

**CLIPPING THE WINGS OF AN UNTRAMMELED EXECUTIVE: A COMMENT ON R. SAMPANTHAN & OTHERS VS. HON. ATTORNEY GENERAL & OTHERS [“THE DISSOLUTION OF PARLIAMENT JUDGMENT”]**

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On 9<sup>th</sup> November 2018, His Excellency the President issued a Proclamation<sup>1</sup> ostensibly under Article 70(5) of the Constitution read with Article 33(2)(c) thereof inter alia dissolving the Parliament of the Republic and calling for a general election. The ensuing events led to a seminal moment in the legal history of Sri Lanka.

Several individuals and organizations including the Leader of the Opposition at the time, Mr. R Sampanthan preferred Fundamental Rights Applications<sup>2</sup> under

and in terms of Articles 17, 35 and 126 of the Constitution<sup>3</sup> to the Supreme Court. Upon Leave to proceed being granted the said cases were heard together before a bench comprising of 07 Justices of the Supreme Court. On 13<sup>th</sup> December 2018 the Supreme Court delivered a landmark judgment inter alia quashing the said Proclamation<sup>4</sup>. The judgment was delivered by *H. N. J Perera CJ* with 5 other Justices concurring with him. Whilst concurring with the Judgment, *Sisira J De Abrew J* delivered a separate judgment<sup>5</sup>.

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<sup>1</sup> Gazette Extraordinary bearing No. 2096/70 dated 9<sup>th</sup> November 2018 (“Proclamation”)

<sup>2</sup> SC/FR/351/2018 to SC/FR/361/2018

<sup>3</sup> The Second Republican Constitution of 1978 (as amended) (“Constitution”)

<sup>4</sup> SC/FR/351/2018, SC/FR/352/2018, SC/FR/353/2018, SC/FR/354/2018, SC/FR/355/2018, SC/FR/356/2018,

SC/FR/358/2018, SC/FR/359/2018, SC/FR/360/2018 & SC/FR/361/2018 (SC Minutes 13/12/2018) (“**Sampanthan vs. AG**”/ “the Judgment”)

<[http://www.supremecourt.lk/images/documents/sc\\_fr\\_351\\_2018.pdf](http://www.supremecourt.lk/images/documents/sc_fr_351_2018.pdf)> accessed 4/10/ 2019

<sup>5</sup> SC/FR/351/2018 (SC Minutes 13/12/2018) (“**De Abrew J’s Judgment**”)

The present analysis is not *per se* a comment on how the Court addressed the issue of the constitutionality of the Proclamation. Instead, this is an attempt to examine how the Supreme Court has delineated the limits of the powers wielded by the Executive Branch of the State including His Excellency the President, in the context of the jurisdiction conferred on the Supreme Court to review the actions of the President in terms of the 19<sup>th</sup> Amendment to the Constitution<sup>6</sup>.

### **Pre 19<sup>th</sup> Amendment- blanket immunity to the president?**

Article 35(1) of the Constitution as it stood prior to the 19<sup>th</sup> Amendment inter alia stated that no proceedings can be instituted against an incumbent President in respect of anything done or

omitted to be done by him/her either in his/her official or private capacity.

At first glance the said provision appears to confer a blanket immunity from suit to an incumbent President. This may lead to the impression that prior to the 19<sup>th</sup> Amendment an incumbent President could exercise his discretion without any fetter by means of judicial review. However, as discussed below, there is a body of jurisprudence that goes back several decades wherein the Supreme Court has intervened to sanction various unconstitutional actions done or sought to be done by or on behalf of the Presidents of the Republic.

In **Maithripala Senanayake & another vs. Mahindasoma & others**<sup>7</sup>, the Governors of the North Central and Sabaragamuwa Provinces acting under the direction of the President proceeded to dissolve the Provincial Councils of the

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<[http://www.supremecourt.lk/images/documents/s\\_c\\_fr\\_351\\_2018\\_contd.pdf](http://www.supremecourt.lk/images/documents/s_c_fr_351_2018_contd.pdf)> accessed 04/10/2019 > accessed 4/10/2019

<sup>6</sup> The 19<sup>th</sup> Amendment to the Constitution (“19<sup>th</sup> Amendment”).

