only be available through incursions into privacy and obtaining significant personal data – i.e., search history, website visit history, messages etc.).

4.4.7 False information in a reconciliation context

Having examined some of the features and issues of false information online, this subsection will consider how these may work in practice in relation to the wider context of this thesis in terms of reconciliation. The spread and effects of false information, whilst a general global issue, has been identified as being of particular concern to the Sri Lankan context. False information has the potential to exacerbate social divisions, lack of trust in the democratic process, and contribute to inimical effects on the reconciliation process.[557] Of particular

[556] The effects of disinformation, as well as being difficult to isolate and identify, may 'linger' as its potential consequences may impact on a broader scale when compared to targeted speech. *Ibid*, p 924.
[557] 'Better Moderation of Hate Speech on Social Media: A Sri Lankan Case Study for Reputational Cost Approaches' Strategy Brief, *Verite Research* (2021), p 7.

concern is its potential to aggravate communal tensions and incitement to violence.[558] Although these concerns point to the issue of false information being pertinent to a thorough examination of free speech within a reconciliation context in Sri Lanka – what makes it warrant particular consideration is its inclusion in the Online Safety Act as a key component of the online regulation regime established by it. Similar to the issue of anonymous online speech, this will be approached by establishing some of the main ways in which the key issues pertain to the reconciliation context, whilst more specific examination of practical effects will be addressed in the latter part of this chapter and its analysis of the Online Safety Act. Identifying the broader issues at this point will allow for a better appraisal of the relevant provisions at that stage.

Free speech in the context of reconciliation requires particular consideration of political speech in public discourse based on a participatory democracy. In addition, considering the continuing process of reform and (re)establishment of democratic norms, there is an interest in extending protections to a wider range of speech. There may be a stronger case for broadening the scope of what counts as political speech and as particularly relevant to public discussion. As part of the transition to stability and rule of law, the democratisation and reconciliation process requires a wide range of contributions and access to information in public discourse.[559] The topics this could include will likely encapsulate the most controversial matters (such as religion, conflict, abuse etc.), and therefore likely to attract false information. Heated debate can attract disinformation by those intending to mislead the public and influence political outcomes, the divided public discussion can leave room for misinformation to be spread and believed, and the divisive nature (and potential political interests), can incentivise malinformation. As discussed previously in this subsection there is potential for false

[558] *Ibid*; 'Regulating Social Media in Sri Lanka: An Analysis of the Legal and Non-Legal Regulatory Frameworks in the Context of Hate Speech and Disinformation', *Democracy Reporting International* (2021), p 3.
[559] See Chapter Two.

information to be of value to public discourse. The interests of establishing a reconciliation process that can endure long-term, requires that people are able to contribute to the fullest degree possible. This may particularly be the case in a context such as Sri Lanka, where trust in the State and its institutions are low, meaning that State regulation of what constitutes false information may contribute to a perception of an imposition of majoritarian rule.

Whilst there is potential for there to be value in some instances of false information (or at least in a broader sense, by allowing it in public discourse) which is all the more relevant in a reconciliation context – the issue of harm is still a large concern. It is also arguably heightened in such contexts due to the potential for communal violence and incitement. The nature of a context such as Sri Lanka which has gone through periods of instability and is in the process of strengthening democratic norms, means that social divisions can be particularly inflamed, and the risk of violence is heightened. The effects of false information that may foment and exacerbate such tensions, can therefore be of a different scale when compared to countries with a more stable background. Whilst those States may still be concerned about similar effects, the scale of their impact may be different. The potential for incitement to violence may be more to do with targeted and isolated incidents. In a less stable context with fraught divisions, the potential for the situation to result in group or communal violence is more of a factor.

However, whilst the potential for violence that can be amplified by false information provides strong reasons for State intervention, it is not always apparent to what degree censorship can help in practice. For example, Holvoet points to the government response to allegations of mass atrocities and abuse in Myanmar. A State security ministry official's response was that 'there

is no such thing as Rohingya. It is fake news.'[560] Leaving aside the accuracy of that response, what it (and its international reception) reflects is that the efficacy of State power in identifying false information is dependent on its perceived and actual reliability in terms of objectivity and rule of law. Either the State will be perceived as lying and falsely claiming fake news out of political interests, or the State spokespersons are genuine, but their statements lack credibility. If there are instances of genuine abuse and a State claims it is false information, it ends up in a situation where competing claims of false information are alleged. In such a case, the determinations of the State will end up being the deciding factor because of its asymmetric power over public discourse. Part of the reasoning behind a participatory democracy-based approach to free speech is that it facilitates the public's ability to hold the State to account. If States can take the role of arbiters of truth, then they may be empowered to repress legitimate criticism by branding it as false information. If institutions are not independent and subject to democratic norms, they may be more susceptible to this issue.

Like many other States, Sri Lanka has faced issues with State overreach in terms of regulating speech – but what has been identified as particularly problematic has been its tendency towards a misapplication of speech related laws to stifle criticism. Hate speech and disinformation laws have been 'perversely misapplied', often targeting speech critical of the State or unpopular to majority sentiment, rather than holding perpetrators to account.[561] As this concerning trend relates to general speech laws (relating to hate speech, penal code etc.) that have been applied to bring disinformation within its scope, it raises much cause for concern as to the extent that specific legislation targeting disinformation can be abused. Institutions have also been

[560] Holvoet, *supra* note 547, p 225; Hannah Beech, 'No Such Thing as Rohingya: Myanmar Erases a History' *The New York Times* (2017) https://www.nytimes.com/2017/12/02/world/asia/myanmar-rohingya-denial-history.html .
[561] Verite research, *supra* note 557, p 19.

criticised as being politicised and utilised by the State to stifle dissent.[562] It is unlikely that the public will be able to hold much trust in effective application false information laws by the State and will be justifiably wary of overreach.

However, despite concerns as to the misapplication of false information laws, the potential harms of incitement to violence need to be addressed. As the potential for violence is counter to the objectives of reconciliation, and the context of deep division may make the risk of communal violence more acute – the effects of false information should be actively mitigated as much as possible. False information has been attributed to fuelling some of the contexts in which communal violence has taken place in Sri Lanka. Highly polarised relationships between communities have been exploited and exacerbated by rumours and conspiracies against minority groups that have been alleged to contribute to resultant instances of communal violence and rioting.[563] A speech framework that facilitates the reconciliation process will therefore need to reconcile the objective of mitigating harm with safeguarding from State overreach (and chilling effects on free speech). Such a framework should be cautious of accepting criminal sanctions for false information. The circumstances of a context such as Sri Lanka are such that people may be wary of State repression, as well as a trend of State interference in free speech using laws to stifle criticism – which could contribute to people being less likely to contribute to public discourse. Criminal sanctions make this issue particularly acute in practice. The consequences of the misapplication (or politically targeted

[562] *Ibid*.
[563] *Ibid* p 15, examples are given pointing to the escalation of anti-Muslim sentiment driven both by anti-Muslim disinformation from majoritarian group propagating conspiracies relating to Muslim expansionism, and from extremist Islamist groups calling for violence against non-Muslims. One of the more notable examples of disinformation and its impact on violence was the conspiracy of Muslim sterilisation. A restaurant owner in Ampara was filmed being confronted for allegedly mixing sterilisation pills into food served to non-Muslims. This sparked widespread attention with much disinformation being spread online, arguably being a substantial contributing factor in subsequent rioting in the area. It should also be noted that incidents like this are likely to be a significant part of the reasoning in including rioting as part of the false statement provisions in the Online Safety Act, which will be discussed in more detail later in this chapter.

use) of these laws would be likely to disincentivise participation.[564] People may be reticent to engage with controversial issues because of the threat of State retaliation, through the use of laws relating to false information.

Furthermore, the particularly polarised nature of a post-conflict State with deep social divisions may make it more difficult to foresee the consequences of speech. If people fear that a statement could end up being construed as false, and then attributed to wider instances of, or campaigns calling for violence – the threat of criminal sanctions may make them over-cautious with engaging in public discourse. Criminal sanction of false statements should therefore be narrowly construed to apply to clear instances of intentional incitement to violence. Both intent and foreseeability of impact should be clearly established.[565] Although this may potentially leave room for some harmful false information to escape sanction, such a formulation may be a good balance between safeguarding from clear incitement and the abuse of speech laws by the State. In terms of practical ways of mitigating the effects of harmful false information, State initiatives to combat these can be a useful avenue.[566] Long-term, a record of reliable action by the State to provide accurate information can help rebuild trust in State institutions and lessen the impact of false information on social divisions. Supporting community driven methods of exposing false information can also assist in this endeavour (perhaps filling in the gaps where

[564] This is also compounded by some of the more general issues raised in this subsection such as difficulties in distinguishing types of false information (with the possibility of lawful speech being mischaracterised as disinformation), proving elements such as intent, and identifying and attributing false information propagated online. Also see some of the practical consequences of State abuse by using the cover of an objective of combatting false information to stifle speech inconvenient to the government, *infra* note 580, 582, 583, 585, discussing the recent case of *State of Missouri v Biden, Murthy et al*.

[565] Admittedly, these are difficult criteria to prove, and poses a substantial evidentiary burden. Online false statements can be difficult to relatively difficult to address through criminal law, where proving its elements (*actus reus* and *mens rea*) are challenging to establish see Pielemeier, *supra* note 494, p 924, 925 – however, this also implies the benefits of a strict standard that leaves less room for arbitrary use or abuse, which can help assuage fears that lead to a reluctance to participate in public discourse – and target the most dangerous forms of false information. See Chapter Three and Five for discussion as to why a free speech framework in a reconciliation context requires caution and safeguarding against State overreach due to perceptions and real considerations of a lack of independence and capacity of institutions.

[566] See Law Commission, *supra* note 503, for proposals to combat misinformation through public education initiatives supported by the State.

State action is slow in its response – or where parts of the public remain sceptical of the State).[567]

4.5. Other features of the internet relevant to the Sri Lankan situation

This chapter has so far examined in particular detail two specific features of online speech. Anonymous speech and False information have received special attention due to its direct relevance to the legislative framework set out in the Online Safety Act. These issues form the basis for specific provisions relating to online speech in the Act and the significance of their inclusion warranted this attention. By establishing some of the main issues, and relating them to a reconciliation context, the discussions set out above can help inform an appraisal of the Online Safety Act which will be discussed in the next section. However, there are some other features of online speech that are worth mentioning at this stage. They will not be examined as thoroughly but will be pointed out so as to give an idea of how (whilst not specifically contributing to the online speech framework in Sri Lanka), they affect the impact of speech online – particularly why special consideration is often given to online speech (as opposed to offline).

4.5.1 Permanence of speech in the online space

[567] Community notes on 'X' (formerly Twitter), has been an example of how community fact-checking can address some of the issues of misinformation. This can help provide rapid responses to false information by rebutting it and steering the conversation (and audience) to more accurate and reliable sources. Perhaps in a reconciliation context, this can also address the gap caused by distrust in the State. Mary Roeloffs, 'X's Community Notes Accurately Corrected Vaccine Misinformation 97% Of The Time Last Year, Study Says', *Forbes* (2024) https://www.forbes.com/sites/maryroeloffs/2024/04/24/xs-community-notes-accurately-corrected-vaccine-misinformation-97-of-the-time-last-year-study-says/?sh=5b0fbf7f4996

A distinguishing feature of online speech from what may have been the case prior to technological change with the internet, is that content posted online attains a degree of permanence. It can be exceedingly difficult (arguably impossible in many cases), to retract what is posted online, and it can create a clear link to the speaker. This alters the context of what it means to express opinions online. In an offline, pre-internet era, there would be a clear distinction between off-hand comments spoken aloud, and written forms of expression. The latter could imply a degree of intentionality, and a relative expectation that it would be crafted with more attention and deliberation. With the internet, conversations, off-hand comments, and general casual discussion, can become permanently 'published' online. This content can become further entrenched if they are reposted, shared, screenshotted etc. This results in accountability for more general forms of conversation that could not have existed previously.

The division between general conversation and concerted efforts to contribute to discourse is therefore blurred online. Speech that is made off-hand, humorously, in poor taste etc. that ordinarily would not have attracted prosecutorial attention, can now be more likely to do so and be attributed to the speaker.[568] This causes an arguably significant change in the nature of conversation and how it is regulated by society. As an example, a post made as a joke whilst drunk can end up resulting in criminal liability, even after being taken down with an apology issued, and there being no specific harm caused.[569] In another example, a man received a criminal conviction for joking about blowing up an airport on Twitter.[570] This reveals a new standard of accountability for casual speech that has resulted from an online architecture where

[568] Jacob Rowbottom, 'To Rant, Vent, and Converse: Protecting Low Level Digital Speech', Cambridge Law Journal, Vol. 71 Issue 2 (2012), p 355, 356.
[569] *Ibid*; *R v Blackshaw* EWCA Crim 2312 (2011). This concerned a young man who created a Facebook page whilst drunk called 'The Warrington Riots' and took it down hours later. There were no riots caused by it, and he received a 4-year sentence.
[570] *Ibid*; Owen Bowcott, 'Twitter joke trial: Paul Chambers wins High Court Appeal against conviction' *The Guardian* (2012) https://www.theguardian.com/law/2012/jul/27/twitter-joke-trial-high-court .

speech becomes permanent, easy to find, and easier to link to the speaker. This can affect the nature of public discourse. Casual conversation can form part of a person's contribution to public discourse, and it can be difficult to distinguish its political nature. By holding speakers in effect to higher standards of accountability, this creates a burden on them (they may be reluctant to joke about an issue), that may prevent them from engaging in discourse. A brown skinned man making a joke about explosives and airports (whilst in poor taste), may be a reflection of frustrations regarding discriminative security practices – but could attract the attention of State action because of its relative permanence once posted.[571] Even in the absence of any specific political characteristics, this could lead to a general unease in contributing to public discourse. Knowing that one may be held accountable for remarks made in the heat of the moment or a long time ago may mean that people avoid posting altogether. Public debate can attract heated remarks and opinions on issues can change – if people are wary of being held accountable in the future for these things, they may be less likely to contribute.

4.5.2 The low barrier to entry

Publishing written content in the past would require more time, resources, and concerted effort, relative to the ease in which people can access a platform online. This can produce a democratising effect where the public can engage with public discourse (both to publish and consume content) without some of the financial or structural barriers of the past. Journalism would have required joining an established company, or significant funds to establish a paper in the past – whilst the internet has allowed for individuals to compete, and even surpass, traditional media. However, there can also be negative effects to this. All that is required to

[571] Obviously, this is subject to genuine concerns as to safety. There is a marked difference between making a bomb threat within an airport, causing panic – and a general joke made in poor taste. The 'Twitter joke trial' concerning Paul Chambers was overturned on appeal as it was clearly a silly joke, unlikely to be construed as menacing – *ibid*.

publish online is an internet enabled device. This means that although it allows for a wider range of useful discourse, it also allows easier access for those wishing to use it for malicious or harmful purposes. Internet pile-ons, hateful campaigns/comments, trolling etc. may be more likely considering the relatively low effort on the part of the speakers to do so.

4.5.3 The scale of online content

Another way in which speech issues online can be magnified by its features, is the sheer scale of information and content that is produced and shared. The vast amount of material online can make the exercise of regulation difficult. Institutions may struggle to keep pace with the quantity of content, where allocating resources to manage it becomes increasingly impractical. This also affects the quality of censorship where regulating speech ends up being dependant on mechanisms that are less than ideal. The preferred way in which to assess the harm of an expression would need real people evaluating its content and levels of cross-examination (with multiple perspectives to account for biases), so that the nuances of expression can be assessed to identify whether is contains harmful characteristics and apply it to regulatory standards.[572] Dealing with scale results in less than ideal ways to address issues online and the standard expected of speech censorship can decline. An example would be the automation of censorship, where efforts to keep pace with the volume of content (and a lack of, or difficulty in allocating resources for, labour), means that automated software-based approaches are utilised to identify harmful speech online. This removes a human element of being able to understand nuances in speech and its context. This could potentially either result in overbroad censorship (where key words can result in automatic censorship) or inadequate identification (where content is tailored

[572] The harm in speech is not always immediately apparent, and an appraisal of the less obvious parts of speech to identify its nature is difficult at scale. This is particularly the case in terms of online speech where it may consist of content expressed casually, with lexicon popular online, or humorously expressed (in meme format) etc.

to avoid detection by automated censorship). Both these issues can pose unique problems. In the former, legitimate speech may be flagged and automatically censored because it contains key words that are associated with controversial topics. Although it could be argued that speakers can appeal (and the automated system exists to rapidly act on an issue, preventing potential immediate harmful effects, and leaving room for later consideration), the fact remains that by automatically restricting speech and requiring concerted action for it to be reinstated, it does place a burden on the speaker. Furthermore, if legitimate contributions to public debate are automatically restricted, the impact of the restriction may have already taken effect before it is reinstated. For example, a political post during election time may be automatically flagged and removed (or temporarily restricted) perhaps if it contained a controversial key word or discussed a controversial political hot topic – potentially only reinstated after the electoral process has concluded. This in effect, renders the political contribution ineffective as the person has been excluded from public discourse in terms of affecting change. If a person is unable to contribute during the time period where it is most pertinent, it removes the democratic nature of public discourse. A participatory democracy requires people to be able to have input within the democratic process, and the hurdle of being automatically restricted can effectively exclude them from it. Obtaining a satisfactorily prompt appeal process can also be unequal in practice. A speaker with connections or a substantial public following may be able to put pressure on a platform and bring to attention the issue to the issue so that they are encouraged to review the restriction. A speaker without that clout may be disadvantaged, awaiting an appeal (with no guarantee of its outcome), until the relevance of the expression becomes pointless anyway. In terms of the latter issue (tailoring content to evade detection), although technology develops at a rapid pace, it will still struggle to keep up with human ingenuity. Malicious speakers will be able to adapt to automated censorship and use dog-whistle terms, context-based allusions, insinuations, and different formats to escape the true nature of the content being identified.

Such expressions will be identifiable to human audiences, whilst automated mechanisms may struggle to discern its nature.

The problem of dealing with the scale of online speech has been readily apparent in Sri Lanka. Not only has it been difficult to keep up with the quantity of expression posted online, but also domestic characteristics that have posed particular challenges. One issue that has been identified is that local vernacular, such as slang or colloquial derogatory terms, can escape moderation due to the limits of automated mechanisms. They will also struggle to interpret historical and cultural context that is essential to understanding the nature of the content. Another similar issue is that of limitations in language. Tools of online content moderation will often be based on widely spoken languages and will often struggle to interpret and regulate local languages. Much of the content in Sri Lanka will be expressed in Sinhala and Tamil, with service providers lacking the capability to effectively categorise it.[573]

Facebook itself has recognised these issues and produced a report following instances of ethno-religious rioting in Sri Lanka, highlighting some of the problems with moderating online content in specific domestic contexts.[574] Although they pointed to initiatives to better address the problem of harmful content escaping identification online due to lack of capacity by hiring 'dozens more Sinhala and Tamil speaking content moderators to review and remove content that violates our Community Standards…', this is unlikely to produce the sort of capability that would be necessary to adequately monitor and respond to the scale of content being produced.[575] It seems impractical to rely on social media companies to be able to commit the

[573] The most popular platforms or providers will be large corporations (such as Meta, X, etc) based abroad and with very little or insufficient specific expertise in local language or context.
[574] 'Facebook Response: Sri Lanka Human Rights Impact Assessment', *Facebook* (2020) https://about.fb.com/wp-content/uploads/2021/03/FB-Response-Sri-Lanka-HRIA.pdf , p 1.
[575] *Ibid*, p 2.

resources and labour to every country to individually analyse content to a satisfactory degree. This means that whilst companies and providers can contribute to some degree, a large burden will rest on State institutions. In a post-conflict reconciliation context, where not only social and democratic issues are at play – but economic challenges, the State will struggle to fill that gap.

Another way in which the scale of online speech affects its impact is that the quantity itself can change the perception of the content. Online content is produced at an extraordinary rate. There is not only an incredible amount of volume in terms of quantity, but it is also produced at a rapid rate. It would not be physically possible for an individual to consume the amount of content uploaded online each day (or even, each minute), within the span of their lifetime. Therefore, considering the scale of content on the internet, from the perspective of the individual it is arguably infinite. This is a relevant consideration to the nature of online speech when factoring how it affects the relationship between a speaker and audience. The internet does indeed provide individuals the facility to easily create and post their speech, and for others to find it. However, that ease of access also means that the numbers of speakers are greatly increased, and each piece of content must compete with innumerable others. Each expression is arguably a drop of water in an ocean. Consider a hateful post on a popular platform – in theory, every person with internet access could view this. However, its place within the expanse of all available material online means that it may not necessarily receive the wide reach that it has potential for. People may not even see it – as an individual post amongst billions, this reduces the chances of people even coming across it. People may also ignore it – there is so much content competing for attention that people may be less concerned about an individual post. This raises questions as to causality or harm of speech online. Those examining harmful content can point to many examples, but despite its potential reach, it is not necessarily

determinative of its actual impact in practice. Within a reconciliation context where people are engaging in public discourse, it may therefore be challenging to attribute harm (and thereby justify restrictions) to a satisfactory degree.

4.5.4 Interactive nature of online discourse

The way in which conversation occurs online has changed and adapted with technology. This can make it difficult to identify what counts as public discourse. Engaging with a topic can now take the form of liking, sharing, reposting, commenting etc. which blurs the line between casual interaction with the online space and engagement with public debate. The act of liking a post is substantially less concerted than writing an opinion piece – yet the increasingly pervasive relevance of online life to reality means that it can have similar real-world consequences.[576] This can also impact a user's experience of public discourse. An individual's post can immediately be subject to scrutiny and counter argument, with the audience being able to reply almost instantaneously, with comments, video replies, memes, annotated screenshots etc, which suggests a positive impact of accountability.[577] Therefore an approach to a free speech framework (as argued for in this thesis in relation to reconciliation) that widens the

[576] For example, the Canadian politician (deputy leader of the B.C. Green Party) Dr. Sanjiv Gandhi, was fired and forced to resign as Green party candidate following 'inadvertently' liking a social media post https://www.cbc.ca/news/canada/british-columbia/bc-green-party-removed-1.7023294 , also a Principal fired for liking a Pro-Palestine post https://www.ndtv.com/india-news/parveen-shaikh-mumbai-school-principal-fired-for-liking-pro-palestine-post-5615370, and NASCAR driver for liking a controversial meme https://edition.cnn.com/2023/08/05/sport/nascar-noah-gragson-suspended-spt/index.html . The impact of this change to discourse by online interactivity and its effects, is highlighted by Elon Musk's pledge to cover the legal fees for people who have been fired for their posts and likes on 'X' https://www.forbes.com/sites/mollybohannon/2023/08/06/elon-musk-promises-to-cover-legal-fees-for-people-fired-over-tweets/?sh=4d0a34d7148e .

