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The Presidency and the Supreme Court: The Constitutional Jurisprudence of Presidential Powers under the 1978 Constitution

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Introduction

The Second Republican Constitution of 1978 introduced the office of the Executive President, vesting the holder of the office with considerable powers, enumerated predominantly in Chapter VII of the Constitution. The powers vested in the office of the Executive President were so vast that it famously prompted the President at the time, J.R. Jayewardene, to proclaim that the only thing he could not do as President was to make a man a woman and *vice versa*.[1] Though much has been said about the concentration of power in the office of the President and the need to abolish the executive presidency, there has been very little analysis of the manner in which the powers of the President have evolved over the life of the Constitution, through the jurisprudence of the superior courts.

This essay will seek to examine how the institution which has the sole and exclusive jurisdiction to hear and determine any matter relating to the interpretation of the Constitution,[2] the Supreme Court, has moulded the powers of the President through the process of judicial interpretation. In analysing the jurisprudence on the powers of the President under various heads, the writer will argue that despite small victories in between, the Courts have largely refrained from referring to the founding principles of the Constitution including the Rule of Law, the separation of powers and constitutionalism itself to keep the 'overmighty executive'[3] in check. The selective application of these principles in some cases perhaps gives credence to the theory of judicial realism. However in most cases, it will be noted that the legal justification given by the Courts in rejecting the various arguments which sought to curtail the powers of the President have had a sound

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[1] For an analysis of the arguments forwarded for a powerful executive at the time of drafting the Second Republican Constitution, see J.A.L. Cooray (1995) ***Constitutional and Administrative Law of Sri Lanka*** (Colombo: Sumathi): p.106.

[2] The 1978 Constitution: Article 125 (1).

[3] C.R. de Silva, '*The Overmighty Executive? A Liberal Viewpoint*' in C. Amaratunga (Ed.) (1989) ***Ideas for Constitutional Reform*** (Colombo: Council for Liberal Democracy). See now, C.R. de Silva, '*The Overmighty Executive Reconsidered*', elsewhere in this book.

jurisprudential basis, making the allegation against the Court purely that it has at times been overly positivist and reluctant to engage in the kind of activism which may have been desirable given the imbalance of power between the organs of Government under the 1978 Constitution.

This essay does not contain an exhaustive analysis of all case law relating to all powers of the President. Such an analysis would have to be the subject of a much larger work. Instead, the focus has been to analyse trends in the judicial treatment of the President's powers through a survey of what my view are landmark judgments relating to certain key powers of the President including immunity from suit, the power to make appointments and the power to promulgate emergency regulations. In conclusion, I will assess whether the Supreme Court has fulfilled its role as the guardian of the Constitution in relation to the vast powers of the President and will analyse the possible reasons for the success or the failure of the Court in this area.

Immunity from Suit: An Impregnable Shield

A presidential power that has been contested fiercely before the Courts of Sri Lanka has been the immunity of the President from suit enshrined in Article 35 of the Constitution. Time and again, attempts to challenge the powers and actions of the President before the Courts have been thwarted by the veil of immunity cast over the President. The battle to find exceptions to the seemingly blanket immunity conferred by Article 35 has taken on many complexions. Article 35 reads as follows:

> 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.
>
> (2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during

which such person holds the office of President 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) of this Article shall not apply to any 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.

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.

Early Battles: Election Offences

An early case that went into the extent of the immunity conferred on the President was *Kumaranatunge v. Jayakody and another*.[4] This was a case where the President was cited as a respondent in the context of an election petition filed in terms of the Ceylon (Parliamentary Elections) Order-in-Council 1946. The petitioner was an unsuccessful candidate for election to the Mahara seat at the Parliamentary Elections held in May 1983, and challenged the election of the first respondent, the successful candidate, on the basis that the second respondent, the President of the Republic, had at an election meeting held in support of the first respondent's candidature, committed the corrupt practice of making false statements of fact in relation to the personal character and conduct of the petitioner.

Counsel for the petitioner sought to rely on Section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, which requires the petitioner to join as respondent in the Election Petition, *any person against whom any allegation of any corrupt practice is*

[4] (1984) 2 SLR 45.

made in the petition, as a basis for citing the President as a respondent in the petition. When confronted with the immunity conferred on the President by Article 35 of the Constitution, counsel for the Petitioner submitted that Article 35 does not apply to the present case for the reason that the Election Petition is not a proceeding against the President. His contention was that the test to determine whether proceedings were against a particular person was to look at the relief sought. In the present case, the object of the election petition and the only relief sought thereon was a declaration that the election was void. Thus, the proceedings were solely against the candidate and not against the President. It was only in compliance with the mandatory provision of Section 80A (1) (b) of the Ceylon (Parliamentary Elections) Order-in-Council that the latter was joined as a respondent to the petition.

The Courts however rejected this submission holding that an election petition was a proceeding *sui generis* which cannot be equated to a private litigation between and limited to two parties. The State and the public had an interest in an election petition and that is why once filed, such petition could not be withdrawn without leave of the Election Judge. But perhaps the better basis for rejecting the argument was that an election petition entails legal consequences for all parties against whom allegations of any corrupt or illegal practices are made. The election judge is called upon not only to determine that the election is void but also to report any offenders to the President. Such persons would incur the Penal consequences stipulated in Section 82 D of the Ceylon (Parliamentary Elections) Order-in-Council. Thus the Court held that an election petition is a proceeding not only against the candidate, but also against all respondents joined in the Election Petition. The Courts reiterated what has become a familiar refrain in the context of the immunity of the President; that Article 35 gives blanket immunity to the President from having proceedings instituted or continued against him in any court in respect of anything done or omitted to be done by him either in his official or private capacity during the tenure of his office.

Counsel for the petitioner then resorted to relying on the underlying principles of the Constitution, submitting that the immunity enshrined in Article 35 jars with the concept of

democracy, the purity of elections and the right of franchise. It was submitted that Sri Lanka cannot be a Democratic Socialist Republic, if the President is given the comprehensive immunity envisaged by Article 35 of the Constitution. It is prudent to note here that the Courts did acknowledge that absolute immunity of the President may conceptually be inconsistent with the principles of democracy and sovereignty of the people. However, their Lordships held firm to the view that it is not for a court of law to question the validity of any particular provision of the Constitution. It was held that where the language of the Constitution is plain and unambiguous, effect has to be given to it and a court cannot cut down the scope or amplitude of such provision for the reason that it cannot notionally harmonize with an ideal of the Constitution. Thus, the attempt to carve out exceptions to the immunity of the President on the basis of statutory requirements, the nature of the relief sought on the petition as well as the basic features of the Constitution was stubbornly resisted by the Supreme Court.[5]