<sup>7</sup> [1998] 2 Sri. LR 333

said provinces. Upon upholding a decision of the Court of Appeal to quash the said decisions, the Supreme Court held that;

*[...] the Governor had no discretion in the circumstances of the case in the matter of the dissolution of the Provincial Council. Article 154 F (2) which requires the exercise of the Governor's discretionary powers on the directions of the President has no applicability in this matter. Parliament ....expressly conferred the power of dissolution on the Governor, and not on the President, and specifically and unambiguously in apt words provided the manner and circumstances in which the Governor should exercise his power of dissolution.*<sup>8</sup>

On the question of the President's Immunity from suit the Court held that;

*It was suggested by the appellants that, since the Governor was a delegate, his action in dissolving the Provincial Council could not be*

*questioned because of the immunity from suit conferred on the President by Article 35 of the Constitution. .... The Governor has no immunity from suit. He is not beyond the reach of the law, and it is not appropriate to invent new official immunities.*<sup>9</sup>

In Karunathilaka & another vs. Dayananda Dissanayaka (Case No. 1)<sup>10</sup>, the Petitioners sought to challenge the President's issuance of an emergency regulation by proclamation under the Public Security Ordinance<sup>11</sup> which had the effect of cancelling several Provincial Council elections. The Supreme Court whilst quashing the said regulation opined on the applicability of Article 35 as follows;

*[...] Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no*

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<sup>8</sup> Ibid, 370

<sup>9</sup> Ibid, 372

<sup>10</sup> [1999] 1 Sri. LR 157

<sup>11</sup> Public Security Ordinance No.25 of 1947 (as amended)

longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. .... Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct. .... It is the respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 ....<sup>12</sup>

In **Senasinghe vs. Karunatilake, SSP Nugegoda & others**<sup>13</sup> the Supreme Court (per Fernando J) opined that;

*this Court has reviewed the acts of the entire Cabinet of Ministers*

*inclusive of the President.....and of the President ..... despite Article 35 which only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review.*<sup>14</sup>

In **Sugathapala Mendis & another vs. Chandrika Kumarantunga & others (The Water's Edge case)**<sup>15</sup> the Supreme Court in a far-reaching judgment impugned certain acts of the President at the time and held that;

*[...] all facets of the country - its land, economic opportunities or other assets - are to be handled and administered under the stringent limitations of the trusteeship posed by the Public Trust Doctrine and must be used in a manner for economic growth and always for the benefit of the entirety of the citizenry of the country and we repeat, not for the benefit of granting gracious favours to a privileged few, their family and/or friends. Furthermore, being a creature of the Constitution, the*

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<sup>12</sup> Ibid, 177

<sup>13</sup> [2003] 1 Sri. LR 172

<sup>14</sup> (n12), 186

<sup>15</sup> [2008] 2 Sri LR 339

*President's powers in effecting action of the Government or of state officers is also necessarily limited to effecting action by them that accords with the Constitution. In other words, the President does not have the power to shield, protect or coerce the action of state officials or agencies, when such action is against the tenets of the Constitution or the Public Trust....*<sup>16</sup>

With regard to the President's immunity from suit, the Court citing the aforementioned dicta in **Karunathilaka & another vs. Dayananda Dissanayaka** held that;

*Such a conclusion is unequivocal. To hold otherwise would suggest that the President is, in essence, above the law and beyond the reach of its restrictions. Such a monarchical/dictatorial position is at variance with (i) the Democratic Socialist Republic that the preamble of the Constitution defines Sri Lanka to be, and (ii) the spirit implicit in the Constitution that*

*sovereignty reposes in the People and not in any single person*<sup>17</sup>...

