1. INTRODUCTION

A constitutional crisis is a problem or conflict arising in the functioning of government that cannot be solved through, legislative or constitutional means. Neither the executive, the legislature nor the judiciary can solve such a problem due to the lack of constitutional or other legislative provisions available to address the phenomenon.

The first covid-19 infected person in Sri Lanka was identified on 25 January, the second on 10 March. The government beginning from 16 March gradually began enforcing lockdown measures and by 19 March enforced a strict lockdown, restrictions of movement and curfews, banning gatherings and assemblies and thus restricting citizens’ rights and freedoms.

Parliament was dissolved on 2 March in preparation for the 25 April parliamentary elections. On 19 March the Election Commission postponed the elections due to the pandemic to a later date.

This paper examines if a constitutional crisis has been triggered in Sri Lanka by the postponement of the Parliamentary Elections and what measures can be taken to address the current situation.

2. COVID-19 RESPONSE MECHANISMS IN SRI LANKA

2.1 QUARANTINE AND TREATMENT

Identification, quarantine and treatment of covid-19 patients to prevent the spread of the pandemic in Sri Lanka, is handled by the network of hospitals coming under the Ministry of Health, through the Health Services Department under the Director General of Health Services, the network of hospitals under the Health Ministry and the Provincial Councils, the Medical Officer Health (MOH) offices functioning under the provincial councils and the local government, and Public Health Inspectors (PHIs) at grass root levels that report to the MOH. Members of the Police and Sri Lanka armed forces (The Sri Lankan Army, Navy and the Air Force) provide support to these officials (at this point the President has, under section 12 of the Public Security Ordinance called upon the Sri Lanka Armed Forces to help the Police maintain law and order). Some quarantine centers are facilitated by the Army and Navy.

Quarantine and treatment are based on the Quarantine and Disease Prevention Ordinance No 03 of 1897. In addition, the Minister of Health declared covid-19 as a quarantinable disease in March 2020 and further orders were issued covering the appointment of officials for

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and Prime Minister Mahinda Rajapaksa and founder of the Sri Lanka Podujana Peramuna (People’s Front), the party under which Gotabhaya Rajapaksa contested the November presidential election. This party has filed candidate nominations for the forthcoming parliamentary elections in all electoral districts. Basil Rajapaksa holds no formal post in the party nor in the government, and is one of 46 members in the Task Force that includes secretaries to certain ministries, army commanders, acting Inspector General of Police, heads of state departments and five members representing the private sector.

On 31 March the President established the “Presidential Task Force on Modernising Sri Lanka’s Education Affairs, and Maintaining Education in the face of the Corona Pandemic”. This task force consists of 26 members including secretaries to certain ministries, vice-chancellors of state universities, principals representing state and international schools under two Co-Chairpersons, the secretary to Ministry of Higher Education and secretary to Ministry of Education. When a large number of Navy personnel who were working to contain the spread of the coronavirus had contracted the virus, another task force was set up on 27 April 2020 to “Study and Provide Instructions on measures to be taken by all Armed Forces to Prevent Coronavirus Infections among members of the Tri Forces”. Headed by a retired Airforce Commander, this task force consists of six members including two doctors and retired officers from Army, Navy and Airforce. These Task forces were established under the powers vested in the President under Article 33 of the Constitution.

With the dissolution of parliament on 2 March, all its members including ministers, deputy ministers and state ministers lost their portfolios. However, according to Article 47 of the Constitution, the powers of the cabinet ministers remain until the next election. According to the Constitution the President, in addition to his presidential powers, is also accorded special powers as the head of the Cabinet. The cabinet meets weekly under the leadership of the President and ministers have to take decisions based on the cabinet papers issued by the presi-
dent and the decisions relating to the suppression of the spread of covid-19. These decisions are implemented by the relevant ministries. However, due to the dissolution of parliament there is no parliamentary oversight of the work of the task forces nor the cabinet of ministers.

