

The unresolved constitutional dilemma: Persisting Imbalance of power exposed by the Constitutional Coup 2018

By *Binendri Perera**

Abstract: On 26th October 2018, Sri Lankan President surprised the nation with his abrupt removal of the Prime Minister in office and the appointment of another Prime Minister on ambivalent constitutional grounds. Through his actions, President Sirisena was attempting to bring to the power the former strongman Rajapaksa from his own party to entrench himself as well as their party, while undercutting Wickremasinghe and his party. Constitutional Coup 2018 was executed meticulously to ensure that the President and his old enemy, now his new-found ally could capture governmental power. The result was that Sri Lanka had two Prime Ministers claiming to be appointed to office. The paper discusses the dramatic and complicated actions and reactions that occurred during the Constitutional Coup 2018. This paper analyzes how the Constitutional Coup exposed the persisting imbalance of power as a weakness of the Sri Lankan Constitution of 1978 that undermines constitutionalism and how this weakness persisted despite the 2015 constitutional reforms. Even though the constitutional coup 2018 was resolved affirming the supremacy of the constitution the paper analyzes how the weakness exposed during then paved the way towards the deterioration of the system of checks and balances.

A. Introduction

On that fateful Friday evening of 26th October 2018, Sri Lankans were settling in front of their televisions when it was announced that a new Prime Minister had been sworn into office. Welikala named this a 'constitutional coup,' a term I will also use to refer to the incidents that took place from October to December 2018. The incumbent Prime Minister, who claimed he had no idea of his ouster, announced at once that he remained the lawful prime minister. Thereby, the country suddenly had two Prime Ministers contesting for legitimacy. Sri Lankans commented that the sighting of two rainbows earlier in the week presaged this catastrophe and wondered what surprises the next day would bring. Many more Friday

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evening surprises were in the store, as a struggle for power among the country's most powerful politicians and their respective parties had begun. This paper analyzes the dramatic events of the Constitutional Coup 2018 of Sri Lanka to expose the imbalance of power created by Constitution of 1978, which persisted despite the Nineteenth Amendment to the Constitution.

Through Section B. of this paper, I will introduce the executive presidency as designed by the 1978 constitution of Sri Lanka and the changes brought to this office through the most recent amendments to the constitution. This section elaborates on the chaotic shifts in constitutional structure in the country in a way that affects the core constitutional principles. Then, in Section C. I will analyze how constitutional coup 2018 progressed from its initial stages to a constitutional crisis, challenging the Nineteenth Amendment to the Constitution. In Section D. I will analyze the imbalance of power among the three branches of the state due to the tilt of power towards the executive president as an enduring weakness of Sri Lanka's constitution that undermines constitutionalism.

B. President versus Prime Minister: Constitutional and political backdrop

Sri Lanka's 1978 Constitution provides for a semi presidential model of governance.¹ The Constitution creates an imbalance of power among the three organs of the state. Even though Article 4 of the Constitution sets out functional and compositional separation of powers,² sufficient constitutional provision is not made to ensure equal autonomy for the three branches of the state to empower them to act as a check against each other.³ This im-

1 A.J. Wilson, *The Gaullist System of Asia: The Constitution of Sri Lanka*, London 1980, p. 1-2.

2 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 4: 'The Sovereignty of the People shall be exercised and enjoyed in the following manner : (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum ; (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People ; (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law ; (d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and (e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament and at every Referendum by every citizen who has attained the age of eighteen years and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors.'

3 See, Zoltan Balazs, *The Principle of the Separation of Powers*, Lanham 2016, cites Viles' pure definition of separation of powers which consists of three main aspects through which the separation of powers should take place. While Sri Lanka meets the compositional and functional separation of powers, there are shortcomings in the ability of the branches to guard their independence and act as a check against other branches. President had excessive control over the Parliament and its sessions. President also enjoyed the power to appoint judges. Parliament had the power to impeach the judges

balance has often paved the way for the executive presidency to become a puppeteer behind a façade of separation of powers. President could manipulate legislative, executive, and judicial functions according to his or her agenda using the broad range of constitutional powers accorded to the office. This was sanctioned by the pre-constitutional understandings of providing for a strong executive to spearhead economic development.⁴

However, recent Constitutional Amendments have been shifting these pre-constitutional understandings drastically according to the political climate of the state. The seventeenth Amendment, introduced in 2011, sought to reduce the powers of the executive presidency, by introducing an independent Constitutional Council to advise the President on appointments to the independent commissions. However, this amendment was not implemented as consensus could not be reached regarding the composition of the Constitutional Council at the end of the first Constitutional Council's term.⁵ Meanwhile, the President continued to make unilateral appointments in the absence of the Constitutional Council in violation of the Seventeenth Amendment.⁶

The Eighteenth Amendment, introduced in 2010, replaced the Constitutional Council with a Parliamentary Council. Its composition allowed for the Parliamentary Council to be dominated by the President and his party.⁷ Parliamentary Council could not furthermore bind the Presidential decisions and could only 'make observations' regarding suitable appointees.⁸ By removing the limit on the number of terms that a candidate could run for the

(Art. 107(2)) and impeach the President, though the latter was made impractical by the constitutional text itself. Judiciary remained the weakest according to 1978 Constitutionally, expressly prohibited from engaging in a post-enactment review of legislation (Art. 80 (3)) and prevented from being an effective check against the president by Art. 35's broad immunity clause (*Mallikarachchi v Shiva Pasupathi*, 1 Sri LR 74 (1985) (Sri Lanka)).

4 *The Vision*, President (then Prime Minister) J R Jayawardene's speech on moving the Second Amendment to the First Republican Constitution, p. 2 and *G.L. Peries*, The Executive Presidency of Sri Lanka: A Conceptual and Functional Analysis, in: Priyanee Wijeskera / Naufel Abdul-Rahman, *Vision & Reality*, The 1978 Constitution of Sri Lanka, Pannipitiya 2014, p. 83.

5 Constitutional composition of the Constitutional Council under the Seventeenth Amendment: (a) the Prime Minister; (b) the Speaker; (c) the Leader of the Opposition In Parliament; (d) one person appointed by the President; (e) five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition; (f) one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than the respective political parties or independent groups to which the Prime Minister and the Leader of the Opposition belong and appointed by the President; See also, *Dinesha Samaratne*, The Nineteenth Amendment to the Constitution, Content and Context, in: Asanga Welikala (ed), *The Constitutional Council and the Independent Commissions: The New Framework for Depoliticizing Governance*, Colombo 2016, p. 155.

6 *Charu Lata Hogg*, *Return to War: Human Rights Under Siege*, New York 2017, p. 111.

7 Composition of the Parliamentary Council: (a) the Prime Minister; (b) the Speaker; (c) the Leader of the Opposition; (d) a nominee of the Prime Minister, who shall be a Member of Parliament; and (e) a nominee of the Leader of the Opposition, who shall be a Member of Parliament.

8 Eighteenth Amendment, Article 41A (1).

Presidency, the Eighteenth Amendment further entrenched Presidential powers.⁹ Meeting the two-thirds majority required to amend the constitution thus was an easy move for the then-President Rajapaksa, because his party enjoyed 144 out of 225 seats in Parliament.¹⁰

The Eighteenth Amendment was negated by the Nineteenth Amendment, introduced in 2015, which once again attempted to restrict the powers of the President.¹¹ The nineteenth Amendment was introduced soon after Sirisena became the President on a manifesto to abolish/reform the executive presidency and promote good governance.¹² Thereby, the current President himself was committed to the move of limiting the powers of his office at the beginning of his term and worked actively to garner the required two-thirds majority to amend the constitution.¹³ Therefore, the process of amending the Nineteenth Amendment connotes a shift from original pre-constitutional understandings as to the powers of the President.

I. Presidential powers under the original 1978 constitution

The 1978 Sri Lankan Constitution provides for a semi-presidential form of government. Article 4 (b) concentrates executive powers on the President.¹⁴ As head of the executive and the government, the President heads the Cabinet of Ministers and appoints as the Prime Minister 'the Member of Parliament who in his opinion is most likely to command the confidence of Parliament'.¹⁵ The President also appoints the Ministers, State Ministers, and Deputy Ministers and assigns them subjects, functions, and ministries. In doing so he is free to act on his own and to consult the Prime Minister only 'where he considers such consultation to be necessary'.¹⁶ According to Article 47, the President could also remove any of these members, including the Prime Minister, anytime he wishes.¹⁷ The president thus *had*

9 *Kalana Senaratne*, in *supra* note 5, at p. 56.

10 *Nira Wickremasinghe*, *Sri Lanka in the Modern Age: A History*, Oxford 2014, p. 382.

11 *Asanga Welikala*, *supra* note 5.

12 *Aruni Jayakody*, *supra* note 5, at pp. 34-44.

13 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 82 (5) 'A Bill for the amendment of any provision of the Constitution or the repeal and replacement of the Constitution, shall become law if the number of votes cast in favor thereof amounts to not less than two-thirds of the whole number of Members (including those not present) and upon a certificate by the President or the Speaker, as the case may be, being endorsed thereon by the provisions of Article 80 or 79. This is subject to art. 83, which states that amendment of certain provisions requires approval by people at a referendum.'

