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Due Process during COVID-19 in Sri Lanka

ASIA'S PATH FORWARD

By Nishana M Weerasooriya and Ahalya Lelwala | 16 September 2020

INTRODUCTION

On 11 March 2020, the novel coronavirus (COVID-19) was declared a pandemic by the World Health Organization (WHO).¹ In Sri Lanka, the first diagnosis of COVID-19 was reported on 27 January 2020.² Indication of the spread of the virus was visible from 11 March 2020, after the second patient, a local, was reported to have contracted the virus.³ As a result, the Sri Lankan government on 20 March 2020, imposed a curfew island-wide,⁴ and ordered sectors other than essential services to adopt a 'work from home' model.⁵ From 11 May 2020, civilian life and economic affairs returned to normal despite the imposition of a full/partial curfew in parts of the island.⁶ Finally, on 28 June 2020, the curfew was completely lifted.⁷ The Sri Lankan government's response to COVID-19, albeit prompt and well-received,⁸ have affected several sectors in Sri Lanka, including the judicial sector. Since 16 March 2020, the normal functioning of Sri Lankan courts was disrupted. The Judicial Service Commission Secretariat

¹ "WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020," World Health Organization, March 11, 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (accessed May 23, 2020).

² "Chinese woman at IDH tested positive for coronavirus," Daily Mirror, January 27, 2020, http://www.dailymirror.lk/breaking_news/Chinese-woman-at-IDH-tested-positive-for-coronavirus/108-181996 (accessed May 23, 2020).

³ "Sri Lankan tests positive for coronavirus," Daily News, March 11, 2020, <https://www.dailynews.lk/2020/03/11/local/214046/sri-lankan-tests-positive-coronavirus> (accessed May 23, 2020); "First Sri Lankan in SL infected with Covid-19 found," Daily Mirror, March 11, 2020, http://www.dailymirror.lk/top_story/First-Sri-Lankan-in-SL-infected-with-Covid-19-found/155-184635 (accessed May 23, 2020).

⁴ "Island-wide curfew imposed," President's Media Division, March 20, 2020, <http://www.pmdnews.lk/%e0%b6%85%e0%b6%af-%e0%b6%b4%e0%b7%83%e0%b7%8a%e0%b7%80%e0%b6%bb%e0%b7%94-06-00-%e0%b7%83%e0%b7%92%e0%b6%a7-%e0%b7%83%e0%b6%b3%e0%b7%94%e0%b6%af%e0%b7%8f-%e0%b6%b4%e0%b7%99%e0%b6%bb%e0%b7%80%e0%b6%bb/> (accessed May 23, 2020).

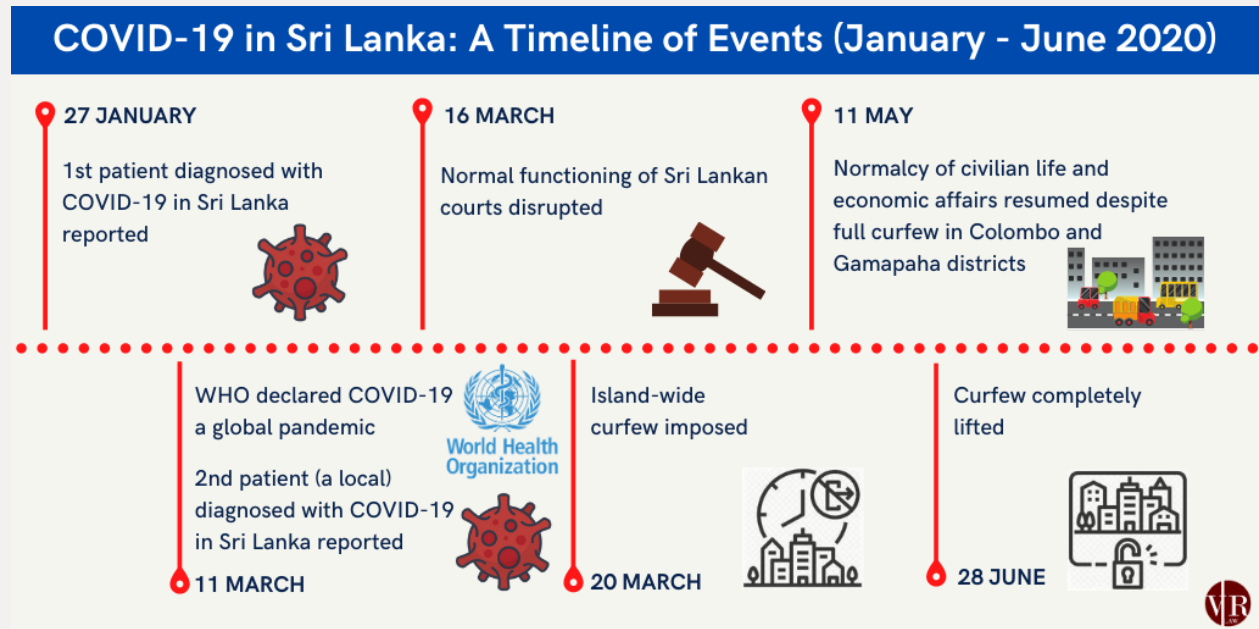
⁵ "More stern measures to curb COVID – 19," President's Media Division, March 20, 2020, <http://www.pmdnews.lk/%e0%b6%9a%e0%b7%9c%e0%b6%bb%e0%b7%9d%e0%b6%b1%e0%b7%8f-%e0%b6%b4%e0%b7%8f%e0%b6%bd%e0%b6%b1%e0%b6%ba%e0%b6%a7-%e0%b6%ad%e0%b7%80%e0%b6%ad%e0%b7%8a-%e0%b6%b4%e0%b7%92%e0%b6%ba%e0%b7%80%e0%b6%bb/> (accessed May 23, 2020); "Work from Home period extended till April 20th," President's Media Division, April 13, 2020, <http://www.pmdnews.lk/prevention-of-covid-19/> (accessed May 23, 2020).

