

Presidentialism without immunity: the impact of the 19th Amendment on Jurisprudence on Executive power in Sri Lanka.

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Introduction

The 19th Amendment (19A) to the Constitution was passed by Parliament on the 28th of April 2015¹ and came into force on the 15th May 2015.² The Amendment resulted in a shift in the dynamic between the three organs of Government, with the Executive President becoming more accountable to the Judiciary and Parliament. It brought in a number of changes to this effect, among them the reduction of the terms of both the President and Parliament, reductions in Presidential powers including that to dissolve Parliament, and the reintroduction of the Constitutional Council and independent Commissions. Among these, a change which has seen far-reaching consequences and is central to this paper is the restriction of the President's immunity from suit under Article 35 by extending the Supreme Court's fundamental rights jurisdiction to official acts of the President.

When the Executive Presidency was first introduced to Sri Lanka in 1978 under the Second Republican Constitution, the office came with significant powers and almost total immunity from suit in both civil and criminal proceedings³. The rationale for this was that if such immunity was not conferred *'not only the prestige, dignity and status of the high office would be adversely affected but the smooth and efficient working of the Government of which he is the head would be impeded.'*⁴ However, this immunity from suit, as this paper will suggest, had a number of negative implications on the rule of law and the supremacy of the Constitution. Thus, the repeal of Article 35, and its replacement with a new provision through section 7 of the 19A Act has paved the way for increased accountability and the rule of law. The paper will discuss precisely how this has happened.

¹ Hansard Vol 234 - No. 8 (Part II) col 989 - 1004 (28 April 2015)

² *Ada Derana*, 'speaker signs 19th amendment to constitution' (*Ada Derana*, 15 May 2015) <<http://www.adaderana.lk/news.php?nid=3087>>

³ Article 35(1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

⁴ *Mallikarachchi vs. Siva Pasupathy* [1985] 1 Sri LR 74,78.

Presidential immunity prior to the 19th Amendment

Article 35(1) of the pre-19A constitution holds that:

While any person holds office as President, no proceedings shall be instituted to continue against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.

Article 35(1) provided almost absolute immunity to the individual holding the office of President during their tenure in office. This position was continuously reiterated by the apex courts of Sri Lanka, whenever there was an attempt to challenge the acts of the President by way of writ or a fundamental rights application.⁵ In fact, in the case of Mallikarachchi V. Shiva Pasupati, Attorney-General⁶ the Supreme Court went to the extent of holding that a fundamental rights application could not be brought against the acts of the President even by citing the Attorney-General as a Respondent in place of the President.

Prior to the 19A, there existed only a few qualifications to presidential immunity. First, Article 35(2) implicitly limited the

immunity of the President to the duration of their tenure. Therefore, any official or private act or omission of the President while holding office could be subject to litigation once the President ceases to hold office⁷. This Article also means, however, that any pending actions against an incumbent President are suspended from the moment they take office until the moment they cease to hold office, though the duration of the presidency will not count when determining if a matter is prescribed. In Karunathilaka v. Dayananda Dissanayake & others,⁸ Justice Fernando reiterated that proceedings could be brought against the President when they are no longer in office due to the fact that immunity is a shield for the doer, and not for the act.⁹ He held that the immunity granted to the President does not transform an illegal act into a legal one.

Second, prior to the 19A, Article 35(3)¹⁰ (as amended by the 14th Amendment) specified three instances in which presidential immunity would not apply even during the term of a presidency. Firstly, when the President assigned to himself any cabinet or non-cabinet ministerial subject or function, the immunity was not available in

proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament. Provided that any such proceedings in relation to the exercise of any power to any such subject or function shall be instituted against the Attorney General

⁵ Victor Ivan v. Sarath N. Silva, Attorney-General and Another [1998] 1 Sri LR 301

⁶ [1985] 1 Sri LR 74

⁷ See also Sugathapala Mendis v. Kumarathunga (The Waters Edge Case) [2008] 2 Sri LR 339,380 - 382

⁸ [1999] 1 Sri LR 157

⁹ See also Senasinghe v Karunathilake Senior Superintendent of Police, Nugegoda And Others [2003] 1 Sri LR 172; Sugathapala Mendis v. Kumarathunga (The Waters Edge Case) [2008] 2 Sri LR 339

¹⁰ Article 35 (3) - 'The immunity conferred by paragraph 1 of this Article shall not apply to any

relation to the exercise of any power pertaining to that subject or function.¹¹ Secondly, presidential immunity did not apply if Parliament moved a Resolution alleging that the President was permanently incapable of discharging the functions of his office by reason of physical or mental infirmity or that the President was guilty of one of the offences enumerated in the five sub-paragraphs of Article 38(2)(a). Thirdly, immunity was not available in proceedings in the Supreme Court under Article 130(a) relating to the election of the President or the validity of a referendum; to proceedings in the Court of Appeal under Article 144; or in the Supreme Court relating to the election of a Member of Parliament.