14 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 30 (1) elaborates that 'There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and the Government, and the Commander-in-Chief of the Armed Forces.'

15 *Ibid.* art. 43 (3).

16 *Ibid.* art. 44, 45, 46.

17 *Ibid.* art. 47: 'The Prime Minister, a Minister of the Cabinet of Ministers, any other Minister or Deputy Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he – a. is removed

tight control over all the key office holders of the executive branch. Because the ministers are drawn from the parliament, he exerted indirect influence over the legislature. Furthermore, the President could also assign to himself any ministerial portfolio that he does not assign to another minister and determine the number of portfolios he shall hold.¹⁸ Consequently, the president could assign to himself any number of crucial subject areas. President Rajapaksa, for instance, held the Ministry of Finance, Defense, Ports, and Law during his term and his offices together accounted for 50% of Sri Lanka's budget in 2014.¹⁹

According to Article 30 (1) of the Constitution, the president is the Commander-in-Chief of the Armed Forces and according to Article 33 (2) (g), he has the power to declare war and peace. This presidential power cannot be reviewed by the Supreme Court according to Article 35 (1) proviso of the constitution. Moreover, the presidential powers to declare an emergency according to section 2 of the Public Security Ordinance No 25 of 1947 and section 5 of the Ordinance provides for the making of Emergency Regulations for the detention of persons, acquisition of property, and amendment of any law other than the constitution, subject to the supervision of the parliament. These powers are endorsed by Articles 155 (1), (2), and (3) of the 1978 Constitution.

President also has ceremonial powers as the head of the state as specified in Article 33 (2) of the Constitution. J.R. Jayawardena, initiator of the 1978 Constitution justified these broad executive powers citing the necessity to bring about economic development. These powers were then sustained by military necessity emanating from the civil war which lasted for nearly three decades. However, President Mahinda Rajapaksa's exercise of executive power in an authoritarian manner to sanction corruption, nepotism, and human rights abuse even after the end of the civil war in 2009,²⁰ led to public disillusionment towards his rule as well as the unrestrained nature of the constitutional grant of executive powers.

II. The shift of political power in the presidential election 2015

In 2014, at the beginning of the campaign for the Presidential election 2015, Maithripala Sirisena broke ranks with Rajapaksa to become the opposition coalition's common candidate.²¹ Sirisena was the Minister of Health under the previous regime in Rajapaksa's Cabinet and the General Secretary of the Sri Lanka Freedom Party (SLFP), the senior party of

by a writing under the hand of the President; b. resigns his office by writing under his hand addressed to the President; or c. ceases to be a Member of Parliament.'

18 *Ibid.* art. 44 (2).

19 *Niranjan Rambukwella*, Rajapaksa family controls 56% of the budget, 10% more than 2010, <https://www.colombotelegraph.com/index.php/rajapaksa-family-controls-62-of-budget-22-more-than-in-2010/> (last accessed: 22. April 2021).

20 *BBC News*, Profile: Mahinda Rajapaksa, <https://perma.cc/G95G-VPER>.

21 *Reuters*, Sri Lankan Minister quits, to challenge Rajapaksa for the presidency, <https://www.reuters.com/article/us-sri-lanka-election/sri-lankan-minister-quits-to-challenge-rajapaksa-for-presidency-idUSKCN0J50W520141121> (last accessed: 22. April 2021).

the United People's Freedom Alliance (UPFA), which was led by Rajapaksa at the time.²² However, to run for presidential election, Sirisena received support from the United National Party (UNP), the other major political party in Sri Lanka, and its leader Ranil Wickremasinghe. The UNP is a direct descendant of the Ceylon National Congress, 'a loose alliance of individuals and political groups drawn from the local Westernized elite, who sought to win elections to the colonial legislature' and later formed 'the first post-independence government' with its 'conservative pro-capitalist orientation.'²³

The SLFP was formed by 'an alienated leader who split from the UNP,' promising 'to usher in the age of the 'common man' by changing the national official language to Sinhala, and adopting democratic-socialist economic reforms.'²⁴ As SLFP 'remained the standard-bearer of the interests of the more traditional, Sinhala-educated middle and lower-middle classes, as well as the rural poor' UNP, has 'presented to itself to the minority communities as the more tolerant and liberal alternative to the SLFP.'²⁵ Sirisena's initial SLFP affiliation alongside the newly extended support of the UNP allowed him to defeat Rajapaksa in the 2015 Presidential election. Sirisena emerged victorious on a manifesto to abolish and change (used interchangeably) the executive presidency, promote good governance and accountability.²⁶

III. Reform of presidential powers under the Nineteenth Amendment 2015

The Nineteenth Amendment to the Constitution of 1978 was enacted after the shift of presidential power in 2015 and curtailed presidential powers in three important ways. Firstly, presidential power was directly reduced through provisions reintroducing the limit on the number of terms he or she can be elected to office and removal of presidential immunity in cases where the president's decisions violate fundamental rights.²⁷ Secondly, the President was required to co-operate with Prime Minister in decisions regarding the appointment and functions of Cabinet Ministers, Ministers, and Deputy Ministers.²⁸ In *In re Nineteenth Amendment*, the Supreme Court affirms that the President was not the 'sole repository of

22 *Ibid.*

23 *Amita Shastri & Jayadeva Uyangoda*, *Introduction to Political Parties in Sri Lanka, Change and Continuity*, Oxford 2018, p. 2.

24 *Ibid.*

25 *Ibid.*; *Amita Shastri*, *United National Party: From Dominance to Opposition and Back*, *supra* note 23, at p. 111.

26 *Neil DeVotta & Sumit Ganguly*, *The Scarring of Democracy in Sri Lanka*, <https://www.usnews.com/news/best-countries/articles/2018-11-08/commentary-sri-lankas-constitutional-crisis-and-the-threat-to-its-democracy> (last accessed: 22. April 2021).

27 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art.31 (2), and art. 35 (1).

28 *Ibid.*, art. 43, 44, 45.

executive power' and that executive power is shared with the Cabinet of Ministers, who are answerable to Parliament, and also with the Public service in certain instances.²⁹

Thirdly, the Nineteenth Amendment reintroduced the Constitutional Council, which was to provide recommendations on appointments to the Commissions,³⁰ appointment of superior court judges, Judicial Service Commission, Attorney-General, Auditor General, Inspector General of Police, Parliamentary Commissioner for Administration (Ombudsman), and the Secretary-General of Parliament.³¹ President is constitutionally required to abide by these recommendations according to Article 41B (1) and Article 41C (1). Moreover, the transitional provisions of the Nineteenth Amendment curtailed the ability of the future presidents to hold ministerial portfolios as he wishes, by requiring prime ministerial concurrence in such allocations.³²

To ensure that the Prime Minister could act with sufficient independence, the original constitutional power of the President under Article 47 to remove him from office at will just like any other Cabinet Minister was removed by the Nineteenth Amendment. This was a political necessity because Wickremasinghe, Sirisena's ally during the 2015 Presidential election and the leader of the UNP, sought to wield substantial power within the government.

After the Parliamentary elections of 2015, the operative National Government was formed between the UNP and a section of the UPFA. This was significant because the two main parties that have continued to dominate Sri Lanka's politics since independence,³³ were working in a coalition for the first time. Therefore, unlike the previous coalitions, where the minority parties joined forces with one of the main parties, participants of the coalition were generally of equal bargaining power. At the same time, the party ideologies of the two main parties were significantly different. The UNP's 'pragmatic, ideologically conservative and pro-property orientation' was in tension with the 'reformist social-democratic policy orientation' and 'nationalist' tendencies that have characterized the UPFA.³⁴

Furthermore, though Sirisena became the leader of UPFA, the party was fragmented between his supporters and Rajapaksa supporters, who formed an informal opposition against the government in Parliament.³⁵ Continuing tensions between Sirisena and Rajapaksa factions within the UPFA since the beginning of Sirisena's coalition with the UNP complicated

29 In re Nineteenth Amendment to the Constitution, S.D. 04/2015, 7-8 (2015) (Sri Lanka), <https://perma.cc/V5SH-NT2V>.

30 *Ibid.*, Schedule to art. 41B specifies the Commissions.

31 *Ibid.*, Schedule to art. 41C specifies these offices.

32 Nineteenth Amendment 2015, sec. 50.

33 *Amita Shastri & Jayadeva Uyangoda*, *supra* note 23, at p. 4.

34 *Ibid.* at pp. 11-14.

35 *New York Times*, Ex-President of Sri Lanka Says He'll Lead Opposition in Elections, <https://perma.cc/T3UL-V4KS>.

the situation from within the party itself.³⁶ Therefore, working the coalition proved harder than initially envisaged.

C. Progression of the constitutional coup

Welikala called the president's attempt to remove the incumbent Prime Minister from office based on ambivalent constitutional grounds to transfer the power from UNP to SLPP a 'Constitutional Coup'.³⁷ Venugopal called this an 'unconstitutional seizure of power'.³⁸ Uyangoda follows the term constitutional coup stating that it is 'reflective of the substantive analysis developed by both'.³⁹ I will also use the term constitutional coup as I layout its initial stage and then trace its development into a constitutional crisis with the dissolution of Parliament.