Immunity: Rationale and Exceptions

Perhaps the most frequently cited judgment on Presidential immunity is *Mallikarachchi v. Shiva Pasupati, Attorney General.*[6] In this case, Sharvanada CJ engaged in an exhaustive analysis of Presidential immunity, its scope, justification and rationale. The Petitioner in the case challenged the order made by the President proscribing the Janatha Vimukthi Peramuna (JVP) under the provisions of the Emergency Regulations under the Public Security Ordinance. The Petitioner, a member of the JVP, contended that the President had, in proscribing his party, exercised the power vested in him by the relevant Emergency Regulations *mala fide* and without any grounds. He sought a declaration from Court that his Fundamental Rights enshrined in Articles 14 (1) (a), (b), (c) and (d) and Article 12 (2) of the Constitution had been violated by the said proscription and also

[5] See however, the dissenting judgment of Wadugopitiya J. in which his Lordship foreshadows the exceptions to be subsequently carved out to Presidential immunity by holding that the immunity given to the President was not a blanket cover to protect the wrongful activities of other persons.
[6] (1985) 1 SLR 74.

prayed *inter alia* for a declaration that the President's order was inoperative. The petitioner cited 'Shiva Pasupati', Attorney General, as the respondent to his application. The Court conclusively defined the scope of Article 35, holding that Article 35 (1) confers on the President during his tenure of office an absolute immunity in legal proceedings with regard to acts or omissions in his official or private capacity. The Court held that the object of Article 35 is to protect from harassment the person holding the high office of the Executive Head of the State and noted that such a provision is not unique to the 1978 Constitution, with the 1972 Constitution as well as the Constitutions of several other countries including India, containing similar provisions.

Sharvanada CJ explained the rationale for Presidential immunity. It was held not to be based on the idea that, as in the case of the King of Great Britain, he can do no wrong. The rationale of this principle was 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 removed from office under the provisions of Article 38 of the Constitution. Once a person has ceased to hold office as President, he may be held to account in proceedings in the ordinary courts of law. The key question to be decided in the case however was whether the proceedings could be brought under Article 35 (3) of the Constitution and whether therefore, the institution of proceedings against the Attorney General was permissible.

Article 35 (3) provides that the immunity of the President shall not apply to any proceedings in 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. It further provides that in relation to the exercise of any power, pertaining to any such subject or function, it is competent to institute proceeding against the Attorney General. Article 44 (2) gives a discretion to the President to assign to himself any Ministerial subjects or functions and vests him with the residual power to remain in charge of any subject or function not assigned to any Minister under the provisions of Article 44 (1).

Sharvanada CJ held that Article 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. The order of proscription complained of by the Petitioner was however, not an order made by the President on the footing of any assignment of subjects and functions in terms of the provisions of Article 44 of the Constitution. It was, on the other hand, an order made by the President under and by virtue of a power vested in him by an express provision of law, *viz*., Regulation 68 of the Emergency Regulations, made under the provisions of section 5 of the Public Security Ordinance. Therefore, his Lordship was of the view that the Attorney General could not be called upon to answer the allegations in the petitioner's application as he does not represent the President in proceedings which are not covered by the proviso to Article 35 (3).

Counsel for the petitioner sought to justify the citing of the Attorney General as respondent by reference to Rule 65 of the Supreme Court Rules, which provides that in proceedings under Article 126 of the Constitution, the Attorney General shall be cited as respondent. The Court however held that Rule 65 was designed to meet the mandate of Article 134 of the Constitution, which states that the Attorney General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. That Rule however did not visualize the Attorney General being made a sole party respondent to answer allegations against the President.

It is interesting to note that the Court felt inclined to explain the rationale for Presidential immunity, given that it only had to rely on a plain reading of Article 35 to dismiss the petition. This is particularly noteworthy given the holding in *Kumaranatunge*,[7] which emphasised the limited role of the Courts when confronted with clear and unambiguous provisions of the Constitution. This perhaps indicates that their Lordships were not entirely at ease with the consequences of blanket immunity and felt obliged to lay out the basis on which such immunity rests. It may have been

[7] Discussed above.

interesting to argue on the nature of the President's powers to make Emergency Regulations under the Public Security Ordinance and perhaps equate it to the assigning of Ministerial powers and functions under Article 44 (2) of the Constitution[8]. However, no such argument was made and the immunity of the President withstood this newest challenge based on the exception to immunity provided for in Article 35 (3).

The Dependent: Challenging the President's Acts through Those who Rely on Them

Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al[9] concerned the date of the Provincial Council Elections and was another case concerning the immunity of the President in relation to proclamations and emergency regulations made under the Public Security Ordinance. After the date of the Provincial Council elections and the date for commencing postal voting was fixed as per the Provincial Council Elections Act No.22 of 1998, the returning officers suspended the postal voting a day before the issue of postal ballot papers was to commence without adducing any reasons therefore. The very next day, the President issued a proclamation under section 2 of the Public Security Ordinance (PSO), bringing the provisions of Part II of the ordinance into operation throughout Sri Lanka and made an Emergency Regulation under section 5 of the PSO which had the legal effect of cancelling the date of the poll. Thereafter, the first respondent, the Commissioner of Elections, took no steps to fix a fresh date for the poll.

The petitioners complained that the failure of the Commissioner of Elections and the returning officers of the twelve districts to hold elections to the five Provincial Councils, on and after the decided date, was an infringement of their fundamental rights under Articles 12 (1) and 14 (1) (a) of the Constitution. The Courts held that the making of the Proclamation and the Regulation, as well as the conduct of the respondents in relation to the five

[8] The Court's response to Emergency Regulations promulgated by the President will be discussed below.
[9] (1999) 1 SLR 157.

elections, clearly constitute 'executive action' as per Article 126 of the Constitution which vests the Court with the jurisdiction to determine Fundamental Rights claims and that the Court would ordinarily have jurisdiction over the matter. The question relevant to the present discussion was whether that jurisdiction was ousted by reason of the immunity of the President enshrined in Article 35 of the Constitution.

Mark Fernando J. emphatically held that Article 35 does not oust the jurisdiction of the Court with regard to the Proclamation and Regulation issued by the President under the PSO. Article 35 only prohibits the institution of legal proceedings against the President while in office. It does not exclude judicial review of an impugned act or omission against some other person who does not enjoy immunity from suit but relies on an act done by the President in order to justify his conduct. His Lordship held that **"**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, 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". The Respondents were relying on the Proclamation and Regulation of the President, and the review thereof by the Court was not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President.

Thus, *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al* could be seen as a case which dented the hitherto impregnable fortress of presidential immunity, albeit rather mildly. Fernando J. clarified that the immunity of the president enshrined in Article 35 was *immunity ratione personae,* or immunity personal to the President during her period of office. There was no constitutional bar to challenge the acts of the President in a suit against a person who does not enjoy immunity, provided the person concerned is relying on an act of the President. Thus, the door was opened for a challenge to an act of the President through a proxy other than the Attorney General under the provisions of Article 35 (3).

