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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (F/R) Application No. 446/2019

Women & Media Collective
No. 56/1, Sarasavi Lane,
Castle Street,
Colombo 08.

PETITIONER

Vs.

1. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

2. Mr. Don. Shamantha Jude
   Anthony Jayamaha
   No. 93/6, Senanayake Mawatha,
   Nawala.

3. Mr. T.M.J.W. Thennakoon
   Commissioner General of Prisons,
   Prison Headquarters,
   No. 150, Baseline Road,
   Colombo 09.
   Mr. H.M.T.N. Upuleniya

Commissioner General of Prisons,
Prison Headquarters,
No. 150, Baseline Road,
Colombo 09.
[SUBSTITUTED 3RD RESPONDENT]

4. Mr. R. M. P. S. B. Rathnayake
Controller General of Immigration and Emigration, Department of Immigration and Emigration
"Suhurupaya",
Sri Subhuthipura Road,
Battaramulla.

Mr. U. V. Sarath Rupasiri
Controller General of Immigration and Emigration, Department of Immigration and Emigration
"Suhurupaya",
Sri Subhuthipura Road,
Battaramulla.
[SUBSTITUTED 4TH RESPONDENT]

5. C.D. Wickramarathna
Acting Inspector General of Police, Sri Lanka Police, Police Headquarters, Colombo 01.

6. Hon. Thalatha Atukorale
Minister of Justice,
Ministry of Justice and Prison
Reforms - Sri Lanka
Superior Courts Complex
Colombo 12.

Hon. Nimal Siripala de Silva
Minister of Justice,
Ministry of Justice and Prison
Reforms - Sri Lanka
Superior Courts Complex
Colombo 12.
[SUBSTITUTED 6TH RESPONDENT]

Hon. Mu. U. M. Ali Sabry PC
Minister of Justice,
Ministry of Justice and Prison
Reforms - Sri Lanka
Superior Courts Complex
Colombo 12.
[SUBSTITUTED- SUBSTITUTED 6TH RESPONDENT]

Hon. (Dr.) Wijeyadasa Rajapakshe PC
Minister of Justice, Prison Affairs
and Constitutional Reform,

Ministry of Justice, Prison Affairs and Constitutional Reforms - Sri Lanka,
Superior Courts Complex,
Colombo 12.
[SUBSTITUTED-SUBSTITUTED-SUBSTITUTED 6TH RESPONDENT]

7. Mr. Kalinga N. Indatissa PC
The President,
The Bar Association of Sri Lanka,
No. 153, Mihindumawatha,
Colombo 12
and also of
No. 20, 1st Lane,
Epitamulla Road, Pitakotte.

Mr. Saliya Pieris PC
The President,
The Bar Association of Sri Lanka,
No. 153, Mihindumawatha,
Colombo 12.
[SUBSTITUTED 7TH RESPONDENT]

8. Mr. Kaushalya Nawaratne
Attorney-at-Law and the
Secretary,
The Bar Association of Sri Lanka,
No. 153, Mihindumawatha,
Colombo 12
and also of
No.8B, 1st Lane,
Pagoda Road, Nugegoda.

Mr. Rajeev Amarasuriya
Attorney-at-Law and the
Secretary,
The Bar Association of Sri Lanka,
No. 153, Mihindumawatha,
Colombo 12.
[SUBSTITUTED 8TH
RESPONDENT]

Mr. Isuru Balapatabendi
Attorney-at-Law and the
Secretary,
The Bar Association of Sri Lanka,
No. 153, Mihindumawatha,
Colombo 12.
[SUBSTITUTED- SUBSTITUTED
8TH RESPONDENT]

9. Mr. Roger Jonsson
   Clearpoint Residencies,
   No.1, Perera Mawatha,
   Kotuwegoda, Rajagiriya.

10. Mrs. Caroline Jonsson-Bradley
    Care of her father Roger Jonsson,
    Clearpoint Residencies,
    No. 1, Perera Mawatha,
    Kotuwegoda, Rajagiriya.

11A. His Excellency Maithripala Sirisena,
    Former President of Sri Lanka,
    No. 2, Mahagamasekara Mawatha
    (Formerly Paget Road),
    Colombo 07.
    [11TH ADDED RESPONDENT]

RESPONDENTS

BEFORE : **S. THURAIRAJA, PC, J**
YASANTHA KODAGODA, PC, J AND
JANAK DE SILVA, J.

COUNSEL : Sanjeeva Jayawardena, PC with Rukshan Senadheera for the Petitioner.

Nerin Pulle, PC, ASG for the 1st, 3rd, 4th, 5th and 6th Respondents.

Saliya Pieris, PC with Thanuka Nandasiri for the 7th and 8th Respondents.

Dr. Romesh De Silva, PC for the 9th and 10th Respondents.

Faiszer Musthapha, PC with Pulasthi Rupasinghe and Siera Amarasiri for the 11A Respondent.

WRITTEN Petitioner on 29th March 2023 and 31st August 2023

SUBMISSIONS : 1st, 3rd, 4th, 5th and 6th Respondents on 9th August 2023

9th and 10th Respondent on 29th March 2023 and 21st August 2023

11A Respondent on 27th March 2023 and 25th August 2023

ARGUED ON : 09th June 2023, 12th June 2023, 20th June 2023, 13th July 2023, 17th July 2023 and 24th July 2023

DECIDED ON : 06th June 2024

CONTENTS OF THE JUDGMENT

S. THURAIRAJA, PC, J.

YASANTHA KODAGODA, PC, J.

S. THURAIRAJA, PC, J.

1. In the early weeks of November 2019, the Royal Park Murder, as it was dubbed commonly, made the limelight once more as the convict, Don Shramantha Jude Anthony Jayamaha (the 2nd Respondent), to the utter disbelief of the public, was granted a Presidential Pardon by the then Executive President Maithripala Sirisena, as one of the hindermost acts of his incumbency.

2. The Petitioner, a non-profit organization dedicated to, *inter alia*, the promotion and protection of the rights of women in Sri Lanka, moved this Court by Petition dated 13th November 2019 on behalf of themselves and especially in the public interest and the general societal interest of Sri Lanka, invoking its sole and exclusive fundamental rights jurisdiction under Article 126 of the Constitution to review the constitutionality of the said decision of His Excellency. The Petitioner contended, *inter alia*, the impugned Pardon to be in violation of the fundamental right to equality and equal protection of the law, of the Petitioner and of the people and the citizenry of Sri Lanka, as guaranteed by Article 12(1) of the Constitution.

3. The matter was taken up for support on 29th November 2019, by which point the President had ceased to hold office. As such, the Petitioner filed the Amended Petition dated 02nd December 2019, adding His Excellency the former President, Maithripala Sirisena, as the 11A Respondent. Following the unfortunate delays caused by the global pandemic, on 23rd September 2022, leave to proceed was granted in respect of the Petitioner's Application.

4. In the course of these proceedings, it was revealed that the 2nd Respondent had received not one, but two presidential pardons. The first one of which was granted in May 2016, whereby the sentence of death imposed upon the 2nd Respondent by the Court of Appeal was commuted to one of life imprisonment. The second was granted in November 2019 by the 11A Respondent in a purported exercise of his powers under

Article 34 of the Constitution, as a result of which the 2nd Respondent was released from prison on 8th November 2019. I shall hereinafter refer to the former as the '1st Pardon' and the latter as the '2nd Pardon', for the sake of convenience.

SUBMISSIONS OF THE PETITIONER

5. Mr. Sanjeeva Jayawardena, PC on behalf of the Petitioner, set forth extensive submissions before this Court on various grounds challenging the constitutionality of the 2nd Pardon and stressing the need for this Court to issue guidelines governing the grant of presidential pardons. For ease of analysis, I have produced hereinbelow a non-exhaustive summary of the most decisive of contentions so put forward.

6. The foremost contention of the Petitioner was that, unlike Article 72 of the Constitution of India, which provides for the power of presidential pardon, Article 34 of the Constitution of Sri Lanka has imposed preconditions as set out under the proviso to Article 34(1), which must be strictly adhered to in granting a pardon. Where the proviso is not followed, it was contended, that such a pardon would amount to an encroachment of judicial power.

7. Interestingly, the learned President's Counsel opted not to challenge the 1st Pardon but contended that the 2nd Respondent remains a murder convict despite the said Presidential Pardon, for such a pardon does not have the effect of altering the 'historical fact' that he was sentenced to death. In this line of reasoning, it was further contended that the proviso to Article 34(1) of the Constitution contemplates this historical fact of being sentenced to death by a court of law which cannot be altered except by a court of higher standing; and as such the proviso must necessarily be followed afresh in granting the impugned 2nd Pardon, which had not been done.

8. The Petitioner further submitted the power of pardon under Article 34 to be one reposed on the President, and the President alone; and for this reason, it was argued

that it cannot be delegated to any other. In this regard, the Petitioner stressed that there is no warrant signed by the President himself in the instant case. The learned President's Counsel for the 11A Respondent—former President Maithripala Sirisena—conceded that there is no such warrant available but asserted that Article 34 does not call for such a warrant, with which the learned Additional Solicitor General agreed.

9. Another one of the most pivotal contentions put forward by the Petitioner relates in its essence to the Public Trust Doctrine. The learned President's Counsel was steadfast in his assertion that this power of presidential pardon is exercised on behalf of the people, and therefore, it is to be exercised in the public interest in accordance with the Public Trust Doctrine and that it must necessarily be free from whim, caprice, arbitrariness, unreasonableness or *mala fides*. The same was unequivocally supported by Mr. Saliya Pieris, PC representing the 7th and 8th Respondents as well as Dr. Romesh De Silva, PC representing the 9th and 10th Respondents.

10. In their written submissions, the Petitioner also questioned, in view of the large number of convicts on death row, if a proper system of evaluation and assessment had been followed in selecting the beneficiaries of presidential pardons, and further questioned how the 2nd Respondent was cherry-picked by the President to be granted the privilege of a presidential pardon, to the exclusion of all other convicts; asserting that the 2nd Respondent does not deserve state intervention to grant him a presidential pardon by any parity of reasoning.

11. The Petitioner also emphasised that reasons must be given for any decision relating to granting presidential pardons and that a pardon can be rescinded where there is manifest fraud or deception in obtaining it.

12. In addition, the Petitioner alleged the Committee appointed by the then Minister of Justice, for the ostensible purpose of giving recommendations, to be one not found in law; and, regarding the reports prepared by the said committee, further asserted

its functions to have been a grave encroachment on the judicial province since said recommendations have the effect of attempting to substitute the findings of the trial court.

Intervenient-Petitioners

13. The 1st and 2nd Intervenient-Petitioners, Rev. Balangoda Buddhagosha Thero and Most Rev. Dr. Raymond Wickramasinghe, by Petition dated 19th June 2023, sought to be added as party Respondents. They sought to assist this Court by clarifying their alleged involvement in granting the impugned 2nd Pardon following a news report, which, in a gross misinterpretation of court proceedings, reported the learned President's Counsel for the Petitioner to have submitted the names of the Intervenient-Petitioners as being associated with the impugned Pardon.

14. The Press Release dated 11th November 2019 by the President's Media Division categorically mentions the Intervenient-Petitioners amongst those who requested a presidential pardon to be granted to the 2nd Respondent. By their affidavits, the Intervenient-Petitioners submitted this alleged involvement to be an utter falsity and further clarified the actual facts and circumstances of their appeals.

15. They asserted that their appeals only urged the former President to pay more attention towards detainees in general, so as to educate and rehabilitate them in a positive environment until their sentences are concluded. They further asserted that they had not made any personal requests on behalf of the 2nd Respondent in order to obtain a presidential pardon. After perusing the appeals made by the Intervenient-Petitioners to the President, this Court is left with no doubts as to the truthfulness of the aforesaid assertions.

SUBMISSIONS OF THE RESPONDENTS

16. The 2nd Respondent—the grantee of the Pardon, Don Shramantha Jude Anthony Jayamaha—remained absent and unrepresented all through this hearing.

17. The 7th and 8th Respondents, the President and Secretary of the Bar Association of Sri Lanka, and the 9th and 10th Respondents, Roger Johnson and Caroline Jonsson-Bradley, the father and the sister of the deceased Yvonne Johnson, made representations before this Court, and their submissions are congruent to a great extent with that of the Petitioner, albeit with slight dissimilarities with regards to certain legal positions.

18. Dr. Romesh De Silva, PC representing the 9th and 10th Respondents, challenged the 1st Pardon as well as the 2nd Pardon, unlike the Petitioner, and prayed that compensation be granted to the 9th and 10th Respondent for the troubles and distresses they have had to endure as a result of the impugned acts of the 11A Respondent.

19. He emphasized the necessity to follow the purposive approach in interpreting Article 34 of the Constitution and deemed the proviso to Article 34(1) as being a condition precedent to granting of pardon to offenders condemned to death by a court of law, and further maintained that the power only exists once this condition precedent has been fulfilled. Accordingly, any purported exercise of Article 34(1) without conforming to the procedure set out in the proviso thereunder was argued to be *ultra vires*.

20. The learned President's Counsel recognized Section 3(q) of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015* to be a mandatory legal requirement in granting a pardon, and further commented that while there is no strict legal requirement of consulting any other stakeholders, such consultation may stand favourably towards state actors insofar as the test of reasonability is concerned.

21. With regards to the circumstances of the 1st and 2nd Pardons, he invited the Court to take cognizance of the fact that the purported directions/orders—however it might be aptly termed—by the then President, dated 20th March 2016 and 29th October 2019, do not amount to 'warrants' or 'proclamations' but are mere approvals at best; and as such contended the said directions/orders to lack the required sanctity in law.

22. Moreover, it was contended that there is a total failure to comply with the procedure set out under the proviso to Article 34(1) for the report from the trial judge, the report containing advice of the Attorney-General and the report containing the recommendations of the Minister of Justice have not been obtained in granting the 1st and 2nd Pardons. The learned President's Counsel contended any one of those failures, on its own, to be capable of vitiating the decision to grant a pardon, and that a total failure of this nature to be most certainly fatal inasmuch as such action would be procedurally *ultra vires* and therefore null and void *ab initio*.

23. Furthermore, the learned President's Counsel strongly emphasized the necessity of being cautious in considering authorities from other jurisdictions, for it is paramount that we appreciate our own distinct constitutional framework and its developments first and foremost in interpreting Article 34. Illustrating this point, he pointed out how the preamble of the Constitution of India manifests the Constitution as supreme whereas the Constitution of Sri Lanka manifests the people as supreme and sovereign. He further submitted Article 4 of the Constitution of Sri Lanka to set out the manner in which the people expect to exercise their powers as the sovereign and any deviation of it to be unconstitutional. The learned President's Counsel conceded that, according to the jurisprudence of India, the President of India can, in fact, look into the merits of a case, but further contended this line of reasoning to be wholly inappropriate in our own constitutional setting as the President is not vested with any judicial power in terms of the Constitution of Sri Lanka.

24. In full agreement with the Petitioner with regards to the effect of a pardon, it was submitted by the learned President's Counsel that what a pardon 'takes away' or 'erases' is the punishment and not the conviction. The conviction would remain intact, as the former is a matter for the executive whereas the latter is a matter for the judiciary.

25. Commenting on the purpose of presidential pardoning power in general, the learned President's Counsel noted that this power exists in many jurisdictions as a means of remedying cases of proven miscarriages of justice and asserted that the President within our own framework has no power to correct miscarriages of justice for the same reason aforementioned.

26. With regards to the jurisdiction of the Court, he submitted all acts of the President to be judicially reviewable, except where such power has been expressly ousted by the Constitution itself; and the standard of judicial review applicable to acts done by the President under Article 34 of the Constitution was suggested to be the same standard applicable to any other matter which is subject to judicial review for it would be anathema to the Rule of Law and our Constitution if it is held that the President possessed unfettered power in any regard.

27. Mr. Saliya Pieris, PC representing the 7th and 8th Respondents advocated that all presidential pardons must necessarily consider the perspective of the victims, and that any pardon must be such to preserve the Rule of Law.

28. He differed greatly from the learned President's Counsel for the Petitioner as well as 9th and 10th Respondents inasmuch as he contended that the President must be able to rectify where there is a miscarriage of justice, as our law does not recognize a review process once the appeals have been exhausted. In support, he highlighted how legal wrongs of the same nature may carry varying degrees of blameworthiness, so to speak, in certain moral perspectives.

29. Commenting on the effects of a pardon, the learned President's Counsel submitted that the judicial finding of guilt remains untouched following a pardon, as it is only a convict who can be pardoned; but conversely, he also recognized 'free pardons' as being an exception, where the conviction was said to be as good as erased.

30. The learned President's Counsel further invited the Court to take cognizance of how the 69 other inmates, whose sentences were also commuted as a result of the 1st Pardon, may be affected by any pronouncements of this Court. However, in this regard, as I shall advert to later on, the learned Additional Solicitor General, on behalf of the Hon. Attorney-General, submitted the actions of the former President in granting the 1st Pardon as well as the 2nd Padon to be *ultra vires* for the mandatory procedure set out in the proviso to Article 34(1) has not been followed.

31. While the submissions of the two aforementioned Respondents buttress the position taken by the Petitioner in various degrees, the submissions of the 11A Respondent stand in stark contrast.

Submissions of the 11A Respondent

32. Representing the 11A Respondent, Mr. Faiszer Mustapha, PC took up the position that the failures of state officials and other non-state parties involved in the process of granting the impugned Pardon cannot and should not cast aspersions against the 11A Respondent. In this line of reasoning, the learned President's Counsel attempted to draw a distinction between the office of presidency and the holder of such office, asserting the liability of the state vis-à-vis the liability of the 11A Respondent to be distinct and separate.

33. The position of the 11A Respondent was that he has, at all times material to this case, acted reasonably in good faith, and not arbitrarily, considering the advice given to him by those well suited to give such advice, and further contended that there has

been substantial compliance to the procedural requirements on the part of the 11A Respondent in granting the 1st and 2nd Pardons.

34. With regards to the procedure established under proviso to Article 34(1), the learned President's Counsel contended the conduct of 11A Respondent to be in substantial compliance with the said procedure as it was the recommendations made by the Minster of Justice—being the final step of the procedure therein—had purportedly been followed by the 11A Respondent. He asserted that it is reasonable for him to presume compliance with the procedure established by law, once such recommendations have been received from a legal luminary such as the Minister of Justice at that time. In considering this contention, the learned President's Counsel also invited this Court to take cognizance of the fact that the 11A Respondent is a *'lay President'* in assessing the merits of his conduct.

35. The 11A Respondent was adamant in his position that state officials have been imprudent in their official conduct and that he has, at all times, followed the advice tendered to him. He further stated that he exercised this power in the same manner as every President before him and that he has not done anything his predecessors have not done, and listed out many instances where the exercise of the power of pardon by his predecessor and successors have been controversial.

36. In furtherance of this position, he invited notice towards a letter sent by the Presidential Secretariat dated 14th July 2015—during the incumbency of former President Mahinda Rajapaksa—where it is evident on the face of it that officials have acted on the fallacious understanding that the reports contemplated under Article 34 of the Constitution and Section 286(b) of the *Code of Criminal Procedure Act* are one and the same.

37. With regards to the effect of a pardon, the 11A Respondent, in stark contrast to all other parties who made submissions before this Court, contended that the 2nd

Respondent ceased to be an offender condemned to suffer death once the 1st Pardon was granted, for the said Pardon commuted the sentence of death imposed by the Court of Appeal to one of life imprisonment. In view of this, the written submissions tendered on behalf of the 11A Respondent, dated 24th March 2023, assert that it was not mandatory to follow the procedure set out in the proviso to Article 34(1) and that the President could exercise his powers under Article 34 freely insofar as the impugned 2nd Pardon is concerned, as the 2nd Respondent was no longer an offender sentenced to death at the time of the said Pardon.

38. However, with regards to the question as to whether or not the power of pardon impinges upon the powers of the judiciary, the 11A Respondent, in his written submissions dated 25th August 2023, asserted the power of pardon to be a purely executive function and that the President acts in a wholly different plane which in no way make inroads to the judicial province.

39. Furthermore, in the written submissions dated 25th August 2023, the 11A Respondent raised a technical objection with regard to the Petitioner's failure to substitute the present Minister of Justice, Dr. Wijeyadasa Rajapakshe, PC, and thereby pleaded the application be dismissed *in limine* for want of necessary parties.

Submissions of the Hon. Attorney-General

40. On behalf of the Hon. Attorney-General, Additional Solicitor General Mr. Nerin Pulle, PC made submissions representing the 1st, 3rd, 4th, 5th and 6th Respondents, and tendered exhaustive written submissions on 09th August 2023, several weeks before any other party with commendable expeditiousness.

41. The learned Additional Solicitor General categorically asserted during his oral submissions as well as the written submissions that the Attorney-General never represented the 11A Respondent, as he has ceased to hold office as the President, and only represented the 1st, 3rd, 4th, 5th and 6th Respondents.

42. Most significantly, the learned Additional Solicitor General agreed with the contention of the Petitioner that the actions of the former President in granting the 2nd Pardon are *ultra vires*. In that, he contended the 1st Pardon itself to be *ultra vires* and a nullity by virtue of the failure on the part of the former President to follow the procedure established by law. Due to this, it was submitted that the 2nd Respondent remained a prisoner condemned to death at the time of granting the 2nd Pardon, which meant that it was mandatory for the President to have followed the procedure set out under Article 34(1).

43. Insofar as the purpose of the power of pardon is concerned, he submitted this power to be one corollary of values such as compassion and forgiveness, which are fundamental values in all mainstream religions. It was submitted that the power is vested in the President as a 'safeguard' against judicial errors or as a 'check' on the powers of the judiciary. The learned Additional Solicitor General was of the opinion that this power is not only a 'check' on the judiciary, merely limited to rectifying miscarriages of justice, but also one which may be used on a number of other grounds which are impossible to be exhaustively listed. The power of pardon was described as one which would extend to situations where the exercise of judicial power, whether due to factors existing at the time or supervening circumstances, has led to a result wherein the continued deprivation of liberty of the individual cannot stand.

44. It was further submitted by the learned Additional Solicitor General that unless there is obvious or gross unlawfulness, such as in the case of a pardon granted in return for a bribe, the judicial arm of the State would be wary of interfering with the exercise of such power by the executive arm. The learned Additional Solicitor General also took up the position, in his oral submissions as well as his written submissions, that the power of the President under Article 34(1) constitutes a *sui generis* power, the exercise of which amounts neither to executive nor administrative action as contemplated in Article 17 read with Article 126 of the Constitution. On the other hand, he also

conceded during his submission that any purported exercise of the power of pardon can be judicially reviewed insofar as the procedure established under the proviso to Article 34(1) is concerned.

45. With regards to the role of the Minister of Justice, it was the submission of the learned Additional Solicitor General that the Minister's function in the pardoning process commences if, and only if, the President has instigated the process set out under the proviso. It was further submitted that the advice tendered by the Minister in the instant case to not be the recommendation as contemplated under the said proviso.

46. The learned Additional Solicitor General also submitted, via written submission dated 5th August 2023, a list of provisions to be found in the *Code of Criminal Procedure Act, No. 15 of 1979* and the *Prisons Ordinance, No. 16 of 1877* enabling commutation and remission of sentences which he contended to be parallel to Article 34.

47. With regards to Section 3(q) of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015*, the learned Additional Solicitor General differed greatly from the opinions of other Counsel. It was his submission that the requirements under the said Act can only be conceived as directory, and also that it would be to add on to or otherwise modify the Constitution if the same were to be held mandatory.

48. The learned Additional Solicitor General, having agreed that the actions of the President in granting the pardon are *ultra vires*, further submitted the decision of the 11A Respondent to pardon the 2nd Respondent, though it may have been done under the colour of his office, to be a strictly personal decision for which no one but the 11A Respondent in his personal capacity can be held responsible. As such, it was contended that there is no cause to hold the State liable in the instant application.

49. Having considered the totality of the submissions made by the Counsel, it is apparent that what seemed a singular and straightforward question has proliferated into many

facets. In the interest of confronting the most fundamental of issues in perspective without being distracted by frills and frippery, I wish to crystallize the issues before us in the following questions, which I shall proceed to answer in the course of this judgment in no particular order:

Firstly, it needs to be considered whether or not it was necessary for the constitutional procedure to be followed anew in granting the impugned 2nd Pardon to the 2nd Respondent, seeing as his sentence of death had been commuted to one of life imprisonment by the 1st Pardon. This is the most pertinent question insofar as the procedural requirements are concerned. In answering this question, decrypting the nature and effect of a presidential pardon under Article 34 is of the essence;

Secondly is the question which I consider the greatest in magnitude, both in terms of its effect on the instant application as well as constitutional significance: is the power of pardon under Article 34 amenable to judicial review only insofar as procedural irregularities? To put it in the simplest of terms, can this Court inquire into the merits of the President's decision and what are the standards of review applicable? This must necessarily be considered in view of the learned Additional Solicitor General's submission that this power is of a *sui generis* nature;

Thirdly, questions were also raised as to the exact nature of the requirements contemplated in the proviso to Article 34(1) and how such requirements must be interpreted. I shall proceed to answer this question in my analysis of the factual circumstances relating to the impugned Pardon as each element is taken up for consideration; and

Finally, this Court was also invited to consider whether or not it was necessary to set out guidelines to be followed in the exercise of this power vested in the President under Article 34.

BACKGROUND OF THE IMPUGNED PRESIDENTIAL PARDON

50. Given the intricacy and sensitivity of the matters before us, it is apropos that we are wise to the entire context of the impugned Pardon, starting from the crime itself leading up to the Petition before us.

51. The 2nd Respondent, Don Shramantha Jude Anthony Jayamaha, was indicted before the High Court of Colombo for the murder of Yvonne Johnson, who was only 19 years old at the time of her death. On 01st July 2005, the body of Yvonne was discovered, lying in a pool of her own blood, on the 19th-floor stairway of the Royal Park Apartment Complex, where her family had made home. By judgment dated 28th July 2006, the learned Judge of the High Court, having arrived at the irrefutable and inescapable inference that the accused himself perpetrated the barbarity leading to her untimely demise—primarily on account of, *inter alia,* a palm impression of the accused in blood, which was proven to be of the deceased—found him guilty of culpable homicide not amounting to murder and sentenced him to a term of 12 years rigorous imprisonment with a fine of Rs. 300,000 moreover.[1]

52. Aggrieved by the aforesaid conviction, the 2nd Respondent preferred an appeal. The Hon. Attorney-General, too, in a move not before seen, appealed against the conviction of culpable homicide not amounting to murder, canvassing the same be quashed in favour of a conviction of murder. The principal position of the Hon. Attorney-General was that the 2nd Respondent had harboured the most conspicuous murderous intention towards the deceased and that the evidence led at the trial was

[1] HC Colombo Case No. 2722/2005

more than sufficient to establish his criminal liability for the offence of murder beyond reasonable doubt.

53. The Court of Appeal, in a single consolidated judgment spanning 33 pages, following a detailed and comprehensive analysis of the evidence, dismissed the appeal of the 2nd Respondent while allowing the appeal of the Hon. Attorney-General.[2] The Court of Appeal, in this analysis, noted how the head of the deceased had been bashed on the edge of a step more than once, causing it to be disfigured beyond virtual recognition, as well as the findings of the Judicial Medical Officer to the effect that the cause of death had been strangulation by the deceased's own stretch pants used as a ligature having contorted her body and bending her legs backwards.

54. The defence of grave and sudden provocation taken up by the accused-appellant was described by the learned Judges of the Court of Appeal as *"most untenable and hilarious if not ludicrous"*.[3] Accordingly, seeing the ferocity of the offence and its meditated nature, by judgment dated 11th July 2012, the Court of Appeal quashed the decision of the learned High Court Judge and found the 2nd Respondent guilty of murder and **sentenced him to death**.

55. The 2nd Respondent sought to have the said conviction by the Court of Appeal reversed by way of a Special Leave to Appeal Application before the Supreme Court. However, the Supreme Court dismissed the Application, affirming the findings of the Court of Appeal and the sentence of death.

56. Thereafter, in May 2016, the sentence of death imposed upon the 2nd Respondent was commuted to one of life imprisonment by a Presidential Pardon (1st Pardon), purportedly in pursuance of the recommendations made by the then Minister of

[2] vide *Don. Shamantha Jude Anthony Jayamaha v. Hon. Attorney-General* C.A. 303/2006 and CALA 321/06, C.A. Minutes of 11 July 2012, now reported as (2012) 2 Sri LR 236

[3] ibid at 22

Justice, Dr. Wijeyadasa Rajapakshe, PC, who is also the Minister of Justice at the time of this hearing. It is noteworthy that this 1st Pardon was a group pardon whereby the sentences of 70 death row convicts, including that of the 2nd Respondent, were commuted to life *en masse*.

57. In November 2019, less than a decade into the sentence of death imposed upon the convict by the Court of Appeal, the 11A Respondent, in the final weeks of his presidency, granted the impugned Presidential Pardon (2nd Pardon) to the convict purportedly exercising his powers under Article 34 of the Constitution. As a result, the 2nd Respondent was released from prison on 08th November 2019.

58. Despite interim orders being issued to prevent the 2nd Respondent from fleeing the jurisdiction, as prayed for by the Petitioner when the matter was taken up for support on 29th November 2019, it was later revealed by the Controller General of Immigration and Emigration by affidavit dated 05th December 2019 that the 2nd Respondent had departed to Singapore on 15th November 2019, having obtained his passport soon after the impugned 2nd Pardon on 14th November 2019.

59. The written submissions of the Hon. Attorney-General very helpfully included therewith a timeline of events, which brings much needed perspicuity to what is clearly a haphazard sequence of conduct. The same is produced hereinbelow, *mutatis mutandis,* for the sake of clarity.

28 July 2006	2nd Respondent convicted of culpable homicide not amounting to murder by the High Court of Colombo and sentenced to a term of 12 years rigorous imprisonment and a fine of Rs. 300,000/-
11 July 2012	Court of Appeal overturns the said judgment and convicts the 2nd Respondent of murder and sentences him to death

22 October 2012	Application for Special Leave to Appeal refused by the Supreme Court
14 July 2014	Letter sent to the Attorney-General by the Secretary to the President - Stating that the report of the High Court Judge in terms of Section 286(b) of the CCPA is being forwarded attached thereto - Instructing that it be forwarded to the Minister of Justice with his advice
11 May 2015	The Committee to review prisoners on death row recommends the commutation of the 2nd Respondent's sentence
12 May 2016	Letter by Minister of Justice to the President in regard to the appointment of the Committee to review prisoners on death row and its recommendations
20 May 2016	The Secretary to the President informs the Secretary, Ministry of Justice that the President has granted approval in terms of Article 34(1) to commute the sentences of the 2nd Respondent and 69 other prisoners
21 May 2016	The Acting Secretary, Ministry of Justice communicates to the Commissioner General of Prisons that said prisoners are to be now considered as prisoners serving life imprisonment
01 August 2017	Written plea dated 30th July 2017 by the mother of the 2nd Respondent to the then President, titled "අම්මා කෙනෙකුගේ

	කණගාටුදායක තත්වය පිළිබඳ පැහැදිලි කිරීමට *[to explain the grief of a mother]* received by the Presidential Secretariat
07 February 2019	Unsigned, undated appeal for pardon bearing the name of Ven. Athuraliye Rathana M.P. printed on a Parliament letterhead received by the Presidential Secretariat
09 May 2019	Additional Secretary to the President (Legal) sends letter to Commissioner General of Prisons, calling for details on the 2nd Respondent and instructing him to personally attend to the matter (Marked Urgent)
14 May 2019	Commissioner General of Prisons submits details of the 2nd Respondent to the Additional Secretary to the President (Legal)
27 May 2019	The Additional Secretary to the President (Legal) requests Additional Secretary to the President (Constitutional and Statutory Affairs/CSA) to submit a copy of the letter dated 20th May 2016 sent to the Ministry of Justice regarding the commutation of the 2nd Respondent's sentence of death to one of life imprisonment
28 May 2019	The aforesaid letter submitted to the Additional Secretary to the President (Legal) by the Additional Secretary to the President (CSA)
11 June 2019	The Additional Secretary to the President (Legal) sends letter to the Hon. Attorney-General, requesting a copy of the advice, if any, made in respect of the reports submitted under

	Section 286(b) of the CCPA along with the letter dated 14th July 2014
13 June 2019	The parents of the 2nd Respondent send another written plea to the President seeking a presidential pardon
19 July 2019	A formal Petition pleading a pardon, drafted by the 2nd Respondent's legal representatives, submitted to the President
12 September 2019	Letter by the Hon. Attorney-General setting out the circumstances of the case and advising that the execution of the sentence of death imposed by the Court of Appeal should be done considering the cruel and inhuman nature of the assault, age of the accused, and the behaviour of the accused before and after the conviction
04 October 2019	The Additional Secretary to the President (Legal) submits report to the President/Secretary to the President with, *inter alia,* the following: - Setting out the details regarding the Committee appointed to consider the sentences of death row inmates - Noting that the 2nd Respondent is, at the time, a prisoner serving a life sentence following presidential pardon (commutation) on 20th May 2016 - Setting out the procedure to be followed under Article 34 of the Constitution and that the same has not been followed in granting the 1st Pardon

- Noting that the Attorney-General had not sent his advice via the Minster of Justice
- Further noting that the procedure must be followed as though the 2nd Respondent is a prisoner serving a life sentence, as the President has already granted him the 1st Pardon, with or without following the due procedure
- Concluding that the President may at his discretion grant a conditional pardon

08 October 2019 — The Commissioner General of Prisons sends letter to the Secretary, Ministry of Justice and Prison Reforms regarding a Special State Pardon scheme to the selected classes of prisoners, which specially excludes prisoners serving life sentences

29 October 2019 — The Additional Secretary to the President (Legal) submits memorandum to the Secretary to the President, in response to the instruction received to bring the 2nd Respondent under the scheme of Special State Pardon, which states the following:

- The 2nd Respondent cannot be considered under the said scheme as the Prison report [presumably the letter dated 8th October 2019] specially excluded prisoners serving life sentences
- The 2nd Respondent, who is serving life imprisonment, can be granted a free or conditional pardon in terms of the provisions under the Constitution

29 October 2019	On the aforementioned memorandum by the order/direction stating "නිදහස් කිරීමට අනුමත කරමි *[I approve to be released]*", the President approves the release of the 2nd Respondent
30 October 2019	Instructions minuted to the Additional Secretary to the President (CSA) to implement the aforesaid order of the President in accordance with the provisions of the Constitution
04 November 2019	Secretary to the President informs the Secretary, Ministry of Justice and Prison Reforms that the President has approved the 2nd Respondent to be released
08 November 2019	The Secretary to the Minister of Justice informs the Commissioner General of Prisons that the then President has ordered the release of the 2nd Respondent
08 November 2019	The Commissioner General of Prisons forwards the letter dated 04 November 2019 to the Superintendent, Kuruwita Remand Prison
09 November 2019	2nd Respondent released from prison
13 November 2019	Fundamental Rights Application filed by the Petitioner
14 November 2019	Passport issued to the 2nd Respondent
15 November 2019	2nd Respondent departs to Singapore
On or about 17 November 2019	11A Respondent ceased to hold office as the Executive President of the Republic

29 November 2019	Application supported before the Supreme Court - The Court imposes a travel ban on the 2nd Respondent - Attorney-General appears for the 1st, 3rd, 4th, 5th and 6th Respondent but not Maithripala Sirisena, former President and the 11A Respondent of the instant application
17 November 2021	Right to Information Request to the Ministry of Justice to obtain any material relating to the pardoning of the 2nd Respondent

TECHNICAL OBJECTION OF THE 11A RESPONDENT

60. Before I answer any of the questions before us, I wish to first dispense with the technical objections raised by the 11A Respondent in his final written submissions dated 25th August 2023. The 11A Respondent invited the Court's notice to the fact that one of the necessary parties, as highlighted during the submissions, *viz*. the incumbent Minister of Justice Hon. Dr. Wijeyadasa Rajapakshe, PC —who was also the Minister of Justice at the time of granting the impugned Pardon—has not been made party to the instant application. On this basis, it was pleaded that this application be dismissed *in limine* for want of necessary parties.

61. As held by Amerasinghe J. in ***Samanthilaka v. Ernest Perera***,[4]

> *"The person who has infringed or is likely to infringe a fundamental or language right is not a necessary party in the sense in which that phrase is used in connection with ordinary civil litigation. The failure to make a person who is alleged to have violated or is likely to violate a fundamental or language right a*

[4] [1990] 1 Sri LR 318

respondent in a petition for relief under Article 126 of the Constitution is not, in my view, a fatal defect." [5]

62. It must be borne in mind that, in applications under Article 126, this Court is not adjudicating upon the rights of Petitioners as against the Respondents. The central concern is whether there has been an infringement or imminent infringement of fundamental rights by executive or administrative action. The failure to name a person who may have personified such action as a respondent should not be deemed fatal to an application under Article 126, unless such failure prevents this Court from deciding the questions before it fairly and effectively.

63. Even where it so appears that the State or any person, named or unnamed, is prejudiced by such failure, it would not be in the interest of justice to dismiss an application *in limine* or *in toto* merely by virtue of such failure, especially where the case is of great constitutional significance. The constitutional guarantees afforded to the populace and the constitutional duties imposed upon this Court must always take precedence over mere technicalities and procedural rules. The more appropriate course of action in such an instance would be to join them as a party and grant a fair and complete hearing, so as to meaningfully inquire into potential violations of fundamental rights, for such is the constitutional duty of this Court.

64. In the instant application, I do not see this failure as one which prejudicially affects any party. The Petitioner at no point challenged any actions by the then Minister of Justice, Dr. Wijeyadasa Rajapakshe, PC; and the 06th Respondent (Minister of Justice) was represented by the Attorney-General. With regards to the conduct of the 11A Respondent, the advice or recommendation given by the then Minister of Justice is

[5] ibid at 325

only relevant insofar as it appears on the record, and the records have been produced for the perusal of this Court.

65. I wish to distract this judgment no further by this objection, for it is but a frivolous one considering the nature of the questions before us, and the same is therefore rejected.

POWER OF PARDON/ PREROGATIVE OF MERCY/ EXECUTIVE CLEMENCY

Cognate and Analogous Law

66. In early Britain, when an absolute monarch reigned with virtually unfettered power, the power of pardon, like all prerogative power, was often misused. Kings frequently used pardons as partisan indulgences and for other self-serving ends, such as to consolidate power. It is said that pardons were often sold during the time of Edward II. Be that as it may, for they are clearly past such reprehensible undemocratic traditions, though one might legitimately question if we are.

67. In the present-day United Kingdom, too, the power of pardon exists in the form of the royal prerogative of mercy. This power is exercised by the Crown on the advice of the Justice Secretary. The establishment of the Court of Criminal Appeal in 1907 and the Criminal Cases Review Commission (CCRC) on 31st March 1997, by virtue of Section 8 of the *Criminal Appeal Act 1995 (UK)*, which provides a mechanism to refer possible miscarriages of justice to the criminal courts of appeal, has considerably diminished the need to exercise the prerogative of mercy.

68. Earlier views of the English Courts saw this power as one not amenable to judicial review.[6] Although the landmark House of Lords decision in ***Council of Civil Service***

[6] *Horwitz v. Connor* [1908] 6 CLR 38; *Ex parte Kinally* [1958] CrimLR 474; *Hanratty v. Lord Butler* [1971] 115 SJ 386; *de Freitas v. Benny* [1976] AC 239; *Thomas v. R* [1980] AC 125; *R v. Toohey, ex parte Northern Land Council* [1981] 151 CLR 170.

Unions v. Minister for the Civil Service (GCHQ Case) (1985)[7] conclusively recognized the potential for judicial review of the exercise of prerogative powers where the subject matter of the power is justiciable, it, too, did not recognize the exercise or non-exercise of the royal prerogative of mercy as reviewable; for Lord Roskill plainly included the prerogative of mercy in the list of powers His Lordship felt to be non-justiciable.[8]

69. The tide changed with the decision in ***R v. Secretary of State for the Home Department, ex parte Bentley (1994)***,[9] where the Home Secretary's decision to reject a claim for a posthumous free pardon was successfully reviewed on the basis that he had erred in law in his failure to consider the grant of a conditional pardon in making the decision. Even though ***Bentley*** did not necessarily amount to a major doctrinal transformation, it effectively established some level of judicial scrutiny over the exercise of the prerogative of mercy in the English setting.

70. In the United States, the power of clemency, or the power to pardon federal crimes, is vested with the President of the United States under Article II, Section 2, Clause 1 of the United States Constitution, except in cases of impeachment. Despite the earlier breakaway from the British Monarchical tyranny, the framers of the American Constitution have added to it this power, which is undeniably based on the British king's prerogative of mercy, in a rather potent form.

71. In the words of Chief Justice Marshall of the United States Supreme Court in ***US v. Wilson (1833),***[10]

> *"The power of pardon in criminal cases had been exercised from time immemorial*

[7] [1985] AC 374.

[8] vide Lord Roskill *obiter dicta,* ibid at 418.

[9] [1994] QB 349.

[10] 32 U.S. (7 Pet.) 150 at 160.

by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended and not communicated officially to the court."

72. While the true extent of the power remains constitutionally unresolved, it is no longer conceived by the US Courts as a private act of grace as the learned Chief Justice has. In ***Biddle v. Perovich (1927)***,[11] Justice Holmes opined that "*…[a] pardon in our days is not a private act of grace from and individual happening to possess power. It is part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed…*".

73. In New Zealand, the Governor-General retains the power to exercise the royal prerogative of mercy as set out in the Letters Patent Constituting the Office of the Governor-General 1983, being His Majesty's Representative in New Zealand, acts on the advice of the Minister of Justice. When it comes to potential miscarriages of justice, just as in the UK, the Criminal Cases Review Commission established by the *Criminal Cases Review Commission Act of 2019 (NZ),* has the authority to refer a conviction to courts for review, which was formerly within the purview of the Governor-General. No authority is empowered to perform such a function under the

[11] 274 U.S. 480 at 274

existing legal framework in Sri Lanka once the appeal process has been exhausted. Jurisprudence emanating from New Zealand, too, recognizes the prerogative of mercy as being amenable to judicial review.

74. In Australia, the royal prerogative of mercy is exercisable by the Governor-General or the Governor of a state, under the advice of the Attorney-General and the Executive Council, as the case may be. Each state and territory have enacted legislation which enables convictions and/or sentences to be reviewed, like in the UK and New Zealand, after the appeal process has been exhausted.

75. When it comes to India, the power to grant pardon exists as part of the constitutional scheme. Article 72 of the Indian Constitution provides for the President to "*grant pardon, reprieve, respite or remission punishment or to suspend, remit or commute the sentence of any person convicted of any offence…*".

76. But the President of India cannot act upon his or her own whims and fancies as the exercise of this power is to be necessarily guided by the Home Minister and the Council of Ministers per Article 74(1) of the Indian Constitution, and, according to the jurisprudence emanating from India, it is also susceptible to judicial review. Article 161 of the Indian Constitution grants similar powers to State Governors in regard to persons convicted of any offence against any law relating to matters to which the executive power of such state extends.

77. Though the learned Counsel have relied on authorities from many jurisdictions as persuasive precedents, it is unnecessary for this Court to take upon the arduous task of examining in detail the power of mercy/pardon/clemency, or whatever else it may be called, in these jurisdictions. Though that may be so, even a momentary look makes it palpably apparent that the jurisprudence emanating from these jurisdictions have evolved to better complement the Rule of Law and the democratic ideals.

78. It is also apparent that many issues which have never been brought before this Court have already been considered in detail by courts overseas. While we ought to be mindful of preserving the values of our own distinct constitutional framework, we might derive vital assistance, as appropriate, being attentive to the circumstances affecting a court's decision, for some of the decisions offer strong persuasive analyses that are very much consistent with the scheme of our own Constitution.

79. Under our law, like in India, the pardoning power exercised by the President exists as part of the constitutional scheme. The chief variance between our law and that of India is the manner in which such power is fettered. The President of India must exercise his power under Article 72 of the Indian Constitution on the advice of the Central Government, and he is bound by such advice; whereas in Sri Lanka, the proviso to Article 34(1) provides for special procedure to be followed in pardoning offenders sentenced to death, while no such specific provisions are given for sentences short of death.

Relevant Provisions Under the Constitution of Sri Lanka

80. As Ceylon left behind its colonial past and the prerogative of the British Crown concerned us no longer, it is in the First Republican Constitution of Sri Lanka that this power received express recognition as part of the constitutional scheme.

81. Article 22(2) of the 1972 Constitution set out the executive power of pardon as follows:

> *"The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka –*
>
> *(a) grant a pardon, either free or subject to lawful conditions;*
>
> *(b) grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender;*

(c) substitute a less severe form of punishment for any punishment imposed on such offender; or

(d) remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence.

Provided that where any offender shall have been condemned to suffer death by the sentence of any court, the President shall cause a report to be made to him by the judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the ***Minister whose function it is to advise the President on the exercise of the said powers****."*

82. Article 34 and Article 154B(9) of the Second Republican Constitution exhaustively set out the power of pardon within the existing Sri Lankan constitutional order.

83. Article 34 of the 1978 Constitution provides;

(1) "The President may in the case of any ***offender convicted*** *of any offence in any court within the Republic of Sri Lanka —*

(a) grant a pardon, either free or subject to lawful conditions;

(b) grant any respite, either indefinite or for such period as the President may think fit, of the execution of any sentence passed on such offender;

(c) substitute a less severe form of punishment for any punishment imposed on such offender; or

(d) remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence.

***Provided that where any offender shall have been condemned to suffer death by the sentence of any court**, the President shall cause a report to be made to him by the Judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice, who shall forward the report with his recommendations to the President.*

(2) The President may in the case of any person who is or has become subject to any disqualification specified in paragraph (d), (e), (f), (g) or (h) or Article 89 or sub-paragraph (g) of Paragraph (1) of Article 91 –

(a) a grant of pardon, either free or subject to lawful conditions; or

(b) reduce the period of such disqualification.

(3) When any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders, if more than one."[12]

84. Article 154B(9) provides;

"Without prejudice to the powers of the President under Article 34 and subject to his directions the Governor of a Province shall have the power to grant a pardon

[12] Emphasis is mine

to every person convicted of an offence against a statute made by the Provincial Council of that Province or a law made by Parliament on a matter in respect of which the Provincial Council has power to make statutes and to grant a respite or remission of punishment imposed by Court on any such person.

Provided that where the Governor does not agree with the advice of the Board of Ministers in any case and he considers it necessary to do so in the public interest, he may refer that case to the President for orders."

85. Article 34 makes it abundantly clear that the President of the Republic is vested with wide constitutional power and discretion with regard to the exercise of pardoning power; but, like in other jurisdictions, not without limitations. The framers of the Constitution have sought to significantly fetter such power and discretion to grant a pardon with regards to offenders condemned to death, by virtue of the proviso to Article 34(1).

86. The proviso establishes additional legal procedures to be followed where an offender *"condemned to suffer death by the sentence of any court"* is to be pardoned. In effect, this procedure is an additional constitutional safeguard to ensure that the Presidential Pardon is not lightly granted to those who have been convicted of the most heinous of crimes.

87. **N.S. Bindra's Interpretation of Statutes (8th Ed)** states as follows:

"It is an established rule that constitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest. [State v. Gordon, 158 SW 683] Some cases even go so far to hold that all constitutional provisions are mandatory. [Nesbit v. Peo, 36 at p. 121; State v. Hitchcock, 146 SW 40] But more accurately, the test as to whether a provision is mandatory or directory is the intention of those who framed and adopted it. [Clark v. Los Angeles, 116 at p. 722] This intention is to be gathered

not so much from a technical construction of particular words, as from a consideration of the language and purpose of the entire clause. [State v. Burrow, 104 SW 526] There is a strong presumption in favour of its being mandatory [Merwin v. Fusell, 124 SW 1021]…" [13]

88. The express and specific inclusion of a special procedure that is only applicable to offenders sentenced to death, and the language employed in the provision, such as the repeated use of the term 'shall', amply manifest the legislative intention to create a special safeguard which must mandatorily be followed.

89. **N.S. Bindra (supra)** further provides that;

"Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred and it is, therefore, probable that such was the intentions of the Legislature [Bai Kamla v. Mane, AIR 1966 Guj 37, 39 (Mehta, J.), quoting Maxwell on *interpretation*, 1962 Ed. at p. 364*]…."*[14]

"….When a power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all. The other modes of performance are necessarily forbidden. [Madho Singh v. Hira Lal, 1983 MPWN 281] Where authority is granted to public officers to do a thing in a certain way, the manner of doing the thing is mandatory, or jurisdictional, and a limitation on the authority of the officer, even though the doing of the thing in the first place may be discretionary [Sutherland: Statutory Construction, 3rd Ed., Vol., III at p. 89]…"[15]

[13] at 916

[14] ibid at 600

[15] ibid at 612 citing Sutherland: *Statutory Construction*, 3rd Ed., Vol. III at 89

90. In light of this, I have no qualm holding that the procedural requirements set out in the said proviso can only be interpreted as preconditions to granting a presidential pardon to an offender sentenced to death by any competent court of law. Failure to comply with this procedure established by law in granting a pardon would *ipso facto* make such pardon *ultra vires* and void *ab initio*. Therefore, it is imperative that this procedure be followed in granting a presidential pardon to a prisoner sentenced to death for such pardon to be of any validity.

91. None of the parties who were represented before this Court made any submissions contrary to this finding.

Other Legal Provisions for Remission and Commutation of Sentences Under the Laws of Sri Lanka

92. The learned Additional Solicitor General placed before this Court a list of legal provisions in our law which set out supplementary procedures enabling remission and commutation of prisoners. I must note that many of these provisions were only included in the written submissions dated 09th August 2023, but were not once brought to this Court's cognizance during the hearing.

93. Chapter XXVI of the *Code of Criminal Procedure Act, No. 15 of 1979* and the *Prisons Ordinance, No. 16 of 1877* provide for the suspensions, remissions and commutation of sentences.

94. Sections 311 and 312 of the Code of Criminal Procedure Act provide as follows:

> *"Section 311 – (President may suspend or remit sentence on conditions)*
>
> *(1) When **any person has been sentenced** to punishment for an offence the President may, at any time without conditions or upon any conditions which the person sentenced accepts, suspend **the execution***

of his sentence *or remit the whole or any part of the* ***punishment to which he has been sentenced***.

(2) Whenever an application is made to the President for the suspension or remission of a sentence the President may require the presiding judge of the court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused together with his reasons for such opinion.

(3) If the person in whose favour a sentence has been suspended or remitted fails to fulfill the conditions prescribed by the President, the President may cancel such suspension or remission; whereupon such person may if at large be arrested by any police officer without warrant and remanded by a Magistrate's Court to undergo the unexpired portion of the sentence.

(4) ***Anything herein contained shall not be deemed to interfere with the right of the President to grant pardons, reprieves, respites, or remissions of punishment****."*[16]

"Section 312 – (President may commute sentence)

The President may, without the consent of the person sentenced, commute any one of the following sentences for any of the commuted sentences indicated in the corresponding entry: -

Sentence	*Commuted Sentence*
Death	*Rigorous or simple imprisonment for life or for any other term*

[16] Emphasis is mine

Rigorous Imprisonment	*Any lesser term of rigorous imprisonment, or any term of simple imprisonment not exceeding the term to which such person might have been sentenced, or fine*
Simple imprisonment	*Any lesser term of simple imprisonment, or fine"*

95. The learned Additional Solicitor General highlighted the words contained in Section 311(4) to buttress his position that these procedures exist independently of the powers under Article 34(1). However, as one might observe, it states therein that anything in this Section shall not be deemed to interfere with the powers of the President under Article 34. Although that may be constitutionally valid and true, the converse of this proposition can never be accepted. Where a constitutional provision and ordinary laws cover the same plane, the constitutional provision, by its very nature, has a supervening effect on such ordinary laws.

96. Therefore, it is axiomatic that the exercise of the powers entrusted upon the President under the aforementioned provisions of the *Code of Criminal Procedure Act* must necessarily be subject to Article 34 of the Constitution as well as all such limitations Article 34 itself is subject to.

97. Section 58 of the *Prisons Ordinance, No. 16 of 1877* as amended by *Ordinance No. 53 of 1939* provides,

> *"Section 58 – (Remission of sentences and rewards for good conduct)*
>
> *A remission of sentence, or a gratuity or privileges, according to such scales as may be prescribed by rules under section 94, may be earned by industry and good conduct by any prisoner who is undergoing a sentence of*

imprisonment of either description for a term in the aggregate exceeding one month.

Provided, however, that this section shall not apply to-

(a) a civil prisoner; or

(b) a person committed to prison under Chapter VII of the Code of Criminal Procedure Act, No. 15 of 1979.

(c) a person committed to prison to serve the unexpired portion of any sentence of imprisonment or preventive detention upon the forfeiture or revocation of a licence to be at large under the Prevention of Crimes Ordinance."

98. Section 94 of the *Prisons Ordinance* empowers the Ministers to make all such rules, not inconsistent with the *Prisons Ordinance* or any other written law relating to prisons, as may be necessary for the administration of the prisons and for carrying out or giving effect to the provisions and principles of the *Prisons Ordinance*. Rule 40 of the rules so promulgated provides as follows:

"On the completion of the fourth, eights, twelfth, fifteenth and twentieth years, respectively, of the term of imprisonment of every prisoner, irrespective of age, the Superintendent of the prison shall forward to the Commissioner, for the consideration of the Governor General, a report upon all points having a material bearing on the question of the remission of sentence, including the condition of the prisoner, his demeanor, his attitude towards his offence and towards crime generally, his conduct and industry, and his fitness for resuming the responsibilities and normal avocations of citizenship together with a report from the Medical Officer of the prison upon the mental and physical condition of the prisoner, with particular reference to the effect of the imprisonment upon his health. When a prisoner has served twenty years in prison his case shall be

submitted for the consideration of the Governor-General once in every twelve months."