[577] With the other side of it being the potential for a post to immediately be left with hateful abusive comments. Furthermore, there is also the potential for targeted campaigns of trolling or abuse, where each posts attracts concerted efforts by groups to silence and intimidate.

scope for political speech, will therefore have to account for the changing nature of discourse online.

4.5.5 Intangibility of restrictions

The internet architecture lends itself to promoting greater levels of access to public discourse, but also provides new tools to regulate speech. These mechanisms of regulating speech have adapted to technological change and can differ from the more direct methods in which offline speech is limited. The process of censoring offline speech can arguably be more straightforward. States may restrict a publication by targeting publishers, forcing a publisher to close, prevent them from printing, seize material, restricting circulation etc. These measures are arguably more tangible in the sense that the public are more likely to be aware of and notice the restriction. It may relatively be more straightforward for the public to realise that a newspaper's offices have been shut down, or that physical copies of a paper or leaflet have been confiscated. The speaker will also be able to point this out to demonstrate clear examples that censorial action has been taken against their speech.

On the other hand, censorship online can take less direct forms and be implemented in ways that are less easy to identify. Not only can the audience be less likely to notice the restrictions, but even the speaker may not be aware that they have been censored. States are therefore empowered to restrict speech in ways that are difficult to identify and hold to account. For example, this is a current issue in the US where State institutions are alleged to influence and pressure social media companies and platforms to censor inconvenient speech. The release of the 'Twitter Files' which provide an insight into government efforts to influence the restriction of speech online by pressuring social media companies to adopt policies and remove content,

demonstrate not only the ability to the State to utilise social media companies as proxy State moderators, but also the difficulty in identifying that such restriction was taking place.[578] This influence was revealed through unusual events, and the opaque nature of the relationship between the State and social media companies (and degree to which resultant action has been taken), means that it is difficult to know whether, and to what degree, this information would have otherwise been available.[579]

In practice, State influence in shaping obscure moderation policies by companies can result in significant concerns as to its impact on the democratic process. The recent case of *Missouri v Biden* shows how the pressure exerted on social media companies by State institutions to remove content unfavourable to the government, can result in them capitulating and providing privileged access to moderating features, downgrading posts by limiting its reach, removing posts, and deplatforming users.[580] This case concerned the removal or downgrading of posts by social media platforms following pressure from State institutions and officials. The plaintiffs were three doctors, a news website, a healthcare activist, and two states.[581] The content concerned related to a range of topics relating to vaccines, lockdowns, State corruption, and allegations relating to Hunter Biden (President Joe Biden's son, whose laptop contained allegedly incriminating information, the reporting of which was restricted by social media companies). A significant amount of concerted attempts to influence and pressure these companies by State institutions was revealed (with them often acquiescing to these demands), and notably, they were encouraged to utilise methods of limiting the speech by employing

[578] Spiked, *supra* note 380.
[579] Elon Musk's acquisition of Twitter and subsequent decision to release evidence of government interference is an unusual occurrence and cannot be a reliable indicator of how State influence can be exposed regularly. The public cannot be confident that governmental influence over online speech will be apparent.
[580] *State of Missouri v Biden, Murthy et al*, Case No. 23-30445, United States Court of Appeal for the Fifth Circuit (2023), p 2.
[581] *Ibid*.

algorithmic mechanisms that could hide the censorship efforts.[582] Not only were individual posts moderated according to direction from the State, but the companies also yielded to their influence by changing their moderation policies in accordance with their directions.[583] Material that was favourable to the government such as positive news and posts relating to their policies was also artificially boosted. White House officials requested 'algorithmic amplification' to make sure that a 'favourable review reaches as many people' – which was obliged by the platforms who carried this out to ensure 'the right messages'.[584] The case lists numerous significant examples of concerted efforts (often successful), to manipulate public discourse online.

This is particularly concerning in this context as it points, not only to State overreach in regulating online speech, but also the way that the obscure nature of online moderation can be abused. The public is unlikely to know the degree to which the State can influence moderation policies and can often be unaware (or unable to prove) its effects. Clearly, States are cognisant of this power and are willing to use it to stifle unfavourable speech. Such overreach by States over public discourse is fundamentally adversative to a democratic form of government. The difficulty in even identifying such overreach means that its effects can either be overlooked or discovered too late. By the time algorithmic manipulation of speech may be discovered and addressed, its relevance may have passed rendering its contribution to public discourse moot.[585]

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[582] *Ibid*, p 5. Officials encouraged companies to engage in a process of 'slowing it down', which suggests that it could circumvent the backlash of obvious restrictions, by effectively limiting the expression without the speaker being aware. Individuals claiming that their posts were being hidden by a manipulation of the system could therefore easily be disregarded as conspiratorial as they would not be able to point to concrete examples of censorship.

[583] *Ibid*, p 7. Notably, many of the instructions were couched in language implying the objective of combatting false information – showing both how this feature can relate to that of false information online, and also the inherent risks of abuse in regulating false information.

[584] *Ibid*, p 8.

[585] Justice Alito dissenting in *Murthy et al v Missouri, Supreme Court of the United States* 601, On Application for Stay, No. 23A243 (23-411) (2023), p 2. Alito J commenting on the decision to suspend the injunction preventing State officials from coercing social media companies to engage in censorship or actively controlling their decisions regarding the content posted on their platforms, pending review by the Supreme Court. The State

The perception itself of this overreach and the murky nature of online content moderation can contribute to a decline in trust by the public towards the State, its institutions, and the democratic process. It is easy to imagine when considering the controversies of the 2020 US presidential election, how such a breakdown in trust can result in further instability. Furthermore, this may be particularly concerning within a context such as Sri Lanka where wariness towards the State (and fears of overreach based on past experiences) contribute to a chilling effect – which may be magnified by the intangibility of restrictions.

4.6. Concluding points

This chapter so far has set out some of the key issues relating to online speech and has set out how it relates to the wider research area of this thesis. Particular attention was given to the issues relating to anonymous speech online and false information. Its specific inclusion as part of the provisions of the recently enacted legislative instrument for regulating online speech in Sri Lanka, warrants this attention as it will help to analyse the effects of its scope when considering the Online Safety Act. This chapter has established that there are arguably some benefits to those forms of speech, and this is particularly the case within a reconciliation context. Anonymous speech can help facilitate the entry of the general population to public discourse and encourage them to participate and contribute, whilst providing some degree of protection from (perceived or real) risks that would otherwise cause them to be reluctant to

argued (arguably on tenuous grounds considering the speculative nature of their assertions and lack of clear irreparable harm), that they may need to retain this ability to deal with emergencies (at least, until a Supreme Court determination as to its legality). As pointed out by Alito J, it is concerning that this has been allowed considering its potential effects on democracy – a determination may not occur until 'late in the spring of next year'. This means that not only will the State be able to continue to influence substantial moderation of online speech, but this overreach will continue into an election year (2024). Abuse by the government could therefore have profound effects on political discourse close to an election, potentially effecting electoral outcomes and perceptions of its integrity.

engage in public debate. A mechanism to overcome this reluctance is useful in a reconciliation context with the objective to promote open political discussion and State legitimacy, and where a recent history of instability and repression can contribute to the public being wary of interference with their rights. On the other hand, it is recognised that anonymous speech can carry risks, with malicious actors potentially using this feature to engage in harmful speech and avoiding consequence. Any formulation of speech regulation should therefore be able to achieve a satisfactory balance in terms of ensuring that the protection from harm potentially caused will be subject to safeguards that prevent a negative impact on democratic participation. False information is not necessarily seen as a direct facilitator of participation, but there is scope for recognising some degree of value in it for public discourse.

Democratic debate in a reconciliation context will invariably require strong debate on controversial issues, which can often attract false information. Definitional issues, and difficulty in identifying (and distinguishing) the nature of a false statement (whether misinformation, disinformation, or malinformation), and the extent of its effects – means that a cautious approach is necessary to ensure that there is less potential for regulations to be wrongly applied or abused. Genuine concerns exist as to the potential harm that can be caused by false information, particularly in regard to incitement to violence (and especially in a State like Sri Lanka with recent instability and deep divisions). It may be difficult to attribute both intent and causality to such speech, the effects of false information are more difficult to identify and may be spread out (compared to targeted or direct calls for violence). Criminal sanctions should also be carefully employed considering its potential to dissuade democratic participation and be limited to disinformation that clearly can be attributed to malicious and foreseeable incitement to violence. A State going through the process of reconciliation is more likely to have significant sections of the public that are wary of the State, and trust in institutions and the rule of law are likely to be low. Not only should a speech framework protect against actual

State overreach with the misuse of laws relating to false statements – but it must protect against perceived fears of its abuse that could disincentivise participation. This requires adequate safeguards. Furthermore, non-criminal methods (especially with misinformation), can be one of the most appropriate ways in which harms can be mitigated whilst ensuring the protection of public discourse.

The other features of online speech that have been discussed, whilst not receiving the same degree of analysis as the first two, serve to demonstrate some of the ways in which regulating online speech can pose unique challenges. They explain the State's motivation in bringing in specific legislation to address online speech and justify the need for separate attention in this thesis. In addition, their effects are not in isolation and can be viewed as interacting and affecting other aspects of online speech. For example: the intangibility of online restrictions impacts the regulation of false information and can heighten concerns of the ways in which the State could abuse its powers and restrict inconvenient speech, the low barrier to entry of the internet makes anonymous speech easy to abuse by malicious speakers, and the scale of content online exacerbates issues relating to both false information and anonymous speech, etc.

4.7. The regulation of online speech in Sri Lanka: background to the current framework

4.7.1 Introduction

The legal framework of Sri Lanka in relation to online speech can be split into two categories – general instruments and specific ones. The general instruments, discussed in Chapter Three, are the laws in place that pertain to limitations on speech, but do not specifically focus on online

speech. They apply to both online and offline speech and have largely been the basis for State regulation of online speech. As these have already been examined, and they do not necessarily contain much in terms of features to distinguish between online and offline speech, it is not necessary to go over them again at this stage. A caveat to this, may be the practical effects of the features of online speech, discussed in the first part of this chapter, that may have impacted how they have been applied. For example, the scale or quantity of online speech and the issue of false information, may have contributed to the State being overanxious or overzealous in applying these laws. Having to adapt to the change in speech resulting from technological change and growing reliance on online platforms by the populace (with fears of its influence and potential effects), could have resulted in the State being somewhat 'trigger-happy' leading to over-repressive use of State power as a misguided preventative measure. The specific legal instruments are formulated to directly address and regulate online speech.

Although other legislation has existed (besides the recent Online Safety Act), it has been largely vague, and its application has received little attention – largely being used in tandem with the general measures to justify an arrest. The most notable one, and requiring the most attention, is therefore the Online Safety Act. It will therefore take up the majority of this part of the chapter. This was passed as a controversial piece of legislation with significant ramifications on how online speech will be regulated in Sri Lanka. As a recently passed piece of legislation, there is little to no indication yet as to its effects in the absence of practical application or judicial treatment in practice. Much of the discussion in this part of the chapter will therefore be speculative, drawing conclusions based on its potential applications and ramifications on public discourse online. This requires an epistemological approach that can incorporate an analysis of how the Act affects the free speech framework of Sri Lanka and its potential use in practice. This will be done by the following:

Firstly, the background relating to the Act will be set out. This will be largely descriptive but will be useful in setting out the context of the Act – allowing for it to be assessed in terms of its wider place within the county's speech regulation framework.

Secondly, it will be necessary to narrow the scope of analysis in terms of this Act. The Online Safety Act of 2024 and its provisions cover a range of communication online. Although they may all affect many aspects of free speech, it is necessary to focus the attention of this chapter on those most relevant to the wider topic of this thesis. For example, provisions in the Act relating to protecting children (combatting child pornography) are an important part of regulating online speech; however, in the interests of remaining within the research objectives of this thesis (democratic participation, reconciliation etc.), analysis will be limited to provisions that directly relate to some of the key issues in terms of public discourse and political speech. Broader discussions on how the Act impacts free speech are therefore beyond the scope of this thesis, and the key areas that are chosen for examination should provide an insight as to the Act's probable effects on a participatory democracy in the context of reconciliation in Sri Lanka.

Thirdly, in the absence of substantial case law or examples of how this Act may be used by the State and interpreted by the courts, it necessary to set out what the ostensible intent and effect of these provisions are. In other words, it should be established what the actual aims of the provisions are, and the intended scope of what it governs, and regulatory powers it grants. By looking at the provisions of the Act, its direct effects can be extrapolated, and analysed in terms of its impact.

Fourthly, continuing from the above, the Act's indirect effects should be accounted for. As widely accepted and previously discussed in this thesis, a consideration of a free speech framework cannot be isolated to its direct effects – speech laws can be oppressive due to their chilling effect on public discourse. Therefore, it will be necessary to not only consider what is ostensibly within the scope of the Act, but also its potential, and what forms of expression could end up being affected. This will allow for an evaluation of what, and to what degree, the possible effects of the regulation may be – and whether it could end up including political speech that is legitimate, requires protection, and would result in a chilling effect on public discourse that would negatively affect democratic participation.

Finally, these discussions and findings should be assessed and applied in terms of the goal of reconciliation and the criteria that has been set out in this thesis. This thesis has set out that not only is political speech and participatory democracy vital to the reconciliation process – but also that there are considerations to be accounted for when evaluating the effectiveness of a free speech regime in practice within such contexts. The potential implications of the Act should therefore be considered within this context through the criteria established.

4.7.2 Background to Sri Lanka's online safety laws

Much of the State's approach to regulate speech online has been to utilise the powers granted by more general speech laws (ICCPR Act, Penal Code etc.). However, even prior to the enactment of the Online Safety Act, certain statutory laws relating to online speech existed and were used. Whilst the new Act provides more specific attention and confers stronger powers of regulation, the previous statutory instruments remain relevant. This is both as a background to the context in which the new Act was brought in, and also concerns their lasting effects.

They have been utilised in the past to regulate speech and can still be used in the future. Two of the main legal instruments that have been used to regulate online speech are briefly examined below.

4.7.2.1 Sri Lanka Telecommunications Act No. 25 of 1991

One of the main functions of this Act is to establish the Telecommunications Regulatory Commission of Sri Lanka.[586] The Act sets out a basis for government regulation of telecommunication and establishes a framework for its exercise. In addition to the Commission itself being given powers to exercise regulatory action, the relevant Minister's powers are set out (with the Minister able to give general or special directions).[587] A range of offences and penalties are also established, pertaining to both content transmitted and wider activity beyond speech (such as tampering with or damaging telecommunication installation).[588] What is immediately apparent is that (unsurprisingly considering the date of enactment) it is outdated in terms of online speech. References to calls and telecommunication lines show that its objectives were based on a context prior to technological changes that have made online speech (with social media etc.) the most pervasive and relevant target of regulation.

However, the State has still been willing to adapt its provisions in this regard. The creation of an offence of where there is a transmission of 'any message of an indecent, obscene, seditious, scurrilous, threatening or grossly offensive character' establishes a broad scope for limitation of speech.[589] The terms used are vague and can clearly be open to abuse.[590] It could also

[586] Sri Lanka Telecommunications Act (SLTA) No. 25 of 1991, Part 1 Section 2.
[587] SLTA, Part 7.
[588] SLTA, Part 6.
[589] SLTA, s 58.
[590] The basis on subjective terms that have not been narrowly defined are reminiscent of some of the issues identified with the Penal Code, discussed in Chapter Three. It provides for criminal sanction with either a fine

potentially be interpreted to include hate speech and incitement to violence, albeit with the ambiguous terminology making it reliant on proper use by the State.[591] The Act also empowers the State to limit the transmission of messages where there is a 'public emergency or in the interest of public safety and tranquillity'. This poses similar issues in terms of being overbroad and open to abuse, and also can be interpreted and adapted to apply to social media and to include disinformation, particularly with incitement to violence.[592]

In practice, the State has taken advantage of this vagueness to justify arbitrary application of regulation. This has often been by assuming broad powers of regulation and using the threat (and use) of sanction to limit speech online, and to block websites.[593] As an example, the interpretation of the Act to apply to false information online has allowed it to be used to regulate a wide range of speech. During the Covid-19 crisis, the Commission established by the Act informed the public that it was a 'punishable offence' and to therefore refrain from 'misusing all forms of telecommunication services to circulate or share false or fabricated information on COVID-19 to create unnecessary panic among the general public' – as commentators have pointed out, it is unclear which actual provisions of the Telecommunications Act this is based on.[594] Similarly, the Commission has blocked websites and justified such measures as based

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and/or imprisonment. However, worth bearing in mind for the latter discussion of the Online Safety Act, the sanctions imposed are notably less severe, at least comparatively – with a fine being up to five thousand rupees and imprisonment up to six months. Part of the motivation for the new Act may therefore be not only to specifically tailor legislation to keep pace with online speech, but also to strengthen the sanctions.

[591] Democracy Reporting International, *supra* note 558, p 16; SLTA, s 69.

[592] *Ibid*.

[593] There are many examples of the State blocking websites in Sri Lanka, which has been identified as particularly concerning in terms of its impact to democracy. There has been a tendency in the past to react to news sources critical of the government by blocking domestic access. Furthermore, concern has been raised about instances in the past where certain sites have been blocked during elections. See J.C. Weliamuna, *The internet as a medium for free expression: A Sri Lankan legal perspective* (Centre for Policy Alternatives 2013), p 16, 17.

[594] Democracy Reporting International, *supra* note 558, p 16; 'Refrain from circulating false info on Covid-19: TRCSL', *DailyMirror* (2020) https://www.dailymirror.lk/breaking_news/Refrain-from-circulating-false-info-on-Covid-19-TRCSL/108-184897 .

on combatting alleged false information.[595] Right to information requests have revealed direct government orders to get the Commission to carry out the blocking of websites, attributed to orders made from the President's Office.[596] Particularly concerning for democratic norms in the country, is the fact that four websites were blocked for allegedly spreading false information about the President. The vague interpretation of the Act has therefore allowed the State to abuse regulatory powers (arguably tenuously interpreting the Act to the extent that such powers were manufactured), and directly limit public discourse critical of the government.

Another example is the blocking of social media platforms, using the justification of combatting incitement (including hate speech and false information) during periods of instability or violence/rioting. Responding to requests from the Ministry of Defence following incidents of riots in 2018, the Commission took steps to block access to social media, with the government claiming that temporary restrictions were necessary to prevent the spread of extremist and inflammatory material that could exacerbate the situation.[597] These restrictions continued after the situation was contained – and such measures were used again following the Easter Sunday terror attacks in 2019, with restrictions to social media justified to prevent the spread of misinformation.[598]

[595] Raisa Wickrematunge, 'Blocked: RTI requests reveal process behind blocking of websites in Sri Lanka' *Groundviews* (2017) https://groundviews.org/2017/12/08/blocked-rti-requests-reveal-process-behind-blocking-of-websites-in-sri-lanka/ - some of these websites are clearly news or political sites, showing a direct effect on political speech.
[596] Raisa Wickrematunge, 'RTI Reveals Lanka E News Blocked On Order From President's Office', *Groundviews* (2018) https://groundviews.org/2018/04/11/lanka-e-news-blocked-on-order-from-presidents-office-rti-reveals/ .
[597] Democracy Reporting International, *supra* note 558, p 17; 'Facebook and other Social Media Networks are temporarily blocked' *Newsfirst* (2018) https://www.newsfirst.lk/2018/03/07/measures-taken-monitor-social-media-websites-trc .
[598] *Ibid*; Jane Wakefield, 'Sri Lanka attacks: The ban on social media' *BBC* (2019) https://www.bbc.com/news/technology-48022530 .

The Telecommunications Regulatory Commission itself also faces criticism of susceptibility to political influence. The Act itself provides for some government influence – the relevant Minister is authorised to give directions, and the Commission is headed by the Secretary to the Ministry.[599] Whilst this on its own would suggest some potential for political influence, the issue of impartiality has been further called into question by subsequent actions. The role of chairperson has been occupied by the President's Secretary, and the Commission has been brought under the purview of the Ministry of Defence (which comes under the President, effectively bringing it under the President's purview).[600] Thus, the President may be able to exert influence through direct instructions, and through the chairperson. This could therefore be open to abuse, particularly in regards to political speech that is critical of or inconvenient to the government.

