

DUE PROCESS AND PREPAREDNESS FOR PUBLIC EMERGENCIES

**LESSONS FOR SRI LANKA,
FROM THE COVID-19 PANDEMIC**

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1 Introduction

“Due process” is a legal concept that embodies specific rights, privileges, and immunities that are vested in every individual who is confronted by the justice system. Due process serves to protect individuals from the power imbalances and dynamics that exist within a justice system, and is based on fundamental legal principles, such as ‘equal protection’, and ‘fairness’.¹ Traditionally, due process envisages rights and freedoms such as the right to be informed of the reasons for arrest, the right to a fair hearing before an impartial judge or jury, and the right to legal representation.² An individual is entitled to due process throughout the period s/he remains confronted by the justice system; that is, from the point of being apprehended until a competent court or tribunal makes a final decision.

In early 2020, the global spread of the SARS-CoV-2 (COVID-19) virus caused the deadliest pandemic in recent history. Many governments, including the government of Sri Lanka, adopted prolonged lockdowns, social distancing, and travel restrictions in order to curb the spread of COVID-19. As a consequence of the challenges posed by COVID-19 and health measures taken, judicial proceedings in Sri Lanka were significantly impacted. Although Sri Lanka experienced phases where judicial proceedings returned to normalcy, the recurring waves of COVID-19 in Sri Lanka revealed the vulnerability of the Sri Lankan judicial system to function adequately in the face

of crises that restrict physical mobility and gathering. A lack of measures to cope adequately in such crises can undermine the due process rights and interests of those that are confronted by the justice system, thereby increasing the risks of miscarriages of justice.

This report explores the due process implications of the challenges that the judicial system in Sri Lanka faced due to the COVID-19 pandemic. It proceeds to identify the gaps that need to be addressed, to shore up the due process requirements of Sri Lanka’s judicial system. The research on which this report is based on, draws significantly from secondary sources of information that are publicly accessible during the period from 01 October 2020 to 10 June 2021. The research team also consulted legal practitioners from different parts of Sri Lanka and members of civil society, to triangulate certain aspects of the findings.³

The report is divided into six sections: (1) the legal framework and scope of due process in Sri Lanka; (2) Sri Lanka’s COVID-19 experience; (3) the judicial response to the challenges brought about due to COVID-19; (4) analysis of the due process implications of the COVID-19 restrictions and the responses of the judiciary; (5) comparative analysis of the judicial experience of India and Singapore in dealing with COVID-19 restrictions; and, (6) critical lessons learned to improve Sri Lanka’s due-process commitments.

2

Law: The Scope of Due Process in Sri Lanka

In Sri Lanka, due process is collectively manifested in four key instruments. The rights, privileges, and immunities recognised by these instruments are outlined in Exhibit 1 below.

The Supreme Court has progressively interpreted the due process rights and principles recognised in Sri Lanka on

several occasions.⁴ For instance, in *Attorney-General v Segulebbe Latheef and Another*, the Supreme Court held that an accused's right to a fair trial includes, among other rights and safeguards, a fair and public hearing by a competent, independent, and impartial court/tribunal established by law, to be informed of his rights and entitlements, and to be tried without undue delay.⁵

Exhibit 1: Due process rights and protections recognised under different laws in Sri Lanka

Constitution of Sri Lanka	<ul style="list-style-type: none">▪ Freedom from arbitrary arrest and the right to know the reasons for arrest,⁶▪ Right to be produced before the nearest competent court after being deprived of liberty,⁷▪ Right to be heard at a fair trial, in person or by an attorney-at-law,⁸▪ Freedom from arbitrary punishment,⁹▪ Right to be presumed innocent until proven guilty,¹⁰▪ Freedom from retrospective punishment.¹¹
International Covenant on Civil and Political Rights Act, No. 56 of 2007	<ul style="list-style-type: none">▪ Right to be tried in his/her presence,¹²▪ Right to defence in person or through legal representation and to be informed of this right,¹³▪ Right to be assigned legal assistance in appropriate cases,¹⁴▪ Right to call and examine witnesses on behalf of or against him/her.¹⁵▪ Right to an interpreter,¹⁶▪ Freedom from self-incrimination,¹⁷▪ Right to appeal against any sentence to a higher court.

International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018

Imposes obligations on the State to:

- Prevent any person from being held in secret detention,¹⁸
- Allow law enforcement and the Human Rights Commission of Sri Lanka ('HRCSL') to access any place of detention,¹⁹
- Ensure that all law enforcement authorities maintain records and registers containing specific information and data on persons who have been deprived of their liberty.²⁰
- Allow persons deprived of liberty 'to communicate with and be visited by his relatives, attorney-at-law or any other person of his choice' as provided for by law.²¹

Code of Criminal Procedure Act, No. 15 of 1979

- An individual must be informed of the reasons for his arrest,²²
- An arrested person must be produced before the nearest magistrate within 24 hours of being arrested,²³
- Rights and entitlements of suspects/offenders during a trial or legal proceeding.²⁴

3

COVID-19 Context and Impact: Surges and lockdowns

3.1 Three waves and lockdowns

As at the time of writing this brief, Sri Lanka was going through a third wave of COVID-19 related restrictions. The first wave was from early March to June 2020, following the initial detection of positive COVID-19 cases in the community.²⁵ In order to curb the spread of COVID-19, on 20 March 2020, lockdown style curfews were imposed on the entire island.²⁶ The impact of the first wave was relatively low, with approximately 2,070 patients and 11 deaths recorded.²⁷ By May 2020, the lockdowns were gradually phased out and by July 2020, the government encouraged the resumption of normal day-to-day activities, albeit with some health restrictions.²⁸ Nevertheless, the first wave caused severe disruptions to Sri Lanka's government and administrative functions for a period of approximately three months.