I. Constitutional coup: the initial stage

The constitutional implications of the Nineteenth Amendment to the 1978 Constitution were not crystallized and it was during the constitutional coup that its bounds were tested for the first time. The actors were engaged in a battle over the nature and extent of presidential power constitutionally accorded to the president through the Constitution as amended by the Nineteenth Amendment. In this section, I will analyze the initial stage of the constitutional coup in terms of the actions the political actors took, what was at stake due to these actions and the goals they aimed to achieve.

II. Nature of actions taken by political actors involved in the constitutional coup

Sri Lankan Constitutional Coup commenced on the late evening of Friday 26th October 2018 with three actions that were orchestrated abruptly and virtually simultaneously.⁴⁰ Firstly, the UPFA withdrew from the National Government that they jointly formed with the UNP under Articles 46 (4) and (5) of the 1978 Constitution.⁴¹ The nineteenth Amendment introduced the concept of the National Government to the Sri Lankan Constitution 1978 in very broad and imperfect terms. According to Article 46 (5) 'National Government'

36 Jayadeva Uyangoda & Keerthi Ariyadasa, Sri Lanka Freedom Party: Continuity through Ideological and Policy Shifts, *supra* note 23, at p. 153.

37 Asanga Welikala, *Paradise Lost? Preliminary Notes on a Constitutional Coup*, <https://perma.cc/ZT-U4-VFZY>.

38 Rajesh Venugopal, *The Second Coming of Sri Lanka's Mahinda Rajapaksa*, <https://blogs.lse.ac.uk/southasia/2018/11/12/the-second-coming-of-sri-lankas-mahinda-rajapaksa/> (last accessed: 22. April 2021).

39 Jayadeva Uyangoda, in: Asanga Welikala (ed.), *Constitutional Reform and Crisis in Sri Lanka*, Colombo 2019, p. 109.

40 Asanga Welikala, *supra* note 37.

41 *Ibid.*

is a coalition between the political party or the independent group obtaining the highest number of seats in Parliament and any number of other political parties or independent groups in Parliament.' Article 46 (4) allows for Parliament the power to override the limitation regarding the composition of the Cabinet stated in Article 46 (1) if a National Government is formed. However, the Constitution remains silent about the dissolution of the National Government.⁴² President engaged in the constitutional coup based on the constitutional ambiguity regarding the dissolution of the National Government to withdraw his party from the coalition, which he argued as dissolving the Cabinet of Ministers and used that as a precursor to removing the Prime Minister.⁴³

Secondly, a new Prime Minister was immediately sworn-in before the President; and thirdly, the President removed the incumbent Prime Minister in writing,⁴⁴ citing Article 42 (4) of the constitution as the basis.⁴⁵ Sirisena's newly appointed Prime Minister was Rajapaksa, the previous President of Sri Lanka and the former leader of the UPFA. While the coalition between Sirisena and the ousted Prime Minister, Wickremasinghe from the UNP, was deteriorating since early 2018, the sudden alliance of Sirisena with the political rival whom he had been publicly accusing of a variety of offensive acts was unexpected.⁴⁶

On October 26 2018, Wickremasinghe immediately responded publicly to the President's letter purporting to remove him from office. He claimed that Article 42 (4) does not confer such power on the President to remove the Prime Minister because Article 46 (2) introduced by the Nineteenth Amendment states that the Prime Minister continues in the office while the Cabinet of Ministers functions unless he resigns or ceases to be a Member of Parliament.⁴⁷ Thereby, Wickremasinghe stated that he remains Prime Minister according to the Constitution.⁴⁸ He claimed that he could prove his claim by showing that he commands the confidence of Parliament, and called for an emergency parliamentary session.⁴⁹

President's address merely implies that he has the legal authority to appoint the Prime Minister as he wishes, referring to his appointment of Wickremasinghe in 2015 'although

42 *Ibid.*, art. 46 (4).

43 *Asanga Welikala*, *supra* note 37.

44 *Ibid.*

45 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 42 (4): 'The President shall appoint as Prime Minister the Member of Parliament, who, in the President's opinion, is most likely to command the confidence of Parliament.'

46 *The Economist*, Back to the bad old days, Sri Lanka's president installs his arch-enemy as prime minister, <https://perma.cc/ZW5N-ZRRB>.

47 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 46 (2) 'The Prime Minister shall continue to hold office throughout the period during which the Cabinet of Ministers continues to function under the provisions of the Constitution unless he (a) resigns his office by writing under his hand addressed to the President, or (b) ceases to be a Member of Parliament.'

48 *Colombo Telegraph*, Constitutional Crisis With MR Becoming PM: Appointment Illegal And Unconstitutional, I'm Still The PM – Says Ranil, <https://perma.cc/3KQS-AXG8>.

49 *The Week*, Sri Lanka Crisis: US following developments with concern, <https://perma.cc/B849-HQWL>.

he had only 47 members in the Parliament.⁵⁰ However, the Nineteenth Amendment to the Constitution introduced by the Sirisena-Wickremasinghe coalition thereafter amends Article 47 of the Constitution which hitherto allowed the President to remove the Prime Minister just like any other minister.⁵¹ Therefore, as Welikala points out, the constitutional method to remove the Prime Minister under the Constitution as amended by the Nineteenth Amendment was to defeat him through passing a vote of no confidence in Parliament or defeating his budget.⁵² While the President did not follow this explicit constitutional process, he still claimed that he was acting according to the constitution.

Constitutionality of Presidential actions was defended based on two main arguments: firstly, that withdrawal of the UPFA dissolved the National Government, making the current Cabinet of Ministers unconstitutional as per Article 46 (1) and (4) of the Constitution, which together reads that the number of the Cabinet of Ministers can exceed thirty only when a National Government is formed. It was argued that such unconstitutionality dissolves the Cabinet of Ministers and this allows the President to appoint a Prime Minister and a Cabinet of Ministers afresh.⁵³ However, this theory was based on ambivalent constitutional grounds. Dissolution of National Government itself was questionable because according to Article 46 (5), National Government is not only formed between the two major political parties but rather can be formed by the political party or the independent group with the highest number of seats with other recognized political parties or independent groups. Therefore, withdrawal of the UPFA, which did not command the highest number of seats in the Parliament, does not automatically dissolve the Cabinet. Furthermore, according to Article 46 (4), Parliament, and not the President, has the power to determine the number of Cabinet of Ministers if a National Government is formed.⁵⁴ The political formation of the National Government has to be constitutionally acknowledged by both the legislature and the executive. Therefore, the President's argument that he alone can decide whether the National Government is dissolved is questionable. Even if the President's version of constitutional interpretation was accepted, it was still in tension with the primary purpose of the Nineteenth Amendment, which was enacted to reduce the powers of the President.⁵⁵

Secondly, an argument was made that the Sinhala text of the 1978 Constitution provides for the removal of the Prime Minister based on Article 48 which provides that the Cabinet of Ministers stands dissolved upon 'the Prime Minister ceasing to hold office by death, resignation or otherwise,' Sinhala translation of which reads as 'the Prime Minister ceasing to

50 *Ibid.*

51 See *supra* note .

52 *Asanga Welikala*, *supra* note 37.

53 *Reuters*, Sri Lanka president appoints newly appointed PM as finance minister, <https://perma.cc/YQX6-EH3F>.

54 Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art. 46 (4), *amended by* the Nineteenth Amendment to the Constitution, 2015.

55 *Asanga Welikala*, *supra* note 5 at pp. 11-12.

hold office by *removal*, resignation or otherwise.' It is a canon of statutory interpretation in Sri Lanka, explicitly mentioned in many of the statutes, that the Sinhala language will prevail during any inconsistency among the three languages: Sinhala, Tamil, and English. Thereby, it was claimed that the President was removing the Prime Minister according to this phrase in Sinhala version, later discovered to be in Tamil text as well.⁵⁶

Constitutional scholars responded to this argument by stating that the constitution, which is the supreme law of the land, requires a *sui generis* interpretation in line with the spirit of the constitution without according automatic preference to one language.⁵⁷ Such a reading of Sinhala and Tamil texts of the constitution also makes it untenable to hold that the President continues to hold the power to remove the Prime Minister at his whim.

On 28th October 2018, two days after the removal of Wickremasinghe and the appointment of Rajapaksa as the Prime Minister, Sirisena addressed the nation to explain his actions. He stated that there were differences of 'policy, culture, personality and conduct' between himself and the ousted Prime Minister Wickremasinghe, which led to 'this political and economic crisis'.⁵⁸ The differences that the President pointed out were accurate. While Sirisena is 'from the rural peasantry from of the north-central province',⁵⁹ Wickremasinghe is from the English-speaking upper-caste elite with a Colombo-centered education and a strong UNP political lineage.⁶⁰

According to the President, these differences led the Prime Minister to 'arrogantly and stubbornly [...] to avoid collective decisions'.⁶¹ Sirisena also referred to his disagreements with the economic policies of Wickremasinghe, which allegedly favored foreign investment at the expense of local industries.⁶² President highlights Wickremasinghe's failure to take action against the former Governor of the Central Bank who was guilty of the Bond scams of 2015 and 2016, who was Wickremasinghe's colleague appointed to office by him.⁶³ However, none of these factors created a 'political or economic crisis' which warranted the President to remove the Prime Minister abruptly without any prior notice on dubious constitutional grounds.

