# LST REVIEW

# Technological Advancement and Implications for Human Rights

Law & Society Trust

# Contents

# Editor's Note

Unprecedented advancement in technology and social media in the recent past has generated new discussion on the protection and promotion of human rights. Technology has increased the scope for a closer monitoring of potential human rights violations and has contributed to a more efficient evidence base for vindicating human rights across the globe. Social media especially, transcends national boundaries in securing support to redress both the infringement and imminent infringement of human rights.

Technological advances however, are not without subjection to abuse and exploitation. Human frailty, in all its dimensions, is apparent in the use and abuse of technology, and specifically in the arena of 'social media'. The LST Review, in this edition explores the scope of the law, as well as progressive developments in the law that are needed to both address and redress rights violations associated with technological advancements. While the scope of this discussion is extensive, the contributions contained herein raise some core issues and considerations, and provide a sound base on which to take forward a dialogue that is relevant to law reform in Sri Lanka (and South Asia).

In their paper exploring both opportunities and challenges to redressing human rights through technology, Shalomi Daniel and Karunakaran Chakrawarthy outline the more positive influence of technology on both the promotion and vindication of human rights. These attributes may at times get diluted in a discourse of the all-encompassing 'power' of technology to 'take over' the most fundamental aspect of life and encroach on the privacy of the individual. This paper highlights for instance, the singular advancement of the freedom of expression and the right to information that has been made practically possible by technology. And gives insight into the due consideration given by law courts around the world not to encroach on the capacity of technology to promote these rights; in protecting against the narrow interpretation of the limits of 'free expression, and in the admissibility of evidence that falls outside the scope of 'conventional evidence'.

Thiagi Piyadasa, discusses the urgent need for laws and regulations to combat technology facilitated sexual violence and crimes against women and girls. Based on available evidence, women and girls are predominantly subject to such violence, though little has been done understand the pervasive nature of the problem. She argues that it is vital to understand the 'social dynamics' that lead to 'online violence' in attempting to define appropriate laws and regulations. Importantly, the paper highlights the different forms in which online sexual violence can take place; referring to the famous 'Wariapola' incident and theorisations on 'gender based hate speech' and 'rape culture', she highlights the dilemma that the girl in question was subject to, when after suffering harassment on the streets she was further subject to harassment online when her reaction to street-harassment was circulated on social media. This paper refers to progressive legal developments from other parts of the world, to point to the urgent need for such reforms in the Sri Lankan context.

Responding to the phenomenon of online 'hate speech', Chapa Perera outlines the boundaries between the freedom of expression and hate speech. She draws on the

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ICCPR to distinguish between expressions that merely 'offend' to other forms of speech that are destructive of norms that guard against – discrimination, hate and abuse, vilification and incitement. The paper discusses the inherent problems in combatting hate speech in social media, though in form and substance it is much the same as in other media. The lack of an uniform approach to hate speech among 'intermediaries' (Facebook, Twitter etc...) is identified as part of the problem that facilitates the use of 'hate' by extremist groups and such entities. Solutions for the promotion of the freedom of expression in all its potential, without the destructive perpetuation of hate speech, are discussed.

Azra Jiffrey makes a unique contribution to the discussion of technology and human rights; her paper explores the potential of technology, and in particular social media platforms, in promoting 'participatory' Constitution making in Sri Lanka. Participation is discussed as an underlying 'right' that is intrinsic to the attainment of civil rights and to deliberative democracy. Drawing from examples around the world, her paper provides useful insight into a way forward for Sri Lanka's future trajectory to Constitutional reform.

The discussions also highlight the potential exclusion of those who do not have access to technology, in a world that is increasingly reliant on it. As pointed out, technological contributions cannot be viewed in isolation, without due consideration to other institutions and processes that facilitate the realisation of human rights.

The LST Review looks forward to further exploring and informing these discussions.


Rasika Mendis

Editor

# Technology as a Means of Redressing Human Rights Violations – Opportunities and Challenges

Karunakaran Chakrawarthy Yadavan and Shalomi Daniel*

## Introduction

The recent scandal involving the National Security Agency (NSA) shocked the world. The scandal broke out when NSA was found to have been carrying out surveillance of citizen communication without the knowledge of the citizens. Further, it was revealed that telephone conversations of world leaders have been tapped. It reminded the world of the pervasive nature of modern technology.[1] The right to privacy and the freedom of expression were severely threatened as a result of these developments, as citizens were made aware of the power that technology gave governments to tap into the private lives of its citizens. The world was left with extreme thoughts of whether technology was leading society towards 'dystopia', with 'Big Brother's' all pervasive power policing even the individual's innermost thoughts.

Among its other associations with 'power', technology also enables unmanned drone attacks to be launched in order to carry out targeted killings. The automated and robotic nature of the attacks robs it of the ability to be proportionate and differentiate between civilians and combatants.[2] As the attacks are unmanned and launched far from the target, the presence of accountability and transparency in relation to the attacks is absent, as it is difficult to trace back to the source of the attacks. Again, an instance where the development of modern technology is shaking the foundations of human rights, and proving to threaten core rights, such as the right to life.

The absence of laws specific to such developments results in a legal quagmire where preventing human rights violation by technological advancements became a challenge. Thus, over the past few years, the advance of technology seems to counter the progressive realisation of human rights. It has been viewed as a destroyer and not a defender of human rights.

Therefore, the debate as to whether technology can be used to redress human rights violations has been overlooked. This paper attempts to identify instances where the development in technology has contributed towards the advancement of human rights or

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[1] Iain levine, 'Will technology transform the human rights movement?' (OpenGlobalRights, March 26) <https://www.opendemocracy.net/openglobalrights-blog/iain-levine/will-technology-transform-human-rights-movement> accessed 5 November 2015
[2] *Ibid*

towards the prevention of human rights violations. The paper also highlights the challenges faced in grasping these opportunities due to the rigidity of laws and legal norms. As a result the paper will focus on practical applications of technology for the enhancement of human rights while identifying very briefly the reluctance of the courts to incorporate technological advances into the human rights discourse. Case law and examples from across the globe have been employed to present a worldview on positive impacts technology can have on human rights.

**The Freedom of Speech**

The advancement of technology has enhanced the freedom of speech and expression. An individual is able to express her opinions to a wider audience through the internet with connects people from around the world.[3] The introduction of social media platforms has further enhanced the freedom of speech. As a result, there is a wider exchange of ideas and opinions which facilitates the creation of a marketplace of ideas, from whence the best ideas can emerge.[4] Thus, certain opinions and prejudices that could have remained uncontested due to the lack of the communication of opposing views, have now been challenged due to the advancement of technology that facilitates cross cultural dialogue.

The Indian Supreme Court in a recent judgment struck down Section 66A of the Information Technology Act which sought to criminalize *inter alia* 'grossly offensive', 'menacing', 'annoying' and 'inconvenient' speech on the internet. The Supreme Court stated that the terms in the provision were too broad and thus there was no clear distinction between speech that was allowed and that which was prohibited. Further, the Courts were of the opinion that too much discretion was vested in the police officers to arrest individuals on the basis of this Section. Moreover, the vagueness of the terms meant that the individuals could have no certainty regarding what were the prohibited degrees of speech. Thus, the Court held that the overbroad nature of the terms pose a danger to the freedom of speech and expression on the internet.[5] Thus, the Court acted to prevent the violation of the human right of freedom of speech and expression. The judgment indicates that restricting the use of technology infringes on the human right of freedom of speech and expression. Hereby, the Court recognized the important role played by modern technology in enhancing free speech.

Further, by enhancing and protecting free speech, technology contributes towards the redressing of human rights violations. Suppressed voices which have been prevented from

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[3] Jack M Blakin, 'Digital Speech And Democratic Culture: A Theory Of Freedom Of Expression For The Information Society' [2004] 79(1) New York University Law Review 1, 2

[4] Peter Maggiore, 'Viewer Discretion is Advised: Disconnects between the Marketplace of Ideas and Social Media Used to Communicate Information during Emergencies and Public Health Crises' [2012] 18 Mich. Telecomm. & Tech. L. Rev. 627, 642

[5] Gautam Bhatia, 'Free Speech Under the Indian Information Technology Act: The Supreme Court's Recent Judgment' (Media Privacy and Communications, 27 March) <http://ohrh.law.ox.ac.uk/free-speech-under-the-indian-information-technology-act-the-supreme-courts-recent-judgment/> accessed 6 November 2015

crying out for their rights and justice, have now been given a medium through which they can communicate their grievances to a larger community. The usage of social media in the Arab Spring is a prime example of how technology can be used to create awareness, rally around for reforms and successfully lobby for change.[6]

However, the use of technology in this respect also highlights the challenge of ensuring that technology is not similarly used to incite violence or extremism. Further, the ability of social media to create a 'hype' and fuel an emotive response as opposed to a rational response poses yet another challenge. For example, the 2011 London riots were blamed on social media which provided the platform for the rioters to organize themselves.[7] The state of turmoil and the failure to establish stable democracies following the Arab Spring might be blamed by some on the fact that technology was used in kindling an emotional reaction resulting in the uprisings as opposed to a rational demand for change that was genuinely felt to be needed.[8]

## The Right to Privacy and Anonymity to Achieve Free Speech

Technology has also paved the way for those who are reluctant to divulge their identity, to remain anonymous, while expressing themselves freely to a global audience. The ability to be anonymous on the internet has been instrumental in encouraging more people to voice their thoughts and opinions without fear of facing dreadful consequences, especially in countries under repressive regimes. Thus, the anonymity feature, contributes towards buttressing not only the freedom of speech and expression, but also the right to privacy of these individuals.[9] They are given the right to choose how much information about themselves they would like to reveal. Thus, not only are they encouraged to express themselves, they are also protected when they voice their opinions and have control over how much of themselves they wish to reveal.

The introduction of encryption, which is one of the means by which technology has been harnessed to heighten the right to privacy of individuals, has sparked much debate of late. This technology makes use of mathematical algorithms to secure data that is transmitted and stored in devices. Therefore, the data cannot be accessed or deciphered by others unless

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[6] Heather Brown, Emily Guskin and Amy Mitchell, 'The Role of Social Media in the Arab Uprisings' (Pew Research Center's Journalism Project, 28 November) <http://www.journalism.org/2012/11/28/role-social-media-arab-uprisings/> accessed 4 November 2015

[7] *Ibid*

[8] Goldman Lisa, 'Social Media Has Been a Mixed Blessing for the Arab Spring' (TechPresident, 15 February) <http://techpresident.com/news/wegov/23510/social-media-harming-arab-uprising> accessed 6 November 2015

[9] Marc Rotenberg, (Preserving Privacy In The Information Society) <http://www.unesco.org/webworld/infoethics_2/eng/papers/paper_10.htm> accessed 7 November 2015

they have access to the encryption key which acts as a security password.[10] Thus, it is believed that this technology which increases privacy, would also as a result safeguard the freedom of expression. As this technology prevents the interception of data, it would encourage individuals to express themselves freely. Further, encryption technology would also encourage individuals to search and gain awareness on sensitive or controversial issues and form their own opinions. Thus this technology also promotes the search for information.[11]

The views expressed by certain heads of State stating that encryption should be banned or watered down, indicates that the degree of privacy this technology is able to afford to citizens even against surveillance undertaken by the State.[12] Thus, any attempt to weaken this protection would firstly, infringe upon the right to privacy of individuals as the data that they transmit and store can be intercepted by others and especially by the authorities. This will result in a chilling effect on the freedom of expression of individuals who would be reluctant to speak out in the face of possible interception, sanction or intimidation by State authorities.

Anonymity has received limited protection under international law. The European Court, the African Commission on Human and Peoples Rights and the Inter-American Commission on Human Rights have upheld the anonymity of sources mainly as a corollary of the freedom of expression.[13] However, the right to anonymity in general as opposed to merely the protection of sources of information online, has not been given adequate protection under International Law. In the domestic sphere, certain US, Canadian and Swedish laws have extended protection to the right to anonymity and anonymous speech.[14]

With relation to online anonymity, the UN Special Rapporteur in the 2013 report has emphasized the importance of anonymity and the right to privacy especially in relation with the freedom of expression. The report recognizes that weakening the right to privacy and anonymity will lead to a chilling effect of the free expression of ideas and opinions.[15] Further, the 1997 OCED Guidelines on Cryptography sets down certain rules to be adhered to in an effort to enhance the right to anonymity. The guidelines stress the need for the

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[10] Danielle Kehl, 'If you don't totally understand what encryption is, this guide is for you' (Slate Magazine, 24 February)<http://www.slate.com/articles/technology/safety_net/2015/02/what_is_encryption_a_nont echnical_guide_to_protecting_your_digital_communications.html> accessed 8 November 2015

[11] Electronic frontier foundation, " (Anonymity and Encryption Comments submitted to the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ) <https://www.eff.org/document/eff-comments-submitted-united-nations-special-rapporteur-promotion-and-protection-right> accessed 7 November 2015

[12] Danielle (n 10)

[13] Article19.org, (Response to UN Special Rapporteur's Call for Comments on Encryption and Anonymity Online, ) <https://www.article19.org/data/files/medialibrary/37862/A19-Response-to-UN-Special-Rapporteur-Anonymity-and-Encryption--Final.pdf> accessed 10 November 2015

[14] *Ibid*

[15] UNGA 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', (17 April 2013) 23rd Session (2013) UN Doc (A/HRC/23/40)

right to privacy and anonymity to be given priority when domestic legislation on Cryptography is drafted.[16]

However, certain cases, such as the European Court cases of *K.U. v. Finland*[17] and *Delfi v. Estonia*[18], have shown that the courts are reluctant to allow complete right to privacy. The courts have expressed concern that anonymity and privacy might be detrimental to national security and minority rights in certain instances. Thus, though there might be adequate development in the law to prevent human rights violations, as in protecting the right to privacy, anonymity and freedom of expression, the law seems reluctant to allow such heightened protection in the light of competing interests. This reluctance on the part of the courts can be understood as there is room for encryption technology to be abused and to cause human rights violations through cyber-attacks. One such cyber-attack was the release of viruses to shutdown national defence mechanisms or resource bases.[19]

### Right to Information

Moreover, technology has been instrumental in nurturing the right to information. Information about a wide range of topics can be accessed through the internet.[20] The access to information is made easier as a wealth of information is made available with a few clicks. Further, information about current affairs and governmental activity is made available online and thus ensure accountability and transparency. As citizens are able to access information, it serves to keep the power vested with various public authorities in check. Thus, citizens are less vulnerable to manipulation or abuse as they are able to keep track of what is being done.

Technologies enhancing right to privacy have the potential to influence the right to information. If the anonymity of web users is not protected, individuals would be discouraged from increasing the pursuit of knowledge on controversial issues as their search information would be accessible.[21] Thus, individuals would be gullible to the information that they are given and not be allowed to conduct their own research on the matter and reach their own conclusion. The ignorance of the individuals in such situations can be exploited by State authorities to carry out activities which the citizens might oppose if they could have had the opportunity to research and verify the information given to them. Thus by assuring the right to privacy and information, technology is able to prevent the State manipulating its citizens.

