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My No.

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உமது இல.
Your No.



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திகதி
Date.
12.09.2023

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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

H.E. Ranil Wickremesinghe
President of the Republic of Sri Lanka
Minister of Defence,
Presidential Secretariat
Colombo 01

Your Excellency,

Copy of Revised Anti-Terrorism Bill

We write to you with reference to the recent decision of the Cabinet of Ministers approving the publishing of a Bill titled 'Anti-Terrorism' in the Official Gazette. We understand that the said Bill is a revised version of the Bill previously gazetted on 17 March 2023.

We kindly request that a copy of the revised Bill be shared with the Human Rights Commission of Sri Lanka to enable the Commission to fulfil its mandate in terms of section 10(c) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996. The said provision empowers the Commission to 'advise and assist the government in formulating legislation...in furtherance of the promotion and protection of fundamental rights'.

We enclose herewith our observations on the previous version of the Bill, which was published in the Official Gazette on 17 March 2023 (See Annex 1). The Commission invites the Government of Sri Lanka to consider and incorporate these observations into the revised Bill prior to placing the Bill on the Order Paper of Parliament. We will share our observations on the revised Bill as and when a copy of the same is furnished to the Commission, or the said Bill is published in the Gazette.

Thank you.

Sincerely,

Justice L T B Dehideniya
Chairman
Human Rights Commission of Sri Lanka

Justice L.T.B. Dehideniya
Judge of the Supreme Court (Retired)
Chairman
Human Rights Commission of Sri Lanka

Cc: Hon. Wijedasa Rajapakshe
Minister of Justice, Prison Affairs and Constitutional Reforms
19 Sri Sangaraja Mawatha, Colombo 01

Secretary to the Cabinet
Office of the Cabinet of Ministers
Lloyd's Building, Sir Baron Jayathilaka Mw., Colombo 01,

Annex 1

Observations and Recommendations on the Anti-Terrorism Bill published in the Official Gazette on 17 March 2023

1. Judicial Safeguards

The Commission notes that the Bill titled 'Anti-Terrorism' published on 17 March 2023, when compared with the Prevention of Terrorism Act, No. 48 of 1979 (PTA), introduces certain judicial safeguards with respect to suspects and accused persons.

First, clause 28 of the Bill provides that an arrested person must be produced before the nearest Magistrate no later than within forty-eight hours of the arrest.

Second, clause 81 of the Bill sets out the conditions on which a confession to a Magistrate could be admissible against the accused. Such conditions are that the suspect must be examined by a government forensic medical specialist immediately before and after the confession to a Magistrate, and the specialist's report should be produced by the prosecutor during the trial at the inquiry into the voluntariness of the confession. We note that, currently, under section 16(1) of the PTA, a confession to an officer not below the rank of Assistant Superintendent of Police is admissible as evidence against the accused.

The Commission observes that the guarantee of judicial oversight of the welfare of persons in custody, and the guarantee that all accused persons are afforded a fair trial, are basic features of the Sri Lankan Constitution encapsulated in Article 13 of the Constitution. The exercise of powers and functions in this respect remains the exclusive province of the judiciary of Sri Lanka and must not be assigned to executive officials. The fundamental right to be free from torture, and inhuman or degrading treatment (Article 11), and the fundamental right to a fair trial (Article 13) can only be meaningfully guaranteed if judicial officers are entrusted with such powers and functions.

We recommend that the following basic judicial safeguards be retained in any proposed law concerning the offence of terrorism:

- (a) arrested persons are expeditiously produced before a Magistrate; and**
- (b) only confessions made before a Magistrate are admissible in a court of law.**

2. Definition of Terrorism

We wish to reiterate the observations of the Commission expressed in its Press Notice dated 6 April 2023. The Commission observed:

[T]he broad scope of the definition as contemplated in the Bill will lead to its use in ways to interfere with the fundamental rights enshrined in the Constitution, in a way to restrict the freedom of speech and expression as well as the right to protest.

Further, the definition contemplated in the Bill shall make it difficult to distinguish between legitimate acts of dissent and actual acts of terrorism. The Government could use the broad definition of terrorism to target and silence dissenters and activists. This

not only violates the right to protest peacefully but also the right to free speech which is an inalienable right enshrined in the Constitution.