3. COVID-19 AND THE PARLIAMENTARY ELECTIONS

The current eighth parliament under the 1978 Constitution was elected in the Parliamentary Elections of 17 August 2015 and first met on 2 September 2015. According to Article 62(2) of the Constitution the Parliament remains in force for 5 years, i.e. until 2 September 2020. However, according to Article 70(1) the President has the power to dissolve Parliament after 4.5 years from the day of its first meeting. Article 70(5) prescribes that the proclamation for the dissolution of Parliament should be published by gazette, set a date for the elections and summon the new Parliament to meet on a date not later than three months after the date of this proclamation.

Accordingly, on 2 March 2020 it was proclaimed that:

- From midnight on 2 March 2020 Parliament is dissolved
- Parliamentary Elections are to be held on 25 April 2020
- The date for the new Parliament to convene is 14 May
- Nominations should be called from 12 to 19 March (midnight) 2020

Following the President’s proclamation, the Election Commission started election preparations and, under the Parliamentary Elections Act (No 1) of 1981, called for nominations from the 22 electoral districts. Once the nominations are received, the Election Commission should inform about the election date, the electoral districts, names of candidates and locations of polling stations.\(^{11}\)

Accordingly, on 20 March 2020 the Election Commission named the 22 electoral districts, announced the election date of 25 April 2020 and that the information on the names of the candidates and locations of polling stations would follow.\(^{12}\)

Due to the restrictions and curfew in place from 20 March to contain the covid-19 pandemic, conducting the elections on 25 April as announced by the President and the Election Commission was fast becoming a risky endeavour from a public health perspective.

The Election Commission decided to postpone the elections, citing Section 24(3) of the Parliamentary Elections Act which provides such postponement when “due to any emergency or unforeseen circumstances the poll for the election in any electoral district cannot be taken on the day specified”. According to this clause, the polling in an “electoral district” can be postponed if it has not been held, but not the entire election. The notice of 21 March 2020 by the Election Commission stated that “the Election Commission hereby announces that the poll for the Election in the Electoral Districts mentioned in the Schedule below cannot be taken on 25 April 2020 due to the Covid-19 outbreak in Sri Lanka”.\(^{13}\) The notification then listed all 22 electoral districts. Accordingly, the Election Commission postponed the polling in the 22 electoral districts which in effect amounts to the postponing of the parliamentary elections.

The gazette further states that “the day for the taking of the poll for the Election of Members of Parliament for the said Electoral Districts and that the said date will be notified by a Gazette Notification in due course”.

The Election Commission therefore requested the President in two letters on 31 March and 1 April 2020 to seek the determination of the Supreme Court on this issue based on the powers vested in the court under Article 129 of the Constitution. The Secretary to the President

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\(^{11}\) Article 24(2) of the Parliamentary Elections Act


responded on 6 April 2020 that the Election Commission is responsible for setting the election date and that the President has no intention to interfere with duties and obligations of the Election Commission. Thus, the question of reference to the Supreme Court in terms of Article 129 of the Constitution would not arise.\textsuperscript{14} The Election Commission on 20 April declared 20 June as the new election date.\textsuperscript{15}

The postponement of the elections to 20 June 2020 means that the first meeting of the new parliament cannot take place on 14 May 2020, as announced by the President on 2 March 2020.

According to Article 70(5)(c) of the Constitution, the President could proclaim a different date for the summoning of Parliament, however, the amended date cannot be later than three months after the date of the original proclamation. The new date for summoning of the first Parliament therefore must be a date before 2 June 2020.

Since the Election Commission has postponed the elections due to the covid-19 pandemic to 20 June, it is impossible to summon the new Parliament before 2 June. The President therefore cannot set a new date to summon the new parliament as provided for by Article 70(5)(c) of the Constitution.

4. COMPLICATIONS TRIGGERED BY THE DELAY IN CONVENING PARLIAMENT

4.1. POSSIBLE FUNDING ISSUES AFTER 30 APRIL

The budgeting process for the year 2020 should have begun in November 2019, but instead of the Appropriation Bill (budget), a Vote on Account for the period from 1 January to 30 April 2020 was presented by the then Minister of Finance (under the “Yahapalanaya Government”) under Article 150(2) of the Constitution and passed by Parliament on 23 October 2019.

