

**IS THE CURE WORSE THAN
THE DISEASE?**

**REFLECTIONS ON COVID GOVERNANCE IN
SRI LANKA**

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Sri Lanka's accelerated democratic decay amidst a pandemic

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Introduction

The health and other challenges spawned by COVID-19 have engulfed Sri Lanka since 2020, raising with them multiple issues related to rights, governance, and reconciliation (Fonseka, Ganeshathasan, and Welikala, 2021). The present challenges must also be examined in the context of what was promised in 2019. In the heels of the devastating Easter Sunday attacks and chaotic governance model of the Yahapalanaya government, calls for a strong leader emanated. The Presidential election in November 2019 witnessed Gotabaya Rajapaksa elected President on the platform of technocratic governance, security, stability, and discipline. The 'Vistas of Prosperity and Splendour' encompassing ambitious reform proposals was presented as the answer to Sri Lanka's present challenges. Instead of prosperity and splendour, Sri Lanka is now confronted with unprecedented health and economic challenges, heightened militarisation, rising inequalities and rights violations, policy incoherence, and blatant disregard for the rule of law (Fonseka and Dissanayake, 2021).

This chapter examines the legality and constitutionality of the mechanisms that the Sri Lankan government has introduced since the onset of COVID-19. In this connection, it looks at structures established ostensibly to manage the health crisis, as well as the legal framework governing various restrictions imposed during several stages of the pandemic response. The chapter also provides a brief account of legislation rushed through in the haze of the pandemic frenzy, and worrying trends of increased authoritarian rule and militarisation. The chapter's specific focus is on how the amalgamation of these mechanisms and policies serves to undermine accountability and transparency in governance, with serious implications for Sri Lanka's constitutional democracy.

Structures

Since the onset of COVID-19 in March 2020, several Presidential Task Forces have been established to address various COVID-19 related issues ('Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', 2020; also see 'Q and A on Regulations Issued under the Quarantine and Prevention of Diseases Ordinance & how this impacts the COVID-19 response in Sri Lanka', 2020). These task forces were established under Article 33 of the Constitution which sets out the duties and powers of the President. While the Gazettes refer to Article 33 in general, it is assumed that Article 33(2)(h)¹ in particular has been invoked to establish the task forces.

The mandates of these task forces are ambiguous, as are the scope of their authority and their relationship with existing structures ('Pandemic Crisis and Democratic Governance in Sri Lanka', 2021). Another point of contention is the inclusion of former and present military, and law and order officials within the composition of these

¹ Article 33 (2) of the Constitution of Sri Lanka. 'In addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law, the President shall have the power...(h) to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorised or required to do.'

task forces. The emergence of ad hoc structures consisting of military personnel is viewed as a manifestation of the increasing militarisation of civilian spaces and functions. Despite assurances of professionalism and efficiency ('Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', 2020), the present upsurge in COVID-19 cases shows that these new structures and ad hoc procedures underscored by a militarised approach have been unable to contain the crisis ('An Update on the Legal Framework to Address the COVID-19 Pandemic in Sri Lanka', 2021). What follows is a brief overview of the entities established since March 2020.

As an immediate response to the crisis, the 'National Operation Centre for Prevention of COVID-19 Outbreak' (NOCPCO) helmed by Army Commander General Shavendra Silva ('No decision taken to declare a complete lockdown', 2021) was established by President Gotabaya Rajapaksa to "coordinate preventive and management measures to ensure that healthcare and other services are well geared to serve the general public." (President's Media Division, 2020)

On 26 March 2020, more than a week after the establishment of the NOCPCO, a Presidential Task Force ('Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', 2020) was established by way of Gazette Extraordinary No. 2168/8 to "direct, coordinate and monitor the delivery of continuous services for the sustenance of overall community life, including the supply of food provisions produced in rural areas and producers direct to consumers giving priority to the Districts of Colombo, Kalutara, Gampaha, Puttalam, Jaffna, Mannar, Kilinochchi, Vavuniya and Mullaitivu which have greater vulnerability in the eradication of coronavirus in Sri Lanka", and perform 12 related tasks.

The vague and expansive descriptions of tasks assigned to the Task Force are compounded by the lack of oversight, transparency, and accountability relating to their implementation. Further, there is an absence of established procedures to scrutinise and hold these task forces accountable, as they are both appointed by and answerable to the President.

