



SRI LANKA'S EVOLVING CRISIS: IMPLICATIONS ON RULE OF LAW AND CONSTITUTIONAL DEMOCRACY

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ISAS-KAS Workshop

Sri Lanka's Evolving Crisis: Implications on Rule of Law and Constitutional Democracy

April 2023

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Executive Summary

In November 2022, the Institute of South Asian Studies in the National University of Singapore and its partner, Rule of Law Programme Asia, Konrad-Adenauer-Stiftung, Singapore, hosted a closed-door hybrid workshop comprising four sessions with distinguished speakers from Sri Lanka, Singapore and outside the region. The workshop included presentations by and moderated discussions with the speakers and an interactive session with invited participants.

Titled 'Sri Lanka's Evolving Crisis: Implications on Rule of Law and Constitutional Democracy', the workshop discussed issues relating to Sri Lanka's current crisis and the broader relevance of these insights on the rule of law and constitutionalism. It also initiated a conversation on the legal dimensions of Sri Lanka's economic crisis, legislative and political reforms and transitional justice in the country, and on Sri Lanka's legal power and impact on democratic freedoms. The workshop saw a robust engagement between the panellists and the invited stakeholders and covered a wide swathe of topics.

The crisis also holds lessons for other emerging markets and developing countries, several of which are also facing external debt crises and imminent political instability amidst escalating costs and rising social inequalities.

Sri Lanka's current crisis is an evolving and dynamic situation. Its political, economic, and social manifestations demonstrate the significance of legal institutions and processes in upholding the responsibilities of democratic governance and protecting citizen rights. The crisis also holds lessons for other emerging markets and developing countries, several of which are also facing external debt crises and imminent political instability amidst escalating costs and rising social inequalities. Against this background, this Special Report presents the analysis on the discussions to bring out perspectives on the Sri Lankan crisis for broader dissemination. The report broadly discusses the themes of economy, transitional justice and democratic freedoms from a rule of law perspective.

Introduction

Sri Lanka has been a hotbed of political crisis in one form or another – the attempted coup of 1962, insurrections in the 1970s and 1980s, the highly protracted civil war, the 2018 constitutional crisis and the 2022 people’s protest in the form of the *Aragalaya* (struggle), which resulted from the severe economic hardships in the country. The 2022 political and economic crisis in Sri Lanka did not occur overnight. It resulted from years of mismanagement, corruption, unequal power sharing and concentration of power within a group of the political elite, among others. Multiple amendments brought to the constitution over the years to reflect the personal and political interests of the elites and resulting domestic volatility paved the way for external influences.

It resulted from years of mismanagement, corruption, unequal power sharing and concentration of power within a group of the political elite, among others.

The protest movement emerged in late March 2022, demanding President Gotabaya Rajapaksa’s government and many of his family members relinquish power. Over a hundred self-organised and organic protests spread across the country. In April 2022, mass protests in Colombo commenced by the protesters blocking the gates of the presidential secretariat and setting up the protest camp, known as ‘Gota Go Home’, over a period of a few months.¹ Although part of the reason for the crisis was the lack of basic amenities such as cooking gas, fuel and electricity, the widespread protests were not limited to a demand for basic needs. They were also a critique of a crisis of political representation, authoritarianism, a culture of corruption and a culture of impunity.²

The Sri Lankan crisis has transcended from a domestic issue to a regional one and has also involved major international institutions. India and China have emerged as the two main regional players who have been closely monitoring the situation in the country. While China

¹ Saroj Pathirana, “Sri Lanka protesters divided on leaving main camp amid crackdown”, *Al Jazeera*, 1 August 2022, <https://www.aljazeera.com/news/2022/8/1/sri-lanka-protesters-divided-on-leaving-main-camp-amid-crackdown>.

² Jayadeva Uyangoda, “Taking Aragalaya ideas seriously”, *Groundviews*, 19 July 2022, <https://groundviews.org/2022/07/19/taking-aragalaya-ideas-seriously/>.

China, on the other hand, could use this economic crisis as an opportunity to increase its influence in the country in the pretext of providing financial assistance.

sees the crisis as an opportunity to increase its involvement in Sri Lanka through economic assistance, India is equally eager to restore its traditional sphere of influence and even bring in other players like the United States (US).³ India could “prompt Colombo to align closer with the US, given Washington’s greater attention now to the small countries in the region as part of its Indo-Pacific strategy.”⁴ China, on the other hand, could use this economic crisis as an opportunity to increase its influence in the country in the pretext of providing financial assistance.⁵ Additionally, organisations like the International Monetary Fund (IMF) and the United Nations Human Rights Council (UNHRC) have been actively involved in assisting Sri Lanka to tide over this crisis through health, food security, social protection and economic policy advice.⁶

The following three chapters analyse Sri Lanka’s democratic institutions and processes, which have largely failed to prevent its current economic and political crises. It also studies whether ethnocracy or authoritarianism is the root cause of the crisis, discusses the contestations over the legitimacy of the *Aragalaya* and explores the chances of overcoming the ongoing crisis towards instituting a more stable socio-economic climate.

³ David Rising and Sheikh Saaliq, “Sri Lanka crisis gives India chance to gain sway vs China”, *AP News*, 30 June 2022, <https://apnews.com/article/china-asia-india-beijing-39cb62791910790bd7b2e10e5ae23d>.

⁴ Roshni Kapur, “Sri Lankan Crisis: Regional Implications”, S. Rajaratnam School of International Studies, 13 May 2022, <https://www.rsis.edu.sg/rsis-publication/rsis/sri-lankan-crisis-regional-implications/#.Y9eoY-wzY6U>.

⁵ “Sri Lanka’s Economic Crisis: A Chinese Debt Trap?”, *Nippin.com*, 11 October 2022, <https://www.nippon.com/en/in-depth/d00840/>.

⁶ “Human rights must be at heart of solution to Sri Lanka crisis : A UN Resident Coordinator blog”, *UN News*, 17 May 2022, <https://news.un.org/en/story/2022/05/1118442>.

Legal Dimensions of Sri Lanka's Economic Crisis

Sri Lanka's economy has been constantly hit by one crisis after another since 2018. The country faced a constitutional crisis and political turmoil in 2018 when President Maithripala Sirisena dismissed and replaced Prime Minister Ranil Wickremesinghe with Mahinda Rajapaksa.⁷ The 2018 crisis is significant – It indicated how the different political factions used the constitution and the law to realise their political agendas. The subsequent ruling by the Supreme Court, however, reflected the importance of strong institutions in upholding democracy. Then, in 2019, a series of terror bombings took place. A year later, the COVID-19 pandemic struck and, in 2022, Sri Lanka experienced its worst economic crisis against the backdrop of the Russia-Ukraine conflict.

Recurring policy missteps and less than desirable economic management resulted in the country suspending its international debt payments in April 2022, due to unsustainable debt levels and critically low reserves, making it difficult for the country to even import basic items. This had a ripple effect on the economy and significantly disrupted the people's livelihoods while crippling their day-to-day lives. Widespread public frustration culminated in mass public protests which ultimately lead to Gotabaya resigning as president in July 2022. What began as an economic crisis quickly turned into a political one, with significant implications for the country's legal system and state institutions.

This had a ripple effect on the economy and significantly disrupted the people's livelihoods while crippling their day-to-day lives.

Sri Lanka's current crisis is a broad-based one. This section of the Special Report explores the legal and constitutional dimensions of Sri Lanka's economic crisis against the above context. There are two key aspects to this: first, identifying the legal and constitutional policies which contributed to the political-economic aspects of the Sri Lankan

⁷ For more information, see: Chulanee Attanayake, S Narayan et al, 'The Sri Lankan Political Crisis', *ISAS Brief 610*, 1 November 2018, <https://www.isas.nus.edu.sg/wp-content/uploads/2018/11/ISAS-Briefs-No.-610-A-Political-Crisis-in-Sri-Lanka-1.pdf>.

crisis; and second, exploring the legal and institutional reforms required for the government to access IMF funds.

Background: Timeline of Sri Lanka's 2022 Economic Crisis

All these have been a constant feature of Sri Lanka's economic portfolio ever since the civil war ended when the country accelerated an infrastructure-heavy development model funded by unsustainable borrowing practices.

The current economic crisis in Sri Lanka is largely a culmination of missteps by multiple administrations since the civil war ended in 2009.⁸ As the October 2022 World Bank report shows, even prior to the COVID-19 pandemic, the country consistently exhibited structural weaknesses such as low government revenue mobilisation due to low tax revenue to gross domestic product (GDP) ratio; rising interest payments; weak fiscal discipline; risky external commercial borrowings, and weak export competitiveness.⁹ All these have been a constant feature of Sri Lanka's economic portfolio ever since the civil war ended when the country accelerated an infrastructure-heavy development model funded by unsustainable borrowing practices.

However, it was not until 2019 that several policies that contributed to the current crisis were implemented.¹⁰ These policies were announced by the Gotabaya administration when it was just appointed, particularly the decision to cut the value added tax from 15 per cent to eight per cent in November 2019 and the complete ban on the import of chemical fertilisers in 2021. Together with externalities arising from COVID-19 pandemic and the 2022 Russia-Ukraine conflict, the Sri Lankan economy plunged into a serious crisis which continues to plagued the country.