In **Singarasa vs. Attorney General**<sup>18</sup> the Petitioner sought to set aside a conviction against him on the basis of the findings of the Human Rights Committee – Geneva established under the International Covenant on Civil and Political Rights, under the Optional Protocol to the Covenant. The President, exercising powers under Article 33(f) of the Constitution (as it existed prior to the 19<sup>th</sup> Amendment) had acceded to the covenant. Whilst holding that the Accession to the Optional Protocol 1997 by the President at the time, is inconsistent with the Constitution and is in excess of the power of the President as contained in Article 33(f), the Supreme Court held that;

*The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic*

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<sup>16</sup> Ibid, 374

<sup>17</sup> Ibid, 381- 382

<sup>18</sup> [2013] 1 Sri LR 245

*Article 3 cited above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the People. The President exercises the executive power of the People and is empowered to act for the Republic under Customary International law and enter into treaties and accede to international covenants. .... such act cannot be inconsistent with the provisions of the Constitution or written law<sup>19</sup>....*

From the aforementioned precedents it is clear that the Supreme Court even prior to the 19<sup>th</sup> Amendment, did not consider the immunity conferred under Article 35(1) to grant the President an absolute and unfettered right to act in a manner that is contrary to the Constitution. It is submitted that the underlying rationale that emerges from the said precedents is that the sovereignty of the Republic is ultimately

vested with the people and that the President and/or their agents cannot exercise their executive power in contravention of the Constitution and that the President does not possess any ‘plenary’ power which accords him/her an unfettered degree of discretion.

### **The 19<sup>th</sup> Amendment**

The framers of the 19<sup>th</sup> Amendment *inter alia* sought to bring in provisions to the Constitution designed to act as checks and balances on the executive and the administrative state as a whole.

One such measure was the repealing and replacing of Article 35(1) of the Constitution with a new provision which contained two important provisos<sup>20</sup>.

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<sup>19</sup> (n17), 260

<sup>20</sup> 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:*

*power unconstrained by the other organs of governance.*<sup>22</sup>

The first proviso is that the immunity conferred to the President by Article 35(1) should not be read and construed as restricting the right of any person to prefer a Fundamental Rights Application, in respect of anything done or omitted to be done by the President, in his official capacity.

The second proviso provides that that such jurisdiction now vested in the Supreme Court does not apply to the President's power to declare war and peace.

In, **In Re the Nineteenth Amendment to the Constitution Bill**<sup>21</sup> their Lordships of the Supreme Court opined that;

*[...] the Constitution did not intend the President to function as an unfettered repository of executive*

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*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).*

It is submitted that the aforementioned dicta succinctly encapsulate the spirit and ambit of the 19<sup>th</sup> Amendment.

### **Sampanthan vs. AG**

At the outset it must be noted that the decision of the Supreme Court in **Sampanthan vs. AG** must be considered in the light of the body of jurisprudence discussed above and the amendments brought forth by the 19<sup>th</sup> Amendment.

A major portion of The Judgment deals with the various jurisdictional objections raised by the Respondents<sup>23</sup>. It is submitted that most of the dicta relevant for the present analysis is contained in these portions.

One of the objections raised by the Respondents' was that a specific mechanism is available in terms of

<sup>21</sup>Decisions of the Supreme Court on Parliamentary Bills for the years 2014 & 2015, 26

<sup>22</sup> Ibid, 31

<sup>23</sup> Vide: (n4), 27 to 45

Article 38(2) of the Constitution to impeach an incumbent President and that in view of the availability of the said mechanism the Supreme Court does not have jurisdiction to inquire into the Proclamation under an application made in terms of Article 126<sup>24</sup>. Their Lordships rejected the said contention as a “*non-sequitur*”<sup>25</sup> since a Member of a dissolved Parliament cannot impeach the President via that Parliament.

Their Lordships’, further held that;

*[...] the inalienable right of every citizen of our country to invoke the fundamental rights jurisdiction of the Supreme Court is a cornerstone of the sovereignty of the people which is the Grundnorm of our Constitution.*<sup>26</sup>

*[...] mere existence of the procedure described in Article 38 (2) cannot deprive those Petitioners ...of the inalienable right of every citizen of our country to invoke the*

*fundamental rights jurisdiction of the Supreme Court. .... the fundamental rights jurisdiction of the Supreme Court can be immediately invoked by any Member of Parliament in his capacity as a citizen .... His right to do so is not dependent on cobbling together the required majority of Members of Parliament. Thus, there is no valid comparison between the procedure specified in Article 38 (2) ..... and the inalienable right of a Member of Parliament.... to invoke the jurisdiction of this Court for the protection of fundamental rights.*<sup>27</sup>

