

SRI LANKA'S PUBLIC HEALTH RESPONSE:



LAW, EXECUTIVE ACTION AND MINORITY RIGHTS



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**NATIONAL CHRISTIAN
EVANGELICAL ALLIANCE SRI LANKA**



Norad

SRI LANKA'S PUBLIC HEALTH RESPONSE: LAW, EXECUTIVE ACTION AND MINORITY RIGHTS

National Christian Evangelical Alliance of Sri Lanka (NCEASL)

Produced in collaboration with Minority Rights Group

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INTRODUCTION

The National Christian Evangelical Alliance of Sri Lanka (NCEASL), formally the Evangelical Fellowship of Ceylon was founded in 1952. With a constituency of over 200 member churches and organisations, the NCEASL is the main representative body for over 200,000 Evangelical Christians in Sri Lanka. The NCEASL works actively in three broad areas: Mission and Theology; Religious Liberty and Human Rights; and Relief and Development.

The NCEASL is affiliated to the World Evangelical Alliance (WEA), a worldwide network of over 620 million Christians in 129 countries. The WEA also holds Special Consultative Status with the United Nations Economic and Social Council. For over two decades, the Religious Liberty Commission (RLC) of the NCEASL has documented incidents of religious freedom violations against Sri Lanka's Christian community. The aim of the RLC, however, is to advance religious liberty for all Sri Lankans through advocacy and lobbying, research and documentation and training and education.

Following the COVID-19 outbreak in Sri Lanka, several safety measures were taken. The available laws relating to public health crises were all introduced during colonial times. It is apparent that they are outdated and fail to take into consideration modern challenges and technological developments. For instance, the Quarantine and Prevention of Diseases Ordinance No. 3 of 1897, could not have foreseen a global pandemic of this magnitude, or the levels of global and intra-country movement that set the context for the outbreak. These laws have also been interpreted and applied in the current context in a manner that curtails certain rights and freedoms of minority groups, and further, fails to adequately address unique issues minority groups might face in the context of a nation-wide lockdown such as access to essential services.

The importance of robust domestic laws that facilitate strong health systems has also been recognized by leading international institutions such as the World Health Organization. On the launch of its Covid-19 Law Labs, WHO recognizes that "laws that are poorly designed, implemented, or enforced can harm marginalized populations, entrench stigma and discrimination, and hinder efforts to end the pandemic."¹ Well-designed laws can help build strong health systems; evaluate and approve safe and effective drugs and vaccines; and enforce actions to create healthier and safer public spaces and workplaces.

This policy paper seeks to analyse current laws and measures that responded to the COVID-19 pandemic from March to August 2020, and understand the impact these laws had on minority communities in Sri Lanka. This analysis is limited by the following factors: (1) the paper relies on material published online relating to laws, measures and impact, (2) the general lack of information

¹ WHO, "New COVID-19 Law Lab to Provide Vital Legal Information and Support for the Global COVID-19 Response" (www.who.int, July 22, 2020) <<https://www.who.int/news-room/detail/22-07-2020-new-covid-19-law-lab-to-provide-vital-legal-information-and-support-for-the-global-covid-19-response>> accessed 2nd August, 2020.

on impact on minorities as a consequence of lack of forums and spaces to share their lived realities, and (3) possible self-censorship and restraint in publicly voicing grievances or complaints during an emergency situation. The paper also considers recommendations to better address modern day concerns, taking into consideration international jurisprudence.

1. EXISTING LEGAL FRAMEWORK GOVERNING RESPONSE TO THE PANDEMIC

Responding to a pandemic requires a wide variety of measures to be taken, primarily on the direction and information provided by the public health authorities of a country. As with any highly infectious disease, the main concern with the COVID-19 pandemic was preventing the spread of infection. The legal framework considered below relates mainly to restrictions placed on movement, assembly and expression as part of the response to the pandemic.

The two most relevant pieces of legislation are the Quarantine and Prevention of Diseases Ordinance of 1897 and the Disaster Management Act of 2005.

The **Quarantine and Prevention of Diseases Ordinance of 1897** is the law governing quarantine in relation to infectious disease in Sri Lanka. The stated objective of the law is preventing the spread of contagious and infectious diseases in Sri Lanka, which particularly refers to the plague. The law permits the relevant Minister to make regulations on a wide range of subjects, from the maintenance of sanitary conditions of various items and places, to the quarantine of individuals and items with the purpose of preventing the spread of infectious disease. Multiple regulations have been made on a wide range of such subjects previously.

On 20th March 2020 the Health Minister gazetted the novel corona virus as a quarantinable disease and directed that it was compulsory to place those identified as suspected or infected with the virus in quarantine.² Gazette (Extraordinary) No. 2168/6 dated 25th March 2020 issued under the Quarantine and Prevention of Diseases Ordinance amended several regulations previously gazetted under the Ordinance to, *inter alia*, establish the 'proper authority' for various geographical locations. This included the Director General of Health Service as the 'proper authority' for the whole of Sri Lanka.

On or about 11th April 2020, the Minister of Health and Indigenous Medicine issued the Gazette (Extraordinary) No. 2170/8 in terms of Sections 2 and 3 of the Quarantine and Prevention of Diseases Ordinance mandating the manner in which the corpses of those who have died of COVID-19 shall be cremated³. Curiously, the regulation was made as an amendment to the Regulations relating to Storage of Grain and Regulations relating to Ancylostomiasis published in Gazette No.7481 of 28th August 1925.

² Gazette (Extraordinary) dated 20th March ,2020 [No.2167/18].

³ Gazette (Extraordinary) dated 11th April,2020 [No. 2170/8].

The **Sri Lanka Disaster Management Act No. 13 of 2005** defines a disaster to mean “the actual or imminent occurrence of a natural or man-made event, which endangers or threatens to endanger the safety or health of any person or group of persons in Sri Lanka” and specifically includes, *inter alia*, an epidemic.

The Act establishes primarily two bodies: The National Disaster Management Council, and the Disaster Management Centre. The Act also sets out the procedure to be followed following the declaration of a state of disaster. The declaration of a State of Disaster must be by way of a Proclamation in terms of Section 11(1) of the Act and is to be approved by a Resolution of Parliament under and in terms of Section 11(3) of the Act.

Notably, the Act also makes provision for the Council to obtain the assistance of non- governmental organizations. Given the suitability of the provisions of this Act, it is noteworthy that it was not used during the COVID-19 pandemic in Sri Lanka.

Laws relevant to restricting movement, association and expression are the **Public Security Ordinance of 1947** and provisions of the **Penal Code of 1883**.

Sri Lanka’s Public Security Ordinance provides for the President, by Proclamation by way of gazette to declare that it’s provisions come into operation in view of the existence or imminence of a state of public emergency, in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community. Under and in terms of Sections 2(4) and 2(6) of the Act, unless approved by Parliament, such Proclamation is only valid for a specific time period. The law makes provision for the President to make emergency regulations in the interests of public security and the preservation of public order.

The law also makes provision for orders on curfew to be made by the President, for the maintenance of public order, by Order published in the Gazette. The law further makes provision for the declaration of essential services by the President by Order published in the gazette where he considers it necessary in the public interest and essential to the life of the community.

Chapter 14 of the Penal Code refers to offences affecting public health and safety.

Section 261 of the Penal Code states:

A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. A public nuisance is not excused on the ground that it causes some convenience or advantage.

Section 262 of the Penal Code states:

Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with

imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Overall, it is evident that all, except one, of the laws that could have been utilized to respond to a public health crisis of this scale were over a hundred years old. This has several implications: the laws fail to anticipate the risks of globalized living, fail to utilize modern communication tools to reach out to people and to listen to people, fail to have adequate fundamental rights protections, fail to have adequate checks such as parliamentary oversight and democratic decision making at the fore, fail to address inequality, fail to prioritize gender and fail to incorporate the principles of necessity and proportionality.

