IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 126 of the Constitution.

SC FR 163/2019

Janath S. Vidanage
Petitioner

Vs.

1. Pujith Jayasundara
   Inspector General of Police

and 3 others.
Respondents

SC FR 165/2019

Nagananda Kodithuwakku
Petitioner

Vs

1. Hon. Maithripala Sirisena
   The Minister of Defence

and 8 others
Respondents

SC FR 166/2019

Saman Nandana Sirimanne
Petitioner

Vs.

1. Pujith Jayasundara
   Inspector General of Police

and 3 others
Respondents

SCFR 184/2019

1. Jude Dinuke Laknath Perera

and 3 others
Petitioners

Vs.

1(a) Gotabaya Rajapakse
His Excellency the President
Presidential Secretariat
Galle Face, Colombo 01.

and 48 others
Respondents

SCFR 188/2019

P.K.A.D. Sunil Perera
Petitioner

Vs.

1. Attorney General
Attorney Generals' Department,
Colombo 12.
(On behalf of)
Maithripala Sirisena
President and Minister of Defence
(as per the 19th Amendment)

and 15 others
Respondents

SCFR 191/2019

1. Rev. Fr. Galgana Mestrige Don Henry
Marian Ashok Stephen.

and 2 others
Petitioners

Vs.

1. Hemasiri Fernando
Former Secretary to the Ministry of Defence

and 12 others
Respondents

SCFR 193/2019

Hilmy Ahamed
Petitioner

Vs.

1. Hon. Attorney General
Attorney Generals' Department,

1A. Mithripala Sirisena
(Former President of Sri Lanka)

and 12 others
Respondents

SC.FR 195/2019

Mr. Saliya Pieris,
President's Counsel,
The President,
Bar Association of Sri Lanka,

and 4 others
Petitioners

Vs.

1. Gen. S.H.S. Kottegoda (Retd.)
Secretary, Ministry of Defence,

and 93 others
Respondents

SCFR 196/2019

Seerangan Sumithra
Petitioner

Vs.

1. Mr. Ranil Wickremesinghe
Hon. Prime Minister
Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation
Northern Province Development and Youth Affairs

and 43 others
Respondents

SC FR No. 197/19

Dr. Visakesa Chandrasekaram,
Petitioner

Vs

1. Mr. Ranil Wickramasinghe,
Hon. Prime Minister of the Republic, Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation,
Northern Province Development and Youth Affairs,

and 44 others.
Respondents

SC FR 198/2019

Pussewela Kankanamge Kasun Amila Pussewela.
Petitioner

Vs

1. Mr. Ranil Wickramasinghe,
Hon. Prime Minister of the Republic, Minister of National Policies, Economic Affairs, Resettlement and Rehabilitation,
Northern Province Development and Youth Affairs,

and 43 others.
Respondents

SCFR 293/2019

Moditha Tikiri Bandara Ekanayake,
Attorney-at-Law
Petitioner

Vs.

1. Hemasiri Fernando,
Former Secretary to Ministry of Defence,

and 43 others
Respondents

Before : Jayantha Jayasuriya, PC, CJ

B.P. Aluwihare, PC,J

L.T.B.Dehideniya, J

Murdu N.B. Fernando, PC,J

S. Thurairaja, PC,J.

A.H.M.D.Nawaz, J .

A.L. Shiran Gooneratne, J

Counsel : Gamini Perera with Ishara Gunawardana, Leel Gunawardana and Wijitha Salpitikorala for the Petitioners in SCFR No. 163/19 & 166/19.

Dharshana Weraduwage with Dhanushi Kalupahana and Ushani Atapattu for the Petitioner in SCFR 165/2019.

Wardani Karunaratne for the Petitioner in SC.FR.No.184/19.

Lakshan Dias with Maneesha Kumarasinghe and Dayani Panditharathne for the Petitioner in SCFR 188/19.

Saliya Peiris, PC with Thanuka Nandasiri for the Petitioners in SCFR 191/19.

Rushdhie Habeeb with Mrs. Shahla Rafeek for the Petitioner in SC.FR.No.193/19.

Sanjeewa Jayawardena, PC with Ms. Dilumi de Alwis, Charitha Rupasinghe, Ms. Lakmini Warunwithana, Niranjan Arulpragasan, Milhan Mohammed, Ms. Ridmi Benaragama and Gimhani Arthanayaka, Ms. Ranmali Meepagala & Eranga Tilekeratne for the Petitioner in SC.FR.No.195/19.

Thanuka Nandasiri on behalf of Mr. Kameel Maddumage with Nuwan Bopage for the Petitioner in SC.FR.No.196/19, 197/19 & 198/19.

Manohara de Silva, PC with Mrs. Nadeeshani Lankatileka for the Petitioner in SC.FR. 293/19.

