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The Executive Presidency and Immunity from Suit: Article 35 as Outlier

Niran Anketell

Introduction

Democracies have often struggled with the need to balance the importance of shielding state functionaries from the vagaries of incessant litigation with the importance of protecting the rule of law. In presidential systems, executive presidents are often granted limited immunity from suit, though the degree and nature of such immunity varies from jurisdiction to jurisdiction. This paper undertakes a comparative study of presidential immunities in various jurisdictions from a Sri Lankan perspective. The paper will comprise three parts. Part 1 analyses Article 35 of the Second Republican Constitution of 1978 and the manner in which Sri Lankan courts have interpreted relevant constitutional provisions. Part 2 will consider the doctrine of presidential immunity reflected through American and French jurisprudence, and the degrees to which they shield presidential action. Finally, Part 3 will consider Article 35 in light of other immunity provisions and question the suitability of the Article 35 formulation in the context of the Sri Lankan presidency.

Article 35 and the Courts

The constitutional provisions on presidential immunity are found in Article 35 of the 1978 Constitution. Article 35(1) lays down the substantive rule in relation to Presidential immunity:

> "[w]hile 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"

The text of the article thus appears to provide absolute immunity to the person of the President for the duration of his presidency. Article 35(2), which suspends the running of time during the pendency of a person's tenure in office as President for the purpose of determining the prescription of a claim also confirms that Article 35 envisages immunity for an individual only for as long as he holds the office of President. A President may be made a party to an action – civil or criminal – in respect of acts

committed during the pendency of his term only after he ceases to hold office.

Article 35(3) however lists the exceptions to the substantive rule in Article 35(1). It provides that the provisions of Article 35(1) would not apply to 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]"

Besides the exceptions relating to election petitions heard by the Supreme Court in relation to the election of a President, or those relating to petitions heard in the Court of Appeal relating to the election of a Member of Parliament,[1] or the exercise of the consultative jurisdiction of the Supreme Court under Article 129, an important exception is provided in relation to the exercise of powers exercised by the President qua Cabinet Minister. Article 44(2) provides that the President may assign to himself the subjects and functions of a Minister and determine the number of Ministries in his charge. The effect of the exception in Article 35(3) would be to render 35(1) inapplicable to the exercise of power pertaining to any such subject or function.

The proviso to Article 35(3) stipulates that proceedings under the exception must be instituted against the Attorney General. This means that except in relation to election and referendum petitions, no adversarial legal proceedings may be instituted directly against the President.

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[1] The Fourteenth Amendment to the Constitution that came into effect on 24th May 1988 amended Article 35 so as to not grant the President immunity in relation to election petitions in the Court of Appeal against the election of a Member of Parliament.

This very broad immunity provided to the President has often emerged in constitutional litigation in the Supreme Court and Court of Appeal over the years. Despite the seemingly clear provisions in Article 35, several questions involving issues of constitutional interpretation and legal first principles have been argued before the appellate courts. The first case to grapple with the nature of presidential immunity under the 1978 Constitution was *Visuvalingam v. Liyanage (No.1)*[2] where a full bench of the Supreme Court heard arguments on the issue of whether the failure of the judges of the Supreme Court and Court of Appeal to take oaths within the specified time limits mandated by the Sixth Amendment to the Constitution resulted in their ceasing to hold office as judges. The issue emerged in this case because a five-judge bench had been constituted to hear a fundamental rights application, but a sitting was adjourned when it came to light that the Justices of the Court had not taken oaths as required by Sixth Amendment. The situation was compounded by the fact that all the judges received fresh letters of appointments and took their oaths afresh before the President after the time limits had run out. On resumption of sittings, the question arose whether the hearing should commence *de novo* or merely be resumed. The state argued that proceedings should be started *de novo* because the judges had ceased to hold office and had been re-appointed afresh, while the petitioner contended that the proceedings should be continued because the judges had not ceased to hold office *de jure.* One of the preliminary objections raised by the state was that the court was precluded from directly or indirectly calling in question or making a determination on any matter relating to the performance of the official acts of the President by operation of Article 35(1). In their decision, seven judges of the Supreme Court held that proceedings could be continued because the judges had not ceased to hold office. In his concurrence, Justice Sharvananda dismissed the preliminary objection raised by the state on the basis, *inter alia,* that actions of the executive are not above the law and that the rule of law would be found wanting in its completeness if Article 35 was interpreted to preclude any court from questioning the validity or legality of the act of a President. He further stated:

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[2] *Visuvalingam v. Liyanage (No.1)*, (1983) 1 SLR 203.