We further observe that, in clause 3(1), the Bill sets out the criteria for the offence of terrorism by introducing certain 'intentions' that can make ordinary offences amount to the offence of 'terrorism'. These intentions are:

- (a) intimidating the public or section of the public;
- (b) wrongfully or unlawfully compelling the Government of Sri Lanka, or any other Government, or an international organization, to do or to abstain from doing any act;
- (c) unlawfully preventing any such government from functioning;
- (d) violating territorial integrity or infringement of sovereignty of Sri Lanka or any other sovereign country; or
- (e) propagating war or advocating national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

Intentions '(b)' and '(c)' (i.e., 'wrongfully or unlawfully compelling the Government of Sri Lanka...to do or abstain from doing any act', and 'unlawfully preventing any such government from functioning') can include public protests and demonstrations, strike action, and acts of civil disobedience, which are integral to the fundamental right of all citizens to the freedoms of expression, association, and peaceful assembly.

Meanwhile, clauses 3(2)(f) and 3(2)(l) of the Bill respectively specify the following acts as part of the offence of terrorism: 'serious obstruction to...essential services or supplies' and 'being a member of an unlawful assembly'.

Taken together, we observe that clauses 3(1)(b) or (c) and clauses 3(2)(f) or (l) can potentially criminalise legitimate acts of public protests by citizens, as obstruction of essential services or participating in an assembly of some kind can be characterised as 'wrongful' or 'unlawful' simply through the issuance of police directives in terms of clause 61 of the Bill (see below).

Therefore, the terms 'wrongful' and 'unlawful' can be easily abused by state law enforcement authorities to categorise peaceful assemblies as such. These terms may be contrasted with violent assemblies, which unambiguously entail assemblies that are violent in nature, and are the opposite of 'peaceful assemblies' contemplated by Article 14(1)(b) of the Constitution.

For example, a spontaneous protest by a trade union may be construed as a serious obstruction to essential services. The protests may be intended to compel the government to revisit some policy (which then makes the intention of the protest fall within clause 3(1)(b) of the Bill). Although the protest may be perfectly peaceful in nature, the protest may be deemed 'unlawful' by law enforcement officials owing to violations of directives issued under clause 61 of the Bill. Therefore, acts of obstruction and the participation in such an assembly (under clauses 3(2)(f) and (l) of the Bill) along with the ostensible intention of compelling the government to do something, can constitute the offence of 'terrorism' under the Bill.

Moreover, the effects of the overbroad definition of the offence of terrorism are compounded by other provisions of the Bill. For example, under clause 10(1)(a) of the Bill, a person who 'publishes or causes to be published a statement, or speaks any word or words, or makes signs or visible representations which is likely to be understood by some or all of the members of the public as a direct or indirect encouragement or inducement for them to commit, prepare or instigate the offence of terrorism' also commits an offence.

Considering the above example, even calling for or supporting trade union action that can be deemed an offence of terrorism under clauses 3(1) and (2) of the Bill may be considered a separate offence under clauses 10(1)(a) of the Bill. This framework further jeopardizes the people's fundamental right to the freedom of speech and expression, which includes the right to call for peaceful protests against governmental policies.

The same problem arises with respect to offences relating to 'terrorist publications' under clause 11 of the Bill, as what constitutes a 'terrorist publication' includes a publication that is 'understood...as direct or indirect encouragement or other inducement...to commit or, to prepare for, the offence of terrorism'. Therefore, considering the above example, any publication that encourages such public protests or trade union action, may be treated as 'terrorist publications', and may constitute a separate offence.

Additionally, the failure to report an offence or preparation of an offence is separately criminalised under clause 15 of the Bill. Considering the above example, such an offence can apply to those who are aware of plans to stage trade union action (which is treated as an offence of terrorism) but fails to report such plans.

The Commission accordingly reiterates its previous observation, expressed in Press Notice dated 26 October 2022, that 'the offence of terrorism can be dealt with under general law'.

It also reiterates its recommendation that the definition of 'terrorism' be confined to the following: 'Any person by the use of threat or use of force and violence by unlawfully targeting the civilian population or a segment of the civilian population with the intent to spread fear thereof in furtherance of a political, ideological, or religious cause commits terrorism.'

3. Long-term detention without trial

The Commission observes that clauses 31 and 37 of the Bill enable a suspect to be held in detention without trial for a maximum period of twelve (12) months.

Clause 31 of the Bill enables a Deputy Inspector General of Police (DIG) to issue a detention order for an initial period of three months. This provision may be contrasted with section 9 of the PTA, which only enables the Minister of Defence (often the President of the Republic) to issue a detention order.

It is observed that a detention order is an extraordinary measure that amounts to a restriction on the fundamental right to the freedom from arbitrary detention guaranteed by Article 13(2) of the Constitution. An executive official such as a DIG ought not to be vested with such extraordinary power.