The overbroad mandate of the above Task Force may also serve to undermine the independence and expertise of the civil administration in responding to the health crisis. According to the mandate of the Task Force, all public officers and other persons to whom the Task Force may issue instructions or from whom assistance for the provision of services may be requested, are required to comply with the instructions, render assistance, and furnish information as is required. Further, the Task Force is mandated to report to the President all cases of delay or default on the part of any public officer in the discharge of their duties and responsibilities ('Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', 2020).

On 27 April 2020, another Presidential Task Force was established by way of Gazette Extraordinary No. 2173/4 to study and provide instructions on measures to be taken by all armed forces to prevent Coronavirus infection among members of the tri-forces, and its remit was later expanded to include those addicted to drugs now under rehabilitation as well as inmates of the Prisons.²

More recently, the Presidential Task Force for National Deployment and Vaccination Plan for COVID-19 Vaccine was established by Gazette Extraordinary No. 2208/33 of 31 December 2020. Chief among the tasks assigned to the Task Force is the identification of "a safe and efficacious COVID-19 vaccine that is most appropriate for Sri Lanka in consultation with technical experts and on available evidence", and establishing appropriate and streamlined regulatory and administrative procedures for emergency approval and procurement in order to facilitate timely access to vaccines.

Among other structures established during the pandemic were the task forces to implement the policy of 'Vistas of Prosperity and Splendour.' The Task Force for Economic Revival and Poverty Alleviation was established by way of Gazette Extraordinary No. 2172/9 on 22 April 2020. This was followed by the Presidential Task Force to build a Secure Country, Disciplined, Virtuous and Lawful

² *Gazette (Extraordinary) No. 2185/41 of 21 July 2020*. Available at: http://www.documents.gov.lk/files/egz/2020/7/2185-41_E.pdf (Accessed: 14 June 2021).

Society (established by Gazette Extraordinary No. 2178/18) and the Presidential Task Force for Archaeological Heritage Management in the Eastern Province (established by Gazette Extraordinary No. 2178/17), both established on 2 June 2020 ('The Appointment of the Two Presidential Task Forces', 2020). These task forces were appointed during the absence of a functioning Parliament, where checks and balances were skewed in favour of the Executive.

Noteworthy is the fact that there are a number of existing legal and institutional frameworks, such as the Disaster Management Act No. 13 of 2005, which can facilitate the response to the crisis, raising questions about the need to resort to ad hoc measures such as task forces in the first place.

For instance, the National Council for Disaster Management established under the Disaster Management Act is required to formulate a National Disaster Management Plan which can facilitate the emergency response and relief, and recommend the allocation of funds for disaster management.³ The Disaster Management Centre (DMC) appointed by the Council is assigned several functions including the issuance of instructions and guidelines to appropriate organisations, non-governmental organisations, and district and divisional secretaries on activities relating to disaster management, and the implementation of coordinated work programmes with these organisations.⁴ In May 2005, the first National Disaster Management Council was established, and the Disaster Management Centre was subsequently appointed with offices in all districts to oversee disaster preparedness, early warning, and relief work in response to the Tsunami ('Sri Lanka, the tsunami and the evolution of disaster response', 2014).

Moreover, in the event that the counter-measures to respond to a disaster are beyond the resources or means normally available to the administration, the Act empowers the President to declare a state of disaster by Proclamation on the President's own motion or on

3 Section 4 of the *Disaster Management Act No. 13 of 2005*.

4 Section 8(2)(e) of the *Disaster Management Act No. 13 of 2005*.

the advice of the Council.⁵ Since epidemics are included within the definition of a disaster under the Act⁶ it can be reasonably inferred that the provisions detailed above can facilitate an efficient and expeditious government response to an unprecedented health crisis with sufficient oversight and accountability ('Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', 2020). Despite this, the government is yet to resort to implementing the Act and instead resorted to rule by task forces and other entities.

In addition to the task forces, several expert committees were appointed to provide recommendations and guidelines on COVID-19 related issues. Notable among these was the expert committee set up by the Ministry of Health on 24 December 2020 to study the controversial mandatory cremation regulations. ('Cremation Vs. Burial: Expert Panel Revises Recommendation To Include Both Cremation And Burial Of COVID-19 Dead Bodies', 2021) These arbitrary and discriminatory regulations, which lacked scientific merit and were contrary to the guidelines issued by the World Health Organisation (Saroor and de Soysa, 2020), prevented the Muslim community from practising their religious burial rites (*Report of the United Nations High Commissioner for Human Rights*, 2021). Submitting its recommendations, the expert committee stated that it has "...revised the recommendations on disposal of bodies to include both cremation and burial, while adhering to the specified safety precautions." ('Cremation Vs. Burial...', 2021) In February 2021, in response to sustained criticism by minorities in the country as well as national and international rights groups, the regulations were amended ('An Update on the Legal Framework to Address the COVID-19 Pandemic in Sri Lanka', 2021).