Priyantha Nawana, PC, SASG with Nerin Pulle, PC, ASG, Dileepa Peiris, DSG, Dr. Avanthi Perera, SSC, Sureka Ahmed, SC and Induni Punchihewa, SC for the 3rd 4th Respondents in SCFR 163/19 & 166/19. 6A & 7th Respondent in SCFR 165/19. 34th Respondent in SCFR 184/19. 6th , 9th 15th and 16th Respondents in SCFR 188/19. 4th, 11th,12th and 13th Respondents in SCFR 191/19. 1st, 6th & 14th Respondents in SCFR 193/19. 4th, 44th, 48th, 52nd , 54th, 55th, 56th, 77A, 78A,84A and 64th Respondents in SCFR 196/19, 197/19 , 197/19. 3rd, 4th, 35th, 42nd and 44th Respondents in SCFR 293/19.

Suren Fernando with Sanjith Dias for the 2nd Respondent in SCFR No.165/19, 184/19, 188/19 & 193/19, for 6th Respondent in SCFR 191/19 & 293/19, for 8th Respondent in SCFR 195/19 and for the 1st Respondent in SCFR 196/19, 197/19 &198/19.

Viran Korea with Niran Anketel, Dushinka Nelson and Thilini Vidanagamage for the 1st Respondent in SCFR163/19 &166/19,

for the 2nd Respondent in SCFR 293/19, for 3rd Respondent in SCFR 191/19 &195/19, for 5th Respondent in SCFR 188/19, for 6th Respondent in SCFR 165/19, for 7th Respondent in SCFR 196/19, 197/19 & 198/19, for 12th Respondent in SCFR 193/19 and for 33rd Respondent in SCFR 184/19.

Mohan Weerakoon PC with Mr. Prabuddha Hettiarachchi for 2nd Respondent in SCFR 163/19,16 for 3rd Respondent in SCFR 188/19, for 1st Respondent in SCFR 191/19 and 293/19, for 5th Respondent in SCFR 193/19, for 6th Respondent in SCFR 196/19, 197/19 and 198/19, and for 32nd Respondent in SCFR 184/19.

Faizer Musthapa , PC with Shahida Barrie, Pulasthi Rupasinghe, Amila Perera, Ashan Bandara and Dhananjaya Perera for the 1st Respondent in SCFR 165/19, 184/19 & 193/19, for 44A Respondent in SCFR 196/19, 197/19 & 198/19, for 66A Respondent in SCFR/195/19.

Dulindra Weerasuriya PC with Chamith Marapana and Saman Malinga for the 12th Respondent in SCFR 184/19, 7th Respondent in SCFR 188/19 and 293/19, 10th Respondent in SCFR 195/19, 3rd Respondent in SCFR 193/19 and 2nd Respondent in SCFR 196/19, 197/19 & 198/19.

Sudarshana Gunawardana for the 10th Responded in SCFR 188/19, 7th Respondent in SCFR 193/19, 5th and 14th Respondents in SCFR 196/19, 197/19 and 198/19. 36th Respondent in SCFR 293/19, 38th, 39th and 45th Respondents in SCFR 195/19.

K.V.S. Ganesharajan with Sri Ranganathan Ragul and Nasikethan for the 94A Respondent in SCFR195/19.

Argued on : 20.07.2022, 27.07.2022, 02.08.2022

Decided on : 26.09.2022

The quintessential question that has arisen before Court in the course of the hearing of the substantive applications is whether the immunity afforded to an incumbent President in terms of Article 35 (1) of the Constitution must inure to the benefit of Mr. Ranil Wickremesinghe who holds the office of the President as at present. It is axiomatic that all the proceedings in the fundamental rights applications commenced long before Mr. Ranil Wickremesinghe assumed the office of President. As opposed to the submissions made on behalf of Mr. Wickremasinghe that the immunity delineated in Article 35 (1) accrued in his favour when he became both the Acting

President and subsequently the President of the country, there were rival submissions made against the proposition and this Court will assay them but not before we have set out the lineal trajectory of the immunity provision since the year 1978.

The arguments for and against immunity have pivoted on Article 35 of the 1978 Constitution as it stands under the 20th Amendment to the Constitution.

Provisions of Article 35 (1) as enacted by the 20th Amendment to the Constitution

Article 35 (1) of the Constitution, as it now stands under the 20th Amendment, reads as follows:

> *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 in his official or private capacity;*
>
> *Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President in his official capacity;*
>
> *Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under paragraphs (g) of Article 33.*

It must be stated that the standalone Article 35 (1) of the Constitution sans the two provisos, as it now stands under the 20th Amendment, is a re-enactment of the originally existing Article 35 (1) of the 1978 Constitution without any material alteration. The 19th Amendment which became effective on 15.05.2015 carried a different wording in regard to the term "proceedings". Whereas the original Article 35 (1) of the 1978 Constitution and the current Article 35 (1) after the 20th Amendment confer immunity from suit in any type of "proceedings", the previously existing Article 35 (1) of the 19th Amendment conferred immunity from suit in respect of "civil or criminal proceedings". Thus one could see that the use of the expression **"no proceedings**" in the old Article 35 (1) and the identical provision of the 20th Amendment puts it beyond doubt that as long as a person holds office as President, he would stand outside the pale of not only criminal and civil proceedings but also judicial review.

