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Your No. }



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22.11.2023

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இலங்கை மனித உரிமைகள் ஆணைக்குழு
Human Rights Commission of Sri Lanka

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

Hon. Minister,

Recommendation to Repeal / Amend Sections 365 and 365A of the Penal Code

We write to you in terms of section 10(d) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 with reference to sections 365 and 365A of the Penal Code (Chapter 19). Section 10(d) of the Act mandates the Commission 'to make recommendations to the Government regarding measures which should be taken to ensure that national laws...are in accordance with international human rights norms and standards'. The said sections of the Penal Code relate to 'unnatural offences' and 'acts of gross indecency between persons' and has been used for criminalising sexual activity between persons of the same sex.

We are pleased to note that the Supreme Court of Sri Lanka recently determined that 'decriminalisation of sexual activity amongst consenting adults irrespective of their sexual orientation only furthers human dignity and as such this cannot be considered as being an offence that must be maintained on the statute book' (SC SD 13/2023 *et al*, p. 31). It also determined that 'the removal of criminalisation of intimate acts between consenting adults, which was a crime based on moral imperatives of a bygone Victorian era, would be in conformity with Article 12(1) [of the Sri Lankan Constitution] and would uphold the dignity of human beings' (SC SD 13/2023 *et al*, p. 36). The said observations were made in the Court's determination on the constitutionality of a Private Member's Bill to amend section 365 and repeal section 365A. Prior to this determination, the Supreme Court in *Sanath Wimalasiri v. The Attorney General* (SC Appeal No. 32/2011) held that consensual same-sex activity should not attract a custodial sentence.

Sri Lanka is party to the International Covenant on Civil and Political Rights (ICCPR), which under Articles 2 and 26 guarantees the right to non-discrimination. The Human Rights Committee, the treaty body tasked with supervising the implementation of the ICCPR, has observed that the right to non-discrimination includes non-discrimination on the grounds of sexual orientation. Sri Lanka in its state party report submitted to the Human Rights Committee on 25 April 2021 stated that 'discrimination on the grounds of sexual orientation is implicitly prohibited' by Article 12(2) of the Sri Lankan Constitution. The Human Rights Committee, in its Concluding Observations on Sri Lanka, (26 April 2023), observed that the continued criminalisation of same-sex activity under sections 365 and 365A of the Penal Code violated Articles 2 and 26 of the ICCPR. It also observed that such continued criminalisation, the arrest and detention of persons under these sections, and the ill treatment of suspects, violated the

right to freedom from torture or cruel, inhuman or degrading treatment (Article 7), the right to liberty and security of persons (Article 9), and the right to privacy (Article 17) guaranteed under the ICCPR. It accordingly recommended the repeal of sections 365 and 365A of the Penal Code.

We observe that sections 365 and 365A of the Penal Code, and measures taken thereunder, are not in accordance with international human rights standards and norms as contained in Articles 2, 7, 9, 17, and 26 of the ICCPR. At observations made at the Third Universal Periodic Review of Sri Lanka in 2017 too, the Commission noted that ‘consensual sex between adults should not be criminalised...[and] sections 365 and 365A of the Penal Code, which criminalise same sex relations should be repealed.’

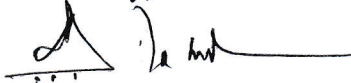
Moreover, at its Third Universal Periodic Review in 2017, Sri Lanka voluntarily pledged ‘to ensure and strengthen respect for fundamental rights of all persons, including those from the LGBTIQ community, and address concerns raised in that regard’, and recalled this pledge in its National Report submitted during its Fourth Universal Periodic Review in 2023. We accordingly encourage the Government of Sri Lanka to fulfil this pledge and introduce necessary amendments to the Penal Code to bring it in accordance with international human rights standards and norms, including those contained in the ICCPR.

We note that the abovementioned Private Member’s Bill to Amend the Penal Code (Chapter 19) was tabled in Parliament on 4 April 2023. The Bill clarifies that the legislative intent behind it is the amendment of provisions in the Penal Code that make sexual orientation a punishable offence. The Bill accordingly proposes to suitably amend section 365 and to repeal section 365A of the Penal Code.

The Commission recommends that your Ministry consider supporting the enactment of the said Bill and adopting the said Bill as a government proposal to ensure its expeditious passage.

We thank you for your Ministry’s continued cooperation and 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