IN THE SUPREME COURT
OF THE DEMOCRATIC SOCIALIST REPUBIC 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.

Application No. **SC/FR/246/2022**

Ambika Sathkunanathan
No. 27, Rudra Mawatha,
Colombo 6.

Petitioner

Vs.

1. (A) Hon. Attorney General
Attorney General's Department,
Colombo 12.

1. (B) Hon. Attorney General,
Attorney General's Department,
Colombo 12.

2. Gamini Senarath
(Former) Secretary to the President,
Presidential Secretariat,
Colombo 01.

3. Saman Ekanayake
Secretary to the President,
Presidential Secretariat,
Colombo 01.

4. General (Retired) Kamal Gunaratne
Secretary, Ministry of Defence,
Defence Headquarters Complex,
Sri Jayawardenapura Kotte.

Respondents

Application No. **SC FR 261/2022**

1. Wewala Pandithage Namini Thathprabha Panditha
Pabasara, Sarasawi Mawatha,
Horonduwa,
Yatiyana,
Matara.

2. Rusiru Tharinda Egodage
728/E, Kuttampokuna Road,
Himbutuwelgoda,
Kelaniya.

Petitioners

Vs.

1. C.D. Wickramaratne
Inspector General of Police,
Police Headquarters,
Colombo 10.

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

Respondents

Application No. **SC FR 262/2022**

1. Centre for Policy Alternatives (Guarantee) Limited
No. 6/5, Layards Road,
Colombo 5.

2. Dr. Paikiasothy Saravanamuttu
No. 3, Ascot Avenue,
Colombo 5.

Petitioners

Vs.

1. Hon. Attorney General

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

Respondents

Application No. **SC FR 274/2022**

1. Atham Lebbe Aazath
No. 75/65, Maligakanda Road,
Maradana,
Colombo 10.

2. Laxmanan Sanjeev
No. 19, 2/5, Asian Courts,
Milagiriya Avenue,
Colombo 4.

Petitioners

Vs.

1. Saman Ekanayake
Secretary to the President,
Presidential Secretariat,
Colombo 1.

2. General (Retired) Kamal Gunaratne
Secretary to the Ministry of Defence,
Ministry of Defence,
Defence Headquarters Complex,
Sri Jayawardenapura Kotte.

3. S. Hettiarachchi
Secretary to the Ministry of Public Security,
15th Floor, Suhurupaya,
Battaramulla.

4. C.D. Wickramaratne
Inspector General of Police,
Police Headquarters,
Colombo 10.

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

Respondents

Application No. **SC FR 276/2022**

Thudugala Mudalige Pubudu Sandun Thudugala
No. 50, Ayesha Watta,
Yakalla,
Ibbagamuwa.

Petitioner

Vs.

1. Hon. Ranil Wickremasinghe
President of the Democratic Socialist Republic of Sri Lanka and Minister of Defence

Hon. Attorney General
(In terms of proviso to Article 35(1) of the Constitution.)

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

3. Gamini Senarath
(Former) Secretary to the President,
Presidential Secretariat,
Colombo 1.

4. Saman Ekanayake
Secretary to the President,
Presidential Secretariat,
Colombo 1.

5. General (Retired) Kamal Gunaratne
Secretary, Ministry of Defence,
Defence Headquarters Complex,
Sri Jayawardenapura Kotte.

Respondents

Before: **Murdu N.B. Fernando, PC, CJ.**
Yasantha Kodagoda, PC, J.
Arjuna Obeyesekere, J.

Appearance:

Pulasthi Hewamanne with Harini Jayawardhana, Fadhila Fairoze, Linuri Munasinghe and Githmi Wijenarayana instructed by Lilanthi de Silva for the Petitioner in SC FR 246/2022.

Dr. Gehan Gunatilleke with Oshan Fernando and Avishka Jayaweera instructed by R.N.S. Livera appeared for the Petitioners in SC FR 261/2022 till Dr. Gunatilleke's appointment as a Commissioner of the Human Rights Commission of Sri Lanka. Thereafter, Mr. Oshan Fernando appeared with Avishka Jayaweera instructed by R.N.S. Livera for the Petitioners

Suren Fernando with Luwie Ganeshathasan and Kyathi Wickremanayake instructed by R. N. S. Livera for the Petitioners in SC FR 262/2022.

Thishya Weragoda, Prathap Welikumbura, Dilan Nalaka, Yasanga Senadheera and Chamodi Wijeweera instructed by Niluka Sanjani Dissanayake for the Petitioners in SC FR 274/2022.

Ermiza Tegal with Namashya Ratnayake instructed by Judith Darshika Ariyanayagam for the Petitioner in SC FR 276/2022.

Rajiv Goonethileke, Deputy Solicitor General, Shaminda Wickrama, Senior State Counsel with Sajith Bandara, State Counsel, Madushika Kannangara, State Counsel and Jemiah Sourjah, State Counsel for the Respondents.

Argued on:	11th & 30th January, 10th February, 15th & 16th March, 2nd May, 23rd June, 7th August, 3rd & 11th October, 5th & 15th December 2023 and 27th February & 2nd July 2024.
Written Submissions tendered on:	For Petitioners in SC FR 246/2022, SC FR 261/2022 and SC FR 262/2022 – filed on 30th August 2024. For Petitioners in SC FR 274/2022 and SC FR 276 – filed on 03rd September 2024. For Respondents – filed on 12th March 2025.
Judgment delivered on:	23rd July, 2025

Judgment

Yasantha Kodagoda, PC, J.

An insight into the Judgment

1) In 2022, public protests were held in several parts of the country including in Colombo. It culminated in a massive public protest on 9th July 2022, resulting in the then President vacating his official residence and resigning from office after having temporarily left the country on or around 13th July 2022. Initially, the Prime Minister functioned as the Acting President. An election was scheduled to be held (and subsequently held) in Parliament on 20th July 2022 to elect from among the Members of Parliament a President to serve the remainder of the term of office of the President who resigned. The Acting President stood for that election as a candidate and he won to become the President of the Democratic Socialist Republic of Sri Lanka.

2) In the run-up to the election, on 17th July 2022, the Acting President issued a Proclamation under section 2 of the Public Security Ordinance, No. 25 of 1947 (as amended) and thereby declared an island-wide state of Emergency. On 18th July 2022, Emergency Regulations were promulgated by him under section 5 of that Ordinance. The Petitioners challenged both the issuance of the Proclamation and the promulgation of Emergency Regulations, on the footing that they amounted

to an abuse of power. The contention of the Petitioners was that the ground situation which prevailed as at 17th and 18th July 2022 did not warrant the impugned course of action adopted by the Acting President. The Respondents sought to justify the impugned actions on the basis of the power conferred on the President by sections 2 and 5 of the Public Security Ordinance and the ground situation that prevailed.

3) This Judgment contains a detailed exposition and the findings of this Court on (i) the ground situation that prevailed, (ii) whether this Court has the jurisdiction to judicially review the making of a Proclamation under section 2 of the Public Security Ordinance, (iii) the nature of the power vested in the President by sections 2 and 5 of the Public Security Ordinance, (iv) the manner in which judicial review of the exercise of the power contained in section 2 of the Public Security Ordinance should be carried out, and (v) the lawfulness or otherwise of the impugned Proclamation issued under section 2 of the Public Security Ordinance.

Formalities

4) Application SC/FR/246/2022 along with SC/FR/261, 262, 274 and 276/2022 were heard simultaneously during a consolidated hearing. Thus, all pleadings were consolidated and made applicable in respect of all parties in the several Applications. As the core issues to be adjudicated upon by this Court were similar though not necessarily identical, learned counsel for all parties proposed that a consolidated Judgment be pronounced by Court. The Court agreed to do so; thus, this single Judgment.

5) In all these matters, following the Applications being supported, the Supreme Court has granted *leave to proceed* under Articles 12(1) and 14(1) of the Constitution.

The Petitioners

SC/FR/246/2022

6) The Petitioner (Ms. Ambika Sathkunanathan) had been a member of the Human Rights Commission of Sri Lanka. The Petitioner's position is that she filed her Application in pursuance of her duties in terms of Article 28(a) of the Constitution, which confers on every person in Sri Lanka the duty to *inter alia* uphold and defend the Constitution and the law.

SC/FR/261/2022

7) The 1st Petitioner (Ms. W.P. Namini Thathprabha Panditha) an Attorney-at-Law and the 2nd Petitioner (Mr. Rusiru Tharinda Egodage) both being citizens of Sri Lanka, are conveners of the *Liberal Youth Movement of Sri Lanka*. This organisation is said to be dedicated to the promotion of the Rule of Law and liberal democratic values, including the protection and promotion of fundamental rights. The organisation is also against all forms of violent extremism. The Petitioners have taken up the position that they have preferred their Application on their own behalf and in national and public interest.

SC/FR/262/2022

8) The 1st Petitioner (Centre for Policy Alternatives (Guarantee) Limited) is a body incorporated under the Companies Act, of which the primary objectives are to *inter alia,* provide inputs into public policy-making and implementation processes in constitutional, legislative and administrative spheres of governance. That is with the view to ensuring responsible and good governance. It also proposes constructive policy alternatives aimed at strengthening and safeguarding democracy, pluralism, the Rule of Law, human rights and social justice. The 2nd Petitioner (Dr. Paikiasothy Saravanamuttu) is the Executive Director of the 1st Petitioner organisation.

SC/FR/274/2022

9) The 1st Petitioner (Mr. Atham Lebbe Aazath) is an Attorney-at-Law and the 2nd Petitioner (Mr. Laxmanan Sanjeev) is an LL.B. graduate and a student of the Sri Lanka Law College. Both of them have introduced themselves to this Court as human rights activists.

SC/FR/276/2022

10) The Petitioner (Mr. T.M.P. Sandun Thudugala) is the Head of Programmes at the Law and Society Trust, a non-profit organisation engaged in legal research, advocacy and human rights documentation.

The Respondents

11) His Excellency the former President Honourable Ranil Wickremasinghe has been cited as the 1st Respondent in Application No. 276/2022. As His Excellency was the incumbent President of the Democratic Socialist Republic of Sri Lanka at the time the Application was filed, on his behalf, the Honourable Attorney General has been named a Respondent in terms of Article 35(1) of the Constitution. During

the period relevant to these Applications, His Excellency was the Acting President. In Application Nos. 246/2022 and 262/2022, the Honourable Attorney General has been cited as a Respondent in terms of Article 35(1) of the Constitution. Additionally, in all Applications, the Honourable Attorney General has been cited as a Respondent in terms of Rule 44 of the Supreme Court Rules read with Article 126(2) of the Constitution. Gamini Senarath, the former Secretary to the President during whose tenure as Secretary to the President the impugned Proclamation had been issued by the then Acting President, has been cited as the 2nd and 3rd Respondent, in Application Nos. 246/2022 and 276/2022, respectively. The succeeding Secretary to the President Saman Ekanayake (who is the sole Respondent who has filed an Affidavit and supporting material objecting to the grant of relief), has been cited as the 3rd, 1st and 4th Respondent in Application Nos. 246/2022, 274/2022 and 276/2022, respectively. The then Secretary to the Ministry of Defence Major General (retired) Kamal Gunaratne has been cited as the 4th, 2nd and 5th Respondent in Application Nos. 246/2022, 274/2022 and 276/2022, respectively. The then Inspector General of Police C.D. Wickremaratne has been cited as the 1st and 4th Respondents respectively in Application Nos. 261/2022 and 274/2022. The then Secretary to the Ministry of Public Security S. Hettiarachchi has been cited as the 3rd Respondent in Application No. 274/2022.

Composite factual narrative of the Petitioners

12) Though all the Petitioners have not adverted to all the aspects contained in the under-mentioned narrative and the sequence of events, the following composite picture can be adduced from the Affidavits of the Petitioners and the material placed by them before the Supreme Court. The documents attached to the Affidavits of the Petitioners and produced as documentary evidence were extremely useful to put together this composite picture.

13) From early 2022, the economic situation of the country started to rapidly deteriorate in a manner that was visible to and deeply felt by the public. It evolved into an unprecedented economic and financial crisis which resulted in acute shortages of basic amenities and necessities such as fuel, cooking gas, electricity, certain food items and medicine. It is well-known that this situation resulted from a serious depletion of foreign exchange reserves of the Government which resulted in an ensuing inability by the Government to service foreign debt and both the State and private sector importers importing goods. Inflation and correspondingly the cost of living rapidly escalated coupled with a serious depreciation of the Sri

Lankan Rupee against the US Dollar. A detailed account of the disastrous financial situation and the ensuing economic meltdown that occurred during this era, its early manifestations, seriousness, preventable nature and culpability of identified individuals who held high public office during that era is found in the Divisional Bench judgment of this Court in ***Samarakoon vs. Wickremasinghe*** and ***Jayaratne vs. Attorney General*** *[SC FR 195/2022 and 212/2022, SC Minutes of 14th November 2023]*.