99. In addition, Rule 235(1) provides that,

"Every prisoner shall be entitled to send, shortly after his conviction, one petition to the Governor on matters connected with his trial or conviction. A prisoner shall be permitted to send an additional petitioner if in the opinion of the Superintendent there are special circumstances, or if the prisoner was not aware of the certain facts at the time of the first petition, or if the prisoner has been more than one year in prison and not less than one year has elapsed since the date of his last petition."

100. The learned Additional Solicitor General further submitted for the perusal of this Court Rules 298 to 306 as being relevant for the allocation of marks for the purposes of remission.

101. It is evident that these provisions under the *Prisons Ordinance* were promulgated well before any of our autochthonous constitutions were even conceived. But they continue to remain in force as provided by Articles 168(1) and 170 of the Constitution.

102. According to Article 170,

"'existing law' and 'existing written law' mean any law and written law, respectively, in force immediately before the commencement of the Constitution which under the Constitution continue in force";

"'law' means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council"; and

"'written law' means any law and subordinate legislation [and includes statutes made by a Provincial Council, Orders], Proclamations, Rules, By-laws and

Regulations made or issued by any body or person having power or authority under any law to make or issue the same."

103. Article 168(1) provides that which continues in force under the Constitution as follows:

"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, mutatis mutandis and ***except as otherwise expressly provided in the Constitution,*** *continue in force".*[17]

104. The learned Additional Solicitor General also invited the Court to be mindful of the effect of Article 16(1) in this regard. Article 16(1) of the Constitution provides,

"All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the ***preceding provisions of this Chapter****"*[18]

105. It is to be noted that Article 168(1) does not universally validate all laws in force immediately before the commencement of the Constitution, but only validates such pre-existing laws which are not inconsistent with the express provisions of the Constitution.

106. If the *Prisons Ordinance* provided for any procedures which could be conceived as independent and as of like effect and nature to Article 34, such procedure would be vitiated by the Constitution coming into force. As such, the procedures under the *Prisons Ordinance* can only remain in force inasmuch as the same are able to harmoniously operate within the constitutional scheme. Article 16(1) saves the

[17] Emphasis is mine

[18] Emphasis is mine

provisions only from invalidation on the ground of inconsistency with fundamental rights and does not extend to Article 34 or any other provision of the Constitution.

107. However, the aforementioned provisions of the *Prisons Ordinance*, including the rules promulgated thereunder, do not appear to be at variance with the power of pardon as contemplated in the Constitution. They, too, much like Sections 311 and 312 of the *Code of Criminal Procedure Act*, appear to complement the power of pardon under Article 34 rather than being parallel and independent.

108. Considering the aforementioned, although the learned Additional Solicitor General referred to the procedures under the Code of Criminal Procedure Act and the Prisons Ordinance as parallel to Article 34 of the Constitution, they are not to be conceived as functioning independently or separately. Such parallel and independent procedures may exist elsewhere, but in the context of the Sri Lankan *corpus juris*, such procedures complement and exist as ancillaries to the constitutional provisions—not in addition.

109. Hence, it is my view that all such laws which provide for the President or any officer of the State to pardon, remit, commute or otherwise interfere with the sentence of any prisoner must necessarily be subject to the mandates of Article 34. Furthermore, the exercise of any power granted by such provisions must be bound by the same principles and restrictions as the President may be in the exercise of his or her power under Article 34 of the Constitution; for any of the aforesaid legal provisions to enable a circuitous route whereby constitutional mandates can be effectively circumnavigated would be repugnant to the basic tenets of constitutionalism.

Assistance to and Protection of Victims of Crime and Witnesses Act

110. As it was the subject of extensive discussion, I see it fit to place special focus on the relevance of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015.*[19] At the time of delivering this judgment, *Act No. 4 of 2015* was repealed and replaced by the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023*. However, it is the former which was operational at the time of granting the impugned Pardon. All references I have made hereinbelow are to the 2015 Act, unless otherwise specified.

111. Section 3(q) of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015* provided,

> *"[Section] 3.*
>
> *A victim of crime shall have the right:—*
>
> *…*
>
> *(q) in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person convicted of having committed an offence, to receive notice thereof and submit through the Authority to the person granting such pardon or remission, the manner in which the offence committed had impacted on his life including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other aspects concerning his life."*

112. The Petitioner contended that, by virtue of this provision, a duty has been cast upon any authority considering pardon to give notice of such pardon to any victims of an offence with respect to which the potential grantee of the pardon was convicted; and asserted that the 11A Respondent had acted in breach of this duty in granting the

[19] Hereinafter at times referred to as the *'Victim and Witness Protection Act'* for convenience

impugned Pardon. All President's Counsel appearing for the Respondents agreed with the Petitioner in this regard, save for the 11A Respondent and the Attorney-General.

113. The learned Additional Solicitor General maintained that Section 3(q) of the Act should not be construed as mandatory, as that would be to impliedly amend the Constitution. The crux of his position was that, since Article 34(1) has expressly provided for the procedure to be followed in granting a pardon, for the *Victim and Witness Protection Act* to stipulate additional mandatory procedure would be tantamount to impliedly amending the proviso to Article 34(1) by an Act of Parliament. And this, he asserted to be blatantly unconstitutional.

114. The learned Additional Solicitor General invited this Court's cognizance towards Article 82(1) of the Constitution, according to which,

> *"No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution."*

115. In light of this, he submitted that if the Petitioner's contention is accepted, the *Victim and Witness Protection Act* would have the effect of adding to the procedural requirements under Article 34(1), although it did not, at the Bill stage, abide by the requirements of Article 82(1). While contending Section 3(q) of the *Victim and Witness Protection Act* to be *ex facie* inconsistent with Article 34 of the Constitution, he did not, however, seek to challenge the same in light of Article 80(3), which precludes post-enactment judicial review of legislation; but rather invited the Court to adopt a harmonious interpretation, considering Article 84(1) and Article 84(3).

116. Article 84 provides,

> *(1) "A Bill which is not for the amendment of any provision of the Constitution or for the repeal and replacement of the Constitution, but which is inconsistent with any provision of the Constitution may be placed on the Order Paper of Parliament without complying with the requirements of paragraph (1) or paragraph (2) of Article 82.*
>
> *…*
>
> *(3) Such a Bill when enacted into law shall not, and shall not be deemed to, amend, repeal or replace the Constitution or any provision thereof, and shall not be so interpreted or construed, and may thereafter be repealed by a majority of the votes of the Members present and voting."*

117. As such, the learned Additional Solicitor General submitted that Section 3(q) of the *Victim and Witness Protection Act* is to be interpreted as directory rather than mandatory to avoid inconsistency with the provisions of the Constitution, for the constitutional provisions must always prevail over any other law.

118. In support, he submitted a passage from ***Southern Provincial Co-Operative Employee's Service Commission v. Bentota Multi-Purpose Co-operative Society Ltd. & others***,[20] where Janak De Silva J. opined as follows:

> *"…If there is indeed a conflict, clearly the constitutional provision prevails as the Grundnorm in the sense propounded by Kelson…"*[21]

119. In spite of finding merit in this submission of the learned Additional Solicitor General, I find myself unable to unreservedly align with it. While Article 34(1) provides for several requirements to be met in granting a pardon, I do not see how such

[20] CA/PHC/71/2013, C.A. Minutes of 09/08/2018 ('Bentota Multi-Purpose Case')

[21] ibid at 5

requirements can be interpreted as exhaustive. The language of Article 34(1) makes no such suggestion. As was observed with regards to the ancillary procedure in the *Prisons Ordinance* and *Code of Criminal Procedure Act*, the mere constitutional recognition of a thing does not render nugatory all such other legal provisions that may come within its ambit.

120. Keeping with the contemporary drifts in constitutional interpretation, it is axiomatic that constitutional provisions are to be given a dynamic interpretation, whereby not only the purpose of a statute but also the prevailing legal, moral and societal norms are better appreciated. In considering whether a statutory provision is inconsistent with the Constitution, the appropriate test must be whether such statutory provision and its purpose are at variance with the basic structure of the Constitution and the norms embodied therein. A more inapt approach I cannot imagine to such consideration than a purely semantic one. Where the purpose and rationale of a statute are homogenous with that of the Constitution, I do not see why linguistic indifferences should disrupt their harmony.

121. The extract from the ***Bentota Multi-Purpose Case (supra)***, does not for a moment suggest the force of a statute be diluted at the first sign of conflict with a constitutional provision. Where the excerpt quoted above is interpreted literally and restrictively, without due regard to the linguistic milieu of the Kelsonian theory, it might well manifest such a fallacy. In truth, as it appears to me, it only dictates that where there is an actual inconsistency, the Grundnorm to postulate the constitutional norms as supreme over other legal norms and their corresponding legal provisions. This stands an utterly sensible proposition as the constitutional norms more closely reflect the sovereign will of the people. However, where the inferior norms resonate with a superior norm, the latter only augments the efficacy of the former.

122. I see no conflict between Section 3(q) of the *Victim and Witness Protection Act* and Article 34(1) of the Constitution. Just as the legislature has legitimately enacted

ancillary procedures to make the power under Article 34 more meaningful, it may likewise tighten its limitations so far as it lends itself to the constitutional scheme.

123. In this regard, Surasena J. has made a similar observation in ***Hirunika Premachandra v. Attorney-General and Others***: [22]

> *"I agree that the provisions of the Constitution must prevail over the provisions of any general law. The questions as to which prevails, whether the provisions in the Constitution or the provisions in general law, would arise only when they are in conflict with each other. In this situation I see no conflict between the provisions in Article 34 and Section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act… They certainly can co-exist together."*[23]

124. As such, I am of the opinion that Section 3(q) of the Act is to be interpreted as mandatory and as complimenting the non-exhaustive requirements set out under the proviso to Article 34(1), for the Section underpins the purpose of the said proviso.

125. Despite this conclusion, one must not close their mind to the constitutional significance of the submissions made by the learned Additional Solicitor General in this regard. The legislature is by no means empowered to change, amend or otherwise affect the force of a constitutional provision by a mere enactment without complying with the requirements set out in Article 84 of the Constitution. As the learned Additional Solicitor General very aptly observed, where there is a material inconsistency between a statutory provision and the purpose of a constitutional provision, the Court is to presume that the legislature did not intend to contravene the provisions of the Constitution and the statute must be interpreted accordingly.

[22] SC FR 221/2021; SC FR 225/2021; SC FR 228/2021, S.C. Minutes of 17 January 2024

[23] ibid at 52

126. Moreover, the conclusion I have arrived at should not be stretched to such illogical ends as a means to circumvent Article 84 of the Constitution. The statutory provision in question only retains its mandatory force on account of being consistent with the purpose of Article 34.

127. Without prejudice to the argument which I have dispensed with above, the learned President's Counsel for the 11A Respondent contended that 'victim of crime' as contemplated in the Act included parents and guardians only where such offence is committed against a 'child victim', and that a 'child victim of crime' as contemplated in the Act included a person under the age of 18 years. With this interpretation, I concur.

128. He then submitted that the parents and siblings of the 19-year-old, Yvonne, who was the victim of the offence perpetrated by the 2nd Respondent, did not fall within the definition, as she had attained the age of majority at the time of the offence. In essence, he attempted to distinguish the circumstances of the impugned Pardon from the ambit of the Act, be it mandatory or directory.

129. Under Section 45 of the 2015 Act, "victim of crime" and "child victim of crime" were defined as follows:

> *""**child victim of crime**" and "child witness" respectively means, a person who is **less than eighteen years of age** and who is either a victim of crime or is a witness ;*
>
> *...*
>
> *"victim of crime" means **a person including a child** victim who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an alleged—*
>
> *(a) offence under any law; or*

(b) infringement of a fundamental right guaranteed under Articles 13(1) or (2) of the Constitution,

***and includes** a person who suffers harm as a result of intervening to assist such a person or to prevent the commission of an offence, and the **parent or guardian of a child victim** of crime and any member of the family and next of kin of such person, **dependents and any other person of significant importance to that person**..."*[24]

130. A perusal of the provision indicates that it clearly recognises as a 'victim of crime' those directly affected, be it an adult or a child, by an act contemplated therein. Apart from such directly affected persons, three other classes of persons are deemed a 'victim of crime' under the scheme of this Act:

i. Firstly, it includes such persons who intervene either to assist a directly affected person or to prevent the commission of the offence, and suffer harm as a result;

ii. Secondly, it includes the parent or guardian of a child victim of crime, any member of the family and next of kin or such child victim of crime; and

iii. Thirdly, this also includes dependents and any other person of significant importance to a person directly affected.

131. The submission of the learned President's Counsel was in complete disregard of this third class of persons, which certainly includes parents and siblings. I do not for once think the legislature intended to exclude parents and siblings of a directly affected person from this definition. The phrase "*that person*" in "*dependents and any other*

[24] Emphasis is mine

person of significant importance to ***that person****"*[25] cannot be interpreted to mean a child victim for the simple reason that a child victim cannot have legal dependents.

132. This position is made clearer under the more recent *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023*, where family members are expressly given recognition. Section 104 defines a 'victim of crime' as follows:

> *""victim of crime" means a person who has suffered any injury and includes, where appropriate-*
>
> *(a) a member of the family of the victim of crime or a dependent of the victim of crime;*
>
> *(b) a person of significant importance to a victim of crime;*
>
> *(c) a person who suffers injury in intervening to assist a victim of crime;*
>
> *(d) a person who suffers injury in preventing another person from victimization; and*
>
> *(e) a child victim of crime;*
>
> *…"*

133. Admittedly, the phraseology of these Acts, if strictly construed, can lead to much difficulty. The phrase "any other person of significant importance" is certainly as ambiguous as legislative language can get. If the executive is required by law to give notice to all such persons who may have been of 'significant importance' to a direct victim, the power of pardon would be rendered nugatory. The practical difficulties which could arise out of such a broad interpretation are self-evident. Therefore, to dispense with this burden imposed by the *Victims and Witness Protection Act*, it would

[25] Emphasis is mine

be sufficient for an authority considering pardon to be in substantial compliance with the requirements of Section 3(q).

134. Where no attempt is made to dispense with this burden, the effect of which is to exclude the victims of a crime from the process of granting pardon, such failure alone may be capable of vitiating the validity of a pardon, depending on the circumstances.

135. In the South African Case of ***Albutt v. Centre for the Study of Violence and Reconciliation and Others***,[26] the decision to so exclude the victim from the special dispensation process was held irrational. It was stated that *"…[t]he victims of these crimes are entitled to be given the opportunity to be heard before the President make a decision to grant a pardon under the special dispensation"*.

136. Turning towards Section 5 of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023*, it provides as follows:

"[Section] 5.

(1) A victim of crime shall have the right-

…

(f) in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person convicted of an offence, to receive notice thereof and submit through the Authority to the person granting such pardon or remission, the manner in which the offence committed has impacted on such victim of crime physically, emotionally, psychologically, financially, professionally or in any other manner;

…

[26] CCT 54/09 [2010] at 74

(4) In the event the person in authority considering the grant of a pardon or remission of sentence referred to in paragraph (f) of subsection (1) is the President, the duty of informing the Authority of such fact for the purpose of giving notice thereof to the victim of crime shall be on the Secretary to the President, and in the event such person in authority is the Governor of a Province, such duty shall be on the Secretary to the Governor of such Province."

137. As can be seen, though Section 5(1)(f) of the 2023 Act is not a *verbatim* reproduction of Section 3(q) of the 2015 Act, they are identical in substance and effect. As such, the views I have expressed with regard to the 2015 Act can most certainly be extended, *mutatis mutandis,* to the 2023 Act as well.

138. I wish to further note in this regard that, in spite of whether this provision is mandatory or directory, it has the effect of creating a legitimate expectation to the effect that any victim, as defined under the Act, would be given reasonable notice and afforded an opportunity to speak their grievances. Where any authority acts in breach of such legitimate expectation, that itself may, depending on the circumstances, vitiate the validity of such pardon.

POWER OF PARDON: EFFECT

139. The Oxford English Dictionary defines the term 'pardon' as *"[a] formal remission, either free or conditional, of the legal consequences of a crime; an action on the part of the proper authority in a state, releasing an individual from the punishment imposed by sentence or that is due according to law"*.

140. The following passage from **Bracton's *De Legibus et Consuetudinibus Angliae***, from as far back as the mid-13th century, is said to be the earliest exposition as to the effect of a pardon under the English law:

> *"But in all the aforesaid cases, whatever may have been the cause,* ***when the outlawry has been made duly and according to the law of the land, a person is not restored except to the king's peace alone****, that he may go and return and contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted. For* ***the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection****, which the outlawed person has lost through his flight and contumacy,* ***but that which is another's he cannot give by his own grace****.* ***Likewise a person justly and duly outlawed is not restored to anything except to the king's peace****, that he may go and return and have protection, but he cannot be restored to his rights of action and other things, for* ***he is like a new-born infant and a man as it were lately born****. Likewise inlawry does not restore a person to his previous actions and obligations, nor to his homage nor fealties, nor to his oaths, nor to other things dissolved by his outlawry, against the will of those by whose will they were previously united and confirmed, and accordingly neither to his inheritances nor to his tenements to the prejudice of the lords, and so they cannot be restored to those things to which they had only a right. But no one is bound to them by preceding obligations, but they are bound to all others, that they may not be in a better condition on account of their outlawry, since they ought to be in a worse condition."*[27]

141. Henry de Bracton may have been somewhat ahead of his time in his juristic thinking, and the passage may not speak of the effect of a pardon in so many words, but it does reflect where the jurists were heading as regards the bounds of the king's

[27] Henry de Bracton, *De Legibus et Consuetudinibus Angliae,* Twiss's Translation, Vol. 2, at 371 as cited in Williston, 'Does a Pardon Blot Out Guilt?' (1915) Vol. 28 No. 7 Harvard Law Review 647, at 649 (Emphasis is mine)

prerogative and is indicative of a new paradigm where a king was no longer an omnipotent sovereign.

142. A more precise record of the effects of a pardon can be found in **Halsbury's Laws of England (4th Ed)**, which states,

> *"**The effect of a pardon** under the Great Seal **is to clear the person from all infamy, and from all consequences of the offence** for which it is granted[1], **and from all statutory or other disqualifications** following upon conviction[2]. **It makes him, as it were, a new man**, so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence for which he was convicted.[3]"* [28]

143. Support for this proposition runs as far back as the 17th century. **Hawkins Pleas of the Crown (7th Ed)**[29] states,

> *"I take it to be settled at this day, that the pardon of a treason or felony even after a conviction of attainder, does so far clear the party from the infamy and all other consequences of his crime, that he many not only have an action for a scandal in*

[28] *Halsbury's Laws of England* (4th edn 1974) Vol 8, at para 952. (Emphasis is mine).

[1] Bac Abr, Pardon, H; *Hay v Tower Division of London JJ* (1890) 24 QBD 561 at 565; 2 Hale PC 278. The effect is confined to the offence for which it was granted: see *R v Harrod* (1846 2 Car & Kir 926).

[2] *Hay v Tower Division of London JJ* (1980) 24 QBD 561; *Bennet v Easedale* (1626) Cro Car 55. In the days when a conviction disqualified a man from being a witness, a pardon removed the disqualification: *Fine's Case* (1623) Godb 288; *R v Gully* (1773) 1 Leach 98 at 99; 2 Hawk PC (1824 Edn) 547. The disqualification was removed in all cases by the Evidence Act 1843. As to the equitable claim of an accomplice who turns King's evidence to the mercy of the Crown, see *R v Rudd* (1775) 1 Leach 115 at 121, 125.

[3] *Cuddington v Wilkins* (1615) Hob 67 at 81; 2 Hawk PC (1824 Edn) 547; and cf. *Leyman v Latimer* (1878) 3 ExD 352.

[29] Ch 37 p. 354 § 48 as cited in *Lennox Phillip v. The Commissioner of Prisons (Trinidad and Tobago)* [1991] UKPC 41 (10 December 1991) at 7

calling him a traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him as it were a new man; and gives him a new capacity and credit."

144. And, as per **Blackstone**,

*"**A pardon** by the king **makes the offender a new man**, and **acquits him of all corporal penalties and forfeitures** annexed to that offence, for which he obtains his pardon. But nothing can restore the blood, when once corrupted, if the pardon be not allowed till after attainder, but the high power of parliament. Yet if a person attainted receives the king's pardon, and afterwards has a son, that man may be heir to his father; because the father being made a new man, might transmit new inheritable blood; but if he had been born before the pardon, he would never have inherited at all."* [30]

145. It is not inconceivable how one might misapprehend the aforementioned as denoting the fallacy that a pardoned offender was to be regarded an innocent man as if he had never committed the offence with respect to which he was pardoned; however, as a more judicious mind might see, a more precise construction of the language takes us far from it.

146. In ***Cuddington v. Wilkins (1615)***,[31] the plaintiff brought an action against the Defendant for calling him a thief after a pardon. It was held that the felony was extinct by virtue of the pardon. Their Lordships said,

"[T]hough he were a thief once, yet when the pardon came, it took away not only, poenam [penalty], but reatum [liability], for a felony is contra coronam et

[30] William Blackstone, *Commentaries on the Laws of England,* Book IV, Chap. 31 in WM. Hardcastle Browne, A. M. (ed), *Commentaries on The Laws of England, By Sir William Blackstone: In One Volume* at p. 732

[31] S.C. Hob. 67; 80 ER 231

dignitatem regis [against the crown and the dignity of the King]. Now when the king had discharged it, and pardoned him of it, he hath cleared the person of the crime and infamy, wherein no private person is interested but the Commonwealth, whereof he is the head, and in whom all general wrong reside, and to whom the reformation of all general wrong belongs." [32]

147. The decision in ***Cuddington v. Wilkins*** may *prima facie* appear to reinforce the said fallacy, but the most prudent observation of Hobart C.J., four years after in ***Searle v. Williams***,[33] indicates a subtle but vital distinction to be drawn:

> *"It was said, that* ***he could no more call him thief, in the present tense****, than to say a man hath the pox, or is a villain after he be cured or manumised, but* ***that he had been a thief*** *or villain* ***he might say****."* [34]

148. I am in full agreement with this observation by Hobart C.J., which appears to me as a more precise interpretation of the old authorities. Although many subsequent authorities greatly trouble any attempt to reconcile the position with regard to the effect of a pardon in this manner, the more recent authorities reflect the same approach as the one taken by Hobart C.J.

149. One troubling authority is ***Ex parte Garland***,[35] where Field J. held,

> *"****A pardon reaches both the punishment prescribed for the offence and the guilt*** *of the offender; and* ***when the pardon is full, it releases the punishment and blots out the existence of the guilt****, so that* ***in the eye of the law the offender is as innocent as if he had never committed the offence****... It removes*

[32] ibid at 82. (Emphasis is mine)

[33] 2 Hob. 288 at 294

[34] Hob. 81 at 82 (Emphasis is mine)

[35] 71 U.S. (4 Wall.) 333 (1866)

the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity." [36]

150. The written submissions of the Hon. Attorney-General submitted, citing ***Ex parte Garland***, the following:

"*Further, the effect of a presidential pardon was explained by the U.S. Supreme Court in Ex Parte Garland 71 U.S (4 Wall.) 333 (1867) at 351:*

*…It is, therefore, within the power of the President to limit his pardon, as in those cases in which it is individual and after conviction, to the mere release of the penalty—it is equally within this prerogative to extend it so as to include a whole class of offenders—to interpose this act of clemency before trial or conviction**; and not merely to take away the penalty, but to forgive and obliterate the offence**."* [37]

151. The aforementioned passage is often cited erroneously by scholars as an explanation by the Supreme Court of the United States, when it is, in fact, an argument made for the petitioner, as recorded in the judgment. It appears that the learned Additional Solicitor General, too, has been susceptible to the same error. Perusal of the Report indicates that the arguments for the petitioner are recorded on pages 338 to 351, whereas the arguments for the United States are recorded from pages 352 to 364. It is not until page 374 of the Report that the opinion of the court is to be found.

152. While some subsequent cases have cited ***Ex parte Garland*** with approval, it has also been the subject of much criticism. Many cases have found fault with its rationale and

[36] ibid at 380 (Emphasis is mine)

[37] Witten Submissions on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents dated 9th August 2023, para 35 (reproduced *verbatim* for accuracy)

have refused to follow the same. As such, it can no longer be considered good authority.

153. ***In re Spenser***,[38] Deady J. commenting on the case of ***Ex parte Garland (supra)*** states,

> *"And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The* ***effect of the pardon is prospective and not retrospective****.* ***It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence***."

154. As noted by the Supreme Court of California *in* ***People v. Biggs***,[39]

> *"****It is universally established that a pardon exempts the individual from the punishment which the law inflicts*** *for the crime which he has committed; and generally peaking it also removes any disqualifications or disabilities which would ordinarily have followed from the conviction.* ***To say, however, that the offender is a 'new man' and 'as innocent as if he had never committed an offence' is to ignore the difference between the crime and the criminal****. A person adjudged guilty of an offence is a convicted criminal, though pardoned he may be deserving of punishment, though left unpunished; and the law may regard him as more dangerous to society than one never found guilty of crime, though it places no restraints upon him following his conviction. The criminal character or habits of the individual, the chief postulate of habitual criminal statutes, is often as clearly disclosed by a pardoned conviction as by one never condoned****. The***

[38] 5 Sawy. 195, 199 (1878)

[39] 9 Cal.2d 508 (Cal. 1937) at 511-512

broad generalizations quoted above are, if taken too literally, logically unsound as well as historically questionable."

155. In ***People v. Carlesi***,[40] the Appellate Division of the Supreme Court of New York noted that,

> *"The pardon of this defendant did not make "a new man" of him;* ***it did not "blot out" the fact or the record of his conviction****, and of course, the Supreme Court, in deciding that the Congress could not impinge upon the pardoning power of the Executive did not intend to hold that the Executive could blot out a solemn record of the judicial branch of government. (See Roberts v. State of New York, 30 App. Div. 106; 160 N.Y. 217.) The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that.* ***But it did not obliterate the record of his conviction or blot out the fact that he had been convicted****. (Matter of ____, an Attorney, 86 N.Y. 563.)* ***It relieved the defendant of the consequences*** *which the law attached to his offense."* [41]

156. The majority decision in ***Slater v. Olsen***[42] noted as follows:

> *"We do not approve of the statement in the case of Ex parte Garland... that the effect of a full pardon is to make the offender 'a new man' that 'in the eyes of the law the offender is as innocent as if he never committed the offence' because of the broad implications that may be attributed to them. The statements have been approved by some courts, but are strongly disapproved by many authorities."*

[40] 154 App. Div. 481 (N.Y. App. Div. 1913)

[41] ibid at 486-487

[42] 299 N.W. 879 (Iowa 1941), 880 at 881

157. It is to be noted that even the dissenting judgment of Wennerstrum J., with whom Bliss and Hale JJ. concurred, was in agreement with this element of the majority judgment.

158. In ***R v. Cosgrove***,[43] Morris C.J. for the Supreme Court of Tasmania opined,

> *"Mr. Sholl contends that if a conspirator is pardoned he is in the position of one who has never committed the crime and another person can no more be convicted of having conspired with him than of having conspired with one who has been acquitted or discharged. The gist of his contention is that a pardon wipes out the crime ab initio. I have examined* ***the passages in Hawkins Pleas of the Crown to which he referred and I think they do not go as far as he contends****. At p.538 the learned author is really illustrating the fact that sometimes you may have the offence of one so far dependent upon the offence of the other that one falls with the other, and he instances the state of the law in England at the time as to accessories. The authorities on libel and slander in my opinion do not establish that a pardon wipes out the crime ab initio. They are based on a special policy which the law has seen fit to adopt in relation to defamatory words. Blackstone states the effect of a pardon in Vol. 4, p.402, as follows: '4, Lastly, the effect of such pardon by the King, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity.' That passage is entirely consistent with what Hawkins says.*
>
> *Accordingly,* ***a pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact***

[43] (1948) Tas SR 99, at 106

***commit the crime**, but merely from the date of the pardon gives him a new credit and capacity. The plea in my opinion is not sustained."*[44]

159. Having considered the conflicting jurisprudence, Watkins L.J. of the English Court of Appeal in ***R v. Barry Foster***,[45] agreeing with the positions in Tasmania and New Zealand, as expounded respectively in ***R v. Cosgrove (supra)***[46] *and* ***Re Royal Commission on Thomas's Case***,[47] opined as follows:

"Many of the extracts we have been shown from textbooks and articles, some of them written centuries ago, tend to support the proposition that a pardon leaves the existence of a conviction untouched. These extracts include the works of Bracton, Blackstone, Hawkins Pleas of the Crown 1824 and Holdsworth's History of English Law. We have been referred also to a number of English cases.

In Prohibitions Del Roy ((1607) 12 Co.Rep. 63; 77 E.R. 1342) King James I was firmly, if not severely, advised of his powers by the judges of the day. At p.65 and p.1343 of the respective reports it is stated: "And the Judges informed the King, that no king after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice." Statements to the like effect appear in many of the works to which we have been referred. In cases decided later on a contrary opinion seems to be expressed. For example, in Hay v. Justices of the Tower Division of London (1890) 24 Q.B.D. 561, it was stated that: "The King's pardon doth not only clear the offence itself, but all the dependencies, penalties and disabilities incident unto it." Authority for that

[44] ibid at 105-106 (Emphasis is mine)

[45] (1984) 79 Cr. App. R 61; (1985) QB 115; (1984) 2 All ER 697

[46] (1948) Tas.S.R. 99

[47] (1980) 1 N.Z.L.R 602

proposition was claimed to arise from Cuddington v. Wilkins (1615) 1 Hob. 67 and 81 (80 E.R. at 216, 231). It is submitted, however, especially by Mr. Williams [Counsel for the Appellant], that upon a full reading of both of those cases, Cuddington's in particular, it is doubtful whether they really do support the proposition that a conviction is done away with by a free pardon. We agree with that.

...

We refer above all in this context to Cosgrove (1948) Tas.S.R. 99, in which judgment was given by the Supreme Court of Tasmania. In that case a pardon had been granted. It was a case which involved corruption. It was held that the pardon granted was not the equivalent of an acquittal.

...

Finally, so far as quotation from authority is concerned, we refer to Re Royal Commission on Thomas's Case [1980] 1 N.Z.L.R. 602. In 1979 Thomas was granted a free pardon in respect of his conviction for the murders of David and Jeanette Crewe. Later a Royal Commission was set up to inquire into and to report on the circumstances of Thomas's conviction. The Commission began its work and while it was sitting the New Zealand Police Association and others applied for a judicial review of certain decisions of the Commission, for a writ of prohibition to prevent the Commission from continuing to consider the matters referred to it under the terms of reference, or an order declaring that the Commission be disqualified from continuing to consider those matters. It is quite obvious from the judgment in the case that much of the argument presented to the court by counsel was devoted to the question of the impact of a free pardon upon conviction. The High Court (Full Court) at Auckland held, among other things: "The effect of the pardon was to remove the criminal element of the offence named in the pardon, but not to create any factual fiction, or to raise the inference that the person pardoned had not in fact committed the crime for which the

pardon was granted. Thomas, by reason of the pardon, was deemed to have been wrongly convicted, and he could not again be charged with the murders of the Crewes." Many of the authorities shown to us were referred to in the judgment of the Court....

***We respectfully agree that the effect of a free pardon is as stated in the judgments in the Tasmanian and New Zealand cases**. In other words**, the effect of a free pardon is** such as, in the words of the pardon itself, **to remove from the subject of the pardon, "all pains penalties and punishments** whatsoever that from the said conviction may ensue," but **not to eliminate the conviction itself.** Mr. Arlidge suggests that a person pardoned rather than having his conviction quashed may be under the practical disadvantage that if he is called as a witness his conviction may be put to him; it could not be if it is quashed. We express no opinion as to that. **He has reminded us that constitutionally the Crown no longer has a prerogative of justice, but only a prerogative of mercy. It cannot, therefore, he submits, remove a conviction but only pardon its effects**. The Court of Appeal (Criminal Division) is the only body which has statutory power to quash a conviction. **With that we entirely agree**." [48]*

160. This view is endorsed by the US Courts of Appeal for the Third Circuit in ***United States v. Gregory Paul Noonan***.[49] With specific reference to the dicta in ***R v. Barry Foster (supra)***, It was concluded that:

"...on the basis of long-held traditional views on the effect of a pardon, covering diverse periods and sources from Bracton and Blackstone to Professor Williston, from seventeenth century English cases to those in contemporary courts of Great Britain and the British Commonwealth, from 1915 teachings of the Supreme

[48] [1984] 2 All ER 697 (Emphasis is mine)

[49] 906 F.2d 952 (3d Cir. 1990)

Court, and the 1975 analysis of the Court of Appeals of the Seventh Circuit, ***we conclude that the Presidential pardon of 1977 does not eliminate Noonan's 1968 conviction and does not "create any factual fiction" that Noonan's conviction had not occurred*** *to justify expunction of his criminal court record.* ***Poena tolli potest, culpa perennis erit*** *(The punishment can be removed, but the crime remains)"* [50]

161. Having considered authorities from Britain, the United States, Australia and New Zealand, I now turn towards the jurisprudence emanating from India.

162. ***Maru Ram v. Union of India***[51] the Supreme Court of India opined that,

"... sentencing is judicial function and whatever may be done in the matter of executing that sentence in the shape of remitting, commuting or otherwise abbreviating, the ***Executive cannot alter the sentence itself****. In Rabha's case (1961) 2 SCR 133 at pp. 137, 138 : (AIR 1961 SC 334), a Constitution Bench of this court illumined this branch of law. What is the jural consequence of a remission of sentence?*

In the first place, an order of remission does not wipe out the offence: it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence*; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of re mission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the*

[50] ibid at para 72 (Emphasis is mine)

[51] (1980) AIR 2147

court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's "Constitutional law" on the effect of reprieves and pardons vis a vis the judgment passed by the court imposing punishment, at p. 176, para 134: —

"A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. 'The judicial power and the power over sentences are readily distinguishable', observed justice Sutherland. To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment."

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched." [52]

163. The 11A Respondent, in a self-defeating submission, to buttress his contention that the power of pardon does not interfere with the judicial domain, cited the following

[52] ibid at p. 2158, para 24 (Emphasis is mine)

passage from ***Kehar Singh v. Union of India***,[53] in his written submissions dated 25th August 2023:

> *"We are of the view that it is open to the President in the exercise of the power vested in him by Art. 72 of the Constitution to scrutinize the evidence on the record of the of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it and this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him."* [54]

164. This passage, I must note, contradicts his own submission in regard to the effect of a pardon. As I have noted earlier in the judgment, the 11A Respondent also contended before this Court that it was not necessary to follow the constitutional procedure set out in the proviso to Article 34(1) of the Constitution in granting the impugned 2nd Pardon as the 2nd Respondent was, at that point in time, not an offender condemned to suffer death by the sentence of any court. The gist of this contention is that the 1st Pardon modified the judicial sentence to one of life imprisonment, and necessarily wiped out the sentence of death. It is now palpably clear, by their own admission, that this contention cannot stand.

[53] (1989) AIR 653 at p. 658, para 10

[54] At pp. 32-33, para 43

165. In the more recent judgment of ***Epuru Sudhakar v. Govt. of A.P,***[55] as noted by Kapadia J.,

> *"Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or set aside the punishment for a crime. It eliminates the effect of conviction without addressing defendant's guilt or innocence…"*

Can a 'Free Pardon' Blot Out a Conviction?

166. There were several instances in the above discussion where the terms 'free pardon' or 'full pardon' appeared. The term 'free pardon' appears in the Constitution itself. Whether there are any special jural consequences attached to what is known as a 'free pardon' under our law is a question we must consider.

167. While most Counsel did not suggest free pardons as having an exceptional effect, learned President's Counsel Mr. Saliya Pieris submitted 'free pardons' as being capable of erasing the conviction itself. This position is supported by some of the old authorities.

168. As to what a full pardon means, **Durga Das Basu** in ***Commentary on the Constitution of India (3rd Ed)***[56] states,

> *"A full pardon wipes out the offence in the eye of law and rescinds the sentence as well as the conviction. [Ex parte Garland, (1866) 4 Wall. 333.] It restores the offender to that legal condition in which he would have been had the crime not*

[55] (2006) AIR S.C. 3385, at para 64; vide also *The Union of India & Ors v. Smt Sushma Soni & Anr, D.B. Civil Writ Petition No. 5467/2003*

[56] Durga Das Basu, *Commentary on the Constitution of India* (3rd edn, S.C. Sarkar & Sons Ltd. 1955) at 454

been committed. [Hay v. Justices of London, (1890) 24 Q.B.D. 561; Knote v. U.S., (1877) 95 U.S. 140.]"

169. The headnote of ***Sarat Chandra Rabha & Ors v. Khagendranath Nath & Ors***,[57] reads,

*"…an order of remission of the sentence under S. 401 of the Code of Criminal Procedure, **unlike the grant of a free pardon**, cannot wipe out either the conviction or the sentence. Such order is an executive order that merely affects the execution of the sentence and does not stand on the same footing as an order of Court, either in appeal or in revision, reducing the sentence passed by the Trial Court"*[58]

170. While I do agree with the views expressed in ***Sarath Chandra Rabha (supra)*** to the extent it has been cited in ***Maru Ram (supra)***, I find myself unable to align with the portion I have emphasized above. The power of pardon being a creature of ancient origins, courts are understandably confronted with such anachronistic views. No doubt if you travel back in time far enough, when absolute monarchs reigned with brutish mandates, there would have been a time when a pardon—free pardon, full pardon, remissions, commutation or whatever other form it might take—was able to blot out guilt at the whim of a king and set a man free, for then, the king was one who could do no wrong. The king was the fountain of justice, in whose name justice was dispensed. Justice was his prerogative. If we are to set our jurisprudence that far back and let ourselves be swayed by the vestiges of time immemorial, we may as well dust off the old guillotines.

[57] (1960) 2 S.C.R. 133

[58] Emphasis is mine

171. More recent authorities have unequivocally rejected the age-old propositions, as can be seen from the analysis set out above from the case of ***R v. Barry Foster (supra),*** which has ever so eloquently analysed the jurisprudence from several jurisdictions. The more recent Indian authorities, too, have moved away from this position.[59]

172. Article 89 of the Constitution is the only constitutional provision which makes reference to a free pardon. It provides,

> *"No person shall be qualified to be an elector at an election of the President, or of the Members of Parliament or to vote at any Referendum, if he is subject to any of the following disqualifications, namely –*
>
> *…*
>
> *(d) if he is serving or has during the period of seven years immediately preceding completed serving of a sentence of imprisonment (by whatever name called) for a term not less than six months imposed after conviction by any court for an offence punishable with imprisonment for a term not less than two years or is under sentence of death or is serving or has during the period of seven years immediately preceding completed the serving of a sentence of imprisonment for a term not less than six months awarded in lieu of execution of such sentence:*
>
> *Provided that if any person disqualified under this paragraph is granted a* ***free pardon*** *such disqualification shall cease from the date on which the pardon is granted…"*

173. Article 89 very clearly refers to the disqualifications arising in consequence of a conviction, and not the conviction itself. Therefore, it is palpably clear that, as reflected

[59] vide Arvind P. Datar, *Commentary on the Constitution of India,* Vol 1 (2nd edn, Wadhwa and Company Nagpur 2007) at 648; Mahendra P. Singh, *V.N. Shukla's Constitution of India,* (8th edn, Eastern Book Company Lucknow 1990) at 265

in the language of our own Constitution, the term 'free pardon' does not contemplate any special jural effect. If I may advert to the language of Article 34 once more, it states that *"[t]he President may… grant a pardon, either free or subject to lawful conditions…"*. In this sense, a 'free pardon' or 'full pardon' in our constitutional scheme means only a pardon which blots out all consequences of a sentence with no lawful conditions attached thereto, and nothing more should be read into it. To hold otherwise would be violative of Article 4 of the Constitution.

174. Article 4 provides,

> *"The Sovereignty of the People shall be exercised and enjoyed in the following manner:–*
>
> *(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*
>
> *(b) the* ***executive power of the People****, including the defence of Sri Lanka, shall be* ***exercised by the President of the Republic*** *elected by the People;*
>
> *(c) the* ***judicial power of the People*** *shall be* ***exercised by Parliament through courts****, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law****, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament*** *according to law…"* [60]

[60] Emphasis is mine

175. It is apparent that the President is vested with no amount of judicial power. The language of Article 4 sets out, by the words *"the judicial power of the People shall be exercised by Parliament through courts",* that the judicial power is vested only with the courts of law, subject to several exceptions where the parliament may exercise that power. The phrase *"by the Parliament through courts"* is vulnerable to misinterpretation, and is, in fact, misinterpreted more often than not. This phraseology by no means establishes the Parliament as a supra-judicial authority, nor does it conceive the Parliament as a conduit of judicial power; It is but a sentiment to the instrumentality of legislation in the judicial process.

176. The people have entrusted their judicial power to the judiciary and nowhere else, except in matters relating to the privileges, immunities and powers of the Parliament and its members. I find the following authorities relevant to be considered in this regard.

177. As noted in the English case of ***R v. Barry Foster (supra)***,[61]

> *"… [Crown Counsel] reminded us that constitutionally the Crown no longer has a prerogative of justice, but only a prerogative of mercy. It cannot, therefore, he submits, remove a conviction but only pardons its effects. The Court of Appeal (Criminal Division) is the only body which has statutory power to quash a conviction. With that we entirely agree."*

178. Citing the above case, ***United States v. Gregory Paul Noonan (supra)***[62] stated that,

> *"Likewise, in the context of our tradition, our law, and our constitutional doctrine—be it state or federal—the* ***executive branch has never possessed "a***

[61] [1985] 1 QB 115 at 130

[62] 906 F.2d 952 (3d Cir. 1990)

prerogative of justice"**. **That has always been the exclusive province of the Third Branch of government, the judiciary." [63]

"Whatever be the effect of a Presidential pardon in other respects, as we shall volunteer below, the notion that the President has the ability, through the pardon power vested under Article II, Sec. 2, to tamper with judicial records is a concept jurisprudentially difficult to swallow. The idea flies in the face of the separation of powers doctrine. We need only to note that Article III, Sec. 1 states: 'The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.' It is beyond cavil that the maintenance of court records is an inherent aspect of judicial power."[64]

179. The President of the Democratic Socialist Republic of Sri Lanka is not vested with a 'prerogative of justice'. He or she is but the custodian of executive power, which ultimately belongs to the People of the Republic. The President cannot, in the exercise of the power of pardon, usurp the judicial power of the people, which is exclusively vested in the judiciary, except in such limited circumstances where it is expressly vested with the Parliament.

Conclusion of the Court Regarding the Effects of a Pardon

180. In examining existing authorities, especially those from the United States and Britain, we were first confronted with the phenomenon that there is a wide array of conflicting views. However, it was further revealed how contemporary courts, across the many jurisdictions we examined, have come to a consensus as to this question.

[63] ibid at 26 (Emphasis is mine)

[64] ibid at 33

181. It is now unquestionable that a pardon leaves the conviction untouched. It is purely an executive act which is, by its very nature, incapable of changing the judicial record or encroaching upon the judicial province. An act of pardon, reprieve, respite, remission or commutation—or whatever other manifestation of this power under Article 34—leaves the judicial record, ergo the conviction, untouched and unscathed. It does not *create any factual fiction* that a crime had never been committed or the grantee had never been convicted.

182. A party is acquitted on the ground of his innocence; he is pardoned through public favour, for the good of the Republic. It is upon this very ground that the power of pardon is never vested in a judge.[65] Insofar as the power of pardon is concerned, *poena tolli potest, culpa perennis erit* [The punishment can be annulled, the sin will be perpetual].

183. As such, the effects of 'reprieve', 'respite', 'remission', 'commutation' and 'pardon' can be summarized thus:

> **Reprieve or Respite:** A reprieve, i.e., a temporary suspension of the punishment fixed by law, and a respite, i.e., a postponement to the future the execution of a sentence, means, in essence, to stay the execution of a sentence or the enforcement of a penalty,[66] which offers a brief interval of rest or relief. E.g., a reprieve or respite may be granted to a pregnant prisoner till childbirth.[67] They

[65] *Cook v. Freeholders of Middlesex*, 2 Dutch. (N.J.) 326, 331, 333 (1857)

[66] Mahendra P. Singh, *V.N. Shukla's Constitution of India,* (8th edn, Eastern Book Company Lucknow 1990) at 385. Per Blackstone, "[a] REPRIEVE, from *reprendre,* to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended…": Wilfrid Prest, *The Oxford Edition of Blackstone: Commentaries on the Laws of England – Book IV of Public Wrongs* (Oxford University Press 2016) at p. 255, para 387

[67] As Blackstone notes, "REPRIEVES may also be *ex necessitate legis* [from legal necessity]: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis* [in favour of the offspring]; and therefore no part of the bloody

are often used interchangeably, and I see no distinction in principle, insofar as their effects.

Remission: A remission reduces the term of the sentence without changing its character. E.g., a sentence of 5 years simple imprisonment may be remitted to a sentence of 2 years simple imprisonment or a ten thousand rupees fine to one of two thousand rupees.

Commutation: A commutation is the conversion to a lighter penalty of a different form. It changes the punishment to one of a different character than that originally imposed. This power can only be exercised to reduce and not to enhance the sentence.[68] E.g., a death sentence to one of life imprisonment.

Pardon: The term 'pardon' is often used as an umbrella term for all of the aforementioned. It released the convict from the punishment, or part thereof, for some offence, without touching the sentence or the conviction itself. It is a *full* or *free pardon* to which no conditions are attached and the convict is released from the entirety of the punishment. A *limited pardon* relieves the offender from some but not all the consequences of the conviction. A

proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman big with child: and, when through the violence of the flames the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted the sacrifice, they cast it again into the fire [The reference is to the 'Guernsey Martyrs', Catherine Cauchés and her daughters Guillemine and Perotine, condemned to death as heretics in July 1556. According to Foxe, it was the bailiff of Guernsey who ordered Perotine's child to be thrown back into the fire] as a young heretic [2 Hal. P. C. 412.]. A barbarity which they never learned from the laws of *antient* Rome; which direct [*Ff.* 48. 19. 3.], with the same humanity as our own, "*quod praegnantis Mulieris damnatae poena differatur, quoad pariat* [that the punishment of a pregnant woman condemned, shall be respited until after her delivery]:" which doctrine has also prevailed in England, as early as the first memorials of our law will reach [Flet. *l.* 1. *c.* 38.]: Wilfrid Prest, *The Oxford Edition of Blackstone: Commentaries on the Laws of England – Book IV of Public Wrongs* (Oxford University Press 2016) at p. 255, para 388

[68] *K.M. Nanavati v. State of Bombay* AIR 1961 SC 112: (1991) 1 SCR 497

conditional pardon imposes some condition, such as good behaviour, for the pardon to remain effective.

184. Following this arduous analysis of authorities, we may now prudently answer the first question I laid down aeons back, as to whether or not the constitutional procedure must be followed anew in granting the impugned 2nd Pardon to the 2nd Respondent. The answer must most certainly be in the affirmative. Despite the 1st Pardon commuting the sentence of death to one of life imprisonment—presuming the same is legally valid for the moment—the 2nd Respondent to this date remains an offender condemned to suffer death by the sentence of a court.

185. If a dozen pardons, remissions or respites, as the case may be, are to be granted to a convict sentenced to death at any point in time, the procedure must be followed *de novo* in granting each of such pardons.

POWER OF PARDON: SCOPE, PURPOSE AND UNDERLYING PHILOSOPHY

186. The nature of this power and the purpose for which it exists is a question all learned Counsel attempted to answer. In my view, effectively answering this question is imperative before we venture into the question with regards to the extent of its amenability to judicial review, for it would be otiose to deliberate on the justiciability of a power that is ill-defined and obscure. This question, which comes before us for the first time, has been the subject of many judicial and academic discussions in other jurisdictions, as with most other aspects of the power of pardon, and some, but not all, such authorities resonate well with our own jurisprudence.

187. As was noted in ***Ex parte Bentley (supra)*** the prerogative of mercy in the United Kingdom is *"capable of being exercised in many different circumstances and over a wide range'*.[69] Justice Basten of the New South Wales Court of Criminal Appeal in ***Cameron***

[69] [1994] QB 349, at 363 (Watkins L.J. for the Court)

v. The Queen[70] recognized old age, illness and decrepitude as actors that may be relevant to the executive power of early release based on mercy.

188. Per **Halsbury's Laws of England (5th Ed)**,

> *"The occasion for clemency might be, for example: medical grounds; fresh evidence indicating a wrongful conviction revealed too late or unavailable for consideration by the court of trial but insufficiently conclusive to justify a pardon; to mitigate the consequences of some irregularity at a summary trial; to compensate a prisoner for physical injury suffered in prison through no fault of his own; as a reward for supplying valuable information to the authorities investigating serious crime; or for exceptionally meritorious conduct by the prisoner during his imprisonment"* [71]

189. In a classic exposition in regard to the purpose of Executive Clemency, in ***Ex parte Philip Grossman***,[72] Taft C.J. of the Supreme Court of the United States expounded,

> *"Executive clemency exists to afford relief from under harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."*

[70] [2017] NSWCCA 229, [13]

[71] *Halsbury's Laws of England, Additional Materials: Sentencing and Disposition of Offenders (Release and Recall of Prisoners)* (5th edn, 2013) Vol 92, at para 768

[72] 45 S.Ct. 332 ; 69 L. Ed. 527; 267 U.S. 87 (1925) at para 28

190. According to the Supreme Court of the United States stated in ***Ex parte William Wells***,[73] this power is to be exercised "*particularly when the circumstances of any case disclosed such uncertainties as made it doubtful it there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice.*"

191. Among this myriad of reasons, there may also be purely political and practical considerations. Alexander Hamilton's **The Federalist No. 74** in 1788, explaining why the Founding Fathers vested with the President of the United States such wide discretionary power, states,

> "*… But the principal argument for reposing the power of pardoning in this case to the Chief Magistrate [Chief Administrator] is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.*"

192. **Corpus Juris Secundum (Vol. 67-A)** reads,

> "*The* ***pardoning power is founded on considerations of the public good, and is to be exercised on the ground that the public welfare***, ***which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence***. *It may also be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made in the operation or enforcement of the criminal*

[73] 15 L. Ed. 421; 59 U.S. 307 (1855) at 59

law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law." [74]

193. Supreme Court of India, in ***Epuru Sudhakar v. Govt. of A.P. (supra)***,[75] further cited the following passage from **'American Jurisprudence'** explaining the underlying philosophy of the pardon power:

"...every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy." [76]

194. In ***Maru Ram v. Union of India (supra)***,[77] the Supreme Court of India stated that,

"*Considerations for exercise of power under Articles 72/161 [Articles which deal with Presidential Pardon in India] may be myriad and their occasions protean, and are left to the appropriate Government, by no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise."* [78]

[74] Vol. 67-A pp. 16-17, as referred in *Epuru Sudhakar v. Govt of AP,* (2006) AIR S.C. 3385 at 3390 (Emphasis is mine)

[75] AIR 2006 SC 3385 at p. 3390, para 16

[76] ibid at para 16, citing *American Jurisprudence* 2d. at 5

[77] 1980 AIR 2147; 1981 SCR (1) 1196; 1981 SCC (1) 107

[78] 1980 AIR 2147 at para 72 (Emphasis is mine)

195. Moreover, in ***Kehar Singh v. Union of India (supra)***[79] the following was observed with regard to the purpose of presidential pardoning power:

> *"... the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty..."*

196. Their Lordships further observed, with regard to the nature of this power, that,

> *"... The **power so entrusted is a power belonging to the people** and reposed in the highest dignitary of the State. **In England**, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary**. It is a power which is capable of exercise on a variety of grounds**, **for reasons of State as well as the desire to safeguard against judicial error.** It is an act of grace issuing from the Sovereign. **In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme**. In an opinion, remarkable for its erudition and clarity, Mr. Justice Holmes, speaking for the Court in W.I. Biddle v. Vuco Perovich, 71 L. Ed. 1161 enunciated this view and it has since been, affirmed in other decisions."* [80]

197. It is to be noted that this observation in ***Kehar Singh***—as with many authorities cited above—does not take cognizance of some of the more vital recent developments in English law noted earlier in this judgment, as it was decided over three decades ago.

[79] 1989 AIR 653 at para 7

[80] ibid (Emphasis is mine)

The United Kingdom has now enacted special legislation as a safeguard against judicial error and miscarriages of justice, which, in my view, is indicative of a paradigm shift in the attitude towards the exercise of the prerogative of mercy.

198. Therefore, we must be exceptionally mindful in seeking guidance from such older authorities, as persuasive as they are, for it is imperative that we construe our constitutional provisions in light of the constitutional norms of our time, which is what the Rule of Law demands of this Court.

199. Despite this, it is clear that Indian jurisprudence, in consonance with the judgment of Justice Holmes, has consistently recognized the power of pardon as part of the constitutional scheme to be exercised in a manner which would better serve public welfare, which emerges as the contemporary norm in all jurisdictions we have examined in the judgment. This most certainly is the fitting approach for any republic, including our own.

Nature and Scope of Presidential Pardon under Article 34 of the Constitution of Sri Lanka

200. It is pertinent to reiterate the celebrated judgment of Justice Oliver Wendell Holmes Jr., in ***Biddle v. Perovich (supra)***,[81] which I unequivocally endorse vis-à-vis our own constitutional framework:

> "…A *pardon in our days is* ***not a private act of grace from an individual*** *happening to possess power.* ***It is part of the Constitutional scheme***. ***When granted, it is the determination of the ultimate authority that the public welfare will be better served*** *by inflicting less than what the judgment fixed…*"[82]

[81] 274 U.S. 480 at 274

[82] Emphasis is mine

201. It was revealed to us that, in other jurisdictions, there have been instances where pardons were granted to persons before conviction, or, at times, even before they were charged with an offence. President Gerald Ford's pardon of President Nixon following Watergate stands a prominent example.