Furthermore, Sirisena stated that he is removing the incumbent Prime Minister due to his alleged failure to investigate an assassination plot against himself.⁶⁴ Without credible

56 *Dinesha Samaratne*, Losing a Paradise We Never Had?, <https://perma.cc/B4M8-92N8>.

57 *Ibid.*

58 *Colombo Telegraph*, President Maithripala Sirisena's Address To The Nation – Full Text, <https://perma.cc/QKZ5-L9FA>.

59 *Jayadeva Uyangoda & Keerthi Ariyadasa*, *supra* note 23, at p. 152.

60 *Amita Shastri*, *supra* note 23, at pp. 106-119.

61 President Maithripala Sirisena's Address To The Nation – Full Text, *supra* note 5858.

62 *Ibid.*

63 *News First*, Interpol red notice is not sufficient to bring Mahendran back to Sri Lanka- PM, <https://perma.cc/2VHM-W39A>.

64 *Ranga Sirilal & Shihar Aneez*, Sri Lankan president suspends the parliament after firing prime minister, <https://perma.cc/BAP7-DGBC>.

evidence, accusations were also made that the Prime Minister engineered the assassination attempt.⁶⁵ However, there was little reference to this matter as the coup progressed. Sirisena also refers to the circumstances under which he was elected to office in 2014: 'It was a risk and a challenge that no politician in the history of the country wanted to accept. I faced this challenge despite the dangers to me and my family.'⁶⁶ Ironically, he fails to mention that the threat to his life he speaks about came from the very man he was just appointed as Prime Minister.

When Wickremasinghe, backed by the Speaker to the Parliament as well as an alleged majority of members, insisted upon a vote i.e. a floor test in the parliament to ascertain who commands the confidence of the House, President responded aggressively by proroguing the Parliament, using his power under Article 33 (2) (c).⁶⁷ While this act was within the President's powers, this was a strategy to create a majority in Parliament by taking in the Members of Parliament (MPs) who would cross the floor.⁶⁸

This substantive goal was in tension with the understanding that the President would not use his ceremonial powers in a way that affects the integrity of Parliament. Parliament remained prorogued for almost three weeks,⁶⁹ despite the Speaker of Parliament officially communicating the dangers of such prolonged dysfunction of the legislature,⁷⁰ and numerous public protests and petitions demanding for reconvening of the Parliament.⁷¹

III. Nature of the stakes involved

Sri Lankan President and the newly appointed Prime Minister were playing a dangerous game at this point. The stakes were high, in terms of both the political controversy their actions would ignite and the damage that will be caused to their political careers if they were to be defeated. If the constitutional coup was to fail Sirisena's political power, as well as popularity, would suffer irrevocably. He was turning against the coalition he formed in 2014 and returning to his adversary whom he had already turned against once. Public cynicism against this line of betrayals would cost him the opportunity to run for a second term of Presidency unless he was to succeed in the constitutional coup to transform the current constitutional and political structure. Meanwhile, Rajapaksa's popularity was already on the

65 *Thisaranee Gunasekara*, What Is At Stake Is Democracy Itself, <https://perma.cc/Z656-V6JS>.

66 President Maithripala Sirisena's Address To The Nation – Full Text, *supra* note 58.

67 *Neil DeVotta & Sumit Ganguly*, *supra* note 26.

68 *Ranga Sirilal & Shihar Aneez*, *supra* note 64.

69 *Taylor Dibbert*, Sri Lanka's Constitutional Crisis: Rajapaksa's Dark Past Shapes the Present, <https://perma.cc/4BYJ-ZKJP>.

70 *Agence France-Presse & Associated Press*, Sri Lanka's constitutional crisis could become a 'bloodbath', the speaker warns, <https://perma.cc/9727-43NJ>.

71 *Shihar Aneez*, Supporters of Ousted PM Protest as Sri Lanka Gripped by Political Crisis, <https://www.usnews.com/news/world/articles/2018-10-30/supporters-of-ousted-pm-protest-as-sri-lanka-gripped-by-political-crisis> (last accessed: 22. April 2021).

rise as was evident through his party's victory in local government elections earlier in the year.⁷² Therefore, he was risking his opportunity to win the Parliamentary elections in 2019, providing him a constitutional entitlement to the Prime Minister position, if the constitutional coup fails and his popularity plummets again as a result. If Wickremasinghe was to lose his claim he and his party would lose their position of power, with little chance of restoration. However, if Wickremasinghe's claim succeeds, his as well as his political party's power and popularity, which were on the decline, would be reinstated for a considerable future.

Two Prime Ministers and two Cabinets of Ministers vying for legitimacy while the legislature remained prorogued led to the dysfunction of both the political branches. Therefore, the constitutional coup was having a drastic impact on the governance of the country, as well as the country's economy. The public as well as the political actors were alarmed by the gravity of calamity and uncertainty brought about by it.⁷³

IV. Nature of the constitutional, political and personal goals to be achieved

Sirisena was aware that he was already losing his popularity and by aligning himself with Rajapaksa he was aiming to remain in power through the latter's re-emerging popularity.⁷⁴ Even though Rajapaksa's popularity was on the rise, it was widely assumed that he required power urgently to stop the trials against his family members for alleged offenses committed during his regime.⁷⁵ Specifically, the Trial-at-Bar for misuse of public funds to build the DA Rajapaksa Museum and Memorial, in which Rajapaksa's brother and former Defense Secretary was the main defendant, was to commence on December 4th, 2018.⁷⁶

If Sirisena and Rajapaksa were to succeed in their coup, Sri Lanka's constitutional and political backdrop has transformed drastically. State media were arbitrarily taken over immediately after Rajapaksa's appointment.⁷⁷ Discussions were already underway to halt investigations into human rights violations that took place during the civil war period and

72 *Andreas Johansson*, Sri Lanka local elections: the return of Rajapaksa, <https://www.opendemocracy.net/andreas-johansson/sri-lanka-local-elections-return-of-rajapaksa> (last accessed: 22. April 2021).

73 *Jayadeva Uyangoda*, The Political is Personal: An Essay in Despair from Sri Lanka, <https://perma.cc/ZX43-CTYN>.

74 *Nyshka Chandran & Sri Jegarajah*, 'Constitutional crisis' could destabilize Sri Lanka, pushing it closer to China, <https://perma.cc/CJ9A-ZA9M>.

75 *Tisaranee Gunasekara*, Deranged, <https://perma.cc/S3NM-MWFA>.

76 *News First*, AG files a case against Gotabaya Rajapaksa in connection to the D.A. Rajapaksa Museum, <https://perma.cc/N9PD-TMZA>; *Daily News*, Rajapaksa Museum case fixed for November 9, <https://perma.cc/TZK8-4YW3>.

77 *Jack Moore*, Sri Lankan press freedom crushed following Mahinda Rajapaksa's return, <https://perma.cc/2BWY-H8Q8>.

strip down post-war reconciliation mechanisms.⁷⁸ Through reading the constitution in a way that expands the powers of the President, the office of the executive would once again enjoy unchecked power to manipulate the branches of the state and arbitrarily restrict fundamental rights.

Therefore, in a context where the country was facing economic struggles due to both domestic and global factors,⁷⁹ the overwhelming national debt,⁸⁰ and investigations into corruption which strained the careers of many politicians, the constitutional coup was a desperate attempt at political survival.

V. Escalation of Constitutional coup into a Constitutional Crisis

While the individual members crossed and crossed back across the floor during the initial stage of the constitutional coup, the Sirisena-Rajapaksa coalition could not gather a sufficient number of MPs to create the required majority in Parliament.⁸¹ Sirisena-Rajapaksa coalition failed to garner the support of the minority parties, firstly, because they failed to establish sufficient constitutional and political justification for their initial actions. United People's Liberation Front, one of the main minority parties in current politics that started as a radical Marxist movement, has recently softened its approach to focus on promoting democracy and constitutionalism.⁸² Therefore, the dubious constitutional grounds upon which the Sirisena-Rajapaksa coalition proceeded did not receive their support.⁸³

Secondly, the Sirisena-Rajapaksa coalition made it clear from the outset that they were going to take a Sinhala-Buddhist majoritarian approach to governance, which the UPFA's forerunner SLFP has done since its inception.⁸⁴ Moreover, Rajapaksa was widely known as the leader who realigned UPFA towards 'hardline nationalism' since 2005.⁸⁵ This approach was in direct conflict with the party ideologies of political parties that represent minority communities, who advocate for effective reconciliation mechanisms and remedies for human rights violations, especially during the civil war. Therefore, Tamil National Alliance

78 *Nyshka Chandran & Sri Jegarajah*, *supra* note 74. See also, *Michael Safi*, Sri Lanka crisis: activists fear the end of human rights investigations, <https://perma.cc/B4F4-D4LM>.

79 For instance, the strengthening of the US dollar and changes in investor confidence based on fluctuations of US-China trade wars resulted in the depreciation of the Sri Lankan rupee. *Groundviews*, Money Talks: some facts around the depreciation of the Sri Lankan Rupee, <https://perma.cc/AE8W-2H8V>.

