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HUMAN RIGHTS COMMISSION OF SRI LANKA

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08 June, 2020

Secretary to the President

Secretary/Ministry of Defense

Inspector-General of Police (Acting)

HRCSL Recommendations on Regularizing the Imposition of Curfew

The Human Rights Commission of Sri Lanka (HRCSL, the Commission) observes that a large number of persons have been arrested and vehicles confiscated for violation of curfew imposed from March, 2020 and thereafter in view of the COVID-19 pandemic. While the Commission fully recognizes the need to restrict freedom of movement in the interests of public health and public order during an extraordinary health emergency such as that facing the country at present, it is incumbent on the Commission per its lawful mandate as an oversight body to examine whether such restrictions are imposed in a manner that is compatible with relevant provisions of the Constitution and international human rights obligations of Sri Lanka and to make necessary recommendations to the government in that regard.

The Commission views the matter under consideration as one that affects the larger public interest. The Commission also has received expressions of public concern regarding the legality of the manner in which curfew is imposed at present.

The Commission has, from time to time, made recommendations to the government per the mandate conferred on it under s. 10 (c) & (d) of the Human Rights Commission of Sri Lanka Act, No.21 of 1996. S. 10 (c) & (d) declare as follows:

s. 10 – The functions of the Commission shall be: ...

(c) to advise the government in formulating legislation and administrative directives and procedures, in furtherance of the promotion and protection fundamental rights;

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பிரதான அலுவலகம் }
Head Office }
දුරකථන }
தொலைபேசி }
Telephone }

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14, ஆர். ஏ. தே மெல் மாவத்தை, கொழும்பு - 04.
14, R. A. De Mel Mawatha, Colombo - 04.
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Chairperson }
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Secretary }

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தரந்த அழைப்பு }
Hotline }

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மின்துறை }
e-mail } sechrc@gmail.com
වෙබ් }
இணையம் }
Web } www.hrcsl.lk

(d) to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards;...

The Commission is also mindful that it is mandated to examine complaints “regarding procedures” with a view to ensuring compliance with the provisions of the Constitution relating to fundamental rights (S.10 (a)).

In this instance, the matter that falls within the purview of the Commission per its lawful mandate is to examine whether or not the curfew currently enforced in the country (whether in the whole country or in parts thereof) is being imposed in a manner that is in violation of the fundamental rights of the people under the Constitution of Sri Lanka and also Sri Lanka’s international human rights obligations.

The Commission having given due consideration to the matter, presents the following observations and recommendations:

- i) The Commission is strongly of the view that given the unprecedented nature of the health crisis facing Sri Lanka at present owing to the COVID-19 pandemic, the imposition of curfew or other forms of restriction of movement covering the entire country or certain areas as necessary is essential in the interest of public health and public order.
- ii) Freedom of movement guaranteed under Article 14 (1) (h) of the Constitution to all citizens is a critically important freedom closely interlinked with all other aspects of human rights. However, Article 15 (7) provides that the right shall be subject to restrictions. In order for such restrictions to be constitutional they should be “prescribed by law” for certain purposes which include the protection of public order and public health. “Law” for purposes of restrictions under the Article includes regulations made under existing law relating to public security (i.e., emergency regulations).
- iii) The Supreme Court of Sri Lanka has held that freedom of movement can be restricted even for purposes of national security only according to Art. 15 (6) and (7) of the Constitution. If the State cannot establish that the restriction was imposed by law, the fundamental right to freedom of movement is violated (**Vadivel v. OIC, Sithambarapuram Regional Police Post, Vavuniya**, [2002] 3 Sri LR 146); that even during a state of emergency the setting up of security check points along roads in an

arbitrary manner violates freedom of movement (*Rodrigo v. Imalka, SI Kirulapone*, SC (FR)No. 297/2007 S.C. Minute of 03.012.2007).

iv) Similarly, international human rights obligations undertaken by Sri Lanka recognize that freedom of movement can be restricted only on the basis of law to attain specific goals including the protection of public health and public order (Article 12, International Covenant on Civil & Political Rights). Such restrictions must be consonant with all other rights. The General Comment on Article 12 adopted at the Sixty-seventh session of the UN Human Rights Committee, on 2 November 1999 provides as follows:

To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant (clause 11 of General Comment No.27).

v) The current curfew (i.e., restriction on freedom of movement) imposed in Sri Lanka is for purposes of maintaining public health and preventing public disorder. Both purposes are covered by Article 15 (7) of the Constitution and also our international obligations.

vi) Therefore, the central issue that requires our attention is whether curfew has been validly imposed by law to comply with requirements of our Constitution and international human rights law obligations.

vii) Quarantine and Prevention of Disease Ordinance, No. 3 of 1897

a) It appears that the currently enforced curfew is being imposed under powers emanating from the Quarantine and Prevention of Diseases Ordinance, No.3 of 1897 (as amended). S. 2 of the Ordinance authorizes the Minister to make regulations for “the purposes of preventing the introduction into Ceylon of any disease, and also preventing the spread of any disease in and outside Ceylon”. The matters the Minister may make regulations under S. 2 (1) do not include extensive restrictions on movement such as the imposition of curfew. The Section only permits, regulations for the purpose of “isolating all cases of disease and diseased persons” – i.e., of quarantining infected people - which is of limited scope.