> "…an intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law."[3]

Going further, Justice Sharvananda held:

> "[t]hough the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden."[4]

In *Mallikarachchi v. Shiva Pasupati,*[5] Chief Justice Sharvananda expanded on his opinion in *Visuvalingam*. The petitioner in the case alleged that the proscription by the President of the Janatha Vimukthi Peramuna (JVP) in terms of the prevailing emergency regulations was invalid as it infringed his fundamental rights. The five judges were unanimous in refusing to grant leave to proceed. Explaining the reasons for the refusal of leave, the Chief Justice held that because the petition did not fall within the exceptions to Article 35(3), the immunity of the President would preclude such action. He further stated that this inability to maintain an action in the face of Article 35(1) could not be cured by the naming of the Attorney General as a Respondent, stating:

> "[a]rticle 35 (3) exhausts the instances in which proceedings may be instituted against the Attorney-General in respect of the actions or omissions of the President in the exercise of any powers pertaining to subject or functions assigned to the President or remaining in his charge under that paragraph 2 of Article

[3] Ibid: p.210.
[4] Ibid.
[5] *Mallikarachchi vs. Shiva Pasupati* (1985) 1 SLR 74.

> 44. It is only in respect of those acts or omissions of the President, that it is competent to proceed against the Attorney-General."[6]

The Chief Justice went on to explain the rationale for the doctrine, stating that "[i]t is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions."[7] Dealing with the purpose of Article 35, he said:

> "[t]he principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law."[8]

Following this reasoning, the Chief Justice observed that the President is not above the law of the land. The Chief Justice observed that the immunity of head of state is not unique to Sri Lanka and noted that the efficient functioning of the executive required the President to be immune from judicial process. He went on to say:

> "[i]f such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected, but the smooth and efficient working of the Government of which he is the head will be impeded. That is the rationale for the immunity cover afforded for the President's actions, both official and private."[9]

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[6] Ibid: p.77.
[7] Ibid.
[8] Ibid: p.78.
[9] Ibid.

Thus, in the reasoning of the Chief Justice, two distinct arguments justified the conferring of immunity on the President. First, the President – for the duration of his term in office – ought not to be answerable to the jurisdiction of any, except the representatives of the people by whom he may be impeached. Second, the efficient working of the government would be impeded if the President were not to be provided with immunity.

Despite this ruling, the Supreme Court in later cases signalled willingness to strike down emergency regulations promulgated by the President. In *Wickremabandu v. Herath*[10] the court struck down parts of an emergency regulation that it considered to be violative of the petitioner's fundamental rights. In *Joseph Perera v. Attorney General*[11] a five judge bench of the court also held Regulation 28 of the Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986 to be *ultra vires* the constitution. Neither the majority judgment nor the minority judgment dealt specifically with Article 35.

It was in the case of *Karunatilake v. Dayananda Dissanayake (No.1)*[12] that Justice Mark Fernando articulated the reasoning through which emergency regulations promulgated by the President could be struck down. Justice Mark Fernando held, referring to Article 35 of the Constitution:

> "[w]hat is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law … I hold that 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 longer in office, and (b) other persons at any time … Immunity is a shield for the doer, not for the act … It (Article 35) does not exclude judicial review of the lawfulness or propriety of an impugned act or omission,

[10] *Wickremabandu v. Herath* (1990) 2 SLR 348.
[11] *Joseph Perera v. Attorney General* (1992) 1 SLR 199.
[12] *Karunatilake v. Dayananda Dissanayake* (1) (1999) 1 SLR 157.

> in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or 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 on the institution of proceedings against the President."[13]

Karunatilake's case, read with *Visuvalingam,* signified the possibility of a gradual erosion of the effect of Article 35's grant of near blanket immunity. The decoupling of a presidential act from the person of the President, would, if taken to its natural conclusion, open the doors to uninhibited judicial review, at least in respect of public law and constitutional matters. However, *Karunatilake* left certain questions unanswered, such as whether a suit against a presidential act could be dismissed for non-joinder of necessary parties. Sri Lanka's appellate courts have generally adopted a strict attitude to non-joinder of parties in public law and constitutional cases, consistently holding that where a necessary party was not named, the petition would be liable to be dismissed.[14]