The second wave of COVID-19 was from October 2020 to February 2021.²⁹ The second wave was significantly more widespread than the first wave, recording approximately another 80,000 patients and 450 deaths.³⁰ The second wave also witnessed a 'prison cluster', with COVID-19 patients being recorded in the Welikada, Mahara and

Negombo prisons, which are among Sri Lanka's largest detention facilities.³¹ COVID-19 cases were also detected among law enforcement units, and certain police stations were isolated for short periods of time.³² Although prolonged island-wide lockdowns were not imposed during the second wave, the government imposed lockdowns in several areas that had higher COVID-19 detection rates, and government and administrative functions were impacted for several months. The locality of Hulftsdorp, which houses the apex courts of Sri Lanka and the main court complexes of Colombo, was designated as a high-risk area and placed under lockdown from March to May 2020, and again in October 2020 to January 2021.³³

By mid-April 2021, authorities recognised Sri Lanka as being in a third-wave of COVID-19 spread. This wave has, thus far, resulted in the highest surge of COVID-19 patients.³⁴ From 21 April to 10 June 2021, Sri Lanka recorded approximately 118,000 total cases and 1,381 deaths.³⁵ The third wave of COVID-19 prompted further lockdowns and strict travel restrictions, and led to the closure of prisons to visitors once again.³⁶

3.2 Suspension of in-person legal proceedings

Sri Lanka's court procedure and practice has been heavily reliant on in-person proceedings and physical filings and producing of documents and evidence.³⁷ A typical functional court room will include the participation of judges, lawyers, court staff, witnesses, suspects/detainees, and law enforcement personnel, all of whom converge from different localities. Sri Lankan court infrastructure has not been regularly expanded, causing court houses to be crowded.³⁸ Additionally, Sri Lanka's justice system has also been slow in adopting digital and electronic solutions to enable remote proceedings and e-filing of documents and evidence.³⁹ At the end of 2019, it was

reported that there were approximately 766,000 pending cases in the courts.⁴⁰

The judicial system of Sri Lanka already had several chronic deficiencies that affected the effective functioning of the justice system. The COVID-19 restrictions then served to exacerbate the functional limitations of the courts. Consequent to the restrictions imposed to contain the spread of Covid-19, the courts suspended legal proceedings or functioned at minimal capacity for prolonged periods of time.⁴¹

4

Response: Delayed and passive

Sri Lanka's court system operates in two tiers: 1) the apex courts, and 2) the courts of first instance. The system of management of the courts is vested with the judiciary to maintain the separation of powers between the three branches of the state. In order to

ensure continued administration of justice, the judiciary adopted several measures to address the challenges presented by COVID-19. Both tiers of courts adopted measures to respond to the COVID-19 restrictions, and these are set out separately.

4.1 Response of the apex courts

Consequent to Hulftsdorp being declared an isolated locality during the first and second COVID-19 waves, the Supreme Court and the Court of Appeal proceedings were suspended for prolonged periods of time. Interim measures were taken to hear only 'urgent' and 'essential' matters with all other cases being rescheduled.⁴² In April 2020, the apex courts issued notices on the measures that would be adopted upon the recommencement of court proceedings.⁴³ These measures included the scheduling and calling of cases on a staggered basis, allocating specific time slots for cases, and limiting attendance in court to only counsel/attorneys-at-law.⁴⁴ By around May 2020, the courts had resumed operations to a great extent, and on 12 October 2020, the Supreme Court also introduced pre-hearings to streamline cases that were to be fixed for argument and created a designated court for calling/mention matters.⁴⁵ In mid-October 2020, the Hulftsdorp area was declared a high-risk zone and placed on lockdown once again, and the courts reverted

to hearing only 'urgent' and 'essential' matters.⁴⁶ In January 2021, the lockdown imposed on the Hulftsdorp locality was lifted and the Supreme Court and the Court of Appeal resumed operations, albeit under strict health and social distancing guidelines. However, by early May 2021, the Supreme Court and Court of Appeal once again temporarily suspended regular proceedings in light of the third wave of COVID-19.⁴⁷

With effect from 15 February 2021 and 01 March 2021 respectively, the Supreme Court and the Court of Appeal adopted rules that would be applicable in the event of an 'inability to conduct conventional physical hearings due to any reason prejudicial to national security, public safety or the order and security within the precincts' of the courts.⁴⁸ It was through these rules that, for the first time, the apex courts of Sri Lanka formally approved the use of remote technology to conduct hearings during public health emergencies.

4.2 Response of courts of first instance and tribunals

The regulation of all other courts and tribunals; that is, the high courts, district courts, magistrate courts, primary courts, and labour tribunals, falls under the purview of the Judicial Services Commission ('JSC').

Between March and May 2020, the JSC issued several circulars containing directions and instructions on how court proceedings were to function in light of the COVID-19 restrictions.⁴⁹ The circulars were initially issued on a short-term basis, and then periodically extended with revisions in light of the changing circumstances. These circulars sought to suspend the regular proceedings of courts and limit hearings to 'urgent' cases and applications pertaining to bail/remand during lockdown periods. In early May 2021, the courts of first instance were once again required to suspend regular sittings in response to the surge of COVID-19 patients.⁵⁰

Notably, Magistrates were encouraged to hear bail/

remand applications during lockdowns using virtual solutions and video conferencing applications, such as Skype.⁵¹ Thus, in May 2020, for the first time, Sri Lankan courts used video conferencing technology to conduct bail hearings.⁵² In November 2020, a process to e-file bail requests at the High Courts was also introduced.⁵³ The procedure provides the parties with the discretion to opt for virtual hearings of bail applications.

