



Beyond representation: independent and international institutions – Sri Lanka as a case study

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Sri Lanka's experience thus far with the pandemic of 2020 lends itself to the study of three aspects in constitutional law that go 'beyond representation.' They are innovations in the exercise of executive power, namely (i) the use of 'Task Forces' that are appointed by the Executive, (ii) the role of fourth branch institutions and (iii) the role of experts and professional organizations.

What were the main mechanisms used to handle the COVID 19 challenges, both health and economic, in your country? How well did they work for the purpose?

Confirmed cases of COVID-19 have been reported in Sri Lanka since March. By 20 March, the Government imposed an island-wide curfew which meant that no one could leave their place of residence at any time, except with a curfew pass. Meanwhile, Sri Lanka's Eighth Parliament was dissolved on 2 March under Article 70 of the [Constitution](#) and general elections were scheduled for 25 April. The Constitution provides that the Parliament can be dissolved six months ahead of its full term. After nominations were handed in, the Elections Commission postponed the general elections indefinitely due to COVID-19. From May, the curfew was [relaxed](#) except in the most populated districts - Colombo and Gampaha. By 28 June, the curfew was [lifted](#). By the end of July, the Head of the COVID-19 Task Force [declared](#) that the community spread of COVID-19 has been curbed.

In June, the Elections Commission announced the rescheduling of the general elections to August. Parliamentary elections were held successfully on 5 August with a 76% voter [turnout](#). The Ninth Parliament of Sri Lanka met, in person, on 20 August. As of 28 August, according to the [Epidemiology Unit](#) of the Ministry of Health, Sri Lanka has had only 12 deaths due to COVID-19 and 2,989 confirmed cases of which 2,842 have recovered. In contrast, the Epidemiology Unit [reported](#) that so far in 2020, 25,925 cases of dengue fever has been reported.

Sri Lanka's response to COVID-19 is being led by the President through the National Operation Centre for the Prevention of COVID-19 Outbreak (NOPCO). Under Article 33(2)(h) of the Constitution, the President has the power 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.' The [NOPCO](#) is headed by the Chief of Defence Staff and Commander of the Sri Lanka Army. The President also established the [Presidential Task Force](#) to direct, coordinate and monitor the delivery of continuous services and for the sustenance of overall community life. During the same time, the special COVID-19 Healthcare and Social Security Fund, [Itukama](#), was established to receive donations.

Since the 1940s, Sri Lanka has had a relatively robust free public health care system. The *Quarantine and Prevention of Diseases Ordinance 1897*, as amended, and the regulations issued under that

Ordinance have guided public health authorities and law enforcement authorities in designing responses to the control of the pandemic. These regulations include a [regulation](#) that the corpse of a person who dies of COVID-19 must be cremated. Cremation contravenes the religious beliefs of Muslims and this regulation has been [challenged](#) by way of a petition before the Supreme Court. Four Special Rapporteurs of the United Nations, including the Special Rapporteur on Freedom of Religion or Belief, [wrote](#) to the Sri Lankan Government on this matter. Guidelines for social distancing and the wearing of face masks however are [not covered](#) by these regulations.

Are there particular features of the constitutional system in your country that affected its response to the emergency?

Sri Lanka's response to the pandemic has been implemented without a declaration of emergency. Under the existing *Public Security Ordinance 1947*, read together with article 155 of the Constitution, the President may declare a state of emergency and issue Emergency Regulations. However, the Government chose to issue a curfew instead and to manage its response to the pandemic in a different way. In the absence of a declaration of emergency, the legal basis and the constitutionality of the extended curfew was [unclear](#). At the time it was in force, it was a matter of debate and discussion. Calls were also [made](#) during this time to resummon the dissolved Parliament. It was argued that resummoning Parliament would allow the Government to obtain necessary approvals for [management of public finance](#) and to obtain approval for emergency regulations if a declaration of emergency had to be made.

What role did courts play in responding to the emergency? Were courts inhibited/precluded from review by the facts of the emergency?