4.7.2.2 Computer Crime Act No. 24 2007

The purpose of this Act was to provide for the identification of computer crimes and to set out the procedures for investigation and prevention of such crimes.[601] It is apparent that this Act was not necessarily drafted with a primary intention of regulating speech online – its scope is far broader and pertains to cybercrimes in general. Provisions relate to a variety of cybercrimes such as unauthorised access to a computer, unauthorised damage, unlawfully obtained data etc.[602] However, the relevant provision to the subject of this thesis is Section 6. This provision sets out that where any person who intentionally causes a computer to perform any function, knowing or having reason to believe that such function will result in danger or imminent danger

[599] SLTA, Part 1 s 3.
[600] Democracy Reporting International, *supra* note 558, p 18.
[601] Computer Crime Act No. 24 2007 (CCA), preamble.
[602] CCA, Part 1 s 3; s 5: s 7.

to— a) national security, b) national economy, or c) public order - shall be guilty of an offence and shall on conviction be punishable with imprisonment of either description for a term not exceeding five years.[603]

Although it is not explicitly formulated to apply to speech, this provision has been applied by the State in relation to regulating online speech. In addition, it has been interpreted as applying to speech online in the form of violence and/or disinformation. Looking at the text of the provision, two elements of the offence are apparent – intention to commit the offence, and knowledge (or reason to believe) that it could result in danger or imminent danger. This would presumably preclude its application to misinformation, limiting it to disinformation (as this is based on intentional spread of false information).[604] What constitutes as danger or imminent danger is left vague, potentially allowing for broad application.[605] This is also a cognizable offence, which means that the police may arrest an individual without a warrant.[606] In practice, this law (and its interpretation to apply to online speech) has been used both to be utilised to regulate speech (in the absence of specific laws, for example with false information online), and to bolster justifications for arrests of online speech by coupling it with other general speech

[603] CCA, s 6. Notably, the term of imprisonment is far more severe when compared to the SLTA.
[604] However, in practice this distinction is not applied, and the law has been used to target false information in general – including misinformation. Democracy Reporting International, *supra* note 558, p 19.
[605] It is not specified whether this relates to violence, leaving the possibility for the State to justify restrictions based on wider potential harms. Interpretations in bad faith allow for State institutions to link broad potential dangers (without providing evidence of direct harm or causality), to national security or public order – Himal Kotelawala, 'Poorly worded legal provisions can be construed to cover fake news' *economynext* (2021) https://economynext.com/poorly-worded-legal-provisions-can-be-construed-to-cover-fake-news-sri-lanka-lawyer-82815/ . However, in a more positive trend, the recent Supreme Court decision in *Ramzy Razik* (discussed in Chapter Three in terms of its decision relating to other limitations) has provided some clarity in narrowing this element of the offence – in that case, the State's vague justification of potential danger was insufficient, and the Court determined that the lack of any actual danger occurring, as well as lack of evidence to show imminent danger to public order, meant that this limb of the offence was not satisfied. This would imply that the State pointing to the heated reaction to the expression in that case was insufficient, and this has been narrowed to relate to evidence of violence. *Ramzy Razik* SC/FR Application No. 135/2020 (2023), p 39.
[606] *Ibid*.

laws.[607] During the Covid-19 crisis, the Act was utilised to arrest people for 'spreading misinformation via social media', 'creating false propaganda' about the virus (allegedly harming national security), and for criticising public officials (in relation to their handling of the pandemic) on Facebook.[608] The power granted to make arrests without a warrant has been utilised not only in direct application of the law – but also to generally target and stifle speech. In 2021, the police informed the public to 'refrain from promoting false information on social media individually or in an organised manner.'[609]

What is particularly concerning is that the police highlighted their power to make arrests without a warrant. This thinly veiled threat is easy to identify as having a chilling effect on public discourse. It also serves as an example of the argument raised in this thesis that the formulation and evaluation of speech laws in a post-conflict or reconciliation context are affected by its specific domestic factors. The public in Sri Lanka would be especially wary of the State abusing these powers, and even more disinclined to engage with public debate with the knowledge that institutional safeguards are relatively weaker. An arrest without warrant can be arbitrarily imposed, face delays in getting redress (with court delays, financial burden etc.), and perceived unlikelihood of accountability (State officers being held liable for misconduct).

4.7.3 Enacting the Online Safety Act

[607] In *Ramzy Razik* (note 605), as with other cases, this Act is used in conjunction with other laws (such as the ICCPR Act). This can be viewed as a way of justifying an arrest in terms of online speech, hoping for at least one charge to stick by picking multiple laws, and validating an arrest without a warrant.

[608] Democracy Reporting International, *supra* note 558, p 19, 20. It seems that in addition to being used to bolster the justification of arrests through general/hate speech laws – its specific use has been to interpret it to allow for the regulation of false information online. This could explain some of the motivation behind the introduction of the Online Safety Act, to ensure specific powers available to the State.

[609] Zulfick Farzan, 'Refrain from promoting false information; can be arrested without warrant; police', *Newsfirst* (2021) https://www.newsfirst.lk/2021/06/08/refrain-from-promoting-false-information-can-be-arrested-without-warrant-police .

As seen in the above discussion, the existing regulatory framework for online speech would likely have been viewed as inadequate by the State in terms of the amount of regulatory power it provides and lack of specificity. Rather than specific provisions relating to the main issues of online speech, the State would have to interpret it to cover these in individual cases – leaving them open to criticism and the potential for a prosecution under these laws to not survive judicial scrutiny. The motivation for bringing in the new law can therefore be viewed as filling this gap, empowering the State with specific regulatory powers over online speech. In addition, governments have pointed to previous instability (such as riots affecting national security and public order), hate speech (and incitement to violence), and combatting crises (powers to address speech online such as false information during the pandemic) – to justify the necessity to increase regulatory powers and to directly address the main issues in online speech. The passage of the Bill into law has been controversial. Even before the law was enacted, the proposed Bill attracted significant criticism for its potentially chilling effect on free speech. Concerns were raised about its independence, broad powers to restrict speech, and failure to adequately consult with and incorporate the recommendations of experts.[610] In addition to concerns about the repressive nature of the Bill, criticism was raised that it was rushed through parliament, with inadequate space for debate or review.[611]

4.7.3.1 Supreme Court Determination on the proposed Bill

[610] 'Sri Lanka: Withdraw the Online Safety Bill' *Article-19* (2024) https://www.article19.org/resources/sri-lanka-withdraw-online-safety-bill/ ; see also the Asia Internet Coalition's letter to the Minister of Public Security highlighting issues in the Bill such as severe criminal sanctions and vague definitions in the offences – 'Asia Internet Coalition's Submission On The Draft Online Safety Bill, Sri Lanka' (2024) https://aicasia.org/download/876

[611] Meenakshi Ganguly, 'Sri Lanka's Proposed Internet Law Threatens Upcoming Elections' *Human Rights Watch* (2024) https://www.hrw.org/news/2024/01/23/sri-lankas-proposed-internet-law-threatens-upcoming-elections ; 'Sri Lankan Parliament votes on controversial online safety bill' *Hindustan Times* (2024) https://www.hindustantimes.com/world-news/sri-lankan-parliament-votes-on-controversial-online-safety-bill-what-is-it-101706000666176.html .

The Online Safety Bill, facing opposition from the public, civil society organisations, and opposition politicians, was challenged in the Supreme Court. The Supreme Court is able to review proposed Bills and assess its compatibility with the Constitution and its fundamental Rights guarantees. It can then direct how such a Bill can be enacted in a way compliant with the Constitution. The Supreme Court, in its Determination found that over thirty clauses in the Bill were incompatible with the Sri Lankan Constitution.[612] Noting issues with the formulation of the Bill, the Court proposed several amendments that would bring it within better compatibility with the Constitution. Two key examples of issues with the Bill are discussed below.

4.7.3.2 Expanded scope

Although framed as pertaining to safety online (and therefore presumably most relevant to cybercrime and specific objectives of protecting internet users from online content deemed harmful), the wide range of offences seem to extend beyond what would be expected. Clause 17 in the Bill (subsequently adopted as Section 16) sets out an offence where an individual 'intentionally and maliciously seeks to outrage the religious sentiments of any group by communicating a falsehood that insults or aims to insult that group's religion or religious beliefs.'[613] In the Court's opinion, this would go beyond what would be expected in terms of the scope of a law addressing online safety.[614] The Court stated that 'while the ostensible aim

[612] 'Observations on the Online Safety Act, No. 9 of 2024', *Human Rights Commission Sri Lanka*, Press Notice No. HRC/P/i/E/08/02/24.
[613] Supreme Court Special Determination S.C.(S.D.) *Online Safety Bill* (2023).
[614] Notably, this terminology echoes the wording of the Penal Code, discussed in Chapter Three. This can be viewed as a reproduction of existing offences, and also implies a formulation of a hate speech law. Framing such laws in terms of outraging religious sentiments are deeply problematic in terms of free speech - see Chapter Three.

of Clause 17 is to protect religious sentiments from intentional and malicious falsehoods, its actual scope extends beyond the remit of "online safety", as traditionally understood. Online safety, in its quintessential sense, is concerned with safeguarding users from immediate digital threats, such as cyberbullying, phishing, scams, or exposure to harmful content. The focus is on creating a safe environment where users can navigate and interact without fear of personal harm, privacy breaches, or digital manipulation'[615] – showing concern as to government overreach, and that the inclusion of such provisions would change the nature of what would ordinarily be expected to be within the objectives of legislation governing online safety. Similarly, the introduction of clauses that focus on broader issues of national security and public order (such as Clause 21 of the Bill, subsequently Section 19 of the Act), 'deviates from the principal objective of protecting internet users and the public from online harm and providing for their safety.'[616] It is also 'overly expansive and not strictly aligned with the intended scope of the proposed law.'[617]

4.7.3.3 Vague terminology

The Supreme Court in its Determination highlighted significant issues as to the terminology of the offences which are framed in vague terms that do not set out clear parameters. Without specific definitions and parameters, they are 'amorphous, open to varied interpretations contingent upon individual or situational perspectives…the lack of precise delineations may lead to misinterpretation or abuse.'[618] The Court emphasised the negative effect that such terminological inadequacy can have on free speech (as well as it being inconsistent with

[615] S.D. note 613 p 51.
[616] *Ibid*, p 53. The clause pertains to false statements that cause officials to mutiny, or induces the public to commit an offence against the State or public tranquillity.
[617] *Ibid*, p 53.
[618] *Ibid*, p 52.

Constitutional free speech guarantees). Some of the clauses are described as being 'broad and vague to the point of being nonsensical.'[619] Furthermore, the imprecise terminology would prevent a reasonable person from reliably knowing what would come within the parameters of the offence and would self-censor, resulting in a chilling effect on free speech.[620] The concerns raised by the Court at this point highlight both deficiencies in the legislation, as well as a recognition of its potential negative effect on public discourse. This provides a useful basis to support some of the criticisms that will be raised later in this chapter when discussing the provisions of the enacted legislation.[621]

Despite the challenges raised against the proposed Bill, it was rushed through Parliament and eventually passed. The resulting Act has been criticised as (although adding certain amendments) failing to comply with the Supreme Court Determination due to included sections and omissions.[622] Although the Act does not seem to comply with the Supreme Court Determination (and can therefore be seen to contain provisions that are contrary to Fundamental Rights, including free speech guarantees in Sri Lanka), the Court is not able to Judicially review legislation once it is enacted.[623] Although a petition was brought to the Supreme Court claiming that the Act was invalid due to non-compliance with the Determination, the Court refused leave to proceed with the application, recognising that it was specifically excluded from jurisdiction over enacted legislation.[624] However, it is able to

[619] *Ibid*, p 49.
[620] *Ibid*, p 50.
[621] Some of the criticism will highlight the vague terms used in the Online Safety Act, and the Supreme Court determination shows a recognition of these potential issues. This would support the argument that these deficiencies can negatively affect public discourse, and therefore be contrary to establishing a speech framework that promotes democratic participation in reconciliation.
[622] 'Observations on the Online Safety Act, No.9 of 2024', *Human Rights Commission of Sri Lanka*, Letter to Speaker of Parliament (2024) https://www.hrcsl.lk/wp-content/uploads/2024/02/HRCSL-Letter-to-Speaker-on-08-02-2024.pdf .
[623] The Constitution of the Democratic Socialist Republic of Sri Lanka, s 80 (3).
[624] Supreme Court Fundamental Rights Application No. 37/2024; the Court also cited *Gamage v Perera* (2006) 3 SLR 354 p 359, reiterating that the Constitution has removed the Court's powers to review the legality of the

conclude on the manner in which the laws are sought to be enforced by the State.[625] Thus, as the Online Safety Act has been passed it will not be able to question the validity of the Act itself but may judge on how it is used.

4.7.4 The Online Safety Commission

Before proceeding into an examination of the provisions of the Online Safety Act that relate to governing online speech as relevant to this thesis, this part of the chapter will briefly consider the Online Safety Commission established by the Act. This is necessary as, not only will it be a key part of how the speech provisions are applied, but it has also attracted criticism and concern in regard to its powers and independence. As the newly established institutional regulatory mechanism specifically constituted to apply regulation over online speech, an evaluation of it features will provide insight into the potential effects of the Act. Section 4 of the Act establishes the Commission and sets out its purpose of achieving the objectives of the Act.[626] The Commission will consist of five members with relevant qualifications, who are appointed by the President subject to the approval of the Constitutional Council.[627] The President may also suspend or remove members of the Commission.[628] The Chairman of the Commission shall be appointed by the President.[629] The powers of the President over the

Act; the Court is also unable to review issues with the legislative process in which the Act was passed (the Bill was certified whilst Parliament was prorogued), *Wijewickrema v Attorney General* (1982) 2 SLR 775.

[625] *Ramzy Razik, supra* note 605, p 24, 25.

[626] Online Safety Act (OSA), No. 9 of 2024, Part 1 s4.

[627] OSA, s 5 (1). In practice, the requirement for approval of the Constitutional Council may not be an effective check on executive power. The Executive Presidency in Sri Lanka means that a disproportionate amount of power is centralised, and the Constitutional Council can be pressured to act as a rubber-stamp – 'Political crisis brews over Constitutional Council's legal position' *The Sunday Times* (2023) https://www.sundaytimes.lk/231126/columns/political-crisis-brews-over-constitutional-councils-legal-position-539529.html

[628] OSA, s 7 (2). Removal from office is subject to approval from the Constitutional Council and a hearing of the relevant member. The President can suspend the member until the date of the hearing. This can be contrasted with the Human Rights Commission which contains (at least relatively) better safeguards on the President's ability to remove members (such as an order supported by a majority of parliament for removal from office) – Human Rights Commission of Sri Lanka Act, No. 21 of 1996, s 4 (1) (b).

[629] OSA, s 8.

members of the Commission may impact its ability to function independently. The powers of the Commission are far reaching and include a variety of regulatory controls including - issuing notices to remove prohibited statements, issuing notices to internet service providers or intermediaries to disable access or to remove statements, carry out investigations, issue codes of practice, advise the government, and to obtain the assistance of the police to conduct investigations.[630]

4.8. The Online Safety Act 2024

4.8.1 Introduction

Having set out some of the background context to Sri Lanka's previous framework for regulating online speech, and the passage from Bill to enactment of the Online Safety Act – this section will now move to the substantive part of analysing its provisions and effects. This is important in terms of the wider themes of this thesis due to the substantial effect on the speech framework in Sri Lanka that the Act may contribute to, and the relevant criticisms of its provisions (as will be examined below) that may affect democratic participation within the reconciliation process. As mentioned previously, the scope of this Act is broad and applies to a range of offences. It is therefore necessary to narrow the focus of analysis to that most pertinent to the aims of this thesis. Due to the broad nature of the Act which includes many aspects of regulation that can affect public discourse, it may be necessary to justify some omissions. Firstly, provisions relating to online safety such as child abuse, online cheating (fraud), and contempt of court will not be considered. Although these regulations are relevant to discussions of free speech online, they are less directly related to the main focus of this thesis

[630] OSA, Part 2 s 11 (a) – (q).

which considers the protection of political speech to promote participatory democracy conducive to reconciliation. Secondly, there are provisions that are relevant to discussions about political discourse but will be excluded as they are beyond the scope of this thesis. This is particularly the case with regard to provisions relating to regulations that impact internet intermediaries and service providers. As discussed earlier in this chapter, State influence on internet intermediaries can pose significant risks in terms of the potential for abuse and overreach. However, in the interests of narrowing the scope of this discussion to comport with the aims of the thesis, it is necessary to prioritise examination to the key features of online speech in terms of how regulation will affect political discourse and reconciliation (State action on individual speech) – whilst discussions as to the regulations of platforms may require further inquiry in separate research.[631]

This section will therefore focus on two main areas of online regulation established in the Act – False information and anonymous speech. These two features of online speech receive particular prominence and attention within the Act,[632] and have been extensively discussed in the previous parts of this chapter, setting out its importance as key features of online speech,

[631] However, this does not mean that the impact of this is completely excluded. The justification for limiting prohibited statements and directing internet intermediaries to censor (political speech) will be based on provisions relating to key aspects of online speech that will be assessed. Essentially, what is excluded is an analysis of the mechanisms and reach of the State in terms of direct effects on the intermediaries (and imposing liabilities on intermediaries), but not the actual issues of speech. For example, the Act empowering the State to direct intermediaries and place regulatory burdens on internet services warrants separate inquiry as to the relationship between the State and platforms - and its impact on free speech – but for the purpose of this thesis, it will only be considered in terms of how such powers affect the application of the main provisions considered (i.e., enforcing provisions relating to anonymous speech or false information). Although State power over the intermediaries is not directly considered, unduly onerous provisions that are considered can be seen to be even more repressive because of these powers. See Coe, *supra* note 493, p 214 - discussing how imposing statutory responsibility on internet services can both potentially benefit public discourse, as well as be criticised for its potential threat to free speech, discussed in the context of the UK's Online Safety Act. This is perhaps representative of how the Online Safety Act (2023) of the UK differs – it is primarily based on imposing duties and regulation on internet service providers, whilst the Sri Lankan OSA focusses on powers to compel services to comply with enforcing the action taken (by the State against individuals). Although the UK OSA does include individual offences (including false communications provisions, somewhat similar to false statements in Sri Lanka), the two Acts remain different in that the Sri Lankan Act does not impose general duties of regulation on service providers, beyond complying with those specifically directed by the State in individual cases enforcing the Act. For similar reasons, provisions relating to financing online locations etc. will be left to other research.

[632] See OSA, preamble; Part 3; Part 6.

and its particular relevance in terms of its impact on political discourse (and effect on free speech in a reconciliation context). By setting out some of the key issues in relation to these aspects of online speech and in particular its relation to a reconciliation context, the examination of the relevant provisions in the Act can be assessed in terms of how it may affect democratic participation in practice.

4.8.2 Anonymous speech

The previous sections of this chapter set out some of the reasons why anonymous speech may be beneficial for public discourse, particularly in a reconciliation context such as in Sri Lanka where there are challenges in encouraging democratic participation. This will be relevant for some of the criticisms of these provisions of the Act, later in this section. However, it has also been pointed out that there are concerns regarding the potential harm of anonymous speech, as a particular feature of online speech, which forms the basis of some of the motivations of State regulation. A joint Cabinet Memorandum presented to the Cabinet of Ministers highlighted these motivations in the context of the drafting of the OSA, showing that their intention was to formulate provisions that could enable the State to '…combat contemporary challenges online such as inauthentic online accounts and bots which manipulate and distort public opinion'.[633] The intention of the Act is therefore to empower the State with specific powers to combat this feature of online speech and keep pace with technological development.

4.8.2.1 Identifying inauthenticity

[633] Supreme Court Special Determination *supra* note 613, p 33.

Although the discussion of the provisions within this subsection is based on issues of anonymous speech (having identified this feature of online speech as of particular importance), the terminology of the OSA does not directly refer to it as such. It is therefore open to interpretation what aspects of anonymous speech come within the scope of the Act. The relevant provisions of the Act refer to 'inauthentic online accounts and coordinated inauthentic behaviour.' In the section at the end of the Act which sets out interpretation of definitions, an inauthentic online account is defined as 'an online account that is controlled by a person other than the person represented (whether by its user, unique identifier or other information) as its holder, and the representation is made for the purpose of misleading the end users in Sri Lanka of any internet intermediary service as to the holder's identity.'[634]

Coordinated inauthentic activity is defined as 'any coordinated activity carried out using two or more online accounts, in order to mislead the end users in Sri Lanka of any internet intermediary service as to any matter, but excludes any activity carried out using online accounts- (a) that are controlled by the same person; and (b) none of which is an inauthentic online account or is controlled by a bot.'[635] A strict reading of the definition of an inauthentic account could be argued to ostensibly relate to pseudonymous speech. The definition suggests that what is being targeted are online accounts that represent the identity of the speaker as someone else (i.e., pseudonymous), as opposed to accounts that are anonymous by withholding the identity of the speaker. The element of misleading the end users as to the holder's identity further supports this by implying that what is targeted is the use of an account in a way that represents it as another person. Essentially, 'misleading' implies something different to withholding (an anonymous username is different from the use of a real name or image that

[634] OSA, s 52 (1).
[635] *Ibid*.

people would believe is the identity of a person). However, it remains to be seen how this will be interpreted and applied in practice. Although there may be relatively clear-cut cases (such as an account made in someone's name or image without their knowledge or consent, used to impersonate them and convince the public that this person is behind the account), other applications may be less clear and may also apply to anonymous speech. If a strict reading of the definition is applied, a Court may be persuaded that an online account that clearly withholds not only identity, but any reference to identity, does not come under these provisions. For example, an anonymous account that uses random numbers and symbols as a username with a blank display picture, is unlikely to mislead as to identity.

However, what is the position if a generic name or AI generated picture is used? It may be possible for this to come within these provisions (the State could argue that some people may believe this to be their real identity), even though this is a feature of anonymous speech that is not necessarily with the intent to mislead. Another question that arises is: at what point does a representation of an account become misleading? Besides clear examples of falsely claiming they are another person, there may be the possibility that some instances where an account claims to be an expert, a senior official, a person affected by a policy, from a certain class or social/economic background etc., is disputed by the State as being misleading. Perhaps most concerning to political speech is the question of how this may affect satire. Satire often uses pseudonymous accounts to lampoon and criticise people and matters of political interest – and it may be deemed to mislead end users.[636]

4.8.2.2 OSA powers over anonymous/pseudonymous speech

[636] This is of course subject to the Courts balancing and recognising the strong protections for political speech that includes satire when assessing how these provisions apply – however in practice it may still provide a justification for the State to exercise power using these provisions to restrict inconvenient or embarrassing speech.

The provisions of the OSA do not necessarily ban outright anonymous or pseudonymous speech – but rather serve to provide the State with the power to regulate it and limit its protection.[637] In instances where the Act will apply (where an inauthentic account is used to communicate a prohibited statement), the Commission will be able to impose significant restrictions on an inauthentic account. This includes the power to issue a notice to an internet intermediary requiring it to refrain from permitting its services being used by the online account, and/or permitting it to interact with any end user.[638] Where such notice has not been complied with, the Commission will submit an application to the Magistrate's Court, which can then impose an order applying the directions of the notice.[639] As has been previously discussed in this chapter, anonymous speech can provide a facilitating role in helping to promote engagement in public discourse. In a participatory democracy, there may be valid reasons why people choose to contribute through pseudonymous accounts – particularly in a context such as Sri Lanka where recent history and social factors may make people less comfortable with revealing their identity online when engaging in political discussion. Content that is produced and shared through anonymous accounts may therefore be of particular value to public discourse in such contexts, as it can contain genuine political contribution critical of the State (as well as popular majoritarian opinion) that can be shared without fear of reprisal. The effect of the provisions of the OSA relating to inauthentic accounts allows the State to remove access to this type of speech and may be open to abuse. Once a notice (or subsequent

[637] The relevant provisions are not framed as targeting any instance of inauthentic accounts, but specifically when in conjunction with it being used to communicate a 'prohibited statement' – OSA, Part 6, s 31 (2) (b). Prohibited statements mainly relate to false statements, which is discussed in the next section of this chapter.
[638] OSA, s 32 (1) (a) and (b).
[639] OSA, s 32 (4). This can be made to have effect either indefinitely or for a specified period not exceeding three months, OSA Section 32 (5). There are several subsections setting out how the internet intermediary will have to appear before the Magistrate, with them eventually deemed to have committed an offence and liable to imprisonment of up to seven years or a fine up to ten million rupees – OSA s 32 (11). As mentioned previously, issues relating to holding intermediaries liable are not specifically addressed except to show how the Act empowers regulation. In this case, the power to compel intermediaries in this way demonstrates how anonymous speech is negatively impacted by the legislation.

order) has been imposed, a speaker will be burdened with having their account removed and having to find the resources to appeal. Even if it is eventually reinstated, it is easy to envisage how this could be abused by the State to effectively exclude speech from political discourse (for example, a popular pseudonymous blog that is critical of the government being restricted just before an election period).