Judges were also vested with discretion to release persons from remand custody by ordering that such persons enter into bonds (without sureties).⁵⁴ Such measures were implemented to prevent persons from languishing in remand custody. The JSC also set strict timeframes for rescheduling the hearing of bail applications and cases and reiterated the duty of judges to ensure that the directions contained in the circulars were strictly adhered to.⁵⁵ Similar measures were issued by the JSC during the second and third waves of COVID-19.

5

Implications: Effects on due process

This section seeks to analyse the implications on due process that resulted from the repeated waves of COVID-19 restrictions and the response of the judiciary.

Two key due process rights were identified as having been adversely affected by COVID-19 restrictions, namely: (1) the right to a fair trial; and (2) access to legal representation and assistance. The implications of COVID-19 and the judicial response on these two due process rights will be analysed separately.

The analysis revealed that the due process implications of COVID-19 restrictions arose not only from the shortfalls in the response to those restrictions, but also from the exacerbation of existing chronic issues. As such, each analysis of the implications on due process rights will be presented in two parts: 1) the pre-pandemic circumstances and preparedness for situations of restricted access; and 2) the responses of the judiciary and their efficacy in meeting the COVID-19 restrictions and challenges.

5.1 Right to a fair trial: Undermined by delays, unprotected by guidelines

Three issues that undermine the right to a fair trial were identified: (1) the exacerbation of delays due to the postponement of cases; (2) the lack of measures and guidelines to conduct virtual hearings; and (3) discretionary determination of cases to be heard on an 'urgent' basis.

5.1.1 Exacerbation of delays in case disposal

According to a Special Committee report in 2017, it was noted that a criminal case takes an average of 17 years to complete; that is, approximately 10 years for the trial and an additional 7 years for the appeal process.⁵⁶ Prior to the onset of COVID-19 in Sri Lanka, there were 776,600 cases pending in courts, of which 4,620 cases had been pending for close to 20 years.⁵⁷ These data points are indicative of systematic delays in concluding cases

through the courts.

Extended delays in concluding legal proceedings can significantly undermine the right to a fair trial. The implications of such delays were explored in *Jayasinghe v. the Attorney General*, where the Supreme Court stated that delays can adversely impact a suspect's right to a fair trial, due to: (i) the loss of memory of parties; (ii) unavailability of required witnesses and documents, (iii) increase in expenditure for legal counsel, and (iv) the loss of a will to fight for justice. The Supreme Court has noted that 'justice delayed is justice denied: for the very good reason that delay may result in the denial of the substance of a fair trial, although all the forms are solemnly observed'.⁵⁸

In the wake of COVID-19, the already slow court system had to additionally contend with social distancing

measures, travel restrictions, and area-wide lockdowns. Most courts in Sri Lanka were shut down from March to May 2020, intermittently during October to November 2020, and once again from mid-May 2021.⁵⁹ During these lockdown periods, cases were postponed and rescheduled. Even after lockdowns were relaxed after the first and second waves, for approximately two months, several cases continued to be postponed for various reasons, such as witnesses being unable to travel to court, or lawyers being unable to obtain instructions from clients.⁶⁰ These measures exacerbated the systemic problem of delays in case disposal.

In certain courts, judges had adopted practical measures on their own volition to continue the functioning of courts and non-disruption of proceedings. These measures included allowing for video calling on mobile phones, limiting access to courtrooms only to lawyers and to witnesses as and when the relevant case was being heard, and making minor infrastructural changes such as affixing plexiglass/polythene partitions around witness stands to allow witnesses to testify without wearing masks.⁶¹ However, these practical measures appear to have been adopted at the discretion of the judges, and as such, were not uniformly adopted in all courts in Sri Lanka.⁶²

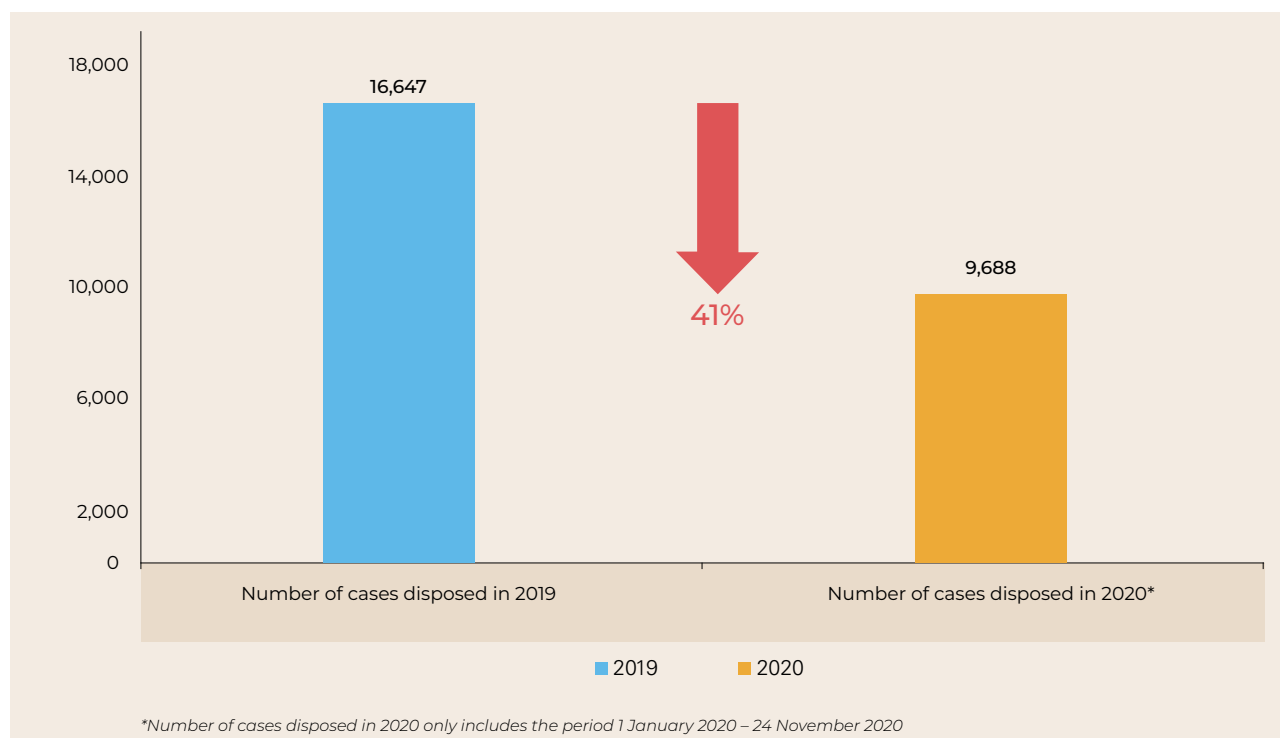
Some key informants remarked that the appeal courts had adopted remote proceedings and allowed lawyers to file documents electronically.⁶³ Moreover, the judges would routinely instruct court registrars to communicate with suspects who were presented virtually to ensure that they understood the outcomes of the proceedings of the day.⁶⁴