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[16]Oecd.org, (OECD Guidelines for Cryptography Policy) <http://www.oecd.org/sti/ieconomy/guidelinesforcryptographypolicy.htm> accessed 11 November 2015

[17] K. U. v FINLAND App no 2872/02 (ECtHR, 2 December 2008)

[18] DELFI AS v ESTONIA App no 64569/09 (ECtHR, 10 October 2013)

[19] Shahrooz Shekaraubi, (Iran's Case against Stuxnet) <http://www.internationalpolicydigest.org/2014/03/18/irans-case-stuxnet/> accessed 12 November 2015

[20] Article19.org (n 13)

[21] Article19.org (n 13)

## Awareness of Human Rights Violations

Further, the advancement in technology and creation of social media sites such as twitter and facebook has contributed towards drawing attention to the violations of human rights in various parts of the world. This has helped human rights defenders and activists to lobby for action to be taken and to pressurize governments and perpetrators of human rights violations into taking measures to cease activities detrimental to human rights.[22] Thus, technology has been effective in combatting human rights violations as the proof of violations can be recorded and stored with the aid of technology. Videos, satellite images and photographs have been used as evidence to make repressive regimes or rebel groups to admit to the committing of human rights violations. The governments have not been able to escape in the face of damning evidence captured through technology.

For example, Human Rights Watch used satellite images to warn Seleka commanders in the Central African Republic by showing them the images of villages being burnt down by their forces.[23] Further, technology has also been instrumental in documenting evidence of human rights violations, and alerting the world at large about the commission of such atrocities. Creating awareness and applying pressure on the perpetrators of human rights violations can be done based on the evidence captured through advanced technological devices. For example, Human Rights Watch relied on the help of satellite imagery in order to document human rights violations such as the civilian infrastructure being destroyed in Syria, the attacks against the Muslim communities in Burma and the forced resettlement in Tibet.[24]

Further, the release of information through social media platforms or through technology which enables the videoing and recording of human rights violations has galvanized various human rights groups and governments to take action to intervene and stop the violations or to carry out investigations into the matter. For example, the usage of the Channel 4 footage of alleged human rights violations during the last stages of the war in Sri Lanka, as instrumental in creating awareness and triggering investigations into this issue.[25]

Thus, the advancement of technology especially through facilities which have enabled the capture and dissemination of live footage has contributed as a catalyst with regards to action taken to redress human rights violations.

Moreover, technology has been proven instrumental in documenting and collecting evidence of human rights violations without exposing human rights activities to the dangers in the area. For example, satellite images, eyewitness testimonies and video forensics, which is a minute analysis of video footage on an intricate frame by frame basis, was used by Human

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[22] Iain (n 1)

[23] Iain (n 1)

[24] Iain (n 1)

[25] Kathleen o'neill and others, 'New Wine in Old Wineskins? New problems in the use of electronic evidence in Human Rights investigations and prosecutions 'Bernard and Audre Rapoport Center for Human Rights and Justice' http://www.crl.edu/sites/default/files/d6/attachments/pages/Rapoport-E-evidence-report.pdf accessed 12 November 2015

Rights Watch in Syria in order to gather evidence of the Syrian government's use of chemical weapons, without having to step in to the area for this purpose.[26]

## Challenges Faced when Using Technology to Create Awareness

There are challenges and limitations to how technology may be used towards the actual 'redressing of human rights'. Firstly, it has to be conceded that the examples put forth are instances where human rights activists have been able to document human rights violations and merely share them with a larger audience. While it is accepted that this is an improvement from the time where the human rights violations taking place in one part of the world could not be communicated in a timely manner to others, it has to be recognized that currently, an improvement has been made only in this respect. Technology is only able to merely shed light on human rights violations in various places. Technology has yet been the means of directly intervening to stop or prevent such violations.[27] Thus, the contribution of technology towards redressing human rights violations, is at best, indirect.

Secondly, while the video footages and tweets act as a catalyst for action against human rights violations, it will take some time for such information to be verified and certified as authentic prior to any action being taken in this regard.[28] Further, the information communicated especially through social media sites are not conclusive evidence of who the perpetrators are. Thus, while a video footage or tweet might indicate that a mass killing has taken place, there is no indication of who the perpetrators were and what was the cause of the killing.

Hence, governments or international organizations cannot rush in to intervene till the footage is first checked to see if it is genuine or has been maliciously fabricated or tampered with. Next, there has to be more investigation into the killings in order to identify the reason for the killings.[29] More time, investigation and even diplomatic measures such as negotiations or sanctions might be required to identify the perpetrators. Following all of this, the perpetrators cannot still be tried and punished solely based on a video captured on a phone or a series of tweets. Thus, while technology might aid in gathering corroborating and circumstantial evidence as well as drawing attention to the human rights violations, technology has not yet been able to provide conclusive primary evidence based solely on which perpetrators of human rights violations can be brought to justice.[30]

Thirdly, whilst capturing and releasing images or video footage of human rights violations, the human dignity and right to privacy of the victims should also be respected, especially in cases such as sexual assault or rape. Moreover, if victims or eyewitnesses are being

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[26] Iain (n 1)

[27] Iain (n 1)

[28] Eyewitnessprojectorg, (Eyewitnessproject.org); http://www.eyewitnessproject.org/?page_id=38 accessed 10 November 2015

[29] Ibid

[30] A Ashouri and others, 'An Overview of the Use of Digital Evidence in International Criminal Courts' [2014] 11 Digital Evidence and Electronic Signature Law Review 117

interviewed, their consent has to be obtained. These elements should be verified before documenting violations or eyewitness testimony.[31] Further, these details should be checked again before any action is taken on the information on human rights violations communicated through technology. Further, the protection of the witnesses who are interviewed and recorded on videos should also be ensured especially if the witnesses remain in the area where the human rights violations have been committed.

On the other hand, ensuring the consent and security of witnesses and victims might prove to be arduous where the violations are documented far from the place where the violations are being carried out, such as through satellite images, as the relationship between the victims, witnesses and those who document the incidents is remote.[32]

## Judicial Handling of the Dilemma

Currently, there is much lobbying to admit such evidence captured on mobile devices in the form of videos and photographs in international criminal court proceedings against the perpetrators of grave crimes such as war crimes and genocide. The international criminal court has for the most part preferred to use video evidence corroborating, as opposed to direct, evidence.[33]

This leads to the question as to whether the video released by Channel 4 titled 'Sri Lanka's killing fields' will be admissible as evidence. The report released by the Panel of Experts appointed by UN Secretary General Ban Ki-moon following the release of the video by Channel 4, stated there were credible allegations of human rights violations and recommended that an independent investigation be carried out. The panel of experts speaking of video and photographic footage submitted by citizens stated that whilst the footage could not be used as a primary source, as they could not be independently verified by the Panel, they could be used to corroborate other sources of information.[34] This follows the trend since the Nuremburg trials, where video footage has been used to contextualize information in the sphere of war crimes investigation.[35]

However in the case of *Lubanga,*[36] the court relied on video evidence to conclude that the former DRC warlord Thomas Lubanga was guilty of having recruited child soldiers.[37] The video showed Lubanga visiting a training camp and being surrounded by soldiers.[38] It was

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[31] Iain (n 1)

[32] Iain (n 1)

[33] A Ashouri (n 30)

[34] K O'Neill (n 25), 46

[35] Mariel Gruszko, 'In the news: authenticating video footage as evidence in Sri Lanka' (Witness, August); <https://blog.witness.org/2011/08/authenticating-video-footage-as-evidence-in-sri-lanka/> accessed 11 November 2015

[36] *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (ICC)

[37] Duerr, 'Lubanga appeals ruling requestions ICC fairness' [2014] 171 International Justice Tribune

[38] T lingsma, 'On appeal, Lubanga calls two more 'non child' soldiers' [2014] 160 International Justice Tribune

concluded that the soldiers gave the appearance of children under 15. The judges stated in their judgment that the 'video evidence clearly shows recruits under the age of 15 in the Rwampara camp.'[39] Thus, the Court seems open to take into consideration video evidence. This amounts to a step forward in terms of how technology can redress human rights violations. Perpetrators of human rights violations can be speedily brought to justice if the Court is progressive and accepts the technology as a means of presenting direct and not merely corroborative evidence.

Thus, while, technology has been able to aid the redress of human rights violations to a certain extent, by providing the basis on which to begin investigations and by drawing the attention of human rights activists and international organizations, it is limited in the sense that it is unable to directly prove or vindicate alleged human rights violations. This can be attributed to the very nature of video evidence which allows it to be easily tampered with or edited. Thus, a long process of authenticating has to be carried out before the video evidence can be admitted. For example, the UN Special Rapporteur on extra-judicial, summary or arbitrary executions commissioned a group of experts consisting of an audio and video expert, a forensic pathologist and a ballistic expert to determine the authenticity of the channel 4 videos.[40] Given the high threshold of doubt attached to criminal proceedings which requires proof beyond reasonable doubt, technology has still a long way to go in order to meet this standard. Thus relaxing the rules on admissibility of evidence could work in favour of admitting video evidence and pave the way for technology to play a role in redressing human rights violations.

However, changing the law to accommodate the evidence presented by technology might prove to pose a disadvantage to the alleged perpetrators who would be subjected to grave punishments based on merely video evidence which may have been tampered with or fabricated. Thus, relaxing rules on admissibility of evidence can lead to injustice to the alleged perpetrators who may not deserve to be punished as perpetrators of international crimes such as genocide and crimes against humanity.

### Is there a solution to the problem?

The legal quagmire surrounding the use of the Channel 4 video as evidence to find the Sri Lankan government guilty of human rights violations during the last stages of the war, resulted in the development of new software applications which are able to identify the authenticity of the evidence collected.[41] The software is able to trace the locations and surroundings of the alleged incident in order to determine if the footage captured on camera is genuine or whether it has been tampered with.

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[39] *The Prosecutor v Thomas Lubanga Dyilo* (n 36)
[40] Mariel Gruszko (n 35)
[41] Barbora Holicka, (GBV Uncovered, ) <http://www.gbvuncovered.com/blog/eyewitness-hold-war-criminals-accountable> accessed 9 November 2015

A camera application introduced by 'eyeWitness', termed "eyeWitness to Atrocities", captures the metadata that allows the footage to be used in trials and investigations.[42] Further, this also stores the information in a storage facility of the eyewitness organization. Following this the organization works with the legal authorities in analysing the information captured. When the images are taken, the GPS coordinates, date, time, location of surrounding objects and device movement data are also collected as a result of the application being able to expand the metadata which is collected and found in the images to access this information. Moreover, the application can also be used to ascertain if the footage has been tampered with or altered in any way. The original footage is then stored in a facility maintained by eyeWitness till used for investigations. Further, while the user of the application can remain anonymous if she wishes, this anonymity will not affect the verifiability of the footage.[43]

## Technology Protects Human Rights Defenders

Moreover, technology has also helped to pave the way for heightened protection of human rights defenders through the development of software applications termed 'panic button'.[44] This enables those at risk to attract attention to their whereabouts and hasten means of rescue. The panic button app was developed by Amnesty International in collaboration with 'iiliab'[45] and other activists and tech experts in order to alert the community of human rights defenders if one of them was abducted or detained unlawfully. As the first few hours following a disappearance are crucial, this application is helpful in alerting the community of human rights activists immediately if one of the activist's safety is threatened.

This is an example of technology redressing human rights violations to a certain extent, albeit in an indirect manner. Human rights activists will not be discouraged from continuing their work as they know there is a means of accessing help should they face any danger especially when they have been receiving threats against their life and safety. Further, in the event of the activists facing any danger, this technology facilitates the redress of human rights violations against human rights defenders themselves, by enabling the rest of the human rights community to take immediate action towards safeguarding the rights of the individual in question and ensuring her safety as soon as possible.

## Conclusion

It is evident that technology has opened up a 'Pandora's box' of issues and concerns with respect to relevant human rights discourse. Despite recent accounts of grave human rights

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[42] Eyewitnessprojectorg (n 28)
[43] Eyewitnessprojectorg (n 28)
[44] Frontlinedefendersorg, (Frontlinedefendersorg,) <https://www.frontlinedefenders.org/node/29166> accessed 8 November 2015
[45] *Ibid*

violations through the use of technology, there are also many examples of where technology can be used to further human rights.

Technology plays an important role in enhancing civil and political rights such as freedom of speech and expression, right to privacy, right to anonymity and right to information. The ability of technology to connect people from different walks of life across the globe and the increase in the dissemination of information and knowledge has contributed to this. However, it is observed that technology plays more of a role in enhancing these rights than offering a redress mechanism in the event of these rights being violated. On the other hand, it can be argued that in the past, these civil and political rights could be easily infringed by the banning of newspapers and publications that propagate controversial sentiments, the use of force against protestors and the blocking of websites to prevent access to information. These human rights violation of the past, are now being redressed by technology which facilitates a more secure platform for the exercise and enjoyment of these civil and political rights.

In terms of the usage of technology to prosecute and convict perpetrators of human rights violations, technology has played the role of a facilitator and catalyst of investigations into the alleged violations as opposed to a means of redress. Thus, technology has not been able to directly intervene in redressing violations of rights such as the right to life. Technology has only been able to draw attention to the violation. Thus, the challenge lies in amending procedural laws to allow technology to play a more pivotal role in bringing perpetrators to justice.

Finally, technology contributed by providing means through which violations of the human rights of human rights activists and defenders can be redressed. In this instance too, technology does not directly intervene in preventing or redressing human rights violations, but rather in drawing attention to the violations.

However, the first step towards redressing human rights violations is the need for the general public to be made aware of the violations, it can be safely concluded that technology is indeed a vital means of redressing human rights violations especially in the 21st century where technology has been intricately woven in to the day to day lives and functioning of individuals, organizations and nations.

# Communication Technology and the Perpetration of Sexual Violence against Women and Girls

Thiagi Piyadasa*

## Introduction

Communication technology has increasingly become a necessary feature in our daily lives. For the younger generation it has become an irreplaceable form of socialization and therefore plays a role in shaping values, norms and behaviour. These technologies facilitate speedy and efficient transactions and transmission of information and knowledge, and help connect people worldwide for purposes that range from business, leisure, activism and crime.

While the benefits and risks of emerging communication technology particularly to finance and business are well documented, this paper seeks to explore and highlight the issue of 'technology facilitated sexual violence' against women and girls (hereinafter referred to as 'TFSV' a term borrowed from Henry and Powell[1]). TFSV affects women across the world, however little has been done to understand the nature and prevalence of TFSV in Sri Lanka. This paper will argue on the importance of exploring the social dynamics that contribute and lead to TFSV in order to prevent and explore appropriate legal and social 'remedies' or responses for those affected.

For the purpose of this paper, the definition of "communication technology" includes both devices (computers and mobile phones) and associated platforms of communication (social networking sites, websites, text messages, email)[2]. This definition is employed to recognize that the perpetration of TFSV often includes the use of multiple devices and platforms. Sexual violence is used to include rape, sexual harassment and abuse, blackmail, bullying and gender based hate speech that is often sexual in content.

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[1] Nicola Henry and Anastasia Powell, "Embodied Harms: Gender, Shame and Technology-Facilitated Sexual Violence", *Violence Against Women*, Volume 21 (6), pp.758-779, 2015.
[2] Nicole Bluett-Boyd et al, "The role of emerging communication technologies in experiences of sexual violence: A new legal frontier? Executive Summary", Journal of the HEIA, Volume 20, No.2, 2013.

