THE SRI LANKAN EXPERIENCE WITH COVID-19: STRENGTHENING RULE BY EXECUTIVE

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SUMMARY: I. *Introduction*. II. *Rule by 'Taskforces' and military*. III. *The illegality of the curfew, lack of a public discourse and the acculturalization of a no-rules emergency*. IV. *The dispensability of Parliament*. V. *Conclusion*.

I. INTRODUCTION

Sri Lanka's constitutional governance in the post-war context was already taking an authoritarian turn when COVID 19 stuck in February 2020. The country had just elected its war-time Defence Secretary, Gotabaya Rajapaksa, a former army soldier as its President in November 2019. President Rajapaksa came into power promising to repeal reforms enacted in 2015 that took away some powers from the disproportionately powerful Executive Presidency and to make the Presidency strong again. The Government that came into power in 2015 promised to abolish the Executive Presidency but settled for a reformed Presidency unable and unwilling to muster support for a wholesome reform effort. President Rajapaksa has very conveniently instrumentalised the COVID19 pandemic to justify and further expand the powers of the Executive at the expense of the other two forms of Government. This short article will focus on three aspects of how COVID19 has impacted on matters relating to constitutional governance: Firstly, the impact of the military-run, non-statutory, arguably extra-legal authorities on constitutional governance. Secondly, the extra-legal nature of the curfew imposed by the Government, the lack of public debate about its illegality and its impact on a public culture supportive of the rule of law and finally the side-lining of the Parliament and the re-emergence of the centrality of the Executive in constitutional discourse and practice.

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II. Rule by 'Taskforces' and military

Two Government entities were created and tasked with coordinating the Sri Lankan Government's response to COVID-19, The 'National Operation Centre for Prevention of COVID-19 Outbreak' headed by Lt. Gen. Shavendra Silva, the Commander of the Sri Lankan Armed Forces; and The Presidential Task Force established to direct, coordinate and monitor the delivery of continuous services and for the sustenance of overall community life headed by the President and Prime Minister's brother Basil Rajapaksa.[1]

The President through a gazette notification gave an expansive mandate to the Operation Centre and the Task Force. The Taskforce was given powers that are already vested with statutory bodies.[2] The establishment of Presidential Task Forces usurping and replacing the powers of statutory bodies accountable only to the President is a major challenge that Sri Lanka faces in the post-war context in derogation of the principle of Separation of Powers. The pandemic has provided additional reasons for the Executive to justify its arrogation of powers and the side lining of statutory bodies. This rule by committees and taskforces is becoming a permanent feature of Sri Lanka's constitutional governance.

On top of this 'rule by task forces' is the fact that the running of these task forces are being entrusted with current military leadership or retired military leaders.[3] Rather than placing public health officials in charge of running those establishments created, the Government has entrusted the work to the Sri Lankan Armed Forces. The incumbent Army Commander faces credible allegations of war crimes committed during the last phase of the civil war and has been travel sanctioned by the US Government. The move to involve the military is seen as part of the overall agenda of militarising governance in Sri Lanka, a move that the country's minorities fear would entrench majoritarianism.

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[1] This section draws heavily from this briefing note co-authored by this author: Adayaalam Centre for Policy Research, 'Sri Lanka's militarised response poses grave threats to human rights' (30 April 2020) <*http://adayaalam.org/situation-brief-no-3-covid-19-sri-lankas-militarised-response-poses-grave-threats-to-human-rights/*>.

[2] See further: Centre for Policy Alternatives, 'Brief Guide III: Structures to deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force' (April 2020) accessed at: <*https://www.cpalanka.org/wp-content/uploads/2020/04/FINAL-Presidential-Task-Force-on-COVID19-April-2020-copy.pdf*>.

[3] See further: International Truth and Justice Project, 'Sri Lanka's Militarisation of COVID-19 Response' (8 April 2020) accessed at: <*https://itjpsl.com/assets/press/English-ITJP_COVID-19-press-release-Merged-copy.pdf*>.

The primary justification for militarisation of Sri Lanka's Governance structure during COVID 19 has been mounted on the premise of efficiency of delivery. The perception that the ordinary organs of Government are inefficient and their perceived lack of capacity to respond to immediate and urgent concerns has been used by the Government to justify the increased involvement of the military in the Governance in the country. The contrary is however true. Sri Lanka despite its troubled history has a vibrant health service well networked through its public health inspector system. Future studies will have to establish this, but it will not be wrong to suggest that this well networked public health system is the primary reason that Sri Lanka contained COVID19.

III. The illegality of the curfew, lack of a public discourse and the acculturalization of a no-rules emergency

On 20 March 2020, the Government announced an island-wide three-day curfew with less than 12 hours' notice. The curfew has been described largely as 'police curfew' in notifications by the police.[4] The curfew is justified by the Police as being 'necessary to prevent violations of provisions and regulations of the Quarantine and Prevention of Diseases Ordinance'.[5] The Army Commander has described the curfew as a ''Quarantine Curfew'.[6] A major concern about the curfew is that the Government has not provided any real legal basis for it nor does it seem to feel the need to articulate one, implying that the law can be dispensed with in matters of urgency. The laws of Sri Lanka do not provide for a 'police curfew'. No curfew has been declared under the Public Security Ordinance (PSO), neither has a 'state of disaster' been declared under the Disaster Management Act. The Government has likely been reluctant to declare a curfew under the PSO because to declare a curfew longer than a month it needs Parliament's approval. This was rendered impossible owing to the President's decision to dissolve the Parliament and his refusal to reconvene it (See next section for further details).