⁶ "Updated announcement on curfew," President's Media Division, May 10, 2020, <http://www.pmdnews.lk/updated-announcement-on-curfew-2/> (accessed July 16, 2020).

⁷ "Curfew completely lifted," President's Media Division, June 28, 2020, <http://www.pmdnews.lk/%e0%b6%87%e0%b6%b3%e0%b7%92%e0%b6%bb%e0%b7%92-%e0%b6%b1%e0%b7%93%e0%b6%ad%e0%b7%92%e0%b6%ba-%e0%b6%b8%e0%b7%94%e0%b7%85%e0%b7%94%e0%b6%b8%e0%b6%b1%e0%b7%92%e0%b6%b1%e0%b7%8a-%e0%b6%89%e0%b7%80/> (accessed July 16, 2020).

⁸ Nadira Gunatilleke, "WHO Chief lauds Sri Lanka's COVID-19 response," Daily News, April 1, 2020, <https://www.dailynews.lk/2020/04/02/local/215581/who-chief-lauds-sri-lanka%E2%80%99s-covid-19-response> (accessed May 23, 2020); "WHO Chief phones President to discuss COVID-19 impact," Daily FT, April 2, 2020, <http://www.ft.lk/healthcare/WHO-Chief-phones-President-to-discuss-COVID-19-impact/45-698394> (accessed May 23, 2020).

(JSC) directed all high courts, district courts, magistrate’s courts, and labor tribunals to avoid hearing of cases in open court, except for pressing and crucial matters.⁹ However, the JSC noted that this restriction did not extend to hearing matters relating to bail.¹⁰ The JSC also recommended the use of communication technologies such as virtual court proceedings to grant bail or to extend the duration of remand.¹¹ (See Figure 1: Timeline of events in relation to Covid-19 in Sri Lanka).



‘Due process of law’ means, in essence, that governments must uphold the legal safeguards that protect citizens’ rights to life, liberty, and property.¹² Due process encompasses several rights of the defendant, such as the right to be informed of the reasons for arrest, the right to a fair hearing before an impartial judge and jury, the right to be presumed innocent until proven guilty, and the right to

⁹ “JSC/SEC COR: 1,” Sri Lanka Judicial Service Commission Secretariat, March 16, 2020, <http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-01.pdf> (accessed May 23, 2020).

¹⁰ “JSC/SEC COR: 2 - Measures in view of preventing the spread of COVID-19 Virus,” Sri Lanka Judicial Service Commission Secretariat, March 19, 2020, <http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-02.pdf>; “JSC/SEC COR: 3,” Sri Lanka Judicial Service Commission Secretariat, March 26, 2020, <http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-03.pdf>; “JSC/SEC COR: 3(i),” Sri Lanka Judicial Service Commission Secretariat, March 30, 2020, <http://www.jsc.gov.lk/web/images/pdf/Circular/Covid19/jsc-sec-cor-03i.pdf> (accessed May 23, 2020).

¹¹ “JSC/SEC COR: 1”; “JSC/SEC COR: 2 - Measures in view of preventing the spread of COVID-19 Virus.”

¹² Black’s Law Dictionary, 6th Edition. (1990), s.v “due process of law”, accessed June 24, 2020, p. 500-501.

legal representation.¹³ The Constitution of Sri Lanka upholds individuals' due process rights in Articles 12 and 13. Article 12 guarantees the right to equality before the law, while Article 13 guarantees freedom from arbitrary arrest, detention, and punishment. The Supreme Court of Sri Lanka has noted: 'Article 13(2) embodies a basic constitutional safeguard, almost universally recognized: that judge and suspect must be brought face-to-face, before liberty is curtailed,' even under restrictive laws like Sri Lanka's Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA).¹⁴ This principle reflects a procedural safeguard, which is often crucial to prevent the abuse of persons in custody. Production before a magistrate can be important to ensuring the humane treatment of persons in custody, as it provides an opportunity for a judicial officer to examine the suspect, and for the suspect to complain of ill treatment.

Furthermore, the International Covenant on Civil and Political Rights (ICCPR) in Article 9 protects an individual's right to liberty and security of person, including the right to be protected from arbitrary arrests or detention; and the right to be produced before a judicial officer immediately following arrest or detention. Sri Lanka ratified the ICCPR in 1980.¹⁵ Sri Lanka subsequently enacted the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 to give effect to certain parts of the Covenant. The basic features of Article 9 of the ICCPR, however, were already reflected to a great extent in Article 13 of the Sri Lankan Constitution.

However, the concept of due process and the dignity of the accused faces significant challenges in Sri Lanka. Many segments of society view punishment as retributive justice – where the suffering of the perpetrator is justified. Prejudices such as ethnicity, religion, and type of offense shape society's willingness to accept that equal protection of the law, fundamental rights and human dignity are rights of every citizen,¹⁶ and that such rights extend to perpetrators of crime. The Supreme Court of Sri Lanka, quoting a U.S. Supreme Court case, observes: "[A] prisoner is not wholly stripped of constitutional

¹³ *ibid.*

¹⁴ *Weerawansa v. The Attorney-General and Others* [2000] 1 Sri. L.R. 387 (Supreme Court of Sri Lanka) p. 415.