## Technology Facilitated Sexual Violence against Women

Communication technology has been conceived of as a democratizing and liberating space for otherwise marginalized groups as it provides equal opportunity to engage and benefit through its various platforms. The use of Twitter in the mass mobilization of protestors in Tahir Square, Egypt in 2011 and more recently the strong online social media campaign for the Maithreepala Sirisena Presidential Campaign in January 2015 is demonstrative of this fact. Similarly postmodern feminists for example have viewed new technologies as empowering to women and non-hegemonic genders[3]. However, certain other feminists such as Judy Wajcman have argued that 'technology is both a source and cause of gender inequality' because real life gender realities also play out in the virtual world[4]. This is perhaps the crux of the matter and why TFSV should be taken more seriously in Sri Lanka.

TFSV against women is not necessarily a new phenomenon but is a growing issue, particularly in Sri Lanka. These crimes may include but are not limited to sexual harassment, blackmail and bullying via the use of mobile phones, email or social networking sites, creation and distribution of sexual content originating with or without the consent of the woman, capturing and distribution of incidents of sexual assault, creating fake profiles of women with the intent of blackmailing or luring women for sexual purposes, and hate speech. Global literature and national data (that is currently available) reveal that women are the predominant victims or targets of technology facilitated sexual violence. A survey conducted in Germany among 9000 internet users found that women were significantly more likely than men to be victims of online sexual harassment, cyber-stalking, and insulting comments[5]. Interviews with officials attached to SLCERT as well as the Police Cyber Crimes Division confirmed that the majority of complaints made to them were from women.

Many of these crimes are recognized forms of criminal behavior that now take place through technology facilitated mediums[6]. However, scholars have argued that there is a distinction between sexual violence crimes that take place online and offline that affect victims in particular ways. The necessity for this distinction is attributed to the unique nature of communication technology that affords greater reach at a fraction of the time, and the difficultly if not the impossibility of erasing such content once it has been uploaded to the internet. This is further complicated by the issue of jurisdiction with companies such as Facebook, Whatsapp, Instagram being located beyond the borders of Sri Lanka. For the purpose of seeking justice for women affected by these crimes, this paper will argue that online and offline crimes should be recognized as distinct offences within the law in Sri Lanka.

TFSV is not simply an extension of recognized crimes but subjects a victim to multiple harms due to the nature and quality of communication technology outlined above. For

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[3] Nicola Henry and Anastasia Powell, p.762
[4] *Ibid.*
[5] *Ibid.,*p. 759
[6] Peter Grabosky, 2001 in Nicola Henry and Anastasia Powell, p.763

example TFSV provides the opportunity for third parties to continue to perpetrate the crime by viewing and sharing the picture or video, and thus forces the victim to relive the violence over and over again while attracting public attention and ridicule. In 2009, a Royal Australian Navy Sailor was found guilty of two counts of rape after he filmed himself raping a fellow officer and shared the video with three male peers[7]. In another example known as the 'Defence Skype Scandal' two Australian cadets were charged with 'using a carriage service to cause offence' and 'committing an act of indecency' when one secretly filmed consensual sex with a female cadet while a livestream was set up in another room filled with male cadets[8]. The main accused was later terminated from the Australian Defence Force Academy. The Academy noted that his conduct was inconsistent with the values and standards expected of a member of the Defence Force[9].

Interestingly these cadets were not charged with sexual harassment despite the fact that they deliberately humiliated a fellow female cadet in front of her peers. Newspapers reported that this incident caused the female cadet to be 'bullied out of the military and her dream job', she went on to recall how '[Some] boys in the room across from me thought it was fun to terrorise me and call me the Skype slut continually every time I left my room.'[10] This would have direct repercussions for how women are viewed and treated in the Defence forces, an extremely patriarchal institution world over. Seen in this light, this crime can be interpreted as an extension of gender based violence where technology becomes yet another tool by which to exercise power over women. In this process women are reduced to objects for male conquest and gratification. According to Martha Nussbaum 'to objectify is to treat as a mere thing, a tool of the purposes of the objectifier, an entity whose subjective feelings need not be taken into account, or whose feelings, like her autonomy, may be willfully violated'[11]. To the male cadets who orchestrated the livestream and the male cadets that accepted the invitation to view it, the female cadet was an object for their gratification. At that point she was not seen as a peer or colleague, and this culture of seeing women as objects for male gratification is symptomatic of gender based violence.

A number of recent incidents in Sri Lanka suggest that more significant legal attention needs to be paid to the issue of TFSV. In 2015 'Grassrooted Trust' a member of the National Task Force on Cyber Exploitation coming under the purview of the National Child Protection Authority received complaints from school girls regarding threats they had received from anonymous individuals claiming to be in possession of naked and semi naked pictures of the girls. In total 70 girls received these threats. The perpetrators had contacted the girls via 'Snapchat', 'Whatsapp' and 'Instagram'. These pictures were sometimes leaked by ex-boyfriends, friends and in some instances the girls themselves sent these pictures after being befriended by the perpetrator. In certain cases the girls' own Facebook account

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[7] *Ibid.*, p. 767
[8] *Ibid.*
[9] ADFA cadet Daniel McDonald sacked over Skype sex scandal, ABC Net, 9 November 2013. http://www.abc.net.au/news/2013-11-09/adfa-cadet-sacked-over-skype-sex-scandal/5080834 (Accessed on 6 December 2015)
[10] *Ibid.*
[11] Martha Nussbaum in Nicola Henry and Anastasia Powell, p.768

passwords had been secretly obtained and the perpetrators would log in to contact her friends, who would in turn send these pictures to the perpetrator being made to believe they were chatting with their friend. In some instances girls were blackmailed into obtaining naked pictures of their friends or other girls to prevent their own pictures from circulating. Subsequent to several awareness campaigns in schools, Grassrooted Trust was sent a link to a database of over 2500 pictures of naked images of school girls. The link to the database was also circulated among tuition classes and sports clubs and included details of the girls' names, their schools and a description of the picture. Interested individuals could obtain these pictures by contacting the perpetrator via certain apps.

While the exact age of the perpetrator is unknown, it is clear that these images are circulated widely among school boys. The motivations and reasons for boys to circulate these images include popularity, competition, peer pressure, masturbation, revenge, blackmail, curiosity and 'because the picture belongs to him, he can share it'. The girls noted that sharing of naked pictures was normal, and a symbol of trust and fidelity. Some also noted that they felt obligated or were pressurized by their boyfriends, as boys would be bullied if they didn't have a naked picture of their girlfriend. Self-esteem also plays a role in motivating girls to capture and share these images.

This incident demonstrates the power and influence of mainstream and social media in shaping young people's conception of self and sexuality. It also adds to the existing body of knowledge that has clearly identified the role of media in promoting discriminatory gendered norms and stereotypes that perpetuate gender based violence. As Michael Salter explains the reporting of women's issues is trivialized and allegation of sexual violence and rape treated with a high degree of suspicion.[12] Unfortunately this has meant propagating particular gendered norms and expectations which heavily influence young men and women, particularly in the absence of comprehensive health or relationship education in schools. One perpetrator even went so far as to use the popular UN campaign 'He for She' to convince young girls to send naked pictures of themselves, justifying it as 'liberating'.

This incident necessitates a closer examination of 'perpetration' as the perpetrator could be school boys or adult men. Similarly when school boys actively distribute these images and use these images for personal gratification, are they perpetrating violence against girls? A national study in USA published in 2006 reported that 'nearly half or 43 percent of minor solicitation are perpetrated by other minors'.[13] It appears that developments in communication technology have made it easy for young people to perpetrate violence against their peers, and TFSV appears to be targeted mainly at girls and women.

A different form of TFSV took place in 2014 when a YouTube video of a young woman slapping a man at the Wariyapola Main Bus Halt went viral[14]. The woman claimed that the

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[12]Michael Salter, "Justice and revenge in online counter-publics: Emerging responses to sexual violence in the age of social media", *Crime Media Culture*, Volume 9 (3), pp.225-242, 2013, p.227.
[13]*Enhancing Child Safety and Online Technologies: Final Report of the Internet Security Technical Task Force*, Berkman Center for Internet & Society, Harvard, 31 December 2008. https://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf
[14] "I suffered mental trauma: Wariyapola girl", C. Wijeyesinghe, *Daily Mirror*, 8 September 2015.

man in question made inappropriate remarks to her and her friend and upon being provoked further she slapped him. What was interesting was the reaction of the public that commented on this video across multiple platforms. The young woman in question was immediately branded as the 'Wariyapola Girl' and came under heavy public scrutiny for 'taking the law into her own hands' and for 'assaulting' a man. No mention was made of the initial behavior on the part of the man which led to this incident and the issue of sexual harassment of women in public places and transport was completely silenced. Subsequently in 2015 the man in question was found guilty of sexual harassment and in an interview the young woman stated that in fact she was not the first to slap him. Before her, the time keeper and her friend hit the accused[15]. The reason this detail is important is to highlight the probable motive behind the video, which appears to be targeted at ridiculing the young woman's conduct rather than highlighting an incident of sexual harassment. It could also be argued the motive could have been to punish an outspoken woman who was defending herself. Shockingly even popular singers like Iraj put up pictures on Facebook that ridiculed the action of this young woman[16] contributing to the normalcy and acceptability of the public's reaction to this incident. Comments even went so far to claim that even if the young man made any remarks, the woman deserved it because of the way she was dressed. This can be referred to as gender based hate speech with repercussions not only for the young woman in question but for all women. Not only did the young woman have to experience violence first hand by the accused, she was also subject to repeated threats, hate speech from complete strangers on an online platform. Alexa Dodge referring to the work by Fairbairn explains 'in the context of sexual violence and social media, it is particularly important to think about sexual violence on a continuum that involves emotional, psychological, and verbal violence as well as physical violence'[17]. In this case as there was no legal conception of technology facilitated sexual violence within our law, the extension of harm that was caused by the distribution of the video and the resulting comments and treatment could not be recognized.

In another example from Sri Lanka, a video of a woman being assaulted by a police officer at the Ratnapura Bus Terminal went viral in September 2014[18]. The video showed the police officer beating her with what appeared to be an iron wire as well as dragging her by her hair and kicking her. It later transpired that the woman was a commercial sex worker. She claimed that the police officer began assaulting her after she refused his request for free sexual services. Similar to the Wariyapola incident, while there was some concern over the assault by the policeman, the majority of comments appeared to legitimize the action. The rationale appeared to be the need to maintain public decency. Following this incident two protests were held in Ratnapura against sex workers operating around the main bus stand which included three wheel drivers among others. Sex workers report that often

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15 *Ibid.*
16 The picture showed Iraj and another individual pointing to a signage for Wariyapola with a look of fear. It was clear that the picture was done to make fun of the young woman who was provoked.
17 Alexa Dodge, "Digitizing rape culture: Online sexual violence and the power of the digital photograph", *Crime Media Culture*, pp.1-18, 2015, p.3
18 "Bared: Sex worker's vulnerability", C. Kirinde, *The Sunday Times*, 12 October 2014.

three wheel drivers benefit from the trade, as they engage in finding clients and also receive a share from the sex worker's earnings. What transpired is a reflection of social structures and inequalities. It is therefore important to consider the experiences of a sex worker or persons from other marginalized groups in experiencing TFSV and the possible barriers they would face when coming forward to report it.

These incidents can be explained with reference to theorization of gender based hate speech and rape culture. Rape culture can be defined as 'a complex set of beliefs that encourage male sexual aggression and supports violence against women. A rape culture condones physical and emotional terrorism against women and presents it as the norm. In a rape culture, both men and women assume that sexual violence is a fact of life, as inevitable as death or taxes.'[19] This conclusion is not drawn simply based on the three examples provided. It is based on how rape and sexual violence is portrayed in the media in Sri Lanka, in the manner in which investigations and trials on rape are conducted, the practice of victim-blaming by referring to the woman's conduct, her clothing or the fact that she was out at night.

TFSV should be understood as an extension of existing patriarchal practices that condones violence against women while causing multiple harms due to the very nature of communication technology. As noted by Anastasia Powell the 'internet and mobile technologies are indeed also tools utilized for the mass distribution and consumption of women as sexual objects through mainstream and amateur pornography, as well as the direct sexual exploitation and abuse of young women and girls'.[20] Communication technology therefore not only helps perpetuate existing gendered norms it also actively contributes to and strengthens such norms by inviting a public audience to like, tweet, share or comment.

**Legal Framework to Address Technology Facilitated Sexual Violence against Women**

Countries are forced to come to terms with these emerging crimes, and many have introduced specific legislation. For example the State of Victoria, Australia passed a law in 1999 that prohibits the use of surveillance devices outside the scope of law enforcement purposes. Similarly to address the growing incidents of voyeurism, in 2007 a new law was passed titled the Summary Offence Amendment (Upskirting) Act 2007 to prosecute actions of upskirting and downblousing; and the issue of privacy is dealt with through the application of laws relating to minor misdemeanor or summary offences[21]. For situations where women are photographed without their consent, or when pictures are circulated without the consent of the woman, Powell points out that the benefit of a privacy law is that the issue of consent is dealt with and the 'sexual image itself becomes evidence of the crime

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[19] Buchwald et al., 2005 in Alexa Dodge, p.3
[20] Anastasia Powell, "Configuring Consent: Emerging Technologies, Unauthorised Sexual Images and Sexual Assault", *The Australian and New Zealand Journal of Criminology*, Volume 43 Number 1, pp.76-90, 2010, p.79
[21] New South Wales Summary Offences Act 1988, Victorian Summary Offences Act 1996

as long as it was taken in a situation where a reasonable person would expect to be afforded privacy'[22]. In the United Kingdom judges' guidelines have been introduced that call for more severe penalties when the crime is recorded and distributed[23]. As noted by Powell these guidelines establish a formal acknowledgment of the additional harm caused to the victims[24].

In terms of recognizing violence through the use of communication technology, Sri Lankan policy makers have traditionally focused on and prioritized child pornography and this has led to legislation that seeks to criminalize child pornography that is published or found on computers and mobile phones. This includes the Obscene Publications Act No. 4 of 1927, Penal Code Amendments No.29 of 1998, and No. 16 of 2006. These provisions are used when the young woman or boy in question falls within the definition of a child that is below the age of 18 years. Recent examples of TFSV among school going children however highlight the issue of consent, particularly as the age of consent in Sri Lanka is 16 years. Therefore in situations where the girl has consented and sent the image to her boyfriend or friend, does that constitute child pornography? What about the boys who would actively circulate the image to friends? Would there be a punishment in such instances? What would that punishment or response be?

The absence of specific laws that criminalize TFSV against women is a significant gap in the law given that interviews with SLCERT and the Police Cyber Crimes Division claim that in fact the majority of technology facilitated violence is reported by women and girls. The most common scenario includes sexual pictures of the woman (taken with or without the consent of the woman) being circulated or the threat of circulation and blackmail; creation of fake profiles; circulation of women's personal mobile phones via escort services or social networking sites, creation of fake nude pictures by editing private or public images and mass circulation of these images, including the threat of distribution. It is extremely problematic when the law distinguishes between girls and women when it comes to sexual violence and only makes provisions for the protection of girls because they fall within the definition of a child. It ignores the lived realities of women and the spectrum of violence women experience during the course of their lifetime.