The Minister of Health has issued several Regulations under this Ordinance after the outbreak of the COVID-19 pandemic. However, none of them provide for the

imposition of any form of travel restrictions. It is also noted that the Minister has not made any regulations under s.2 read together with s.3 (2), the latter being an *omnibus* clause.

- b) Regulations issued by the Minister dated 25 March, 2020 published in Gazette No. 2168/6 of same date, among other things, designates the Director-General of Health Service as the ‘proper authority’ for the whole of Sri Lanka for purposes of the Ordinance. Regulations gazetted in March, 2020 (Gazette No. 2168/6 of 25 March, 2020) empower the proper authority to designate an area as ‘diseased locality’:

Diseased locality means any locality infected or suspected of being infected with disease and declared to be diseased by the proper authority as a diseased locality for such period as the proper authority shall determine (Regulation 2).

- c) However, recent regulations do not specify the powers the “proper authority” may exercise over designated diseased areas. Under Quarantine and Prevention of Diseases Regulations of 1925 (as amended), the proper authority is empowered, among other matters, to prevent entry into or exit from ‘diseased localities’ (Regulation 55 of General Regulations). We have observed the recent exercise of such powers in relation to specific localities where persons infected with COVID-19 virus had been located (e.g. Suduwella, Akurana, localities in Beruwala, Welisara Navy Camp). It is doubtful whether these powers relating to specific localities (in which diseased persons have already been located) could be extended to declare curfew for the entire country or several districts for preventive purposes. Nothing in the existing quarantine regulations suggest the conferment of such extensive powers on the proper authority.

- d) On the other hand, given the necessity to limit movement beyond ‘diseased localities’ during an epidemic or a pandemic for preventive purposes, it is observed that the Minister could utilize wide powers conferred by S. 3(2) of the Ordinance to **issue** regulations conferring powers on relevant authorities to declare curfew for public health purposes on the advice of health authorities. S. 3 (2) provides as follows:

Provided always that nothing in this section shall restrict or be construed to restrict the generality of the powers conferred on the Minister by s. 2, but such powers shall extend to all matters, whether similar or not to all

in this section mentioned, as to which it may be expedient to make regulations for the better carrying into effect the objectives of this Ordinance.

viii) Police Ordinance, No. 16 of 1865

After the breakout of the COVID-19 virus infection in Sri Lanka, the Acting Inspector General of Police, made the following Declaration dated 20 March, 2020 under the heading ‘Declaration of Police Curfew Islandwide’:

With a view to prevent violation of provisions and regulations of the Quarantine and Prevention of Disease Ordinance imposed for prevention of spreading Covid-19 alias New Corona Virus the police curfew has been imposed for the whole island from 1800 hours of 20.03.2020 to 0600 hours of 23.03.2020.

The public was informed of this Declaration by the Director-General of Public Information.

Since 20 March, the public has been informed of many declarations relating to curfew by the Presidential Media Division. However, police declarations pertaining to the announcements of the PMD are not available in the public domain. A request was made by the HRCSL to IGP (Acting) by letter dated 27 May, 2020 to make available to it copies of all police declarations of curfew since 20 March together with related advisories from the health authorities. However, the Commission has yet to receive a response.

It is noted that S. 56 of the Police Ordinance, No.16 of 1865 (as amended) lays down the duties of individual police officers including the duty to “preserve the peace”. An examination of the Ordinance as a whole indicates that it does not confer general powers on the police to declare curfew. It appears that ‘police curfew’ has evolved as a practice.

It is observed, however, that extensive arrests have been made and vehicles confiscated for violation of curfew by the police on the basis of ‘police curfew’.

The Commission has consistently expressed its appreciation of the role played by the Police Department and other institutions in assisting the public health authorities to control the pandemic. It is critically important, however, that all official actions fall within the permitted limits of the law.

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<p>දුරකථන தொலைபேசி Telephone</p>	<p>94 -11- 2505580 / 81 / 82</p>	<p>ලේකම් செயலாளர் Secretary</p>	<p>011-2505521</p>	<p>උද්‍යෝගී රේඛාව துரித அழைப்பு Hotline</p>	<p>1996</p>	<p>වෙබ් අඩවිය இணையம் Web</p>	<p>www.hrsl.lk</p>

ix) **Sri Lanka Disaster Management Act, No.13 of 2005**

The term “disaster” is defined by the above statute to also include an epidemic (S.25). However, extraordinary measures that can be taken in the event of a disaster can be taken by the designated authorities only if a ‘state of disaster’ is declared by the President and is approved by Parliament (S.11). In the absence of a sitting Parliament, no such declaration can be made.

x) **Public Security Ordinance, No.25 of 1947 (PSO) (as amended)**

It is the PSO that clearly provides for powers to impose curfew (S.16 in Part III of the PSO):

