



## Brief Guide I

### Evolving Legal Issues in the Context of COVID-19

The Centre for Policy Alternatives (CPA) has prepared this brief guide to raise several legal issues and highlight consequences in the context of Covid-19 in Sri Lanka. Sri Lanka has taken swift action in recent weeks to contain Covid-19 outbreak. These actions have been taken in the backdrop of Parliament being dissolved by President Gotabaya Rajapaksa on 2<sup>nd</sup> March 2020. Whilst CPA acknowledges the work done by those in the frontlines in containing the spread of the virus, increasing concerns are raised of emerging governance and rights issues in the response to the present health emergency. This brief guide aims to constructively engage with the authorities to ensure the Government is able to deal with Covid-19 pandemic efficiently, lawfully and constitutionally. In the effort to tackle the virus, CPA underlines the importance of upholding of the rule of law and adherence to constitutional governance in Sri Lanka.

#### Executive Summary

Firstly, attention is drawn to the postponement of parliamentary elections. Parliament was dissolved on 2<sup>nd</sup> March 2020, at a time when there was no known health emergency in Sri Lanka for Covid-19. However, with numbers rising, calls were made to postpone elections but to no avail. Notable here is the point that nothing in the Constitution or the Parliamentary Elections Act prevented the President from withdrawing the Gazette which dissolved Parliament.

On 19<sup>th</sup> March, with the conclusion of the period for nominations, the Election Commission decided to postpone elections. In such a context, Parliament remains dissolved with uncertainty as to when elections will take place. Moreover, despite the Gazette issued on 2<sup>nd</sup> March summoning “the new Parliament to meet on” the 14<sup>th</sup> May 2020, no such Parliament will be in existence to meet on the said date.

The guide also examines issues around the dissolution of Parliament and its ramifications. Whilst the Election Commission had little choice in postponing the election, it has nonetheless impacted on the fundamental rights of citizens. CPA notes that if the President had withdrawn the Gazette dated 2<sup>nd</sup> March 2020, Parliament would continue to function until the end of August 2020.

CPA discusses here several consequences that flow from the absence of a functioning Parliament. In terms of Article 148, Parliament is responsible for full control over public finance, a position reiterated by several Supreme Court determinations. In the absence of a functioning Parliament, serious consequences arise including the lack of oversight over the constitutional limitations on the President’s ability to make appropriations. This may give unfettered control over public finance to the Executive against the letter and

spirit of the Constitution, and with no checks and balances. In order to ensure both constitutionality and efficiency in the response to the emergency, it is critical for Parliament to be summoned to pass the necessary appropriations.

Despite Sri Lanka having decades of experience tackling numerous disasters, Covid-19 presents an unprecedented challenge with the need for new frameworks. In the absence of a functioning Parliament, concern is also raised as to how this would be done. Furthermore, not summoning Parliament also prevents the government from using several existing mechanisms which could be used by the Government to deal with the present emergency.

Parliament as an institution has an important role in situations of emergency, and it is paramount that the different arms of the Government function in a manner that would both effectively respond to the emergency, and do so in a manner that respects the Constitution and the rule of law. These issues, discussed in detail in the guide, require urgent attention to ensure that Sri Lanka's response to the emergency are effective, measured, and in adherence to the constitutional framework. Inaction and/or unwillingness in this regard will have serious and long-term consequences.

## **Background**

President Gotabaya Rajapaksa issued a Gazette notification dissolving Parliament on 2<sup>nd</sup> March 2020.<sup>1</sup> In terms of this notification;

- i) Parliament would stand dissolved at midnight on 2<sup>nd</sup> March 2020;
- ii) The Parliamentary Elections are to be held on 25<sup>th</sup> April 2020;
- iii) Nominations for Parliamentary Elections to be accepted between 12<sup>th</sup> March 2020 and 12 noon on the 19<sup>th</sup> March 2020; and
- iv) The new Parliament to commence sittings on 14<sup>th</sup> May 2020.