An interesting variation of the above argument was made in *Victor Ivan v. Hon. Sarath N. Silva and others.*[10] The President appointed the respondent as the Chief Justice. The petitioners alleged that the appointment, which was made during the pendency of a disciplinary inquiry into the respondent *qua* attorney-at-law under Section 42 of the Judicature Act, violated their Fundamental Rights under Article 12(1), 14 (1) (a) and (g) of the Constitution. The petitioners prayed for a declaration that their fundamental rights were violated and that the said appointment was null and void. Counsel for the petitioner argued that the respondent was the 'beneficiary' of the impugned appointment by the President. The appointment could therefore be questioned through the respondent who was 'invoking' the President's act. The burden lay on the respondent to establish the lawfulness of the act of the President, notwithstanding the immunity under Article 35, which was personal to the President.[11] In response to this argument, Wadugopitiya J. cited cases such as *Mallikarachchi v. Shiva Pasupathy. Attorney General, Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al and Joseph Perera v. Attorney-General et al* to reiterate that though the President's immunity remains inviolable, the acts of the President under certain circumstances, may be challenged. However, his Lordship followed *Karunathilake* in holding that for such a challenge on an act of the president to succeed, there must be some other officer who has himself performed some executive or administrative act which violates someone's fundamental rights and relies on the act of the President to justify the same.

In the present case, the respondent had not "invoked" the President's act to rely on or justify any act. The observation was also made that there was no allegation of any executive or administrative action violative of anyone's fundamental rights performed by the respondent. The only act challenged was that of

[10] (1998) 1 SLR 340.

[11] Wadugopitiya J. first dealt with the issue of the constitutionality of the appointment made by the President. This section of the Judgment will be dealt with subsequently when dealing with the President's power of appointments.

the President in appointing the respondent as Chief Justice. In the circumstances, his Lordship was of the view that what the petitioners were asking the Courts to do was to amend Article 35 of the Constitution by judicial action, something which was not within the power of the Court to do. Therefore, it was emphatically held that the President enjoyed immunity under Article 35 (1) of the Constitution in respect of appointing the Chief Justice. His Lordship also held that Article 35 would be rendered meaningless and indeed nugatory, if any individual were to be deemed to be able to question the act of appointment as has been prayed for by the petitioners.

His Lordship also observed in *obiter* that in cases where the President's acts are challenged, the President cannot be made a party and cannot even be defended by the Attorney General, which raises serious questions about the applicability of the rule of *audi alteram partem* to such proceedings. It was further held that the only way in which to remove the Chief Justice from office was to follow the procedure under paragraphs (2) and (3) of Article 107 of the Constitution. Thus it could be seen that his Lordship clearly demarcated the scope of the exception to immunity carved out by Mark Fernando J in *Karunathilake*. The Court firmly entrenched the requirement that another party, who himself has committed some administrative or executive action which is challenged before Court and who relies on the President's actions to justify such conduct is essential to challenge the validity of the acts of the President. A party who benefits from the President's action would therefore be insufficient.

Challenging the President's Acts through Writ

In *Rev. Seruwila Saranakinthi and others v. The Attorney General and others*[12], the petitioners who were electors of the Eastern Province, invoked the writ jurisdiction of the Court of Appeal, against the Attorney-General, the Minister and the Secretary of the Ministry of Home Affairs, Provincial Councils and Local Government. The substantial relief sought was the grant and issue of a mandate in the nature of writ of mandamus directing the respondents to

[12]C.A. 852/2002 (Writ) (2004) 1 SLR 365.

take necessary action to hold a poll in the Eastern Province under the present administrative structure as required by section 37(2)(a) of the Provincial Councils Act, No. 42 of 1987. They also sought a direction to the respondents to refrain from altering administrative structure of Eastern Province without holding such a poll. The power of determining the date of the poll was vested with the President in terms of the provisions of section 37(2)(a) of Provincial Council Act, No.42 of 1987.

The Court reiterated the holding in *Mallikarachchi v. Shiva Pasupati, Attorney General*, that as per Article 35 (3) of the Constitution, the only instances in which acts or omissions of the President could be the subject of judicial proceedings through the representation of the Attorney General were where the President exercised powers under Article 44(2). The Petitioners did not contend that the President's power of determining the date of the poll in terms of the provisions of section 37(2)(a) of Provincial Council Act, No.42 of 1987 is a function that is covered by Article 44(2) of the Constitution. Thus, the Court held that the Petitioners had erred in citing the Attorney General as the Respondent and the petition failed.

Thus, it is clear that challenging the acts of the President through the writ jurisdiction of the Court of appeal does not alter the fundamental principles of immunity that apply when such a challenge is made by invoking the Fundamental Rights jurisdiction of the Supreme Court.

Immunity not Immutable

That the immunity of the President does not apply after ceasing to hold office has been firmly established. In *H. Senarath And Others v. Chandrika Bandaranaike And Others*[13] the Courts declared that that there had been an infringement of the Petitioners' rights guaranteed under Article 12 (1) of the Constitution due to the unreasonable, arbitrary and mala fide action of *inter alia* the first Respondent, who was at the material time, the President of the Republic, in securing for the first Respondent a free grant of land vested in the Urban Development Authority, a premises from which two public authorities were ejected to be used as her

[13] SC (FR) 503/2005.

residence after retirement and staff and other facilities, contrary to the provisions of the President's Entitlements Act No. 4 of 1986.

In *Sugathapala Mendis And Others v. Chandrika Bandaranayaike Kumarathung And Others* (The Water's Edge Case), the former President was held to be in violation of Article 12 (1) of the Constitution in the appropriation of public assets, which were held in trust for the public.[14]

Observations: Immunity of the President

The foregoing analysis demonstrates that Presidential immunity has been challenged based on statutory requirements, through proxies (i.e. by persons invoking or benefiting from the act or through the Attorney General) and by reference to wider principles underlying the Constitution. However, the Courts have carved out very limited exceptions to the President's immunity, with the acts of the President amenable to challenge only through another party invoking the same and as shall be observed later, in the context of Emergency Regulations. There is no question that immunity from suit for the Executive President is largely justified. As held by Sharvananda CJ in *Mallikarachchi v. Shiva Pasupati, Attorney General*,

> "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".[15]

However, one of the key checks that exist on the President, given that he is immune from suit during his period of office, is the fact that he is amenable to the jurisdiction of Parliament and the representatives of the People therein, by whom he might be

[14] SC (FR) 352/2007.
[15] (1985) 1 SLR 74, 78.

impeached and removed from office under the provisions of Article 38 of the Constitution.[16]

Nevertheless, given the hierarchical nature of party politics in Sri Lanka, where the President enjoys untrammelled power as the head of the party, this check is hardly effective when the President is from the same party as the governing party in Parliament. This is amply demonstrated by the attempt to impeach President Premadasa, where the President prorogued Parliament upon getting wind of an impeachment motion and managed to exercise his influence to thwart the impeachment motion and sack the initiators from the party. The narrative of this attempted impeachment is captured in the case of *Dissanayake v. Kaleel*,[17] concerning the expulsion of the members concerned.

