From Immunity to Impunity: A Critique of Constitutional and Statutory Immunities in Sri Lanka

Gehan D Gunatilleke, Mr.
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1. Introduction

1.1 The Nature of Impunity

Those who abuse power almost invariably enjoy the power to abuse. Impunity is both a corollary of power and a tool for power retention; a phenomenon that, by design, perpetuates the misery of those affected by it. As suggested by Paul G. Lauren, understanding official impunity requires recognition of a government’s inherent belief that the treatment of those under its control and the policies it pursues are beyond scrutiny.¹ In a sense, the international legal regime has helped galvanize the idea of impunity. Through the emergence of concepts such as nationhood and national sovereignty, governments began to realize with increasing regularity that their actions could not be subjected to scrutiny. As Lauren aptly puts it, ‘victims therefore remained objects of international pity rather than subjects of international law.’² A widespread culture of impunity throughout the world was indeed the culmination of such normative and ideological developments.

More recent trends in international criminal law and human rights protection have led to a transformation in the way we view impunity. International momentum, as demonstrable by the plethora of rights conventions, resolutions and reports within the United Nations system, has begun to build towards an unequivocal demand for the end to official impunity.³ In this context, the United Nations Updated Principles on Action to Combat Impunity defines ‘impunity’ in the following terms:

[T]he impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since

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¹ Paul G. Lauren, From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights Context, in Ramesh Thakur and Peter Malcontent (eds.) From Sovereign Impunity to International Accountability: The Search for Justice in a World of States, United Nations, (2004), [*Lauren, From Impunity to Accountability*] at 16.
² Ibid. at 17.
³ Ibid. at 27.
they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.4

Despite the fact that those with power have certain natural inclinations towards impunity, contemporary international norms clearly recognize the general obligation of States to take effective action to combat impunity. Accordingly, principle 1 of the UN Principles on Action to Combat Impunity declares:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

Thus there are five basic obligations cast upon States in respect of combating impunity: first, to investigate violations of human rights; second, to take appropriate measures against perpetrators including prosecution and punishment; third, to provide victims with appropriate remedies and reparation; fourth, to facilitate the ascertainment of the truth; and finally, to develop and implement preventive measures. The nature and scope of these obligations reveal that impunity is a systemic problem, which requires a systematic response. Thus States are responsible for not only combating impunity in individual cases but also for exposing its very fabric and transforming the culture that sustains it.

A number of commentators present compelling normative justifications for combating impunity.5 Diane Orentichter for instance argues that international law obligations form an important counterweight to impunity and must be seen as ‘another weight added to the scales on the side of justice.’6 Moreover, other commentators such as Paul Lauren7 and Martha Minow8 present accountability as the central goal of justice. They contend that breaking through the ‘walls of impunity’ and moving to a ‘culture of accountability’ requires that offenders be held accountable.9 Earlier authors such as Luc Huyse have observed: ‘to replace moral order requires that ‘justice be done’…there is a moral obligation to victims to prosecute those responsible.’10

7 Lauren, From Impunity to Accountability, op. cit. at 15ff.
9 For a more in-depth analysis of Martha Minow’s arguments in particular, see Stephan Parmentier, Global Justice in the Aftermath of Mass Violence: The Role of International Criminal Court in Dealing with Political Crimes (2003), at 205.
Such reasoning is also implicit in Orentlichter’s suggestion that prosecution is essential to justice, as it ‘offers to restore the fundamental norms of human decency and to secure the moral integrity of society in addition to deterring future crimes.’

Notwithstanding encouraging trends in international law and academic consensus on the importance of combating impunity, the practical response to the issue has tended to hinge on the gravity of the human rights violations concerned. The international community’s response to both the Yugoslavian and Rwandan crises—though belated—were commendable, considering the Security Council resolutions that led to the establishing of two ad hoc tribunals. Thus at least a concerted effort was made to bring the perpetrators of some of the most heinous crimes of the recent past to justice. However, serious international condemnation of impunity appears to take place only in the context of the gravest of violations, leaving States today to continue to enjoy the benefits of incredible levels of impunity. The harder cases, such as those involving U.S. action in Iraq, Afghanistan and Guantánamo Bay, Cuba, have failed to see justice, accountability and victim reparation in the manner and form contemplated by international norms. In a sense, the lack of consistent international pressure has revealed the need for greater impetus in terms of enforcing the obligations of individual States to combat impunity within their jurisdictions.

Similarly, in the case of Sri Lanka, the international community, while acknowledging widespread impunity, has not interpreted gross human rights violations taking place in Sri Lanka as amounting to a threat to international peace and security. Hence the primary obligation to investigate human rights violations, prosecute and punish perpetrators, and provide reparations for victims, remains with the Sri Lankan State. Whether impunity lies in respect of the gravest human rights abuses imaginable, as seen Yugoslavia and Rwanda, or serious violations, as seen in Sri Lanka, the inescapable need to eradicate it remains the same. Accordingly, the words of former UN Secretary General Kofi Annan uttered over a decade ago, remains infinitely true, regardless of the context of impunity:

There can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.

1.2 The Sri Lankan Crisis of Impunity

Several factors within the politico-legal system in Sri Lanka contribute towards its culture of impunity. This paper focuses on one particular aspect of this problem, i.e. constitutional and statutory immunities, and postulates that these immunities form the foundation on which the culture of impunity is built. Before delving into this focus area, it is perhaps important to briefly outline the entire gamut of factors that lead to impunity in Sri Lanka.

First, the origin of impunity is rooted in the concept of presidential immunity. Following the promulgation of the 1978 Constitution, the executive presidency was introduced and entrenched within the politico-legal system in Sri Lanka. The President now wields tremendous powers of

13 See Kofi Annan, as cited in www.ictr.org, 31 October 2001 cited in Lauren, *From Impunity to Accountability*, at 33.
governance, which clearly invade the spheres of other the organs of government. His or her sphere of influence has expanded over the years, culminating in the passing of the Eighteenth Amendment to the Constitution. This Amendment effectively entrenched absolute power in the executive by removing the term limit of the presidency and ensuring that key appointments including that of the Chief Justice and the Attorney-General were made at the unilateral behest of the President. Hence granting immunity to an over-mighty executive invites an irrevocable system failure. Presidential immunity and other statutory immunities clearly set a structural tone which results in impunity, as the inherent lack of accountability flows from the highest seat of power down to the lowest state functionary.

Second, the introduction of the emergency regime has ensured the widespread permeation of impunity. It is no coincidence that the President plays a pivotal role within the emergency regime: by declaring states of emergency, calling out the Armed Forces to maintain law and order under the Public Security Ordinance No. 25 of 1947 (as amended) (PSO), and, as Minister of Defence, issuing detention orders under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (as amended) (PTA). The fact that—in theory at least—none of these actions may be effectively challenged in a court of law, provided an overarching cover of ‘emergency’ to law enforcement authorities inclined to violate human rights. Despite the fact that the Sri Lankan judiciary has attempted to limit the reach of these ouster clauses as traditionally termed, there is little doubt that the culture of impunity in Sri Lanka owes its entrenchment to the near perpetual state of emergency in the country. In recent years, the withdrawal of the state of emergency promulgated under the PSO has not changed Sri Lanka’s ‘emergency culture’, which continues under the equally draconian provisions of the PTA and the regulations issued under it.

Third, the perpetuation of impunity is dependent on its sustained accommodation by the criminal justice system. Quite apart from the traditional immunities afforded to public officials and the ad hoc enactment of specific ‘immunity laws’, the role of the Attorney-General has been pivotal in this regard. The historical evolution of the Attorney-General’s role—from an independent and impartial officer of the state, to a subservient agent of the executive—has taken place in tandem with the emergence of impunity in Sri Lanka. Hence the Attorney-General’s role in prosecuting perpetrators of human rights violations, as well as in representing state agents accused of violating human rights, is decisive to the continued sustaining of the culture of impunity in the country.

Fourth, the erosion of judicial independence in Sri Lanka has impacted on the rule of law in the country. Factors such as the flaws in the system of judicial education and training, the lack of integrity in the process of appointing judges and the lack of security of tenure appear to have contributed to the erosion of the independence of the judiciary and have encouraged the prevalence of impunity.