More recently, the Health Minister appointed another expert committee to study the international production of drugs and treatment to control COVID-19 ('Expert Committee to keep tab on new COVID therapies, vaccines', 2021) There were news reports of

5 Section 11 of the *Disaster Management Act No. 13 of 2005*.

6 Section 25k of the *Disaster Management Act No. 13 of 2005*.

similar bodies appointed to look into vaccination, such as the expert committee to recommend what age groups ought to receive the Sinopharm vaccine (Jayasinghe, 2021).

Despite the multiple entities created in 2020 and 2021, limited to no information is publicly available as to the functioning of these bodies.

Legal framework

The imposition of quarantine, curfew, police curfew, and the more recent travel restrictions since 2020 has generated confusion, due to a lack of clarity and information available in the public domain regarding their legal basis. These restrictions are often announced through press releases without citing the specific legal provisions to justify the curtailment of the right of free movement. Despite legal ambiguities, record numbers of arrests continue to be made due to alleged violations of these restrictions (Ranasinghe, 2021). Whilst the need to restrict free movement to contain the spread of the COVID-19 is not disputed, the confusion generated by the lack of an established legal framework provides leeway for the arbitrary and selective application of these restrictions, as the public loses confidence in the actions taken by the government to mitigate the effects of the health crisis.

Quarantine

From the very outset, the operation of quarantine regulations under the outdated Quarantine and Prevention of Diseases Ordinance, which was first introduced by the British on 9 February 1897 and last amended in 1952, (Gunasekara, 2020) has been a cause for concern.

The Ordinance does not provide the legal basis for the imposition of curfew (*HRCSL Recommendations on Regularizing the Imposition of Curfew*, 2020). While Section 2 of the Ordinance provides that “[T]he Minister may, from time to time, make... revoke or vary, such regulations as may seem necessary or expedient

for the purpose of preventing the introduction into Sri Lanka of any disease, and also preventing the spread of any disease in and outside Sri Lanka”⁷, matters in respect of which regulations may be made as listed under Section 3 make no mention of the power to impose a curfew.

Despite these concerns, several regulations were issued under the Quarantine and Prevention of Diseases Ordinance in recent months. These include:

1. Gazette Extraordinary No. 2167/18 - Friday, March 20, 2020 declaring COVID-19 a quarantinable disease for the purposes of the existing Quarantine Regulations passed under the Ordinance in 1925 and 1960, making these regulations applicable to procedures taken in relation to COVID-19.
2. Gazette Extraordinary No. 2168/6 of Wednesday, March 25, 2020 defining the proper authority and a diseased locality.
3. Gazette Extraordinary No. 2170/8 of Saturday, April 11, 2020 on mandatory cremation of persons who die of COVID-19.
4. Gazette Extraordinary No. 2197/25 of Thursday, October 15, 2020 on restriction of movement and guidelines to be followed in public places.
5. Gazette Extraordinary No. 2216/38 of Thursday, February 25, 2021 on cremation or burial of persons who die of COVID-19.

Concerns have been raised about the institutions and actors authorised to carry out the quarantine process. Regulations issued in October 2020 pertaining to the restriction of movement stipulated that a Proper Authority is accorded with the authority to remove any person diseased or suspected to be diseased in any house or place to be removed to a public hospital or other place provided for the

⁷ Section 2 of *Quarantine and Prevention of Diseases Ordinance No. 3 of 1897*.

purpose, or direct them to self-quarantine. Therefore, the Military or law enforcement involvement in the quarantine process contravenes these Regulations since neither is identified as a Proper Authority ('Q and A on Regulations Issued under the Quarantine and Prevention of Diseases Ordinance & how this impacts the COVID-19 response in Sri Lanka', 2020).