The government resigned after the election of the new President in November 2019 and the then opposition members of Parliament became the ruling party. The new Cabinet met in November 2020 but the budget for 2020 was not passed. Accordingly, the Vote on Account passed by Parliament on 23 October 2019 will remain in force until Parliament passes the Appropriation Bill or until 30 April 2020.

According to Article 148 of the Constitution, Parliament has complete control over public finances and it has not authorized the government to use consolidated funds after 30 April. There are two ways that funds can be spent under Article 150(2), either by resolution of Parliament or by any law being granted for specified public services or the President may, according to Article 150(3), if he dissolves Parliament before the Appropriation Bill for the financial year has been adopted “authorize the issue from the Consolidated Fund and the expenditure of such sums as he may consider necessary for the public services until the expiry of a period of three months from the date on which the new Parliament is summoned to meet”.

However, although the President can order expenditure for public services for a period of three months from the date when the new Parliament is summoned to meet, he has no authority to issue from the consolidated fund after 30 April until the convening of the new parliament. From the last day given by parliament for expenditure to the date the new parliament is summoned, there are no legal provisions authorising the President to spend on his own volition from the consolidated fund. If the President attempted this, it would be a violation of the Constitution.

4.2. AN EMERGENCY WITHOUT EMERGENCY NOTIFICATION LEADS TO DISTORTION OF REPRESENTATIVE DEMOCRACY

A “police curfew” was first imposed in the Puttalam District from 17 March to control the Coronavirus pandemic and enforced throughout Sri Lanka on 20 March. However, the police have no legal provisions to impose a police curfew under general law. Such power can only be
granted under the Public Security Ordinance and Article 155 of the Constitution, under Emergency Regulations. In order to impose emergency regulations, the President must declare an emergency.

Article 155(4) of the Constitution requires the President to seek the approval of parliament within 10 days once an emergency situation is declared by the President in a gazette notification. If an emergency is proclaimed after the dissolution of Parliament the proclamation operates as a summoning of Parliament to meet on the tenth day after the proclamation (Article 155(4)i). This provides the possibility to issue a legally valid police curfew in the event of an emergency declaration. So far the government and the President have not officially declared an emergency as this proclamation would lead to the reconvening of Parliament.

In the meantime, the Attorney General in his reply to the Acting Inspector General of Police on 30 April 2020, justified the ‘Quarantine Curfew’ including the temporary measures adopted in restriction of movements when the Acting Inspector General of Police sought the Attorney General’s advice and approval on the imposition of the curfew. On 3 May 2020, former Tamil National Alliance parliamentarian President Counsel M. Sumanthiran in his letter to the Human Rights Commission requested the Commission to advise the government to take steps to legalize the curfew which was imposed not in line with the law. Similarly, delivering a ruling on the bail application on 11 May to an accused arrested on charges of violating the curfew, the Gampaha Magistrate declared that the curfew imposed by the Police since 18 March to contain the spread of the coronavirus on the directives of the Director-General of Health Services was legally valid.

Sri Lankan parliamentary history shows instances of enacting special legislation to respond to exceptional circumstances, such as the Rehabilitation of Persons, Properties and Industries Act No. 29 of 1987 during the war period and the Tsunami (Special Provisions) Act No. 16 of 2005. However, it is not possible to enact legal provisions to face and mitigate the consequences of the covid-19 pandemic in the absence of a functional Parliament.

If the Parliament met, amendments to the Constitution and the Elections Act could be enacted to address the issues resulting from the postponement of the parliamentary elections due to the covid-19 pandemic. In the history of the Sri Lankan Parliament there have been instances where amendments to the Local Authorities Elections Ordinances were introduced removing legal hurdles that could have surfaced preventing the holding of local government elections even after receiving nominations.16

A long absence of Parliament is not conducive to democracy. The three pillars of a representative democracy are the Executive, the Legislature and the Judiciary. A system of checks and balances must be worked out between these three pillars for a democracy to function. In Sri Lanka the Legislature has been paralyzed as Parliament has been unable to meet for nearly three months. The people elect the President and Members of Parliament for their offices but it is the Constitution that outlines the powers of the President and the Members of Parliament and empowers them to carry out their duties in those roles after taking oaths under the Constitution. This binds them to exercise their powers in strict accordance with the Constitution. Article 33 A of the Constitution states that the President is responsible to Parliament. Similarly, legislative powers, including fiscal control, are vested in Parliament.