Fifth, parliamentary privilege has had at least a notional bearing on the issue of impunity. Under section 4 of the Parliament (Powers and Privileges) Act No. 21 of 1953, no Member of Parliament ‘shall be liable to any civil or criminal proceedings, arrest, imprisonment, or damages by reason of anything which he may have said in Parliament or by reason of any matter or thing which he may have brought before Parliament by petition, bill, resolution, motion or otherwise.’ The courts have in fact interpreted proceedings in Parliament to not only include formal
transaction of business in Parliament or in committees, but also to include matters connected
with or ancillary to the formal transaction of business. Moreover, the conduct of Members of
Parliament has often been exempted from media reporting, thereby diminishing public
accountability of parliamentarians. The 1978 Amendment to the principal Act gave Parliament
concurrent powers with the Supreme Court to punish offenders including media personnel in
respect of breaches of privilege specified in Part A of the Schedule of the Act. These concurrent
powers were subsequently removed through an Amendment brought in 1997. Yet the
Amendment of 1980, which penalizes the wilful publishing of any report of any debate or
proceeding in Parliament containing words or statements after the Speaker has ordered such
words or statements to be expunged from the official report of the Hansard, continues to persist.
Such provisions appear to permit irresponsible Members of Parliament to evade public
accountability for statements made on the floor.

While each of the five factors outlined above contributes towards the entrenchment, permeation
and maintenance of the culture of impunity in Sri Lanka, we advance the view that constitutional
and statutory immunities provide perhaps the most decisive contribution. In this particular paper,
we examine relevant case law, archival material and available literature on the subject of
presidential immunity as well as statutory immunities afforded to public officials.

Unravelling the precise nature of impunity in Sri Lanka is indisputably relevant to on-going
debates on accountability in Sri Lanka. The prevalence of impunity in respect of state officers
committing human rights abuses lays claim to a complex history encompassing two insurrections
propelled by radicalized Sinhala youth in the seventies and eighties as well as a separatist struggle in the North and East led by the Liberation Tigers of Tamil Eelam (LTTE). In the past
two years, there have been calls for accountability in respect of violations of international human
rights and humanitarian law committed by both parties to the conflict during the final stages of
the war between the government and the LTTE. It is probable that some of the underlying
structural forces that drive the present government’s strikingly poor approach to accountability
would also be revealed in the course of this analysis.

2. Presidential Immunity

The 1978 Constitution introduced the notion of an executive presidency into the constitutional
framework in view of the state’s agenda to expedite economic development. Abandoning the
previous Westminster style of government, (premised on a ceremonial Head of State with an
executive Prime Minister and a Cabinet of Ministers collectively responsible to Parliament), that
was the core of previous Constitutions in 1948 and 1972, the creation of this new supreme
executive office was justified on the basis that it would ensure greater stability in terms of vital
decisions taken in the national interest. The office of the Executive President, with its claiming
of broad immunities, was also expected to provide greater protection for minorities in Sri Lanka.

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15 See Lakshman Gunasekera, Freedom of Expression and Media Freedom, in Law & Society Trust, Sri Lanka:
State of Human Rights 1998 (1998), at 105. Also see Kishali Pinto Jayawardena, Freedom of Expression and Media
16 See Act No. 27 of 1997.
17 Act No.17 of 1980.
Hence the concept of presidential immunity became very much entrenched in the scope and structure of the present Constitution.

However, scarcely a decade later, it had become broadly recognised that the concentration of executive powers in one individual along with the immunities attached to the office had proved to be greatly inimical to the constitutional balance of powers. The manifestoes of political parties promised to revert to the old Westminster system of rule when competing for electoral votes. Yet, each government that came into power retained the executive presidency, with abuse of power becoming progressively more evident as the decades passed.

The enactment of the Eighteenth Amendment to the Constitution in 2010 brought to a close an era in which successive presidential candidates had promised to abolish the executive presidency. Instead, it ushered in a new epoch where an over-mighty president for life became a plausible reality. The relationship between constitutional and statutory immunities afforded to one individual and the culture of impunity in Sri Lanka is the essential focus of this section of the Study.

The present section undertakes an analysis of the presidential immunity clauses in both the Constitution of Sri Lanka and the Public Security Ordinance No. 25 of 1947, and thereafter examines the relevant jurisprudence and academic observations on the subject.

1.3 Analysis of the Constitution

1.3.1 The basis for presidential immunity

Article 35(1) of the Constitution provides:

> 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.

The above Article appears to provide absolute immunity to the individual holding the office of President for the duration of his or her tenure. The provisions of Article 35(2), however, explicitly limits immunity to the duration of tenure, as it suspends the running of time during a person’s tenure in office as President for the purpose of determining whether an action against that person is out of time or subject to prescription. Therefore, actions or omissions by the person holding office as President prior to assuming that position could be subject to litigation, once that person ceases to hold office as President. Pending actions against a person at the time of assuming office as President would effectively be suspended until the person ceases to hold office. Further, official or private acts or omissions of the President while holding office may be subject to litigation once the President relinquishes his authority under the Constitution. This would seem to be a simple reading of the text of Article 35(1) read with Article 35(2).
1.3.2 Restrictions on presidential immunity

Article 35(3) provides:

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 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.

The provisions of Article 35(3) of the Constitution appear to further restrict the extent of immunity granted to an incumbent President. The President is permitted under Article 44(2) of the Constitution to assign to himself or herself any ministerial subject or function. For instance, the incumbent President has assigned to himself, the subjects of Defence, Finance, Ports & Aviation and Highways. However, it appears that his actions in his capacity as Minister of the relevant subjects are not exempt from suit. This is particularly important in terms of the President’s actions in the capacity of Minister of Defence, where he is authorized to issue detention orders and promulgate regulations under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. The role of the Attorney-General in defending the President in proceedings falling within the purview of this Article will be closely examined later in this Study.

1.4 Analysis of Statutes

1.4.1 Public Security Ordinance

Section 8 of the Public Security Ordinance No.25 of 1947 (PSO) provides: ‘No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court.’

The office of the President itself promulgates these Emergency Regulations (ERs). Thus the Regulations fall directly within the scope of presidential immunity. The tone that such a clause sets is somewhat incredulous; as such regulations are not subjected to the rigorous process that is associated with lawmaking. Even Bills of Parliament are subject to a form of pre-enactment judicial review within a narrow window of opportunity. ERs promulgated by the President, however, appear to be beyond judicial reach given the range of ouster clauses contained both in

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18 See Article 121 of the Constitution. Article 121(1) provides: ‘The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament, and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph “citizen” includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.’
the Constitution and in the PSO.\textsuperscript{19} Hence the law clearly permits the perpetuation of a state of emergency well beyond the need of the hour. The repercussions of this permissive framework will be discussed in greater depth in the next chapter. However, there have been sporadic instances where presidential acts have been the subject of judicial review. Particular judges of Sri Lanka’s Supreme Court have taken care not to apply the doctrine of presidential immunity in a manner that results in blanket immunity to those purporting to act under the ERs. Most notably, there have been instances where ERs promulgated by the President has been successfully challenged in the Supreme Court.\textsuperscript{20}

Such progressive judicial reasoning has, however, depended largely both on the individual capacity and commitment of the judge hearing a particular case as well as the political context of the day. These judicial precedents have proved to be insufficient in limiting institutionally entrenched presidential immunity as the succeeding analysis will demonstrate. There is little doubt therefore that the origination of impunity can be traced to the manner in which the system treats the one individual with the most amount of power. Instead of building checks and balances so as to avoid absolute power, the system grants the very thing that ensures absolution: immunity. In this context, a constitutional and legal culture in which accountability is under-prioritized is immediately established. The simple equation remains: where leaders are permitted to act with impunity, their followers act likewise. Hence impunity in Sri Lanka appears to be very much a structural problem, starting with the office of the Executive President.

\textbf{1.5 Analysis of Case Law}

This section examines several key cases that deal with the law on presidential immunity. It is noted that though the statutory framework excludes any judicial review of presidential decision-making, presidential immunity has been a subject addressed by certain progressive courts. For example, the courts have not applied the doctrine of presidential immunity in a manner that results in blanket immunity to those purporting to act under the ERs. The Supreme Court has consistently reviewed ERs promulgated by the President\textsuperscript{21}

The following analysis is presented in chronological order so as to ascertain the direction in which jurisprudential shifts—if any—have taken place.

\textbf{1.5.1 Visuvalingam v. Liyanage (Case No. 1)}\textsuperscript{22}

This was the first case to deal with the question of presidential immunity under the 1978 Constitution. The case concerned the issue of whether the failure of the judges of the Supreme Court and Court of Appeal to take the necessary oaths before the President within the specified time limits under the Sixth Amendment to the Constitution resulted in their ceasing to hold office.

\textsuperscript{19} See Article 35(1) of the Constitution and section 8 of the PSO.

\textsuperscript{20} Joseph Perera v. Attorney-General [1992] 1 Sri.L.R 199; Wickremabandu v. Herath [1990] 2 Sri.L.R. 348. More recently, see Centre for Policy Alternatives v. Defence Secretary and Others S.C. (F.R.) 351/08, Supreme Court Minutes, 15 December 2008 (per S.N. Silva CJ.). The case sought to challenge the proposed ERs of 2008. The Supreme Court granted leave to proceed despite the fact that the President had promulgated the impugned ERs. The Regulations were subsequently withdrawn, so the issue of presidential immunity in relation to the promulgation of the relevant ERs was not thoroughly examined by the Court.

