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My No.

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26.10.2023

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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

Hon. Dr. Wijeyadasa Rajapakshe
Minister of Justice, Prison Affairs and Constitutional Reforms
19 Sri Sangaraja Mawatha,
Colombo 10

Hon. Minister,

Observations and Recommendations on the Revised Anti-Terrorism Bill

We write to you with reference to the Bill titled 'Anti-Terrorism' published in the Official Gazette on 15 September 2023. We understand that the said Bill is a revised version of the Bill previously gazetted on 17 March 2023, and that it is currently not on the Order Paper of Parliament, as clarified by the Hon. Attorney General in S.C. Special Determination 70/2023 *et al.*

We have reviewed the said revised Bill and wish to share our observations and recommendations on the Bill in terms of our mandate under 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'.

The following general observations and recommendations are presented for your consideration in view of revising the Bill to ensure compatibility with the fundamental rights chapter of the Sri Lankan Constitution and Sri Lanka's international human rights obligations:

1. Substantially revise the definition of the 'offence of terrorism' by narrowing its scope;
2. Ensure any detention order issued against any persons suspected of the 'offence of terrorism' be subject to judicial oversight as envisaged by Article 13(2) of the Constitution;
3. Ensure that a judge is, at all times, vested with meaningful authority to grant bail to any suspect taken into custody on suspicion of the 'offence of terrorism';
4. Ensure any person deprived of liberty be granted prompt and meaningful access to legal counsel without arbitrary or unreasonable conditions; and
5. Refrain from granting the police any powers to issue directives restricting the fundamental rights of the people.

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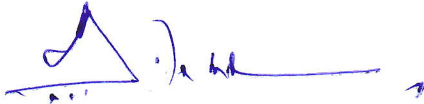
Additionally, we enclose herewith our detailed observations and recommendations on the specific provisions of the revised Bill (Annex 1). The Commission invites your Ministry to consider and incorporate these observations into the revised Bill prior to placing the Bill on the Order Paper of Parliament.

We thank you for your Ministry's cooperation and continued engagement.

Sincerely,



Justice L T B Dehideniya
Chairman

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

Human Rights Commission of Sri Lanka

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

Annex 1

Observations and Recommendations on the Revised Anti-Terrorism Bill published in the Official Gazette on 15 September 2023

Clauses 3, 10, 11 and 15: Definition of Terrorism, and related Offences

We 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) propagating war or, violating territorial integrity or infringement of sovereignty of Sri Lanka or any other sovereign country.

We note that intention '(b)', i.e., 'wrongfully or unlawfully compelling the Government of Sri Lanka…to do or abstain from doing any act' may include public protests and demonstrations, strike action, and acts of civil disobedience, which are integral to the fundamental rights of all citizens to the freedoms of expression, association, and peaceful assembly.

Clause 3(2)(e) of the Bill provides that the act of 'causing serious damage to any place of public use, a State or Governmental facility, any public or private transportation system or any infrastructure facility or environment', if carried out with one of the abovementioned intentions, can amount to the 'offence of terrorism'.

While such an act may amount to a criminal offence under the Penal Code Ordinance, No. 2 of 1883 (as amended), the Commission is concerned that such act is now capable of being characterised as an 'offence of terrorism' when committed with the intention of compelling the government to do or to abstain from doing any act. For example, public protests against a particular governmental policy may escalate to the point where serious damage to a place of public use may occur. While perpetrators of such damage may be dealt with under ordinary criminal law, the characterisation of such acts as an 'offence of terrorism' is unreasonable and disproportionate, particularly given that such suspects would be subjected to a separate procedural regime under the proposed Bill. For example, by virtue of being a suspect with respect to the offence of 'terrorism' as opposed to under the ordinary criminal law, a suspect would be liable to be detained under a detention order without prospect for bail.