It is therefore contended that the Courts should employ the techniques of constitutional interpretation including reading the Constitution as a whole and subjecting it to a teleological interpretation based on the founding principles of the Constitution, to carve out reasonable exceptions to the immunity of the President. As held by Justice White in his dissenting opinion in *Nixon v. Fitzgerald*,[18] "Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law". At the very least, the Courts should have jurisdiction over acts of the President which amount to intentional violations of the Constitution as argued in *Sumanasiri Liyanage v. H.E. Mahinda Rajapakse and others*,[19] discussed below. The case of *Rameshwar Prasad v. Union of India and others*[20] provides an example of the judiciary crafting exceptions to Constitutional immunity in relation to the Governor. In this case, the Court held that the immunity conferred by the Constitution did not preclude the

[16] For an exposition of the other non – judicial checks applicable to the Executive President in the United States, See the judgment of Powell J. in *Nixon v. Fitzgerald* 457 U.S. 731 (1982).
[17] (1993) 2 SLR 135.
[18] 457 U.S. 731 (1982).
[19] S.C. FR No 297/2008.
[20] AIR 2006 SC 980.

Court from examining the validity of the action on the grounds that it was *ultra vires* or *mala fide.*[21]

The Supreme Court determination on the Eighteenth Amendment to the Constitution (2002)[22] provides an example of the kind of reasoning that may be adopted to carve out exceptions to the immunity of the President from suit.[23] Though the Eighteenth Amendment determination (2002) did not directly concern presidential powers, the Courts made reference to the powers of the President by way of analogy. The Court held that in terms of Articles 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the People, which is inalienable. The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution. That would be inconsistent with the Rule of Law. The Court explicitly recognised that the immunity given to the President under Article 35 is limited. Though the limitations identified were those that had already been recognised by the Courts, such as Article 35 (3) of the Constitution, Emergency Regulations made by the President[24] and to the limited extent discussed in the next segment, Presidential Appointments[25], there lies no barrier to extending this line of reasoning to allow the Courts to exercise jurisdiction over other acts of the President, notwithstanding Presidential immunity in light of the founding values of the Constitution.

[21] It must be noted however that the immunity conferred by Article 361 of the Indian Constitution is immunity *ratione materiae,* or immunity in respect of official acts and not personal immunity as is the case with Article 35 of the Sri Lankan Constitution.
[22](2002) 3 SLR 71.
[23]The determination is also important in establishing the link between Articles 3 and 4 of the Constitution. The Courts cited several determination of the Supreme Court (SC Special Determinations 5/80, 1/82, 2/83, 1/84 and 7/87) in holding that Articles 3 and 4 must be read together.
[24] *Joseph Perera v. Attorney General*(1992) 1 SLR 199.
[25] *Silva v. Bandaranayake* (1997) 1 SLR92.

Powers of Appointment: A Sword over other Organs of Government

Another power of the President, which serves to entrench the Presidential institution as a whole, and based on which a considerable amount of litigation has taken place, is the power of the President to make appointments to public office. It has to be noted that most challenges to the President's powers of appointment have been resolutely defended through the immunity of the President and that there is a significant overlap between the jurisprudence under these two areas.

Appointing the Guards: Appointment of Judges to the Superior Courts

A seminal case concerning the powers of the President to appoint Judges to the superior Courts is *Edward Francis William Silva, President's Counsel and Three Others v. Shirani Bandaranayake and Three Others*.[26] Here, the Petitioners challenged the appointment by the President of the first respondent as a Judge of the Supreme Court under Article 107 of the Constitution. The key issue before the Court was the nature and extent of the power of appointing Judges to the Superior Courts, conferred on the President by the said Article. Mark Fernando J. in his judgment acknowledged that Article 107 does not expressly prescribe any qualifications or restrictions on the power of the President to make appointments under Article 107. However, his Lordship held that considerations of comity require that in the exercise of that power, there should be cooperation between the Executive and the Judiciary in order to fulfil the object of Article 107.

> "The Chief Justice, as the head of the Judiciary, would undoubtedly be most knowledgeable about some aspects, while the President would be best informed about other aspects. Thus co-operation between them would, unquestionably, ensure the best result".

Fernando J. was cautious to indicate that the manner, the nature and the extent of the co-operation needed are left to the discretion

[26] (1997) 1 SLR 92.

of the President and the Chief Justice, and that this may vary depending on the circumstances. It was also highlighted that the power of appointing Judges is neither untrammelled nor unrestrained, and ought to be exercised within limits, as the power is discretionary and not absolute. Fernando J. held that if, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed, because it is the will of the People which that provision manifests, that such a person cannot hold that office. Article 125 would then require the Court, in appropriate proceedings, to exercise its judicial power in order to determine the question of ineligibility. Other examples of reviewable appointments cited by his Lordship included the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude.

Despite this, his Lordship stopped short of questioning the validity of the appointment in question, holding that the petitioners have failed to establish, *prima facie*, the absence of the necessary co-operation, and have also failed to indicate how they propose to supply that deficiency. Mark Fernando J's judgment in the present case could be seen as a cautious step to read into the provisions of Article 107, certain conditions that the President must follow in appointing Judges to the Superior Courts. Though his Lordship based such conditions on considerations of comity, his Lordship proceeded to state quite clearly that the discretion of the President with regard to appointments was not absolute and was subject to the Constitution, furnishing several examples of appointments, which in his Lordship's opinion would be unconstitutional and which would not withstand a legal challenge.

The Appointment of the Chief Justice

Victor Ivan v. Hon. Sarath N. Silva and others[27] was a case which analysed the impact of Fernando J's judgment in *Edward Francis Silva v. Shirani Bandaranayake*, in the context of the appointment of

[27] (1998) 1 SLR 340.

the Chief Justice. Following Fernando J.'s judgment, Wadugopitiya J. held that it was desirable that there be co-operation between the President and the Chief Justice before an appointment is made to the superior Courts. However his Lordship noted that Fernando J. does not in any way suggest that such co-operation and consultation was a legal or constitutional requirement or was in any way mandatory. It was noted that there were no suggestions of the nature of the co-operation and consultation that was required in the appointment of the Chief Justice himself. Thus his Lordship came to the conclusion that the appointment of the respondent by the President was wholly intra vires and not violative of any constitutional provision.

It will be seen therefore, that the requirements of co-operation and consultation that Fernando J. deemed desirable in making appointments to the superior Courts under Article 107 of the Constitution have definitively been held not to be mandatory requirements. Therefore, unless the appointment is manifestly flawed to the tune of the examples given by Fernando J. in *Edward Francis Silva v. Shirani Bandaranayake,* it is unlikely that a legal challenge to an appointment made by the President under Article 107 could be sustained.

Court to order Appointments?