(1) *Where the President considers it necessary to do so for the maintenance of public order in any area, he may, by Order published in the Gazette, direct that, subject to such exemption as may be made by that Order or by any subsequent Order made under this section, no person in such area shall, between such hours as may be specified in the Order, be on any public road, railway, public park, public recreation ground or other public ground or the seashore except under the authority of a written permit granted by such person as may be specified in the Order...*

It is not necessary to declare a state of emergency to invoke powers under Part III although it requires adherence to S.2 (3) of the PSO. S. 21 of the PSO requires:

(1) *An Order made under section 12, section 16 or section 17 shall be in operation for a period of one month from the date of its publication in the Gazette, but without prejudice to the earlier rescission of that Order or to the making of a further Order at or before the end of that period.*

(2) *The provisions of subsection (3) of section 2 shall, mutatis mutandis, apply to an order made under section 12, section 16 or section 17 in like manner as they apply to a Proclamation made under subsection (1) of section 2.*

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Section 2(3) of the PSO provides:

Where a Proclamation is made under the preceding provisions of this section, the occasion thereof shall forthwith be communicated to Parliament, and, if Parliament is then separated by any such adjournment or prorogation as will not expire within ten days, a Proclamation shall be issued for the meeting of Parliament within ten days, and Parliament shall accordingly meet and sit upon the day appointed by that Proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

The fact that the occasion of making of a Proclamation under subsection (1) cannot be communicated to Parliament by reason that Parliament does not meet when summoned to meet as provided by this subsection shall not in any way affect the validity or operation of that Proclamation or of the provisions of Part II of this Ordinance or anything done under that Part: Provided that in such event, Parliament shall again be summoned to meet as early as possible thereafter.

The concept of maintenance of ‘public order’ has been recognized by the Supreme Court to mean the prevention of public disorder. Widespread breaches of peace and tranquility result in public disorder. The Supreme Court referred extensively to jurisprudence of the Indian Supreme Court which had differentiated between breaches of ‘law and order’ and ‘public order’, holding that public order is the narrower concept which is synonymous with public peace, safety and tranquility (**Siriwardena v. Liyanage** [1983] 2 Sri LR 164 per Wimalaratne J.). Serious public health crises such as the current pandemic give rise to concerns of public disorder emanating from public fears and insecurity. The concept of public safety referred to by the Supreme Court is of great relevance in the instant situation. Safety of the public from the spread of a deadly disease, preventing violence and hostility emanating from public suspicions and fears about sources of the disease etc. are all concerns that justify restriction of the right to movement in the interest of public order.

Similarly, from a procedural perspective, we observe that the President has invoked Part III of the PSO to make orders under S.12 to call out the armed forces to maintain public order in all districts since the April 21 bombings last year. The Presidential Order is renewed and re-gazetted each month, the most recent via order published in Gazette No. 2176/17 of 21 May, 2020.

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xi) Recommendations

- a) These are recommendations made by the Human Rights Commission of Sri Lanka under powers vested in it by Act No.21 of 1996 for purposes of promoting and protecting fundamental rights.

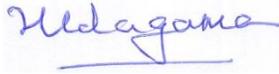
The Commission reiterates its view that restrictions to freedom of movement (e.g., imposing curfew, restricting movement to diseased localities) are a critical necessity in the interests of public health and public order during a health crisis of the nature that has gripped the country at present. However, such restrictions cannot be in violation of the Rule of Law. Both the Constitution and international human rights obligations of Sri Lanka stipulate that restrictions to freedom of movement are legitimate only if imposed by law in order to achieve permissible objectives. Preservation of public health and public order are permissible objectives. The central issue addressed by these recommendations is the manner in which the restrictions should be imposed by law.

The Commission is of the view that the imposition of curfew can be regularized in two ways:

- (i) By Order made by the President and Gazetted under S.16 of the PSO— this is the most authoritative manner in which curfew could be declared. A pandemic calls for decisive action; this option would be the stronger one also taking into account the extent to which rights of the public are affected by continuous restrictions on right to movement. It also must be noted that a declaration of a state of emergency is not required to use powers under S. 16; OR
- (ii) By Regulation made by the Minister under S. 2 read together S. 3 (2) of the Quarantine and Prevention of Disease Ordinance. It is the observation of the Commission that the ‘proper authority’ appointed by the Minister has powers to restrict movement only over ‘diseased localities’. Such powers do not confer wide enough authority to impose countrywide curfew as a precautionary measure.

- b) It is essential that there is transparency in the declaration of curfew and all other forms of restriction of movement. All declarations of curfew must be formally made and must be available in the public domain. Currently, the Presidential Media Division announces the imposition and withdrawal of curfew. Although we are made to understand that curfew is currently declared by the police purportedly under the Quarantine and Prevention of Disease Ordinance, the declarations are not available in the public domain.

The Commission wishes to emphasize that nothing in these recommendations should be construed by any member of the public to act contrary to health guidelines issued by the public health authorities in regard to the COVID-19 pandemic or act in a manner that would be harmful to public health in general.



Chairperson

Human Rights Commission of Sri Lanka

cc: Hon. Attorney-General
Secretary/Ministry of Health
Director-General/Health Service