The legal basis for the continued arrests made due to alleged violations of quarantine regulations remains unclear as limited information is available in the public domain. In a letter to the Inspector General of Police (IGP) in May 2021, the Human Rights Commission drew attention to the importance of ensuring legality and non-discrimination with regards to these arrests (*IGP responds to HRCSL in respect to the arrest of persons violating quarantine rules*, 2021).

Sections 4(1)⁸ and 5(1)⁹ of the Quarantine and Prevention of Diseases Ordinance contain provisions that may authorise these arrests. Alternatively, sections 262¹⁰ and 264¹¹ of the Penal Code may also provide the basis for arrests ('An Update on the Legal Framework to Address the COVID-19 Pandemic in Sri Lanka', 2021).

8 Section 4(1) of the *Quarantine and Prevention of Diseases Ordinance No. 3 of 1897*. 'If any person, without lawful authority or excuse (proof whereof shall lie on him), contravenes any regulation made under this Ordinance, or does or omits to do anything which under the provisions of this Ordinance or of any regulations made thereunder he ought not to do or omit, or if he obstructs or impedes or assists in obstructing or impeding any inspector or other officer appointed under this Ordinance, or any police officer in the execution of any provision of this Ordinance or of any regulation made thereunder, he shall be guilty of an offence against this Ordinance.'

9 Section 5(1) of the *Quarantine and Prevention of Diseases Ordinance No. 3 of 1897*. 'If any person is guilty of an offence against this Ordinance, he shall be liable on conviction before a Magistrate to imprisonment of either description for a term not exceeding six months or to a fine not less than two thousand rupees and not exceeding ten thousand rupees, or to both.'

10 Section 262 of the *Penal Code of Sri Lanka*. 'Whoever unlawfully and 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.'

11 Section 264 of the *Penal Code of Sri Lanka*. 'Whoever knowingly disobeys any rule made and promulgated by Government for... regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.'

Curfew

The Government has consistently failed to make reference to the relevant legal provisions authorising the imposition of 'curfew' ('Curfew in response to COVID-19: Legal Framework and Relevant Questions in Sri Lanka', 2020). In June 2020, the Human Rights Commission noted that curfew should be imposed in a manner that is compatible with relevant provisions of the Constitution and international human rights obligations of the state (*HRCSL Recommendations on Regularizing the Imposition of Curfew*, 2020). While several statutes contain provisions for the imposition of curfew, it is unclear whether the requirements stipulated by these statutes have been met.

The power of the President to impose curfew has been laid out in the Constitution and the Public Security Ordinance. However, the Ordinance was not cited in the various press releases announcing 'quarantine curfews', and the term is not referenced in any known law. The government has often used such terminology which lacks a legal basis.

Section 16 of the Public Security Ordinance provides that "the President may, by Order published in Gazette, prohibit persons in a specific area, to be in public places between such hours as may be specified, except under the authority of a written permit granted by such person as may be specified in the Order." However, two requirements need to be met for such Order to be legally valid. Firstly, the requirement of publishing the Order in the Gazette must be fulfilled. Secondly, the Order needs to be communicated to Parliament, in the same manner a Proclamation of State of Emergency has to be communicated to Parliament (*HRCSL Recommendations on Regularizing the Imposition of Curfew*, 2020).

Both the Constitution and the Public Security Ordinance empower the President to make Emergency Regulations, if he is of the opinion that such regulations are "necessary or expedient in the interests of public security."¹² These regulations also

¹² Section 5 of the *Public Security Ordinance No. 25 of 1947*.

prevail over other laws¹³, and may override, amend or suspend the operation of the provisions of any law, except Constitutional provisions.¹⁴ They cannot be called in question in any court.¹⁵ However, for these regulations to come into operation, a Proclamation needs to be made to bring in a State of Emergency,¹⁶ with the approval of Parliament.

Police curfew

In several instances, ‘police curfew’ was imposed island-wide or in selected police jurisdictions (Foreign Ministry, Sri Lanka, 2020). There were no references to specific legal provisions which authorised the imposition of police curfews. Several provisions of the Penal Code relating to public nuisance read with the Police Ordinance may illustrate police officers’ role in ensuring public safety, but these provisions do not provide sufficient legal basis for the imposition of what is termed ‘police curfew’.