Though this explicit formulation in Article 35 (1) of the 20th Amendment is sufficient to confer immunity from suit in respect of fundamental rights applications, an exception is however provided for in the first proviso to the Article in that in an application under Article 126 of the Constitution it is not the President who should be made a respondent thereto, but it is the Attorney General in respect of anything done or omitted to be done by the President in his official capacity. In other words the first proviso to Article 35 (1) excludes the application of President's immunity **where a person complains to the Supreme Court under Article 126 that the act or omission *qua* President** amounts to a violation of a fundamental right. Such an action should be though commenced against the Attorney General.

It is to be pointed out that this exception had its provenance in the 19th Amendment (the first proviso to Article 35 (1) therein) and it continues to survive the 20th Amendment. It is pertinent to observe at this stage that Clause 5 of the 20th Amendment Bill to the Constitution sought to remove this constitutional provision (the first proviso to Article 35 (1)) that had permitted recourse to the Supreme Court in regard to an alleged infringement or imminent infringement resulting from an act of the President. The nub of the 20th Amendment Bill was to restore the status quo ante that had prevailed prior to the enactment of the 19th Amendment. In other words Clause 5 of the 20th Amendment to the Constitution Bill did not contain a proviso to the President's immunity as was found in the 19th Amendment. The Supreme Court observed in a majority determination as follows:[1]

> *Thus it is seen that our Constitution which is founded on rule of law does not tolerate non-justiciability. It is premised on the very basic tenet that every injury must be remedied. If the avenue for redress is to be taken away, that is a matter that directly impinges on the fundamental rights of the people as found in Article 3 of the Constitution…*
>
> *Therefore, the removal of the existing right guaranteed through the Constitution to the people to invoke the jurisdiction of the Supreme Court under Article 126 in relation to acts of the President is inconsistent with Articles 3 and 4 of the Constitution. Hence we*

[1] SC SD 01-39/2020

determine that clause 5 in its current form requires the approval of the people at a referendum.

In light of the above determination of the Supreme Court that the removal of the first proviso to Article 35 (1) that had been introduced in the 19th amendment constituted an inconsistency with the Constitution, the bill was eventually passed with the above proviso having been restored. Thus the first proviso to Article 35 (1) continues *proprio vigore* in the 20th Amendment enabling the impugnment of President's acts or omissions *qua* President in fundamental rights applications.

Thus it is so ingrained in both the 19th and 20th Amendments that the first proviso to Article 35 (1) entails that it is only the action or inaction of the incumbent President *qua* President that could be challenged for infringement or imminent infringement of fundamental rights protected under Chapter III or IV of the Constitution.

It is worth recounting at this stage that the argument advanced by the learned Counsel for the incumbent President in favour of immunity and that of other learned President's Counsel who argued against immunity both riveted on Article 35 (1) and its first proviso.

Whilst the argument for immunity relied for its strength and stay on the very words of Article 35 (1), the contention against immunity drew attention to the fact that it is only the acts and omissions *qua* President that would qualify for immunity. In other words the argument against conferral of any immunity on the incumbent President focused on the unavailability of immunity for an executive or administrative action that emanated from a different capacity other than that of a President. The learned Counsel pointed out that these fundamental rights applications impugn the alleged omission of the incumbent President, at a time when he was the Prime Minister of the country in 2019 -the *annus horribilis* in question. In such a scenario it was argued by Shammil Perera P.C, Manohara de Silva P.C Saliya Peiris P.C and Faiszer Mustapha P.C that the inaction complained of was from an executive omission *qua* Prime Minister and such a factual matrix would not attract the immunity afforded in Article 35 (1) of the Constitution.

On the contrary Mr. Suren Fernando the learned Counsel for the incumbent President has invited this Court to decline jurisdiction and discontinue proceedings in respect of Mr. Ranil

Wickremesinghe because no proceedings shall be continued against him since he has assumed the office of President. Mr. Priyantha Nawana P.C Senior Additional Solicitor General has associated himself and made submissions to the like effect. Mr. Faiszer Mustapha P.C who appeared for the former President Maithripala Sirisena advanced the argument of absurdity if this court were to hold that no proceedings could be had against a former Prime Minister whilst a former President would have to defend himself in respect of the allegations made against him for alleged violations of fundamental rights.

All these arguments partake of the fundamental question of constitutional interpretation surrounding Article 35 (1) of the Constitution and its first proviso.

Before we deal with these principal arguments, it is apposite to allude to the constitutional litigation and jurisprudence that have emerged out of the seemingly clear words of Article 35 (1), since the provision of Article 35 (1) sans its provisos, as it stands now, is identical to the original Article 35 (1) of the 1978 Constitution. The case law we assay presently arose under the original Article 35 (1) of the 1978 Constitution.

But a distinguishing aspect of this case has to be borne in mind. While the previous case law alludes to the acts or omissions *qua* President of the previous holders of the office, the question before us in this case is whether proceedings must be discontinued in relation to a former Prime Minister who has since become the President. Could his acts or omissions allegedly in the capacity of the office of Prime Minister continue to be challenged now that he has become the President? Is the immunity in Article 35 (1) extensive enough to suspend the fundamental rights proceedings, which began long before he became the President? This is the pith and substance of the jurisdictional question that has arisen before us and before we proceed to answer this question, we would indulge in an analysis of the scope and extent of the immunity provision that has had a chequered history.