An interesting issue regarding the President's powers of appointment is whether a Court order pursuant to a fundamental rights violation has an impact on the same. In *Brigadier Liyanage v. Chandananda De Silva*[28] it was held that the failure to promote the Petitioner following his acquittal in a criminal trial was arbitrary and violative of the petitioner's fundamental rights guaranteed under the Constitution. The Court made order that the promotion of Brigadier Liyanage be implemented. But upon the President choosing not to comply with the said order, the Courts held that the refusal of the President to follow a Court order could not be challenged in Court.

Thus the power of the Courts to issue just and equitable orders

[28] (2000) 1 SLR 21.

under its fundamental rights jurisdiction[29] will be of no avail to a Petitioner whose remedy lies in the hands of the President. The Courts cannot force the hand of the President, even in the face of the violation of fundamental rights.

The Seventeenth Amendment: A Step Towards Accountability and Good Governance

A seminal point in the evolution of the powers of the President vis-à-vis the public service was the seventeenth amendment to the Constitution of Sri Lanka. This amendment aimed to alter the legal regime for the appointment, regulation of service and disciplinary control of Public Officers forming part of the Executive. It placed a restriction on the discretion hitherto exercised by the President and the Cabinet of Ministers in relation to these matters and subjected such discretion to the Constitutional Council, the new body to be established under the amendment. The amendment was referred as an urgent bill for determination by the Supreme Court as to its constitutionality under Article 122 (1) of the Constitution[30].

The question before the Supreme Court was whether the amendment amounted to an erosion of the Executive power of the President and is thereby inconsistent with Article 3 read with Article 4 (b) of the Constitution. Article 3 states that the Sovereignty is in the People and is inalienable and Article 4 states that the Executive power of the People shall exercised by the President. The Supreme Court held that the President was empowered to appoint one member to the Constitutional Council and that though there was a restriction on the discretion of the President, the appointments to the Constitutional Council as per Article 41 A (1) (c) would be the act and deed of the President. The Court further held that the powers of appointment, transfer, control and dismissal of all heads of Department are vested in the Cabinet of Ministers, chaired by the President, though this power had to be exercised after ascertaining the views of the Public Service Commission. Moreover, the President would still appoint

[29] Article 126 (4).
[30] S.C. Determination No. 6/2010.

the Heads of the Army, Navy and Air Force, which is an essential part of the defence of Sri Lanka referred to in Article 4 (b).

These four matters taken together were sufficient for the Supreme Court to hold that though there was a restriction on the discretion of the President in relation to the appointment, dismissal etc. of Public Officers, the amendment does not erode the executive power of the President in a manner that is inconsistent with Article 3 read with Article 4 (b) of the Constitution. Therefore, there was no requirement of a Referendum in terms of Article 83 of the Constitution for the amendment to be effective.

Though the determination enabled the passing of a Constitutional amendment which received a resounding mandate in Parliament and was widely accepted as a step in the direction of good governance without the need for a referendum, the long term impact of a holding that the amendment did not alter Articles 3 and 4 of the Constitution will be seen later.

Seventeenth Amendment: The Aftermath

Following the coming into force of the Seventeenth Amendment to the Constitution, the non-appointment of members of the Constitutional Council, as well as several of the Commissions envisaged by the amendment, led to cases which challenged the President's power to appoint, or refrain from making appointments to these positions. These cases led to an interesting conflict between the duties of the President under the provisions of the new amendment and the immunity of the President under Article 35.

One such case is *Public Interest Law Foundation and Another v. Attorney General and Another.*[31] The Petitioners invoked the writ jurisdiction of the Court of Appeal seeking a writ of mandamus compelling the President to appoint certain members of the Election Commission. The Petitioners contended that consequent to the Seventeenth Amendment coming into force, the President is left with no discretion to appoint the Chairperson and the members

[31] (2004) 1 SLR 169.

of the Election Commission once the recommendations of the Constitutional Council had been made. The Petitioner argued that the basic features contained in Article 41B of the Seventeenth Amendment would be nullified if Article 35 were invoked. Sripavan J. cited a line of authority including *Mallikarachchi v. Shiva Pasupati,Attorney General, Edward Francis Silva v. ShiraniBandaranayake, Karunathilake v. DayanandaDissanayake, Commissioner of Elections* and *Victor Ivan v. Hon. Sarath N. Silva and others* in coming to the well established conclusion that Article 35 gives blanket immunity to the President from having proceedings instituted or continued against her in her official or private capacity, except in circumstances specified in Article 35 (3). The present case did not fall within the ambit of Article 35 (3), thus the Attorney General was not competent answer the allegations in the petition. Article 41B of the Constitution conferred the power to make appointments exclusively on the President and had to be read subject to Article 35 of the Constitution. Thus the Court of Appeal determined that the President could not be compelled to make appointments under the provisions of the Seventeenth Amendment to the Constitution and that the amendment had not altered the blanket immunity of the President from suit.

That the legal regime for appointments created by the Seventeenth Amendment to the Constitution did not alter the inability to institute proceedings against the President for matters related to such appointments was confirmed by the subsequent case of *Sumanasiri Liyanage v. H.E. Mahinda Rajapakse and others* S.C. FR No 297/2008. The Petitioners in this case challenged the non appointment of the Constitutional Council in terms of the former[32] Article 41A of the Constitution and the appointment of the fourth respondent, Mohan Pieris, President's Counsel, as the Attorney General, allegedly in violation of the procedure prescribed by the Seventeenth Amendment to the Constitution.

The Attorney General raised the preliminary objection that the petitioners could not maintain the application due to the immunity of the President enshrined in Article 35 of the Constitution. But the more interesting argument raised by the

[32] At the time the case was decided, the Seventeenth Amendment to the Constitution had been repealed.

Attorney General was that since the Seventeenth Amendment did not result in an erosion of the executive power of the President, the provisions relating to the constitution of the Constitutional Council should be deemed to be a directory requirement, in order to ensure a reading of the provisions of the seventeenth amendment which is consistent with Article 3 read with Article 4 (b) of the Constitution. The Attorney General also argued that the President should not be compelled to appoint the Council in view of the specific provisions of the Seventeenth Amendment that vests the discretion in the President to 'satisfy himself' that all the criteria contained in the Constitution pertaining to nominations to the Council had been adhered to. The argument was also made that the President was required to give consideration to the views of the Parliamentary Select Committee appointed with regard to the implementation of the seventeenth amendment before making appointments to the Constitutional Council, due to the responsibility of the President to Parliament in terms of Article 42 of the Constitution.

Unfortunately, by the time judgment was delivered, the Seventeenth Amendment to the Constitution was repealed and replaced by the Eighteenth Amendment and the questions in the petition became ones of purely academic interest. J.A.N. Silva CJ decided not to deal with the arguments pertaining to the nature of the duty of the President to appoint the members of the Constitutional Council and resorted to the all too familiar refrain of Presidential immunity to dismiss the petition. The Petitioners made an innovative argument that provisions such as Article 38 (2) (a) (i) of the Constitution, which deals with the process for the removal of the President where the President is guilty of intentional violation of the Constitution and where an inquiry and report of the Supreme Court may be necessitated, displays that the immunity conferred by Article 35 (1) is not absolute and that the jurisdiction of the Supreme Court may be invoked where intentional violation of the Constitution is involved. The Petitioners also relied on *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al* to argue that the challenge was on the act of the President and not on the President himself.