\textsuperscript{21} Ibid.

\textsuperscript{22} [1983] 1 Sri.L.R. 203.
as judges. A five-judge bench had been constituted to hear a fundamental rights application, but the sitting was adjourned when it came to light that the Justices of the Court had not taken oaths as required by the Sixth Amendment. The situation was compounded by the fact that all the judges received fresh letters of appointments and took their oaths afresh before the President after the time limits had run out. On resumption of the sittings, the question arose whether the hearing should be held de novo or merely continued. The State argued that proceedings should be held de novo because the judges had ceased to hold office and had been reappointed afresh, while the petitioner contended that the proceedings should be continued because the judges had not ceased to hold office de jure. One of the preliminary objections the State raised was that the Court was precluded from directly or indirectly calling into question or making a determination on any matter relating to the performance of the official acts of the President by operation of Article 35(1).

The majority of the Supreme Court held that proceedings could be continued because the judges had not ceased to hold office. In his concurrence, Justice Sharvananda (as he was then) dismissed the preliminary objection raised by the State. He observed:

…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.

This was an important principle in relation to the scope of the doctrine of presidential immunity. The Court appeared to draw a crucial distinction between the person of the President—who is necessarily granted immunity from suit—and the acts of the President—which necessarily remain subject to judicial review. Justice Sharvananda further opined:

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

Thus, in this early case, the Supreme Court adopted a fairly liberal position vis-à-vis the scope of presidential immunity. It was hence concluded that the invocation of the President’s acts by another person per se would not preclude the Court from inquiring into the legality of the President’s act or omission.

23 According to the Seventh Schedule to the Constitution and under Article 157A and Article 161(d) (iii) of the Constitution, the judges of the Supreme Court and Court of Appeal are required to make the following oath: ‘I, … do solemnly declare and affirm swear that I will uphold and defend ‘the Constitution of the Democratic Socialist Republic of Sri Lanka and that I will not, directly or indirectly, in or outside Sri Lanka, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.’


25 Ibid.
1.5.2 Kumaranatunga v. Jayakody

This case concerned the election for the Mahara seat in Parliament held on 18th May 1983. The petitioner and the 1st respondent were amongst the candidates and the 1st respondent won the election defeating the petitioner by 45 votes. The petitioner then filed an election petition seeking to have the election declared void on the grounds *inter alia* that the 2nd respondent, as agent of the 1st respondent, made false statements of fact in relation to the personal character and conduct of the petitioner, a corrupt practice under section 58(d) read with section 77(c) of the Ceylon (Parliamentary Elections) Order in Council of 1946. The defence pleaded presidential immunity, as the 2nd respondent held the office of President of the Republic of Sri Lanka at the time.

The Court of Appeal held that every case in which a party relies on a constitutional provision does not automatically involve the interpretation of the Constitution. It was held that ‘interpretation’ is the process of reducing the statute applicable to a single sensible meaning and the making of a choice from several possible meanings. ‘Application’ on the other hand is the process of determining whether the facts of the case come within the meaning so chosen. It was accordingly opined that the language of Article 35(1) of the Constitution is so clear and unambiguous that the need for interpretation of this Article did not arise. The Court was of the view that there were two aspects to Article 35(1): first, that the President is immune from all proceedings, and second, that the Court is barred from entertaining and continuing any proceedings against him. It was further held that there are only three exceptions to presidential immunity and they are set out in Article 35(3): proceedings in relation to the exercise of any ministerial function which he assigns to himself under Article 44(2) of the Constitution; impeachment proceedings under Article 38(2) read with Article 129(2) of the Constitution; and election petition proceedings relating to the election of the President himself under Article 130(a) of the Constitution. The Court also held that the Ceylon (Parliamentary Elections) Order in Council of 1946 has not been elevated to constitutional status and that the requirements of joinder of parties set out in section 80A(1)(b) of the Order in Council cannot supersede Article 35(1) of the Constitution. Hence no petition can be instituted impleading the President as a respondent.

Justice Tambiah proceeded to opine:

> The language of Article 35 is clear and unambiguous. Article 35(1) embraces all types of proceedings and confers a blanket immunity from such proceedings, except those specified in Article 35(3). The fact that the immunity will be misused is wholly irrelevant (emphasis added).

The Court clearly adopted a conservative stance on the issue and declined to examine the question whether the President committed the corrupt practice of making a false statement. The petition was accordingly dismissed, thereby setting an unhealthy precedent in favour of granting broad immunity to the President. It is evident that such interpretation created a wide space for the President himself to act with impunity and possibly engage in certain corrupt practices to the benefit of his agents during elections other than presidential elections. Thus, in many ways, the case represented the genesis of an unhealthy judicial deference towards presidential acts. Such

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deference came at a critical time—when a pervasive culture of impunity within the country had already begun to emerge under the executive presidency.

1.5.3 Mallikarachchi v. Attorney-General

The petitioner in this case was a member of the Politbureau of the Janatha Vimukthi Peramuna (JVP), which was a recognised political party, and was elected a member of the District Development Council of Colombo. He functioned in this capacity until the President proscribed the JVP on 30th July 1983, under the provisions of the then Emergency Regulations made under the PSO. The orders of proscription were continued periodically through publications in the Gazette. The petitioner alleged that the President was driven by mala fides and aimed at eliminating opposition, and that the petitioner and his fellow members were prevented from contesting and putting forward candidates for election to Parliament for the Kundasale and Trincomalee electorates. The petitioner claimed that the proscription infringed his fundamental rights under Article 14(1)(a), (b), (c) and (d) and Article 12(2) of the Constitution. The petitioner also made the Attorney-General a party to the proceedings.

The Supreme Court held that, by Article 35(1) of the Constitution, the President during his tenure of office was absolutely immune from legal proceedings in his official or private capacity. The immunity afforded by Article 35(1) is personal to the President. Citing Justice Ranasinghe in Satyapala v. The Attorney-General, it was held that the order of proscription is ‘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 is not one done as a result of or because of any such assignment of subjects and functions. It is, 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…’

The Chief Justice at the time, 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 vested with paramount power and duties, he should be given immunity in the discharge of his functions.’

The 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.

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28 Article 14(1) of the Constitution provides: ‘Every citizen is entitled to (a) the freedom of speech and expression including publication; (b) the freedom of peaceful assembly; (c) the freedom of association; (d) the freedom to form and join a trade union.’ Article 12(2) provides: ‘No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.’
29 S.C Application No. 40/84, Supreme Court Minutes, 30 April 1984 and 11 May 1984.
30 [1985] 1 Sri.L.R., at 77
31 Ibid. at 78.
Following this reasoning, Chief Justice Sharvananda 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. It was accordingly opined:

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 (emphasis added). \(^\text{32}\)

Hence the Court held that these proceedings could not have been instituted against the Attorney-General, as he was not competent to represent the President in proceedings not covered by the proviso to Article 35(3). Moreover, it was held that Rule 65 of the Supreme Court Rules requiring the Attorney-General to be cited as a respondent in proceedings for the violation of Fundamental Rights under Article 126 of the Constitution does not contemplate the Attorney-General being made a sole party respondent to answer the allegations in the petition. Such inclusion merely serves the purpose of meeting the mandate of Article 134, which states that the Attorney-General shall be noticed and shall have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. Accordingly, the Court thought it fit to dismiss the application.

Interestingly, Sharvananda C.J.’s reasoning was that presidential immunity is needed for the dignity of the office. Yet, this reasoning appears to be questionable, as accountability to the courts, in which the judicial power of the people is reposed, surely cannot undermine the dignity of the executive. It is clear that there is no incompatibility between answerability to courts and ‘dignity’ in a democratic sense. In fact, no citizen is less dignified by virtue of his or her answerability to the judicial process. What the former Chief Justice possibly meant by his sentiments on the loss of dignity was that a spate of frivolous cases against the President would cause unnecessary embarrassment to the office. Yet granting blanket immunity on these grounds is an overreaction. Frivolous cases could certainly be dismissed at a threshold stage without burdening the President’s office. However, serious cases that credibly call into question the integrity of the President or his or her decisions ought to be heard by the courts. In fact, the integrity of the executive, and indeed, the entire system of governance is contingent on treating such allegations against the President seriously. In these circumstances, the view that the actions of the President are completely beyond the reach of the courts—however serious the allegations against the President are—encourages official acts of impunity, particularly where those acts could be traced to some presidential power. As history demonstrates, such impunity may be attributed to precisely these foundational judicial attitudes.