The tax cuts, in particular, resulted in rating agencies downgrading Sri Lanka to a substantial risk investment category in 2020, effectively

⁸ Matthew Campbell, "How a Ruling Family Tipped Sri Lanka Into Economic Free Fall", *Bloomberg*, 1 December 2022, <https://www.bloomberg.com/news/features/2022-12-01/sri-lanka-inflation-corruption-spur-economic-crisis>.

⁹ "Sri Lanka Development Update – Protecting the Poor and Vulnerable in a Time of Crisis", October 2022, *World Bank*, <https://thedocs.worldbank.org/en/doc/6c87e47ca3f08a4b13e67f79aec8fa3b-0310062022/original/Sri-Lanka-Development-Update-October-2022-final.pdf>.

¹⁰ "Timeline | Sri Lanka's economic crisis was in the making from November 2019", *First Post*, 4 April 2022, <https://www.firstpost.com/world/timeline-sri-lankas-economic-crisis-was-in-the-making-from-november-2019-10515461.html>; "Sri Lanka crisis timeline: from galloping inflation to a president's resignation", *The Guardian*, 15 July 2022, <https://www.theguardian.com/world/2022/jul/10/sri-lanka-crisis-timeline-from-galloping-inflation-to-a-presidents-resignation>; and "How crisis unfolded in Sri Lanka", *Reuters*, 22 July 2022, <https://www.reuters.com/article/us-sri-lanka-crisis-timeline-idAFKBN2OX09B>.

closing Colombo's access to international financial markets. With the COVID-19 pandemic spreading rapidly in 2020, the country's exports (owing to weak global demand and disrupted supply chains), remittances and tourism revenue were severely impacted. This led the country to service its external debts and pay for imports using official reserves amidst its lack of access to international financial markets. In April 2021, the government imposed a total import ban on chemical fertilisers and other agrochemicals, only to partially lift it in November 2021, following protests by the farmers. However, the policy had already reduced agricultural yields resulting in the country importing food staples.¹¹ The Russia-Ukraine conflict in early 2022 did not help the situation as it contributed to stress in the energy and commodities markets.¹²

The Russia-Ukraine conflict in early 2022 did not help the situation as it contributed to stress in the energy and commodities markets.

The Central Bank of Sri Lanka also officially adopted a heavily critiqued monetary strategy of printing money to repay the country's sovereign debt.¹³ This resulted in record-high inflation and depreciation of the Sri Lankan Rupee, adding to the stress on the country's balance of payments.

As a result of the various misdirected policies, government revenues fell, imports increased, prices escalated and the official reserves dipped dramatically from US\$7.6 billion (S\$10.14 billion) in end-2019 to US\$400 million (S\$534 million) in end-2021.¹⁴ Consequently, the government formally defaulted on its international payments in April 2022. The economy was weighed down by hyperinflation, fuel shortages which resulted in prolonged power outages, and a general persistent shortage of basic necessities, including food.

¹¹ "Timeline | Sri Lanka's economic crisis was in the making from November 2019", op. cit.

¹² Russia and Ukraine are both agricultural export giants as well as have a crucial role in the energy markets. The conflict caused an overall inflationary pressure on the commodities markets but the main transmission channel to Sri Lanka was on account of the rising oil prices which had a spillover effect on the domestic economy.

¹³ Mihir Sharma, "Sri Lanka Shows the Folly of Fringe Theories", *The Washington Post*, 22 April 2022, https://www.washingtonpost.com/business/sri-lanka-shows-the-folly-of-fringe-theories/2022/04/17/cb07fba8-beae-11ec-b5df-1fba61a66c75_story.html.

¹⁴ The World Bank, "SRI LANKA DEVELOPMENT UPDATE PROTECTING the POOR and VULNERABLE in a TIME of CRISIS", (The World Bank Group, October 2022), <https://thedocs.worldbank.org/en/doc/6c87e47ca3f08a4b13e67f79aec8fa3b-0310062022/original/Sri-Lanka-Development-Update-October-2022-final.pdf>.

The *Sri Lanka Opinion Tracker Survey 2022*, conducted by the Institute for Health Policy, revealed that the Sri Lankan consumer confidence declined steeply between March 2022 and June 2022.¹⁵ The survey also indicated that while the COVID-19 pandemic had impacted jobs and incomes, beyond March 2022, falling incomes and economic disruptions were the main factors driving consumer confidence down.¹⁶

These factors culminated in widespread frustration and protests by the general public. This social unrest quickly turned into a political crisis. Figure 1 captures the timeline of these events. Presently, under Wickremesinghe, the current president, a staff-level agreement has been reached between the Sri Lankan government and the IMF to secure a US\$2.9 billion (\$3.99 billion) assistance to be released over four years as a way to help the flailing economy.¹⁷

Legal and Constitutional Dimensions of Sri Lanka's Economic Crisis

Since independence, Sri Lanka has had three different constitutions and multiple constitutional amendments.

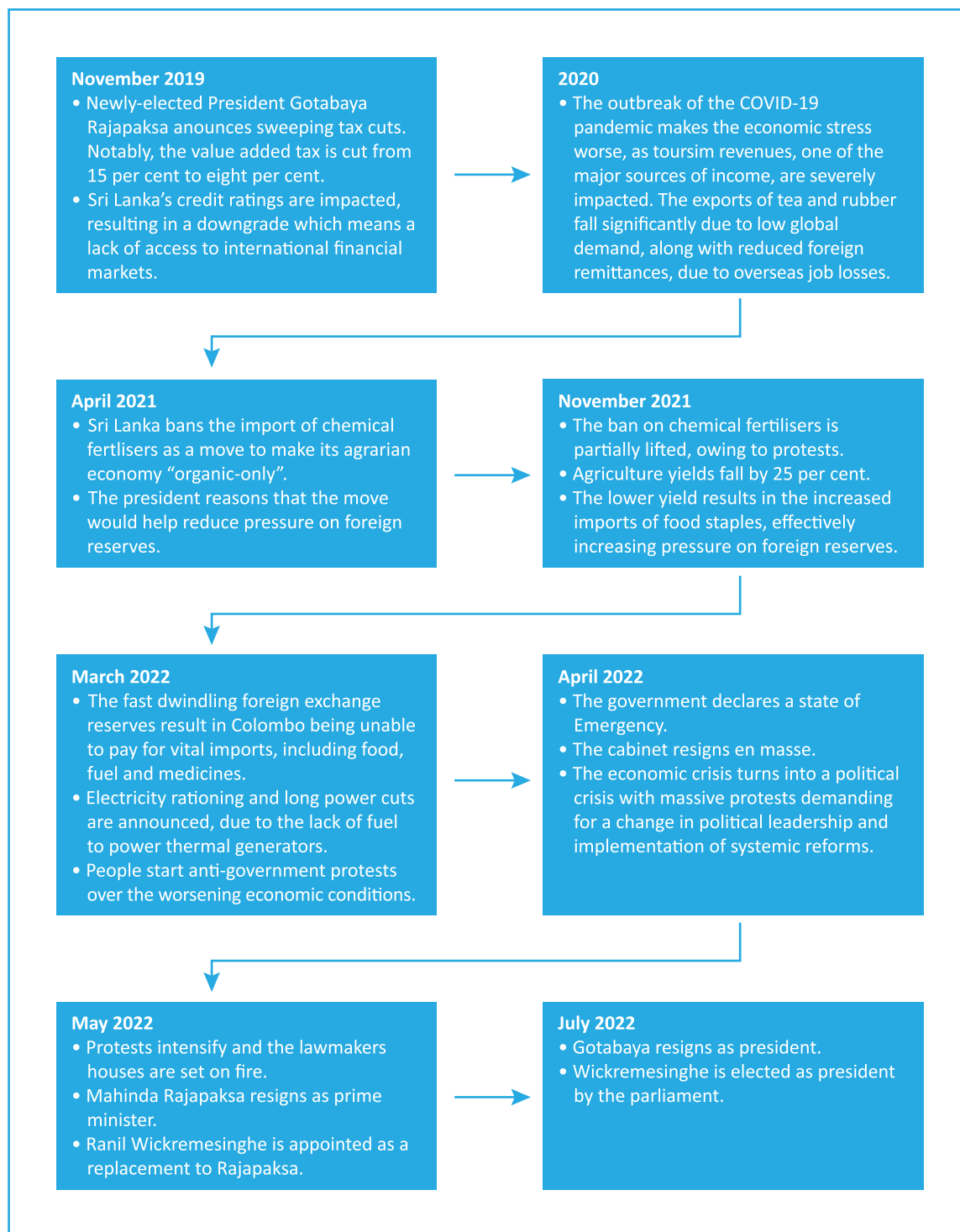
The genesis of the current crisis in Sri Lanka can be attributed to a fundamental crisis in constitutionalism. Since independence, Sri Lanka has had three different constitutions and multiple constitutional amendments. The three constitutions are the Soulbury Constitution or the Independence Constitution, promulgated in 1947; the Republican Constitution of 1972, adopted after Sirimavo Bandaranaike came into power following the 1971 general elections with a two-thirds majority for the first time – a necessity to make constitutional reforms; and then six years later, the Second Republican Constitution of 1978, adopted under President J R Jayewardene.¹⁸

¹⁵ Institute for Health Policy, July 2022, "Sri Lanka Consumer Confidence: Consumer confidence continued to decline in June", *SLOTS Report #2022-07*, <https://www.ihp.lk/publications/docs/SLOTSReport202207.pdf>.

¹⁶ Institute for Health Policy, March 2022, "Consumer Confidence Collapses despite Waning Omicron Wave as Economic Disruption Hits", *SLOTS Report #2022-02*; <https://www.ihp.lk/publications/docs/SLOTSReport202202.pdf>.