The President had from December 2019 been of the position that he would dissolve Parliament at the first available opportunity, which is when the Parliament elected in August 2015 would have completed four and a half years of its five-year term. At the time he dissolved Parliament, there were no active Covid-19 cases within Sri Lanka, despite a growing crisis in China and Europe, and large numbers of cases in other East Asian countries.

The first confirmed case of a Sri Lankan citizen was reported on 11<sup>th</sup> March 2020, and by 18<sup>th</sup> March 2020 the total number of confirmed cases had risen to 53.<sup>2</sup> During this period there were several calls from some political parties and election monitoring organisations to postpone Parliamentary Elections for a few months until the threat of the disease had abated.<sup>3</sup>

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<sup>1</sup> Gazette (Extra Ordinary) No 2165/8, 2 March 2020, available at [www.presidentsoffice.gov.lk/wp-content/uploads/2020/02/2165-08\\_E.pdf](http://www.presidentsoffice.gov.lk/wp-content/uploads/2020/02/2165-08_E.pdf)

<sup>2</sup> Epidemiology Unit Ministry of Health & Indigenous Medical Services, Coronavirus disease 2019 (COVID-19)-Situation Report -19.03.2020, available at [http://www.epid.gov.lk/web/images/pdf/corona\\_virus\\_report/sitrep-sl-en-19-03\\_10.pdf](http://www.epid.gov.lk/web/images/pdf/corona_virus_report/sitrep-sl-en-19-03_10.pdf)

<sup>3</sup> Newswire.lk, "Safety of public of 'paramount concern', Postpone Election – TNA", <http://www.newswire.lk/2020/03/16/safety-of-public-of-paramount-concern-postpone-election-tna/>; The Centre for Monitoring Election Violence, "CMEV Calls for Postponement of General Election 2020", <https://cmev.org/2020/03/17/cmev-calls-for-postponement-of-general-election-2020/>

Furthermore, the government declared 16<sup>th</sup> March 2020 as a Public Holiday and the 17<sup>th</sup> to 19<sup>th</sup> March were declared “special holidays”, with the government announcing several other measures aimed at curbing the spread of Covid-19.<sup>4</sup> The members of the Election Commission also met public health officials to discuss the “contingency measures” for Parliamentary Elections.<sup>5</sup>

Upon conclusion of the period for nominations on 19<sup>th</sup> March 2020, the Election Commission informed the media that Parliamentary Elections would be postponed.

### **Current position regarding the Parliamentary Elections in Sri Lanka**

The Election Commission issued a Gazette notification officially announcing that the elections would be a contested election in all 22 electoral districts, in terms of section 24(1) of the Parliamentary Elections Act.<sup>6</sup>

However, by further Gazette notification dated 21<sup>st</sup> March 2020, the Commission notified the public that the poll in all 22 electoral districts cannot be taken on 25<sup>th</sup> April 2020 due to the Covid-19 outbreak in Sri Lanka.<sup>7</sup> The notification further specified that the Commission would appoint a date after 14<sup>th</sup> May 2020 as a date for the poll and that “the said date will be notified by a Gazette Notification in due course.”<sup>8</sup>

As such, Parliament remains dissolved and there is presently no exact date as to when the poll for Parliamentary Elections will take place.

Whilst the nomination period has ended, the names of candidates nominated by the respective political parties and independent groups for each electoral district have not been gazetted in terms of S. 24(1) (b) of the Parliamentary Elections Act.

Furthermore, whilst the President in his proclamation summoned the new Parliament to meet on 14<sup>th</sup> May 2020, no such Parliament will be in existence to meet on the said date.

