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இலங்கைச் சட்டத்தரணிகள் சங்கம்
BAR ASSOCIATION OF SRI LANKA

22nd December 2021

Hon. Professor G.L. Peiris,
Foreign Minister,
Foreign Ministry,
Colombo 1.

Honourable Minister,

PROPOSED AMENDMENTS TO THE PREVENTION OF TERRORISM ACT

We write with reference to the above-captioned matter and the meeting the Management Committee of the Bar Association of Sri Lanka had with you on the 15th December 2021 upon your invitation on the proposed amendments to the Prevention of Terrorism Act (PTA).

By our letter dated 15th December 2021 we have requested for the following additional documents:

- a) the Interim Report of the Presidential Commission appointed under section 2 of the Commission of Inquiry Act headed by Justice A. H. M. D. Nawaz (reported to be handed over to His Excellency the President on 20 July 2021); and
- b) the Report of the Committee of Officers (to make recommendations to the Cabinet Sub-Committee appointed by the President), chaired by the Defence Secretary, General (Retd.) Kamal Gunaratne, appointed to review the Prevention of Terrorism Act which had been handed over to His Excellency the President on 15 November 2021.

By the said letter we also placed on record that even though the Government of Sri Lanka in its response dated 11th December 2021 to the Joint Communication received by seven from seven UN Special Procedure Mandate Holders concerning the PTA, submitted through the Permanent Mission to Geneva, to the Special Procedures Branch of the Office of United Nations High Commissioner for Human Rights, at paragraph 4 (g) thereof had stated that the Cabinet sub-committee had already conducted discussions with the Bar Association of Sri Lanka, whereas as of 11th December 2021, discussions had not taken place with the Cabinet sub-committee.

As set out by us at the said meeting, the BASL sees the Government's willingness to revisit the PTA and to ascertain the views of among others the BASL as a positive step and the BASL hereby submits its **preliminary observations** on reforms that should be effected to the PTA on an urgent basis. Once the documents and draft Bill are received, the BASL will set out its position more comprehensively.

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President
Kalinga Indatissa PC

Deputy President
Shavindra Fernando PC

Secretary
Rajeev Amarasuriya

Treasurer
Nalin C. De Silva

Assistant Secretary
Pasindu Silva

PRELIMINARY OBSERVATIONS ON THE PTA

1. Amendment to Section 2

The BASL proposes that the following changes be made to Section 2 of the PTA:

- (i) Amend Section 2(1) by the substitution of words "Any person who" with the following phrase: *"Any person, who commits any act referred herein below with the intention of intimidating a population and 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"*

By the aforementioned amendment the executive would be prevented from misusing the PTA to arrest and detain persons who are not connected to terrorist acts.

- (ii) Repeal or amend Sections 2(g) and 2(h) of the PTA as presently the said subsections impinge on freedom of expression and are often abused by the executive to detain and imprison persons who are not involved in terrorist activity.

- (iii) Section 2(2) to be amended accordingly in light of above.

2. Introduction of a provision allowing bail to suspects and accused under the PTA

- (i) The BASL proposes that a new subsection 2(4) be added stating that :-

"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.

Provided however that where a person has been subject to a total period of one year's incarceration in detention and in remand, he shall be granted bail by the High Court without any further exceptional circumstances being required.

Provided further that where an application is made by the Attorney General for an extension of remand for a further period of three months, at least one month prior to the expiration of the said period of one year, the High Court may after hearing the person concerned allow an extension of the remand period for a further time period of three months at a time, which extensions shall not in any event exceed one year upon the expiry of which the High Court shall grant bail to the Suspect.

Provided further that the Attorney General at least one month prior to the expiration of the said second period of one year, makes Application to the High Court stating that there continues to exist exceptional circumstances which requires the extension of remand period for a further time period of three months at a time, the High Court may after hearing the person concerned and upon being satisfied that there continues to exist such exceptional circumstances allow an extension of the remand period for a

further time period of three months at a time, which extensions shall not be granted if the said exceptional circumstances have ceased to exist.

Provided further that there shall lie an appeal directly to Supreme Court by either Party on being aggrieved by an Order made by the High Court on the fact whether there continues to exist exceptional circumstances which requires the extension of remand period for a further time period of three months at a time or not."

- (ii) It is proposed that Section 15(2) of the PTA which relates to persons indicted under the PTA in the High Court be subject to the proposed Section 2(4) of the PTA.

3. Section 5

It is proposed that Section 5(a) and (b) of the PTA be amended by the insertion of the words "intentionally or wilfully" to the offences so that a person would be prosecuted only if he has withheld information intentionally or wilfully.