Nevertheless, major delays in court proceedings were experienced due to the disruptions in day-to-day court proceedings. While a degree of delay might have been inevitable in the face of the exigencies created by public health crises, such delays could have been mitigated by proactive responses. The following is a list of six

key deficiencies identified in the JSC circulars and the notices by the judiciary, which impeded the proclivity of the courts to reduce delays in disposing cases:

1. Only 'urgent' or 'exceptional' cases were expected to be heard, while other cases could be rescheduled at the discretion of the judge.⁶⁵
2. The general tenor of these circulars and notices were to suspend regular court proceedings, rather than encouraging courts to explore practical solutions to conducting hearings. Courts were not periodically advised and instructed on adopting practical alternatives (based on available resources) to continue court proceedings in a safe manner.
3. Courts were not periodically advised and instructed on adopting practical alternatives (based on available resources) to continue court proceedings in a safe manner.
4. Institutional and infrastructural arrangements to streamline hearings, such as designating separate court rooms for calling matters and trials, were not swiftly or only partially adopted.
5. It took the apex courts almost one year after Sri Lanka's first COVID-19 lockdown to set out procedures that enabled virtual hearings and e-filing.
6. Procedures to enable virtual hearing of trials in courts of first instance have not yet been formulated.

Consequent to these circumstances, the number of criminal cases that were disposed in 2020 were significantly lower when compared with the cases disposed in 2019 (See Exhibit 2 for the comparison in criminal case disposal between 2019 and 2020). The decrease in concluded cases will only contribute to the existing backlog of cases and is likely to cause further delays in the future.

Exhibit 2: Comparison in Criminal Case disposal between 2019 and 20

Sources: 'AG's Dept concludes 16,647 criminal cases in 2019', Daily News, 1 January 2020; 'AG concludes action regarding 9688 Criminal Cases', NewsFirst.lk, 24 November 2020.⁶⁶

By contrast, other countries from different regions that had far greater COVID-19 impacts than Sri Lanka were relatively quick to adopt virtual technologies to ensure that court proceedings were not disrupted. Box 1 provides the responses by judiciaries in other countries that were hit worse by COVID-19 than Sri Lanka, within six months from March 2020.

BOX 1: RESPONSES WITHIN THE SIX MONTHS FROM MARCH 2020 BY JUDICIARIES IN OTHER COUNTRIES THAT WERE HIT WORSE BY COVID-19 THAN SRI LANKA

Indonesia recorded the highest number of COVID-19 cases in Southeast Asia. By mid-April 2020, the Indonesian Supreme Court directed all lower courts to adopt video conferencing technology. Even prior to this, between March and April 2020, at least 380 lower courts had switched to virtual hearings, and approximately 25,000 criminal proceedings had been conducted online.⁶⁷

India experienced extreme surges of COVID-19 throughout 2020. As a response, between March and September 2020, the country's district and high courts switched to remote technology and heard approximately 2.6 million cases virtually.⁶⁸ Furthermore, an additional 1,500 video conferencing licenses were purchased by the Indian government to facilitate virtual hearings across more courts in the country.⁶⁹

The **United Kingdom (UK)** was one of the worst affected countries, with over 4.5 million cases and 127,800 deaths recorded due to COVID-19. However, by the last week of March 2020, courts had switched to using remote technology and the number of virtual hearings increased from 1,000 a day to almost 3,000 a day by mid-April 2020, constituting 85% of all cases.⁷⁰ In May 2021, a specialised Cloud Video Platform was established in the Crown and Magistrates courts to enable virtual criminal proceedings. By September 2020, more than 30,000 cases were heard using this platform.⁷¹