¹⁵ "UN Treaty Body Database – Sri Lanka," United Nations Human Rights Office of the High Commissioner, accessed July 16, 2020, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN.

¹⁶ See *Kandawalage Don Samantha Perera v. Officer in Charge, Hettipola Police Station*. 2020, S.C. FR Application No. 296/2014 (Supreme Court of Sri Lanka, June 16) citing *Ajith Perera v. Daya Gamage et al.* 2019, SC FR Application No. 273/2018 (Supreme Court of Sri Lanka, April 18) p. 23, http://www.supremecourt.lk/images/documents/sc_fr_296_2014.pdf (accessed July 31, 2020) p. 4. The Court notes: "The concept of human dignity, which is the entitlement of every human being, is at the core of the fundamental rights enshrined in our Constitution."

protections when he is imprisoned for crime. *There is no iron curtain drawn between the Constitution and the prisons*" (emphasis added).¹⁷

The selective application of due process rights, often to the exclusion of minorities or persons overtly critical of the government, Buddhism, or the Buddhist clergy, predates the COVID-19 pandemic. For instance, in April 2019, a prominent writer, Shakthika Sathkumara, wrote a fictional story that allegedly offended Buddhism and the Buddhist clergy, and was arrested and detained. He was granted bail approximately four months after his arrest.¹⁸ The pandemic has exacerbated the selective application of due process rights in Sri Lanka. There is greater space for selectivity and abuse of process as there is limited access to courtrooms and judges who enforce the law, despite measures put in place by the JSC.

This article will discuss the fulfilment of due process rights when arrests were made during the COVID-19 curfew period in Sri Lanka. It will briefly identify the legal framework used for those arrests, highlight the due process requirements contained therein, and analyze the state of due process in Sri Lanka. The article will argue that compliance with due process standards has become more ad hoc depending on the political nature of the offense. It will conclude that such discriminatory compliance undermines the rule of law and democratic values in Sri Lanka and will suggest recommendations to address these challenges to democracy.

Due process standards for arrests made during COVID-19 from 16 March – 14 April 2020

The police issued an internal directive to the Criminal Investigations Department (CID) and Officer in Charge (OIC) of police stations across the country, to arrest persons who make or share false or malicious content on social media criticizing government officials involved in preventing the spread

¹⁷ Rathnayake Tharanga Lakmali v. Niroshan Abeykoon (Inspector of Police – Embilipitiya Police Station), SC/FR Application 577/2010 (Supreme Court of Sri Lanka) Judgement decided on December 17, 2019, http://www.supremecourt.lk/images/documents/sc_fr_577_2010.pdf (accessed July 31, 2020) p. 12, quoting United States Supreme Court *Wolff v. McDonnell*, 418 US 539, 555-6 (1974).

¹⁸ Shakthika Sathkumara was arrested for writing a fictional story that insinuated an incident of abuse within the Buddhist temple. He was arrested under the ICCPR Act on the basis that his novel offended Buddhism. He was arrested on 1 April 2019. Although he was produced before a magistrate on several occasions, his request for bail was taken up only on 9 July 2019 before a high court judge, and he was granted bail on 5 August 2019. See Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April – 1 May 2020, "Opinion No. 8/2020 concerning Shakthika Sathkumara (Sri Lanka)", A/HRC/WGAD/2020, May 5, 2020, <http://www.freedom-now.org/wp-content/uploads/2020/05/WGAD-Opinion-8-2020-Sri-Lanka.pdf> (accessed July 31, 2020) pp. 2-4.

of COVID-19 in Sri Lanka.¹⁹ However, on a later date, the government clarified that the police internal directive, only applied to cases in which the 'fake or malicious' information contravened laws surrounding duties of public officers and not mere criticism of the government.²⁰

This section examines selected arrests made during the period from 16 March 2020 to 14 April 2020. The arrests include cases directly related to COVID-19, as well as other arrests made in connection to the 2019 Easter Sunday Attacks.²¹

Table 1: Details of selected arrests from 16 March - 14 April 2020

EX.	INCIDENT DETAILS	RELEVANT LAW	DATE OF ARREST	PRODUCED BEFORE A JUDGE (REMANDED OR BAIL SET)	DUE PROCESS REQUIREMENTS
1	Individual arrested for allegedly using his Facebook account to create and share false content regarding the number of COVID-19 deaths in Sri Lanka. ²²	Penal Code Sri Lanka Computer Crimes Act, No. 24 of 2007: Section 6	16 March 2020	Released on bail on 16 March 2020. ²³	Computer Crimes Act, section 21 provides: when a warrant-less arrest is made, the defendant shall be produced before a judge within 24 hours.
2	Individual arrested for reportedly using his Facebook account to falsely claim that the coronavirus	Penal Code	24 March 2020	Ordered to be remanded till 1 April 2020.	

¹⁹ “ධන්‍යාදායක සහ අනවසරයෙන් මාධ්‍යය සහ ඊවසයාවලින් ප්‍රචාරය කරන ප්‍රචේතනාත්මක ව්‍යවස්ථාපිත දැඩි නීතිමය පියවර,” (“Strict legal action against people posting false information and malicious statements via the internet”), Police Log Book, Ministry of Defence Sri Lanka, April 1, 2020, http://www.defence.lk/upload/police_report/Media%20on%202020.04.01%20at%201210.pdf (accessed June 23, 2020).