¹⁷ "Unprecedented economic and political crisis mark 2022 in Sri Lanka; India's assistance provides breather", *The Print*, 30 December 2022, <https://theprint.in/world/unprecedented-economic-and-political-crisis-mark-2022-in-sri-lanka-indias-assistance-provides-breather/1289662/>.

¹⁸ P K S Nambodiri (1978) *Sri Lanka's New Constitution*, Strategic Analysis, 2:7, 242-245, 10.1080/09700167809421472.

Figure 1: Timeline of Sri Lanka's crisis

Sources: Adapted from "Timeline | Sri Lanka's economic crisis was in the making from November 2019", op. cit; and "Sri Lanka crisis timeline: from galloping inflation to a president's resignation", op. cit.

The republican constitutions, and the subsequent amendments to them, also granted omnipotent powers to the executive presidency and presidential immunity with very little accountability.

Through the two republican constitutions in 1972 and 1977, the provisions for human rights improved following the inclusion of a Bills of Rights.¹⁹ However, the provisions for checks and balances necessary to maintain good constitutionalism, good governance and enabling diversity and equal citizenship were weakened with the subsequent amendments. These resulted in a progressive erosion of constitutionalism. The first fault line was that all three constitutions were hardly consultative. The second was that even though the 1948 constitution had a sound system of checks and balances, including judicial review of legislation and guarantees of independent judiciary and administrative services necessary for a healthy democracy, the ensuing republican constitutions saw a concentration of power within the executive, with the judicial review being removed in the legislature and political interference in the judiciary and administrative services. The republican constitutions, and the subsequent amendments to them, also granted omnipotent powers to the executive presidency and presidential immunity with very little accountability.²⁰ This includes the president's power to make unilateral appointments and removals to the cabinet, judiciary, institutions and administrations, including all the permanent secretaries of ministries, tri-forces and the police.

While there was progressive erosion of constitutionalism through the three constitutions, there was also a progressive establishment of constitutional majoritarianism through the constitutional establishment of a unitary state while elevating Sinhala as the sole official language (until 1987) and necessitating the state's obligation to give foremost place to Buddhism as well as to foster the Buddhist Order or *Buddha Sasana*.²¹

¹⁹ Fernando, Laksiri, "Human Rights and the 1978 Constitution", *Reforming Sri Lankan Presidentialism: Provenance, Problems and Prospects*, edited by Asanga Welikala, 333-69. Colombo: Centre for Policy Alternatives, 2015; and Jayampathy Wickramaratne, "Fundamental Rights and the 1972 Constitution", *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice*, ed. Asanga Welikala, 2012, <http://constitutionalreforms.org/the-sri-lankan-republic-at-40/>.

²⁰ Basil Fernando, "The Need to Restore Judicial Review", *Groundviews*, 5 May 2022, <https://groundviews.org/2022/05/05/the-need-to-restore-judicial-review/>.

²¹ Jayampathy Wickramaratne, "The Principle of Equality in Diverse States – Chapter 6 Assuring Equality, Autonomy and Territorial Integrity in Sri Lanka"; 158-194, 2021, https://doi.org/10.1163/9789004394612_008; and Nihal Abeyasingha, "The Constitution of Sri Lanka, Buddhism and Other Minorities", *Groundviews*, 23 December 2022, <https://groundviews.org/2022/12/23/the-constitution-of-sri-lanka-buddhism-and-other-minorities/>.

These key developments resulted in weakened constitutionalism and a weakened democratic culture, leading to a long-term governance crisis.

De-democratisation of the Economy

Another argument for the current crisis is that it is the outcome of institutional failures – be these economic or political. The constitution, the legal framework and the more political-administrative structures in the state reflect the emergence of underlying structures of power and specific interest groups since the 1980s. The political leadership since the 1970s has consistently used the constitution to consolidate political power and introduce national neo-liberal policies that benefit a selected group.²² This has resulted in deep politicisation and de-democratisation of institutions and parliamentary systems.

A second wave of neo-liberalisation followed the end of the civil war in 2009.²³ A powerful new local business class emerged, with connections to leading politicians, and was able to lobby for preferential policies and capture key infrastructure projects. The emergence of this business class was also reflected in the increasing informalisation of political power in Sri Lanka. Through a proliferation of task forces, for example, the military played an increasing role in civilian governance, but also, importantly, in connecting with some of the emerging business groups.²⁴ A hyper-focus on correcting the rule of law and the constitution misses out on tackling this de-democratisation of the political economy and relevant state institutions.

The emergence of this business class was also reflected in the increasing informalisation of political power in Sri Lanka.

The economic crisis is also closely linked to the role of ideology and stasis in political beliefs. As flawed and polarised as the Sri Lankan

²² Gomez, M (2022). Constitutional Struggle in Sri Lanka. *Federal Law Review*, 50(2), 174-191, <https://doi.org/10.1177/0067205X221100258>; and Dr Thamil Venthan Ananthavinayagan, "Hijacking a Third World State: Post-colonial governance, elitism and international law. The case of Sri Lanka", *Groundviews*, 6 September 2020, <https://groundviews.org/2020/06/09/hijacking-a-third-world-state-post-colonial-governance-elitism-and-international-law-the-case-of-sri-lanka/>.

²³ Ahilan Kadirgamar, "Second Wave of Neoliberalism: Financialisation and Crisis in Post-War Sri Lanka", *Economic & Political Weekly*, Vol. 48, Issue No. 35, 31 August 2013, <https://www.epw.in/journal/2013/35/web-exclusives/second-wave-neoliberalism-financialisation-and-crisis-post-war-sri>.

²⁴ Viruben Nandakumar, "In Sri Lanka, the Military Still Runs the Show", *Foreign Policy*, 4 August 2022, <https://foreignpolicy.com/2022/08/04/sri-lanka-military-power-protests-history/>.

From the late 1970s onwards, there was a shift in ideological beliefs that market-led growth works best with low government spending, low taxes and shrinking some of the state services, almost akin to a reactive embrace of neoliberalism in post-Soviet nations.

democracy has been since independence, it still elects via universal franchise. However, political leaders have increasingly relied on patronage rather than policy to appeal to the voters. A possible reason for this route can be attributed to the historical circumstances when Sri Lanka became a democracy, which coincided with the Great Depression, thus disincentivising the political leaders to have a pro-market stance on the nation's growth. From the late 1970s onwards, there was a shift in ideological beliefs that market-led growth works best with low government spending, low taxes and shrinking some of the state services, almost akin to a reactive embrace of neoliberalism in post-Soviet nations.

Constrained by poor revenue performance and the need for deficit financing, there was a shift in how the governments, in general, reduced the country's expenditure to GDP from 30 per cent in 1990 to 20 per cent in 2015.²⁵ It is also to be noted that since 1990, the proportion of GDP collected in tax revenue has steadily declined.²⁶ As a result, government spending on even positive welfare areas like health has gradually fallen over time.

So, a course correction must include a progressive taxation system, a widening tax base and the ability to rationalise spending and subsidies to revive the economy. The IMF staff-level agreement for the Extended Fund Facility programme, reached with the present government in September 2022, aims to restore economic stability, including macroeconomic stability and debt sustainability. It also looks to safeguard financial stability, protect the vulnerable and undertake structural reforms to address corruption and unlock Sri Lanka's growth potential. It is, however, subject to the IMF Board's approval and contingent on Sri Lanka receiving financing assurances from official creditors, good progress on a collaborative agreement

²⁵ Yougish Khatri, Edimon Ginting, and Prema-chandra Athukorala, "The Sri Lankan Economy: Charting A New Course, Chapter 2 Economic Performance and Macroeconomic Management", ADB, 2017, <https://www.adb.org/sites/default/files/publication/373316/sri-lankan-economy.pdf>.

²⁶ Mick Moore, "The Political Economy of Long-Term Revenue Decline in Sri Lanka", *ICTD Working Paper 65*, February 2017, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13403/ICTD_WP65.pdf.

with private creditors, and the completion of prior actions.²⁷ China and India, two of Sri Lanka's main creditors, have already backed Sri Lanka's bid to unlock the package. Sri Lanka also completed talks with Japan on debt restructuring.²⁸ As for the rest, it is more a question of political will than having proper constitutional rules that will help achieve the desired results.

Addressing the larger structural problem in the Sri Lankan crisis, however, lies in the answer to the question of how the parliamentary system can be re-democratised and how the debate on system change progresses. Only time will tell whether the current reforms will lead to a different way of doing politics and building robust systems and institutions. Nevertheless, it is a crucial issue that requires close examination as the situation unfolds, given the potential lessons it holds for multiple developing economies in the world and in the region. The mass public protests indicate how the people espouse equality, equity and better governance, and this could be the precursor for the change in system Sri Lanka is looking for.

Only time will tell whether the current reforms will lead to a different way of doing politics and building robust systems and institutions.

²⁷ "IMF Staff Reaches Staff-Level Agreement on an Extended Fund Facility Arrangement with Sri Lanka", *IMF Press Release NO. 22/295*, 1 September 2022, <https://www.imf.org/en/News/Articles/2022/09/01/pr22295-imf-reaches-staff-level-agreement-on-an-extended-fund-facility-arrangement-with-sri-lanka>.