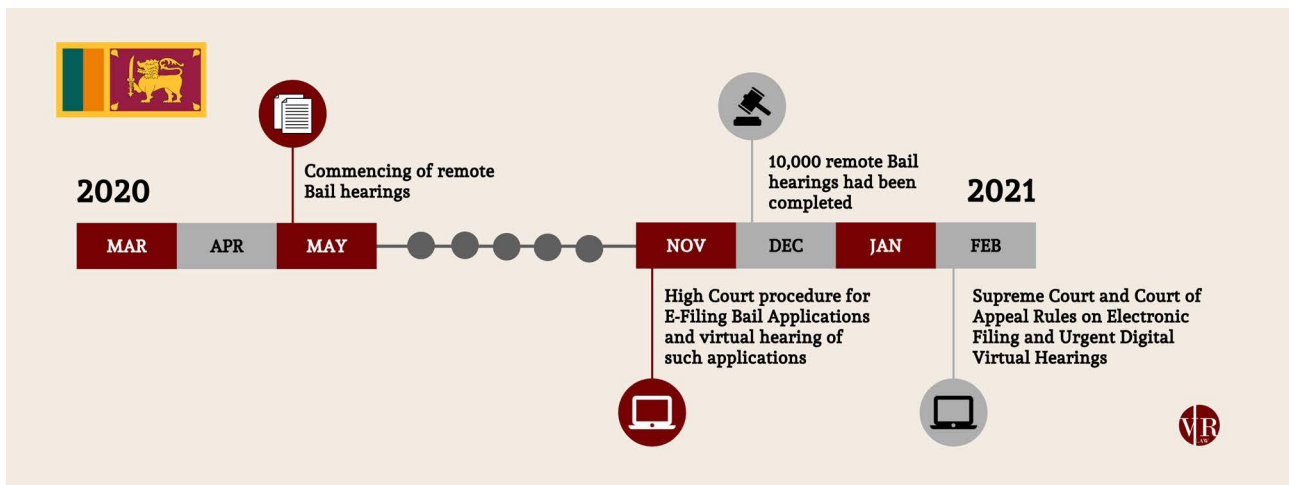
5.1.2 Lack of measures and guidelines on using remote technology

Prior to the COVID-19 pandemic, there were no formal procedures or processes that allowed for bail applications to be heard or for suspects to be produced in court through remote/virtual means. Thus, the necessary institutional and infrastructural arrangements for virtual proceedings needed to be formulated for the first time.

In response to COVID-19, on 16 March 2020, the JSC authorised the use of remote technology to hear and dispose of bail/remand applications. On 20 May 2020, video-enabled telecommunication technology was used for the first time in Sri Lanka to virtually produce suspects who were the subject of a bail/remand application.⁷² Subsequently, in June 2020, the Cabinet of Ministers provisionally granted approval for the hearing of bail and remand applications of prisoners in four prisons

in Colombo, using ‘video conferencing systems’.⁷³ Furthermore, the United Nations Development Programme (UNDP) undertook a project with other stakeholders such as the Ministry of Justice, the JSC and Legal Aid Commission of Sri Lanka to facilitate remote hearing of bail applications, by providing equipment to a few courts and prisons in the Western Province. UNDP also assisted in providing virtual legal assistance to prison inmates. Through these efforts Sri Lanka conducted 10,000 remote hearings of bail applications and 75 virtual legal assistance sessions, between May and December 2020.⁷⁴ In November 2020, a ‘virtual courthouse’ program was pioneered for the Commercial High Courts of Sri Lanka by Sri Lanka Telecom together with the Colombo Law Library.⁷⁵ Additionally, the procedure for e-filing of bail application introduced in November 2020 had resulted in about 70 bail applications being filed using the system, by January 2021.⁷⁶ See Exhibit 3: Timeline for adopting alternatives in Sri Lanka.

Exhibit 3: Timeline for adopting alternatives in Sri Lanka



In practice, such bail applications were heard from two different locations; the suspect in prison, and the judge and lawyers in the courtroom. They were connected via a Skype link on laptops placed in the prison and in the courtroom.⁷⁷ Although the use of such technology is a convenient solution, the system adopted by the courts presents two critical challenges. First, communicating through laptops provides a limited visual range, making it challenging to meaningfully assess whether the prisoner

has been abused or is being coerced, coached, or unduly influenced by prison officials.⁷⁸ Second, it was also noted by key informants that remote hearings can have the effect of discouraging suspects from speaking out against any unfair treatment, as they cannot confidentially communicate with their lawyer or relatives, as would normally be the case when presented in open court.⁷⁹ In addition, Magistrates do not routinely inquire into the condition of the suspect, which was further highlighted

as contributing to suspects being discouraged from speaking up during remote proceedings.⁸⁰

At least three other inherent issues have been highlighted in respect of using remote technology for legal proceedings, in general. First, virtual and video proceedings may not provide sufficient space for lawyers to confidentially communicate with clients, particularly if they are in custody. Second, the ability to record or duplicate electronic data raises significant privacy and identity fraud issues. Third, it has been contended that participating in virtual hearings from remote locations, such as homes or detention facilities, may unwittingly exacerbate the latent prejudices that judges, lawyers, and jury members may have against suspects and witnesses.⁸¹

To date, no guidelines or best practices to deal with these issues of virtual hearings have been published

in Sri Lanka. The publishing of such guidelines could have served two purposes. First, it could have served to guide litigants and the judiciary in conducting virtual hearings in a manner that is fair by all parties. Second, it could have assisted institutions in developing standard operating procedures on virtual hearings and thereby gradually normalised such hearings. The lack of such guidelines or best practices on virtual hearings in Sri Lanka has, thus, created a situation where virtual hearings are conducted without taking into cognisance the several due process concerns associated with virtual hearings. Accordingly, the right to a fair hearing, is likely to be at risk without guidelines to address the inherent issues of virtual hearings. See Box 2 for guidelines and best practices adopted by stakeholders and institutions of countries in different regions that follow the common law tradition and experienced varying COVID-19 impacts.

BOX 2: COVID-19 VIRTUAL HEARING BEST PRACTICES PUBLISHED BY OTHER COUNTRIES AND INSTITUTIONS

In April 2020, the **Indian courts** adopted rules on video conferencing.⁸² In May and June 2020, the Supreme Court published guidelines on hearing matters through video/tele-conferencing.⁸³ Both these sets of rules and guidelines contain detailed procedures on virtual court proceedings, and cover aspects such as preparatory arrangements, setting up remote points to join proceedings, examination of persons and exhibiting documents through video conferencing, establishing virtual lobbies/break rooms etc.