Finally, in both *Karunathilaka*, and in *Visuvalingam & Others v. Liyanage & others*¹², the Court held that others cannot rely on the immunity granted to the President, or the Presidential seal to claim immunity for themselves. This stemmed from the fact that the immunity was granted personally to the President.¹³

Lack of Accountability Arising from Near-Absolute Presidential Immunity

The immunity granted under Article 35 of the Constitution was the subject of much criticism among legal practitioners and academics as it allowed for the unchecked abuse of power by the President. The separation of powers requires that each

organ of government is able to act as a check on the other two organs, and the disabling of the Judiciary from acting as a check on the Head of the Executive resulted in an overly powerful President who was able to disregard the provisions of the Constitution without the fear of any repercussion.

The 18th Amendment (18A) to the Constitution which was introduced in September 2010 strengthened an already powerful Executive, and further bolstered presidential immunity. This was done through the 18A's removal of the two-term limit imposed on the President.¹⁴ This meant that the President could enjoy immunity for life if they succeeded in getting elected continuously. Thus the Amendment permitted an incumbent President to continue for an unlimited number of terms without any judicial review of any of their actions.

There are several examples where legitimate and important cases were dismissed in view of the sweeping immunity granted to the President under Article 35. In 1999, when President Kumaratunga appointed Sarath Silva as the Chief justice, three fundamental rights applications were filed in the Supreme Court challenging his appointment. The principal contention in all the three cases was that the President acted arbitrarily in appointing Sarath Silva when there were complaints pending against him for

¹¹ Article 35(3) as amended by the Fourteenth Amendment

¹² [1983] 1 Sri LR 203

¹³ *ibid* 240-241

¹⁴ Article 31(2) of the Constitution was amended by section 2 of the 18th Amendment to the Constitution

professional misconduct.¹⁵ The Court refused leave to proceed and dismissed all three petitions, holding that the conduct of the first respondent in holding office as Chief Justice as a consequence of his appointment by the President under Article 170 of the Constitution did not constitute 'executive or administrative action' within the ambit of Articles 17 and 126 of the Constitution. It concluded that in view of the immunity granted to the President under Article 35, the appointment made by the President cannot be challenged. The alleged misconduct of a high judicial officer was thus shielded by the fact that the President had appointed him as the Chief Justice.¹⁶ Presidential immunity thus prevented holding both the Chief Justice appointee and the President accountable.

Another classic example of how presidential immunity leads to a lack of accountability is seen in *Public Interest Law Foundation v. the Attorney-General*.¹⁷ In this case, a public interest group went before the Court of Appeal to seek a Writ to compel the President to appoint members of the Election Commission under the 17th Amendment to the Constitution. As per Article 41B of the Constitution then, the President had no discretion over appointments to the Election Commission after the Constitutional Council forwarded

its recommendations. The Court refused to issue notice and held that Article 35 gives blanket immunity to the President from having proceedings instituted or continued against them in any court, in respect of anything done or omitted to be done in their official or private capacity, except in the circumstances specified in Article 35(3). Thus, presidential immunity prevented the president from being held to account over important administrative decisions with constitutional and democratic significance.

In another example, when a former President failed to appoint members to the Constitutional Council under the 17th Amendment, this omission was challenged by way of fundamental rights application¹⁸. Despite the non - appointment bringing this vital part of the scheme of the Constitution to a standstill, the application was dismissed *in limine* by the Supreme Court on the basis that the President had been made a Respondent. Article 35(1) had tied the hands of the Court, and it was not able to protect the Constitution.

19th Amendment to the Constitution and the Modification of Presidential Immunity

The 19A repealed Article 35¹⁹ and replaced it with the following provision:

¹⁵ Victor Ivan and others v Hon Sarath Siva and others [2001] 1 Sri LR 309

¹⁶ ICJ, Authority without accountability: The crisis of impunity in Sri Lanka (ICJ, 2012) pg 53.
<<https://www.refworld.org/pdfid/50ae365b2.pdf>>

¹⁷ C.A. Application No 1396/2003, Court of Appeal Minutes, 17 December 2003.

¹⁸ Liyanage and another v. H.E Mahinda Rajapakse and others, SC FR Application No. 297/2008, Supreme Court Minutes 18 March 2011

¹⁹ Section 7 of the 19th Amendment to the Constitution Act.

(1) 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:

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33(2)(g).

(2) Where provision is made by law limiting the time within which proceedings of any description may be instituted against any person, a period of time during which such person holds the office of President of the Republic of Sri Lanka shall not be taken into account in calculating any period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) shall not apply to proceedings in the Supreme Court under paragraph (2) of Article 129 and to proceedings under Article 130 (a) relating to the election of the President or the validity of a referendum.

Although Article 35 prior to the 19A covered all forms of legal proceedings, the post-19A version restricted this to ‘civil and criminal proceedings’. This was necessary as the 19A introduced a novel proviso that subjected anything done or omitted to be done by the President in their official capacity to the fundamental rights jurisdiction of the Supreme Court. Accordingly, at present, any Executive action by the President can be challenged by a citizen under Article 126 of

the Constitution if it violates a fundamental right.