²⁸ "After India, China Backs Sri Lanka's Bid To Secure IMF Bailout Package", *Press Trust of India*, 22 January 2021, <https://www.ndtv.com/world-news/after-india-china-backs-sri-lankas-bid-to-secure-imf-bailout-package-3714131>.

Legislative Reforms and Transitional Justice in Sri Lanka

Successive governments, despite their ideological orientation, have adopted communal policies that have hampered efforts to fulfil their commitments on transitional justice and accountability.

To acquire a holistic understanding of the current crisis in Sri Lanka, it is important to discuss the state of democracy and the issue of transitional justice in the country. The crisis in Sri Lanka is deeply embedded in the state of its ethnic relations. The term 'ethnic relations', in the context of Sri Lanka, refers to the social, economic and political forces that led to the 26-year-long civil war. After the war ended, nationalist politics continued to undermine the country's reconciliation, peace and development efforts. The Rajapaksas' political regime was popularly associated with the politics of Sinhala Buddhist nationalism. Their use of ethnocracy and identity politics has been criticised for legitimising poor governance and for being one of the structural causes of the current crisis. However, it would be incorrect to say that this kind of nationalist politics is limited to any one mainstream political party or group. Successive governments, despite their ideological orientation, have adopted communal policies that have hampered efforts to fulfil their commitments on transitional justice and accountability. Nationalist politics pervade state institutions, the economy, and the broader society and culture.

One of the main parallels between the recent people's protests in Sri Lanka and the island's troubled ethnic relations has been the question of accountability and justice. During the protests, the issue of accountability was explicitly highlighted concerning government policy decisions which paved the way for the crisis. These included the allocation of development priorities and expenditure of public finance, which were explored in more detail in the previous section of this Special Report. Protestors criticised the concentration and arbitrary exercise of power by cronies (family or political alliances). The Rajapaksas were one of the more recent political dynasties in the country, with eight family members serving as ministers in the

parliament, demonstrating the nepotistic culture prevalent in the system.²⁹

The question of accountability was also raised on how the government restricted the freedom to protest. Apart from this, the concentration of power within the executive presidency was criticised as detrimental to a healthy democracy.

However, the struggle against the unjust and arbitrary exercise of power and demands for accountability have a much longer history than the context of the present crisis. They have been fundamental to the ethnic conflict. In the post-war context, the Tamil community in the country and the Tamil diaspora, together with other human rights defenders, raised questions regarding alleged human rights violations and war crimes, especially in the last stages of the war, continued militarisation in the North and East of Sri Lanka and incidents of state-linked enforced disappearances.³⁰

To understand the 2022 mass protests in Sri Lanka in relation to the ethnic question and transitional justice, it is important to note some developments like the country's shrinking public sphere, the struggle for transitional justice in Sri Lanka and the presidency and power-sharing.

Sri Lanka's Shrinking Public Sphere and Prospects for System Change

Sri Lanka's politics is fundamentally based on ethnicity and religion. This explains the emergence of religious or ethnicity-based political parties in the country. Some political parties claim to surpass the discrimination of caste and religion through minority representation. However, they are mostly seen as tokenism to gain electoral benefits. In such an environment, the inclusive nature of the protest movement

Apart from this, the concentration of power within the executive presidency was criticised as detrimental to a healthy democracy.

²⁹ Dilrukshi Handunnetti, "The Fall of the House of Rajapaksa: How Unbridled Nepotism Let Sri Lanka Down", *The Wire*, 10 May 2022, <https://thewire.in/south-asia/mahinda-rajapaksa-family-sri-lanka>.

³⁰ Mithurja Pathmanathan, "International Investigation Into Sri Lanka's Enforced Disappearances Only Chance For Justice", *Human Rights Pulse*, 2 March 2021, <https://www.humanrightspulse.com/>.

and the emergence of a collective platform to articulate politics was unusual and remarkable. Tamil slogans became common in the protest sites, mainly in Sinhala-dominated Southern Sri Lanka. Muslim and Christian prayers took place publicly at protest sites, despite anti-Muslim sentiments becoming a norm, especially after the 2019 Easter attacks. In spite of this new wave of change, the people's expectations of a system change has not happened and does not seem to be a possibility in the foreseeable future.

Freedom of expression and assembly are routinely violated through detentions and arrests.

One of the distinct characteristics of the recent protest movement was the claiming of public spheres by the people to express their anxieties and demands towards the government. This was not only limited to Galle Face Green in Colombo but also other protest sites in other parts of the country.³¹ However, with the new interim president, Wickremesinghe, coming into power, there has been a rapid shrink in the public space. Freedom of expression and assembly are routinely violated through detentions and arrests. This is done mostly on the pretext of the provisions under the Prevention of Terrorism Act (PTA), which has not been designed to deal with the present conditions. This Act allows the authorities to carry out arrests without warrant for unspecified "unlawful activities", and permits detention for up to 18 months without producing the suspect before a court.³² For instance, on 12 November 2022, two women were arrested while marching towards Galle Face Green, demanding the release of two individuals detained under the Act.³³

However, the gradual loss of public space in Sri Lanka is not a new phenomenon. This cannot be overlooked as a simple constitutional crisis or a law and order issue. This series of events demonstrates the country's state and future of democracy, if not addressed promptly. It shows the dismantling of Sri Lanka's democratic institutions and

³¹ Meera Srinivasan, "'Occupy Galle Face': A tent city of resistance beside Colombo's seat of power", *The Hindu*, 12 April 2022, <https://www.thehindu.com/news/international/occupy-galle-face-a-tent-city-of-resistance-beside-colombos-seat-of-power/article65313735.ece>.

³² "Prevention of Terrorism", *Lawnet*, Ministry of Justice, <https://www.lawnet.gov.lk/prevention-of-terrorism-3/#:~:text=%E2%80%9Cunlawful%20activity%E2%80%9D%20means%20any%20action,or%20in%20connection%20with%20the>.

³³ "Two women engaged in protest march arrested by police", *Adaderana*, 12 November 2022, <http://www.adaderana.lk/news/86096/two-women-engaged-in-protest-march-arrested-by-police>.

practices in a systematic manner. Some Sri Lankan studies scholars argue that the main roots of this trajectory can be traced to the 1978 constitution's Article 20A, which gave immense power to the president of the country.³⁴ In response to popular pressures to reform or abolish the executive presidency, in October 2022, the 22nd amendment was passed by the parliament.³⁵ This amendment aims to trim presidential powers and ramp up anti-corruption safeguards in the country. However, according to some rights activists, this move is insufficient to bring an impactful change and is merely "tinkering with presidential powers".³⁶

The demand within the popular protests for a system change demonstrated the lack of public trust in the government and the political opposition. Among the changes called for were greater transparency and accountability of elected representatives and public officials, with due measures in place to ensure the suitability of public appointments. However, the politicisation of state institutions, corruption and political patronage remain largely unaddressed. Political parties have not taken any significant initiatives to change the entry requirements of their potential candidates at any level of the electoral system. There is also a lack of a major public debate to make these pre-qualifications a core requirement of electoral politics. Except for the most recent people struggle, Sri Lanka has not seen an organic and widespread people's movement demanding good governance and social justice. These issues led Sri Lanka to the present crisis, and the absence of systemic reforms will continue to undermine the people's well-being and freedom.

Political parties have not taken any significant initiatives to change the entry requirements of their potential candidates at any level of the electoral system.

Transitional justice is highly significant for a country like Sri Lanka, which has suffered from years of civil war, post-war repercussions and corrupt establishments which came to power. The opposition parties

³⁴ Sudha Ramachandran, "Sri Lanka's Democracy on the Edge", *The Diplomat*, 26 September 2020, <https://thediplomat.com/2020/09/sri-lankas-democracy-on-the-edge/>.

³⁵ "Once bitten, twice shy: How Sri Lanka is limiting its President's powers", *Hindustan Times*, 6 September 2022, <https://www.hindustantimes.com/world-news/sri-lanka-22nd-amendment-sri-lanka-political-crisis-once-bitten-twice-shy-how-sri-lanka-is-limiting-its-president-s-powers-101662449898106.html>.

³⁶ Uditha Jayasinghe, "Sri Lanka passes constitutional amendment aimed at trimming presidential powers", *Reuters*, 21 October 2022, <https://www.reuters.com/world/asia-pacific/sri-lanka-passes-constitutional-amendment-trim-presidential-powers-2022-10-21/>.

and civil society also need to step up and fight for transitional justice in the country.

The Struggle for Transitional Justice in Sri Lanka

When the war ended with the military victory over the Liberation Tigers of Tamil Eelam, there was no formal compulsion on the state to initiate any transitional justice mechanisms or engage in constitutional reforms.

The period immediately after a conflict is an opportune moment to implement transitional justice efforts and help the state and society to move towards state-building and a shared future.³⁷ Despite the end of the civil war, Sri Lanka has struggled to deal with its past due to its divisive politics. When the war ended with the military victory over the Liberation Tigers of Tamil Eelam, there was no formal compulsion on the state to initiate any transitional justice mechanisms or engage in constitutional reforms. The power asymmetry gave little incentive to the state to transform the political and legal structures, and address minority-related issues. The end of the war was also a defeat of Tamil separatism and posed the challenge of meaningful power devolution. The transitional justice process was essentially without a transition.³⁸

In a way, Sri Lanka transitioned from a state of war to a constitutional dictatorship. Several commissions were formed to inquire about enforced disappearances, extra-traditional killings, allegations of torture and sexual violence, but these were not impactful. For example, Mahinda, then president, established the Lessons Learnt and Reconciliation Commission in 2010 after rejecting calls for an independent international inquiry into the civil war. However, according to a report by Amnesty International, the commission was fundamentally flawed, lacked independence and provided no accountability for atrocities.³⁹

It was in 2015 that Sri Lanka committed to a new transitional justice and accountability process. In October 2015, the government, acting through the UNHRC, co-sponsored a resolution to set up four

³⁷ Elham Atashi, "Afghanistan: transitional justice in the midst of war", *Nationalities Papers, The Journal of Nationalism and Ethnicity*, Volume 41, No. 6, 30 May 2013, 1049.