The matter of non-joinder in relation to immunity arose in the case of *Silva v. Bandaranayake*[15] where the petitioners alleged that the appointment by the President of Dr Shirani Bandaranayake as a judge of the Supreme Court violated their fundamental rights under the constitution. A seven-judge bench was constituted to consider whether leave to proceed could be granted. The Justices unanimously refused to allow leave to proceed, with Justice Fernando writing on behalf of himself and three other Justices of the Court, and Justice Perera's concurrence on behalf of himself and two other Justices. While Justice Fernando's judgment did not deal with the question of immunity, Justice Perera's reasoning included the assertion that the President's acts were immune from judicial scrutiny by virtue of Article 35, except in actions relevant

[13] Ibid: p.17.
[14] See *Farook v Siriwardena*(1997) 1 SLR 145; *Rawaya Publishers v. Wijayadasa Rajapaksha* (2001) 3 SLR 13.
[15] *Silva v. Bandaranayake* (1997) 1 SLR 92.

to Article 35(3). Following the *dicta* in the *Mallikarachchi* case, Justice Perera stated:

> "[w]e are of the view, therefore, that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of law, more-so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party"[16]

Having made this point, Justice Perera went on to deal with the violation of natural justice that would be caused if the President's acts could be impugned without the President being named a party to the action. This reasoning appeared to take no notice of the court's previous decisions permitting the review of presidential acts. It also meant that while naming of the President as a respondent would result in the dismissal of the case on account of Article 35, the failure to do so would also result in dismissal for reason of non-joinder.

In the case of *Victor Ivan v. Hon. Sarath N. Silva*,[17] the petitioners sought to apply the reasoning in *Visuvalingam's* case that Article 35 permitted challenges against any person invoking an act or decision of the President in support of his own act or decision, by instituting a fundamental rights action against the newly appointed Chief Justice on the ground that he was the 'beneficiary' of the appointment of the President. In this way, the petitioners sought to place the Chief Justice in the position of 'invoking' the President's act as his own justification for holding office. The unanimous judgement of the five-judge bench authored by Justice Wadugodapitiya, in which leave to proceed was refused, considered the existing authorities, but held that the holding of office of Chief Justice by the 1st Respondent was not an 'executive or administrative action.' Thus, the matter could not be pursued through the remedy provided by Articles 17 and 126, which apply to violations of fundamental rights. Justice Wadugodapitiya concluded that, in effect, the only act the petitioners had alleged to have infringed their rights was the act of

[16] Ibid: p.99.
[17] *Victor Ivan v. Hon. Sarath Silva* (1998) 1 SLR 320.

appointment by the President, who in turn had immunity from suit and could not be named as a respondent.

In involving a challenge to the appointment of a Chief Justice, Justice Wadugodapitiya held that the appointment of a Chief Justice could not be canvassed through the limited space created by *Karunatilake's* case, stating:

> "Justice Fernando takes the matter beyond doubt when he clearly states that for such a challenge to succeed, there must be some other officer who has himself performed some executive or administrative act which is violative of someone's fundamental rights, and that, in order to justify his own conduct in the doing of such impugned act, the officer in question falls back and relies on the act of the President. It is only in such circumstances that the parent act of the President may be subjected to judicial review."[18]

In *Senasinghe v. Karunatilleke*,[19] the petitioner alleged that his fundamental rights were violated by the actions of the police, who claimed they were acting under and in terms of Section 45 of the Referendum Act in refusing to allow a political procession to proceed. Justice Fernando writing for all three judges held that the excess of force used on the petitioner was violative of the constitution, but also went a step further in striking down the referendum order issued by the President, on the grounds that the police were purportedly acting in terms of Section 45 of the Referendum Act. The court held that the President's act was justiciable since the respondents were 'taking refuge' in that act.

It appears therefore from the foregoing analysis that judges will not entertain actions where the incumbent President's acts are impugned indirectly. To question presidential acts successfully – other than through the exceptions created by Article 35(3) – there must necessarily be a secondary mischief, which enables a collateral challenge. At that stage, if the person alleged to have committed the secondary mischief invokes an act of the President

[18] *Silva v. Bandaranayake* (1997) 1 SLR 92 at 326.
[19] *Senasinghe v. Karunatilleke* (2003) 1 SLR 172.

to explain her act, the court may inquire into the legality of the presidential act upon which reliance is placed.