202. However, the power entrusted to the President of Sri Lanka under Article 34 of the Constitution cannot be used in this manner. Article 34 contemplates "any offender ***convicted*** of any offence, whereas Sections 311 and 312 of the *Code of Criminal Procedure Act, No. 15 of 1979* contemplates a person "***sentenced to punishment*** for an offence" and a "person ***sentenced***", respectively. In this sense, the power must be distinguished from the power of the Attorney-General to enter into a *nolle prosequi* under Section 194 of the *Code of Criminal Procedure Act, No. 15 of 1979*. The power under Section 194(1) is one which can only be exercised by the Attorney-General himself (vide Section 401 of the Code).

203. Although much of the authorities clearly set out the power of pardon to be an executive power, the learned Additional Solicitor General made a rather unique contention in which he argued the power to be of a *sui generis* nature, for it did not fit easily into the legislative, executive or judicial spheres of government. This submission is one which bears upon the reviewability of the power. Despite this Court's earlier conclusion to the effect that this power is of executive nature, so as to test the veracity of the said conclusion, I shall mull over the learned Additional Solicitor General's submission separately where I consider judicial reviewability.

204. The 11A Respondent, however, conceded the power of pardon to be a purely executive power which does not undermine the judicial power over sentencing. He submitted, relying on ***Kehar Singh v. Union of India (supra)*** and ***United States v. Benz (supra),*** that the power of pardon only abridges the executive function of enforcing a judgment without altering the judgment itself, as it operates in an entirely different plane to that of judicial power. With this submission, I agree in its entirety.

Having said that, I cannot rule out an extraordinarily abhorrent and bizarre act in a purported exercise of this power from potentially interfering with the functions of the judiciary under appropriately deplorable circumstances. Apart from such instances of absolute misrule, the exercise of the power of pardon ordinarily does not interfere with the judicial function, even where such exercise has been simply and plainly imprudent and/or *ultra vires*.

205. It was also contended on behalf of the 11A Respondent that *"the President of the Republic could exercise his discretion freely in granting a pardon to a person who has not been sentenced to a death penalty"*.[83] It was then alleged that the Petitioner was *"seeking to derogate the power vested in the office of the President of the Republic by the present Application"*.[84]

206. The Petitioner's submission was that the President is not vested with unfettered discretion in any regard under the Constitution, for such discretion is anathema to established constitutional and administrative law principles. This submission is, of course, an axiom. Any suggestion to the contrary, in the words of **Wade and Forsyth**, is constitutional blasphemy.[85]

207. Quite apart from the days of the Kings, Queen and Emperors with real power over their subjects, the constitutionally established democratic systems of today are invariably predicated upon the immutable republican principles of constitutional governance. On top of the express limitations imposed by the Constitution itself and other provisions of the law, the scope of this power under Article 34 is necessarily limited by such principles. The black letter of the law may not say the same in so many

[83] Written Submissions on behalf of the 11A Respondent dated 24th March 2023, at para 7

[84] ibid at para 15

[85] vide C.F. Forsyth and I.J. Ghosh, *Wade and Forsyth's Administrative Law* (Oxford University Press, 12th edn) at 16

words, but a constitution is never to be interpreted devoid of the very principles underlying it. The principles so infused to the text are indissoluble from it; for otherwise, the constitution is without constitutionalism. Chief among the most fundamental canons of constitutionalism is the Rule of Law, which has often been described as the bedrock upon which our Constitution is grounded.

208. Moreover, as Justice Holmes rightfully propounded regarding the power of pardon, the manner of its exercise must be such that it better serves public welfare. Much of the jurisprudence I have already set out amply illustrates the proclivity to recognize this power as one that must be exercised in the public interest. This was so even in constitutional monarchies. This position essentially predicates the Public Trust Doctrine, which is well-established in our constitutional jurisprudence as one of the great bulwarks of popular sovereignty.

209. As **Immanuel Kant** writes, as far back as in the 18th century, with reference to the sovereign 'right' to pardon a criminal;

> *"The right to pardon a criminal (ius aggratiandi), either by mitigating or by entirely remitting the punishment, is certainly the most slippery of all the rights of the sovereign. By exercising it he can demonstrate the splendor of his majesty and yet thereby wreak injustice to a high degree. With respect to a crime of one subject against another,* ***he absolutely cannot exercise this right, for in such cases exemption from punishment (impunitas criminis) constitutes the greatest injustice toward his subjects****. Consequently, he can make use of this right of pardon only in connection with an injury committed against himself (crimen laesae majestatis). But, even in these cases, he* ***cannot allow a crime to go unpunished if the safety of the people might be endangered thereby****."* [86]

[86] Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd (trans.), Hackett, 2nd ed, 199, at 144 (Emphasis is mine)

210. Per G. S. Singhvi J., in ***Devender Pal Singh Bhullar v. State of N.C.T of Delhi***,[87]

> *"...the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people."* [88]

211. It is clear that the power of pardon, in its variety of forms, has been long recognized as power which must serve the best interest of the people. This line of thinking is well grounded in our Constitutional jurisprudence, albeit not specifically with regards to the power of pardon for the common law on that front has only just begun to develop.

212. In one of the better expositions of the Public Trust Doctrine, Shiranee Tilakawardane J., in ***Sugathapala Mendis v. Chandrika Kumaratunga (Waters Edge Case)***,[89] opined,

> *"The principle that those charged with upholding the Constitution—be it a police officer of the lowest rank or the President—are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People... Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People."* [90]

[87] 2013 (5) SCALE 575; 2013 (VII) AD 29 (SC); AIR 2013 SC 1975; 2013 (2) ALT 151 (Cri); 2013 (2) KLT 353; 2013 (2) MLJ 591 (Cri); 2013 (2) RCR 647 (Criminal); 2013 (6) SCC 195; 2013 CriLJ 2888

[88] ibid at para 22

[89] [2008] 2 Sri LR 339

[90] ibid at 352

213. This cardinal Doctrine of Public Trust, which is well established in our law as protector of the Rule of Law itself, extends as it is to any and all such power vested in public authorities by law.[91] To conceive the power of pardon under Article 34 as an exception to this general principle would be manifestly illogical, given the Constitution itself does nothing to so set it apart.

214. No creature under the Constitution has unlimited or unfettered power. In the words of Sripavan C.J., ***In Re the Nineteenth Amendment to the Constitution***,[92] *"[c]learly the Constitution did not intend the President to function as an unfettered repository of executive power unconstrained by the other organs of governance"*.

215. There is no power capable of being exercised freely by the President, or by any other servant of the public for that matter, for they are constantly weighed down by the trust reposed upon them. The sovereign will of the people, as manifested by the Constitution, recognizes this very burden under Article 4(d). It is the pardoning power of the people that has been entrusted upon the President by the Constitution—Like all other executive power, it, too, must necessarily be exercised for the benefit of the people.[93] If ever there was an executive who could do all but 'turn a man into a woman and a woman into a man', those days are long gone.

[91] As can be understood from the many seminal decisions which has recognised the principle as such. Vide *De Silva v. Atukorale* (1993) 1 Sri LR 283; *Bandara v. Premachandra* (1994) 1 Sri LR 301; *Premachandra v. Montague Jayawickrama* (1994) 2 Sri LR 90; *Jayawardene v. Wijayatilake* (2001) 1 Sri LR 132; *Vasudeva Nanayakkara v. Choksy and Others (John Keells Case)* S.C. (FR) 209/2007, SC Minutes of 21 July 2008, now reported as (2008) 1 Sri LR 134; *Sugathapala Mendis and Another v. Chandrika Kumaratunga and Othes (Waters Edge Case)* SC FR 352/07, SC Minutes of 08 October 2008, now reported as (2008) 2 Sri LR 339; *Vasudeva Nanayakkara v. Choksy* S.C. (FR) No. 158/2007, SC Minutes of 04 June 2009; *Premalal Perera v. Tissa Karaliyadda* SC FR No.891/2009, SC Minutes of 31 March 2016

[92] SC SD 04/2015 at p. 7

[93] While I may use phrases such as power of pardon/pardoning power/presidential pardon etc. interchangeably throughout the judgment in referring to the power of pardon as vested in the

Purpose and Underlying Philosophy of Presidential Pardon Under Article 34 of the Constitution of Sri Lanka

216. Mr. Saliya Peiris, PC was of the opinion that this power must be conceived as a means of empowering the President to remedy any proven miscarriages of justice, as there exists no procedure to correct such errors in our law; and that many of the aforementioned authorities recognized the power as such. The learned Additional Solicitor General, too, agreed with this view, submitting further that this power exists as a means of providing a check on judicial power. I find myself unable to align entirely with either of these perspectives, for modern norms appear to be at odds with the same.

217. I wish to first consider the latter contention of the learned Additional Solicitor General, in regard to this power being part of the checks and balances scheme, as the former warrants a more thorough discussion.

218. In my view, the proposition that this power is part of the checks and balances scheme within our Constitution is wholly untenable. The said proposition necessarily hinges on an assertion that this power exists for the sole purpose of redressing—in the sense of correcting or rectifying and not merely providing relief against—judicial errors and miscarriages of justice. If there are multiple purposes, some of which do not concern themselves with the merits of the judicial pronouncements, it can no longer be maintained.

219. As already observed, among the myriad of reasons which may warrant the exercise of pardoning power, many jurisdictions recognize, not only moral and legal considerations but also purely political considerations as legitimate. Presidential pardons are often granted to mark Independence Day celebrations and other

President as a matter of convenience, I use all such term to mean what I have described here and must be read as such unless context requires otherwise.

culturally significant events. Over 1,500 prisoners were granted such pardons by the incumbent President, marking Independence Day and Vesak celebrations in 2023. Other prisoners, such as foreign nationals, are at times pardoned in the national interest as a matter of international policy—I shall keep any precise references to myself in the interest of not passing any prejudicial comments. Such cases in no way involve miscarriages of justice or judicial errors.

220. These examples resting on the aforementioned authorities demonstrate categorically that this power exists not solely as a means of redressing proven miscarriages of justice, but also to serve a myriad of other motives. Moreover, this power concerns itself only with those convicted of criminal offences. If this is indeed part of the checks and balances scheme within our Constitution, it would only be a check on the criminal jurisdiction of the courts. As such, neither the provision itself nor its historical usage point towards it solely being a check of judicial power.

221. While it is so glaringly apparent that this power cannot be conceived as one in existence as a check on judicial power for the sole purpose of redressing proven miscarriages of justice, could this function of redressing proven miscarriages of justice and judicial errors be one of its many functions? In all fairness, this was, in fact, the precise nature of the submission made by the learned Additional Solicitor General. This is a question which demands a more careful and nuanced contemplation.

222. In this regard, this Court is in full agreement with Dr. Romesh De Silva, PC appearing for the 9th and 10th Respondents, in his view that there is no competent body, save and except such courts with appellate and revisionary jurisdiction, within our constitutional scheme to redress possible miscarriages of justice.

223. Altering or setting aside a conviction or a sentence is a function which falls exclusively within the judicial domain. Yet, the pardoning power of the people may well be used, based on reasonable grounds, to offer some redress to a person convicted of a crime

insofar as the execution of the sentence is concerned; such is the precise effect of a pardon. To put in much simpler terms, this power may grant some redress, in that it can offer some form of reparation or relief against the harshness of justice, but it may not correct, rectify, amend or alter a conviction or a judicial record. There is a sharp distinction between the two effects, as was discussed earlier, for those functions operate on two distinct and separate planes.

224. In the words of Sutherland J. in ***United States v. Benz***,[94]

> *"The judicial power and the executive power over sentence are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."*

225. What the President has been empowered to do under Article 34 of the Constitution is to look into the merits of the execution or the continuation of a sentence which has been passed—not the merits of the judicial decision which predicated such sentence. The inquiry by the President in the exercise of the power of pardon must not be tantamount to subjecting a convict to a retrial.

226. Admittedly, much older authorities in great numbers can be cited in support of the contention set forth by the learned Additional Solicitor General and Mr. Saliya Pieris, PC who urged this power to be conceived as one which may correct miscarriages of justice for lack of better procedure to achieve the same end. As anachronistic as this view may be, I must admit that it is susceptible to some reason when considered in

[94] 75 L. Ed. 354; 282 U.S. 304; 51 S.Ct. 113 at para 16

the correct context—yet, I do not think it finds any sympathy within our constitutional scheme.

227. **Prof. Samuel Williston** proposes this line of reasoning as a probable reason as to why some courts showed a continued willingness to accept the ***Garland*** rationale.[95] He reasons thus:

> *"A probable reason why courts have been willing to continue a mode of expression which suggests that a pardoned convict is the equal in character and conduct of an innocent man is because it has seemed desirable to conceal an injustice which the criminal law inflicts upon an innocent man unjustly accused and convicted. Under the law of England no new trial was possible in case of felony. [Regina v. Murphy, L.R. 2 P. C. 535 (1869)] The only redress, therefore, for an unjust conviction was a pardon. Of this procedure an acute English critic (afterwards a judge) said:*
>
> > *"However unsatisfactory such a verdict may be; whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.*
> >
> > *This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in it-self, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places everyone concerned, and especially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon*

[95] vide supra the reasoning as to the effect of a pardon in *Ex parte Garland* 71 U.S. (4 Wall.) 333 (1866)

> *to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious." [STEPHEN, HISTORY OF THE CRIMINAL LAW, p. 312.]*
>
> *This defect in English procedure was corrected by the Act of I907 creating a court of criminal appeal, with the widest powers, including the right to hear further evidence and decide questions of fact."* [96]

228. As we were repeatedly told by the learned President's Counsel, it is true that there is no formal procedure to challenge a judicial decision after a refusal of special leave by the Supreme Court. I do not, however, see this only as a defect, for there must be some finality in judicial procedure. Where new facts have come to light subsequent to the total exhaustion of the appeal procedure, a prisoner may find solace in the doctrine of *per incuriam*.

229. The new approach in Australia, UK and New Zealand, which provides for review committees to refer cases back to the appellate court, appears a much wiser solution to this defect highlighted by the learned Counsel. However desirable that may be, it is not for this Court to establish such regimes; and for the power of pardon to interpose into this lacuna in our law would be clearly obnoxious to Article 4 of the Constitution.

230. As we have clearly seen earlier in the judgment, the pardoning power of the people as exercised by the President is one which operates in the executive plane,[97] and has

[96] Williston, 'Does a Pardon Blot Out Guilt?' (1915) Vol. 28 No. 7 Harvard Law Review 647, at 659

[97] vide *Maru Ram v. Union of India* (1980) AIR 2147; *Epuru Sudhakar v. Govt. of A.P* (2006) AIR 3385; *Sarat Chandra Rabha & Ors v. Khagendranath Nath & Ors* (1960) 2 S.C.R. 133

no bearing on the judicial record. The power to correct a wrongful conviction lies with the judiciary and the judiciary alone.

231. Therefore, if such an executive function were to set right a wrongful conviction and correct a miscarriage of justice, that would be inconsistent with not only Article 4, but also the findings of this very Court with regards to the effect of pardon earlier in this judgment. Considering the above, I do not see the power of pardon under Article 34 of the Constitution as a measure capable of correcting miscarriages of justice.

232. Any authorities which may support the proposition that the prerogative of mercy, power of pardon, executive clemency, or any other manifestation of this power, as being capable of correcting a wrongful conviction are from a time long gone and are not persuasive against contemporary constitutional norms. As such, in my view, among the myriad of ends this power may achieve, correcting miscarriages of justice or wrongful convictions is not one.

233. As regards the purposes for which the power may be invoked, to lay out an exhaustive list would be a bootless errand. It may be used for any purpose which serves the public interest, such as social reconstruction and rehabilitation, as objectives of punishment attain overriding importance in a Welfare State. The utmost object of punishment is the protection of society, through the removal of offenders from it or through rehabilitation, in this era of human rights.

234. Remission of sentences for good behaviour as provided by the *Prisons Ordinance* or any other law would, in this sense, be in the public interest where such scheme legitimately comes to fruition. Consideration may also be political; in that, they may strengthen international relations or resolve long-standing social issues. It may even be an act of grace—not a private act of grace, but a public one, for is the pardoning power of the people that is vested in the President.

235. Pardons may further be issued to better reflect changing moral attitudes towards what is deemed criminal or illegal, as with the posthumous pardon of Dr. Alan Turing, known as the father of modern computer science, who was convicted of gross indecency based on a homosexual relationship and committed suicide following chemical castration treatment. This pardon undoubtedly stands as a sentiment to the contemporary moral and political attitude towards homosexuality in Britain, an end which no court of law would be so effective in achieving.

236. In conclusion, though there are a myriad of grounds upon which the power of pardon may be exercised, such exercise should be in the public interest and must necessarily conform to the finer canons of constitutionalism. Moreover, the power so enshrined under Article 34 does not operate as a check on the judiciary and cannot be used to correct miscarriages of justice, for any encroachment of the judicial province by the President is blatantly offensive to the scheme of the Constitution. The power of pardon, as I have persistently stressed, is to be exercised in the best interest of the populace. It is a tool which must serve the public—not the gifted demagogues.

JUDICIAL REVIEW AND ITS SCOPE

237. The law in this regard may be thought settled to a certain degree in light of the recent judgment of Surasena J. in ***Hirunika Premachandra v. Attorney-General and Others (Duminda Silva Pardon)***,[98] whereby the pardon granted to former parliamentarian Duminda Silva by the former President Gotabaya Rajapaksa was held to be null, void and of no force or avail in law by this Court. While the general reviewability of the actions of a President has been analysed vis-à-vis the immunities afforded to the Executive Presidency by the Constitution,[99] the many nuances

[98] SC FR 221/2021; SC FR 225/2021; SC FR 228/2021, S.C. Minutes of 17 January 2024

[99] With reference to *Visuvalingam v. Liyanage* (1983) 1 Sri LR 203; *Premachandra v. Major Montague Jayawickrema and others* (1994) 2 Sri LR 90; *Edward Francis William Silva President's Counsel and three others v. Shirani Bandaranayake and three others* (1997) 1 Sri LR 92; *Karunathilaka v. Dayananda*

associated with the reviewability of certain aspects of pardoning power have not come into question therein.

238. The case before us is one significantly less straightforward. In light of this, the Counsel have been rather inventive and resourceful in their submissions. I do not see it fit to dispense the question of reviewability without duly appreciating the same.

239. The learned Additional Solicitor General, relying on the judgments of ***Attorney-General v. Dr. Shirani Bandaranayake***[100] and ***Thenuwara v. Chamal Rajapaksa, Speaker of Parliament***,[101] submitted the power of pardon vested in the President under Article 34 of the Constitution to be what he called a '*sui generis* power'.

240. Seeing as this Court has already accepted the power of pardon to be an entirely executive function, this submission of the learned Additional Solicitor General in regard to the power of pardon being a *sui generis* power, which does not fit easily into legislative, executive or judicial spheres, must fail *a fortiori*. Nonetheless, owing to the ingenuity of this submission, I shall consider the same so as to test the veracity of my earlier conclusion.

241. Article 4(b) of the Constitution provides that "*the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People*". According to the learned Additional Solicitor General, while the executive power is vested with the President, it does not mean that the exercise of

Dissanayake (1999) 1 Sri LR 157; *Victor Ivan and others v. Sarath N. Silva and others* (2001) 1 Sri LR 309; *Singarasa v. Attorney-General* (2013) 1 Sri LR 245; *Rajavarothiam Sampanthan v. Attorney-General* SC FR 351-356/2018, SC FR 358- 361/2018, SC Minutes of 13 December 2018

[100] *Attorney-General v. Dr. Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake* S.C. Appeal No. 67/2013, S.C. Minutes of 21 February 2014

[101] *Athula Chandraguptha Thenuwara and others v. Chamal Rajapaksa, Speaker of Parliament and others* SC/FR/665-672/2012, S.C. Minutes of 24 March 2014

any and all powers vested in the President constitutes executive and administrative action.

242. The submission made by the learned Additional Solicitor General essentially attempted to classify the power of pardon as a *sui generis* power, and claimed such *sui generis* powers to have certain distinguishable characteristics, such as the fact that they cannot easily be classified under Article 4 and that they require concurrence from more than one organ of government. Indeed, the cases he relied upon recognized the power of impeachment of judges under Article 107 of the Constitution as such a *sui generis* power, but the extent to which those judgments lend themselves to the position taken by the learned Additional Solicitor General is questionable.

243. He further submitted *sui generis* powers to be beyond the scope of judicial review, for such power does not fit in the moulds of executive or administrative action as contemplated by Articles 17 and 126 of the Constitution.

244. In ***Attorney-General v. Dr. Shirani Bandaranayake (supra)***,[102] a five-judge bench of this Court stated as follows:

> *"In my view none of these powers are exclusively powers of Parliament or the exclusive province of any other governmental organ, as all those provisions adverted to by the learned Attorney General seek to create mechanisms which are unique and are sui generis in the sense that they are the only mode of removal of the incumbents of those offices known to the Constitution. The power of removal of the President of Sri Lanka, the Chief Justice and other Judges of the Supreme Court, the President and other Judges of the Court of Appeal and the Commissioner General of Elections in terms of the aforesaid provisions of the Constitution, have to be exercised by one organ of State in concurrence with one*

[102] S.C. Appeal No. 67/2013, SC Minutes of 21 February 2014 at 19-20

or more governmental organ or organs, and this feature constitutes a system of checks and balances which is essential for the preservation of the Rule of Law."

245. In ***Thenuwara v. Chamal Rajapaksa, Speaker of Parliament***,[103] it was opined that,

"This was an integral part of a sui generis function of Parliament which did not fit easily into the legislative, executive or judicial spheres of government and bore a unique complexion in that, while being more disciplinary in nature, it could not be exercised by Parliament alone and had to be performed in concurrence with the President of Sri Lanka, as contemplated by Article 107(2) and (3) of the Constitution. It is for this reason that the power of impeachment does not find express reference in Article 4(a) of the Constitution that deals with the legislative power of the People vested exclusively in Parliament and the People at a Referendum, or in either Article 4(b) that vests the executive power of the People exclusively on the President or Article 4(c) that vests the judicial power of the People in Parliament to be carried out by the courts and other tribunals or institutions administering justice, "except in regard to matters relating to the privileges, immunities "and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law."

246. The learned Additional Solicitor General submitted it to be evident from the abovementioned dicta, that *"…sui generis powers have certain characteristics, being that they cannot easily be classified under Article 4 and that they involve concurrence with another organ of government…".*[104]

[103] SC/FR/665-672/2012, SC Minutes of 24 March 2014 at 9

[104] Written Submission on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents dated 9th August 2023, p. 35 para 127

247. It was his position that the power or pardon is one exercised by the President in concurrence with the judiciary, as Article 34 requires the President to obtain a report from the trial judge. I do not see any merit in this position. The trial judge plays no part in the decision by merely producing a report. Collaborations of this nature between two organs of the State do not amount to concurrence as contemplated in the aforementioned dicta. Such engagements are commonplace in routine workings of the State; for if not, the State apparatus would come to a standstill, or a constitutional deadlock, as it is often called. In this sense, if Ministers were to participate in the legislative process does that make such process *sui generis?* Are the proceedings before a Magistrate following a B-Report *sui generis?* Is the function of this Court in delivering this judgment *sui generis*, seeing as we have procured two files from the Presidential Secretariat? As evident, this proposition manifests absurdities.

248. Furthermore, the aforementioned dicta, have in no way established a category or class of power called '*sui generis'* that is *ipso facto* beyond the scope of juridical review. Nor can the views expressed therein be taken to constitute criterion to identify what may be termed *sui generis*. In fact, no such test, definition or criterion of what constitutes *sui generis* can exist. *Sui generis* means to be 'unique', 'a thing of its own kind' with 'nothing else like it'. If there is somehow a category of *sui generis* power with determinable characteristics, whatever included therein would no longer be *sui generis*. The test for what constitutes *sui generis* must necessarily be *ad hoc*.

249. As such, I am of the view that ***Thenuwara v. Chamal Rajapaksa (supra)*** and ***Attorney-General v. Dr. Shirani Bandaranayake (supra)*** did not try to define a new class of power called *'sui generis'* which can never be judicially tested. The cases merely noted the power of the President regarding the impeachment of judges as being unique for its manner of exercise, and nothing more must be read into it.

250. In regard to this argument of *sui generis*, the learned Additional Solicitor General further submitted that *"…classifying the President's power of pardon under Article 34*

as a sui generis power does not preclude this Court from subjecting a purported pardon by the President to judicial review on the procedure. If the President has not followed the procedure set out in Article 34 the President cannot be considered as having exercised his power under Article 34 and said act would be null and void ab initio."[105] The crux of this submission is that, where the President has not exercised the power in accordance with the procedure under Article 34, such exercise is no exercise of the power of pardon, and therefore loses its *sui generis* character.

251. This submission of the learned Additional Solicitor General would essentially limit judicial review of the power of pardon to the ground of procedural impropriety. As such, any exercise of the power would not be reviewable on its merits.

252. The first case submitted in support of this was ***Maru Ram v. Union of India (supra)***,[106] wherein the Indian Supreme Court held,

> *"Consideration for exercise of power under Article 72/161 may be myriad and their occasions protean, and are left to appropriate Government,* ***but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide… only in these rare cases will the court examine the exercise***"[107]

253. I cannot help but see this as contrary to the position taken by the learned Additional Solicitor General. All the grounds set out by the Indian Supreme Court therein would enable a court to look beyond procedural impropriety. As noted in ***Kehar Singh v. Union of India***,[108]

[105] ibid at p. 37 para 136

[106] (1980) AIR 2147

[107] ibid at 2175 (Emphasis is mine)

[108] (1989) AIR 653, at para 11

> *"At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with the question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations define in Maru Ram v. Union of India, (1981) 1 SCR 1196 at p. 1249; 1980 SC 2147 at pp. 2174-2175…"*

254. While the cases of ***Maru Ram*** and ***Kehar Singh*** did not call for judicial intervention, relying on the law set out therein, in the case of ***Swaran Singh v. State of Uttar Pradesh***,[109] a grant of remission by the Governor of Uttar Pradesh was invalidated by the Supreme Court of India. Commenting on the power of the Governor to grant a pardon, it was held that,

> *"If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer cannons of the constitutionalism, the byproduct order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."*[110]

255. As held in ***Epuru Sudhakar v. Government of A.P.***,[111] the exercise of the power of pardon in India is reviewable under the following grounds:

> *"The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Art. 72 or Art. 161, as the case may be, is available and their orders can be impugned on the following grounds:*
>
> *(a) that the order has been passed without application of mind;*
>
> *(b) that the order is mala fide;*

[109] (1998) 4 SCC 75

[110] ibid at 79

[111] (2006) AIR 3385, at para 3

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) the relevant materials have been kept out of considerations;

(e) that the order suffers from arbitrariness."

256. From the decisions aforementioned, I see no proclivity from the Supreme Court of India to limit themselves to merely inquiring into procedural irregularities.

257. As I have noted earlier, even in England, being a constitutional monarchy where the power exists as a royal prerogative, the Courts have not limited themselves in such a manner. As Watkins L.J. held in ***R v. Home Secretary ex parte Bentley***,[112]

> *"…The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the royal prerogative is reviewable, in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the ground of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.*
>
> *We conclude therefore that some aspects of the exercise of the Royal prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by cases basis whether the aspect in question is reviewable or not."*

258. A similar attitude was taken in ***Burt v. Governor General***,[113] where it was held that the refusal to exercise the prerogative of mercy should have the potential to be

[112] [1993] 4 All ER 442

[113] [1992] 3 N.Z.L.R. 672 at 678

reviewed to the extent that it is based on justiciable considerations. The central attitude of the court was that each case had to be considered individually in light of justiciability. Where a decision is heavily policy-laden, such a decision may potentially be non-justiciable.

259. In this regard, the Doctrine of Political Question becomes very much relevant. The Doctrine stands for the notion that where a question is fundamentally political, as opposed to legal, courts should not inquire into the same as an apolitical organ of the government.

260. ***Baker v. Carr***[114] is one case where the Doctrine was extensively considered by the Supreme Court of the United States. It was held that,

> *"The* ***nonjusticiability of a political question is primarily a function of the separation of powers****. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or* ***whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.****..."* [115]

261. It was contended during the proceedings, chiefly by the 11A Respondent, that the President must be answerable to the Parliament and not the courts, where he has exercised the power of pardon in violation of the Constitution. However, in my view, political accountability through the executive and legislative branches, and judicial review through the courts need not be mutually exclusive.

[114] (1962) 369 U.S. 186

[115] ibid at para 43 (Emphasis is mine)

262. The learned Additional Solicitor General also invited this Court's cognizance towards the 'Delegation Test' and the 'Alienation Test' as propounded in the ***Special Determination on the Twenty First Amendment to the Constitution Bill***.[116]

263. The Delegation Test sets out any change to the delegation of the people's sovereignty in terms of Article 4, which brings in another person or institution to exercise the power of the other to be an infringement of Article 3 of the Constitution. The Alienation Test sets out any transfer, relinquishment or removal of a power attributed to one organ of government to another organ or body to be inconsistent with Article 3 read with Article 4 of the Constitution.

264. It was submitted that, as it is the President who is conferred with the power by Article 34, if the grant of pardon under this Article is "*… reviewed on the merits by the Supreme Court in exercise of fundamental rights jurisdiction it would fail the delegation test as it would 'bring in another person or institution' into the exercise of such power*".[117]

265. It was further submitted that "*it would also constitute a 'transfer, relinquishment or removal' of a power attributed to the President to another as* ***it would allow the Supreme Court instead of the President to take decisions regarding who would be given a pardon***".[118]

266. In this regard, I see it pertinent to cite the opinion of Wilson J. for the Canadian Supreme Court in ***Operation Dismantle Inc. v. The Queen***:[119]

> *"…the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters*

[116] SC/SD/31-37/22

[117] Written Submissions on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents dated 9th August 2023, at p. 28 para 93

[118] ibid at para 94

[119] (1985) 13 CRR 287 at 309-310

of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed…

… if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution…

…if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so."

267. The aforementioned was cited by the Constitutional Court of South Africa in the case of ***The President of the Republic of South Africa and the Minister of Correctional Services v. John Phillip Peter Hugo***,[120] where the pardoning power of the South African President under the Interim Constitution was concerned.

268. In the case of ***Ryan Albutt v. Centre for the Study of Violence and Reconciliation and Others***[121] questions were raised regarding the rationality of the decision to exclude victims of the crime from participating in a special dispensation process. It was held by the Constitutional Court of South Africa that,

[120] (1990) CCT 11/96, at para 29

[121] CCT 54/09 [2010] at 28

"... Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved...

The applicant very properly concedes that this Court has the constitutional authority to examine whether the means adopted by the President are rationally related to the objective sought to be achieved by granting pardons to those convicted prisoners who claim to have committed offences with a political motive."

269. When an application, as provided for by Article 126, is made before the Supreme Court, it is made in respect of an infringement or an imminent infringement of fundamental rights by executive or administrative action. The jurisdiction of the Court under Article 126 is to hear and determine any questions relating to the infringement or imminent infringement of fundamental rights by such action. Needless to say, whatever the factual matrix of such a case may be, the focal point this Court concerns itself with is the fundamental rights of the populace as guaranteed by the supreme law of the land.

270. The question we are concerned with is whether the actions of the President in granting pardon have violated the rights of any one or more persons, and not as to whom it must be granted. Where infringement of fundamental rights is alleged with regard to

any exercise of executive and administrative power, it is our sacred and solemn duty to intervene, as the protector and guarantor of fundamental rights.[122]

271. As held in ***Premachandra v. Major Montague Jayawickrema***,[123]

> *"When considering whether the exercise of a statutory power or discretion, especially one conferred by our Constitution, is subject to review by the judiciary, certain fundamental principles can never be overlooked. The first is that our Constitution and system of government are founded on the Rule of Law; and to prevent the erosion of that foundation is the primary function of an independent judiciary."*

272. Where an authority acts *ultra vires* to the Constitution, it is such authority that defeats itself. In reviewing whether any authority has exercised its power within the constitutional limitations, the Court does not, and need not, assume its role. As Article 118(b) of the Constitution provides, the Supreme Court of the Republic exercises *jurisdiction for the protection of fundamental rights.* Read with Article 4(d), it imposes upon this Court a sacred and solemn duty to exercise its jurisdiction in a manner that would protect, advance, secure and respect fundamental rights. In essence, this Court is tasked with a Sisyphean calling to act as a protector of the Rule of Law, which is the corollary of the duty imposed upon it by Article 4(d) read with Article 118(b) of the Constitution.

273. I do not think I can better articulate this than Their Lordships of the Indian Supreme Court have in ***Kehar Singh v. Union of India (supra)***:[124]

> *"... Indeed, we think that the order of the President cannot be subjected to judicial*

[122] *Palihawadana v. Attorney-General* [1978] 1 Sri LR 65 at 66

[123] [1994] 2 SLR 90 at 102

[124] (1989) AIR S.C. 653 at para 11

review on its merits except within the strict limitations defined in Maru Ram, etc. v. Union of India. [1981] 1 S.C.R. 1196 at 1249. ***The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court...***

This Court in fact proceeded in State of Rajasthan and Others v. Union of India, [1978] I S.C. R. 1 at 80-81 to hold:

".....So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so .....this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so. what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law ...." and in Minerva Mills Ltd. v. Union of India. [1981] 1 S. C. R. 206 at 286-287, Bhagwati, J. said:

"....the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded.....The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent Machinery is the judiciary which is vested with the power of judicial review....."" [125]

[125] Emphasis is mine

Conclusion of the Court on Reviewability

274. At the very outset, I unequivocally reject the position taken by the learned Additional Solicitor General to the effect that judicial review of the power of pardon must be limited to a mere procedural inquiry. It is one that can be reviewed under any of the ***GCHQ*** grounds, including proportionality.[126] Though the *obiter dicta* of Lord Roskill in the ***GCHQ Case*** plainly excluded the prerogative of mercy from the classes of prerogative power which may be susceptible to judicial review, this is no longer the accepted view in England.[127] With the constitutionalization of administrative law, various other grounds have been recognized as capable of invalidating a decision of a public authority; but all such grounds necessarily fall within the broader limbs of judicial review recognised in ***GCHQ***.

275. This, however, does not mean that this Court would be competent to review any and all decisions made by the President under Article 34. Whether a particular exercise of Article 34 is one that should be subjected to judicial review is a question to be determined with regard to the justiciability of the considerations. As I have already adverted to, there are a myriad of considerations upon which this power may be exercised. And some such considerations may conceivably be beyond the judicial competence.

276. For example, where a pardon is based upon considerations of foreign policy, so long as such a grant is in the public interest, a Court of law would hardly be the place to debate such matters. To this extent, the Doctrine of Political Question is of significance. Where the considerations of a pardon involve such questions of policy,

[126] vide *Council for the Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9 (GCHQ Case)

[127] vide supra, *R v. Home Secretary ex parte Bently* [1993] 4 All ER 442; *R v. Barry Foster* [1985] 1 QB 115

should the courts prefer not to intrude because they are ill-equipped to intrude, judicial forbearance may be judicious.

277. In this regard, this Court prefers the approach taken in ***R v. Home Secretary ex parte Bently (supra)***.[128] Watkins L.J. in ***Bentley*** rejected a test of reviewability based on the justiciability of categories of power in favour of an examination of the court's capacity to weigh the competing interests and principles in each individual case. As such, I am of the opinion that, as was done in ***Bentley***, it must be left for the judges of each individual case to determine the justiciability of the consideration upon which the pardon is based, on a case-by-case basis.

278. In approaching this question of justiciability, the Court must first and foremost appreciate the nature and content of the executive or administrative decision: that is to say, the 'considerations' of the pardon. In this, the persons directly affected, and its impact on the wider community beyond the parties of the case become relevant, for this power is exercised in the public interest. The other most pertinent question is the suitability of the court's personnel and process to review a particular decision. It cannot be gainsaid that courts of law may not be the appropriate forum or be suitably equipped in all contexts and circumstances to carry out the functions which a judicial review process of such policy laden questions would ideally demand of them. It is for this very reason the concept of justiciability remains useful.

279. Wherever the president does not give reasons for the pardon, as in this case, a court should not self-curtail its jurisdiction, by presuming the involvement of any non-justiciable considerations. Furthermore, for judicial review is the norm, the burden to prove a consideration non-justiciable shall be on such party which alleges it to be un-justiciable. However, no authority can elude judicial scrutiny by merely invoking and playing on the word 'policy'. The Court must further inquire whether such policy

[128] [1993] 4 All ER 442

considerations are a mere pretext towards fulfilling an ulterior motive. In addition, where bad faith, improper motive or manifest unreasonableness is properly established against any public authority, a court of law may strike down even the most policy-laden decisions or actions of such authority.[129]

280. With regards to the Doctrine of Political Question and the reviewability of policy-laden issues, I see it pertinent to note the following observations of the esteemed Bhagwati J., as His Lordship then was, in ***State of Rajasthan v. Union of India***:[130]

> *". . . it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political . . . It was pointed out by Mr. Justice Brennan in the Opinion of the Court delivered by him in Baker v. Carr [(1962) 369 US 186] an epoch making decision in American Constitutional history, that the mere fact that the suit seeks protection of a political right does not mean that it presents a political question. This was put in more emphatic terms in Nixon v. Harndon [(1926) 273 US 536], by saying that such an objection 'is little more than a play upon words . . . Even before Baker v. Carr, courts in the United States were dealing with a host of questions 'political' in ordinary comprehension. Even the desegregation decision of the Supreme Court in Brown v. Board of Education [(1953) 347 US 483], had a*

[129] vide R *v. Secretary of State for the Environment ex parte Hammersmith and Fulham LBC and others* [1991] 1 AC 521; R *v. Parliamentary Commissioner for Administration ex parte Dyer* [1994] 1 All ER 375

[130] AIR 1977 S.C. 1361

clearly political complexion . . . The Supreme Court in Baker v. Carr held that it was within the competence of the Federal Courts to entertain an action challenging a statute apportioning legislative districts as contrary to the equal protection clause. This case clearly decided a controversy which was political in character, namely, apportioning of legislative districts, so because a constitutional question of violation of the equal protection clause was directly involved and that question was plainly and indubitably within the jurisdiction of the Court to decide. It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'Judicial hands off'. So long as a question arises whether an authority under the Constitution has acted within the limits of its powers or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so . . . No one however highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution, or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining whether it is limited, and if so, what are its limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law . . ." [131]

281. I do not think any more needs to be said than His Lordship has on the matter. The exact passage I have cited above has been cited with approval by this Court in ***Premachandra v. Major Mantague Jayawickrema***,[132] and I, too, find myself in total agreement with it.

[131] ibid at 1412-13

[132] (1994) 2 SLR 90 at 109-110

282. An overly limited approach to this issue of justiciability can mean that an illegal decision, a decision which fails tests of Wednesbury reasonableness or proportionality, may survive to perpetuate unfairness. Accordingly, a court of law must not sit idle and be lethargic where the great basic rights enshrined in the Constitution are threatened. Article 4(d) read with Article 118(b) of the Constitution demands that it be a proactive guardian of such rights as the protector and guarantor of fundamental rights. Only then can the fundamental right enshrined under Article 17 be meaningful. It is for this very purpose the Constitution has vested in this Court the power to grant such relief or make such directions as it may deem just and equitable in any circumstances.[133]

CIRCUMSTANCES OF THE IMPUGNED SECOND PARDON

283. Much of the documentary material relating to the 1st and 2nd Pardon, which are instrumental *in casu,* were not initially produced before this Court. It was only once this Court made directions to procure the same were they produced by the Presidential Secretariat.

284. The 11A Respondent asserted that he did not have access to the said documentary material as he ceased to hold office as the President on or about 17th November 2019. He further asserted that, when he requested said documentary material from his successor, he was informed that they were not available. Thereafter, by way of a Right to Information (RTI) request to the Ministry of Justice, he had obtained some—but not all—of the said documents, which were then filed before this Court. It was also observable that while the 11A Respondent had sent an RTI request to the Ministry of Justice to obtain the documents relating to the pardon therefrom, a similar request has not been made to procure any material from the Presidential Secretariat.

[133] vide Article 126(4) of the Constitution

285. While I do not wish to dwell on the frail excuses, I am left wondering why he would be so inclined to accept as true any such statements as to the unavailability of documents. If he perused such necessary documents in granting the pardon, as he ought to have, he must have been well aware of the fact that they were, in fact, available.

286. Be that as it may, the aforementioned documentary material were finally produced by the Presidential Secretariat as they appear to have wondrously materialized following the directions made by this Court.

Requests/Petitions/Appeals for Pardon

287. Article 34 of the Constitution does not expressly require a request, appeal, plea, petition, etc., to be made for a presidential pardon to be granted. As such, the mere absence of a request for pardon will not *ipso facto* vitiate the validity of such pardon. However, where any authority acts *ex mero motu* with no request made, either pleading a pardon or inviting the authorities' attention towards a prisoner, and any authority grants or considers granting a pardon to a prisoner, the authority must explain how and why the prisoner was so selected for such a grant. A presumption of arbitrariness can be drawn where there is any failure on the part of such authority to so explain, either at the time of granting the pardon or, at the least, when any aspect of such pardon is challenged before a court of law.

288. In the instant case, it was contended that the pardon was granted pursuant to the many requests made to His Excellency the President regarding the 2nd Respondent. Presidential Secretariat File Ref. 'PS/LD/අපරා/24-7/2017', which includes the documentation regarding the impugned 2nd Pardon, does contain many requests made by Attorneys-at-Law, religious leaders and other groups. However, most of the requests do not specifically refer to the 2nd Respondent, except for three requests, *viz.* a formal petition for pardon made on behalf of the 2nd Respondent, two written pleas

to the President by the parents of the 2nd Respondent and a letter by Ven. Athuraliye Rathana Thera M.P.

289. Among the general requests (those requests which do not make specific reference to the 2nd Respondent) are the requests made by the Intervenient-Petitioners. As was highlighted by the learned President's Counsel for the Petitioner, this Court observed many such request letters to be identical, and even the ones which are not identical are written in strikingly similar language. They had also been filed around the same time. These facts are indicative of an effort in concert by all those involved. Be that as it may, none of those request letters specifically refer to the 2nd Respondent.

290. As the Intervenient-Petitioners have stated in their affidavits, both dated 17th June 2023, they have only invited further attention of the former President towards taking appropriate measures in furtherance of the education and rehabilitation of prisoners in general, and young prisoners in particular. Despite this, as apparent from the Press Release by the President's Media Division dated 11th November 2019, the former President, in arriving at his decision to pardon the 2nd Respondent, has clearly been influenced by these general requests.

291. The said Press Release, which strictly relates to the impugned Pardon, states,

> "…පූජ්‍ය බලංගොඩ බුද්ධගෝෂ ස්ථවිරයන් වහන්සේ ද මෙවැනි උගත් තරුණ සිරකරුවන් සම්බන්ධයෙන් සමාව දීම වැදගත් වන බව ජනාධිපතිතුමා වෙත ලිඛිතව දැන්වා සිටියහ.
>
> *[Ven. Balangoda Buddhagosha Thero, too, informed the President in writing as to the importance of pardoning such educated young prisoners]*
>
> දකුණු පළාත් කතෝලික පදවියේ රදගුරු රේමන්ඩ් වික්‍රමසිංහ රදගුරුතුමා ජනාධිපතිතුමා වෙත… කරුණු දක්වමින් පෙන්වා දුන්නේ ජීවිතාන්තය දක්වා සිර දඬුවම් විඳින තරුණ ස්වයං පුනරුත්ථාපනයකට ලක්ව ඇති උගත් සිරකරුවන්ට සමාව දීම සම්බන්ධයෙන් උන්වහන්සේගේද ආශීර්වාදය හිමි වන බවය...

[Bishop Raymond Wickramasinghe, Bishop of the Catholic Diocese of the Southern Province pointed out, while presenting facts to the President, that his blessings are also there with regards to the pardoning of educated prisoners who have undergone self-rehabilitation and are serving life sentences]"

292. Most Rev. Dr. Wickramasinghe had issued an immediate clarification following this Press Release seeking to better explain his involvement. This clarification, issued on the same day, states as follows:

"I observed a statement from the President's Media Division about the Presidential Pardon for ***Royal Park Murder Convict…*** In the Sinhala Translation of the statement, mentions clearly that I made a personal written request on behalf of the Convict (Jude Shramantha Anthony Jayamaha). ***I wish to state that I have not made any request on behalf of Jude Shramantha Jayamaha, neither to the President nor to the respected Judiciary…*** *However, a few years ago, I recall, a group of Rev. Buddhist Monks and some Civil Society Members approached me to make a written appeal to the President to pay attention to the Prisoners, especially to the Young Detainees, help them to study and rehabilitate them in a positive environment.* ***We will continue to voice the same in the future too.***

I regret that our appeal was singled out to give an impression about this particular case, which I believe is absolutely not acceptable…"

293. This clarification indeed reflects the true nature of the appeals made by the Intervenient-Petitioners as well as most others mentioned in the Press Release. I fail to see how any rational mind could interpret the contents of these appeals as relating to any prisoners convicted of murder, or such other grave offences, let alone the 2nd Respondent specifically.

294. Among the specific requests, the foremost are the appeals to the then President by letter dated 30th July 2017 by the mother of the 2nd Respondent, titled "අම්මා කෙනෙකුගේ කණගාටුදුයක තත්වය පිළිබඳ පැහැදිලි කිරීමට *[to explain the grief of a mother]*" and the joint letter dated 13th June 2019 by the mother and father of the 2nd Respondent. They are but appeals to pathos, and I do not see it necessary to be analysed. It hardly comes as a surprise that parents would petition for their son's release.

295. Secondly, the President is claimed to have been influenced by an appeal made by Ven. Athuraliye Rathana Thero M.P. The aforementioned Press Release dated 11th November 2019 states, in this regard, that,

> "…තරුණයාට ජනාධිපති සමාව ලබාදීම වෙනුවෙන් මුලිකත්වය ගෙන ස්විශේෂී කාර්යභාරයක් සිදුකරමින් අවශ්‍ය මැදිහත්වීම හා සම්බන්ධීකරණ කටයුතු පාර්ලිමේන්තු මන්ත්‍රී පුජ්‍ය අතුරලියේ [රතන] ස්වාමීන්වහන්සේ විසින් සිදුකරන ලද අතර, උන්වහන්සේ විසින් මෙම තරුණයාගේ [දෙමව්]පියන් සහ ඥාතීන් ජනාධිපතිතුමා වෙත මුණගස්වා මේ පිළිබඳ දීර්ඝ කරුණු දැක්වීමක් ද [සිදුක]රන ලදී.
>
> *[Ven. Athraliye Rathana Thero, Member of Parliament, played a key role and coordinated in obtaining Presidential pardon for this youth and he has brought the parents and close relations of the youth to meet the President and give a lengthy explanation of the background.]*
>
> …උන්වහන්සේ විසින් මේ සම්බන්ධයෙන් ලිඛිත ඉල්ලීමක්ද ජනාධිපතිතුමා වෙත යොමු [කරමි]න් පෙන්වා දුන්නේ මෙයට අදාළ සිද්ධිය ප්‍රේම සම්බන්ධයක් පදනම් කරගෙන තරුණයෙක් හා [තරු]ණියක් අතර ඇති වූ ආරවුලක් බවත්, ශ්‍රමන්ත ජූඩ් ඇන්තනි යන ඇය බන්ධනාගාරය තුළ යහපත් කල්ක්‍රියාවෙන් යුක්තව සිටීම මෙන්ම, බන්ධනාගාරගතව සිටිමින්ම භාහිර උපාධිය සාර්ථකව [නිමා]කොට, ඉන් අනතුරුව මේ වන විට ආචාර්ය උපාධියට අදාළ අධ්‍යයන කටයුතු හදාරමින් සිටින මෙම තරුණයා මනා පෞර්ෂයකින් යුත් උගත්, බුද්ධිමත් තරුණයෙක් ලෙස පෙනී යාන [හෙයි]න් මේ පිළිබඳ කාරුණිකව

කරුණු සලකා බලා මෙහුට ජනාධිපති සමාව ප්‍රදානය කරන්නේ [නම් එ]ය සාධාරණ හා මානුෂික කාරණයක් වනු ඇති බවත්ය.

[Ven. Rathana Thero also made a written appeal to the President explaining that the murder took place due to an argument over a love affair between the youth and the young girl and Shramantha Jude Anthony Jayamaha, while serving his sentence in prison with good behaviour and conduct and undertook studies to successfully complete his external degree and now working for his PhD and he is an intelligent young man with a pleasant personality. He appealed to consider the above and release him on a Presidential pardon…]

…බුද්ධ දේශනාව අනුව යමින් කරුණා, දයානුකම්පාවෙන් යුක්තව මෙම කාරණය කෙරෙහි [අවධා]නය යොමු කරන ලෙස ද, පුජ්‍ය අතුරලියේ රතන ස්ථවිරයන්වහන්සේ ගරු ජනාධිපතිතුමා [හට] කරුණු පෙන්වා දුන්න...

[…Ven. Rathana Thero also appealed to the President to consider this in accordance with the Buddhist teachings of compassion…]" [134]

296. The Presidential Secretariat File Ref. 'PS/LD/පොදු/24-7/2017' also contains the said written appeal purportedly made by Ven. Athuraliye Rathana Thera. However, while this undated appeal is printed on a Parliament letterhead, it bears neither a signature nor an official seal or stamp of the Thero. The content therein, too, must trouble any reasonable person. It states, *inter alia,* the following:

"…බන්ධනාගාර ගතව සිටියදී මරණ දඩුවම නියම වූ පසු ඔහු මත්ද්‍රව්‍යට ඇබ්බැහි වී තිබුණි. පසුව මා මැදිහත් වී මෙම තරුණයා පුනුරුත්ථාපනය කොට මැගසින් බන්ධනාගාරයෙන් කුරුවිටට මාරු කෙරුණි. දැන් වසර 5ක් ගතවී ඇත. ඔහු ආර්ථික විද්‍යාව පිළිබඳ ඔක්ස්ෆර්ඩ් සරසවියේ ආචාර්ය උපාධියක් දක්වා සම්පූර්ණ කර ඇත...

[134] Translations are a *verbatim* reproduction of the translations as appeared in Press Release, 'Clarification on presidential pardon' (Newslk, 11 November 2019) https://www.news.lk/news/politics/item/28178-clarification-on-presidential-pardon, produced marked 'X2' by the Petition of the Intervenient-Petitioners

[…During his imprisonment, after being sentenced to death, he was addicted to drugs. This youth was rehabilitated and transferred from Magazine Prison to the Kuruwita Prison. It has now been 5 years. He has completed up to a Doctorate in Economics from Oxford University…]".[135]

297. The contents of this written appeal should ring instant alarm bells in any rational mind—including the obvious falsity of some claims, a Member of Parliament somehow having access to and the ability to transfer prisoners, and a Parliament letterhead bearing such information without a date or signature. Despite such concerns, in a puzzling move, the President has, in fact, acted upon this written letter of appeal. Written on the face of this appeal are the instructions of the President to the Additional Secretary (Legal), signed by His Excellency, directing her to "කථාකරන්න *[speak]*". The palpably dubious nature of these appeals the President has clearly relied upon is *prima facie* indicative of an ill-considered, imprudent and arbitrary course of conduct.

Report of the Trial Judge

298. The foremost requirement set out under the proviso to Article 34(1) is for the President to *"cause a report to be made to him by the judge who tried the case"*. Perusal of the documentary material before us reveals that officers of the Presidential Secretariat Office have long acted under a fallacious understanding to the effect that the report of the trial judge contemplated in Article 34 of the Constitution and the report contemplated in Section 286(b) of the *Code of Criminal Procedure Act, No. 15 of 1979* are one and the same. This is, of course, not the case. The procurement of a 286(b) report can in no way amount to compliance with the first requirement under the proviso to Article 34(1) of the Constitution.

[135] Translation is mine

299. Letter dated 14th July 2014—at the time of the 11A Respondent's predecessor—addressed to the Hon. Attorney-General from the Additional Secretary to the President appears to suffer from the same mistake. It is clear that these officers have committed this same mistake for well over a decade, at the least.

300. The Section 286(b) report is not one made in contemplation of a pardon. It is made for an entirely different purpose. Section 286(b) of the *Code of Criminal Procedure Act* provides as follows:

> *"… so soon as conveniently may be after sentence of death has been pronounced the Judge of the High Court who presided at the trial or in case of his absence or inability his colleague or successor in office shall forward to the President the notes of evidence made by the Judge at the trial with a report in writing signed by him setting out his opinion whether there are any and what reasons why the sentence of death should or should not be carried out."*

301. While the report contemplated under 286(b) considers whether or not a sentence of death should be carried out following a conviction, the Article 34 report concerns itself with whether or not it is appropriate to pardon, remit or otherwise alter the effect of a sentence of a prisoner as I have hitherto discussed.

302. The learned Counsel, in the course of the proceedings, raised questions as to the nature of the report which must be obtained with regard to Trials-at-Bar and in instances where the death sentence is given by an appellate court, as in the instant case. When it comes to Trials-at-Bar, I am of the opinion that the report under Article 34 may either be a joint report by all the judges or three individual reports by each judge.

303. If the sentence of death is imposed upon a prisoner by an appellate court, the reports, either joint or individual, must be called from the judges of the appellate courts who passed the death sentence in addition to the report/s by the judge/s of the original

court. While the proviso to Article 34(1) of the Constitution only requires that *"…the President shall cause a report to be made to him by the* ***Judge who tried the case****…",* it would be utterly artificial to merely call for a report from the High Court judge where the apex courts in our judicial hierarchy have brought their wisdom in adjudicating the appeals. Constitutional provisions, or even statutory provisions for that matter, must always be interpreted in a manner that would make the provision meaningful.

304. Clearly, the intention of this provision, as manifested therefrom, is to enable the President to be informed of all such considerations associated with a judicial sentence. If the appellate judges who passed the sentence of death do not weigh in, this intention would be frustrated. However, this would not be strictly necessary where the appellate courts have only affirmed the decision of the High Court judge, unless the President deems so necessary.