[4] Ministry of Foreign Affairs, 'Declaration of Police Curfew Island Wide' (20 March 2020) accessed at: <*https://www.mfa.gov.lk/declaration-of-police-curfew-island-wide/*>.

[5] *Ibid*.

[6] 'Heed the advice of health professionals to eliminate the virus – Army Commander' (12 April 2020) *Sunday Observer* accessed at: <*http://www.sundayobserver.lk/2020/04/12/news-features/heed-advice-health-professionals-eliminate-virus-%E2%80%93-army-commander*>.

Even the Opposition failed to raise questions about the legality of the curfew, afraid that the public will misconstrue it for encouraging the violation of the rules imposed, leading to a spike in infections. But the lack of public debate on legality and scrutiny helps build a culture where rule of law becomes a disposable community during times of emergency.

IV. The dispensability of Parliament

President Gotabaya Rajapaksa dissolved Parliament on 02 March 2020. The Sri Lankan Constitution empowers a President to dissolve parliament after 4 ½ years of it being elected.[7] The length of a Parliament's term is 5 years. Given that the Parliament was controlled by the party opposite, from the day he was elected to office President Rajapaksa had always wanted to go for fresh elections. But because of the fixed term limitation he had to wait till the 02nd of March. However it can be argued that when he dissolved Parliament it was clear that COVID 19 had stuck Sri Lanka and that holding elections within the three months time framework as required by the Constitution[8] would not have been possible. The President hence while being well within his Constitutional powers in dissolving Parliament however probably did so knowing that holding the elections within a three-month framework because of the spread of COVID19 would be difficult. The President also refused to invoke the Constitutional provision that provides for recalling Parliament even if it was dissolved for emergency purposes.[9] The Election Commission wrote to President Rajapaksa suggesting a joint referral to the Supreme Court seeking its advice on whether it can postpone elections given the extraordinary nature of the situation but President Rajapaksa refused. The Election Commission then went on to postpone the elections beyond the three months frame stating that there was no normalcy to conduct the polls. A number of political parties, a think tank and private individuals approached court seeking an order directing the President to reconvene parliament and postpone the elections. But the Supreme Court after a 10-day consecutive day hearing declined to hear the case (refused leave to proceed) without even providing reasons.

The President and his party's public messaging around the issue sought to portray opposition parties as being afraid of facing elections and hence anti-democratic. The Opposition on the other hand claimed that the Presi-

7 Article 70 (1) of the Constitution of Sri Lanka.
8 Article 70 (5) (b) of the Constitution of Sri Lanka.
9 Article 70 (7) of the Constitution of Sri Lanka.

dent by refusing to reconvene Parliament was undermining a key organ of Constitutional Democracy - Parliament.

The President's handling of COVID19 – draconian measures enforced by the Sri Lankan Armed Forces – did have its desired effect of preventing the further spread of the virus. In fact the Senior Additional Solicitor General produced a document on the detailed use of the intelligence apparatus in COVID19 tracing to the Supreme Court to substantiate her claim that the Government has done well in containing COVID 19 in the case referred to above. The impact of the President's approach and the Supreme Court's order strengthens the political power of the Executive Presidency.

In 2009 when the war was brought to a brutal end then President Mahinda Rajapaksa (the current President's elder brother and currently Prime Minister) brought in far reaching constitutional amendments to the Constitution[10] including the elimination of the two term limit on a person holding the office of President. I have elsewhere described the end of the war as a 'Constitutional moment' that rallied forces in favour of entrenched centralisation to argue the case for retaining and furthering a strong Executive.[11] In 2015 Mahinda Rajapaksa was defeated and the electoral theme of the incoming President Maithripala Sirisena was the repeal of the Executive Presidential system. Reforms were brought in far short of a complete abolition, but the Prime Minister accountable to the Parliament gained more powers in the amendments passed in 2015.[12] The Easter Sunday attacks of 2018 swung the pendulum back and provided the impetus for those in favour of a strong executive and now COVID 19 has further helped sustain that swing towards a strong executive. This time around the additional factor has been the increased acceptance of the role of the military in Executive led governance.

V. Conclusion

The Sri Lankan experience with COVID 19 from a constitutional law perspective serves as a reminder of the extent to which constitutional democracies are vulnerable in times of emergencies. The impact of COVID 19 in Sri Lanka as this short article has argued has served to strengthen the role of the

[10] The 18th Amendment to the Constitution of Sri Lanka.

[11] Guruparan, K., 18 May 2009 as a Constitutional Moment: Development and Devolution in the Post War Constitutional Discourse in Sri Lanka', *2010 Junior Bar Law Review,* pp. 41-51.

[12] 19th Amendment to the Constitution of Sri Lanka.

Executive over and above the other two organs particularly to the detriment of the Parliament. This is not a unique Sri Lankan phenomena but is part of a global trend in which populist movements are capturing democratic space and producing strong man autocratic regimes. The executive led response to COVID 19 is helping to further this agenda.