Another concerning part of the powers granted by the OSA in relation to anonymous speech, is the powers of disclosure that it provides for. Where a person aggrieved by an alleged communication of a prohibited statement brings a complaint to the Commission and specifies the absence of information – the Commission '…shall make an application to the Magistrate's Court by way of a petition and affidavit seeking a conditional order directing the internet intermediary on whose online location such prohibited statement was communicated, to disclose the information regarding the identity of the person who communicated the prohibited statement.'[640] The Magistrate's Court will consider whether the statement was prohibited, disclosure is for the sole purpose of identifying the person who communicated the statement, and whether it is a 'proportional and necessary response in all of the circumstances of the matter before the Court, taking into consideration whether the petitioner's right to disclosure of the information is outweighed by any countervailing right or interest of the person sought to be identified.'[641] The Act also provides for civil action to be instituted in the District Court to apply for an order to disclose information relating to the identity or location of the person who communicated a prohibited statement through an inauthentic online account.[642] The Court will consider whether the information sought is necessary to initiate legal proceedings and whether 'the aggrieved person's right to get such information disclosed is outweighed by any

[640] OSA, Part 4, s 25 (1) and (2).
[641] *Ibid* (3) (a) – (c).
[642] *Ibid* s 26 (1).

countervailing right or interest of the person sought to be identified.'[643] The Act clearly provides significant avenues for disclosure, allowing for a person to be identified if a case is brought against them. This is not based on counteracting an immediate harm nor the interests of the audience in knowing the identity of the speaker, but the right of the petitioner in bringing proceedings.

As discussed previously in this chapter, such powers are open to abuse where they can be applied, through strategically targeted or arbitrary cases, to identify anonymous speakers – effectively removing any anonymous protection.[644] The effect of this can have significant implications for a speaker. They may genuinely fear retaliation by the State or parts of the public if they are exposed. Although the provisions contain clauses that require the Courts to balance the rights or interests of the speaker, it may not be clear to what degree this may be applied in practice, nor whether the Courts will be able to accurately determine the risk to the speaker if they are exposed. It would therefore seem that there is a lack of adequate safeguards in place to protect a speaker if their information becomes required to be disclosed – an issue that was recognised by the Supreme Court in its Special Determination on the Bill. The Court noted a lack of safeguards to protect the confidentiality of information that may be obtained during proceedings or investigations carried out and suggested amendments that would help secure it. This would require every person engaged in an investigation under the Act to maintain strict confidentiality with regard to all information obtained in the investigation and restrictions on them disclosing it to any other person or for any other purpose (with criminal sanctions if found to have contravened this).[645] Unfortunately, these safeguards were not adopted, and the

[643] *Ibid* (2) (a) – (d).
[644] See *supra* note 459.
[645] S.C. (S.D.) *supra* note 541, p 60. Service providers would also not be held liable under civil or criminal law for disclosure for the purposes of an investigation.

Act does not adequately provide for protection.[646] The practical implications of this are discussed in more detail below.

4.8.2.3 Effects of the OSA and limitations on anonymous speech

At this point it is worth briefly recalling some of the discussion in the earlier parts of this chapter in order to assess the impact of the OSA on public discourse through its provisions relating to anonymous speech. Anonymous speech was identified as a key feature of online speech, bringing with it many challenges of regulation and concerns about its potentially harmful effects. This includes its potential disinhibiting effect, use by malicious speakers to spread harmful content, and preventing the audience from a full appraisal of the nature of an expression (gauging its credibility with knowledge of the author). However, it is also apparent that there is value in anonymous speech to public discourse. Anonymous (including pseudonymous) speech can be political, with a long history of it being utilised to criticise the State, and as a facilitator of democratic participation. The topics that are most politically relevant, may also be the most controversial, and people may be especially concerned with maintaining their anonymity when discussing these issues. The public's willingness to enter political debate may be predicated on their ability to do so without fear of public or State reprisal. This motivation to remain anonymous can be in terms of general concerns of privacy, livelihood, public backlash – but also relate to genuine fears of violent retaliation. This is particularly the case in a reconciliation context such as in Sri Lanka, where these fears are magnified and more apparent. Reiterating the point that has been raised throughout this thesis

[646] Statement on the Online Safety Act, *Centre for Policy Alternatives* (2024) https://www.cpalanka.org/statement-on-the-online-safety-act-no-09-of-2024/#:~:text=The%20Centre%20for%20Policy%20Alternatives,constitutional%20democracy%20in%20Sri%20Lanka .

– in such contexts, an analysis of the law itself and its effects cannot be taken in isolation and is especially dependant on specific contextual factors. Such States suffer from capacity (of institutions to protect rights), willingness (of the State to maintain democratic norms), potential of abuse (with a history of State repression), and public distrust or fear of the State. Anonymous speech can arguably be even more valuable (and needs protection) because the democratic participation necessary for reconciliation may not be possible when the public is wary of the State, the majoritarian public, and the potential ramifications of open political discussion. These issues must be taken into account when considering the provisions of the OSA.

As discussed above, the OSA effectively removes protection for anonymous speech by allowing for enforced disclosure of identity without sufficient safeguards to ensure confidentiality. This means that the State will have effective means to target speakers using anonymous accounts that communicate information that is inconvenient to the State or unpopular with the majority.[647] This may also produce substantial negative effects on public discourse and participation with its indirect impact that causes a chilling effect on free speech. Not only is legitimate political speech at risk of being stifled when anonymous speakers are identified (without safeguards for confidentiality) and possibly face retaliation – but any future speakers will be dissuaded from participating. People will be aware that speech that is posted online anonymously or by pseudonym, will be subject to disclosure of their identity if a complaint is made to the Commission and investigations brought. The substantial powers that the Commission has in terms of compelling disclosure (and lack of strict confidentiality clauses), means that anonymous speech loses its use. Those wary of the State (and the public

[647] In the previously discussed *Author of a Blog* Case (*supra* note 476), the interests of the public in knowing the identity of the speaker (revealed by a news company) were weighed against his privacy. The OSA provides for direct State interference based on prohibited statements that are assessed by a Commission that has already been criticised in terms of its potential lack of independence. In a similar situation with an official writing an anonymous political blog criticising State institutions, it would be easy to envisage the State (directly or by proxy) bringing a complaint which then identifies the speaker, opening them to retaliation.

majority) will be especially disincentivised to participate in political discussion. The risk of being exposed, and potential resultant harm (physical, livelihood, harassment etc.) may strongly dissuade them. Deep societal divisions (and recent memories of State abuse) would mean that those in the minority would be fearful of contributing to discussion, and those that were able to through anonymous accounts will no longer believe that to be viable. They will also be less likely to trust the institutions enforcing this.[648] Consider, for example, an individual from a minority from a part of the country that was in conflict during the war, criticising a senior military officer. They would be particularly concerned that their identity could lead to them being branded as part of terrorist sentiment (by both the State and the public). They would also be fearful of the significant influence that such an individual could have – both in terms of pressuring institutions to target the individual (to bring a case and order disclosure), and to harass, threaten, or harm them once their identity is discovered.[649]

Another example could arise if a person anonymously criticises majoritarian religious sentiment or LGBT issues within a repressively conservative context. They would have genuine fears of their identity being exposed and facing social consequences or even physical harm. The overall effect of the Act's approach to anonymous speech therefore deprives public discourse of valuable political contributions by severely limiting an aspect of online speech that could benefit democratic participation and reconciliation. An argument that this is necessary because of the potential negative effects of anonymous speech may not be

[648] They may be less likely to trust the objectivity of the Commission itself, or even the Judicial system – particularly the lower Courts. In addition, if restrictions have been imposed to prevent circulation of a prohibited statement, the person will have to appear before the Magistrate (without safeguards for their identity) to show cause why such an order should not be made absolute – making anonymous speakers both exposed and unlikely to be willing or able to contest restrictions even before investigations have concluded. OSA, s 24 (5), (6).
[649] Notably, the first reported arrest under the Act has concerned speech criticising politicians - https://colombogazette.com/2024/02/11/sri-lanka-makes-first-arrest-under-controversial-online-safety-act/ ; and an Army Commander obtaining an order against a YouTube channel that alleged he was engaged in corruption - https://www.dailymirror.lk/breaking-news/Army-Commander-obtains-order-against-YouTube-channel-under-Online-Safety-Act/108-282656 .

persuasive, considering that the powers of disclosure are not framed to prevent harm (a more reasonable case could be made to require disclosure where there is clear incitement to violence, but as will be discussed in the next subsection, prohibited statements can apply to a broad range of online speech), nor are they subject to enough safeguards.

4.8.3 False Statements

Part 3 of the OSA sets out an extensive list of prohibited statements. These are almost all in relation to communicating false statements and apply to a range of related offences.[650] It is clear from the attention that false statements receive in the OSA that it forms a large part of the motivation of enacting this law – despite concerns that much of the scope for content regulation established by the Act goes far beyond what would ordinarily be considered within the ambit of online safety (i.e., cybercrimes etc.).[651]

4.8.3.1 What comes under false statements?

As previously discussed in this chapter, false information can include a range of material that can be challenging to categorise. This can include disinformation, misinformation, and malinformation. The government's motivations in terms of the type of speech that was intended to be targeted was often framed as necessary to combat fake news and misleading assertions

[650] S 52 (1) sets out the list of offences contained in Part 3 that come under the definition of prohibited statements. The offenses of contempt of court (through false statements), online cheating (fraud by false information) and harassment (by publishing private information) whilst prohibited statements, will not be considered here in order to keep analysis on the provisions that most impact political speech for the purposes of this thesis.

[651] See OSA, preamble, Part 3, and other provisions that are based on prohibited statements; for the Court's concerns regarding the scope of the Act, see S.C. (S.D) *supra* note 613.

when such laws were initially proposed.[652] Although the OSA frames this as false statements (which could include a range of false information), the Act itself does provide some clue as to the intended target. Section 52 (1) of the OSA which sets out the interpretation of terminology within the Act, defines false statements as '…a statement that is known or believed by its maker to be incorrect or untrue and is made especially with intent to deceive or mislead but does not include a caution, an opinion or imputation made in good faith.' Ostensibly, the key elements present of knowledge or belief of falsity and intention to deceive or mislead suggest that these statements will apply to disinformation, and misinformation/ malinformation will be excluded from the scope of these offences. A person sharing misinformation should not come within the scope of these offences as they will not have knowledge of its falsity and can therefore be seen to have communicated in good faith without intent to deceive. Malinformation, whilst also not necessarily coming within this scope (due to being based on true material, albeit with intention to deceive), may be open to interpretation depending on the case. For example, if a statement is made by a person claiming politician X hates people from Y group citing statements taken out of context, could it be known to be incorrect? It is difficult to predict how this may be interpreted in practice.[653] There have been some suggestions that legislation that specifically targets disinformation could result in a 'liability gap' due to excluding material such as malinformation that could potentially cause harm.[654] However, the difficulty in identifying such potential harms would mean provisions based on a lower threshold of intention to cause

[652] 'Laws to curb fake news via new media' *Daily News* (2021) http://archives1.dailynews.lk/2021/04/21/local/247129/laws-curb-fake-news-new-media ; Nethmi Rajawasam, 'Sri Lanka's online truth law can be revised, President tells Facebook' *economynext* (2023) https://economynext.com/sri-lankas-online-truth-law-can-be-revised-president-tells-facebook-131990/ .

[653] This might depend on whether there is attributed any significance in there being knowledge of a statement being incorrect or untrue, as opposed to terminology that states knowledge of false information. The UK OSA (s 179 (1) (b)), frames this in terms of knowledge of false information, and it may therefore be up to the Courts to determine the intention of Sri Lanka's OSA. This may either be an unnecessary complication caused by the drafting of the Act or an inconsequential distinction in practice - and for the purposes of this discussion it will be presumed to relate to false information until further judicial examination.

[654] Coe, *supra* note 493, p 231 – such concerns were raised in the UK during consultations pertaining to the UK OSA, and by the Law Commission itself.

likely harm are at odds with free speech guarantees (the intention to cause potential harm is difficult to assess with clarity or consistency, particularly in the case of malinformation, and therefore may result in overbroad application).[655]

4.8.3.2 Powers to use against false statements

The OSA provides for a range of methods to regulate false statements. A person aggrieved by such communication may make a complaint to the Commission which may then begin investigations.[656] If satisfied that there is sufficient material, the Commission may issue notice to the person who communicated the statement to remove it (prevent its circulation).[657] There will be twenty-four hours to comply with this notice, failure to comply will result in the Commission issuing a notice to the internet intermediary/service provider to disable access by end users to the statement and to remove it from such online location.[658] If this is not complied with, the Commission may apply to the Magistrate's Court to obtain an order directing the person or service provider to comply.[659] In addition, an affected person may directly apply to the Magistrate's Court to obtain an order to prevent circulation of an alleged false statement.[660] The person against whom such order is made will have to appear before the Magistrate within two weeks to show cause as to why such order should not be made absolute.[661] If the order is not complied with, they will have committed an offence and be liable for criminal sanction.[662]

[655] *Ibid* – although a lower threshold based on harm was suggested (in the UK OSA), the government recognised its potential negative impact on free speech and decided not to include it.
[656] OSA, Part 4, Section 23 (1), (2), and (5).
[657] OSA, s 23 (6) (a).
[658] OSA, s 23 (6) (b), (7). The internet service provider will also be required to comply within twenty-four hours.
[659] OSA, s 23 (8). Similar sanctions apply as with direct application to the Magistrate's Court.
[660] OSA, s 24 (1).
[661] OSA, s 24 (5) and (6).
[662] Imprisonment of up to five years or a fine of up to two million rupees.

The Magistrate can then also order access to the online location containing the prohibited statement to be disabled, or for the relevant communication to be removed.[663]

The above are the preventative measures available under the Act to prevent the circulation of certain prohibited statements. If an offence is found to have been committed, sanctions can include imprisonment up to 3 years,[664] 5 years,[665] and 7 years[666] – and/or fines. Clearly the Act provides for significant powers in relation to false statements and its offences, both in preventing its dissemination pending investigation and in imposing criminal sanctions. The fact that any person can engage the effect of these provisions by claiming to be an aggrieved party and making a complaint to the Commission, makes its preventative mechanism particularly concerning. Unpopular speech may attract arbitrary complaints either directly or by proxy to prevent circulation of information, placing a burden on the speaker and preventing them from contributing to public discourse. The relevant provisions should therefore be carefully considered in terms of whether they contain enough in the way of clarity and safeguards to not be at risk of abuse.

4.8.3.3 General prohibition

Section 12 of the OSA sets out a general prohibition of false statements. If 'any person, whether in or outside Sri Lanka, who poses a threat to national security, public health or public order or promotes feelings of ill-will and hostility between different classes of people, by communicating a false statement…' they will have committed an offence and be liable for criminal sanction. At the outset, the reasons for the Supreme Court's reservations about the

[663] OSA, s 24 (9).
[664] OSA, s 16.
[665] OSA, s 12.
[666] OSA, s 19.

terminology used are apparent. The terms apply in relation to an offence that encompasses a broad range of potential speech, enforcing more general speech regulation compared to what would be expected of specific online safety. Presumably, the inclusion of some of the terms can be attributed to State concerns regarding recent instability (for example, the State could point to disinformation spread online during the Covid-19 pandemic to justify the inclusion of public health etc.). The use of the words 'promotes feelings of ill-will and hostility' echoes that of the Penal Code, which has already been criticised as not fit for purpose in the modern context.[667] What is meant by different classes of people has been interpreted to include ethnic and religious groups – and this part of the offence can therefore be seen to establish a hate speech law.[668] The terms ill-will and hostility are extremely vague and difficult to apply to an objective degree. It is easy to imagine arbitrary abuse of this provision to stifle legitimate political speech that is merely controversial or unpopular. By reproducing these problematic terms, it further entrenches these outdated laws. Another issue in the formulation of this offence is that it is based on a 'threat to' national security, public health, and public order. Whilst the definition of a false statement includes an element of intention, this provision does not appear to do so. Therefore, there is a conceivable possibility that if someone knowingly communicates disinformation but does not intend to pose a threat to the stated areas, they may still be deemed to have committed an offence. The lack of clarity in what constitutes a threat would mean that the State has substantial powers in determining speech that can be regulated. By not specifying the threshold of harm which brings this provision into effect, its potential application is far too broad and open to arbitrary use.[669]

[667] See Chapter Three for discussion relating to Penal Code (Section 120).
[668] *Ramzy Razik, supra* note 605, p 30.
[669] This can be contrasted to some extent with the UK OSA, which in its offence for false information sets out as part of its limbs not only knowledge of falsity, but also intention to cause non-trivial psychological or physical harm to a likely audience (s 179 (1) (c)). Although this itself has been criticised as potentially inadequate in terms of satisfactory identification of what that type of harm means in practice and clarity as to the threshold (see Coe, *supra* note 493, p 232), it at least serves as a relatively clearer indication of the scope of the offence as well as setting out a higher threshold.

4.8.3.4 Inciting/causing a riot

As this thesis has established when setting out the criteria for a free speech framework conducive to reconciliation, the issue of violence, and in particular that of communal riots that descend past State control, are a significant concern. Arguably, this is one of the distinguishing features of such States, as it demonstrates the context of recent instability and risks of potential group violence, that are more pronounced in such circumstances. Therefore, States will be more likely to be specifically concerned about material that not only harms individuals but can incite reactions between deeply divided groups that end up in violent riots. Despite these concerns, the other part of this is that laws in these contexts are also relatively more open to arbitrary use and abuse, and the chilling effects of speech regulation can be made worse by public distrust in the State and its institutions. Therefore, laws attempting to address this issue must be subject to significant safeguards. The OSA sets out an offence of causing a riot if 'any person, whether in or outside Sri Lanka who maliciously or wantonly, by way of an online account or through an online location, by communicating a false statement, gives provocation to any person or incites any person intending or knowing it to be likely that such provocation or incitement will cause the offence of rioting to be committed…',[670] with sanctions split between if rioting occurs in consequence of the provocation and if rioting has not occurred.[671] The terminology used here again mirrors that of the Penal Code.[672] The Supreme Court in its Special Determination highlighted the issues with these terms, describing them as 'laden with subjectivity', and

[670] OSA, Part 3, s 14.
[671] OSA, s 14 (a) and (b). If rioting has occurred, the person will be liable to imprisonment up to 5 years, and/or a fine of up to five hundred thousand rupees; if rioting has not occurred, imprisonment of up to 3 years, and/or a fine of up to three thousand rupees.
[672] Penal Code of Sri Lanka (1885), s 150 'Whoever maliciously or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation…'

without explicit definitions included they can become 'malleable, susceptible to varying interpretations based on individual or situational biases.'[673] The Court also implied the potential for negative effects on political speech where '…an impassioned critique or an assertive viewpoint, while strong in its expression, may not inherently be malicious. However, in the absence of clear delineations, such expressions risk being branded as malevolent based on the personal interpretations of those who evaluate them.'[674] In deciphering the intended scope of this provision, some consideration may be necessarily as to the decision to include separate aspects, i.e., maliciously or wantonly; and intending or knowing it to be likely. Either this is a tautology (which is made difficult to identify by nature of the drafting due to the vague terms and lack of definition), or it exists to deliberately expand the scope of the offence. The wording of the provision by referring to maliciously and intending, implies an element of intent to cause a riot. Malicious intent could also be interpreted as a higher threshold than intent on its own, with it being coupled with particularly spiteful or malevolent intent to cause violence. However, by including 'wantonly' (and knowing it to be likely) it suggests that there is scope for the offence to apply beyond direct intent if criminal recklessness and callous disregard for consequence is present.[675] Although this potentially suggests that whilst the scope of the offence is extended to communications without intent, it is still limited to criminally indifferent/reckless statements – it is difficult to predict how this will apply in practice. The interpretation of these provisions by the State when being enforced, may be used to justify targeting inconvenient political speech. 'Wantonly' could be interpreted as merely irresponsible as deemed by the State. This is even more concerning when considering that a person will be liable of an offence even if a riot does not occur. It would already be exceedingly

[673] S.C. (S.D.) *supra* note 613, p 48.
[674] *Ibid*.
[675] The approach of other Courts in interpreting the meaning of these terms may be useful, albeit decided in completely different legal situations, see *Smith v Wade* 461 U.S. 30 (1983); *Philadelphia, W. & B.R.Co. v Quigley*, 62 U.S. 202 (1858).

difficult to attribute and prove causative effect between a statement and the occurrence of a riot. The fact that an offence can be committed without a riot means that it must be based on speculation by the State. The State could claim that a statement, even without intent, could have been likely to cause a riot and move to restrict it and impose criminal sanction. A person could therefore (in addition to being censored) potentially face imprisonment for a statement that they did not intend to cause violence, and where such violence did not even occur. Arbitrary application could easily trammel legitimate political speech where the State targets speech, criticising it by claiming a potential link to rioting.[676] Considering the severe penalties involved, this can easily cause a significant chilling effect on free speech – particularly in a context where there is distrust of State institutions, people will be reluctant to participate in public discourse when they could be potentially linked to this offence. There would not be enough foreseeability of how it will be applied to a statement, and will be dependent on the State's interpretation.