Thus it may be possible to identify the following rules on presidential immunity that have emerged through the interpretation of Article 35 by the judiciary:

1. The person of the President enjoys absolute immunity in respect of all acts or omissions in respect of private or official matters done by him during his tenure of office, although such immunity will not preclude actions against a former President in respect of acts done by him during his tenure of office.
2. All pending civil and criminal actions against the President must be suspended until the person ceases to hold the office of President, subject to the proviso that the period of suspension will not be considered in computing time limits or prescription relating to such actions.
3. No fresh civil or criminal actions can be instituted against the President during his tenure of office in respect of acts or omissions done by him prior to assuming office. Such actions can be instituted only after the person has ceased to hold the office of President.
4. The only exceptions to the above rules are to be found in Article 35(3) of the constitution.
5. Article 35 shields the doer and not the act. Thus, any person invoking the act of a President to justify her actions is imposed with the burden of proving the validity of the President's acts. In the event the President's act is found to be invalid, the court may deem it void.

Presidential Immunity in the United States and France

The United States

Unlike the Sri Lankan Constitution of 1978, the doctrine of presidential immunity finds no explicit mention in the text of the constitution of the United States. However, historical factors and the judicial branch's deference to executive power have shaped the emergence of the doctrine over time. The absence of a

codified text on immunity results in some uncertainty in the United States as to the precise contours of the scope of immunity. However, since the doctrine has been developed gradually by the judiciary, its development has been crafted in recognition of constitutional first principles such as the separation of powers doctrine and the rule of law. Given the contestation on the degree to which a President must be immune, there has been extensive discussion by academics and practitioners alike on the first principles of law that conceptually underpin the grant of immunity to the President.

The case of *Marbury v. Madison*[20] paved the way for the emergence of the immunity doctrine. Chief Justice Marshall's historic judgment introduced the idea of judicial review of legislation for the first time, and drew, in respect of executive acts, a distinction between 'ministerial acts' and 'political and executive acts.' The term 'ministerial acts' was defined to be those where an executive actor is bound by law to perform an act; whereas 'political and executive acts' are those where the actor is provided a measure of discretion in determining whether or not, and how, he will perform the act. *Marbury* ruled that the court possesses the jurisdiction to compel performance of a 'ministerial act', while it would defer to the executive in relation to 'political and executive' acts.

This distinction then became critical to the 1867 decision of *Mississippi v. Johnson*,[21] where the President was placed beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers which were 'political and executive'. The question of whether the court would exercise its jurisdiction in relation to acts that were 'purely ministerial' was left open. In this case, the state of Mississippi had sought to restrain the President from enforcing the Reconstruction Acts passed by Congress that the state alleged to be unconstitutional. The court expressed deep reservations about restraining or compelling the performance of a 'political' act, explaining that the harmonious relationship between the three arms of government would be disrupted if the court were to restrain the President in the manner prayed. The

[20] *Marbury v. Madison* 5 U.S (1 Cranch) 137.
[21] *Mississippi v. Johnson* 71 U.S. (4 Wall) 475.

court argued that in the event the injunction were issued, Congress might move to impeach the President for non-performance of his functions, and the court would then be placed in the unenviable position of having to protect the President by interfering with proceedings in Congress. This, the Court said, would be a catastrophic blow to comity between the coordinate branches of government and separation of powers.

In the 1974 *Watergate* case,[22] the Supreme Court held that the President was amenable to subpoena to produce evidence for use in a criminal case. The court held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." The court went on to say that the primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and that to accept the President's argument would disturb the separation of powers function of achieving "a workable government." Thus, the court recognised the importance of balancing recognition of the immunity of the President with the imperative to ensure that no person was above the law. What is clear therefore is that the separation of powers doctrine "is not a mantra whose incantation will automatically discredit a practice. Backed however, by other principles […] the separation of powers is a useful and potent instrument for jurisprudential analysis."[23]

In the landmark case of *Nixon v. Fitzgerald*,[24] the Supreme Court extended presidential immunity from civil suit for acts performed within the 'outer perimeter' of his official duties. The question as to what constituted acts outside the 'outer perimeter' of his official duties was not answered clearly. The court divided five – four, and the majority decision was based on what it considered to be the President's "unique position in the constitutional scheme" and the,

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[22] *United States v. Nixon*, (1974).418 U.S. 683.
[23] D. Wells, '*Current Challenges to the Doctrine of the Separation of Powers – The Ghosts in the Machinery of Government*' (2006) ***Queensland University of Technology Law and Justice Journal*** 6(1): p.105
[24] *Nixon v. Fitzgerald* (1982) 457 U.S 731.