5. CONSTITUTIONAL REMEDIES

The Constitution provides several opportunities to resolve these issues.

The President dissolved Parliament on 2 March 2020 in accordance with the powers vested in the President under Article 70(5) of the Constitution. There are no constitutional provisions to annul such a declaration. However, under Section 18 of the Interpretation Ordinance, this proclamation can be revoked on the basis that there is a legal provision that the issuer has the power to

change, amend and revoke any notice. The Parliament would reconvene and the electoral nominations called for will be void. The President may, at any time, dissolve Parliament again and call for new elections.

There is a prior example for such a cancellation of a proclamation calling for an election. On 10 July 2001 then President Chandrika Bandaranaike Kumaratunga announced a referendum for 10 August which was cancelled on 7 August 2001 and re-announced on 2 November 2001.17

The Constitution in Article 70(7) also provides for the re-summoning of parliament by the President if “an emergency has arisen of such a nature that an earlier meeting of Parliament is necessary”. The Constitution also allows parliament to “stand dissolved upon the termination of the emergency or the conclusion of the General Election, whichever is earlier”, enabling the Parliament to meet until the time of an election and allowing the approval of funds and the enactment of necessary legislation. Applying this provision would resolve the crisis of non-sitting and non-functioning Parliament and provide a legal basis and parliamentary oversight for the existing emergency measures.

According to Article 129(1) of the Constitution, the President can refer to the Supreme Court a question of law or fact of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. This constitutional power is only available to the President. The current situation of postponed elections and a situation which has already led to non-adherence with constitutional requirements by not being able to convene the new parliament until 2 June as required would be one of such a nature and importance that a referral to the Supreme Court seems appropriate.

6. CONCLUSION

The current situation in Sri Lanka is often referred to as a constitutional crisis as if it is a situation which no one can fix. However, there is a solution to the constitutional issues that have surfaced with the postponement of the parliamentary elections to 20 June due to the covid-19 pandemic. The executive, the legislature or the judiciary could provide a solution to this problem; it does not need to become a constitutional crisis. There are three alternatives to choose from to address the current situation and either annul the proclamation calling for the election, reconvene parliament under Article 70 (7) or refer the question to the Supreme Court. This would not only prevent Sri Lanka from entering a potential constitutional crisis but would also provide the necessary parliamentary oversight over emergency measures taken to address the covid-19 pandemic, restricting rights and freedoms. In view of time and assuming that the elections would take place either in June or shortly thereafter, the most appropriate course of action for the President at this juncture would be to reconvene the Parliament under Article 70(7) of the Constitution.

However, according to Article 64 of the Constitution, the term of the current Eighth Parliament ends on 2 September 2020. If a parliamentary election cannot be held and a new parliament is not convened within three months from that date, a constitutional crisis will definitely arise. The Constitution would need to be amended to address that situation. A constitutional amendment would need a 2/3 majority of the parliament and could necessitate a referendum.

Postponing the Parliamentary Elections to any date before or on 2 December 2020 will not create a constitutional crisis in Sri Lanka as per the existing legal provisions.

However, of the three pillars of democracy, the Executive, the Legislature, and the Judiciary, the Legislature does not exist at present. The responsibility of not pushing the country into a constitutional crisis is the responsibil-

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17 It was announced by Gazette Extraordinary No. 1192/16 and cancelled by Gazette Notification No. 1196/18 and Gazette Notification No. 1199/30, https://www.parliament.lk/si/referendums
ity of the executive and the judiciary. The judiciary could be triggered to intervene in a crisis only in an instance where the President approaches the Supreme court for an opinion or where a citizen files either a fundamental rights petition or a writ application.

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