

DOES THE ASSISTANCE TO AND PROTECTION OF VICTIMS OF CRIME AND WITNESS ACT NO.4 OF 2015 RESTRICT THE FREEDOM OF EXPRESSION?

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*“Laws alone cannot secure freedom of expression; in order that every man presents his views without penalty there must be spirit of tolerance in the entire population.” -
Albert Einstein*

Introduction

The main objective of the criminal justice system is to ensure the Rule of Law and the Legitimacy. The purpose of this article is to make a critical analysis of the Assistance to and Protection of Victims of Crime and Witness Act No.4 of 2015 (hereinafter refer as “The Act”) and its boundaries in a country which follows an Adversarial system. Further I intend to discuss the effect of the Act to the Freedom of Expression which is the fundamental right guaranteed by the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter refer as “the Constitution”) and the International community, based on the current criticisms of ongoing trials and the police investigations in Sri Lanka.

Right to Freedom of Expression

The Chapter III of the Constitution has recognized that the Freedom of Expression as a fundamental right. Every citizen is entitled to the freedom of speech and expression, including publication.¹ A person who has not been a citizen of any other country, but has been a resident of Sri Lanka permanently and legally immediately prior to the enactment of the Constitution and continues to be a resident, or has been a resident for a period of ten years from the enactment of the Constitution shall be entitled,

to the right declared and recognized by paragraph (1) of this article.²

Furthermore, Sri Lanka is a state party to the International Covenant on Civil and Political Rights (ICCPR) which was adopted by the General Assembly of the United Nations on 16th December 1966 and entered into force on 23rd March,

¹ Constitution of the Democratic Socialist Republic of Sri Lanka 1978, 14(1)(a)

² Constitution of the Democratic Socialist Republic of Sri Lanka 1978, 14(2)

1976. Sri Lanka has acceded to that Covenant on 11th of June 1980. As a Dualist country, a substantial part of the civil and political rights referred to in that Covenant have been given legislative recognition in the Constitution of Sri Lanka as well as in other legislation enacted by Parliament.³ The Article 19 of the Covenant emphasis the right to Freedom of Expression. According to that, everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either oral, in written or in print, in the form of art, or through any other media of his choice. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

There was a comprehensive discussion regarding the Article 19 of the said Covenant under the General comment No. 34 at the 102nd session of the Human Rights Committee held on 29th of July

³ International Covenant on Civil and Political Rights (ICCPR) Act No.56 of 2007, Preamble

2011. That is, the Freedom of expression and media, express that, a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives are essential. This implies that free press and other media are able to comment on public issues without censorship or restraint and to form a public opinion. The public also has a corresponding right to receive media output.⁴As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.⁵ States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. Now there is a global network

⁴ General comment no.34 in 102nd session of the Human Rights Committee, Article 13

⁵ General comment no.34 in 102nd session of the Human Rights Committee, Article 14

for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.⁶ States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.⁷

Considering the Freedom of expression and political rights together, the Committee, in its General comment No. 25 states that the participation in public affairs and the right to vote, elaborates on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. Free communication of information and ideas about public and political issues between citizens, candidates and elected representatives are essential. This implies that free press and other media are able to comment on public issues and to form a public opinion without censorship or restraint.⁸

The application of Article 19 (3) expressly states that the exercise of the Right to freedom of expression carries

with it special duties and responsibilities. For this reason two limiting areas of restrictions on the rights are permitted, which may relate either to respect the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put the right itself in jeopardy. The Committee recalls that the relationship between a right and a restriction and between a norm and an exception must not be reversed.⁹ Also it lays down specific conditions and it is only subjected to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in sub-paragraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on the grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.¹⁰ State parties should put in place effective measures to protect against attacks aimed at silencing

⁶ General comment no.34 in 102nd session of the Human Rights Committee, Article 15

⁷ General comment no.34 in 102nd session of the Human Rights Committee, Article 16

⁸ General comment no.34 in 102nd session of the Human Rights Committee, Article 20

⁹ General comment no.34 in 102nd session of the Human Rights Committee, Article 21

¹⁰ General comment no.34 in 102nd session of the Human Rights Committee, Article 22

those exercising their right to freedom of expression. Under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks due to their line of work. So too are persons who engage in gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.¹¹ Restrictions must be provided by law. Law may include laws of parliamentary privilege and laws of contempt of court. Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.¹²