The 19A does not completely remove presidential immunity. A further proviso lays down that the jurisdiction granted to the Supreme Court to review fundamental rights petitions in respect of presidential actions does not extend to a declaration of war or peace by the President under Article 33(2)(g) of the Constitution. Article 35(1) also provides for how such an application can be brought, i.e. against the Attorney-General. It thus appears that when a fundamental rights application is brought against an act done by the President in their official capacity, the Attorney-General must be made Respondent in dual capacities, both under this section and as per the Supreme Court Rules of 1990.

The limb of Article 35 (3) which waived the immunity of the President when exercising ministerial subjects and functions under Article 44 (2) has been repealed by the 19A, as the post 19A Constitution no longer provides for the President to hold such subject or function (subject to the transitional provisions in section 51 of the 19th Amendment Act).

There have been several fundamental rights applications filed challenging the President’s actions under Article 35(1) since the introduction of 19A. However, the extent to which the President was subject to the fundamental rights jurisdiction of the Supreme Court saw its greatest test following several fundamental rights applications that were filed following the

dissolution of Parliament in October 2018. The landmark judgement of seven judges of the Supreme Court in Rajavarithan Sampanthan and others v Attorney General²⁰ deals in depth with the matter of immunity of the President post-19A. The Court, responding to submissions made by the Attorney-General referencing the precedent in Mallikarachchi²¹ stated that the position at present is very different to the law prior to 19A.²² The Court stated that if the submission of the Attorney-General on presidential immunity was to be accepted then it would render the first proviso of Article 35(1) post the 19A meaningless for the most part, and therefore rejected the Attorney-General's argument.²³ The Court held that in upholding its constitutional duty under Article 4(d), it could not permit the emasculation of the first proviso to Article 35(1) and that it had to vigorously protect the totality of its jurisdiction for the protection of fundamental rights conferred by the Constitution.

The Attorney-General attempted to argue that the dissolution of Parliament by the President did not constitute "executive or administrative action" falling within the purview of Article 126 of the Constitution and, therefore, did not fall within the first proviso to Article 35 (1).²⁴ He argued that acts done by the President under the powers

listed in Article 33(2) of the Constitution (including the power of dissolution) are all acts done in the exercise of the "plenary powers of the Head of State" and are not "acts done by the President in the exercise powers of governmental nature". The Court emphasised in response that the President is a creature of the Constitution and that his powers are only those which are specifically vested in him by the Constitution and by law. The Court rejected the contention put forward by the Attorney General that the President in his capacity as the Head of State has a species of inherent unrestricted omnipotent power akin to that of royal prerogative power held by a monarch.²⁵

Resulting Position on Presidential Immunity

The resulting position presidential immunity currently is that where the President is acting in his capacity of Head of State, Head of Government, or as the Commander in Chief of the Armed Forces, if an act of the President violates a fundamental right of the people guaranteed under the Constitution, it would fall within the jurisdiction of the Supreme Court under Article 126 read with the first proviso to Article 35(1) of the Constitution.

²⁰ SC FR Application No 351/ 2018 Supreme Court Minutes 13 December 2018 (Available at <http://www.supremecourt.lk/images/documents/sc_fr_351_2018.pdf>)

²¹ [1985] 1 Sri LR 74

²² SC FR Application No 351/ 2018 Supreme Court Minutes 13 December 2018 at pg 33 of the judgement

²³ *ibid.* pg 34 of the judgement.

²⁴ *ibid.*

²⁵ *ibid* pg 38 of the judgement.

The judgment of the seven-judge bench which has clarified the resulting position is important for many reasons. The court goes into several key principles of public law that have evolved over a period of 30 years²⁶. Their Lordships dismantled any indication that the President under the present Constitution has “*plenary executive powers*” or “*is akin to a monarch*”. This has far-reaching consequences for accountability and the Rule of Law. Prior to the 19A the President, though a creature of the Constitution, faced virtually no consequences for their acts while in office, even if those acts amounted to a blatant violation of the Constitution itself. Thus the Executive was supreme, and could not be checked by the apex courts. By confirming that an act of the President acting in any capacity is subject to the fundamental rights jurisdiction, the court affirms that it is the Constitution that is Supreme. Article 33 (1)(a) of the Constitution which was also brought in by way of the 19A, imposes a duty on the President to ensure that the Constitution is respected and upheld, which further strengthens the position that the Court clearly laid out.

Concluding observations

Looking back at the jurisprudence on presidential immunity depicts a changing trend towards better accountability from the Executive President from prior to the 19A to

the post-19A state of affairs. Prior to the 19A the President enjoyed sweeping immunity and the Superior courts in the Country were unable to resort to the principles underlying the Constitution and uphold the rule of law to keep the powers of the President in check, except in limited instances. The 19A and the case of *Rajavarthian Sampanthan (Dissolution case)* is a turning point in the country's path to upholding principles of rule of law and Constitutionalism. This has created a shift in the separation of powers, and it is hoped that this trend will continue, bringing with it greater accountability.

²⁶ Mario Gomez, The Courts Respond to Executive Tyranny in Sri Lanka, Int'l J. Const. L. Blog, Jan. 24, 2019, at:

<<http://www.icconnectblog.com/2019/01/the-courts-respond-to-executive-tyranny-in-sri-lanka>>