14) From about March 2022, members of the public began to protest against the failure of the Government to resolve the economic hardships encountered by them. They also protested regarding certain general issues of governance which were political in nature that had been ostensibly troubling them over a period of time. These public activities gradually evolved into mass-scale vociferous public protests which were conducted throughout the country. At one stage, large numbers of people occupied public areas immediately outside the Presidential Secretariat, areas adjacent to the *Shangri-La* Hotel in Colombo and the northern part of the Galle Face Green. These nation-wide protests were popularly called the *'Aragalaya'* (The Struggle). The protesters complained of some of the policies of the then President His Excellency Gotabaya Rajapaksa and his Government, and demanded that he steps down from the Presidency. Protesters also called for an overall change in systems of governance, with the tag-line *'system change'*. The protests were largely peaceful. However, there was a complete obstruction of a gate of the Presidential Secretariat, and a partial occlusion of the Galle Road near the Presidential Secretariat.

15) On the 9th of May 2022, the protesters were attacked by persons who had allegedly come out of the Prime Minister Honourable Mahinda Rajapaksa's official residence – the *Temple Trees*. Some of the Petitioners have alleged that this mob was instigated to attack the protesters by those within the *Temple Trees*. This incident triggered a violent reaction. That night, several residences and other property of politicians of the Government, including houses of some Ministers and Members of Parliament of the Government were attacked and subjected to arson. A Member of Parliament (MP) of the Government and his Personal Security Officer (PSO) were forced out of the jeep they were travelling and murdered. That night, there was an almost successful attempt by a group of protesters to breach the security points and invade the *Temple Trees* at a time when the Prime Minister

Honourable Mahinda Rajapaksa was in the residence. [vide "P1" and "P2" filed in SC FR 276/2022.]

16) Following the afore-stated incident, the Prime Minister Hon. Mahinda Rajapaksa, MP resigned. Sequel to his resignation, the then President His Excellency Gotabaya Rajapaksa appointed Honourable Ranil Wickremasinghe, MP as the Prime Minister of the Democratic Socialist Republic of Sri Lanka.

17) Meanwhile, the *Aragalaya* continued.

18) As evidenced by "P2(a)" and "P2(b)" produced by the Petitioner in SC FR 246/2022, on 9th July 2022, a very large number of protesters converged in Colombo from different parts of the country. They congregated in the general area of the Colombo Fort, and later invaded and forcibly occupied the President's official residence (named the *'Janadhipathi Mandiraya'*) situated in Fort, Colombo 1. In the midst of these developments, during the morning hours of the 9th, at a time when protesters had thronged the entrance of the official residence of the President and soon prior to the protesters forcibly entering the official residence of the President, the then President His Excellency Gotabaya Rajapaksa left the residence from a rear gate. During the evening hours of that day, the protesters also entered and occupied the Presidential Secretariat, and that night a mob set ablaze and destroyed the private residence of the recently appointed Prime Minister Honourable Ranil Wickremasinghe. That night, protesters also forcibly entered the *Temple Trees* and occupied it.

19) On 10th July 2022, an attempt was made to invade the official residence of the former Prime Minister Hon. Mahinda Rajapaksa situated at Wijerama Mawatha, Colombo 7. It was foiled by law enforcement authorities.

20) On 13th July 2022, a large number of people gathered at the Polduwa junction in Sri Jayawardenepura Kotte where the main roadway to the Parliamentary complex is situated, and engaged in a protest. As referred to later, it had been violent, with the protesters seeking to proceed towards the Parliament, and the police and the armed forces taking measures to prevent that from happening. Towards late night, that protest had been successfully repulsed. On or around the same day, a group of protesters invaded the State-owned Sri Lanka Rupavahini television station situated near the Independence Square, Colombo 7, and for a

brief moment successfully forced producers of a live programme to allow protesters to address viewers through such programme. On that same day, President His Excellency Gotabaya Rajapaksa whose whereabouts were not known to the public, left the country.

21) On or about that time, he appointed the Prime Minister Hon. Ranil Wickremasinghe as the Acting President. That night, the Acting President in terms of section 16 of the PSO, declared an all-island curfew. It ended by 5.00 a.m. the following morning. (*Gazette Extraordinary* No. 2288/21 dated 13th July 2022 produced during the hearing.)

22) As evidenced in "P2(c)" produced by the Petitioner in SC FR 246/2022, on 14th July 2022, the Speaker of Parliament announced that President Gotabaya Rajapaksa had resigned from the office of the President. According to "P2(d)" in the same Application, on 14th July 2022, the then Prime Minister Hon. Ranil Wickremasinghe amended the duties and functions of the Minister of Defence.

23) As depicted in the *Gazette* notification "P2(e)" produced by the Petitioner in SC FR 246/2022, on 15th July 2022, the Honourable Prime Minister assumed duties as the Acting President. Consequent to which, the Parliament was to meet (and met as scheduled) on 20th July 2022 to elect a President. Meanwhile, His Excellency the Acting President Honourable Ranil Wickremasinghe declared his candidacy at such election.

24) As revealed in "P5(a)" and "P5(b)" produced by the Petitioner in SC FR 246/2022, the Inter-University Students Federation (an umbrella organisation of university students of State universities) had organised a large-scale protest to be held on 19th July 2022, calling for the resignation of the Acting President. It was to be held once again at the Polduwa junction. The police had obtained a Magisterial order under section 106 of the Code of Criminal Procedure Act to prevent certain named individuals from participating in that protest. That was for the purpose of preventing the protest taking place.

25) On 17th July 2022, a Proclamation purportedly under section 2 of the Public Security Ordinance was issued by the Acting President declaring a *'state of Emergency'* with effect from 18th July 2022. This Proclamation was published in

Gazette Extraordinary No. 2288/30 dated 17th July 2022. This Proclamation resulted in bringing into force Part II of the Public Security Ordinance. The making of this Proclamation has been challenged by the Petitioners in these proceedings.

26) On 18th July 2022, certain *'Emergency Regulations'* were promulgated by the Acting President purportedly under section 5 of the Public Security Ordinance. These Regulations titled *'Emergency (Miscellaneous Provisions and Powers), No. 1 of 2022'* were published in *Gazette Extraordinary* No. 2289/07 dated 18th July 2022. It was submitted on behalf of the Petitioners that these Emergency Regulations were almost identical to the previous set of Emergency Regulations promulgated by the former President Gotabaya Rajapaksa in May 2022, published in *Gazette Extraordinary* No. 2278/23 dated 6th May 2022 and subsequently abolished by the former President with effect from 20th May 2022. On 21st July 2022, Regulation 2(1) was amended. That was by "P8(d)" published in *Gazette Extraordinary* No. 2289/41 dated 21st July 2022. The Emergency Regulations of 18th July 2022 have also been challenged by the Petitioners in these proceedings.

27) During the hearing of these Applications, all parties agreed that the impugned Emergency Regulations were not enforced.

28) During the hearing, learned Counsel who appeared for the Petitioners expressed agreement with learned Deputy Solicitor General for the Respondents that on 19th July, a large mob forcibly entered and occupied the Prime Minister's Office situated at Flower Road, Colombo 7. It is revealed in "P5(a)" and "P5(b)" produced by the Petitioner in SC FR 246/2022.

29) As revealed in "P3(a)" and "P3(b)" produced by the Petitioner in SC FR 246/2022, on 20th July 2022, an election was held in Parliament to elect a President to complete the remainder of the term of office of the former President. The Acting President cum Prime Minister who contested, won that election. Accordingly, as evidenced by "P3(d)" produced by the same Petitioner, on 22nd July 2022, His Excellency Ranil Wickremasinghe was sworn in by His Lordship the Chief Justice Jayantha Jayasuriya, PC as the President of the Democratic Socialist Republic of Sri Lanka.

30) Both the afore-stated Proclamation and the Emergency Regulations were subsequently approved by the Parliament on 27th July 2022. On 5th August, the

Emergency Regulations were amended and published in the *Gazette Extraordinary* No. 2291/43. Since no attempt was made by the Government to obtain the approval of the Parliament to the said Regulations, on 18th August 2022, due to the operation of the law, the impugned Regulations lapsed.

31) As stated above, the Petitioners challenged both the afore-stated Proclamation (declaring a state of Emergency) ["P6(a)", "P6(b)" and "P6(c)", which are notifications published in *Gazette Extraordinary* No. 2288/30 dated 17th July 2022] and the corresponding Emergency Regulations ["P8(a)", "P8(b)" and "P8(c)" titled "Regulations" and referred to in Regulation 1 as the *'Emergency (Miscellaneous Provisions and Powers) Regulations, No. 1 of 2022'* published in *Gazette Extraordinary* No. 2289/07 dated 18th July 2022].

Criticism of the Petitioners

32) The principal criticism of the Petitioner in SC/FR/246/2022 against the afore-stated Proclamation is that, it had not been issued by the then Acting President, and had been merely singed and issued by the Secretary to the President. It was asserted on behalf of the Petitioners that there was no evidence placed before this Court by the Respondents to establish that the said Proclamation had in fact been issued by His Excellency the Acting President Ranil Wickremasinghe himself. Learned counsel for the Petitioner claimed that thus the purported Proclamation is not valid in law. Further, he argued that in any event, the situation that prevailed at the time of the issue of the Proclamation did not warrant and justify the making of a Proclamation under section 2 of the Public Security Ordinance. The Petitioner in SC/FR/276/2022 also took up the same position. However, during the consolidated hearing into all Applications relating to this Judgment, learned counsel in SC/FR/276/2022 conceded that particularly upon perusal of the original Proclamations signed by His Excellency the Acting President in Sinhala, Tamil and English languages which were subsequently ordered to be published in the *Gazette* and also to be communicated to the Honourable Speaker (along with the corresponding minutes, dated 17th July 2022) as contained in the file maintained by the Presidential Secretariat, there was sufficient proof that His Excellency the Acting President Ranil Wickremasinghe had himself issued the impugned Proclamation ["P6(a)", "P6(b)", and "P6(c)"]. However, learned Counsel for the Petitioner in SC FR 246/2022 persisted in his criticism that the Acting President himself had not issued the Proclamation. A detailed consideration of this criticism will follow.

33) The Petitioners also vehemently criticised the Acting President for having taken action purportedly under section 2 of the Public Security Ordinance to declare a state of Emergency and thereby for having brought Part II of the Ordinance into force. Their submission was that the ground situation which prevailed as at 17th July 2022 was not a 'public emergency' and therefore in no way warranted the President to issue a Proclamation under section 2 of the Public Security Ordinance and declare Emergency. A detailed consideration of that submission will follow.

34) The Petitioners also as a group alleged that the *Emergency (Miscellaneous Provisions and Powers) Regulations* No. 1 of 2022 (hereinafter sometimes referred to as 'the impugned Emergency Regulations') were coloured by political and other motives, and were aimed at crushing dissent and protests, censuring criticism, and resulted in an unprecedented curtailment of the exercise of the fundamental rights of the people. They claimed that expression of dissent is a healthy and robust component of a true democracy and thus suppression of dissent was undemocratic and an infringement of fundamental rights. In the circumstances, they have sought from this Court, a determination that the afore-stated Proclamation declaring a state of Emergency was unconstitutional, unnecessary, was made for extraneous and political reasons, and was a violation of the purposes of the Public Security Ordinance.

35) Critiquing the individual Emergency Regulations, the Petitioners claimed that the impugned Emergency Regulations have the effect of restricting the fundamental rights of the people in an unconstitutional manner, and were overbroad, making such Regulations unlawful. The Petitioners alleged that the impugned Regulations were vague and amounted to prior restraint of fundamental rights. The Petitioners alleged that Regulations 8 to 18, 20, 21, 23, 25 to 28, 33, 34, and 36 to 38 infringed the fundamental rights of citizens. They alleged that these Regulations were not permissible in law and were not proportionate restrictions which were necessary as a measure of response to the situation that prevailed in the country as at the time the Emergency Regulations were promulgated. Learned counsel further submitted that the impugned Regulations contained (i) overbroad powers of search, arrest, detention and interrogation, (ii) restrictions and prior restraint of freedom of speech, assembly, association and movement, (iii) the ability to issue detention orders without judicial oversight, (iv) enabled arbitrary piling of punishments and imposition of offences and penalties, (v) provisions relating to

remand which amounted to arbitrary and excessive restrictions on freedom, and (vi) arbitrary restrictions on access to detainees. In the circumstances, the Petitioners alleged that the impugned Emergency Regulations were violative of their fundamental rights guaranteed by Articles 10, 11, 12(1), 12(2), 13(1), 13(2), 13(3), 13(4), 13(5), 14A, 14(1)(a), 14(1)(b), 14(1)(c), 14(1)(g) and 14(1)(h) of the Constitution. Further, learned counsel for the Petitioners took up the position that the impugned Emergency Regulations were not necessary and were not a proportionate response which was required in a democratic society, and the measures adopted do not deal with the exigencies of the situation that prevailed at the time the state of Emergency was promulgated. The Petitioners further alleged that the impugned Emergency Regulations impinged on judicial discretion and oversight and therefore were additionally violative of Articles 4(c) and 111C of the Constitution.

