

[The Courts Respond to Executive Tyranny in Sri Lanka](#)

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The final three months of 2018 were challenging times for constitutional resilience and order in Sri Lanka. Almost four years since the peaceful political transition of 2015, the country plunged into a constitutional crisis when President Sirisena purported to sack Prime Minister Wickremesinghe on October 26, replacing him with former President Rajapakse.

Just hours before the sacking, Sirisena's United People's Freedom Alliance quit the coalition government with the Wickeremesinghe's United National Front. The President contended that the collapse of the coalition meant that Cabinet stood dissolved and he could appoint a new Prime Minister. Sirisena prorogued Parliament to allow Rajapakse to cobble a majority amongst lawmakers.

Sri Lanka achieved a constitutional equilibrium when the Parliament passed the 19th Amendment to the Constitution in May 2015.^[1] The Amendment sought to distribute powers more evenly between the Legislature and the Executive and trimmed the substantial powers of the President, among other things, by preventing the President from dissolving Parliament before four and a half years of its first sitting. The Amendment also required the President to appoint a Prime Minister who would most likely command the confidence of Parliament.

In November 2018, as Rajapakse was struggling to obtain a majority, Sirisena dissolved Parliament and announced a parliamentary election for January. This was the first time in recent constitutional history that there had been such an open defiance of the Constitution. It was this decision—to dissolve Parliament and call an election—that was challenged in the Supreme Court.

In December 2018 the courts delivered two key decisions: one from the Supreme Court and one from the Court of Appeal, that halted the country's descent into constitutional anarchy and helped (at least partially) resolve a battle of political egos. From the perspective of constitutional politics (especially given Sri Lanka's experience with judicial crises), these decisions are momentous: to some extent, they signaled the courts' willingness to resolve politically-charged, inter-branch disputes, and showed that the judiciary had the courage to push back against executive tyranny.

The Supreme Court Decision

The December 13 decision of the seven-judge bench of the Supreme Court is important for several reasons.^[2] While holding that the President could not dissolve Parliament until four and half years had elapsed, the Court drew widely from several key public law principles.^[3] In particular, the Court reasserted the principle that all public authorities and functionaries, including the President, must function according to the law and the constitution. As a corollary, the Court reiterated the rule of law as

the foundation of the constitution and that any interpretation of the constitution should advance the rule of law.[4] To the Court, all three organs have equal status and must be able to maintain effective checks and balances on each other.[5]

On the question of unconstitutionality, the Court declared that the principle of constitutional supremacy was part of Sri Lanka's constitutional fabric, and that it allows the Court to strike down unconstitutional executive action.[6]

In nullifying the President's act, the Court held that the right to equality and equal protection of the law in Article 12(1) provided protection against arbitrary and the mala fide exercise of power while guaranteeing natural justice and legitimate expectations.[7]

Many of these principles are part of a significant body of public law jurisprudence that has evolved over a period of 30 years. The Supreme Court has, in a long chain of decisions, held that public power is held in trust and must be exercised reasonably, fairly and for the public benefit.[8]

The Court of Appeal Decision

In a second decision, the Court of Appeal—in an application for a Writ of Quo Warranto by 122 MPs—issued an interim order restraining Rajapakse and his Cabinet from functioning until a final determination was made on the merits.[9] The 122 MPs had in their application stated that there were two no-confidence motions passed in Parliament on November 14 and 16 against the Rajapakse-led government and therefore he and his government had no right to continue in office. Rajapakse appealed this order to the Supreme Court, but the Supreme Court refused to vacate the interim order and ordered instead that the matter be taken up in January. As a result of these decisions, Rajapakse resigned as Prime Minister and Wickremesinghe was re-appointed as Prime Minister bringing to an end 50 days of political turmoil.

Institutional Resilience

In a prior era, Sri Lanka's public institutions confronted grave challenges to their independence. The courts were not spared, as the Chief Justice faced an illegal impeachment. Yet the last four years have shown that these institutions are resilient enough to bounce back and progressively recover public credibility. The two recent judicial decisions are a sign of this resilience and are also a result of the 19th Amendment passed in 2015—an amendment that altered in a fundamental way the relationship between the executive and the legislature, paving the way for a more independent judiciary. That there was a rule of law-based resolution to the constitutional crisis is an indication of the resilience of the country's public institutions despite several years of prior constitutional authoritarianism.

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[1] Nineteenth-Amendment to the Constitution of Sri Lanka, certified on 15th May 2015.

[2] *Sampanthan v Attorney General*, SC Minutes of 13th December 2018.

[3] *Id.* at pp 73 – 75.

[4] *Id.* at p 74.

[5] *Id.* at p 75.

[6] *Id.* at p 69.

[7] *Id.* at p 86.

[8] See Mario Gomez, ‘Blending Rights with Writs: Sri Lankan Public Law’s New Brew’. Cape Town: ‘Acta Juridica’ 2006 and ‘The Modern Benchmarks of Sri Lankan Public Law’, (2001) 118 *South African Law Journal* pp. 581- 612.

[9] CA (Writ) Application 363/2018, CA Minutes of 3rd December 2018.