It is important to note that the Public Security Ordinance is relevant in the context of the imposition of curfew during the pandemic, being the law with the most explicit provisions relating to the same. However, these laws, with a strong focus on policing and security, are in themselves problematic when responding to a crisis involving public health and well-being.

It is also noted that apart from provisions of the Quarantine Ordinance under which 3 regulations were issued, to the best of the knowledge of the authors, none of the other laws have been utilized.

The controversy and uncertainty concerning the legality of the curfew imposed is significant. By way of legal opinion, the Attorney General announced that police could impose curfew⁴ in response to COVID-19 implying that the curfew was in fact legal, and a Magistrate court order determined that Quarantine Ordinance legitimized police curfews.⁵ In June 2020, the Human Rights Commission issued a statement recommending regularization of the curfew under existing laws.⁶ The legality of the curfew therefore was a debated issue. The uncertainty that attaches to the question of legality creates an undesirable situation for all citizens.

The applicable laws that contained a feature of parliamentary oversight - the Disaster Management Act and Public Security Ordinance - were not utilized in response to the pandemic.

The legal context was also shaped by the fact that parliamentary elections had been declared on 2nd March 2020, effectively dissolving parliament until new members were elected. As a consequence,

⁴ Yoshitha Perera, "AG Approves Imposition of Curfew" (www.dailymirror.lk, April 30, 2020) <http://www.dailymirror.lk/breaking_news/AG-approves-imposition-of-curfew/108-187529> accessed 1st September, 2020.

⁵ Order dated 11th May 2020 in MC 1108/20 of Magistrate Court of Gampaha

⁶ "Secretary to the President Secretary/Ministry of Defence Inspector-General of Police (Acting) HRCSL Recommendations on Regularizing the Imposition of Curfew" (2020) <<http://www.hrsl.lk/wp-content/uploads/2020/02/curfew.HRCSL-recommendation-final.pdf>> accessed 31st August, 2020.

Sri Lanka functioned without a representative body during the initial stages of the pandemic and for at least 5 months thereafter.

The section below takes a look at the many measures that were taken by the State in response to the pandemic. It considers whether: (1) these measures were within this available legal framework and (2) what adverse impact on minority rights did the measures (legal or not) have.

2. MEASURES TAKEN BY EXECUTIVE AND ADMINISTRATIVE INSTITUTIONS

This section provides a broad overview of the impact of measures taken by executive and administrative officials and institutions in response to the pandemic. In this section, the consideration of measures is limited to those identified as resulting in or having potential to result in the infringement of minority rights. Therefore, the measures set out are not an exhaustive list of measures taken during the pandemic.

The broad categories of measures this paper looks at are:

- a. Restriction of movement (quarantine, curfew)
- b. Restriction of speech, expression and dissent
- c. Restriction of freedom of assembly (religious worship, protests)
- d. Relief measures
- e. Preventing burial in a denial of religious and cultural practice
- f. Measures that impeded trust building (language, punishment focused)
- g. Protection of privacy and media ethics

A. RESTRICTIONS OF MOVEMENT

The first confirmed case of infection in Sri Lanka, a Chinese national, was reported on 27th January 2020. The patient was quarantined, treated at the National Institute of Infectious Diseases and recovered. On 10th March, the first Sri Lankan national tested positive, a 52-year-old tour guide who had travelled through Habarana and Dickwella. The Director General of Health Services (DGHS), Dr. Anil Jasinghe informed the media that required steps had been taken to inspect the locations and it was also reported that around 685 people had been quarantined at two centers in Batticaloa.⁷

On 13th March it was announced that the President and Prime Minister had issued several directions on quarantine of all Sri Lankans entering the country, disinfecting public transport, restricting public gathering, purchase of facemasks and contact tracing pertaining to the two individuals identified as

⁷ "Sri Lanka: Sri Lankan President Seeks Public Cooperation to Fight Coronavirus" (www.colombopage.com, March 11, 2020) <http://www.colombopage.com/archive_20A/Mar11_1583944296CH.php>. accessed 27th August 2020

infected at the time.⁸ The President had also commented on ‘the importance of using electronic, print and social media to educate people about the disease but not to create a state of social confusion’.

On 14th March a decision was taken by the DGHS that only designated state hospitals could carry out testing for COVID19.⁹ On 19th March conditional approval was granted for private hospitals to conduct testing.

The President by issuance of Gazette declared 16th March to be a public holiday¹⁰ and thereafter the 17th, 18th and 19th of March 2020 were also declared public holidays “*to support (the) quarantine process on Corona Virus*”.¹¹

On 17th March, President Gotabaya Rajapaksa appointed the ‘National Operation Centre for Prevention of COVID-19 Outbreak’ to ‘coordinate preventive and management measures to ensure that healthcare and other services are well geared to serve the general public’.¹² The Center was led by Acting Chief of Defense Staff Army Commander Lt. Gen. Shavendra Silva. At the press conference for the launch of the Center, Lt Gen. Silva said “From now on, please know that the official information will be issued by this centre,” and commented on the government response to COVID19 stating that “the armed forces and the Health Ministry had expanded the number of quarantine facilities to 22. At present, 2,258 individuals are undergoing a 14-day quarantine program at the facilities.”

On 16th March, it was reported that the police had announced that ‘anyone found hiding symptoms of the coronavirus will be handed a 6-month jail term’ and that the arrests could be effected without a warrant.¹³

⁸ PMD News, “Concrete Decisions to Prevent Spread of COVID – 19” (President’s Media Division, March 13, 2020) <<https://www.pmdnews.lk/concrete-decisions-to-prevent-spread-of-covid-19/>> accessed 27th August 2020.

⁹ Ministry of Health and Indigenous Medical Services, “PCR TESTING FOR COVID-19” <https://www.epid.gov.lk/web/images/pdf/Circulars/Corona_virus/scan126.pdf> accessed 17th August 2020.

¹⁰ Gazette (Extraordinary) dated 15th March 2020 [No. 2166/51]

¹¹ Gazette (Extraordinary) dated 17th March 2020 [No. 2167/7]

¹² PMD News, “Army Commander Shavendra Silva Heads National Operation Center for Prevention of COVID- 19 Outbreak” (President’s Media Division, March 17, 2020) <<http://www.pmdnews.lk/army-commander-shavendra-silva-heads-national-operation-center-for-prevention-of-covid-19-outbreak/>> accessed 18th August 2020.

¹³ IANS, “6-Month Jail for People Hiding Coronavirus Symptoms in Sri Lanka” (KalingaTV, March 16, 2020) <<https://kalingatv.com/world/6-month-jail-for-people-hiding-coronavirus-symptoms-in-sri-lanka/>> accessed 10th August 2020.

On 19th March 2020, the government urged the public to work from home and declared a "work from home period" for 8 days from 20 March to 27 March.¹⁴ On 20th March 'police' curfew was declared for three days. The 'curfew' was lifted on the 24th for half a day and thereafter indefinite 'curfew' was announced for certain Districts and intermittent curfew in all other parts of the country. Those engaged in essential work, including healthcare workers, were exempt from curfew. The Presidential Secretariat also announced that paddy farming and plantation including work on tea small holdings and fishing activities were permitted in any district (President's Media Division (PMD), 2020). Inter district travel was prohibited. On 9th April it was reported that DIG Ajith Rohana stated that 'any person who crosses district border in violation of curfew will be compulsorily sent for 14-day quarantine' effective from 10th April.¹⁵

From about 20th March, daily news items reported the number of persons arrested for violating curfew. Between 20th and 30th March the numbers were in mainly the several hundred with the highest being 2405 on 24th March. In the month of April, the daily average reported was 1096.¹⁶ Numbers of vehicles seized were also regularly reported. As of 29th June, it was reported that 72,284 persons in total had been arrested for curfew violations since March 2020.¹⁷

Social distancing and mask wearing as measures to prevent transmission of COVID19

On 11th April Police Media Spokesperson SSP Jaliya Senaratne announced that it was compulsory for anyone stepping out onto main roads or by roads to wear a mask and also mentioned that a large number of government officers have been directed to self-quarantine due to the carelessness of the public. On 24th April it was reported that the Sri Lanka Army on the instructions of Army Commander Lieutenant General Shavendra Silva has deployed a Quick Reaction Team (QRT) to randomly check body temperature of people in Colombo.¹⁸

¹⁴ Pavani Hapuarachchi, "March 20-27 Declared a 'work from Home' Period" (Sri Lanka News - Newsfirst, March 19, 2020) <<https://www.newsfirst.lk/2020/03/19/20-27-march-declared-a-work-from-home-period/>> accessed 12th August, 2020.