### **Legal Consequences of Postponing Parliamentary Elections**

In terms of Article 70(1) of the Constitution, the President has the power to dissolve Parliament any time after the lapse of four and a half years from the date of Parliament’s first meeting. This was the provision that was used by the President to issue the Gazette dated 2<sup>nd</sup> March 2020 dissolving Parliament, noted above. If the President had not dissolved Parliament, then in terms of the Constitution, that Parliament would have continued until 1<sup>st</sup> September 2020.<sup>9</sup>

The Election Commission used the powers granted to it in terms of section 24(3) of the Parliamentary Elections Act to postpone the poll for Parliamentary Elections in all 22 electoral districts. In terms of that

<sup>4</sup> President's Media Division, "More decision to contain COVID – 19 outbreak", <http://www.pmdnews.lk/more-decision-to-contain-covid-19-outbreak/>

<sup>5</sup> Manjula Fernando, "EC, Health Ministry to decide on contingency measures tomorrow", The Sunday Observer, available at <http://www.sundayobserver.lk/2020/03/15/news/ec-health-ministry-decide-contingency-measures-tomorrow>

<sup>6</sup> Gazette (Extra Ordinary) No. 2167/12, 20<sup>th</sup> March 2020, available at [http://www.documents.gov.lk/files/egz/2020/3/2167-12\\_E.pdf](http://www.documents.gov.lk/files/egz/2020/3/2167-12_E.pdf)

<sup>7</sup> Gazette (Extra Ordinary) No. 2167/19, 21<sup>st</sup> March 2020, available at [http://www.documents.gov.lk/files/egz/2020/3/2167-19\\_E.pdf](http://www.documents.gov.lk/files/egz/2020/3/2167-19_E.pdf)

<sup>8</sup> Ibid Para (ii)

<sup>9</sup> Article 62(2) of the Constitution.

Act, the Election Commission can only exercise this power after it has issued a declaration that the election is a contested one in terms of section 24(1).<sup>10</sup>

Up until the point the Election Commission issued the order postponing the poll, there was nothing in the Constitution or the Parliamentary Elections Act which prevented the President from withdrawing the Gazette dated 2<sup>nd</sup> March 2020. The President does have an obligation to act reasonably and does not have the power to withdraw such a Gazette in an arbitrary manner.<sup>11</sup> Given the present circumstances, however, he would have been entirely justified in withdrawing the Gazette and it is unlikely that any accusation of arbitrariness would have been raised. The effect of the withdrawal would have been to retract the dissolution of Parliament.

The decision of the Election Commission to postpone the Parliamentary Elections is welcome as holding elections during the Covid-19 pandemic is likely to have had disastrous consequences.

However, the Elections Commission postponing the Parliamentary elections has raised several consequences discussed below:

### 1. The Election Campaign

The Election Commission's decision to postpone the election does not directly impact campaigning through activities which are not prohibited in terms of the Parliamentary Elections Act. This could have led to a situation where candidates continued to campaign and thereby act as vectors for the spread of Covid- 19 and place the public at greater risk.

The Commission has sought to mitigate this risk by not issuing the Gazette specifying the names of candidates and their respective serial numbers as assigned by the Commission. In the absence of the official serial number issued by the Commission, a candidate can only engage in a limited range of activities.

Furthermore, even without the declaration of a 'curfew', the Police Ordinance and the Code of Criminal Procedure both contain several provisions which could be used to prevent public campaigning and election meetings which could exacerbate the spread of Covid-19.<sup>12</sup>

### 2. Dissolution of Parliament

The Election Commission only has the power to postpone the election. This order does not undo the proclamation issued by the President dissolving Parliament. As such at present, Parliament remains dissolved in terms of Article 70 of the Constitution, with no clearly defined date for elections or reconvening a newly elected Parliament. This raises several legal challenges.

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<sup>10</sup> Which it did on the 20<sup>th</sup> March 2020. See Footnote 6 above.

<sup>11</sup> See **Rajavarithiam Sampanthan and Others Vs. The Hon. Attorney General and Others, SC FR 351-356/ 2018, SC FR 358- 361/ 2018**

<sup>12</sup> See generally S. 77 – 81 of Police Ordinance, S. 106 of the Code of Criminal Procedure Act.

## I. The Sovereignty of the People

In terms of Article 3 of the Constitution, the sovereignty of the people includes the powers of the government, fundamental rights and the franchise. Parliament, consisting of the elected representatives of the people is the main instrument by which the legislative power of the people is exercised.