Sections 261¹⁷ and 262¹⁸ in the Penal Code on ‘Public Nuisances’ recognises the public right to safety. Additionally, Section 56 of the Police Ordinance provides that it is every police officer’s duty to use his best endeavours and ability to prevent public nuisances. However, this Ordinance does not contain any provisions

13 Section 7 of the *Public Security Ordinance No. 25 of 1947*.

14 Article 155(2) of the Constitution.

15 Section 8 of the *Public Security Ordinance No. 25 of 1947*.

16 Article 155(3) of the Constitution.

17 Section 261 of the *Penal Code of Sri Lanka*. ‘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.’

18 Section 262 of the *Penal Code of Sri Lanka*. ‘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.’

authorising the police to impose curfews ('Curfew in response to COVID-19: Legal Framework and Relevant Questions in Sri Lanka', 2020).

Legislation rushed through during the pandemic

While there was an urgent need to have laws that could be used to respond to the rapidly evolving health crisis, the priority of the government was to rush through other laws that further consolidated executive power and weakened Parliament. The 20th Amendment to the Constitution and the Colombo Port City Economic Commission Act are two examples of legislation rushed through amidst a pandemic. In contrast, there is yet to be a genuine effort by the government to introduce relevant laws to address the evolving health crisis. This is despite the private member Bill submitted by MP Sumanthiran on 19 October 2020 which, among other things, aimed to provide the legal basis for Parliament to declare a state of public health emergency and to adopt special measures in the interest of public health (Indrajith, 2020).

20th Amendment

The 20th Amendment to the Constitution was passed into law on 22 October following a mere two-day debate (*Sri Lanka: newly adopted 20th Amendment to the Constitution is blow to the rule of law*, 2020).

The principal changes made by the 20th Amendment sought to remove the checks and balances on the Executive Presidency. It abolished the limitations on Presidential powers in relation to key appointments to independent institutions through the Constitutional Council, which was replaced by the toothless Parliamentary Council, with the effect of providing unfettered discretion to the President to make appointments and compromise the independence of these institutions ('Statement on the Twentieth Amendment', 2020).

A particularly problematic procedural issue was the introduction of several new provisions at the Committee Stage, such as the increase of the number of superior court judges, which were absent in the gazetted Bill of the Amendment. Against the backdrop of the pandemic, introducing such provisions at the last stage of the constitutional amendment process to circumvent the requirement for judicial review and public engagement was antithetical to basic democratic principles (*Sri Lanka: newly adopted 20th Amendment to the Constitution is blow to the rule of law*, 2020).

Colombo Port City

19 petitions challenging several clauses of the Colombo Port City Economic Bill were filed in the Supreme Court. Among the petitioners were the Opposition and civil society groups¹⁹ who raised concerns about the potential implications of the bill on sovereignty, territorial integrity, and the rule of law. The Supreme Court in its determination suggested 25 amendments, which were promptly accepted by the government to pre-empt the requirement for a two-thirds majority in Parliament or a referendum to pass the Bill (Srinivasan, 2021).

Other concerns raised by critics included the limited opportunity given for public consultation and review during the legislative process. The day after the Supreme Court determination was announced, the Bill was hastily debated and passed within the span of the next two days. (‘Transparency International Sri Lanka continues to have serious concerns about new Colombo Port City Law’, 2021)

The undue haste with which these bills were passed in Parliament during the pandemic is a cause for concern, especially since the legislation has long term implications for the rule of law, sovereignty, and the fundamental rights of citizens.

19 ‘The Centre for Policy Alternatives (Guarantee) Limited and Dr. Paikiasothy Saravanamuttu vs. The Attorney General (SC SD 4/ 2021) (in re the Colombo Port City Economic Commission Bill)’, 2021.

Governance and rights issues

Politicised and militarised response

From the outset, the ability of those in the frontline to respond to and deal with the emergency, and the wealth of skill and expertise within the civil administration that can play a role in mitigating the crisis were apparent ('Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force', 2020). However, prominence was given in the emergency response to military personnel and technocrats aligned to the President, at the expense of side-lining experienced civil service with expertise in health and other relevant subjects (Fonseka, 2020).

Militarisation has continued to permeate various aspects and levels of the pandemic response, as oft-repeated references to discipline and efficiency are made to allay concerns about its adverse effects. For instance, former and present military officials were appointed to positions in government including the post of Secretary to the Ministry of Health and the Director General of the Disaster Management Centre. Moreover, the composition of the task forces appointed in response to the pandemic included several members with a military background ('Technocratic Populism and the Pandemic State', 2020). In January 2021, senior army officers were entrusted with the coordination of COVID-19 prevention measures and overseeing the quarantine process at the district level. The appointments of these officers were made on the recommendations of Army Commander Shavendra Silva ('Army officers to coordinate COVID-19 prevention measures', 2021). As head of the NOCPCO, he has become the public face of the response, as key decisions and announcements linked to the health crisis continue to be communicated by him (Fonseka, 2020).