¹⁵ "Anyone Crossing District Borders Sent to Quarantine Centers – DIG Ajith Rohana" (www.adaderana.lk, April 9, 2020) <<http://www.adaderana.lk/news/62446/anyone-crossing-district-borders-sent-to-quarantine-centers-dig-ajith-rohana>> accessed 4th August , 2020.

¹⁶ Datasheet of news items of curfew related arrests maintained by author.

¹⁷ "Sri Lanka: Over 72,000 People Arrested for Curfew Violations" (www.colombopage.com, June 29, 2020) <http://www.colombopage.com/archive_20B/Jun29_1593410414CH.php> accessed 1st August , 2020.

¹⁸ "Army Conducts Random Temperature Checks in Colombo" (Dailymirror.lk, April 24, 2020) <https://www.dailymirror.lk/breaking_news/Army-conducts-random-temperature-checks-in-Colombo/108-187158> accessed 3rd August , 2020.

On 25th May, DIG Ajith Rohana at a media briefing stated that 'legal action will be taken against those who fail to maintain social distancing in public places.' He also announced that police would inspect CCTV footage at workplaces from time to time in order to monitor if employees maintained social distancing while at work. "The intelligence unit will archive video recordings of social distancing activities so that the police can produce such footage in court if necessary."¹⁹

On 3rd June, the Police Media Unit confirmed that 1,064 persons had been arrested for violating quarantine regulations in 6 days, stating that the arrests had been made after several warnings were issued to persons to wear face masks and maintain physical distancing when in public places. The Health Services Director General Dr. Anil Jasinghe also stated that "We have given the authority to the Police to take necessary action against whoever violates the quarantine regulations and health guidelines that have been issued for various sectors. We also urge that the general public take some initiative and responsibility in following the guidelines that were issued to safeguard their health and wellbeing as Covid-19 is very much a threat to society,".²⁰

Public Health Inspectors (PHIs) and members of the Election Commission (EC) had informed the Government and also the Health Ministry about the necessity of gazetting those guidelines under the Quarantine and Prevention of Diseases Act in order to ensure these were strictly followed by the public, especially during election campaigning by political parties, politicians, and their supporters.²¹

On 24th June 2020, guidelines were issued regarding attendance to cinema halls. On 29th June it was reported that 1,214 persons who were not wearing face masks in public places were sent for 14 days of quarantine.²²

¹⁹ Dharshnana Sanjeeewa Balasuriya, "Will Sue Those Who Flout Social Distancing Etiquette: DIG" (Dailymirror.lk, May 25, 2020) <https://www.dailymirror.lk/front_page/Will-sue-those-who-flout-social-distancing-etiquette%3A-DIG/238-188927> accessed 6th August, 2020.

²⁰ "Violating Quarantine Regulations: Over 1,000 Arrested in Six Days" (The Morning - Sri Lanka News, June 3, 2020) <<https://www.themorning.lk/violating-quarantine-regulations-over-1000-arrested-in-six-days/>> accessed 7th August, 2020.

²¹ Maheesha Mudugamuwa, "Failure to Gazette Covid-19 Health Guidelines: Authorities Unable to Take Legal Action" (The Morning - Sri Lanka News, June 17, 2020) <<http://www.themorning.lk/failure-to-gazette-covid-19-health-guidelines-authorities-unable-to-take-legal-action/>> accessed 8th August, 2020.

²² "Over 1,200 Caught Not Wearing Masks, Sent for Quarantine" (www.adaderana.lk, June 29, 2020) <<http://www.adaderana.lk/news.php?nid=65093>> accessed 4th August, 2020.

B. MEASURES RESTRICTING SPEECH, EXPRESSION AND DISSENT

Two weeks into the lockdown, on 1st April 2020, a letter was issued by the Police Media Division to all News Directors and Editors stating in relation to public officials engaged in COVID19 health crisis work that “එම රාජකාරී, විවේචනය කරමින් සහ නිලධාරීන්ගේ සුළු අඩුපාඩු මතුකර පෙන්වමින් ඉතා බරපතල ලෙස එම රජයේ සේවකයින් රාජකාරියට බාධා කරමින් සහ ඔවුන් බැන නප්පනය කරමින් අසත්‍ය හෝ ද්වේශසහගත ප්‍රකාශ ... ප්‍රසිද්ධ කරන බව වාර්තා වී ඇත. එම තනතුරුට එරෙහිව ඉතා තදින් නීතිය ක්‍රියාත්මක කිරීමටත් ... අත්අඩංගුවට ගෙන .. නීතිමය පියවර ගන්න ලෙසත් ... උපදෙස් ලබාදී ඇත”. Translated, it refers to directions given for legal action to be taken against video and other publications on the internet that criticize the work of state officials and highlight their minor mistakes which hinders their work and for threats and, false and malicious statements.²³ To this date the letter appears only to be available in Sinhala leaving the Tamil speaking public of Sri Lanka uninformed of executive intent.²⁴

Consequent to the police statement and under offences connected to ‘misinformation’ there were an alarming number of reports of arrests allegedly in response to social media messages.

On the 7th of April DIG Ajith Rohana was reported as stating that spreading misinformation on social media regarding COVID-19 prevention could lead up to a 5-year imprisonment²⁵

On 12th April it was reported that the police were investigating 70 persons for ‘spreading false information across social media’.²⁶ On 22nd April it was reported that 40 persons were under investigation.²⁷ The applicable law was unclear, with speculation that it could be the ICCPR Act, the Computer Crimes Act or the Penal code.

²³ “Malicious Attacks on Public Servants on Social Media Will Be Arrested! - Acting IGP” (www.lankanewsweb.net, April 1, 2020) <<https://www.lankanewsweb.net/66-special-news/59435-People-posting-media-showing-malicious-attacks-on-public-servants-on-social-media-will-be-arrested>> accessed 15th August, 2020.

²⁴ Thushi, “Covid-19 Pandemic & Freedom of Expression Rights” (english.theleader.lk, April 17, 2020) <<https://english.theleader.lk/news/692-covid-19-pandemic-freedom-of-expression-rights>> accessed 11th August, 2020.

²⁵ “Spreading misinformation on coronavirus punishable by 5 years in prison – Police” (Adaderana.lk, April 7, 2020) <<http://www.adaderana.lk/news.php?nid=62355>> accessed 15th August 2020.

²⁶ Zulfick Farzan, “Police to Arrest and Prosecute Those Who Post False Content on Social Media” (Sri Lanka News - Newsfirst, April 12, 2020) <<https://www.newsfirst.lk/2020/04/12/police-to-arrest-and-prosecute-those-who-post-false-content-on-social-media/>> accessed 20th August, 2020.

²⁷ Vimukthi Vidarshana, “Sri Lanka Government Intensifies Crackdown on Social Media” (www.wsws.org, April 9, 2020) <<https://www.wsws.org/en/articles/2020/04/09/medi-a09.html>> accessed 22nd August, 2020.