The following table provides information on the type of incidents reported to SLCERT, and though this data is not disaggregated by gender, SLCERT confirmed that the majority of cases of social media/fake profile creation were reported by women. The increase in reporting over the years is perhaps due to increased awareness about the services offered by SLCERT or the increase in smart mobile phones usage within the market where it has been reported that the majority of Sri Lankans access the internet via their mobile phones. However it also highlights the potential risks of violence against women, particularly through social media.

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[22] Anastasia Powell, p.83
[23] *Ibid.*, p.80
[24] *Ibid.*

| Type of Incident | 2014 | 2013 | 2012 | 2011 | 2010 | 2009 | 2008 |
|---|---|---|---|---|---|---|---|
| Phishing | 12 | 8 | 8 | 6 | 6 | 10 | 5 |
| Abuse/Privacy | 8 | 8 | 8 | 2 | 20 | 10 | 3 |
| Scams | 12 | 18 | 6 | 3 | 10 | 11 | 5 |
| Malware | 3 | 2 | 2 | 1 | 5 | 12 | 11 |
| Defacements | 56 | 16 | 15 | 20 | 8 | 15 | 14 |
| Hate/Threat mail | 10 | 8 | 6 | 3 | 12 | 8 | 6 |
| Unauthorized Access/Attempted | 8 | 11 | 1 | 3 | 10 | 3 | 5 |
| Intellectual property violation | 3 | 3 | 3 | 5 | | | |
| DoS/DDoS | 6 | 1 | 1 | 1 | | | |
| Fake Accounts/ social media | 2250 | 1200 | 1100 | 1425 | 80 | | |

With SLCERT reporting they receive over 50 calls per day regarding social media, it is clear that swift action must be taken to address the issue of technology facilitated sexual violence against women and girls. As an initial response it is possible through amendments to existing laws that provide for reporting of incidents of child abuse to include incidents of sexual violence against women such as in Section 286B of the Penal Code (Amendment) Act No.16 of 2006 that requires 'a person who provides a service by means of a computer to take all such steps as necessary to ensure that such computer facility is not used for the commission of an act constituting an offence relating to the sexual abuse of a child'.

Similarly in Penal Code (Amendment) Act No.29 of 1998 Section 286A specific reference is made to indecent and obscene photographs or film of a child which could be amended to include women '(2) Any person who, being a developer of photographs or films, discovers that any photograph or film given to him for developing is an indecent or obscene photograph or a film of a child, shall, forthwith on such discovery, inform the officer in charge of the nearest police station that he has in his possession, such photograph or film'. Existing penal code laws that criminalize sexual harassment for example could be amended to recognize technology facilitated sexual harassment and violence, especially in sentencing.

In conceptualizing TFSV the law will have to grapple with questions of privacy, consent, and perpetration. The law in Sri Lanka does not recognize a common law right to privacy. Therefore individuals do not have a civil remedy in response to any alleged infringement of privacy by another individual acting in their personal capacity. This is relevant to the

numerous situations where school girls and women are photographed without their knowledge. These pictures are taken in private and public functions, public transport, school vans, uploaded and circulated via social networking sites. Admittedly, in many of these situations the perpetrator is unknown and a complaint will need to be lodged to the administrators of the relevant social networking site for example Facebook if one is to request that the page is deleted. Where the perpetrator can be identified, the victim would have civil remedies under defamation laws for the online violence perpetrated against them.

## Making Communication Technology Safe for Women and Girls

Several key steps can be taken to ensure that emerging communication technology is safe for women and girls. The first step is to recognize TFSV as an extension of gender based violence that can in certain instances lead to actual physical violence, as in the case of certain incidents reported to the Police, or that certain physical crimes may continue in other ways through the use of communication technology. For example, a long debated issue among the State and women's rights activists has been the issue of statutory rape. Police report that out of the total number of incidents of rape, the majority are statutory rape. During the first eight months of 2014 police recorded 1046 cases of rape and sexual abuse, and 788 of those cases involved girls below the age of 16 years, and these were attributed to 'love affairs'[25]. It has been argued that in majority of these cases this is consensual sex between adolescents. Meanwhile global statistics reveal that it is the younger generation that is most likely to fall prey to TFSV, where very often the sexual images are taken with the consent of the girl but the distribution takes place as a result of revenge or blackmail after the relationship has ended or turned sour. It would seem likely that in most of these cases of statutory rape, girls may have consented or been forced to pose for pictures which may very well be used against them in future. The example of the 70 girls described above makes this a possibility.

This leads to the second issue of public awareness, particularly for young men and women, not only with regard to the possible risks involved but also to provide a clear message on the criminal aspects of such action regardless of whether the law recognizes it as such. Awareness programs conducted by SLCERT and the Police Cyber Crimes Division should be made mandatory in all schools, empowering young people to make safe choices online. Grassrooted Trust recommends a more holistic approach of comprehensive health and relationship education. In the past, the Ministry of Child Development and Women's Affairs and certain quarters of the police recommended lowering the age of consent so as not to penalize boys who engage in 'consensual' sex with girls below the age of 16 years. If these actors recognize adolescents as sexually active, then comprehensive health and relationship education should be mandatory for all school children, the failure of which can be considered a breach of duty. The Directive Principle of State Policy and Fundamental Duties Section Article 27 (13) provides that 'The State shall promote with special case the

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[25] Premalal Wijeratne, *Mawbima*, 5 October 2014, p.2

interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination'.

At present, the Police Cyber Crimes Division is located in the Police Headquarters in Fort. This is not accessible for many people, and therefore the State should aim for every police station to have police officers capable of handling a report of TFSV which would include advanced information technology (IT) skills and an understanding of the laws that are applicable. More importantly these police officers would need to be trained to avoid the well-documented bias against women that exists within Sri Lanka's criminal justice system[26]. Strong cultural and social norms prevent many women from reporting incidents of rape and sexual violence. For these same reasons many women do not come forward to report TFSV. It is therefore important for the police to make an extra effort to placate fears by ensuring a non-judgmental response to complaints. Unfortunately, most information uploaded onto the internet becomes a permanent and pervasive part of a person's online history[27] and could affect job prospects, promotions, and relationships. This 'digital dirt' can impact on a woman's 'character' that is often the subject of aggressive cross examination in any court matter.

Police highlight specific challenges that they face in identifying the perpetrators in cases of creation of fake profiles, uploading and doctoring of pictures for online distribution. On certain occasions where they have been able to identify and apprehend the accused, Police have been unable to find the pictures or videos as the accused, in most likelihood, has saved them on online storage sites such as 'Dropbox'. Police have also identified the difficulties in obtaining information from internet service providers. Internet Service Providers (ISP) do not maintain a database of IP addresses that have been assigned. Therefore even if the police are able to obtain the IP address through a court order, they are unable to trace this to a physical computer or location, making it impossible to trace the individual.

While this paper has largely discussed the dangers posed to women by emerging communication technology, it does not discredit the obvious opportunities afforded by technology. For example victim-survivors have used technology to record incidents of sexual violence. In 2010, a 12- year -old German girl secretly filmed her step father raping her[28]. Similarly in another example in UK a man was convicted of rape after the victim-survivor was able to produce a recording of the rape on her mobile phone, countering the perpetrator's claim that she was just 'playing hard to get.'[29] Within this context, it becomes important that Sri Lankan courts are able to call for and verify digital evidence in a timely manner. This would mean investing in relevant authorities, training and technology that could facilitate this speedy response.

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[26] *Report of the Leader of the Opposition on the Prevention of Violence Against Women and the Girl Child,* December 2014, p.16/17
[27] Alexa Dodge, p.6
[28] Anastasia Powell, "Seeking rape justice: Formal and informal responses to sexual violence through techno-social counter publics", *Theoretical Criminology,* Volume 19 (4), pp.571-688, 2015, p.576
[29] *Ibid.*

Michael Salter highlights that communication technology platforms also provide survivors of sexual violence a unique opportunity with the 'possibility of response'. Referring to Baudrillard's work on 'monopoly of speech' held by social elites, typically bourgeois white men', Salter argues that new technologies offer survivors the right of response hitherto denied by 'old media' platforms[30]. He gives the examples of Alexandra Goddard, a blogger who used social media to gather evidence implicating a number of boys in the gang rape of a girl in Steubenville, Ohio[31]. He also gives the example of 'Predditors' a Tumblr blog that was set up to identify and name men who post online pictures of women and girls taken without their consent[32]. This opens up the possibility that some individuals may be accused mistakenly. It is therefore important for lawmakers to understand the dynamics of technology facilitated platforms and ensure that communities are not forced to rely on extra-judicial measures alone to seek justice.

## Conclusion

Technology facilitated sexual violence against women is a relatively neglected aspect in Sri Lanka. TFSV should be understood not only as an extension of gender based violence, but in doing so also recognize the distinct manner in which TFSV extends the original harm experienced by the victim-survivor. As a result of being an extension of gendered norms, it is important to keep in mind that TFSV will affect specific groups of women in unique ways, as discussed in the example of the Ratnapura police assault of a sex worker.

In order for the law to fully understand this growing issue, relevant authorities would need to gather gender disaggregated data to understand the nature and prevalence of TFSV in Sri Lanka, this will enable contextualized responses. Any response will have to be based on a strong prevention and public or school awareness campaign that prioritizes the rights and safety of both women and girls and thereby recognize that the root causes for violence against women and girls are one and the same. This would involve adequate allocations for resources and technology, investment in training and sensitization to ensure timely response.

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[30] Michael Salter, p.227 and 228.
[31] *Ibid.*
[32] *Ibid.*

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# Social Media and Hate Speech: Exploring Boundaries to Freedom of Expression

### Chapa Perera[*]

## Introduction

Social media has gained significant momentum as a medium that encourages free speech and expression. It is generally opined that the advent of social media has created a 'digital revolution' through the creation and the widespread availability of technologies that make it easy to share information[1]. It has lowered costs pertaining to the sharing of information, removing the hurdles that traditional media represent; made information easily accessible across cultural and geographical borders[2]; developed an affordable mechanism for those with access to the internet to utilize and build upon existing information[3]; and encouraged the democratization of speech by encouraging an increasing number of people, from diverse segments of societies throughout the globe[4], to come forward and express their ideas and concerns.. Hence, social media is largely instrumental in the process of making information more available to people, thereby diluting the monopoly that many governments and institutions previously enjoyed.

Presently, social media is widely used as a tool for advocacy and awareness. It helps bring to our attention global issues, which we may not have otherwise heard of. For an example, the Arab Spring first started gaining momentum through social media, with the citizens of the oppressed regimes voicing out their grievances[5]. Social media is especially used by international organizations and civil society groups as an advocacy tool, in order to reach out to the grassroots with their message[6]. Above all, social media allows people from different parts of the world to connect, to share ideas and to discover new possibilities.

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[1] Balkin JM, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' [2004] N.Y.U.L. Rev. 1, 6

[2] *Ibid*, p. 7

[3] *Ibid*

[4] *Ibid*, p. 8

[5] Carol Huang, 'Facebook and Twitter key to Arab Spring uprisings: report' (The National, 6th June) <http://www.thenational.ae/news/uae-news/facebook-and-twitter-key-to-arab-spring-uprisings-report> accessed 10 December 2015

[6] For examples see campaigns such as HeForShe (http://www.heforshe.org/); Bring Back Our Girls (https://www.facebook.com/bringbackourgirls/); My World (http://vote.myworld2015.org/)

However, while social media shows great potential in terms of expanding the boundaries of communication, it has also led to the wide dissemination of 'hateful language and expression'. This phenomenon is loosely termed as online "hate speech".

This essay thus seeks to assess whether the hate speech on social media platforms warrant a re-exploration of the limitations pertaining to freedom of expression, as we know it. Hence, it will be focused on the salient aspects of the freedom of expression, the negative effects of hate speech both online and offline, and what possible solutions can be sought to curb this 'endemic of hate'.

## Freedom of Expression versus Hate Speech

### Freedom of Expression

The development of language, with complex structure and wording, instead of the gestures used by other living beings, is considered as the product of superior human intellect.

Hence, the freedom to hold and express ideas and opinions without any interference, and to seek, receive and impart information and ideas through any media[7], is considered vital for the protection of human dignity. This is termed as freedom of expression.

In the words of Mr. Mogens Schmidt[8]

> "...One may argue that freedom of opinion and of expression constitute the cornerstone of any democratic society and a solid and fundamental basis for development. Indeed, the right that guarantees freedom of expression is widely seen as underpinning all other human rights and democratic freedoms. If the individual does not have the right to freely seek, receive and impart her ideas and opinions, she will also not be able to benefit from her other human rights..."[9]

The above quotation articulates the importance of freedom of expression for the exercise of democratic functions. Where people do not have the freedom to express their views without any interference, true participation does not occur · and participation being an essential feature of good governance and democracy, this results in the denigration of the latter.

It is owing to this reason that freedom of expression has been recognized as one of the core principles of many regional and international human rights documents. Apart from the Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights too reiterates the same principle:

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[7] United Nations, 1948, Universal Declaration of Human Rights, Article 16
[8] Deputy Assistant Director General, Communication and Information Sector, UNESCO
[9] Schmidt M, 'Limits to the restrictions to freedom of expression – Criteria and Application' [2008] 0 http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/experts_papers/schmidt.doc accessed 10 November 2015

> "Everyone shall have the right to freedom of expression; this right shall include the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

However, freedom of expression is not without its limitations. There exists a vast body of international law which states that freedom of expression can be limited when conflicting with other rights. Hence, where a particular person's freedom of expression negatively affects the rights of reputation of others, national security, public order, public health or morals, then such speech can be regulated. However, it has been emphasized that such regulation should be necessary and in accordance with a procedure established by law[10].

## Hate Speech

While speech that may 'offend'[11]another individual or a group may not be subject to censure under international law, hate speech remains an exception to this. The notion of hate speech refers to a 'broad spectrum of extremely negative discourse stretching from hatred and incitement to hatred; to abusive expression and vilification; and arguably to extreme forms of prejudice and bias'[12].

Hence, hate speech has been recognized and addressed in several prime documents related to human rights. For example, according to the ICCPR[13]:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, shall be prohibited by law"

The concept of hate speech has not been given a uniform articulation, and is largely dependent on how communities, governments or international organizations perceive the concept of 'hate speech'. Nevertheless, it is not without common features. Hate speech is generally understood to describe forms of speech inciting violence, hatred or discrimination against other people or groups, with particular reference to their ethnicity, religious belief, gender or sexual orientation, language, national origin or immigration status[14]. Yet another feature of hate speech is that they are largely rhetorical in nature, invoking hatred through arousing the emotions of the people. The content of hate speech may not necessarily be accurate in terms of facts or history. Instead, the focus is on garnering an emotional response through misleading facts and aggressive speech.

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[10] International Covenant on Civil and Political Rights, Article 19
[11] See *Handyside v the United Kingdom* (5493/72) [1976] ECHR 5
[12] Jacobs JB, Potter K, Hate Crimes: Criminal Law and Identity in Politics (Oxford University Press, New York) 11
[13] International Covenant on Civil and Political Rights, Article 19
[14] See, Recommendation No. R(97) 20 on 'hate speech' adopted October 1997 by Committee of Ministers of Council of Europe

There is a fine line differentiating free speech and hate speech, giving rise to much debate. What one person may perceive as one's freedom to articulate one's disagreement with another individual or group, a person affected may view as constituting hate speech.