Silva CJ dismissed the former argument, holding that Article 38 merely provides the procedure for Parliament to hold the

President accountable to it for the due discharge of his powers, duties and functions under the Constitution or any written law as contemplated by Article 42 of the Constitution. He also dismissed the latter argument holding that the preliminary objection of the Attorney General was with respect to the petitioners challenging the President himself and not the act of the President as manifested by the President being made a respondent.

It may have been interesting to observe how the Courts would have responded to the argument that what was being challenged was the act of the President and not the doer, if the President was not cited as a respondent. However, as held by Wadugopitiya J. *in Victor Ivan v. Hon. Sarath Silva*, to challenge the act of the President, one must cite another party who relies on the act of the President to justify his conduct. Citing the fourth respondent who had been appointed to the post of Attorney General may not have been sufficient, since as held in *Victor Ivan* in the context of the appointment of the Chief Justice, such beneficiary of the President's act is not invoking the act of the President to justify any executive or administrative action committed by such person.

The Eighteenth Amendment: Redefinition or Reversal?

The Eighteenth Amendment to the Constitution had a profound impact on both the President's powers of appointment and the term of the Executive President. The President referred the Bill to the Supreme Court for determination of its constitutionality in term of Article 122 (1) (b) of the Constitution as an urgent bill in the national interest.[33] Several Petitioners appeared before the Court on the basis that numerous provisions of the Bill were inconsistent with Articles 3 and 4 of the Constitution, thereby requiring the Bill to be passed by the People at a Referendum in accordance with Article 83 of the Constitution.

Clause 5 of the Bill had the effect of repealing the Constitutional Council established by the Seventeenth Amendment to the Constitution and replacing the same with a Parliamentary

[33] S.C. (Special Determination) No. 01/2010.

Council consisting the Prime Minister, the Speaker, the Leader of the Opposition, a nominee of the Prime Minister and of the Leader of the Opposition respectively, both Nominees being Members of Parliament. The President was empowered to make appointments to key positions and commissions including that of the Chief Justice, the Elections Commission and the Public Service Commission. In making such appointments, the President 'shall seek the observations of the Parliamentary Council'. This was a far cry from the provisions of the Seventeenth Amendment, under which none of the specified appointments were to be made by the President, except on a recommendation of the Council. Counsel for the petitioners contended that the Constitutional Council was established with the intention of safeguarding the independence of the judiciary through placing a restriction on the discretion of the President in appointing judges. The removal of this safeguard was contrary to Article 4(c) of the Constitution which specified how judicial power was to be exercised.

The Courts however cited *Edward Francis William Silva, President's Counsel and Three Others v. Shirani Bandaranayake and Three Others* in holding that prior to the introduction of the Seventeenth Amendment, the discretion of the President in making judicial appointments was unfettered. It was held that the special determination of the Supreme Court on the Seventeenth Amendment had been very clear that the provisions of the amendment did not restrict the discretion of the President in a manner inconsistent with Article 4 (a) of the Constitution. Thus the Courts held that the proposed Eighteenth Amendment was only a process of redefining the restrictions that were placed on the President by the provisions of the Seventeenth Amendment and was in no way inconsistent with Article 3 of the Constitution read with Article 4.

It is submitted that in the author's view, the reasoning of the Supreme Court in the determination on the Eighteenth Amendment was legally tenable, given the reasoning of the Supreme Court in the special determination on the Seventeenth Amendment to the Constitution. The determination in the latter case, that the provisions of the Seventeenth Amendment did not erode the executive powers of the President, allowed the Court to reason *vis-à-vis* the Eighteenth Amendment, that a return to a

regime for appointments similar to that which existed prior to the Seventeenth Amendment was not inconsistent with Article 3 read with Article 4. The Eighteenth Amendment therefore, did not need to be approved by the People at a Referendum.

The Amendment that Never got Through: The Nineteenth Amendment of 2002

A case in which contrary reasoning was adopted was the determination on the Nineteenth Amendment to the Constitution.[34] The Bill introduced *inter alia* provisions curtailing the President's powers relating to the dissolution of Parliament, particularly when the President is not a member of the governing party, and the President's discretion to appoint a Prime Minister, with the President being mandated to appoint as Prime Minister a person nominated by a Resolution of Parliament. The Courts here took a refreshingly activist view and held that the relevant clauses of the Bill have to be examined in the light of Articles 3 and 4 of the Constitution, which enshrine the sovereignty of the people and the manner in which it should be exercised by the different organs of Government. This examination should be made in the light of the balance of power that has been struck in the Constitution and in the context of the separation of powers contained particularly in Article 4. The Courts further held that the organs of Government referred to in Article 4 must exercise their power only in trust for the people. In light of this the Court held that the dissolution of Parliament is a component of executive power of the People to be exercised by the President for the People. It cannot be alienated in the sense of being transferred, relinquished or removed from where it lies in terms of the Constitution. Thus the transfer of power from the President to Parliament as contemplated in the amendment violated Article 3, read with Article 4 of the Constitution and had to be approved by the people at a referendum.

What is noteworthy is the reference to concepts such as public power being held in trust for people and the separation of powers, in the absence of the same in the special determinations on the seventeenth and the eighteenth amendments. However, it must be

[34](2002) 3 SLR 85.

noted that in all three determinations, the use of these founding values or the lack thereof, ultimately resulted in entrenching the powers of the President.[35]

Observations: Powers of Appointment

The foregoing cases demonstrate the vast powers of the President pertaining to appointments to public office. Powers of appointment are a key factor which serves to entrench the power and influence of the President over the other organs of Government. The influence exerted on the persons holding public office is accentuated when the power of appointment is coupled with the power of removal. As per Interpretation Ordinance, the general rule is that an appointing authority has the power to remove an appointee[36]. Even where special rules for removal are provided, as in the case of the impeachment of a judge of the superior courts[37] it is contended for the reasons set out in the conclusion of this chapter, that the President exerts considerable influence over the same.[38]

The Supreme Court has not often resorted to the basic values and principles of the Constitution, nor adopted the various theories of Constitutional interpretation, to justify reading in mandatory restrictions to the President's power to make appointments to key positions. It is pertinent to note that this is in stark contrast to their counterparts in India. In *Supreme Court Advocates-on Record Association v Union of India*,[39] part of the famous 'Three Judges Cases',[40] the Supreme Court of India developed the principle that judicial independence means that no other organ of government would have a say in the appointment of judges. The Court then went on to create the collegiate system under which the