Factual justification provided by the Respondents for the issuance of the impugned Proclamation bringing into force Part II of the Public Security Ordinance (declaring a state of Emergency) and the promulgation of the impugned Emergency Regulations

36) The Secretary to the President Saman Ekanayake (3rd Respondent in SC/FR/246/2022) who succeeded the previous Secretary Gamini Senarath, has in Applications SC/FR/246/2022, 261/2022, 262/2022 and 276/2022 presumably on behalf of all Respondents placed before this Court, the following explanation:

i. It had been in the backdrop of the incidents that took place in the country on 9th May, 9th July and 13th July 2022, that the necessity to declare a state of Emergency and promulgate Emergency Regulations had been considered and decided upon by His Excellency the then Acting President.

ii. On 9th May 2022, there had been reports of clashes between certain groups of people, which resulted in serious bodily injuries being inflicted on people, damage being caused to property including to passenger transport vehicles, arson and destruction of residential property and the murder of two persons. Two months later, on 9th July 2022, an unrest of greater magnitude occurred which resulted in severe damage being caused to public property including the Presidential Secretariat, the official Residence of the President, and the official residence of the Prime Minister. The

breakdown of public order extended to the sudden disruption of telecasts by the Sri Lanka Rupavahini Corporation.

iii. On 13th July 2022, civil unrest took place at the Polduwa junction near the Parliament which led to an organised group of violent people confronting security officials and forcibly acquiring two T56 machine guns, three magazines and sixty bullets, which were in the custody of security forces personnel.

iv. It was in this background that the former Secretary to the President Gamini Senarath had received the following letters dated 16th July 2022:

(i) Letter ["R2"] from the Secretary to the Ministry of Defence Major General (retired) Kamal Gunaratne.

(ii) Letter ["R3"] from the Minister of Public Security Tiran Alles, MP. To that letter had been attached an even dated letter ["R1"] addressed to the Secretary to the Ministry of Public Security from the Inspector General of Police C.D. Wickremaratne.

v. "R1" contains the following factual assertions:

- That on 13th July 2022, a group of approximately one thousand persons had attempted to take-over the area surrounding the Parliament. That attempt had been quelled by the police and the armed forces.
- That during the afore-stated incident, members of that group had assaulted several officers of the police and the armed forces, inflicted injuries to them and robbed two T56 firearms, three magazines, and sixty ammunitions.
- That this organised group was planning to thwart future sessions of the Parliament and prevent the election of a President by infringing the parliamentary privileges of Members of Parliament and by exerting illegal influence on such Members of Parliament.

vi. By "R3", the Minister of Public Security has recommended that, with the view to preventing the occurrence of a situation similar to that which occurred on the 9th and 10th of May 2022, immediate steps be taken by the

President to, acting in terms of the Public Security Ordinance, to declare an island-wide state of Emergency and thereby a curfew.

vii. By "R2", the Secretary to the Ministry of Defence had requested that arrangements be made to *"… by virtue of the powers vested in the President, publish an Extraordinary Gazette notification declaring that the provisions of the Part II of the Public Security Ordinance (Chapter 40) shall come into operation throughout Sri Lanka with effect from 16.07.2022"*. He had also suggested that *"… Emergency Regulations be made as provided under Section 5 of the Public Security Ordinance"*.

viii. Having been apprised of the possibility of an outbreak of violence, and drawing from the immediate past experience, in particular having regard to the propensity for violence to quickly spread across the country, on 17th July 2022, His Excellency the Acting President declared a state of Emergency which came into effect on 18th July 2022. Secretary to the President Saman Ekanayake has denied the allegation made by some of the Petitioners that the proclamation declaring a state of Emergency was issued by the former Secretary Gamini Senarath, and has asserted that it was in fact issued by the Acting President.

ix. The reasons for the issuance of the said Proclamation were *"in the interest of public security, the protection of public order and the maintenance of supplies and services essential to the life of the community"*. Consequently, on 18th July 2022, the President promulgated the *Emergency (Miscellaneous Provisions and Powers) Regulations* No. 1 of 2022.

x. On 27th July 2022, both the declaration of Emergency and the Emergency Regulations were placed before the Parliament and were approved. The Emergency Regulations lapsed on 18th August 2022.

37) In SC/FR/274/2022, Secretary to the President Saman Ekanayake (the 1st Respondent in that Application) has while reiterating the position he had taken in the other Applications, stated that the IGP had brought to the attention of the President that based on intelligence reports, there were moves afoot to incite people on social media to rally around the Parliament to disrupt the proceedings in Parliament to elect the new President. Drawing from the immediate past

experience and the destruction that had been caused, the IGP, Secretary to the Ministry of Defence and the Minister of Public Security had recommended that it would be prudent in the circumstances that prevailed, to declare a state of Emergency, in order to avert a situation similar to what took place on the 9th and 10th May, 9th July and 13th July 2022. Being apprised of the possibility of an outbreak of violence, and having regard to the propensity for violence to quickly spread across the country, His Excellency the Acting President declared a state of Emergency on the 17th of July 2022 by *Gazette Extraordinary* No. 2288/30.

38) The Secretary to the President has further stated in his Affidavit that the declaration of a state of Emergency was a necessity to end the ongoing violence and damage to life and property, considering the past experiences in Sri Lanka where clashes and mob violence had escalated to destruction of life and property in mass-scale.

39) As regards the promulgation of Emergency Regulations, the Secretary to the President has contended that if there is any allegation of abuse of power in the exercise and operation of the Emergency Regulations, such action may be addressed under Article 126 of the Constitution. He has stated that institution of criminal proceedings under the Emergency Regulations is subject to the sanction of the Attorney General and the imposition of punishment would be carried out by courts of law, and therefore, the relevant authorities are subject to the overarching supervision of the Attorney General and the judiciary.

40) The Secretary to the President has also responded to the criticisms pertaining to the individual Regulations contained in *Gazette Extraordinary* No. 2289/07.

Conclusions reached by Court regarding the factual scenario

41) The events of 2022 referred to by both the Petitioners and the Respondents associated with the '*Aragalaya*' and in respect of which some amount of evidence has been placed before this Court are certainly unprecedented in the annals of the history of this country. Though there may be debate regarding the possible causes, motivating factors, socio-political dimensions, whether or not there was any external interference or involvement, justification, lawfulness or otherwise of the individual incidents that constituted the '*Aragalaya*' as well as the '*Aragalaya*' as a whole, identities of those involved both directly and indirectly, outcomes,

immediate and long-term implications etc., the events themselves have become part of the publicly known recent history of this country.

42) I cannot brush aside the fact that the key events referred to by the parties to these Applications are matters so etched even in our memory. That is particularly due to we too being citizens of this country who led our lives the way any other citizens lived during that era and not in ivory towers or silos. There are picture-perfect images in our own memory of the key events referred to by both the Petitioners and the Respondents. However, as far as it is reasonably possible, I will restrict the analysis of the situation that prevailed and conclusions reached, to the factual contents of the evidence presented by both parties, including the contents of the documentary evidence presented. Nevertheless, it would be necessary for me to point out, that this Court in the interests of justice would be compelled to take **judicial notice** regarding certain matters of critical importance and to 'fill in the blanks' left open by the parties (as is to be expected in adversarial proceedings, where only what is favourable to such party is presented to court).

43) As provided in Section 56 of the Evidence Ordinance, no fact of which the court will take judicial notice need be proved. Further, section 57 of that Ordinance provides that on all matters *inter alia* of 'public history', the court may resort for its aid to appropriate books or documents of reference. That is as a substitute to or to supplement evidence placed before court by the parties. Most externally visible events relating to and associated with the *'Aragalaya'* of 2022 are indeed matters of public history. The events themselves are matters of public record, having been extensively covered by both the conventional and contemporary media. What remains under debate are the causes, involvement of individuals, outcomes, and lawfulness or otherwise of what happened, which are not strictly relevant to the determination of these Applications.

44) In the interests of justice, this Court did adopt an inquisitorial mode of hearing, but called for and considered the contents of the file relating to the declaration of Emergency maintained at the Presidential Secretariat.

45) Certain events which were part of, associated with, ran parallel to and or surrounding the *'Aragalaya'* of 2022, were unparalleled and unprecedented. The protests themselves were patronised by very large numbers of the masses justifying they being called truly 'public or mass protests'.

46) Based on the evidence placed before this Court and matters in respect of which the Court has taken judicial notice, the key events associated with the *Aragalaya* can be itemised as follows:

(i) Public protests commenced in early 2022 and gradually the size of the participants and frequency of the protests increased. The main protest site was the northern end of the Galle Face Green, the area of the Bandaranaike statue and the *Shangri-La* Hotel, and the main gate of the Presidential Secretariat. At times, due to protests and processions that were held, public thoroughfares were blocked or partly blocked. [Affidavit of the Petitioner in SC FR 246/2022, "P9(b)" filed in SC FR 246/2022, and the Affidavit of the Petitioner in SC FR 276/2022.]

(ii) On 9th May 2022, a group of counter-protesters attacked protesters of the *Aragalaya* who were engaged in a protest near the Presidential Secretariat. It resulted in violence and public disquiet. The reaction to this attack by those who supported the *Aragalaya* was intense, overwhelming and on certain occasions violent. ["P9(b)" filed in SC FR 246/2022, Affidavit of the Petitioner in SC FR 276/2022, "P2" and "P3" filed in SC FR 276/2022, and the Affidavit of the Secretary to the President.]

(iii) On 9th May 2022, a protesting mob had forced out a Member of Parliament from his vehicle and brutally murdered him and his Personal Security Officer. ["P9(b)" filed in SC FR 246/2022 and the Affidavit of the Secretary to the President.]

(iv) On 9th July 2022, a large crowd converged on the Colombo Fort, and a large number of them invaded and occupied the President's official residence, the Presidential Secretariat and the official residence of the Prime Minister (with the first of these two situations occurring almost simultaneously). ["P2(b)" filed in SC/FR 246/2022 and the Affidavit of the Secretary to the President.]

(v) On the night of 9th July 2022, the private residence of the Prime Minister was destroyed by arson. ["P5(a)" filed in SC FR 246/2022, the Affidavit of the Petitioner in SC FR 276/2022, and "P4" and "P5" in SC FR 276/2022.]

(vi) On 9th July 2022, President Gotabaya Rajapaksa who had been democratically elected to office in November 2019 had to mid-term vacate his official residence due to the public uprising and protesters storming his residence. His whereabouts within the country were not known for some

time and thereafter he temporarily though left the country. Later he resigned from the Presidency while remaining overseas. ["P2(a)", "P2(b)", "P2(c)", and "P9(b)" filed in SC/FR 246/2022.]

(vii) Though in the past, Sri Lanka has not been immune to protests near and surrounding the Parliament, a protest in the magnitude of what took place at the Polduwa junction on 13th July 2022 and the associated circumstances, have been unique and unprecedented. [Affidavit of the Secretary to the President, "R1".]

(viii) On 13th July 2022, the Prime Minister's Office in Flower Road, Colombo 7 was invaded by the protesters and occupied.

(ix) On 13th July 2022, the Sri Lanka Rupavahini which is a national television station cum channel was temporarily taken-over by some of the protesters, forcing the authorities to disrupt routine transmission and televise the presence of a protester inside the studio addressing the public. [Affidavit of the Secretary to the President.]

47) In view of the foregoing facts and circumstances, and the other evidence placed before this Court, I conclude that as at 17th July 2022, when the President declared a state of Emergency with effect from 18th July 2022, an extraordinary situation which had serious security implications, existed in Sri Lanka. I also conclude that, the situation on 13th July 2022 which culminated in one of the roads leading to the Parliament being blocked and thereafter the Parliament being virtually encircled by protesters (by blocking the other roadways as well), if not brought under control in a timely and effective manner, had the possible effect of thwarting the holding of the scheduled election in Parliament on 20th July 2022 in terms of Article 40(1)(C) of the Constitution. Thus, as at 17th July 2022, in my view, there was a serious situation involving a deterioration of law and order in the country.