Many countries, however, have adopted legislation condemning hate speech. The rationale behind such condemnation stems from the fact that hate speech hinders the exercising of one's fundamental freedoms and basic human rights. Many extremist groups use hateful language to incite hatred and feelings of violence in the minds of their followers, which often lead to instances of extreme violence. Furthermore, hate speech generates fear in the minds of minorities, incapacitating their freedom to engage freely in society. It destroys the ethos of citizenship and co-existence.

### Hate Speech in Social Media

As observed by the UN Human Rights Council Special Rapporteur on Minority issues[15],

> "Social media platforms have also been used to disseminate hate speech content against groups, which has fuelled inter-communal tensions and led, in some cases, to violent clashes among communities."

The report also goes on to note how "social media is a fertile ground for radical and terrorist groups to spread hateful messages" with special attention on how terrorists groups use these platforms to recruit supporters.

What is thus observed by the Special Rapporteur is currently a growing concern in the world of digital media. The very same platforms which cater towards enhancing opportunities for participatory democracy are also used as mediums to advocate hatred.

An example, also close to home, is the recent advent of Sinhala Buddhist extremist groups in Sri Lanka.

Whereas social media usage in Sri Lanka has shown much positive trends in the recent past[16], it is also being utilized by extremist groups and/ or individuals with extremist ideologies who advocate hatred. One of the most popular instances in this case is the *Bodu Bala Sena*, a nationalist group advocating an extremist ideas and popularly viewed as 'Sinhala Buddhist extremists', have used several Facebook, Twitter and YouTube accounts expressing their opinions, especially against the Muslim community in Sri Lanka. The content consisted crude and spiteful language, with pictorial depictions invoking hatred[17].

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[15] Report of the Special Rapporteur of Minority Issues (A/HRC/28/64)
[16] For more information read, Gunawardena N, 'Social Media and General Elections 2015' ( 2015)<http://www.dailymirror.lk/85811/social-media-and-general-elecations-2015> accessed 13 November 2015
[17] Samaratunge S, Hattotuwa S, Liking Violence: A Study of Hate Speech on Facebook in Sri Lanka (CPA, Colombo), pp. 9-10

The substance of hate speech online is quite similar to hate speech visible among traditional media. Even though there lacks a coordinated mechanism to evaluate the use of hate speech on social media worldwide, several studies illustrate 'that such speech was predominantly based on ethnicity and religious affiliation, and that much online hate speech comes in reaction to events that transpire or are witnessed online'[18]. According to *HateBase*[19], hate speech related to gender, sexual orientation, disability and class have seen an increase in the recent past.

## *Why is online hate speech more intense?*

Whereas the content of hate speech remains quite similar in terms of both online and offline media, what clearly distinguishes online hate speech is that it renders ineffective the laws and regulations that can be transposed in terms of offline media. The very nature of social media, which is considered as an asset in terms of democratic dialogue, plays to the advantage of extremist groups focused on disseminating hateful content.

While one may argue that the publication of expressions of hateful ideas assumes similar characteristics both online and offline, it is contended that the impact created by the former is more intensified in comparison to the latter. There are several reasons for this.

Firstly, intermediaries[20] adopt their own unique criteria in deciding what constitutes hate speech. For example, whereas Facebook consider content with 'threatening language' posing 'serious threats of harm to public and personal safety'[21], YouTube defines hate speech as 'content that promotes violence or hatred against individuals or groups based on certain attributes'[22]. On the other hand, Twitter 'prohibits the promotion of hate content, sensitive topics, and violence globally', and gives a detailed enumeration of the features which would qualify content as hate speech[23]. Whereas the intermediaries argue that the very nature of speech, and the importance of encouraging free speech, prevents them from adopting a text book formulae to define hate speech, this nevertheless leads to a situation where the users find it hard to gauge if a particular message or post meets the given criteria constituting hate speech.

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[18] Umati Project, 'Monitoring Online Dangerous Speech in Kenya' [2013] 0 <http://www.ihub.co.ke/blog/wp-content/uploads/2014/06/2013-report-1.pdf> accessed 10 November 2015

[19] *HateBase* is a web based application that collects instances of hate speech online worldwide. This can be accessed via: http://www.hatebase.org/

[20] 'Intermediaries' is the term used for organizations that mediate online communication such as Facebook, Twitter and Google.

[21] Facebook, 'What does Facebook consider to be hate speech?' <https://www.facebook.com/help/135402139904490> accessed 13 November 2015

[22] Youtube, 'Hate Speech' <https://support.google.com/youtube/answer/2801939?hl=en> accessed 13 November 2015

[23] Twitter, 'Hate content,sensitive topics and violence' <https://support.twitter.com/articles/20170425> accessed 13 November 2015

However, the biggest challenge is not the disparity in definition, but the manner in which these definitions are enforced. Whereas offline media have the ability to control or to regulate the content being published, prior to it reaching a particular audience, the intermediaries in the internet do not enjoy similar luxuries. The very nature of the internet, and especially of social media, being premised on the interaction of users, makes it hard to moderate and regulate each and every comment or opinion expressed through these platforms. It is against the principles of democratic speech if each and every line of content posted by the users has to undergo a particular screening process. It is also not feasible in the light of the massive amount of data that will need to be analyzed, if such mechanism comes into place.

It is due to this reason that many social media platforms adopt a form of community reporting. They rely on the users to notify them of such hateful content being posted on a user's profile, or if a group is ardently advocating for hatred against another group. On the other hand however, not all such reporting can be acted upon fairly. For example, a significant number of groups advocating hate speech in Sri Lanka are largely written in the Sinhala language. In many cases, language is used with several nuances[24]. This makes it difficult for foreign based intermediaries to assess whether the said group or individual content meets the prescribed criteria for hate speech.

Yet another challenge in terms of regulating hate speech in social media can be attributed to the anonymity it allows to its users: "the internet facilitates anonymous and pseudonymous discourse, which can just as easily accelerate destructive behavior as it can fuel public discourse."[25] Many social media sites such as Facebook, YouTube and Twitter give users the freedom to be registered under any name they prefer. Even though this is practiced in order to protect one's privacy, this has enabled individuals appear online under pseudonyms or as different personalities. This gives them the protection of anonymity, since it renders the process of tracing back the content to the real individual difficult. Moreover, this also presents the ideal opportunity to misrepresent oneself as another person, thereby affecting him/her through publishing hateful content online. This is in contrast to offline forms of media, where the original source is easily identifiable. Even if technology is available to trace back to the source who published the specific content, the significant costs attached to it deters those affected in doing so. In the words of Drew Boyd, the Director of Operations at the Sentinel Project[26]:

> "Internet grants individuals the ability to say horrific things because they think they will not be discovered. This is what makes hate speech online so unique, because people feel much more comfortable speaking

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[24] Samaratunga and Hattotuwa, Liking Violence: A Study of Hate Speech on Facebook in Sri Lanka, *supra* note 17, at pp. 4-5

[25] Citron, Danielle Keats and Norton, Helen L., Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age (2011). Boston University Law Review, Vol. 91, p. 1435, 2011; U of Maryland Legal Studies Research Paper No. 2011-16. Available at SSRN: http://ssrn.com/abstract=1764004

[26] The Sentinel Project, see https://thesentinelproject.org/

hate as opposed to real life when they have to deal with the consequences of what they say."[27]

The above quotation proves how people are more comfortable expressing their ideas, especially hateful ones, behind the anonymity that a computer screen affords. It allows them the privacy to be hateful , without actually coming out into the open, public space. For example, the *Kill a Jew* Facebook page that was created in 2010, with the view of spreading anti-Semitic views, generated a furor of violence and fear among the communities. There were many comments and posts with hateful and crude language, discussing ways to murder the Jews and sexually abuse the dead bodies. This page was banned by Facebook when it was brought to the attention of its administrators[28]. However, this page, and the manner in which the users interacted and engaged on the site, clearly illustrated how people are 'freer' to act more hatefully online, than they would be in the public.

Thirdly, social media is itinerant in nature – even after content is removed, it still has the potential to find expression elsewhere, in the same online space under a different name or in a different space altogether[29]. Moreover, users can remain anonymous online. One's anonymity gives extreme freedom in terms of creating and recreating different 'profiles' for interaction, which may not always be noticed or reported soon enough to mitigate the dissemination of hate speech. Whereas in the past poorly constructed thought withered at the face of public rejection, online media allows such content to appear in several platforms, reaching out to a larger number of persons[30].

Yet another factor that further intensifies the negative effect of online hate speech is its transnational nature. Since offline media - be it printed, electronic or oral – are generally rooted in one jurisdiction, they are subjected to the rules and regulations applicable in the particular territory. Hence, this makes the execution of any perpetrators feasible. On the other hand, social media platforms do not come under one particular jurisdiction, and has increased mobility across borders. Even though one country might be able to ban particular websites or content, rooted in their jurisdiction that does not abide with the standards of free speech, States might find it hard to ban content that are made available through millions of platforms with roots in countries with much lenient laws pertaining to speech.

Moreover, several incidents have proven how the content thus disseminated on social media and online platforms has a physical impact in the offline world. Such direct link between hate speech and real life violence was seen in the case of Benjamin Smith[31], the killer who went on a racially motivated shooting spree in Indiana and Illinois in 1999. Several months

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[27] UNESCO, Countering Online Hate Speech (UNESCO, France), p. 14
[28] Kaplin Y, "Kill a Jew' page on Facebook sparks furor' (The Jerusalem Post 2010) <http://www.jpost.com/Jewish-World/Jewish-News/Kill-a-Jew-page-on-Facebook-sparks-furor> accessed 12 November 2015
[29] UNESCO, Countering Online Hate Speech, *supra* note 27, p.14
[30] *Ibid*
[31] Charles Dixon, " (Hate Speech And The Internet: A Vehicle For Violence?,) <http://newsone.com/979755/hate-speech-and-the-internet-a-vehicle-for-violence/> accessed 17 November 2015

before the murders, he has expressed his views to a producer of a documentary, describing several racist groups he interacted with on the internet, and how reading their literature made him more 'racially conscious'. This shows the disturbing potential that online platforms possess to warp the reality in the minds of its users, and to instill an alternate reality through a gradual process of misinformation and emotional rhetoric.

A similar example can be found close to home as well. The hate speech used by the *Bodu Bala Sena* extremist groups not only lead to much furor online, but studies also depict how 'along with this increasing hate speech online, acts of physical violence against the Muslim community in particular, but also religious minorities in Sri Lanka have become more co-related, widespread and frequent'[32].

Hence, it is clear from the above that hate speech online has more potential to create feelings of hatred and violence. The fact that these platforms offer anonymity further accentuates this problem, as it requires considerable effort to track the original perpetrator of the crime. The same person who fears to recite such hateful thoughts in the public finds an alternate personality during his/her time online. The fact that such information can now be sent across borders, escaping the clutches of the law, and the fact that these content can be shared and reproduced much more easily, further add to the significant problem that online hate speech represents.

## Seeking Solutions

It is therefore abundantly clear that the regulation of hate speech online is as essential as it is perplexing. While it is essential to regulate and minimize such content from entering online platforms, the manner in which this can be done is the subject of much heated debate.

*State intervention*

A topic of much contention in the arena of digital media is the extent to which a government should intervene in the regulation of hate speech online. Historical evidence suggests that government intervention in the regulation of free speech and expression can contravene fundamental freedoms.

It is this very same reason that lead to the benchmark decision of the Indian Supreme Court in 2015, when it repealed the provision 66A of the Information Technology Act, which criminalized 'grossly offensive', 'menacing', 'annoying' and 'inconvenient' speech over the internet.

The Supreme Court, delivering its judgment, discussed the vagueness with which the said provision were drafted, and how such vagueness may result in the denigration of freedom of expression. Commenting on the discrepancies around the terminology 'grossly offensive',

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[32] Samaratunga and Hattotuwa, *supra* note 17, at 14

"Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some....In point of fact, section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total."[33]

The problem thus addressed by the Nariman J. is a common occurrence when a State intervenes in the process of regulating social media. In a context where law and power exist in common parlance, and the fine line between the two is being constantly diluted, the State having such power over a form of media which has the potential to serve as a platform of democratic dialogue will definitely prove detrimental to free speech, often resulting in social backlash.

On the other hand, it can be argued that a State sponsored system is needed to prosecute extremist groups who disseminate such hateful content across the internet. It lies in the mandate of the government to protect its people, with special attention to minority groups and women[34]. Especially considering the growing trend of hate speech based on gender, sexuality, social class, and the most recent trend of negative political campaigning, it is essential that laws be enacted to deter such speech.

Hence, it is recommended in this case that laws be enacted to bring to the attention of the courts such hateful content, allowing the courts to decide whether the said content meets objective criteria to be designated as hateful. There are obvious benefits for this, including but not limited to, the public discourse it brings about. As opposed to the State striking down websites, the judiciary will be deciding on it through an in-depth analysis, with both sides of the suit presenting their case. This encourages public discourse regarding an objective criterion for assessing such websites, which in turns leads to better awareness and understanding of the complexity of these issues.

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[33] Shreya Singhal v Union of India [2012], pp. 87-88
[34] For example, the 1978 Constitution of Sri Lanka guarantees such special mechanisms for the advancement of women and children through the 12 (4)

*Alternative strategies to combat hate speech.*

*i. Collaborative efforts by States*

States have enormous potential and resources that can be utilized for the purpose of regulating hate speech through collaborative efforts. Whereas laws and regulations may not be the best practice in this case, States can come together in seeking collective solutions. In the words of the UN Human Rights Council Special Rapporteur on Minority issues, States have the ability to work collaboratively with organizations and projects that conduct campaigns to combat hate speech, including on the internet, through financial support and State commitment[35].

The 'No Hate Speech' Movement is an example as to how States can support the process of spreading awareness on the importance of combatting hate speech on social media. The campaign, supported by the Council of Europe, is a youth led advocacy movement that seeks to 'reduce the levels of acceptance of hate speech and to develop online youth participation and citizenship'[36]. The campaign has thus gained large momentum owing to the significant support received by European countries.

*ii. Role of the intermediaries*

Firstly, it is suggested that the intermediaries adopt a more transparent approach in terms of specifying what they define as hate speech, the harms they seek to address through their hate speech policies as well as the consequences of policy violations[37]. It is also important that they specify what they define as hate speech, instead of adopting broad and vague definitions. Clearer definitions mean that people who use the sites are more aware as to what they should not tolerate, which encourages them to report cases where they are affected by witness such hateful ideas being circulated.

Whereas it may be difficult for intermediaries to adopt a uniform standard for hate speech, especially considering the vast audience they cater to, it is contended that this definition does not have to be specific per say, but more of a clearer illustration as to which forms of speech will be characterized as hateful. In fact, it can be a spectrum of definitions, ranging from speech that threatens and incites violence, speech that intentionally inflicts severe emotional distress, speech that harasses individuals and even speech that silences counter-speech. What matters in this case is having a uniform definition across all social media platforms, and a clear enunciation of what the individual web site considers hate speech to be.