The Supreme Court has recognised in several judgements that the failure to hold elections on the due date or postponing such elections is a violation of the franchise and a violation of the fundamental rights of the people.<sup>13</sup> Whilst the Election Commission had little choice in postponing the election due to the prevailing circumstances, it has nonetheless resulted in an abridgement of the fundamental rights of citizens. Had the Gazette dated 2<sup>nd</sup> March 2020 dissolving Parliament been withdrawn by the President (instead of the Election Commission being forced to postpone the poll), this would not have violated the franchise of the people as Parliament would have been able to continue to function until the end of August 2020.

As well being an affront to the sovereignty of the people, the absence of a functioning Parliament has several other serious consequences on governance.

## II. Public Finance

In terms of Article 148<sup>14</sup> of the Constitution, Parliament has full control over public finance. Article 149 – 152 of the Constitution provides for specific enumeration of this control, including in relation to government income / revenue and government expenditure.

The Supreme Court in several determinations<sup>15</sup> has concluded that Article 148 makes it mandatory that Parliament retains full control of matters relating to public finance. The Supreme Court has further explained that the obligation on Parliament to exercise full control means:

- (i) Control over the sources of finances, i.e., imposition of taxes, levies, rates and the like and the creation of any debt of the Republic.
- (ii) Control by way of allocation of public finance to the respective departments and agencies of the Government and the setting of limits of such expenditure; and
- (iii) Control by way of continuous audit and check as to due diligence in performance in relation to (i) and (ii) above.

Importantly, the Supreme Court goes further in its determinations in providing a rationale for why this control is important. Firstly, the full control by Parliament is part of the function of Parliament as a check on the executive. Secondly, Parliament is not exercising this power for its own benefit but is exercising power in “trust” for the people. As such, it is incumbent on Parliament to ensure that public finance is controlled in a transparent and open manner.

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<sup>13</sup> **Karunatileke Vs. Dissanayake (1999) 1 S.L.R. 157 at pg. 173-174; Mohamed Hussain Hajjar Muhammad and others vs. The Election Commission of Sri Lanka and others SC FR 35/2016**

<sup>14</sup> “Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.”

<sup>15</sup> See **Supreme Court Special Determination 3&4 /2008 [in re the Appropriation Bill] ; Supreme Court Special Determination 28 & 29/ 2016 [ In re the Fiscal Management (Responsibility) (Amendment) Bill ]**

It goes without saying that Parliament as a deliberative assembly, is best placed to exercise such control in a transparent manner. The business of Parliament is made public and is a matter of public record. Bills, motions and resolutions passed by Parliament are also public. Members of the government and the opposition have the freedom of speech to raise questions, make statements and engage in debate within Parliament. Moving public finance outside the domain of Parliament and giving the Executive unfettered control would not only be clearly unconstitutional, but also unwise, and against the public interest.

However, there is one<sup>16</sup> important exception to this rule, which is contained in Article 150(3):

“Where the President dissolves Parliament **before the Appropriation Bill for the financial year has passed into law**, he may, **unless Parliament shall have already made provision**, 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**.

An analysis of this provision shows us that it relates to a very specific situation. It applies only where:

- (i) Parliament has not made any provision regarding expenditure for the period after the dissolution of a Parliament and the commencement of a newly elected Parliament;
- (ii) The President can make allocations from the Consolidated Fund, but only to the extent “necessary for public services”;
- (iii) The time period for this allocation is limited and not open ended.

After the Presidential Election in November 2019, the new government did not present a budget. Instead, Parliament passed a Vote on Account on 23<sup>rd</sup> October 2019, covering the period commencing from 1<sup>st</sup> January 2020 and ending on 30<sup>th</sup> April 2020 or on a date on which the Appropriation Act for 2020 commences, whichever comes first.<sup>17</sup> In a situation where Parliament is dissolved there is no chance of the Appropriation’s Act being passed during April 2020, as such 30<sup>th</sup> April 2020, is the date on which appropriations made by Parliament through the vote on account come to an end. As such the President’s powers in terms of Article 150(3) can only be triggered after the 30<sup>th</sup> April 2020.<sup>18</sup>