In May 2020, the **UK Administrative Law Bar Association** published 'Guidance to Advocates on Remote Hearings' to assist lawyers with the challenges posed by virtual hearings held due to COVID-19 restrictions.⁸⁴ These guidelines contain procedures and tips for lawyers in preparing for and dealing with documents, technology, and hearings in respect of virtual proceedings. In July 2020, the **UK Judicial College** published the 'Good Practice on Remote Hearings' containing guidelines for judges conducting virtual hearings during the COVID-19 pandemic.⁸⁵ These guidelines specifically require judges to consider and respond to varying levels of technological competency of litigants, disturbances, technological issues, and time lapses. Judges are also encouraged to explain the approach of the hearing, develop skills in controlling virtual platforms, and to be mindful that litigants' behaviour might be different than what is expected within a court premises.

In May 2020, the **Bar Associations of British Columbia and Ontario in Canada** published their respective best practices on remote hearings in light of COVID-19 restrictions.⁸⁶ These best practices were to serve as guidelines for lawyers in preparing themselves and their clients for virtual hearings, planning for technological issues, and presenting documents and evidence. The best practices also contain several communication tips and pointers that lawyers are encouraged to adopt during virtual hearings.

International due process watchdog organisation, **Fair Trials**, published 'Safeguarding the Right to a Fair Trial during the Coronavirus Pandemic: Remote Criminal Justice Proceedings' in April 2020.⁸⁷ This document

outlines several issues commonly associated with virtual hearings and recommends several practical measures that are designed to improve effective participation, enhance virtual access to lawyers and information, and ensure the presumption of innocence.

5.1.3 Discretion in prioritising cases to be heard on an 'urgent' basis

The JSC circulars and notices of the apex courts that were issued in light of COVID-19 limited hearing of cases only in 'urgent' or exceptional circumstances. Counsel were required to submit an application and motion demonstrating the exigencies of the case on behalf of their client, and the judge would then determine if the case constituted an 'urgent' or 'essential' matter warranting a prompt hearing.⁸⁸ In the apex courts an 'urgent' application, motion or appeal is to be determined by a designated judge, for the purposes of determining whether a matter requires an urgent virtual hearing.⁸⁹

Accordingly, cases that would usually be fixed for a hearing with some degree of foreseeability, would be fixed for hearing during lockdowns only upon it being established that there is some degree of 'urgency' or an exceptional circumstance.

However, despite the lapse of several months since COVID-19 restricted the capacity of the courts, as at 10 June 2021, there is still a lack of clarity as to what factors should be considered by judges when determining if a case is 'urgent' or 'exceptional'. It appears that judges have complete discretion, without adequate guidance, in determining which cases involve matters that are 'urgent' or exceptional.⁹⁰ As such, there are no safeguards to ensure that matters requiring urgent judicial intervention, such as cases concerning an imminent deprivation of liberty or the interests of vulnerable persons, would be heard as a matter of priority. Guidelines and the development of jurisprudence in this regard could have crystallised what amounts to an 'urgent' or exceptional situation and assist judges in adopting a consistent and equitable approach to prioritising the types of cases that should be heard even during lockdowns. Box 3 provides the best practices recommended by international bodies and organisations for prioritising 'urgent' cases during the COVID-19 pandemic.

BOX 3: INTERNATIONAL BEST PRACTICES ON PRIORITISING CASES DURING THE COVID-19 PANDEMIC

In May 2020, the **International Commission of Jurists (ICJ)** published a briefing note titled 'The Courts and COVID-19'. In this note, the ICJ acknowledged the general lack of consensus on what constitutes an 'urgent' case, but listed out the following factors as being 'especially worth considering' when determining if a case is urgent or not:

- Whether there is a violation of constitutional rights or human rights, particularly if there is irreparable harm,
- Whether the matter is likely to cause harm to vulnerable persons, such as children, women, and persons with disabilities,
- Whether the case pertains to domestic violence, abuse, or neglect,
- Whether the case pertains to the question of deprivation of liberty.

In exploring the issue of prioritising 'urgent' cases, the **Organisation for Security and Cooperation in Europe** has also provided some guidance. They observe that 'some general guidance on the determination of urgency in the form of laws, regulations or recommendations is beneficial to avoid arbitrariness and ensure fairness, transparency and consistency, if at the same time balanced with flexibility to decide on a case by-case basis.' Thus, it is recommended that a dual system of legal guidelines and judicial discretion be set in place when prioritising cases.⁹¹

5.2 Access to legal representation and assistance

In 2018, the Human Rights Commission of Sri Lanka (HRCSL) conducted an extensive Prison Study,⁹² where it was observed that the lack of 'effective and accessible legal aid mechanism[s]' and methods to communicate have created serious challenges for prisoners to retain legal counsel and seek legal assistance.⁹³ In fact, only one prison out of the 20 institutions considered for the study provides prisoners with communication services via telephone.⁹⁴ The usual practice is that lawyers have to visit suspects in prison and obtain instructions in person.⁹⁵ Recently, in May 2021, the Bar Association of Sri Lanka (BASL) in a letter addressed to the Inspector General of Police and heads of the Criminal Investigation Department and Terrorist Investigation Department, raised concerns about the violations of the right to confidential communication between lawyers and their clients in custody. The letter highlighted certain unlawful practices adopted by police officers which were in violation of the right to access legal assistance. These included the recording of the communication between lawyers and their clients or sitting through the consultation or at a close distance to monitor the consultation.⁹⁶

The HRCSL report also highlighted due process violations that occur when prisoners are produced before courts without legal representation. For instance, it was reported that Magistrates did not communicate with pre-trial detainees following their production in court and did not provide them with reasons for placing them in remand.⁹⁷ Additionally, remandees claimed that proceedings in court were not conducted in a language that they understood.⁹⁸ Thus, inadequate access to legal assistance has been a prevailing issue among persons confronted by the justice system in Sri Lanka even prior to the COVID-19 pandemic.