> "… policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."

The majority argued that immunity was "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." While the court's decision recognised that the separation of powers doctrine and the position of the President within the scheme of the constitution alone did not entail absolute immunity in relation to all legal proceedings, it contended that only a sufficiently broad public interest would serve to limit the immunity of the President. Thus even though the Supreme Court had previously held that the President was amenable to a subpoena in a criminal trial in the *Watergate* case, it held in *Nixon v, Fitzgerald* that "mere private suits for damages based on a President's official acts" fell short of the interest required to override immunity.

It is useful to note that the Supreme Court had already extended absolute immunity from civil suits to other state actors before the *Fitzgerald* decision.[25] However in *Mitchell v. Forsyth*,[26] the Supreme Court limited the absolute immunity afforded government officials by declaring that immunity did not extend to nongovernmental duties. Instead, the court ruled that a government official has qualified immunity when engaging in unofficial government actions. The principle on which reliance was placed to determine whether a government official is entitled to absolute immunity was the nexus between the conduct and the government agent's official duties.

In relation to civil liability for suit relating to a person's private acts before he becomes President, the Supreme Court in *Clinton v.*

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[25] *Stump v. Sparkman,* (1978) 435 U.S 349; *Pierson v. Ray,* 386 U.S. 547, 554 (1967).;*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1871); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Tenney,* 341 U.S. at 372, 377; *Butz v. Economou,* 438 U.S. 478, 508-17 (1978).
[26] *Mitchell v. Forsyth* (1985) 475 U.S. 511.

Jones[27] denied the President's application for qualified temporary immunity that would stay the trial until the President ceased to hold office. Justice John Paul Stevens writing for the majority held that the doctrine of separation of powers was intended to protect one branch of government from intruding into the domain of the other, and that a trial judge performing his judicial duties did not interfere with the authority of the President. Justice Breyer's concurrence expressed the view that the President would have the benefit of immunity only if he would be able to show that the process of court would substantially interfere with the constitutionally assigned duties of the President.

Thus, the *Clinton* and the *Watergate* cases taken cumulatively appear to suggest that a President would not be entitled to immunity from criminal process or civil trial for private acts. The question as to whether the President would be immune from a criminal charge as opposed to mere criminal process – such as a subpoena to hand over material evidence – has hitherto not been addressed by the Supreme Court. It is also not certain as to whether the President is entitled to qualified (temporary) immunity from civil trial caused by acts performed while he was in office as President. The reasoning in the *Watergate* and *Clinton* cases would, however, appear to suggest that there is no fundamental distinction between immunity for acts committed prior to assuming office and immunity for acts committed while in office.

The court's judgment in both these cases only seek to balance the disruption that could potentially be caused to the executive arm of government with the need to ensure just government. Significantly, there is no indication of the existence of absolute immunity for acts committed by a sitting President while in office. With the expanding scope of judicial review and increasing limitations on the discretion of the executive in all developed public law jurisdictions, the distinction between ministerial acts and political acts appears to have eroded over time. In its place, the distinction between constitutional review and the broader scope of administrative procedures has taken central importance.

[27] *Clinton v. Jones* (1997) 520 U.S. 681.

Thus, in the case of *Franklin v. Massachusetts*,[28] Justice Sandra Day O'Connor's majority opinion held that a President's act cannot be questioned for abuse of discretion under the Administrative Procedures Act (APA). She argued that because the Act was silent on the question of immunity, that silence could not impute to the legislature the intention to waive the immunity of the President in relation the Act. However, she acknowledged, in deference to existing authority, that his actions may be reviewable for their constitutionality. Prior to *Franklin,* two decisions by the Supreme Court had held presidential acts to be unconstitutional in suits which had been brought against subordinates of the President who carried out his orders.[29]

The foregoing analysis of the development of the doctrine in the constitutional jurisprudence of the United States reveals that immunity has been affirmatively extended only to acts within the 'outer perimeter' of the President's duties, cases challenging exercises of power under the APA, and another class of cases where civil proceedings would substantially interfere with the ability of the President to fulfil his constitutional duties.