Moreover, it is suggested that the intermediaries remove content that seem overly hateful or inciting violence. This is, in fact, one of the most powerful tools available at the disposal

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[35] Report of the Special Rapporteur of Minority Issues (A/HRC/28/64)
[36] http://www.nohatespeechmovement.org/
[37] Citron and Norton, *supra* note 25, see at 1457

of the intermediaries[38]. Whereas some existing social media platforms actively search for and delete any site or account that carry offensive and hateful language[39], some social media platforms limit such removal in the cases involving threats of violence[40]. In fact, many academics argue that social media intermediaries should adopt a stronger stance in combatting and removing such content[41].

While this can indeed be considered as a quick and efficient way of regulating hate speech online, it is submitted that this may not entirely be in line with the democratic debate that social media platforms have the potential to nurture. Every company has its own policy and subjective beliefs pertaining to political and social conundrums, and a blanket policy of removing all hateful speech may result in the denigration of freedom of expression of certain minority groups. It also needs to be remembered that social progression is premised on an active marketplace of ideas, through which unpopular opinions are struck down and new discourse develops. Certain hateful propaganda by extremist groups has also seen the birth of strong anti-hate speech advocacy movements online. For example, this was witnessed among many Sri Lankan social media users when the *Bodu Bala Sena* was disseminating hateful content through both online and offline methods. The 'Say No to Racism' movement launched by Sri Lankans gained much momentum, and instilled a feeling of solidarity among people of all communities who opposed such extremist views.

On the other hand, it may not be an entirely successful endeavor for social media sites to go in search of such users or accounts and remove such content. Many such social media sites are run in a native language, with nuances of language that the reviewers may not entirely grasp. Secondly, due to the itinerant nature of social media content, such hateful speech can once again find online presence elsewhere.

Moreover, not all reviewers of social media content are affluent with the social and political contexts prevailing in the country from where such hate speech groups originate. It needs to be understood that there are subtle differences in terms of western ideologies and the ideologies in the Global South. An intervention from social media intermediaries thereof can thus result in the evaluation of a particular context from their own perspectives, without necessarily being sensitive to the thoughts of these other groups.

Hence, while it is recommended that intermediaries adopt a strong stance against extremely violent groups advocating direct physical injuries, they should not go in search of such content with the objective of removing them, or directly remove any such content they come across, merely because it may seem highly offensive.

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[38] *Ibid*, p. 1468
[39] MySpace, for an example, maintains an aggressive stance against hate speech. Refer to the MySpace user agreement policy: https://myspace.com/pages/terms
[40] Citron and Norton, *supra* note 25, see at p. 1469
[41] *Ibid*, see in general pp. 1440-1442

*iii. Prevention through empowerment*

It is submitted that the most effective way of combatting hate speech online is through self-regulation and the capacity for empathy. One needs to be self-disciplined and possess the ability to discern between hateful speech and free speech. This is when true democratic dialogue occurs. Thus, what is essential in this context is to generate awareness among the users of online platforms regarding the harmful effects of social media and the importance of engaging in peaceful, constructive dialogue.

Civil society can play a significant role in this context through mobilizing people at grassroots levels and the policy making bodies encouraging a more inclusive approach to education and other government policies[42].

Another important aspect to consider in this context is shaping education as a tool to combat hate speech, both online and offline. It is submitted that one's hatred is inherently connected to what one identifies as right and wrong. For example, the manner in which the history of Sri Lanka is taught in schools is believed to contribute to a sense of superiority among the majority Sinhalese. The text books consist of historical narratives which are largely biased to the Buddhist population, and fail to give adequate attention to how other minorities contributed to the development of the society and enrichment of culture. This instills a sense of superiority in the minds of the majority, which gradually leads to an inferior treatment of the minorities. The latter, on the other hand, live in the constant fear and hatred that his/her race and nationality are being degraded by the majority.

Hence, what is needed is an education system which offers a balanced perspective on history – a system which does not breed inferiority and superiority. Education should focus on the development of a child's personality and leadership skills based on empathy, co-existence and mutual understanding.

It is also recommended that, in the Sri Lankan context, schools should adopt a more open approach towards social media. What is currently witnessed across many schools in Sri Lanka is a blatant rejection of social media as harmful and damaging. However, the reality is that many students do engage in these platforms, sometimes under pseudonyms. This blatant rejection makes the student afraid and reluctant to reveal any problem that he/she may encounter, or to talk with an elderly person regarding any form of doubt instilled through social media. This ignorance contributes to further accentuate this problem. If the schools approach social media platforms with an open mindset, with a focus on nurturing dialogue and debate over social media platforms, this empowers young people to use social media as a means of furthering their knowledge and enhancing their perceptions.

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[42] Myanmar presents a good example in the following case; refer · Benesch S, 'Flower Speech: New Responses to Hatred Online' [2014] Internet Monitor 2014; 100, 100-101

## Conclusion

Freedom of expression is a human right that is fundamental to the achievement of many other human rights. Living in a political atmosphere wherein many rights are already limited, to further curb one's right of expression, be it online or offline, has the potential to lead to a blatant infringement of this most fundamental freedom. It also needs to be kept in mind that hate speech is also a form of expression, albeit negative in nature.

On the other hand, it is conceded that hate speech should be curbed. The negative effects of hate speech in social media are largely felt in the status quo, and a solution is necessary.

However, the solution should not ideally come in the form of imposing more limitations online. This will only lead to a slippery slope, mostly resulting in governments shaping the internet content according to their whims and fancies.

Hence, what is essential is shaping the minds and attitudes of the people, by encouraging digital citizenship, education and empowerment; not by imposing more restrictions to the freedom of expression. Boundaries imposed by legal sanctions will only aggravate the situation, as the need to address the root causes for hatred and extremist beliefs drowns in the urgency of controlling their voices.

# The Role of Technology in Strengthening Participatory Constitution Making in Sri Lanka

Azra Jiffry*

## Introduction

In today's highly globalized context, the need to engage the public in the process of decision making in public affairs of the State has been felt more than ever before. The growth of technology has led to a transformation in the human rights discourse, in view that the means of communication have become simple and easy.[1] Information is readily accessible to every individual today. News is shared virally across social media giving the people opportunity to raise their opinions and concerns, even before it reaches the print media.[2] Whether to provide feedback on Government activities, to indicate appreciation or displeasure, to express criticism, or even to protest a particular government move[3], such web platforms hav provided the ideal space, and function as a tool to assess collective public response. This arrangement of participation via technology has virtually become an effective check mechanism on the activities of the State.

This paper discusses the extensive impact of technology on public participation in matters of public concern, and how it could be utilized as a platform in future Constitution-building in Sri Lanka. Participation is examined as a political right that promotes deliberative democracy. Deliberative democracy in essence strives for consensus by means of participation in public decision making. Given the State's commitment to provide a political settlement addressing the grievances of the war torn communities, and to adopt a new Constitution in the near future, the importance of public participation as a tool that could promote genuine reconciliation between the communities of Sri Lanka cannot be over-stated.[4] The paper also discusses various models of participation through technologies that

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[1] Cherif Bassiouni, 'The Future of Human Rights in the Age of Globalization' (2011-12) 40 Denv. J Int'l L. & Pol'y 36

[2] Facebook and Twitter facilitate this trend. Social media does not have restrictions similar to that of the print media. This has given rise to Citizen Journalism.

[3] This was done by sharing posts and pictures, campaigning by collectively changing the profile pictures. For instance, the picture protesting the ban of full-face helmet, was used as a profile picture in Facebook.

[4] See the Foreign Affairs Minister's Speech 'Sri Lanka's response to UNHRC: The Full Text of Foreign Affairs Minister's Speech Today' Colombo Telegraph (14.09.2015) <https://www.colombotelegraph.com/index.php/sri-lankas-response-to-unhrc-the-full-text-of-

have been tried in other countries and the extent to which Sri Lanka has been successful in using technology as a means of participation. Based on the above discussions, I attempt to analyse the potential in Sri Lanka for using technology as a means of promoting participation in order to build an inclusive Constitution.

## Participation and Democracy

Public participation mobilises people to express their opinions. It is the cornerstone of democracy[5] and an effective mechanism of promoting human rights. Due to the increased difficulties faced by the citizens in accessing the political institutions, and the ultimate frustration caused due to this distance between the State and its people, the legitimacy of representative democracy has been constantly questioned.[6] In order to rectify such defects, notions of deliberative democracy and inclusive decision making in public affairs have been surfacing for a significant period of time. Participation of the people further legitimizes the role of the State. A process of deliberation generates discourse and well-reasoned arguments among the citizenry to support the collective decision making. Proponents of deliberation contend that while rectifying the defects of representative democracy, it reaffirms the sovereignty of the people and strengthen their collective power.[7]

With the advent of time, 'participation' in public discourse entered into the realm of rights, establishing itself as a political right, encompassing the right to information, right to education, right to assembly and freedom of expression.[8] The basis for the citizen's right to participation in relation to Constitution making process derived its legitimacy from the right to participate in public affairs and the right to self-determination.[9] Nevertheless, the fruits of participation had been far from realizing its objectives due to the inherent difficulties relating to time, effort and communication in coordinating participation. These obstacles were subsequently overcome with the incredible advances in technology that

foreign-affairs-ministers-speech-today/> accessed on 02.11.2015; Angela M Banks, 'Expanding Participation in Constitution Making: Challenges and Opportunities' (2007-08) 49 Wm. & Mary L. Rev. 1043; Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 Chicago J. of Int'l Law 663

5 Philipp Dann et al. 'Lessons Leant from Constitution-Making: Processes with Broad Based Public Participation' Briefing Paper no.20 (Democracy Reporting International) p 4

6 Rubens Besark, 'Trends for participatory democracy: The Influence of the Internet in the Profile of Political Representation and on the Participatory Budgeting' (2012) Analele din Bucuresti Seria Drept 155; Yash Ghai, 'A Participatory Process for Making a New Constitution' p 2

7 Yash Ghai Ibid; Michele Brendt et al. Constitution Making and Reform Options for the Process (Interpeace 2011) p 81

8 Equal Participation in Political and Public Affairs <http://www.ohchr.org/EN/Issues/Pages/EqualParticipation.aspx> accessed on 27.10.2015

9 Right to participate in public affairs as stated in Article 21 of the Universal Declaration of Human Rights (UDHR); Article 25 of the International Covenant on Civil and Political Rights. Sri Lanka acceded the ICCPR in 1980; Right to participation in also endorsed by the UNHRC in Marshall v Canada (5.3 U.N. Doc. CCRP/C/43/D/ 205/1986) in relation to Constitution-making. See Angela Banks (n5)

facilitated speedy and effortless communication between different parties; As such the notion of public participation gained back its momentum.[10]

## The need for a participatory Constitution

Sri Lanka has had experiences filled with anti-democratic flavour in the previous Constitution-making experiments. The 1947 Constitution-making was largely left to the elites in power.[11] The process excluded the people of Sri Lanka to a great extent. The 1972 and 1978 Constitutions of the country, despite being autochthonous, were shrouded in secrecy. In the first Republican Constitution of 1972, there was barely any effort for consensus among the members of the House of Representatives themselves.[12] The Tamils did not participate in the final stages of the process. The Constitution making was confined to a group of elite lawyers led by Dr. Colvin R De Silva.[13] In the 1978 Constitution making, there had allegedly been surprises in the last minute due to unexpected changes in draft Constitution.[14] The process lacked any national debate or a public referendum. The focus was largely on the substance; the need for stability and economic development by way of establishing executive presidency. Thus the post-independence Constitution making exercises eventually provided the ground for the political playfield of the major parties.

The 1978 Constitution has been amended 19 times, the pendulum swinging between strengthening the powers of the President on the one hand, and improving the checks and balances against the executive presidency on the other. The crisis remains nevertheless. The three Constitutions and the amendments have had conveniently overlooked the aspect of participation of the people.

The passing of 19th Amendment in the Parliament aptly captures the present dilemma Sri Lanka is faced with in terms of participation and transparency in the process. There were groups of people who were anxious to get the bill passed without delay; they held protests, organised forums for deliberation and created awareness campaigns via social media. Despite this, the majority of the population did not have adequate knowledge of the consequences of passing the bill. The State on the other hand, facilitated participation that was highly restricted and changed the contents considerably during the last two readings of the bill. In addition to this, the citizens had to wait for a significant period of time to obtain the original copies of the 19th amendment which was passed in the Parliament. In this process, the country witnessed a legislature that was barely listening to the demands of the people, opacity in the process instead of transparency, and doubts about the outcome of passing the bill. Rohan Edirisinha, a prominent Constitutional expert, remarked about the

[10] Cherif Bassiouni (n 1)

[11] Primarily from the proposals for Constitutional Reform of the Soulbury Commission.

[12] Radhika Coomaraswamy, 'The 1972 Republican Constitution in the Postcolonial Constitutional Evolution of Sri Lanka' in Asanga Welikala (ed), *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (CPA 2012) pp. 126-127

[13] S Wijeratne, 'The need for an islandwide Constitutional dialogue' *Daily News* (16.03.2005)

[14] Nihal Jayawickrama, 'A Constitutional Dream' *Colombo Telegraph* (08.11.2015) <https://www.colombotelegraph.com/index.php/a-constitutional-dream/> accessed on 08.11.2015

process of passing the bill, "Never again should Sri Lanka have a constitutional amendment process like the 19th Amendment process."[15]

Partly as a result of non-inclusiveness and lack of accountability in governance, the country suffered heavy losses due to war, destruction and abuse of power. A corrective measure requires the need for empowerment of the people to participate in the Constitution making process of the country in the future. An inclusive process could pave way to rectify the past mistakes and move forward.

## Sri Lanka; Democracy in Perspective

According to the present Constitution of Sri Lanka, sovereignty lies with the people of the country.[16] Sri Lanka has a history of free and fair elections at regular intervals and it has conducted one referendum since its independence. Apart from the elections, there are barely any means of political participation in the country.[17] Despite the widespread use of the notion 'yahapalanaya'[18], mechanisms to ensure accountability, transparency and involvement in decision making in public affairs have been minimal.[19] Hence, it may be argued that democracy, in its complete sense, is yet to spread its roots in the country and establish itself.

Moreover, in the post-war context of Sri Lanka, healing and restoration of justice to a great extent, has not been realised. In view of this, the new political regime that came to power in early 2015 committed itself to promote reconciliation, provide a political solution to the ethnic conflict and to combat corruption in governance. The problems that need to be addressed through these commitments have no easy fixes. They would require participation and social dialogue on the one hand; accountability and transparency on the other. In such circumstances, deliberative democracy plays a significant role in order to complement the progress of the new political commitment, and address the defects in governance.[20] Deliberation also helps in monitoring the political elites against abuses of State power. Political ignorance in an era of deliberative democracy impedes the progress of the State. It is therefore essential to engage the citizenry in governance through education and by

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[15] As quoted by Rohan Edirisinha in the Panel Discussion on 19th Amendment. '#KnowYour19th' can be accessed on YouTube via <http://youtu.be/ZfYMiPFZepo> accessed on 02.11.2015

[16] Article 3 of the Constitution of Sri Lanka (1978)

[17] A survey published by the CPA states that 52.8% of the people were not familiar with the term 'Right to Information'. See Democracy in Post-War Sri Lanka Survey- June 2015 (Centre for Policy Alternatives) <http://www.cpalanka.org/democracy-in-post-war-sri-lanka/? accessed on 10.11.2015

[18] The terms referes to 'Good Governance', a concept comprising of key attributes of transparency, responsibility, accountability, participation and responsiveness. See Good Governance and Human Rights' <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.asp x> accessed on 10.11.2015

[19] Sri Lanka's rank in World Democracy Index is 87 out of 169 countries for the year 2014 and the score for participation is 4.4 out of 10.