80 *G.D. Kapila Kumara*, Sri Lankan Economy in 2018 and 2019 outlook, <https://perma.cc/9EHQ-2MXW>.

81 *The Japan Times News*, Sri Lanka rivals target defectors to end the political crisis, <https://perma.cc/QW7B-57F8>; *Tamil Guardian*, Sirisena admits couldn't get 113 MPs due to high asking prices, <https://perma.cc/WAA6-WK74>.

82 *Ibid.* Pp. 16-17.

83 *Binodkumar Singh*, Sri Lanka: Presidential Paroxysms – Analysis, <https://perma.cc/4UFK-5DH4>.

84 *Amita Shastri & Jayadeva Uyangoda*, *supra* note 23, at pp. 13-14.

85 *Ibid.* At p. 13.

and Sri Lanka Muslim Congress sided with the UNP,⁸⁶ the party that took a more moderate stance towards the grievances of ethnic minorities in recent years.⁸⁷

In the face of mounting national and international pressure to reconvene the Parliament,⁸⁸ there was an attempt on the President's side in early November to convene and adjourn the Parliament without carrying out the floor test to ascertain which Prime Minister commanded the confidence of the House.⁸⁹ However, this move was rejected by the Speaker who insisted on sorting out the issue of the legitimacy of the government in power.⁹⁰ Therefore, on November 9, 2018, the President resorted to dissolving the Parliament.⁹¹ This was an explicit violation of Article 70 (1) of the Constitution according to the Nineteenth Amendment.⁹² However, it was justified as a democratic solution to the situation at hand, allowing people to express their will through an election.⁹³

But, this Presidential action, widely questioned for its legitimacy,⁹⁴ brought the country to a 'decisive turning point in the direction of the constitutional order, a moment at which the order threatens to break down' as stated by Levinson and Balkin in their elucidation of 'constitutional crisis'.⁹⁵ According to the two scholars a constitutional crisis has three main characteristics. First is the inability to sort out the disagreements within normal politics.⁹⁶ This was happening in Sri Lanka with the suspension of the legislature while the legitimacy of the executive was in question. The dissolution of the legislature under precarious conditions was the climax of this situation, whereby the avenue for resolving the tension within normal politics was effectively closed down. Even during the urgent appeals made to the

⁸⁶ *K Mukunthan*, Tamil Leaders Played An Honourable Role In Restoring Constitutional Governance In Sri Lanka, <https://perma.cc/FE49-3E79>; *The Japan Times News*, Sri Lanka rivals target defectors to end the political crisis, <https://perma.cc/F9FQ-LD2B>.

⁸⁷ *Amita Shastri*, *supra* note 23, at pp. 106-114.

⁸⁸ *Groundviews*, The Constitutional Crisis: A Round Up, <https://perma.cc/7LNP-Z4BQ>; *Nyshka Chandran*, Political turmoil could test Sri Lanka's ties with the international community, <https://perma.cc/3V25-33LK>.

⁸⁹ *Colombo Telegraph*, Speaker overrides UPFA – Floor Test On November 14 When Parliament Reconvenes, <https://perma.cc/6F6E-VGJY>.

⁹⁰ *Ibid.*

⁹¹ *Dharisha Bastians & Vindu Goel*, Sri Lanka President Dissolved Parliament Amid Power Struggle, <https://perma.cc/43LN-5NH8>.

⁹² *Jayampathy Wickramaratne*, On Dissolution Of Parliament, <https://perma.cc/N66Q-C733>; *Jayadeva Uyangoda*, After Dissolution, <https://perma.cc/4HXN-MRS6>; *Jayadeva Uyangoda*, The Gravest Crisis, <https://perma.cc/N4ZS-3RD5>.

⁹³ *Zaheena Rasheed & Rathindra Kuruwita*, 'Let people decide': Sri Lankans want a vote as the crisis drags on, <https://perma.cc/J3RB-KQ53>.

⁹⁴ See *Shihar Aneez*, *supra* note 71.

⁹⁵ *Sanford Levinson & Jack M. Balkin*, Constitutional Crisis, *University of Pennsylvania Law Review* 157 (2009), pp. 715-716.

⁹⁶ *Ibid.*

judiciary, there was considerable worry about whether the judiciary could contain chaos created by the virtual collapse of both the other branches of the state.

Secondly, Levinson and Balkin emphasize the importance of opposition raised ‘within the class of respectable politicians, jurists or commentators, or a well-regarded mass movement or social organization’ for a situation to qualify as a constitutional crisis.⁹⁷ In Sri Lanka, significant opposition arose from academics, professionals, and students by way of petitions, peaceful protests, and internet-based activism.⁹⁸ Religious opposition came directly from the Church of Ceylon publicly condemning the unconstitutional and undemocratic nature of the Prime Minister change.⁹⁹ In a quiet, yet powerful, manner, Chief Priest of *Malwathu* Chapter indicated opposition towards the ongoing political controversy through his refusal to grant an audience to the President.¹⁰⁰ Citizens conducted mass protests which continued every day.¹⁰¹

Further acts of citizen condemnation came through the return of Presidential conferred titles,¹⁰² direct letters to the President condemning his controversial acts of publicly making homophobic comments.¹⁰³ Letters of protest were also written to the President challenging the arbitrary transfer of Inspector of Police (IP) Nishantha Silva of the Criminal Investigation Department (CID) in charge of the allegedly politically motivated assassination of Editor of Sunday Leader newspaper, Lasantha Wickrematunge, and the abduction and assault of the journalist, Keith Noyahr.¹⁰⁴ Transfer of IP Nishantha Silva was canceled subsequent-

⁹⁷ *Ibid.*

⁹⁸ *Groundviews*, A Coup In Asia's Oldest Democracy: A Statement by Sri Lankan Students, <https://perma.cc/B4VU-WFCM>; *India Today*, Students protest ongoing political crisis in Sri Lanka, <https://perma.cc/R3PR-R9DA>; *Groundviews*, No Constitution = No Democracy: A Statement by 900 Sri Lankan Students on #CoupLK, <https://perma.cc/SBA3-68L3>.

⁹⁹ *The New Indian Express*, Sri Lanka political crisis: Church of Ceylon against ‘unconstitutional’ removal of PM Wickremesinghe, <https://perma.cc/G7NX-8ED2>.

¹⁰⁰ *Malwathu* Chapter is one of the most prestigious chapters of Buddhist monks in Sri Lanka. See *Colombo Telegraph*, Malwatte Mahanayake Refuses to Meet Sirisena: President’s Media Division Makes Desperate Attempt To Suppress Story, <https://perma.cc/ZM63-7XYJ>.

¹⁰¹ *Shihar Aneez*, *supra* note 71; *Groundviews*, Sri Lanka Political Crisis: How Citizens are ‘taking a stand’ for democracy, <https://perma.cc/4GA8-MMKT>; *ABC News*, Sri Lanka political crisis: Thousands march in protest against president’s decision to sack prime minister, <https://perma.cc/SCF6-3M6H>.

¹⁰² *Devanesan Nesiah*, An Open Letter to President Maithripala Sirisena, <https://perma.cc/32K2-P4AN>.

¹⁰³ *Colombo Gazette*, President under fire over “butterfly” comments, <https://perma.cc/4AYY-RYD6>; *Colombo Telegraph*, Sirisena Should Be Held Responsible For Homophobic Incidents In Sri Lanka In Coming Days: Sri Lankan LGBTIQ+ Community, <https://perma.cc/JJM3-JL3E>.

¹⁰⁴ *Daily Mirror*; CID’s IP Nishantha Silva Transferred, <https://perma.cc/Z6YK-42BAColombo Telegraph>, Lasantha’s Daughter Writes Moving Letter To Sirisena Against Attempt To Transfer CID OIC Nishantha Silva, <https://perma.cc/VBU5-K53X>.

ly.¹⁰⁵ These diverse ways of rejecting Presidential actions made a significant impact on the public perception of the situation at hand.

Thirdly, Levinson and Balkin argue that the other branches of the state play a central role to seek resolutions to the crisis. In Sri Lanka, the judiciary, as well as the legislature, had to take combined efforts for the crisis to finally subside. The constitutional impasse was finally brought to an end by a three-judge bench of the Supreme Court granted interim relief on November 14, 2018, suspending the Presidential Gazette proroguing the parliament.¹⁰⁶ Parliament reconvened the next day, however, hostility in the House disrupted carrying out the floor test.¹⁰⁷ MPs resorting to violence and undignified actions to disturb the proceedings of the legislature resulted in injuries to the MPs as well as the police officers on duty.¹⁰⁸ Floor test to ascertain which Prime Minister commanded the majority of the House was carried out as a ‘voice vote’ and by way of signatures amidst violence on November 14 and 15, 2018.¹⁰⁹

Despite the lack of confidence in the new government being proven numerous times, Sirisena and Rajapaksa refused to accept this result.¹¹⁰ Sirisena kept on refusing to accept the no-confidence motions passed against Rajapaksa, requiring different procedures each time.¹¹¹ He stated that he will not reappoint Wickremasinghe even if the latter achieved unanimous support of the Parliament.¹¹² Thereby, Wickremasinghe went before the Court of Appeal seeking a writ of quo warranto,¹¹³ and obtained an Interim Order in his favor on

105 *Daily FT*, Police Commission Cancels transfer of CID Inspector Nishantha Silva, <https://perma.cc/KK3V-MVLU>.