1.5.4 Karunathilaka v. Dayananda Dissanayake (Case No. 1) \(^\text{33}\)

The period of office of the Central, Uva, North-Central, Western and Sabaragamuwa Provincial Councils came to an end in June 1998. Following the period of nomination and fixing a date for the main poll, the issue of postal ballot papers was fixed for 4th August 1998. However, by

\(^{32}\) Ibid.
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telegram dated 3rd August 1998, the respective returning officers suspended the postal voting without adducing any reason. The very next day, the President issued a Proclamation under section 2 of the Public Security Ordinance No. 25 of 1947 (PSO) 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 Commissioner of Elections took no steps to fix a fresh date for the poll.

The Supreme Court, in a rare decision held that the making of the Proclamation and the Regulation as well as the conduct of the respondents in relation to the five elections, clearly constituted ‘executive action’ and the Court would ordinarily have jurisdiction under Article 126 of the Constitution. It was further held that Article 35 did not oust this jurisdiction, as it only prohibited the institution of legal proceedings against the President while in office. It did not exclude judicial review of an impugned act or omission against some other person who did not enjoy immunity from suit but relied on an act done by the President in order to justify his conduct. Importantly, the Court was of the view that it had the power, notwithstanding the ouster clause in section 8 of the PSO, to review the validity of the impugned Regulation. Accordingly, it was opined that the impugned Regulation was not a valid exercise of the power under section 5 of the PSO, as it was not an Emergency Regulation. In any event, the Court held that the impugned Regulation cannot be sustained as being for a purpose set out in section 5 of the PSO, as the petitioner had established that prima facie up to the end of July 1998, there was no known threat to national security or public order, and the respondents failed to show that even in August 1998, there was any such threat.

The Court further held that the suspension of the issue of postal ballot papers was unlawful, arbitrary and mala fide, as it was done with the knowledge that the impugned Proclamation and Regulation would be made the next day and for a collateral purpose. Hence the respondents were directed to fix new dates for the issue of postal ballot papers and poll.

This case is significant for two reasons. First, the Court was prepared to grant a purposive interpretation to the presidential immunity clause contained in the Constitution. The Court effectively castigated public officials who sought to rely on the concept of presidential immunity to acquire immunity for their own actions. Hence the Court established the principle that even when acting upon or in anticipation of an act of the President, public officials were not immune from suit. This principle is crucial for the purpose of restricting official acts of impunity, since public officials may no longer seek the broad cover of presidential immunity to shield their actions. The principle may be expanded to include unlawful acts purportedly committed under Emergency Regulations notwithstanding the fact that the President was responsible for the promulgation of the Regulations. Second, the Court ignored the application of the ouster clause in section 8 of the PSO. As discussed later in this Study, this rare departure from a strict application of ouster clauses has been crucial for the occasional maintenance of checks and balances on the actions of public officials.

1.5.5 Senasinghe v. Karunatilleke

This case concerned a fundamental rights application before the Supreme Court, and related to the assault and unlawful arrest of the petitioner by the Police during a public demonstration held

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34 [2003] 1 Sri.L.R. 172.
in 2001. The background to the incident involved a presidential Proclamation under Article 70 of the Constitution, which sought to prorogue Parliament. Acting under Article 86 of the Constitution read with section 2 of the Referendum Act No. 7 of 1981, the President had also issued a Proclamation directing the Commissioner of Elections to hold a Referendum of the people on the need of a ‘new Constitution’. The public demonstrations were in response to these Proclamations and the Referendum proposal. Acting under section 45 of the Referendum Act, which banned processions during the period in which a Referendum was scheduled to take place, the Police sought to suppress the demonstrations.

The petitioner established before Court that he was not a participant in the demonstrations, but merely a bystander. Yet the Police fired tear gas, which struck the petitioner. Even after identifying himself as an attorney-at-law, police officers shot the petitioner in the face with rubber bullets and arrested him. He was thereafter released due to his severe injuries for which he was hospitalized for two weeks.

Justice Mark Fernando opined that the proposed Referendum was invalid, as the question submitted to the people was incapable of an intelligible and meaningful answer. Hence it was held that section 45 of the Referendum Act under which the Police acted had no application. Accordingly, it was concluded that the State had violated the petitioner’s fundamental rights under Articles 11, 13(1) and 14(1)(h) of the Constitution. These constitutional provisions respectively deal with torture or cruel, inhuman and degrading treatment, arbitrary arrest and the freedom of movement.

The Court also dealt with certain other fundamental questions that are relevant to the present Study. First, it held that it had the jurisdiction to review the legal aspects of the Referendum, particularly as Parliament, which could question the political aspects of the Referendum, had been prorogued. Second, the Court dealt with the question of presidential immunity, as the President herself had issued the two Proclamations that were under scrutiny. Justice Fernando observed:

> It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred.

The Court recalled that on a number of previous occasions, it had reviewed the acts of the entire Cabinet of Ministers inclusive of the President. It was further held that Article 35 of the Constitution, ‘only provides a shield of personal immunity from proceedings in courts and tribunals, leaving the impugned acts themselves open to judicial review.’ Thus the Court

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35 Ibid. at 187.
36 Ibid.
37 Ibid. at 186.
concluded that it had jurisdiction to consider whether the Proclamation and the Referendum proposal were in conformity with the Constitution and the Referendum Act. Accordingly, the Court declared the Proclamation and the Referendum proposal to be invalid.

This case clearly illustrates the scope for judicial review of even presidential acts. Unfortunately, the instances where the Court has been willing to challenge presidential immunity remain exceptions to the general trend of judicial deference towards the President’s decision-making authority. As demonstrable by later jurisprudence in more uncertain times where the independence of Sri Lanka’s judiciary came to be the focus of considerable public scrutiny, the norm has been that the President’s actions are simply not justiciable.

1.5.6 Victor Ivan and Others v. Sarath Silva

The petitioners in this case alleged that the appointment of the 1st respondent (a former Attorney-General, Sarath Silva) as the Chief Justice by former President Chandrika Bandaranaike Kumaratunga, pending a disciplinary inquiry, infringed their fundamental rights under Articles 12(1) and 17. The petitioners sought a declaration that the appointment is null and void. The disciplinary proceedings were contemplated on the ground of alleged misconduct concerning interference with the proceedings in District Court Colombo Case No. 17082/Divorce and acts or omissions in respect of proceedings against a certain Magistrate. It was contended that the 1st respondent was the ‘beneficiary’ of the impugned appointment. Hence the appointment could be questioned through the 1st respondent. The petitioners relied on the dicta of Justice Sharvananda (as he was then) in the Visuvalingam case that Article 35 did not preclude the courts from requiring any person who invoked the President’s act in his support to prove the legality of such act. Hence it was argued that the burden was on the 1st respondent to establish the lawfulness of the President’s act, notwithstanding immunity under Article 35, which was personal to the President.

The Supreme Court unanimously held the conduct of the 1st respondent in holding office as Chief Justice in consequence of his appointment by the President under Article 170 of the Constitution did not constitute ‘executive or administrative action’ within the ambit of Articles 17 and 126 of the Constitution. Hence the 1st respondent could not have been ‘invoking’ the President’s acts to justify his holding of office. Consequently, the petitioners had in effect challenged an act of the President in respect of which they were constitutionally precluded from challenging in a court of law.

The judgement in this case also considered the effect of legal precedents where the Supreme Court had struck down Emergency Regulations promulgated by the President. In the case of

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40 Ibid. at 187.
41 [2001] 1 Sri.L.R. 309. Piquantly, then Chief Justice Sarath Silva, in constituting the Supreme Court Bench to hear the very case against him (in a clear conflict of interest) nominated a Bench including judges who were junior in rank thereby bypassing the most senior judges of the Supreme Court. This was just one example of judicial bias in the composition of Benches during this period; for a more detailed analysis, see Judicial Corruption in Sri Lanka, Pinto-Jayawardena, Kishali and Weliamuna, JC in Transparency International Global Report, Cambridge University Press; 1st edition, 2007.
Joseph Perera v. Attorney-General, a five judge bench of the Supreme Court ruled that Regulation 28 of the Emergency (Miscellaneous) (Provisions & Powers) Regulation No. 6 of 1986 was ultra vires Article 15(7) of the Constitution and therefore void. None of the judges in that case, however, dealt with the issue of Article 35. The previous case of Wickremabandu v. Herath had already held that Emergency Regulations could be declared void. As discussed above, Justice Mark Fernando in the case of Karunatilake v. Dayananda Dissanayake (1) articulated the reasoning through which Emergency Regulations promulgated by the President could be struck down. He opined:

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…I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time…Immunity is a shield for the doer, not for the act…It (Article 35) does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or respondent who relies on an act done by the President, in order to justify his own conduct . . . It is the Respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President.