Public Security Ordinance and related provisions of the Constitution

48) During the final months of British colonial rule of Ceylon (as Sri Lanka was called then) at a time when Ceylonese had considerable power of self-governance and as revealed by the published proceedings of the State Council (a predecessor of the present Parliament) contained in the Hansard, in the wake of the first general strike involving government clerical employees, on 11th June 1947 the State Council of Ceylon having initially suspended the Standing Orders, by a majority vote of thirty-three (33) to seven (7) enacted the Public Security Ordinance, No. 25 of 1947. Some historians as well as some counsel before Court referred to this

Ordinance as the *last piece of colonial legislation*. That may not necessarily be an accurate reference, as it was presented to the State Council, debated upon and voted on by Ceylonese elected and appointed representatives of the People. Soon after Independence, the Ordinance was amended by Ordinance No. 6 of 1948, and thereafter by the enactment of a series of laws (Acts Nos. 22 of 1949, 34 of 1953, 8 of 1959, 6 of 1978, and No. 28 of 1988) by which significant amendments were introduced to the Ordinance.

49) The original long-title of the Ordinance read as follows:

> *"An Ordinance to provide,* ***in the event of a public emergency****, for the enactment of Emergency Regulations in the interests of the public security and the preservation of public order and the maintenance of supplies and services essential to the life of the community."*

This long-title was amended on two subsequent occasions.

As at today, the long-title reads as follows:

> *"An Ordinance to provide for the enactment of emergency regulations* ***or the adoption of other measures*** *in the interests of the public security and the preservation of public order and for the maintenance of supplies and services essential to the life of the community."*

[Certain terms of the two long-titles have been emphasised by me to indicate the nature of the two amendments introduced.]

50) The Public Security Ordinance (hereinafter sometimes referred to as 'the PSO') originally comprised of two parts (Parts I and II), and by Act No. 8 of 1959 a third part was added.

51) The PSO is an exceptional piece of legislation. The exceptionality of this law primarily arises out of section 2 of the Ordinance which is read with section 5, that empowers the President to, under certain circumstances (morefully explained below) promulgate Regulations (commonly referred to as 'Emergency Regulations') which have the force of law of unique character and force. An imperative step preceding the promulgation of such Regulations would be the issuance of a Proclamation under section 2 bringing into force Part II of the PSO which commences with section 5. It is the making of a Proclamation under section 2 that is commonly referred to as *'the declaration of a state of Emergency'*.

52) Thus, the PSO seeks to deviate from the conventional scheme for the separation of powers contained in the Constitution, and confers on the President the extraordinary executive power to legislate and thereby make extraordinary delegated legislation of unique standing. It is interesting to note that Hon. G.G. Ponnambalam had on 10th June 1947 participating in the debate in the State Council referred to these Regulations which can be made under section 5 of the Ordinance as *'extra-legislative legislation'*. This term in my view correctly describes Emergency Regulations, as they are enacted by an authority outside the legislature. As aptly put by Mr. Pulasthi Hewamanne, once the President declares a state of Emergency, he can, through the promulgation of Emergency Regulations, override any law and even restrict the exercise of fundamental rights enshrined in the Constitution. The President can, through such Regulations authorise behaviour towards citizens, which otherwise (in terms of the regular law) is expressly forbidden by law.

53) In terms of section 2 of the Ordinance, where in view of the **existence or imminence of a state of 'public emergency'**, the **Governor-General** (should now be read as a reference to the '**President**') **is of the opinion** that it is **expedient so to do -**

i. **in the interests of public security and the preservation of public order,** or
ii. **for the maintenance of supplies and services essential to the life of the community**,

he may, by **Proclamation** published in the *Gazette,* declare the **provisions of Part II of the Ordinance**, shall forthwith or on such a date as may be specified in the Proclamation, **come into operation** throughout Ceylon (should now be read as a reference to 'Sri Lanka') or in such part or parts of Ceylon as may be so specified.

54) Following Part II of the Public Security Ordinance being brought into operation by the President acting in terms of section 2(1) of the Ordinance, he is empowered by section 5(1) to make such **Regulations** (referred to in other provisions of the Ordinance as "Emergency Regulations") **as appears to him to be expedient** in –

(a) the **interests of public security** and the **preservation of public order**, and the **suppression of mutiny, riot or civil commotion**, or
(b) for the **maintenance of supplies and services essential to the life of the community**.

It would thus be seen that, the purposes for which the Ordinance has empowered the President to make Emergency Regulations are –

(i) protection of public security and the preservation of public order, or

(ii) suppression of a mutiny, riot or a civil commotion, or

(iii) maintain supplies and services essential to the life of the community.

Such Regulations can be made by the President, when he **subjectively forms the opinion** that to achieve one or more of the afore-stated purposes, the making of Regulations is **expedient**.

55) In terms of section 5(2) of the Ordinance, the Emergency Regulations that the President is empowered to make under section 5(1) shall without prejudice to the generality of the powers conferred by section 5(1) -

i. authorise and provide for the detention of persons;

ii. authorise the taking of possession or control of any property or undertaking;

iii. authorise the entering and search of any premises;

iv. provide for amending any law, for the suspending the operation of any law and for applying any law with or without any modification;

v. provide for charging, in respect of the grant or issue of any license, permit, certificate or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;

vi. provide for payment of compensation and remuneration to persons affected by the Regulations; and

vii. make provision for the apprehension and punishment of offenders and for their trial by such courts, not being courts martial, and in accordance with such procedure, as may be provided for by the Regulations, and for Appeals from the orders or decisions of such courts and the hearing and disposal of such Appeals.

56) The Emergency Regulations the President is empowered to promulgate under section 5(1), has the force of law, and in particular, can have the capacity to amend any law, suspend the operation of any law, and be used to apply any existing law with or without any modification. In terms of section 7 of the Ordinance, an Emergency Regulation or any order or rule made in pursuance of such a

Regulation shall have effect notwithstanding anything inconsistent therewith contained in any law; and any provision of a law which may be inconsistent with any such Regulation or any such order or rule shall, whether that provision shall or shall not have been amended, modified or suspended in its operation under section 5 of the PSO, to the extent of such inconsistency have no effect so long as such Regulation shall remain in force. Thus, it would be seen that Emergency Regulations shall prevail over all other written laws, other than the Constitution.

57) It is important to note that all the matters contained in section 5(2) in respect of which the President is empowered to make Regulations, are indeed matters which come within the legislative competence of the Parliament. Therefore, they are matters in which the Parliament may make 'ordinary' or 'regular' laws as well. In fact, other than in respect of the matter contained in 'iv' above, the ordinary law of the country contains provisions of law to regulate matters contained in section 5(2) of the Ordinance. What then is the purpose of making Emergency Regulations under section 5(1)? The purpose is to deviate from the ordinary law in situations where the President forms the opinion that the ordinary law of the country is insufficient or ineffective to deal with the situation that has arisen, and to make Regulations which are necessary and effective. Furthermore, the President should be of the opinion that the regular Parliamentary procedure provided by the Constitution to enact laws is cumbersome and time consuming, and therefore resort should be had to the exceptional mechanism contained in section 2 read with section 5 of the Ordinance to make Regulations to deal with the situation that has arisen. Thus, the scheme contained in sections 2 and 5 of the PSO is very much an extraordinary mechanism, particularly as the President from whom Executive power stems is empowered from outside Parliament to perform a function which ordinarily the Parliament is empowered to perform under the powers vested in it by the Constitution. The scheme is exceptional, as it results in the Executive in the performance of an executive function being empowered to make Regulations which have the force of law to empower the Executive and its agents to exercise executive power and to also engage in law enforcement. Thus, it is a significant departure from the doctrine of separation of powers. It is also necessary to note that since Emergency laws have the power to amend, suspend and modify existing laws, the promulgation of Emergency Regulations that have such effect, changes one of the primary paradigms on which the Rule of Law operates, and that being the written law.

58) The Public Security Ordinance must be read together with provisions of Chapter XVIII of the Constitution, titled 'Public Security'. Article 155(1) of that Chapter provides that the Public Security Ordinance which was in force prior to the commencement of the Constitution (1978 Second Republican Constitution) shall be deemed to be 'law' enacted by Parliament. Notwithstanding Article 16(1) which provides that all existing law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of Chapter III (which provides for fundamental rights), Article 155(1) has been inserted, due to certain provisions of the PSO being specifically inconsistent with certain provisions of the Constitution, including certain Articles outside Chapter III, and the overall scheme of the Constitution.

59) Article 155 provides for the relationship between the President and the Parliament with regard to the promulgation of Emergency Regulations and a fine balance of power between the Executive and the Legislature with regard to the exercise of power under the PSO. For example, in terms of Article 155(4), upon making of a Proclamation under section 2 of the PSO, the occasion thereof shall forthwith be communicated by the President to the Parliament. In terms of Article 155(6), following such notification by the President, unless the Parliament approves such Proclamation, it shall lapse within fourteen (14) days of making the Proclamation. In terms of Article 155(5), if the Parliament approves the Proclamation, it shall remain in force for up to one month. Furthermore, to keep such Regulations alive in the long-term, Parliamentary approval for the promulgated Regulations must be obtained on a regular basis, once a month. I shall not deal with that scheme contained in Article 155 any further, as it was not debated during the hearing of these Applications.

60) Article 155(2) provides for the most important limitation on the promulgation of Emergency Regulations, that being such Regulations <u>not being capable of</u> having the legal effect of over-riding, amending or suspending the operation of any of the provisions of the Constitution. Thus, in the hierarchy of written laws, Emergency Regulations stand second only to the Constitution.

61) As evident from the contents of the Hansard relating to proceedings of the House of Representatives (also a predecessor of the present Parliament) of 1958 – 59, on 18th December 1958, the then Prime Minister Hon. S.W.R.D. Bandaranaike had introduced a Bill in the House of Representatives for the amendment of the PSO.

As the proceedings of House of 8th January 1959 relating to the enactment of the Amendment reveal, the proposed enactment (which was later passed by both the House of Representatives and the Senate by majority vote) had been introduced in the wake of certain incidents involving the occurrence of disturbances that had taken place in certain locations of the country in 1958. The ensuing Act No. 8 of 1959, caused the following amendments to the Public Security Ordinance:

i. The long title of the Ordinance being amended (in the manner described in a preceding paragraph.).
ii. Section 2 being amended to enable a Proclamation to be brought into force either in respect of the entire country (island-wide emergency) or in respect of any identified part of the country (a localised emergency).
iii. Section 9 being amended. (Not in a manner that has any relevance to this matter.)
iv. At the end of Part II, a new part (Part III) being introduced to the PSO.

62) This new part added to the PSO (Part III) contains a series of powers which the President may exercise. They include the following:
    i. In a situation endangering public security, and it is the President's opinion that the police are inadequate to deal with such situation, calling out the armed forces for the maintenance of public order. Members of the armed forces so called, will possess the powers of the police to search and arrest (section 12).
    ii. Empowerment of the police and armed forces called out to seize and remove guns and explosives (section 13).
    iii. Empowerment of the police and the armed forces called out to seize and remove offensive weapons and offensive substances (section 14).
    iv. Declaration of curfew (section 16).
    v. Declaration of certain services essential to the life of the community, as essential services (section 17).

63) It would thus be seen that Part III of the PSO confers on the President considerable Executive power (not provided for by routine legislation) to deal with a special situation that has arisen, which powers are both preventive (such as the power to declare a curfew) and curative (such as the power to call out the armed forces to assist the Police) in nature. Part III is a stand-alone part of the Ordinance, and invoking power under any of the sections of Part III does not require a

Proclamation to be issued under section 2 of the PSO. In other words, Part III serves as an alternative to Part II of the PSO (section 2 read with section 5 of the PSO). In fact, in Hon. S.W.R.D. Bandaranaike's speech introducing the Amendments, he has explained that Part III was being introduced so as to enable the Prime Minister (who at that time was required to act on the advice of the Governor) to without resorting to the declaration of a state of Emergency (which the then Prime Minister has referred to as an *"unwieldy step"*) have recourse to invoking the special powers (such as calling out the armed forces to assist the Police by exercising police powers) either in the whole or any part of the country, to respond to an extraordinary situation that has arisen. The then Prime Minister the late Hon. Bandaranaike has also referred to invoking Part II of the Ordinance as "*the last drastic step*". Thus, it would be seen that, when a situation endangering public security has arisen, the President becomes entitled to elect (choose) from either acting under section 2 of the PSO and bring into force Part II of the PSO, or alternatively taking one or more of the actions provided for by Part III of the PSO. Therefore, it would be seen that in an extraordinary security situation, having recourse to section 2 and Part II of the PSO is not imperative as it is not the only available option. Having recourse to Part II or to Part III is a choice the President must make.