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, if serious damage to places of public use in the context of a public protest can be deemed an 'offence of terrorism', encouragement of that protest may be considered a separate offence under **Clause 10(1)(a)** of the Bill. This framework further jeopardises the people's fundamental right to the freedom of speech and expression (guaranteed

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under Article 14(1)(a) of the Constitution) 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 them to commit or, to prepare for, the offence of terrorism'. Therefore, considering the above example, any publication that encourages such public protests, may be treated as a 'terrorist publication', 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 a public protest (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 and its letter to H.E. the President on 12 September 2023, that 'the offence of terrorism can be dealt with under general law'.

We reiterate the recommendation that the definition of 'terrorism' be narrowed 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.'

Clauses 28 and 78: Judicial Safeguards

The Commission notes that the revised Bill titled 'Anti-Terrorism' published on 15 September 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.

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.

Clause 78 of the Bill sets out the conditions on which a statement 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 statement 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 statement. We note that, currently, under section 16(1) of the PTA, a statement 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

Justice L.T.B.Dehideniya
Judge of the Supreme Court (Retired)
Chairman

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.

Clauses 28, 31 and 37: 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 the Secretary to the Ministry of Defence to issue a detention order for an initial period of two 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 the Secretary to the Ministry of Defence, ought not to be vested with such extraordinary power.

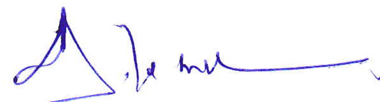
The essence of Article 13(2) of the Constitution is that no person is held in custody, detained, or deprived of personal liberty *except upon and in terms of the order of [a] judge*' (emphasis added). However, under **Clause 28(2)(a)** of the Bill, when a detention order has been issued in terms of **Clause 31**, and is placed before the Magistrate for his inspection, the Magistrate '*shall make an order to give effect to such detention order*' (emphasis added). 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. We observe that this denial of meaningful judicial oversight with respect to a detention order is inconsistent with Article 13(2) of the Constitution.

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).

Clauses 30, 36 and 72: Absence 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.

Justice L.T.B.Dehideniya
Judge of the Supreme Court (Retired)



Under **Clause 30(2)** of the Bill, the Magistrate shall grant bail to a suspect against whom criminal proceedings have not been instituted within a period of one year. However, the proviso to **Clause 30(1)** of the Bill enables the extension of that period (of not instituting criminal proceedings against a suspect) by an order of the High Court on the application of the Attorney-General. Such extensions, which can be obtained for periods of three months at a time, prevent a Magistrate from releasing a suspect on bail for the duration of such extensions.

Under **Clause 36** of the Bill, the Magistrate may refuse to extend a detention order after the lapse of two months. However, under **Clauses 36(4) and (5)**, there are no circumstances in which the Magistrate can grant bail to a suspect. The Magistrate has only three options: (a) to extend the detention order; (b) to refuse to extend the detention order, but to place the suspect in remand custody if 'there exists reasonable ground to believe that the suspect may have committed an offence'; or (c) to discharge the suspect if there are 'no reasons to believe that the suspect has committed an offence'. The Bill, therefore, does not contemplate a situation in which the Magistrate can grant bail to a suspect who is suspected of having committed an offence, as in the case of any criminal proceeding in which bail may be granted by a Magistrate.

Under **Clause 72** of the Bill, the Secretary to the Ministry of Defence is empowered to order that a person be detained until the conclusion of the trial before the High Court if they are of the opinion that 'it is necessary or expedient that a person be kept in the custody of any authority in the interest of national security and public order'. It is observed that the High Court is stripped of any authority to consider granting bail to such an accused person, and power in this respect is exercised solely by an executive official, i.e., the Secretary to the Ministry of Defence.

The Commission reiterates 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'.

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 an offence of or related to 'terrorism' or to a person accused of an offence of or related to 'terrorism', in terms of the Bail Act, No. 30 of 1997.