The Court in Victor Ivan’s case dealt with Fernando J’s sentiments in the following manner:

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

The Court sought to distinguish the two cases by emphasizing that the 1st respondent had not committed any executive or administrative act while relying on a particular act of the President. Hence the Court was precluded from reviewing the President’s act of appointing the 1st respondent as Chief Justice. This line of reasoning simply nullified the remarkable creativity demonstrated by earlier judicial precedents through which Justice Fernando was prepared to engineer the review of decisions effectively flowing from the President. The Court in this case instead re-established the fundamental principle that the President’s acts are beyond review and that even those that benefit from such acts cannot be questioned in a court of law. In the present case, the alleged misconduct of a high official was shielded by the fact that the President had

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46 Ibid. at 177.
47 [2001] 1 Sri.L.R., at 325.
now appointed him as Chief Justice. Hence, the former Attorney-General was exculpated by the Court even for interfering with the administration of justice, purely due to the Court’s reluctance to review a presidential decision.

The resulting position was simply that the former Attorney-General (later appointed Sri Lanka’s Chief Justice) was afforded the space to act with complete impunity. The case remains a classic example of how presidential immunity often lays the practical groundwork for acts of impunity by other public officials, departing from earlier jurisprudence, which construed the reach of that immunity in commendably strict terms.

1.5.7 Senarath v. Kumaratunga

In contrast to the former decision, this case was decided at a period when the earlier amity between the former Chief Justice Sarath Silva and former President Chandrika Bandaranaike Kumaratunga had run its course. The matter involved an alleged infringement of Article 12(1) through the unlawful, unreasonable, arbitrary and mala fide executive action of the 1st respondent, Chandrika Bandaranaike Kumaratunga who at the material time had been President of the country. The case was filed soon after the 1st respondent ceased to hold office. The alleged conduct involved securing to herself inter alia a free grant of developed land and premises from which two public authorities were ejected, purportedly under the President’s Entitlement Act No. 4 of 1986.

Then Chief Justice Sarath Silva held that the provisions of the President’s Entitlement Act were worded in such a manner that only a former President was eligible for the entitlements in the Act. Hence an incumbent President would not have occasion to decide on his or her entitlements. Moreover, it was held that where the Executive, being the custodian of the People's power, abuses a provision of the law in the purported grant of entitlements under such law, and secures benefits that would not come within the purview of such law, it is in the public interest to plead a violation of the right to equality before the Court. The Court further concluded that a denial of locus standi in circumstances where there has been a brazen abuse of power to wrongfully gain benefit from public resources would render the constitutional guarantee of equality before the law meaningless.

The Court thus allowed the application and issued a declaration that the fundamental rights of the petitioners, guaranteed by Article 12(1), had been infringed by executive action in the purported grant of benefits to the 1st respondent contrary to the provisions of the President’s Entitlements Act. Hence the case furnishes authority for the ability to sue a President for acts committed during his or her term of office after the end of such term of office.

1.5.8 The Waters Edge Case

The petitioners in this case filed a fundamental rights application in the Supreme Court in the public interest. The petitioners alleged that their fundamental rights were violated due to the

acquisition of the impugned land for a purported public purpose. However, it was found that the land was sold to a private entrepreneur to serve as an exclusive and private golf resort. This seminal case remains important with respect to the Court’s expansive analysis of the public trust doctrine. Perhaps the jurisprudential contribution that is most relevant to this Study is the Court’s examination of presidential immunity.

The Court observed that the former President (Chandrika Bandaranaike Kumaratunga) had acted in excess of her power as Head of the Executive as well as Finance Minister during the material period in which the land transactions took place. It was revealed that the President herself was responsible for issuing the Cabinet Memorandum that set in motion the entire land transaction. Hence the Court thought it fit to hold the former President responsible for the corrupt transaction and ordered her to pay compensation of Rupees three million to the State. Justice Shiranee Tilakawardane, writing for the Court, observed:

[B]eing a creature of the Constitution, the President's powers in effecting action of the Government or of state officers is also necessarily limited to effecting action by them that accord with the Constitution. In other words, the President does not have the power to shield, protect or coerce the action of state officials or agencies, when such action is against the tenets of the Constitution or the Public Trust, and any attempts on the part of the President to do so should not be followed by the officials for doing so will (i) result in their own accountability under the Public Trust Doctrine, betraying the trust of good governance reposed in them under the Constitution by the People of this nation, in whom sovereignty reposes and (ii) render them sycophants unfit to uphold the dignity of public office.  

Crucially, the Court also pronounced on the applicability of the doctrine of presidential immunity:

The expectation of the 1st Respondent as a custodian of executive power places upon the 1st Respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no attempt was made by the 1st Respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents—present and future—to engage in corrupt practices or in abuse of their legitimate powers (emphasis added).

In light of the fact that former President Kumaratunga had betrayed the public trust, the Court found no reason to hold that any remnants of previous immunity granted to her should hinder full judicial scrutiny of her actions. In light of this judgment, which later the Supreme Court refused to review, it appears that the pervasive nature of presidential immunity is, after all, capable of being controlled. Hence Presidents who seek to abuse their power may no longer assume that

51 Ibid.
52 Ibid.
they enjoy immunity for life. Such a realization may form the necessary basis for preventing immunity from transforming into impunity with the ease at which it has taken place during the past few decades under the present Constitution. Yet cases such as the Waters Edge case cannot be genuinely regarded as trend-setting interventions of the Court. Such cases, unfortunately, remain anomalies or in a harsher sense, products of the peculiar political environment of the day.

1.6 Abolishing Presidential Immunity: Restoring ‘Constitutional Equilibrium’

1.6.1 Recent trends in judicial attitudes

What may be gleaned from the foregoing analysis is that, while Article 35 provides absolute personal immunity to the President, it only shields the President during his or her term. Hence acts committed during such tenor may later be called into question. A number of other cases may be cited where a former President’s acts have been struck down in proceedings before the Supreme Court. Examples include the case of Singarasa v. Attorney-General, where the former President’s ratification of the Optional Protocol to the International Covenant on Civil and Political Rights was held to be ultra vires; the case of Wijesekara v. Attorney-General, where a former President’s act of merging the Northern and Eastern Province through a Proclamation made under the Emergency Regulations was held to constitute a continuing violation of the rights of the petitioners who were from the Eastern province; and the case of Senarath v. Kumaratunga discussed above. Therefore, anyone invoking the act of a President to justify his actions is imposed with the burden of proving the validity of the President’s acts.

However, these trends must be understood in their proper context. In respect of Singarasa v. Attorney-General, Wijesekara v. Attorney-General and Senarath v. Kumaratunga the

57 The issue of presidential immunity also received attention in cases such as Public Interest Law Foundation v. the Attorney-General C.A. Application No 1396/2003, Court of Appeal Minutes, 17 December 2003. This case was filed by a public interest group in the Court of Appeal, calling upon the Court to compel President to appoint the members of the Elections Commission under the Seventeenth Amendment to the Constitution. It was contended that Article 41B of the Constitution did not permit the President to wield unfettered powers over the appointment of the Elections Commission, and that she had no discretion over the appointments once the Constitutional Council forwarded its recommendations. However, it was held that Article 35(1) of the Constitution gave ‘blanket immunity’ to the President from proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in limited circumstances constitutionally specified in Article 35(3). The Court later reiterated this position in Visvalingam v. Attorney-General C.A. Application No. 668/2006, Court of Appeal Minutes, 2 June 2006, also published in LST Review, Volume 16 Issue 224 June 2006. This position may, however, be contrasted with the previous case of Silva v. Bandaranayake [1997] 1 Sri LR 92 where the majority of the Supreme Court examined the presidential act of appointing a Supreme Court judge despite the constitutional bar relating to presidential immunity. The appointment itself, however, was ultimately not struck down. Commentators have compared the two cases to arrive at the conclusion that the immunity principle has been inconsistently applied by the courts, which has led to uncertainty in the law. See Kishali Pinto-Jayawardena, The Rule of Law in Decline: Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP) in Sri Lanka, The Rehabilitation and Research Centre for Torture Victims (2009), at FN.334.
59 S.C. (FR) Application No. 243, 244 and 245/06, Judgment delivered on 16 October 2006.
factual context involved former President, Chandrika Bandaranaike Kumaratunga and former Chief Justice Sarath Silva. The former Chief Justice had already developed a penchant for undermining the acts of the former President, as animosity had steadily grown between the two high officials, in contrast to the amity that existed during the first several years of the former Chief Justice’s term. In later years, the former Chief Justice had struck down several of the initiatives of the Kumaratunga government, and had specifically targeted the acts of the former President. Hence the personal animosity that existed between the Court and the former executive and the clear political ambitions of the former Chief Justice simply cannot be ignored when examining these cases.\footnote{61}  

Consequently, rather than an actual reversal of the trend of judicial deference towards the executive, these cases are more likely to be seen as historically and contextually explainable anomalies. Some of the decisions handed down by the Supreme Court during this period were indeed legitimately critiqued as judicial trespassing on the executive sphere.\footnote{62} Abrupt and temperamental shifts of initial judicial empathy and subsequent judicial hostility towards the executive became a hallmark of the Sarath Silva Court (1999-2009) and were an unprecedented development in the history of Sri Lanka’s Supreme Court. This trend continued during the remaining years of the former Chief Justice’s term, following President Kumaratunga’s successor, the incumbent President Mahinda Rajapaksa being elected to presidential office.  