106 *Shyamon Jayasinghe*, Sri Lanka’s Judiciary In Its Finest Hour, <https://perma.cc/9MNH-VSDP>.

107 *Aljazeera*, Chaos in Sri Lanka parliament as MPs exchange blows, <https://perma.cc/T974-6EYD>; *Michael Safi & Amantha Perera*, Sri Lanka’s MPs pass no-confidence vote against disputed PM Rajapaksa, ; *Associated Press*, Chilli powder and chairs thrown in Sri Lanka parliament on the second day of violence over the constitutional crisis, <https://perma.cc/F38D-GF9H>.

108 *Lanka Business Online*, Sri Lanka’s noble Police – Iconic image of Sri Lanka’s constitutional crisis, <https://perma.cc/3L6E-QKA5>.

109 *The Economic Times*, Sri Lanka’s Parliament passes no-confidence vote against Prime Minister Rajapaksa, <https://perma.cc/TT9A-WVVP>; *The Hindu*, Sri Lankan President Sirisena must find a way to work with Ranil Wickremesinghe, <https://perma.cc/N5E9-8GTF>; *The New Indian Express*, Sri Lanka: Mahinda Rajapaksa loses the no-trust vote, <https://perma.cc/V52Q-PAGB>.

110 *The Guardian*, The Guardian view on Sri Lanka: president v prime minister, <https://perma.cc/XTN5-JJVK>; *Neil DeVotta & Sumit Ganguly*, Asia’s Oldest Democracy Takes a Hit <https://perma.cc/CKV7-K422>; *Bharatha Mallawarachi*, Disputed Sri Lankan premier faces second no-confidence motion, <https://perma.cc/R9YW-RH2J>.

111 *Lakshmi Subramanian*, Sirisena calls for third trust motion, parliament to meet again, <https://perma.cc/U75N-HDXB>.

112 *Colombo Telegraph*, I Will Not Reappoint Ranil Even If All 225 MPs Support Him: Sirisena, <https://perma.cc/DK7T-9YEX>.

113 *Colombo Telegraph*, All MPs supporting NCM Against MR File Writ of Quo Warranto Challenging Purported Government’s Unlawful Continuation in Office, <https://perma.cc/5KCM-Z74L>.

December 3, 2018.¹¹⁴ Meanwhile, on December 13, 2018, the Supreme Court confirmed the unconstitutionality of the Presidential Proclamation dissolving the Parliament.¹¹⁵ On the day after, Supreme Court also confirmed as interim relief, the continuation of the Interim Order issued against the government by the Court of Appeal.¹¹⁶ Rajapaksa stepped out of office soon after these decisions,¹¹⁷ finally restoring the status quo.

VI. The aftermath of the constitutional crisis

Levinson and Balkin set down three possible conclusions to a constitutional crisis: prevention of the crisis, substantial transformations of 'forms and practices of power', and 'dissolution of the existing constitutional order'.¹¹⁸ Sri Lankan judicial decisions managed to restore the status quo, by affirming the Supremacy of the Constitution and also reiterating the limits upon Presidential powers laid down by the Nineteenth Amendment to the constitution. However, questions remained regarding the far-reaching implications of the constitutional crisis for the country's constitutional tradition, as discussed by Samararatne at the initial stage of the constitutional coup.¹¹⁹ In this section, I will map the key political and constitutional developments in 2019 and 2020 in the aftermath of the constitutional coup 2018, highlighting how constitutionalism deteriorated during this period.

Constitutional Coup 2018 concluded with the resignation of the illegal Prime Minister and the re-appointment of the unlawfully ousted Prime Minister.¹²⁰ Cabinet of Ministers from his party was reappointed soon after.¹²¹ However, the President who violated the constitution continued in office.¹²² Furthermore, the MPs who committed assault, a criminal offense which is not covered by Parliamentary privilege, during the constitutional coup continued to hold office unprosecuted. Meanwhile, the President and the Prime Minister could not act in coordination with each other in governance, which the key requirement of the Nineteenth Amendment.

¹¹⁴ *The Economic Times*, Sri Lankan court bars Mahinda Rajapaksa from acting as Prime Minister, <https://perma.cc/S5KR-EP9P>.

¹¹⁵ R. Sampanthan et. al. v Attorney-General, *supra* note 140.

¹¹⁶ *Colombo Telegraph*, Status Quo Remains: Supreme Court Unanimously Refuses To Issue Stay Order On Court Of Appeal Interim Relief, <https://perma.cc/EP67-G6VU>.

¹¹⁷ *Shihar Aneez & Ranga Sirilal*, Sri Lankan PM resigns to make way for the new government, <https://perma.cc/6DFH-FV2T>; *Jayadeva Uyangoda*, Judiciary's Message: Constitution and Democracy First, <https://perma.cc/W5C7-VQBA>.

¹¹⁸ *Sanford Levinson & Jack M. Balkin*, *supra* note 95, at p. 715.

¹¹⁹ *Dinesha Samararatne*, *supra* note 56.

¹²⁰ *Rathindra Kuruwita*, Sri Lanka: PM reinstated after weeks of the crisis, <https://perma.cc/JHK5-A MJW>.

¹²¹ *Khemer Times*, Sri Lanka gets a new cabinet lineup, <https://perma.cc/7YHE-CD5M>.

¹²² *Tamil Guardian*, Sirisena admits couldn't get 113 MPs due to high asking prices, <https://perma.cc/3XC7-36KQ>.

Due to this lack of coordination between the President and the Prime Minister, the government failed to prevent the Easter Sunday attacks on April 21st, 2019, despite receiving prior warnings.¹²³ *Report of the Select Committee of Parliament to look into and report to Parliament on the Terrorist Attacks that took place in different places in Sri Lanka on 21st April 2019* states that, since the Constitutional Crisis 2018, the President did not invite the Prime Minister, the Minister of Defense and Inspector General of Police to attend the meetings of the National Security Council, which it recognizes as 'the apex national security decision making body.'¹²⁴ The Report details the systemic lack of coordination among the different institutions involved in information gathering and taking decisions about national security.¹²⁵ This proved to be a fatal shortcoming as the government when even though the Director of Sri Lanka Intelligence Service had notice of a potential security threat from as early as 4th April 2019.¹²⁶

President also appointed an ad hoc three-member committee to investigate on a questionable legal basis and the Parliamentary Select Committee Report deems it as 'not desirable and should not be treated as a valid precedence'.¹²⁷ However, this continuing clash between the legislature and the executive prevented the taking of actions to redress the exposed systematic drawbacks and hold the individuals responsible accountable.

The public lost their confidence in the government irreparably due to this incident. Gotabhaya Rajapaksa, Mahinda Rajapaksa's brother and the Defense Secretary during the pre-2015 period, used this to his advantage during the presidential campaign leading up to the presidential election in November 2019.¹²⁸ He won the election with an overwhelming majority on 16 November 2019,¹²⁹ and by his appointment, Mahinda Rajapaksa became the Prime Minister legally a year after the Constitutional Coup.¹³⁰

Gotabhaya Rajapaksa was elected with a mandate to repeal the Nineteenth Amendment to the Constitution. He dissolved the Parliament on March 2, 2020, according to Article 70

123 *BBC News*, Sri Lanka attacks: Government admits 'major intelligence lapse', <https://www.bbc.com/news/world-asia-48044636> (last accessed: 22. April 2021).

124 *Report of the Select Committee of Parliament to look into and report to Parliament on the Terrorist Attacks that took place in different places in Sri Lanka on 21st April 2019*, at p. 30.

125 *Ibid.*, pp. 38-44.

126 *Ibid.*, p. 45.

127 *Ibid.*, pp. 32-33.

128 *Aditi Shah, Shihar Aneez*, *Many Sri Lankans want a strongman leader, and that favors Gotabaya Rajapaksa*, <https://www.reuters.com/article/us-sri-lanka-gotabaya-analysis/many-sri-lankans-want-a-strongman-leader-and-that-favors-gotabaya-rajapaksa-idUSKCN1V00SO> (last accessed: 22. April 2021).

129 *Asad Hashim*, Gotabhaya Rajapaksa wins Sri Lanka Election, <https://www.aljazeera.com/news/2019/11/gotabaya-rajapaksa-wins-sri-lanka-election-191117133518223.html> (last accessed: 22. April 2021); *Gotabhaya Rajapaksa*, Sri Lanka's powerful new president, <https://www.bbc.com/news/world-asia-50389014> (last accessed: 22. April 2021).