Prisons are highly vulnerable institutions during public health crises, and as such, access to prisons was completely prohibited during the COVID-19 lockdowns and even thereafter.⁹⁹ As a result of telephone/non-physical means of communication with prisoners not being the practice in the vast majority of prisons, lawyers faced several challenges in communicating with their clients in prison. Lack of access to legal assistance was particularly problematic where communication was required in light of special circumstances.¹⁰⁰ For instance, it was noted that there were challenges in obtaining information from detained clients in light of ongoing investigations and verifying if suspects with non-communicable diseases were receiving medical attention in prisons.¹⁰¹ While lawyers were able to obtain information from the family members of their detained clients in most instances, there were some instances where lawyers were restricted from obtaining instructions from detained clients in relation to their cases.¹⁰² This in turn barred cases from progressing, adding to delays and backlogs.

Some judges adopted practical solutions to facilitate communication between lawyers and detained clients in light of the travel restrictions and bans on prison visits. These solutions included requesting prison officials to allow the detained clients to contact the counsel using a telephone at an agreed upon time, which was recorded in the case proceedings.¹⁰³ However, such measures were implemented at the discretion of the judge, and as such, were not uniformly adopted in courts across Sri Lanka.¹⁰⁴

The lack of legal representation and assistance could result in detainee being unaware of their lawful rights and entitlements when being confronted by law enforcement officials. Such situations can gravely prejudice persons who are confronted by the law.

6

The Comparative Analysis: Measures adopted in India and Singapore to mitigate due process violations during COVID-19

This section will discuss the Indian and Singaporean responses to legal consequences arising out of the COVID-19 pandemic. These two countries were selected for the comparative analysis as they belong to the Asian region, and have legal systems that are based

on English common law traditions. Similar to the analysis on Sri Lanka, the comparative analysis will be framed in terms of the pre-pandemic circumstances of India and Singapore and their response to the challenges presented by COVID-19.

6.1 India

6.1.1 Pre-COVID-19 framework

Similar to Sri Lanka, the scope of due process in India is embodied in the Indian Constitution and Criminal Procedure Code. These instruments recognise the rights, privileges and immunities that are traditionally associated with due process. India also relied heavily on in-person legal proceedings; but it gradually commenced using legal technology to streamline the disposal of cases by the courts, since 2007.¹⁰⁵

Two policy decisions taken in India were key to India's adoption of electronic and technological solutions in hearing cases.¹⁰⁶ First, in the case of *Youth Bar Association of India v. Union of India*, the Indian Supreme Court directed the central and state governments to upload all first information reports¹⁰⁷ of all police stations on the official website of the police of all states, as early as possible.¹⁰⁸ The authorities were urged to do this preferably

within 24 hours from the time of registration of the first information report in the police station.¹⁰⁹ In this case, the Court recognized the right of the accused to obtain a copy of the first information report at the earliest stage.¹¹⁰

Secondly, India adopted the e-Court Integrated Mission Mode Project, which provided a basic platform to implement electronic solutions in the administration and disposal of court cases. The objective of this project was to provide designated services to litigants, lawyers and judiciary through computerisation of the entire court system.¹¹¹ In 2007, Phase I of this project was approved by the Cabinet Committee on Economic Affairs (CCEA) and aimed to digitise 13,348 District & Subordinate courts over a two-year period.¹¹² As of 31 March 2015, the Indian Ministry of Justice reported that approximately 95% of the activities relating to installation of hardware and software, connectivity, management reforms had been completed.¹¹³ Phase II of this project was initiated in 2015

with the aim of providing 30 different services for litigants within a duration of four years.¹¹⁴

The judiciary had also set up a national e-Courts portal on 7 August 2013¹¹⁵ and the National Judicial Data Grid (NJDG), which are data hosting services. Through these services,¹¹⁶ litigants and stakeholders can access data on case registration, case list, case status, daily orders, and final judgments. Currently, these services allow the public to access information in respect of over 70 million pending and decided cases and more than 30 million orders/judgments of cases in the district and subordinate courts.

6.1.2 Covid-19 specific responses

On 24 March 2020, Indian Prime Minister Narendra Modi announced a nationwide 21-day lockdown. Simultaneously, on 26 March 2020, the Indian Supreme Court issued an order that the apex courts and lower courts only hear

urgent cases.¹¹⁷ However, on 18 May 2020, the Supreme Court decided to postpone its summer vacation, and conduct virtual hearings under freshly issued guidelines.¹¹⁸ These guidelines required respective courts to publish their case lists well in advance and for parties to specify whether they have the capacity to participate in virtual hearings through their own devices or through digital facilities which had been installed in the Supreme Court premises prior to the pandemic.¹¹⁹ In addition, the Indian Supreme Court developed the 'SCI-Interact' software to make all its 17 benches paperless and to incorporate artificial intelligence tools to streamline the working of courts.¹²⁰ The several technological components of this software was designed to speed up case disposal and assist faster decision-making.

