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A Statement by the Asian Human Rights Commission

SRI LANKA: The Contempt of Court Law and Practice In Sri Lanka Violates the International Law and Sri Lankan Constitution

Asian Human Rights Commission (AHRC) , a Regional Human Rights Organization, having seriously observed and studied the manner in which the Contempt of Court law and the way it is practiced in Sri Lanka, wish to express its deep concern over the violations of International law and the Sri Lankan Constitution itself, by depriving protection of law to the persons accused of this offence.

AHRC is particularly concerned about the manner Article 105 (3) Of Sri Lanka's Constitution has been interpreted in a manner that violates International Law and the Constitution of Sri Lanka, The reasons on which this concern is based are set out below.

The manner in which the power given to the Supreme Court under Article 105 (3) has been used in the recent past, requires a review, particularly regarding the case of Michael Emmanuel Fernando (No: 1189/2003 U.N. Doc. CCPR/C/83/D/2003 (2005)), the case of S.B Dissanayake (U.N. Doc. CCPR/93/D/1373/2005, Communication No. 1373/2005), and the case of Ranjan Ramanayake (SC Rule No. 1/2018).

Our concerns are as follows:

Disproportionate Punishment as illegal Detention

In all three of these cases, the sentences that have been meted out by way of imprisonment. In the case of Fernando, for one year rigorous imprisonment for allegedly talking loud in court; in the case of S. B Dissayanayake for speaking the word 'shameful court' in a public meeting outside courts, two years rigorous imprisonment; in the case of Ranjan Ramanayake referring to judicial corruption for which he was sentenced to rigorous imprisonment for four years plus the loss of participation in elections for seven years. In the first two cases, the United Nations Human Rights Committee, having considered the communications made to it by Fernando and Dissanayake, held that these sentences of imprisonments amount to disproportionate punishment and that under international law, disproportionate punishment amounts to illegal detention. Under Sri Lankan law, protection from illegal detention has been guaranteed by the constitution, which notes it is a violation of fundamental rights. Thus, this practice of disproportionate punishment itself is a violation of the international and the Sri Lankan law and the fact that no reasons have been given for such disproportionate and harsh punishments aggravates the situation. Thus, this use of disproportionate punishments, which is now getting established as a permanent practice, is a threat to the very idea of a fair trial and also the notion of the rule of law. It is likely to have a deadening effect on the entire system as lawyers, litigants and anyone else who is dealing with the system of administration of justice is likely to be seriously intimidated when they have to pursue their claims for justice under such circumstances.

Contempt of Court – An offence without a Definition

While Article 105 (3) of the constitution provides for the power to deal with contempt of court to the supreme court and the court of appeal and the discussion relating to punishment by way of imprisonment or fine or both, the offence of contempt of court has not been defined by any law in Sri Lanka. For all laws that carry criminal punishments in Sri Lanka, each offence is defined in terms of the element, which constitutes the offence and also the maximum punishment that the court is entitled to give in case the charge against the accused is proved beyond a reasonable doubt. Thus, the universal practice of defining an offence in Sri Lanka relating to all crimes including such serious crimes as terrorism, enforced disappearances, murder and rape and all such serious crimes, followed in the case of contempt of court offences.

Following is a Sample of How Crimes are Defined in Sri Lanka, taken from the Penal Code;

Murder

Except in the cases hereinafter excepted, culpable homicide is murder

Firstly- if the act by which the death is caused is done with the intention of causing death; or

Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or

Thirdly- If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

The title of an offence is different to its definition

As shown in the above paragraph the title of an offence is different to the definition of an offence. Contempt of Court is the title or the name of an offence. In Sri Lanka it has not yet been defined. What Article 105 (3) states is the title of the offence. To act under the said article, the offence needs to be defined.

Without a defined offence no trial can be conducted

This practice of conducting trials for undefined offences seriously undermines a fair trial because without an accused knowing exactly with what offence he is being charged, and the elements of that offence and the possible punishment all his rights when facing trial will become un-exercisable. Thus, a charge for contempt of court will be treated as a unique kind of charge unlike a person accused of any other crime. Among other things, this violates the basic fundamental rules of equality before the law which is also a fundamental right enshrined in the constitution of Sri Lanka and also one of the most basic human rights recognized under international law.

Previous case law in Chchhari Mudlier Vs, Mohomadu

Previously, Sri Lankan courts have defined that (See Chchhari Mudlier Vs, Mohomadu, (See 21 NLR 369) all the offences recognized in Sri Lanka are those which are being recognized under a statute. Thus, uniform practice of Sri Lankan courts is to recognize criminal offences only if they are defined in a statute, that is either in the penal code or by way of any other statute. This uniformly practiced legal provision is an entrenched part of the Sri Lankan legal system and a violation of it will have a serious impact on the whole idea of offences as understood in Sri Lanka within the framework of law.

A procedure for trial for Contempt of Court should be the same as other trials

There is also no procedure laid down for the conduct of a trial of contempt of court. Thus, it should be presumed that the same procedures as followed in the criminal procedure court regarding the conduct of a fair trial should also apply to cases of contempt of court. The basics that are laid down in the criminal procedure court is that investigations into a crime could begin only when basic evidence is placed before the investigating authority to the effect that a reasonable cause exists to undertake an investigation into a given offence. Thus, the existence of an offence in terms of law is essential to begin even an inquiry into an offence. Thereafter, it is investigated by procedures laid down in the criminal investigations division recognized under the law. After all the evidence have been collected, if there is adequate grounds to proceed to the filing of charges or indictment for a particular offence,

then the charges would either so filed by the particular investigating authority if it is allowed by law, or all the evidence should be placed before the attorney general. The duty of the attorney general is to go through all the evidence and decide whether the elements that constitute an offence have been established through the available evidence and whether there is a likelihood of success of prosecution, which may be brought before the relevant court, which would hear the trial. No such investigations have been held in any of these three contempt of court cases. Thus, an examination of evidence by the attorney general was not possible as there was first of all no offence as defined by law and secondly no investigations were conducted, as required by the criminal procedure code.