Specifically, it is noted that, Right to freedom of expression is restricted under regulations made by the President under section 5 of the Public Security Ordinance (Chapter 40). Accordingly, no person

shall, by word of mouth or by any other means whatsoever, communicate or spread any rumor or false statement which is likely to cause public alarm or public disorder.¹³

Relevancy of Assistance to and Protection of Victims of Crime and Witness Act No.4 of 2015

When considering the intention of the parliament, it should be noted that “The object of the Bill is to give protection to victim and witnesses, to encourage coming forward and giving evidence without fear in their minds.”¹⁴ The ultimate purpose of the enactment of this Act is to provide for the setting out of rights and entitlements of victims of crime and witnesses and the protection and promotion of such rights and entitlements; to give effect to appropriate international norms, standards and best practices relating to the protection of victims of crime and witnesses; the establishment of the national authority for the protection of victims of crime and witnesses; constitution of a board of management; the victims of crime and witnesses assistance and protection division of the Sri Lanka police department; payment of compensation to victims of crime; establishment of the victims of crime and witnesses assistance and protection fund and for matters

¹¹ General comment no.34 in 102nd session of the Human Rights Committee, Article 23

¹² General comment no.34 in 102nd session of the Human Rights Committee, Article 24

¹³ Extraordinary Gazette No. 1405/14, 13.08.2005, Part 5, Regulation No. 28

¹⁴ Hansard, The Hon.(Prof) G.L.Peris,19.02.2015, Column 106

connected therewith or incidental thereto.¹⁵

According to the Act, Section 46 has been given a wide interpretation for the victim of crime and the witnesses.¹⁶

Part III of the Act states the offences which can be committed against victims of crime and witnesses. As per Sec 8(1)(a) and Sec 8(1)(b) any person who threatens a victim of crime or a witness with injury to his person/ reputation/ property or to the person or reputation or property of any other in whom such victim of crime or witness has an interest or voluntarily causes hurt to a victim of crime or a witness with the intention of causing alarm to such victim of crime or witness or to cause such victim of crime or witness to refrain from lodging a complaint against such person with a law enforcement authority or testifying at any judicial or quasi-judicial proceedings or to compel such victim of crime to withdraw a complaint lodged or legal action instituted against such person.

A person who commits one or more of the offences above shall be convicted by High Court. It is interesting to note that a prison term is mandatory.

Section 8(2) states that any person who,

(a) voluntarily causes grievous hurt to a victim of crime or a witness; or

(b) wrongfully restrains a victim of crime or a witness in order to stop the legal process from been instituted in one of the manners specified in the act commits an offence attracting a mandatory imprisonment and a fine of rupees thirty thousand.

Section 8(3) states any person who, (a) by force compels or by any deceitful means, by abuse of authority or by any other means of compulsion, induces any victim of crime or a witness to leave any place; or

(b) intends to cause or knowing that he is likely to cause wrongful loss, damage or destruction to the property of a victim of crime or a witness, causes such loss, damage or destruction to the property of that victim of crime or witness in order to stop the legal process from been instituted in one of the manners specified in the act commits an offence attracting a mandatory imprisonment not exceeding twelve years and to a fine of rupees thirty thousand.

Section 8(4) states that a person who,

(a) commits any harassment, intimidation, coercion, violation, physical or mental suffering, loss or damage to the reputation of another person; or

(b) an adverse change being made to the conditions of employment in the place of employment of such other person, due setting the legal process in motion in one or more of the manners specified in the

¹⁵ Assistance to and Protection of Victims of Crime and Witness Act No.4 of 2015, Preamble

¹⁶ Assistance to and Protection of Victims of Crime and Witness Act No.4 of 2015, Sec 46.

act commits an offence attracting a mandatory imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.

Section 8(5) states that any person who,

- (a) having received information given for the purpose of commencing or conducting an investigation into an offence; or
- (b) having gathered information in the course of an investigation into an offence; or
- (c) having received such information referred to in paragraphs (a) and (b) from any other person, provides, issues or gives to a third person or publishes or otherwise disseminates any such information or part thereof regarding the identity of the relevant victim of crime or a possible witness or informant who provided such information and thereby places the life of such victim of crime, witness or informant in danger, other than in good faith and in accordance with or in compliance with—

- (a) any provisions or procedures established by law;
- (b) an order made by a judicial officer; or
- (c) a directive issued by a person duly authorised to do so by or under any law,

commits an offence, and shall on conviction by the High Court be imprisoned for a term of not exceeding seven years and to a fine of rupees fifteen thousand.