The decision of a bench of 9 judges of the Supreme Court in ***Visuvalingam v Liyanage*** *(No 1)*[2] was the first case that grappled with the original Article 35 (1) of the 1978 Constitution and in a sense a watershed in the interpretation of the Presidential immunity conferred by Article 35 of the Constitution. Though the then Article 35 (1) did not contain provisions similar to the first

[2] (1983) 1 Sri LR 203

provisos of the 19th and 20th Amendments and thus proceedings could not be taken even against the Attorney General as the representative of the State for alleged violation of fundamental rights by the President, Justice S. Sharvananda (as His Lordship then was) gave an indication of the extent of the immunity in the case when he stated:

> *"…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]

Justice Sharvananda further added:

> *"[T]hough the President is immune from proceedings in a 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]

The conclusion to be arrived at in the light of the ruling of the Supreme Court as highlighted above is that in terms of Article 35 (1) of the Constitution, as long as a person holds office as President of the country, he cannot be impleaded in court for acts or omissions in his official or private capacity. However if someone relies on the lawfulness of the act, he bears the obligation of proving it lawful.[5]

Rationale for conferring immunity

Be that as it may, what is germane to the resolution of the issue before this Court is the purposive construction that the Supreme Court placed on Article 35 (1) of the Constitution. In ***Mallikarachchi v Shiva Pasupati***[6] Chief Justice Sharvananda 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

[3] Ibid: p.210
[4] Ibid.
[5] Also vide *Karunathilaka v Dayananda Dissanayake, Commissioner of Elections* (Case No 1) 1999 (1) Sri LR 157 at 177
[6] *Mallikarachchi vs. Shiva Pasupati* (1985) 1 SLR 74.

vested with paramount power and duties, he should be given immunity in the discharge of his functions." [7] Enunciating 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]

Pursuant to this reasoning which underpinned the purpose of immunity, 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. His Lordship went on to say:

> *"It is…. 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 there from being harassed from 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. That is the rationale for the immunity cover afforded for the President's actions, both official and private."*[9]

Thus, in the elucidation of the intent and purpose underlying the immunity the Chief Justice attributed the conferral of immunity to two distinct arguments. First, the President – for the duration of his term in office – ought not to be answerable to the jurisdiction of any court, 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.

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

In ***Kumaratunga v Jayakody and Another***[10] the Supreme Court observed that Article 35 (1) of the 1978 Constitution provided a wider ambit of immunity than the scope of immunity provided under Article 23 (1) of 1972 Constitution. Under the first autochthonous Constitution the immunity applied to the institution or continuation of civil or criminal proceedings while any person held the office of the President of the Republic. The extent of immunity operated in respect of anything that the President had done, or omitted to have done during the period that he had held that office as the President of the Republic.

Article 23 (1) of the 1972 Constitution read as follows:

> "*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*".

The corresponding Article 35 (1) of the 1978 Constitution and the 20th Amendment mirrored the same language except in the collocation of the words "**no proceedings**" which replaced the expression "**no civil or criminal proceedings**" of Article 23 (1) of the 1972 Constitution. But it is worthy of note that Article 35 (1) of the 19th Amendment adopted the very words of Article 23 (1) of the 1972 Constitution. As we said before in this order, the all embracing collocation "**no proceedings**" in the 20th Amendment prima facie aims at prohibition of judicial review but in two provisos to the main sub article of the 20th Amendment, derogations have been enacted. The first proviso excludes the application of President's immunity where a person claims by an application under Article 126 that a violation of his fundamental rights has occurred. The second proviso excludes from the Supreme Court its own jurisdiction to pronounce upon the exercise of the President's power to "declare war and peace" under Article 33 (2) (g) of the Constitution. The 20th Amendment, like its predecessor the 19th Amendment, also stops the running of the period of limitation during the time the immunity applies-see Article 35 (2) of the Constitution which reads as follows:

> "*Where the 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 the period of time prescribed by that law*…."

[10] (1984) 2 Sri L.R 45

From the foregoing discussion it is clear that apart from the first proviso to Art.35(1) of the Constitution which takes away the immunity of the President, there are four other instances given in Art.35 (3) in which immunity from suit is taken away. These four instances are set out in Art.35(3) of the Constitution thus:

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

First, where the President under Article 44(2) of the Constitution "…assigns to himself any subject or function not assigned to any Minister…" proceedings may be instituted against the President, in that capacity regarding matters arising out of that Ministry. However, such proceedings may be instituted against the Attorney General in his capacity as the Principal Law officer of the State who has a right to appear before the Court on behalf of the President.