130 *Mahinda Rajapaksa*, Sri Lanka's long-time leader back in seat of power, <https://www.bbc.com/news/world-asia-24918281> (last accessed: 22. April 2021).

proviso since the four years and six months has then lapsed since its first meeting. However, Parliamentary election couldn't be held due to the COVID19 pandemic and therefore, the new Parliament could not meet within the three months as required by Article 70 (5).¹³¹ Nevertheless, the President continued to govern the country without the Parliament through the initial months of the public health emergency.¹³² Even though this was challenged before the court, Supreme Court dismissed the petition at the Leave to Proceed stage itself.¹³³ The Parliamentary Election was held on August 5, 2020, and the SLPP emerged with a victory that was few seats short of the two thirds majority in Parliament required to amend the Constitution.¹³⁴ The UNP, which was then fragmented, only received 1 seat, while its break away party Samagi Jana Balawegaya (SJB) received 54 seats.¹³⁵

One of the first acts of the new government was to introduce the Twentieth Amendment to the Parliament, which reversed many of the Nineteenth Amendment's attempts to strengthen the system of checks and balances back to the Eighteenth Amendment position.¹³⁶ Samaratne has called this Sri Lanka's Constitutional ping pong.¹³⁷ This amendment was challenged before the Supreme Court by thirty nine petitioners and the Supreme Court held that the Amendment can pass subject to several modifications.¹³⁸ The Twentieth Amendment was then passed with the court's suggestions and numerous Committee stage suggestions, with several opposition MPs crossing the floor to make up the Two Thirds Majority.¹³⁹ This Amendment has reinforced the power of the executive presidency that was originally recognized by the 1978 Constitution. The Amendment restores the president's power to hold Cabinet portfolios, to dismiss the Prime Minister at will and provides prima-

131 *Centre for Policy Alternatives*, Structures to Deal with COVID-19 in Sri Lanka: A Brief Comment on the Presidential Task Force, <https://www.cpalanka.org/wp-content/uploads/2020/04/FINAL-Presidential-Task-Force-on-COVID19-April-2020-copy.pdf>, (last accessed: 22. April 2021); *Jayadeva Uyangoda*, A constitutional solution to the impending constitutional crisis, <https://gndviews.org/2020/04/30/a-constitutional-solution-to-the-impending-constitutional-crisis/>, (last accessed: 22. April 2021).

132 *Ibid.*

133 *Daily News*, Supreme Court Dismisses FR Petitions, <https://www.dailynews.lk/2020/06/02/law-order/219880/supreme-court-dismisses-fr-petitions> (last accessed: 22. April 2021).

134 Election Commission of Sri Lanka, Parliamentary Election 2020, Votes, Seats & National List Seats by Party – All Island, https://elections.gov.lk/web/wp-content/uploads/election-results/parliamentary-elections/Votes_Seats_NL_SBP_02.pdf (last accessed: 22. April 2021).

135 *Ibid.*

136 *Center for Policy Alternatives*, Statement on the Twentieth Amendment <https://www.cpalanka.org/statement-on-the-twentieth-amendment-2/>, (last accessed: 22. April 2021).

137 *Dinesha Samaratne*, Sri Lanka's Constitutional Ping pong: the Twentieth Amendment in a historical perspective, <https://www.himalmag.com/sri-lankas-constitutional-ping-pong-2020> (last accessed: 22. April 2021).

138 *In re Twentieth Amendment to the Constitution* SCSD No 1-39/2020.

139 *Chandani Kirinde*, 20th Amendment Triumphs, <http://www.ft.lk/top-story/20th-Amendment-triumphs/26-707950> (last accessed: 22. April 2021).

ry to the President in making appointments to the key positions of the state and independent commissions by reintroducing the Parliamentary Council.

Therefore, while the Sri Lankan judiciary has shown its capacity and independence in its constitutional interpretation to uphold the rule of law and democratic governance, weaknesses of Sri Lanka's politics remain unaltered and continue to shape the constitutional order.

D. Imbalance of power: Persisting weakness of the constitutional framework

The Sri Lankan Constitution coup 2018 shows the continuing tilt of power towards the executive president despite the Nineteenth Amendment. Even though the joint endeavours of the legislature and the judiciary prevailed in the end, this was achieved only with the greatest difficulty. This section analyses how this power imbalance continued despite the resolution of the immediate crisis. This paved way for the further deterioration of the system of checks and balances, even though the Supreme Court upheld the Constitution and its principles as supreme in *Sampanthan et al v Attorney General*.¹⁴⁰

I. Tilt of power towards the Executive president

The imbalance of power established by the 1978 Constitution has allowed the executive president to become a puppeteer behind a façade of separation of powers. Before the Nineteenth Amendment, Presidential actions were protected under the broad immunity clause of Article 35 (1) which reads that 'While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity.' This was subject to three specified exceptions to which the Nineteenth Amendment added that the president can be judicially held accountable for violation of fundamental rights.

The Presidential dissolution of Parliament in violation of the Constitution was challenged as a violation of the petitioners' right to equal protection of the law. The Petitioner, Leader of the Opposition in Parliament, argued that the President's Proclamation dissolving the Parliament is ultra vires the constitutional procedure laid out. Therefore, their right to equal protection of the law to complete their respective terms in parliament according to law and the right of people to be represented in parliament according to law.¹⁴¹ Supreme Court upheld that Sri Lanka's Article 12 jurisprudence on right to equality is extensive to capture this instance.¹⁴² The court notes that it has 'even extended the jurisprudence under

140 R. Sampanthan et. al. v Attorney-General, (2018) SC FR Application No. 351/2018 (Sri Lanka): <https://perma.cc/MQ79-UNAZ>.

141 R. Sampanthan et. al. v Attorney-General, *supra* note 140, at p. 14.

142 *Ibid.*, at pp. 86-87.

Article 12 (1) to encompass the protection of Rule of Law,' citing *Jayanetti v Land Reform Commission*.¹⁴³

The Nineteenth Amendment allowed for the President to be checked by the courts for his violations of fundamental rights. Constitutionally, politically and socially accepted the role of the judiciary to defend fundamental rights gave the Supreme Court's decision a higher legal legitimacy at this point. However, the fact that the president was challenged through a circular method for violation of fundamental rights shows the lack of accountability for the president within the political process. An intentional violation of fundamental rights is a ground for impeachment, under Article 38 (2) of the Constitution. However, the Sri Lankan impeachment process remains a dead letter of the constitution because the president can interfere in the parliamentary process. This is because the President continues to enjoy the unrestricted power to prorogue the parliament. President Premadasa used this to buy him time to regain the support and control of the Parliament when an impeachment motion was brought against him.¹⁴⁴

Similarly, the political process could not hold President Sirisena accountable for his unconstitutional actions during the Constitutional Coup 2018 and this was followed by further negligent executive actions that led to the failure of the government to prevent the Easter Attacks in 2019.¹⁴⁵ Despite all this, the president remained in office until the end of his term. Even afterward he refused to take responsibility for his negligence and the executive failure to prevent the Easter Attacks.¹⁴⁶

Article 33 (2) (c) introduced by the Nineteenth Amendment to the Constitution empowers the President to summon, prorogue, and dissolve the Parliament. These are the ceremonial powers of the crown as the head of state.¹⁴⁷ Respondents in *Sampanthan et al* claimed that because the power of dissolving the Parliament was exercised by the President as the head of the state they were not 'executive action or administrative action' reviewable by Courts under Article 126,¹⁴⁸ which lays down the procedural requirements to invoke the fundamental rights jurisdiction.

However, the Supreme Court rejected the respondents' position that there are plenary or prerogative executive powers. The Supreme Court emphasized that 'it must be remembered that the President, who is the Head of State under the Constitution, is but a creature of the Constitution. His powers are only those which are specifically vested in him by the Constitution and the law. Equally, the exercise of these powers by the President is circumscribed

143 R. Sampanthan et. al. v Attorney-General, *supra* note 140, at p. 86.

144 *Lakadev Liyanagama*, Rebellion Crushed, <https://www.dailynews.lk/2018/05/01/supplement/149659/rebellion-crushed> (last accessed: 22. April 2021).

145 Sri Lanka attacks: Government admits 'major intelligence lapse', *supra* note 123.

146 *Economy Next*, Former Prez Sirisena refuses to accept responsibility for Sri Lanka's Easter Sunday attacks, <https://economynext.com/former-prez-sirisena-refuses-to-accept-responsibility-for-sri-lankas-easter-sunday-attacks-71216/> (last accessed: 22. April 2021).

147 *Hilaire Barnett*, Constitutional & Administrative Law, London 2013, p. 302.

148 R. Sampanthan et. al. v Attorney-General, *supra* note 140, at pp. 36-37.

by the provisions of the Constitution and the law.¹⁴⁹ Supreme Court's assertion of its powers to rule on the constitutionality of presidential actions in this manner altered the course of the constitutional coup.

