# Constitutional Ping-Pong

## Sri Lanka's Crisis and the Rediscovery of Political Agency

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Sri Lanka is at a moment of reckoning, with its political class, its public institutions and with its collective identity. No longer can it ignore the causality between state capture through executive aggrandizement and economic malgovernance. The rupture caused by this unprecedented and tragic crisis has brought the country to a unique political moment in which the majority of Sri Lankans are demanding and imagining a better collective future. Central to that new momentum, I argue, is the rejection of self-serving politics that has characterized Sri Lanka's post-independence history and has been a particular feature of the current government. For the first time in Sri Lanka's history, the demands for constitutional governance articulated through traditions of protest and dissent expressed mostly by marginalized groups are now being echoed by the mainstream. The demand is for political accountability, democratic reforms and economic justice.

### Context: From Constitutional Failures to Economic Crisis

Arbitrary policy decisions on tax concessions, public expenditure and the failure to take preventive measures through debt restructuring (among other things) by the Executive and the Central Bank led to Sri Lanka's economic and political crisis. Executive discretion has been exercised, on several occasions, without a scientific basis or consultation. Sri Lanka officially defaulted from repayment of some of its $51 billion foreign debt on 12 April 2022 in what has been described as its worst economic crisis, ever. The tax concessions that were introduced by the current government in 2019 caused the loss of 25% in government revenue which then resulted in Sri Lanka being locked out of international financial markets in 2020. Dwindling foreign exchange reserves has resulted in shortages of essentials such as LPG gas, fuel, and now, very worryingly, even basic medicine. Added to this is the steep rise in the cost of living, resulting from the depreciating of the Rupee against the US Dollar. As of 11 April, five individuals died while waiting in line for LPG gas or fuel. Last year, the President imposed a ban on the use of chemical fertilizer with immediate effect. This ill-conceived policy, subsequently revoked, created a crisis in food production. This is a 'man-made' economic crisis, brought on by a political crisis made possible to a large extent by failures in Sri Lanka's constitutional governance and problems with its political culture. Sri Lankans have come out to the streets in large numbers throughout the Island, demanding that the President and the Prime Minister step down. The Government initially imposed a state of emergency and a ban on social media in its efforts to suppress protests. People, ably supported by lawyers, the Bar Association and the Human Rights Commission, resisted these unconstitutional efforts. For instance, lawyers have turned up, voluntarily and in large numbers, when peaceful protestors have been arrested by the police. Since early April, peaceful protests have grown in numbers and in scale. The Gota Go Gama (GGG) is the more well-known manifestation of the people's protests. It is both a continuous protest since 9 April and a temporary village, including a 'people's university', field hospital, library, legal aid centre, free supply of food/water and many other features available 24/7. The people's protests are unprecedented in scale, form and substance. It is bringing together Sri Lankans as never before and is a call for a system change.

The people's protests have already brought about significant democratic gains, gains that were previ-

ously thought to be impossible. The Governor of the Central Bank, the Minister of Finance and the Cabinet of Ministers resigned in early April. Though no formal statements were made, these resignations were a response to the people's protests against the mismanagement of the economy. One of the parties in coalition with the ruling political party, the Sri Lanka Freedom Party, is now sitting independently in Parliament. The Government no longer enjoys the near two third majority it had in Parliament. Since then, the two remaining brothers of the Rajapaksha family in the Executive, the President and the Prime Minister, have sought to negotiate a political arrangement to remain in office. In contrast, the main political party in the Opposition, the Samagi Jana Balawegaya (SJB), and the independent group have presented two proposals for constitutional reform. The Prime Minister, too, has announced that he would make proposals for reform, but actual proposals have not been published yet. Nevertheless, a Cabinet subcommittee has been appointed to study these proposals.

## Constitutional Reform, Yet Again

Both sets of proposals seek to reduce the powers of the Executive President and strengthen Sri Lanka's Fourth Branch (guarantor institutions) by way of ensuring independence in the appointment process, but the proposals by the SJB are, by far, more substantive and systematic. The independent group has proposed that the President acts on the advice of the Prime Minister in making appointments to the Cabinet and proposes the re-introduction of a revised Constitutional Council. The SJB has proposed to abolish the Executive Presidency and to re-introduce a parliamentary democracy with a strong fourth branch in its place. The President will be elected by Parliament, will act on the advice of the Prime Minister and will be the Head of the State. The parliamentary democratic system that the SJB has proposed is modified to the extent that appointments to high office and to independent commissions will be at the approval and recommendation (respectively) of the Constitutional Council. The Constitutional Council will include ex officio (3) and nominated elected representatives (3) and nominated persons. For the first time, appointments to the post of Governor of the Central Bank, to the Monetary Board, and the Port City Commission, are also brought under the Constitutional Council.