“Investigations Underway to Arrest 40 Suspects for Spreading Fake News on Social Media” (Sri Lanka News - Newsfirst, March 17, 2020) <<https://www.newsfirst.lk/2020/03/17/investigations-underway-to-arrest-40-suspects-for-spreading-fake-news-on-social-media/>> accessed August 22, 2020.

On or about 3rd April, the Ministry of Health issued guidelines to the media relating to reporting on the pandemic. The guidelines required the media to, among other things, respect the right to privacy of patients, only report technically and scientifically accurate information, and refrain from stating the race and religion of infected persons.²⁸ On 28th April, after close to two hundred persons in the Sri Lanka Navy were diagnosed as infected with COVID-19, the Defense Ministry requested print and electronic media to respect the privacy of coronavirus infected patients and refrain from filming individuals' homes when public authorities conduct check-ups.²⁹

C. MEASURES AFFECTING FREEDOM OF ASSEMBLY

On 11th April it was reported that a local government politician was taken into custody for congregating with the general public under curfew hours, 7 persons were arrested for attending a religious event in Uppuveli, Trincomalee and directed to self-isolation at their respective homes.³⁰

On 9th June, a small group of protestors, members of the Front Line Socialist Party, observing social distancing and mask wearing, were violently arrested by the police.³¹ This took place a week after the lockdown had been lifted and Pubudu Jayagoda, FSP member was reported stating "This protest was publicized well before; it's not something that we organized in secret. But the Kollupitiya Police Officer-in-Charge had sought a court order restricting the protest citing public health concerns,".

On 20th May, the Defense Ministry said it has instructed Security Forces in the North to take necessary actions to prevent holding any gatherings or meetings in Jaffna. Three politicians were reported as prevented from crossing the Sangupiddy roadblock. Similarly, people also seeking to cross the roadblock enroute to commemoration events in memory of loved ones who lost their lives

²⁸ "Health Ministry Issues Guidelines on COVID-19 Reporting | Daily FT" (Www.ft.lk, April 3, 2020) <<https://www.ft.lk/news/Health-Ministry-issues-guidelines-on-COVID-19-reporting/56-698459>> accessed 23rd August, 2020.

²⁹ "Defence Ministry Requests Media to Respect Privacy of Coronavirus Infected Patients" (news.lk, April 28, 2020) <<https://news.lk/news/political-current-affairs/item/30049-defence-ministry-requests-media-to-respect-privacy-of-coronavirus-infected-patients>> accessed 26th August, 2020.

³⁰ "22,000 Curfew Violators Arrested so Far" (www.adaderana.lk, April 11, 2020) <<http://www.adaderana.lk/news/62504/22000-curfew-violators-arrested-so-far>> accessed 25th August 25, 2020.

- and "Sri Lanka : Police Arrest 24 People Attended New Year Rituals at Kovils Ignoring Instructions, Deploy Plainclothes Officers" (www.colombopage.com, April 14, 2020) <http://www.colombopage.com/archive_20A/Apr14_1586880895CH.php> accessed 25th August, 2020.

³¹ Kalani Kumarasinghe, "Sri Lanka Cracks Down on Black Lives Matter Solidarity Protest" (thediomat.com, June 11, 2020) <<https://thediomat.com/2020/06/sri-lanka-cracks-down-on-black-lives-matter-solidarity-protest/>> accessed 16th August, 2020.

at the end of the war in 2009. Major General Wanigasooriya is quoted as saying ‘anyone who wanted to commemorate their loved ones, who died in the 30-year long war, could remember them at their homes following health advice to prevent coronavirus spreading further’.³²

D. RELIEF MEASURES

In response to the loss of access to food and other essential items experienced as a result of the restrictions imposed, a Presidential Task Force for the management and distribution of essential food and other items was entrusted to ensure door to door supply of essential items for people to purchase and measures for people to access medicines and health services were announced.³³ The President announced concessions ‘to ensure the uninterrupted continuation of civilian life’ (PMD, 2020). This included the promise to provide Rs. 5000 as a single payment to low income families and eligible groups including registered senior citizen allowance recipients, registered disabled persons, farmers registered under the Farmers’ Insurance scheme, registered kidney patients and Samurdhi recipients. As at June 2020, it is reported that Sri Lanka provided over 5.7million monthly payments of Rs 5,000 to households in April and May of 2020 (Kidd et al., 2020).

E. MEASURES RELATING TO BURIAL

The issue of burials of those who died of COVID-19 assumed particular significance during the pandemic.

On or about 27th March 2020, the Ministry of Health in collaboration with Ceylon College of Physicians coordinated by the Epidemiology Unit of Ministry of Health issued Provisional Clinical Practice Guidelines on COVID-19 suspected and confirmed patients (Version 3). As per these guidelines, **both cremation or burial were allowed** for bodies identified under category I, II and III, where the option of burial was allowed provided that all steps to prevent contact with body is ensured³⁴.

On or about 31st March 2020, the Ministry of Health in collaboration with the Ceylon College of Physicians coordinated by the Epidemiology Unit of Ministry of Health, issued Provisional Clinical Practice Guidelines on COVID-19 suspected and confirmed patients (Version 4). According to this

³² “Sri Lanka : Defense Ministry Instructs Security Forces to Follow Quarantine Law to Prevent Gatherings in North” (www.colombopage.com, May 19, 2020)

<http://www.colombopage.com/archive_20A/May19_1589867944CH.php> accessed 21st August, 2020.

³³ “Gazette No. 2168/8” dated 26th March 2020 <http://documents.gov.lk/files/egz/2020/3/2168-08_E.pdf>.

³⁴ Ministry of Health in collaboration with Ceylon College of Physicians co-ordinated by Epidemiology Unit, “Provisional Clinical Practice Guidelines on COVID-19 Suspected and Confirmed Patients (Version 3)” dated 27th March 2020.

version, **exclusive cremation was imposed as funeral arrangements for deaths of Covid-19 patients of category I, II, and III**³⁵.

On or about 1st April 2020, the 1st Respondent Director General of Health Services issued the circular No. *EPID/400/2019 n-cov* to all Provincial Directors and Regional Directors of Health Services and all Heads of the Institutions regarding Autopsy practice and disposal of dead bodies due to COVID-19 (Version date 31st March 2020). As per this circular, **exclusive cremation was prescribed** for disposal upon death of bodies of persons who were Covid-19 patients of category I, II, and III³⁶

F. ACCESSING COURTS

Due to the declaration of public holidays from 16th to 19th March courts too were closed during this period across the country.³⁷ Guidelines issued by the Judicial Service Commission (JSC) dealt with several aspects including: Attorneys to advise clients not to personally attend court, No adverse orders to be made in the absence of parties in court, Courts to entertain requests for postponements favourably, Hearings to be limited to ‘urgent and essential matters’ ostensibly to be decided by court or applications made by attorneys on behalf of litigants, Cases that are merely being mentioned for administrative steps not to be called out in open court, and to be rescheduled, Magistrates are ‘at liberty’ not to entertain new plaints (meaning criminal cases), Bail applications to be processed ‘where possible’ through electronic means, Prison authorities to take steps to prevent crowding of court ‘cells’.³⁸ By 26th March, the JSC circular focused on granting of bail.³⁹ In one JSC circular there

³⁵ Ministry of Health in collaboration with Ceylon College of Physicians co-ordinated by Epidemiology Unit, “Provisional Clinical Practice Guidelines on COVID-19 Suspected and Confirmed Patients (Version 4)” dated 31st March 2020.