The Accused in Contempt of Court cases has same rights as other accused

Once an indictment has been filed before the relevant court, the accused is entitled to receive all the evidence that would be used against him during the trial. Thus, the accused becomes aware of the accusation against him and he has time to prepare to answer to the details of evidence and thereby to make a reasonable defence. No such procedure was followed in any of these three cases. Therefore, these trials are regarded as some kind of special trials, but not as normal trials that are recognized under Sri Lankan law. Thus, once again the principle of equality and the principle of equality before the law has been violated. On the other hand, a fair trial is not possible without fulfilling the procedures set out above.

SC as a trial Court

The constitution only names the Supreme Court as a court that has the power to deal with contempt of court. In terms of the Sri Lankan law, this means that the supreme court has a power to hear trial before the supreme court itself or before the court of appeal on contempt of court cases. It only gives the power of hearing and determining a case. However, the manner in which the trial is conducted has to be in terms of the legal procedure in Sri Lanka, which applies to all offences. For example, the high courts of Sri Lanka have the power to hear and determine trials in very serious criminal offences. However, the manner in which the court hears and determines the case is determined by laws which require that a fair trial should take place. As far as the duty to follow procedures of a fair trial, there is no distinction between the power of high courts or a supreme court. The only difference in case of contempt of court is that the Supreme Court and the Appeal Court has the power to conduct the trial before that courts itself. Thus, apparently denial of fair trial procedures as mentioned above, can be excused in terms of Article 105 (3) of the constitution.

The Principle Against Unlimited Discretion

Under the same article 105 (3) the Supreme Court, or the Court of Appeal, there is discretion in giving sentences of imprisonment, or a fine, or both. The word “discretion” has no special meaning only for contempt of court cases. The word discretion of the courts has similar meaning as it is applied to any other court proceedings. In all court proceedings in Sri Lanka as well as within the common law, the basic principle is that the discretion must be exercised on the basis of laws that exist by way of statute. For example, in the normal criminal case, the statute will state that a sentence of not more than ten years could be given if the case is proved beyond a reasonable doubt. Within that context, the discussion of the court means that it could consider various mitigating factors or aggravating factors either to reduce the sentence or increase the sentence within the framework of the statutory limitations. However, since there is no statute laying down the maximum or minimum punishment in the case of the contempt of court, the court is not in a position to exercise discretion till such an offence is created and the sentence spectrum with limitations is laid down by statute. The laws and practices on the use of discretion has been well laid down in Sri Lankan case law as well as in Britain and other common law jurisdictions where the principles related to the exercise of discretion is well laid down.

The Right to appeal must be same as other criminal cases

In all criminal cases in Sri Lanka, there is a right to appeal. However, in the three contempt of court cases mentioned above, the right of appeal has been denied. In the case of Emmanuel Fernando, who applied for leave to appeal to the Supreme Court. The appeal was summarily dismissed. Now the rule that is followed is that there is no appeal against a judgment of the Supreme Court regarding contempt of court cases. This again is a fundamental violation of

the right to a fair trial. In even the most heinous crimes such as terrorism, enforced disappearances, murder and the like there is a right of appeal. Only for this criminal offence of contempt of court, there is no such right of appeal. This again is a violation of equality before the law and also a violation of natural justice.

Problems relating to interpretation of Article 105 (3) of the Constitution

Therefore, there are very serious problems associated with the manner in which section 105 (3) of the constitution has been interpreted so far and this matter needs to be corrected to ensure the serious violation of the basic rights of citizens enshrined in the constitution by the highest courts in Sri Lanka itself.

The following definition of rule of law applies to Contempt of Court cases and trials as well,

“The core of the existing principle is... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of law publicly made, taking effect (generally) in the future and publicly administered in the courts.”

Further to this, he articulated eight principles: (Lord Tom Bingham- Rule of Law)

- 1) The law must be accessible, intelligible, clear and predictable.
- 2) Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.
- 3) Laws should apply equally to all.
- 4) Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.
- 5) The law must afford adequate protection of fundamental Human Rights.
- 6) The state must provide a way of resolving disputes which the parties cannot themselves resolve.
- 7) The adjudicative procedures provided by the state should be fair.
- 8) The rule of law requires compliance by the state with its obligations in international as well as national laws."

The Loss of memory of basic notions of Criminal Justice

1. Loss of Memory of Basic Notions of Criminal Justice and Jurisprudence of Interpretation of the Constitution:

2. Perhaps due to the 43 years of practice of law under the 1978 constitution, basic notions of justice practiced under the Common Laws, including Rule of Law, is rapidly being lost in Sri Lanka. The result is the loss of the central concern for the protection of the individual. The accused in Contempt of Court cases are all entitled to protection under the law, All who act on behalf of the state, are bound by law and therefore should not exceed their power, Where this fails law can turn into tyranny,

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The Asian Human Rights Commission (AHRC) works towards the radical rethinking and fundamental redesigning of justice institutions in order to protect and promote human rights in Asia. Established in 1984, the Hong Kong based organisation is a Laureate of the Right Livelihood Award, 2014.

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