It is accordingly recommended that the extraordinary measure of issuing detention orders be subject to judicial oversight as envisaged by Article 13(2) to ensure that no person is 'held in custody, detained, or deprived of personal liberty *except upon and in terms of the order of [a] judge made in accordance with procedure established by law*' (emphasis added).

4. Denial of bail

It is recalled that under section 7 of the PTA, the Magistrate is required to remand a suspect until the conclusion of the trial. The Magistrate (and after the indictment is served, the High Court) is

precluded from granting a suspect (and thereafter, an accused person) bail. At present, the Attorney-General may consent to bail when the case is before the Magistrate, and the Court of Appeal may grant bail when the case is before the High Court, and after the indictment is served.

Under clause 28(2)(a) of the Bill, the Magistrate is compelled to give effect to a detention order. In such a context, the judge is not given any discretion to refuse to give effect to a detention order that they believe to be wrongly issued, and is, therefore, precluded from issuing a judicial order on the matter. It is reiterated that Article 13(2) of the Constitution provides that the detention of a person must only be 'upon and in terms of the order of [a] judge'.

Under clause 36 of the Bill, the Magistrate may refuse to extend a detention order after the lapse of three months and may even grant bail to the suspect. However, under clause 36(5)(c), the Magistrate can grant bail to the suspect only 'where there are no reasons to believe that the suspect has committed an offence'. It is noted that such a condition imposes an unreasonably high threshold for a Magistrate to exercise their discretion in granting bail to a suspect, as no Magistrate can reasonably believe a suspect to be innocent without first trying the matter. In effect, a bail hearing would be identical to a trial wherein the legal representatives of the suspect would have to establish the innocence of the suspect for the suspect to qualify for bail.

It is recommended that the continued operation of a detention order, from the outset, be subject to an order of a judicial officer. It is also recommended that a judicial officer be vested with meaningful authority to grant bail to any suspect taken into custody on suspicion of the offence of 'terrorism', and such authority be in terms of the Bail Act, No. 30 of 1997.

5. Expansion of police powers

It is observed that clause 61 of the Bill empowers a Senior Superintendent of Police (SSP) to issue 'directives' requiring the public:

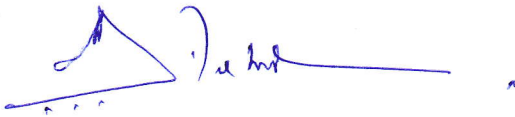
- (a) not to enter any specified area or premises;
- (b) to leave a specified area or premises;
- (c) not to leave a specified area or premises and to remain within such area or premises;
- (d) not to travel on any road;
- (e) not to transport anything or to provide transport to anybody;
- (f) to suspend the operation of a specified public transport system;
- (g) to remove a particular object, vehicle, vessel or aircraft from any location;
- (h) to require that a vehicle, vessel, ship or aircraft to remain in its present position;
- (i) not to sail a vessel or ship into a specified area until further notice is issued;
- (j) not to fly an aircraft out of, or into a specified air space;
- (k) not to congregate at any particular location;
- (l) not to hold a particular meeting, rally or procession; and
- (m) not to engage in any specified activity:

Clause 61(1)(m) specifies that 'any specific activity' may be prohibited by such directive, which gives the broadest possible power to an SSP to prohibit any activity by any person. A directive will be valid for 24 hours and can be extended for further periods of 24 hours, the total of which cannot exceed 72 hours.

Although the proviso to clause 61(1) of the Bill requires directives to be approved by a Magistrate, the safeguard introduced through the proviso is inadequate, given that an SSP can effectively exercise powers akin to those exercised by the President of the Republic under the Public Security

Ordinance, No. 25 of 1947. For example, by issuing a directive to persons to not travel on a road, or not to congregate in an area, or not engage in a procession, an SSP can exercise powers that are identical to the powers of curfew that are exercised by the President under section 16 of the Public Security Ordinance. Such police directives would amount to restrictions on a range of fundamental rights, including the freedom of speech and expression, the freedom of peaceful assembly, the freedom of association, and the freedom to manifest religion or belief. It is observed that a fundamental right may be restricted in terms of Article 15 of the Constitution only where such restriction is via 'law' (i.e., an Act of Parliament) or an emergency regulation issued by the President of the Republic.

It is accordingly recommended that no powers be vested in police officers, of whichever rank, to issue directives restricting the fundamental rights of the people.

A handwritten signature in blue ink, appearing to read 'L.T.B. Dehideniya', with a stylized flourish at the end.

Justice L.T.B. Dehideniya
Judge of the Supreme Court (Retired)
Chairman
Human Rights Commission of Sri Lanka