With the departure of former Chief Justice Sarath Silva in 2009, these temperamental incursions into the executive sphere, which was characterised more by the personal motivations of the former Chief Justice rather than a commitment to the judicial role in the cause of constitutional governance, came to a predictable halt. In the face of an Executive President who moulded his office, particularly in his second term, on the strength of the victory of his administration over the LTTE, Sri Lanka’s judiciary retreated to the shadows of a timorous reluctance to openly challenge executive actions except in very few cases and that too, more in the role of a conciliator rather than as a strong check on abuse of executive power.


\footnote{62} See International Bar Association (IBAHRI), Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka, (May 2009), at 7. In this report, the ruinous impact of the politicisation of the Office of Sri Lanka’s Chief Justice was pithily commented on in the following manner: ‘The judiciary is currently vulnerable to two forms of political influence: from the Government and from the Chief Justice himself. The nature and degree of influence oscillates between the two and depends on the relationship between them at the time. The perception that the judiciary suffers from political influence has arisen in recent years due to the excessive influence of the Chief Justice, the apparently inconsistent jurisprudence of the Supreme Court in relation to certain issues and through tensions between the judiciary and the executive...The perceived close relationship between the Chief Justice and the Government has from time to time made individual judges reluctant to return judgments which may be perceived to be critical of the executive. This may be illustrated by the scarcity of dissenting judgments during his tenure in office.’  

1.6.2 Some comparative illustrations

The fluctuating judicial attitude towards immunity in Sri Lanka may be compared with trends in the United States in order to give meaning to the idea that law, and not the person of the President, is the ultimate ‘ruler’ within the system.

It must be noted at the outset that, unlike the Sri Lankan Constitution, the U.S. Constitution does not provide for presidential immunity. The concept of presidential immunity in the U.S. context has evolved over time through judicial reasoning. Hence a survey of the U.S. case law on the subject may be undertaken for comparative purposes only while bearing in mind the variance in context.

In the case of *Clinton v. Jones*, the Supreme Court considered President Bill Clinton’s alleged sexual misconduct, which took place prior to taking up office. The Court unanimously held that litigation should not be delayed until the conclusion of the presidential term and distinguished the case of *Nixon v. Fitzgerald*. In *Fitzgerald*, the President had already left office, so the question of ‘distraction’ was limited. Thus the main argument in favour of immunity was that the system should not chill the President’s exercise of power by presenting the risk of subsequent litigation. In a split decision of 5-4, the Court ruled in favour of absolute immunity. However, the Court in *Jones* sought to depart from the previous ruling by holding that presidential immunity cannot extend beyond the scope of any action taken in an official capacity. It was held that such a reading of immunity did not violate the separation of powers doctrine, as the outcome of the case would have no bearing on the scope of the official powers of the executive branch. Hence it was concluded that there would be no misallocation of judicial or executive power when considering questions that relate entirely to the unofficial conduct of the individual who happens to be the President. More specifically, the reasoning in *Jones* provides an important counteraction to the sentiment that the answerability of the President to the courts undermines the dignity of the office. The U.S. Supreme Court in *Jones* was of the firm opinion that defence of civil litigation would not unnecessarily burden the President in terms of time, nor affect the performance of his functions.

The recent judicial approach in the U.S. towards scrutinizing the President’s private actions even while he remains in office sends a strong and clear message about the limits of power. It confirms that no individual—not even the President—is above the law. Hence even the President must be held accountable to the courts and ultimately to the judicial power of the people.

The proper framework for defining the relationship between the judiciary and the executive was discussed at length in the case of *Youngstown Sheet & Tube Co. v. Sawyer*. This case concerned the question as to whether the courts could review the President’s *official* acts. The case involved the President’s ordering of the Secretary of Commerce to take possession and operate the nation’s steel mills following the failure of steel mill owners and workers to reach an agreement on a new wage contract during the Korean War. The issue before the Supreme Court

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64 457 U.S. 731 (1982).
65 See *Mallikarachchi v. Attorney-General* [1985] 1 Sri.L.R. 74, per Chief Justice Sharvananda.
was whether the President was acting within his constitutional powers when he issued an order to take possession of and operate steel mills. Hence the main question was whether the President’s actions amounted to unconstitutional ‘lawmaking’ or whether it was a legitimate exercise of power implied in the aggregate power of the President arising from a necessity to avoid national catastrophe.

In a celebrated concurring opinion, Justice Robert Jackson presented an interesting framework with respect to determining the scope for judicial review of presidential acts. He opined that presidential power is not fixed but fluctuates in relation to Congress. If Congress sanctions a presidential act, the strongest presumptions and the widest latitude of judicial interpretation would support such an act. If the act is an independent act that is in an ambiguous area, which Justice Jackson regarded as the ‘zone of Twilight’, there would be concurrent authority, and the act can be legitimate only by reason of the inertia, indifference or acquiescence of Congress. The test of power and the scope of judicial review in such cases would depend on the imperatives of the events. Finally, if the act is contrary to what Congress has laid down i.e. there is no express or implied authority given by Congress, then the act falls under the President’s own constitutional powers minus any congressional powers over the matter. In such a context, the courts must consider this with caution for ‘what is at stake is the equilibrium established by our constitutional system’. The majority of the Supreme Court ultimately held that the President did not have unrestricted power to seize private property in emergencies.

The U.S. experience gives credence to the notion that constitutional ‘equilibrium’ must be the governing factor that informs any court of its limits in reviewing presidential acts. Courts simply cannot neglect their ultimate allegiance to the Constitution. Hence it is a notion of constitutionalism that must prevail over presidential immunity. It is only through a transformation in judicial attitudes towards the executive, towards the courts’ own limits of power and towards the supremacy of the Constitution that impunity flowing from presidential acts could be effectively curtailed.

2. Statutory Immunities

Apart from the overarching influence of presidential immunity on the culture of impunity in Sri Lanka, several other statutory provisions within the legal framework provide (or provided) an additional basis for granting immunity to state officials. Some of these key provisions are discussed in this section.

2.1 The Indemnity Act

This Act was passed within a specific context to provide indemnity to politicians, service and police officers and any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office. It was an early precursor to widespread

67 Ibid. at 634.
68 Ibid. at 638.
69 No. 20 of 1982.
indemnity legislation, and was made applicable between 1st to 31st August 1977 and thereafter extended to 16th December 1988 by the Indemnity Amendment Act No. 60 of 1988.

The salient provisions of the Act are found in section 2:

No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing, whether legal or otherwise, done or purported to be done with a view to restoring law and order during the period August 1, 1977, to the relevant date, if done in good faith, by a Minister, Deputy Minister or person holding office under or employed in the service of the Government of Sri Lanka in any capacity whether, naval, military, air force, police or civil, or by any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office or so employed and done or purported to be done in the execution of his duty or for the enforcement of law and order or for the public safety or otherwise in the public interest and if any such action or legal proceeding has been instituted in any court of law whether before or after the date of commencement of this Act every such action or legal proceeding shall be deemed to be discharged and made null and void.

The Indemnity Act was met with severe criticism due to its encouragement of public officials to act with absolute impunity. More recently, the UN Secretary General’s Panel of Experts on Accountability in Sri Lanka described the Act as a law that ‘greatly weakened the State’s duty to pursue serious violations of rights.’

The defence advanced by governments of the day was that the provisions of the Act were never actually implemented. Yet the message that the law conveyed to the security apparatus including the military and the police with regard to the laxity with which human rights abuses would be viewed, was unmistakable. As discussed later, laws such as the Indemnity Act provided an unhealthy precedent that was carried forward by subsequent anti-terrorism and emergency laws.

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70 The relevant ER provisions applicable between 2005-2011 provide for a similar framework and will be discussed later in this Study. For instance, Regulation 19 of Emergency Regulations of 2006 provides: ‘No action or suit shall lie against any Public Servant or any other person specifically authorized by the Government of Sri Lanka to take action in terms of these Regulations, provided that such person has acted in good faith and in the discharge of his official duties.’ Moreover, Regulation 73 of the Emergency Regulations of 2005, section 9 and 23 of the Public Security Ordinance No. 25 of 1947 and section 26 of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 each provide indemnity to public officials acting in good faith. See International Commission of Jurists, Sri Lanka: Briefing Paper on Emergency Laws and International Standards (March 2009), available at: http://www.icj.org/IMG/SriLanka-BriefingPaper-Mar09-FINAL.pdf, ['ICJ, Briefing Paper on Emergency Laws and International Standards']. It is noted that these clauses were left untouched in the May 2010 amendments to the Emergency Regulations.