[35] For a critique of the Supreme Court Determination on the Nineteenth Amendment, See R. Edrisinha, '*The Constitutional Crisis :Cohabitation and Defence*' ***The Sunday Leader*** <http://www.thesundayleader.lk/archive/20031221/spotlight-2.htm> accessed 21st August 2014.
[36] Interpretation Ordinance (Cap.12): Section 14 (f).
[37] The 1978 Constitution: Article 107 (3).
[38] See Concluding Observations below.
[39] AIR 1994 SC 268.
[40] Also involving *S. P. Gupta v. Union of India* AIR 1982 SC 149and *In re* Special Reference 1 of 1998.

appointment and transfer of judges are decided by a forum chaired by the chief justice and four other judges of the Supreme Court. Whilst such a collegiate system has no place in the Indian Constitution and could be criticised as a step too far in judicial activism, it is submitted that the reasoning adopted by the court on the fundamental importance attached to the independence of the judiciary could be adopted in espousing the more moderate approach of reading in mandatory requirements in the exercise of the President's powers of appointment.[41]

The amendment that heralded a drastic change to the President's powers of appointment unfortunately lasted only a few years and was not implemented even during its existence. The Supreme Court determination that the Seventeenth Amendment did not violate Article 3 read with Article 4 (b) allowed the amendment to be repealed with one fell swoop. It is contended that the Seventeenth Amendment did alter the powers of the Executive in a manner that violated Article 3 read with Article 4 (b) and that the Supreme Court should have determined as such and that the amendment be approved by the People at a Referendum. This would have entrenched the salutary provisions of the seventeenth amendment making it much more difficult to repeal. This unfortunately did not take place and the Eighteenth Amendment reversed almost *in toto* the progress achieved by the Seventeenth Amendment. Despite the determination on the Eighteenth Amendment being arguably sound in law, given that the party led by the President had control of over two-thirds of the seats in Parliament, the Supreme Court was the only institution that was capable of preventing the Executive from reversing the provisions of the Seventeenth Amendment to the Constitution. While some might argue that the Court was powerless to prevent this, it may also be asserted that the Court lacked the judicial will to do so.

[41] For an argument that the Courts should get involved in resolving the power tussle between the President and the Senate in the United States regarding appointments, see '*Developments in the Law: Presidential Authority*' (2012) 125 ***Harvard Law Review*** 2057.

Emergency Regulations

The power of the President to promulgate emergency regulations under the Public Security Ordinance as per Article 155 of the Constitution has been a rare area in which the Court has been willing to exercise its judicial power.

Emergency Regulations not to violate the Constitution

An important case concerning emergency regulations is *Joseph Perera v. Attorney General.*[42] The police arrested the petitioners after dispersing a youth meeting they had organised. The respondents sought to justify the arrest and detention on the basis of powers vested in the police by the Emergency Regulations. The Courts held that Article 155(2) of the Constitution empowers the President to make regulations overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution. Thus, the President's legislative power of making Emergency Regulations is not unlimited, and it was not competent for the President to restrict via Emergency Regulations, the exercise and operation of the fundamental rights of the citizen beyond what is warranted by Articles 15(1) to (8) of the Constitution.

Moreover, the Court held that the Emergency Regulations owe their validity to the President's subjective satisfaction that it is necessary in the interest of public security and public order, and that it is not for the Court to question bona fide regulations made to meet the challenges of the situation. However, the situation is different altogether when the impugned regulation concerns the Fundamental Rights enshrined in the Constitution. In such a case, the Court was competent to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by Emergency Regulation and the object sought to be achieved by the same. If the court does not find any such nexus or finds that activities which are not pernicious have

[42](1992) 1 SLR 199.

been included within the sweep of the restriction, the court was not barred from declaring such Regulation void as infringing Article 155(2) of the Constitution.

Accordingly, the Court found that the present Regulations confer unguided and unfettered discretion upon an executive authority without narrow, objective and definite standards of guidance. Thus the Regulations did not fall within the restrictions to the freedom of speech enshrined in Article 15 of the Constitution and were invalid. They were also held to violate Article 12 of the Constitution, as they would permit arbitrary and capricious exercise of power which is the antithesis of equality before the law.

Regulations to be in the Proper Form

We have seen in *Karunathilake v. Dayananda Dissanayake, Commissioner of Elections et al,* that Mark Fernando J. entertained a challenge on an Emergency Regulation on the basis that it was the decision and not the person of the President that was being challenged.

Fernando J. in fact went a step further in his analysis of the validity of the acts of the President under the PSO in *Karunathilake.* While declining to rule on the validity or otherwise of the Proclamation issued by the President, his Lordship ruled that the Emergency Regulation made thereunder was invalid. He held that, in as much as emergency regulations are a species of delegated legislation which must be in the form of a rule and in as much as the impugned regulation had the character of an order, it was not an emergency regulation at all. There was no legal provision authorizing the making of an order.

Regulations must be for the Purposes specified in the Public Security Ordinance

In *Wijesekera and Others v. Attorney General* [43] the petitioners contended that the proclamation declaring that Section 37 (1) of the Provincial Councils Act shall apply to the Northern and Eastern Provinces, resulting in their merger for administrative

[43] (2007) 1 SLR 38.

purposes violated their rights under Article 12 (1) of the Constitution. The Courts held that the Power reposed in the President by S5 of the Public Security Ordinance to make Emergency Regulations amending any law, has to be read subject to the provisions of Art 155(2) and that an Emergency Regulation cannot have the effect of amending or overriding the provisions of the Constitution. The amendment introduced by the Regulation in question had the effect overriding the provisions of Art 154(A)(3) which only empowers the Parliament to provide by law for the merger of two or three provinces. Moreover, the impugned Emergency Regulations could not be reasonably related to any of the purposes provided in Section 5 (1) of the Public Security Ordinance. It had manifestly been made for the collateral purpose of amending an unrelated law by means of which the President purported to empower himself to act in contravention of specific conditions laid down in the law. It was held that the clause in Article 80 (3) of the Constitution, barring judicial review does not apply to Emergency Regulations, being in the nature of delegated legislation and that the impugned Emergency Regulation was ultra vires and made in excess of the power reposed in the President. It was therefore invalid and of no effect or avail in law.

The foregoing cases demonstrates that despite Emergency Regulations being used frequently by the President, the Courts have been prepared to question the *vires* of the act of the President to promulgate Emergency Regulations, by reference not only to the provisions of the Constitution, but also the form of such Regulations and the purposes for which such Regulations may be promulgated as per Section 5 (1) of the PSO. Thus, at least in the sphere of Emergency Regulations, the Courts have asserted the supremacy of the Constitution in curbing the powers of the President, and clear in their stance that such regulations are a form of delegated legislation and are subject to judicial review. The Courts have not been shy to declare such regulations invalid on the basis that they were made ultra vires.