³⁶ Dr Anil Jayasingh, Director General of Health Services “Circular No. EPID/400/2019 n-Cov Issued to All Provincial Directors and Regional Directors of Health Services and All Heads of the Institutions Regarding Autopsy Practice and Disposal of Dead Bodies Due to COVID-19” version dated 31st March 2020.

³⁷ Arjuna Ranawana, “BASL Says All Courts Closed down Today” (EconomyNext, March 17, 2020) <<https://economynext.com/basl-says-all-courts-closed-down-today-59450/>> accessed 12th August, 2020.

³⁸ HS Somaratne, “JSC/SEC COR: 1” <<http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-01.pdf>> accessed 16th August, 2020.

³⁹ HS Somaratne, “JSC/SEC COR: 3” <<http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-03.pdf>> accessed 16th August, 2020.

is reference to a circular by the Secretary to the President⁴⁰ and the government policy to ensure 'routine tasks without interruption'.⁴¹

The Chief Justice and Judges of the Supreme Court exercising rule making power in terms of Article 136 of the Constitution, published a gazette to extend time within which appeals had to be filed in the Supreme Court and Court of Appeal.⁴² This was presumably to ensure that litigants were not adversely affected by closure of superior courts in Colombo.

⁴⁰ "Special Circular on Court Proceedings – Presidential Secretariat of Sri Lanka" (www.presidentsoffice.gov.lk, March 2020) <<https://www.presidentsoffice.gov.lk/index.php/2020/03/19/special-circular-on-court-proceedings/?lang=en>> accessed 17th August, 2020.

⁴¹ HS Somaratne, "JSC/SEC COR: 2" <<http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-02i.pdf>> accessed 19th August, 2020.

⁴² Gazette (Extraordinary) dated 6th May 2020 [No. 2174/4] and Gazette (Extraordinary) dated 12th May 2020 [No. 2175/2]

3. IMPACT ON MINORITY RIGHTS

PROBLEMS WITH USE OF THE QUARANTINE ORDINANCE

The Sri Lankan state relied primarily on the Quarantine Ordinance in response to this public health crisis. It is an outdated law and has no provisions for public communication, grievance recording mechanisms and does not provide for specific legal recourse if measures discriminate or cause hardship to minorities or vulnerable groups.

By way of an amendment to an existing regulation under the Ordinance, the Director General of Health was named as the proper authority to issue rules.

The manner in which rules were enacted is not clear because the Minister in charge of the subject of Health enacted regulations three regulations by amending the existing 'Regulations relating to Storage of Grain and Regulations relating to Ancylostomiasis published in Gazette No.7481 of August 28, 1925'. 'Ancylostomiasis' is in reference to a hookworm. The question arises as to why COVID-19 specific regulation/s were not enacted. The fact that a 1925 regulation was chosen to be amended also meant that citizens were compelled to access the 1925 regulation.

It was possible for COVID-19 specific regulations to have been drafted and enacted. For example, the 1925 regulations were detailed and appear to be evidence based. The legal drafting capacity, technological advancement and level of medical information available today compared to 1925 means that drafting appropriate and evolving COVID-19 specific regulations were possible but not done. There was adequate time to do so even after the initial onset of the pandemic, as the weeks of lockdown went by. The lack of such specific regulations (including on measures such as curfew, quarantine and social distancing) may have contributed to the significant confusion regarding the legality of the applicable standards to be followed, during the pandemic. The union of Public Health Inspectors, for example, stated that there was a lack of legal provisions to protect officers engaged in their duties pertaining to disease control and that it placed officers at risk.⁴³

It is of concern that there were no clear legal rules and that it was not addressed. When governance does not properly address concerns relating to the clarity of law and legality of measures, the rule of law is affected and impairs the ability of citizens to participate in public life.

⁴³ Kalani Kumarasinghe, "PHIs to Withdraw from Duties If Needs Aren't Met" (Dailymirror.lk, April 2, 2020) <https://www.dailymirror.lk/breaking_news/PHIs-to-withdraw-from-duties-if-needs-arent-met/108-186112> accessed 22nd August, 2020.

RELIANCE ON EXTRA-LEGAL MEASURES

As detailed previously in this report, there were several regular announcements by the President, Prime Minister, Ministry of Health, Director General Health Services, head of the National Operations Center, Media spokesperson and a DIG of the Sri Lanka Police during the pandemic. These statements were about measures taken, directions to the public and information relating punitive measures taken against those failed to abide by restrictions on movement. The role that these officials played with their involvement in public communication was significant. Many of the measures so publicized were extra-legal as they were not based on any particular law. In contrast, directions by the Director General of Health Services could be traced to issuance of relevant circulars in the capacity of the proper authority and as such had legal authority. Therefore, it appears that the other public messages relied on the office to give force to the message.

The Presidential Task Forces established to handle and coordinate COVID-19 responses is perhaps the most important of these examples. It is noted that the President does not have explicit power under the constitution of Sri Lanka to institute such a task force. The task force is thus an example of rule by executive order and is antithetical to democracy and the rule of law.

It is to be noted that the effectiveness of such measures is not dependent on their legality. Legality is an important requirement because it ensures that those entrusted with power will exercise such power only within the bounds of the law, and further that it will accord with principles of constitutionalism, democracy and human rights. For example, the Disaster Management Act if utilized would have meant that the National Council for Disaster Management, a representative body, would have informed the decisions taken by appropriate authorities, during the pandemic. Ensuring that measures taken have input or feedback from representative bodies is important in ensuring rights of minorities and other vulnerable communities are addressed and the particular disadvantages and vulnerabilities of all communities are meaningfully considered and addressed during crisis situations.

SECURITY OVER PUBLIC HEALTH

In order to be effective, public health law must necessarily rely on a framework of trust building and public participation. Attempting to tackle public health through a securitization and criminalization approach will not, in the long term, be a successful strategy. Such an approach is necessarily based on the fear of punishment as a means of deterrence, and as far as public health is concerned, such fear can in fact be counter-productive, leading to members of the public failing to disclose information regarding symptoms of illness, exposure to infection, etc., all of which are crucial in preventing the spread of the disease concerned.

For minorities, particularly minority community members from low income households, security laws and law enforcement practices have a context that cannot be ignored. Failure to explain the scope or objective of the law to citizens (particularly to those from vulnerable backgrounds), arbitrary

application of the law, practices of torture and ill treatment are common place. Historically, national security has been used to exercise arbitrary and disproportionate force against members of minority communities. The fear that this will take place again is thus a likely and reasonable one, and must be taken into consideration.

In this regard, the Disaster Management Act is the most suitable legislation of laws in place. With this law, it would have been possible to enforce measures to combat COVID-19 with an approach that was not based on securitization and criminalization.

The language of the Quarantine Ordinance regulations of 1925, as old as they are, also reflects this notion of public health in its language. The Ordinance provides for 'duty of occupant in any building in which disease occurs'(Sec 46) 'removal of diseased persons'(Sec 49), 'entering or leaving' a house or area of an infected person(Sec 55, 56, 58 and 59), 'duties of householders and drivers of public conveyance'(Sec 68 and 69), 'evacuation' (Sec 74 and 75) and 'isolation of persons infected with disease' (Sec 79). The language is not one of criminality and security, with no mention of arrest, detention or seizure.

In Sec 60, it is noted that the regulation places the obligation on the authority to carefully explain to relatives the need for measures to disinfect the clothes of a corpse of a person who had died of the infectious disease. There is also some limited provision on explaining procedure to those to whom the regulations applied.

It is important to note the use of language reflecting the concept of proportionality. For example, the above-mentioned regulation always refers to infected or diseased persons or area and does not set out broad powers of restricting movement. This does not mean that under the more general power of the proper authority if it was deemed necessary that such a direction could not have been made. However, refraining from treating such an eventuality as the norm reinforces the idea of proportionality and also ensures that extraordinary measures are exceptions.