Elected representatives in Sri Lanka have been playing political and constitutional ping-pong on reforming the Executive Presidency and its Fourth branch since the 1990s. Political parties have promised to abolish the Executive Presidency during election campaigns but failed to deliver on the promise when elected. Since the 17$^{th}$ Amendment to the Constitution in 2001, the political elite has played constitutional ping-pong on the Fourth Branch, taking Sri Lanka through four amendments which brings us to the current debate on the proposed 21$^{st}$ Amendment. The 17$^{th}$ Amendment constitutionalised Sri Lanka's Fourth Branch for the first time, giving the Constitutional Council the power to approve or recommend appointments to high office and independent commissions. In 2010, the 18$^{th}$ Amendment removed the term limit of the Executive President and replaced the Council with a Parliamentary Council which had no binding powers. In 2015, Sri Lanka swung back and went all the way to a premier-presidential system under the 19$^{th}$ Amendment. The Constitutional Council was reintroduced in a modified form. In 2020, under the 20$^{th}$ Amendment, the Parliamentary Council was reintroduced. One of the features of the 19$^{th}$ Amendment that survived the 20$^{th}$ Amendment is the restriction to the immunity of the President during office. In less than two years, Sri Lanka seems to be ready to swing back yet again. What does this rally tell us about Sri Lanka's political culture and constitutional democracy? What insights can be gained from this experience on the development of constitutional resilience? I have argued elsewhere that during this constitutional ping-pong, Sri Lanka's Guarantor Branch has developed constitutional resilience by stealth. Whether this resilience will emerge as a counterpoint to state capture in the present crisis remains to be seen.

## Constitutional Imagination and Political Agency

Unlike in India, Sri Lanka's independence from the British was not accompanied by a people's movement that defined a Sri Lankan identity. In contrast, debates about a Sri Lankan identity had distinct ethnic overtones. Sri Lanka was described by her coloniser as a model democracy. But in fact, what followed was that the autocratic legacy of colonial rule morphed into ethno-nationalism and remained a barrier to the growth of democratic and constitutionalist ideas. Ethno-nationalism in Sri Lanka co-existed with a strong welfare state, thereby producing numerous disharmonies – socially, politically and constitutionally. Thus far, these disharmonies have been most apparent in the peripheries of Sri Lanka's political and constitutional imagination. It is the ethnic minorities (Tamils and Muslims), the poor, the women, who were denied their constitutional protections. The numerical majority and those with social and economic privilege could ignore these experiences at the political peripheries and continue with business, more or less, as usual. The economic crisis however, has created a rupture in which it is no longer possible to do so. As political scientist Jayadevan Uyangoda has observed, hitherto, a majority of Sri Lankans were primarily voters, participating in a system of political patronage through their vote. Today, for the first time in Sri Lanka's history, this majority seems to be discovering and asserting its political agency as citizens. Many are making political statements by participating in local or large-scale protests, demanding accountability and educating themselves. This process has been enabled and well supported by a vigilant and proactive Bar Association and other civil society actors. It has held the police accountable every time it has sought to restrict the freedom of expression and peaceful protest in Colombo. However, restrictions experienced by protestors in the North and the East, have more or less, remained. This discrepancy is a reminder that while the protests by the majority Sri Lankans are unprecedented and impacting a resolute political class, some of the enduring problems in Sri Lanka, such as the problem of ethno-nationalism, discrimination against minorities and militarization remain. Despite the phenomenal push back by the people, the political class continues to resist the resignations and the system change that the People are demanding. This points to two other intractable problems in Sri Lanka; that of state capture and of political parties.

## State Capture and Colonial Lineages

State capture prevents public institutions from fulfilling its mandate and neutralizes internal and external checks on such systems. The Twentieth Amendment to the Constitution (2020) in but one mechanism used to entrench state capture in Sri Lanka. Going beyond the present moment, I am increasingly of the view that in jurisdictions such as Sri Lanka the very idea of a modern state established by colonial rulers carried with it ideas of extraction for private gain. In this part of the world, the British East India company preceded the colonial state. Despite the democratic gains made over time, this idea of extraction for private gain endured. Political patronage allowed political parties to undermine public institutions. Undemocratic political parties, in some cases also based on political dynasties, further consolidated this culture. The absence of regulation of campaign finance and the lack of public accountability for assets and liabilities of elected representatives facilitated this form of state capture. In Sri Lanka, today, these dynamics have compounded in a political party that was formed on the basis of a political family and an entire state machinery that ended up bankrupt due to mismanagement, negligence and corruption. Therefore, the popular movement ([redacted]/ [redacted]) that is unfolding in Sri Lanka today manifests the push and pull between democratic demands for a progressive political and economic future for Sri Lankans and the stumbling block which is a corrupt political class that, thus far, seems unable and unwilling to respond to this call.

## Writing in Times of Crisis

This blog post would be incomplete if I do not acknowledge the challenges of coping with, living through, responding to and working in, a complex

crisis of this nature. My public engagement from a constitutional perspective takes place in the midst of daily power cuts, while navigating the non-availability of essential goods and while dealing with the emotional burden of the crisis. Teaching and writing about public law, at a time like this, is an intellectual challenge which has an emotional toll too. I must say that the solidarity shown by my dear colleagues in other parts of the world, has been remarkable and very encouraging. It has helped me to gain insights to another significant dimension of academia – one which approaches collaboration with a posture of compassion and collegiality. It resonates with the argument by Philipp Dann, Michael Riegner and Maxim Bönnemann about the role of comparative constitutional law scholars as listeners, enablers, contributors and translators. When scholars respond to a crisis in this way, it contributes to a very supportive academic culture across political boundaries and thereby enables the development of relevant and effective scholarship too.

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