305. In the event of impossibility in obtaining this report, due to death, illness, old age or any incapacity, the maxim *lex non cogit ad impossibilia* may apply, for interests of justice should take precedence over technical conformity. It may be deemed sufficient in such instances to call for a report from such judges who are still able to provide the same, or even to substitute a 286(b) report under the *Code of Criminal Procedure Act* in lieu of the report contemplated under the proviso to Article 34(1) of the Constitution. But this may only be done in cases of absolute impossibility.

306. In the instant case, it is apparent that the 11A Respondent and his subordinate officers have acted under this misconception that reports contemplated under Section 286(b) of the *Code of Criminal Procedure Act* and Article 34 of the Constitution are one and the same. As such, there is a clear failure to comply with the first requirement set out under the proviso to Article 34(1) of the Constitution. The pardon granted to the 2nd Respondent can be struck down on this basis alone.

Advice of the Attorney-General

307. The proviso to Article 34(1) secondly requires the President to forward the report made by the judge who tried the case to the Attorney-General with instructions that it be sent to the Minister of Justice with the Attorney-General's advice thereon. It is apparent from the word "thereon" that the advice of the Attorney-General must be based on the report.

308. The Presidential Secretariat File Ref. 'PS/LD/පොදු/24-7/2017' contains but a single letter by the Hon. Attorney-General addressed to the President. This letter dated 12th September 2019 by Dappula de Livera, PC having set out the circumstances of the offence committed by the 2nd Respondent, concludes as follows:

> "...මෙම නඩුවට අදාළ ඉහත සඳහන් කරන ලද කරුණු සහ විශේෂයෙන් මෙම සිදුවීම සිදුවන අවස්ථාවේ චූදිත කෲර හා අමානුෂික අන්දමින් මරණකරුට පහරදුන් ආකාරය සහ චූදිතගේ වයස සහ සිද්ධියෙන් පසු සහ වැරදිකරු වීමෙන් පසු ඔහුගේ හැසිරීමද සැලකිල්ලට ගෙන 2012.07.11 වන දින අභියාචනාධිකරණය විසින් චූදිත අභියාචකට ලබාදෙන ලද මරණ දඬුවම ක්‍රියාත්මක කිරීම සුදුසුද යන්න තීරණය කිරීමට සිදුවන බව සඳහන් කළ යුතු වේ.
>
> *[...Whether it is appropriate to carry out the sentence of death imposed upon the accused by the Court of Appeal on 11.07.2012 has to be decided by taking into account the above-mentioned facts relating to this case and especially the manner in which the accused brutally and inhumanly assaulted the deceased at the time of the incident and the age of the accused and his behavior after the incident as well as after being found guilty.]"* [136]

309. The content of this communication by the Attorney-General could not be further from advice in support of granting a pardon to the 2nd Respondent. The above response of

[136] Translation is mine

the Attorney-General is only logical, as he was sent a Section 286(b) report seeking advice thereon. As such, he has advised the President in line with the proper purpose and function of a 286(b) report. It amounts in no way to a performance of the Attorney-General's role in granting a pardon as contemplated under the proviso to Article 34(1) of the Constitution.

310. I cannot help but observe the role played by the Attorney-General in proceedings of this nature as peculiar. The Attorney-General prosecuted the offender before the High Court. And thereafter, the Attorney-General appealed against the conviction which he deemed erroneous. According to Article 35, it is against the Attorney-General that an application under Article 126 is to be made where the actions of an incumbent President are to be challenged. In fact, under Article 134(1), the Attorney-General has a right to be heard in all proceedings before the Supreme Court in the exercise of its jurisdiction under Articles 120, [121, 122, 125], 126, 129(1) and 131. Balancing these interests is by no means an easy task.

311. The solemn objective of any officers of the Attorney-General's Department in proceedings of this nature should be protecting and fostering the Rule of Law and public interest. Needless to say, the duty imposed by Article 4(d) to respect, secure and advance fundamental rights extends to the Attorney-General as well. This duty was ever so clearly explained by Kodagoda J. in ***Wijerathna v. Sri Lanka Ports Authority:***[137]

> *"In this regard, it is necessary to point out that, the primary duty of Attorneys-at-Law is to assist Court in the due administration of justice. Their duties and obligations towards their respective clients are subordinate to the duty they have towards Court. This is more so with regard to officers of the Attorney General's Department, who are quite rightly deemed to be ministers of justice, due to some*

[137] SC FR 256/17, SC Minutes of 11 December 2020 at 24

of the quasi-judicial functions conferred on the office of the Attorney-General by law. Therefore, officers of the Attorney General's Department are required to actively aid Court in the discovery of the truth and administer justice according to law. It is of critical importance to bear in mind that, officers of the Attorney General's Department are duty bound to act in the best interests of the State, as doing so would be in public interest. Thus, the overall objective of legal professionals serving the State, should be the protection and fostering of public interest. Protecting and acting in the best interests of the State and public officials, is circumscribed by the overarching professional duty legal officers of the State have towards Courts to assist in the administration of justice. Legal Officers of the State are certainly not required and should not protect or defend public officials who have committed any illegality or otherwise acted contrary to law."

312. While the duty of the Attorney-General in proceedings under Article 126 has been so set out by this Court in several instances, the exact nature of the duty of the Attorney-General within the process set out under Article 34 of the Constitution remains ill-defined.

313. I have hitherto discussed the relevancy of the *Assistance to and Protection of Victims of Crime and Witnesses Act* and see no need to revisit the same. There exists no doubt as to the right of a victim to have their grievances heard in the process of granting pardon. The victims of the instant case, at the time of the impugned Pardon being granted to the 2nd Respondent, were not granted this opportunity. The victims had been deprived of a hearing, up until the fundamental rights application was taken up before this Court. This is a rare case where the persons aggrieved by the offence had the means of retaining the best of legal counsel. Undoubtedly, this will not always be the case. The chances are that most will remain oblivious even to the fact that an offender has been pardoned.

314. It is for this reason the Attorney-General must represent the interests of any party howsoever aggrieved by an offence. This duty is a corollary to the Attorney-General's duty to act in the public interest. In this sense, the advice of the Attorney-General to the President, as contemplated under Article 34 of the Constitution, must necessarily account for how the fundamental aims of the criminal justice system would be better served by a presidential pardon.

Recommendations of the Minister of Justice

315. Once the advice of the Attorney-General is sent to the Minister of Justice along with the report by the trial judge, the Minister is required to forward the report to the President with his or her recommendations. The duty of the Minister, too, is necessarily connected to the report prepared by the trial judge. The recommendations of the Minister must be made in consideration of the advice of the Attorney-General thereto.

316. However, the Presidential Secretariat File Ref. 'PS/LD/පොදු/24-7/2017' does not contain any report or like communications from the Minister of Justice in relation to the impugned 2nd Pardon. The Additional Secretary to the President (Legal), in a memorandum dated 04th October 2019, observes the following in this regard:

> "...එහෙත්, ඉහත කරුණු ගෙන බැලීමේ දී මරණීය දණ්ඩනය ප්‍රකාශයට පත් කිරීමෙන් අනතුරුව ආණ්ඩුක්‍රම ව්‍යවස්ථාව ප්‍රකාරව ජනාධිපතිවරයා වෙත යොමු කර තිබූ 286 බී වාර්තාව නීතිපති වෙත යොමු කර ඇතත්, නීතිපති උපදෙස් අධිකරණ අමාත්‍යාංශය හරහා ජනාධිපති කාර්යාලය වෙත ලැබී නොමැති බව ආණ්ඩුක්‍රම අංශයෙන් ව්‍යවස්ථා දන්වන ලදී.
>
> *[...However, considering the above facts, after the pronouncement of the sentence of death, although the 286 b report which was sent to the President according to the Constitution has been forwarded to the Attorney-General, the Constitutional*

Division informed that the Attorney-General's advice thereon has not been forwarded to the Presidential Secretariat via the Ministry of Justice.]

එබැවින් මේ සම්බන්ධයෙන් නැවත සිහි කැඳවීමක් 2019.09.12 දිනැතිව යොමු කරන ලද නමුත්, නීතිපති විසින් සිය උපදෙස් අධිකරණ අමාත්‍යතුමිය වෙත නොව අතිගරු ජනාධිපතිතුමන් වෙත යොමු කර ඇත...

[Therefore, a reminder in this regard was issued on 12.09.2019, but the Attorney-General has directed his advice not to the Minister of Justice but to His Excellency the President...]

එහිදී නීතිපති අවධාරණය කර ඇත්තේ මෙම ඝාතනය පෙර සැලසුම් කරන ලදුව සිදු කරන ලද ඝාතනයක් බව හෙළිදරව් නොවන බවත්, විශේෂයෙන්ම මෙම සිදුවීම සිදුවන අවස්ථාවේ දී වූදිත කෲර හා අමානුෂික අන්දමින් මරණකරුට පහර දුන් ආකාරය , වූදිතගේ වයස හා සිද්ධියෙන් පසු සහ වැරදිකරු වීමෙන් පසු ඔහුගේ හැසිරීම ද සැළකිල්ලට ගෙන 2015.07.11 [sic] දින පනවන ලද මරණ දඬුවම ක්‍රියාත්මක කිරීම සුදුසු ද යන්න තීරණය කිරීමට සිදුවන බව ය.

එනයින් බලන කල නීතිපතිතුමන්ගේ මතය මෙම මරණ දඬුවම ක්‍රියාත්මක කළ යුතු ද යන්න පිළිබඳව පැහැදිලිව ඉදිරිපත් කර නොමැති බව නිරීක්ෂණය කරමි.

[Hon. Attorney-General has emphasized how this killing was not revealed to be a premeditated one and, whether it is appropriate to carry out the sentence of death imposed on 2015.07.11 has to be decided especially considering the brutal and inhuman manner in which the accused attacked the deceased, his age and behaviour after the incident as well as the conviction.

In light of this, I observe that the advice of the Attorney-General has not been clearly presented on whether the death penalty should be carried out]." [138]

[138] Translation is mine

317. Not only are the failures in this regard palpably apparent on the face of the record, but the Additional Secretary (Legal) has also given instructions to the President categorically drawing His Excellency's attention to these failures.

Conduct of the President and the Presidential Secretariat

318. The Additional Secretary to the President (Legal) in her memorandum to the President/Secretary to the President dated 4th October 2019 has made the following observations:

> "…මෙම අවස්ථාව වනවිට නිසි ක්‍රියාමාර්ග අනුගමනය කරමින් හෝ නොකරමින් චූදිත හට පනවා ඇති මරණ අඩුවම ජීවිතාන්තය දක්වා සිර දඩුවමක් බවට පත් කරමින් 2016.05.20 දින ජනාධිපති සමව ලබා දී ඇත.
>
> *[At this point, either following proper procedure of without following proper procedure, the accused has been granted Presidential Pardon dated 2016.05.20 commuting the death sentence imposed upon him into a life imprisonment.]*
>
> ඒ අනුව මෙතැන් සිට අනුගමනය කල යුත්තේ ජීවිතාන්තය දක්වා සිර දඩුවම් විඳින පුද්ගලයකු සම්බන්ධයෙන් ක්‍රියා කළ යුතු අකාරයටය.
>
> එනමුත්, ඔහුගේ වයස සහ සිර දඩුවම් විඳිමින් සිටිය දී අත්පත් කර ගෙන ඇති අධ්‍යාපන සුදුසුකම් අනුව යහපත් පුරවැසියෙකු බශයෙන් ඉදිරියේ දී සමාජයට සේවය කිරීමේ ඇති හැකියාව කෙරෙහි ද අවධානය යොමු කරමින්… **අතිගරු ජනාධිපතිතුමන්ගේ අභිමතය පරිදි කොන්දේසි සහිත සමාව ලබාදීමේ හැකියාව ඇත**.
>
> *[Accordingly, to be followed from here onwards is the same steps followed in relation to person sentenced to life imprisonment.*
>
> *However, based on his age and educational qualifications acquired during incarceration, focussing on his ability to serve the society in the future as a good*

citizen… in accordance with the discretion of His Excellency a conditional pardon is possible.]"[139]

319. The Commissioner General of Prisons by letter dated 08th October 2019 to the Secretary, Ministry of Justice and Prison Reforms has recommended that a Special State Pardon in terms of Article 34 of the Constitution be granted to the categories of prisoners he had specified therein. The said letter specifically excludes from its ambit such prisoners convicted of any offences set out in Annexure 1 thereto and such prisoners sentenced to death or life imprisonment. Despite this, as apparent from Presidential Secretariat File Ref. 'PS/LD/පොදු/24-7/2017' Minute Sheet V, the President has directed/ordered for the 2nd Respondent to be included within this Special State Pardon.

320. The aforementioned memorandum from the Additional Secretary to the President (Legal) addressed to the Secretary to the President, states the following:

"…මාගේ 2019 ඔක්තෝබර් 04 දිනැති නිල් 18 හි ඇතුළත් කර ඇති වාර්තාව හා 2019 ඔක්තෝබර් 04 දිනැති කාර්ය සටහන් පත්‍ර V හි සටහන හා බැඳේ;

ඒ අනුව, විශේෂ රාජ්‍ය සමාව ලබාදීමේ ක්‍රියාවලිය තුළදී මෙම කටයුතු සිදු කරන ලෙස ඔබගේ 2019 ඔක්තෝබර් 15 දිනැති සටහන මගින් දන්වා ඇත.

එහෙත්, බන්ධනාගාර වාර්තාව අනුව විශේෂ රාජ්‍ය සමව ලබාදීමට යෝජනා කර **ඇත්තේ මරණ දණ්ඩනය සහ ජීවිතාන්ත සිර දඬුවම් නියම වූ සිරකරුවන් නැර,** අනිකුත් සිරකරුවන් සඳහා ය…

එබැවින්, විශේෂ රාජ්‍ය සමාව ලබාදීම යටතේ මෙම සිරකරුට නිදහස ලබාදීමේ හැකියාව නොමැත.

[139] Translation is mine

ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ ප්‍රතිපාදන අනුව දැනට ජීවිතාන්තය දක්වා සිර දඬුවම් විඳින මෙම සිරකරු හට සම්පූර්ණ සමාවක් හෝ නිත්‍යානුකූල කොන්දේසි සහිතව සමාවක් ලබාදීමට ජනාධිපතිවරයාට බලය ඇත්තේ ය.

ඒ අනුව සුදුසු නියෝග සඳහා ඉදිරිපත් කරමි.

[Relating to my report dated 04 October 2019 included in Blue 18 and Minute Sheet V *dated 04 October 2019;*

Accordingly, your note dated 15 October 2019 has informed to carry out these acts under the Special State Pardoning process.

However, according to the prison report, Special State Pardon has been proposed for prisoners other than those sentenced to death and life imprisonment…

Therefore, the prisoner cannot be released under the Special State Pardon.

According to the provisions of the Constitution, the President has the power to grant a full pardon or a pardon with any lawful conditions to this prisoner who is serving sentence of life imprisonment.

Accordingly, I present the same for appropriate orders.]" [140]

321. On this memorandum, written somewhat illegibly, is the order/direction of the President stating "නිදහස් කිරීමට අනුමත කරමි *[I approve to be released]*". It is upon this order/direction alone the prisoner was released. Thereafter, by letter dated 04th November 2019, the Secretary to the President (Acting) has communicated to the Secretary of the Ministry of Justice and Prison Reforms that the President has approved the release of the 2nd Respondent.

[140] Translation is mine

322. The latter states,

> "දෙන් ශමන්ත ජූඩ් ඇන්තනි ජයමහ යන අය නිදහස් කිරීම සඳහා අතිගරු ජනාධිපතිතුමා විසින් අනුමැතිය ලබා දී ඇත… *[His Excellency the President has approved the release of Don Shamantha Jude Anthony Jayamaha…]*"

323. It is apparent from this course of conduct that the President has paid no mind to any of the relevant considerations in granting the impugned Pardon. The President has merely approved the decision made by someone else with no rhyme or reason. I agree with Mr. Faiszer Mustapha, PC and the learned Additional Solicitor General in their assertion that Article 34 requires no warrant to be issued by the President. That does not mean, however, that a President can exercise this power so haphazardly as the 11A Respondent has done. There must be some sanctity involved in the decision, making it attributable to the President.

Duty to Give Reasons

324. Both Mr. Sanjeeva Jayawardena, PC and Dr. Romesh De Silva, PC argued that the President is required to give reasons for his decisions to grant a presidential pardon to any prisoners. The precise nature of the contention made by Mr. Sanjeeva Jayawardena, PC was that the President should have reasons for granting a pardon, even if such reasons were not communicated to the public at the time of granting the pardon.

325. In the words of Lord Denning M.R. giving reasons is *"one of the fundamentals of good administration".*[141] It is trite law that a duty to give reasons may be implied at common law, particularly under circumstances where it prejudices the ability of persons to successfully apply for judicial review or where such failure to give reasons amounts to

[141] *Breen v. AEU* [1971] 2 QB 175 at 191

arbitrariness.[142] In ***Epuru Sudhakar v. Govt. of A.P (supra)***,[143] with regard to the duty to give reasons it was noted as follows:

> *"…In any event, the absence of any obligation to convey the reasons does not mean that there should not be a legitimate or relevant reasons for passing the order…*
>
> *The position if the Government chooses not to disclose the reasons or the material for the impugned action was stated in the words of Lord Upjohn in the landmark decision in Padfield and Ors. v. Minister of Agriculture, Fisheries and Food and Ors. (1968 (1) All ER 694) at p. 719:*
>
> *"……if he does not give any reason for his decision it may be if circumstances warrant it, that a Court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion……"*
>
> *The same approach was adopted by Justice Rustam S. Sidhwa of the Lahore High Court in Muhammad Sharif v. Federation of Pakistan (PLD 1988 Lah 725) where at p. 775 para 13 the learned Judge observed as follows:*
>
> *"I have no doubt that both Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies… If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be*

[142] vide *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] (1) All ER 694; *R v. Secretary of State for Home Department ex parte Doody* [1993] UKHL 8, [1994] 1 AC 531; *R v. Minister of Defence ex parte Murray* [1998] COD 134 (QBD); *Suranganie Marapana v. Bank of Ceylon* [1997] 3 Sri LR 264; *R v. Criminal Injuries Compensation Authority ex parte Leatherland* [2000] TLR 12 October; *South Buckinghamshire District Council v. Porter (No 2)* [2004] 1 WLR 1953; *Lal Wimalasena v. Asoka Silva* SC Application No. 473/2003, S.C. Minutes of 04 May 2005; *Karunadasa v. Unique Gemstones* [1997] 1 Sri LR 256

[143] (2006) AIR S.C. 3385 at para 38-43

decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer."

Justice Sidhwa's aforesaid observations have been referred to and approved in S.R. Bommai's case (supra) [1994 AIR SCW 2946].

Since there is a power of judicial review, however limited it may be, the same can be rendered to be an exercise in futility in the absence of reasons."

326. As noted, when reasons are not given, the court may presume the pardon to be given on justiciable considerations and proceed to scrutinize the same. Moreover, where a Petitioner is able to establish a *prima facie* case, it is for the authority to justify their actions as reasonable. When no reasons are given in such instances, it stands to good reason that a presumption of arbitrariness would result therefrom.

327. As Lord Pearce noted in ***Padfield v. Minister of Agriculture, Fisheries and Food***,[144]

"If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."[145]

328. In the words of Lord Keith in ***R v. Trade Secretary ex parte Lonrho PLC***,[146]

"The absence of reasons for a decision where there is no duty to give them cannot itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision,

[144] [1968] AC 997

[145] ibid at 1053

[146] (1989) at 620

the decision maker who has given no reasons cannot complain if the court draws the inference that he has no rational reason for his decision".

329. While some of the older authorities may suggest that there is no duty to give reasons for a decision at the time of giving a decision, I do not see this a fit conclusion within our law. This proposition may have held water sometime back, but the tide has now changed. This is not to say that every routine and minute decision needs to be substantiated in meticulous detail—that would be an absurdity. Admittedly, while openness and transparency in administration might make it desirable to impose a duty to give reasons at all times for all decisions no matter how small, such a cumbersome duty would undoubtedly burden the public authorities to an unwarranted degree. As with all things, a fair balance must be struck. According to Prof. Wade,[147] *"… such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them…".*

330. As held in ***Sirimasiri Hapuarachchi v. Commissioner of Elections***,[148] by Shirani Bandaranayake J., as Her Ladyship then was, with Amaratunga and Marsoof JJ. agreeing,

> *"Accordingly an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from*

[147] *Administrative Law* (9th edn, Oxford University Press 2004) at 527

[148] (2009) 1 SLR 1

the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement…[149]

It is to be noted that there have been instances where Courts had quashed the decisions when only vague reasons had been given (Re Poyser and Mills' Arbitration ([1964] 2 Q.B. 467) or in circumstances where ambiguous reasons were provided (R v Industrial Injuries Commissioner, Ex parte Howarth ((1968) 4 K.I.R. 621)." [150]

331. In line with this, there is no doubt that there is a requirement to substantiate an administrative decision by giving reasons where a decision affects the rights of any person—or the rights of the populace in general. It need not be said that granting a presidential pardon to any offender is a decision of that nature. However, I wish to point out plainly that this duty to give reasons is not one which only applies to the President in granting a presidential pardon. The duty also extends to the Attorney-General and the Minister of Justice in performing their respective roles under the proviso to Article 34(1) of the Constitution.

332. With regards to this duty to give reasons in granting a presidential pardon, we must necessarily take into account the effect of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 10 of 2023*. Section 5(1)(f) of the Act provides that a victim of a crime shall have the right to "*in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person*

[149] ibid at 11

[150] ibid at 16

convicted of an offence, to receive notice thereof and submit through the Authority to the person granting such pardon or remission, the manner in which the offence committed has impacted on such victim of crime physically, emotionally, psychologically, financially, professionally or in any other manner".

333. In my view, the manner in which an offence would affect or impact the victim most certainly includes the position a victim would be placed in when an offender is released. A victim of a crime must be given notice of the fact that an authority is considering the offender to be pardoned along with such reasons as to why the offender is considered, so that a victim may meaningfully exercise their right to be heard under Section 5(1)(f) of the Act.

Conclusion: Second Pardon

334. The most rudimentary requirement in exercising the pardoning power of the people as vested in the President of the Republic by virtue of Article 34 of the Constitution is to obtain the three constitutionally mandated reports under the proviso therein, *viz*. of the Trial Judge, the Attorney-General and the Minister of Justice. Where the same have not been obtained, the President, very simply, does not, and cannot, exercise the power of pardon. Each step of this procedure set out under the proviso has a proximate nexus to one another. Devoid of this nexus, there can be no compliance with this procedure. Therefore, the failure to obtain the proper report from the judge who tried the case alone leads to a causal sequence resulting in a total procedural failure.

335. Mere mechanical compliance with the procedural requirements is strictly insufficient. The report of the judge, advice of the Attorney-General and the recommendations of the Minister must all be substantial and reveal that the relevant authority has applied their mind to the matter in performing their respective duties under the Constitution. A pardon must satisfy not only the procedural but also the substantive aspects of

Article 34. It is then—and only then—the discretion of the President to grant a pardon comes alive.

336. The Counsel also raised objections with regard to the validity of the Committee appointed by the Ministry of Justice to consider the commutation of sentences of death row convicts. According to the submissions made by the learned Additional Solicitor General, the said Committee was appointed by virtue of the *Prisons Ordinance, No. 16 of 1877*. Even where no laws specifically provide for such committees to be appointed, I see no reason why the Minister should be prevented from appointing a committee to satisfy himself as to the recommendations to be made in connection with granting a pardon.

337. In granting the 2nd Pardon, none of the requirements set out under the proviso have been satisfied. There is a total failure to act in compliance with the constitutional procedure. For this reason alone, I find the impugned 2nd Pardon *ultra vires* the Constitution.

338. It does not appear from the record that the President has directed his mind to the question of whether a pardon would be in the public benefit. Instead of considering the deserving prisoners, whose release would better serve the ideals of criminal justice, the record indicates that the President had clearly attempted to foist the 2nd Respondent into an arrangement that would secure his release. This is apparent from the President's direction to include the prisoner within the Special State Pardon scheme, even when it specifically excluded those serving life imprisonment. This Court does not see how the impugned Pardon would serve the public interest, and the 11A Respondent made no attempt to explain the same. Therefore, I find the impugned Pardon to be an exercise of power for an improper purpose.

339. It is also apparent on the face of the record that the officials have made several substantive errors in performing their functions, and also that the President has not

taken relevant considerations into account while being motivated by such other considerations any prudent person would at once discard. The failure of the President to give reasons for the decision and his actions in contravention of the legitimate expectation of the victims arising out of Section 3(q) of the *Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015* further adds to the list of fatal mistakes committed in granting the pardons.

340. Seldom do you see a decision so conspicuously bad that it has committed nearly all classes of malfeasances known to administrative law. The actions of the President amount to such a blatant betrayal of the public trust, that it shocks the conscience of this Court. For a decision so deeply laden with errors to stand would be a travesty of justice. For the reasons hereinbefore set out, I find the impugned 2nd Pardon null and void *ab initio*.

CIRCUMSTANCES OF THE FIRST PARDON

341. The validity of the 1st Pardon (a pardon *en masse*) was not expressly challenged by the Petitioner. However, Dr. Romesh De Silva, PC as well as the learned Additional Solicitor General, ardently argued the same to be bereft of any legal validity. While Mr. Saliya Pieris, PC did not necessarily refute this contention, he invited this Court to be mindful of how any pronouncement concerning the 1st Pardon may affect the 69 other prisoners who were beneficiaries of it.

Reviewability of the First Pardon

342. Before this Court can go on to review the circumstances surrounding the 1st Pardon, we must first consider if it is reviewable at all. The 1st Pardon was granted in May 2016 and this Petition was not filed until 13 November 2019. Article 126(2) of the Constitution provides that where a person alleges an infringement or an imminent

infringement of fundamental rights by executive or administrative action, he must apply by way of petition to the Supreme Court within one month thereof.

343. The precise language of Article 126(2) of the Constitution is as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been* ***infringed or is about to be infringed by executive or administrative action****, he may himself or by an Attorney-at-Law on his behalf,* ***within one month thereof****, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement…"*[151]

344. The language places emphasis upon not only an act itself which is violative of fundamental rights but also the consequences of an act which may be perceived as violative of fundamental rights. In the exercise of its fundamental rights jurisdiction, this Court has, by and large, favoured neither deontological nor consequentialist perspectives, so to speak—and rightfully so. The Court has, historically, reviewed both means and ends, as appropriate, without distinction when challenged. This attribute is not resultant of individual idiosyncrasies of judicial minds, as some may be so inclined to think. A balanced pluralistic approach which cerebrates a variety of ethical principles and frameworks is always preferred in adjudicating matters of fundamental human rights.

345. Any and all procedural rules, too, must be interpreted to better complement this broad ethical framework. The term 'thereof' in Article 126(2) of the Constitution cannot, therefore, be taken to contemplate only the executive or administrative acts *per se,* but must be read to further include the latent consequences of such acts. An

[151] Emphasis is mine

executive or administrative act, which does not *per se* violate fundamental rights, may well have latent effects that are violative of fundamental rights of the citizenry. Surely, the framers of the Constitution could not have intended for such effects to go unrectified.

346. 'Thereof' refers to, in this sense, not the executive or administrative act itself, but the violation or imminent violation of fundamental rights—such violation may result from the act itself or its effects, foreseen or unforeseen. This Court has jurisdiction to review an act which may yet be a decade old, provided the violation is imminent or no older than one month at such time a petitioner applies to the Court.

347. What has then been the effect of the 1st Pardon granted in 2016 which makes it violative of fundamental rights, and thus reviewable, in the present day? If the 1st Pardon were to be taken in isolation, it may *prima facie* appear as one which is not at variance with the fundamental rights chapter. But, as I see, in the backdrop of the instant case, it cannot be understood as an isolated act: It must be understood with reference to what it has come to be—and what it has come to be is a crucial step in a series of unlawful actions by the executive which ultimately led to the release of the 2nd Respondent. The release of the prisoner has much to do with the 1st Pardon as it does with the 2nd Pardon.

348. The 2nd Pardon has given the 1st Pardon new life. The latter has been but an inchoate phase in the grand scheme of things securing the release of the prisoner. It is based on the purported effect of the 1st Pardon to convert his sentence of death to one of life imprisonment that the 2nd Pardon was granted, as a result of which the prisoner was released. To this end, the 1st and 2nd Pardons have operated in concert. As such, the 1st Pardon was as operative as the 2nd Pardon in the alleged violation of fundamental rights.

349. I must note that, to this extent, the pardons granted to the other 69 death row prisoners may be distinguishable. Those pardons, which were granted long back, have not been so reanimated by subsequent actions to result in fresh violations of fundamental rights, as has happened with the 1st Pardon granted to the 2nd Respondent. In this context, the findings of this Court with regard to the 1st Pardon should not prejudice nor extend to the other 69 prisoners whose sentences were commuted thereby.

General Validity of a Pardon *en masse*

350. It is pertinent to note that the aforementioned 1st Pardon is a pardon *es masse* which dealt with 70 death row prisoners. It can often be in the interest of the Republic and its citizenry to not leave even the most deplorable of criminals to languish in the grimmest of conditions on death row and see to it that they are released following signs of reformation, as is often done commemorating revered holidays. I see no reason as to why such pardons would be *ipso facto* invalid in law.

351. The law need not always rule with an iron fist—in fact, it must not. Notions of justice, humanity, empathy and fairness are as much a part of the law as the black letter of the legislature. However, when such notions are blatantly misused as a pretext or a precursor to achieve the most unlawful and unreasonable of ends, the Courts of law cannot look the other way, no matter how far-reaching the consequences.

352. As noted in the case of ***The President of the Republic of South Africa v. John Phillip Peter Hugo***,[152]

> *"Where the power of pardon or reprieve is used in general terms and there is an "amnesty" accorded to a category or categories of prisoners, discrimination is inherent. The line has to be drawn somewhere, and there will always be people on*

[152] CCT 11/96 at para 31

one side of the line who do not benefit and whose positions are not significantly different to those of persons on the other side of the line who do benefit… Indeed, there might well have been prisoners in the first category who, if assessed individually, might have been considered to be more deserving pf a remission of sentence than persons in the latter category."

353. Therefore, an authority must take special care in dispensing their respective duties with regard to presidential pardons of this nature. For a pardon *en masse* to be valid, the President must necessarily pay mind to each individual offender separately and give reasons for each prisoner separately. In addition, any category or categories of prisoners so considered must be clustered together on a rational basis which would stand objective scrutiny.

Conclusion: First Pardon

354. The learned Additional Solicitor General submitted, with regards to the 1st Pardon, that *"…the President has failed to follow the due procedure in exercising his power of pardon in this instance given that although said commutation is purported to be done in accordance with Article 34 the lawful procedure mandated by the Constitution has not been followed".*[153] However, the 11A Respondent contended that there has been substantial compliance with the procedure set out under the proviso to Article 34(1) as the President has acted in accordance with the recommendations of the Minister of Justice.

[153] Written Submission on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents dated 9th August 2023, p. 50 para 198

355. The Additional Secretary to the President (Legal) in the report dated 04th October 2019, addressed to His Excellency the President/Secretary to the President observes as follows:

> "...ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ විධිවිධාන පරිදි මරණ දඩුවමෙන් දඩුවම් කරන ලද සිරකරුවෙකු හට ජනාධිපති සමව ලබා දීමේ දී පහත ක්‍රියාමාර්ග අනුගමනය කල යුතුය.
>
> - ඒ අනුව මරණ දඩුවම පනවන ලද මහාධිකරණය විසින් අපරාධ නඩු විධාන සංග්‍රහයේ 286 (බී) යටතේ ජනාධිපතිවරයා වෙත වාර්තාවක් ඉදිරිපත් කරනු ලැබිය යුතුය.
> - ජනාධිපතිවරයා විසින් එකී වාර්තාව පිළිබඳව නීතිපති උපදෙස් අධිකරණ විෂය භාර අමාත්‍යවරයා වෙත යැවිය යුතු බවට නීතිපති වෙත නියම කල යුතුය.
> - ඒ අමාත්‍යවරයා විසින් සිය නිර්දේශය සමග එම වාර්තාව ජනාධිපතිවරයා වෙත එවිය යුත්තේ ය.
>
> එබැවින් මරණ දඩුවම, ජීවිතාන්තය දක්වා සිර දඩුවමක් බවට පත් කිරීමේ දී ඉහත පියවර ගෙන නොමැති බව පැහැදිලි වේ... *[sic]*
>
> *[...According to the provisions of the Constitution the following procedure must be followed in granting a Presidential Pardon to an offender sentenced to death*
>
> - *Accordingly, a report under 286(b) of the Code of Criminal Procedure Act must be provided to the President by the High Court which passed the sentence of death.*
> - *The President must direct the Attorney-General to forward the Attorney-General's advice on the report to the Minister in charge of Justice.*
> - *That Minister must send the report to the President with recommendations.*

As such, it is apparent that the above steps have not been taken in commuting the sentence of death into a sentence of life imprisonment…]"

356. The letter dated 12th May 2016 by the Minister of Justice to His Excellency states the following, with reference to the report of the Committee to review prisoners on death row:

"…එම කමිටුව විසින් 2013.09.26 දින දක්වා මරණීය දණ්ඩනය නියම ව, සියලුම අභියාචනා නඩු කටයුතු අවසන්ව ඇති සිරකරුවන් සම්මුඛ පරීක්ෂණයට භාජනය කරමින් තම කමිටුවේ වැඩ කටයුතු කරනු ලැබේ.

[…The said Committee is conducting its work by interviewing prisoners sentenced to death until 26.09.2013 whose appeals have been exhausted.]

කමිටුවට ඉදිරිපත් කරන ලද සිරකරුවන් අතුරින් 70 දෙනෙකු වෙත පනවා ඇති මරණීය දණ්ඩනය ජීවිතාන්ත සිර දඩුවමක් බවට පරිවර්තනය කිරීම කමිටුව විසින් නිර්දේශ කර වාර්තා ඉදිරිපත් කර ඇත. (අදාළ වාර්තා මේ සමඟ අමුණා ඇත) අනෙකුත් වාර්තා ඉදිරියේ දී එවනු ඇත.

[Out of the prisoners presented, the Committee has submitted reports recommending to commute the sentence of death upon 70 of the prisoners. (Relevant reports are attached herewith) Other reports will be sent in future.]

එකී කමිටු නිර්දේශයන් මා විසින් සලකා බැලීමෙන් අනතුරුව ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 34(1)ඇ වන ව්‍යවස්ථාව ප්‍රකාරව අතිගරු ජනාධිපතිතුමන් වෙත පවරා ඇති බලතල ප්‍රකාරව මෙම සිරකරුවන් වෙත පනවා ඇති මරණීය දණ්ඩනය ජීවිතාන්ත සිරදඩුවමක් බවට පරිවර්තනය කිරීම මා විසින් නිර්දේශ කරමි.

[After considering the recommendations of the said committee, I recommend that the death sentence imposed on these prisoners be commuted to life imprisonment in accordance with the powers vested in His Excellency the President under Article 31(1)(c) of the Constitution.]"

357. Attached to this letter is a list of 70 prisoners, where the 2nd Respondent appears as the 40th. The Committee has given its recommendation regarding the 2nd Respondent on 11th May 2015. However, the Assistant Secretary to the President, by letter dated 14th July 2014 (during the incumbency of 11A Respondent's predecessor), has requested the Attorney-General to forward his advice regarding the 2nd Respondent to the Minister of Justice, purportedly in pursuant to the orders made the President. No reasons were adduced before this Court as to why this attempt was taken to set Article 34 procedure in motion almost 10 months before the Committee recommendation.

358. As I have set out earlier in this judgment, the recommendations of the Minister of Justice are to be given having considered the advice of the Attorney-General on the report prepared by the Judge who tried the case. In the instant case, the record does not contain any documentation containing such advice of the Attorney-General nor any report by the Judge who tried the case. The aforementioned letter also notes that "(අදාළ වාර්තා මේ සමඟ අමුණා ඇත) අනෙකුත් වාර්තා ඉදිරියේ දී එවනු ඇත *[(Relevant reports are attached herewith) Other reports will be sent in future]*". As such, it was entirely unreasonable for the President to have acted on this letter in the absence of such other reports.

359. Therefore, the contention of the learned President's Counsel for the 11A Respondent that there had been substantial compliance to the procedure set out by law in granting the 1st Pardon is a glaring *non sequitur* as there had been a total failure to follow the procedure set out under the proviso to Article 34(1) of the Constitution. For this reason alone, this Court cannot resist the finding that the 1st Pardon, too, has *ultra vires* the Constitution and, therefore, is null and void *ab initio*.

LIABILITY OF THE RESPONDENTS

360. The guiding principles with regard to the liability of the State and the Respondents have been exhaustively discussed in the ***Easter Sunday Case***,[154] and I see no need to discuss the same. The principle of constitutional tort is now well-established in our law.

361. The learned Additional Solicitor General contended the 11A Respondent alone to be responsible for any lapses there may be in the exercise of the President's power under Article 34 of the Constitution, as the power of pardon is one which requires his personal attention. He further submitted that *"when the 11A Respondent made his decision to pardon the 2nd Respondent, it may have been done under the colour of office, but at the same, very much a personal decision for which no one else, including the State can be held responsible".*[155] The obvious purpose of this contention is to avoid State liability. Both the learned Additional Solicitor General and the learned President's Counsel for the 11A Respondent attempted to establish the office as severable from its holder, but for two distinct purposes. While the learned Additional Solicitor General contended the 11A Respondent to be solely liable, the 11A Respondent vehemently contended that the State should bear sole responsibility for he has only acted according to the advice given to him.

362. The position of the learned Additional Solicitor General was not so much a theoretical one, which requires us to dwell deep into the jurisprudence, but simply that there are no circumstances in the instant case attracting State liability. He argued that the Constitution lays down a clear and specific procedure to be followed when the

[154] SC/FR/163/2019, S.C. Minutes of 12 January 2023

[155] Written Submission on behalf of the 1st, 3rd, 4th, 5th and 6th Respondents dated 9th August 2023, p. 64 para 228

President grants pardon to a person condemned to death and that the State has, to that extent, put in place the necessary procedure to prevent arbitrariness.

363. I find no sympathy with this submission. Indeed, the Constitution has put in place guiding principles for all aspects of governance, but can that be read as a sufficient safeguard against arbitrariness? This Court has many a time dealt with the attempts of the State to place *ultra vires* acts of its officials beyond what is attributable to the State. In my view, this submission of the learned Additional Solicitor General is but another manifestation of the same line of argumentation.

364. In support of his position, the learned Additional Solicitor General invited the Court to consider the following passage *inter alia* from the case of ***Kanda Udage Malika v. D.M. Abeyratne, Police Constable, Kandaketiya Police Station***,[156]

> *"It is illogical to hold the state responsible for acts committed by such officers in pursuing their personal vengeance without the authorization or knowledge of the persons in authority. This was also highlighted in Goonewardene V. Perera and Others [1983] 1 Sri LR 305 (Soza, J.) as follows,*
>
> > *"The State no doubt cannot be made liable for such infringements as may be committed in the course of the personal pursuits of a public officer of to pay off his personal grudges. But infringements of Fundamental Rights committed under colour of office by public officers must result in liability being cast on the State."*
>
> *In light of the above, the phrase 'colour of office' is not limited to whether or not the officers were in official uniform but includes factors surrounding the conduct of the officers and the authority given to them. In the instant case the SC/ FR/ 157/2014 JUDGMENT Page 22 of 25 acts committed by the errant officers were*

[156] SC/FR/157/2014, S.C. Minutes of 21 May 2021

> *not committed under the supervision or the orders of a senior officer. The state has not in any manner approved nor shall approve such conduct. In considering the facts laid before this court the acts of the officers were conducted in their personal capacity and not in the 'colour of office'"*

365. The views I have expressed hitherto are in no way at variance with what is quoted above. As the learned Additional Solicitor General submitted, State liability rests upon the particulars of each individual case. An instance of purely private acts done by a person who may be employed by the State is quite distinct from the Head of State misusing the power entrusted upon him: the former involves no exercise of power at all.

366. The instant case is one which concerns several cogs of a broken wheel. Officials other than the 11A Respondent have played a role in what has transpired, some out of sheer incaution and inaptitude—albeit not to an extent which renders them personally liable. The complete and utterly imprudent manner in which the 11A Respondent has conducted his official affairs has exacerbated such effects into proportions unimaginable. For these reasons, I do not think this a case where State liability can be avoided.

367. The totality of the 11A Respondent's submissions was but a bid to evade personal accountability. Citing other contentious pardons granted by his predecessors and successors, the 11A Respondent submitted that he has not acted in a manner unfamiliar to the presidency as his actions align with the *modus operandi* of granting presidential pardons.[157] To my mind, this is a case of the defence being worse than the offence. To accept this absurdity would be to leave us in a perpetuating cycle of

[157] Written Submission of the 11A Respondent dated 25th August 2023, pp. 21-22 paras 27-28

delinquencies. Past injustices do not justify present wrongdoings, and I loathe that we have come to a point where it is necessary to pronounce this.

368. With regards to the 1st Pardon, he argued that, once the recommendations of the Minister of Justice were received, it was reasonable for him to operate under the assumption that all antecedent procedural requirements had been duly complied with. As I have already observed, there have not been any definitive recommendations or advice in favour of granting a presidential pardon to the 2nd Respondent. The words "අනෙකුත් වාර්තා ඉදිරියේ දී එවනු ඇත *[Other reports will be sent in future]"* in the letter dated 12th May 2016 from the Minister of Justice makes it amply clear that this letter does not contain the final recommendations as contemplated under the proviso to Article 34(1) of the Constitution. To presume compliance with all other procedural steps solely based on the aforementioned letter is borderline farcical.

369. In addition to this, the 11A Respondent also submitted that he has at all times acted in accordance with the advice of other officials and that it was reasonable for him to place reliance on such advice as a *lay president*. The 11A Respondent further submitted that he had been a Grama Niladhari and then a member of the Parliament and a Minister, with no legal qualifications. Therefore, he argued that he had committed no wrong in acting on the advice of State officials.

370. This perplexing notion of a *lay president* is not one known to law. To accept this contention would be tantamount to effectively establishing incompetence as a defence in our constitutional and administrative law jurisprudence. The maxim *ignorantia legis neminem excusat/ ignorantia juris non excusat/ ignorantia juris haud excusat*[158] precludes even an illiterate man from pleading ignorance of the law.

[158] These are but different forms of the same maxim

371. As held in ***Bandara v. Premachandra***,[159]

> *"...the State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the judiciary must endeavour to ensure that this expectation is realized..."*

372. Shiranee Tilakawardane J. opined in ***Sugathapala Mendis v. Chandrika Kumaratunga (Waters Edge Case) (supra)***[160] that,

> "*The Public Trust Doctrine, taken together with the Constitutional Directives of Article 27, reveal that all state actors are so principally obliged to act in furtherance of the trust of the People that they must follow this duty even when a furtherance of this trust necessarily renders inadequate an act or omission that would otherwise legally suffice. In other words,* ***it is not enough to argue that procedure has been followed,*** *when procedural compliance results in a violation of the public trust.* ***That action was either taken or not taken due to contravening orders from a superior or because reliance upon another entity's or individual's discretion was deemed sufficient, is simply not a defense afforded to state institutions or state actors***" [161]

373. A defence which cannot be afforded to state institutions or state actors, as Tilakawardane J. has noted, is certainly not available to the Head of the State, the Head of the Executive and of the Government.[162]

[159] [1994] 1 Sri LR 301

[160] [2008] 2 Sri LR 339

[161] ibid at 353 (Emphasis is mine)

[162] vide Article 30 of the Constitution

374. Moreover, the Additional Secretary to the President (Legal) in report dated 04th October 2019, addressed to His Excellency the President/Secretary to the President has made the following observation: "එබැවින් මරණ දඬුවම, ජීවිතාන්තය දක්වා සිර දඬුවමක් බවට පත් කිරීමේ දී ඉහත පියවර ගෙන නොමැති බව පැහැදිලි වේ… *[As such, it is apparent that the above steps have not been taken in commuting the sentence of death into a sentence of life imprisonment…].*[163] It is in this context the former President has granted the impugned Pardon.

375. Clearly, the defence so taken up by the 11A Respondent is of no merit. It is but a merely self-serving argument attempting to create a semblance of logicality in his conduct pardoning the 2nd Respondent.

GUIDELINES FOR FUTURE EXERCISE

376. All parties, except for the Attorney-General, had no objections to this Court setting out guidelines for the exercise of the power of pardon. I also wish to note that, despite all Counsel agreeing to assist this Court in promulgating such guidelines, none of the written submissions have honoured this undertaking. The learned Additional Solicitor General, too, conceded the necessity to promulgate guidelines during the proceedings but has nonetheless taken a completely conflicting position in the written submissions.

377. In defence of this tergiversation, he relied upon ***Kehar Singh v. Union of India (supra)***, where the Supreme Court of India observed that it was perhaps unnecessary to spell out specific guidelines, and other cases such as ***Shatrughan Chauhan v.***

[163] Translation is mine

Union of India,[164] ***The State of Haryana v. Raj Kular Bittu***[165] and ***Bikas Chatterjee v. Union of India***,[166] which purportedly support this proposition.

378. However, it is apposite that we carefully examine the reason for this conclusion and appreciate the context in which it is made. In ***Kehar Singh v. Union of India (supra)***,[167] the Court has unanimously held:

> *"…It seems to us that* ***there is sufficient indication in the terms of Art. 72 and in the history of the power*** *enshrined in that provision* ***as well as existing case law****, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."*

379. I am in agreement with Their Lordships that it is unnecessary—or rather impracticable—to draw out specific guidelines. While the Indian constitution and the common law indeed provide guidelines as observed; *per contra,* our law in this regard is still at a stage of infancy and the Constitution itself only provides guidelines with regards to pardoning offenders sentenced to death. Be that as it may, the observations this Court has made in this judgment remain equally applicable in principle in reviewing pardons

[164] Writ Petition (Criminal) No. 34, 56, 136, 139, 141, 132, 187, 188, 190, 191, 192, 193/2013, S.C. India Minutes of 21 January 2014

[165] SC/Criminal Appeal/721/2021, S.C. India Minutes of 03 August 2021

[166] [2004] 7 SCC 634

[167] (1989) AIR 653, at p. 661 para 16

granted to convicts punished with sentences short of death—save for the observations made with regard to the proviso to Article 34 of the Constitution.

380. As Their Lordships have observed, drawing specific guidelines with regard to the exercise of any power that is so wide in amplitude carries with it many challenges and Constitutional dangers. Perhaps, this is why all the Counsel failed in their undertaking to assist this Court in setting out such guidelines. Even if all-encompassing and thoroughgoing guidelines are drafted through much labour, it will not be long before such guidelines are outmoded.

381. For these reasons, I am in agreement with the learned Additional Solicitor General in that it is not necessary for this Court to promulgate specific guidelines for the exercise of the power of pardon.

CONCLUSION OF THE COURT AND CONSEQUENTIAL ORDERS

382. For the many improprieties associated with the 1st and 2nd Pardons granted to the 11A Respondent, I hold both the 1st and 2nd Pardons null and void *ab initio* and of no force or avail in law. As a result, the *status quo ante* the 1st Pardon is to be reverted. The 2nd Respondent, Don Shramantha Jude Anthony Jayamaha, is henceforth to be considered a convict on death row.

383. The Attorney-General and all relevant authorities are hereby directed to take all required steps towards his extradition arrangements: Necessary orders to be issued by the High Court of Colombo.

384. Furthermore, I find that the Petitioner has successfully established the 11A Respondent to have intentionally acted in a manner entirely abhorrent to the Rule of Law in direct violation of the Constitution. The 11A Respondent has thereby violated the fundamental rights of the Petitioner, 9th and 10th Respondents, and of the people and the citizenry of Sri Lanka as enshrined under Article 12(1) of the Constitution.

385. I have already adverted to the facts underlying the liability of Respondents. I do not see how it would be just and equitable to burden the taxpayer for the malfeasances we have uncovered as they have already paid dearly for these proceedings and now towards the cost of extradition, among other things.

386. Taking into account the totality of the circumstances of this case, the Court orders as follows:

I. The 11A Respondent is directed to pay as compensation a nominal sum of Rs 1,000,000/- (Rupees One Million) to the 9th Respondent and a nominal sum of Rs. 1,000,000/- (Rupees One Million) to the 10th Respondent. The total sum is to be paid within one months from the judgment.

II. The 11A Respondent is further directed to pay the costs of this litigation to the Petitioner as well as the 9th and 10th Respondents.

III. The State is directed to pay as compensation a sum of Rs 100/- (Rupees One Hundred) to the 9th Respondent and a sum of Rs. 100/- (Rupees One Hundred) to the 10th Respondent, within one months from the judgment.

387. I am mindful of the fact that pain, suffering and psychological distress the 9th and 10th Respondents have had to endure over the years, resulting from the felony itself to the unlawful and arbitrary executive acts which denied them justice. No amount of financial recompense may make amends—nonetheless, let this be symbolic.

Application Allowed.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J

388. Honourable Justice S. Thurairaja shared with me a draft of the judgment he proposes to deliver in this matter. I have had the occasion to read and consider that draft judgment. I find myself in agreement with the main finding contained in the draft judgment, that being the impugned grant of the two pardons by the 11A Respondent to the 2nd Respondent are unlawful and have no force of law. However, in view of the salutary importance of this matter, particularly from the perspective of constitutional and public law and the significance of the several questions of law argued by learned counsel, I have deemed it necessary to pronounce my own judgment. I am conscious that the primary question of law and facts considered by this Court, namely judicial review of a pardon granted by His Excellency the President, has so far been considered by the Supreme Court only on one previous occasion, and the judgment of this Court with regard to that matter was pronounced very recently. In the course of this judgment, I propose to refer to some of the findings contained in that judgment, with which I respectfully find myself in agreement.

Parties to the case and Public Interest Litigation

389. The Petitioner – *Women & Media Collective* is a non-profit organization dedicated to *inter-alia,* the promotion and the protection of the rights of women. The 1st Respondent is the Honourable Attorney General. The 3rd, 4th and 5th Respondents are, respectively the Commissioner General of Prisons, Controller General of Immigration and Emigration and the (Acting) Inspector General of Police (at the time this matter was argued). The 6th Respondent (both the original and the three substituted) are former Ministers of Justice and the present Minister. The 7th, 8th and the Respondent substituted for the 8th Respondent are respectively the former President of the Bar Association of Sri Lanka (BASL), the present President of the BASL, and the former Secretary of the BASL. The 9th and the 10th Respondents are the father and the sister

of one Yvonne Johnson, the committing of whose murder the 2nd Respondent – Don Shramantha Jude Anthony Jayamaha had been convicted of by the Court of Appeal. The 11A Respondent is His Excellency Maithripala Sirisena, the former President of the Democratic Socialist Republic of Sri Lanka. It is the 11A Respondent who had purportedly granted two pardons to the 2nd Respondent, which taken as a whole is the subject matter of the Application.

390. The Petitioner claimed without contest from all Respondents excluding the 11A Respondent that this Application was filed in public and societal interest and that they had the right to do so. It is important to note that all Respondents except the 11A Respondent claimed that the impugned decision of the 11A Respondent to grant a pardon to the 2nd Respondent was a matter of public importance. The position of the 11A Respondent was that this is an instance of 'selective call' by the Petitioner for 'accountability and justice'. A consideration of the material placed before this Court and the organizational mandate of the Petitioner, it is evident that Petitioner has sufficient and genuine interest in advocating matters of this nature, and similar matters of constitutional and public law importance, particularly where is relates to the rights and interests of women. In the circumstances, this Court decided that this Application should be treated as an instance of ***public interest litigation***. That is the basis on which this Court took the initiative of calling for and examining certain documents from the office of the President (commonly referred to as the "Presidential Secretariat") which were not pleaded by any of the parties to this Application. This Court is acutely conscious that particularly in matters of *public interest*, this Court should, in appropriate instances in the exercise of the jurisdiction vested in this Court by Article 118(b) of the Constitution, not limit the examination of the matter being adjudicated upon, to the 'pleadings' filed by parties and to the 'evidence' placed before Court. Where appropriate, in the interest of justice, the Court should proceed to an inquisitorial mode of adjudication and proactively call for and examine other relevant material. That is for the purpose of gaining a comprehensive understanding

of the attendant facts and circumstances of the matter which has to be adjudicated upon. That is a matter where the Court exercises discretion and does so in the interest of justice.

Background

391. Before I venture to deal with the facts and attendant circumstances pertaining to the impugned presidential pardon granted to the 2nd Respondent – Shramantha Jude Jayamaha by the 11A Respondent, I believe it would be appropriate to provide in some detail a narrative regarding the 2nd Respondent and his encounter with the criminal justice system.

392. On 12th October 2005, the 1st Respondent – Attorney General indicted the 2nd Respondent in the High Court of Colombo for having on 1st July 2005, in Rajagiriya, committed the murder of Yvonne Johnson and thereby committing the offence of *'murder'* which in terms of section 296 of the Penal Code, is punishable with death. According to the evidence presented to the High Court by the prosecution, the murder of Yvonne Johnson (a young girl of 19 years, belonging to the upper echelons of society, the daughter of the 9th Respondent and elder sister of the 10th Respondent) had been committed on a staircase linking the 18th and 19th floors of tower 'B' of a condominium housing complex named the *"Royal Park Residencies"*. Thus, the highly publicized criminal trial against the 2nd Respondent became entrenched in the public knowledge domain as the *"Royal Park Murder Case"*.

393. The trial in the High Court (Case No. HC 2722/2005) took place before a Judge of the High Court who sat without a jury. Following trial, on 28th July 2006, the learned Judge of the High Court found the accused *'guilty'* for the lesser offence of *'culpable homicide not amounting to murder'* on the basis of the 4th limb of section 294 of the Penal Code (knowledge) read with the 4th exception of the definition of the offence of *murder*, and convicted him of such lesser offence. The convicted accused was

sentenced to serve a punishment of twelve (12) years rigorous imprisonment and to the payment of a fine of Three Hundred Thousand Rupees (Rs. 300,000.00).