At the ground level, the heavily militarised nature of the pandemic response could be witnessed in relation to contact tracing, manning checkpoints (*Sri Lanka: Increasing Suppression of Dissent*, 2020), and administering vaccines, (Jayawardana, 2021) in addition to the forcible transportation of persons to quarantine centres (*Sri*

Lanka: vulnerable groups pay the price for militarization of COVID-19 response, 2020b) and the usage of drones to monitor isolated areas (Charindra, 2020).

The entrenchment of militarisation is also exemplified by the framing of the pandemic in security jargon, with the response to the pandemic being termed as a ‘war on the pandemic’ and a ‘national security challenge’ rather than being treated as a health crisis (Fonseka, 2020). The pandemic provides a convenient justification for an expansive military and security sector, and serves to legitimise and normalise certain practices implemented under the guise of the emergency response. While the military has a role to play during an emergency, it does not justify the current level of military involvement in public office and civilian space, which may have long-term implications for Sri Lanka’s constitutional democracy.

In addition, several key appointments related to the newly established ad hoc structures and public institutions exemplify the politicisation of the pandemic response. Prominent among these appointments are several task forces chaired by Basil Rajapaksa, including the Presidential Task Force on Continuous Supply, Operation and Coordination of Essential Services. This appointment gave rise to the accusation that government supporters were being prioritised in the distribution chain. Moreover, the distribution of Rs. 5,000 to selected households was mired in controversy, since the selection of households was made by local government authorities with minimal oversight (Colombage, 2020a). Additionally, the appointment of a number of retired and currently serving military officials to key positions in the public sector highlighted the politicisation inherent even in the militarisation of public institutions amidst the ongoing public health crisis.

Repression

The health crisis has also been used as a pretext to quell dissent. In April 2020, senior lawyer and activist Hejaaz Hizbullah was arrested by the Criminal Investigation Department (CID) following a call from the Ministry of Health cautioning him to remain at home

(Ruwanpathirana, 2020). United Nations High Commissioner for Human Rights Michelle Bachelet expressed alarm at the clampdown on freedom of expression during the COVID-19 pandemic (*Asia: Bachelet alarmed by clampdown on freedom of expression during COVID-19*, 2020), as reports emerged of arbitrary arrest and intimidation of those who allegedly criticise the government.

The Acting Inspector General of Police had previously warned that legal action would be taken against those who publish posts on social media criticising government officials while highlighting minor shortcomings ('Strict action against those criticise state officials on social media', 2020). In a letter to the Acting IGP, the Human Rights Commission observed that the arrest of individuals for the mere criticism of public officials or policies would be unconstitutional (*Limiting Freedom of Expression in a Democracy: The Need to Strike a Lawful Balance*, 2020).

The recently formed special CID team is set to take action against the dissemination of 'fake news' on social media platforms, especially since it has allegedly created "various issues in respect of public movements and the prevention programmes for dengue and COVID-19." (Nathaniel, 2021)

Laws and regulations invoked to ostensibly manage the health crisis are also instrumental in significantly curtailing fundamental rights of speech, association, and personal liberty. The climate of repression exacerbated by the militarised response to the health crisis may also have a lasting impact on substantive democracy. The measures implemented to quell dissent have the effect of shrinking the space for civic engagement in political processes, and citizens may be reluctant to express views in online and offline spaces due to fear of arrest or reprisal.

Effects on marginalised and vulnerable groups

The COVID-19 crisis has revealed existing societal fault lines and exacerbated structural inequalities in society, as marginalised and vulnerable groups such as daily wage earners, Free Trade Zone (FTZ) workers, migrant workers, and the estate community continue to

bear the brunt of the crisis ('Socio-Economic Index in the face of COVID-19', 2021). Curfews and lockdowns to contain the spread of COVID-19 has impacted millions of daily wage earners ('Partial shutdown sinks small businesses, daily wage earners', 2020), and many migrant workers remain stranded mostly in the Gulf States, without accommodation or access to repatriation flights (Hamza, 2021).