Did the President make a Proclamation under section 2 of the Public Security Ordinance?

64) Mr. Pulasthi Hewamanne raised a point regarding the absence of proof of the President (Acting President Hon. Ranil Wickremasinghe) having personally issued the impugned Promulgation under section 2 of the PSO. He drew the attention of this Court to *Gazette Extraordinary* No. 2288/2022 dated 17th July 2022 containing the purported Proclamation. He submitted that thought there is a reference in it to the name *'Ranil Wickremasinghe'* and it contains a seal (which he conceded was an image of the President's official seal), at the bottom of the Proclamation was a reference to *'Gamini Senarath, Secretary to the President'*. Learned counsel submitted that, the purported Proclamation had been issued not by the President, but by the Secretary to the President. He submitted that therefore, the impugned Proclamation was a nullity.

65) He further submitted that, the State had chosen not to present to this Court an Affidavit from the President and only he ought to be in a position to reveal whether he did in fact issue a Proclamation on 17th July 2022. Furthermore, the

possible eye-witness to the issuance of a Proclamation (if such a Proclamation had been issued) being the then Secretary to the President Gamini Senarath, has also not presented to this Court an Affidavit notwithstanding the fact that he too has been cited as a Respondent. Also, learned counsel pointed out that the Respondents have not presented to this Court documentary evidence relating to the impugned Proclamation, such as a certified copy of the original Proclamation. Learned counsel submitted that in the circumstances, this Court does not have any reliable evidence that acting under section 2 of the PSO, on 17th July 2022, a Proclamation had been issued by the then Acting President His Excellency Ranil Wickremasinghe. In the circumstances, learned counsel invited this Court to conclude that the President had not issued the impugned Proclamation. It is on that footing that he urged this Court to declare that the purported Proclamation is a nullity.

66) Indeed, for reasons best known to the State, the Attorney General had chosen not to present to this Court the best evidence regarding the making of a Proclamation under section 2 of the PSO. That being the testimony (presented in Affidavit form) of the maker of the Proclamation, namely His Excellency the Acting President Ranil Wickremasinghe. Indeed, such an Affidavit would have been very useful in establishing among other things that the Acting President had in fact issued the impugned Proclamation. It would have served another purpose, to which I will advert to later in this Judgment. The point raised by Mr. Hewamanne was crucial to the interests of the State, since if his submissions on this matter were to be accepted by this Court, then *ipso facto,* this Court would have to declare that the impugned Proclamation was a nullity. However, due to the following reason, with regard to proof of making of the impugned Proclamation by Acting President Ranil Wickremasinghe, the absence of an Affidavit from him, was not fatal.

67) Particularly due to the paucity of the evidence presented by the Attorney General, this Court called for and examined the file maintained by the Presidential Secretariat regarding this matter. At folio 6 of that file, this Court found the original of the Proclamation made by the Acting President and signed by him. It also had an image of the President's seal. At the bottom of the Proclamation, the then Secretary to the President Gamini Senarath had made an endorsement "*By the Command of the Acting President*", typed his name and designation and signed it. That file also contained a journal entry of 17th July 2022 containing the signature

of Acting President Ranil Wickremasinghe certifying his having issued the impugned Proclamation.

68) Furthermore, the file contained a copy of the Hansard relating to the proceedings of the Parliament of 27th July 2022 with a reference to the communication received by the Honourable Speaker from the Acting President (under Article 155(4) of the Constitution). It related to the making of a Proclamation under section 2 of the PSO. According to the proceedings of Parliament, the Honourable Speaker had notified the House of the receipt of the said communication and had thereafter tabled the afore-stated communication before the House. Inserted into the Hansard proceedings of that day was a scanned image of that communication dated 17th July 2022 received from the Acting President notifying the Honourable Speaker of the issuance by him of a Proclamation under section 2 of the PSO. At the bottom of the communication is the signature and the name of the Acting President. In the circumstances, it is the view of this Court that, these two items of evidence coupled with the hearsay evidence of the Secretary to the President Saman Ekanayake (as it was not him, but Gamini Senarath who was the Secretary to the President as at 17th July 2022), are amply sufficient for the Court to conclude that Acting President Ranil Wickremasinghe had himself issued the impugned Proclamation under section 2 of the PSO.

69) **Accordingly, this Court concludes that the Acting President His Excellency Ranil Wickremasinghe had issued the impugned Proclamation of 17th July 2022, acting under section 2 of the PSO.**

Has the jurisdiction of the Supreme Court been ousted in reviewing a Proclamation issued by the President under section 2 of the Public Security Ordinance?

Submissions of learned Counsel

70) Learned Deputy Solicitor General Mr. Rajiv Goonethileke who commenced arguments for the Respondents in this matter, submitted that a Proclamation made under section 2 of the PSO is not judicially reviewable. Citing Article 154J(2) of the Constitution, learned counsel submitted that the making of a Proclamation made under the PSO as well as the grounds for making such Proclamation shall not be called into question by any court or tribunal. Explaining his position on this matter further, he submitted that Article 154J(1) provides that the President upon making a Proclamation under section 2 of the PSO, is authorised to give directions to any Governor, as to how to exercise his executive powers. He further submitted that,

this provision relates to all instances (such as the instance impugned in these Applications) where a Proclamation has been issued under section 2 of the PSO. His submission was that the drafters of the Constitution intended to keep the issuance of a Proclamation of Emergency outside the realm of judicial review. He argued that, even during the post-21st Amendment era, Article 35 does not override the ouster clause contained in Article 154J(2). His position was that a Proclamation made under section 2 of the PSO was akin to a declaration of war and peace. Therefore, while Regulations promulgated pursuant to a Proclamation may be challenged, as the Proclamation itself is based on a subjective assessment by the President of the prevailing situation (which only he would be competent to determine given the circumstances existent at that time), a Proclamation made under section 2 of the PSO is excluded from judicial review.

71) In response, Mr. Pulasthi Hewamanne argued that Article 154J appears in Chapter XVIIA of the Constitution which deals with the establishment of Provincial Councils introduced by the 13th Amendment to the Constitution. He argued that in view of the fact that this ouster of the jurisdiction clause was specifically not inserted into Article 155 at the time, notwithstanding a new Article 155(3A) being simultaneously introduced by the 13th Amendment, the Parliament by enacting Article 154J(2) did not intend to oust the jurisdiction provided by Article 126 of the Constitution. He submitted that the location of Article 154J indicates the intention of the Parliament to limit the applicability of the ouster clause to the situations contemplated in Article 154J(1) in relation to Provincial Councils, for instance, where the country is 'threatened by war or external aggression or armed rebellion'. He argued that Article 154J(2) is a sub-article, which must be read with Article 154J(1) and is limited in its application to proclamations made in respect of Provincial Councils. He further submitted that Article 154J has the effect of extending the scope of the Public Security Ordinance to Provincial Councils.

72) Citing the Judgments of this Court in *Atapattu and Others vs. People's Bank and Others [1997] 1 Sri L.R. 208* and *Wickremabandu vs. Herath [1990] 2 Sri L.R. 348*, Mr. Hewamanne submitted that there is no constitutional ouster on the exercise of the jurisdiction vested in the Supreme Court by Article 126 of the Constitution, which is a higher Constitutional right. He submitted that in the face of the 1978 Constitution, Article 154J(2) would not amount to an ouster of jurisdiction. He further submitted that in any event, both Article 154J(2) and section 3 of the PSO must give way to the Constitution 'as it stands today'. He submitted that after the

20th Amendment to the Constitution, the only Constitutional ouster of judicial review is contained in Article 35(1) with regard to the *'declaration of war and peace'* by the President under Article 33(g). Therefore, he stated that the impugned Proclamation of Emergency is amenable to Article 126 of the Constitution. He further argued that this is especially so, in view of Article 118(b) conferring on the Supreme Court, the onerous duty of protecting fundamental rights, which has been interpreted to be broader than mere 'enforcement', as highlighted in the cases of *Sumanadasa and Others vs. Attorney General [2006] 3 Sri L.R. 202* and *Ramzy Razik vs. CI Senaratne [SC FR 135/2020, SC Minutes of 14th November 2023]*. Learned counsel submitted that this onerous duty is reflected in Article 4(d) of the Constitution, and as held in the case of *Bulankulama and Others vs. Secretary, Ministry of Industrial Development and Others [2000] 3 Sri L.R. 243,* there is in essence 'a public trust duty' upon this Court to protect fundamental rights, which he referred to as the 'judicial component of the Public Trust Doctrine'.

73) Learned counsel also submitted that for the exclusion of jurisdiction, there must be a clear and specific exclusion of the jurisdiction of this Court *vis a vis* the duty to protect fundamental rights. He quoted the following passage from *Rajavarothiam Sampanthan vs. Attorney General [SC FR 351/2018, SC Minutes of 13th December 2018]:*

> *"In the absence of a specific and express provision in the Constitution which strips the Supreme Court of jurisdiction under Article 118(b) read with Article 126 and Article 17 for the protection of fundamental rights, the provisions of Article 118(b) read with Article 126 and Article 17 shall prevail. Therefore, this Court has the jurisdiction and, in fact, a solemn duty to hear and determine these applications according to law."*

74) Due to these reasons, learned counsel submitted that even if the learned Deputy Solicitor General's argument regarding the statutory jurisdictional ouster contained in section 3 of the PSO could be considered correct as at 1947 when the PSO was enacted, it cannot be considered as acceptable now, as according to the jurisprudence of this Court, (a) an ouster clause must be considered as giving way to the higher Constitution norms, and (b) Article 12(1) of the Constitution has been expanded to ensure the protection of fundamental rights. Thus, in poetic language, the learned counsel submitted that *"if there is only one fixed star in our constitutional constellation, it is that, no person or body, is vested with uncontrolled discretion"*.

75) Mr. Suren Fernando expressed similar views. He too argued that Article 154J(2) specifically applies in relation to Provincial Councils and to the Governor, and does not have a general application. He stated that the Parliament has not thought it fit to make such an amendment or to introduce an ouster of the jurisdiction clause into Chapter XVIII of the Constitution which deals specifically with Public Security. Mr. Fernando pointed out that in fact, an amendment to Chapter XVIII of the Constitution was introduced by the 13th Amendment (by which the entirety of Chapter XVIIA including Article 154J was introduced) by adding Article 155 (3A). As such, the choice of placing of Article 154J(2) in Chapter XVIIA of the Constitution and not in Chapter XVIII was deliberate, as the Parliament intended the ouster clause to have limited application.

76) Responding further to the submissions of the learned DSG who cited the case of *Yasapala vs. Ranil Wickremasinghe [1983] 1 FRD 143*, in support of his contention that historically Proclamations have not been struck down by this Court, Mr. Fernando submitted that even in the case of *Yasapala vs. Wickremasinghe,* the Court did go into the issue of the Proclamation. He argued that the evolution of the Constitutional mechanism for the conferment of Presidential immunity clearly shows that immunity in a strict sense is no longer existent in our Constitutional jurisprudence. Extensively analysing the evolution of the system for presidential immunity, learned counsel submitted that in July 1980, when the Proclamation in the case of *Yasapala* was challenged, the immunity of the President was found in the original (unamended) form of Article 35(3) of the Constitution, which read as follows:

> *"35(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President:*
> *Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General."*

Learned counsel submitted that by the 19th Amendment to the Constitution introduced in 2015, Article 35 was repealed and replaced in the following manner:

"35 (1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity;
Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President in his official capacity:
Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under Article 33(2)(g)."

Learned counsel thereafter cited the case of *Sampanthan vs. Attorney General,* which was decided by this Court after the enactment of the 19th Amendment to the Constitution. In that case, the Court considered the jurisdiction of this Court to judicially review official acts of the President, and the Court held as follows:

"According to Article 35(1) of the Constitution, the President of the Republic while holding office enjoys immunity from suit. But does it mean that the Supreme Court cannot examine the legality of actions performed by the President of the Republic? I now advert to this question. In terms of the 2nd proviso to Article 35(1) of the Constitution, the Supreme Court has no jurisdiction to pronounce upon the exercise of the powers of the President of the Republic performed under Article 33(2)(g) of the Constitution. This Article deals with the power of the President of the Republic to declare war and peace. The words "anything done or omitted to be done by the President in his official capacity" in the 1st proviso to Article 35(1) of the Constitution should be stressed. Thus, when Article 35 is considered, it is clear that except the acts done by the President of the Republic in the exercise of his powers conferred by Article 33(2)(g) of the Constitution, the other acts of the President of the Republic are not immune from suit. It has to be stated here that the President of the Republic is a creature of the Constitution."