²⁰ “Sri Lanka raises concerns on reference to Sri Lanka in OHCHR press release,” Media Release, Ministry of Foreign Relations – Sri Lanka, June 9, 2020, <https://www.mfa.gov.lk/sri-lanka-raises-concerns-on-reference-to-sri-lanka-in-ohchr-press-release/> (accessed June 23, 2020). The clarification was disclosed in a letter to Michelle Bachelet, the United Nations High Commissioner for Human Rights, dated 8 June 2020.

²¹ On Easter Sunday on 21 April 2019, six coordinated bombings took place across three churches respectively, in Colombo, Negombo and Batticaloa, while another three attacks occurred at three popular hotels in Colombo. The attacks were committed by a local radical Islamist group known as National Thowheed Jamaanth (NTJ). See “Sri Lanka attacks: What we know about the Easter bombings,” BBC News, April 28, 2019, <https://www.bbc.com/news/world-asia-48010697> (accessed July 22, 2020).

²² “Two arrested for spreading false information on Covid-19 on social media,” Ada Derana, March 16, 2020, <http://www.adaderana.lk/news/61420/two-arrested-for-spreading-false-information-on-covid-19-on-social-media> (accessed June 24, 2020).

²³ “Man suspected of spreading false information on coronavirus granted bail,” Colombopage, March 16, 2020, http://www.colombopage.com/archive_20A/Mar16_1584376889CH.php (accessed May 23, 2020).

	pandemic in Sri Lanka had resulted in the death of ten people. ²⁴	Computer Crimes Act: Section 6			
3	Individual arrested for allegedly using his Facebook account to falsely claim that VIPs were specifically allocated to the Kotalawala Defense University as a quarantine center. ²⁵	Penal Code Computer Crimes Act: Section 6	1 April 2020.	Ordered to be remanded till 9 April 2020.	
4	The CID arrested an individual for allegedly using her Facebook account to state that the president had contracted the coronavirus. ²⁶	Penal Code Computer Crimes Act: Section 6	5 April 2020	Ordered to be remanded till 9 April 2020.	
5	The CID arrested Hejaaz Hizbullah, a prominent lawyer in Sri Lanka. ²⁷	Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979. ²⁸	14 April 2020	Not produced before a magistrate's court since his arrest. ²⁹	Section 7(1) of the PTA states: any person arrested should be produced within 72 hours before a magistrate unless a detention order has been made.

²⁴ "Educational administrator remanded for uploading fake news," Daily News, March 25, 2020, <http://www.dailynews.lk/2020/03/26/law-order/215175/educational-administrator-remanded-uploading-fake-news?page=32> (accessed May 23, 2020); "Uni. employee remanded for spreading fake news on COVID-19," Ada Derana, March 25, 2020, <http://www.adaderana.lk/news/61822/uni-employee-remanded-for-spreading-fake-news-on-covid-19> (accessed June 24, 2020).

²⁵ "Uni. student arrested for spreading false info on Covid-19," Ada Derana, April 2, 2020, <http://www.adaderana.lk/news/62172/uni-student-arrested-for-spreading-false-info-on-covid-19> (accessed June 24, 2020); Lakmal Sooriyagoda, "University student remanded for uploading fake news," Daily News, April 2, 2020, <http://www.dailynews.lk/2020/04/03/law-order/215679/university-student-remanded-uploading-fake-news> (accessed May 23, 2020).

²⁶ "Directress of a dancing institute remanded for spreading false news about the President," Newswire, April 6, 2020, <http://www.newswire.lk/2020/04/06/directress-of-a-dancing-institute-remanded-for-spreading-false-news-about-the-president/> (accessed May 23, 2020).

²⁷ "Lawyer Hejaaz Hisbullah arrested over Easter Sunday attack," Daily Mirror, April 15, 2020, http://www.dailymirror.lk/breaking_news/Lawyer-Hejaaz-Hisbullah-arrested-over-Easter-Sunday-attack/108-186622 (accessed May 24, 2020).

²⁸ "ICJ raises concerns on arbitrary arrest, detention of lawyer Hejaaz Hizbullah," Daily FT, April 22, 2020, <http://www.ft.lk/news/ICJ-raises-concerns-on-arbitrary-arrest-detention-of-lawyer-Hejaaz-Hizbullah/56-699090> (accessed May 25, 2020).

²⁹ As of 29 July 2020, Hizbullah had not been produced before a magistrate since his arrest. See "185 lawyers write to BASL Chief with fresh appeal," Daily FT, May 21, 2020, <http://www.ft.lk/news/185-lawyers-write-to-BASL-Chief-with-fresh-appeal/56-700528> (accessed May 25, 2020).

				On 1 July 2020, the Fort Magistrate refused the request to produce Hizbullah in court. ³⁰	Section 9 provides: A detention order can be issued by the Minister of Defence to detain the suspect for a duration of three months at a time. The detention order can be renewed up to eighteen months.
6	Ramzy Razeek was arrested for allegedly uploading a post on Facebook – <i>‘Muslims have been surrounded on all sides by racist groups operating in the country.... It is time to prepare for an ideological jihad for the country and all its citizens, using the pen and keyboard as weapons.’</i> ³¹	International Covenant on Civil and Political Rights Act, No. 56 of 2007. Computer Crimes Act. ³²	9 April 2020	Produced before the magistrate on several occasions, who ordered the extension of his remand period. He is yet to be granted bail. ³³	Section 3(4) of the ICCPR Act states: no person suspected or accused of an offense under section 3 shall be enlarged on bail, except by the High Court in exceptional circumstances.

³⁰ Shavini Madhara, “Easter Sunday attacks: Magistrate rejects request to produce Hizbullah in court,” Daily News, July 2, 2020, <http://www.dailynews.lk/2020/07/02/law-order/222075/magistrate-rejects-request-produce-hizbullah-court> (accessed July 2, 2020).