Sec 8(6) states that any person who is alleged, suspected or accused of having committed an offence, offers, provides or

gives any gratification to any other person who is—

- (a) intending or preparing to institute legal proceedings against such person for having committed such offence; or
- (b) likely to provide information or testimony against such person to any law enforcement authority, Commission or court, with a view to preventing, discouraging or dissuading such other person from instituting legal proceedings or providing truthful information or testimony against such first mentioned person who is alleged, suspected or accused of having committed such offence shall on conviction by the High Court for a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.

Section 8(7) states that any person who with the intention of obtaining any protection or assistance from the Authority, the police including the Division, a Court or a Commission, provides any information knowing or having reasonable grounds to believe that such information is false, commits an offence, and shall on conviction by the High Court for a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.

Section 8(8) states that any person who is in charge of or participating or assisting in providing protection to a victim of crime or to a witness or who otherwise is in possession of information relating to the protection being afforded to a victim

of crime or a witness, provides, issues or gives to another person such information and thereby places the life of such victim of crime or witness in danger, other than in good faith and in accordance with or in compliance with one of the ways stipulated in this act commits an offence attracting a term of imprisonment not exceeding seven years and to a fine of rupees fifteen thousand.¹⁷

Section 9 stipulates that attempting or instigating the commission of an offence under Section 8 to be an offence.

It is interesting to note that an offences under Sections 8 and 9 to be cognizable and non-bailable. As per Sec 10 a person accused of any offence specified in Sections 8 or 9 can only be enlarged on bail under exceptional circumstances by the Court of Appeal.

Relationship between the Act and Right to Freedom of Expression

Victims of crimes, witnesses and their next of kin face numerous problems as a consequence of being subjected to criminality including threats, harassment, intimidation, retaliations or reprisals and other criminal offences which are inter related with the criminal justice system. One of the main points of this Act is that the doer who committed the above

mentioned offences to the victim of the crime and witnesses should be either the perpetrator or a party of such person. It is confirmed that the traditional four corners of the Act only covers the victim of crime, any member of the family, next of kin of such person and witnesses those who gain benefits of the case but it does not cover any third party who have not been mentioned above.

Freedom of expression is a main pillar for any free spirited and democratic society which is a necessary condition for the materialization of the principles of transparency and accountability that are, in turn, vital for the promotion and protection of human rights. It is common for the members of the underworld or gangsters to threaten and influenced the victim of crime and witnesses. When the third party, who is not a perpetrator or a party of such person criticize or comment their opinion and make a statement through electronic, printed or social media regarding the Public officer or police officer relating to investigation or an ongoing trial based only for the public interest has not been covered or restricted by this Act. Even though this Act does not include the above mentioned acts as offences, if those acts could fulfill the required elements, suspects of those acts can be produce before the court under the offences related to criminal intimidation¹⁸, Criminal Force¹⁹ Assault²⁰ or Sexual harassment²¹

¹⁷ Assistance to and Protection of Victims of Crime and Witness Act No.4 of 2015, Section 8

¹⁸ Penal Code, Section 483

about the victim of the crime, witnesses in ongoing investigations and trials by a third party or through mass media.

A mere statement or comment made by any person or media station who is not the perpetrator or party of such on a witness of crime, witnesses or ongoing cases cannot be bought before the court under this Act. If such person is brought before a court of law it can be argued that it is a breach of his freedom of expression.

This right can be misused by the police when mere and unreliable evidence is brought before the court when reporting facts, this can in turn result in the time of the court being wasted and more importantly the purpose of the Act being abused.

Conclusion

Right to freedom of expression, which is recognized as a fundamental right by the constitution, and the relevant limitations²² are set out in the constitution. That is, a special Act cannot exceed the supreme law of the country which would be contrary to constitutionalism.

In conclusion, it can be seen that the application of this Act does not cover mere statements or comments made

¹⁹ Penal Code, Section 341

²⁰ Penal Code, Section 343

²¹ Penal Code, Section 345

²² Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Article 15