There are also several detailed provisions in the regulation for storage of grain as was at the time relevant for rats as carriers of plague. This is an example of the detail to which the regulations are able to specific and by so doing set parameters to the use of residual power.

AVAILABLE LAWS WERE NOT USED

Available law with provisions for imposing curfew and penalties relating to the spread of disease was not used during the COVID-19 pandemic. The PSO was not utilized. Curfew to be imposed in terms of the PSO requires a declaration by the President under Section 16, which was not made. To the best of the information made available to the public, no sections of the penal code were used. The Penal Code was not cited in any publicly available information or by the Sri Lanka Police.

AVAILABLE LAWS WERE NOT APPROPRIATE

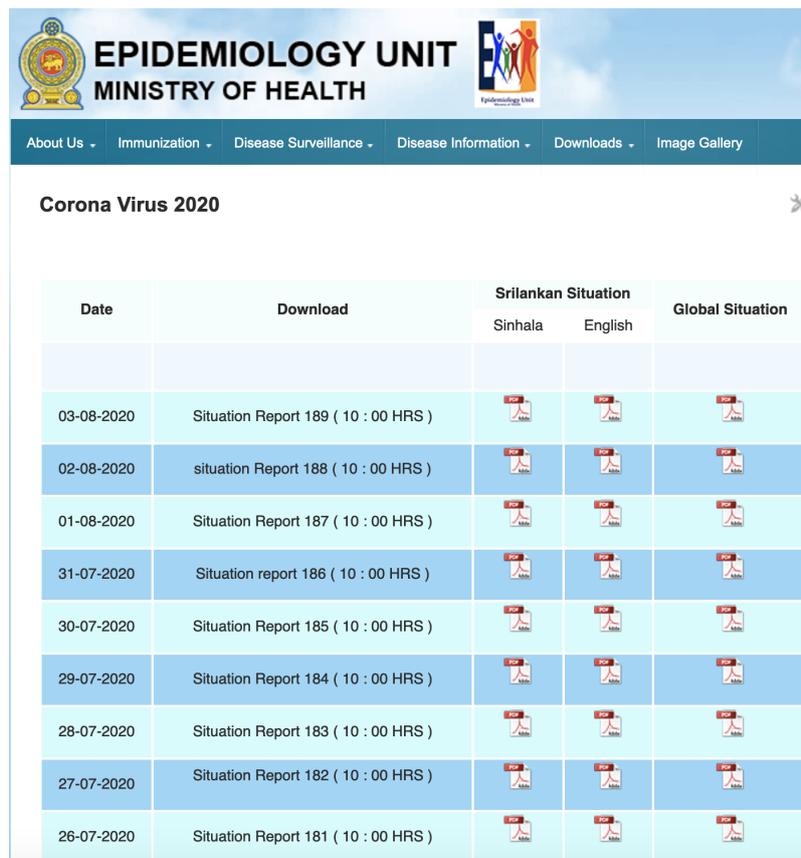
It must be noted that both the PSO and the Penal Code are not appropriate pieces of legislation. The PSO is essentially a security focused, regressive piece of legislation which when enacted in 1947 was passed as an 'urgent bill' in ninety minutes and drew warnings from the floor of the House that the matter required careful consideration. It is an overly broad piece of colonial legislation which posits wide arbitrary power in the executive. It has not been amended since its enactment. The only check is a parliamentary one which merely ensures debate and legislators who are concerned about minority rights, who are usually a numerical minority in this forum, have little impact. There is no provision for judicial recourse for violation of individual rights. Even if the fundamental rights jurisdiction is moved for imminent or established violations, the fact that the legislation is of a 'national security' character means that the judiciary will be on the back foot. Unless judiciaries are independent, there is a strong likelihood of favouring restrictions of rights justified by vague notions of security. There is no domestic jurisprudence on the criteria and different approach public health restrictions ought to take.

Similarly, the criminalized approach of the penal code provisions is extremely unhelpful, because the focus of the law is to detain, charge and prosecute those found to be 'unlawfully or negligently' spreading a disease known to be harmful to life. A penalty focused law causes citizens to fear the law, and thus makes them more likely to attempt to evade it by withholding information that is possibly crucial in containing the spread of the disease (for example the failure to report to authorities that an individual is showing symptoms of a disease, informing authorities of potential spread of infection etc). These laws are as such wholly unsuited for a public health emergency.

LANGUAGE RIGHTS

A concern that was not widely raised in public media (except anecdotally over social media), was the failure of key public institutions involved in public messaging over the COVID-19 pandemic to publicize information in the Tamil language. Institutions particularly noted as failing in this respect were the Police media division, Presidential media division and the Health Ministry. For example as shown in the image below, the coronavirus updates by the Epidemiology Unit were only given in Sinhala and English.

Source:http://www.epid.gov.lk/web/index.php?option=com_content&view=article&id=225&lang=en



The screenshot shows the website of the Epidemiology Unit, Ministry of Health. The page is titled "Corona Virus 2020" and features a table of situation reports. The table has columns for Date, Download, Srilankan Situation (Sinhala and English), and Global Situation. Each row represents a situation report from July 26, 2020, to August 3, 2020. The reports are available in Sinhala and English, but not in Tamil.

Date	Download	Srilankan Situation		Global Situation
		Sinhala	English	
03-08-2020	Situation Report 189 (10 : 00 HRS)			
02-08-2020	situation Report 188 (10 : 00 HRS)			
01-08-2020	Situation Report 187 (10 : 00 HRS)			
31-07-2020	Situation report 186 (10 : 00 HRS)			
30-07-2020	Situation Report 185 (10 : 00 HRS)			
29-07-2020	Situation Report 184 (10 : 00 HRS)			
28-07-2020	Situation Report 183 (10 : 00 HRS)			
27-07-2020	Situation Report 182 (10 : 00 HRS)			
26-07-2020	Situation Report 181 (10 : 00 HRS)			

These public institutions were the key sources of public information during the five months under review of the COVID-19 crisis. Public communication, particularly during a public health crisis, must be in the three languages of Sinhala, Tamil and English. There were also instances of delayed messaging in English or Tamil was also experienced and is also highly inadequate. These failures exclude citizens from positively participating in addressing the crisis and leads to people aggravating the crisis due to acting without information.

For minority communities, particularly in a country with language-based minority populations, respect for language rights is imperative.

LACK OF CHECKS AND BALANCES: LEGISLATURE AND JUDICIARY

There are two main checks and balances of executive action. During emergency and disaster situations, including a pandemic, it is likely that executive power may go unquestioned and unchecked. In a healthy democratic system, those bearing executive power are conscious of the tendency for arbitrary and disproportionate executive action and that it ought ideally to return as soon as possible to a system within which checks and balances function strongly. Parliamentary debate to ensure that issues are fully discussed in a representative manner and subjecting executive action to judicial scrutiny are two main checks.

PARLIAMENT

In several other countries, parliaments responded to the pandemic by enacting appropriate necessary legislation on movement, social distancing, economic response packages, financial support, family support, access to the judiciary, labour, lay-offs and collective vacations (for example the United Kingdom passed the Coronavirus Act of 2020). Parliaments played an important role in responding to the pandemic. Measures were also taken in many countries to enable parliaments to act remotely.

In Sri Lanka, Parliament had been dissolved on 2nd March 2020 in anticipation of an election in April. Therefore, there was no legislative functioning during the month of March in which the coronavirus cases started to be identified and measures to control the pandemic in the country had to be taken. All debates that would have taken place within Parliament by peoples' respective representatives took place in the media. Even then it can be asked if restraint was palpable because permitting the executive to act with broad powers was acceptable. No primary legislation was enacted in Sri Lanka in response to the pandemic.