394. Being aggrieved by the conviction and the sentence, the convicted accused (2nd Respondent) appealed to the Court of Appeal. Also being aggrieved by the trial judge not having found the accused guilty of committing the offence of murder, the Attorney General (1st Respondent) also appealed to the Court of Appeal. These 'cross-appeals' as they are generally referred to, were taken up together and heard by a bench of two Justices of the Court of Appeal, in a consolidated appellate hearing. Delivering judgment dated 11th July 2012, the Court of Appeal dismissed the Appeal of the accused – appellant and allowed the appeal of the Attorney General. Accordingly, the Court of Appeal set aside the conviction for *'culpable homicide not amounting to murder'* imposed by the High Court, and substituted that conviction with a conviction for the offence of *'murder'*. Accordingly, the accused - appellant was sentenced to suffer *'death'*.

395. Learned President's Counsel for the Petitioner submitted that the sentence imposed by the Court of Appeal on the 2nd Respondent satisfied both broad theories of punishment, being 'punitive justice' and 'deterrent justice'. It is necessary to note that, as regards the state of mind of the 2nd Respondent – Shramantha Jude Jayamaha at the time of causing the death of Yvonne Johnson, the Court of Appeal in its judgment has observed that *"according to the facts and circumstances of the instant case, the inhuman and the gruesome manner in which the murder was committed clearly shows the murderous intention the accused appellant entertained …"*. The Court of Appeal also arrived at a finding that the murder was premeditated. Further, the judgment of the Court of Appeal reveals clearly that, given the evidence resented, none of the exceptions to culpability for *'murder'* which would reduce culpability from *'murder'* to *'culpable homicide not amounting to murder'* were applicable.

396. By filing an Application in the Supreme Court, the accused – appellant (Shramantha Jude Jayamaha) now found *'guilty'* by the Court of Appeal for having committed *'murder'*, sought *Special Leave to Appeal* to the Supreme Court against the judgment of the Court of Appeal. Having heard counsel for Shramantha Jude Jayamaha and the Attorney-General, on 22nd October 2013, the Supreme Court refused the grant of *Special Leave to Appeal,* thereby ending the criminal justice response to the offence of *murder* committed by the 2nd Respondent – Shramantha Jude Jayamaha. As the 2nd Respondent stood convicted for having committed the murder of Yvonne Johnson, he was sentenced to suffer *'death'*.

397. From that point onwards commenced the management of the penal sanctions imposed by the Court of Appeal on the convict – 2nd Respondent. Thus, the 2nd Respondent was detained in the *'death row'* pending his execution. It is noteworthy that execution of persons sentenced to *'death'* has not taken place in Sri Lanka since 1974, as it is a matter in public record that there exists a *de-facto* moratorium on executions.

398. Learned President's Counsel for the Petitioner Mr. Sanjeewa Jayawardena and the learned President's Counsel for the 9th and 10th Respondents Dr. Romesh De Silva submitted that the crime (offence) committed by the 2nd Respondent was heinous, horrendous and utterly gruesome, and that his conduct was pregnant with extreme barbarism and should shock the collective conscience of any civilized society. Court did not hear learned President Counsel for the 11A Respondent (the former President) stating otherwise. Learned President's Counsel for the Petitioner and the President's Counsel for the 9th and 10th Respondents vehemently argued that the punishment imposed on the 2nd Respondent by the Court of Appeal and indirectly approved by the Supreme Court when it refused the grant of *Special Leave to Appeal,* should not have been even indirectly set-aside by the 11A Respondent – the former President, through any form of pardon. They lay heavy emphasis on their assertion that the

interests of society can be served only by a person such as the 2nd Respondent being detained in the *death row* till his natural death. I noted with a sense of relief that neither of the President's Counsel for the Petitioner or 9th and 10th Respondents advanced the view that execution of prisoners in the *death row* should take place in this country.

399. Learned President's Counsel for the Petitioner submitted that, *"… His Excellency Maithripala Sirisena, in a move that has shocked and left the public aghast, purported to invoke his powers under Article 34 of the Constitution, and granted a Presidential Pardon to the accused. … This stunningly obnoxious move on the part of the President, especially in respect of a convict on death row, who has been sentenced both by the Court of Appeal which is the penultimate court of the country, as well as the Supreme Court, which is the apex court, on the eve of the relinquishment of his term of office as President, has led to concerted public censure both locally as well as internationally, and brought the criminal justice system to ridicule. Apart from subverting the court of justice, it had also rendered naught the entire processes which took place, inter alia, before the Court of Appeal as well as Your Lordship's Court and the due application of the prevalent laws of the country, …"*.

Grant of Presidential Pardon to the 2nd Respondent

400. The Petitioner filed the instant Application following the 2nd Respondent having been granted a purported pardon by the 11A Respondent (who at the time of the grant of the impugned purported pardon, was serving as the President) acting purportedly under Article 34 of the Constitution. That pardon resulted in the 2nd Respondent being set free (released from prison). The Petitioner premised his case on the footing that while the 2nd Respondent was in the *death row* awaiting his execution, the President had granted the impugned pardon. However, when pleadings were filed and this Court examined additional material called for and received from the office of the

President (Presidential Secretariat), it transpired that, on 17th May 2016, the 11A Respondent had granted a pardon to the 2nd Respondent and sixty-nine (69) other prisoners who had been sentenced to death and at that time being detained in the *death row*. That purported pardon resulted in the commutation of the sentence the 2nd Respondent was serving, from the *'death sentence'* to *'life imprisonment'*. Thereafter, on 29th October 2019, the 11A Respondent had once again granted another pardon to only the 2nd Respondent which resulted in the 2nd Respondent being released from prison and set free.

401. In the circumstances, it is necessary to consider in some detail the sequence of events and attendant circumstances relating to the grant of both purported pardons.

First Presidential Pardon granted to the 2nd Respondent

402. Though not presented to this Court as evidence by the Petitioner and the Respondents, the material called for from the Presidential Secretariat and examined by this Court revealed that by letter dated 14th July 2014, sent on behalf of the Secretary to the President, an Assistant Secretary to the President had notified the Attorney-General that on the direction of the President, the Attorney-General was *"required in terms of Article 34(1) of the Constitution to submit to the Minister of Justice his views regarding the report of the High Court judge prepared in terms of section 286(b) of the Code of Criminal Procedure Act regarding High Court Colombo case No. HC 2722/2005"*. The letter indicates that the afore-stated 'report' was attached to the letter. The relevant file (No. PS/CSA/00/9/3/67) maintained by the Presidential Secretariat offers no clue as to the circumstances which led to this letter being sent. Nor did the submissions of the learned Additional Solicitor General offer any explanation in this regard. This court found no basis to conclude that this letter was dispatched as part of a routine process followed by the Presidential Secretariat with regard to all prisoners in the *death row*. It is to be noted that this letter had been sent during the Presidency of former President Mahinda Rajapaksa, who is not a party to

this Application. One can only speculate that a person acting on behalf of the 2nd Respondent – Shramantha Jude Jayamaha may have submitted a plea for a pardon, to former President Mahinda Rajapaksa, which resulted in the Presidential Secretariat seeking the views of the Attorney-General. However, it remains a mystery as to why the Presidential Secretariat did not attach to the afore-stated letter addressed to the Attorney-General, the purported 'report' of the Judge who convicted the 2nd Respondent for having committed *murder* and sentenced him to death, though there is a reference to such report in the letter.

403. Learned Additional Solicitor General submitted that an examination of Attorney General's Department file No. CR1/204/2005 (which he submitted is the file in which the afore-stated letter dated 14th July 2014 has been filed) does not contain the attachment referred to (report of the High Court judge) in the afore-stated letter. When inquiries were made in this regard, learned ASG submitted that he was unaware of the existence of such a 'report' prepared in terms of section 286(b) of the Code of Criminal Procedure Act (CCPA). Furthermore, an examination of the original letter received by the Attorney-General which the learned ASG submitted to this Court, reveals that it does not contain two punctures, an item of circumstantial evidence which one would expect to exist, should there have been a document stapled to it, and the staple subsequently removed. Nor was there a clip or marks of corrosion that is generally seen in locations where there has been a paper clip. In fact, an examination of Presidential Secretariat's original file No. PS/CSA/00/9/3/67 also reveals that it also does not contain the report said to have been submitted by the learned judge of the Court of Appeal. All these circumstances point towards the irresistible conclusion that no such report had been filed of record in the file maintained by the Presidential Secretariat, and that the Assistant Secretary did not forward such report to the Honourable Attorney-General. If that be the case, upon receipt of the said letter, why didn't the Attorney-General call for it, as the letter referred to such a report? Learned ASG had no explanation to offer to this Court in that regard.

404. Instead of calling for the report referred to in the afore-stated letter dated 14th July 2014, the Attorney-General chose to reply to the said letter (though section 286 of the CCPA does not confer any statutory duty for the Attorney-General to perform with regard to the Report of the High Court Judge) directly to His Excellency the President. He did so, instead of forwarding his observations to the Minister of Justice, which is a procedural step contained in the proviso to Article 34(1) of the Constitution. Moreover, the report prepared by the High Court Judge in terms of section 286 (b) of the CCPA is only for the purpose of enabling the President to, based on notes of evidence and reasons given by the Judge, decide whether the sentence of death should be carried out or not. It is not the report that is contemplated in the proviso to Article 34(1) of the Constitution.

405. By his letter dated 1st October 2014, the Attorney General of the day wrote to His Excellency Mahinda Rajapaksa (the then President) commencing by giving an outline of the case. The Attorney General has expressed the view that *"the available material does not suggest that it was a pre-mediated murder …"* (That observation of the Attorney General is contrary to the finding of the Court of Appeal, which the court arrived at sequel to the Attorney General's own appeal to that court, and the submissions made in that regard by counsel representing the Attorney General.) He further expressed the view that *"… considering the above facts and the circumstances of this case, especially the age of the accused at the time of the incident and his post-conviction conduct, in my view this is not a fit case for the execution of the death sentence imposed on the accused appellant by the Court of Appeal on 11.07.2012"*. Subject to that, the Attorney-General did not recommend any respite or the grant of a pardon to the 2nd Respondent.

406. This letter has been copied to the Secretary, Ministry of Justice. An examination of Presidential Secretariat's file No. PS/CSA/00/9/3/67 does not reveal any further action

having been taken regarding this matter, during the pendency of the term of office of then President Mahinda Rajapaksa.

407. From the material presented to this Court, it appears that the 6th Respondent - Minister of Justice had appointed a 'Review Committee' headed by a retired judge, which had been mandated with the task of submitting to him a report on whether the sentence of death imposed on convicts and thus are in the *death row* should be commuted to life imprisonment. Learned Additional Solicitor General did not cite a specific provision of the law in terms of which the Committee was established. Thus, this Court concludes that it has been administratively created to aid the Minister of Justice. Learned ASG did advert to the fact that this Committee had been in existence for a considerable period of time in the past. The Committee had interviewed all those who had been sentenced to death up to 26th September 2013 and whose appeals to superior courts had been finally disposed of. For each prisoner interviewed, the Committee has prepared a report and submitted a collection of such reports to the Minister of Justice. The said Committee has recommended that the sentence of death imposed on seventy (70) convicts be 'commuted' to life imprisonment.

408. Among the afore-stated seventy (70) prisoners, was the 2nd Respondent. He had been interviewed by the Committee, and having taken into consideration several factors, on 11th May 2015, the members of the Committee recommended that the sentence of death imposed on the 2nd Respondent – Shramantha Jude Jayamaha be 'commuted' to life imprisonment. Among the factors the Committee has taken into consideration, are the following:

(i) that at the time of the incident, the prisoner was 19 years of age;

(ii) that prior to the date of the murder, there had been no previous acrimonious incident between the deceased and the prisoner;

(iii) that the deceased, the sister of the deceased (who was the girl-friend of the prisoner) and the prisoner were persons who used to frequent clubs, consume alcohol and take drugs;

(iv) that the family background of the prisoner had contributed to his character;

(v) that the encounter between the deceased and the offender which led to the murder of the deceased, was accidental;

(vi) that it was the deceased who had initiated the row with the prisoner; and

(vii) that the killing was not premeditated.

409. The Report indicates that it was the 2nd Respondent who had provided a narrative of what happened on the day of the murder. Further, it does not appear that the Committee had read and considered the evidence recorded at the trial or the judgments of the High Court and the Court of Appeal. Nor does the Committee have engaged in any verification of the narrative provided to it by the 2nd Respondent. The Committee seems to have been completely ignorant of the need to consider the views of the family of the deceased victim. Learned President's Counsel for the Petitioner and the learned President's Counsel for the 9th and 10th Respondents submitted that the observations of the Committee were contrary to the findings of the Court of Appeal. That is factually correct.

410. Consequently, following a consideration of the reports of the Committee (including the report pertaining to the 2nd Respondent), by letter dated 12th May 2016 addressed to the 11A Respondent, the Minister has presented the said reports, and has recommended that the President acting in terms of Article 34(1)(c) of the Constitution, may be pleased to 'commute' the sentences of death imposed on the afore-stated 70 prisoners to life imprisonment. However, it is to be noted that on the face of the material pertaining to the grant of the 1st pardon (commutation of sentence) to the 2nd Respondent, it is evident that the 6A Respondent – Minister of Justice has not

considered the Report of the learned judge who sentenced the 2nd Respondent to death. Nor has he considered the report of the Attorney General (contained in his letter dated 1st October 2014).

411. Following the recommendation of the 6A Respondent – Minister of Justice reaching the 11A Respondent, by his minute dated 17th May 2016 (on the very same day the documentation was submitted to him), acting purportedly under Article 34(1)(c) of the Constitution, had 'pardoned' all seventy (70) prisoners who were on the *death row,* by directing that their sentence be commuted to a sentence of *life imprisonment*.

412. According to material available in File No. PS/CSA/00/9/3/67 of the Presidential Secretariat, on two previous occasions (i.e. on 11th December 2015 and 20th April 2016, respectively) thirty (30) and eighty-three (83) prisoners sentenced to death had been purportedly pardoned by the 11A Respondent by commuting their death sentence to life imprisonment. Further, after the afore-stated purported pardon given to seventy (70) prisoners, on 25th January 2017, another sixty (60) prisoners in the *death row* had been purportedly pardoned and a term of life imprisonment substituted therefor.

413. Thus, it is seen that the 1st pardon received by the 2nd Respondent was not peculiar to him, and was part-and-parcel of a scheme that was in place. The lawfulness or otherwise of the procedure that had been followed is a different matter, which I shall advert to later.

Second Presidential Pardon granted to the 2nd Respondent

414. As the 11A Respondent's affidavit was not informative at all, the sequence of events which culminated in the impugned pardon (2nd pardon) being granted to the 2nd Respondent had to be gathered from the material contained in File No. PS/LD/ඔමාළ/24-7/2017 maintained by the Presidential Secretariat. Counsel representing all parties had access to the file, and were issued with copies thereof by learned ASG. Even after examining the contents of the said file, learned President's

Counsel for the 11A Respondent did not seek permission of this Court to file an additional affidavit explaining in detail, the sequence of events and the reasons for the grant of the 2nd purported pardon to the 2nd Respondent. It is a matter of regret that the Honourable Attorney General did not deem it appropriate to tender affidavit and documentary evidence explaining in detail the events that took place which resulted in the grant of the impugned pardon. In order to gather information and conclude on the circumstances under which the impugned 2nd purported pardon had been granted, this Court had only the documents and entries contained in the afore-mentioned file, which the Court itself decided to call for and examine in the interest of justice.

415. Upon a consideration of the documents, minutes and entries contained in the afore-stated file, it transpired that by handwritten letter dated 30th July 2017 (transmitted via facsimile), the mother of the 2nd Respondent, Sandra Jayamaha has presented an Appeal to the 11A Respondent, seeking an appointment, enabling her to meet with His Excellency the President to explain *'the suffering faced by her as a mother for the last 12 years and to state related facts'*. The letter indicates that her *'suffering'* arising out of the conviction and sentence of her son for having committed *'murder'*, which she states was *'not intentional'*. This letter has been addressed to President Maithripala Sirisena, to the 'attention of' one Mr. Erick Weerawardena. Another copy of the same letter contains the endorsement *'Reg. introduction by Mr. Preethi Warawitage'*. Neither the learned President's Counsel for the 11A Respondent nor the learned ASG offered any assistance to enable this Court to conclude who these two gentlemen are, or to understand their possible relationship or involvement with either Mrs. Sandra Jayamaha or former President Maithripala Sirisena. The file does not indicate whether pursuant to the receipt of this letter, the 11A Respondent granted an appointment to Mrs. Sandra Jayamaha or whether she received any other opportunity to make representations to the President.

416. The file also contains an undated, unsigned letter addressed to the President by Member of Parliament (MP) Ven. Athuraliye Rathana Thero, which seems to have been received by the office of the Private Secretary to the President on 7th February 2019. The venerable Thero alleges in the letter that the imprisonment of the 2nd Respondent was sequel to a *'wrong judgment'* and has requested that the 2nd Respondent *'be granted full freedom'* and that doing so would be *'justifiable and humane'*. This letter contains an endorsement by the 11A Respondent (the then President) requiring Additional Secretary (Legal) to the President to discuss the matter with him. The 11A Respondent, in his affidavit makes no reference to the receipt of this letter, notwithstanding his own handwritten minute appearing on the letter. During the hearing, all counsel agreed with each other that the afore-stated endorsement had been made by the 11A Respondent. Furthermore, neither the 1st Respondent - Attorney-General nor the 11A Respondent presented to Court any evidence indicative of whether or not a meeting took place between the 11A Respondent and the Additional Secretary (Legal). However, it appears from the file that, consequent to the receipt of the letter from Venerable Athuraliye Rathana Thero, Additional Secretary (Legal) Mrs. Lakshmi Jayawickrema had taken several steps with regard to this matter, such as calling for a report regarding the prisoner (2nd Respondent) from the Commissioner General of Prisons and writing a letter to the 1st Respondent (Attorney-General). Thus, one can reasonably assume that she had been instructed by the 11A Respondent to take certain action with regard to the request received by the 11A Respondent pertaining to the 2nd Respondent.

417. By letter dated 11th June 2019, the Additional Secretary (Legal) drew the attention of the 1st Respondent Attorney-General to the previous letter dated 14th July 2014, and sought his assistance to obtain a copy of the letter sent by the Attorney-General to the Secretary to the Ministry of Justice.

418. In the meantime, by letter dated 13th June 2019, Mr. Preethi Jayamaha and Mrs. Sandra Jayamaha respectively the father and mother of the 2nd Respondent, reiterated their request to the President to grant a pardon to the 2nd Respondent. To that letter has been attached proof of the purported educational qualifications acquired by the 2nd Respondent while he remained imprisoned, a newspaper article said to have been authored by a retired Justice which has been critical of the judicial proceedings held against the 2nd Respondent, and letters purportedly by (i) the Bishop of the Southern Province Reverend Raymond Wickremasinghe, (ii) Venerable Dr. Keradewela Punnarathana Nayake Thero, (iii) Attorney-at-Law Mahesh Madawala, (iv) a person with an illegible signature and no name, (v) the *Nawa Jeewana Amadyapa Handa Sevaya,* (vi) Attorney-at-Law Nalani Kamalika Manatunga, (vii) Attorney-at-Law Nilruk Ihalakathrige Kumudu Nanayakkara, and (viii) Venerable Balangoda Buddhagosha Thero. The afore-stated letters make no specific reference to the 2nd Respondent. Nor do they contain a request that the 2nd Respondent be granted a pardon. These letters contain general references to the need to grant relief to young persons who have been rehabilitated while being detained in prison and have highlighted the need to permit such persons to reintegrate into society as free citizens and lead a productive life.

419. During the hearing of this matter, Reverend Wickremasinghe and Venerable Punnarathana Thero sought to intervene in the proceedings before this Court, and through counsel Mr. Shamil J. Perera, PC, vehemently emphasized that they did not make a recommendation to the President that the 2nd Respondent be granted a presidential pardon. There is no evidence before this Court to conclude the circumstances under which the mother and father of the 2nd Respondent obtained these letters from their respective authors to be presented to the President in support of their plea that a presidential pardon be granted to the 2nd Respondent.

420. The file also contains a 'petition' purportedly to have been jointly settled by retired Judge of the Supreme Court Justice Rohini Marasinghe and President's Counsel Sarath Kongahage, and signed by the 2nd Respondent, seeking a presidential pardon for the 2nd Respondent. The petition has been forwarded to the President purportedly by retired Justice Rohini Marasinghe, by her letter to the President dated 19th July 2019. The grounds on which the pardon has been sought are, (a) the denial of the appeal presented by the 2nd Respondent against his conviction for having committed murder and therefore the alleged miscarriage of justice that had occurred, and (b) the exemplary life of the 2nd Respondent spent during the period of imprisonment and the achievement of high educational qualifications while being imprisoned.

421. In response to the letter dated 11th June 2019, the Attorney-General by his letter dated 12th September 2019 addressed to the President, has expressed the view that a consideration of whether it is appropriate to grant a pardon to the 2nd Respondent should be founded upon a consideration of the totality of the associated facts and circumstances, including (i) the nature of the cruel and inhuman attack of the 2nd Respondent towards the deceased, (ii) the age of the 2nd Respondent at the time of the commission of the offence (19 years), and (iii) the conduct of the 2nd Respondent both after the incident in issue and after having been convicted. It is to be noted that the Attorney-General has not expressed a specific view on whether or not a presidential pardon should be granted to the 2nd Respondent. Learned Additional Solicitor General was unable to explain why the Attorney-General deemed it appropriate to express a view on the matter without considering among others, the report from the Judge who convicted the 2nd Respondent for having committed murder. That requirement being a constitutional necessity, non-compliance by the Attorney-General being the chief legal advisor of the state, causes considerable concern to this Court.

422. By memorandum dated 4th October 2019, the Additional Secretary (Legal) has forwarded her views regarding the matter of the grant of a presidential pardon to the President and to the Secretary to the President. She has *inter alia* observed the following:

- The grant of the first pardon to the 2nd Respondent which resulted in the commutation of the death sentence to one of life imprisonment had not been carried out in terms of the requisite procedure, in that the High Court (sic) had not presented a report to the President in terms of section 286(b) of the CCPA, and the Attorney-General and the Minister of Justice have not expressed their views upon a consideration of the said report of the Judge who condemned the 2nd Respondent to death.
- The Attorney-General has not expressed a clear view as to whether or not the death sentence imposed on the 2nd Respondent should be carried out.
- Independent of the correctness or otherwise of the procedure followed, the sentence of death imposed on the 2nd Respondent has been converted into life imprisonment. Thus, the procedure to be followed hereinafter is the procedure to be followed with regard to a person who has been sentenced to serve life imprisonment.
- Having regard to the conduct of the 2nd Respondent following his conviction, the President may consider the grant of a pardon to the 2nd Respondent subject to conditions.

423. Thereafter, it appears from the correspondence in the file between the Presidential Secretariat and the Commissioner General of Prisons, that consideration had been given to whether the 2nd Respondent could be granted a 'special state pardon' which according to the said correspondence, is given to groups of prisoners based on the punishment imposed on them, the term of imprisonment already served, and their conduct within the prison. Learned Additional Solicitor General in his submissions did

not make a specific reference to any provision of the Constitution or any other law, which empowers the President to grant this category of pardons, save as provided by Article 34(1).

424. On 29th October 2019, the Additional Secretary (Legal) has addressed a memorandum to the Secretary to the President stating that by minute dated 15th October 2019, the President had directed that the 2nd Respondent be granted a 'special state pardon'. She has explained that however, pardons according to the scheme relating to the grant of 'special state pardons' were being contemplated by the prisons authorities only for prisoners who have not been sentenced to death or life imprisonment. Therefore, it would not be possible to grant a 'special state pardon' to the 2nd Respondent. The President has the power to grant either a full pardon or a pardon that is subject to lawful conditions. In view of the foregoing, the Additional Secretary (Legal) has sought a suitable direction from the President.

425. It must be inferred that this memorandum had been presented by the Secretary to the President to the 11A Respondent. Consequently, the 11A Respondent has made an endorsement *"the release is approved"* and has signed below the endorsement. Sequel thereto, by letter dated 4th November 2019, the Presidential Secretariat has informed the Secretary to the Ministry of Justice that the President has given his approval to the release of the 2nd Respondent, and has notified him to take necessary action according to the procedure provided in the Constitution. The Secretary to the Ministry of Justice has communicated this decision to the Commissioner General of Prisons.

426. It is sequel thereto that the 3rd Respondent - Commissioner General of Prisons had on 9th November 2019, released the 2nd Respondent.

Presidential power to grant a Pardon

427. From very early periods of organized human civilization when monarchs reigned, monarchs being the fountain of all plenary powers of the state and the source of executive, legislative and judicial power, by themselves had exercised the power to, at their own discretion, grant clemency (pardon) to persons convicted of having committed crimes. During that period, the power to grant clemency was the prerogative of the monarch, was exercised at his sole discretion, and the exercise of the power was unquestionable. It was treated as a divine act of mercy. This power and the associated mechanism are found to-date in both contemporary common and civil law traditions. In Britain, it is recorded that the 'Royal Prerogative of Mercy' was originally an inherent and unique sovereign prerogative power of the monarch, exercised by the monarch in exceptional cases where in his opinion 'injustice' had occurred to a person by the courts system (criminal justice system). The historical background of the power of pardon is articulated by James P. Goodrich in the article titled 'Use and Abuse of the Power to Pardon' [11 J. American Institute of Criminal Law & Criminology 334 (May 1920 to February 1921)] in the following manner:

> "*The power to pardon is one of the oldest departments of governmental function. It seemed to have been exercised by the chief of the tribe to soften the rigor of tribal customs. Side by side with the harsh aspects of the written law appear the king and other rulers exercising the right of pardon, not by any express authorization contained in the law, but by common consent. The king ruling by divine right, deriving his power from God, and not from the people, was superior to and above the law and claimed and exercised the right to set it aside when the ends of justice so required.*
>
> *While the code of Hammurabi, with its long line of statutory crimes, is silent as to the pardoning power and gives no such authority to the king, yet we know that it was one of the kingly prerogatives, for Samsu Illuna, the son of the Great*

Hammurabi, more than 2,200 years B.C., pardoned a runaway that had, according to the law, forfeited his life in fleeing from his master.

The Mosaic law nowhere gives the kings or judges the right to pardon, yet, we know that King David exercised the right. The cities of refuge were established as places where those who innocently shed blood might escape the hands of the avenger. The right of sanctuary was a merciful provision to free the individual from the consequences of his unlawful act.

The Greeks, in Plato's laws, made provision that the prisoner might, after conviction of his crime and an exile of two or three years, be pardoned by a group of citizens, twelve in number, and allowed to return.

During the republic and monarchy of Rome, the power to pardon was freely exercised by the executive as it was by the early English, Scottish and Irish kings.

Before the granting of the great charter by King John, the kings granted pardons and forgave offences against the law, and, ruling by divine right, not only claimed the right to suspend the law as to individuals, but as to entire classes of individuals. They also claimed that having the power to pardon after the offense, they might grant a dispensation to violate the law with impunity. Controversies arose between king and parliament over this clear abuse of power until finally parliament passed a law abolishing this prerogative of the king, "as it hath been assumed and exercised of late" and denied the pardoning power of the king in the future, "unless parliament shall make provision for such power in the terms of the statute."

In the development of English law, it was often found necessary to abate the cruelty of its criminal statutes through the exercise of royal clemency. …The English courts generally held that the right to pardon was an ancient remnant of

the kingly prerogatives; since not given to the king by the people, they could not take it away.

While the bare legal right of the king to pardon is still recognized under the English law, yet, it is only exercised under the advice of the prime minister. However much King George may sympathize with the Mayor of Cork in his hunger strike, and however greatly he may desire to order his release, yet he well says "custom forbids," he is but the symbol of the Empire and the real power to pardon rests with the prime minister Lloyd George."

428. Discussing the connection between the historical evolution of the writ of habeas corpus (also called the 'Great Writ of Liberty') and the grant of pardons, Paul D. Halliday, Professor of History at the University of Virginia, in his treatise titled 'Habeas Corpus: From England to Empire' [Belknap Press of Harvard University Press, Cambridge, Massachusetts, London, England, 2010], has analyzed the power of pardon at great length. An extract from that analysis is reproduced below:

"… While the natural subject performed the bond of allegiance only with his body, the King could do more. We return then to miracles. For that is what the royal power to create sanctuary or to grant pardon was: a miracle by which the normal rules of law, which might inflict the ultimate pains on the subject's body, were suspended. This same power, analogized outward and taken up by the justices of King's Bench, gave habeas corpus its unusual force. An examination of sanctuary and pardon suggests how this worked…

By a Royal charter, the king granted the franchise of sanctuary, a place marked out for mercy. But resort to sanctuary required a penalty: permanent exile, either by remaining for the rest of one's life within the sanctuary, or by abjuring the realm. Either way, resort to sanctuary – extralegal mercy – broke the ties of allegiance between the subject and king…

The Reformation destroyed monastic sanctuaries, so it may be more than coincidental that the period of the greatest use of royal pardons – the first two decades of Elizabeth's reign – occurred between the end of English monasticism and the onset of the writ's greatest period of development at century's end. Matthew Hale called pardon "dispensation with laws" or "an exemption from government", allowable because the king thereby excused offenders "against his own suit": in other words, felons, who were prosecuted in the king's name. Commentators viewed this use of the prerogative in miraculous terms. True, only God could pardon the ultimate penalties of sin. But from God "derived to princes [the power] to remit the penalty of the laws temporal." Or as James Morice asked, "What is more agreeing unto the high majesty of a king than with loving mercy to temper the severity of justice"? When the king pardoned those attained of treason, the king simultaneously restored the inheritance of the traitor's heir.

…The king's unique capacity to pardon – to breathe life again into the "dead person in law" – was the same power by which anyone, even an alien, might become a subject…By protecting his subjects – natural and otherwise – where law warranted, and by granting mercy where law did not warrant, the king exercised his prerogative. In both cases his body commanded theirs…

There was an important connection between pardons and habeas corpus in practice as well as in conception. In the sixteenth century, the writ was one of the means by which a pardon recipient might be brought into court to plead the pardon. Most of these pardons pleaded on habeas corpus arose prior to conviction…habeas may have provided the best means for being brought into court to use a pardon prior to trial…"

429. In the article titled 'The Problematic Presidential Pardon: A Proposal for reforming Federal Clemency' [(2009) 3 Harvard Law & Policy Review, 447], Jonathan Menitove

has provided the historical background to the power of pardon in the following manner:

> *"…Rather than perceive it as a failsafe in the criminal justice system, the British viewed the executive clemency as a power vested in the monarch in accordance with his divine right to rule. Pardons were thought of personal gifts from the monarch that required no justification and were not subject to criticism. Naturally, monarchs began to abuse the pardon, employing this power for monetary and political gain. …Upon colonizing the New World, the British Crown delegated clemency power to the colonies' royal Governors…"*

430. In almost all countries which have retained the monarchical system of governance, legislative mechanisms have been put in place by the respective legislatures which stipulate the procedure to be followed, and on whose recommendation the monarch should act. Thus, the exercise of this power is regulated. In most such countries, power has been vested by statute in an officer holding high executive office mostly in the justice sector, empowering him to recommend to the monarch, the grant of a pardon in appropriate cases. Thus, the sovereign prerogative and unfettered discretionary character of the power vested in the monarch to decide on the grant of the pardon has now become virtually non-existent, with the monarch being required to act upon the recommendation of an officer of the Executive.

431. In countries with republican Constitutions, the power to grant a pardon has been vested in the Head of State. In countries where the Head of State is appointed or exercises nominal executive power, he acts on the recommendation of the elected Prime Minister or the Minister in-charge of law or law enforcement. In countries with an Executive Presidency (such as in Sri Lanka), the power is vested directly in the President. In almost all countries which are republics, the power to grant a pardon is contained in the Constitution of the respective country. It is to be noted that, Article 34 of the Constitution of Sri Lanka confers on the President wide power to grant a

pardon, respite, substitute a less severe sentence, or remit the whole or any part of the punishment imposed by a court of law on any person, all of which are different manifestations of the exercise of power of pardon conferred on the President by the Constitution. [Thus, in this judgment, unless where specifically required, I shall refer to these various manifestations of the power of pardon as 'pardon' in general.] Further, Article 154B(9) confers on a Governor of a Province limited power to grant a pardon, which power he shall exercise on the advice of the Board of Ministers.

432. From country to country, the procedure to be followed by the Head of State when considering the grant of a pardon varies. In some legal systems, no procedure has been specified by written law.

433. The primary objective of criminal justice is the detection and investigation of crime, identification and apprehension (arrest) of the perpetrator, prosecution of the perpetrator (accused) of crime, and if found *'guilty'* and the accused is convicted, determination and imposition of punishment on the convict. A secondary objective of criminal justice is the enforcement and management of penal sanctions imposed on the convicted person by court. Particularly in the background of one ground on which the grant of the pardon to the 2nd Respondent has been impugned, it is important to note that another secondary objective of criminal justice is the delivery of 'justice' to the victim of crime (which particularly in the case of deceased victims would include members of the family of such deceased, such as the 9th and 10th Respondents), and provide reparation to victims. Contemporary norms of the *rule of law* demand that, the processes and measures of criminal justice are carried out strictly according to law. This is crucial, as criminal justice measures such as arrest, remand, prosecution and imprisonment, have a direct bearing on the liberty of the person who is subject to such measures, and therefore would have a bearing on his fundamental rights.

434. While the detection and investigation of crime and identification and apprehension of perpetrator of crime, are components of executive power given effect to through law enforcement, so is the institution of criminal proceedings against the accused and his prosecution. The trial of the accused and determination of guilt or otherwise is the function and responsibility of the judiciary. If found *'guilty'*, the determination of the penal sanctions (sentence) to be imposed on the convicted accused and its imposition is also part of judicial functions. However, the execution of such punishment and its management rest once again on the executive arm of the state. Thus, alternatively, the executive and the judicial arms of the state are vested with distinct duties of enforcing different segments of the criminal justice process. It is fundamental that the non-prosecution and non-punishment of perpetrators of crime is an affront to the *rule of law*, and is not in public interest. Similarly, the prosecution or the punishment of persons who are not responsible in terms of the law (legally culpable) for committing offences, is also contrary to the *rule of law* and is 'unjustified' and 'unlawful' in the broad sense. The non-prosecution and non-punishment of offenders (which if widespread and systematic would give rise to a climate of impunity) and the prosecution and punishment of persons who are not responsible in terms of the law for committing crimes, denote a failure of the criminal justice system, and can be referred to as a situation which results in 'injustice'. Their repercussions are serious and far reaching. Should the executive arm of the state choose to arbitrarily not enforce punishment imposed on persons convicted by the judiciary, it would be a major afront to the functioning of the judiciary, impinge upon the administration of justice, and would violate the *rule of law*.

435. Developed legal systems contain mechanisms for judicial review of executive action taken *inter alia* in the sphere of law enforcement in the criminal justice process. Similarly, legal systems contain judicial mechanisms which are aimed at appellate consideration of decisions of trial courts. Further, invocation of the revisionary jurisdiction is possible to correct illegality in judicial decision-making. These judicial

mechanisms are aimed at ensuring that objectives of criminal justice are achieved only in terms of the law, and to prevent possible miscarriages of justice. In this backdrop, it is important to note that, unless there are cogent and justiciable reasons, the grant of a pardon to a person who has been convicted by a trial court and thereafter has exhausted unsuccessfully his right to appeal against the conviction and the sentence imposed by a competent court, should be viewed with the greatest possible circumspection. That is the case at hand relating to the 2nd Respondent. This is particularly due to the serious and far-reaching consequences arising out of the grant of a pardon to a person correctly convicted for having committed an offence, as the grant of a pardon under such circumstances has the potential of adversely affecting the very fabric of the *rule of law* and social justice, and would defeat the objectives of criminal justice.

Purposes of conferring on the President the power to grant a Pardon

436. During the hearing of the petition, on multiple occasions, the Court inquired from learned counsel, the purpose for which the power to grant a pardon has been vested in the monarch or on the Head of State, as the case may be. As the object and purpose could vary from country to country, we invited counsel to focus on the situation in Sri Lanka. All counsel agreed with each other that the Constitution was silent as to the purpose for which the power to grant pardon has been vested in the President. There is also no judicial precedent other than the recent pronouncement of the Supreme Court in ***Hirunika Premachandra and Another vs. Honourable Attorney General and Others*** *[SC/FR 221, 225, and 228/2021, SC Minutes of 17th January 2023]* (hereinafter referred to in the name of the beneficiary of the impugned pardon, as the *'Duminda Silva Pardon Case'*), which provides any guidance in this regard. The benefit of that judgment was not available to learned counsel when they argued this matter and when they submitted post-argument written submissions.

437. Although Mr. Sanjeewa Jayawardena, PC on behalf of the Petitioner did not express a specific view regarding the possible purposes for which the power to grant a pardon has been vested in the President and may be exercised, he submitted that the President cannot exercise this extraordinary power in a manner that violates the *rule of law*. He contended that the powers of the President are confined to the four corners of the Constitution. He further submitted that the powers vested in the President must be used only in furtherance of public good and not for an improper or personal purpose.

438. Dr. Romesh de Silva, PC who appeared for the aggrieved 9th and 10th Respondents, submitted that the exercise of the power of pardon is *'limited to the proper exercise of Executive power which is inextricably linked and circumscribed by the doctrine of public trust'*. The learned President's Counsel submitted that it is not possible to enumerate the varied circumstances under which the President may exercise the power of pardon. In that regard, he submitted that (i) emergence of new evidence which was not available at the time of the trial which points towards the innocence of the convicted person, and (ii) the grant of a pardon which is necessary to achieve the greater welfare of the nation (such as pardoning of prisoners in furtherance of national, ethnic or religious reconciliation and permitting a terminally ill patient to spend the remaining few days of his life at home) are purposes for which the power of pardon may be exercised by the President. Therefore, it was his submission that *"the President cannot resort to Article 34(1), unless the doctrine of public trust necessitates it"*. Learned President's Counsel vehemently rejected the proposition that a purpose for which the power of pardon may be exercised by the President is to rectify a *'miscarriage of justice'*. Learned President's Counsel submitted that the President lacks the authority to review a judgment of a court of law based on the allegation that a miscarriage of justice had occurred. He submitted that the principle of finality of judgments and orders delivered by court is an inherent aspect of the administration of justice. Therefore, the judgment of any original court should be

considered and treated as binding and conclusive, with its authority superseded only by the right to appeal, and with the judgment of the appellate court remaining similarly final and conclusive. In the circumstances, the learned President's Counsel submitted that *"it would therefore strike a note of irony if any individual, regardless of their level of competence, were permitted to review and reconsider the judgment of a Court."*

439. The position of Additional Solicitor General Mr. Nerin Pulle, PC was that the power vested in the President to grant a pardon to a convict, exists as a safeguard against a *'miscarriage of justice'* and is a *'check on the exercise of the judicial power by the judiciary'*. The learned Additional Solicitor General submitted that it is not however, the only purpose for which the power of pardon may be exercised. He submitted that there may be a number of other grounds on which a pardon may be granted, *"as long as there is no obvious or gross unlawfulness, such as in the case of a pardon granted in return for a bribe"*. Citing certain foreign judicial authorities (which I shall advert to later), learned Additional Solicitor General sought to demonstrate that purposes of granting a pardon may include (i) the reduction of an excessive sentence, (ii) situations where in the opinion of the President, the grant of a pardon to a convict would benefit the public, and (iii) situations which necessitate curing a miscarriage of justice that has occurred due to possible fallibility of human judgment. Learned Additional Solicitor General agreed with the submission made by learned President's Counsel for the 9th and 10th Respondents that the purposes of granting a pardon cannot be laid down in an exhaustive list. Thus, he submitted that *"in recognizing the broad range of situations wherein the power of pardon may be exercised, the framers of the Constitution have refrained from stipulating any particular set of circumstances in which the President may exercise the power of pardon"*.

440. Mr. Faizer Mustapha, PC who appeared for the 11A Respondent (former President) did not venture to explain the purposes for which the power of pardon in terms of Article 34(1) may be exercised by the President. Instead, learned President's Counsel pointed out that *"the exercise of the power of pardon has been freely and with the widest discretion been exercised time and time again, both in the case of routine mass pardons and individual pardoning by the predecessors and successors of the office of the President of the Republic …"*. Particularly since learned President's Counsel represented the former President who had granted both pardons referred to in this judgment, Court expected learned counsel to explain the purpose for which his client had exercised power vested in him by Article 34 of the Constitution. However, his views on the matter were not conspicuous.

441. In the ***Duminda Silva Pardon Case***, the purpose of vesting in the President the power to grant a pardon has not been directly discussed. However, Justice Surasena delivering the unanimous judgment of this Court, citing from the advice sent in that case by the Attorney-General to the Minister of Justice, has expressed the view that the President must have reasons for the grant of a pardon, which must be capable of being assessed objectively and those grounds should be capable of withstanding the *"test of rationality, reasonableness, intelligible and objective criteria"*.

442. **On a consideration of the nature of the power vested in the President by Article 34 of the Constitution, its impact on the *rule of law,* its potential under certain circumstances to defeat the objects and purposes of criminal justice, and its possible consequence of negating the impact of the exercise of judicial power which is exercised by courts and tribunals on behalf of the people, it is my considered view that, it is not possible to stipulate exhaustively the purposes for which the Constitution has vested the unique and extraordinary power in the President to grant a pardon. However, it is manifest that the power to grant a pardon is extraordinary in nature, and may be exercised by the President (a) in**

terms of the law, (b) in exceptional situations, (c) on an objective consideration of relevant facts and in *good faith*, and (d) to serve the interests of the public, and for no other reason.

443. In my view, one possible instance which would justify the exercise of the power to grant a pardon, since it would necessarily be in public interest, would be to redress a proven instance of a miscarriage of justice. Where an allegation of a miscarriage of justice has been made, the President must, following objective scrutiny, satisfy himself that such allegation is substantiated based on incontrovertible cogent evidence (which had surfaced after the final appeal had been dispensed with and thereby all judicial remedies had been exhausted), and it is established to the satisfaction of the objective mind of the President that in fact, a miscarriage of justice had occurred. The responsibility of examining such an allegation that a miscarriage of justice had occurred, must be appropriately conferred on a Commission of Inquiry appointed by the President in terms of the Commissions of Inquiry Act, No. 17 of 1948 (as amended) and following investigation and inquiry by such Commission, and the receipt of its Report, the President can decide on whether or not to grant the requested pardon founded upon a consideration of the findings of such Commission of Inquiry.

444. This court wishes to highlight three other possible instances which may justify the grant of a pardon. They are, (i) the grant of a pardon (a) to a terminally ill or extremely old convict awaiting the execution of the death sentence, with only a small period of life left, or (b) on other humanitarian considerations, (ii) the grant of a pardon to a foreign national who has been convicted for committing a non-serious offence such as the offence of unauthorized entry into the territorial waters of Sri Lanka for fishing, whose pardon is granted in furtherance of advancing or strengthening Sri Lanka's international relations particularly with the state of which the convict is a national, and (iii) the grant of a pardon to a convict in furtherance of the policy of the state to achieve ethno-social, religious or political reconciliation.

445. This Court will not venture to list out other possible instances where the grant of a pardon may be in public interest, as the list is unlikely to be exhaustive. **It is necessary to highlight that in all these instances where the grant of a pardon is permissible, what is sought to be achieved is public interest and public good (as the public is collectively the sovereign of the republic), and not the grant of a benefit to the recipient of the pardon, though that is also an inevitable outcome. It is also necessary to observe that, 'public interest' should not be a ground to be used only to 'justify' an impugned decision to grant a pardon, in situations where the decision to grant the pardon had been taken due to an extraneous or collateral reason. Nor can it be an after-thought crafted by the decision-maker or his competent counsel, to justify the impugned decision. The decision-maker being the President, should have formed the view objectively, on an application of rational and intelligible criteria, which should be manifest to court as being reasonable with a rational and conclusive nexus of serving the interests of the public, particularly when compared with the objectives of criminal justice. Reasons for the decision which should reflect the opinion of the President and of nobody else, contemporaneously documented alongside the decision of the President, should reveal the justification for the decision to grant the pardon. Such reasons must be presented to Court when the decision to grant or refusal to grant a pardon is impugned before a competent court.**

446. It is of paramount importance to note that the power to grant a pardon should not be viewed or exercised as if it is a frill which comes with the presidency to be exercised at the whims and fancies of the President or as an act that would confer spiritual merit or divine blessings on the decision-maker. As held in several judgments of this Court, every power that is vested in a public authority must be exercised for the purposes for which they have been conferred, and in public interest. [***De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*** *(1993) 1 Sri L R 283*, ***Sugathapala Mendis and Another v Chandrika Kumaratunga and***

Others *(2008) 2 Sri L R 339*, ***Jayawardena v Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs and Others*** *(2001) 1 Sri L R 132*]. In ***Heather Therese Mundy v Central Environmental Authority*** *[SC Appeal 58/2003, SC Minutes of 20.01.2004]*, Justice Mark Fernando has held the view that "*powers vested in public authorities are not absolute or unfettered, but are held in trust for the public to be exercised for the purposes for which they have been conferred*" and that "*their exercise is subject to judicial review by reference to those purposes*". Therefore, power conferred on public functionaries should not be exercised as a means of achieving collateral financial, political or other benefit. Power must be exercised in *good faith* with due diligence, and to achieve the purpose for which that power has been vested. Therefore, in contemporary Constitutional and Publica law of this country, the grant of a Pardon by the President acting under Article 34 of the Constitution is not an act of clemency or mercy.

447. The use of the power to grant pardon to a convict for any extraneous purpose which is not in public interest, would amount to an abuse of the power, and an act which violates public trust vested in the Presidency. Thus, exercise of the power to grant a pardon under such circumstances would be unlawful, as it would amount to an abuse of power. It is necessary to point out that given the circumstances under which the power was exercised, the exercise of the power to grant a pardon for a purpose that is not in public interest may amount to an intentional violation of the Constitution by the President and or an act of corruption. In all such situations where the power to grant a pardon has not been exercised in public interest and amounts to an abuse of power, if impugned through judicial proceedings and the claim is proven, this Court is duty-bound to make an appropriate pronouncement quashing the pardon and where appropriate proceed to ensure that appropriate sanctions flow.

Procedural requirements pertaining to the exercise of the power to grant a Pardon

448. Article 34 of the Constitution provides as follows:

> *(1) The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka –*
>
> *(a) grant a **pardon**, either free or subject to lawful conditions;*
>
> *(b) grant any **respite**, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender;*
>
> *(c) **substitute a less severe form of punishment** for any punishment imposed on such offender; or*
>
> *(d) **remit the whole or any part of any punishment** imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence:*
>
> *Provided that **where any offender shall have been condemned to suffer death by the sentence of any court**, the President shall cause a report to be made to him by the Judge who tried the case and shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice, who shall forward the report with his recommendation to the President.*
>
> *(2) The President may in the case of any person who is or has become subject to any disqualification specified in paragraph (d), (e), (f), (g) or (h) of Article 89 or sub-paragraph (g) of Paragraph (1) of Article 91 –*
>
> *(a) grant a pardon, either free or subject to lawful conditions; or*
>
> *(b) reduce the period of such disqualification.*

> *(3) When any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders, if more than one.*
>
> [Emphasis added.]

449. It is the proviso to Article 34(1) which explicitly stipulates the procedure to be followed when exercising the power conferred on the President relating to a person who has been condemned to suffer death by the sentence of any court. The Constitution is silent as to the procedure to be followed with regard to other instances where the person concerned has not been condemned to suffer death by a sentence of a court, but has been imposed any other sentence, such as life imprisonment or any other term of imprisonment. Whether the applicable common law fills that lacuna, and therefore the unwritten law requires the President to even in such other cases follow a particular procedure which is in conformity with the rules of natural justice, is not a matter this Court needs to adjudicate upon in this case, as there was virtual consensus among learned counsel, that the case being considered does come within the purview of the proviso contained in Article 34(1). That is because, as set-out in detail in the introductory part of this judgment, the Court of Appeal sentenced the 2nd Respondent – Don Shramantha Jude Jayamaha to death, which judicial pronouncement was not subsequently set-aside by any other competent court. Thus, for all purposes, as at the time of the consideration of the grant of both the 1st and 2nd purported impugned pardons, the 2nd Respondent was a person who had been *condemned to suffer death by a sentence of a 'court'*. In this regard, it is necessary to note that, even if the 1st pardon referred to in this judgment is deemed not to be unlawful, the 1st pardon did not have the effect of setting aside the conviction for murder imposed by the Court of Appeal and the sentence of death imposed on the 2nd Respondent. Thus, as at the time the 11A Respondent considered the grant of the pardon which in effect removed

the term of life imprisonment imposed as a result of the 1st purported pardon, the 2nd Respondent remained to be a person who had been condemned to death. Thus, the procedure set-out in the proviso to Article 34(1) was applicable even with regard to the impugned 2nd pardon.

450. The procedure the President is required to follow (as contained in the proviso to Article 34(1) in cases where the person whose sentence is under consideration for the grant of a pardon, contains a sequential step-by step-approach. A consideration of the proviso to Article 34(1) reveals unequivocally that it contains procedure to be followed by the President, the Attorney-General and the Minister in-charge of the subject of Justice. Such procedure is set out below:

1. The President shall cause a report to be made to him by the Judge who tried the case.
2. The President shall forward such report to the Attorney-General. The communication to the Attorney-General shall contain instructions, that after the Attorney-General has advised thereon, the report of the Judge shall be sent together with the Attorney-General's advice to the Minister in-charge of the subject of Justice.
3. On the receipt of the afore-stated communication from the President, upon a consideration of the report of the Judge and other relevant material which the Attorney-General may be briefed of such as a report of the State Counsel who conducted the prosecution against the convict (though a consideration of such additional material is not a requirement contained in the proviso to Article 34(1), thus not a mandatory requirement), the Attorney-General shall record his advice on the matter, and forward the report of the Judge (together with his advice) to the Minister in-charge of the subject of Justice.
4. Upon receipt of the material submitted by the Attorney-General, the Minister in-charge of the subject of Justice shall on a consideration of such

material and any other material which the Minister may deem to be relevant (which is also not a mandatory requirement), forward to the President his recommendation. It is to be reasonably assumed that to the Minister's communication to the President would be attached, the opinion expressed by the Attorney-General.

451. It is necessary to note that, what is meant by the term *'a report to be made to him by the Judge who tried the case'* is the report of the Judge who pronounced the sentence of death on the accused - convict. In the circumstances of this case, that would be a reference to the learned Justices of the Court of Appeal who allowed the appeal of the Attorney-General, found the convicted accused – respondent *'guilty'* of having committed the offence of *'murder'* and accordingly sentenced him to *'death'*.

452. A perusal of the material called for from the Presidential Secretariat and examined by court pertaining to the grant of the 1st and 2nd purported pardons as well as the evidence placed before this Court by all parties, reveal clearly the absence of such a report having been called for and examined by the 11A Respondent President Maithripala Sirisena and the 1st Respondent Attorney-General. The 11A Respondent in his affidavit to this Court does not even claim to have complied with the first step in the procedure stipulated in the proviso to Article 34(1) of the Constitution when he was called upon to consider the grant of the 2nd purported pardon. Thus, procedural irregularity stems from the very beginning of both purported pardons.

453. As regards the 2nd Respondent - Attorney-General, on the occasion relating to the grant of the 1st purported pardon, he has not been actuated by the receipt of a communication from the President, which should have contained the report of the Judge who sentenced the 2nd Respondent to *'death'*. On the first occasion, though by letter dated 14th July 2014, the Presidential Secretariat sought the opinion of the Attorney-General, a report by the Judge who sentenced the 2nd Respondent to death was not submitted. Nor did the Attorney-General separately receive and consider the

report of the relevant Judge. The material available does not in any way disclose that the Attorney-General considered the report of the relevant Judge. Furthermore, instead of his opinion on the matter being communicated to the Minister of Justice, he has forwarded his opinion (which did not contain a recommendation that the 2nd Respondent be granted a presidential pardon) to the President, and copied such communication to the Minister of Justice. Thereafter, the matter of the 1st purported pardon seems to have remained in abeyance till the change of the Presidency in January 2015 from former President Mahinda Rajapaksa to former President Maithripala Sirisena.

454. In May 2016, the Minister of Justice acting upon a report of a 'Review Committee' (the appointment of which is not referable to a specific statutory provision which learned ASG could successfully cite before this Court) recommended to the President the grant of a presidential pardon to seventy (70) inmates who were in the *'death row'* awaiting their execution, which included the 2nd Respondent. It is on the strength of the report of the said Committee and the general recommendation of the Minister of Justice contained in his letter to the President dated 12th May 2015, that the 11A Respondent – then President Maithripala Sirisena had on 17th May 2016, decided to grant pardon to all seventy (70) convicts on the *'death row'* in respect of whom the Minister of Justice had made recommendations, which included the 2nd Respondent.

455. On the occasion of the grant of the 2nd purported pardon, the documents filed of record in the corresponding file maintained by the Presidential Secretariat and its minutes reveal that the process which culminated in the grant of the 2nd purported pardon commenced upon the 11A Respondent receiving a letter of request dated 30th July 2017 from the mother of the 2nd Respondent, seeking a pardon for her son. A perusal of the documents and minutes of the file does not indicate any action having been taken with regard to the said letter till 19th February 2019, when the 11A Respondent (then President) received an unsigned letter in support of the plea to

grant a pardon to the 2nd Respondent. That plea had been submitted by Ven. Athuraliye Rathana Thero, Member of Parliament. As set-out above, it appears that following the appeal by the venerable monk, the 11A Respondent received another appeal by the mother and father of the 2nd Respondent supported by several letters to which reference has been made earlier in this judgment. Further, the 2nd Respondent himself appears to have presented an appeal to the President. It is thereafter that the Presidential Secretariat once again wrote to the Attorney-General, the Attorney-General expressed an opinion on the matter, and the Additional Secretary (Legal) to the President also made certain observations. Thereafter, on 29th October 2019, the 11A Respondent decided that the 2nd Respondent should be *'set free'*.