³¹ “Sri Lanka: Due Process Concerns in Arrests of Muslims - Government Critic, Lawyer Detained,” Human Rights Watch, April 23, 2020, <https://www.hrw.org/news/2020/04/23/sri-lanka-due-process-concerns-arrests-muslims> (accessed May 25, 2020). The post on Razeek’s Facebook account was in Sinhala.

³² “Sri Lanka: Health concerns for detained blogger: Ramzy Razeek,” Amnesty International, May 20, 2020, <https://www.amnesty.org/en/documents/asa37/2357/2020/en/> (accessed May 25, 2020).

³³ As of 29 July 2020, Razeek is yet to be granted bail. Ibid.; Damith Chandimal and Ruki Fernando, “Freedom of Expression vs. Hate Speech, Fake and Misleading News,” Groundviews, May 3, 2020, <https://groundviews.org/2020/05/03/freedom-of-expression-vs-hate-speech-fake-and-misleading-news/> (accessed June 26, 2020).

“An open letter to HRCSL: Uphold Ramzy Razeek’s fundamental right to freedom of speech, expression and publication,” Sri Lanka Brief, June 24, 2020, <https://srilankabrief.org/2020/06/an-open-letter-to-hrcsl-uphold-ramzy-razeeks-fundamental-rights-to-freedom-of-speech-expression-and-publication/> (accessed June 26, 2020).

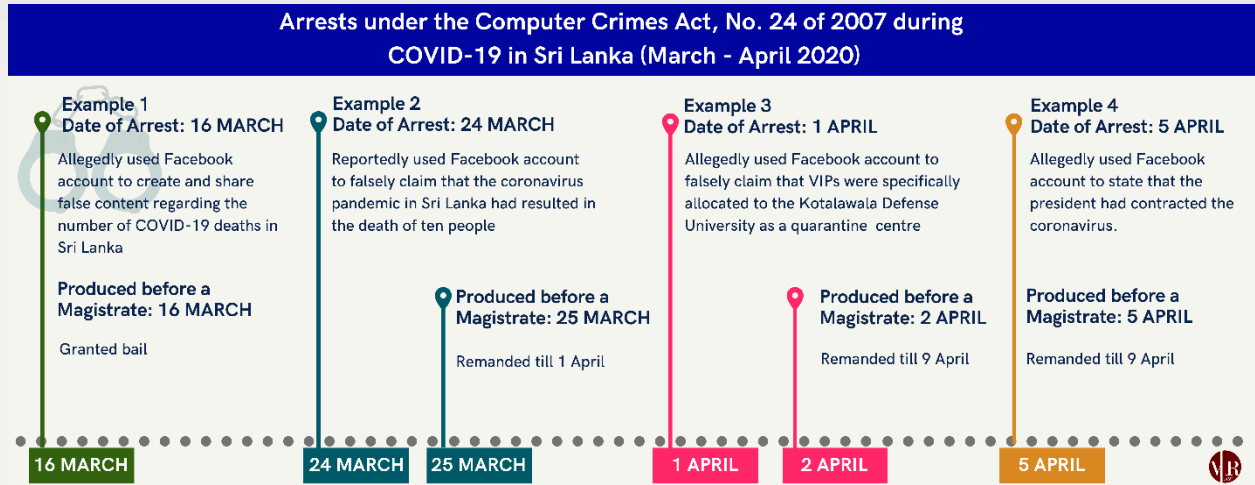


Figure 2: Arrests under CCA

Consistent compliance with due process standards under the Computer Crimes Act

The arrests in examples 1 – 4, were reportedly made under the Penal Code and section 6 of the Computer Crimes Act (CCA). Section 6 provides that it is an offense if any person uses a computer with intent to perform a function ‘knowing or having reason to believe that such function will result in danger or imminent danger to (a) national security; (b) the national economy; or (c) public order.’ In light of the due process requirement provided in the CCA, it appears that the four persons arrested were produced before the Colombo Magistrate’s court on the same day as their arrest or within the twenty-four-hour time frame. Thus, the due process requirement to be examined by a judge was respected by law enforcement for arrests made under the CCA. (See Figure 1: Arrests under CCA).

Ad hoc application of due process: challenges in the face of draconian and ambiguous laws

Ad hoc application of due process during COVID-19 in Sri Lanka (April - July 2020)