As the lower courts had already adopted some level of digitisation, these courts were able to conduct over 2.6 million virtual hearings within the first four months after lockdown was lifted.¹²¹

6.2 Singapore

6.2.1 Previous legislative and policy decisions

In Singapore, due process rights are recognized under three main regimes: (1) the Constitution; (2) the Criminal Procedure Code (CPC); and (3) the Singapore Police Force Act (SPFA). Most significantly, an amendment to the Constitution in 2010 allowed the Police or other relevant authorities to produce detainees before a competent court by way of video conferencing or similar technology.¹²² Following this constitutional amendment, Singapore introduced numerous processes to enhance the efficiency and effectiveness of the court system to meet the evolving requirements of the society. As of 2019, Singapore had already installed e-processes that enabled virtual inspection and retrieval of court documents, obtaining audio recordings of High Court hearings (in open court trials), and seeking remote interpretation services for criminal trials.¹²³ The resulting increase in efficacy and transparency through these measures have

contributed to Singaporean courts' reputation of being a forum that guarantees prompt relief.¹²⁴ In fact, in 2019, 15,702 new civil and criminal matters were filed at the Supreme Court, out of which 15,041 matters were concluded within the same year.¹²⁵

6.2.2 Judicial response to Covid-19 pandemic

In April 2020, Singapore enacted the COVID-19 (Temporary Measures) Act No. 19 of 2020, which provides a wide range of measures to solve issues arising from the pandemic ranging from violation of health regulation to breach of contracts.¹²⁶

On 26 March 2020, the Chief Justice issued a message on the various precautionary measures put in place to ensure the continuity of court operations and services, while safeguarding the health and safety of practitioners, court users and court officers.¹²⁷ The measures

mentioned in the Chief Justice's message included business continuity measures and measures to increase the cleaning of court premises. These measures included safe distancing and the splitting of judges and court staff into groups that would intermittently attend court sessions either physically or virtually. On 27 March 2020, the Chief Justice directed that the use of electronic means of communication should be enhanced when conducting hearings, so that the provision of legal services

and proceedings are uninterrupted during lockdown periods.¹²⁸ From 01 April 2020, the Supreme Court commenced hearings via video or telephone conferencing for certain cases. A guide on attendance to virtual hearings was developed and posted on the Supreme Court website for easy reference.¹²⁹ The court authorities also ensured that all parties were clearly notified of the implications of unauthorised recordings or data collection of such virtual hearings.¹³⁰

7

Lessons for the Future

Two key findings can be gleaned from the above analysis of the Sri Lankan judiciary's experience with COVID-19, as well as the comparative analysis of the experience of other countries.

First, even prior to the COVID-19 pandemic, Sri Lanka's judicial system had several chronic issues. The courts were backlogged with pending cases and needed infra-structural and technological upgrades, while safeguards to ensure proper access to legal assistance were weak. These chronic issues had already undermined due process and made the judiciary vulnerable to disruptions in the event of a public crisis. Therefore, when the COVID-19 pandemic spread to Sri Lanka, a proactive response was necessary by the judiciary in order to prevent prolonged disruptions and further undermining of due process.

The second finding is that, despite a proactive response being required to counter the impacts of the COVID-19 pandemic, the response by the judiciary was lacking in urgency, as robust solutions were not readily or systematically adopted. The rules published by the Supreme Court and the Court of Appeal, earlier this year, on hearings during public emergencies was a positive step towards being prepared for future situations where in-person hearings are not feasible. However, similar rules are yet to be published in the courts of first instance. Furthermore, guidelines for the use of virtual technology and improving access to legal assistance in times of lockdown have not yet been formulated.

These findings are symptomatic of a general lack of urgency in the judicial system. Strengthening due process, therefore, requires urgent proactive action by key institutions such as the JSC, Ministry of Justice, and the BASL. Accordingly, adopting and advancing judicial policies and plans that are conducive to proactivity and dynamism can be crucial in animating justice and preparedness for public crises.

There have been few positive developments. For instance, the proposed Coronavirus Disease 2019 (Temporary Provisions) Bill, provides for alternative courts and the use of remote communication technology to conduct proceedings.¹³¹ In addition to the above, the BASL has proposed to resume court proceedings even if COVID-19 travel restrictions are extended. However, more permanent and proactive measures will be required in order to guarantee lasting solutions to chronic issues.

While the need for a shift to proactivity and dynamism is a key takeaway from the experience of the Sri Lankan judiciary's response to COVID-19, other ancillary lessons can be learnt from the experience of other countries. The experience of the judiciaries of other countries suggests that Sri Lanka can explore the adoption of several short term and medium-term solutions to enhance preparedness for public crises and, thus, strengthen due process. Such short-term and medium-term solutions include:

Short-term solutions

- Fully adopt and implement digital infrastructure and procedures to enable e-filing and virtual hearings for courts of first instance during situations where conventional in-persons hearings are infeasible.¹³²
- Introducing institutional reforms such as designating separate courts for calling matters and trials, scheduling daily time limits per hearing, and enhancing the accessibility to alternative dispute resolution forums.
- Publishing best practices and standard operating procedures in consultation with judges, the BASL, and other stakeholders such as the Ministry of Justice, and the Department of Prisons, to explore and promote effective communication and accessibility in virtual/remote settings.
- Publishing lists of lawyers who are willing to provide legal aid to persons who have been confronted by the justice system in all police stations in order to assist such persons in finding legal representation.¹³³

Medium-term solutions

- Normalising the use of legal technology by equipping courts with virtual conferencing facilities, adopting digital tools to assist in case management, incentivising the use of e-filing and e-production portals, and promoting remote legal aid and assistance.
- Provide capacity building for judges, prison officials, lawyers, and law enforcement on the use of appropriate technology, and on conducting virtual hearings.
- Equipping prisons and detention centres with video conferencing facilities that provide a greater visual range to enable meaningful virtual hearings of bail/remand applications in circumstances where prisoners cannot be brought to court.
- Equipping prisons, detention centres and police stations with telephone facilities and secure rooms that are capable of being partitioned, to enable confidential communication between lawyers and detained clients.

End Notes

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