Power to enter into Treaties and Covenants

A case in which the powers of the President were ostensibly circumcised was *Sinharasa v. The Attorney General*[44]. In the context of an application for revision of a Supreme Court Judgment in the light of a finding of the Human Rights Committee under the Optional Protocol of the ICCPR, the Courts held that the President had acted ultra vires in acceding to the Optional Protocol of the ICCPR, and making a declaration thereunder. His Lordship Sarath Silva CJ held that Articles 3 and 4 formed the effective framework of the Constitution and that as evinced by such Articles, the Sri Lankan Constitution is cast in a Republican mould where Sovereignty is reposed in the People. It was noted that there was a functional separation in the exercise of the power derived from the Sovereignty of the People by the three organs of Government and that such organs do not have a plenary power that transcends the Constitution. Therefore, the exercise of power was circumscribed by the Constitution and written law that derives its authority there from.

Having cited these principles, his Lordship held that Article 33 (f) of the Constitution limits the power of the Executive to bind the Republic qua state. The Article empowers the President *"to do all such acts and things; not being inconsistent with the provisions of the Constitution or written law as by international law, custom or usage he is required or authorized to do." Thus, the President is empowered* to enter into a treaty or accede to a Covenant, the contents of which are not inconsistent with the Constitution or written law. His Lordship held that the limitation interposes the principle of lega1ity, being the primary meaning of the Rule of Law. It was held that the accession to the Optional Protocol conferred public law rights and was an exercise in legislative power by the President, contrary to Article 4 (a) of the Constitution under which the legislative power of the people was to be exercised by Parliament and Article 76, under which Parliament may not abdicate its legislative power. The accession was also held to be a conferment of judicial power to the Human Rights Committee in

[44]S.C. SpL (LA) No. 182/99.

Geneva, contrary to Article 3 read with Article 4 (c) of the Constitution, which deals with the manner in which judicial power is to be exercised.[45] Therefore the accession to the Optional Protocol was inconsistent with the provisions of the Constitution and was in excess of the power of the President as contained in Article 33(f) of the Constitution. The accession and declaration therefore did not bind the Republic qua state and had no legal effect within the Republic.

This case is an illustration of the willingness of the Supreme Court to resort to the basic structure of the Constitution and principles such as the separation of powers, the rule of law and constitutionalism to narrow the scope of the President's powers if it so wished.

Concluding Observations

As we look back over the jurisprudence of the superior courts on the subject of Presidential powers over the three and a half decade lifespan of the Second Republican Constitution, it is a fair argument to make that the "overmighty executive" has become even mightier, in spite of the Supreme Court's sole and exclusive jurisdiction to interpret the Constitution and keep the executive in check.[46] In fact, it has been argued that the makers of the Second Republican Constitution envisaged a hybrid Presidential – Parliamentary system[47] where executive power vested in the President **and** the Cabinet of Ministers, all of whom (other than the President) have to be members of the legislature.[48]

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[45] It maybe argued that this point was wrongly decided as the power of the Human Rights Committee only extends to making recommendations and not binding judicial decisions

[46] For a discussion of the developments relating to the Executive Presidency in the post war era, See M. Gomez (2014) ***Reform and Reconciliation in Post-War Sri Lanka*** (2011) ***Asian Yearbook of International Law***, Vol.17, 117,127 – 128.

[47]See R. Edrisinha, note 31; A.J. Wilson (1980) ***The Gaullist System In Asia*** (Macmillan): pp.46 & 208; H.M. Zafrullah (1981) ***Sri Lanka's Hybrid Presidential and Parliamentary System & the Separation of Powers Doctrine*** (University of Malaysia Press).

[48] This is unlike the case in France, where the members of the cabinet are not members of Parliament

In the Supreme Court Determination on the Thirteenth Amendment to the Constitution,[49] Wanasundera J. in his dissenting opinion held that

> "any attempt to bypass it (the cabinet) and exercise executive powers without the valve and conduit of the cabinet would be contrary to the fundamental mechanism and design of the constitution. It could even be said that the exercise of executive power by the President is subject to this condition… This follows from the pattern of our constitution modeled on the previous constitution, which is a parliamentary democracy with a cabinet system…To take any other view is to sanction the possibility of establishing a dictatorship in our country; with a one man rule."[50]

However, the Supreme Court has not subsequently taken cognizance of the hybrid nature of executive power in the Constitution, nor used reasoning akin to that of Wanasundere J. above, to reign in the powers of the Executive President.

Presidential immunity has been used as an impregnable shield and the powers of appointment of the President have been deployed as the sword in the battle to entrench vast powers in the office of the President. The potential Achilles heel to the office of the President, the Supreme Court, has been unable to resort to the principles underlying the Constitution and the doctrine of Constitutionalism to keep the powers of the President in check, except for limited instances such as emergency regulations and in fashioning out narrow exceptions to Presidential immunity.

The Supreme Court has selectively resorted to the values underpinning the Constitution in cases such as *Singarasa*and the Special Determination on the Nineteenth Amendment to the Constitution, the latter case ironically serving to safeguard the powers of the President. This demonstrates that the Court is capable of applying such principles to shape the powers of the

[49](1987) 2 SLR 312.
[50](1987) 2 SLR 312, 341.

President in accordance with such values. The will to do so however, has been lacking. The question then arises as to why such will has been lacking. It is contended that one of the key reasons for this unwillingness to check the powers of the President is the President's power to appoint the judges of the Superior Courts.

Though Judges are expected to have security of tenure after their appointment and though as Marsoof J. pointed out in *Attorney General v. Shirani Bandaranayake and Others*[51] the power to impeach a Judge of the Superior Courts through the process outlined in Article 107 of the Constitution is vested jointly in the Parliament and the President, the power the President commands over the Parliament, particularly if the governing party is the party to which the President belongs, enables the President to significantly influence the impeachment process[52]. The President's power over parliament is in turn fuelled by the power of the President to make appointments to the Cabinet of Ministers and the hierarchical structure of Sri Lanka's political parties.

Therefore, it is asserted that an appointment mechanism that can ensure independence whilst retaining accountability, resembling the procedure introduced by the Seventeenth Amendment to the Constitution, is essential if the Courts are to fulfil the role of restraining the powers of the Executive President. The primary application of the doctrine of separation of powers elucidated by Montesquieu lies in relation to the independence of the judiciary from legislative and executive influence. As Blackstone has observed, the main preservation of public liberty in England consists "in the distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown".[53] In fact, as pronounced by the Privy Council in relation to the 1947 Constitution in *Liyanage v. the Queen*[54] "the importance of securing the independence of the

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[51] SC Appeal no. 67/2013.

[52] This is amply demonstrated by the context surrounding the recent impeachment of Chief Justice Shirani Bandaranayake as well as impeachment attempts in the past, particularly the impeachment process initiated against Neville Samarakoon CJ.

[53] ***Blackstone's Commentaries*** (12th Ed.)1, 269.

[54] (1965) 68 N.L.R. 265.

judges and maintaining the dividing line between the judiciary and the executive and also, one should add, the Legislature, was appreciated by those who framed the Constitution". Unless such appreciation is recognized or at the very least read into the Sri Lankan Constitution, and the independence of the judiciary guaranteed in an effective manner, the powers of the President will continue to grow, untrammelled and unchecked by the other organs of government.