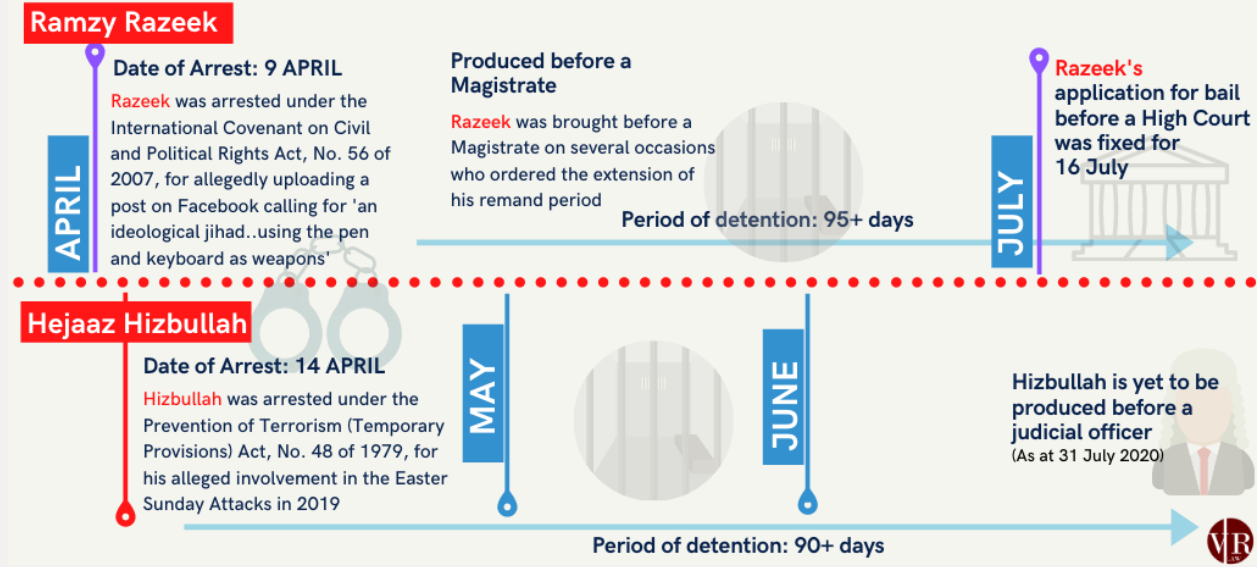


Figure 3: Examples of ad hoc application of due process during COVID-19

Arrest and detention of Hejaaz Hizbullah under the PTA

According to a fundamental rights (FR) petition filed on behalf of Hizbullah on 5 May 2020, there are allegedly multiple violations under the PTA and of his fundamental rights, including: (i) the CID had failed to inform Hizbullah of the reasons for his arrest; (ii) they had denied him meaningful access to legal counsel; (iii) the CID had failed to produce him before a magistrate's court since his arrest; (iv) the detention order was not in compliance with the PTA, and was reportedly issued by the president of Sri Lanka on 25 April 2020, (but dated 17 April 2020);³⁴ and (v) Hizbullah had not been allowed to meet his

³⁴ Amnesty International South Asia (@amnestysasia), "The FR petition on the arbitrary detention of Hejaaz Hizbullah comes up before the Sri Lankan Supreme Court tomorrow (22nd). The Detention Order issued on 17 April 2020 by the President using the draconian Prevention of Terrorism Act has expired." Twitter, July 21, 2020, <https://twitter.com/amnestysasia/status/1285518475817971712> (accessed July 21, 2020); "Eliminating Intolerance and discrimination based on religion or belief and the achievement of Sustainable Development Goal 16 in Sri Lanka," Amnesty International, ASA 37/2487/2020, June 8, 2020, <https://www.amnesty.org/en/documents/asa37/2487/2020/en/> (accessed July 22, 2020) p. 6; Thyagi Ruwanpathirana, "On Hejaaz

family until 3 May 2020.³⁵

The PTA deals with offenses related to 'terrorism'. It affords law enforcement officials with broad powers of entry, search and seizure.³⁶ However, the PTA also stipulates certain due process standards despite its broad powers in sections 7 and 9. The Supreme Court has set out the following procedure with respect to the PTA: (i) the process for arrest laid down in section 6 'does not dispense with the need to give reasons'; (ii) section 7(1) exempts a suspect from being produced before a magistrate within seventy-two hours, where a detention order under section 9(1) has been issued during that period; and (iii) a suspect must be immediately brought before a magistrate after a detention order has been issued according to section 9(1).³⁷ Assuming that the detention order for Hizbullah was issued on 17 April 2020 (as it was backdated) he should have, nevertheless, been produced before a magistrate promptly after the detention order was issued in accordance with section 9(1) of the PTA. Considering the violations recorded in the aforementioned FR petition, the due process requirements laid down in the Act were disregarded during Hizbullah's arrest and detention. Thus, it appears that Hizbullah's right to due process was violated.

Section 15(2) of the International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018 stipulates that detained persons have the right to meaningful access to lawyers. Although the right of access to legal advice/assistance is not explicitly enshrined in the Constitution, the Supreme Court has held that the right to a fair trial – articulated in article 13(3) – encompasses the 'right to have a counsel and to communicate with him'.³⁸ Although Hizbullah was afforded limited access to his lawyer, these meetings were not confidential, as the authorities were allegedly present during these meetings.³⁹

Hizbullah: The latest victim of Sri Lanka's draconian Prevention of Terrorism Act," Daily FT, July 17, 2020, <http://www.ft.lk/columns/On-Hejaaz-Hizbullah-The-latest-victim-of-Sri-Lanka-s-draconian-Prevention-of-Terrorism-Act/4-703241> (accessed July 17, 2020).

³⁵ See S.S Selvanayagam, "Fundamental Rights petition seeks to extricate detained lawyer Hejaaz Hizbullah," Daily FT, May 7, 2020, <http://www.ft.lk/news/Fundamental-Rights-petition-seeks-to-extricate-detained-lawyer-Hejaaz-Hizbullah/56-699840> (accessed May 24, 2020).

³⁶ Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, sec. 6, ss. 1.

³⁷ Weerawansa v. The Attorney-General and Others, [2000] 1 Sri. L.R. 387 (Supreme Court of Sri Lanka) p. 394, p. 390 point 4(b), and pp 407-408. The Supreme Court in this case held that section 9(1) of the PTA or any other provision in the PTA does not take away the constitutional safeguard provided in article 13(2) ie. every person deprived of personal liberty should be brought before a judge before further detention.

³⁸ The Attorney-General v. Segulebbe Latheef and Another [2008] 1 Sri L.R. 225 (Supreme Court of Sri Lanka) p. 226.