ACCESS TO COURTS

Access to the judiciary is a basic feature of good governance. This commentary looks at (1) peoples' access to courts to secure ordinary remedies such as maintenance, protection orders in the case of domestic violence, timely investigation and prosecution of criminal acts, and (2) peoples' access to courts to challenge executive and administration action for reasons of use of arbitrary power, irrelevant reasons, unreasonableness, or for being in breach of fundamental rights. The latter is particularly important during emergency situations during which the likelihood for infringement of rights is higher.

Judicial attention was directed towards processing of bail applications in the wake of the health crisis. The confusion surrounding this issue was evident with statements such as: 'the best place for remandees at present is the prison as the premises are not visited by anyone from the outside and

there is very less possibility of the virus entering prisons⁴⁴ and the opposite position being taken a few days later when the government announced bail will be given to '8,000 remand prisoners, being held for drug offences, as part of its efforts to contain the spread of the novel coronavirus'⁴⁵.

The JSC circulars concerning the functioning of courts were not accessible to the public in a manner that is effective and meaningful. There was no regular and clear public communication either to legal professionals or to the public. The directions given are addressed to the judiciary and sometimes to lawyers. The public communication component of these institutions was weak prior to the pandemic and as such there were no existing systems or mechanisms, to be used during an emergency such as this health crisis. This resulted in public confusion among litigants concerning the status of litigation following the outbreak of the pandemic. It is to be noted that such lack of communication, particularly during a public crisis, arguably contributes to the erosion of public confidence in the judiciary.

It is significant that prescribed time bars for appeal applications were lifted during the pandemic, but not the one-month time limit prescribed for fundamental rights applications. In terms of ensuring that the rights of all citizens are protected, the latter legal provision ought necessarily to have been suspended.

The closure and uncertainty relating to the functioning of Courts was significant in relation to violations of minority rights during the pandemic. Particularly during the government's response in a disaster situation, the rights of minority groups are even more vulnerable. The arrest and detention of Hejaaz Hizbullah, a human rights lawyer, by which police are reported as having accessed his home under the pretense of measures related to the pandemic⁴⁶, and the impact of the decision to impose cremation of bodies of persons who died of COVID-19 or believed to have died of the disease which affected the right of Muslims to burial their dead, are both examples of this.

⁴⁴ Zulfick Farzan, "Prison Is Best Place to Protect Prisoners from COVID-19: ASG Jayamanne" (Sri Lanka News - Newsfirst, April 2, 2020) <<https://www.newsfirst.lk/2020/04/02/prison-is-best-place-to-protect-prisoners-from-covid-19-asg-jayamanne/>> accessed 23rd August, 2020.

⁴⁵ "Outlookindia.Com - More than Just the News Magazine from India" (<https://www.outlookindia.com/>) <<https://www.outlookindia.com/newscroll/coronavirus-lanka-to-grant-bail-to-8000-remand-prisoners/17971>> accessed 25th August, 2020

⁴⁶ "Sri Lanka: Arrest and Detention of Attorney-at-Law Hejaaz Hizbullah Is Arbitrary & Interference of His Legal Practice – Joint Statement | Sri Lanka Brief" (www.srilankabrief.org, April 22, 2020) <<https://srilankabrief.org/2020/04/sri-lanka-arrest-and-detention-of-attorney-at-law-hejaaz-hizbullah-is-arbitrary-interference-of-his-legal-practice-joint-statement/>> accessed 26th August, 2020.

LACK OF TRUST BUILDING MEASURES

Public health practice is focused on cure and prevention. A WHO publication on the vital role of law in public health recommends that to maximize the success and legitimacy of the public health law reform, countries should integrate the following six principles into the law reform process: stewardship, transparency, participation, fairness, accountability and following the rule of law.⁴⁷

For example, in Argentina, a WhatsApp bot was created to answer questions about prevention, symptoms, and general information from city services about COVID-19. Also, a self-testing software was developed and on the first day of launching, 500,000 people took the test using the app.⁴⁸

Several of the measures such as appointing military officials into the highly visible and leadership positions of the health response efforts, enforcing measures by focusing on penal consequences, failing to communicate in the Tamil language, failing to strengthen opportunities for community participation, failing to strengthen responses with fairness and accountability and failing to message and act with a heightened sense of protecting the rule of law, contribute to a public health response that failed to build public trust .

⁴⁷ "Advancing the Right to Health: The Vital Role of Law" <<https://www.who.int/healthsystems/topics/health-law/chapter5.pdf>> accessed 26th August, 2020.

⁴⁸ "A Rule of Law-Based Response to COVID-19" (Dailymirror.lk, June 20, 2020) <<https://www.dailymirror.lk/opinion/A-rule-of-law-based-response-to-COVID-19/172-190379>> accessed 27th August, 2020.

4. BROAD RECOMMENDATIONS FOR PUBLIC HEALTH LAW REFORM IN SRI LANKA

Public health specific law geared to the present context is a crucial component in responding to public health crises such as COVID-19. This section identifies and elaborates on the key attributes that such a public health law or laws ought to have to guarantee the right to health and well-being for all citizens and other members of the public equally.

Rights of minorities and other vulnerable groups need to be strengthened in emergency situations because there is pre-existing inequality in our society and because minority or vulnerable group interests may not be visible or may not be taken into account when focusing on majority interests.

It is also a misconception to think that focusing on or giving space to minority rights hampers the public health response. Focusing on minorities does not threaten majority rights or security. If responses are evidenced based no one is placed at risk. Responding to minority concerns may mean additional investment on the part of the government, but that is in fact part of what governments are responsible for. The limitation in Article 15 of the Constitution which says rights can be violated for reasons of public health, must not be seen as a ready defence, but rather as an exception to the norm.

RECOMMENDATIONS TO LAW AND POLICY

1. CLEAR, COHERENT, SIMPLE LANGUAGE COVID19 SPECIFIC LAW AND/OR REGULATIONS

Public health laws have developed across the world to become modern, scientific and incorporate legal standards ideally developed as a result of democratic processes.

When responding to a health crisis, the most effective course of action would have been for Sri Lanka to have enacted appropriate regulations under the existing Quarantine Ordinance, or alternatively, enact special legislation addressing COVID-19. In terms of special legislation, it is important to ensure that it contains an appropriate sunset clause. Special legislation necessarily contains broad discretionary power and the application of such powers must be limited to the time period to which it is absolutely necessary. This guards against use of overbroad powers in ordinary situations which amount to a violation of democratic principles.

Clear, coherent, simple language rules must be properly legally enacted. This is adherence to the rule of law and ensures that the system of checks and balances protects all interests.

2. COMMUNICATION WITH THE PUBLIC AND SENSITIVITY TO MINORITY CONCERNS

The need for effective communication between the state and the people was evident during the pandemic and the resultant curfew⁴⁹. As reflected in the widely acclaimed success of countries like New Zealand and Argentina, an effective communications strategy is key to effective management of a public health crisis. It is recommended that:

- The relevant law and regulations in clear, simple language be widely publicized in local languages via all major media outlets and social media.
- Guidelines on prevention that supplement the laws and regulations be widely publicized in local languages via all major media outlets and social media.
- Mechanisms must be set in place to facilitate feedback/complaint mechanisms for members of the public to communicate grievances and concerns to government officials. This is a civilian function and must necessarily be led by civilian administrators and not military personnel.
- Local government officials must receive education, training and guidelines in order to both disseminate information, and also receive and respond to feedback of members of the public. Localizing responses within a given framework is an important step for effective dissemination of information and effective engagement with people.
- The Government must ensure that an appropriate public health authority release regular, updated information relating to the factual status of the public health situation at hand (Eg: infection rates, quarantined areas, curfews/lockdown, etc.). Availability of reliable government information will help discredit inaccurate, and in some cases inflammatory disinformation, including information that deliberately targets particular minority communities, or other vulnerable groups or individuals.
- Misinformation and public criticism must be handled by a) responding with correct information publicly and individually and b) creating public grievance mechanisms.