Second, Parliament has a power to move a Resolution alleging that the President is "permanently incapable of discharging the functions of his office by reason of physical or mental infirmity or that the President has been guilty of" one of the offences enumerated in the five sub-paragraphs of Article 38 (2)(a). In order to invoke this power the Resolution must be signed by "not less than two thirds of the whole number of Members of Parliament…. Or not less than one-half of the whole number of Members of Parliament". In the latter case the Speaker of the House plays a key role. Where not less than one-half of the members have signed the Resolution the Speaker must be satisfied that, "such allegation or allegations merit inquiry and report by the Supreme Court". In either event the Speaker is obliged to refer the matter to the Supreme Court for inquiry and report. In either category of references, the Supreme Court is allowed a maximum period of two months within which the Report containing the decision of the Supreme Court must be

submitted to the Speaker. The Constitution requires that the hearings be held before at least five judges, of whom the Chief Justice shall be one of them, unless he himself decides not to sit." The hearing shall be in private although the court has the power to hear in open sessions.

The Report presented to Parliament shall be voted on and if it proves to be adverse to the President, and the Resolution to remove the President is voted upon "by not less than two – thirds of the whole number of Members (of Parliament) voting in its favor", he shall then be removed from office, and shall under the Constitution, cease to be the President. This is a process that the Constitution provides for the impeachment of a President.

At the hearing before the Supreme Court "…the President shall have the right to appear and to be heard in person or by an Attorney at law…" The President however may not be compelled to appear if he wishes not to take any part in the proceedings. He still has the right not to take part in the proceedings, notwithstanding the fact that his immunity has been excluded from application at those proceedings.

Third, the President has no immunity from proceedings where his own election as President is being challenged under Article 130 (a) or the validity of a referendum.

Fourth, in proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament, another exception is enacted in regard to the immunity found in Article 35 (1).

It repays one's attention that the above are the only exceptions in the Constitution as regards the immunity of a President.

In a nutshell, in all proceedings that fall under Article 35(3), the application of the presidential immunity is excluded.

The exceptions mentioned above are the constitutional exceptions to the application of presidential immunity.

As is apparent now, the above discussion can be summed up pithily. The Court has already discussed the scope and extent of Article 35(1) which accords immunity from suit to the President. We took this opportunity to comprehensively deal with Article 35(1) in order to show that the blanket immunity that the President enjoyed under the original Article 35(1) of the 1978

Constitution has since become qualified or been eroded. In fact, the changing contours of immunity provisions in Sri Lanka have been commented upon in the case of ***Rajavarothiam Sampanthan v Attorney General*** [11] where the Supreme Court observed that the decision in ***Mallikarachchi v Shiva Pasupathi*** (supra) relied on by the Attorney General in the case, is of no relevance, as the absolute immunity granted to the President did not exist anymore after the Nineteenth Amendment. As has been made clear, even when the Constitution afforded absolute immunity to the President, his actions have been reviewed on the basis that 'immunity shields only the doer and not the act' – see ***Karunathilaka v Dayananda Dissanayaka***[12] Justice Mark Fernando pertinently observed in the case at page 176

> *"The immunity conferred by Article 35 is neither absolute nor perpetual. While Article 35(1) appears to prohibit the institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35(3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires the proceedings be instituted against the Attorney-General. What 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. It is also relevant that immunity endures only "while any person holds office as the President". It is a necessary consequence that immunity ceases immediately thereafter, indeed it would be anomalous in the extreme if immunity for private acts were to continue. Any lingering doubt about that is completely removed by Article 35(2), which excludes such period of office, when calculating whether any proceedings have been brought within the prescriptive period. The need for such exclusion arises only because legal proceedings can be instituted or continued thereafter. If immunity protected a President even out of office, it was unnecessary to provide how prescription was to be reckoned."*

[11] *Rajavarothiam Sampanthan v Attorney General*, SC FR 351-356/2018, and 358-361/2018, SCM 13 December 2018

[12] (1999) 1 Sri.LR 157.

Despite the attenuation of immunity by constitutional amendments and judicial pronouncements in the above manner, the immunity from proceedings does exist in its uncompromising terms of Article 35 (1) and it is this provision that is invoked to discontinue proceedings in respect of Mr. Ranil Wickremasinghe.

This Court has already alluded to the *raison d'être* for these immunity provisions favoring a sitting President of the country. The overarching purpose that girdles the immunity provision was again reiterated by H.D.Tambiah J (as His Lordship then was) in ***Kumaratunga v Jayakody*** (supra). His justification for the conferment of immunity bears repetition. His statement of the law, applies with equal force, to the new version of Art.35(1) as found in the 20th Amendment. Tambiah J said:

> *"On a mere reading of Article 35(1), it is clear that absolute personal immunity is conferred on the President, during the tenure of his office, from any proceedings in any court or Tribunal in respect of anything done or omitted to be done by him either in his official or private capacity. It is not an immunity for all times but limited to the duration of his office. Article 35(1) says "no proceedings", that is every type of proceedings, without limitation or qualification. The Article further says "no proceedings" shall be instituted or continued against the President in respect of anything done or omitted to be done by him in his official or private capacity. If that is so, he, cannot be impleaded, he is above the process of any Court to bring him to account as President in respect of anything done in his official or private capacity. The President, while in office, has been put beyond the reach of the Court. – there are two aspects in Article 35(1) – immunity of the President from all proceedings, and the Bar to the Court entertaining and continuing with the proceedings."*[13]

When Sharvananda CJ and H.D. Tambiah J (as His Lordship then was) characterized immunity as personal to the office of the President and justified it on the imperative requirement to protect the Head of the State from being frivolously dragged into Court, and harassed needlessly, it ought to be borne in mind that they employed a purposive construction of the immunity provision.