³⁸ Zachariah, Mampilly, "The nexus of militarisation and corruption in post-conflict Sri Lanka", Dominik Zaum, Cheng, Christine in *Corruption and Post-Conflict Peacebuilding: Selling the Peace?*, Routledge, 2011, 180.

³⁹ "Sri Lanka: Inquiry into armed conflict fundamentally flawed", Amnesty International, 7 September 2011, <https://www.amnesty.org/en/latest/press-release/2011/09/sri-lanka-inquiry-armed-conflict-fundamentally-flawed/>.

transitional justice mechanisms to address human rights violations during the war: Commission for Truth, Justice, Reconciliation and Nonrecurrence, an Office on Missing Persons, an Office for Reparations and an Independent Judicial Mechanism to investigate allegations of violations and abuses of human rights and violations of international humanitarian law.⁴⁰ The state also committed to reforming the PTA, which human rights organisations have criticised for prolonged arbitrary detention of minority communities and political dissidents.⁴¹ However, none of the mechanisms were impactful and preventive detention remains unchanged. In 2019, Amnesty International released a report, *Flickering Hope: Trust, Justice, Reparation and Guarantee of Non-Recurrence in Sri Lanka*, which studied the working of these mechanisms.⁴² The report assessed that these bodies have not adequately addressed crucial issues, which can be seen, for instance, in controversies and objections to the Office on Missing Persons and failure to ensure accountability of the crimes. Regarding the PTA, the Sri Lankan government had committed to reform the act with assistance from the European Union (EU) and a bill was presented to the parliament in February 2022.⁴³ However, experts have expressed disappointment in these revisions for not fully complying with the country's international human rights obligations.⁴⁴

The state also committed to reforming the PTA, which human rights organisations have criticised for prolonged arbitrary detention of minority communities and political dissidents.

Two further important events occurred in 2019 and 2020, where presidential pardons were used to undermine the rule of law in Sri Lanka. In 2019, Sirisena, then-president, pardoned a Buddhist monk accused of inciting violence against ethnic minority Muslims without any reason for the pardon.⁴⁵ The following year, Gotabaya, then-

⁴⁰ "30th session of the Human Rights Council (14 September to 2 October 2015)", United Nations Human Rights Council, <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session30/res-dec-stat>.

⁴¹ "In a Legal Black Hole", Human Rights Watch, 7 February 2022, <https://www.hrw.org/report/2022/02/07/legal-black-hole/sri-lankas-failure-reform-prevention-terrorism-act>.

⁴² "Flickering hope: Truth, justice, reparation and guarantees of nonrecurrence in Sri Lanka", Amnesty International, 25 January 2019, <https://reliefweb.int/report/sri-lanka/flickering-hope-truth-justice-reparation-and-guarantees-nonrecurrence-sri-lanka>.

⁴³ "Sri Lanka: UN experts call for swift suspension of Prevention of Terrorism Act and reform of counter-terrorism law", United Nations Human Rights, 2 March 2022, <https://www.ohchr.org/en/press-releases/2022/03/sri-lanka-un-experts-call-swift-suspension-prevention-terrorism-act-and>.

⁴⁴ Ibid.

⁴⁵ "Sri Lanka president pardons hardline Buddhist monk", *Reuters*, 23 May 2019, <https://www.reuters.com/article/uk-sri-lanka-monk-pardon-idUKCN1SS23V>.

president granted a presidential pardon to a prisoner on death row for the murder of eight persons in Mirusuvil.⁴⁶

There is also longstanding pressure from the EU to address transitional justice and human rights in general and Sri Lanka risks losing access to the Generalised Scheme of Preferences+ trade benefits if these commitments are not honoured.

There remains continued pressure from international organisations, the civil society and the Tamil diaspora for accountability over such issues. Sri Lanka also receives considerable assistance from institutions such as the UNHRC to assist in the process. One such process is the Sri Lanka Accountability Project, which was set up in 2021.⁴⁷ This was built through a mandate by the UNHRC Resolution 46/1 to collect evidence on human rights abuses in the country.⁴⁸ It is separate from the Office of the High Commissioner for Human Rights in Colombo. It has commenced proceedings to document cases of sexual violence, child rights and recruitment and unlawful killings. There is also longstanding pressure from the EU to address transitional justice and human rights in general and Sri Lanka risks losing access to the Generalised Scheme of Preferences+ trade benefits if these commitments are not honoured.⁴⁹

The idea of transitional justice has become all the more important in the current crisis in Sri Lanka, and there is a demand for more impactful reforms and accountability from the government. Therefore, the government must look into the matters of power-sharing and the executive presidency for more effective implementation of transitional justice in Sri Lanka.

The Presidency and Power Sharing

There is a struggle around the presidency and for meaningful devolution of power to solve the ethnic issue. In 1978, the executive presidency was introduced because it would provide political stability and consequently lead to economic growth. However, in 44

⁴⁶ Ahalya Lelwala, "Presidential pardons in Sri Lanka: An Unchecked Executive Power?", Verite Research, <https://www.veriteresearch.org/2020/07/21/presidential-pardons-in-sri-lanka-an-unchecked-executive-power/>.

⁴⁷ Sanja de Silva Jayatilleka, "Geneva and the accountability SLAP", *Daily FT*, 14 January 2022, <https://www.ft.lk/columns/Geneva-and-the-accountability-SLAP/4-729161>.

⁴⁸ Ibid.

⁴⁹ Shihar Aneez, "Sri Lanka risks of losing EU trade concession over PTA – German envoy", *economynext*, 18 February 2023, <https://economynext.com/sri-lanka-risks-of-losing-eu-trade-concession-over-pta-german-envoy-112711/>.

years of the presidency, the country has experienced some of the worst political violence and economic crises since independence. What was seen as a transformative constitution to create economic transformation based on political stability instead resulted in a protracted period of political instability and a complete collapse of the economy.

In 1978, after the second amendment to the constitution, the president began to enjoy vast powers in the country and has proven, as an institution, to be extremely difficult to abolish. It has not come to pass despite the abolition of the executive presidency from being a major campaign platform in multiple election cycles. Beyond the vast legal powers that the president enjoys, there has been a Buddhist dimension to the presidency. Sri Lankan presidents have, in the past and present, participated in an official capacity in Sinhala Buddhist rituals and projected themselves as the protector of the country's Sinhala Buddhist heritage. This remains an obstacle to abolishing the presidency. Initially, the presidency was projected as an institution that would have to appeal to a multi-ethnic vote bank for the aspirant to be elected. However, as seen in 2019 and 2015, Sri Lankan presidents are predominantly elected with the Sinhala Buddhist vote bank, for they are the country's majority.

Beyond the vast legal powers that the president enjoys, there has been a Buddhist dimension to the presidency.

In 2007, the Sinhala Commission Report highlighted an element of fear among the majority Sinhala Buddhist community about power-sharing.⁵⁰ Opposition to the idea of power-sharing with the Tamil community was recorded due to a fear of the break-up of the unitary state that would lead to an erosion of the Sinhala Buddhist identity. Sinhala Buddhist nationalists see the president and the unitary state as a shield and a protector of their interests and the idea of a Sinhala Buddhist state. Therefore, like transitional justice, abolishing the presidency and power sharing are seen as undermining the concept of a Sinhala Buddhist state.⁵¹

⁵⁰ Neil DeVotta, "Sinhalese Buddhist Nationalist Ideology: Implications for Politics and Conflict Resolution in Sri Lanka", East-West Center, 1 January 2007, <https://www.eastwestcenter.org/publications/sinhalese-buddhist-nationalist-ideology-implications-politics-and-conflict-resolution-s>.

⁵¹ Mario Gomez, "Constitutional Struggle in Sri Lanka", Australia National University, 16 May 2022, <https://journals.sagepub.com/doi/10.1177/0067205X221100258?icid=int.sj-abstract.similar-articles.7>.

Another issue is the significant deterioration of the political literacy of the voters. Sri Lanka's Elections Commission Chairman, Nirmal Punchihewa, highlighted this issue during an event in November 2022, where he said that despite Sri Lanka's high social development indicators, including universal literacy, the political literacy of the people remains very low.⁵²

This movement was leaderless, and its primary demands were government change and economic crisis resolution.

In the North and East, the people's movements demanded these changes even before the mass street protests in the South in 2022. The first movement that saw the unification of the Tamils and Muslims was during the February 2021 peaceful march from Pottuvil in the East to Polikandy in the North.⁵³ The main aim of the protest was to demand justice and equality for the minority communities in the country – the protest movement of 2022 in the South shares commonalities. The protests were relatively inclusive and the movement was largely non-violent, and included a diverse group of people, irrespective of class, ethnicity, religion or gender with a common demand, that is, the resignation of the Rajapaksas. This movement was leaderless, and its primary demands were government change and economic crisis resolution. However, these developments have not played a decisive role in changing the country's political system long term, due to the lack of a consistent social movement in this direction.