³⁹ Ruwanpathirana, "On Hejaaz Hizbullah: The latest victim of Sri Lanka's draconian Prevention of Terrorism Act."

The Constitution also guarantees a citizen's fundamental right to the presumption of innocence until proven guilty.⁴⁰ This fundamental right can be restricted by law in the interests of national security.⁴¹ Despite the CID not having informed Hizbullah of the reasons for his arrest, the police revealed to the public that the arrest was made due to his alleged involvement in the Easter Sunday Attacks.⁴² Following the police media release, Hizbullah was cast in a negative and prejudicial light in the Sri Lankan media. Such coverage violated his right to be presumed innocent.⁴³ The negative media coverage further indicates that, among segments of the public, there is an inability to recognize the rights and human dignity of perpetrators of crime, irrespective of ethnicity or religion, or the type of offense they have committed.⁴⁴

Arrest and detention of Ramzy Razeek under the ICCPR Act

Razeek's post calling for an 'ideological jihad' was written after an earlier statement he had uploaded criticizing the Sri Lankan health ministry guidelines, which ordered the cremation of persons who had died or was suspected to have died due to COVID-19, in contravention to their families' freedom of religion.⁴⁵ The ICCPR Act provides the high court with jurisdiction to grant bail to any person accused of an offense under the Act. Furthermore, it provides that the high court should give prominence to hear trials in respect to offenses under section 3, and trials 'shall not be postponed, unless due to any

⁴⁰ Sri Lanka Constitution, art. 13, sec. 5.

⁴¹ Sri Lanka Constitution, art. 15, sec. 1.

⁴² Selvanayagam, "Fundamental Rights petition seeks to extricate detained lawyer Hejaaz Hizbullah"; "Lawyer Hejaaz Hizbullah arrested over Easter Sunday attack," Daily Mirror, April 15, 2020, http://www.dailymirror.lk/breaking_news/Lawyer-Hejaaz-Hisbullah-arrested-over-Easter-Sunday-attack/108-186622 (accessed May 24, 2020).

⁴³ Gihan de Chikera, "Protecting human rights while preventing terrorism - Arrest of lawyer reopens debate on PTA," Daily Mirror, April 25, 2020, <http://www.dailymirror.lk/news-features/Protecting-human-rights-while-preventing-terrorism/131-187186> (accessed May 24, 2020); Gehan Gunatilleke, "Hejaaz: A lawyer for all seasons," Daily FT, May 11, 2020, <http://www.ft.lk/columns/Hejaaz-A-lawyer-for-all-seasons/4-699988> (accessed May 24, 2020); "Detained lawyer Hejaaz's family deeply disturbed by vile, vicious attack," Daily FT, May 15, 2020, <http://www.ft.lk/news/Detained-lawyer-Hejaaz-s-family-deeply-disturbed-by-vile-vicious-attack/56-700228> (accessed May 24, 2020); Ethics Eye (@EthicsEye), "Parts of #medialk claim #Hizbullah's 'connection to an incident involving training children to use firearms' was 'revealed'. As suspects are presumed innocent until proven guilty & investigations are ongoing, is it acceptable for #lka media to criminalise a person in this manner?," Twitter, May 23, 2020, <https://twitter.com/EthicsEye/status/1264118115824271360> (accessed May 25, 2020).

⁴⁴ "The preamble of the Constitution recognises Dignity and Well-being of the People as a fundamental value that should be furthered by assuring to all People Freedom, Equality, Justice, Fundamental Human Rights and the Independence of the Judiciary." See Rathnayake Tharanga Lakmali Vs Niroshan Abeykoon (Inspector of Police – Embilipitiya Police Station). 2019, SC/FR Application 577/2010 (Supreme Court of Sri Lanka, December 17), http://www.supremecourt.lk/images/documents/sc_fr_577_2010.pdf (accessed July 31, 2020) p. 13.

⁴⁵ Chandimal and Fernando, "Free Expression, Hunger and Racism in context of COVID19."

unavoidable circumstances'.⁴⁶ However, Razeek was not produced before a high court immediately following his arrest, and instead was brought before a magistrate on several occasions.⁴⁷ On 29 May 2020, it was noted that Razeek's request for bail before a high court judge was fixed for 16 July 2020, over 3 months after his arrest.⁴⁸ (See Figure 3: Examples of ad hoc application of due process during COVID-19)

CONCLUSION AND RECOMMENDATIONS

The selective enforcement of due process rights is not a new phenomenon in Sri Lanka. However, the COVID-19 pandemic has created a greater space for harm by the state as arrestees and detainees have limited access to courts and judges who are able to review complaints of rights violations while in custody. Judging from the above examples, however, an arrestees' right to be produced before a judge, was only violated in the cases of Hizbullah and Razeek, which exemplifies the issue of selective compliance with due process standards by the state.

Both Hizbullah and Razeek were critical of the government's COVID-19 health regulations, meanwhile the individuals in examples 1–4 had allegedly disseminated misinformation regarding COVID-19. Razeek's post calling for an 'ideological jihad' was written after an earlier statement he had uploaded criticizing the Sri Lankan health ministry guidelines, which ordered the cremation of persons who had died or was suspected to have died due to COVID-19, in contravention of their families' freedom of religion.⁴⁹ Similarly, Hizbullah too, along with others criticized the same COVID-19 regulation, in a letter addressed to the President. He was arrested a day after sending the letter, although the stated reasons for his arrest were not connected to the letter.⁵⁰

⁴⁶ International Covenant for Civil and Political Rights Act, No. 56 of 2007, sec. 3.