[13] Ibid., at pages 58 – 59.

It bears repeating that constitutional interpretation is different from statutory or common law interpretation because of the general and open-ended nature of the language used in Constitutions. Furthermore, the text of Constitutions is of an ancient origin and it concerns topics that are central to a country's basic political structures and values. These factors have helped develop a distinct set of constitutional interpretative techniques that require their judicious use in judicial interpretation. This distinction between constitutional interpretation and statutory interpretation was further highlighted by Chief Justice Dickson of the Canadian Supreme Court in the following words:

> *"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realties often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind."* [14]

We have been referred to US precedents on immunity available to a President and it is to be noted that unlike the Sri Lankan Constitution of 1978, the doctrine of immunity finds no explicit reference in the Constitution of the United States. Even so historical antecedents and judicial deference to executive power have shaped the emergence of the doctrine in course of time. The absence of constitutional authority left the creation of an American immunity doctrine, which has evolved over time rendering the contours of the scope of immunity uncertain-see ***Mississippi v. Johnson***[15] where the President was placed beyond the reach of judicial direction.

The court concluded it lacked jurisdiction to enjoin President Andrew Johnson from enforcing the Reconstruction Acts. In 1982, the United States Supreme Court by a bare 5-4 majority held that the President enjoyed absolute immunity from civil damages for official action taken within

[14] *Hunter v Southam Inc.,* 1984 SCC OnLine Can SC 36: (1984) 2 SCR 145
[15] *Mississippi v. Johnson* 71 U.S (4 Wall) 475.

the outer perimeter of his authority. The plaintiff in ***Nixon v. Fitzgerald***,[16] an Air Force cost control expert, alleged that Nixon and White House aides violated his First Amendment rights by forcing him from his job in retaliation for damaging testimony he gave before Congress. The Court reasoned that the President's unique position as chief constitutional officer demanded the absolute immunity from civil damages. Article II grounds the President unique responsibilities, such as conducting foreign affairs, serving as Commander-in-Chief of the armed forces and managing the entire executive branch, which the Court held required the utmost discretion and sensitivity. As these responsibilities entail decisions likely to arouse intense passions, the Court lamented that each presidential decision, like a judge's verdict, could prove a lighting rod for civil suits. In sum, the Court opined that subjecting the President to civil damages liability based on his actions would hamstring his ability to make the difficult decisions the Republic required him to make. This prospect outweighed the losses to just one person that civil damages could compensate. The court accordingly upheld President Nixon's absolute immunity defense on public policy grounds and dismissed Fitzgerald's claim.

Clinton v Paula Jones[17] pertained to civil liability relating to a person's private acts before he became the president. The Supreme Court 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. The foregoing would show that the United States courts do indulge in a balancing act between good government and immunity and this has been made possible by a non-codification of the doctrine of immunity in the U.S. Constitution. But it cannot be gainsaid that there is a perceptible strand of opinion in the U.S that the demands of the presidency would require immunity and often times the very invocation of purposive interpretation is discernible in the U.S precedents.

Across the Palk Strait Article 361 of the Indian Constitution provides absolute immunity to the President and even the Governor for the exercise and performance of the powers and duties of

[16] *Nixon v Fitzgerald* (1982) 457 U.S 731.
[17] *Clinton v Jones* (1997) 520 U.S 681.

their office or for any act done or purporting to be done by them in the exercise and performance of those powers and duties, subject, as regards the President, to an impeachment under Article 61.

So the conferral of immunity of varying degrees is not unique to Sri Lanka and as we said at the beginning, we return to the question that looms large in this case-namely whether the immunity as set out in Article 35 (1) would attach to Mr. Ranil Wickremesinghe -the incumbent President of the country. He became the acting President on 13th July 2022 and on 20th July 2022 Mr.Wickremesinghe was elected as the 9th President by Parliament.

As we said before, several counsel argued that immunity afforded in Article 35 (1) of the Constitution would not be applicable to Mr. Ranil Wickremasinghe as what is rendered immune to a suit is an act or omission *qua* President. For instance Shammil Perera P.C citing ***Mallikarachchi v Shiva Pasupati*** (supra) submitted that immunity conferred by Article 35 (1) only immunizes from suit, or during the tenure of the office of the President, acts or omission *qua* President. The learned President's Counsel contended, as did Mr.Manohara de Silva P.C that Article 35 (1) of the Constitution cannot apply to an act or omission which arose in the official capacity of a former Prime Minister. Faiszer Mustapha P.C who appeared for the former President contended that immunity lies only in respect of acts or omissions in the capacity of the President. The substance in essence of all the argument against immunity is that upon assumption of office as President, immunity inures to any person only for prospective acts or omissions *qua* President and if the prospective act or omission in the capacity of the President results in an infringement of fundamental rights, that becomes actionable by virtue of the first proviso to Article 35 (1). The learned Counsel further submitted that the Constitution has made no provisions for immunity of prior acts or omissions that were committed in a different capacity. The fact remains that the acts or omissions complained in these proceedings all related to purported fundamental rights violations that allegedly took place prior to the assumption of office as acting President and later as President by Mr. Ranil Wickremasinghe.