France

The constitution of the Fifth Republic envisaged a powerful President, albeit one somewhat removed from the day-to-day administration of the affairs of government. This was the design of Charles de Gaulle who asserted the need for a strong and stable leadership by an executive head of state. Thus, the constitution as it was originally designed contained an immunity clause in Article 68, which read:

> "The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical votes in open ballots and by

[28] *Franklin v. Massachusetts* (1991) 505 U.S. 778.
[29] See *Panama Refining Co. v. Ryan* (1935) 293 U.S 388; *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S 579.

> an absolute majority of their members ; he shall be tried by the High Court of Justice."

The Constitution however was amended after public outcry over alleged abuses of power by President Chirac and on 19th February 2007, the constitution was amended to limit the grant of immunity. The amended Article 67 reads:

> "The President of the Republic shall incur no liability by reason of acts carried out in his official capacity, subject to the provisions of Articles 53-2 and 68 hereof. Throughout his term of office, the President shall not be required to testify and shall not be the object of any criminal or civil proceedings, nor of any preferring of charges or investigatory measures. All limitation periods shall be suspended for the duration of said term of office. All actions and proceedings thus stayed may be reactivated or brought against the President no sooner than one month after the end of his term of office."

Thus, the amendment limits the absolute immunity afforded to the President of France only in respect of acts carried out in his official capacity, while his person enjoys qualified or temporary immunity from criminal and civil process during his tenure in office in respect of acts done before or after he assumed office. However, the Conseil d'Etat – the administrative court - is empowered to hear recourses against decrees and other executive actions, rendering the acts of a President jusiticiable in a court of law.

Notably however, in France, it is the Prime Minister who, in terms of Article 20, directs the actions of the government, assumes responsibility for national defence, ensures implementation of legislation, promulgates regulations and is responsible for civil and military appointments. In contrast, the President's powers include those in relation to the appointment of Prime Minister, the passage of laws, appointments to the superior courts, and the dissolution of the legislature. He also has a central role in the conduct of foreign affairs. Thus, the immunity granted to the President in France must be viewed in the light of the fact that the preponderant powers over general governance are

reposed in the Prime Minister, with the President entrusted only with certain important constitutional functions and the conduct of foreign relations.

Article 35 in light of Immunity Provisions Elsewhere

The historical antecedent of Article 35 of the 1978 Constitution – Article 23 of the 1972 Constitution – read:

> (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 him in respect of anything done or omitted to be done by him either in his official or private capacity.
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> (2) Where provision is made by law limiting the 'time' within which proceedings of any description may be brought 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.

Article 35 of the Second Republican Constitution was thus a near verbatim reproduction of the text concerning the immunity of the President in its predecessor constitution. However, while Article 23 of the First Republican Constitution granted immunity in respect of 'civil or criminal proceedings', Article 35 mandates that 'no proceedings' shall be instituted against the President. The matter of judicial review of administrative action was therefore left unaddressed in Article 23, whereas Article 35 clearly precludes all administrative or constitutional suits. The later constitution is thus, at least facially, wider in its grant of immunity than its predecessor.

More notably, however, while the President under the 1972 Constitution was the Head of State, Head of the Executive, and the Commander-in-Chief of the armed forces, Article 27 of that constitution mandated that the President "shall always except as otherwise provided by the Constitution, act on the advice of the

Prime Minister, or of such other Minister to whom the Prime Minister may have given authority to advise the President on any particular function assigned to that Minister." In fact, under Article 25, it was the Prime Minister who nominated a person to the office of President, and could even initiate a resolution to have the President removed from office by a simple majority of the National State Assembly. Thus, wholly unlike the overmighty President under the 1978 Constitution, the President under the 1972 Constitution did not exercise any discretionary executive power. Those powers were in fact exercised by the Prime Minister and his Cabinet. Furthermore, Article 5 declared the National State Assembly to be the supreme instrument of state power of the republic, exercising the legislative, executive, and judicial power of the people. Thus, the 1972 Constitution established a presidency that was a titular head of state. Given this, the logic behind presidential immunity in the 1972 Constitution appears not to have been animated by a desire to ensure effective government, since the President wielded no real executive power that could potentially have been disrupted by litigation. Given that the Prime Minister and the Cabinet of Minister were not immune, immunity under Article 23 was certainly not established with the intention of precluding public law suits against the government.