⁴⁷ "Sri Lanka: Health concerns for detained blogger: Ramzy Razeek"; Chandimal and Fernando, "Freedom of Expression vs. Hate Speech, Fake and Misleading News".

⁴⁸ Amnesty International South Asia (@amnestyasiasa), "Update: Ramzy Razeek has been remanded by the Magistrate's Court until 11 June. At the High Court, the hearing on Bail Appeal was fixed for 16 July. He has been in prison for over 50 days now, solely for expressing his peaceful opinions online." Twitter, May 29, 2020, <https://twitter.com/amnestyasiasa/status/1266307218564976640> (accessed June 27, 2020).

⁴⁹ Chandimal and Fernando, "Free Expression, Hunger and Racism in context of COVID19."

⁵⁰ Thyagi Ruwanpathirana, "On Hejaaz Hizbullah: The latest victim of Sri Lanka's draconian Prevention of Terrorism Act."; "Sri Lanka: Human Rights Under Attack - Lawyers, Human Rights Defenders, and Journalists Arrested, Threatened, Intimidated", Human Rights Watch, July 29, 2020, <https://www.hrw.org/news/2020/07/29/sri-lanka-human-rights-under-attack> (accessed July 31, 2020). Extraordinary Gazette No. 2170/08 issued on April 11, 2020 by the Sri Lanka Ministry of Health directed the cremation of persons who died or was suspected to have died due to COVID-19. However, the WHO guidelines for 'Infection prevention and control for the safe

Consistent compliance with due process standards is required regardless of the legal framework used to arrest persons, and the political context, at all times. The basic presumption of innocence must be upheld as a norm-rather than an exception - and procedural safeguards must be complied with to reduce the potential for abuse of persons in custody. The selective denial of due process poses a serious challenge to the rule of law and democratic values in Sri Lanka and sets a bad precedent for the future.

The following recommendations aim to address the historic challenges to democracy posed by delays in the justice system which can impact the selective compliance with due process standards in Sri Lanka and are amplified by COVID-19. The second set of recommendations addresses the specific issues surrounding the concept of due process within society.

Interventions to address historic challenges to democratic freedoms

Introduce legal regulations applicable to law enforcement to address the procedural problems in producing suspects before a judge immediately after arrest. Such safeguards provide an additional check on law enforcement and limit the exacerbation of violations of due process rights during emergency situations such as COVID-19.

Regulations should cover:

1. Promoting the setup of virtual court hearings to produce suspects (virtually) before a judge immediately after arrest, and for bail applications, as a matter of judicial policy. This solution was adopted for the first time in Sri Lanka on 20 May 2020.⁵¹ Furthermore, the cabinet of ministers provisionally granted approval to implement a program to provide 'video conferencing' in certain court rooms and prisons in the Colombo district for the purpose of hearing bail applications of remand prisoners.⁵²
2. Introduce infrastructure in prisons to include rooms for virtual hearings, and for prisoners to communicate confidentially, via online means, with their lawyers.

management of a dead body in the context of COVID-19' dated March 24, 2020 provides that 'people who died from COVID-19 can be both buried or cremated'.

⁵¹ "Courts go hi-tech," The Sunday Morning, May 22, 2020, <http://www.themorning.lk/courts-go-hi-tech/> (accessed June 25, 2020); "Sri Lanka conducts first ever court session via video conferencing," News 1st, May 20, 2020, <https://www.newsfirst.lk/2020/05/20/sri-lanka-conducts-first-ever-court-session-via-video-conferencing/> (accessed June 25, 2020).

⁵² "Utilizing video conferencing systems for consideration of a bail applications and for remand extensions in respect of the prison inmates," Cabinet of Ministers – Sri Lanka, Press briefing, June 10, 2020, http://www.cabinetoffice.gov.lk/cab/index.php?option=com_content&view=article&id=16&Itemid=49&lang=en&dID=10493 (accessed June 25, 2020).

3. Digitization of police records and case records for remote access by relevant stakeholders.⁵³ Digitization would aid the prompt production of arrestees (virtually) before a judge following their arrests.

Interventions focused on accepting the concept of due process:

The idea that criminals are entitled to due process and deserving of dignity is not widely recognized in Sri Lanka. Therefore, there is a need to convince a broader segment of society at large, and law enforcement, that due process rights are important, despite the crimes that may have been committed.

Institutional level change:

1. Conduct training programs for the law enforcement on criminal procedure, due process, and fundamental rights, applicable to persons in custody.
2. Support the recommendation provided in a Sri Lankan Supreme Court case, for the Inspector General of Police to formulate guidelines applicable to law enforcement on citizens' legal safeguards provided in national and international law and global best practices. These recommended guidelines should cover *inter alia*, promoting equal protection of law; protection of human dignity; informing suspects of the reasons for their arrests; and producing suspects before a judge to assess legality of detention.⁵⁴

⁵³ Section 15(4) of the International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018 provides that 'law enforcement authorities shall assure the compilation and maintenance of up-to-date official registers or records of persons deprived of liberty'. Such registers shall contain information including: (i) identity of person deprived; (ii) date, time, place and authority that deprived the person of liberty; (iii) place of detention and the date and time the person was brought to that place of detention. Any judicial or competent authority, upon request, shall have access to the registers of persons deprived of liberty.

⁵⁴ Landage Ishara Anjali (Minor) and Another Vs Waruni Bogahawatte and Others. 2019, SC (FR) Application No. 677/2012 (Supreme Court of Sri Lanka, June 12) http://www.supremecourt.lk/images/documents/sc_fr_677_2012.pdf (accessed 29 July, 2020) pp. 21 – 24.

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