⁴⁹Nalaka Gunawardene, "Sri Lanka: Media and Fact-Checkers Tackle Covid-19 'Infodemic'" (International Media Support, March 24, 2020) <<https://www.mediasupport.org/sri-lanka-media-and-fact-checkers-tackle-covid-19-infodemic/>> accessed 27th August, 2020.

3. DO NOT ADOPT A SECURITY FRAMEWORK

Public health responses require public health officials to direct and be the public face of government responses. The police are the primary enforcement agency in civilian relations. Engaging the military in civilian enforcement must be a last resort response and even then, it must be for limited and necessary activities. Depending significantly on an enforcement strategy to respond to a public health emergency, particularly a military involved enforcement there is real danger of short term and long-term consequences. In the short term it could result in non-reporting of disease and in the long term it may contribute to the erosion of public trust.

The highly prominent role of Sri Lanka's military in the management of the pandemic response warrants serious consideration. A popular argument in its defense is that successful management of the crisis necessarily required a high level of discipline. However, discipline ought to be a feature of the police and perhaps is not. Discipline and having adequate numbers of personnel in the enforcement arm of the public health response strategy while necessary cannot justify a military led response. The operations and enforcement part of the strategy must not overshadow a civilian-led and evidence-based response. In Sri Lanka's case the prominence and leadership roles given to the military serves no purpose except a political one.

Also noteworthy in this context, is Sri Lanka's defense budget: despite the end of the civil war, Sri Lanka has spent disproportionately large portions of its national budget on the armed forces and related expenditure⁵⁰. Inevitably, this has meant limited resources for other public services, including the health service. Consequently, it is no surprise that the support of the Sri Lankan military is necessary to enable its public health service to enforce safety measures during a public health crisis. Although perhaps presently necessary in an emergency situation such as the pandemic, in the long term, this is something that needs to change. This is not merely in the interests of restricting the role of the military in the administration of civilian affairs, in order to uphold the role of democracy and the rule of law, but also to ensure that other public services, such as the health service are no longer neglected. Serious consideration must be given to the reallocation of resources, in a more equitable, proportionate and effective way.

Apart from its implications on the rule of law and democracy, the prominent role of Sri Lanka's military in the management of the health crisis presents certain concerns particularly among minority communities. Due to the country's history of civil war and long-time conflict, the Tamil community, particularly in the North and East, typically views the military with fear, or at the very least, suspicion. Placing members of the military in prominent roles in the

⁵⁰ Daniel Alphonsus, "'Sri Lanka's Post-War Defence Budget: Overspending and Underprotection'" (Harvard University 2019).

management of a public health crisis could thus deter members of minority communities from engaging with authorities in an open, honest way, which could indeed be crucial in the effective management of a crisis of this nature. Placing public health professionals and experts in more prominent response roles and ensuring diverse representation in the relevant authorities, will ensure that members of all communities are more likely to trust authorities, and the system in place and will facilitate more honest, open engagement on their part, which is crucial to effective management of the crisis.

4. *CONSEQUENT SOCIO-ECONOMIC CONCERNS MUST BE ADDRESSED*

Public health crises must also be recognized as having immediate and long-term socio-economic impact. For example, during the COVID19 there was need for economic relief particularly among daily wage earners who were suddenly unable to engage in their livelihood⁵¹.

The economic impact includes the need for food assistance, rental assistance, suitable hygiene facilities appropriate for the context (particularly for those without proper housing), reproductive and health services and labour related protections. The public health legal framework must recognize this fact and connect and collaborate with other state institutions to address specific needs as they develop. The law must ensure that responses are both timely and evidence based. It is also important that the relevant law and mechanisms prioritize individuals and communities economically vulnerable even prior to the health crisis, such as workers employed in Sri Lanka's tea estates⁵², and thus placed in an even more vulnerable position.

⁵¹ "Partial Shutdown Sinks Small Businesses, Daily Wage Earners | Daily FT" (Www.ft.lk, March 19, 2020) <<https://www.ft.lk/front-page/Partial-shutdown-sinks-small-businesses-daily-wage-earners/44-697783>> accessed 28th August, 2020.

⁵² Meera Srinivasan, "Uncertainty during Difficult Times" The Hindu (April 4, 2020) <<https://www.thehindu.com/news/international/uncertainty-during-difficult-times/article31258774.ece>> accessed 28th August, 2020.

5. USE OF MEDIA AND RESPECT FOR PRIVACY AS TOOLS TO STRENGTHEN SOCIAL RELATIONS

The guidelines issued by the Health Ministry during COVID19 are as follows⁵³:

- Only report verified and accurate information on COVID-19
- Do not mention race or religion of persons infected with COVID-19 or of those who die of it
- Identify those infected with COVID-19 as patients and not as carriers/transmitters of the disease
- Base reporting on technical and scientific basis, and not on personal views of different persons
- Do not publish photographs or show videos of those infected with COVID-19 without their permission
- When showing video footage of sensitive nature taken at funerals of those who died due to COVID-19, it is best to blur the videos
- Do not report in a manner that causes hatred among people
- Report on COVID-19 in a positive manner so as to build cooperation and support among people in dealing with the disease

It is recommended that guidelines along these lines be applicable to media reporting during any public health crisis. State media must model best practice and counter news items that are not constructive.

6. ACCESS TO COURTS AND STRENGTHENING PUBLIC ENGAGEMENT

Access to court has been discussed above as being important for reasons of securing safety, financial maintenance, and also protecting one's rights. It is important that even during an emergency situation – in fact, especially during an emergency situation – that Courts continue to function, engage with the public, and take the necessary steps to ensure continuance of access and safety measures (eg: conducting remote court hearings, which seems to have

⁵³ "Health Ministry Issues Guidelines on COVID-19 Reporting | Daily FT" (Www.ft.lk, April 3, 2020) <<https://www.ft.lk/news/Health-Ministry-issues-guidelines-on-COVID-19-reporting/56-698459>> accessed 28th August, 2020.

taken place in some limited instances⁵⁴). Public messaging and accepting of concerns and complaints must be part of the public communications strategy.

In light of the inevitable difficulties litigants are likely to face in filing legal challenges during a public health crisis, technical rules, such as time bars to filing certain applications, must be explicitly relaxed. In the Sri Lankan context, this is especially important for fundamental rights applications which have a time bar of one month. Fundamental rights and writ applications, if timely redress is obtained, serves as an important check on government action. It can be particularly effective in securing rights of minorities and vulnerable communities.

⁵⁴ "Sri Lanka Conducts First Ever Court Session via Video Conferencing" (Sri Lanka News - Newsfirst, May 20, 2020) <<https://www.newsfirst.lk/2020/05/20/sri-lanka-conducts-first-ever-court-session-via-video-conferencing/>> accessed 28th August, 2020.

"Special Circular on Court Proceedings – Presidential Secretariat of Sri Lanka" (www.presidentsoffice.gov.lk, March 2020) <<https://www.presidentsoffice.gov.lk/index.php/2020/03/19/special-circular-on-court-proceedings/?lang=en>>. accessed 28th August, 2020.

CONCLUSION

This report looked at the legal and executive measures taken in response to the pandemic, particularly those measures that were identified as affecting minority rights and analysed the features of these measures caused such affectation.

A key finding was that Sri Lanka's public health framework must be strengthened on aspects of rule of law, independent and democratic processes, public communication and grievance handling. In terms of guiding principles, the focus was on trust building and substantive equality. The recommendations section is contextually specific and responds to existing institutional weaknesses and experience of minority groups. The extraordinary circumstances of a pandemic create opportunity. This opportunity can be used to learn and build strong democratic structures.

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