In the circumstances, learned counsel submitted that Chief Justice H.N.J. Perera had clearly held that it is only the act of declaring war or peace that was excluded from the jurisdiction of this Court. Accordingly, he submitted that since 2015, the only Constitutional ouster *vis a vis* Article 126 relates to challenging a decision of the President to declare war or peace. Mr. Fernando citing Articles 35 and 33(g) of the Constitution, submitted that the judgment in *Sampanthan vs. Attorney General* (cited above) and the Determination of this Court in *Re the Twentieth Amendment*

to the Constitution [SC SD 1/2020-39/2020], reflect the present status of the law created by the 19th and the 20th Amendments to the Constitution. Therefore, all actions and omissions of the President in his official capacity, with the exception of only the declaration of war and peace, are subject to judicial review by the invocation of the fundamental rights jurisdiction of the Supreme Court.

77) Ms. Ermiza Tegal submitted that the power to proclaim a state of Emergency is not a *sui generis* act, but an Executive act, and thus is reviewable under Article 126 of the Constitution. She cited the case of *Karunathilaka and Another vs. Dayananda Dissanayake, Commissioner of Elections and Others (Case No. 1) [1999] 1 Sri. LR 157* in support of her submission. Learned counsel argued that the act of proclaiming a state of Emergency is an 'Executive act' because (a) the power to proclaim a state of Emergency is modeled to be Executive in nature, and (b) the power to enact Emergency Regulations which is an Executive act, derives from the power to proclaim a state of Emergency. As regards the argument contained in (a) above, learned counsel drew the attention of this Court to sections 2(1) and 2(4) of the PSO and Article 155 of the Constitution which reflect a framework that (i) the legislature has set out in its own wisdom the conditions that the President must subjectively be satisfied of when proclaiming an Emergency, and (ii) that the President, once satisfied with these conditions can proclaim a state of Emergency.

78) Learned counsel for the Petitioners submitted in unison that a Proclamation of a state of Emergency is subject to the fundamental rights jurisdiction of this Court under Article 126 of the Constitution and therefore is reviewable by this Court. They also cited the judgment in the case of *Karunathilaka vs. Dayananda Dissanayake, Commissioner of Elections (Case No. 1) [1999] 1 Sri.LR 157*, where both the Proclamation and Emergency Regulations had been considered by this Court as amounting to 'executive action' and thus, they opined that this Court has jurisdiction under Article 126 of the Constitution to review the possible infringement of fundamental rights. Extensively analysing Article 155 of the Constitution and the PSO, learned counsel for the Petitioners submitted that the Public Security Ordinance, 'appeared to do then, just the opposite of what the Constitution now intends', by granting extraordinary and undefined powers to the President. Commenting on the evolution, they submitted that the wide powers stipulated under the PSO were reduced by the subsequent Constitutions, by introducing checks. They submitted that under the 2nd (1978) Republican Constitution, concerning emergency powers, Article 155(2) of the Constitution

imposed significant limitations on the broad powers granted by the PSO, by enacting that Emergency Regulations cannot override, amend or suspend the provisions of the Constitution. Therefore, he submitted that regardless of the context in which the PSO was enacted, it must now be reviewed in light of the 1978 Constitution and its subsequent amendments, and that the principles of the Rule of Law, Sovereignty of the People, Constitutional Supremacy, respect for fundamental rights and freedoms and the independence of the judiciary *'which form the hallmarks of this Court's jurisprudence, must now guide the usage of the PSO'* which were introduced at a very different era of democracy. Learned counsel for the Petitioners further submitted that while Article 155(8) of the Constitution grants the legislature the power to terminate a state of Emergency, Article 126 read with Articles 118 and 35 empower this Court to review a Proclamation. This, they submitted reflects the fact that undue deference need not be given to any decision by the President to issue a Proclamation of Emergency.

Views of the Court and conclusions reached

79) Section 3 of the PSO provides that where the provisions of Part II of the Ordinance are or have been in operation during any period by virtue of a Proclamation under section 2, the fact of the existence or imminence, during that period, of a state of public emergency shall not be called in question in any court. Learned counsel for the Respondents submitted that the said provision precludes judicial review of the impugned Presidential Proclamation made on 17th July 2022, and therefore no court including the Supreme Court can question the making of the Proclamation impugned in these proceedings. However, when pointed out that it is trite law that Article 126 read with Article 17 of the Constitution enables the Supreme Court to judicially review any executive or administrative decision or action for the purpose of determining whether such impugned decision or action constitutes either an infringement or imminent infringement of a fundamental right, and that such jurisdiction conferred by the Constitution can be exercised notwithstanding a finality clause in the nature of section 3 of the PSO (which is a statutory provision), learned counsel withdrew that objection.

80) Learned counsel for the Respondents thereafter cited Article 154J of the Constitution, and drew the attention of this Court to Article 154J(2) contained in Chapter XVII A of the Constitution. Article 154J introduced by the 13th Amendment, to the extent relevant to the objection raised, provides as follows:

(1) *Upon the* ***making of a proclamation under the Public Security Ordinance*** *or the law for the time being in force relating to public security,* ***bringing the provisions of such Ordinance*** *or law* ***into operation*** *on the ground*

that the maintenance of essential supplies and services is, threatened, or

that the security of Sri Lanka is threatened by war or external aggression or armed rebellion,

the ***President may give directions to any Governor*** *as to the* ***manner in which the executive power exercisable by the Governor is to be exercised****.*

The directions so given shall be in relation to the grounds specified in such Proclamation for the making thereof.

Explanation: …

Provided that …

(2) *A* ***Proclamation under the Public Security Ordinance*** *or the law for the time being relating to public security,*

shall be conclusive for all purposes *and*

shall not be questioned in any Court*,*

and no Court or Tribunal ***shall inquire into, or pronounce on, or in any manner call in question****, such*

Proclamation,

the grounds for the making thereof, or

the existence of those grounds or

any direction given under this Article.

[Dissection of Article 154J into its constituent ingredients and emphasis were added by me.]

81) It would be seen that Article 154J(1) confers on the President the power to issue directions to the Governor of a Province regarding the manner in which he should exercise executive power. According to Article 154F(1) read with Article 154C of the Constitution, unless the Constitution has provided otherwise, the Governor shall exercise his functions (including executive functions) on the advice of the Board of Ministers and the Chief Minister at the head of such Board of the relevant Province. It would thus be seen that, the Governor exercising executive power

under the direction of the President would be the exception to the norm and would arise in a situation where the President has, due to one out of the two situations contained in Article 154J(1) [i.e. (i) the maintenance of essential supplies and services is threatened or (ii) the security of Sri Lanka is threatened by war or external aggression or armed rebellion] issued a Proclamation under the Public Security Ordinance (PSO). The Constitution also provides for certain other exceptional situations where the President has been empowered to issue directions to the Governor regarding the manner in which he should exercise his power. Be that as it may, it would be seen that Article 154J(1) does not relate to all situations wherein the President issues a Proclamation under section 2 of the Public Security Ordinance. An example would be the case at hand, wherein the impugned Proclamation issued by the President on 17th July 2022 did not give rise to the President issuing directions to Governors regarding the manner in which he shall exercise his executive functions. In my view, Article 154J(2) would apply only in situations where a Proclamation is made under section 2 of the PSO in one of the two situations referred to in Article 154J(1) and is followed up by the President issuing directions to a Governor regarding the manner in which he is required to exercise executive functions. Whereas, the impugned situation is one in which the President has issued a Proclamation under section 2 of the PSO (issued for different purposes), and had not issued directions to one or more Governors of Provinces. What he has done following the issuance of the impugned Proclamation is to make Regulations (also impugned in these Applications) under section 5 of the PSO. Thus, the impugned situation is one distinctly different from the situation provided for in Article 154J(2) read with Article 154J(1) of the Constitution.

82) What Article 154J(2) provides for is the conferment of a shield preventing judicial review of a Proclamation issued under Article 154J(1) and directions issued thereunder to a Governor of a Province by the President. It would thus be seen that the purported Constitutional ouster contained in Article 154J(2) does not relate to all situations where the President issues a Proclamation under section 2 of the PSO.

83) This view of the scope of Article 154J(2) is strengthened by arguments preferred by learned counsel for the Petitioners, as regards (a) the location of the Article (within Chapter XVIIA of the Constitution), (b) its introduction during the enactment of the 13th Amendment by which the Provincial Councils system was

established, and (c) the Parliament not having introduced the substance of Article 154J(2) under Chapter XVIII of the Constitution dealing exclusively with Public Security, despite a new provision been introduced to Chapter XVIII. Thus, it is apparent that Article 154J(2) should only be read with Article 154J(1), which relates to a particular situation where the Governor is required to act on the directions of the President as opposed to acting on the advice of the Board of Ministers of the relevant Province as regards the exercise of his executive functions.

84) Without repeating the submissions made by learned counsel for the Petitioners as findings of this Court, it would suffice for me to express agreement with their submissions regarding the reviewability of all presidential decisions and actions, save and except the only matter in respect of which the Constitution has ousted judicial review, that being the declaration of war and peace. Thus, it is necessary to point out that the view advanced by learned counsel for the Respondents is against the current view taken by this Court as regards judicial reviewability of all presidential decisions and actions (excluding the declaration of war and peace), including the exercise of executive powers such as the power to dissolve the Parliament and the grant of a Pardon to a person convicted by a court of law.

85) As regards judicial reviewability of decisions and actions of the President, I find myself in respectful agreement with the decisions contained in ***Re The 19th Amendment to the Constitution*** *[SC SD 04/2015, Decisions of the Supreme Court on Parliamentary Bills, 2014-2015, Volume XII]*, ***Rajavarothiam Sampanthan vs. Attorney General*** *[SC FR 351 to 356/2018 and 358 to 367/2018, SC Minutes 13th December 2018]*, ***Re The Twentieth Amendment to the Constitution*** *[SC SD 1-27, 29-39/2020, Decisions of the Supreme Court on Parliamentary Bills, 2019-2020, Volume XV]*, ***Re The Twenty First Amendment to the Constitution*** *[SC SD 31/2022]*, ***Hirunika Premachandra vs. Attorney-General and Others*** *[SC FR 221/2021, SC Minutes of 17th January 2024]* and ***Women & Media Collective vs. Attorney-General and Others*** *[SC FR 446/2019, SC Minutes of 6th June 2024]*.

86) From a generic perspective it would be seen that, unlike any other jurisdiction vested in the Supreme Court, Article 118(b) confers on the Supreme Court a unique jurisdiction relating to fundamental rights. It is clearly distinguishable from the other jurisdictions vested in the Supreme Court. The objective of conferring that unique jurisdiction is not to provide for the Supreme Court to merely judicially adjudicate and pronounce upon disputes relating to alleged infringement and imminent infringement of fundamental rights. The Constitution has vested a

considerably enhanced and superior responsibility of paramount importance to proceed beyond the mere judicial adjudication of disputes and make orders (under the just and equitable jurisdiction conferred by Article 126(4) of the Constitution) for the protection of fundamental rights of the People. The Parliament in its own wisdom appears to have taken note of who the collective Sovereigns of the Democratic Socialist Republic are, and the importance of ensuring *inter alia* through the Supreme Court the protection of their fundamental rights. By vesting that special jurisdiction on the Supreme Court, the Parliament on the one hand has called upon the Supreme Court to move beyond the conventional role of Courts (being the judicial adjudication of disputes) and to assume a proactive stance in the protection of fundamental rights. On the other hand, the Parliament has ensured that such protective measures the Supreme Court imposes, reigns supreme, only secondary to the Constitution itself and the Rule of Law. The framers of the Constitution have been acutely conscious that the full and free exercise of Sovereignty by the People according to their will would be possible only if the People both collectively and individually have the opportunity to freely exercise their fundamental rights. Fundamental rights serve as the bedrock on which the People exercise their Sovereignty. Therefore, as a means of protecting the Sovereignty of the People by ensuring the protection of their fundamental rights, this Court has been vested with the jurisdiction to protect fundamental rights. That highlights the importance of the jurisdiction which the Supreme Court shall exercise in terms of Article 126 read with Article 17 of the Constitution. Thus, the ability to judicially review executive and administrative decisions and actions of even the President is a Constitutional duty the Supreme Court has been vested with, and which cannot be ousted by any statutory provision or an incidental provision contained in the Constitution itself, meant to provide for a completely different situation. The Constitutional jurisdiction to determine the alleged infringement or imminent infringement of fundamental rights can be ousted only by a specific, express provision, and that too not by the application of a 'ouster' or 'finality' clause, but by conferring immunity to the President and thereby specifically excluding the exercise of jurisdiction under Article 126 of the Constitution. The Constitution as it stands today has done so only in one instance, that being by the 2nd proviso to Article 35(1), i.e. the declaration of war and peace.