The proviso to Article 70 (1), after the Nineteenth Amendment, reads that Parliament cannot be dissolved by the President without a two-thirds majority of the Parliament until four and a half years have passed since its first meeting. Nevertheless, Article 33 (2) (c), added by the Nineteenth amendment to Article 33 on 'Duties, Powers and Functions of the President,' reiterates that dissolution of Parliament is a power of the President. Respondents argued that Article 62 (2) of the Constitution, which reads as '*Unless Parliament is sooner dissolved*, every Parliament shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said period of five years shall operate as a dissolution of Parliament (emphasis added)' and Article 70 (3) which states that 'A Proclamation proroguing Parliament shall fix a date for the next session, not being more than two months after the date of the Proclamation: *Provided that at any time while Parliament stands prorogued the President may by Proclamation – (i) summon Parliament for an earlier date, not being less than three days from the date of such Proclamation, or (ii) subject to the provisions of this Article, dissolve Parliament*(emphasis added),' should be interpreted as allowing the President to dissolve the Parliament before its term matures.¹⁵⁰

Based on these provisions, the respondents argued that the constitution now provided for two procedures, one legislature led under Article 70 (1) and the other executive-led, based on the other provisions cited above.¹⁵¹ However, the Supreme Court holds that the effect of such interpretation would empower the President to interfere with the legislature as and when he wished. Supreme Court states that Article 33 (2) indeed gives the President the power to unilaterally dissolve the Parliament, however, after four and half years of its term has passed. Article 62 (2) confirms this position and Article 70 (3) lays down the specific procedure to follow when the Parliament is dissolved. While the court restricted the presidential power to dissolve the parliament, he still has the power to do so within the constitutional limits. President Gotabaya used this provision to dissolve the parliament before the end of its term and refused to reconvene the Parliament when the election could not be held within the constitutionally stipulated period of three months due to the outbreak of the pandemic. From March to August 2020, the country struggled through the initial stages of the pandemic while the legislature remained disabled. This brought to the spotlight the extent to which the executive president can exploit the imbalance of power in favour of his office.

149 R. Sampanthan et. al. v Attorney-General, *supra* note 140, at p. 37.

150 R. Sampanthan et. al. v Attorney-General, *supra* note 140, at pp. 45-70.

151 *Ibid.*

II. Weak powers to the other organs of the state

Appointment of Prime Minister by the President, based on the legitimacy he gains from within the Parliament, is a crucial instance of the Sri Lankan Constitution's attempt to create a hybrid of the Presidential system and the Westminster system of responsible government.¹⁵² The latter concept required that the executive is effectively responsible to the Parliament. However, in juxtaposing the Presidential system of the United States with the Parliamentary system of the United Kingdom, the 1978 Constitution prioritized the stability of the executive office over the accountability of the Parliamentary process.¹⁵³ Therefore, in the event of a conflict between the Presidential assessment of who commands the confidence of the Parliament and actual command of confidence, Presidential assessment arguably received preference before Nineteenth Amendment, because according to then Article 47, the President could remove the Prime Minister by writing just like any other Minister. The effect of this provision was that the President had control over the Prime Minister and the Cabinet, rather than them being held accountable by Parliament. Therefore, this original position of the 1978 Constitution concentrated the executive power in the President.¹⁵⁴

The Nineteenth Amendment shifted preference to the actual command of confidence in Parliament by the Prime Minister. Yet there was no constitutionally laid out procedure for the Parliament to ensure that Prime Minister remained in office based on its confidence. While the ousted Prime Minister and numerous other political actors demanded a floor test to be carried, the Speaker's ability to conduct the floor test was questioned as being against Parliamentary conventions.¹⁵⁵ Due to the unsettled nature of the pre-constitutional understandings, there was no Parliamentary convention to directly apply to the situation, and the procedure of carrying out the floor test had to be established during the crisis. When Parliament was finally reconvened after the Interim Order granted by the Supreme Court, carrying out the floor test was still controversial and challenged with physical force.¹⁵⁶

Even after the floor test was conducted, the President continued to refuse to accept its result communicated to him by the Speaker.¹⁵⁷ Parliament still could not assert its integrity autonomously without the cooperation of the President. Court of Appeal, as well as the Supreme Court, had to grant interim relief confirming that Parliament's assertion of the actual majority prevails before Rajapaksa resigned from his illegal post and Sirisena was left with no choice but to appoint Wickremasinghe. Court of Appeal, granting interim relief in

152 *Hilaire Barnett*, *supra* note 147, at p. 220.

153 *Jayampathy Wickramaratne*, *Towards Democratic Governance in Sri Lanka: A Constitutional Miscellany*, Rajagiriya 2014, pp. 98 & 117.

154 As was argued in: *In re Nineteenth Amendment* based on Article 4 (b), *supra* note 29.

155 Sirisena Now Says He Prematurely Dissolved Parliament To Prevent Bloodshed In House, *supra* note .

156 See, *supra* note 107.

157 See, *supra* note 111.

the case seeking quo warranto against the Prime Minister and Cabinet of Ministers, recognized that their decision suspends the functioning of the Prime Minister, the Cabinet of Ministers, and the other Ministers, crucial components of the executive.¹⁵⁸ Nevertheless, the court highlighted the overriding importance of restraining potential usurpers of such significant offices from functioning and taking crucial decisions that affect the country.¹⁵⁹ This joint attempt in effect transformed the President's power to appoint the Prime Minister to a nominal power, highlighting the significance of the shift in the scope of presidential powers emerging through the Nineteenth Amendment. However, the Twentieth Amendment has once again shifted the powers back to the president while relegating the position of Prime Minister.

Political power fragmented along the party lines due to the breaking up of the National Government at the onset of Constitutional Coup 2018. The fragmented government of 2018 meant that the political process could not be as easily manipulated as the whim of one or several individuals. Another crucial result of the fragmented political power was that it exerted minimal control over the judiciary. Judiciary, in turn, used its independence to interpret the constitution to uphold the rule of law and supremacy of the constitution and played a crucial role in resolving the constitutional crisis. Decisions of the judiciary were revolutionary because Sri Lanka's courts have generally been excessively deferent to the executive as well as the legislature.¹⁶⁰ However, the fact that the judiciary's capacity depended upon the fragmentation of political power,¹⁶¹ signals the lack of an embedded principle of judicial independence. This was proven in 2019 when the Supreme Court dismissed the fundamental petition challenging the constitutionality of continued dissolution of the Parliament.¹⁶² The Court, by dismissing the case at the Leave to Proceed stage, did not even provide reasons for this decision, despite its constitutional significance.¹⁶³

Whereas the 1978 Constitution allowed President the exclusive power to appoint the judges, this constitutional position was in a continuous flux since the Seventeenth Amendment.¹⁶⁴ The Nineteenth Amendment restricted the powers of the President, by stating that

158 *France 24*, Sri Lanka court denies Rajapaksa authority to act as PM, <https://perma.cc/LJS8-KEXQ>.

159 *Ibid.*

160 Courts sanctioned the passing of the Eighteenth Amendment to the Constitution, which entrenched the Presidential power and took away the limitation of the number of terms that the President could contest, *In re Eighteenth Amendment 10 SriLR 3 (2002)*. Court also in effect allowed the MPs to cross the floor easily, by insisting upon stringent procedural requirements that were difficult to parties to meet, Ameer Ali v Sri Lanka Muslim Congress, *supra* note .

161 See generally, *Daryl J. Levinson & Richard H. Pildes*, Separation of Parties, Not Powers, *Harvard Law Review* 119 (2006), at p. 2350.

162 Supreme Court Dismisses FR Petitions, *supra* note 133.

163 *Ibid.*

164 *Dinesha Samararatne*, *supra* note 5, at pp. 147-174.

he should act on the advice of the Constitutional Council.¹⁶⁵ Even the Constitutional Council that was introduced by the Nineteenth Amendment is composed of a majority of parliamentary members, and therefore, not as independent as it was initially envisaged to be when the majority of its members were to be from the civil society. During the Constitutional Coup of 2018, Constitutional Council blocked the appointment of several judges of the President's choice who were likely to be biased towards the President's position once they were promoted to the Supreme Court.¹⁶⁶ This ensured that the judiciary was independent of the political process at the time of the constitutional coup. However, it exposes that mechanisms in place to uphold the compositional independence of the judiciary also depend upon the fragmentation of political power.

With the enactment of the Twentieth Amendment, Constitutional Council was replaced by a Parliamentary Council identical to that of the Eighteenth Amendment. Therefore, once again there are minimal checks against the president's discretion to make appointments to the judiciary, other key positions in the state and the commissions. The Twentieth Amendment also expands the composition of the judiciary, thus opening up the opportunity for the president to pack the court. This would further weaken the independence of the judiciary.¹⁶⁷

E. Conclusion

While the immediate crisis presented by the Constitutional Coup 2018 was averted, the constitutionally sanctioned imbalance of power that undermines constitutionalism remained intact. Therefore, even though the fragmentation of political power and independence of the judiciary led to the resolution of the constitutional crisis of 2018 following the constitutional principles, the events exposed the persisting tilt of power towards the executive president in Sri Lanka. This then paved for the government's failure to prevent the Easter Attacks in April 2019. This fatal failure of government was capitalized by the political opposition to highlight the importance of a powerful executive and to achieve this purpose, the Twentieth Amendment was enacted. The Amendment undid the Nineteenth Amendment's attempt to redress the 1978 Constitution's imbalance of power and reinforced the weakness of the 1978 Constitution which undermines the system of checks and balances.

165 *Ibid.*

166 *Colombo Telegraph*, Sirisena's Blatant Attempts To Manipulate Judiciary: Delays Appointments Of Two New Judges Ahead Of Dissolution Case Hearing, <https://perma.cc/PHD5-SJWV>.

167 Twentieth Amendment to the Constitution of Sri Lanka (2020), Sec. 25, 31.