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கிலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

2019.08.29

Mr. Chandana D. Wickramaratne
Acting Inspector General of Police
Police Headquarters
Colombo 01.

The Human Rights Commission of Sri Lanka's (HRCSL) analysis of the scope of Section 3 of the ICCPR Act, No.56 of 2007 and attendant guidelines

The HRCSL is pleased to present herewith the Commission's legal analysis of the scope of section 3 of the ICCPR Act, No.56 of 2007 (ICCPR Act) and its recommendations in regard to the provision's application.

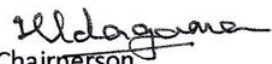
The Commission is of the view that section 3 of the ICCPR Act is an important legal tool in combating hate speech. As we are aware, hate speech has unfortunately become a common phenomenon in the country targeting various groups.

However, the Commission observes that the enforcement of section 3 of the ICCPR Act has not been done in a consistent and an even-handed manner, and sees the need for greater clarity on the legal scope of the offence recognized by the said provision.

The enclosed document containing the legal analysis and recommendations of the HRCSL is a result of the Commission's research on the scope of section 3 in light of relevant international jurisprudence, as section 3 is an incorporation of Article 20 of the International Covenant on Civil and Political Rights.

The analysis and recommendations were finalized after consulting legal practitioners in the field of fundamental rights.

The Commission recommends that these guidelines are taken into consideration by the Police Department for the fair and effective enforcement of section 3 of the ICCPR Act. We would be pleased to provide clarifications, if necessary.


Chairperson

Human Rights Commission of Sri Lanka

Dr. N. D. Udagama
Chairperson
Human Rights Commission of Sri Lanka

Enclosure: The Human Rights Commission of Sri Lanka's legal analysis of the scope of section 3 of the ICCPR Act, No.56 of 2007 and attendant recommendations.

HUMAN RIGHTS COMMISSION OF SRI LANKA
LEGAL ANALYSIS OF THE SCOPE OF SECTION 3 OF THE ICCPR ACT, NO.56 OF 2007
AND ATTENDANT RECOMMENDATIONS

The Human Rights Commission of Sri Lanka considers Section 3 of the International Covenant On Civil and Political Rights Act No.56 of 2007 (ICCPR Act) as a significant legal framework to address hate crimes. As there is no authoritative Sri Lankan jurisprudence on Section 3 of the ICCPR Act, the Commission has drawn from the discussion surrounding Article 20 of the International Covenant on Civil and Political Rights (the Covenant) i.e. the original Article to which Section 3 of the ICCPR Act gives domestic effect, in order to understand its scope and application. The Commission presents its observations below:

Part 1. International Jurisprudence on Article 20 of the Covenant

Article 20 of the Covenant reads as follows:

- (1) Any propaganda for war shall be prohibited by law.
- (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

1.1 The relevance of Freedom of Expression

It is recognized by the UN Human Rights Committee i.e. the independent expert body which oversees the implementation of the Covenant (UNHRC) that Article 20 should be read in conjunction with Article 19 of the Covenant which recognizes Freedom of Expression. For example in the ICCPR General Comment No. 11¹ it is observed that the prohibition required by Article 20 is compatible with the Freedom of Expression guaranteed under Article 19. Further, in *Ross v Canada*² it has been held by the UNHRC that restrictions under Article 20 should be permissible under Article 19 as well.

1.2 Elements of the Article 20 Offence

The Commission observes that the aforementioned offence under Article 20 (2) embodies two significant elements:

- i) Advocacy of national, racial or religious hatred; and
- ii) Incitement to discrimination, hostility or violence

¹ General Comment 11, United Nations Human Rights Committee, 29 July 1983.

² Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000).

Under Article 20, advocacy of national, racial or religious hatred is permissible until it constitutes incitement to discrimination, hostility or violence.

However, not all forms of incitement are proscribed under Article 20.

As per the Rabat Plan of Action, a crucial element of incitement as recognized under Article 20 is intention.

The Human Rights Organization ARTICLE 19 (ARTICLE 19) observes that "the decisive factor should be that a speaker who incites others to discrimination, hostility or violence intends not only to share his/her opinions with others but also to compel others to commit certain actions based on those beliefs, opinions or positions."⁴

The scope of intent as contained in the Rome Statute of the International Criminal Court adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, in force since 1 July 2002 is as follows;

Article 30 para. 2 of the Rome Statute:

- a) In relation to conduct, that a person means to engage in the conduct;
- b) In relation to a consequence, that a person means to cause that consequence or is aware that it will occur in the ordinary course of events.

A *mens rea* that is less than intent (such as 'recklessness' or 'negligence') would not, therefore, meet the threshold of Article 20(2).

- d. **Content and Form** – The provocative nature of the content, the nature of the arguments, the mode of expression used, the tone used in the expression etc...
- e. **Extent of the advocacy** – The reach of the advocacy i.e. its public nature, magnitude and the size of the audience.
- f. **Imminent harm** – Reasonable probability that the incitement would cause imminent harm.

ARTICLE 19 observes that actions compelled by the speaker need not actually follow for the speaker to be held liable.

⁴ ARTICLE 19, 'Prohibiting Incitement to Discrimination, Hostility or Violence', December 2012 available at <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>

The offences under Section 3 -

Section 3 (1) - No person shall propagate war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Section 3 (2) - Every person who— (a) attempts to commit; (b) aids or abets in the commission of; or (c) threatens to commit, an offence referred to in subsection (1), shall be guilty of an offence under this Act.

Procedural requirements under Section 3 -

Section 3 (3) - A person found guilty of committing an offence under subsection (1) or subsection (2) of this section shall on conviction by the High Court, be punished with rigorous imprisonment for a term not exceeding ten years.

Section 3 (4) - An offence under this section shall be cognizable and non-bailable, and no person suspected or accused of such an offence shall be enlarged on bail, except by the High Court in exceptional circumstances.

2.2 The Commission observes that Section 3(1) is an articulation that consolidates subsections (1) and (2) of Article 20 of the Covenant.

2.3 Further under Section 3 (2), Article 20 has been extended to cover attempts to commit, aid or abet offences under Section 3(1).

Part 3. Recommendations of the HRCSL on the scope of Section 3 of the ICCPR Act

In light of the foregoing, the Commission presents its recommendations as follows:

3.1 In view of the observations under Part 2 above, the Commission recommends that Section 3 of the ICCPR Act be interpreted in light of the international jurisprudence on Article 20 of the Covenant.

3.1.1 That the six-part threshold test as contained in the Rabat Plan of Action and discussed in Part 1.2.1 above be adopted in order to determine the forms of advocacy that fall within the scope of Section 3.

3.6 State obligations under the ICCPR and the interpretation of Section 3 of the Act:

3.6.1 The State has an obligation to protect individuals from incitements to discrimination, hostility or violence by third parties as well as to refrain from engaging in such acts in order to protect rights and ensure equal protection of the law for all.

3.6.2 Where there is reasonable suspicion that a person is committing a Section 3 offence, and public officers with the power to set the procedure under the ICCPR Act in motion fail or omit to enforce the law, such omission shall amount to state inaction which gives rise to a fundamental rights violation (Article 12 (1) of the Constitution of Sri Lanka) as a tacit state approval of hate speech.