[20] Johan Schaffer, 'Deliberative Democracy in Transnational Governance: Problems of Legitimacy, Agency and Representation'(2012) p 4

promoting participation in public affairs among the people. Intellectual discourses and social dialogues will enhance the perspectives of the people, and give life to the notion of political participation.

## Technology as a Platform for Participation

### Evolution or revolution?

The internet has been facilitating participation in public discourse around the world in the recent past.[21] The Arab Spring of 2011 epitomized the phenomena, by organising the protests purely through social media. It included awareness campaigns to educate and empower the people. Subsequent to the Arab Spring, many countries witnessed such protests organized via the internet to draw the attention of the State to many pressing issues faced by the people.[22] Where the mainstream media did not cover such protests, 'citizen journalism' took charge of reporting the situation to the people via internet.[23] Such grassroots uprisings were beyond the control of Government particularly due to the difficulties in removing the web content or shutting down the server. In the instances where the Government intervened by trying to block the websites nationwide, it had more adverse consequences for the regime, damaging its reputation in the international community due to its authoritarian governance and infringement of freedom of speech and expression.[24]

With the empowerment of people by means of technology, increasing numbers of people have begun to voluntarily participate and contribute to various causes on the web. Such collective organisations of people contain a greater potential, facilitating a larger space for innovation and experiment. Dowell argues that the architecture of the internet which is highly decentralized facilitates the collaboration of people for different reasons and causes.[26] In addition, the political elites increasingly center their political campaigns in the web and social media, acknowledging the revolutionary progress of participation through

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[21] Prior to Arab Spring, the 'Orange Revolution' of Ukraine in 2004 was organized through mobile phones. *See* Robert McDowell, 'Technology and the Sovereignty of the Individual' (2012) 10 J. on Telecomm. & High Tech. L. 356

[22] Occupy Movement that organized Occupy Wall Street in the United States and similar protests in other countries to fight inequality, organised its protests primarily through the internet, inspired by the Arab Spring. Anthony Alessandrini, 'Their Fight is our Fight: Occupy Wall Street, Arab Spring, and New Modes of Solidarity Today' <http://what-democracy-looks-like.com/their-fight-is-our-fight/> accessed on 10.11.2015

[23] Particularly in countries where media is biased towards the State, protests against the State are given less coverage. This was true in the above case of 'Occupy Wall Street' protests.

[24] Egypt was alleged to have attempted to shut down the servers during the Arab Spring revolution. More recently, Turkey Government blocked access to Twitter and Youtube after massive allegations of corruption were brought against the Government. The move was severely criticized by other countries. *See* 'Turkey blocks access to social media and Youtube over hostage photos' (The Telegraph) <http://www.telegraph.co.uk/news/worldnews/europe/turkey/11518004/Turkey-blocks-access-to-Facebook-Twitter-and-YouTube.html> accessed on 10.11.2015

[26] Robert McDowell, (n 21) p 357

technology.[26] By these means, participation enhanced via technology is emerging as a phenomenal force to rise against the violations of human rights and affirms the sovereignty of the people.

Despite the above promising trend, the internet and social media activism has constantly been questioned on grounds of efficacy. To what extent could revolutionary changes be brought about with a set of hash-tags, likes and shares? Some users may even purport to be supporting the cause with hash-tags, but they may not be committed to the cause in their real lives. While one should not paint a utopian picture of internet activism, it should be borne in mind that collective action by the people even by shares and hash-tags in social media could effectively promote solidarity. It is a potential means and mechanism to draw the attention of people. Technology alone will not bring about liberty and democracy; it has made the progress less difficult by facilitating communication and coordination.[27] Technology could also result in a negative influence however, by being a source of rumour and hate speech. In essence, technology could be considered a carrier that gives force to the innovative potential of humans, to be used for the benefit of the humankind or as a destructive means. It is ultimately a choice that each individual makes, to use it efficiently to make a collective difference.

## Participation in Sri Lanka

Use of technology in Sri Lanka for deliberation has been significant in the recent past. Comfortably used and preferred by a large number of people in the country, social media has become the most sophisticated mechanism to instantly broadcast or share information with others. Citizen Journalism in the internet virtually threatens the survival of conventional media.[28] The 2015 Elections of Sri Lanka bears witness for the massive contribution of such technology-aided participation in creating revolutionary changes.[29]

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[26] The political campaign of the US President Barak Obama has been highly centered on the web. His attempts to stay connected to the people include the 'Questions and Answers' session in the past years in Reddit and Twitter. Similarly Former President Mahinda Rajapakse too has engaged with the public twice via Twitter and Facebook. *See* Sanjana Hattotuwa, 'Technology in Constitutional Reform: Central or Peripheral to substance and process?' <http://govright.org/technology-in-constitutional-reform-central-or-peripheral-to-substance-and-process/>; Sanjana Hattotuwa, 'Technology in Parliament: Opening Pandora's Box or Enabling Citizens?' <https://ict4peace.wordpress.com/2015/09/14/technology-in-parliament-opening-pandoras-box-or-enabling-citizens/> accessed on 26.10.2015

[27] Believing technology as a tool of liberty and democracy which however, has been proved fallacious, is called 'cyber utopianism'.

[28] *Colombo Telegraph* and *Groundviews* are prominent examples of Citizen Journalism. *Also See:* Sanjana Hattotuwa, 'Technology in Constitutional Reform: Central or Peripheral to substance and process?' (n 26)

[29] For instance, 174,633 tweets on #GenElecSL and #SLGE2015. For more statistics on this see: Sanajana Hattotuwa, Ibid; Nalaka Gunawardene, 'Sri Lanka Parliamentary Election 2015: How did Social Media make a Difference?' *Groundviews* (03.09.2015)

However, with respect to the post-war context of Sri Lanka[30], technology has not been adequately made use of as an effective mechanism of participation. It has been noted that online participation forums more often target short term purposes; Facebook pages and Twitter sites of political elites are often restricted to political interests failing to reach the citizenry. Government websites are more focused on giving information to the people rather than creating an interactive platform. State coordinated web platforms that allow effective interaction of the people and the State initiated few years back, have not been made popular among the people.[31] Such under-utilization of technological resources raises many skeptic questions about the missed opportunities in the reconciliation and healing process of the post-war Sri Lanka. However, there is a new glimpse of hope as the State voluntarily joined the Open Government Partnership (OGP), being the first member to join from South Asia.[32]

The Open Government Partnership is an initiative launched in 2011 that collaborates with governments to promote transparency, accountability, empowerment of the people and the use of new technologies to promote participation in governance.[33] Subsequent to endorsing the declaration of the OGP, the governments work on an action plan to be implemented in their countries. Sri Lanka, at present is reportedly developing an action plan to promote an open government policy which will inevitably include web and other technologies to enhance participation and transparency.[34]

Participation is a gateway that gives a sense of acknowledgement to vulnerable communities and opens up political discourse about common objectives and differences of opinions amongst the people of the country. Given the development thus far, there is a greater potential for Sri Lanka to utilize technology to adopt a rights-based, participatory approach to Constitution making. It would facilitate a revival of democracy to bring about political equality among citizens and communities.[35]

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<http://groundviews.org/2015/09/03/sri-lanka-parliamentary-election-2015-how-did-social-media-make-a-difference/> accessed on 27.10.2015

[30] M Banks, (n 4) p 1055; Also see in this regard: DS Rajasingham, 'Human Rights, Development and Rathupaswala' (2014) <http://lawandsocietytrust.blogspot.com/2014/09/human-rights-development-and.html> accessed on 29.10.2015

[31] It is anticipated that the situation might change for the better with Government's membership in Open Government Participation on October 27-29, 2015 to promote transparency, accountability and partnership and also embrace new technologies. See in this regard, 'Lanka now a part of Open Government Partnership' *Daily Mirror* (07.11.2015) p 6; The existing web platforms of Sri Lanka underwent significant changes in 2015, and it is now hoped the online services will thrive. The platforms include an e-participation portal and a gateway web platform for government services. See 'Proposed New Government Web Portal' <http://eparticipation.gov.lk/govlk2015/>

[32] Foreign Affairs Minister's Speech (n 4)

[33] 'Open Government Partnership' <http://www.opengovpartnership.org/about> accessed on 10.11.2015

[34] *Ibid*

[35] 'Text of Resolution on Sri Lanka Passed at the United Nations Human Rights Council in Geneva on March 27th 2014' (A/HRC/30/61) pp. 4,15,17

## Reviving Democracy through Channels of Technology

*Technology in Constitution making: lessons from other countries*

This is a relatively new phenomenon. Iceland was the first country to experiment the use of technological platforms optimally to promote participation in their new Constitution making exercise, known as 'crowdsourcing'.[36] The most distinct feature of their process was the inclusiveness it generated during the drafting process of the Constitution. Members of the Constitutional Council posted their drafts on their Facebook page and allowed feedback by ways of likes and comments. In addition, there were other mechanisms that ensured significant transparency in the exercise namely the use of email, Facebook posts, tweets and Skype chats by the people to connect to the drafters to provide submissions. Recordings of some of the open-meetings of the Constitutional Council were published online for public view. It facilitated access to information and educated the people on what was happening behind closed doors.

The Constitution-making process of Ghana and Kenya had elements of technology-aided participation to complement other real-life participatory activities such as live discussions and focus group brainstorming sessions.[37] In Somalia, the process was aided by American agents through mobile technologies to gather precise responses to critical questions.[38] The Constitutional Review Commission of Ghana built up an effective mechanism to filter sixty thousand submissions they received through live discussions, email and social media, and they further developed the selected proposals by engaging the public through mobile technologies.[39] In Kenya, the technological platforms of participation included setting up a dedicated website to inform the people, a Facebook page to create public discourse, use of social media and SMS to provide feedback to a committee of experts.[40] The technological mechanisms set up in the above countries were less aimed at educating the people through awareness campaigns; they were more focused on creating an interactive base for effective communication between the drafters and the people. This was a noteworthy achievement in

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[36] 'Crowdsourcing is an online, distributed problem-solving and production model'. See Helene Landimore, 'Inclusive Constitution Making: The Icelandic Experiment' (2015) 23 Journal of Political Philosophy 166; For an integrated platform of crowdsourcing: see also, Sean Deely and Tarik Nesh-Nash, 'The Future of Democratic Participation: my.con: An Online Constitution Making Platform' in Marta Poblet et. al.(ed), *"Sintelnet WG5 Workshop on Crowd Intelligence: Foundations, Methods and Practices"* (Sintelnet 2014) p 43

[37] Michael Kpessa & Atuguba, 'Grounding With People: Participatory Policy in the Context of Constitution Review in Ghana' (2013) 6 J. Pol & L. 104; Jason Gluck & Brandon Ballou, 'New Technologies in Constitution-Making USIP Special Report' p 3

[38] Google Ideas and VoA aid for Somalia, see Brandon Ballou and Gluck, 'The use of Social Media and Technology in Constitution-Making' *The UN Constitutional A Newsletter on UN Constitutional Support* (Spring/Summer 2014) p 5

[39] Michael Kpessa (n 37)

[40] Jason Gluck & Brandon Ballou, (n 37)

the context of the conservative cultural background and the excessive bureaucracy prevalent in the African countries.[41]

A more tailor-made example is being explored at present in Chile subsequent to the pledge of the incumbent President to build a participatory Constitution.[42] '*GovRight*', a group of specialists in technology, law and policy striving 'to provide the citizens the opportunity to understand and contribute to government and legislation'[43] has agreed to assist the participatory process. GovRight is co-founded by Tarik Nesh-Nash of Morocco who undertook the initiative to launch a site to facilitate participation in the 2011 Constitution building exercise of the country. The project was a massive success where approximately 40% of the suggestions made its way to the draft Constitution.[44] In the case of Chile, the Centre for Humanistic Studies of the University of Minho of Chile (CEHUM) works with GovRight to create a user-friendly, informative and interactive web platform to encourage its people to actively participate in the Constitution building process.[45] This fusion of technology and policy making, to bridge the gaps of interaction, has certainly created much anticipation on its outcome which is yet to be discovered. This new phenomenon of an integrated web platform could possibly emerge as a new trendsetter of the time.

Meanwhile, other countries that involved in the process of Constitution making in the recent years have engaged in different levels of technology-aided participation. Fiji's use of technology was largely confined to the reception of emails from the people to give their submissions and proposals for the Constitution making process of 2012.[46] Many countries launched websites to connect to the people subsequent to the establishment of constituent assemblies to draft the Constitution.[47] The levels of interaction of such websites too differed; some of them focused more on providing information[48], whereas few other sites providing live updates and allowing the people to comment on the drafts published online.[49]

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[41] Kibet Ngetich, 'Toward a People-driven Constitution: Opportunities, Constraints and Challenges of the Kenyan Example' in Said Adejumobi (ed), *Democratic Renewal in Africa: Trends and Discourses* (Palgrave Macmillan 2015) p 133

[42] Andrew Marino, 'GovRight participates in Citizen-participation, technology and new Constitution forum in Santigo, Chile' <http://govright.org/govright-participates-in-citizen-participation-technology-and-new-constitution-forum-in-santiago-chile/> accessed on 28.10.2015

[43] 'About GovRight', < http://govright.org/about-us/> accessed on 28.10.2015. Legislation Lab is one of their most popular projects on civic participation. For more on Legislation Lab see also: Sanjana Hattotuwa, 'Technology in Constitutional Reform' (n 26)

[44] 'Case Study: Reforme.ma' <http://legislationlab.org/en/about> accessed on 02.11.2015; also see: Sean Dealy and Tarik Nesh Nash (n 36); Jocelyn Fong, How Morocco Formed a Citizen Powered Constitution <http://feedbacklabs.org/how-morocco-formed-a-citizen-powered-constitution-and-now-everyone-can-too/> accessed on 27.10.2015

[45] Andrew Marino, (n 42); Also see Sanjana Hattotuwa, 'Technology in Constitutional Reform' (n 26)

[46] Romitesh Kant & Rakuita, 'Public Participation and Constitution-making in Fiji' (2014) [Conference Proceedings] 20

[47] Includes Bolivia, Ecuador, Nepal, Malawi, Kenya, Ghana, Somalia, Zambia, Tunisia, Egypt, Fiji. See Jason Gluck (n 37) p 4

[48] *Ibid.* Includes Bolivia, Egypt, Fiji, Ghana, sierra leone, Zambia, Nepal

[49] *Ibid.* Technologies facilitated participation of marginalized women in Tunisia, and other African countries.

In Egypt and Libya, activists and civil societies took a proactive role to publish leaked copies of the draft Constitution on Facebook and Twitter and stirred public discourse.[50] All such varied levels of interaction provided relatively limited means of participation; they were confined to either informing and educating the public, or receiving submissions and feedback from the people. The efforts in the above countries to utilize technology-aided participation to facilitate the Constitution making exercise were mostly novel and experimental in nature designed to cater the population of their countries.