⁵² Asela Kuruluwansa, "Political literacy of Sri Lankans very poor - EC Chief", *Daily News*, 3 November 2022, <https://www.dailynews.lk/2022/11/03/local/290457/political-literacy-sri-lankans-very-poor-ec-chief>.

⁵³ "From Pottuvil to Polikandy - What happened on the five day march for justice", *Tamil Guardian*, 8 February 2021, <https://www.tamilguardian.com/content/pottuvil-polikandy-what-happened-five-day-march-justice>.

State Legal Power and the Impact on Democratic Freedoms

In Sri Lanka, the rule of law has been practised in an unconventional manner, as it emanated from the demands during Sri Lanka's crisis. Thus, the crisis provides various insights into the rule of law, constitutionalism and constitutional democracy in the country.

The Soulbury system of governance, which derives from the British system, comprised all the fundamental principles and practices imperative to upholding the rule of law and the liberal constitutional tradition.⁵⁴ However, when the Sri Lankan constitution changed in 1987 from a Westminster-style parliamentary system to an executive presidential one, the country adopted a radically different political culture. Under the new executive presidential system, the president heads many key ministries, significantly the defence portfolio.⁵⁵

Under the new executive presidential system, the president heads many key ministries, significantly the defence portfolio.

Over the years, the law has been used to centralise power in the executive branch and to give the president impunity, placing him above the law.⁵⁶ Although the 17th and 19th amendments of the constitution sought to reduce the president's powers, they did so without changing his position of being above the law. Scepticism has been expressed on the legitimacy of the latest 22nd amendment, given that the draft was not made public or drafted with public participation and through consultation with various stakeholders, prior to being passed in the parliament.⁵⁷ The new amendment does not adequately curb the vast powers of the presidency or safeguard the independence of democratic institutions.⁵⁸

⁵⁴ Amita Shastri, Jayadeva Uyangoda, *Political parties in Sri Lanka: Change and continuity*, (Delhi: Oxford University Press: 2018) 235.

⁵⁵ Siri Gamage, Democracy in Sri Lanka: past, present and future, *Asian Studies Review*, Volume 17, 1993, Issue 1, 110.

⁵⁶ Ibid.

⁵⁷ Sakuntala Kadirgamar, "21st Amendment: A way out of Sri Lanka's multiple crises?", *Groundviews*, 30 April 2022, <https://groundviews.org/2022/04/30/21st-amendment-a-way-out-of-sri-lankas-multiple-crises/>.

⁵⁸ "22nd Amendment to the Constitution", Parliament of Sri Lanka, <https://www.parliament.lk/files/pdf/constitution/amendment-proposals/2022/independent-group-proposal-en.pdf>; and "Sri Lanka passes 22nd constitutional amendment bill curbing presidential powers" *peoplesdispatch*, 27 October 2022, <https://peoplesdispatch.org/2022/10/27/sri-lanka-passes-22nd-constitutional-amendment-bill-curbing-presidential-powers/>.

There are five characteristics of democracy in Sri Lanka: universal franchise since 1931; democratically free and fair elections and the rule of law; a multi-party-political system; a vibrant civil society; and a highly educated and sophisticated electorate which is well informed about politics and votes in large numbers.⁵⁹

Ethnocracy or Authoritarianism a Key Driver of the Ongoing Crisis

There are contestations on whether ethnocracy or authoritarianism and the lack of good governance are the main drivers of the ongoing crisis.

In the context of democratic credentials, Sri Lanka has been branded as Asia's oldest democracy, given that it gained a universal franchise in 1931 and political parties regularly alternated in power.⁶⁰ When political parties alternate in power, this ensures checks and balances. If one party remains in power for a long time, it incentivises the state to act illiberally and undemocratically.⁶¹ There are contestations on whether ethnocracy or authoritarianism and the lack of good governance are the main drivers of the ongoing crisis. One can argue that understanding ethnocentrism, majoritarianism and nationalism as the root causes that have eroded the rule of law and good governance in Sri Lanka is necessary to understand the nature of the poly-crisis being experienced by the country.

Even if Colombo solves its longstanding debt problem, it will not achieve socio-political stability because its ethnonationalist and majoritarian trajectories have led to illiberalism, corruption and political decay in the country.⁶² The crisis stemmed from an embedded ethnocracy that has shifted the political structure from a meritocracy to a kakistocracy (a government run by the least qualified or most unsuitable citizens) over time. The rule of law has fundamentally broken down, given the ethnocentric trajectory that the country has pursued since the mid-1950s.⁶³ Although there are competent

⁵⁹ Amael Vier et al, "Defending democracy amid the Covid-19 pandemic", ANFREL International Election Assessment Report, 2020, 67, <https://anfrel.org/wp-content/uploads/2020/09/Sri-Lanka-Report-2020-FINAL-ol.pdf>.

⁶⁰ Neil DeVotta, "Sri Lanka: The return to ethnocracy", *Journal of Democracy*, January 2021, Volume 32, Issue 1, 96.

⁶¹ Saghaar Wright, "An exploration of the various advantages and disadvantages of a one-party dominant political system, in a South African context", *The Yale Review of International Studies*, December 2021, <http://yris.yira.org/comments/5538>.

⁶² Neil DeVotta, "Sri Lanka: The return to ethnocracy", op. cit.

⁶³ Ibid, 97.

individuals, including those who work in the government, the political decay has been such that these people have not been allowed to operate independently and competently, while corrupt, predatory and incompetent leaders are controlling from the top.

The desire to institute an ethnocracy has undermined meritocratic governance in Sri Lanka. It has also allowed the politicians to mask their corrupt rule by appealing to nationalist sentiments, thereby undermining the rule of law. Hence, a longstanding practice of poor governance stemming from ethnocracy has played a major role in the manifestation of the current crisis. The various communal and anti-minority acts, such as the Ceylon Citizenship Act and Sinhala Only Act, were implemented to strengthen the position of the majority instead of the common good.⁶⁴ There is also a lack of acknowledgement that the highly protracted civil war resulted from the state's deeply entrenched majoritarianism. The civil war also allowed the politicians and the state to operate in a more ethnocentric manner by resorting to extra-constitutional and extra-judicial activities that were legitimated on the basis of preserving the state's territorial integrity. Sri Lanka also experienced inter-party politicking rooted in ethnic outbidding, where the two major parties at that time, the Sri Lanka Freedom Party (SLFP) and United National Party (UNP), competed to implement policies to strengthen the position of the majority.⁶⁵

There is also a lack of acknowledgement that the highly protracted civil war resulted from the state's deeply entrenched majoritarianism.

Although conversations and debates on electoral reforms have taken place occasionally, none of the proposed reforms have acknowledged and accepted the ethnocentric political structure of the state that is deeply embedded. Although the state's efforts to address the ethnic issue – such as fully implementing the 13th amendment, greater devolution of powers to the provinces and resuming the holding of provincial council elections – were not wholly absent from the political discourse on the current crisis, they were de-prioritised over

⁶⁴ Neil DeVotta, *Blowback: Linguistic Nationalism, Institutional Decay and Ethnic Conflict in Sri Lanka*, (California: Stanford University Press, 2004) 73.

⁶⁵ Shenali Pilapitiya, "The ethnic outbid: Capturing the voter since independence", *Groundviews*, 3 February 2022, <https://groundviews.org/2022/02/04/the-ethnic-outbid-capturing-the-voter-since-independence/>.

other issues, such as economic and political reforms, which were given more weightage. Hence, the ethnic issue was largely removed from the country's debates. For instance, when the 2023 budget was presented in the parliament by Wickremesinghe, he did not mention the ethnocentrism that has dominated the Sri Lanka discourse since the mid-1950s.⁶⁶

Going forward, while some economic reforms could take place, it will not be the kind that should happen for Colombo to reverse its path in a meaningful manner.

As a result, Sri Lanka is on a path dependency, where the path it has pursued for a long time will make it difficult to reverse the course unless major disruptions occur. Path dependency also states that the government becomes incapable of learning from past errors, and the political system continues to operate according to the deeply entrenched patterns and structures. Going forward, while some economic reforms could take place, it will not be the kind that should happen for Colombo to reverse its path in a meaningful manner.

In contrast, it could also be argued that ethnocracy is a manifestation and not a root cause of competing discourses that formed the post-colonial state and that these tensions have been prevalent in Sri Lanka's history. Ethnocracy has emerged as a result of deeply embedded authoritarianism, centralisation of powers and hegemony. For instance, when the 1972 constitution was implemented, the Bandaranaike government extended the parliament's tenure by two years to 1977 through a misuse of the rule of law and constitutionalism.

The system of authoritarianism has also brought in the culture of dynastic politics that runs deep in Sri Lanka. Since independence, influential families, such as the Senanayakes, Bandaranaiques and Rajapaksas, have dominated politics at various levels and created a nepotistic and corrupt governance culture.⁶⁷ Dynastic power also gave little incentive for politicians to run the country's affairs in the interest of its citizens. These dynasties have also outlasted the

⁶⁶ "Budget Speech - 2023 Sri Lanka, towards a new beginning", Sri Lanka Presidential Secretariat, <https://www.presidentsoffice.gov.lk/index.php/2022/11/14/budget-speech-2023-sri-lanka-towards-a-new-beginning/>.