Historically, besides the argument of executive convenience, two other specific justifications have been forwarded to rationalise the grant of immunity to a head of state. These may have some relevance to the 1972 Constitution's provision on immunity. First, given that the constitution bound the President to act according to the advice of the Prime Minister or a member of the Cabinet of Ministers, exposure of the President to litigation for decisions made in his name and acts performed in his name, but over which he had no legal control, would cause injustice to the President. This reasoning could apply to the grant of immunity in Article 361 of the Indian Constitution to the President of the Union – and Governors of States – for "the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties." Since the courts have

recognised, since *Shamsher Singh v. Punjab*,[30] that the President of the Union and Governor's of States were bound to follow the 'aid and advice' of the Council of Ministers of the Union and State respectively, rendering the President or a Governor liable for decisions made by others would result in injustice.

Second, the argument is sometimes made that the President, being the Head of State and the symbol of the dignity of the state, should be immune from judicial process for as long as he continues to hold the office of the Head of State. In such cases, where provision is made for judicial proceedings in respect of presidential acts to be instituted against the state, the prejudicial effect of immunity on those aggrieved by presidential acts is alleviated. For instance, the proviso to Article 361 of the Indian Constitution clearly provides that "nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State."

In his treatment of the doctrine of immunity in the light of the separation of powers doctrine articulated by Montesquieu, Joseph Rodgers draws from Montesquieu's conception of republican virtues as the source of government legitimacy.[31] He claims that the preservation of the 'honour' of the ruler through retaining privileges unavailable to normal citizens in antithetical to the notion of a republican state, as it is a manifestation of a monarchical attempt at asserting legitimacy. Explaining further, he states:

> "[p]ut simply, a putative monarchy can only successfully exist in an environment in which the sovereign is quite literally understood to be above his subjects and of a noble descent. Honour is not necessarily the result of devotion to community or love of country. Quite the contrary, "it is the nature of honour to aspire to preferments and titles, [and] it is properly placed in this

[30] *Shamsher Singh v. Punjab* (1974) AIR 2192
[31] J.P. Rodgers, '*Suspending the Rule of Law? Temporary immunity as violative of Montesquieu's Republican virtue as embodied in George Washington*' (1997) ***Cleveland State Law Review*** 45: p.301

> government." It is expected that these individuals will work to institutionalize mechanisms to continually protect their own honour and privilege. Without privilege, a monarchy sacrifices its nature."[32]

In light of the discussion above, I argue that neither of the arguments that would possibly have been used to justify Article 23 in the 1972 Constitution have any application to Article 35 in the 1978 Constitution. On the one hand, in terms of the 1978 Constitution, the President wields wide and pervasive control over the government and state, and no prejudice or injustice would be caused to him if he were to be answerable for his own actions. Secondly, while the desire to preserve the 'honour' and 'dignity' of the state could perhaps be understandable in the case of a titular head of state, where real republican executive power is wielded by the head of state as in the case of Sri Lanka under the Second Republican Constitution, any grant of immunity for the purpose of maintaining the 'honour' or dignity of that person undermines the republican nature of the state. Thus, even though the textual formulation of Article 35 is near identical to Article 23 in the 1972 Constitution, the justifications potentially applicable to immunity provisions in the 1972 Constitution or the Indian Constitution do not apply to Article 35.

The central argument that sustains the presidential immunity doctrine in the United States is that based on a particular interpretation of the separation of powers doctrine. The argument posits that the course of government and ability of the executive to govern will be impeded if the President would be vulnerable to litigation. In Jefferson's words:

> "[b]ut would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly

[32] Ibid: p.316.

> trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?"[33]

Defending temporary immunity to a sitting President for acts done in his private capacity, Akhil Amar and Neal Katyal argue that the protection of the President also protects the people whom he serves.[34] They suggest that bedrock constitutional principles of separation of powers provide a 'sturdy constitutional basis for temporary immunity.' The argument has echoed in the judgments of Sri Lanka's Supreme Court. In *Mallikarachchi,* Chief Justice Sharvananda states:

> "…it is therefore essential that special immunity must be conferred on the person holding such high executive office from being subject to legal process or legal action and from being harassed by frivolous actions. If such immunity is not conferred, not only the prestige, dignity and status of the high office will be adversely affected but the smooth and efficient working of the Government of which he is the head will be impeded."[35]