456. Dr. Romesh De Silva, PC who appeared for the 9th and 10th Respondents, laid heavy emphasis on the fact that the powers of the President to grant a pardon have been circumscribed by and are conditional upon strict adherence to Article 34 of the Constitution, and given the facts and circumstances of this matter, compliance with the proviso contained in Article 34(1) was absolutely necessary. Both Dr. De Silva and Mr. Sanjeewa Jayawardena, PC pointed out that, in both instances which resulted in the grant of purported pardons to the 2nd Respondent, the 11A Respondent had grievously breached the procedure contained in the said proviso. Both learned President's Counsel submitted that in the circumstances, both purported presidential pardons were in violation of Article 34(1) of the Constitution, and thus amounted to an infringement of the fundamental rights of the Petitioner and the fundamental rights of the 9th and 10th Respondents recognized by Article 12(1) of the Constitution.

457. Further, Dr. Romesh De Silva, PC pointed out that section 3(q) of the Assistance to and Protection of Victims of Crime Act, No. 4 of 2015 (recently repealed and substituted by Act No. 10 of 2023) provides that *'in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person convicted of*

having committed an offence, to receive notice thereof and submit through the Authority (the National Authority for the Assistance to and Protection of Victims of Crime and Witnesses) to the person granting such pardon or remission, the manner in which the offence committed had impacted on his life including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other aspects concerning his life.' In the circumstances, he submitted that a victim of crime [which in the given circumstances of this case would include both the 9th and 10th Respondents (the father and sister of the deceased, respectively) and mother of the deceased] were entitled to be informed of the fact that consideration was being given to the grant of a pardon to the convict (2nd Respondent), enabling such victims of crime to present to the authority considering the grant of the pardon (through the National Authority) their views on the matter. Dr. De Silva complained that the 11A Respondent had failed to comply with the said mandatory requirement and hence the right of his clients recognized by section 3(q) of the Act had been infringed by the 11A Respondent making the decision to grant the pardon in breach of the fundamental right of the 9th and 10th Respondents recognized by Article 12(1) of the Constitution.

458. For the reasons enumerated above, it would thus be seen that, **the grant of both the first and the second purported pardons were procedurally flawed, and thus *ultra-vires* and therefore unlawful and void on that ground alone.** In fact, learned ASG, submitted that he agreed with learned counsel for the Petitioner and the 9th and 10th Respondents that the procedure followed on both occasions was contrary to the procedure laid down in the proviso to Article 34 (1) of the Constitution.

459. In any other case of judicial review which takes the form of a fundamental rights Application where an infringement of Article 12(1) has been challenged, judicial scrutiny of the procedure followed on the impugned occasion and the identification of the procedural impropriety or irregularity which culminated in the impugned

decision being taken, would be sufficient, for a determination of the unlawfulness of the impugned decision, and thus a declaration being made of an infringement of Article 12(1).

460. However, in this matter, there is a need to proceed further, particularly due to a particular submission vehemently advanced by the learned ASG. That matter is discussed in the next part of this judgment.

Judicial Reviewability of the decision of the President to grant a Pardon

461. In view of the emphasis made by the learned Additional Solicitor General with regard to the scope of reviewability of a decision by the President to grant a pardon to a person convicted of committing an offence, it is necessary to refer to and deal with submissions made by learned counsel in that regard in some detail.

462. **Submissions of the learned Additional Solicitor General -** The essence of the submissions of learned Additional Solicitor General made in this regard was that, though the exercise of power by the President under and in terms of Article 34(1) of the Constitution may be subject to judicial review through the exercise of the fundamental rights jurisdiction vested in this Court by Article 126 of the Constitution, such review is limited to a consideration of procedural *vires* of the impugned decision, as opposed to review on grounds of substantive *vires*. In other words, the position advanced by learned ASG was that, when reviewing the impugned decision to grant a pardon to the 2nd Respondent by the 11A Respondent, this Court may consider only whether the then President had acted in terms of the procedure laid down in the proviso to Article 34(1) of the Constitution, and should refrain from going into the merits of the decision. Learned ASG proceeded to elaborate his core argument made in this regard based on the following specific grounds:

1. limits on the judicial reviewability of the exercise of the power of pardon in other jurisdictions;

2. the scope of judicial review of the exercise of power by President in Sri Lanka;
3. the doctrine of separation of powers supported by checks and balances contained in the Constitution;
4. the power of pardon vested in the President being a *'sui generis'* power.

463. Citing judicial authorities from other jurisdictions, learned ASG submitted that courts have refrained from exercising their jurisdiction to curtail the power of pardon, and has exercised judicial review only in very limited circumstances. He further contended that the reviewability of the exercise of power by the President (not limited to the power to grant a pardon) must be determined on a case-by case basis depending on the nature of the power, nature of the act and the facts of the case. In this regard, learned ASG cited the case of ***R. Sampanthan v AG***, in which it was held that *'…some of the powers vested in the President by Article 33(2) may not, in practice, be reviewable by an application under Article 126 depending on the facts before court…'*.

464. Learned ASG also submitted that the review of the power to grant a pardon on the merits of the decision violates the principle of '*separation of powers'*, in that, it allows this Court, instead of the President to take decisions regarding who should be granted a pardon and under what circumstances. He submitted that doing so would fail the *'delegation test'* and would also constitute a '*transfer, relinquishment or removal'* of a power attributed to the President, to another organ of the state (that being the judiciary). He submitted that '*it would allow the Supreme Court instead of the President to take decisions regarding who would be given a pardon. As such, the review of the exercise of the power of pardon granted to the President by the Supreme Court would violate Article 4 read with 3 of the Constitution'*.

465. Learned ASG further submitted that when considering the unique nature of the power of pardon, it is Parliament that is best suited to carry-out a 'check' on the President, as the power of pardon is not a 'check' against Parliament, but a 'check' against the

judiciary. He said that precluding judicial review on the merits of a decision to grant a pardon does not result in the President being given an unfettered discretion.

466. Further, the learned ASG submitted that the power of pardon is *'sui generis'* (stand-alone) in nature. It was his contention that, the President's power of pardon is provided for separately in Article 34, from the 'powers and functions of the President' which are contained in Article 33, with the intention that the power to grant a pardon is considered separately and be treated as a unique power, in the structure of the Constitution, In the circumstances, he submitted that the power of pardon should be recognized by this Court as a *'sui generis'* power, and thus in the exercise of the fundamental rights jurisdiction the power to grant a pardon should not be made amenable to judicial review on the merits of the decision. He further submitted that as the power of the President to grant a pardon under Article 34(1) is *sui generis* in nature, judicial review of the exercise of such power would violate the doctrine of *separation of powers*, including but not limited to the principle of *checks and balances* contained in the Constitution. He submitted that *'Article 34 of the Constitution which allows the President to grant a pardon is part of the mechanism of checks and balances in the Constitution. … this power allows for the President to act as a check upon the decisions of the judiciary where necessary, in recognition of the fallibility of the judiciary'*.

467. Mr. Pulle prefaced his submissions by making a generic assertion that the Executive and the Judiciary are *'two co-ordinate organs of government, each superior in their spheres as equal elements of the sovereignty of the People'*. He submitted that, if evidence showed that the President when granting the impugned pardon had acted in terms of the proviso to Article 34(1), then this Court should not review the granting of the pardon on the *merits*. He asserted that there are matters which are not amenable to judicial review, and referred to judicial precedent of certain other jurisdictions in which the prerogative of mercy, from which the power of pardon stems, has been placed in such category. Learned ASG cited the following passage

from the judgment of this Court in ***Premachandra v. Major Montague Jayawickrema*** *[(1994) 2 Sri L.R. 90 at page 110]:*

> *"However, there are matters which undoubtedly do not involve legal and constitutional rights, powers and duties, and which may therefore be regarded as purely "political". Mr. Seneviratne referred to Council of Civil Service Unions vs. Minister of Civil Services.*
>
> *Prerogative powers such as those relating to the making of treatise, the defences of the realm, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject-matter are such as not be amenable to the judicial process. As observed in that case, the controlling factor is not the source of the power but its subject matter".*

468. Further, citing several Indian and South African judgments, the learned ASG submitted that it is evident that in those jurisdictions, courts have exercised their jurisdiction only in limited circumstances. The courts in those jurisdictions have refrained from curtailing the power of the Executive to grant a pardon and have refrained from laying down a general rule as to the exercise of the said power.

469. Citing ***Wijesinghe v. Attorney-General and Others*** *[(1978-79-80) 1 Sri L.R. 102]*, learned ASG submitted that not every wrong decision or breach of the law amounts to a violation of a fundamental right and the entitlement to the reliefs available under Article 126 of the Constitution. He further submitted that in these circumstances, in the absence of any intentional or purposeful discrimination evident from the record, this Court should be cautious in exercising the power of judicial review over the grant of a pardon by the President. Referring to the judgment of the Divisional Bench of this Court in ***Rajavarothiam Sampanthan v. Attorney-General (****SC/FR 351/2018, SC Minutes of 13.12.2018),* the ASG submitted that *'this judgment has not closed the door*

on the matter of reviewability of the exercise of powers by the President and has instead admitted the possibility that certain acts of the President may not be subject to judicial review'.

470. Concluding his submissions on this aspect of the case, the learned ASG submitted that reviewability of the President's acts (exercise of power) must be determined on a case-by-case basis depending on the nature of the power, nature of the act, and the facts of the case. He submitted that there is no general rule that all of the President's actions are executive or administrative and that the exercise of all of his powers is reviewable.

471. **Submissions of President's Counsel for the Petitioner -** In response, Mr. Sanjeewa Jayawardena, PC for the Petitioner submitted that, the power of the President exercisable under Article 34 of the Constitution is reviewable, not only on the grounds of procedural *vires,* but also on the grounds of substantive *vires,* such as *irrationality* and *Wednesbury unreasonableness*.

472. Citing a passage from A.V. Dicey on *"Introduction to the study of the Law of the Constitution"* and certain general principles of Administrative Law, learned President's Counsel submitted that, no man whatever be his rank or condition is above the law and thus, all public functionaries are subject to the ordinary law of the land. The absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power, excludes the existence of arbitrariness of prerogative or even wide discretionary authority on the part of the government. Learned President's Counsel submitted that the submission of the learned ASG was *"not only utterly ludicrous, but also contrary to the basic tenets of doctrine of Rule of Law"*.

473. He further submitted that, there are clear collateral motives and extraneous considerations accentuating the action of the 11A Respondent, and the instance of exercise of power in the impugned situation is tainted with *mala fides* and improper intent. He submitted that the former President's conduct gives rise to the violation of

the right to equality and equal protection of the law guaranteed by Article 12(1) of the Constitution.

474. **Submissions of the President's Counsel for the 9th and 10th Respondents -** Dr. Romesh De Silva, PC submitted that judicial review of an act of the President is not confined to review of procedural impropriety. He emphasized that the same standard of judicial review which is applicable to other matters are applicable to the acts done by the President. These he submitted include *inter-alia* principles of *ultra vires,* unreasonableness, arbitrariness, lack of *bona-fides,* proportionality, rules of natural justice, and legitimate expectations.

Views of the Court and Conclusions reached regarding the question of reviewability and justiciability of the President's decision to grant a Pardon

475. The Constitution and associated doctrines founded upon which the Constitution has been drafted, such as (a) the *rule of law,* (b) the doctrine of the *separation of powers*, and (c) *checks and balances* placed in the Constitution to confer a balance in the exercise of executive, legislative and judicial powers and prevent any infringement of the Constitution and the abuse of power, reflect the conferment of *co-equal status* to the executive, legislative and judicial organs of the state. That is to facilitate the proper and lawful discharge of functions and the exercise of powers on behalf of the People who are collectively the sovereigns of the Republic. The respective constitutional obligations and mandates of the Executive, the Legislature and the Judiciary are to be discharged for the purpose of giving effect to the executive, legislative and judicial components of the People's sovereignty in the manner provided by the Constitution. These three organs of the state are required by the Constitution to discharge their constitutional duties in terms of the law, independently of each other, and as provided for and circumscribed by the Constitution.

476. Therefore, I am acutely conscious that, should the Judiciary abstain from or fail to discharge any part of its constitutional duties of exercising judicial power and confer on the Executive, any status that is not consonant with the Constitution, it would be unconstitutional. Furthermore, if the Judiciary through self-imposed restraint provide an opportunity to the Executive to rise above the law and act in violation of the *rule of law*, such self-restraint would by itself be a breach of the trust vested in the judiciary by the Public through the Constitution. That would amount to a violation of the Public Trust doctrine by the Judiciary. In this regard it must be recognized that the Judiciary through its power of judicial adjudication has been conferred by the Constitution the responsibility of ensuring that all three organs of the state (including the judiciary itself) adheres to the Constitution and respects and abides by the *rule of law*.

Reviewability and Justiciability

477. Judicial review is the means by which a court of law engages in scrutiny of an impugned decision, for the purpose of determining whether the impugned decision is lawful. What is sought to be impugned may be a decision *per-se,* refusal to arrive at a decision, conduct arising out of a decision, or the intentional failure to take a particular course of action which is also referable to a corresponding decision to that effect. Thus, judicial review is a judicial procedure adopted by a court vested with jurisdiction to cause judicial review, to determine the legality of an impugned decision. In ***R (Keyu) and Others v. Secretary of State for Foreign and Commonwealth Affairs and Another*** *[(2015) UKSC 69]* Lord Neuberger held that *"There is no more fundamental aspect of the rule of law than that of judicial review of executive decisions or actions"*.

478. Judicial review is carried out by a consideration of the (a) law that empowers a decision to be taken, (b) the decision-making process followed by the decision-maker, and (c) the facts and circumstances considered by the decision-maker and other relevant factual considerations, pertaining to the impugned decision. Judicial review is carried

out by applying legal standards and criteria, and nothing else. Judicial review is a means by which a court engages in determining the legality of the impugned decision. Judicial review audits the manner in which a decision has been arrived at. Unlike in an Appeal, the court engaged in judicial review is not concerned about the correctness of the impugned decision, but its lawfulness. In the case of ***Council of Civil Service Unions v Minister for the Civil Service*** (referred to popularly as the *'GCHQ* case')**,** Lord Roskill citing precedent observed that "*judicial review is not an appeal from a decision, but a review of the manner in which the decision was made."*

479. Judicial review results in a pronouncement being made by court in the form of a declaration regarding the lawfulness or otherwise of the impugned decision. In appropriate situations, in addition to such declaration, relief would also be granted. Often, such relief takes the form of quashing of the decision found to have been unlawful. Whether or not further relief should be granted is determined by a different set of principles. The principles used to determine the lawfulness or otherwise of an impugned decision is distinct from the criteria used to determine whether specific substantive relief should be granted. Nevertheless, they are inter-related.

480. Judicial review facilitates the maintenance of the state and the society in terms of the *rule of law,* and ensures that public affairs are conducted in accordance with the *rule of law*. In ***R (Evans) and Another v. Attorney General*** *[(2015) UKSC 21]* Lord Neuberger held that *"… it is fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well-established exceptions (such as declarations of war), are jealously scrutinized"*. In ***AXA General Insurance Ltd and Others v. The Lord Advocate and Others*** *[(2011) UKSC 46]* Lord Reed held that *"Judicial review under the common law is based upon an understanding of the respective constitutional responsibilities of public authorities and the courts. The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the*

responsibility of ensuring that the public authority in question does not misuse its powers or exceeds their limits" Thus, it would be seen that, broadly, judicial review advances public interest by protecting the *rule of law* and seeks to protect the citizenry from possible abuse of power by public authorities.

481. It is difficult, if not impossible to define the scope of judicial review, save as to very broadly stating that, generally, decisions of public nature, taken or purported to have been taken under the law, which have an impact on legal interests of persons are amenable to judicial review. Further, as seen in judicial precedent, it is not every such public decision that is reviewable. Whether or not a particular decision is reviewable, is determined, founded upon the grounds of judicial review.

482. A detailed consideration of judicial precedent (particularly of the United Kingdom, where contemporary Administrative Law was born, has grown and remains in a process of evolution) shows that the outer boundaries of reviewability are rather ill-defined, in-conclusive, rather murky, and hence not clearly discernible. Furthermore, direct incorporation of the present status and the boundaries of judicial review as contained in the judgments of superior courts of the United Kingdom into the law of Sri Lanka may not be possible and may be wholly inappropriate in certain circumstances. This is due to certain significant differences between the two Constitutional arrangements, corresponding legal systems, and jurisdictions vested in court.

483. These differences stem from the republican character of the Democratic Socialist Republic of Sri Lanka, sovereignty being vested in the People, the inalienable nature of the sovereignty of the People, the manner in which the Constitution dictates that the sovereignty of the People be exercised by organs of the state, significant other features of the Constitution, and the legal system of this country. These features can in my view be encapsulated in the following manner:

(i) The source of all power is ultimately referable to the sovereignty of the People, and is channeled to the three organs of the state through the Constitution.

(ii) The absence of any constitutional link with the native monarchical or colonial governance past of the country.

(iii) The Constitution not recognizing that the sovereignty is vested in the Parliament or the Parliament entertaining any supremacy in comparison with the other two organs of the state.

(iv) Save as provided by the Constitution, the requirement that the sovereignty of the People be exercised collectively in the manner provided in the Constitution.

(v) The emphasis that the sovereignty of the People includes not only the executive, legislative and judicial power, but also fundamental rights and franchise which may be exercised individually.

(vi) The existence of a parity of status between the Executive, the Legislature and the Judiciary, as they form the three integral, indispensable co-equal organs of the state.

(vii) The existence of unique checks and balances which have been provided by the Constitution essentially to prevent an abuse of power, and to ensure legitimacy and the protection of public good.

(viii) The legal system of Sri Lanka not recognizing the existence of Royal or Sovereign prerogatives.

(ix) All power being necessarily referable to sources of written - law which are provided by the Constitution and other statutory instruments.

(x) Neither the President, the Parliament nor the Judiciary being vested with any plenary power which stems from any source outside the Constitution, and

the exercise of all power being subject to Constitutional safeguards which are aimed at the maintenance of the *rule of law*.

484. Nevertheless, subject to these differences, for the purpose of determining whether a particular decision of the Executive is reviewable or not, there is significant relevance and usefulness in courts of this country considering and applying the principles of law recognized by the superior courts of the United Kingdom and other comparative jurisdictions such as India, and reflected in judgments of superior courts of such countries. Principles contained in such judgments unless for specified reasons need to be excluded due to irrelevance, can and may be borrowed and applied to determine local cases, with variations where necessary.

485. Be that as it may, whether or not a particular decision is reviewable is founded upon the answer to several key issues. They are as follows:

a) jurisdiction vested in court;

b) nature of the body or office whose decision is sought to be impugned;

c) source of the power conferred on such body or office, the purported exercise of which is being impugned;

d) character, nature and the scope of the power;

e) object and purpose for which the power has been vested;

f) the nature and scope of the discretion vested in the decision-maker;

g) impact, effect and consequences arising out of the purported exercise of the power and the impugned decision;

h) circumstances under which the power had been exercised on the impugned occasion;

i) factors taken into consideration by the decision-maker; and

j) reasons cited by the decision-maker for the exercise of the power.

486. Associated with and intertwined with judicial review, is the concept of 'justiciability'. Whether an impugned decision is justiciable or not means whether it is amenable to judicial review through the exercise of the jurisdiction vested in Court. Determining whether a particular decision is justiciable or not, is founded primarily upon whether due to (a) the very nature of the power that has been exercised, (b) the purpose for which the power has been conferred, (c) the manner in which the power has been exercised, and (d) the impact, effect or consequences of the exercise of the power, exercise of such power should be made susceptible to the judicial process of review, founded upon legal standards and objective criteria, such as procedural *vires*, good-faith, objectivity, reasonableness, non-arbitrariness, and proportionality.

487. A realistic and pragmatic consideration of certain instances where power has been vested in public authorities (in particular, on the chief of the Executive branch of the state – the President) by the Constitution and by other statutory instruments, reveal that corresponding decision-making may justifiably not be founded upon only on considerations which are reflective of legal standards and principles. Further, in view of the nature of the power and the circumstances under which such power is required to be exercised, it may not be possible to determine the lawfulness or otherwise of such decision founded exclusively upon legal standards and principles. Furthermore, a court of law may be ill-equipped to review the impugned decision of the Executive, on its merits. There may be certain decisions that cannot be subject to judicial scrutiny founded only upon legal standards and principles (provided conditions precedent to the exercise of the power have been satisfied and the decision concerned is procedurally *intra-vires*). In such circumstances, an impugned decision may not be justiciable and hence is likely to be held by this Court to be beyond the scope of judicial review. Therefore, unless the public authority is found to have acted in violation of essential procedural requirements imposed by law, the Court is more likely than not to exercise judicial restraint, and refrain from exercising judicial power and judicially adjudicating on whether the impugned decision is lawful.

488. The primary reasons for holding that a particular decision is not justiciable, are as follows:

(i) Given the nature of the power vested, the circumstances under which the power has been exercised and the factors taken into consideration, due to the very nature of the process of judicial review or due to lack of necessary expertise, the court is not sufficiently equipped or competent to review the impugned decision.

(ii) The decision-maker was required quite justifiably to take into consideration certain factors such as political factors which cannot be judicially reviewed founded upon exclusively upon legal standards and criteria.

(iii) The impugned decision is extremely complex or contains policy-laden intricacies or polycentric issues, which make review through the judicial process difficult, if not impossible.

(iv) The exercise of the power justifiably entails the decision-maker to engage in making subjective choices of his own, as he has been vested with such power to be exercised for public good.

489. While I shall remain open to further consideration and where necessary conclude otherwise, it appears *ex-facie* that due to one or more of the above-listed factors, there may be some instances where the exercise of certain powers vested in the President by the Constitution that may not be amenable to judicial review due to want of justiciability.

490. It is necessary to note that, it would not be appropriate to provide a list of such powers, as such a list would not be neither exhaustive or definitive, as to whether the exercise of a particular power under given circumstances is justiciable or not. Whether an impugned decision should be subject to judicial review, should ideally be determined on a case-by-case basis, based upon a consideration of *inter-alia* the (a)

nature of the power exercised, (b) effects arising out of the exercise of the power, (c) grounds on which the decision is sought to be impugned, (d) factors taken into consideration by the decision-maker, and (e) reasons and justification given by the decision-maker for having arrived at the impugned decision. In the circumstances, a court will not unquestioningly accept an assertion that a particular instance of exercise of power and corresponding decision-making is not justiciable. Whether or not a particular decision is justiciable must be determined not as a preliminary issue at the commencement of the hearing, but at the end of the case following a consideration of the above-mentioned factors.

491. It would be necessary to note that *"judicial review has developed to the point where it is possible to say that no power – whether statutory, common law or under a prerogative – is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of a public power, its scope and its substance. … even when discretionary powers are engaged, they are not immune from judicial review. Discretion has been described as the "hole in the (legal) doughnut", but the hole is not automatically a lawless void. …"* [De Smith's Judicial Review, 9th Edition, Part I, Chapter I, Part 1-03-5]

492. The above view should be seen in the backdrop of the ever-expanding canvas of judicial review, occasioned by responsibility being conferred on courts by law to protect public and national interests by upholding the *rule of law* through the exercise of judicial review of executive decisions. Courts are being increasingly called upon to exercise its jurisdiction by causing judicial review in order to protect public interest in possible instances of exercise of discretionary power in a manner which may be so manifestly contrary to the objects and purposes to be achieved by the exercise of such power, and in the impugned occasion exercised to achieve a collateral purpose, thus amounting to an abuse of power. In an instance of abuse of power, it is judicial review

that would enable a declaration of the unlawfulness of the impugned exercise of power and the restoration of the harm inflicted.

493. In view of the foregoing, it would not be correct to assume that any particular power vested in the President attaches to itself the power to exercise unfettered discretionary authority, and that the power has been conferred on him to be exercised as a *carte blanche*. **All power conferred by law, must be exercised for the object and purpose for which such power has been vested, in *good-faith* and objectively, and in a manner that serves public interest.** As power vested in public functionaries have not been inherited or privately acquired by them, or been vested in them by an all-powerful monarch or bestowed on them by a supra-natural all-mighty being, and as power has been conferred necessarily by law, to be exercised for a specific object and purpose, to secure public good, and not to be exercised according to the whims and fancies of a public functionary or to achieve personal gain, **the exercise of power must be amenable to judicial review in order to ensure the exercise of such power to be in conformity with the *rule of law*.** However, as stated above, **the court may for good reason refrain from exercising judicial review (i) since it is incapable of exercising judicial review as its jurisdiction has been ousted by Parliament, or (ii) in view of the circumstances peculiar to the case at hand, the court is incapable of determining the merits of the impugned decision purely based on the application of legal criteria and standards. In the latter situation, court will voluntarily restrain itself due to the reason that the impugned decision is not justiciable, and thereby showing not servility to the decision-maker, but prudential deference to the decision taken by the decision-maker**.

494. I wish to conclude this part of the judgment by observing that non-justiciability cannot be easily tolerated as it is against the very grain of the *rule of law* which is a founding principle of this Republic, the mechanism that protects constitutionalism, and the guarding principle for the recognition of the sovereignty of the people and protection

public interest. Thus, there exists a rebuttable presumption in favour of reviewability of public decision-making.

Judicial Review and Justiciability of the power conferred on the President by Article 34(1) of the Constitution

495. What is now necessary is to determine whether a decision taken by the President acting purportedly under the powers vested in him by Article 34(1) of the Constitution is justiciable and therefore amenable to judicial review founded not only upon procedural regularity, but also upon the merits of the impugned decision.

496. Notwithstanding the differences in the Constitutional frameworks (listed above) between the United Kingdom and Sri Lanka, it would be useful to bear in mind that in ***Pitman v. State of Trinidad and Tobago*** *[(2017) UKPC 6]* Lord Hughes sitting in the Bench of the Privy Council has held that *"the prerogative of mercy … importantly is subject to judicial control through judicial review"*. He has in his judgment highlighted the importance of independent judicial control of the exercise of the power of the prerogative of mercy.

497. Following the above introductory exposition of the principles of *judicial review* and *justiciability*, I shall now specifically deal with the several arguments placed before this Court by the learned Additional Solicitor General.

(i) When judicially reviewing a decision of the President to grant a pardon to a person convicted and accordingly has been condemned to suffer death by a competent court, should this Court consider only whether the President had acted in terms of the procedure laid down in the proviso to Article 34(1) of the Constitution, or would it be within the jurisdiction of the court to additionally consider the lawfulness of the impugned decision based on the merits of the decision?

498. The issue to be determined by this Court is whether, in the instant case, should judicial review be limited to a consideration of procedural *vires,* or whether in addition to such consideration, the Court is entitled in law to go into the merits of the impugned decision founded upon legal standards and criteria.

499. In support of the submission made in this regard, the learned ASG gave four reasons.

1. In certain other jurisdictions, there exist limits on judicial reviewability of the exercise of the power to grant pardon.
2. The scope of judicial review of the acts of the President is limited.
3. The doctrine of separation of powers supported by checks and balances contained in the Constitution, prevents judicial review on its merits of the impugned decision to grant a pardon.
4. The power of pardon being a *sui generis* power, is outside the scope of judicial review.

500. **Principles of judicial review contained in judicial precedents of other national jurisdictions -** Under this first ground, the learned ASG cited several judgments from the United Kingdom, India and South Africa, and invited this Court to follow the principles contained therein.

501. As regards the applicability of judgments of other countries, in ***Kumarage v. OIC, Special Crimes Investigation Bureau, Ratnapura and Another*** *[(2021) 2 Sri LR 202 at 224]* this Court has made the following observations:

> *"… Courts must exercise great caution and apply extreme diligence when considering a judgment of a Court of a foreign jurisdiction, as a judgment must be necessarily viewed and appreciated in the backdrop of the applicable law, sources of law, evolution of law, jurisdiction of the relevant Court, comparable binding judicial precedents, subsequent developments of judicial precedents,*

natural and inherent conduct of the people of that country, and the socio-cultural and other conditions and circumstances which prevailed in such country at the time the particular judgment was pronounced. All such relevant factors may not be apparent ex-facie in the cited judgment and would not be within the domain of knowledge of judges invited to consider such judgment of the relevant foreign Court."

502. As I have observed previously, the framework of the Constitution of Sri Lanka and the related law, stand unique due to *inter-alia* the ten (10) features listed earlier in this judgment. Therefore, the powers vested in the Executive, the Legislature and the Judiciary of Sri Lanka and the inter-organ relationship, and particularly the judicial power conferred on the Judiciary to be exercised on behalf of the People, cannot be compared with the judicial power vested in the judiciaries of those three countries. Thus, the scope of judicial review which the judiciaries of the United Kingdom, India and South Africa are empowered to exercise by their respective Constitutions and other laws of such countries, cannot be compared with the judicial power vested in this Court by Article 126 read with Articles 17 and 4(c) of the Constitution. Thus, limitations if any, which the courts of such countries may have in reviewing a decision to grant a pardon cannot be said to directly apply to this Court.

503. Be that as it may, I shall with caution consider the leading judgments cited by the learned ASG, in order to see whether in fact, the courts of the three countries cited above have expressed the view that they have limited jurisdiction to judicially review decisions to grant pardons, and whether such jurisdiction is limited to reviewing procedural *vires* of the impugned decision.

504. The learned ASG cited the judgment of this Court in ***Premachandra v. Major Montague Jayawickrema and Another***, *[(1994) 2 Sri L.R. 90],* wherein the Court had quoted from a submission made by a counsel in that case referring to the judgment of Lord Roskill the ***GCHQ case*** reported in *[(1984) 3 WLR 1174]*, seemingly expressing

agreement with counsel that there are matters which undoubtedly do not involve legal or constitutional rights, powers and duties, and which may therefore be regarded as 'purely political'. The judgment contains a quote from Lord Roskill's judgment extracted from the submissions of counsel to the following effect:

> *"Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because of their nature and subject matter are such as not to be amenable to the judicial process."*

505. What seems to have escaped the attention of the learned ASG is the paragraph immediately below the paragraph he has quoted from the judgment of this Court. In that paragraph, this Court has commented as follows:

> *"As observed in that case, the controlling factor is not the source of the power, but its subject matter. The fact that in the UK the appointment of ministers is by the Queen, in the exercise of the prerogative, is beyond review does not conclude the question under our law; as indeed it did not under the laws of Nigeria and India. … In the absence of a written Constitution, defining the jurisdictions and powers of the several organs of government, there may well be reasons why the acts of the Sovereign, particularly in relation to what is historically the 'High Court of Parliament', cannot be questioned in the Sovereign's own Courts.* ***In Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the judiciary.****"* [Emphasis added.]

506. Furthermore, a careful consideration of Lord Roskill's opinion in the ***GCHQ Case*** reflects that, his views as regards the categories of powers which may be beyond judicial review is provisional and *obiter* (as held in the case of *Home Department, ex-parte Bentley*). It would be seen from the case of *Bentley* (cited below) and ***Lewis v.***

Attorney General of Jamaica**, [(2001) 2 AC 50],* the law on the nature and the scope of judicial review of prerogatives including in particular, the prerogative power of mercy has undergone considerable evolution since the delivery of Lord Roskill's opinion in the ***GCHQ case. It is now the position of the English law that (a) a distinction does not lie between the principles pertaining to judicial review with regard power exercised by virtue of prerogatives and other sources of power such as statutory power, and (b) the exercise of prerogative powers conferred by Orders in Council could be subject to judicial review based on ordinary principles of procedural impropriety, illegality, irrationality and proportionality. However, independent of the source of power, reviewability may be restricted on grounds pertaining to justiciability of the impugned decision. At present, it is observable that justiciability is founded not upon the source of the power, not even the subject matter and its nature, but on the factors that may be legitimately taken into consideration when exercising the power and taking corresponding decisions.

507. Citing the judgement of Lord Justice Watkins in ***R. v. Secretary of State for the Home Department, ex-parte Bentley**, [(1993) 4 All ER 442 (Divisional Court of the Queen's Bench)],* in which, the Home Secretary, based on policy, refused to recommend to the Queen of the United Kingdom the grant of a pardon posthumously to a person convicted of having committed murder, the learned ASG submitted that *'there may be certain circumstances in which the Royal prerogative of mercy is reviewable'*. He further submitted that Lord Justice Watkins had refrained from providing a definitive answer as regards the scope of such judicial review. He submitted that Lord Justice Watkins had allowed courts to decide on judicial reviewability on a case-by-case basis. I do not find myself in disagreement with this submission. However, what is even more important to note is that, Lord Justice Watkins has in his judgment observed that *"… the question is simply whether the nature and the subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they*

are ill-equipped to do so? Looked at in this way, there must be cases in which the exercise of the Royal Prerogative is reviewable, in our judgment. ***If for example it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere, and in our judgment, would be entitled to do so"*** [Emphasis added]. Thus, it is clearly seen that ***R. v. Secretary of State for the Home Department, ex-parte Bentley*** serves as precedent (though not binding on this Court) on the principle that even the exercise of power under the Royal Prerogative of Mercy (in contrast with the power to grant a pardon being conferred on the President by the Constitution) may be amenable to review on the merits of the impugned decision such as on grounds of irrationality and unreasonableness and proportionality.

508. Moving on to judicial precedent from India, citing the judgment of the Supreme Court of India, in ***Maru Ram v Union of India and Others*** *([1980)] AIR 2147]*, the learned ASG submitted that *'although the executive clemency is subject to judicial review, the Supreme Court of India has appreciated the need to not curtail "the wide power of executive clemency" by declaring that "the wide power of executive clemency cannot be bound down even by self-created rules."'* The learned ASG further submitted that in the said judgment, the Supreme Court of India has expressed the view that it is only in rare cases where consideration will be given to whether the impugned decision is "*wholly irrelevant, irrational, discriminatory or mala fide*" and examine the decision on that basis.

509. Upon a careful consideration of the entire judgment, I do not see support for the ASG's submission that a decision to grant a pardon is not subject to review on its merits. In fact, the *Maru Ram* judgment supports the view that the exercise of the power to grant a pardon is reviewable even on its merits founded upon legal standards.

510. Citing ***Kehar Singh and Another v. Union of India and Another*** *[1989(1) SCC 204]*, learned ASG submitted that the Supreme Court of India has observed that it was perhaps unnecessary to spell out specific guidelines for the exercise of the power of pardon, since such guidelines may not be able to conceive of all myriads, kinds and categories of cases which may come up for the exercise of such power. Mr. Pulle cited the following excerpt of the judgment:

> *"At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with the question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in Maru Ram, etc. v. Union of India … The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court. … We are not concerned with the merits of the decision taken by the President, nor do we see any conflict between the powers of the President and the finality of the judicial record, a matter to which we have adverted earlier. Nor do we dispute that the power to pardon belongs exclusively to the President and the Governor under the Constitution."*

511. The learned ASG submitted that the Supreme Court of India had explicitly declined considering the merits of the decision taken by the President in exercising the power of pardons.

512. In my view, the ***Kehar Singh*** judgment must be seen in the backdrop of the facts and circumstances of that case. Kehar Singh stood accused of having been culpable for the murder of Prime Minister of India Srimathi Indira Gandhi. He was convicted for that offence and sentenced to death. The appeal against the conviction was dismissed and the Supreme Court refused the grant of special leave. A subsequent review

petition filed in court was also dismissed. Subsequently, Kehar Singh's son Rajinder Singh petitioned the President of India seeking the grant of a pardon to Kehar Singh. The ground on which the pardon was sought, was that Kehar Singh had been wrongly convicted and that he was an innocent person. In support of that ground, the petitioner produced certain extracts of the transcript of evidence led at the trial. The petitioner also sought an opportunity for their legal representatives to make representations to the President in support of the petition. Subsequently, counsel representing Kehar Singh wrote to the President and sought a hearing before the President, to present their case. That request was denied. On behalf of the President, it was communicated to the petitioner, that the President was of the opinion that he cannot go into the merits of the decision finally decided by the highest court of the land. Later, the petitioner was informed that the petition seeking a pardon was rejected by the President. Thereafter, Kehar Singh petitioned the Supreme Court of India seeking to impugn the decision of the President of India refusing to grant a pardon to him.

513. A careful consideration of the judgment reveals that at the hearing before the Supreme Court of India, several issues had been argued. In the above-mentioned factual backdrop, and the issues argued before that court, what is relevant is that the Supreme Court of India has in addition to what was cited by the learned ASG, propounded the following principles:

(a) The power of pardon is a part of the constitutional scheme. This power has been reposed by the People through the Constitution in the Head of State and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when the occasion arises in accordance with the discretion contemplated by the context.

(b) When exercising the power of pardon, the President acts in a wholly different plane from that in which the court acted. He exercises a constitutional power,

the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. This is notwithstanding the practical effect of the presidential act that results in the removal of the stigma attaching the accused of having been found *'guilty'* and the practical effect of commuting the sentence imposed on him. The legal effect of a pardon is wholly different from a judicial supersession of the original sentence.

(c) The President is entitled to examine the case record containing evidence of the criminal case and determine for himself whether the case is one that deserves the grant of relief. The President is entitled to go into the merits of the case, notwithstanding that it has been judicially concluded by the consideration given to it by the court.

(d) There is no right for the condemned prisoner to insist on an oral hearing before the President. The manner of consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for the proper and effective disposal of the petition.

(e) The order of the President cannot be judicially reviewed on its merits except within the strict limitations defined in *Maru Ram v. Union of India.*

(f) The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power, is a matter for the Court exercising judicial review.

(g) The area of the President's power to grant a pardon falls squarely within the judicial domain and can be examined by the Court by judicial review.

514. In my view, the above-mentioned principles must be seen in the light of the following distinguishing features between the power to grant pardon vested in the President of India, and the power conferred on the President of Sri Lanka by our Constitution. First, the President of India does not by himself exercise executive power, and he must act on the advice of the Prime Minister and the Council of Ministers. That is not the situation under the Constitution of Sri Lanka. Second, Article 72 of the Constitution of India does not contain a requirement parallel to the proviso to Article 34(1) of the Constitution of this country, which necessitates the President of India to adhere to a stipulated procedure when determining whether or not a pardon should be granted to a person who has been condemned to suffer death. Furthermore, in any event, when seen in the backdrop of the issues the Supreme Court was required to adjudicate upon in that case, the observation of the Supreme Court of India that, the order of the President cannot be subjected to judicial review on its merits, is *obiter dicta*. In any event, **the Supreme Court of India has conceded that the order of the President regarding the grant or otherwise of a pardon can be judicially reviewed even on the merits, within the scope defined in the case of *Maru Ram*. And in *Maru Ram* the Supreme Court of India held that a decision of the President with regard to a pardon can be reviewed on its merits on grounds of irrelevancy, irrationality, discrimination or mala fides. However, by the use of the terms 'wholly irrelevant' and 'wholly irrational', the court has insisted on a very high threshold.**

515. It is thus seen that judicial precedent of India shows clearly that the decision of the President on the grant or refusal to grant a pardon can be judicially reviewed on its merits based on the criteria referred to in the ***Maru Ram*** case.

516. Furthermore, it is pertinent to note that in ***Kehar Singh*** case, the Supreme Court of India has also proceeded to hold that "*wide as the power of pardon, commutation and release … is, it cannot run riot"*, that "*… all public power including constitutional power,*

shall never be exercisable arbitrarily or mala fide …" and that *"the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of a citizen, cannot be a law unto itself, but must be informed by the finer canons of constitutionalism"*. These observations lend support to the submissions of the learned President's Counsel for the Petitioner and the 9th and 10th Respondents, that the decision of the President either to grant or refuse to grant a pardon, is subject to judicial review not only on the ground of procedural regularity, but on the merits of the decision as well.

517. In view of the above analysis, I find myself unable to accept the learned ASG's assertion that *'the Indian Supreme Court has explicitly declined considering the merits of the decision taken by the President in exercising the power of pardon.'* In fact, the position of judicial precedent of India regarding that point is to the contrary. The Supreme Court of India has very specifically held that such decision is reviewable on its merits on grounds of irrelevancy, unreasonableness (when the impugned decision is wholly unreasonable), discrimination and *mala fides*. The acceptance of these principles is seen even in the more recent case of ***Swaran Singh v. State of U.P.*** *[(1998) 4 S.C.C. 75]* and ***Bikas Chatterjee v. Union of India*** *[(2004) 7 S.C.C. 634].* In the ***Swaran Singh*** case, the Court relying on the position taken up in ***Kehar Singh v Union of India***, has held that *"if such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of constitutionalism, the by-product order cannot get the approval of the law and in such cases, the judicial hand must be stretched to it."* It is notable that in the case of ***Epuru Sudhakar and Another v Government of Andhra Pradesh*** *[2006 AIR SC 3385]*, the Supreme Court, setting aside an order of a Governor of a State to grant a pardon, held that the orders of the President or the Governor under Articles 72 or Article 161, as the case may be, can be subject to judicial review, and can be impugned on the basis that (i) such order has been passed without application of mind; (ii) the order is *mala fide*; (iii) the order has been passed found on extraneous or wholly irrelevant considerations; (v) relevant material have been kept

out of consideration, and (vi) the order suffers from arbitrariness. The court advanced a step further to hold that *"since there is a power of judicial review, however limited it may be, the same can be rendered to be an exercise in futility in the absence of reasons"*. It was further held that *"…a person who seeks exercise of highly discretionary power of a high constitutional authority, has to show bona fides and must place material with clean hands"*.

518. It is also important to note that, none of the judgments of the Supreme Court of India cited by the learned ASG contain any view which departs from the grounds of judicial review on the merits contained in the ***Maru Ram*** case.

519. The learned ASG also submitted to the attention of this Court certain judgments of the Constitutional Court of South Africa. While one such case has been decided based on the 'interim Constitution of South Africa' (which was in force only from 1994 to 1997), the other cases have been decided on the present Constitution of South Africa. I shall refrain from commenting on those judgments, since this Court does not have the expertise or the resources that would be necessary to determine the applicability of the legal principles contained therein to the legal system of Sri Lanka.

The scope of judicial review of the acts of the President in Sri Lanka

520. The learned ASG submitted that this Court has so far not determined that all acts of the President are subject to judicial review. In support of that contention, he submitted the judgment of a Divisional Bench of this Court in ***Rajavarothiam Sampanthan v. Hon. Attorney-General and Others*** *[SC FR Application No. 351/2018, SC Minutes of 13th December 2018]*.

521. It would be seen that in the said case, a Divisional Bench of this Court was called upon *inter alia* to determine whether the Court had jurisdiction to judicially review a decision of the President who had purportedly acted under and in terms of Articles 70(1) of the Constitution in dissolving the Parliament and calling for a General Election.

It had been contended on behalf of the President that the President's decision was a *'political decision'* as when taking the impugned decision, the President had taken into consideration certain *'political'* factors. Perusal of the judgment reveals that the Honourable Attorney General had submitted that in the circumstances, the impugned decision was *'not justiciable'* under Article 126 of the Constitution. In that regard, the judgment of Chief Justice Nalin Perera contains the following passage:

> *"It appears to me that this is an appropriate instance in which the maxim should be applied to raise the inference that to the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution denotes that all the other powers of the President which are listed in Article 33 (2) are, subject to review by way of an application under Article 126 in appropriate circumstances which demand the Court's review of those powers. No doubt* ***some of the powers vested in the President by Article 33 (2) may not, in practice, be reviewable by an application under Article 126 depending on the facts before court.*** *For example, it is hard to think of instances where the performance by the President of a purely ceremonial function [as under Article 33 (2) (b)] would be amenable to review by this Court. On the other hand,* ***it is conceivable that several of the other executive powers vested in the president by Article 33 (2) (c) [other than under Article 33 (2) (g) which is expressly excluded] could be, in appropriate circumstances, subject to challenge under a fundamental rights application under Article 126.***
>
> *In this connection, it is relevant to mention here the decision in EDWARD SILVA vs. BANDARANYAKE [1997 1 SLR 92 at p. 95] where Fernando J, referring to the President's power of appointing Judges of the Supreme Court stated "The learned Attorney-General submitted that the President in exercising the power conferred by Article 107 had a "sole discretion". I agree with this view. This means that the*

eventual act of appointment is performed by the President and concludes the process of selection. It also means that the power is neither untrammelled nor unrestrained, and ought to be exercised within limits, for, as the learned Attorney-General said, the power is discretionary and not absolute. This is obvious. If, for instance, the President were to appoint a person who, it is later found, had passed the age of retirement laid down in Article 107(5), undoubtedly the appointment would be flawed: because it is the will of the People, which that provision manifests, that such a person cannot hold that office. Article 126 would then require this Court, in appropriate proceedings, to exercise its judicial power in order to determine those questions of age and ineligibility. Other instances which readily come to mind are the appointment of a non-citizen, a minor, a bankrupt, a person of unsound mind, a person who is not an Attorney-at-Law or who has been disbarred, or a person convicted of an offence involving moral turpitude."

It should also be mentioned that in SINGARASA vs. AG (supra) S.N. Silva CJ held that the accession by the then President to the Optional Protocol to the International Covenant on Civil and Political Rights was in excess of the power of the President as contained in the then Article 33 (f) of the Constitution [which is on the same lines as Article 33 (2) (h) of the Constitution after the 19th Amendment] and did not bind the Republic qua State and has no legal effect within the State. Although that was a decision where the Supreme Court was hearing an Application for Special Leave to Appeal from a judgment of the Court of Appeal, ***the principle laid down by the Court that an act of the President in the exercise of his powers under Article 33 (2) (h) is subject to review by the Court fortifies the conclusion reached above that all the powers listed in Article 33 (2) [except the power to declare War and Peace listed in Article 33 (2) (g)] are subject to review under Article 126 in appropriate circumstances.***" [Emphasis added.]

522. Thus, it is seen that in the context of the submissions made in that case before the Supreme Court, the Divisional Bench has held that, some of the powers vested in the President by Article 33 (2) of the Constitution **may not, in practice, be reviewable** in an Application under Article 126. That would in my view be dependent on the facts before court and the grounds of impugning the decision. The Divisional Bench has proceeded to hold that, for example, it is hard to think of instances where the performance by the President of a purely ceremonial function [such as under Article 33 (2) (b)] would be amenable to review by this Court.

523. With regard to the judgment of the Divisional Bench, I wish to observe the following:

- First, the afore-stated observation (cited by the learned ASG) is *obiter* in comparison with the key issues determined by the Divisional Bench in that case. What appears evidently as being a *ratio decidendi* of that judgment is the fact that a decision of the President to dissolve Parliament taken ostensibly under Article 70(1) of the Constitution is reviewable under the jurisdiction vested in the Supreme Court by Article 126 read with 17 of the Constitution.
- Second, the Court has proceeded to observe that it is conceivable that some of the other executive powers vested in the President by Article 33 (2) [other than under Article 33(2)(g), which is expressly excluded] could in appropriate circumstances be subject to challenge in an Application alleging an infringement or imminent infringement of fundamental rights.
- Third, the Divisional Bench appears to have been acutely conscious that reviewability (excluding the power vested in the President by Article 33(2)(g) of the Constitution to declare 'war and peace') is primarily founded upon factors which the decision-maker (the President) had taken into consideration when arriving at the impugned decision. Should it be presented to Court that the in the circumstances of the case, the President was required to take into consideration factors *inter alia* certain factors which cannot be assessed purely

founded upon legal criteria and standards and therefore not justiciable, the Court would then refrain from judicially reviewing the impugned decision, not because it lacks jurisdiction, but because the impugned decision is unsuitable for judicial review due to reasons of non-justiciability.

- Fourth, the decision of the Divisional Bench contains no reference to the reviewability of the power of the President to grant a pardon under and in terms of Article 34 of the Constitution.

524. It is important to note that, in matters where the decision-maker cites reasons for his decision which cannot be assessed purely based on legal standards and criteria, refraining from engaging in judicial review would not be founded upon the absence or lack of jurisdiction of the Court to cause judicial review, but on the premise that given the reasons for the decision cited by the President, the impugned decision of the President cannot be judicially reviewed as the issues involved are non-justiciable.

525. I have observed that in the instant matter, neither the 11A Respondent – former President nor the Honourable Attorney-General has asserted that when arriving at the impugned decision to grant a pardon to the 2nd Respondent, the decision-maker (the President) had to (as he was required to) take into consideration certain factors which are not justiciable before a court of law.

526. Due to the afore-stated reasons, guided by judicial precedent (cited above) and the findings of Justice Surasena in the *Duminda Silva pardon case,* **I hold that a decision of the President on the grant or refusal of the grant of a pardon is reviewable by the Supreme Court in the exercise of its jurisdiction contained in Article 126 read with Article 17 of the Constitution, not only on grounds of procedural vires, but on the merits of the decision as well.**

Judicial review of the exercise of the power to grant a Pardon on its merits and the doctrine of separation of powers and the checks and balances contained in the Constitution

527. In this regard, the submission of the learned Additional Solicitor General was that judicial review of the exercise of power by the President to grant a pardon to a person, founded upon the merits of the decision would violate the doctrine of separation of powers recognized by the Constitution, and it would *inter alia,* impede upon the *checks and balances* contained in the Constitution. He therefore asserted that, this Court should refrain from reviewing the impugned decision.

528. The mechanism of separation of powers with functions of government (the 'state') being recognized separately in a tripartite manner as 'executive', 'legislative' and 'judicial' and such functions being separately assigned to be exercised by three different persons or institutions, with there being a bar on the functions assigned to one person or an institution being exercised by another, has evolved over a period of time. The system of governance through the separation of powers should be primarily viewed as being distinct from the system of governance by monarchs, who possessed the source of all powers and exercised plenary executive, legislative and judicial power. There is thus a monopoly of power vested in the monarch. In monarchical governance systems, all officials and institutions of governance derived power from the monarch. They exercised power to the extent such power was vested in them by the monarch and necessarily subordinate to the monarch.

529. Principles embedded in the system of governance which recognizes separation of powers has been hardened into a doctrine. A study of this doctrine, as elaborated by British philosopher John Locke (1632 - 1704) and the French jurist Baron de Montesquieu (1689 - 1757), reveals that in order to secure liberty and to prevent the abuse of power, the three types of powers of the state should be exercised separately by three different organs, subject to necessary checks on each other. Baron de

Montesquieu's view was that liberty cannot exist within a monopoly of power. In his seminal work *The Spirit of Laws* [translated from the French by Thomas Nugent, LL.D, Revised Edition, volume 1, The Colonial Press, at pages 151-152], he has explained the doctrine in the following manner:

> "*When legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.*
>
> *Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislature, the life and liberty of the subjects would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*
>
> *There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.*"

530. In this regard, Hilaire Barnett on ***Constitutional & Administrative Law*** (4th Edition, 2002), has upon examining the historical development of this doctrine of separation of powers, explaining the concept of *checks and balances*, and the need for it, has stated the following:

> *"Throughout history, there has been exhibited a tension between the doctrine of separation of powers and the need for balanced government – an arrangement depending more on checks and balances within the system … than on a formalistic separation of powers. Sir Ivor Jennings has interpreted Montesquieu's words to mean not that the legislature and the executive should have no influence*

over the other, but rather that neither should exercise the power of the other. Sir William Blackstone, a disciple of Montesquieu, adopted and adapted Montesquieu's strict doctrine, reworking his central idea to incorporate the theory of mixed government. While it was of central importance to Blackstone, for example, the executive and legislature should be sufficiently separate to avoid 'tyranny', he nevertheless viewed their total separation as potentially leading to dominance of the executive by the legislature. Thus, partial separation of powers was required to achieve a mixed balanced constitutional structure."

531. Commenting on the modern doctrine of the separation of powers, Barnett also observes the following:

"*The separation of powers doctrine does not insist that there should be three institutions of government each operating in isolation from each other… Under such an arrangement, it is essential that there be a sufficient interplay between each institute of the state. … A complete separation of the three institutions could result in legal and constitutional deadlock. Rather than a pure separation of powers, the concept insists that the primary functions of the state should be allocated clearly and that there should be checks to ensure that no institute encroaches significantly upon the function of the other."*

532. Thus, the essence of the doctrine of separation of powers is that, there should be ideally a clear demarcation in functions between the Legislature, the Executive and the Judiciary, and such power should be vested separately in three distinct organs. Further, none of the organs should have excessive power, and towards that objective, there should be in place, a system of *checks and balances* between the institutions, so that, possible abuse of power can be prevented or remedied. Therefore, it is evident that under the contemporary doctrine of separation of powers, having a rigid separation of powers and functions, indeed would neither be practical nor desirable.

533. In order to secure the *rule of law,* good governance and respect to individual liberty and other rights of the People, the system of separation of powers has been incorporated into many contemporary Constitutions, particularly Constitutions of Republics, but not limited thereto.

534. It is almost impossible to define each of the three powers - 'executive', 'legislative' and 'judicial' in a way that reveals them as mutually exclusive concepts. At the same time, the complete compartmentalization of powers in the three organs of the state can result in impracticality and inefficacy in the functioning of those organs. It is for this purpose that *checks and balances* exist. The concept of *checks and balances* implies that while the three organs of government exercise powers within strict limits and bounds, there exists an equilibrium between the three organs of the state and a balance of power. Further, each organ of the state should act as a watchdog over the other, so as to prevent, eliminate or remedy any abuse of power by such other organ of the state. A balance in power and smooth functioning between organs of the state can be ideally achieved through cooperation. However, while there can be a cooperative approach between the Legislature and the Executive, due to the very nature of adjudication which is required to be carried out for the purpose of the administration of justice, the Judiciary must necessarily remain independent, impartial and neutral. Thus, it would be inappropriate and most undesirable for the Judiciary to be called upon to 'cooperate' with the Legislature and the Executive. This is evident, even by Baron de Montesquieu's exposition that "*there is no liberty, if the judicial power be not separated from the legislative and executive*". What is necessary is for the Judiciary, to abide by the *rule of law* and the jurisdiction vested in courts, adhere to judicial ethics, and administer justice according to law. For that purpose, the Judiciary may exercise powers vested in courts to the extent they are conferred on courts by the Constitution and other laws. Towards the objective of administering justice, the courts shall apply both the written and the unwritten law. The independence of the judiciary is thus, at the core of the doctrine of separation of powers.