It is indubitable that these applications were **instituted** against Mr Ranil Wickremesinghe as one of the Respondents for alleged acts done or omitted to be done long before he became the President on 20th July 2022. Can the proceedings continue now against him?

The very words of Article 35 (1) provide the answer. *What is prohibited by Article 35 (1) is the institution (or continuation) of proceedings against the President. Article 35 does not purport to*

prohibit the institution or continuation of proceedings against any other person. The words in Article 35 (1) "**no proceedings shall be …..continued….."** are intentional. In point of fact proceedings could only be continued if they have been instituted. The Oxford English dictionary defines the word "continue" in its transitive sense to mean "to carry on, keep up, maintain, go on with, persist in (an action, usage, etc.).." . In fact in the legal context the Oxford English dictionary gives an example of a sentence that had appeared in *Boston (*Mass.*) Journal* 23 May 1/6-*He appeared before Judge Sanger of the District court in Cambridge this morning, and has his case continued until June 4.* The use of the word *"continue"* in the above sentence connotes that something had begun in the past and continued thereafter. The corollary follows that having regard to the facts and circumstances of these applications, they all were instituted before Mr. Ranil Wickremasinghe commenced office as President and Article 35 (1) would bar the proceedings from continuing upon Mr. Ranil Wickremasinghe assuming office as President.

The proceedings were instituted and began long before Mr. Ranil Wickremesinghe became the President on 20th July 2022. Article 35 (1) has embargoed the proceedings to continue because the constitutional injunction is a total prohibition, during the presidency, of any proceedings to continue. It must be pointed out that the contention of learned President's Counsel and other counsel who appeared for several of the respondents ignored the impact and import of the words **"no proceedings shall be …continued.."** and a textual and originalist interpretation of Article 35 (1) irresistibly leads us to the conclusion that all other actions and applications relating to official acts, omissions or personal acts prior to the assumption of office as President, cannot be continued in view of the clear and unambiguous wording of Article 35 (1) of the Constitution.

According to the arguments against conferring immunity on Mr. Ranil Wickremesinghe, it is only the act or omission *qua* President that cannot be proceeded against. Neither the English nor the Sinhala text of Article 35 (1) renders itself susceptible to such an interpretation. Both texts are so extensive in their amplitude that even if private actions, be it civil or criminal, had commenced against Mr. Ranil Wickremasinghe, they could not continue because of the stringent terms of Article 35 (1). In the same way if fundamental rights applications had been instituted before Mr. Ranil Wickremasinghe became the President, it could not continue upon his assumption of office as President. The wording of Article 35 (1) is as plain as a pikestaff. Thus if proceedings have been instituted in respect of acts or omissions even *qua* Prime Minister, these proceedings cannot continue because Article 35 (1) prohibits the **continuation of proceedings** even in relation to official acts or omissions as Prime Minister.

A juxtaposition of the two provisions in both Sinhala and English texts of the Constitution shows that both prohibit the continuation of proceedings that were filed against a person long before he becomes the President.

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:*

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

- ජනාධිපතිවරයා ලෙස ධුරය දරන කවර වූ හෝ තැනැත්තෙකු විසින්
- පෞද්ගලික තත්ත්වයෙහි ලා හෝ නිල තත්ත්වයෙහි ලා හෝ
- කරන ලද හෝ නොකර හරින ලද කිසිවක් සම්බන්ධයෙන්
- ඔහුට විරුද්ධව කිසිම අධිකරණයක හෝ විනිශ්චය අධිකාරයක කිසිම නඩු කටයුත්තක් පැවරීම හෝ පවත්වාගෙන යාම නොකළ යුත්තේය.
- එසේ වුවද, ජනාධිපතිවරයා විසින් ඔහුගේ නිල තත්ත්වයෙහි ලා කරන ලද හෝ නොකර හරින ලද කිසිවක් සම්බන්ධයෙන් නීතිපතිවරයාට විරුද්ධව 126 වන ව්‍යවස්ථාව යටතේ ඉල්ලීමක් කිරීමට යම් තැනැත්තෙකුට ඇති අයිතිය සීමා කරන ලෙස මේ අනුව්‍යස්ථාවේ කිසිවක් කියවා තේරුම් නොගත යුත්තේය.

In the circumstances the prohibition that has been imposed by the Constitution will be rendered nugatory if their literal and natural meanings are not given effect to. In fact as we have seen above the prohibition of **institution or continuation of proceedings** against an incumbent President has been constitutionally stipulated having regard to the several duties and obligations cast upon the President. In view of the undivided attention he is obligated to pay towards the affairs of the State, the prohibition has been enacted.

Though the immunity has been described as personal, the President cannot even waive the immunity. Because he cannot waive the immunity, no proceedings can be instituted or continued. We reiterate that the word "*continued*" is used in contra distinction to "*instituted"*. One can continue proceedings only if they have been instituted.