4.8.3.5 False Statements and religion

Yet again, the OSA seems to reproduce outdated and problematic offences taken from the Penal Code and adds strengthened sanctions.[677] Sections 15 and 16 relate to communications that disturb a religious assembly or outrage religious feelings.

[676] For example, they could point to the damage caused during previous situations such as the widespread protests in 2022 to link certain political speech to rioting. Presumably, as an international example, statements relating to Black Lives Matter could come within the scope of such a provision by implying a link to the rioting.
[677] See Penal Code, s 291 – 'Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies…' (imprisonment up to 1 year), and s 291B 'whoever, with the deliberate and malicious intention of outraging the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class…' (imprisonment up to 2 years).

Disturbing a religious assembly is covered: 'Any person, whether in or outside Sri Lanka who by communicating a false statement, voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies...' will have committed an offence.[678] Although the OSA does not provide a definition of what is meant by voluntarily, this can be inferred by reference to the Penal Code which defines it as meaning where a person '…causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.'[679] It is difficult to decipher what the scope of the offence is as it is almost absurdly vague. What would constitute a disturbance to a religious assembly? Would someone be guilty of an offence if they falsely claimed it will rain on Sunday and people did not show up for mass? What if they falsely claimed that the pastor was stuck in traffic? The Supreme Court in its Special Determination pointed out the deficiency in the provision, deeming the clause too 'broad and vague'.[680] It further raised concerns as to its chilling effects on free speech – '…due to this broad and imprecise nature of the offence, no reasonable person would know what would constitute this offence…individuals would self-censor their statements and this offence would have a chilling effect..' and would therefore be inconsistent with free speech guarantees in the Constitution.[681]

Outraging religious feelings is covered: 'Any person, whether in or outside Sri Lanka who with the deliberate and malicious intention of outraging the religious feelings of any class of persons by way of an online account or through an online location by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of

[678] OSA, s 15. A person found to have committed this offence will be liable to imprisonment up to 3 years, and/or a fine up to three thousand rupees.
[679] Penal Code, s 37.
[680] S.C. (S.D.) *supra* note 613, p 49. Described by the Court as being vague to the point of being nonsensical.
[681] *Ibid*, p 50.

that class by communicating a false statement…' will have committed an offence.[682] This again represents a substantial departure from what would ordinarily be considered relevant to legislation pertaining to online safety.[683] By incorporating offences that are already problematic from the Penal Code, it reproduces similar challenges of application and effects on free speech.

Not only is it unclear what will constitute outrage for the purposes of this offence, but it could also easily apply to a range of political speech. A country that has deep divisions on ethno-religious grounds, will clearly require open discussion on religion for a reconciliation process to be effective. People will not be able to predict what sort of statement may end up coming within this provision and will avoid participating in public debate on any issue that may be controversial to religious sentiment. Outrage is clearly subjective and essentially forms a limitation on speech based on offence. People will be outraged if they are offended, if their religion is criticised, or their orthodoxy is challenged – and the application of these provisions will inevitably be based on the outrage of the dominant groups, resulting in a veto of the majority. In practice, criticism of religious institutions or figures, atheistic ideas, discussion of past abuse by religious majorities etc. will attract outrage and the State may use this to stifle such speech – not only through direct criminal sanctions, but by ordering content to be removed and forcing them to justify the statement. This ties in with what has been discussed previously about anonymous speech – such a situation would clearly leave a person with significant concerns for their safety (if there is public outrage related to an expression, then they may also be a likelihood of violent retaliation), and they would avoid making the expression at all.

[682] OSA, s 16. A person found to have committed this offence will be liable to imprisonment up to 3 years, and/or a fine up to three thousand rupees.
[683] S.C. (S.D.) *supra* note 613, p 51. The Supreme Court pointed out that this goes far beyond conventional online safety concerns, i.e., immediate digital threats such as cyber harassment, phishing, scams etc.

Both these provisions contain significant problems in relation to democratic participation and reconciliation. They restate offences that are already deeply flawed in a modern context and essentially further entrench a form of blasphemy law.

4.8.3.6 False statements that cause mutiny or an offence against the State

This part of the Act sets out a provision that relates to false statements that can affect national security and public order. 'Any person, whether in or outside Sri Lanka who communicates any false statement, with intent to cause any officer, sailor, soldier, or airman in the navy, army or air force of Sri Lanka to mutiny, or with intent to cause fear or alarm to the public, induces any other person to commit an offence against the State or against the public tranquillity…' will have committed an offence.[684] This is once again a reproduction of an existing offence contained in the Penal Code. Notably, the offence contained in the Penal Code also relates to the communication of false statements which means that the effect of the OSA's provision is only to increase the criminal sanction (from 2 years to 7 years).[685] The penalty is also more severe than the other offences which demonstrates a particular targeting of such speech by the Act.[686] What is meant by 'fear or alarm' and 'public tranquillity' is not explained in the Act. One explanation may be that it incorporates elements of an offence relating to seditious

[684] OSA, s 19.
[685] Penal Code, s 485 – 'Whoever circulates or publishes any statement, rumour, or report which he knows to be false, with intent to cause any officer, sailor, soldier, or airman in the Navy, Army, or Air Force of the Her Majesty to mutiny , or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State or against the public tranquillity, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
[686] Possibly explaining the inclusion of a separate provision. Even though such speech could come under the general provision of prohibited statements (s 12) which includes false information that pose a threat to national security and public order – this inclusion suggests a more specific offence was formulated for a harsher sanction.

speech.[687] It is not clear how this will apply in practice and how it will affect public discourse. 'Fear or alarm' could apply to political speech which by necessity must address issues that may alarm the public. These types of speech are also likely to attract the attention of the State and motivate it to censor it. For example, strong criticisms of the State's policies, alleged corruption, or the state of the economy could cause fear and alarm to the public – and the State could point to previous examples of instability (rioting etc.) to claim its effect on public tranquillity. Political speech will often inherently contain material relating to some of the most important issues in public discourse that are heavily contested, and therefore can cause alarm. Arguably, this is part of political speech itself by causing alarm to draw attention to an issue and affect political change. A person is unlikely to confidently be able to foresee how such speech is received by the public, nor will they know to what extent it could 'induce' another person to commit an offence. This issue is heightened by the severe penalties imposed, which means the public may be particularly reluctant to participate and criticise the State. If some sort of instability occurs, there may be fears that the State will retaliate by clamping down on speech and targeting a range of statements and attribute a link between a statement and the event.

4.8.3.7 Effect of the OSA on free speech within the reconciliation process

Having gone through the main issues relating to online speech, justifying why it warrants special attention, and the provisions of the OSA - this last part of the chapter will consider applying the findings of this chapter to the criteria that have been set out in this thesis. To recap,

[687] The Penal Code contains a chapter which relates to public tranquillity and contains offences pertaining to unlawful assembly, rioting, obstructing public officers etc. which may imply the harm that is targeted by this term – Chapter 8, Of Offences Against the Public Tranquillity.

a free speech framework that is conducive to the reconciliation process in Sri Lanka (whilst taking into account some of the ground realities) must: protect political speech and democratic participation, allow for a broader range of political speech that can benefit reconciliation, account for limitations that may be necessary (considering factors such as the lack of capacity to combat incitement and the threat of communal violence going beyond State control), and take particular care in having strong safeguards to prevent arbitrary use and abuse of speech laws (taking into account the relatively precarious position of free speech and room for abuse present in such contexts).

Firstly, some of the positives that may help the free speech framework in line with the above criteria will be considered. The OSA, despite its issues, does at least to some extent provide a targeted legislative instrument to address some of the issues of online speech. State regulation of online speech has been based on laws that are outdated to apply to current online speech issues (for example, with the use of the Telecommunications Act which predates social media) – and tenuously interpreting provisions to apply to online speech issues from laws that clearly were not intended to apply, with the drafters unlikely to have envisaged current online speech issues (both the Telecommunications Act and the Computer Crimes Act). This may at least provide some clarity, at least in so far as people have a clearer idea of where to look to determine their potential liability.[688] The Act also addresses the potential harm of incitement to violence (and potential for communal riots) through the communication of false statements.

In situations where this is a concern (for example, disinformation which potentially incited communal rioting in the past), an affected party is provided with an avenue (and framework to

[688] See *supra* note 609 for an example of how the police institutions used a range of offences (some barely even relevant) to target alleged false information. Even the State institutions seemed unsure as to which laws apply.

both claim an offence has been committed and try and mitigate its immediate spread) by applying directly to the Commission or Magistrate's Court.[689] When faced with particularly harmful disinformation that could result in violence, minorities may be more likely to be able to take measures to urge the State to address it. The Act also contains some limited degree of safeguards for example, in providing for the exclusion of opinions or imputations made in good faith in defining false statements[690], and taking into account the right or interest of a person against whom disclosure is sought.[691] Every offence under the Act is non-cognisable (a warrant will be necessary to make an arrest under this Act) and a bailable offence, which is an improvement compared to some of the other laws previously discussed.[692]

However, the overall effect of online speech regulation in Sri Lanka is unlikely to, at least in its current form, adequately meet the challenges of free speech as linked to reconciliation. This chapter has set out some of the reasons why anonymous speech may be beneficial to democratic participation. This is particularly the case in a context such as in Sri Lanka where individuals (especially from vulnerable or minority groups) are reluctant to openly engage in public debate. The effect of the OSA is to severely restrict any protection that such speech would have, with powers of disclosure that are not coupled with adequate safeguards. Whilst the Act's provisions can be used to target harmful speech (hate speech and incitement), the Act is plagued with vague and overbroad terminology that is open to abuse. The public is therefore dependent on the State to ensure responsible application of these powers – which is unlikely to inspire confidence in the current context. Democratic participation is likely to therefore be negatively

[689] People may feel safer making a complaint to the Commission than to the police.
[690] OSA, s 52 (1).
[691] OSA, s 25 (c).
[692] OSA, s 43 (a) and (b). See previous discussion on Computer Crime Act (cognisable) and ICCPR Act (non-bailable). This may however be somewhat perfunctory in practice. Previous instances demonstrate a willingness to use multiple offences under different laws to make an arrest, and in practice this may be possible to arrest without warrant or bail.

affected as people will not be able to confidently predict what constitutes an offence and will fear arbitrary censorship.

The wider scope of political speech that may be necessary for reconciliation is also negatively affected by the OSA. For example, its provisions relating to religion essentially set out a blasphemy law. Discussions relating to religion are vital in this context as they form a key part of political debate, particularly considering a recent history of ethno-religious division. Reconciliation will be difficult to achieve to a lasting degree without people being able to openly discuss and critique these issues. The OSA, by reproducing existing offences from the Penal Code that are already inimical to free speech, not only further entrenches them – but increases the sanctions available to the State. Although an argument may be made that the offences are limited in scope (offences in relation to false statements would appear to apply to disinformation, with the intention/knowledge elements precluding some of the chilling effects by having a higher threshold), this is unlikely to prevent a chilling effect. Not only are the offences themselves vague, but the harm to free speech under the OSA can effectively preclude expression from public debate regardless of whether it ends up being an offence. For example, the effect of requiring disclosure of a pseudonymous account's identity or blocking access to/ordering the removal of an expression, will affect the speaker's ability even prior to a determination of criminality. If this is abused, it can render a person's contribution ineffective (for example, removing political criticism before an election by claiming it is false). This is compounded by both a lack of trust in State institutions, and the lack of independence of the Commission from the Executive. The Commission is also protected by the Act from prosecution which means it is unlikely to be viewed as accountable for overreach.[693]

[693] OSA, s 45 (a) and (b).

4.9. Conclusion

This chapter has set out some of the main issues in regulating online speech and applied it to the Sri Lankan context. The effects of the OSA pose challenges to establishing a free speech framework that is conducive to reconciliation. Reflecting the theme of this thesis, speech laws cannot be looked at in isolation. A proper analysis within a context like Sri Lanka must account for the ground realities. A population with a recent history of conflict and deep divisions are particularly vulnerable to chilling effects on their speech. No matter how well laws are drafted, they are dependent on the capacity and independence of institutions to uphold rule of law. Whilst the criteria set out in this thesis has assisted in pointing out some of the potential negative impacts of the current online speech framework – it can also provide some guidance as to how it may be improved in practical terms.

Firstly, the criteria may be used as a normative framework with which to apply and limit the scope of the OSA. Much of the criticism made in this chapter of the provisions of the OSA relating to speech have been mirrored by the Supreme Court. Although the Court is precluded from reviewing enacted legislation (thus despite considering some of the speech provision incompatible with Constitutional protections, they are unable to make the Act invalid), it can decide on the merits of how it is applied. Considering the concerns that have already been raised, there is scope for them to limit its arbitrary use.[694]

[694] Albeit dependent on it even getting to that stage. The State is able to use the Act to block statements and it may not always be the case that people will be able or willing to appeal. This is even more so considering the lack of confidentiality protections. A person may comply and remove their post to avoid further hassle.

When considering such cases, it may be pertinent to consider some of the points raised in this thesis. The application and enforcement of the Act by the State could therefore be viewed not only in terms of whether it abides by Constitutional protections, but also in terms of whether it fits the criteria for reconciliation. As a stated goal of the State and making up part of a return to democratic norms provided for in the Constitution, a consideration of the impact of a restriction on free speech and its relevance to reconciliation can be relevant. For example, if deciding a case where the provisions relating to religion have been used, the Court can consider the added political relevance to reconciliation of such speech, requiring stronger protections. The Court could also consider interpreting strong safeguards. For example, where there is a requirement to take into account the rights and interests of the person against whom disclosure is sought. Whilst this may end up being interpreted as requiring some degree of direct evidence of harm if an identity is revealed – a case could be made that taking into account the potential chilling effect (that is heightened in a post-conflict context) of disclosure (or even the threat of being exposed), should allow for more general concerns to be taken into account. If an alleged prohibited statement relates to a military or police officer, there is a stronger claim to protect a person's identity for fear of retaliation, even without specific examples of threats made.

Secondly, whilst the Act is enacted and therefore precluded from judicial review, it can still be affected by the political process. With much criticism already levelled against the Act, it would in theory be possible to limit it by bringing pressure to repeal or change it. Much of the criticism of the Act which has been examined in this chapter would form a substantial part of calls to change the Act – but this could be further bolstered by pointing out its detrimental effects to the reconciliation process and free speech. Amendments proposed could also take this into account and ensure that they are formulated in a manner that promotes democratic participation and speech framework favourable to reconciliation.

Lastly, the points raised here can inform as to wider methods and mechanisms of countering the main issues. An important part of this is capacity building. As stated previously the laws themselves cannot be taken in isolation, and one of the most significant problems in Sri Lanka is not just the drafting of the laws but practical issues of application.[695] For example, police officers may not be able (or willing) to distinguish disinformation with the element of intention that brings it within the scope of a false statement, and misinformation/other speech that does not come under these provisions. In fact, the vague terminology of the provisions for prohibited statements not only mean that the public may be unsure of its scope, but the institutions themselves. This could lead to them (either intentionally or not), misapplying them based on a misinterpretation of the terms. One way to combat this is through educational initiatives (workshops, guidelines for interpretation etc.) that equip officers to understand the scope of the Act.

[695] See previous discussion of instruments such as the ICCPR Act which has been abused in practice, far beyond its ostensible reach – Chapter Three.

Chapter Five

Emergency laws: Public Security and Prevention of Terrorism

5.1. Introduction

Since independence, as discussed in the introduction to this thesis, Sri Lanka has faced near-continuous circumstances of conflict that have led to the use of emergency powers by the State. Most notable has been the use of the Public Security Ordinance 1947 (PSO) and the Prevention of Terrorism Act 1979 (PTA), the use of which has been criticised as imposed disproportionately and encroaching upon fundamental rights.[696] The extraordinary power conferred upon authorities by these instruments has led to much repression that has contributed to an environment hostile to free expression. Clearly, in times of turmoil and upheaval, nations will at times tend to find that they have to take extraordinary measures to respond to a threat. The problem of determining the extent to which such action is justifiable and legitimate whilst mitigating its effect on individual liberties has been an historical concern.[697] Such times of instability heighten reactive emotions in governments and populations and run the risk of disregarding rights in the name of security.[698]

[696] The Public Security Ordinance, No. 25 of 1947 (as amended); Prevention of Terrorism Act (Temporary Provisions) Act No. 48 1979.
[697] John Lord O'Brian, 'Restraints Upon Individual Freedom in Times of National Emergency', Cornell Law Review, Vol. 26 Issue 4 (1941), p 523, 525.
[698] *Ibid*.

This chapter focusses attention on emergency powers for the following reasons:

Firstly, a history of continuous circumstances of conflict and instability, coupled with an overeager willingness of successive administrations to utilise emergency powers (often disproportionately) has meant that the need to balance the protection of fundamental freedoms in the country with these powers has been far from uncommon (this directly relates to the particular need to protect from violence in a reconciliation context). Secondly, the use of these powers by administrations as a tool to consolidate power and avoid accountability has meant that speech in the form of political dissent is placed at risk. Thirdly, the indirect effect of emergency powers and their ability to arrest, detain, seize property etc. leads to an uncertain atmosphere contributing to a chilling effect on free speech, particularly in times of upheaval where free speech may be all the more important. Fourthly, the extraordinary nature of these powers means that any change or improvements to the free speech framework in the country may be susceptible to circumvention by a repressive administration – meaning that it is reliant on adequate safeguards on these powers. Emergency laws present an unusual situation where they must be employed by bypassing the usual democratic structure – with the motive of protecting it. Whilst its use can limit free speech, an emphasis on democratic participation can provide the basis for establishing its limitations.[699] This chapter looks at how the current emergency law framework in Sri Lanka came into being, its justifications, how it works, its

[699] See Chapter One and Two for the theoretical framework. The discussions in this chapter directly relate to the issues discussed in Chapters Three and Four, as the speech framework/ instruments of limitation and safeguards are subject to the emergency law framework. Essentially, the discussions of those chapters would be incomplete without considering the effects of the emergency regime which may allow the State to bypass them or change their effect.

disproportionate impact on free speech, its vulnerabilities, and how it can be tailored in a way to protect democratic participation.

This chapter fits into the wider thesis by attempting to reconcile free speech in a democracy undergoing reconciliation, as discussed in Chapter Two, with the need to limit speech in extraordinary cases. If, as posited in this thesis (as set out in Chapter Two and expanded on in Chapters Three and Four), a focus on free speech (and political speech in particular) can benefit Sri Lanka's reconciliation process, then its limitation in times of emergency will be an important consideration. The efficacy of the speech framework and safeguards discussed in Chapter Three and Four are contingent on the effects and safeguards of the emergency laws. This is all the more so, considering that the extensive use of emergency laws in the recent past means that there is a high likelihood that these issues will continue to remain relevant in the future. Citizens of the country should have the confidence that their speech will not be unreasonably restricted through the guise of emergency. This chapter will argue, by linking the criteria set out previously in this thesis, that the emergency laws in Sri Lanka have been used in a way that undermines democracy whilst apparently seeking to support it. This chapter puts forward an argument for considering limiting the impact on free speech of emergency laws, based on the role of speech as aiding democratic participation.

5.2. The Public Security Ordinance

5.2.1 History of The Public Security Ordinance

The Public Security Ordinance 1947 was brought in during the period of British rule as one of the final laws brought in towards the end of the colonial era – mainly to counter political dissent

at the time.[700] Even back then, concerns were raised in the legislature (then called the State Council) as to how these powers could be misused against innocent people.[701] Initially, these emergency powers were utilised to counter the effects of political worker strikes and disruption by trade unions and Marxist factions.[702] These measures were justified as necessary to protect essential services such as food and transportation that were integral to the nation's survival.[703]As the social and political context of the country shifted over the years with increasing tensions, the focus of these emergency powers moved away from trade union activity to these new threats – and to clamp down on dissent. Two armed insurrections (in the 1970s and 80s) by the Marxist Janatha Vimukthi Peramuna (JVP) led to the government bringing in emergency regulations to supress the violence and detain the JVP leaders.[704] Rising ethnic tensions from the late 1970s onwards, fuelled by resentment over language and educational policies, resulted in the advent of an extremist Tamil secessionist movement.[705] The Liberation Tigers of Eelam (LTTE), developed into a highly organised terrorist group, using violence and terrorist attacks to further their secessionist aims. The national security implications and instability caused by this conflict, which developed into a civil war, has arguably had the most impact on the emergency law framework in Sri Lanka. From this period onwards, emergency laws were utilised in response to terrorist attacks. The continuing conflict meant that the period of emergency continued up until 2002 following a ceasefire agreement. However, after the assassination of Sri Lanka's Foreign Minister, Lakshman Kadirgamar, in

[700] 'Briefing Paper: Sri Lanka's Emergency Laws and International Standards' *ICJ* (2009) https://www.icj.org/wp-content/uploads/2012/05/SriLanka-emergencylaws-advocacy-2009.pdf , p 2.
[701] *Ibid* ; Dr. A. P. de Zoysa, member of Colombo South, from Hansard of the State Council debate, 10 June 1947.
[702] A. Jeyaratnam Wilson, *Politics in Sri Lanka 1947-1979* (MacMillan Press 1979), p 119.
[703] Radhika Coomaraswamy and Charmaine de los Reyes, 'Rule by emergency: Sri Lanka's Postcolonial Constitutional Experience', International Journal of Constitutional Law, Volume 2 Issue 2 (2004), p 272, 274.
[704] 'Authority without Accountability: The Crisis of Impunity in Sri Lanka' *International Commission of Jurists* (ICJ) (2012), p 26.
[705] Coomaraswamy, *supra* note 703, p 275.

2005 a new state of emergency was established. The state of emergency and emergency regulations continued after the military defeat of the LTTE in 2009, until 2011.[706]

Despite the end of the civil war, the emergency powers of the Public Security Ordinance still remain relevant in Sri Lanka. A state of emergency was declared, and emergency regulations were brought into force after the Easter bombings by ISIS influenced extremist groups in 2019 and in relation to the communal riots that followed. This precipitated a clampdown on the flow of information, nation-wide curfews, and the blocking of social media sites. In 2022, an economic crisis with fuel shortages, inflation and defaulting on international debts led to the government becoming increasingly unpopular. Public sentiment turned strongly against the government with mass protests demanding for the resignation of the President. On the 1st of April 2022, the President declared a public emergency through the powers of the Public Security Ordinance. Social media sites were once again restricted and a country wide curfew imposed.[707] However, this was short lived, and the state of emergency was revoked only 4 days later. Whilst the justifications for bringing in emergency laws have been varied and clearly present a serious restriction to free speech rights, some circumstances in times of crisis have meant that the State has had to balance these considerations.