The time period for the President to make such allocations is limited to “until the expiry of a period of three months **from the date on which the new Parliament is summoned to meet**”. Presently the Gazette dated 2<sup>nd</sup> March 2020 issued by the President remains valid and operational. As such the President can only make such payments of sums “necessary for public services” until 14<sup>th</sup> August 2020 (i.e. 3 months from the date the new Parliament is summoned to meet). Thus, not only would Parliamentary Elections need to take place before that, the Parliament would also have to pass an Appropriations Bill before 14<sup>th</sup> August 2020 deadline. In the current context of the Covid-19 pandemic, this seems to be an unrealistic deadline.

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<sup>16</sup> See also Article 150 (4), which relates to election related expenditure “Where the President dissolves Parliament and fixes a date or dates for a General Election the President may, **unless Parliament has already made provision in that behalf**, authorize the issue from the Consolidated Fund and the expenditure of such sums as he may, after consultation with the Commissioner of Elections, consider necessary for such elections.”

<sup>17</sup> See [https://www.parliament.lk/files/documents\\_news/2019/vote-on-account/resolution.pdf](https://www.parliament.lk/files/documents_news/2019/vote-on-account/resolution.pdf)

<sup>18</sup> See **Supreme Court Special Determination 30, 31, 32 & 33/ 2016 [In re the Value Added Tax (Amendment) Bill]** where the Court to the view that in light of the specific nature of these provisions, the procedure set forth to pass Bill and/or resolutions related to Finance need to be strictly adhered to. The Court went on to justify its strict interpretation on the basis that “.....it is the paramount duty of this Court to ensure that constitutional provisions are not violated and the powers conferred upon each Branch of the Government by the Constitution is safeguarded...”

Thus, the power of the President in terms of Article 150(3) is limited by time, and in scope to only expenditures that are “necessary for public services.” While what is “necessary for public services” is not defined, it is clear the Constitution contemplates only such expenditures as are essential to keep public services running until such time as full provision through a budget approved by Parliament can be made. Additionally, the Government is constrained by several laws as to the amount of local and foreign debt.<sup>19</sup> These amounts can only be changed by other Acts of Parliament.

The Constitution also envisages several mechanisms for the President to resolve this difficulty with regard to finance. The most straightforward of these mechanisms is for the President to rely on Article 70(7) of the Constitution and summon Parliament due to the emergency that has arisen.<sup>20</sup> Once Parliament is summoned, it can pass the appropriations needed to deal with the Covid-19 pandemic. This will also provide the necessary transparency for the raising and spending for the funds needed for the crisis response. In the present context, it is not at all likely that any opposition party would deny the government funds it needs to deal with the pandemic, especially in light of the seriousness of the crisis and the impending election.

The added advantage of relying on Article 70(7) in the present context is that Parliament will stand dissolved upon the termination of the emergency or upon the conclusion of the Parliamentary Elections on a date determined by the Election Commission, whichever is earlier. This would add a further layer of accountability to ensure Parliamentary Elections will take place without an unnecessary delay.

### III. Special Powers dealing with Public Emergencies.

The Government has taken several steps over the past two weeks in order to prevent the spread of Covid-19 within Sri Lanka. These include:

- Placing individuals in quarantine both within their own homes and within government-run facilities, especially those who are suspected to have been exposed to the virus.
- Requesting persons who have returned to Sri Lanka from certain foreign countries to register with health officials and tracing such individuals who have not so registered.
- Declaring public holidays and other holidays to prevent mass gatherings.
- Declaring curfew in several parts of the country.
- Put in place mechanisms to coordinate delivery efforts of food and other essential items to citizens.

All of these were required measures to prevent the spread of the virus and to protect public health. However, whilst some of the actions undertaken by the Government had a clear legal basis,<sup>21</sup> in relation to others, the legal basis remains opaque. Thus, whilst the Government would be able to deal with the lack of

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<sup>19</sup> See Appropriations Act for 2019 and the Active Liability Management Act.