During the curfew, judicial proceedings were postponed except in urgent matters. The Supreme Court, the Judicial Service Commission, the Attorney-General's Department, the Bar Association and the Department of Prisons worked in partnership in coordinating these efforts. On 11 May, a Magistrate Court had the opportunity to rule on the legality of the curfew when persons who had been arrested for violating the curfew were produced in Court. The Magistrate ruled in that case that the curfew was lawful (Case No B1108/20).

What role did 'independent' institutions play during this period? Did they have a plan for carrying out their roles in these circumstances?

The Human Rights Commission (HRC) and the Elections Commission played a significant role during this time. In a [letter](#) written to the Secretary to the President, the Human Rights Commission recommended that the imposition of curfew be regularized. The HRC recommended that the President invoke the *Public Security Ordinance* or that the relevant Minister act under the *Quarantine and Prevention of Disease Ordinance*. In addition, during this time, the HRC made [recommendations](#) to the Commissioner-General of Prisons for the release of those in remand custody due to their inability to furnish bail and to release vulnerable convicted prisoners who are seriously or terminally ill, over 70 years of age and convicted of minor offences according to the law. Moreover, with reference to the special guidelines issued by the World Health Organization, the HRC [recommended](#) several measures to protect the prison population during this time.

With the dissolution of Parliament, the Elections Commission (EC) had the responsibility of conducting a general election during a pandemic. After nominations were received by the EC, the EC issued a Gazette Notification [postponing](#) the elections without specifying the date for the election. Predictably,

this announcement gave rise to controversy and contestation. Several petitions were filed before the Supreme Court. The argument was made that the dissolution of Parliament was subject to the condition that a new Parliament would be convened within 3 months of such dissolution. It was further argued that the postponement of the elections would violate this condition and that therefore the dissolution of Parliament was unconstitutional. A bench of five justices [dismissed](#) the petitions without granting leave to proceed to the petitioners having heard the matter, in person, for several days. Subsequently, in June the EC set a fresh date for the general elections in August. Whether the EC had the power to postpone the general elections in this manner was [debated and disputed](#). On 5 August the elections were conducted smoothly, with adherence to social distancing protocols and without any serious incidents of violence.

What role did experts play and within what organizational/structural framework?

The importance of expert opinion and their independence was highlighted to some extent during the pandemic. The public health response was led by the National Operation Centre for Prevention of COVID-19 Outbreak, working together with state institutions including the Epidemiology Unit of the Ministry of Health. The views of the Sri Lanka Medical Association, the independent professional body for medical doctors in Sri Lanka, complemented these efforts by way of providing [responses](#).

What positive or negative insights can be gained from the experience of the operation of constitutional government in your country during this emergency in this case?

Sri Lanka's efforts in dealing with the pandemic have been successful so far, at a practical level. The Executive branch, in partnership with public health officials and the military, have given leadership to these efforts. The legality and the constitutionality of several of the measures introduced during this time remain disputed however. These include the postponement of the parliamentary elections, the curfew and the regulations regarding cremation of bodies of people who die due to COVID-19.

It is relevant to note that Sri Lanka has experienced significant political developments during this time. The President's political party, the Sri Lanka Podu Jana Peramuna (SLPP), secured a sweeping victory at the General Elections. The President's brother and former President (2005-2015) has been appointed as the Prime Minister. For the first time in Sri Lankan representative politics, the Government is not led by one of the two oldest and dominant political parties (Sri Lanka Freedom Party and the United National Party). The SLPP's performance in the recent elections is evidence of the strong political support it enjoys. The nominees of the SLPP obtained sweeping victories in the presidential elections (52%) held November 2019 as well as at the parliamentary elections (59%). Abolishing the 19th Amendment was an election pledge of the Sri Lanka Podu Jana Peramuna. The [19th Amendment](#) was introduced in 2015 and introduced, among other things, the Constitutional Council. In his [inaugural address](#) to the Ninth Parliament, the President announced that the 19th Amendment has ambiguities and uncertainties and should therefore be repealed. He further announced that a new constitution should be adopted. It is unclear, as of yet, in what way these proposed reforms would impact existing independent commissions and the Constitutional Council.

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