⁶⁷ Chulanee Attanayake, "The enduring dilemma of dynastic politics in Sri Lanka", The University of Melbourne, 22 July 2022, <https://asialink.unimelb.edu.au/insights/the-enduring-dilemma-of-dynastic-politics-in-sri-lanka>.

political parties, party loyalties and affiliations.⁶⁸ The rank and file of Sri Lanka's political parties were aware that they did not have a chance to inherit the party leadership, and the position was reserved for someone from an influential family. An undesirable collateral outcome of such dynastic politics was the concentration of power in a narrow group of political elites and their clientelist networks and the curtailment of broader political participation in the system, given that it did not facilitate the rise of a new generation of politicians which is void of dynasties affiliations.

As a result, the entrenchment of authoritarianism has corrosively affected the rule of law, democracy and democratic governance in Sri Lanka. Many politicians have entrenched themselves and governed in an undemocratic manner. There have also been instances of leaders beginning their tenure on a pro-democracy platform and gradually moving towards authoritarianism. For instance, Sirisena, who started on a democratic high to restore public confidence, to restore checks and balances and who supported the implementation of the 19th amendment, started governing in an undemocratic fashion gradually, including dismissing the prime minister that was determined as unconstitutional by the Supreme Court.⁶⁹ The minorities have also benefitted from being part of the crony culture, widespread corruption and the weak rule of law over the years by joining party members or joining coalition forces.

Many politicians have entrenched themselves and governed in an undemocratic manner.

Forcing the State to Return to its Roots

Since July 2022, there has been a clear correlation between meeting the citizens' basic needs and widespread protests. The sudden, creative and spontaneous exercise of mass political agency resulted in Sri Lankans transforming themselves from voters to citizens. The people's pushback on the state's discourse on the rule of law was

⁶⁸ Chulanee Attanayake, Roshni Kapur, "Commentary: Personality politics matter more than party loyalty in Sri Lankan general elections", *Channel NewsAsia*, 11 August 2020, <https://www.channelnewsasia.com/commentary/sri-lanka-general-elections-2020-mahinda-gotabaya-rajapaksa-614171>.

⁶⁹ Chulanee Attanayake, Roshni Kapur, "Maithripala Sirisena: A president mired in controversy", *ISAS Brief* 617, 13 November 2018, 1-2, <https://www.isas.nus.edu.sg/wp-content/uploads/2018/11/ISAS-Briefs-No.-617-Maithripala-Sirisena-A-President-Mired-in-Controversy.pdf>.

Given that the earlier response of most state actors and political elites was ineffective, it prompted the Aragalaya to become a formidable force and seek political outcomes that were previously perceived to be unimaginable or impossible.

illustrated in various ways when the protesters educated themselves and mobilised in different protest sites, calling out issues such as the misuse of law, the rule of law and constitutionalism. The *Aragalaya* was an exercise of mass political agency by the people to compel the state to return to its core principles and functions.⁷⁰ Given that the earlier response of most state actors and political elites was ineffective, it prompted the *Aragalaya* to become a formidable force and seek political outcomes that were previously perceived to be unimaginable or impossible.

The current crisis has also given insights into the rule of law, given that lawyers and judges in Sri Lanka determined how the masses thought, discussed and utilised the concept. This is useful in the context of legal doctrines. However, thinking beyond that, it is useful to see the different meanings attached to the rule of law and the different narratives that are built out of the notion of the rule of law. For instance, while protesters have been arrested and their freedoms have been restricted since July 2022, the former also used the law to push back and seek remedies before the Human Rights Commission of Sri Lanka (HRCSL) and courts.⁷¹

The call by the *Aragalaya* for a system change represented the democratic expression at the mass level and the failure of the state to ensure the people's basic needs. While the movement had less of a demand for liberal democracy and transitional justice, it could also be contested that it was unrealistic to expect the movement to address all issues simultaneously. Although the *Aragalaya* marked an inter-ethnic and inter-religious solidarity with common victimhood to demand accountability, transparency and the rule of law, there was little focus on alleged war crimes, transitional justice, and reconciliation. Some of the 'pragmatists' of the movement argued

⁷⁰ Jayadeva Uyangoda, "Taking Aragalaya ideas seriously", *Groundviews*, 19 July 2022, <https://groundviews.org/2022/07/19/taking-aragalaya-ideas-seriously/>; and Bhavani Fonseka, "Sri Lanka's crisis and the power of citizen mobilization", Carnegie Endowment for International Peace, 30 June 2022, <https://carnegieendowment.org/2022/06/30/sri-lanka-s-crisis-and-power-of-citizen-mobilization-pub-87416>.

⁷¹ H R H Amarasinghe, "Aragalaya's fundamental right farce: When lawyers distort facts", *The Sunday Times*, 11 September 2022, <https://www.sundaytimes.lk/220911/sunday-times-2/aragalayas-fundamental-right-farce-when-lawyers-distort-facts-494666.html>.

that it was not the time to raise complex and sensitive issues of accountability and reconciliation.⁷² Hence, there was some scepticism that the *Aragalaya* would immediately transform the socio-political and institutional structures that stem from a deeply-rooted political culture.

There were competing approaches to the rule of law. While the police narrowly used the rule of law and, to some extent, in bad faith, the protesters also invoked the rule of law with different political commitments and intentions. The judiciary was caught in the middle of these two divergent discourses to find a way to reconcile with the differences, whether it was in the form of bail or a fundamental rights petition or reduced sentencing.⁷³ There were also instances of the Sri Lankan Bar Association getting involved, often by issuing an immediate statement.⁷⁴ Such interventions were critical to strengthening the demand for the rule of law that affirmed constitutionalism and respect for human rights and democracy.

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There is also a changing narrative of the nature of the *Aragalaya*. In the initial few months since its inception, the protest movement had the legitimacy, popular support and appeal of its unprecedented and unscripted nature. Over time, the state manipulated the movement, slightly altering the narrative. The state also crafted a narrative that the *Aragalaya* was hijacked by the political opposition, such as the Janatha Vimukthi Peramuna or its umbrella party, the National People's Power and the Frontline Socialist Party, and that the movement's organic and decentralised nature had been compromised. This narrative was also a way for the state to scapegoat and target these political parties and to deflect the increasing appeal of these parties among an electorate that was increasingly disillusioned with the more mainstream political

⁷² Mirak Raheem, "Questions of justice and accountability", *Groundviews*, 21 May 2022, <https://groundviews.org/2022/05/21/questions-of-justice-and-accountability/>.

⁷³ "Activist Randimal Gamage granted bail", *Ada Derana*, 5 January 2023, <http://www.adaderana.lk/news/87376/activist-randimal-gamage-granted-bail->.

⁷⁴ "Statement by Bar Association of Sri Lanka on the Declaration of the State of Emergency", *Mainstream Weekly*, 22 July 2022, <http://mainstreamweekly.net/article12551.html>.

parties such as the Sri Lanka Podujana Peramuna, the UNP, the Samagi Jana Balawegaya and the SLFP.⁷⁵

While the Aragalaya undoubtedly had legitimacy, due to its decentralised nature, it underestimated the state's response and the use of heavy-handed tactics.

There are now contestations over the legitimacy of the *Aragalaya* after adopting a more scripted and engineered form. This issue arose after certain groups among the protestors adopted violent tactics, and this gave the political establishment some leverage to label them as “violent”, “anarchic” and “rebellious”.⁷⁶ It is unsurprising that Wickremesinghe, who had until then called for the rights of the protestors to be respected, changed tactics once in power and adopted these de-legitimisation narratives. While the *Aragalaya* undoubtedly had legitimacy, due to its decentralised nature, it underestimated the state's response and the use of heavy-handed tactics. On 12 July 2022, the Sri Lankan Bar Association issued a statement urging the protestors to withdraw from the public spaces after receiving information that the government was planning to oust them from those places, fearing that it could have led to a bloodbath.⁷⁷

There is also a narrow interpretation of the *Aragalaya* as simply demonstrators participation and public spaces occupation. Some commentators say that the *Aragalaya* should be seen in a more enlightening and wider frame as an idea developed by the process and by those who mobilised to convey their messages and demands to the government. Going forward, although there is an opportunity to build on the momentum of the *Aragalaya* to push for meaningful reforms, there are likely to be efforts to undermine its reputation that is contingent on who controls the power dynamics and public narrative. Academics and the civil society are responsible for ensuring that the plurality of narratives of the *Aragalaya* is not eroded.

⁷⁵ Uditha Devapriya, “The future of the Aragalaya”, *Groundviews*, 22 May 2022, <https://groundviews.org/2022/05/22/the-future-of-the-aragalaya/>.

⁷⁶ M S M Ayub, “Violence in Aragalaya and crackdown”, *DailyMirror*, 13 August 2022, <https://www.dailymirror.lk/opinion/Violence-in-Aragalaya-and-crackdown/172-242979>.

⁷⁷ ANI, “Sri Lanka bar association asks protestors to vacate PM office, calls it against peaceful protest”, *ThePrint*, 14 July 2022, <https://theprint.in/world/sri-lanka-bar-association-asks-protesters-to-vacate-pm-office-calls-it-against-peaceful-protest/1037987/>.

State Capture – The Rule of Law and Human Rights

The ongoing crisis demonstrates that Sri Lanka is undergoing “state capture”, and understanding its nature of systemic political corruption sheds light on the nature of state legal power and its impact on democratic freedoms, civil liberties and human rights. State capture is not new to weak democracies. State capture in global discourses has been used mostly in discussions on corruption. Transparency International has defined state capture as “one of the most pervasive forms of corruption, where companies, institutions or powerful individuals use corruption such as the buying of laws, amendments, decrees or sentences, as well as illegal contributions to political parties and candidates, to influence and shape a country’s policy, legal environment and economy to their interests.”⁷⁸

State capture in global discourses has been used mostly in discussions on corruption.