87) Only one question of law now remains. That is whether in a situation where the President has in the backdrop of one out of the two factual positions referred to in Article 154J(1) makes a Proclamation under section 2 of the PSO and follows up by

issuing directions to a Governor of a Province regarding the manner in which he should exercise executive power, would Article 154J(2) oust the Supreme Court under the jurisdiction vested in it by Article 126 read with Article 17, of judicially reviewing the making of such Proclamation and the directions so issued? The determination of these Applications would not be founded upon the answer to that question. Therefore, I shall leave it for another day.

88) **In view of the foregoing, I overrule the objection raised by learned Counsel for the Respondents that this Court does not have the jurisdiction to judicially review a Proclamation made by the President under section 2 of the Public Security Ordinance.**

Was the issuance of the impugned Proclamation bringing into force Part II of the Public Security Ordinance, lawful?

89) Mr. Pulasthi Hewamanne submitted that, based on the evidence placed before this Court, as at the time the impugned Proclamation was made by the Acting President there was no public emergency. He further submitted that the Affidavit of the Secretary to the President Saman Ekanayake (who was not the Secretary to the President at the time the Proclamation was issued) together with its annexures does not provide an adequate justification for the Acting President to have acted under section 2 of the PSO and have issued the impugned Proclamation. He submitted that in fact "X1" and "X2" (being two *Gazette* notifications announcing curfew) reveal that as at the time the impugned Proclamation was issued, there was a reduction of the duration of curfew, which showed that there was a de-escalation of the intensity of the situation that prevailed at the height of the *Aragalaya.* Drawing the attention of this Court to "R1" and "R3" produced by Secretary to the President Saman Ekanayake (being letters from the Inspector General of Police and the Minister of Public Security), learned counsel submitted that the need if at all was for the imposition of a curfew and not a declaration of a state of Emergency. Learned counsel alleged that the timing of the Proclamation declaring a state of Emergency was indicative that the actual motive of the Acting President was to prevent large-scale lawful dissent being expressed against him for having put forward his candidature for election as the President.

90) Mr. Hewamanne submitted that, a 'state of emergency' as recognised by the Constitution and the PSO is a situation where the nature and the size of the threat is so great, it can threaten the continued existence of the community and the people at large. Because of the threat to the people, extraordinary powers have been given

to the Executive, which would result in a shifting of the balance of powers, and checks and balances in favour of the Executive, to enable it to deal with exigencies of the situation. Mr. Hewamanne conceded that, there may be situations where the ordinary laws of the country may be inadequate to deal with the situation that has arisen. In such situations, resort to extraordinary powers may be necessary.

91) Drawing from international and regional human rights conventions and treaties, Mr. Hewamanne submitted that international law permits States to derogate from certain human rights where national crises pose a demonstrable threat to the life of the nation or where war, public danger or other emergency threatens the independence or the security of the State. However, no such situation would justify the suspension of human rights or a derogation from such standards. However, he did concede that in times of emergency, human rights may be subject to some form of extraordinary limitation, subject to the maintenance of the Rule of Law. He further submitted that a derogation from human rights obligations would be justified only if there is a fundamental threat to the State, and the emergency measures taken were legitimate, necessary in the given circumstances, non-discriminatory and proportionate to the situation that had arisen. He however emphasised that, even at a time of an Emergency, there cannot be a derogation from obligations of the State arising out of certain human rights.

92) Learned counsel also submitted that in view of the position taken up on behalf of the Attorney General, it was necessary for him to stress that the power conferred on the President by section 2 of the PSO was not one that could be exercised *'according to the whims and fancies of the President'*. He hastened to add that no power conferred on any public functionary could be exercised in such manner. To stress that point, he cited the views of this Court in the case of *Women & Media Collective vs. Hon. Attorney-General (cited above)*. He submitted that at a time when the 'emergency' was de-escalating, what his officials sought was the imposition of a curfew, and in view of the fact that there was to be *'a large mass scale protest, to object to the Acting President being elected in as President by a vote in Parliament'*, the Acting President resorted to the declaration of a state of Emergency 'to maintain the status quo' for the purpose of *'protecting the existing power structures … as opposed to the good of the People'*. Learned counsel emphasised that a declaration of a state of Emergency should necessarily be for the purpose of protecting the best interests of the public and be of benefit to the community.

93) Mr. Hewamanne also submitted that there exists a precondition in law for the issuance of a Proclamation under section 2 of the PSO. That being an actual or imminence of a public emergency arising, threatening the continued life of the community. The danger must be so severe that it should even temporarily threaten the continued life of the community. He asserted that the President himself must formulate an opinion as to whether or not an actual state of emergency exists. That should be founded upon an objective assessment of the precondition referred to above. He must also form a view as to the inadequacy of the normal powers available to him to deal with the situation that has arisen. The President cannot form this opinion in an arbitrary manner. It must be grounded upon objective standards, so as to ensure that his decision on the matter is reasonable and justifiable.

94) Mr. Hewamanne also highlighted the need for the President himself to give reasons for his decision to issue a Proclamation.

95) Dr. Gehan Gunatilleke appearing for the Petitioners in SC FR 261/2022 submitted that section 2(1) of the PSO provides that the President may declare a state of Emergency either throughout Sri Lanka or in any part of the country as may be specified in the Proclamation. On 17th July 2022, the impugned Proclamation made by the President related to the whole of the island with effect from 18th July 2022. The President had three options; (i) to use the routine law and take steps to curb the situation, (ii) to issue a Proclamation applicable to only certain parts of the country where resort to Emergency Regulations was necessary, and (iii) issue a Proclamation (as he did on the impugned occasion) applicable to the entire country. Dr. Gunatilleke submitted that, without any valid reason, the Acting President had issued the impugned Proclamation which was applicable to the entire country. He submitted that the declaration of an island-wide state of Emergency was not necessary, and thus was disproportionate to the perceived threat at that time. He submitted that, as evidenced by the fact that on the 14th July 2022, the curfew was imposed only applicable to the District of Colombo, it was clear that the situation in the other parts of the country was normal. Thus, he submitted that there was no justification in having declared a state of Emergency for the entire island.

96) Mr. Suren Fernando supplementing the submissions referred to above by the other two learned counsel for the Petitioners, submitted that the file received from the

Presidential Secretariat and the objections filed by the Respondents do not contain any justification for the declaration of a state of Emergency. He further submitted that the situation that had emerged could have been addressed using the routine laws associated with the criminal justice system, declaration of curfews and calling out armed forces to assist the police, if necessary. With regard to the armed forces being called out, learned counsel submitted that he was referring to section 12 of the PSO, which was in operation at the time the impugned Proclamation was made. He insisted that the declaration of the state of Emergency was clearly in bad faith and was used as a tool to stifle dissent.

97) Mr. Fernando also submitted that the then Acting President whose decisions were being impugned in these proceedings had thought it fit not to apprise this Court of the reasons for his decision. Thus, he submitted that the inescapable conclusion was that the state of Emergency had been declared for a collateral reason.

98) Mr. Thishya Weragoda who appeared for the Petitioners in SC FR 274/2022 submitted that he was associating himself with the submissions made by the other counsel for the Petitioners. He added that the material placed before the Court by the Respondents as well as the material contained in the file called from the Presidential Secretariat and examined by this Court did not show that there was any actual, clear and present or imminent danger which necessitated a declaration of a state of Emergency.

99) Ms. Ermiza Tegal appearing for the Petitioners in SC FR 276/2022 also supported the submissions made by the earlier mentioned four counsel. She also submitted that as at the time the impugned Proclamation was made, there was no evidence of the existence of a disruption of public security, public order or essential services. She also submitted that the incidents submitted by the Respondents as justification for the need to declare a state of Emergency were of low threshold, isolated and containable incidents that could and ought to have been dealt with under legal measures available under the ordinary law. The decision to declare a state of Emergency was anticipatory at best, and appears to have been completely premature. She too insisted that in any event an island-wide state of emergency was completely unnecessary.

100) Ms. Tegal insisted that the Acting President's decision to proclaim an Emergency had not been founded upon a reasonable justification, as is required by law.

101) Ms. Tegal was also critical of the absence of any reasons given by the President, even *ex-post-facto*.

102) Responding to the submissions made by learned counsel for the Petitioners, learned counsel for the Attorney General submitted that the state of Emergency in the instant case was proclaimed by the President having due regard to and having given due attention to the restive situation that existed in the country at the time. He further submitted that contrary to the claim of the Petitioners that the Proclamation was *mala fide*, the factual circumstances which led to the imposition of a state of Emergency clearly indicate that it was the maintenance of public security, public order and essential services that were strictly considered in issuing the Proclamation. He further submitted that it is public knowledge that the country was in a state of turmoil with the resignation of the previous President following a long period of civil unrest. Learned counsel submitted that it was an 'unprecedented event' and the requirement to appoint a new Executive to ensure an orderly transition ought to have been a primary consideration as well. In these circumstances, learned counsel submitted that the Petitioner has no legal basis to impugn the declaration of the state of Emergency contained in *Gazette Extraordinary* No. 2288/30 dated 17th July 2022.

103) Learned counsel submitted that on a reflection of Sri Lanka's constitutional and statutory structure regarding emergency powers, a state of Emergency would be a situation where the nature or size of the threat is so great that it can threaten the continued existence of the community or the people. He stated that it is thus due to the threat caused to the lives of the people, that extraordinary powers are given to the Executive, shifting the balance of powers, and checks and balances in favour of the Executive, to deal with the exigencies of the situation, subject to constitutional and statutory checks, fetters and pre-conditions.

104) Learned counsel for the Attorney General also submitted that a declaration of curfew as a means of controlling the situation would have brought all social and commercial activities of the country to a standstill. Further, it would have seriously restricted the right of movement of persons. Thus, learned counsel's view was that had a curfew been declared, the economic situation that was prevailing in the country would have got aggravated with the shut-down by the imposition of curfew. Hence, the imposition of curfew would have been disproportionate and

would have had negative repercussions on the country. He argued that therefore, His Excellency the President had resorted to the least intrusive measure in controlling the situation that was prevalent in the country.

Views of the Court and Conclusions reached

105) As stated in a preceding part of this Judgment, section 2 of the PSO confers on the President executive power of an extraordinary nature, that being, in a given situation, by the issuance of a Proclamation to declare that the provisions of Part II of the PSO shall come into operation. It is common ground that, it is the making of this declaration that is commonly referred to as a declaration of a 'state of Emergency'. It is the publication of such a Proclamation on 17th July 2022 that was *inter alia* impugned in the proceedings relating to this Judgment. The core submission made on behalf of the several Petitioners was that the impugned Proclamation was *ultra vires* the power conferred on the President (the then Acting President His Excellency Ranil Wickremasinghe) by section 2 of the PSO, read together with provisions of the Constitution and other applicable law. The common contention of all learned counsel representing the Petitioners was that as at 17th July 2022, there was no 'public emergency' that warranted the issuance of a Proclamation under section 2. Furthermore, for multiple other reasons such as improper motive said to have been entertained by the Acting President and malice, it was submitted that the Proclamation was illegal and had no force of law. The position advanced on behalf of the Attorney General was that the situation which prevailed in the country as at the time the Acting President issued the impugned Proclamation, amply justified his decision to bring into force Part II of the PSO and thereafter promulgate Emergency Regulations published in the *Gazette* of 18th July 2025.

106) As stated in a preceding part of this Judgment, for the purpose of determining the question of law involved which is intertwined with a complex factual scenario, the Court needs to initially examine the power vested in the President by section 2 of the PSO. Section 2 (following its amendment by Act No. 8 of 1959) once dissected into its constituent ingredients, appears as follows:

Where, in view of the
existence or imminence of ***a state of public emergency****,*
the President is of opinion that ***it is expedient so to do***

in the ***interests of public security and the preservation of public order***
or
for the maintenance of supplies and services essential to the life of the community,
the President may,
by Proclamation published in the Gazette,
declare that provisions of Part II of this Ordinance shall,
forthwith or on such date as may be specified in the Proclamation,
come into operation throughout Sri Lanka
or
in such part or parts of Sri Lanka as may be so specified.

[Emphasis added by me.]