However, it is not clear that the separation of powers doctrine necessarily supports the grant of immunity, particularly when such immunity is pervasive. In a critique of the essentialist understanding of the separation of powers, Laurence Claus argues that Montesquieu's separation was based on the fundamental tenet of maximising the liberty of the subject. This, he contends, is possible by "apportioning power among political actors in a way that minimises opportunities for those actors to determine conclusively the reach of their own powers."[36]An essentialist separation of powers would manifestly fail to achieve the goal of preventing those actors from determining conclusively the reach of their powers, because the mutual exclusivity

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[33]*Nixon v Fitzgerald* (1982) 457 U.S 731 at p.750, quoting letter from Thomas Jefferson to George Hay (20th June 1807) in P.L. Ford (Ed.) (1905) ***The Works of Thomas Jefferson*** (New York: G.P. Putnam's Sons): p.404.
[34]A.R. Amar & N.K. Katyal, '*Executive privileges and immunities: The Nixon and Clinton cases*' (1995) ***Harvard Law Review*** 108: p.701.
[35]*Mallikarachchi*, fn.6 supra: p.78.
[36] L. Claus, '*Montesquieu's Mistakes and the True Meaning of Separation*' (2005) ***Oxford Journal of Legal Studis*** 25: p.419.

engendered by an essentialist understanding would support rather than oppose arbitrary decisions on the boundaries of one's own power. Of the executive, he says: "if the adjudicator of disputes between the executive government and the citizen were not separate from the executive government, then that government would conclusively determine the reach of its powers, and could do as it pleased."[37] The independence of the judiciary and the power of the judiciary to maintain a check on the executive is thus an essential feature of any separation of powers regime. After an exhaustive treatment of Madison's writings on the separation of power, Gavin Drewry concludes:

> "[t]he founding fathers linked their perception of the need to avoid combining the legislative and executive functions to their concerns about preserving the Rule of Law. If the same institution/ruler makes the laws and interprets/applies them, then those laws can be redefined according to the whim and caprice of that ruler…"[38]

Thus, the doctrine of the separation of powers lends itself to arguments in favour and in opposition to presidential immunity. It is not a bludgeon that determines the propriety of any given legal formulation. While it does not countenance a grant of blanket immunity, it does appear to provide some space for a narrow, temporary immunity in the interest of preventing debilitating litigation. Even where presidential immunity is granted, the general principle ought to be that judicial scrutiny of all executive action including the acts or omissions of the President must be ensured, save to the extent that such demonstrably interferes with the proper and lawful fulfilment of the lawful duties of the President.

Further, blanket immunity in respect of a president violates two dimensions of the rule of law as identified by Dicey. First, by the grant of blanket immunity, the President acquires wide, discretionary powers that cannot be reviewed, and thus opens the

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[37] Ibid: p.425.
[38] G. Drewry, '*The Executive: Towards Accountable Government and Effective Governance?'* in J. Jowell & D. Oliver (Eds.) (2007) ***The Changing Constitution*** (Oxford: OUP): p.188.

door to arbitrary rule. Secondly and more importantly, presidential immunity violates the idea of equal subjection of all classes to one law. As Dicey wrote: "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[39] Article 12 of the Sri Lankan Constitution also contains an expansion of this basic idea. While reasonable classification arguments can be made in this regard, the exclusion of an individual from answerability to the judiciary for the entire tenure of his office clearly appears to violate the fundamental precepts of equal treatment and equal protection.

Conclusion

The foregoing analysis reveals that when Article 35 is compared with other provisions in respect of presidential immunity – whether in previous Sri Lankan constitutions or in notable jurisdictions which provide for presidential immunity – Article 35 is an outlier in terms of the sheer scope of the immunity provided. In fact, the blanket immunity provided by Article 35 is only consistent with immunity provisions applicable to titular heads of state who wield little or no political power. However, in countries such as the United States and France where presidential power is significant, the scope of immunity is much narrower than the formulation in Article 35. Most importantly, while there may be provision for immunity in respect of civil and criminal liability in those jurisdictions, no such immunity is applicable in public law proceedings challenging the constitutional or other validity of an exercise of discretionary power by the President. More modern constitutions like the South African Constitution go further, and are silent on the question of immunity, potentially opening the door to even criminal prosecutions against incumbent Presidents. In contrast, Sri Lanka's grant of presidential immunity is a blunt instrument designed to shield an already powerful institution from judicial scrutiny; ensuring that the person of the President presides powerfully over governance in the country, undermining

[39] Cited in J. Jowell, '*The Rule of Law and its underlying values*' 'in Jowell & Oliver (2007): p.7.

the constitution's stated commitment to the rule of law and republican values.