Of particular concern at present is the spread of COVID-19 among FTZ workers, who were recently prioritised in the vaccination plan (Gunawardana and Padmasiri, 2021). Overcrowding in prisons is also a concern in light of the health crisis which, in one instance, culminated in a riot in Mahara prison where 11 inmates were killed as a result (Srinivasan, 2020). While existing frameworks and newly implemented ad hoc structures do prevail to address these concerns, the persistence of these issues reveals gaps in implementation that need to be rectified.

The surge in domestic violence cases during the lockdown is yet another troubling trend that requires attention. Restrictions on movement in addition to economic and social stresses triggered by the health crisis (UNICEF, 2020) have exacerbated the effects of several risk factors related to domestic violence and limited access to law enforcement authorities and support networks for those at risk (Fonseka, 2021). The gaps in the implementation of the existing legal framework set in place to mitigate these pressing issues need to be addressed.

The effects of the COVID-19 response on the Muslim community were widely criticised, as the marginalisation and stigmatisation of the minority community, which predates the onset of the pandemic, was exacerbated as a result of discriminatory regulations and practices (Fonseka and Dissanayake, 2021). In particular, the Regulations issued by Gazette Extraordinary No. 2170/8 of 11 April 2020 made it mandatory to cremate the body of a person who has died or is suspected to have died of COVID-19 ('Q and A on Regulations Issued under the Quarantine and Prevention of Diseases Ordinance & how this impacts the COVID-19 response in Sri Lanka', 2020). The United Nations human rights experts

noted that the mandatory cremation policy amounts to a human rights violation, since “[T]here has been no established medical or scientific evidence in Sri Lanka or other countries that burial of dead bodies leads to increased risk of spreading communicable diseases such as COVID-19.” (*Sri Lanka: Compulsory cremation of COVID-19 bodies cannot continue, say UN experts*, 2021) In the face of widespread criticism, these regulations were amended to include burial in addition to cremation (‘An Update on the Legal Framework to Address the COVID-19 Pandemic in Sri Lanka’, 2021).

The Muslim community was also targeted as a result of unethical reporting on COVID-19 cases which highlighted the ethnicity of Muslim patients, in an attempt to insinuate that Muslims were to blame for the first wave of the COVID-19 crisis (Ganeshathasan, 2021). Concerns raised by national and international rights groups about these reports were left largely unaddressed.

Irregularities in the vaccine rollout

The vaccine rollout in Sri Lanka began on 29 January 2021. While many on the frontlines of the COVID-19 response including health sector workers received the first dose, the General Secretary of the All Ceylon Nurses Union claimed that nurses are yet to receive the vaccine (‘Nurses yet to receive COVID-19 vaccines; union claims’, 2021), raising concerns about the applicable criteria for risk prioritisation. Current information available on the island-wide deployment of the vaccine is inadequate and unreliable, as the attention has largely been focused on the vaccine drive in the Western province (‘An Update on the Legal Framework to Address the COVID-19 Pandemic in Sri Lanka’, 2021). In addition to these challenges, allegations were made against several politicians for interfering with the vaccination process (Sangakkara, 2021), and influencing health workers at vaccination centres to disregard priority lists and registrations in administering the vaccine (Dewasiri, 2021).

The inadequacies in planning, prioritisation, and risk communication (‘Sri Lanka’s vaccination drive in disarray - College of Community Physicians highlights six key issues’, 2021) added to

the fear and uncertainty surrounding the ongoing vaccine rollout amidst the recently imposed travel restrictions, signalling the need for effective decision-making and a consolidated public campaign to provide information to the public on the rollout process. At present, there is a need to clarify the leadership, organisational structure, and lines of responsibility on decisions with regards to COVID-19 measures ('Let's talk about the vaccine: the need for strategy, clarity and equality', 2021), particularly in relation to the vaccine rollout.

Effects on transparency and accountability

Dissolution of Parliament

The absence of a functioning Parliament during the early stages of the public health crisis had significant implications for the pandemic response and contributed to the already prevalent trend of executive aggrandisement. On 2 March 2020, prior to the COVID-19 outbreak in Sri Lanka, Parliament was dissolved by the President.²⁰ On 19 March, upon the conclusion of the period for nominations, the Election Commission decided to postpone elections as the health crisis escalated. Concerns were raised about the effects of a dissolved Parliament during an emergency, as it would prevent the government from using several existing mechanisms set in place to deal with the emergency. Further, the dissolution of Parliament also provided the Executive with unfettered control over public finance with minimal oversight. It is notable that despite the need for a prompt and effective response at the early stages of the health crisis necessitating the use of these existing mechanisms, the Gazette dissolving Parliament was not revoked by the President. During the months in which the Parliament remained dissolved, the checks and balances were skewed in favour of the Executive as the President established ad hoc structures and issued regulations intended to manage the health crisis.