535. In the case of ***Sri Lanka Jathika Sevaka Sangamaya v Sri Lanka Hadabima Authority*** *[(2015) 1 Sri L R 258],* it was held that *"Article 111C of the Constitution is a manifest intention to ensure that the judiciary is free from interferences whatsoever"* and thus, *"there is a clear demarcation of powers between the judiciary and the other two organs of government, namely, the executive and the legislature"*. It was further held that any act or decision to interfere with judicial power is outside the competence of the Legislature and the Executive, and are inconsistent with the separation of powers between the Executive, Legislature and Judiciary enshrined in the Constitution. Court observed that such acts or decisions are *ultra vires* and have no force or power in law.

536. Article 3 of the Constitution vests sovereignty in the people. Indeed, as submitted by the learned ASG, the powers of the government (the 'state') are components of the sovereignty of the People and have been assigned to the Executive, the Legislature and the Judiciary. Further, Article 4 of the Constitution makes it evident that the legislative power of the People is to be exercised by Parliament, the executive power of the People is to be exercised by President, and the judicial power of the people is to be exercised by Parliament through courts. Thus, the constituent powers of the state emanating from the sovereignty of the People are to be exercised by these three organs of the state, and has been distinctly and separately demarcated by the Constitution. The norm is that, subject to the provisions of the Constitution (which provisions serve as exceptions to the norm and is clearly spelt out in the Constitution), the Parliament does not possess any executive or judicial power, the President does not possess any legislative or judicial power, and the Judiciary does not possess any legislative or executive power. Thus, doctrinally, it is well-established that the principle of separation of powers is one of the principles of constitutionalism founded upon which the Constitution has been created. Furthermore, that the Constitution deals in three distinct and separate chapters, the powers of the Executive, the Legislature and

the Judiciary, lends support to the position that the 1978 Constitution is based on the doctrine of separation of powers.

537. The several exceptions to (deviations from) the doctrine of separation of powers, as contained in the Constitution is where (i) judicial power is exercised by Parliament [as regards matters relating to privileges, immunities and powers of Parliament and of its members – Article 4(c)], (ii) legislative power is exercised by the President as regards the promulgation of Emergency Regulations [Article 155 of the Constitution read with the provisions of the Public Security Ordinance and Article 76(1)], and (iii) legislative power is exercised by the Judiciary [Article 136], has been specifically stated and is limited in nature and scope. Such deviations from the norm have been necessitated in view of the purposes for which such powers are to be exercised and the circumstances and exigencies under which such powers are required to be exercised. The framers of the Constitution have deemed that conferment of such exceptional power serves the best interests of the Public.

538. The Constitution also contains certain specific mechanisms which the learned ASG referred to as *'checks'*. These mechanisms enable not only the emergence of a parity of status between the three organs of the state, but also safety measures to prevent an abuse of power by any one organ of the state, and to provide for remedial measures in the event of a violation of the Constitution. The power conferred on Parliament by Article 38(2) of the Constitution to impeach the President which if successful would result in the dismissal of the President and a vacancy arising in the seat of the presidency, is one example. Another example would be the power vested in the President by Article 70(1) of the Constitution to dissolve Parliament, which would result in the holding of a General Election and the re-composition of the Parliament. Similarly, save one exception [Article 33(g)], acts of the President are subject to the fundamental rights jurisdiction of this Court by virtue of the proviso to Article 35(1) of the Constitution read with Articles 126 and 17.

539. It is important to note that, as it is the People who are collectively the sovereigns of the country, the People too have been vested with power to exercise a *check* on the three organs of the state. That is through the exercise of the remaining two elements of the sovereignty of the People, namely fundamental rights [Article 4(d)] and franchise [Article 4(e)] which may be individually exercised by them. Furthermore, the People have been vested with supreme legislative power by Article 83, which shall be exercised at a Referendum in the circumstances provided in the Constitution. Thus, the ultimate *'check'* on all three organs of the state is vested in the People, as it is they who are sovereign.

540. Both exceptions to the doctrine of separation of powers and the *'checks and balances'* where they exist, are clearly and specifically stated in the Constitution, and the circumstances under which such exceptional power may be exercised is categorically laid down in the Constitution with clarity and precision. Thus, there exists no necessity to assume the existence of such *'checks and balances'*. A *'check'* or a *'balance'* must be explicitly evident from a plain reading of the Constitution. That indeed must necessarily be so. Furthermore, the conferment of powers which serves as exceptions to the doctrine of separation of powers and their exercise, should not result in a negation of a particular instance of the exercise of power that is vested in any particular organ of the state. Therefore, *'checks and balances'* incorporated into the Constitution would not result in the review or revision of the exercise of any particular instance of power by the organ to which such power has been ordinarily conferred by the Constitution. This must necessarily be so, as otherwise, there is room for the abuse of such power and disruption of the delicate equilibrium of power between the three organs of the state. A disruption of that equilibrium would result in disastrous consequences including a serious deterioration of compliance with the *rule of law* and the gradual development of an anarchic and dictatorial situation with the People losing their sovereignty.

541. In this regard, it would be necessary to be reminded of the following passage contained in the Special Determination of the Supreme Court relating to the ***Nineteenth Amendment to the Constitution Bill*** *[(SC SD 11/2002), Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Volume VII]*:

> *"…Inalienability of sovereignty, in relation to each organ of government means that power vested by the Constitution in one organ of government shall not be transferred to another organ of government, or relinquished or removed from that organ of government to which it is attributed by the Constitution. Therefore, shorn of all flourishes of Constitutional law and of political theory, on a plain interpretation of the relevant Articles of the Constitution, it could be stated that any power that is attributed by the Constitution to one organ of government cannot be transferred to another organ of government or relinquished or removed from that organ of government; and such transfer, relinquishment or removal would be an 'alienation' of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution.* ***It necessarily follows that the balance that has been struck between the three organs of government in relation to the power that is attributed to each such organ, has to be preserved if the Constitution itself is to be sustained.***" [Emphasis added.]

542. Further, in the Special Determination of the Supreme Court relating to the ***Twenty First Amendment to the Constitution Bill*** *[SC SD 31/2022]*, it was held that, in the Constitution, the powers and functions of one branch of government are carefully balanced against those of the other two branches of government. This Court has observed that it is "*a delicate balance*", and that "*machinery of government is calibrated to the extent that its parts are not to be moved without the knowledge and consent of its masters, the People*".

543. In the Special Determination of the Supreme Court on the ***Twenty Second Amendment to the Constitution Bill*** *[SC SD 40-49/2022]*, the Court endorsed the

view that was taken by the Court in the Special Determination of the Supreme Court on the ***Twenty First Amendment to the Constitution Bill***.

544. In the ***Nineteenth Amendment to the Constitution*** *(cited above)*, the Court also held the following view:

> *"This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution. Interestingly, these powers are found in chapters that contain provisions relating to the particular organ of government subject to the check. Thus, provision for impeachment of the President is found in Article 38(2) contained in Chapter VII titled, 'The Executive, President of the Republic'. Similarly, the dissolution of Parliament is found in Article 70(1), which is contained in Chapter XI titled, 'The Legislature, Procedure and Powers'."*

545. It is noteworthy that, unlike the *'checks'* contained in the Constitution in respect of the exercise of executive power by the President and legislative power by the Parliament, the Constitution does not contain any *'check'* which the Legislature or the Executive may exercise in respect of the Judiciary as regards the exercise of judicial power. Even the Parliament cannot legislate to annul a specific order or judgment of a court, as the enactment of such legislation would amount to *legislation ad hominem* and hence would be in violation of Article 4(b) read with Article 3 of the Constitution.

546. The learned ASG submitted that *'Article 34 of the Constitution which allows the President to grant pardons is part of the mechanism of 'checks and balances' in the Constitution. … this power allows for the President to act as a check upon the decisions of the judiciary where necessary, in recognition of the fallibility of the judiciary, although*

it may not necessarily be the only ground for pardoning …'. Acceptance of this submission is not possible for the following reasons:

(a) A consideration of the provisions of the Constitution reveals the existence of a system of delicate *'balancing'* of executive, legislative and judicial powers, and a system of *'checks'* between only the Legislature and Executive. The Constitution does not provide for either the Legislature or the Executive to exercise any *'checks'* on the judiciary. Conferring on the Parliament and the President any power to *'check'* the exercise of judicial power would defeat the very purpose for which the People's judicial power has been conferred on the Parliament to be exercised through courts.

(b) The power conferred on the President by Articles 33(f) and 107(1) to, with the approval of the Constitutional Council appoint the Chief Justice, Judges of the Supreme Court, the President of the Court of Appeal and the Judges of the Court of Appeal and the power vested in the Parliament to exercise disciplinary control over such judges through the process provided for in Article 107(2) of the Constitution, is different to the system of *'checks and balances'* which is associated with the doctrine of separation of powers. The exercise of that power by the President and the Constitutional Council and the President and the Parliament, respectively, do not relate to keeping a *'check'* on the exercise of judicial power by the Judiciary. It is a safeguard in preserving the institutional independence of the judiciary.

(c) If Article 34 confers on the President the power to *'check upon the decisions of the judiciary'*, and by the grant of a pardon, correct an error and arrive at a fresh finding, that would amount to an exercise of judicial power by the President. The Constitution has not conferred judicial power to be exercised by the President. Further, exercise of judicial power by the President would be contrary

to and in violation of Articles 3 and 4 of the Constitution and the doctrine of separation of powers.

(d) Acceptance of the supposition of the learned ASG that the power conferred on the President by Article 34 is to enable the President to keep a *'check'* on the exercise of judicial power by the Judiciary, would in effect place the President in a position superior to that of the highest court in the hierarchy of the judicial structure recognized by the Constitution, and it would thus violate the basic constitutional framework recognized by the Constitution and the parity of status conferred on the three organs of the state by the Constitution.

(e) As rightly agreed by learned counsel during the hearing of this matter, the exercise of power under Article 34 is an instance of the President exercising 'executive power'. That position has been advanced by the learned ASG in his post-argument written submissions as well. Using executive power to strike off or annul the effect of a judgment of court which includes the order of sentence imposed by court, would violate all basic norms of constitutionalism recognized by the Constitution of this country, and would in effect result in a fundamental violation of the *rule of law*. It would also consequently suppress administration of criminal justice by an independent judiciary to the whims and fancies of the executive President. The President may grant a pardon to a convict, in respect of whom, new evidence has emerged which shows that he should not have been convicted. In such a situation, the grant of a pardon would be to remedy a miscarriage of justice. That too would not be exercising a *'check'* on the judiciary.

(f) If the power of the President under Article 34 is a *'check'* on the judiciary, in that it provides relief against judicial error, how does that same power act as a *'check'* on the judiciary, when a pardon is granted for a different purpose not linked to the judicial pronouncement, for instance, when pardoning a terminally ill

convict? Therefore, the argument that the power under Article 34 acts as a *'check'* on the judiciary to correct a judicial error, is not a tenable.

(g) Acceptance of the theory propounded by the learned ASG would result in the partial alienation of the exercise of judicial power by the Judiciary to the President, which would violate Article 4(c) of the Constitution and in effect impinge upon the sovereignty vested in the People by Article 3. It would also make the Judiciary subordinate to the President, a feature totally non-existent in the Constitution and a direct obliteration of the independence of the judiciary resulting in an erosion of the *rule of law*.

547. Due to the afore-stated reasons, I reject the position advanced by the learned ASG that, this Court should not judicially review a decision of the President to grant a pardon on its merits, since the grant of a pardon is a *'check'* on the judiciary by the Executive (President), and engaging in judicial review of the impugned decision would be in violation of the doctrine of separation of powers and would render nugatory the afore-stated *'check'*.

Delegation Test and the Alienation Test

548. Learned ASG also submitted that if the exercise of the power of pardon vested in the President by Article 34 of the Constitution is reviewed on the merits of the decision, by this Court in the exercise of the fundamental rights jurisdiction, *"it would fail the delegation test as it would 'bring in another person or institution' into the exercise of such power"*. He further contended that therefore, it would also constitute a '*transfer, relinquishment or removal*' of a power attributed to the President to another, as it would allow the Supreme Court instead of the President to take decisions regarding who would be given a pardon. In support of this contention, he cited the views of this Court in the Special Determination on the ***Twenty First Amendment to the Constitution Bill*** [SC SD 31-37/2022] wherein, the Court has propounded two tests

to determine instances where a violation of Article 4 would amount to a violation of Article 3 of the Constitution. Those two tests are the following:

> "*Accordingly, it is our view that the proper tests to be adopted in determining whether a violation of Article 4 leads to a violation of Article 3 are as follows:*
>
> *1. Different features of the Sovereignty that is reposed in the People can be delegated by the People to be exercised by an organ of government. Delegation by the People of the Sovereignty reposed in them is part of their Sovereignty identified in Article 3. Article 4 deals with both the delegation and the exercise of different features of Sovereignty. In terms of Article 4(b), the People have delegated their executive power to the President elected by them. Any change to such delegation which brings in another person or institution to exercise the executive power of the People must be with the approval of the People as otherwise it infringes Article 3 (Delegation test).*
>
> *2. The transfer, relinquishment, or removal of a power attributed to one organ of Government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution (Alienation Test).*

549. Learned ASG also cited the views of this Court in ***Maithripala Senanayake, Governor of the North Central Province and Another v Gamage Don Mahindasoma and Others*** *[(1998) 2 Sri L R 333]*, to support his submission that even pursuant to the devolution of power effected by the 13th Amendment, the Supreme Court has held that it is the President who is supreme in granting pardons, showcasing the intention of the drafters of the Constitution that the President's power to pardon is not to be alienated or delegated to any other authority.

550. Learned ASG's submission that it is the President who is supreme in granting pardons, and that even in the context of a devolution of power, the power of the President to grant a pardon has not been alienated or delegated to another authority, further supports the view of this Court that the power of the President to grant pardons is

not a *sui generis* power and is thus a purely executive power. That aspect will be dealt with next in this judgment.

551. I find no reason to deviate from the description provided by this Court relating to the ***Delegation Test*** and the ***Alienation Test***. Indeed, compliance with both tests is necessary. However, I must reject the learned ASG's contention that this Court reviewing a decision taken by the President to grant a pardon purportedly under the authority conferred on him by Article 34, on the merits of the decision is a violation of the *delegation test*. Judicial review is not a means of the judiciary taking over the decision-making process exercised by the Executive. Exercising judicial review of the President's decision to grant a pardon to a convicted person, does not result in the judiciary exercising the power conferred on the President by Article 34 of the Constitution. Thus, it would be incorrect to assert that through the exercise of judicial review, the Judiciary would be acting in breach of the *'Delegation test'*. Through the exercise of judicial review, the Judiciary will not transfer to itself and thereby remove the power conferred on the President by the Constitution. In a situation where the Supreme Court exercises judicial review of an impugned instance where the President has exercised power purportedly under Article 34 and has granted a pardon to a particular person, and determines that the exercise of such power had been unlawful and therefore quashes the decision to grant the pardon, it would be open to the President to once again consider the grant of a pardon to the same person, provided the President acts in terms of the law and the merits of the case warrant the grant of a pardon and making the grant of such pardon lawful.

Nature of the power conferred on the President to grant a Pardon

552. Learned ASG submitted that, though in terms of the Constitution the President has been vested with executive power, it does not mean that the exercise of all powers of the President constitute 'executive or administrative' action. He further submitted that

the power to grant a pardon vested in the President by Article 34 cannot be exclusively categorized as executive, judicial or legislative, and should be recognized as a *'sui generis'* power. In support of his argument, he cited the judgments of this Court in ***Attorney General v. Dr. Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake*** *[SC Appeal 67/2013, SC Minutes of 21st February 2014]* and ***Athula Chandraguptha Thenuwara and Others v. Chamal Rajapakse, Speaker of Parliament and Others*** *[SC/FR 665-672/2012, SC Minutes 24th March 2014].* It was submitted that the Supreme Court has in these two judgments held that there are certain functions and powers contained in the Constitution, which are *sui generis* in nature, and that therefore they cannot be categorized as executive, legislative or judicial functions and powers. He thus submitted that such functions and corresponding powers are not amenable to the fundamental rights jurisdiction of this Court, as they are not 'executive or administrative action'. Learned ASG also contended that the judgment in ***Athula Chandraguptha Thenuwara and Others v Chamal Rajapakse, Speaker of Parliament and Others*** *(cited above)* has been quoted with approval in the case of ***Rajavarothiam Sampanthan and Others v Attorney General*** *(cited above)***,** and that the Court has not rejected the possibility of the President possessing *sui generis* powers, although, in that matter, the impugned acts did not constitute any such *sui generis* powers. He submitted that the power to grant a pardon under Article 34 of the Constitution is one such *sui generis* power, and hence is not amenable to the fundamental rights jurisdiction.

553. A perusal of the judgement in ***Attorney-General v. Shirani Anshumala Bandaranayake*** *(cited above)*, reveals that, the two questions of law that had arisen for consideration in that matter was (i) whether the Court of Appeal had erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament and to a Committee of Parliament, and (ii) whether the Court of Appeal had erred in holding that the words *"any Court*

of first instance or tribunal or other institution or any other person" contained in Article 140 of the Constitution extends to the Parliament and to a Committee of Parliament. In the context of the factual circumstances of that case, the issue to be determined by the Supreme Court was whether the Court of Appeal was possessed of jurisdiction to issue an order in the nature of a writ of certiorari in terms of Article 140 of the Constitution in respect of proceedings and actions of Parliament or that of a Select Committee of Parliament, within the process of impeachment of the Chief Justice of Sri Lanka under Article 107 of the Constitution. Justice Saleem Marsoof expressing agreement with an incidental submission made in that case by the Attorney-General, has observed that the power to remove the Chief Justice, Judges of the Supreme Court, the President of the Court of Appeal and Judges of the Court of Appeal through the process contained in Article 107 of the Constitution and Standing Orders made thereunder, is not a power exclusively vested in either the President or the Parliament, but is a power that is unique and is *sui generis* in the sense that it is vested jointly in the Parliament and the President. It is important to note the context in which Justice Marsoof has made that observation. Justice Marsoof has observed that the power of impeachment is *sui generis* as it is jointly vested in the Parliament and the President. It is pertinent to observe that Justice Maroof has not held that the power vested in the President with regard to impeachment of a Judge is 'executive power'. Nor has he held that such power forms a separate category of power vested in the President which is beyond judicial review by the Supreme Court. What his Lordship has concluded is that the relevant power is unique and thus it is *sui generis*.

554. ***Athula Chandraguptha Thenuwara and Others vs. Chamal Rajapaksa, Speaker of Parliament and Others*** *(cited above),* also relates substantially to the same matter which had led to the filing of the above-mentioned Application. However, the factual circumstances pre-dates the facts of the earlier case. The related fundamental rights Application had been filed in the wake of the presentation to the Honourable Speaker of Parliament (1st Respondent), a Notice of Resolution for the removal of the 43rd Chief

Justice of Sri Lanka Dr. Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake. That Resolution had been purportedly under Article 107(2) and (3) of the Constitution read with Order 78A of the Standing Orders of Parliament. Dr. Bandaranayake was the Petitioner before the Court of Appeal in the earlier matter, who sought *inter alia* a writ of certiorari to quash the findings of a Parliamentary Select Committee and a corresponding purported Resolution adopted by Parliament recommending to the President her removal from office of Chief Justice.

555. In ***Athula Chandraguptha Thenuwara and Others***, a preliminary objection had been raised regarding the maintainability of the Application filed by the Petitioner on the premise that the impugned action did not amount to 'executive or administrative action' for the purposes of Article 17 read with Article 126 of the Constitution. Learned Attorney-General in support of the preliminary objection raised had argued that the procedure for the impeachment of the Chief Justice, a Judge of the Supreme Court, etc. was *sui generis*, and was intended to satisfy two fundamental objectives, namely the independence of the Judiciary and judicial accountability, both equally important in the constitutional scheme. It had also been submitted that the powers of Parliament for the impeachment of the President, the Chief Justice and Judges of the Supreme Court and Court of Appeal, are not executive or judicial in character, and such power stand on its own. In response, Justice Saleem Marsoof, PC had once again (in this judgment too) concluded that the power of Parliament with regard to the acceptance of a Resolution for the impeachment of the Chief Justice and the appointment of a Select Committee is an integral part of a *sui generis* function of Parliament which did not fit easily into the legislative, executive or judicial spheres of government, and bore a unique complexion in that, while being more disciplinary in nature, it could not be exercised by Parliament alone and had to be performed in concurrence with the President of Sri Lanka, as contemplated by Article 107(2) and (3) of the Constitution. Nevertheless, for reasons stated in his judgment, Justice Marsoof has proceeded to

hold that that the impugned act of the Honourable Speaker of the Parliament to appoint a Parliamentary Select Committee was indeed "executive or administrative action" within the meaning of Article 126 of the Constitution.

556. It would thus be seen that these two judgments of a Divisional Bench of this Court sets precedence for the recognition of the principle that certain functions and associated powers vested in the Parliament and in the President are unique in nature, in that they do not fall squarely into the classification of legislative, executive and judicial functions. Their unique nature is strengthened by the fact that, the processes contemplated therein cannot be performed independently and exclusively by either the Parliament or the President. As submitted by the learned ASG, a partnership and cooperative approach are required for the fulfilment of the function, and thus, they may be quite rightly referred to as *'sui generis',* because such functions do not fit into the classical definition of legislative, executive and judicial functions. Nor do such powers readily and exclusively fit into either Article 4(a), 4(b) or 4(c) of the Constitution.

557. For the purposes of this judgment, it would not be necessary for me to arrive at a finding as to the exact character or classification of the function vested in Parliament and the President to cause the impeachment of the Chief Justice, a Judge of the Supreme Court, the President of the Court of Appeal and any other Judge of the Court of Appeal. However, it is observable from the afore-stated judgments of Justice Marsoof, that he has <u>not accepted</u> the submission that by virtue of a particular function and associated power being recognized as *'sui generis',* such function and power necessarily and automatically fall outside the ambit of 'executive or administrative action' for the purposes of Article 17 read with 126 of the Constitution. It is to be noted that in ***Rajavarothiam Sampanthan and Others v AG*** *(cited above),* the only purpose for which the case of ***Thenuwara and Others v Chamal Rajapakse, Speaker of Parliament and Others*** *(cited above)* had been cited, has been to describe

what amounts to 'executive or administrative acts' as falling within Article 126. The Court in that matter, has not discussed whether the President is possessed with *sui generis* powers. Upon applying the rationale expounded by this Court in several decisions, including the decision in ***Thenuwara and Others v Chamal Rajapakse, Speaker of Parliament and Others*** *(cited above),* the Court has concluded that the functions and powers vested in the President under Article 33(2) (then) of the Constitution should only be regarded as executive functions and powers of the President. It was held that *"while the President may when exercising those powers be doing so qua Head of State in a historical sense, any such flavour of acting as Head of State does not detract* ***from the core feature that the President is exercising executive powers****".* [Emphasis added]

558. Therefore, it is to be noted that none of the above-mentioned judgments make any reference to the power of the President to be exercised under Article 34. However, certain functions and powers contained in the Constitution vested in the President, the Parliament and in the Judiciary, may not fall within the classical definition of executive, legislative or judicial power. Furthermore, certain functions vested in the three organs of the state may contain different elements of executive, legislative and judicial power, some to be exercised alone and some to be exercised cooperatively by more than one organ of the state. Nevertheless, what is necessary to be examined and determined is whether the power vested in the President by Article 34 to grant a pardon is one such *sui generis* power which neither falls within the ambit of Article 4(b) of the Constitution ('executive power' of the People), nor within the ambit of Article 4(c) of the Constitution ('judicial power' of the People). The objective of doing that would be to determine whether the exercise of the power conferred on the President by Article 34 (the power of pardon), would fall within the scope of 'executive or administrative action' for the purpose of Article 17 read with Article 126 of the Constitution.

559. Before I proceed to analyse what constitutes an 'executive or administrative action', I shall in brief, consider the nature of 'executive power'.

560. In this regard, in his treatise titled ***"Constitutional and Administrative Law of Sri Lanka"*** (Sumathi Publishers, 1995, at page 164), Dr. Joseph A.L. Cooray has observed the following:

> *"It is not possible to give an exact definition of 'executive power'. Ordinarily it connotes the residual governmental function that remain after the legislative and judicial functions are taken away, subject of course to the provisions of the Constitution or of any other law. Executive power is not confined to the mere execution of laws. It includes the determination and execution of policy, the initiation of legislation, the maintenance of order, the promotion of economic and social welfare, the direction of foreign policy, and the conduct of military operations."*

561. In the Journal article titled ***'Inherent Executive Power: A Comparative Perspective'***, published in the Yale Law Journal (vol.115, no. 9, 2006), Assistant Professor Jenny Martinez of the Stanford Law School, has observed that the most striking feature of executive power found in all legal systems is that executive power is not fixed or determinate, but instead, has evolved over time. She has opined that *"the scope of 'executive or administrative action' within each system, and the exercise of such power has fluctuated greatly, with the actual distribution of the scope of 'executive or administrative power' at any given moment shaped by social and political circumstances, as well as the letter of the Constitution."* Moreover, the comparative study conducted by Professor Martinez acknowledges the fact that contemporary democracies have recognized legal or constitutional limits on executive power, in order to preserve a balance of political power with the legislature and courts, even in matters touching on war, foreign affairs, and national security.

562. Dr. Durga Das Basu, in the Chapter on 'The Executive' in his treatise titled ***'Constitutional Law of India'*** (sixth edition, 1991, at page 136), has opined that "*it may not be possible to frame an exhaustive definition of what executive function means and implies"*. Further, he has expressed the following view:

> "*…Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject of course, to the provisions of the Constitution or of any law…*
>
> *The executive function comprises both the determination of policy as well as carrying it into execution, the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy; in fact, the carrying on or supervision of the general administration of the state. It includes political and diplomatic activities…"*

563. Thus, it is seen that though it is not possible to precisely define what executive power is, executive power is what is vested in the Executive organ of government, that is mainly responsible for the formulation of policy for the governance of the state, implementation of policy which can be directly given effect to, initiation of legislation (development of the policy and legal framework) by which policy is to be converted into legislation, and execution (or enforcement) of laws. Executive action is not limited to the mere execution of laws and taking decisions and action founded upon powers conferred on officials by law, but also extends to powers relating to the protection of national security such as by declaration of and waging war, command and direction of the armed forces, conduct of international and multilateral relations by making of treaties, engaging in foreign relations, appointment of ambassadors, and debate, decision-making and voting in international organizations. Executive power includes the appointment of judges as provided in the Constitution, and the making of certain appointments such as Heads of public institutions, all of which are different forms of the exercise of executive power.

564. Article 17 read with Article 126(1) of the Constitution entitles any person to apply to the Supreme Court in respect of an infringement or imminent infringement of a fundamental right by executive or administrative action. However, the Constitution has not, in its own wisdom, defined or described what is meant by 'executive or administrative action'. The jurisprudence of this Court in understanding the scope of that phrase is indeed helpful.

565. As to what amounts to 'executive and administrative action' has been described by Justice Sharvananda in the case of ***Rienzie Perera and Another v University Grants Commission*** *[(1978-79-80) 1 Sri L R 128]* in the following manner:

> "*Constitutional guarantees of fundamental rights are directed against the State and its organs. Only infringement or imminent infringement by executive or administrative action of any fundamental right or language right can form the subject matter of a complaint under Article 126 of the Constitution. The wrongful act of any individual, unsupported by State authority is simply a private wrong. Only if it is sanctioned by the State or done by State authority, does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State.* ***In the context of fundamental rights, the 'State' includes every repository of State power. The expression 'executive or administrative action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions. It refers to exertion of State power in all forms…"*** [Emphasis added.]

566. In a similar vein, Justice Sharvananda in the case of ***Wijetunga v Sri Lanka Insurance Corporation*** *[(1982) 1 Sri L R 1]*, has expressed the following view:

> "*All organs of government are mandated to respect the fundamental rights referred to in Chap. 3 of the Constitution and are prohibited from infringing the same. Actions by the organs of the government alone constitutes the executive or administrative action that is a sine qua non or basis to proceedings under Article*

126. The term 'executive action' comprehends official actions of all government officers … When private individuals or groups are endowed by the State with power or functions, governmental in nature, they become agencies or instrumentalities of the state subject to the constitutional inhibitions of the state."

567. In ***Parameswary Jayathevan v Attorney-General and Others*** *[(1992) 2 Sri L R 356]*, Justice Kulatunga has described 'executive or administrative action' as *"acts done under the colour of office in the exercise or the purported exercise of governmental functions"*.

568. In ***Faiz v Attorney General and Others*** *[(1995) 1 Sri L R 372]*, Justice Mark Fernando has adverted to the phrase 'executive and administrative action' as used in Article 126, in the following manner:

"*The phrase does not seek to draw a distinction between the acts of 'high' officials (as being 'executive'), and other officials (as being 'administrative'). 'Executive' is appropriate in a Constitution, and sufficient to include the official acts of all public officers, high and low, and to exclude acts which are plainly legislative or judicial and of course purely private acts not done under the colour of office.* ***The need for including 'administrative' is because there are residual acts which do not fit neatly into this three-fold classification.*** *Thus, it may be uncertain whether delegated legislation is 'legislative' and therefore, outside the scope of Article 126. …* ***Thus, 'administrative' is intended to enlarge the category of acts within the scope of Article 126; it serves to emphasize that what is excluded from Article 126 are only acts which are legislative or judicial, either intrinsically or upon the application of a historical test… ."*" [Emphasis added.]

569. In ***Pinnawala v Sri Lanka Insurance Corporation Ltd. and Others*** *[(1997) 3 Sri L R 85]*, Chief Justice G.P.S. De Silva has expressed the following view:

> "*The expression 'executive or administrative action' has not been defined in our Constitution. It excludes the exercise of the special jurisdiction of this court under Article 126 in respect of the acts of the legislature or the judiciary. Article 4 of the Constitution mandates that the fundamental rights enshrined in Part III 'shall be respected, secured and advanced by all the organs of the government'. An examination of our decisions indicate that this expression embraces actions not only of the government itself, but also of organs, instrumentalities or agencies of the government. … In the circumstances, I am of the opinion that the expression 'executive or administrative action' in Articles 17 and 126 of the Constitution should be given a broad and not a restrictive construction … .*"

570. In addition, this Court in ***Rajavarothiam Sampanthan v Attorney-General*** *(cited above),* has held that the question of whether an act or omission can be regarded as constituting 'executive or administrative action' must be decided by a consideration of the nature of the power that is exercised, the nature of the act and the facts of each case. On a consideration of the powers vested in the Executive by the Constitution and the views expressed by Judges of this Court (as contained in the above judgments), I find myself in agreement with the view of the learned ASG that there are indeed, certain acts of public officers, which may not be referred to purely as 'executive', 'legislative' or 'judicial'. However, in my view, it cannot be presumed that all such acts which do not fit neatly into the classical categorization as executive, legislative or judicial acts are exempted from the scope of Article 126, and have been kept out of scrutiny by this Court. Such an interpretation would not be in favour of constitutionalism and the *rule of law*. It would considerably narrow down the scope of Article 126, and thus would defeat the mechanism for the protection of fundamental rights as contained in the Constitution. In my view, the residual acts of all state functionaries, may they be holding positions within the legislative, executive and judicial branches of the state, which do not fit into the classical three-fold classification and are not actions of public nature, , are what is referred to in Article

126 as 'administrative acts'. What is excluded from Article 126 are only acts which are 'judicial' or legislative'. **This lends support to my view, that despite the fact that certain powers conferred by law on the Executive may be identified as *sui generis,* and thus, are not classically executive, legislative or judicial in nature, the exercise of such powers are very much within the scope of Article 126 and thus judicially reviewable under the jurisdiction vested in this Court by Article 126 read with Article 17 of the Constitution.**

571. The grant of a pardon is considered once the judicial response to crime has been concluded, and the convict remains under the control of the Executive for the management of his penal sanctions (punishment). It is a power that is conferred on the President, who is vested with the executive power of the People. Furthermore, the provisions relating to the grant of a pardon is found in 'Chapter VII – The Executive' which specifically lays down the provisions relating to the 'President of the Republic'.

572. It is also to be noted that the exercise of the power of pardon by no means alters the judicial record. The judicial record remains unchanged, and the conviction stands notwithstanding the grant of a pardon. Thus, the power to grant a pardon only has the effect of reducing or removing the punishment imposed on the victim. In other words, the grant of a pardon only affects the execution of the sentence imposed on the convict. The execution of a sentence is an executive act.

573. In ***Sarat Chandra Rabha and Others v Khagendranath Nath and Others*** *[(1961) AIR SC 334]*, the following view has been expressed by the Supreme Court of India, as regards the power of the President to remit a sentence, which is a form of the exercise of the power of pardon:

> "*… An order of remission thus, does not in any way interfere with the order of the court;* ***it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of***

imprisonment inflicted by the court, though the order of conviction and sentence passed by the court stands still as it was. The power to grant remission is executive power *and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court…"* [Emphasis added.]

574. The court also cited the following passage from Weater's Constitutional Law on the effect of reprieves and pardons in comparison with a judgment passed by a court, to demonstrate that power of pardon is an executive power:

"*A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment.* ***Both are the exercise of executive functions*** *and should be distinguished from the exercise of judicial power over sentences. The judicial power and the executive power over sentences are readily distinguishable.* ***To render a judgment is a judicial function. To carry out the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment."*** [Emphasis added.]

575. The above-stated view has been followed in the case of ***Maru Ram v Union of India*** *[(1980) AIR 2147]***.** In ***Kehar Singh v Union of India*** *(cited above),* the Supreme Court of India has, in distinguishing between the executive power and the judicial power in the exercise of the power of pardon, expressed the following view:

"*We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede the judicial record.*

The judicial record remains intact, and undisturbed. ***The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from judicial power and cannot be regarded as an extension of it.*** *And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him…"* [Emphasis added.]

576. Therefore, it was held that the legal effect of a pardon is wholly different from a judicial supersession of the original sentence and that it is the nature of the power which is determinative. Moreover, in determining whether the petitioner is entitled to a hearing by the President under Article 72, it was held that "*the proceeding before the President is of an executive character*" and therefore, it is for the petitioner to submit all requisite information necessary for the disposal of the petition.

577. In ***Epuru Sudhakar v Union of India*** *[(2006) AIR SC 3385],* the Supreme Court of India was of the view that 'executive clemency' is administered by the executive branch of the government in the interests of the society and the discipline, education and reformation of the person convicted.

578. In the case of ***United States v Wilson*** *[32 US (7 Pet.) 150 (1833)]* as regards the power of pardon, the Supreme Court of the United States of America has held a follows:

"*The Constitution gives to the President, in general terms, 'the power to grant reprieves and pardons for offences against the United States'. As this power had been exercised from time immemorial,* ***by the executive of that nation*** *whose language is our language, and to whose judicial institutions ours bear resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it…*

A pardon is an act of grace, ***proceeding from the power entrusted with the execution of the laws,*** *which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."* [Emphasis added.]

579. Thus, due to the following reasons, I am unable to agree with the submission of the learned ASG that the power vested in the President under Article 34 is a *sui generis* power, which is neither executive, legislative or judicial, or that it contains a unique combination of such powers.

(i) The power vested in the President by Article 34 is not legislative power, as the exercise of the power to grant a pardon does not result in the creation of rights, duties, prohibitions, stipulation of sanctions, institutions or enforceable procedure.

(ii) The power vested in the President by Article 34 is not judicial power, as the exercise of the power to grant a pardon does not contain the character of judicial adjudication, as it is not a process which results in the stipulation of the applicable law, and the settlement of rights and duties of parties to a dispute.

(iii) As the power vested in the President by Article 34 is neither legislative nor judicial power, and as the (a) power to grant a pardon has been conferred by the Constitution on the President (who is the head of the Executive branch of the state), (b) power to grant a pardon is to be exercised after the judicial process has been completed, (c) exercise of the power has a bearing on the rights and interests of persons, and (d) power is associated with the official functioning of the President who is the Head of the Executive branch of the state, such power is clearly executive power.

580. I wish to also note a fallacy in the learned ASG's submission that the power to grant a pardon is a *sui generis* power, which is outside the scope of Articles 17 and 126 of the

Constitution, as it is neither 'executive or administrative action'. The learned ASG has throughout his submissions rightfully maintained the position that this Court is entitled in these proceedings to judicially review the impugned decision to grant a pardon to the 2nd Respondent, on the legal criteria of procedural regularity. In fact, he indirectly admitted that the impugned decision is unlawful, as it has been taken in contravention with the mandatory procedure prescribed in the proviso to Article 34. He thereby concedes that the impugned decision comes within the scope of Articles 17 and 126 of the Constitution.

581. In view of the foregoing, I hold that **the power conferred on the President by Article 34 of the Constitution to grant a pardon, respite, etc. is not a *sui generis* power. It is 'executive power' which comes within the ambit of Article 4(b) of the Constitution, and for the purposes of Articles 17 read with 126 of the Constitution the exercise of such power amounts to 'executive action'.**

582. **Therefore, and for other reasons set out in this judgment, I hold that the impugned decision to grant a pardon to the 2nd Respondent which has been taken by the President (11A Respondent) acting purportedly under Article 34 of the Constitution, is amenable to judicial review through the jurisdiction invoked by the Petitioner, that being the 'Fundamental Rights jurisdiction' of this Court**.

583. Further, I hold that, **due to the reasons set-out in this part of the judgment, when judicially reviewing a decision of the President to grant a pardon to a person convicted of having committed an offence, this Court may consider <u>not only</u> whether the President had acted in terms of the procedure laid down in the proviso to Article 34(1) of the Constitution, <u>but, it would be within the jurisdiction of the Court</u> to additionally consider the lawfulness of the impugned decision based on the merits of the decision.**

584. Thus, **it would be lawful and appropriate for this Court to judicially review the merits of the decision taken by the 11A Respondent to grant a purported pardon to the 2nd Respondent, founded upon legal standards and criteria generally applicable to the review of executive and administrative action, such as objectivity and good-faith, reasonableness, non-arbitrariness, and proportionality.**

Effect of non-compliance with section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act.

585. During the course of the hearing, learned President's Counsel for the Petitioner submitted that, in terms of section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 (hereinafter referred to as Act No. 4 of 2015 or as the 'Victims of Crime and Witnesses Protection Act'), the 11A Respondent (then President), when considering the grant of a Pardon to the 2nd Respondent, was required to afford an opportunity to the 9th and 10th Respondents (members of the family of the deceased victim) to express their views regarding the grant of a pardon to the 2nd Respondent. Learned President's Counsel complained that the 11A Respondent when granting the purported pardon had not complied with that requirement, which in addition to the earlier mentioned grounds pertaining to procedural irregularity and unlawfulness on the merits of the decision, makes the impugned grant of the pardon contrary to law and thus unlawful.

586. Learned President's Counsel for the 9th and 10th Respondents - Dr. Romesh De Silva, PC also submitted that, the 11A Respondent had acted in violation of section 3(q) of Act No. 4 of 2015. He submitted that by virtue of the definition of the term 'victim of crime' contained in section 46 of Act No. 4 of 2015, the 9th and 10th Respondents being respectively the father and the sister of the deceased, were each deemed to be a 'victim of crime' in respect of the offence of 'murder' committed by the 2nd

Respondent. Thus, at the stage the 11A Respondent was considering the grant of a pardon to the 2nd Respondent, they had the right in terms of section 3(q) of the Victims of Crime and Witnesses Protection Act to have received notice thereof, and further, they had the right to be afforded an opportunity to submit to the President (11A Respondent) information regarding the manner in which the offence committed by the 2nd Respondent has impacted on their lives. Learned President's Counsel submitted that his clients, the 9th and 10th Respondents had not been afforded that opportunity, and thus, the 11A Respondent had failed to respect the right of the 9th and 10th Respondents conferred on them by section 3(q) of the Victims of Crime Witnesses Protection Act. He further submitted that such infringement of the right of the 9th and 10th Respondents was an additional factor which supports his contention that the 9th and 10th Respondents have been denied the equal protection of the law and thus their fundamental right guaranteed by Article 12(1) has been violated by the 11A Respondent.

587. A perusal of the documents pertaining to the grant of both the 1st and the 2nd pardons (the first pardon being a commutation of the sentence), reveal clearly that the 11A Respondent had not complied with the requirement contained in section 3(q) of Act No. 4 of 2015. The 11A Respondent in both of his affidavits filed in this matter, does not claim that he complied with section 3(q). Even in his submissions, learned President's Counsel for the 11A Respondent did not did take up the position that the 11A Respondent complied with the requirement contained in section 3(q) of the Victims of Crime and Witnesses Protection Act. Thus, the position taken up by the 9th and 10th Respondents remains uncontradicted. Therefore, I conclude that the complaint of the Petitioner and the 9th and 10th Respondents that the corresponding victims of crime were not afforded an opportunity by the 11A Respondent to exercise their right in terms of section 3(q) of Act No. 4 of 2015 is well-founded and correct.

588. Learned President's Counsel for the 11A Respondent also did not venture to explain why the 11A Respondent did not comply with the requirement contained in section 3(q) of Act No. 4 of 2015. Nor did learned President's Counsel present to this Court any legal submission seeking to justify non-compliance with section 3(q) of Act No. 4 of 2015.

589. Learned ASG on behalf of the 1st, 3rd to 6th Respondents made extensive submissions in this regard. His submissions on this aspect were two-fold. First, his position was that the constitutional responsibilities of the President under the proviso to Article 34(1) of the Constitution could not have been amended or modified by section 3(q) of Act No. 4 of 2015. He submitted that it is a well-recognized principle that procedures specified by the Constitution cannot be implicitly amended or modified by legislation ('ordinary legislation') and or by subordinate legislation. In support of his position, learned ASG cited views of Court in the cases of ***Migultenne v the Attorney General*** *[(1996) 1 Sri L R 408],* ***Southern Provincial Co-operative Employees Service Commission v Bentota Multi-Purpose Co-Operative Society Ltd. and Others*** *[CA/PHC/71/2013, CA Minutes of 09.08.2018],* and ***Democratic Socialist Republic of Sri Lanka v Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya and Others*** *[SC Appeal 115/2014, SC Minutes of 22.01.2020]*. He submitted that the procedure to be followed when granting a pardon to an offender who has been condemned to suffer death by the sentence of any court, is stipulated in the proviso of Article 34(1), and no law could amend any provision contained in the Constitution except by an amendment to the same. It was his position that if section 3(q) of Act No. 4 of 2015 is to be interpreted so as to include an 'additional step' to the procedure provided in the proviso to Article 34(1), such interpretation is contrary to the Constitution, as such interpretation seeks to amend the proviso to Article 34(1). Secondly, he submitted that Article 84 of the Constitution reflects the legal position that a Bill inconsistent with the Constitution that is subsequently passed into law, notwithstanding the inconsistency, does not have the effect of amending, repealing

or replacing the Constitution or any provision of the Constitution and should not be interpreted or construed in such manner. Learned ASG submitted that Section 3(q) of the Victims and Witnesses Protection Act was *ex facie* inconsistent with Article 34 of the Constitution. However, the corresponding Bill had been passed notwithstanding such inconsistency. By virtue of Articles 84(1) and 84(3) of the Constitution, Act No. 4 of 2015 does not have the effect of amending, repealing or replacing the Constitution or any provision of the Constitution. He asserted that the interpretation provided by the 9th and 10th Respondents amends or modifies the constitutional provisions and hence is, unconstitutional. He urged therefore, that this Court reject such interpretation. Learned ASG submitted that while section 3(q) of Act No. 4 of 2015 was immune from challenge by virtue of Article 80(3), this Court has held that the Constitution is the higher norm and therefore, the Constitutional provision must supersede any *prima facie* inconsistent statutory provision [vide ***Cooray v Bandaranayake*** *[(1999) 1 Sri L R 1];* ***Gamage v Perera*** *[(2006) 3 Sri L R 354];* and ***Southern Provincial Co-Operative Employees Service Commission v Bentota Multi-Purpose Co-operative Society Ltd and Others*** *(CA/PHC/71/2013, CA Minutes of 09.08.2018)*].

590. In conclusion, learned ASG submitted that the constitutionally mandated procedure to grant a pardon to a convict in the death row cannot be implicitly modified by the provisions of section 3(q) of Act No. 4 of 2015, and that failure on the part of the President (pardoning authority) to follow the procedure laid down in section 3(q) of Act No. 4 of 2015 does not vitiate the legality of the impugned pardon. Accordingly, he submitted that section 3(q) of Act No. 4 of 2015 must be interpreted by this Court to be 'directory' rather than 'mandatory', and to be not inconsistent with the Constitution.

591. I agree with learned ASG that in terms of Article 84(3) of the Constitution, constitutional procedure cannot be directly or implicitly amended or modified by

legislation (legislation which is not an 'amendment to the Constitution') and or by subordinate legislation. However, it is necessary to note that once a Bill is enacted by Parliament, its provisions must be respected and given effect to in a manner that is not inconsistent with provisions of the Constitution.

592. I shall briefly consider some of the cases cited by the learned ASG in this regard. ***Migultenne v the Attorney General*** *[(1996) 1 Sri L R 408]* involved the interpretation of sections 106 and 107 of the first Republican (1972) Constitution. In that case, the Court held that subordinate legislation which is made under the provisions of the Constitution cannot override a constitutional provision. In ***Southern Provincial Co-Operative Employees Service Commission v Bentota Multi-Purpose Co-Operative Society Ltd and Others [****CA/PHC/71/2013, CA Minutes of 09.08.2018],* the issue *inter alia* which had to be determined was whether there is a conflict between section 1 of the Southern Provincial Co-operative Employees Service Commission Statute No. 1 of 1998 (a statute enacted by the Southern Provincial Council) and Article 154H of the Constitution. The Court in that case observed that *"the first question that arises for determination is whether there is in fact a conflict between these two provisions, and if so, which provision prevails. … If there is indeed a conflict, clearly the constitutional provision prevails as the Grundnorm in the sense propounded by Kelson…"*. In ***Democratic Socialist Republic of Sri Lanka v Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya and Others [****SC Appeal 115/2014, SC Minutes of 22.01.2020],* the issue to be determined was whether non-compliance with section 196 of the CCPA would vitiate a conviction. The Court observed that many cases have overlooked the effect of Article 138(1) of the Constitution. The following observation was made in that case:

> "*The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has*

occasioned a failure of justice. … The Constitutional provision embedded in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon by the Appellants with regard to the issue that this court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as a grundnorm. All statutes must be construed in line with the highest law…"

593. Thus, it is observable that in the judgments cited by the learned ASG, the impugned statutory provision or subordinate legislation was found to be inconsistent with a constitutional provision. In other words, both the statutory provision and the constitutional provision could not be given effect to parallelly, or the statutory provision could not be given effect to without rendering a constitutional provision nugatory or revised. In such instances, this Court has held that certainly the constitutional provision must prevail. I have no doubt regarding the views expressed by Court relating to that principle. However, in my view, the instant situation is different.

594. Section 3 and in particular sub-section (q) of section 3 of Act No. 4 of 2015 provides as follows:

"3. A victim of crime shall have the right:-

(a) …

(b) …

…

(q) in the event of any person in authority considering the grant of a pardon or remission of sentence imposed on any person convicted of having committed an offence, to receive notice thereof and submit through the Authority to the person granting such pardon or remission, the manner in which the offence committed had impacted on his life including his body, state of mind, employment, profession

or occupation, income, quality of life, property and any other aspects concerning his life."

595. I am mindful of the recent repeal of Act No. 4 of 2015 and the replacement thereof by Act No. 10 of 2023. Section 5(1)(f) of Act No. 10 of 2023 confers on a victim of crime the identical right. In any event, in view of the fact that the grant of the pardon by the President in the instant matter has preceded the enactment of Act No. 10 of 2023, I shall confine my views in this regard, to section 3(q) of Act No. 4 of 2015. However, they do equally apply to compliance with section 5(1)(f) of Act No. 10 of 2023 as well.

596. A consideration of section 3(q) of Act No. 4 of 2015 reveals that it applies to an instance of grant of a pardon, respite, substitute a less severe form of punishment or remission of sentence to a person who has been convicted of any offence. Thus, section 3(q) applies not only to a convict condemned to suffer death by a court of law (in which situation the proviso to Article 34(1) shall apply), but also to any person convicted for any offence. Thus, the application of section 3(q) relates to all persons convicted of having committed any offence, and the President considers the exercise of the power of pardon in such person's favour.

597. The right conferred on a victim of crime by section 3(q), is for him to receive 'notice' of the intended consideration of a pardon to the corresponding convict, and an opportunity to him to through the National Authority for the Assistance and Protection of Victims of Crime and Witnesses to 'submit the manner in which the offence committed has impacted on his life including his body, state of mind, employment, profession or occupation, income, quality of life, property and any other aspects concerning his life'.

598. It would thus be seen that, with regard to situations where the Article 34(1) does apply, section 3(q) of Act No. 4 of 2015 does not repeal, amend or otherwise vary the

requisite procedure contained in the said proviso. Article 34(1) of the Constitution confers on the President discretionary authority. The scope of such discretionary authority is not narrowed down, broadened or otherwise varied by section 3(q) of Act No. 4 of 2015. Furthermore, Article 34(1) confers on the President the power to grant a pardon, respite, substitute a less severe form of punishment, or remission. Section 3(q) of Act No. 4 of 2015, neither reduces or enhances such power. Nor does it place any bar or impediment on the exercise of such power. Furthermore, section 3(q) does not alter in any manner the purpose for which the power conferred on the President by Article 34(1) may be exercised. Thus, section 3(q) does not directly or otherwise repeal, amend, or otherwise vary Article 34(1) of the Constitution. The right conferred on a victim of crime by section 3(q) of Act No. 4 of 2015 can be respected and given effect to, in a manner that does not interfere with the exercise of the power conferred on the President by Article 34(1) of the Constitution.

599. Section 3(q) merely places a statutory duty on the President (the 'pardoning authority') to give notice to a victim of crime of his intention of exercising his power under Article 34(1). That has no bearing on the procedural scheme contained in the proviso to Article 34(1).

600. It is necessary to note that the powers and functions of the President are not only found in the Constitution, but also in the ordinary written law as well. This is evident by the wording in Article 33 which begins with the words "*In addition to the powers and functions expressly conferred on or assigned to him by the Constitution* ***or by any written law****, …".* [Emphasis added.] Thus, it cannot be said that section 3(q) is inconsistent with the provisions in Article 34(1). Where two sources of law provide for the same subject matter, and where one source is the higher law, and where no inconsistency exist, the Court must give both provisions a purposive and a harmonious interpretation.

601. In this regard, the following views of Justice Surasena, in ***Hirunika Eranjali Premachandra and Another v Hon. Attorney General and Others*** *(cited above)* are noteworthy:

> "*I agree that the provisions of the Constitution must prevail over the provisions of any general law. The question as to which prevails, whether the provisions in the Constitution or the provisions in the general law, would arise only when they are in conflict with each other. In this situation I see no conflict between the provisions in Article 34 and section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act. I see no impossibility; no impediment; no contradiction between those two provisions. They certainly can co-exist together. Thus, I am unable to accept the above argument as a justification for the former President's non-compliance / complete ignorance of the provisions in section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act.*"

602. Further, Victims of Crime and Witnesses Act is an Act duly enacted by the Parliament exercising the legislative power of the People. This Court is bound to give effect to the legislation enacted by Parliament, keeping in mind its intention in enacting the relevant legislation. As held by Justice Surasena in the above-stated case, Article 33(h) of the Constitution "*calls upon the President not to do acts and things which would be inconsistent with the provisions of not only the Constitution or written law, but also international customs or usage*". I am in agreement with the observations made by His Lordship.

603. Thus, I am of the view that s. 3(q) of Act No. 4 of 2015 is not inconsistent with procedure laid down in the proviso to Article 34(1) of the Constitution.

604. Thus, I conclude that on the impugned occasion, **the 11A Respondent was obliged to recognize and give effect to the right of the 9th and 10th Respondents conferred on them by section 3(q) of Act No. 4 of 2015. The 11A Respondent**

when granting the impugned pardon has acted contrary to section 3(q) of Act No. 4 of 2015.

605. I must add that it is necessary to note the importance of the existence of a law to protect victims of crime and witnesses. Victims of crime suffer twice: for the first time when they are subjected to criminality (primary victimization); for the second time when they are required to participate in the criminal justice system (secondary victimization). Right from the beginning of the process of criminal justice, up till the end of the process when criminal proceedings finally come to an end, victims of crime suffer psychological trauma in addition to direct harm emanating from being subjected to criminality. The situation of witnesses is no different. Both these categories are highly susceptible and vulnerable to threats, intimidation, harassment, reprisals and retaliation.

606. The Assistance to and Protection of Victims of Crimes and Witnesses Act, No. 4 of 2015 is a giant stride taken by Parliament to protect and provide for rights and entitlements to victims and witnesses of crimes. Thus, this piece of legislation, cannot be discarded as just an ordinary law which need not be considered by the President of the country. The pardoning process is an even more important instance where the President is bound by the law to give notice of his decision to exercise the power of pardon, to those who would directly be affected by the pardoning of the convict: in this case, the 9th and 10th Respondents and the mother of the deceased. After giving such notice, the duty cast on the President by section 3(q) is to *inter alia,* consider the views of the victims of crime (in this case the 9th and 10th Respondents and the mother of the deceased) as regards how the commission of the murder of Yvonne Johnson has impacted on their lives including their state of mind. Dr. Romesh De Silva, PC enlightened court briefly on how the lives of the 9th and 10th Respondents and the mother of the deceased has been shattered beyond any repair, and how the grant of the impugned pardon to the 2nd Respondent without any advance notice to them and

the President not having given them an opportunity to express their views regarding the intended pardon has left them dumbfounded and in utter shock and dismay. The 9th and 10th Respondents now feel that they have been victimized not once or twice, but thrice - the third time due to the grant of a pardon to the 2nd Respondent.