Another objection raised by the Respondents was that in issuing the Proclamation, the President was exercising “plenary executive powers” as the “head of state” and was not engaged in any executive or administrative action<sup>28</sup>. Whilst rejecting this contention the Supreme Court held that;

*Thus, the suggestion inherent in the submission .... that the President, in*

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<sup>24</sup> Ibid, 28 and 29

<sup>25</sup> Ibid, 30

<sup>26</sup> Ibid, 30

<sup>27</sup> Ibid, 33

<sup>28</sup> Ibid, 35 and 36



*his capacity as the Head of State, has a species of inherent unrestricted omnipotent power which is akin to royal prerogative power held by a monarch, has to be emphatically rejected. Since 1972, this country has known no monarch and this Court must reject any submission that carries with it a suggestion to the contrary.*<sup>29</sup>

With regard to the submission of the Respondents that the powers vested in the President in terms of Articles 33(2) of the Constitution are not executive or administrative actions but are actions done qua head of state, the Court with reference to the maxim of statutory interpretation *expressio unius est exclusio alterius* (the explicit mention of one is the exclusion of another) held that;

*Applying the rationale expounded by this Court in the several decisions referred to earlier, I see no reason why the powers vested in the President under Article 33(2) of the constitution should be regarded as anything other than executive*

*action by the President. While the president may when exercising those powers be doing so qua Head of State in a historical sense, any such flavour of acting as Head of State does not detract from the core feature that the President is exercising executive powers.*

*This conclusion is fortified by the specific exemption from this Court's jurisdiction of the President's power to declare War and Peace under Article 33 (2) (g) of the Constitution. The maxim *expressio unius est exclusio alterius* enunciates the principle of interpretation that the specific mention of only one item in a list implies the exclusion of other items.*<sup>30</sup>

As evident from the following dicta, the Court also asserted its jurisdiction to review any action by the President save and except for exercise of the President's power to declare war and peace.

*[...] the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the*

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<sup>29</sup> Ibid, 38

<sup>30</sup> (n4) 41

*Proviso to Article 35(1) of the Constitution denotes that all the other powers of the President which are listed in Article 33 (2) are, subject to review by way of an application under Article 126 in appropriate circumstances which demand the Court's review of those powers.<sup>31</sup>*

The Respondents also contended that the Proclamation cannot be impugned since it gives the people the right to exercise their franchise. Whilst rejecting this contention the Court held that;

*[...] this Court is obliged to act to uphold the Rule of Law. .... submission overlooks the fundamental premise that any exercise of franchise, must be at an election which is duly and lawfully held and which satisfies the Rule of Law. A departure from that rule will result in the negation of the requirement of the Rule of Law that an election must be lawfully called and be lawfully held and, thereby, adversely affect the results of an ensuing election. The basic principle is that nothing valid can result from*

*an illegality. Therefore, I am of the view that the Court has ample jurisdiction and in fact a duty to examine whether "P1" was issued in accordance with the provisions of the Constitution.<sup>32</sup>*

### **Overarching principles laid-down by Sampanthan vs. AG**

It is submitted that the following overarching principles can be gleaned from the Judgment;

- (a) Every citizen has an inalienable right to invoke the fundamental rights jurisdiction of the Supreme Court.
- (b) The sovereignty of the Republic is ultimately reposed in the people.
- (c) The discretion of the executive including any exercise of discretion by the President is not unfettered and the President does

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<sup>31</sup> Ibid, 42

<sup>32</sup> Ibid, 44

not have any inherent unrestricted power.

(d) Any action and/or inaction of the executive including those by the President done or sought to be done in his/her official capacity are amenable for juridical review in a Fundamental Rights application save and except for the President's powers to declare war and peace.

(e) The Supreme Court is obliged to uphold the Rule of Law.

(f) Nothing legal can ensue from an illegality.

beyond the Law and the Constitution. The legal community as a whole has a duty to ensure the legacy of this decision by striving and engaging themselves to protect and uphold Fundamental Right, the Rule of Law and principles of Constitutionalism.

## **Conclusion**

**Sampanthan vs. AG** is perhaps the most significant judgment delivered in the Sri Lankan legal history. By this Judgment the Supreme Court emphatically asserted its independence and demonstrated that no one, including the highest authority in the land is above and