The use of technology-aided participation in the countries discussed above should be identified along with their context in order to derive lessons from their experiences. Iceland that pioneered a full scale deliberation through technology has a relatively smaller population with a high digital literacy and social network penetration.[51] Possibly being the oldest democracy in the world, there is a high degree of awareness of politics and governance among the people of the country.[52] The role played by the civil societies in forming movements and encouraging the people to pressurize the Government towards reforms subsequent to the 2008 economic recession was significant.[53] In contrast, the Governments of the African countries that went through Constitutional reforms were notorious for the highly prevalent corruption and bureaucratic nature of governance. The communities were deeply divided. Given such structure, the level of participation and its outcome ought to be appreciated. Chile, on the other hand, involved in building a new Constitution has a homogenous population on linguistic grounds. The President of Chile who started her second term in March 2014 emphasized the need to cut down the roots with dictatorship by replacing the present Constitution that dates back to Pinochet's regime.[54]

Sri Lanka, in addition to its post-war communities, indicates a considerable degree of inequality of income within the population, based on national statistics. A general perception is that the people are oblivious of the role of the Constitution of the country.[55] A Constitution making process in such a context needs to focus largely on educating the people through awareness campaigns, possibly similar to that of South Africa. Similar to the role of civil society movements in Iceland subsequent to the 2008 recession, the role of civil societies of Sri Lanka too might be of particular importance in encouraging the people to participate, bridging the gap between the Government and the people.[56] The discussion

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[50] *Ibid.* In Somalia, civil societies helped in participation through mobile technologies.
[51] Jochim Astrom et al., *Case Studies on e-pariticipation policy: Sweden, Estonia and Iceland* (Praxis Centre for Policy Studies 2013) 35
[52] Helene Landimore, (n 36) p 2; Paul Blokker, 'Grassroots Constitutional Politics in Iceland' (2012) Available at SSRN: <http://ssrn.com/abstract=1990463> accessed on 28.10.2015; Iceland is ranked 3rd in World Democracy Index 2014.
[53] Helene Landimore, *Ibid.*
[54] Tarik, 'Crowdsourcing the Chilean Constitution' <http://govright.org/crowdsourcing-chilean-constitution/> accessed on 02.11.2015
[55] Views expressed in 'Civil Society Dialogue on Public Participation in Constitution making' conducted by the Centre for Policy Alternatives. See 'CPA encourages Civil Society Participation in Constitution Making' *Daily FT* (15.10.2015) <http://www.ft.lk/article/483049/CPA-Director-encourages-civil-society-participation-in-constitution-making> accessed on 17.10.2015
[56] *Ibid*

also needs to factor in that only one in four Sri Lankans are computer-literate.[57] Due to this digital divide, diverse platforms need to be setup to reach people of all levels to promote participation.

*Tools of technology for e-democracy and governance*

In Sri Lanka, the potential of the internet and social media was largely felt during the 2015 Elections. On the one hand it was a platform of political campaigns to the candidates to effectively interact with the people, and on the other hand, there were many individuals, activists and civil societies educating the people in social networks the power of the ballot paper and the need to collectively stand against abuse of power.[58] This was done in various innovative ways, by setting up dedicated Facebook pages, creating memes with pledges, collectively changing profile pictures to draw attention, hash-tag activism, Twitter and Facebook polls to collect public opinions, and by live updates on news related to the candidates and the Election.[59] Census about the usage of social media during the 2015 Elections bears witness to the achievements of the awareness campaigns, both political and educational.[60]

Hash-tag activism is a relatively new concept in both the prominent social media platforms that is widely used by the people. Although it was used as an informative mechanism during the recent Sri Lankan Elections, in some other contexts, it has been used as a tool to engage with the people. The UK Government uses hash-tags as a means to collect feedback on critical Government plans.[61] In 2014, the Government of Kenya launched #GOKInteracts, which could be used by the people in Facebook and Twitter to ask questions or raise concerns about Government plans and activities, and the Government authorities respond to them.[62] Number of tweets on #GOKInteracts again speaks for its success as a simple yet powerful participatory tool to keep the check mechanism alive.

Every Government uses websites to interact with its citizens although the levels of interaction are of varying degrees. Most countries confine their role to static content heavy web pages to provide the people with information relating to the services provided by their Department or Ministry. Some countries depart from the norm by creating interactive

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[57] 25.1% Computer literacy in Sri Lanka. See Department of Census and Statistics Sri Lanka, 'Computer Literacy Statistics-2014' <http://www.statistics.gov.lk/ComputerLiterarcy/BuletinComputerLiteracy.pdf.> accessed on 20.11.2015. For statistics on social media use in Sri Lanka, see, Nalaka Gunawardene, (n 29)

[58] Refer to note 22

[59] Campaigns on awareness included changing of profile pictures to encourage voting, phrased, #IVotedSL; Twitter and Facebook hashtags on Elections #lka, #SLElections2015 were used to provide special updates , Facebook pages such as 'Hashtag Generation' and 'Aluth Parapura' made pictures and memes to be shared as a tool of awareness.

[60] See in this regard Nalaka Gunawardene, (n 29)

[60] Sanjana Hattotuwa, 'Technology in Constitutional Reform' (n 26)

[61] 'Open Government Project' http://forumopengovernment.org.uk/engage/ accessed on 01.11.2015. This is one mechanism from the comprehensive plan on Open Government subsequent to joining Open Government Partnership.

[62] 'Government of Kenya interacts Online' http://twubs.com/GOKinteracts accessed on 02.11.2015

forums and dynamic content sites to effectively engage the public in discussions to include the people in critical decision making of the country. Sweden conducts online referendum where a fair number of people take part.[63] Various Local Governments in Sweden use their own innovative websites to communicate with the public. Although the trend is uneven, there are platforms to include the people by online forum, in large development projects.[64] Some of the Local Governments have implemented the e-petitioning system.[65] In Estonia, there is a central government participation channel where the people are encouraged to engage and contribute to policy making.[66] The drafts bills are uploaded for public view, requiring new ideas and feedback from the people. In addition to this, there are Local Government initiatives of e-petitioning and online voting as well. Such efforts of mobilising democracy effectively through such technological platforms have been encouraged in the Unites States on national, federal and local government levels.[67] The number of countries that involve in initiatives that promote participation has improved since the launch of Open Government Partnership.[68] Such initiatives are effective means of implementing transparent decision making and preventing abuse of State power by the political elites. These techniques need to be utilized in Sri Lanka's Constitution-making exercise in order to encourage participation and transparency.

Instant messengers such as Whatsapp, Viber and Skype chats are more useful to connect groups of people, to share ideas and facilitate brainstorming. They could be utilized by the people to provide suggestions and feedback to the State authorities. It is interesting to see how some media go beyond their traditional role in providing news and use such platforms innovatively to connect to the people. Some recent trends could be seen in Sri Lanka. *Daily Mirror* has enabled the Whatsapp broadcast feature to send messages to its subscribers on important issues.[69] *Groundviews* has been encouraging participation in interesting ways. The followers of *Groundviews* were invited through Facebook to engage in a Skype conversation to raise their opinion about the recent police attack on the HNDA students.[70] The innovative possibilities to facilitate public participation through existing platforms seem endless.

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[63] Jochim Astrom et al., (n 51) p. 12

[64] *Ibid*

[65] *Ibid*

[66] *Ibid*

[67] Oren Perez, 'Open Government, Technological Innovation, and the Politics of Democratic Disillusionment: E-Democracy from Socrates to Obama' (2014) 9 ISJLP 61

[68] 69 countries have signed up for OGP including Sri Lanka which joined in October 2015.

[69] 'Daily Mirror News Alerts now on Whatsapp' *Daily Mirror* (15.08.2015) http://dailymirror.lk/83609/daily-mirror-news-alerts-now-on-whatsapp/ accessed on 27.10.2015

[70] *Groundviews* experimented with a novel feature on Skype to encourage its followers to engage in discourse via Skype Conversation, about the Police attacks on the HNDA students < https://join.skype.com/DRj0QHwWOoyf > accessed on 6.11.2015. *Groundviews* vowed to continue such innovative experiments using technology to encourage participation and dialogue among the citizens. See 'A Study on Skype Chat as a tool for Public Discourse' *Groundviews* (19.11.2015) <http://groundviews.org2015/11/19/a-study-on-skype-chat-as-a-tool-for-public-discourse/> accessed on 19.11.2015

The use of email and text messaging needs special attention as it dramatically widens access by the people especially in developing countries. These two, being the simplest and easily accessible media, break the barriers of age, class and background as it is available to the majority of the population and used comfortably. SMS has been used by the drafters to ask the people for precise responses in critical stages of the Constitution-making process.[71] Response by email was the most popular medium of submissions for many countries.[72]

In addition to the above, there is educative space for the drafters to learn from many websites. Among other things, 'Constitute' gives access to Constitutions of countries all over the world, in order to compare the Constitution of any two countries, or the present and past Constitutions of a country, or to research on Constitutional provisions relating to a keyword.[73] 'OpenDemocracy' educates on trends and issues relating to democracy all around the world.[74] Some provide tools and analysis on Constitution-making design, process, key cases and Constitutional amendments.[75] 'Legislation Lab', a web project of GovRight, provides an integrated space for the drafters, activists and the people to effectively engage in discourse relating to law and legal provisions.[76] The most recent project of GovRight, called the 'Constitution Lab' was announced in November as an open, online working group for research, understanding and citizen participation in Constitution-building.[77]

Countries in the world are no more isolated. Similar to the very architecture of the internet, countries all over the world are largely interconnected today. The governance of one part of the globe necessarily influences the other part. In this context, any deliberate effort to distance the country from global trends in relation to Constitution-making is likely to negatively affect the prospects and relations of the country. Today, many global initiatives have sprung up to assist the drafters to make a better Constitution, by facilitating the learning of the world experiences and trends. Such initiatives also provide a space for the interaction of such drafters regionally and globally.[78] Most of their projects are based on web platforms. They assist in promoting participation in order to build an inclusive Constitution. This, in turn benefits the well-being of the country and its people as the country goes through an effective transitional phase with its Constitution-making process.

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[71] Michael Kpessa & Atuguba, (n 37); Brandon Ballou and Gluck, (n 38)

[72] See Brandon Ballou and Gluck, Ibid.

[73] Sanjana Hattotuwa, 'Technology in Constitutional Reform', Supra note 26

[74] 'OpenDemocracy' <www.opendemocracy.net> accessed on 28.10.2015

[75] Constitution Net and i.CON. See 'Constitution Making for Peace' http://constitutionmakingforpeace.org/web-links accessed on 28.10.2015

[76] 'Explore Discussions: Legislation Lab' can be accessed at <http://legislationlab.org/en/explore>

[77] 'Announcing: Constitution Lab' <constitutionlab.org> accessed on 15.11.2015

[78] This includes organizations such as USIP, IIDEA, Interpeace, ICT4Peace, United Nations Rule of Law, GovRight and GovLab. GovLab is the initiative that launched the Open Government Partnership. It also provides a participatory platform to transform governance in the world by digital means. It can be accessed via <thegovlab.org>. Other regional networks include African Network of Constitutional Lawyers, Constitution Watch etc. See 'Constitution-Making for Peace' (n 75)

## Conclusion

A Constituent Assembly that prefers closed door negotiations is likely to disregard the role of technology in Constitution-making. Although closed door drafting could be less complicated than inviting citizenry engagement, it is only by way of encouraging public discourses that the process becomes a success, creating a peoples' Constitution.[79] It is important that Sri Lanka facilitates the platform for participation to live up to its commitment for an open government embracing transparency and accountability in governance.[80] Such an open-process will further legitimize the Constitution, ensure its longevity, and create historic opportunities for the people to celebrate the Constitution.[81]

The tools of technology for optimal participation in Sri Lanka could primarily include use of social media and email due to their unique features and widespread use. While social media has established itself as one of the most effective medium of spreading awareness, email is a convenient option for majority of the population due to its resemblance with the traditional post-mail.[82] An interactive website is almost inevitable to connect to the people to share exclusive information and opinions. Creating an integrated platform for participation with collaborations of organizations such as 'GovRight' and 'GovLab' might be novel experiences that would encourage the youth of the country to explore and embrace new technological innovations in par with world trends.[83] The State also needs to develop mechanisms to promote e-democracy to encourage participation in governance in order to be a progressive democratic nation.[84] All such technologies channeling the interaction between the State and its people should cater the different language requirements by facilitating input and output of information in all three languages and provide other aids

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[79] A constitution-making process that is inclusive is more 'owned' by the people. This is particularly important for healing in the post-war context. The celebrations subsequent to the passing of the Constitution in South Africa in 1996 and in Tunisia in 2014 bear witness to such legitimacy. See Philipp Dann *et al.* (n 5) p 4.

[80] See in this regard, Mangala Samaraweera, 'Politics and Development in Sri Lanka' *Colombo Telegraph* (16.11.2015) https://www.colombotelegraph.com/index.php/politics-development-in-sri-lanka/ accessed on 16.11.2015

[81] *Supra* note 79.

[82] See Brandon Ballou and Gluck, (n 38)

[83] These platforms can be considered as transformative platform for governance in the present age. On 16th November 2015, the first ever workshop on ICT and Technology Building was held by IIDEA, collaborating with Google Ideas and ICT4Peace to discuss and brainstorm on the recent trends and future developments. Interestingly enough, Ignite Talks on Encouraging Public Debate included a talk on 'manthri.lk' of Sri Lanka by Asoka Obeysekere. Talks on 'Legislation Lab' and 'DemocracyOS' too were featured. See 'ICTs and Constitution Building Tech Fair' (16.11.2015, NCC, USA) <http://ict4peace.org/wp-content/uploads/2015/11/Concept-Note-and-Agenda_Philadelphia-Tech-fair_FINAL.pdf> accessed on 18.11.2015. See for more, 'ICT for Peace Foundation' < http://ict4peace.org/first-of-its-kind-workshop-on-icts-and-constitution-building/>

[84] Countries such as USA and UK use technology to strengthen the governance of the Local Governments by connecting to people and addressing their concerns. See Jennifer Ishkabtur, 'Digital Technology and Local Democracy in America' (2011) 76 Brook L. Rev. 1416-1417

for marginalized communities.[85] While it makes the process fully inclusive, acknowledging diversity on linguistic and other grounds nurtures good faith among the communities speaking different languages. While contributing towards a participatory Constitution making, it could also create new opportunities of inclusion and reconciliation in the post-war Sri Lanka.

Most importantly, the use of technology to promote participation ought to be complemented by real-life forums, brainstorming sessions and awareness campaigns. It helps in reaching the marginalized communities that have no access whatsoever to any technological devices. It also builds the confidence in people who are wary of technological revolution. In order to ensure technological progression in governance, forces of manipulation and resistance need to be fought against, by educating the people. Ultimately, the use of technology does not guarantee democracy; it is the vision of the people and their efforts that give life to the vision of hailing democracy. Technology makes the ride more innovative and inclusive.

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[85] Certain tools in Interface Design that are used to assist people with disability could be used; features to read out the text loud, extra-large font size, using suitable colours for the background and text could be few guidelines to make the interface more accessible and user-friendly.

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