5.2.2 Background to the roots of constitutional accommodation

[706] ICJ, *supra* note 704, p 27.
[707] 'Sri Lanka restricts access to social media amid protests' *DW* (2022) https://www.dw.com/en/sri-lanka-restricts-access-to-social-media-platforms-amid-protests/a-61343824; 'Social Media platforms blocked in Sri Lanka' *The Indian Express* (2022) https://indianexpress.com/article/world/social-media-platforms-blocked-sri-lanka-7850282/ .

The need for emergency state power in times of crises and its implications has been a pervasive problem that societies have grappled with throughout history. When States are faced with threats, governments must act swiftly to calm public fears and prevent a deterioration of the situation. When faced with serious threats to national security, the public will clamour for strong responses and politicians tend to be tempted to forgo rights in the interests of security. As Ackerman notes – 'They will only gain popular applause by brushing civil libertarian objections aside as quixotic'.[708] The potential (and temptation for the State to allow) for an emergency framework to become entrenched and continue beyond its intended period requires a cautious consideration of where to draw the line of necessity and prevent emergency laws becoming a permanent fixture rather than a temporary measure in extraordinary times (failure to do so may result in the safeguards discussed in relation to the speech framework in Chapters Three and Four ineffective in practice). In times of emergency, nations may require some flexibility in regard to its constitutional and legal structure as a way of responding to a crisis whilst needing to balance rule of law and democratic values – a compromise called 'models of accommodation'.[709]

The Roman Model

The Roman model has been described as having a strong influence on the development of the modern approach to emergency laws. In fact, their approach to this issue with the Roman dictatorship has been described as the prototype for all contemporary models of accommodation.[710] Following the end of monarchy in 509 BC, the new Roman republic aimed to prevent a return to the previous monarchical system by avoiding the centralisation of power

[708] Bruce Ackerman, 'The Emergency Constitution', Yale Law Journal, Vol. 113 No. 5 (2004), p 1029, 1030.
[709] Oren Gross and Fionnuala Ni Aolain, *Laws in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2009), p 17.
[710] *Ibid*.

in one individual. Instead, an executive branch of government was established that was headed by two consuls with enormous power. Despite both consuls being bestowed with near unlimited power over the army and jurisdictional exercise, these executive positions were based on two key principles to act as checks on power – collegiality and a limited period in office that could not be renewed.

Collegiality meant that each consul would be equal to the other in terms of powers and authority and could veto the other's decisions. Their period in office was limited by the fact that they could only be elected for the period of one year and could not be re-elected.[711] The Romans were cognisant that this system might not be suitable for swift decisive action necessary in times of emergency – and created the dictatorship to temporarily mirror a monarchical system when needed to counter an emergency situation by bestowing extraordinary power on one person.[712] Even the term 'dictator', deriving from dictus (which would translate as named or appointed) implies the nature of the role being beyond the ordinary system – the dictator was appointed, whilst all other magistrates (and consuls) were elected.[713] Either the consuls would decide who was to be appointed as dictator, or it could be decided by lot. Significantly however, officials were barred from selecting themselves, which meant that 'the consuls had every incentive to resist the call for dictatorship unless it was really necessary.'[714] The term of the dictator was a short one, limited to 6 months – a limitation that has been viewed as a main contributor to its success.[715] Whilst the Roman model was a novel solution to the circumstances of its historical context, it is not a practical model for the current era.[716] However, it does serve

[711] Max Cary & Howard H. Scullard, *A History of Rome down to the Reign of Constantine* (3rd Ed.) (New York: St. Martin's Press 1975), p 62, 63; Gross and Aolain, *supra* note 709, p 19.
[712] Sanford Levinson and Jack Balkin, 'Constitutional Dictatorship: Its Dangers and its Design', Minnesota Law Review, Vol. 94 (2010) p 1789, 1790, 1791.
[713] Gross and Aolain *supra* note 709, p 19 – 20.
[714] Ackerman *supra* note 708, p 1046.
[715] Gross and Aolain, *supra* note 709, p 21.
[716] Ackerman *supra* note 708, p 1046 – 1047.

as an example of the need for both extraordinary responses to emergencies and the need to provide for stringent checks and balances on these powers. It also goes to show that dictatorial powers in this context are not necessarily anti-democratic but can, with the right limitations, be used to protect democracy and rule of law – becoming a feature of constitutional democracy.[717] In Sri Lanka, the Roman model bears relevance to two features of the emergency law framework. They are: the President's unilateral ability to proclaim a state of emergency and bring in emergency regulations (as opposed to the Roman system where an individual could not make themselves dictator), and the temporal factors (not as a limitation of terms, but through the requirement for monthly parliamentary approval for extensions of emergency powers).

Martial law

Martial law was the approach used by common law systems to respond to emergency situations. Its conceptual basis could be seen to derive from military law (i.e. discipline, order and justice in the military) and originally would have only applied to soldiers, in wartime and military occupation. However, in time it developed into a system of extraordinary powers operating beyond statutory instruments and were designed to deal with times of crisis and violent occurrences.[718] There are two theoretical approaches to martial law. The Diceyan one views it as a common law right, deriving from the right (and duty) of both governments and citizens to respond to force in self-defence through preventative measures.[719]The second is that of Royal

[717] Levinson and Balkin, *supra* note 712, p 1791.
[718] Gross and Aolain *supra* note 709, p 31.
[719] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. Liberty Fund 1982), p 182-183.

prerogative, reserving the Crown's authority to preserve order.[720] Given Sri Lanka's colonial past, martial law has shaped both its experience of emergency rule and the development of its framework.

5.2.3 Background to passage of the PSO

The use of emergency powers and the debate over its infringement of civil liberties in Sri Lanka can be traced to its use by the British colonialists to quell dissent. Authorities used martial law to respond to riots in the Kandyan regions in 1848, with severe punishments of execution and banishment to quash the rebellion.[721] Notably, even during this period of colonial rule, the harsh actions of the administration led to heated protests by officials that demanded that Governor Torrington be recalled – and eventually led to a Parliamentary Committee of Enquiry into the colonial government (the members of the enquiry included future Prime Ministers William Gladstone and Benjamin Disraeli).[722] The Public Security Ordinance was passed by the State Council (the precursor to the current parliament, as the legislature established by the 1931 Donoughmore Constitution) on 11th June 1947 – shortly before the country gained independence on February 4th 1948. De Silva notes that much of the incentive for rushing through this legislation was to quell the radical activities of Marxist parties that were growing increasingly influential - the left-wing organisations, following a period of agitation and industrial action from 1945-1947, had increasingly been able to demonstrate a formidable challenge to the ruling government, now positioned as serious electoral contenders.[723] During

[720] J.V. Capua, 'Early History of Martial Law in England from the 14th Century to the Petition of Right', Cambridge Law Journal Vol. 36 Issue 1 (1977) p 152, 172, 173.
[721] Deepika Udagama, 'An Eager Embrace: Emergency Rule and Authoritarianism in Republican Sri Lanka', in Asanga Welikala (ed.), *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects* (Centre for Policy Alternatives, 2015), Chapter 6, p 288.
[722] Udagama, *ibid*, p 288; Kumari Jayawardena, *Perpetual Ferment: Popular Revolts in Sri Lanka in the 18th and 19th Centuries* (Colombo Social Scientists Association 2010), p 105-109.
[723] K. M de Silva, *A History of Sri Lanka* (Vijitha Yapa 2005), p 605 – 607.

the debates at the Bill stage, there were some council members that advocated for amendments to temper some of the excessive powers of the PSO by limiting the duration of a proclamation of emergency, requiring approval from the Council, and allowing for Judicial review – however this proved futile and the Bill was adopted without these safeguards.[724]

The PSO was amended several times in the following years. The first independent government of Ceylon following the end of British rule brought amendments in 1949 to limit some of the powers of emergency reflecting some of the proposals brought forward during the debate stage of the bill – such as requiring Parliamentary approval within 10 days.[725] Subsequent amendments were brought in, in 1953 and 1959, expanding the powers of emergency following left wing strikes and communal riots. In 1978, alleging misuse of the emergency powers by the previous government – the then government led by J.R. Jayewardene brought progressive amendments to the PSO. These amendments strengthened the authority of the legislature in relation to whether a state of emergency could continue to have effect. Parliamentary approval would be required to extend a state of emergency beyond 30 days.[726] However, these changes were largely nugatory in practice, due to the vast powers of the executive presidency, a deferential Parliament, and the introduction of the Prevention of Terrorism Act. The left leaning parties that had initially taken a principled stand against unfettered emergency powers when the PSO was introduced, enthusiastically adopted its use once in power.

5.2.4 Constitutional Provisions and the PSO

[724] Udagama, *supra* note 721, p 294.
[725] *Ibid*, p 295.
[726] Public Security (Amendment) Law (No. 6 of 1978).

Chapter Xiii of the Constitution of Sri Lanka sets out the constitutional provisions for public security. The chapter explicitly recognises the PSO (which predates the 1978 Constitution) and states that it 'shall be deemed to be a law enacted by Parliament'.[727] Emergency regulations brought through the PSO have 'the legal effect of over-riding, amending or suspending' any law – except provisions of the Constitution.[728] For the emergency regulations to come into effect, the President must first make a Proclamation declaring a state of emergency.[729] This must forthwith be communicated to Parliament.[730] This Proclamation will be valid for a period of 14 days and any further extension must be approved by Parliament.[731] If the Proclamation does not receive approval, then it will cease to have effect.[732] If Parliamentary approval is given, then the Proclamation will have effect for a month and may be extended further every month.[733] The original text of the Constitution provided for a significant safeguard to prevent arbitrary extension of emergency laws. In the original text, if 'a period of ninety consecutive days or a period of ninety days in the aggerate during six consecutive calendar months' has passed since the initial declaration of emergency, a two-thirds majority would be required to approve a further extension of the state of emergency. However, this provision was repealed by the 10th Amendment to the Constitution. As previously noted, the Constitution deems the PSO to be a law enacted by Parliament. This means that it may not be challenged on the grounds of incompatibility with the Constitution as Article 80 (3) prevents any court or tribunal inquiring into or questioning the validity of such an Act. As the Constitution does not provide for judicial oversight over a declaration of a state of emergency or actions taken in good faith

[727] The Constitution of the Democratic Socialist Republic of Sri Lanka (1978), s 155 (1).
[728] *Ibid*, 155 (2). This therefore directly impacts the discussions of Chapters Three and Four, and the framework and instruments that were examined, as they may be altered or overridden by the PSO.
[729] *Ibid*, 155 (3).
[730] *Ibid*, 155 (4).
[731] *Ibid*, 155 (6).
[732] *Ibid*, 155 (8).
[733] *Ibid*, 155 (5).

during this period, this means that Parliament is the sole point of oversight in this regard.[734] Furthermore, Article 154J (2), introduced in the Thirteenth Amendment to the Constitution, explicitly seeks to prevent judicial review of emergency Proclamations – which has been noted by some as coinciding with moves by the courts to invalidate certain regulations at the time.[735]

The Constitution provides for fundamental rights to be restricted by the emergency regulations in the interests of national security.[736] However, it also explicitly prevents the PSO from overriding provisions of the Constitution in Article 155 (2). This suggests that although limitations on the fundamental rights in the interests of national security are permitted, the emergency regulations cannot completely override or replace them.[737] Despite this, the ouster clauses prevent the courts from reviewing the actions of the State Officials which prevents judicial oversight and leaves room for them to breach fundamental rights through their conduct.[738] The approach of the courts to this issue will be considered later in this chapter. Once a state of emergency is declared, Part II (5) of the PSO provides for the President to make any regulations that 'appear to him to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community.' The PSO provides for the President to, at his discretion, issue a wide range of regulations relating to detention of persons,[739] seizure of property,[740] suspension of laws,[741]

[734] Asanga Welikala, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Centre for Policy Alternatives, 2008), p 179.
[735] Coomaraswamy and de los Reyes, *supra* note 703, p 287.
[736]ICJ, *supra* note 704, p 28; Constitution, *supra* note 727, Article 15 (7).
[737] *Ibid*, p 28.
[738] *Ibid*, p 28, 29.
[739] PSO, s 5(2)(a).
[740] PSO, s 5(2)(b).
[741] PSO, s 5(2)(d).

calling out the armed forces,[742] establish a curfew[743] etc.. The President may delegate these powers,[744] and courts are prohibited from reviewing any action done in 'good faith' under the provision.[745] The courts are also prevented from questioning any emergency regulation, rule, or direction made under the PSO.[746]

5.2.5 Vulnerabilities in the PSO and its impact on the Freedom of Expression

5.2.5.1 Definition of Emergency

Ferejohn and Pasquino note that advanced democracies are largely able to deal with emergencies without the use of explicit constitutional powers, but rather through ordinary legislation framed as emergency laws – citing British terrorism legislation and the US Patriot Act as examples.[747] However, the need for dealing with emergency situations has meant that constitutional provisions for dealing with such situations are far from uncommon.[748] The potential for the misuse of such provisions has also been apparent in other countries.[749] Whilst it is not uncommon for constitutional democracies to provide for emergency powers, the approach to dealing with such emergencies is not uniform. One issue relevant to such variation is the difficulty in defining what exactly constitutes an emergency. The framework and application of these regimes are based on factors depending on the political situation and the context of the countries. The circumstances of a region, its history and stability (or lack thereof) can influence perceptions of emergencies and appropriate response.

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[742] PSO, s 12.
[743] PSO, s 16.
[744] PSO, s 6.
[745] PSO, s 9 (Unless by the Attorney-General).
[746] PSO, s 8.
[747] John Ferejohn & Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers', 2 International Journal of Constitutional law, Vol. 2 Issue 2 (2004), p 210, 215.
[748] *Ibid* p 210.
[749] *Ibid*, p 216.

The Sri Lankan Constitution does not impose an objective basis upon which emergency laws are to apply.[750] The President has sole discretion to declare a state of emergency. However, the PSO – whilst not giving a definition of the circumstances justifying the necessity for a state of emergency – does provide elaboration to its intended use. 'Where, in view of the existence or imminence of a state of public emergency, the President is of opinion that it is expedient so to do in the interests of public security and the preservation of public order, or for the maintenance of supplies and services essential to the life of the community', the President is entitled to declare a state of emergency and bring in emergency regulations. It is therefore possible to extrapolate from the PSO the objectives of the emergency laws, and to some degree, a general idea of the conditions that would require a declaration. One of the primary issues of definition in a State's constitutional accommodation of emergency laws is determining when the circumstances have reached a level of severity that justifies the operation of emergency powers.[751] The ICCPR defines a public emergency as a situation that 'threatens the life of the nation.'[752] The UN Human Rights Committee, whilst recognising the basis for derogation from the Covenant, has stressed that such derogations must be subject to safeguards.[753] Measures to derogate in states of emergency must be temporary and of an exceptional nature.[754] The Paris Minimum Standards define a public emergency as an 'exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes as threat to the organised life of the community of which the state is composed.'[755] The Siracusa Principles state that emergency

[750] Welikala, *supra* note 734, p 69.
[751] *Ibid*, p 117.
[752] International Covenant on Civil and Political Rights (1966), Article 4.
[753] ICCPR General Comment No. 29: Article 4 Derogations during a State of Emergency, *UN Human Rights Committee* (2001), para 1.
[754] *Ibid*, para 2.
[755] Richard Lillich, The Paris Minimum Standards of Human Rights Norms in a State of Emergency, American Journal of International Law Vol. 79 No.4 (1985) p 1072, 1073, (Section A 1 (a) and (b)).

measures may only be adopted when 'faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation.' A threat to the life of the nation is defined as one that 'a) affects the whole of the population and either the whole or part of the territory of the state; and b) threatens the physical integrity of the population, the political independence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.'[756] Internal conflict and unrest that do not present a grave and imminent threat to the life of the nation, are not considered valid justification.[757] Economic difficulties per se are also not valid justifications.[758]

These definitions suggest that there is a degree of international consensus on what constitutes an emergency, with regards to its exceptional and contingent nature.[759] The provisions of the PSO do not seem to abide by these definitions. As Welikala notes, terms included in the PSO such as 'in the interests of public security', 'in the opinion of the President' and 'expedient', puts it in conflict with Article 4 (1) of the ICCPR which sets valid circumstances as an emergency that threatens the life of the nation.[760] The lower threshold that the PSO seems to establish for an emergency, leaves room for its provisions to be abused and open for its use in circumstances far from an existential threat. This problem has been borne out in practice. The use of emergency laws has been near continuous through the years and its application frequent – as opposed to an exceptional measure. In fact, emergency powers have been utilised for matters of general government – these laws have been used to address issues far below the high threshold expected of an emergency and for things much more suited to being dealt with through ordinary legislative procedure. Some examples include subjects relating to the quality

[756] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1985) s 39.
[757] *Ibid*, s 40.
[758] *Ibid*, s 41.
[759] Gross and Aolain, *supra* note 709, p 251.
[760] Welikala, *supra* note 734, p 200.

of salt, school boards, banks, forestry, and driving licenses being regulated by emergency regulations issued by the President.[761] The ambiguity presented by the lack of objective preconditions for a declaration of emergency has paved the way for bypassing the 'inconvenient' democratic legislative procedures and ruling through emergency laws. Whilst the argument for why emergency laws may be necessary to protect democracy still holds true, the lack of a clear definitional benchmark preventing arbitrary use, impacts the legitimacy of the State through its potential for incursion into free speech in non-emergency situations (and unnecessarily bypassing the instruments and framework discussed in Chapter Three and Four).

When applying the discussions from the initial theoretical chapters of this thesis – it seems that this aspect of emergency law in Sri Lanka may fall short of the requisite standards. Reconciliation requires a robust protection of political speech and speech contributing to democratic participation. The fact that the use of emergency powers has been so extensive and arbitrary, means that it has gone far beyond the exceptional limits that would be expected. The uncertainty that this leads to, with democratic participation being limited through emergency laws, would be to the detriment of reconciliation. Citizens, particularly from minority backgrounds or areas, may feel their speech and ability to participate in the political process restricted. In addressing this, it may be worth looking at the jurisprudence of the European Courts. As discussed, the issue of arbitrary use of emergency laws presents a limiting factor to democratic participation. In *Ireland v United Kingdom*,[762] the court held that there should be consideration as to whether ordinary laws would have been sufficient to address the issue. Furthermore, in *Mehmet Hasan Altan v Turkey*, it was held that the measures must be strictly required by the exigencies of the situation.[763] Emergency laws must also not be a pretext to

[761] Udagama, *supra* note 721, p 312; Coomaraswamy and de los Reys, *supra* note 703, p 277.
[762] *Ireland v United Kingdom*, App No 5310/71, A/25, (1978) ECHR 1, p 212.
[763] *Mehmet Hasan Altan v Turkey* App no. 13237/17 (2018) ECHR p 94.

limit freedoms.[764] Such approaches go at least some way in safeguarding the democratic process and preventing the abuse of emergency laws, by ensuring its use is limited to exceptional cases. This would help bring Sri Lanka's emergency law framework more in line with one that promotes democratic participation and reconciliation (as set out in the previous chapters). Whilst it may admittedly be a high hurdle to expect the courts to take such a strong stance to enforce these principles, the discussions on the relevant jurisprudence later in this chapter may show that it is not entirely unreasonable to expect the courts to take a more active role, if these principles are accepted.

5.2.5.2 Parliamentary oversight

As stated previously in this chapter, the constitutional framework of emergency laws in Sri Lanka places Parliament in the role of providing oversight. A state of emergency must be communicated to the Parliament forthwith and extensions must be approved every month. Parliament also has the power under the PSO to add to, alter, or revoke an emergency regulation by resolution of Parliament.[765] Whilst this may initially give the impression that the legislature may have been able to play an effective safeguarding role, this has not been the case in practice. The legislature's role has been somewhat overshadowed by the powers of the executive presidency created by the 1978 Constitution, which accords vast powers to the President. The Parliament has essentially acted as a 'rubberstamp', approving consecutive extensions of emergency, and has not exercised their power to revoke emergency laws.[766] The monthly emergency debates are rarely, if ever, significant.[767]

[764] *Ibid* p 210.
[765] PSO, s 5 (3).
[766] Udagama, *supra* note 721, p 296; Coomaraswamy and de los Reyes, *supra* note 703, p 277.
[767] Welikala, *supra* note 734, p 203.

Notably perhaps, the short-lived state of emergency in April 2022 that only lasted four days, may in part be attributed to the precarious political position that the increasingly unpopular government was placed in. The sheer magnitude of the public outpouring of dissatisfaction which lead to mass resignations and political instability in the administration and party, likely meant that it may not have been a certainty whether the government would have been able to muster a majority to approve the state of emergency. It is therefore possible that this, contributed towards the declaration being revoked. This does not necessarily redeem the legislature which has mostly acted as a rubberstamp thus far, and the political climate during this period was unusual - but it does demonstrate the potential of Parliament to act as an oversight mechanism in the future.

5.2.5.3 Freedom of speech and the PSO

The emergency powers granted by the PSO, and the extensiveness of its use has far-reaching effects on the freedom of expression. Whilst there is a more general effect in the sense that the existence of this emergency framework allows for restrictions of fundamental rights including free speech (which is affected by the deficiencies and lack of adequate safeguards as discussed above) – there are also more specific ways in which the emergency laws impact free speech. These are both direct and indirect effects, as discussed below.

Direct effects

In times of public emergency (which threatens the life of the country and is validly proclaimed), there is international acceptance that there are justifiable circumstances where speech may be limited; however, as stated in the Johannesburg Principles, this must be 'only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.'[768] The PSO provides for charging any person who incites or encourages a labour strike in an institution which is deemed to be essential to the life of the community with a criminal offence.[769] This is directly at odds with international opinion that the suppression of industrial unrest is not a reason to restrict industrial unrest.[770] Previous emergency regulations brought in through the powers granted by the PSO provided for State censorship typically through the appointment of a Competent Authority as official censor.[771]

The Emergency Regulations of 2005[772] are particularly notable as an example of just how far reaching the effects of these powers on free speech can be. These regulations provided for extraordinary censorship powers such as:

- Allowing for the Secretary to the Minister of Defence to impose restrictions on a person's 'association or communication with other persons and in respect of his activities in relation to the dissemination of news of the propagation of opinions' that are prejudicial to national security.[773]

[768] Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995), Principle 3.
[769] PSO, s 17.
[770] Johannesburg Principles, Principle 2 (b.)
[771] Udagama, *supra* note 721, p 311.
[772] Sri Lanka: Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2005.
[773] *Ibid*, Regulation 18 (1) (vi).