Article 35 (1) presupposes that proceedings must have been instituted before any person becomes the President. Article 35 (1) goes on to enact that proceedings in respect of acts committed or omitted, that were instituted before one became the President, cannot continue.

Therefore settled is the doctrine that no proceedings shall be instituted or continued against the President, during his tenure of office and except for the exceptions that have been specifically provided for in the first proviso and Article 35 (3), the constitutional embargo that proceedings that commenced before the election of the President cannot continue must be enforced.

The exception to immunity enacted in first proviso to Article 35 (1) is only in relation to prospective acts or omissions of the President *qua* President and the prior acts or omissions that have been alleged fall outside the ambit of the first proviso. As for the alleged omissions averred against Mr. Ranil Wickremesinghe in these applications, it is Article 35 (1) alone that would apply exclusively to confer immunity and the first proviso has no application to such a situation.

In a contractual context, the English Court of Appeal held in ***Re Mahmoud and Ispahani***[18] that a prohibition that has been imposed for public good has to be implemented. The reasoning of this case applies with equal force to the constitutional contract that the 1978 Constitution has made for the people of this country and all organs of state are under an obligation to recognize and advance this prohibition. So on a textual, originalist and purposive construction of the Constitution, this Court takes the view that Article 35 (1) of the Constitution applies *stricto sensu* in regard to the alleged omissions complained of in these applications and for the reasons and justification we have adumbrated, the immunity intended by the Constitution in Article 35 (1) should apply to Mr. Ranil Wickremesinghe.

What remains now is the argument of absurdity that was tangentially touched upon by a learned President's Counsel. The contention ran as follows. The proceedings against the former President Mr.Maithripala Sirisena are likely to continue whilst proceedings against the former Prime Minister would not continue. Such an eventuality, according to learned President's Counsel, leads to absurdity.

Undoubtedly it is a venerable principle of interpretation that a law will not be interpreted to produce absurd results. But there is no absurdity in giving recognition to the textual context of the very words of the Constitution pure and simple. The proceedings against the former President Mr.Maithripala Sirisena were instituted and continued against him by virtue of the first proviso to Article 35 (1) read with Article 126 of the Constitution. The proceedings against the former Prime Minister Mr. Ranil Wickremesinghe were instituted and continued under Article 126 of

[18] (1921) 2 K.B 716

the Constitution simpliciter. When these applications were filed, the immunity in the respect of the former President Mr.Maithripala Sirisena had to drop because of the first proviso to Article 35 (1).

The proceedings have to continue against him because there was no immunity that attached to him even when the proceedings began. There is no immunity that inures to him now and these proceedings need to continue against him. In regard to the incumbent President, the constitutional embargo supervened on 20th July 2022 when he was elected President and this court has to decline jurisdiction to continue proceedings against him by virtue of Article 35 (1) applying to him.

As such different regimes apply to the former President and the incumbent President respectively and this court cannot choose to ignore the plain words of the Constitution and no absurdity arises when the words of the social contract-the Constitution-are patently clear and constitute the legitimate basis of interpretation. As we said before, the *sui generis* character of constitutional interpretation has been recognized in a number of commonwealth jurisdictions. *Dhavan J in* ***Moinuddin vs State of Uttar Pradesh***[19] *stated at 491-*

> *The choice between two alternative construction should be made in accordance with well recognized canons of interpretation.*
>
> *Firstly , court must adopt one which will ensure smooth and harmonious working of the constitution and eschew that which would lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory,*
>
> *Secondly, constitutional provisions are not to be interpreted and applied by narrow technicalities , but as embodying the working principles for practical government,*
>
> *Thirdly, constitutional provisions are not to be regarded as mathematical formulae and that their significance is not formal but vital. Hence practical considerations rather than formal logic must govern provisions which are obscure.*
>
> *Fourthly, the one which avoids a result unjust or injurious to the nation should be preferred.*
>
> *Fifthly, court must read the constitution as a whole, take into considerations of different paths and try to harmonize them*
>
> *Sixthly, and above all court should proceed on the assumption that no conflict or repugnancy between different parts was intended.*

[19] AIR 1960 All 484

Since the prohibition against continuation of proceedings against an incumbent President has been imposed for the common good of the affairs of the State and it is important that the head of state has to be freed from any form of harassment, hindrance or distraction to enable him to fully attend to the performance of his official duties and functions this contextual approach to the words of Article 35 (1) is consistent with the spirit of the Constitution. Accordingly this Court proceeds to hold that no proceedings in respect of these applications can continue against Mr. Ranil Wickremasinghe at this stage.

Jayantha Jayasuriya, PC
Chief Justice

Buwaneka Aluwihare, PC
Judge of the Supreme Court

L.T.B.Dehideniya
Judge of the Supreme Court

Murdu N.B. Fernando, PC
Judge of the Supreme Court

S. Thurairaja, PC
Judge of the Supreme Court

A.H.M.D.Nawaz
Judge of the Supreme Court

A.L. Shiran Gooneratne
Judge of the Supreme Court