Clause 42: Access to legal counsel

The Commission notes that the previous version of the Bill stated in Clause 43 that 'an Attorney-at-Law representing a suspect under this Act, shall have the right to access to such person in police custody, and to make representations, as provided for in written law.' However, the Commission observes that **Clause 42(1)** of the revised version of the Bill now provides: 'An Attorney- at- Law representing a person remanded or detained under this Act, shall have the right of access to such person and to make representations on behalf of such person, subject to such conditions *as may be prescribed by regulations* made under this Act or as provided for in other written law' (emphasis added).

Although the right to access legal counsel is not explicitly guaranteed in the Sri Lankan Constitution, the Commission observes that every person deprived of liberty in Sri Lanka has a statutory right to access legal counsel. Section 15(2) of the International Convention for the

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Judge of the Supreme Court (Retired)

Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018 provides: 'any person deprived of liberty shall have the right to communicate with and be visited by his...attorney-at-law...subject only to the conditions established by written law.'

Therefore, any conditions with respect to a person's ability to access legal counsel while being deprived of liberty must be set out by law in a manner consistent with the fundamental right to a fair trial guaranteed by Article 13(3) of the Constitution.

The Commission notes that Sri Lanka's obligations under international human rights law, and specifically the International Covenant on Civil and Political Rights (ICCPR) ought to be considered in framing any conditions applicable to persons in custody who wish to access legal counsel. Article 9 of the ICCPR guarantees the right to liberty and the security of persons. It also recognises the freedom from arbitrary arrest or detention, and the right to due process established by law. The United Nations Human Rights Committee, the treaty body responsible for interpreting the ICCPR, has elaborated on the state's obligations under Article 9. In General Comment No. 35, the Committee observes that Article 9 imposes an obligation on states to 'permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention'.[1] The Committee also opines that arrested persons should be afforded 'prompt and regular access' to lawyers.[2] Article 14 of the ICCPR meanwhile provides that every person shall have the right 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.' The Committee has elaborated on this right in General Comment No.32 and has accordingly observed that 'the right to communicate with counsel requires that the accused is granted prompt access to counsel.'[3] Thus the ICCPR, which Sri Lanka is party to, clearly recognises the right to prompt and meaningful access to legal counsel.

It is understood that the reference to 'regulations' in **Clause 42(1)** is a reference to the regulations that may be issued by the President under **Clause 90** of the Bill 'for the purpose of carrying out or giving effect to the purposes, principles and provisions of this Act'. **Clause 42(1)** thus enables the President to impose additional, non-statutory, conditions on the ability of persons remanded or detained under the Anti-Terrorism Act to access legal counsel. The Commission is of the view that, in light of the fundamental right to a fair trial guaranteed by Article 13(3) of the Constitution read with Sri Lanka's international human rights obligations, the scheme envisaged by **Clause 42(1)** of the Bill should be substantially reconsidered.

It is recommended that no conditions with respect to accessing legal counsel be imposed through regulations. Persons deprived of liberty ought to be guaranteed prompt and meaningful access to legal counsel without arbitrary or unreasonable conditions being placed on such access.

Clause 60: Expansion of police powers

It is observed that **Clause 60** of the Bill empowers an officer not below the rank of Senior Superintendent of Police (SSP) to issue 'directives' requiring the public: (a) not to enter any

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[1] United Nations Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, at para.35.

[2] *Ibid.* at para.58.

[3] United Nations Human Rights Committee, *General comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, at para.34.

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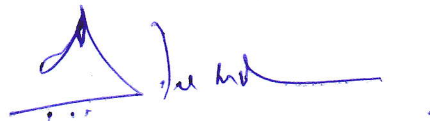
specified area or premises; (b) to leave a specified area or premises; (c) not to leave a specified area or premises and to remain within such area or premises; (d) not to travel on any road; (e) not to transport anything or to provide transport to anybody; (f) to suspend the operation of a specified 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 60(1)(m) of the Bill 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 60(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, the freedom of movement, 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 recommended that no powers be vested in police officers, of whichever rank, to issue directives restricting the fundamental rights of the people.



Justice L.T.B. Dehideniya
Judge of the Supreme Court (Retired)
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