²⁰ Gazette (Extraordinary) No. 2165/8 of 2 March 2020.

Public finance and the Itukama Fund

The economic dimension of the pandemic response, coupled with the need for transparent and accountable management of public finance and government-led fund-raising initiatives is another area worth exploring as the pandemic continues to have detrimental effects on the health of the national economy. It was hoped that the revival of the flagging economy hit by the pandemic would be the main focus of the Appropriation Bill of 2021.

However, the health sector allocation for the central government was Rs. 235 billion (6.43% of government expenditure) compared to the Rs. 348 billion (9.55% of the government expenditure) allocated to the defence sector in the 2021 budget which was passed in Parliament on 10 December 2020 ('Public Report on the 2021 budget: assessment on whether the expenditure allocations and taxation policies are in line with the government's policy', 2020). Critics were equally baffled by the allocations made for certain arbitrarily selected infrastructure projects, such as urban townships, road construction, and walking paths (Colombage, 2020b). In April 2021, Prime Minister Mahinda Rajapaksa announced the allocation of an additional Rs. 18 billion for the expansion of health facilities (Ghosh, 2021).

It is in this context that the 'Itukama COVID-19 Healthcare and Social Security Fund' was established in March 2020 for the purpose of facilitating public donations to help mitigate the COVID-19 crisis and assist related welfare programmes. Whilst the Fund had reportedly accumulated a total of Rs. 1.7 billion, the lack of transparency and accountability with regards to the donations and their distribution has been a topic of public discussion due to its underutilisation amidst an escalating health crisis. On 10 May 2021, the President's Media Division (PMD) released a statement setting out the income and expenditures of the Fund since its establishment. According to the statement, only 23% of the Fund has been utilised to date. The remainder of the Fund is expected to be spent on the vaccination drive ('Remaining 'ITUKAMA' COVID-19 Fund for', 2021)

On 12 May, the Auditor General's Department stated that it had begun auditing the Fund upon the request of the Presidential Secretariat (Thomas, 2021). However, Deputy Auditor General P.L.K. Perera later clarified that the National Audit Office (NAO) does not possess the constitutional powers to audit the Fund directly, since it has not been passed in Parliament under a separate Act. Accordingly, the audit shall have to take place during the annual Presidential Secretariat Audit. The Deputy Auditor General further asserted that the NAO will commence the audit and complete it before the next budget is presented in Parliament (Mudugamuwa, 2021).

These institutional crises can be contextualised within existing social crises, while also having short-term and long-term socio-economic implications. On the one hand, the lack of institutional transparency and accountability and the increasingly centralised decision-making by the executive arm of the government may impede the successful containment of COVID-19 and recovery from the economic fallout, with the effect of further deepening socio-economic rifts (Fonseka, Ganeshathasan, and Welikala 2020). On the other, growing inequalities, marginalisation, and the pervasive culture of impunity are reflected at the institutional level and may lead to diminishing public trust and participation in institutional processes.

Conclusion

Pandemic governance in Sri Lanka is characterised by opaque and militarised structures, selectively applied regulations, and the disregard for existing institutions, mechanisms, and expertise in responding to the public health crisis. While the success in containing the first wave of COVID-19 is commendable, mismanagement and convoluted communication by the government at present may escalate the risks posed by the current upsurge in cases. Ongoing processes of politicisation, militarisation, executive aggrandisement, and the marginalisation of vulnerable communities may also have lasting effects on the rule of law, separation of powers, and the

rights of citizens, and contribute towards the trend of democratic backsliding that is currently underway (Fonseka and Dissanayake, 2021).

The pandemic has already provided a springboard for the curtailment of rights related to speech, association, and liberty, and the negation of democratic principles in favour of entrenching populist authoritarianism, contributing to the already prevalent climate of fear and intimidation. As such, it is imperative that swift action is taken to ensure transparency and accountability in and of the pandemic response, and measures are in place to prevent further democratic decay.

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