To understand how and why human rights have been violated by the Sri Lankan state, why a culture of impunity persisted and why institutions failed, factors such as corruption and bribery need to be considered. Issues of bribery and corruption have mostly been viewed from the perspective of governance, law and enforcement and have often been used as the primary responses to tackle corruption. However, when corruption, nepotism and bribery are deeply entrenched in the political and legal structures, they influence the state’s willingness and capacity to respect and protect human rights and prevent violations.⁷⁹

The notion of state capture in Sri Lanka can explain the causes and consequences of the current crisis in three ways. First, political parties, charismatic leaders and political dynasties deeply supported by ethnonationalist ideologies effectively captured state institutions. They changed the nature of institutional structures and rules to remove checks and balances, oversight, and accountability. This resulted in systemic violations of human rights and the failure of

⁷⁸ “State capture: An overview”, Transparency International, Anti-Corruption Helpdesk, 1, https://www.transparency.org/files/content/corruptionqas/State_capture_an_overview_2014.pdf.

⁷⁹ Jimena Reyes, “State capture through corruption: How can human rights help?”, Human Rights Program, Harvard Law School, Research Working Paper Series, June 2019, 2, http://hrp.law.harvard.edu/wp-content/uploads/2019/07/JimenaReyes_HRP_19_002.pdf.

public institutions to provide effective remedies for such abuses by state captors. In October 2020, the Gotabaya government used its parliamentary majority to push for legislation to weaken the independence of the Bribery Commission, including its mandate to start anti-corruption investigations.⁸⁰ It has also resulted in the deliberate formulation of policies that have denied citizens their fundamental rights and the limited success of democratic law and institutional reforms. For instance, the PTA was weaponised and used indiscriminately against expressions of dissent and opposition.⁸¹

There is also a history of police brutality in Sri Lanka, including forced disappearances in the Southern and Northern regions.

Second, the Sri Lankan state sometimes speaks in multiple voices. For instance, the behaviour of representative state institutions, such as the cabinet and the parliament, varied from that of independent state institutions, such as the HRCSL and the judiciary. Some state institutions were more prone to corruption than others, and others ended up with greater independence. There is also a history of police brutality in Sri Lanka, including forced disappearances in the Southern and Northern regions.⁸² One of the reasons for this scourge is the institutional failure to curb police excesses and the political appointment of police officers who lack merits. The Inspector General of Police has identified that most police officers are appointed on political grounds instead of merits.⁸³

Third, state legal power is subverted and abused when the state is captured. The state discourse on the rule of law allows the state to criminalise and individualise the mass exercise of political agency, along with controlling the political narrative and ignoring dissenting and independent views.

⁸⁰ Matthew Stephenson, "Guest post: How one family is capturing the Sri Lankan state", *The Global Anticorruption Blog*, 29 July 2021, <https://globalanticorruptionblog.com/2021/07/29/guest-post-how-one-family-is-capturing-the-sri-lankan-state/>.

⁸¹ Savitri Hensman, "Widespread condemnation for detention of protesters under PTA", *Groundviews*, 23 August 2022, <https://groundviews.org/2022/08/23/widespread-condemnation-for-detention-of-protesters-under-pta/>.

⁸² "Sri Lanka: Legal and societal consequences arising from the failure to deal with enforced disappearances", Asian Human Rights Commission, 27 October 2021, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-024-2021/>.

⁸³ Dilini Madushanki, "IGP writes to Ministry of Public Security about govt's politicization of the Police", *Ceylon Today*, 18 May 2022, <https://ceylontoday.lk/2022/05/18/igp-writes-to-ministry-of-public-security-about-govts-politicization-of-the-police/>.

The role of big corporations, their relations with the state and their non-committal response to the *Aragalaya* were briefly discussed during the workshop. Some businesses were paradoxically making big profits at the height of COVID-19 despite the economic woes faced by most people in the country. The top nine firms in Sri Lanka allegedly generated US\$1.8 billion (S\$2.4 billion) between April and June 2021, in contrast to the big losses, loss in incomes and loss of jobs felt by the workers, small businesses and the poor.⁸⁴ Hence, they have little interest in pushing for constitutional and political changes because they profit from state capture, tax concessions and bribery.⁸⁵

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Counter-narratives are also likely to emerge from those who are not interested in democracy and are benefitting from the status quo. For instance, many sections of the corporate sector supported the *Aragalaya* initially. Still, they changed their position when Wickremesinghe came to power, knowing that his administration may continue the crony policies that would keep their interests intact. These special interest groups are likely to continue capturing power, but an active civic response may be the best counter-vailing force through democratic and mass movements, and civic responses.

Post-*Aragalaya*, conversations need to be made to reflect the role played by the Bar Association, HRCSL, lawyers, and medical professionals during various crises.⁸⁶ While their efforts to go to the frontlines to provide remedies and support to protesters during the current crisis have received some attention, their contributions to other landmark incidents – such as the 2018 constitutional coup and 2019 Easter Sunday attacks – have not been fully recognised. It will also be helpful to explore the responses and interventions of state institutions and how they have shaped certain discourses.

Moving forward, constitution-building and a new constitution cannot afford to be an elite project. The country also needs to think of

⁸⁴ Saman Gunadasa, "Sri Lankan big business reaps huge profits during pandemic", *World Socialist Web Site*, 30 August 2021, <https://www.wsws.org/en/articles/2021/08/30/prof-a30.html>.

⁸⁵ Ibid.

⁸⁶ H R H Amarasinghe, "Aragalaya's fundamental right farce: When lawyers distort facts", op. cit.

constitution building, besides constitutional design, that includes the participation of the masses. There also needs to be more substantial conversations on constitutional and political spaces to allow people to exercise their constitutional or legal rights and their political agency.

The Way Forward

Sri Lanka's current crisis is a manifestation of larger political, social, economic and legislative issues that have been developing for a long period of time. The crisis that is continuing to evolve demonstrates the impact of the erosion of democracy and legislative framework via multiple constitutional changes that led to power centralisation. It highlights the role of legal institutions in upholding the responsibilities of democratic governance and protecting the citizens' rights.

The crisis provides insights into other emerging markets and developing countries as well. Following the global pandemic and the Russia-Ukraine war, an increasing number of countries in the Global South are going through an external debt crisis, rising inflation and imminent political instability. Many are also characterised by centralised power, shrinking democratic space and weakened government institutions. Amidst this climate, there is a risk of those countries facing a similar crisis to that of Sri Lanka. The Sri Lankan crisis has also raised questions about how the people engage with the state and the political legitimacy of the state as a whole. It also highlighted the need for a fundamental rethinking towards a new social and political imaginary in the country, including rethinking the question of the minorities and the class question in the country. The protest movement has opened the room for a fundamental rethinking of the question of state power and the devolution of power as well as the state-society social contract.

The next few years will be crucial for the development of Sri Lanka. It will some years for the country to overcome the economic crisis, and during this period, the country could witness cycles of political and social change. There are concerns over Sri Lankans leaving the country in large numbers that could result in an erosion of the skilled labour force. Similar to the time of the civil war, there is an increased trend in migration.

The Sri Lankan crisis has also raised questions about how the people engage with the state and the political legitimacy of the state as a whole.

This constitutional reform will also have to include the ethnic question to determine the route for both politics and the economy in the country.

With different governments coming into power and the country struggling to forge political and economic stability, constitutional changes might also occur. There could be a mechanism similar to the constituent assembly, established outside of the parliament, which reaches every region and envisions a new constitutional order encompassing every section of the society. This constitutional reform will also have to include the ethnic question to determine the route for both politics and the economy in the country. This is important because a crisis brings inequality to the forefront and, in the case of Sri Lanka, inequality has been tremendously aggravated over the last few decades.

As Sri Lanka tries to grapple with the recovery, there are two possibilities: progressive possibilities and regressive divergence. It looks unlikely that the country will return to how it was before the crisis in political or economic terms. However, this period also creates room for new concepts and ideas to expedite the road to recovery. Activists and academics can play an important role by building a social movement around a new election, calling for the dissolution of the parliament in March 2023, and encouraging a diverse group of people to contest.

Regarding the abolishment of the presidency, a movement can be set up to build a public consensus around the idea of a referendum seeking to remove the executive body. However, this could be a challenge as the decision to call a referendum lies with the president. Therefore, an alternative could be to coalesce a presidential candidate who can address some of the issues unleashed by the *Aragalaya* movement.

There is also a need to look at the idea of accountability. The concept must cover issues that predate the war and the end of the war, and also on accountability for economic crimes. The processes of dealing with the past have relied heavily on state-led processes, which have not been successful. Therefore, the civil society must be proactive in this respect to employ forms of psychology, art, memorialisation, education, the teaching of inclusive histories and access to economic opportunities as part of a strategy to deal with the past.

The government also faces the challenge of managing competing geopolitical interests, amidst increasing dependence and vulnerability to external forces to manage its foreign exchange and debt crisis going forward. Regional powers, particularly India and China, will continue to court Sri Lanka to assert their dominance amid manoeuvres by Washington and New Delhi in preventing the region from slipping into China's orbit.

Appendix

About the Authors

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