- Making it an offence to distribute or make visible to the public any posters or leaflets, 'the contents of which are prejudicial to public security, public order or the maintenance of supplies and services essential to the life of the community.'[774]
- Stating that 'no person shall, by word of mouth or by any other means whatsoever, communicate or spread any rumour or false statement which is likely to cause public alarm or public disorder.' [775]
- Making it an offence to print or publish any document recording, give information or comment about pictures or films relating to any matter pertaining to the defence and security of Sri Lanka and any matter likely, directly or indirectly to create communal tensions. [776]

These regulations clearly gave the State a quite astonishing degree of control over speech. The regulations are framed in such broad terms that they arguably could cover almost any form of speech pertaining to the conflict at the time.[777] The nearly all-encompassing way in which these regulations have been framed would make it easy for someone posing no national security risk, exercising legitimate speech, to be guilty of an offence. The lack of clarity as to what constitutes public order, national security or prejudicial material, makes it extremely difficult for the layperson to understand what is permissible. It is essential that such restrictions should be limited to the most exceptional of cases where there is a clear and direct threat to national security. Furthermore, it is vital that these restrictions are formulated in a way that is foreseeable to the average person so that they may reasonably be expected to be aware of their potential liability. The direct impact on free speech that these emergency laws have is

[774] *Ibid*, Regulation 27.
[775] *Ibid*, Regulation 28.
[776] *Ibid*, Regulation 29.
[777] 'Sri Lanka: Briefing Paper, Emergency Laws and International Standards', *International Commission of Jurists* (ICJ) (2009), p 25.

compounded by the fact that they have been often used arbitrarily to suppress dissent and to target political opponents.[778] They can easily be used as a powerful tool for repressive governments to quash opposition and stifle political speech and criticism.

Indirect effects

The PSO and emergency regulations that have been brought into force through it, have accorded the State vast powers of arrest and seizure of assets. These powers have in the past led to arbitrary arrests and detention, sometimes leading to instances of torture and deaths in custody.[779] Similar to the regulations discussed above relating directly to speech, these powers of arrest are exceedingly vague and open to abuse. These liabilities would be difficult for the layperson to foresee and there is a high likelihood of people that are not a threat to national security being detained.[780] The lack of foreseeability violates principles of both domestic and international law. The domestic criminal law in Sri Lanka requires for precise language to facilitate the layperson's understanding of their potential liabilities.[781] This principle is also a requirement in international law – even in times of emergency.[782] Public officials are granted broad immunities,[783] which could allow them to operate with near impunity, violate fundamental rights, and further disincentivise any controversial speech by the public. Most emergency regulations have provided for preventative detention – meaning that a person could be detained if deemed to be a threat in the future.[784] The regulations themselves are highly

[778] Udagama, *supra* note 721, p 310.
[779] *Ibid*.
[780] ICJ, *supra* note 704, p 38.
[781] G.L Pieris, *General Principles of Criminal Liability in Sri Lanka* (Colombo: Stamford Lake 1999), Chapter 13.
[782] Welikala, *supra* note 734, p 185.
[783] ICJ, *supra* note 704, p 39.
[784] Udagama *supra* note 721, p 310.

complicated and imprecise. The Attorney General's department has struggled to collate the regulations in operation – despite themselves wielding substantial powers over detainees through the regulations.[785] These factors, coupled with a tendency for consecutive administrations to use these powers against political opponents and dissent, clearly hold tremendous potential to create a climate that has a chilling effect on the freedom of expression.

Applying the framework for free speech in reconciliation set out in the previous chapters, it seems that the effects that the emergency laws have on the freedom of expression may be too constricting. The effects, both direct and indirect, discussed above would likely include political speech and speech necessary for a democratic society. The Strasbourg court has also shown itself to be willing to limit Art 10 rights and utilise Art 17 (circumventing the proportionality test) in response to particularly extreme speech – such as terrorism or incitement to violence.[786] It may be possible to draw some parallels between the purpose of Art 17 in preventing protections under the Convention being used for activity aimed at the destruction or limitation of the ECHR rights and freedoms, and the emergency laws discussed in this chapter. Both are framed as exceptional measures to counter threats to the rights framework itself. However, the Strasbourg Court has limited this approach to exceptional cases, particularly in relation to incitement to violence. Some of the use of emergency laws in Sri Lanka has related to terrorism which may satisfy such an exceptional metric; however (as can be seen from the example of emergency regulations above and the cases below), the restrictions are not limited to advocating for terrorism or inciting violence. The restrictions cover broad areas of speech and restrict legitimate political speech such as discussions relating to the civil war, defence, and security - which would have been one of the most politically

[785] *Ibid* p 313.
[786] Helen Fenwick and Daniel Fenwick, 'National Counter-Terrorism Policies and Challenges to Human Rights and Civil Liberties: Case Study of United Kingdom' in Eran Shor and Stephen Hoadley (eds) *International Human Rights and Counter-Terrorism* (Springer 2019), p 10, 11, 14.

relevant issues at the time. This would not meet the exceptional metric used by the Strasbourg courts, and nor would it be in line with the basis for protecting political speech and democratic participation as set out in Chapter One and Two of this thesis. When not utilising Art 17 and focussing on Art 10, the Strasbourg courts have placed proportionality and the need to protect political speech as key considerations. In *Perinçek v. Switzerland*,[787] for example, the fact that the restriction was not limited to incitement to violence or hatred and the severity of the sanction meant that even in a case of holocaust denial, the restriction failed the proportionality test. The Court has also demonstrated the importance of protecting political expression, with this protection greater in the context of politics/ statements by a politician.[788]

5.2.6 Emergency Law Jurisprudence

As discussed earlier in this chapter, whilst Sri Lanka's emergency law framework allows for some Parliamentary oversight, the role of the Judiciary is explicitly limited. However, the case law in this regard has demonstrated a shift in how the courts have approached this issue and that of the encroachment on fundamental rights. The courts were initially reticent to challenge the authority accorded to the executive and were deferential to its authority.

In *Yasapala,* the Supreme Court refused to challenge the discretion of the President, who has the sole authority decide whether to declare a state of emergency (in the absence of bad faith). The Court highlighted the need to take swift action to maintain law and order and their presumption that the action would be in good faith unless there was reason to believe

[787] *Perinçek v. Switzerland* 63 EHRR 6, Application no. 27510/08 (2016).
[788] *Erkaban v Turkey* App no. 59405/00 (2006).

otherwise.[789] In *Visuvalingam v Liyanage,*[790] limitations on free speech by sealing newspaper publications during a state of emergency was deemed to be beyond judicial review. The Court did not consider a review of reasonableness of a measure to be within its powers.[791]

The turning point that shifted the approach of the Court came from the landmark case of *Joseph Perera v Attorney General*, which concerned the limitation of free speech by emergency regulations. The Court opted to interpret the ouster clause contained in the PSO narrowly and asserted its authority (as the PSO could not override the Constitution) to review regulations by incorporating a proximity test. This was based on the proximity of a measure and its 'rational nexus' to the aims of the measures.[792] The burden of proof would be on the State to prove that this criteria was fulfilled, and whilst the President has immunity over the decision to promulgate emergency regulations , the Court was not completely excluded from assessing its constitutionality.[793] This case paved the way for subsequent rulings that established a body of jurisprudence forming an improved standard of accountability for use of emergency measures.[794]

Whilst the Courts will not review the validity of a statement of emergency (if in good faith), it has proven willing to review the effects of it through assessing the validity of the emergency regulations.[795] The nexus test has helped the Court establish some degree of oversight of emergency laws; however, this may be improved by applying an approach based on protecting free speech in the interests of democratic participation. The nexus test seems to pertain to

[789] *Yasapala v Wickramasinghe*, 1 Fundamental Rights Reports (1980) p 143.
[790] *Visuvalingam and Others v. Liyanage and Others* 2 SLR 123 (1984).
[791] *Kumaratunga v. Samarasinghe* (2) Fundamental Rights Digest 347; *Hirdaramani v. Ratnavale* 75 NLR 67 (1971).
[792] *Joseph Perera*, *supra* note 239.
[793] Udagama, *supra* note 721, p 321.
[794] Welikala, *supra* note 734, p 217; *Amaratunga v Sirimal and Others* 1 SLR 264 (1993); *Shantha Wijeratne v. Vijitha Perera* 3 SLR 319 (2002).
[795] *Karunathilaka v. Dayananda Dissanayake* 1 SLR 157 (1999).

whether the regulations are overbroad or do not relate to the aim or objective in question. This then raises the question as to whether a regulation drafted within those parameters, yet still unreasonable in its limitation of speech rights, could be deemed valid.

In *Sunila*,[796] emergency regulations restricting speech relating to the ongoing war was found to be an acceptable restriction due to national security considerations. The Court referred extensively to the nexus test but was willing to accept the relevance to the stated aim of national security. In assessing the restriction on speech relating to military activities, the Court accepted that there was some ambiguity as to whether it related to the conflict area in the North-Eastern Province, or whether it extended to the south (there had been examples of the regulations being arbitrarily used in the rest of the country).[797] However, the Court was satisfied that the main intention of the regulation was for the North-East (with there being less ambiguity in the Sinhala text) and considered that a valid nexus and reasonable aim in the interests of national security (for protecting military morale) existed. The Court was also satisfied that the regulations had been sufficiently framed in a way that was specific and not overbroad. The Court also recognised its role in assessing the necessity of such measures and that for the regulations to be compatible with the Constitution, they would have to meet this test.[798] However, the national security considerations were held to be sufficient reasons to meet the necessity criteria.[799]

Emergency laws cannot override the Constitution, and the power of the Executive to bring in restrictions to fundamental rights can be seen to derive from Article 15 (7) of the Constitution

[796] *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* S.C. Application No. 994/99 (2000).
[797] *Ibid*, p 381.
[798] *Ibid*, p 369.
[799] *Ibid*, p 385.

which provide for the restrictions of fundamental rights. If the power of the Executive stems from these limitations, then so too does the Court's ability to evaluate whether restrictions are in line with the constitutional protections. In applying this oversight, the Court can approach the issue when dealing with free speech cases, with particular regard to its importance in democratic society through a participation-based framework. This can also inform its assessment of the nexus and necessity tests. Applying a participation focussed approach to the case may provide a more solid protection of free speech. Whilst the Court was willing to accept a relevant nexus due to the regulations being related to military operations in the North-East, this would be less in line with a participatory democracy – these issues would have been some of the most politically relevant at the time, and it is hard to justify such a wide area of restriction. A restriction on speech relating to military operations in the North-East is of course less than if it was state-wide; yet it still casts a wide net that would encapsulate a whole array of relevant speech that would not be a threat to national security. The discourse surrounding one of the biggest social and political issues at the time would be severely restricted. It would also prevent public scrutiny of the state and its handling of the situation.

The framing of the regulations would also be at odds with democratic participation as they were particularly onerous and prevented any publication or distribution of any material pertaining to military operations in the North-East or criticism of the conduct of the Armed Forces or Police, without state permission. This means that any discussion of the conflict would essentially be extremely limited without State approval. Any opposition to State policy, or effort to inform the public, would be exceedingly difficult. Furthermore, the deference of the Court to the national security considerations is difficult to reconcile with the extent that the restrictions limited free speech. Such reasoning could also apply to more recent events that

required discourse to hold State policies to account – such as during the economic crisis, instances of communal rioting, and the Covid-19 pandemic.

A participation focussed approach would not be a departure from the established approach, but a way of informing the Court's application of the nexus test and of strengthening the requirement of necessity. If the Court's ability to exercise authority over emergency regulations stems from the limitations provided for in the Constitution, then this authority includes not just whether a regulation is relevant to a legitimate aim, but also its undue effect on speech. If the protections provided for free speech in Article 14 are based on ensuring democratic participation, the Courts should ensure that the limitations in Article 15(7) are concurrent with that goal. A regulation would be required to have a greater degree of specificity to prevent an 'arbitrary power'[800] and the Court would be able to consider the potential impact and abuse of the impugned regulation to a greater degree than it has previously shown to be willing to. This would strengthen the nexus test to place a heavier burden on the state to demonstrate that an emergency measure does not unduly infringe on speech.

As an example, if there was a situation of violence or riots in a certain region of the country, a regulation preventing the dissemination of information or criticism of State handling of the situation, would not be a permissible restriction if it was merely framed in a way to limit the restrictions to the region. Instead, there would be an expectation that there is a plethora of protected expression (i.e., criticism of the state handling the crisis, information relating to safety in the area, information about the resources used etc.) that cannot fall within the nexus test based upon participatory democracy. A regulation would be acceptable if it is narrow in scope and proportionate enough to justify a limited restriction – for example, sensitive

[800] *Joseph Perera*, *supra* note 239, p 230.

information (as opposed to all information) relating to military operations and specific information that may imperil the safety of military/police officers. Greater recognition of the role of free speech in furthering reconciliation would support the argument that the State should be held to a stricter standard.

5.3. Prevention of Terrorism Act (PTA)

5.3.1 Introduction

The Prevention of Terrorism Act (PTA)[801] is a piece of legislation that has had a far-reaching impact on restrictions of fundamental rights in Sri Lanka. Despite its clear relevance to discussions of reconciliation (and its potential ill-effects in relation to those objectives), the discussion of the Act will be relatively limited in this chapter. A thorough examination of the effects of the Act would require substantial separate attention that is beyond the scope of this thesis. Such an examination would require detailed analysis of the place of legislation targeting terrorism and its effects on broader fundamental rights. Part of the issue with the emergency regulations has been its extended use – both in terms of being used far beyond the context of actual imminent emergency, and its application to a wide range of issues that should fall beyond the ambit of emergency. Therefore, emergency regulations are a continuing feature of the speech framework where even if they have not been renewed, the threat of issuing new emergency laws (and the relative ease with which they are approved) can contribute to a feeling that free speech guarantees can easily and arbitrarily be circumvented. Guarantees and

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

safeguards in more general speech laws (as discussed in Chapter Three and Four) may therefore be viewed as somewhat perfunctory as they may be supplanted by the State through emergency regulations. Although the PTA carries some of these features (by remaining in effect far beyond the context of terrorism into peacetime), its issues relate specifically to laws combatting terrorism – and to calls for it to be repealed. If it were to be repealed, the threat of similar emergency laws would be significantly lower than emergency regulation – potentially requiring a two-thirds majority in Parliament or referendum to be passed.

Similar arguments to those discussed above in terms of emergency regulations may also apply to the PTA. This is both in terms of the necessity of emergency laws to protect democracy in times of crisis (and the need to not extend it beyond such specific periods), and the potential for wider effects on democratic participation by reducing protections and safeguards. Such a law would not be in the interests of reconciliation and therefore it is necessary to point out its incompatibility. The PTA is still a concerningly repressive feature of the speech framework in Sri Lanka and its effects must be considered. Therefore, some of the features of the PTA (that may affect political speech/reconciliation) will be examined, without a more substantive look at the role of terrorism legislation and broader fundamental rights (powers of arrest, detention etc.).

5.3.2 Background to the PTA

The PTA was first introduced as a temporary measure to combat the threat of terrorist activity. The intent of the Act has been described as particular in the sense that whilst conceptualised as

combatting violence, it is framed and has been applied, in terms of the preservation of the government and the goals of public security.[802] The Bill having the aims of countering the threat of terrorism faced little opposition (even from the minority parties) and its passage was expedited as an urgent bill in the national interest, leaving the Supreme Court with only twenty-four hours within which to determine its constitutionality.[803] The wide support it received at the time (and the then-government's strong position) meant that issues of compatibility with the Constitution were minimal as it would be passed with a special (two-thirds majority).[804] The Act was made permanent in 1982 and has continued to remain in force, even after the end of the war.[805] The Act has been described as particularly draconian in nature and directly at odds with the objectives of a free democracy.[806]

5.3.3 Effects of the PTA

A significant issue of the PTA is that it applies wide-reaching regulation under the guise of protecting against terrorism. It goes beyond targeting serious offences of violence and extends into a range of 'unlawful activity'.[807] This ends up reproducing several elements of existing offences that already have laws applying to them and are less serious than the objectives of preventing terrorism (providing the State with stronger sanctions and arresting powers). Most notable in terms of this thesis, is the reproduction of terminology from speech related offences from the Penal Code.[808] The PTA creates an offence for '…words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause

[802] Jayantha Guneratne, Kishali Pinto-Jayawardena, and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka) Responding to the Protection of Minority Rights* (Law and Society Trust 2014) p 193.
[803] *Ibid*, p 194.
[804] *Ibid*.
[805] Ermiza Tegal, *Understanding Rule of Law, Human Security and Prevention of Terrorism in Sri Lanka* (Law and Society Trust 2021), p 3.
[806] 'Sri Lanka: A Mounting Tragedy of Errors' *International Commission of Jurists* (1984) p 33-34.
[807] *Ibid*, p 31.
[808] See Chapter Three.

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.'[809] As previously set out in the criteria for a speech framework conducive to reconciliation, the issue of violence is of particular relevance to reconciliation. It therefore justifies targeted action to prevent it. In this sense, the first part of this provision relating to violence may be appropriate, as a limitation on incitement to violence. However, the inclusion of the latter parts of the provision is clearly beyond what would be expected of such laws. As the issues with such vague terminology have already been discussed that will not be repeated here – the problem is that this inclusion further exacerbates those deficiencies of the Penal Code and provides the State further (and stronger) avenues to enforce them.[810] The PTA extends this offence to restrictions on the press, with broad scope to prohibit publications.[811]

Another aspect of the PTA (and perhaps of most far-reaching consequence to fundamental rights), is the vast powers of arrest and detention that it provides for.[812] This includes: powers of entry/search/arrest without warrant[813], keeping suspects in remand for up to 72 hours[814], and detention orders of up to 18 months.[815] The effects of these powers have been significant and have contributed to a substantial curtailment of rights. The jurisprudence relating to arrests under the PTA is complicated and the Courts have at times has shown a deference to the State and national security interests, whilst also at times showing a willingness to assert limitations and judicial scrutiny on the exercise of these powers.[816] There are also allegations that the

[809] PTA, s 2 (1) (h).
[810] See Chapter Three for discussion of speech limitations in Penal Code, and Chapter Four for other examples of similar terminology being reproduced in other limitations (Online Safety Act).
[811] PTA, s 14 (2).
[812] As well as its lack of safeguards and exclusion of judicial review – Tegal, *supra* note 805, p 23.
[813] PTA, s 6.
[814] PTA, s 7.
[815] PTA, s 9.
[816] *Susila de Silva v Weerasinghe* 1 S.L.R. 88 (1987) (arrest of a journalist where deference was shown by the Court to authorities and security interests); *Dissanayaka v Superintendent Mahara Prison* 2 S.L.R. 247 (1991) (where the Court was willing to deem extended detention as ultra vires); *Weerawansa v The Attorney General* 1

application of the PTA has disproportionately affected and targeted minorities.[817] The treatment of minorities under the PTA may also reflect a trend in which the PTA may be applied more harshly due to minorities being linked to issues of terrorism.[818] To reiterate once again, these issues are clearly relevant to the context of reconciliation – it arguably represents one of the most repressive laws (both in terms of its contents and how it has been used in practice), with accusations of it being used to target minorities and to be at odds with the objectives of reconciliation. However, a proper appraisal of these issues (particularly with powers of arrest etc.) is beyond the scope of this thesis. It should therefore suffice to point out its incompatibility with a speech framework conducive to reconciliation as envisaged in this thesis.

The PTA does not contain appropriate protections for political speech (let alone an expanded scope within reconciliation). Whilst protecting against violence is necessary, its scope applies far beyond what would be expected and in fact focusses more on the State than protecting groups from violence. In terms of safeguards, in addition to its own shortcomings, it serves to further reduce safeguards of other offences in practice.[819] This is further exacerbated by the effects and application of the PTA being made worse when applied within the context of weakened institutions and democratic culture. In addition, the wide powers of detention and arrest contribute to a culture of fear where people are wary of arbitrary deprivation of their rights. They may therefore be reluctant to express political opinions (particularly on issues most relevant to reconciliation such as discussion about the war or discrimination) due to fears that

S.L.R. 387 (2000) (where the Court was willing to narrow the scope of applicability and widen potential for review. Detention orders may only be issues with reasonable grounds for belief or suspicion of unlawful activity; Guneratna *et al*, *supra* note 802, p 199- 216.

[817] Human Rights Watch (2022) - https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act

[818] Guneratna *et al*, *supra* note 802, p 217.

[819] In addition to inadequate safeguards to prevent abuse in terms of the vast powers conferred on the State, the reproduction of other offences means that the State can use the PTA to circumvent those safeguards. For example, with the speech offences from the Penal Code.

it would draw attention from the State which may then target them.[820] Detainees may be held for years awaiting trial and a lack of accountability means that significant allegations of abuse whilst in custody (forced confessions, abuse, torture etc.) are present.[821] The application of the PTA can also have wider effects where even being held on suspicion under these provisions can carry stigmatism and social ostracization from being linked to terrorism.[822] For these reasons, the PTA contributes to a significant chilling effect on free speech (and participation that would benefit reconciliation) and clearly is at odds with the aims of reconciliation.