<sup>20</sup> If at any time **after the dissolution of Parliament**, the President is satisfied that **an emergency has arisen** of such a nature that an earlier meeting of Parliament is necessary, he may by **Proclamation summon the Parliament** which has been dissolved to meet on a date not less than three days from the date of such Proclamation and such **Parliament shall stand dissolved upon the termination of the emergency or the conclusion of the General Election, whichever is earlier**.

<sup>21</sup> In terms of S. 3 of the Quarantine and Prevention of Diseases Ordinance, the Minister has the power to make regulation regarding quarantining certain persons.

legal basis in the short term, the long-term consequences are problematic.<sup>22</sup>

Despite the decades of experience tackling numerous disasters, Covid- 19 represents an unprecedented challenge for the Sri Lankan State with wide ranging consequences for human life, rights, governance and the economy. At the very least this would require the Government to set up administrative and decision-making structures which are accountable, transparent and effective. Such mechanisms would be difficult to set up within the existing legal framework, due to the unique nature of the challenges.<sup>23</sup>

The Government cannot afford to delay the establishment of such mechanisms until a new Parliament is elected. As such, the President should immediately move to summon Parliament in terms of Article 70(7) of the Constitution.

The Government, for reasons not publicly known, seems reluctant to summon Parliament. By not summoning Parliament, the Government is depriving itself of tools it can use to more effectively deal with Covid-19 including not using existing legislation meant to deal with emergency situations.<sup>24</sup> These laws arguably grant the Government wide authority and discretion in dealing with public emergencies with very little oversight but require limited parliamentary oversight after a declaration of public emergency and/or disaster has been made by the President.<sup>25</sup>

It is a common thread in our constitutional scheme<sup>26</sup> and legal system<sup>27</sup> that Parliament has to be called upon to assist the executive in discharging its functions in such situations of emergency. In fact, the Supreme Court has had to intervene and point out that giving open ended authority to the executive branch of government to deal with disasters and emergencies without any parliamentary oversight could lead to such powers being misused and result in arbitrary acts contrary to the Constitution.<sup>28</sup> Thus, it can be argued that our legal system as a whole requires the different arms of the Government to function in a manner that would both effectively respond to the emergency / disaster at hand and do so in a manner that respects the Constitution and the rule of law.

In any event, the checks on the executive are not extensive and give the executive considerable leeway to respond to the situation. It is puzzling as to why the Government would constrain itself by not using such existing legislation which gives it broad powers and instead resort to mechanisms which are patently unconstitutional and illegal.<sup>29</sup> Such acts could reduce public confidence in the Government's capacity to respond to such situations, to its commitment to the rule of law and constitutional governance, and to its capacity to exercise its authority in the public interest. It distracts the Government with unnecessary legal complications and reduces its effectiveness to respond to public needs.

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<sup>22</sup> There are several consequences that could arise due to this, including especially to individual Public officials and also raise complications if the Government intends to take legal action against those who disregard the said orders/ efforts by the Government.

<sup>23</sup> For an example both the Contagious Diseases Ordinance and the Quarantine and Prevention of Diseases Ordinance pre- independence legislation which were developed in a very different social and economic context.

<sup>24</sup> See Public Security Ordinance and Sri Lanka Disaster Management Act.

<sup>25</sup> See Article 155 of the Constitution; S.2(3), S. 16 and 21 of the Public Security Ordinance; S. 10 & 11 of the Sri Lanka Disaster Management Act.

<sup>26</sup> See Article 70(7) and 155 of the Constitution.

<sup>27</sup> See .2(3), S. 16 and 21 of the Public Security Ordinance; S. 10 & 11 of the Sri Lanka Disaster Management Act.

<sup>28</sup> Vide **Supreme Court Special Determination 04/ 2005 [In re the Sri Lanka Disaster Management Bill]**

<sup>29</sup> Gazette (Extra Ordinary) No. 2168/8, 26<sup>th</sup> March 2020, available at [http://www.documents.gov.lk/files/egz/2020/3/2168-08\\_E.pdf](http://www.documents.gov.lk/files/egz/2020/3/2168-08_E.pdf)