2.2 *The Penal Code and the Criminal Procedure Code*

Two provisions in the Penal Code No. 11 of 1887 and the Criminal Procedure Code Act No. 15 of 1979 are relevant to this discussion.

Section 69 of the Penal Code allows for the defence of mistake of fact in good faith under its chapter on ‘General Exceptions’ to liability. Interestingly, the first illustration contained in the section refers directly to a military official’s action in good faith.

A, a soldier, fires on a mob by the order of his superior officer in conformity with the commands of the law. A has committed no offence.

Similar latitude is provided by section 97(2) of the Criminal Procedure Code in relation to the provisions dealing with unlawful assembly. The section reads:

(a) A Magistrate, Government Agent, police officer or member of the Sri Lanka Army, Navy or Air Force or any other person acting under this Chapter in good faith; and
(b) A member of the Sri Lanka Army, Navy or Air Force doing any act in obedience to any order which under military law he was bound to obey,

Shall not be liable in civil or criminal proceedings for any act purported to be done under this Chapter.

This provision was interpreted in the case of *Bernard Soysa v. The Attorney-General & Others.*\(^{74}\) The case involved the holding of a *Sathyagraha* near the *Dalada Maligawa* (translated to mean the Temple of the Sacred Tooth Relic), which is an important public place of worship. The protest was considered to be unlawful, which purportedly warranted the intervention of the Police in the interests of public order. In the fundamental rights case filed by the protesters, the Supreme Court was of the view that the Police were in fact entitled in terms of the duties cast on them by the Criminal Procedure Code and the Police Ordinance No. 16 of 1865 to take steps to disperse the protestors. The Court specifically referred to the provisions of section 97(2) of the Code, which were held to grant to a police officer, exercising such power in good faith, immunity from civil or criminal proceedings for an act purported to be done under the relevant chapter of the Criminal Procedure Code.\(^{75}\) Hence it was concluded that the Police action was justified and that there was no infringement of the fundamental rights of peaceful assembly and expression.

Though the Criminal Procedure Code does not specifically refer to good faith clauses in relation to any other specific offence, the concept of good faith in relation to law enforcement is also found in section 92 of the Code. The relevant section reads:

\(^{74}\) [1991] 2 Sri.L.R. 56.
\(^{75}\) *Ibid.* at 66. The Court was of the opinion that ‘[i]f upon being so commanded such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, the police officer is empowered to proceed to disperse such assembly by the use of such force as may reasonably be necessary to disperse such assembly.’
(1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under color of his office, though that act may not be strictly justifiable by law.

(2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

The above provisions restricts the right of self defence against an act of a public servant or a person acting on the direction of a public servant, where the public servant acts in good faith, notwithstanding the fact that the act may be unlawful. The broad scope of this section appears to permit a public servant to engage in certain unlawful activities falling short of those that cause the apprehension of death or grievous hurt, provided that the defence of good faith is invoked.

Both the above statutory provisions are relatively unambiguous in terms of the broad indemnity they afford public officers. As discussed later in this section, these provisions have been in issue in instances where military officials have been accused of crimes and human rights violations.

2.3 Public Interest Privilege

2.3.1 The statutory basis for public interest privilege

Sections 121 to 131 of the Evidence Ordinance No. 14 of 1895 incorporate the principle that although a witness may generally be compelled to give evidence, that witness may still refuse to answer certain questions on the well recognised grounds of public policy, professional or personal privilege. This principle goes so far as to state that even in instances where the witness may be prepared to do so, he or she will not be permitted to do so. This provision too appears to have profound significance with respect to the indemnification of public officials.

Certain grounds of exclusion, such as information for detection of crime, official communications and professional communications are generally accepted as exceptions to the fundamental principle that parties to litigation have a right to bring before the court, all relevant evidence and to call on others to produce that evidence. However, the inclusion of affairs of state within this category of excluded evidence in relation to criminal prosecutions invites brief discussion as to the extent to which this privilege may be resorted to, in order to render prosecutions for serious human rights abuses, nugatory.

2.3.2 Judicial thinking on public interest privilege

This section refers to the relevant English legal principles in order to demonstrate that the applicable Sri Lankan judicial thinking, in recent times, has been demonstrably conservative.

The researchers particularly acknowledge the guidance provided by the project advisor as well as the reviewer in this part of the analysis.
The doctrine of public interest privilege emanated from the concept of ‘crown privilege’ in the English law. It is has been long-accepted that the British Crown could make an application to a court for the purpose of suppressing evidence in matters of litigation in the public interest, largely if not totally, upon considerations flowing from national security. Thus the principle had assumed the tag ‘crown privilege’. In Conway v. Rimmer\textsuperscript{77} the House of Lords held that the Court had the right (in effect imposing an obligation on Court) to investigate the Crown’s claim for suppression and determine whether it should be allowed or not, if on a balance, the need for secrecy was less than the need to ensure justice to the litigant.

This case encapsulated the rejection by the English courts of the principle of executive fiat, based as it were on a ‘hands off policy.’ This development reflected judicial thinking in the United States where in 1953, in the case of US v. Reynolds\textsuperscript{78} the U.S. Supreme Court laid down the principle that ‘a complete abandonment of judicial control (re: executive claim) would lead to intolerable abuses.’\textsuperscript{79}

In Conway v. Rimmer,\textsuperscript{80} the judiciary articulated the principle that the courts will investigate the Crown’s claim to secrecy and suppression of evidence. It was also opined that while the public interest requires that justice should be done (without withholding evidence), that very same public interest requires not only the Crown but also, a party to litigation to take up the plea directed at suppression of evidence. Thus the concept of ‘crown privilege’ came to be replaced by the expression ‘public interest privilege.’ The resulting position in English jurisprudence was as follows;

(a) The Crown as well as a litigant could take up the plea of privilege to shut out evidence in litigation; and
(b) The Court will investigate into the plea, whether taken up by the Crown or by a litigant in the context of Court proceedings.

This expansion was taken further in R v. Lewes Justices ex parte Home Secretary\textsuperscript{81} when the term ‘public interest immunity’ was upheld as a basis for disallowing information required from the government with regard to a defendant in a criminal prosecution. Thus, the transition from a plea of privilege initially perceived and/or conceived as the Crown’s prerogative extended to a private litigant or party to assert the same in the public interest, culminating in the now established concept of immunity in the public interest.

In Commissioner of Police, the Metropolis v Locker,\textsuperscript{82} the Court enunciated the principle that, the existence (or otherwise) of public interest immunity would depend on whether the Court is satisfied that the nature and status of the procedure in which the class of documents was generated is of a type to which the plea should apply. The Court laid down the principle that

\textsuperscript{77} 1968 (AC) 910 (H/L).
\textsuperscript{78} 345 US 1 (1953).
\textsuperscript{79} Ibid.
\textsuperscript{80} 1968 (AC) 910 (H/L).
\textsuperscript{81} 1973 (AC) 388 (H/L).
\textsuperscript{82} [1993] 3 All ER 584 (EAT).
‘whatever the class of documents in issue, it is the court that would ultimately arbitrate and decide on it.”

The Case of Owen McCoughty and Pat Grew must be regarded as a seminal decision in the context of the scope and content of the doctrine of public interest privilege and immunity. In this case, it was held that the Police and the Ministry of Defence are under a duty to disclose all documents to the Coroner and then it is for the Coroner to assess their relevance. At that stage, if the Coroner is aware of any public interest concerns that the Police or Ministry of Defence may have in relation to the disclosure of the documents, he or she may present public interest certificates setting out their concerns. If they do so, it will then fall to the Coroner to determine the balance for and against disclosure.

The previous legal position in the United Kingdom pertaining to the conclusiveness of executive determinations on matters of privilege stood rejected in this case. Instead the Court ruled that the Police and the Ministry of Defence are charged with the duty to disclose all relevant documents pertaining to a case to the Coroner and that the Coroner was empowered to assess their relevance in relation to the public interest concerns of the executive authorities against disclosure. If the Coroner decides that the information sought to be withheld by the Police or the defence authorities do not relate to public interest concerns or that they in fact do relate to the said concerns, these determinations would be amenable to judicial review. In either of those eventualities, the salutary feature would be that the Court would be the final arbitrator on the matter.