5.3.4 Recent issues

Despite significant criticisms, the PTA continues to be used by the State to clamp down on speech. Its use was revitalised after the Easter bombings which brought the issue of terrorism back into the forefront of public discussion and concern in the country. Whilst much of the discussion of its repressive nature seemed to relate to its use on Tamil minorities during the war and its aftermath, the post-Easter bombings context also brought concerns of its use on the Muslim minority. Notable cases include the arrest of Muslim lawyer Hejaaz Hizbullah and a poet Ahnaf Jazeem.[823] The use of the PTA on Tamil minorities has continued to be an issue – particularly in terms of its use in the north of Sri Lanka (where much of the conflict of the civil

[820] Communities in areas most relevant to reconciliation are particularly afraid of expressing even mild political contributions due to this fear – According to the Human Rights Watch organisation which references a human rights activist working in the north (where much of the conflict of the civil war took place), 'They are using PTA to create fear among activists. When we talk to the families of the disappeared, they say they can be arrested at any time. Police are arresting people for posting pictures on Facebook. They can arrest you for anything.' – *supra* note 817.
[821] Abigail Castle, 'Prevention or Creation of Terrorism? The Sri Lankan Prevention of Terrorism Act', Immigration and Human Rights Law Review, Vol 4 Issue 1 (2022), p 1, 7, 8.
[822] Tegal, *supra* note 805, p 27.
[823] These were based on vague allegations of extremist ideas without credible evidence. The cases were emblematic of a wider targeted backlash against the Muslim population following the Easter attacks. Whilst there are other examples, these received the most attention and criticism (both domestically and abroad) and substantial allegations of impropriety – including arbitrary extension of custody, lack of credible evidence, and preventing access to lawyers. Tegal, *ibid* – p 31, 32; Minoli de Soysa (2022) https://groundviews.org/2022/03/07/the-puzzling-case-of-hejaaz-hizbullah/ .

war took place), critics of the State, and commemorative activity (relating to the war).[824] The effects of the PTA are not limited to minorities – it has also been used for a wider stifling of political speech. The economic crisis in Sri Lanka that began in 2019 sparked widespread protests and instability. This resulted in the State cracking down on protestors – with arbitrary detentions under the PTA of protestors for terrorism.[825]

Although domestic and international pressure to address the problems of the PTA have resulted in some limited legislative initiatives, these have yet to achieve success.[826] The continued existence of the PTA is clearly inimical to the objectives of reconciliation. It contributes to substantial fears of engaging in political discourse due to the threat of arbitrary and targeted detention which contributes to a significant chilling effect. This context of fear may result in undermining the legitimacy of the State and its institutions, and considerably impedes efforts of reconciliation.[827] In fact, the PTA arguably falls short of basic general free speech standards, let alone the extended framework envisioned in this thesis.[828] It therefore falls short of these criteria to such a degree that the appropriate action would be to repeal the PTA and carefully consider any proposed replacement in terms of these discussions and criteria.

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[824] Human Rights Watch, *supra* note 817. Some examples include – a journalist arrested for social media posts about commemoration events relating to the war, arrests made at a memorialisation event, and the arrest of a doctor who served as a medical witness in human rights cases.
[825] Castle, *supra* note 821, p 15-17. Notable cases include the arrest of three student protestors following a protest in 2022, which sparked international criticism.
[826] Some proposals for change have been criticised as being arguably worse than the PTA – Gehan Gunatilleke (2016) https://ohrh.law.ox.ac.uk/speech-and-spies-why-sri-lankas-new-counterterrorism-law-is-a-terrible-idea/ ; bills such as that for a Counter Terrorism Act to replace the PTA have been proposed – although some limited safeguards would be added it was widely viewed as insufficient, lacking public consultation, and failing to address the overbroad scope of provisions (including the speech offences). This proposal was eventually abandoned - Tegal *supra* note 805, p 7; another more recent proposal for an Anti-Terrorism Bill also faces similar criticism – see Ermiza Tegal (2023) https://groundviews.org/2023/09/23/anti-terrorism-bill-version-2-0-still-worse-than-the-pta/ ; some more positive (albeit limited) changes have been brought with an amendment to the PTA in 2022 bringing in some limited safeguards relating to pre-trial detention and requirements to allow regular inspections of prisoner welfare – Castle, *supra* note 821, p 13.
[827] N. Manoharan, 'Counterterrorism in Sri Lanka: Evaluating Efficacy', *East-West Centre Washington* (2006), p 42.
[828] UN Special Rapporteurs, OL LKA 7/2021 - https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26863 .

5.4. Conclusion

The fact that Sri Lanka has spent more time in states of emergency than not, and the way in which this has been abused, is testament to the failings in this system. This chapter has highlighted that in times of existential crisis the protection of democracy, in somewhat circular fashion, necessitates emergency limitations on democratic norms. However, times of crisis can also be the period where democratic participation is even more important to hold the State to account. To ensure that states of emergency are only maintained in times of genuine crises and not arbitrarily extended into perpetuity, the original safeguard provided for in the Constitution prior to the Tenth Amendment (requiring a two-thirds majority in Parliament to extend beyond 90 days), would be more appropriate. Welikala refers to the South African Constitution in this regard which requires a special majority of 60 percent after the initial extension, which would be more in line with international best practice.[829] Such a safeguard would disincentivise arbitrary extensions of emergencies and assumes that continuations may be more likely to be based on genuine emergencies considering the higher bar for legislative approval.

The emergency laws would also benefit from explicit instructions as to the circumstances that necessitate a state of emergency (with acknowledgement of its extraordinary nature as a threat to the life of the nation) and a requirement for specificity in the regulations that are brought in.[830] These must be in line with principles of foreseeability and there should be a requirement to narrowly tailor them to address the extraordinary issue without being overly broad. The

[829] Welikala, *supra* note 734, p 203-204
[830] See Welikala, *ibid*, p 200 and p 236, for commentary on improving emergency law framework and importance of a clear distinction between normal and exceptional circumstances.

concentration of power on the executive President, particularly in relation to their discretion in bringing in a state of emergency and emergency laws makes it difficult to safeguard against misuse and inappropriate intrusions into free speech. Changing this aspect of the emergency regime would be a political matter, yet it is worth considering that if an opportunity were to arise to amend these powers – a requirement of specificity and a clear benchmark for the extraordinary circumstances required for emergency would improve the situation.

Ideally, stricter controls on bringing into force the emergency regime could make a difference in making emergency rule more of the last option that it was intended to be. The executive should have to show that a declaration of emergency is in response to a sufficiently grave situation, that the emergency laws brought into force are necessary, and that they are proportionate. Rather than the implied judicial authority to assess the constitutionality of measures, an explicit review process should be provided for. The legislature should also have greater oversight and approve on a regular basis, not only the state of emergency, but each emergency regulation (such checks and barriers could potentially make arbitrary recourse to emergency powers less appealing to the state and make it more likely to use ordinary legislative means). This would make the emergency laws framework more in line with the UK Civil Contingencies Act where these criteria have disincentivised its use, leading governments to prefer ordinary routes.[831] Furthermore, in the interests of democratic participation and public scrutiny of the State, a move to deal with emergency situations through the legislature may provide adequate means to address emergency situations whilst retaining accountability. The higher burden placed on bringing in a state of emergency and continuing regulations would make it more likely that its use would be limited to times when it would be most needed. In

[831] Civil Contingencies Act 2004 c. 36 (see part 2 of the Act which lays out the conditions for bringing in emergency powers).

addition, a more stringent application of the nexus test when the Court is examining whether a regulation is compatible with the Constitution would help protect free speech in times of emergency. Such a measure would ensure that not only do measures relate to their aims, but would also ensure the State faces a heavy burden to prove that it does not unduly restrict speech. In times of genuine crisis, emergency laws may well be needed to defend the democratic values and rule of law that ensure free speech. A threat to the nation will also be a threat to fundamental rights. However, the potential for abuse of these extraordinary powers necessitates stringent safeguards. The freedom of speech in the country would benefit from a more tempered and accountable emergency law framework that would allow for the exchange of information without undue censorship and promote the legitimacy of State power through democratic participation.

As for the PTA, the discussions in this chapter have shown its substantially negative effects on reconciliation which is not compatible with the criteria that have been set out and expanded on in the previous chapters. There are, however, some steps that may be taken to address these ill-effects and bring the framework more in line with the criteria. The existence of the PTA and the substantially repressive way in which it has been used has contributed to a culture of fear that directly impedes reconciliation with a significant chilling effect. It does not adequately protect free speech guarantees (let alone an extended scope for political discourse in reconciliation). It is also far too broad (and lacking in safeguards) to be justified by the aims of preventing violence. The PTA is therefore not fit for purpose and should be repealed. However, the need to protect persons from violence will mean that a replacement law will be necessary. The threat of terrorism still remains in the public consciousness, particularly following more recent events like the Easter attacks. A replacement counterterrorism law should be carefully considered, and the discussions in this thesis may help in formulating an instrument that does

not impede reconciliation. Such a replacement should conform with international norms.[832] It should have significant safeguards in place and clearly provide for the protection of political discourse. The State must also go further to mitigate the culture of fear that it has caused. This can be done through non-legal initiatives (supporting open discussion etc.), but crucially by action to address the effects of the PTA. This would mean investigating all alleged excesses of the past through the use of the PTA (unreasonable and arbitrary detention, torture in custody, deprivation of rights etc.) and compensating victims. This would demonstrate a recognition of the objectives of reconciliation and an intention to draw a line under past repressive attitudes. This may (in addition to restoring legitimacy of the State by demonstrating a willingness for accountability) help in assuaging fears of the public (particularly minorities) and encourage them to confidently engage in public discourse.

By examining emergency laws, this chapter contributes to the wider thesis by taking into account circumstances where speech must be limited in times of emergency. The issues examined in this chapter provide instances where such restrictions on speech are imposed with the aim of preserving democracy and stability – which are essential prerequisites for lasting reconciliation. As this chapter has demonstrated, there are some justifiable reasons for such an emergency regime. However, this chapter has also shown both its specific deficiencies in Sri Lanka, and its risks of misapplication. If free speech (with a focus on democracy-based arguments and political speech) as a guiding principle for reconciliation is to be used (as argued for in Chapter Two), the current emergency framework does not satisfactorily protect it. The suggestions for reform provided in this chapter will go some way in rectifying this in terms of

[832] See recommendations of UN Special Rapporteurs to bring terrorism laws in line with international norms. These include – clear definitions of terrorism, precision, and legal certainty (particularly in relation to provisions that affect free speech rights), safeguards to prevent arbitrary deprivation of liberty, preventative measures against torture in custody and enforced disappearances, and due process and fair trial guarantees – *supra* note 828.

safeguarding free speech and ensuring emergency laws are limited to exceptional circumstances. For a post-conflict nation with enduring concerns relating to stability, issues pertaining to stability or risks of violence may make the State somewhat too eager to engage emergency laws as a response (and reluctant to relinquish these powers) – however, as set out in the wider thesis, there is a reasonable case to be made that in pursuing long term reconciliation, an approach that prioritises speech and participation can be precisely what aids in furthering this aim.

Chapter Six

Conclusion

At the time of writing, both free speech issues and the challenges of achieving a lasting reconciliation process, remain particularly significant in Sri Lanka. Continuing problems of State overreach in applying existing free speech limitations, as well as bringing in new laws, have meant that the regulation of speech remains a pressing issue in the country. Furthermore, the process of reconciliation faces significant challenges of implementation and addressing issues of division.

This thesis did not attempt to solve all the issues of reconciliation, nor did it look at all forms of free speech. The ambit of the thesis focussed on facilitating the broad goals of reconciliation through setting out a purposive approach to formulating and improving a free speech framework that is conducive to those aims. The scope of analysis was narrowed to political speech (and democratic participation) to specify the parameters of the inquiry and to focus attention on the forms of speech most relevant to the aims of reconciliation. Some of the key questions to be considered therefore were: to what extent could such an approach assist in

facilitating those goals, what would such an approach look like in practice, and what improvements/solutions/criticisms can it provide?

The intent of this thesis was to bridge the gap between the aims of reconciliation and issues of free speech (in a country such as Sri Lanka), with a concerted and specific approach that accounts for domestic factors. This goes beyond calls for bringing a speech framework in line with international norms. Although in a general sense this is a legitimate objective (which this thesis does not contradict, but rather provides a targeted framework in furtherance of it) – it fails to account for some of the specific domestic considerations that affect the efficacy of a speech framework in practice, and the potential functional role of reconciliation in relation to free speech and its limitations. To achieve this, the thesis took an epistemic approach that sharpened the methodology of the inquiry by setting out a normative basis on which to assess the free speech framework, and to apply in order to consider appropriate changes or solutions. This was summarised in a set of criteria in Chapter Two on which analysis of the speech framework in Sri Lanka and mechanisms of restriction were considered. This conclusion will now briefly summarise some of the discussion in the previous chapters and then consider some of the future implications in this area.

The first two chapters were largely theoretical in nature and set out the foundations on which the discussions of the rest of the thesis were based. Chapter One began by discussing the three main justifications for protecting free speech. This was done to set out some of the theoretical basis that underpins the discussion of the rest of the chapters. Identifying the rationale behind protections allows for an approach that targets its main objectives. The argument from democracy/democratic participation was identified as the most pertinent to the aims of this thesis. This is not necessarily to discount the others (the argument from truth, and autonomy)

which remain relevant factors in a broader sense. A democratic justification has a clear link to reconciliation – both in terms of its overall goals, and in terms of its challenges. Part of the issue of reconciliation in a country such as Sri Lanka, is that sections of society have a history of feeling disenfranchised and disaffected with the State. Ensuring an enduring reconciliation and preventing future violence, therefore requires clearly establishing the legitimacy of the State through the process of democratic participation where people feel that they have an equal stake in the democratic process and are able to affect change.

Chapter Two builds on this by setting out the process in which to identify the forms of speech that require the most protection in such contexts. Political speech was identified as most pertinent to democratic participation in a reconciliation context. Features (and challenges) of categorising and identifying political speech were considered, and a case was put forward for expanding the scope of political speech and protections. The process of reconciliation represents a transformative project in terms of healing, legal and institutional reform, and policy – which therefore necessitates a broader scope of political speech. What warrants this stronger protection is therefore wider because political speech in such contexts can take many forms. This is particularly the case in a context such as Sri Lanka (being post-conflict and with recent memories of repression), where political speech may be tentative and be expressed in wider forms. Determining issues that are political in nature can also be affected by this. For example, a history of divisions on ethno-religious lines means that discussions of religion may come within this scope – even if not expressed in ostensibly political terms.

Issues of hate speech and violence were also considered, and the legitimate objective of preventing harm. Limitations on speech can be justified (particularly considering the aims of reconciliation which includes the need to prevent future violence) due to a lack of capacity in

States with weaker democratic norms and institutions to protect the public from such harms. Furthermore, the interests of protecting from violence may be more pronounced and somewhat different from other contexts as there are particular concerns of communal violence, and instability that develops beyond the State's control. However, it was also argued that such weaknesses also contribute to a heightened likelihood of arbitrary use and abuse of limitations (which is confirmed in the other chapters which looked at how limitations have been enforced in practice), which therefore necessitates particularly stringent safeguards. Safeguards that are adequate in countries with stronger norms and institutions may be inadequate in others.

The chapter then set out the criteria on which the analysis of the proceeding chapters was based. These can be summarised as – ensuring protections for political speech and democratic participation, allowing for a wider scope of political speech that accounts for the range of discourse and topics relevant to reconciliation, accounting for legitimate aims in limitations to protect against violence, and accounting for ground realities (institutional weaknesses, State apathy, lack of capacity etc.) that affect the efficacy of the speech framework and potential for abuse of limitations – and therefore providing adequate safeguards.

The remaining chapters applied the findings of the first two theoretical chapters to the specific context of Sri Lanka. This was done by looking at some of the main features of the domestic speech framework and mechanisms for limitations. Chapter Three began by looking at the background to the framework by considering past cases that established protections for political speech. It then looked at some of the main instruments of limitations (within the Constitution, Penal Code, and ICCPR Act), and applied the discussions of the previous chapters to identify some of its weaknesses. Recent cases were looked at, which demonstrated some of the effects of these weaknesses in practice. Most notable is the *Razik* judgment. As a judgment decided

during the writing of this thesis (and the first instance of some of the issues of limitation, particularly in relation to the ICCPR Act, to receive substantial attention from the Supreme Court), it warranted specific attention. The judgment clarifies some of the issues identified with the limitations that had been discussed and marks a positive step in addressing some of these issues by setting out thresholds to limit the scope of restrictions. It also confirms some of the intuitions of this thesis – that reconciliation can be a functional part of an approach to a speech framework. The Court confirms this by linking reconciliation to the interpretation of the law and obligations of the State in enforcement. Despite these positive steps, some aspects arguably represent a missed opportunity and leaves room for improvement. This could be redressed in future cases by applying the criteria and wider discussion of this thesis – this could include linking reconciliation to protecting speech (rather than to justify limitations), and explicitly linking protections to political speech and the wider scope argued for in this thesis.

Chapter Four looked at online speech and justifies it as needing separate and substantial attention within the thesis by pointing out how technology has dramatically changed the nature of communication, how it often replaces traditional mediums as the centre of public discourse, and the struggle for the law to keep pace. The chapter places considerable attention on anonymous speech and false information, to discuss how it has not only become a significant free speech issue in terms of protecting political speech – but has particular relevance to reconciliation in a context such as Sri Lanka. The approach to limitations on these types of speech will therefore benefit from the discussions of this thesis. The Online Safety Act was then considered in detail, applying the discussions of the first part of the chapter.

Like the *Razik* judgment, this Act was passed during the writing of this thesis. This presented a challenge as the effects of the Act would have to be considered in potential terms (without a

body of case law to refer to). However, by applying the criteria and discussions set out in the first two chapters, it was able to critique features of the Act and predict some of its pitfalls. The analysis of the Act was therefore able to identify deficiencies and potentially provide a basis for improvement. Parts of the Act in relation to anonymous speech and false statements were critically examined (based on the themes and criteria of the thesis), and the importance of further safeguards (recognising the potential importance of issues relating to these types of speech to the process of reconciliation in Sri Lanka) were highlighted. Furthermore, the issue of problematic terminology from the Penal Code being reproduced in the OSA (thus further entrenching limitations that were identified in Chapter Three as not being incompatible with the criteria set out in the thesis), was identified and criticised.

Chapter Five looked at emergency laws and their impact on the free speech framework in Sri Lanka. The chapter first looked at some of the justifications for emergency laws that provide for extraordinary limitations in times of crisis, and then considered the two main relevant instruments – the Public Security Ordinance and Prevention of Terrorism Act. The chapter considered some of the direct and indirect impacts on the speech framework (in terms of the wider discussion of the thesis) and its potential chilling effects. These were considered with particular regard to how they are affected by the reconciliation context and domestic realities. Although such emergency laws may be necessary, their current safeguards fall short of the criteria.

Potential changes and solutions were proposed which would help bring such laws in line with the criteria and assuage some of these concerns. A recurrent theme through these chapters is that the law cannot be looked at in isolation. The practical effects of domestic realities substantially affect its efficacy in practice. Weaknesses in institutions, State apathy, restrictive

attitudes, a propensity for overreach without accountability, all contribute to a context where some of the main issues go beyond legal reform of the instruments of limitations. This means that in addition to stringent safeguards, other measures (such as educational initiatives, anti-corruption measures, improved accountability etc.) can be beneficial. This is also particularly relevant in terms of a propensity for the State to respond to crises with calls for more laws to impose limitations. For example, riots in Sri Lanka based on religious divisions resulted in calls for stronger hate speech laws. As the discussions of this thesis has shown, the issue has not been in there being inadequate powers, but in their implementation.

If the arguments of this thesis were to be accepted in Sri Lanka, its potential impact could be varied.[833] On one hand, the arguments might not fundamentally change outcomes, but could help inform and guide a process. For example, the limitations imposed in *Razik* were decided as inappropriate by the Supreme Court; applying the discussions of this thesis would not change this decision. However, it would help change the basis and justifications of the decision and

[833] It may also be worth considering the potential effect, if any, of the recent political context in Sri Lanka. Recent elections brought in a once fringe party to power with a resounding majority (even managing to win in minority dominated areas, despite being a majority Sinhala party – a marked shift from the usual electoral trends where voting patterns are usually clearly split along ethnic lines in these areas). Much of their campaign focussed on turning away from the practices of the previous regimes, and to work towards strengthening democratic norms, a focus on anti-corruption, and addressing minority issues. Notably, the new government conveyed an intention to address some of the issues of the Online Safety Act (suggesting amendments to take into account the Supreme Court Determination, see Chapter Four) and Prevention of Terrorism Act – indicating a willingness to amend or repeal these laws. Although this presents a positive shift, expectations should be managed, at least until concrete steps for reform become apparent. As has often been the case in Sri Lanka, promises of political change have led to disappointing results. For example, the 'good governance' movement that promised political change that would reduce corruption and strengthen democratic norms, proved largely lacklustre in practice. Also consider that successive governments have come into power promising to reduce the strong powers of the executive Presidency (which causes issues in practice by concentrating extraordinary power in the executive, for example see Chapter Five), yet have ended up not only failing to address this but even strengthening these powers once in office. Therefore, expectations should be somewhat tempered despite the claims of reform. At the very least however, the fact that the political landscape implies a willingness to consider reforms (and the elections suggesting that there is public support for this), may indicate that the findings of this thesis may be useful in providing suggestions for reform and that there may be some opportunity for these to be implemented. See: 'Landslide win for new Sri Lankan president's left-leaning coalition' *BBC* (2024) https://www.bbc.com/news/articles/crr9n2w0lyzo ; 'Online Safety Bill: Govt announces Stance' *Newswire* (2024) https://www.newswire.lk/2024/11/06/online-safety-bill-govt-announces-stance/ ; the 'yahapalanaya' or 'good governance' regime and its failure to bring meaningful political change, see Gamini Keerawella ' Democracy Building Initiatives under Yahapalanaya Regime: Lessons Learned' The Island (2022) https://island.lk/democracy-building-initiatives-under-yahapalanaya-regime-lessons-learned/ .

allow it to set out a stronger foundation for speech protections that would help improve it in terms of broader reconciliation objectives. On the other hand, some limitations (and parts of limitations) have been identified as incompatible with a speech framework conducive to reconciliation, and the discussions of this thesis could form the basis and justification for repealing and re-formulating the replacement of such laws. Some pertinent areas of discussion have been excluded as beyond the scope of this thesis. This was in order to focus the scope of inquiry. Some examples include: wider features of a reconciliation process, wider features of institutional reform, and a more detailed look at international examples. This will be left to future research. In addition, there may be future implications that warrant further research. For example, the effects of the *Razik* judgment and the Online Safety Act in practice will result in changes to the framework and relevant discussion which may form an interesting part of further future research on this topic.

This thesis provides a novel approach to approaching free speech and reconciliation in Sri Lanka. It establishes how these two concepts may be linked in practice and a purposive approach that can be utilised in furtherance of its aims. It sets out a targeted way of assessing, formulating, and improving a speech framework to facilitate the reconciliation process.

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