4. Judicial Supervision of Arrests and Detentions - Proposed Amendments to Section 7, 9 and 10 of the PTA

Currently, there is no judicial supervision over the arrests and detention under the PTA. The PTA explicitly removes the discretion of the judicial officer overseeing the arrest and detention from deciding on grant of bail or discharge of the person.

The sections dealing with arrest and detention are Sections 6, 7 and 9 of the PTA. Section 6 provides the executive with the power to arrest and search without a warrant. Sections 7 and 9 deal with the role, or lack thereof, of the judiciary over the continued detention. Section 10 states that the detention cannot be questioned in a court of law.

Section 7 currently reads :-

(1) Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding seventy-two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period and the Magistrate shall, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, make order that such person be remanded until the conclusion of the trial of such person.

Owing to the words "*and the Magistrate shall, on an application made in writing in that behalf by a police officer not below the rank of Superintendent, make order that such person be remanded until the conclusion of the trial of such person:*" the discretion vested in the judiciary to decide as to whether or not a person has been lawfully arrested on sufficient grounds or information has been removed.

Administrative detention is the conferring of wide executive power over the freedom of physical liberty of a person. As such the power must be restrained with judicial supervision and must be proportionate to the danger that is perceived. Section 9 currently empowers the

Minister to make an order detaining a person for three months extending up to a maximum period of 18 months. These lengthy detention periods without judicial supervision go against internationally accepted standards of protections of human rights.

With a view to making this section compliant with human rights standards it is recommended that the detainee be brought under judicial supervision, which poses no prejudice or risk whatsoever to the executive as the person continues to be in custody. There is danger that unsupervised detention may result in the detainee being subject to torture and inhuman treatment.

(i) It is proposed that Section 7 of the PTA be amended as follows:

(1) Any person arrested under subsection (1) of section 6 may be kept in custody for a period not exceeding seventy-two hours and shall, unless a detention order under section 9 has been made in respect of such person, be produced before a Magistrate before the expiry of such period.

(2) The Magistrate may—

(i) based on grounds that the Magistrate deems reasonable in the circumstances, order that the suspect be placed in remand custody; or

(ii) where there are no reasonable grounds for a remand order the Magistrate may make an order for discharge. Any order made in terms of this section shall set out reasons for such order; or

(3) A police officer conducting an investigation under this Act in respect of any person arrested under subsection (1) of section 6 or remanded under subsection (1) or subsection (2) of this section may make an application to the Magistrate

(a) to access to such person and to take such person during reasonable hours to any place for the purpose of interrogation and from place to place for the purposes of investigation; and

(b) to obtain a specimen of the handwriting of such person and do all such acts as may reasonably be necessary for fingerprinting or otherwise identifying such person.

(ii) Accordingly, it is proposed that Section 9 and 10 be amended as follows:

The following section be substituted for the present Section 9. In addition, Section 10 be repealed and / or can be substituted with the proposal under point '6' below.

Section 9

(1) *Where the Minister has reason to believe or suspect that any person is connected with or concerned in any act in preparation to the commission of an offence under this Act, the Minister may order that such person be detained for a period of three months.*

(2) *A person detained in terms of subsection (1) above shall be produced before a Magistrate before the expiry of forty-eight hours together with the Detention Order duly signed by the Minister.*

(3) *The person detained shall be thereafter produced before the Magistrate every two weeks by the authority in whose custody such person remains, for the purpose of the Magistrate to be satisfied of the condition of the person being detained and that investigations relating to connected matters are progressing.*

(4) *In the event the person detained has been detained for a period of over three months, the Magistrate may remand the person or discharge the person in terms of Section 7 .*

Section 10 to be repealed and / or can be substituted with the proposal under point '6' below.

5. Judicial Supervision of Restriction Orders curtailing civil liberties- Proposed amendment to Section 11 of the PTA

Section 11 deals with the powers of the Minister to impose restrictions to various aspects of a person's civil liberties. International law regards this as a way in which administrative / preventive detention is imposed. The standard to be achieved that the restrictions must have cause, be proportionate, and non-discriminatory.

The means by which the above mentioned standard can be achieved is by subjecting the power to judicial supervision. As such, it is proposed that judicial supervision be introduced to Section 11.

Accordingly, it is proposed that Section 11 be amended by substituting the following:

(1) Where the Minister has reason to believe or suspect that any person is connected with or concerned in the commission of any offence in terms of this Act, the Minister may make an order in writing imposing on such person such prohibitions or restrictions as may be specified in such order in respect of

(a) his movement outside such place of residence as may be specified

(b) the places of residence and of employment of such person; or

(c) his travel within or outside Sri Lanka.

and he may require such person to notify his movements to such authority, in such manner and at such times as may be specified in the order.