Even prior to this decision, in ex parte Willey (1995), the English Appellate Court itself held that, where a Minister examines a document which (in his opinion) is subject to public interest immunity and considers that the overall public interest does not favour its disclosure, or, is in doubt as to whether to disclose the information, then the Minister should put the matter to the courts. It is therefore the Courts, and not the executive, which determines whether a public interest certificate is necessary.

In the two consolidated cases of Regina v. H and Regina v. C, the trial judge had held (at a preparatory hearing), that in order to comply with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and a decision of the European Court of Human Rights, special independent counsel should be appointed to represent the interests of the defendants in forthcoming ex parte public interest proceedings. The Court of Appeal allowed the appeal preferred by the Crown from the trial judge’s ruling. The aggrieved defendants appealed against the Court of Appeal ruling in an attempt to have the trial judge’s decision restored. Dismissing the appeals, the House of Lords held that the appointment of Special Counsel to represent a defendant in an ordinary criminal trial as an advocate in matters

83 In that case, the Court distinguished between police grievance procedures and police disciplinary procedures (the plea being available only to the latter on being a purely internal matter).
85 See The Times, 30 September 1990. [1995] 1 AC 274
86 See The Times, 6 February 2004. [2004] UKHL 3
87 Article 6 of the ECHR deals with the right to fair trial.
88 Edwards and Lewis v. UK Application Nos. 39647/98 and 40461/98; Also see The Times, 29 July 2003.
89 [2003] 1 WLR 3006.
concerning public interest immunity was a course of last, never the first, resort. Such an appointment should not be ordered unless and until the trial judge was satisfied that overriding requirements of fairness to the defendants required such a course of action. It was further held that the trial process must be viewed as a whole and a defendant’s right had to be exercised in the framework of the administration of the criminal law ensuring fairness to all sides, namely the position of the accused, the victim and his or her family, and the public.

What is of concern in this instance, however, is that a portion of the Court’s ruling concerned disclosure or withholding information in a criminal prosecution. The House of Lords referred to ‘the Golden Rule’ wherein fairness ordinarily requires that, any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against him, should be disclosed to the defence.90 This decision provides an illuminating insight as to what could be interpreted as ‘public interest’ justifying non-disclosure of material in the prosecution’s hands:

(a) Those most regularly engaged in the effective investigation and prosecution of serious crime, which might involve resort to informers and undercover agents, or the use of scientific or operational techniques, which could not be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations;
(b) In such circumstances, some derogation from the golden rule of full disclosure might be justified;
(c) But such non-disclosure had to be always the minimum necessary to protect the public interest in question and could never imperil the overall fairness of the trial.

Examining these principles in the context of the Sri Lankan law, the relevant provisions of the Evidence Ordinance has been the subject of a number of cases. Section 123 of the Ordinance stipulates an absolute prohibition against disclosing unpublished records relating to affairs of State, while section 124 provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest will suffer thereby.

The legal principles are therefore clear. The privilege applies to an unpublished official record, not published records (following from English law). Moreover, affairs of the State have been interpreted broadly to include the business of the State including communications in regard to international diplomacy, minutes of public servants and state secrets.91 Further, the Court has the power to inspect the document to satisfy itself that the essentials of privilege are satisfied under Section 124.92

In the comparatively recent decision of Sri Lanka’s Court of Appeal in Vandergerd v. Zurlick,93 a plea of privilege was put forward by the Secretary to the Ministry of Foreign Affairs in relation

90 See ibid, obiter, Lord Bingham giving the opinion of the Appellate Committee.
93 [2000] 2 Sri LR, 111.
to what was claimed to be part of an unpublished official record pertaining to the affairs of State. This plea had been rejected by the District Court, which concluded that the document does not relate to affairs of State or to the public interest. The Court had ordered its disclosure on the basis that this was necessary for the administration of justice.

In appeal, the decision was reversed by the Court of Appeal, which held problematically⁹⁴ that where privilege is claimed, the public officer will be the sole judge of whether disclosure will be allowed or not and the courts have no discretion in this regard. Similarly, the right of judicial inspection was held to be relinquished if the document relates to the affairs of State. Hence it was judicially opined that the Sri Lankan law does not permit judicial activism in the manner evinced in the English and the Indian courts.

This decision exemplifies the classically conservative, or indeed excessively pro-State, thinking of the Sri Lankan judiciary in relation to the concept of public interest privilege in recent years. Even though this plea has not been taken in prosecutions of grave human rights violations, the judicial upholding of the plea in the wake of Vandergert v Zurfick⁹⁵ appears to be a grave possibility.

3. Conclusion: A Return to the Juridical

The normative shift that occurred in Sri Lanka after the 1978 Constitution has resulted in a skewed view of presidential immunity, which appears to be at odds with the basic tenets of a ‘rule of law based’ state. The overarching impact of presidential immunity on our legal system is further supplemented by the application of several regressive laws that grant immunity to other public officials.

It appears that both presidential immunity and other indemnity provisions within the law contribute significantly towards the culture of impunity in Sri Lanka. While a state’s obligation to investigate violations of human rights and punish perpetrators is basic, a constitutional cum statutory framework that runs counter to that basic norm paves the way for this culture of impunity.

In light of the above, the provisions in the present Constitution and statutory law that form the basis for official immunity must be narrowly interpreted to reflect greater consistency with the rule of law. Yet such an approach is wholly contingent on the independence and integrity of the judiciary as well as the competence of individual judges. It is also contingent on a transformation of the normative underpinnings of the Sri Lankan legal system. Such a transformation requires a ‘juridical’ approach, which is foundational to the rule of law. If the recognition of the ‘juridical’ is displaced by the ‘administrative’, then the very foundation of the law is undermined.

⁹⁴ Ibid. per Justice Nihal Jayasinghe opining that in Keerthiratna v. Gunawardena (1956) 58 NLR 62, Justice HNG Fernando had not given his mind to the possible overlap between sections 123 and 124 of the Evidence Ordinance and to the possible injury to the interest of the public.
⁹⁵ Ibid.
On the one hand, ‘juridical’ may be defined as ‘relating to judicial proceedings or to the administration of justice.’\textsuperscript{96} Hence the judicial system is composed of those who are expected to gather information, analyze it and come to findings on the basis of legal notions and ‘the manner in which the law is practised.’\textsuperscript{97} The essence of the juridical is therefore this allegiance to the law and its processes. On the other hand, what is meant by ‘administrative’ is the manner of action of the executive.

It is imperative to understand that those who have obligations under the juridical and those who have obligations under the administrative must think and act distinctly and separately.\textsuperscript{98} In fact, the doctrine of separation of powers is founded on such thinking. A good example of this need is reflected in the case of arrest and detention. While the executive is likely to deal with arrest and detention from the perspectives of efficiency and expediency, the judiciary is compelled to uphold the rights of individuals and personal freedom when considering the same issue.\textsuperscript{99} In the ensuing clash between notions of the juridical and the administrative, the executive may wish to modify the law so as to displace juridical notions and to replace them with administrative policies and considerations.\textsuperscript{100} If the executive succeeds in this endeavour, the juridical would be replaced with the administrative.

The judiciary’s response to such endeavours depends largely on the level of independence it enjoys. Though it is tempting to blame the judiciary in Sri Lanka for contributing to the perpetuation of impunity in the country, the lack of judicial independence must be understood as a systemic problem. This problem entails flaws relating to the legal education system, the integrity of the process of appointments and the security of judicial tenure. If the independence of the judiciary is in fact compromised as a result of such systemic flaws, it is likely that the judiciary will act in compliance with executive will. In this context, the juridical sphere would be displaced by the political logic of the administration.

What appears to be at the heart of the challenge faced in Sri Lanka is this apparent transformation of the juridical to the politico-administrative. As emphasized in this paper, this transformation originates from an over-mighty executive characterised by the constitutionally protected immunity of the President. The result is an entrenched culture of impunity. It is our view that constitutional reforms pertaining to the President’s power, the repeal of post-emergency draconian laws and proactive measures to restore the independence of the judiciary are necessary to address the problem of impunity in Sri Lanka. If the hypothesis of this paper—that impunity originates from broad constitutional and statutory immunities, and that its curtailment is contingent on a proactive judiciary—is correct, these reforms must be introduced swiftly and implemented seriously. In such event, salvaging the damaged reputation of Sri Lanka’s legal system and delivering justice to victims of gross human rights violations may cease to be unattainable goals.

\textsuperscript{96} Black’s Law Dictionary, (3\textsuperscript{rd} Ed.), (2006), at 393. The following discussion of this point has originated from a useful reflection in Basil Fernando, The Rule of Law and Democracy in Sri Lanka, Asian Human Rights Commission (March 2012).

\textsuperscript{97} Ibid.

\textsuperscript{98} Ibid.

\textsuperscript{99} Ibid.

\textsuperscript{100} Ibid.