607. Furthermore, affording victims of crime, notice of the consideration being given to grant a pardon, giving them an opportunity to express views, and objectively considering *inter alia* the views of victims of crime, should be recognized as a common law requirement associated with the right to a fair hearing when exercising discretionary authority resulting in power being exercised which has the potential of affecting the interests of such parties (victims of crime).

608. In view of the foregoing reasoning, I conclude that, **in the impugned occasion non-compliance by the 11A Respondent with section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 is an additional ground that vitiates the legality of a pardon that has been granted in favour of the 2nd Respondent purportedly in accordance with Article 34(1) of the Constitution**.

Unlawful actions, violations of the Rule of Law and Article 12(1) of the Constitution

609. Learned ASG submitted that '*not every wrong decision or breach of the law amounts to a violation of a fundamental right and the reliefs available under Article 126 of the Constitution*'. In that regard, he cited the case of ***Wijesinghe v Attorney General and Others*** *[(1978-79-80) 1 Sri L R 102]*. He submitted that *'in the absence of any intentional or purposeful discrimination evident from the record, this Court should be cautious in exercising judicial review over executive pardons*'.

610. As explained in several previous judgments of this Court, a violation of the *rule of law* should necessarily be recognized as an instance of an infringement of Article 12(1) of the Constitution that confers equal protection of the law to all persons. It is well-known that Article 12 is colloquially referred to as the *'guardian of the rule of law'* as the right to equality which is enshrined in Article 12 protects against infringement of the *rule of law*. [See among others ***Wijerathna v. Sri Lanka Ports Authority*** *[SC FR 256/2017, SC Minutes of 11.12.2020]*

611. In the early case of ***Elmore Perera v Major Montague Jayawickrema, Minister of Public Administration, and Plantation Industries and others*** *[(1985) 1 Sri L R 285]* Chief Justice Sharvananda, extensively described in the following manner what the *rule of law* entails:

> "*Our Constitution is certainly founded on the Rule of Law. Administrative law is the area where this principle is to be seen, especially, in active operation. The Rule of Law has a number of meanings and corollaries. Its primary meaning is that everything must be done according to law, no member of the Executive can interfere with the liberty or property of a subject except on the condition that he can support the legality of his action before a court of justice. Another meaning of the Rule of Law is that it implies the absence of wide discretionary powers in the government to encroach on personal liberty or private property rights or freedom of contract and that officials and Ministers are responsible for their unlawful acts to the ordinary courts, applying the ordinary principles of law and that government should be conducted within a framework of recognized rules and principles which restrict discretionary power. Absence of discretionary power is thus kept in check. The Rule of Law requires that that the courts should prevent such abuse. A third meaning of the Rule of Law is that disputes as to the legality of acts of government are to be decided by judges who are wholly independent of*

the Executive. Another meaning is that law should be even handed between government and citizen.

The principle of equality before the law embodied in Article 12 is a necessary corollary to the high concept of the Rule of Law underlying the Constitution. *By virtue of this provision, the Supreme Court is enabled to review and strike down any exercise of discretion by the Executive which exhibits discrimination. … The Rule of Law which postulates equal subjection to the law, requires the observance of the law in all cases."* [Emphasis added.]

612. In ***Priyangani v Nanayakkara and Others*** *[(1996) 1 Sri L R 399]*, Justice Mark Fernando, has held as follows:

"*We are not concerned with contractual rights****, but with the safeguards based on the Rule of Law which Article 12 provide against the arbitrary and unreasonable exercise of discretionary powers.*** *Discretionary powers can never be treated as absolute and unfettered unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred not at the whim and fancy of officials, for political advantage or personal gain."* [Emphasis added.]

613. In ***Vasudeva Nanayakkara v Choksy and Others*** *[(2008) 1 Sri L R 134]*, Chief Justice Sarath N. Silva has expressed the following view:

"Three well-established aspects of our Constitutional Law have to be stated in this regard. They are:

1. ***That the Rule of Law is the basis of our Constitution*** *… The Rule of Law "postulates the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of*

prerogative or wide discretionary authority on the art of the Government" (vide: Law of the Constitution by A. Dicey – page 202) …

2. …

3. That there is a "positive component in the right to equality" guaranteed by Article 12(1) of the Constitution as decided in Senarath v Chandrika Bandaranayake Kumaratunga and where the Executive being the custodian of the People's power act ultra vires and in derogation of the law and procedures that are intended to safeguard the resources of the State, it is in the public interest to implead such action before Court." [Emphasis added.]

614. In ***Wijesekera and 14 others v Gamini Lokuge, Minister of Sports and Public Recreation and 20 others*** *[(2011) 2 Sri L R 329]* Justice Shiranee Tilakawardane has held that "*the Rule of Law is and must be characterized with the principles of supremacy of the law, the quality of the law, accountability to the law, legal certainty, procedure and legal transparency, equal and open access to justice to all, irrespective of gender, race, religion, class, creed, or other status*".

615. In the recently decided case of ***Rajavarothiam Sampanthan v Attorney General*** *(cited above),* a Divisional Bench of this Court has observed that Article 12(1) of the Constitution embraces the *Rule of Law* as well. In that regard, Chief Justice Nalin Perera has expounded the following view:

"***The Supreme Court has even extended the jurisprudence under Article 12(1) to encompass the protection of the Rule of Law. …****Thus, I am unable to agree with the submission that Article 12(1) of the Constitution recognizes 'classification' as the only basis for relief. In a Constitutional democracy where three organs of the State exercise their power in trust of the People, it is a misnomer to equate 'Equal protection' with 'reasonable classification'. It would clothe with immunity, a vast majority of executive and administrative acts that are otherwise reviewable under the jurisdiction of Article 126. More pertinently, if*

*this Court were to deny relief merely on the basis that the Petitioners have failed to establish 'unequal treatment', we would in fact be inviting the State to 'equally violate the law'. It is blasphemous and would strike at the very heart of Article 4(d) which mandates every organ of the State to "respect, secure and advance the fundamental rights recognized by the Constitution". **Rule of Law dictates that every act that is not sanctioned by the law and every act that violates the law be struck down as illegal.** It does not require positive discrimination or unequal treatment. An act that is prohibited by the law receives no legitimacy merely because it does not discriminate between people."* [Emphasis added.]

616. Further, in the ***Special Determination of the Supreme Court on the Special Goods and Service Tax Bill*** *[SC SD 01-09/2022],* this Court has held the view that "*absolute and unfettered discretion being vested in an officer of the Executive is a recipe for (i) unreasonable and arbitrary decision-making, (ii) abuse of power, (iii) corruption and (iv) the roadway to depredation of the Rule of Law. On all such accounts, it results in an infringement of Article 12(1) of the Constitution which guarantees equal protection of the law*".

617. **In view of the foregoing illustrative and clear pronouncements of this Court, I hold that an executive or administrative action –**

(a) which is in excess of the power conferred by law,

(b) which has been arrived at contrary to procedure established by law, or

(c) which on the merits of the decision is contrary to law,

and thus, being unlawful, is a violation of the *rule of law*. Such violation of the *rule of law* amounts to an infringement of Article 12(1) of the Constitution.

618. Thus, it would be possible to a person who possesses the requisite *locus standi* to impugn such unlawful decision by challenging such infringement of Article 12(1) of the Constitution, by invoking the jurisdiction of the Supreme Court vested in it by

Article 126 read with Article 17 of the Constitution, and seek and obtain a declaration of such infringement and where appropriate necessary just and equitable relief.

Final analysis and conclusions pertaining to the grant of the purported Pardons to the 2nd Respondent

619. This Court has already dealt with the grievous non-compliance with procedure contained in the proviso to Article 34(1) of the Constitution on both occasions where the 2nd Respondent was granted a pardon by the 11A Respondent. As pointed out, such non-compliance with the procedure provided by law when arriving at the decision by itself renders the decisions arrived at by the 11A Respondent to grant pardon ultra-vires and hence unlawful.

620. As regards the merits of the decision to grant a pardon to the 2nd Respondent, learned President's Counsel for the Petitioner submitted that the selection of the 2nd Respondent for the grant of a pardon had been without an objective assessment of the merits based on rational and intelligible criteria. In the post-argument written submissions, the learned President's Counsel has submitted further that when granting the second pardon, the 2nd Respondent had been selected for the grant of a pardon to the exclusion of all the other convicts. Had there been an objective consideration of the individual cases, the President should have first considered the grant of a pardon to the following categories of persons who were being detained in the death row:

(a) those who were responsible for committing murder, but the incident of killing was less heinous in nature (intensity, ferocity and barbarity of the murder);

(b) those who were culpable for having committed murder, but the evidence being indicative of the absence of any premeditation;

(c) persons who had been detained in the 'death row' for a longer period;

(d) those in respect of whom mitigatory circumstances applied.

621. Learned President's Counsel submitted that the evidence shows that the 11A Respondent had not engaged in such an objective assessment of relevant facts and circumstances. In the circumstances, he submitted that the conduct of the 11A Respondent was not only unreasonable and arbitrary, but discriminatory as well.

622. Learned President's Counsel for the 9th and 10th Respondents also supported the above submissions made by learned President's Counsel for the Petitioner.

623. In his first affidavit filed in this matter dated 30th November 2021, referring to the 1st purported pardon, the 11A Respondent has taken-up the following position:

> *The Minister of Justice had appointed a review committee to review the sentences imposed on all prisoners condemned to death. The said committee had interviewed the relevant prisoners and thereafter acting on the recommendations of the said committee the Minister by his letter dated 12th May 2016 had recommended that the sentences of death imposed on 70 prisoners be commuted to life imprisonment. The 2nd Respondent was also among the prisoners listed by that Committee and recommended by the Minister. Accordingly, "following due process and acting in terms of the powers vested in the President of the Republic in terms of Article 34 of the Constitution" approved the afore-stated recommendations and granted pardons to all 70 prisoners. In November 2019, acting in terms of the powers vested in the President by Article 34 granted a pardon to the 2nd Respondent who was serving a sentence of life imprisonment. Acted reasonably and in compliance with due process. Acted within the powers vested in the President by Article 34 of the Constitution, and therefore, all aspersions cast on his actions/inactions are devoid of any factual or legal merit.*

624. By his affidavit dated 4th November 2022, the 11A Respondent has reiterated the above-mentioned narrative. In both affidavits, the 11A Respondent has highlighted

the fact that since he is no longer the President, he does not have access to the relevant documentation.

625. Following this Court having called for the two files maintained by the Presidential Secretariat regarding both purported pardons, having received them, and on the instructions of this Court the learned ASG having issued copies of both files to all parties, the 11A who thereby received splendid opportunity to refresh his memory, did not seek to file a third affidavit further explaining his role on the grant of both purported pardons. Further, the 11A Respondent chose not to give reasons for the grant of the 2nd pardon which resulted in the release of the 2nd Respondent from prison.

626. Before proceeding to consider the merits of the two decisions of the 11A Respondent to grant two purported pardons to the 2nd Respondent, it is necessary to consider another matter. The Petitioner invoked the jurisdiction of this Court on the footing that the 11A Respondent had granted a pardon (a single pardon) to the 2nd Respondent which resulted in the 2nd Respondent who had been sentenced to death and was being detained in the death row being released from the prison. However, document produced by the Petitioner marked "P3" being a 'Press Release' issued by the Presidential Secretariat reveals that the release of the 2nd Respondent took place in two phases. First, the sentence of death imposed by the Court of Appeal on the 2nd Respondent (along with the sentence of death imposed on 69 other prisoners) who was being detained in the death row was commuted by the 11A Respondent purportedly under Article 34 of the Constitution to 'life imprisonment'. Second, the 11A Respondent acting purportedly under Article 34, pardoned the 2nd Respondent and thereby directed his release from prison, at a time when he was being detained serving a term of life imprisonment. "P3" makes no reference to the dates on which each of these two pardons were granted. As narrated at the commencement of this judgment, the two-phased grant of relief to the 2nd Respondent is evident from the

documentation and the minutes contained in the two files maintained in this regard by the Presidential Secretariat.

627. Learned President's Counsel for the 11A Respondent submitted that since the first pardon had been granted in 2016, due to lapse of time in excess of one month, this Court was devoid of jurisdiction to judicially review the corresponding decision. However, since the Petitioner did not have prior knowledge that the 11A Respondent had in 2016 granted a purported pardon to the 2nd Respondent, he cannot be faulted for the delay in invoking the jurisdiction of this Court. Furthermore, "P3" which is evidently the only source of information the Petitioner had to comprehend the internal decision-making of the Presidential Secretariat, in my view does not provide adequate reliable information that would necessitate the Petitioner to structure his Petition to this Court impugning the two purported pardons separately. Thus, I find no fault in the Petition in that respect, and conclude that both decisions to grant pardons are subject to review in these proceedings.

Findings of Court regarding the 1st purported Pardon

628. As discussed elsewhere in this judgment and as rightly conceded by learned Additional Solicitor General, the procedure followed by the 11A Respondent and other public functionaries which resulted in the substitution of a less severe form of punishment (commutation of the sentence) from the death sentence to life imprisonment to the 2nd Respondent is contrary to the mandatory procedure prescribed in the proviso to Article 34(1) of the Constitution. Furthermore, the 11A Respondent had not complied with the requirement contained in section 3(q) of Act No. 4 of 2015. I observe that the 'Review Committee' appointed by the Minister of Justice could administratively interview prisoners being detained in the *death row* awaiting their execution (an event which has not taken place in this country since 1974) and could additionally make certain recommendations to the Minister of Justice.

The Minister could take such recommendations into consideration when the President seeks his opinion in terms of the proviso to Article 34(1) of the Constitution. In the alternative, there is nothing in violation of the law, if the Minister presents the recommendations of the Committee to the President, and thereafter, the President sets in motion the procedure laid-down in the proviso to Article 34(1) of the Constitution, and upon completion of the procedure contained in the proviso and having conferred on the victims of crime the opportunity of complying with section 3(q) of Act No. 4 of 2015, the President takes a decision on whether or not to grant a pardon. However, in this instance, the procedure adopted in 2016 which culminated in the grant of the purported 1st pardon to the 2nd Respondent and 69 others is contrary to law and hence is unlawful, as the requisite process was not in conformity with the procedure provided in the proviso to Article 34(1) and section 3(q) of Act No. 4 of 2015.

629. The evidence placed before this Court by the parties and the material called for from the Presidential Secretariat and examined by this Court, do not show that the 11A Respondent objectively considered the matter of granting pardons to the 70 prisoners, including the 2nd Respondent. However, there is no basis to conclude that the 11A Respondent (the then President) acted subjectively either. He had merely perfunctorily 'approved' the recommendation made to him by the Minister of Justice, which was founded upon the report of the Review Committee. A consideration of the Judgment of the Court of Appeal clearly reveals that the findings of the Committee as regards the 2nd Respondent is erroneous on at least the question of premeditation. Furthermore, a plain reading of the report of the Committee relating to the 2nd Respondent shows so apparently that the Committee had taken the narrative given by the 2nd Respondent *ipsi dixit,* as being correct, and had not engaged in any independent verification of the information provided by the 2nd Respondent as regards the incident in issue. Due to all these reasons, the perfunctory approval of the recommendations of the Committee by the President, renders the exercise of power

by the 11A Respondent not in conformity with the law. Thus, the absence of objective and consideration of relevant material in the backdrop of procedural non-compliance with mandatory requirements provided by the law, renders **the impugned purported 1st pardon unlawful and void in the eyes of the law**.

Findings of Court regarding the 2nd purported Pardon

630. An examination of the evidence placed before this Court by the parties and the material examined by this Court which included the totality of documentary material maintained by the Presidential Secretariat with regard to the purported 2nd pardon, reveals the following:

(i) The decision to grant the purported 2nd pardon had been taken by the 11A Respondent (then President) contrary to the procedure prescribed in the proviso to Article 34(1) of the Constitution, in the backdrop of such procedure being mandatory.

(ii) The decision to grant the purported 2nd pardon had been taken by the 11A Respondent without respecting and giving effect to the right of the 9th and 10th Respondents and the mother of the deceased, conferred on them by section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015.

(iii) Procedural non-compliance with and acting contrary to the legal requirements contained in the proviso to Article 34 and section 3(q) of Act No. 4 of 2015, by itself renders the impugned second pardon void.

(iv) The 11A Respondent has not acted **objectively** in arriving at the decision to grant the second purported pardon to the 2nd Respondent, due to **arbitrariness and unreasonableness** in the decision-making process, and due to the **discriminatory approach** adopted by him. The discriminatory approach

adopted by the 11A Respondent is evident when one considers the absence of evidence which shows the existence of any intelligible criteria which distinguishes the 2nd Respondent's case from those of the other prisoners similarly circumstanced (prisoners serving life imprisonment sequel to their sentence of death being commuted to life imprisonment), and the non-consideration of factors identical or similar to that of the 2nd Respondent with regard to such other prisoners. The evidence shows a unilateral consideration of mitigatory factors allegedly in favour of the 2nd Respondent, to the exclusion of possible similar mitigatory factors that may be existent in favour of the other prisoners who were serving life imprisonment.

(v) Additionally, the 11A Respondent's decision to grant the purported 2nd pardon is void due to the absence of any reasons for his decision being contemporaneously recorded by him or on his behalf by an official assisting him, and due to the failure on the part of the 11A Respondent to adduce intelligible reasons for his decision before this Court.

(vi) A consideration of the totality of the applicable material and evidence irresistibly suggests that the grant of the purported 2nd pardon **did not serve public interest**, was **not aimed at serving public interest** and was founded upon a consideration of **factors which are incompatible with the purposes for which the President is empowered to exercise the power of pardon by Article 34 of the Constitution**. The only interests that have been served are the interests of the 2nd Respondent and those who may be near and dear to him. In the circumstances, **the 11A Respondent has grievously violated the Public Trust Doctrine by abusing the power vested in the President by Article 34(1) of the Constitution, for a collateral and improper purpose**.

(vii) For all the reasons stated above, **the impugned purported 2nd pardon is unlawful and void**.

631. I am inclined to add that, the evidence and material examined by this Court [including in particular, the contents of the undated letter addressed to the President sent by Ven. Athuraliye Rathana Thero (received and considered by the 11A Respondent on 2nd February 2019) and "P3"] suggest the inference that the 11A Respondent's decision to grant the purported 2nd pardon had been accentuated by extraneous and irrelevant factors including possible persuasion by Venerable Athuraliye Ratana Thero. However, I will restrain myself from arriving at any finding in that regard, due to lack of sufficient cogent evidence and as the venerable Thero was not a party to these proceedings.

Declarations, Remedies and Orders

632. In view of the foregoing findings and conclusions reached by this Court, exercising the just and equitable jurisdiction of this Court vested in it by Article 126 of the Constitution, the following declarations, remedies are orders are made:

I. It is declared that the grant of the purported 1st pardon in favour of *inter alia* the 2nd Respondent on or about 17th May 2016 is contrary to law, and is accordingly declared unlawful and void.

II. It is declared that the grant of the purported 2nd pardon in favour of the 2nd Respondent on or about the 30th October 2019 is contrary to law, and is accordingly declared unlawful and void.

III. It is declared that by the grant of the impugned purported 1st and 2nd pardons referred to in this judgment, the 11A Respondent – former President Maithripala Sirisena has infringed the fundamental rights of the Petitioner, and the 9th and 10th Respondents guaranteed by Article 12(1) of the Constitution.

IV. In consideration of the grievously abusive, irresponsible, callous and unlawful manner in which the 11A Respondent has exercised power vested in the

President by Article 34(1) of the Constitution on the occasion of the grant of the purported 2nd pardon, as a deterrence measure to him and to all those holding public office and is vested with power to exercise for specific purposes which shall be overall in public interest, the 11A Respondent is directed to pay a sum of Rupees One Million to the Petitioner. The Petitioner shall hold such money in trust, and spend for purposes that are in the best interests of female victims of crime. This sum of money shall be paid within one month of the delivery of this judgment.

V. As a solatium for having caused the infringement of the fundamental right of the 9th and 10th Respondents guaranteed by Article 12(1) of the Constitution and for the pain of mind caused to them and complained of, the 11A Respondent is directed to pay a sum of Rupees One Million each to the 9th and 10th Respondents. This sum of money shall be paid within one month of this judgment.

VI. The Attorney-General shall within one month of this judgment present to His Excellency the President, to the Minister of Justice, to the Secretary to the President and to the Secretary to the Ministry of Justice, a legal advisory containing the principles applicable to the grant of a Pardon to a prisoner, as stipulated in this judgment, and the procedure to be followed with regard to the processing of a request for the grant of a pardon and taking a decision in that regard. A copy of that legal advisory shall be tendered to this Court by Motion.

VII. The Attorney-General shall forthwith, with the assistance of the relevant competent authorities, set in motion a procedure aimed at locating the 2nd Respondent and in terms of the applicable law and agreements with foreign countries, to have him located, brought back to Sri Lanka, apprehended and be placed back in prison to serve life imprisonment. [This order is made in view of

information placed before this Court that sequel to the filing of this Application, immediately preceding this Court having made an interim order on 29th November 2019 restraining the 2nd Respondent from leaving the country, he had left the country, and since not returned.]

It is to be noted that, though this Court has declared the impugned 1st pardon unlawful and therefore void, given the lapse of time since the grant of such pardon and the fact that it applied to 69 other prisoners who were being detained in the *death row*, exercising the inherent discretionary authority vested in this Court by the just and equitable jurisdiction conferred on its under Article 126 of the Constitution, this Court refrains from directing that upon being located, apprehended and returned to prison, the 2nd Respondent be placed in the *death row*.

The Attorney-General shall once in every two months file a Motion in Court setting out steps taken with regard to the implementation of this order and the associated development.

VIII. The Petitioner and the 9th and 10th Respondents shall be entitled to recover from the 11A Respondent, cost of this litigation.

JUDGE OF THE SUPREME COURT

JANAK DE SILVA, J

633. I have had the benefit of reading an early draft of the judgment proposed to be delivered by my brother, Justice Thurairaja, P.C. and the draft judgment of Justice Kodagoda, P.C. I am in agreement with their conclusions that:

(a) The grant of the 1st pardon by the 11A Respondent to the 2nd Respondent on or about 17th May 2016, whereby a term of life imprisonment was substituted to the death sentence, is contrary to Article 34 (1) of the Constitution and hence void and of no force or avail in law;

(b) The grant of the 2nd pardon by the 11A Respondent to the 2nd Respondent on or about 30th October 2019, whereby the 11A Respondent purported to approve the release of the 2nd Respondent, is contrary to Article 34 (1) of the Constitution and hence void and of no force or avail in law.

634. Nevertheless, my brothers differ on the reasons based on which they have arrived at the same conclusions. The declarations and orders they make also differ. Moreover, there are some differences on the reasons for my conclusions. In the circumstances, there is a compulsion to give detailed reasons for my conclusions and the declarations and orders I propose to make in order to ensure that there is a majority judgment on the reasoning leading to the conclusions and the declarations and orders made by Court.

635. In doing so, I will address the following issues:

(A) The effect of a pardon under Article 34 (1) of the Constitution;

(B) Judicial Power under the 1978 Constitution;

(C) Procedural requirements for the grant of a pardon under the Proviso to Article 34 (1) of the Constitution;

(D) Judicial Review of the grant of a pardon by the President under Article 34 (1) of the Constitution;

(E) Due compliance with the procedural requirements; and,

(F) Legality of the grant of the 1st and 2nd pardons

636. I need not deal with the factual matrix of this matter as my brothers have set them out in great detail.

637. Before setting forth my views on the merits of the application, I must address the preliminary objection raised by the learned President's Counsel for the 11A Respondent that a necessary party, namely the incumbent Minister of Justice Hon. Dr. Wijeyadasa Rajapakse, P.C. has not been made a party to this application. It was pointed out that he was also the Minister of Justice at the time the impugned pardon was granted. My brother Justice Thurairaja, P.C. has overruled this preliminary objection for reasons set out.

638. I am in respectful agreement with his conclusion but for different reasons. It is observed that the 6th Respondent and the three substituted 6th Respondents are the then Minister of Justice, subsequent Ministers of Justice ending with the present Minister of Justice. Thus, the incumbent Minister of Justice Hon. Dr. Wijeyadasa Rajapakse, P.C. is in fact a Respondent to the Application.

639. In any event, the Petitioner is impugning the grant of pardons to the 2nd Respondent by the 11A Respondent. In terms of Article 34 (1) of the Constitution, it is the President and the President alone who is empowered to grant a pardon. No doubt there is a consultative process contemplated. Nevertheless, the final decision on whether or not to grant a pardon must be taken by the President and no other. Any alienation or acting under dictation will vitiate the pardon.

640. Accordingly, even if there was any failure to add the then Minister of Justice as a Respondent, it will not be fatal to this application.

(A) ***The effect of a pardon under Article 34 (1) of the Constitution***

641. The learned A.S.G. drew our attention to the provisions in Sections 311 and 312 of the Code of Criminal Procedure Act and Sections 58, 94 and 235 (1) of the Prisons Ordinance No. 16 of 1877 as amended. However, the impugned pardons have been granted pursuant to Article 34 (1) of the Constitution. Hence there is no need to examine the interface, if any, between those provisions and Article 34 (1) of the Constitution. In any event, constitutional provisions must take precedence and apply in case of any inconsistency with any other law.

642. In ***Southern Provincial Co-operative Employee's Service Commission v. Bentota Multi-Purpose Co-operative Society Ltd. and Others*** **[C.A. (P.H.C.) 71/2013, C. A. M. 09.08.2018]**, I held that if there is a conflict between an Act and the Constitution, clearly the constitutional provision prevails as the Grundnorm in the sense propounded by Kelson.

643. Prior to examining the legal effect of a pardon under Article 34 (1) of the Constitution, a comparative examination is both useful and necessary.

England

644. The power of pardon in England was with the Sovereign as part of the prerogative power. The justification for this is described by Chitty [Joseph Chitty, *A treatise on the law of the prerogatives of the crown: and the relative duties and rights of the subject* (London, 1820), page 89] as follows:

> *"The King is, in legal contemplation, injured by the commission of public offences; his peace is said to be violated thereby, and the right to pardon cannot be vested more properly than in the Sovereign, who is, from his situation, more likely than any other person to exercise it with impartiality, and to whom good policy requires*

that the people should look, with submissive respect as the head of the nation, and supreme guardian of the laws."

645. The unfettered exercise of such power was not lacking of controversy. In fact, the Earls, the Church of England and Parliament would contest the King's pardoning power and "*when [these] rival authorities struggled for power, it was often the power to pardon that they sought*" [Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* (OUP, 1989), page 17]. At one time, the prerogative power of mercy of the King was sought to be controlled through legislative intervention. Hence in 1328, a statute called in general terms, for restraint in issuing pardons. In 1390 the Commons secured a statute which recognised certain pardons as issuing from the Chancery as a matter of course [Theodore F. T. Plucknett, *A Concise History of the Common Law* (Liberty Fund, 2010), pages 445-446].

646. The legal effect of a pardon in England was not beyond debate. Early on it was considered that a pardon left the existence of a conviction untouched. This was on the basis that the King was not vested with the power of administration of justice, a position supported by the writings of Bracton, Blackstone, Hawkins [William Hawkins, *A Treatise of the Pleas of the Crown*, (1824)] and Holdsworth [William Searle Holdsworth, *A History of English law* (Methuen and Company, 1903)].

647. Nevertheless, subsequently there were judicial pronouncements to the contrary. In ***Cuddington v. Wilkins*** **[80 Eng. Rep. 231, 232 (K.B. 1614)]** it was held that *"[T]he King's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities incident unto it"*.

648. Hence it was at one time considered that a pardon erased all aspects of the conviction. Thus, Chitty [ibid. page 102] states that:

"The King's pardon, if general in its purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking,

it puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property [...] a legal pardon impliedly removes the stigma and restores a man to credit, so as to enable him to be a witness; and it so far makes him a new man as to entitle him, according to some of our old books, to bring an action against anyone who scandalizes him in respect of the crime pardoned."

649. However, in ***R v. Foster*** **[(1984) 2 All ER 679 at 687]** the Court of Appeal examined in great detail the jurisprudence on this issue and held that the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, *'all pains penalties and punishments whatsoever that from the said conviction may ensue'*, but not eliminate the conviction itself. The Court was guided by the principle that the Crown no longer has a prerogative of justice but only a prerogative of mercy. It is only a court of law with competent jurisdiction that has the power to quash a conviction.

USA

650. The position in the USA took somewhat of a similar route to that in England. In ***Ex Parte Garland*** **[71 U.S. (4 Wall.) 333, 380, 18 L. Ed. 366 (1866)]** it was held that:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

651. Nevertheless, in ***Burdick v. United States*** **[236 U.S. 79, 91, 35 S.Ct. 267, 59 L. Ed 476 (1915)]** it was held that a pardon does not "blot out guilt" nor does it restore the offender to a state of innocence in the eye of the law as was suggested in ***Ex Parte***

***Garland* (supra)**. It was held that far from blotting out guilt, the acceptance of a pardon may constitute a confession of guilt.

652. In ***U.S. v. Benz* [75 L. Ed. 354 at 358]** it was held that:

> *"The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."*

653. This approach was affirmed in ***Nixon v United States* [506 US 224, 232 (1993)]** where it was held:

> *"But the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is "[a]n executive action that mitigates or sets aside punishment for a crime."*

654. The position in the USA now is that although the effects of the commission of the offense lingers after a pardon, the effects of the conviction are all but wiped out. Again, this approach is founded on the separation of the judicial power from the executive arm of government.

India

655. The position in India on the effect of a Presidential pardon is succinctly set out in ***Maru Ram Etc. v. Union of India and Another* [1980 AIR 2147 at 2158]** where it was held that:

> *"Two fundamental principles in sentencing jurisprudence have to be grasped in the context of the Indian corpus juris. The first is that sentencing is a judicial*

function and whatever may be done in the matter of executing that sentence in the shape of remitting, commuting or otherwise abbreviating, the Executive cannot alter the sentence itself. In Rabha's case, a Constitution Bench of this Court illumined this branch of law. What is the jural consequence of a remission of sentence?

In the first place, an order of remission does not wipe out the offence, it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. ***An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was.*** *The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's "Constitutional Law" on the effect of reprieves and pardons vis a vis the judgment passed by the court imposing punishment, at p. 176, para 134:- "A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences.* ***'The judicial power and the executive power over sentences are readily distinguishable',*** *observed Justice Sutherland,* ***'To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which***

abridges the enforcement of the judgment but does not alter it qua judgment." (emphasis added)

656. In ***Kehar Sing and Another Etc. v. Union of India and Another*** **[(1988) Supp. 3 S.C.R. 1102 at 1111]** it was held that, in granting a pardon, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it.

657. This approach is consonant with the traditional demarcation between the powers of government. The legislature enacts laws through legislation, the executive makes policy and executes the laws while the judiciary exercises judicial power and determines disputes between the State and a private party and between private parties.

658. Accordingly, in order to appreciate the legal effect of a pardon given under the 1978 Constitution, it is necessary to ascertain which organ of the State has been vested with judicial power under the 1978 Constitution.

659. Before doing so, let me briefly examine the historical context of the constitutional structure of Sri Lanka and the power of pardon.

Sri Lanka

660. The power of pardon was part of the constitutional framework of Sri Lanka from the time of monarchism. The Royal prerogative of pardon was identified as *rāja karuna* (*The Mahāvamsa*, Ven. Buddhadatta Thero (ed.), 81 p. 533 v. 5).

661. According to Amerasinghe [A.R.B. Amerasinghe, *The Legal heritage of Sri Lanka*, The Royal Asiatic Society of Sri Lanka, The Law and Society Trust, Sarvodaya Vishva Lekha Publishers 1999, page 184]:

"[A] king had the power of pardon. Often, its exercise had little or nothing to do with guilt or innocence: 'executive policy' was the underlying consideration [...] Sometimes, it seems, a monarch was moved to vary a sentence in appeal out of compassion rather than on account of the merits of a case. Thus the Pūjāvaliya referred to the possibility of a traitor who deserved to be impaled, escaping with a small fine "if he wins the king's heart"".

662. According to Wijayatunga [Harischandra Wijayatunga, *Legal Philosophy in Medieval Siṅhalē*, Godage International Publishers (Pvt) Ltd., 2008, 177], under modern law, royal prerogative of pardon is mainly of three sorts:

(1) Free pardon – which rescinds both the sentence and the conviction
(2) Commutation or conditional pardon – which substitutes one form of punishment for another, and
(3) Remission – which reduces the amount of a sentence without changing its character

663. Amerasinghe (supra) and Wijayatunga (supra., 176) narrates instances in which Parākramabāhu II, Vijayabāhu II and Sirisamghabodi exercised the Royal prerogative of pardon. According to Wijayatunga (supra. 177-178), the royal prerogative of pardon was enjoyed by the son of the king as well and gives the example of Prince Vijayabāhu, son of Parākramabāhu II exercising such power

(B) *Judicial Power under the 1978 Constitution*

664. In ***Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development and Others*** **[(1992) 1 Sri. L. R. 286 at 296]** Fernando J. held that whether the relevant provisions in the 1978 Constitution is different from the previous regime must be considered having regard to the fact that the relevant provisions of the 1978 Constitution were not enacted in *vacuo*, but in the background of the

Constitutional provisions, judicial decisions and unsettled problems of the preceding three decades.

665. Prior to the 1972 Constitution, it was accepted that judicial power remained with the judiciary since the Charter of Justice of 1801. As was pointed out by the Privy Council in ***Liyanage and Others v. The Queen*** **(68 N.L.R. 265 at 282)**, the Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature.

666. The 1972 Constitution, the first autochthonous constitution introduced after independence, sought to constitutionalise the concept of Sovereignty. It acknowledged that the Sovereignty is in the People and is inalienable (Article 3). Nevertheless, it did not recognise the concept of separation of powers. The National State Assembly was the institution through which the Sovereignty of the People was to be exercised (Article 4) and was expressly acknowledged to be the supreme instrument of State Power of the Republic (Article 5). It exercised judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.

667. Nevertheless, the Constitutional Court took the view in the ***Local Authorities (Imposition of Civic Disabilities) (No. 2) Bill*** **[Decisions of the Constitutional Court of Sri Lanka, Vol. 6, page 30]** that Parliament today is, as the National State Assembly was, incompetent to exercise directly the judicial power which is to be exercised only through courts and similar institutions. In effect it was acknowledged that there was a functional separation of powers under the 1972 Constitution.

668. The distortion created by the convergence of governmental power in one institution, as was the case under the 1972 Constitution, is best expounded by Montesquieu [Translation by Thomas Nugent, *The Spirit of the Laws*, Hafner Publishing Company, 1959, Book XI, Chap. 6, pages 151-152]:

> *"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.*
>
> *Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislature. Were it joined to the executive power, the judge might behave with violence and oppression."*

669. Moreover, Blackstone [Blackstone's Commentaries Vol. 1 at p. 269] states:

> *"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power.* ***Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative.****"* (emphasis added)

670. The Report of the Select Committee of the National State Assembly appointed to consider the Revision of the Constitution [Parliamentary Series No. 14 of the National State Assembly] ("Report") took the view that the 1972 Constitution and in particular, Article 5, did not effectively guarantee the Sovereignty of the People. The Select Committee was of the view (at page 142) that there was no check on either the Legislature or the Executive acting in derogation of the Sovereignty of the People, or even in usurping it.

671. The Select Committee submitted a Draft Constitution along with the Report. In explaining its functioning, the Report states that, the Legislative, Executive and Judicial powers of the People are to be exercised by the different organs referred to in Article 4 of the Draft Constitution and that adequate safeguards have been provided to prevent the erosion of the Sovereignty of the People.

672. The Report goes on to state (at page 142) that the division of powers among the different organs of government tends to act as a restraint upon the arbitrary exercise, or abuse of, power by the delegates of the People. Significantly, the Report states (at pages 142-143) that the Draft Constitution makes provision:

> *"[…] for the exercise of judicial power of the People by an independent Judiciary. The independence of the Judiciary is secured, in the case of the minor judiciary, by vesting the powers of appointment, dismissal, transfer, and disciplinary control in an independent Judicial Service Commission. The independence of the Judges of the Superior Courts is secured by making Constitutional provision for the security of tenure of such Judges, for the establishment of the Superior Courts and for the entrenchment of the jurisdiction of the Superior Courts, thereby precluding the abolition of these Courts and the creation of parallel jurisdictions by ordinary legislation."*

673. It is significant that Article 4 (e) of the Draft Constitution annexed to the Report and Articles 4 (c) of the 1978 Constitution are substantially the same. Article 4 (c) of the 1978 Constitution reads as follows:

> *"The judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law."*

674. Clearly, Parliament is not the source of the judicial power of the People. The repository of the judicial power of the People is none other than the People themselves on whom the judicial power is vested as part of their inalienable Sovereignty.

675. Accordingly, the judicial power of the People is exercised by courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its members.

676. Even where the Parliament has been vested with the judicial power relating to the privileges, immunities and powers of Parliament and of its Members, such judicial power is limited. Section 22 (3) of the Parliament (Powers and Privileges) Act No. 5 of 1978 as amended, states that every breach of the privileges of Parliament which is specified in Part B of the Schedule to that Act and which is committed in respect of, or in relation to, Parliament shall be an offence under that Part punishable by Parliament.

677. Hence, the judicial power of the Parliament is confined to matters specified in Part B of the Schedule to the Parliament (Powers and Privileges) Act No. 5 of 1978 as amended. In terms of Section 22 (2) every breach of the privileges of Parliament which

is specified in the Schedule to this Act (whether in part A or Part B thereof) shall be an offence under that Part punishable by the Supreme Court under the relevant provisions.

678. The judiciary is an unelected body unlike the executive and the legislature. Since the 1978 Constitution recognises that Sovereignty is in the People, there is no mode through which the judicial power of the People can be transmitted directly to the judiciary. The transmission of the judicial power of the People to the judiciary through the conduit of the Parliament, assists to keep the nexus between the Sovereignty of the People and the exercise of the judicial power of the People by the judiciary. This gives legal effect to the political theory permeating the notion of Sovereignty being with the People. Article 4 (c) of the Constitution must be read and understood in this context.

679. Accordingly, under the 1978 Constitution, the judicial power of the People is vested with the judiciary except in so far as the matters specified in Part B of the Schedule to Parliament (Powers and Privileges) Act No. 5 of 1978 as amended where there is concurrent judicial power in Parliament and the Supreme Court. This position has been reiterated by Court in several decisions.

680. In ***Hewamanne v. De Silva and Another*** **[(1983) 1 Sri. L.R. 1 at 20]** Wanasundera J. held:

> *"Article 4(c) states that –*
>
> *[…]*
>
> *On a plain reading of this provision, it is clear that the judicial power of the People can only be exercised by "judicial officers" as defined in Article 170, except in regard to matters relating to the privileges, immunities and powers of Parliament. I think no counsel before us disputed that* ***these provisions indicate an***

unmistakable vesting of the judicial power of the People in the judiciary established by or under the Constitution and that Parliament acts as a conduit through which the judicial power of the People passes to the judiciary. *Whatever the wording of Article 4 (c) may suggest, there could be little doubt that at the lowest this provision, read with the other provisions, has brought about a functional separation of the judicial power from the other powers in our Constitution and accordingly* ***the domain of judicial power (except the special area carved out for Parliament), has been entrusted solely and exclusively to the judiciary***." (emphasis added)

681. In ***Premachandra v. Major Montague Jayawickrema and Another*** **(Provincial Governors' Case) [(1994) 2 Sri.L.R. 90 at 107]** it was held:

"[...] ***Although Article 4(c) vests judicial power in Parliament, yet there is a functional separation of powers inasmuch as judicial power can only be exercised by courts and other judicial tribunals, subject only to one exception in regard to Parliamentary privilege. And even in that field, when Parliament acts as an institution directly exercising judicial power, there is no express exclusion or exemption from judicial review under Article 140*** *(cf. Dissanayake v. Kaleel(15)). The Superior Courts are thus functionally a separate and co-ordinate organ of government; its power of judicial review cannot be less than that of a body to Parliament; it is illogical to contend that "political questions" are excluded from review by the Judiciary if it is an organ of government co-ordinate with the other organs of government, but are reviewable by the Judiciary if it is a subordinate organ."* (emphasis added)

682. In ***Dr. Athulasiri Kumara Samarakoon and Others v. Ranil Wickramasinghe and Others*** **[S.C. (F.R.) 195/2022 and 212/2022, S.C.M. 14.11.2023 (Economic Crisis case), at page 64]**, the majority (Jayasuriya C.J., Aluwihare, Malalgoda, M. Fernando JJ.) held:

"The Supreme Court is the highest and final Superior Court of record of the Republic. ***Article 4(c) of the Constitution recognizes that the Parliament exercises people's judicial power through courts created and established or recognized by the Constitution or created and established by law. However, the Parliament is empowered to exercise People's judicial power, directly, in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, according to law.*** **Therefore, there is no doubt or ambiguity as to the power of Courts to exercise judicial power of the People in regard to all matters that are recognized by law other than the specific instance excluded by Article 4(c).** The Constitution which is the Supreme law of the Democratic Socialist Republic of Sri Lanka assures that independence of the judiciary as an intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka." (emphasis added)

683. A plain reading of Article 4 (c) of the Constitution makes it clear that the 1978 Constitution does not seek to confer any judicial power in the executive. This view is fortified upon an examination of Article 34 of the Constitution which reads as follows:

> *"34. (1) The President may in the case of any offender convicted of any offense in any court within the Republic of Sri Lanka –*
>
> *(a) Grant a pardon, either free or subject to lawful conditions;*
> *(b) Grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender;*
> *(c) Substitute a less severe form of punishment for any punishment imposed on such offender; or*

(d) Remit the whole or any part of any punishment imposed or any of any penalty or forfeiture otherwise due to the Republic on account of such offence…"

684. None of these provisions indicate any intention on the part of the legislature to consider such a pardon, respite, substitution of a less severe form of punishment or remission to amount to an obliteration of the conviction and sentence imposed by a court of competent jurisdiction. It cannot in law do so since Article 4 (c) of the Constitution does not seek to vest any judicial power in the executive. It is trite law that where two or more interpretations are possible, Court must select the interpretation consistent with the Constitution rather than one which is inconsistent with it.

685. For the foregoing reasons, I hold that the power given to the President under Article 34 (1) of the Constitution does not have the legal effect of altering the judgment or sentence of a court of competent jurisdiction. It only liberates the offender from the execution of the sentence passed by the Court to the extent specified in the pardon.

(C) *Procedural requirements for the grant of a pardon under the Proviso to Article 34(1) of the Constitution*

686. I am in respectful agreement with the views expressed by my brother Justice Kodagoda PC on the procedure that must be followed in terms of the Proviso to Article 34(1) of the Constitution before the President exercises any power of pardon, respite, substitution of a less severe form of punishment or remission.

687. For purposes of clarity, I re-produce the procedural requirements expounded by my brother Justice Kodagoda J, P.C. with which I am in entire agreement:

1. The President shall cause a report to be made to him by the Judge who tried the case.

2. The President shall forward such report to the Attorney-General. The communication to the Attorney- General shall contain instructions, that after the Attorney-General has advised thereon, the report of the Judge shall be sent together with the Attorney-General's advice to the Minister in-charge of the subject of Justice.

3. On the receipt of the afore-stated communication from the President, upon a consideration of the report of the Judge and other relevant material which the Attorney-General may be briefed of such as a report of the State Counsel who conducted the prosecution against the convict (though a consideration of such additional material is not a requirement contained in the proviso to Article 34(1), thus not a mandatory requirement), the Attorney-General shall record his advice on the matter, and forward the report of the Judge (together with his advice) to the Minister in-charge of the subject of Justice.

4. Upon receipt of the material submitted by the Attorney-General, the Minister in-charge of the subject of Justice shall on a consideration of such material and any other material which the Minister may deem to be relevant (which is also not a mandatory requirement), forward to the President his recommendation. It is reasonably assumed that to the Minister's communication to the President would be attached, the opinion expressed by the Attorney-General.

(D) ***Judicial Review of the grant of a pardon by the President under Article 34(1)***

688. The learned ASG submitted that judicial review of the power of pardon on the merits would violate the separation of powers, including the principle of checks and balances. In the alternative, it was submitted that the power of pardon is *sui generis* in nature and not amenable to the jurisdiction of Court under Article 126.

689. In ***Premachandra v. Attorney General and Others*** **[S.C. (F.R.) Application No. 221/2021, S.C.M. 17.01.2024]** Court rejected the argument that the grant of a pardon to an offender by the President is not reviewable by this Court in terms of its jurisdiction under Article 126 read with the proviso to Article 35 of the Constitution.

690. My brother Justice Kodagoda, P.C. has dealt with these contentions and held that a decision of the President on the grant or refusal of the grant of a pardon is reviewable by the Court in the exercise of its jurisdiction contained in Article 126 read with Article 17 of the Constitution, not only on grounds of procedural ultra vires, but on the merits of the decision as well. I am in respectful agreement with his reasoning and conclusions.

691. Nevertheless, I wish to consider a matter raised by the learned ASG by reference to the determination of Court in ***The Twenty First Amendment to the Constitution Bill*** **[S.C.S.D. 31-37/2022]** since I was a member of the bench which made that determination. The learned ASG referred to the Delegation test and Alienation test propounded therein and contended that if the grant of the presidential pardon by the President, who is conferred that power by Article 34 (1) is reviewed on the merits by the Supreme Court in exercise of the fundamental rights jurisdiction, it would fail the delegation test as it would 'bring in another person or institution' into the exercise of such power.

692. In ***The Twenty First Amendment to the Constitution Bill*** **(supra. page 41)** Court held that:

> "*Accordingly, it is our view that the proper tests to be adopted in determining whether a violation of Article 4 leads to a violation of Article 3 are as follows:*
>
> 1. *Different features of the Sovereignty that is reposed in the People can be delegated by the People to be exercised by an organ of government. Delegation by the People of the Sovereignty reposed in them is part of*

their Sovereignty identified in Article 3. Article 4 deals with both the delegation and the exercise of different features of Sovereignty. In terms of Article 4(b), the People have delegated their executive power to the President elected by them. Any change to such delegation which brings in another person or institution to exercise the executive power of the People must be with the approval of the People as otherwise it infringes Article 3. (Delegation Test).

2. *The transfer, relinquishment or removal of a power attributed to one organ of Government to another organ or body would be inconsistent with Article 3 read with Article 4 of the Constitution. (Alienation Test)"*

693. Court laid down these two tests to determine whether a violation of Article 4 leads to a violation of Article 3. It has no application in determining whether the exercise of judicial power by Court amounts to an exercise of executive power since judicial power by its very nature is directed, *inter alia*, at ensuring that legislative action, in the case of Sri Lanka at the pre-enactment stage, and executive and administrative actions are in accordance with law. As was held in ***Premachandra vs. Major Montague Jayawickrema*** **[(1994) 2 Sri. L.R. 9 at 102]**, *"[I]n Sri Lanka, however, it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary*".

694. In any event, the 11A Respondent has not given any reasons for the exercise of the power of pardon in terms of Article 34(1) of the Constitution in relation to the 1st or 2nd pardons.

695. In so far as the 1st pardon is concerned, all what is said in his affidavit dated 30th November 2021, is that he had granted the pardon acting on the recommendations of the committee and the Minister of Justice. Such a course of action is untenable in law and amounts to abdication and acting under dictation. It is only the President, who has been vested with the power of pardon in terms of Article 34(1) of the

Constitution, who can decide to grant a pardon. While it is possible for him to appoint a body to consider the matter in detail and submit a report to him, he cannot be heard to state that the pardon was granted based on the recommendation of such body. He must give his independent mind to the issue and decide whether or not to exercise the power of pardon. On the available material he has not done so. Hence the question of examining the merits of the decision of the 11A Respondent does not arise for consideration.

696. In relation to the 2nd pardon, all what is stated by the 11A Respondent is that acting reasonably and in compliance with due process, he granted the pardon to the 2nd Respondent. No reasons for the exercise of the power of pardon is set out. Thus, in this instance as well, the question of examining the merits of the decision of the 11A Respondent does not arise for consideration.

(E) ***Due compliance with the procedural requirements***

697. The 11A Respondent has failed to comply with the procedural requirements (1) to (4) enumerated above as required by the Proviso to Article 34(1) of the Constitution before granting the 1st and 2nd pardons as more fully elucidated by my brothers Justice Thurairaja, P.C. and Justice Kodagoda, P.C.

(F) ***Legality of the grant of the 1st pardon***

698. As adumbrated earlier, the 11A Respondent has failed to give any reasons for the grant of the 1st pardon. Moreover, even the records maintained at the Presidential Secretariat do not contain any reasons for the grant of such pardon.

699. In ***Pushpakumara v. Director-General (Electric and Electronic Division), Sri Lanka Navy Headquarters and Others*** **[S.C. (F.R.) Application No: 452/2011, S.C.M. 06.07.2021, pp. 5-6]**, I held as follows:

> *"I have no hesitation in holding that once the fundamental rights jurisdiction of this Court is invoked, the decision-maker owes a duty to the Court to disclose the reasons for his decision. Even where no reasons have been given to the affected party, the departmental file must contain the reasons for the impugned decision. Where no such reasons have been recorded, the only conclusion the Court can draw is that the decision was taken devoid of any reasons and is hence arbitrary."*

700. Article 12 (1) of the Constitution embodies the rule of law. Arbitrary action is anathema to the rule of law. Failure to provide reasons for the exercise of executive power makes the exercise of such power arbitrary and capricious. Accordingly, I hold that the 1st pardon infringes the fundamental right guaranteed by Article 12(1) of the Constitution and hence is void and of no force or avail in law.

701. The 11A Respondent has also failed to comply with the procedural requirements (1) to (4) enumerated above as required by the Proviso to Article 34 (1) of the Constitution before granting the 1st pardon as more fully elucidated above. Accordingly, I hold that the 1st pardon violates the rule of law and infringes the fundamental right guaranteed by Article 12 (1) of the Constitution. Hence, it is void and of no force or avail in law on that ground as well.

(G) *Legality of the grant of the 2nd pardon*

702. The 11A Respondent has failed to provide reasons for the grant of the 2nd pardon. Moreover, even the records maintained at the Presidential Secretariat do not contain any reasons for the grant of such pardon.

703. Hence, applying the principle expounded by me in ***Pushpakumara* (supra)**, I hold that the grant of the 2nd pardon is arbitrary and capricious. Article 12 (1) of the Constitution embodies the rule of law. Arbitrary action is anathema to the rule of law. Failure to provide reasons for the exercise of executive power makes the exercise of

such power arbitrary and capricious. Accordingly, I hold that the 2nd pardon infringes the fundamental right guaranteed by Article 12(1) of the Constitution and hence is void and of no force or avail in law.

704. I agree with the contention of the learned President's Counsel for the Petitioner that the 1st pardon does not have the effect of altering the "historical fact" that the 2nd Respondent was convicted by a court of competent jurisdiction and sentenced to death. The conviction and sentence were imposed by the exercise of judicial power.

705. An executive pardon pursuant to Article 34 (1) of the Constitution does not alter the status of an offender. For the purposes of Article 34 (1), he remains *an offender who has been condemned to suffer death by the sentence of any court*. Thus, every time any pardon is contemplated to such a person, the procedure in the Proviso to Article 34 (1) of the Constitution must be followed.

706. As adumbrated above, the procedural requirements in the Proviso to Article 34 (1) of the Constitution were not followed in granting the 2nd pardon. Accordingly, I hold that the 2nd pardon violates the rule of law and infringes the fundamental right guaranteed by Article 12 (1) of the Constitution. Hence, it is void and of no force or avail in law on that ground as well.

707. For the foregoing reasons, I declare that:

(a) The grant of the first pardon by the 11A Respondent to the 2nd Respondent on or about 17th May 2016, whereby a term of life imprisonment was substituted to the death sentence, is contrary to Articles 12(1) and 34(1) of the Constitution and hence is void and of no force or avail in law;

(b) The grant of the second pardon by the 11A Respondent to the 2nd Respondent on or about 30th October 2019, whereby the 11A Respondent purported to approve the release of the 2nd Respondent, is contrary to Articles 12(1) and 34(1) of the Constitution and hence is void and of no force or avail in law.

708. I make the following further declarations and orders:

(1) I declare that by the grant of the impugned purported 1st and 2nd pardons by the 11A Respondent (former President Maithripala Sirisena) has infringed the fundamental rights guaranteed to the Petitioner by Article 12 (1) of the Constitution;

(2) In consideration of the grievously abusive, irresponsible, callous and unlawful manner in which the 11A Respondent has exercised power vested in the President by Article 34 (1) of the Constitution on the occasion of the grant of the purported 2nd pardon, as a deterrence measure to him and to all those holding public office and is vested with power to exercise for specific purposes which shall be overall in public interest, the 11A Respondent is directed to pay a sum of Rupees One Million to the Petitioner. The Petitioner shall hold such money in trust and spend for the purposes that are in the best interests of female victims of crime. This sum of money shall be paid within one month of this judgment.

(3) The Attorney-General shall forthwith with the assistance of the relevant competent authorities set in motion a procedure aimed at locating the 2nd Respondent and in terms of the applicable law and agreements with foreign countries, to have him located, brought back to Sri Lanka, apprehended and be placed back in prison to serve life imprisonment (This order is made in view of information placed before this Court sequel to the filing of this Application, immediately preceding this Court having made an interim order on 29th November 2019 restraining the 2nd Respondent from leaving the country, he had left the country, and since not returned).

It is to be noted that, though this Court has declared the impugned 1st pardon unlawful and therefore void, given the lapse in time since the grant of such pardon and the fact that it applied to 69 prisoners who were being detained in

the *death row*, exercising the just and equitable jurisdiction conferred on it under Article 126 of the Constitution, this Court refrains from directing that upon being located, apprehended and returned to the prison, the 2nd Respondent be placed in the *death row*.

The Attorney-General shall once in every two months file a motion in Court setting out steps taken with regard to the implementation of this direction and the associated development.

709. The Petitioner shall be entitled to recover from 11A Respondent, costs of this litigation

JUDGE OF THE SUPREME COURT