(2) Where the Minister makes a restriction order in respect of any person while an order of detention in respect of such person is in force, such restriction order shall, unless otherwise specified, take effect upon the expiry of the detention order.

(3) Every order made under subsection (1) shall be in force for such period, not exceeding three months, as may be specified therein.

(4) The person restrained by any order made in terms of subsection (1) above shall be produced before a Magistrate within the jurisdiction the person resides within 72 hours of such restriction order by the Minister and the restriction order shall be recorded as an order of court.

(5) After the expiry of three months, the relevant Magistrate shall make appropriate orders to either continue such restrictions, vary such restrictions or remove such restrictions being satisfied of the circumstances of the matter. Any order made by a Magistrate in terms of this section shall set out reasons for same.

6. It is proposed that all orders made under Sections 9 and 11 of the PTA be subject to review under Articles 126 and 140 of the Constitution

7. Prohibition of Publications- Section 14

It is proposed that Section 14 relating to prohibition of publications to be repealed or amended.

8. Confessions- Proposed amendments to Section 16, 17 and 18 of the PTA

It is proposed that Section 16, 17 and 18 to be repealed and instead confessions admissible under Section 24 of the Evidence Ordinance be the only acceptable form of confession. Furthermore, the burden of proof on voluntariness should be on the prosecution and there should be no burden on the defence to prove involuntariness. There must be provisions to ensure that the suspect has access to legal advice prior to making any such confession must be secured as well.

This proposal is supported by the fact that the freedom from torture is both internationally and domestically recognized as a non-derogable right and all measures must be taken to ensure that suspects are not vulnerable to torture.

9. Advisory Board

Section 13 relating to Advisory Board to be repealed in view of the judicial supervision that has been introduced. Otherwise, two parallel review bodies would exist. Administrative structures within the Sri Lanka Police and/or Attorney General's department maintaining specialized review mechanisms to manage PTA cases to ensure that timely investigations are carried out and prolonged detentions are prevented are important.

10. Legal representation and Access to Attorneys-at-Law and Relatives

Specific clauses should be introduced to ensure access to legal advice and legal representation from the moment of arrest and during the entire period of detention. The provisions must be strengthened to ensure that all detentions are properly notified to the Human Rights Commission of Sri Lanka and persons are examined by judicial medical officers, periodically.

Access by an Attorney-at-Law representing a person arrested, remanded or detained under this Act and the right to communicate with his relatives and to have access to them must be ensured. This right exists in terms of the International Covenant on Civil & Political Rights (ICCPR) Act, No. 56 of 2007 and also Section 15(2) of the International Convention for the Protection of All Persons from Enforced Disappearance Act No. 5 of 2018. It is also a right recognized by the Courts in several Judgments.

These laws are presently observed in the breach. Merely proliferating more such laws will not be helpful without a mechanism for speedy remedy.

Further, the right to confidential and full access to an Attorney at Law may be compromised if they are subject to conditions to be made through subordinate legislation. In the past year alone, the BASL has received several complaints from Attorneys-at-Law that officers from both the Criminal Investigations Department (CID) and the Terrorism Investigation Division (TID) have either sat in or recorded (the limited) consultations with their clients.

The PTA should incorporate provisions which allow suspects and accused under the PTA meaningful and unbridled access to an Attorney-at-Law and to their relatives. Such provisions must guarantee immediate and full access and the confidentiality of such access must be ensured.

11. Suspended sentences

It is proposed to amend section 20 of the PTA to allow for suspended sentences for minor offences including those under section 5 for failure to give information.

12. Expeditious trials

In order to ensure the expeditious disposal of cases filed under the PTA, it is proposed that trials be conducted expeditiously and wherever possible on a day-to-day basis. The PTA already states cases under the Act much be given priority, but this is also often observed in the breach.

13. Repeal or Amendment of Section 15A

This section allows the Defence Secretary to detain an Accused under trial in High Court. Such an order should be made by the High Court on application by the Attorney General. It is not

conducive for the Executive to make these orders during a trial. Hence it is proposed that Section 15A be repealed or amended.

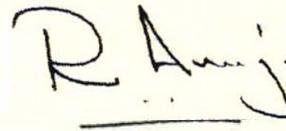
The above proposals are preliminary observations, and the BASL is willing to engage the relevant authorities on the detailed amendments which are being prepared. In this respect, you would no doubt appreciate that prior to being published in the Gazette, it is important for the draft bill to be circulated among all stakeholders including the BASL for their observations.

Thank you,

Yours faithfully,



Saliya Pieris, PC
President
Bar Association of Sri Lanka



Rajeev Amarasuriya
Secretary
Bar Association of Sri Lanka.