107) From the structure of section 2 of the PSO and by the language used, it would be seen that, the legal authority to act in terms of section 2 arises only if there is **a public emergency** or there is **the imminence of a public emergency arising**. When engaging in judicial review of an impugned occasion where the President has purportedly acted under section 2 of the PSO, it would thus be necessary for the court engaged in judicial review to first determine on an objective footing whether in fact the available evidence discloses whether there had been the existence of a public emergency or whether there was the imminence of a public emergency. Thus, from an Administrative Law sense, the standard to be applied to determine objectivity in the decision-making process would be the standard of reasonableness; that being, decision-making by a public functionary who would diligently and in good faith take into consideration all relevant facts, while disregarding any irrelevant facts. Thus, it would be the entitlement of this Court to consider the evidence placed before this Court (including the matters in respect of which the Court is inclined to take judicial notice) and determine whether as at 17th October 2022, there was a public emergency or the imminence of a public emergency arising.

108) In contrast with that objective standard for judicial review to determine whether or not a 'public emergency' existed or whether or not there was the

imminence of a 'public emergency', the next segment contained in section 2 provides for a different basis for judicial review. That is evident from the language used by the legislature. Section 2 provides that, *'**where the President is of opinion that it is expedient so to do** in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, the President may …'.* The legal terminology used may be conveniently referred to as 'subjective language'. It is seen that the Parliament has conferred on the President the entitlement to form a view founded upon his assessment of the prevailing ground situation (that being the existence of a public emergency) or the imminence of the ground situation converting itself into a public emergency that is to arise. It is apparent that by using subjective language, the Parliament has conferred on the President wide discretionary authority.

109) The vexed question that arises is, in a situation where such subjective language has been used, what is the role of the court which is called upon to engage in judicial review? Is the role of the court limited to determining whether in fact the President had entertained that state of mind (as provided in section 2) and if found to be so, stop judicial review at that point, or is it that the law confers on court a wider role, in order to ensure that the interests of the public are protected against possible unreasonable or arbitrary exercise of power, which renders the decision-making process to amount to an abuse of power resulting in an unlawful decision being arrived at? Notwithstanding the use of such 'subjective language', cannot the court probe deeper and consider whether the decision had been taken in good faith, with due diligence, objectively, reasonably and without arbitrariness?

110) As Professor Wade in *"Administrative Law by H.W.R. Wade & C.F. Forsyth"* (10th Edition, p. 354) has observed, courts have an ingrained repugnance to legislative devices (a) which seek to make public authorities judges of the extent of their own powers, and (b) which seek to exempt public authorities from judicial review. Though the application of the literal approach (by recognising the subjective nature of the language used) would render a limited role for courts exercising judicial review, would that be in public interest? Can the courts be satisfied by a mere declaration by the decision-maker or a declaration made on his behalf that given the situation which prevailed, the decision-maker (with regard to the PSO, the President) was satisfied that he should make a Proclamation under section 2, on the footing that it would be ***expedient in the interests of public***

security and the preservation of public order *or* ***for the maintenance of supplies and services essential to the life of the community***, to issue such Proclamation? Would taking such assertion on its face value be in public interest? Professor Wade (at p. 356) points out that courts have refused to allow themselves to be 'disarmed' (deprived of jurisdiction to engage in judicial review). He goes on to point out that (at p. 357) *'many decisions reject the literal approach, and that the court, more characteristically, is not content to relinquish control'*. On a consideration of a series of English cases, Professor Wade has concluded that, if the court is satisfied for good reasons that the decision-maker has acted unreasonably or arbitrarily, then, the court is entitled to sweep aside the literal application of the subjective language contained in the provision of law that confers legal authority to the decision-maker and engage in judicial review from an objective footing. However, it is necessary to acknowledge that, these views of Professor Wade should be understood subject to his observation that 'Emergency powers' vested in the Executive are extraordinary powers, in respect of which judicial review would be limited. This is primarily due to most of such decisions being non-justiciable. Thus, given the status of the law, I would conclude adopting the approach that, with regard to the exercise of emergency powers, though the scope of judicial review is limited, it is not excluded. That is because, the exercise of even a limited degree of judicial review in situations such as that contained in section 2 of the PSO would be in consonance with the Rule of Law and would be in public interest.

111) In view of the foregoing analysis of the law, I would with the greatest respect find myself unable to accept and accede to the approach to judicial review contained in ***Janatha Finance and Investments Ltd. vs. Liyanage and Others*** *[(1983) 2 Sri L.R. 111]* wherein Justice Parinda Ranasinghe (as His Lordship the former Chief Justice was then) in 1983 said that *"the provisions of section 2 of the Public Security Ordinance make the President the* ***sole judge*** *of the existence or imminence of a State of Emergency, and the necessity of bringing into operation the provisions of Part II of the said Ordinance"* [Emphasis added by me.]. It is possible that His Lordship's pronouncement was a reflection of the law as it stood then, which in my view is no longer the case, since the law and judicial philosophy relating to judicial review has considerably widened founded upon the contemporary understanding of the Rule of Law, as reflected in a series of judgments of both the United Kingdom and Sri Lanka, including in ***Council of Civil Service Unions v Minister for the Civil Service (GCHQ case)*** *[1985] AC 374,* ***Mallikarachchi vs. Shiva Pasupathi, Attorney-General*** *[(1985) 1 Sri L.R. 74],*

Karunathilaka and Another vs. Dayananda Dissanayake, Commissioner of Elections and Others *[(1999) 1 Sri L.R. 157],* ***Senasinghe vs. Karunatilleke, Senior Superintendent of Police, Nugegoda and Others*** *[(2003) 1 Sri L.R. 172],* ***Rajavarothiam Sampanthan vs. Attorney-General*** *(cited above),* ***R (Miller) vs. The Secretary of State for Exiting the European Union*** *[2016] EWHC 2768 (Admin.) (Miller I) and* ***R (On the Application of Miller) vs. Prime Minister*** *[2019] UKSC 41 (Miller II),* ***Dr. Athulasiri Samarakoon and Others vs. Ranil Wickremasinghe and Others*** *(cited above)* and ***Hirunika Premachandra vs. Attorney General and Others*** *(cited above),* ***Women & Media Collective vs. The Attorney General and Others*** *(cited above)*. Such progressive development of the law is in my view founded upon the contemporary recognition of the role of courts in upholding the Rule of Law and the protection of public interests. From a Sri Lankan context, the primary objective of such jurisprudence has been to uphold the Sovereignty of the People, recognise Constitutionalism and the Rule of Law, and the protection of public interest occasioned through the due recognition of Articles 3 and 4 (Sovereignty of the People and the Exercise of Sovereignty), the protection of Fundamental and Language Rights of the People (Chapters III and IV), and the due recognition of the Directive Principles of State Policy and Fundamental Duties (Chapter VI) enshrined in the Constitution reflecting the basic structure and the very soul of Sri Lanka's Constitution.

112) However, I would not be hesitant to express the view that, by virtue of the extraordinary power contained in section 2 of the PSO being vested in the President, particularly with regard to matters pertaining to public and State security and the defence of the Nation, this Court will rightfully show due deference to the opinion formed by the President particularly if he had formed such opinion objectively, in good faith and with due diligence. Such deference would not be due to subservience or servility towards the President, but due to principles of Constitutionalism, separation of powers, democratic norms, parity of status between the co-equal organs of the State, and comity that the Executive, the Legislature and the Judiciary are required to maintain towards one another. However, even with regard to decisions of the President relating to public and State security and defence of the nation, I would hasten to express my view that unless judicial review has been specifically excluded as in situations involving the declaration of war and peace (2nd proviso to Article 35(1)), this Court must robustly fulfil its obligations under the Rule of Law and engage in judicial review so as to protect the citizenry from possible abuse of power and the infringement of their fundamental rights. Equally important would be to exercise independence with

regard to the discharge of the Court's Constitutional duty vested in it by Article 118(b) to protect fundamental rights. Thus, in situations where subjective language has been used by the Parliament relating to the conferment of power on the President relating to matters pertaining to public and national security, this Court will pay due regard to the subjective opinion of the President regarding the expediency and necessity to invoke emergency and extraordinary measures, particularly if it is seen that the decision has been arrived at in good faith, objectively and the decision is reasonable and non-arbitrary.

113) This would be a useful point at which this Court may consider the first aspect of section 2 of the PSO. That being whether 'a state of public emergency' existed as at 17th July 2022. As I have stated above, this matter must be considered from an objective standard based on a consideration of what amounts to 'a state of public emergency' and the evidence before this Court as regards the situation that prevailed on 17th July 2022 together with its antecedents.

114) The PSO does not contain a definition of the term **'a state of public emergency'**. Nor is there any other statute which I have come across which contains a definition of the term. A scrutiny of domestic precedence has also not given rise to me locating a definition of the term. However, on a consideration of the views contained in Judgments of this Court including ***Joseph Perera alias Bruten Perera vs. Attorney General and Others*** *[(1992) 1 Sri L.R. 199]*, ***Karunathilaka and Another vs. Dayananda Dissanayake,*** and ***Commissioner of Elections and Others*** *[(1999) 1 Sri.LR 157]*, ***Wijesekera and Others vs. Attorney General*** *[(2007) 1 Sri L.R. 38]*, and also applicable international norms and standards brought to the attention of this Court by learned counsel, I am of the view that **'a state of public emergency'** would for the purposes of section 2 of the PSO contextually mean –

> ***'a situation of exceptional gravity, that poses a serious threat to or attack on the security of the State, preservation of public order or maintenance of essential supplies and services necessary to the life of the community, which threat or attack is of such nature and scale that it justifies the issuance of a Proclamation under section 2 invoking the extraordinary power conferred on the President to make delegated legislation (by promulgating Emergency Regulations under section 5) in a reasonable and non-arbitrary manner, and which Regulations are demonstrably necessary, and proportionate to the situation that has arisen, subject to the***

Constitution and long-term oversight and approval of the Parliament, with the view to, in good faith achieving any of the purposes contained in section 5 of the Public Security Ordinance in order to respond efficaciously to the situation that has arisen, and thereby restoring normalcy in the interests of the Public'.

115) Thus, it would be noted that 'a state of public emergency' is much more serious than a temporary upheaval of the 'law and order' situation of the country reflected by a sporadic transgression of the law by a group of persons. The situation that has arisen must be high in intensity, prolonged in nature, systematic and widespread, and should affect the security of the State or the preservation of public order or the maintenance of essential services and supplies. Furthermore, the situation that has arisen should be of such nature that, it cannot be efficaciously responded to in any manner other than by having recourse to section 2 of the PSO. It would also be seen that in a republican democracy where Sovereignty is vested in the People, the entire objective of issuing a Proclamation under section 2 of the PSO and thereby declaring 'a state of public emergency' is the protection of the interests of the public. The goal should be the restoration of normalcy and not to strengthen authoritarianism and thereby suppress, restrict or infringe the exercise of fundamental rights of the People. Even in a situation where the threat or attack is on the State apparatus or a part thereof, emergency measures are to be adopted to repel or thwart such threat or attack, purely because a threat or attack on the State would adversely affect and injure the interests of the public and not since such threat or attack would be injurious to the interests of persons in high seats of governance.

116) With this definition and description of 'a state of public emergency' in mind, it would be appropriate to revert to the ground situation that prevailed at the time the impugned Proclamation was issued. Since a detailed analysis of the facts has been set out in a preceding part of this judgment, the reference need not be elaborate. Be that as it may, the following events and situations seem to be critical components of the situation that prevailed and worthy of reiteration:

i. The Presidential Secretariat, Prime Minister's Office, President's official residence and the Prime Minister's official residence had been illegally occupied by certain protesters. The Acting President's private residence had been destroyed. There is no evidence as to whether by 17th July 2022, law enforcement and

military personnel had been successful of clearing those premises of the protesters who were illegally occupying the premises (trespassers).

ii. On 13th July 2022, the main gateway to the Parliament at Sri Jayawardenepura Kotte had been choked by a group of protesters. They were successfully dispersed by the use of force by the police and the military. On or around the same day, the President had fled the country.

iii. An election in Parliament to elect a new President to serve the remainder of the term of office of former President Gotabhaya Rajapaksa had been scheduled for 20th July 2022. The Acting President His Excellency Ranil Wickremasinghe had announced his candidature at that election. The Inter-University Students Federation had announced the conduct of another protest at the Polduwa junction (the gateway to the Parliament) on 19th July 2022. It is possible that law enforcement personnel feared that should a protest take place on 19th of July, the protesters may camp overnight and the protest may continue on to 20th July, thereby obstructing Members of Parliament from entering the Parliament to participate at the election of a President. It is likely that they also feared that the presence of protesters in large numbers may cause an element of intimidation to the Members of Parliament who may have to pass through the protesters to gain entry to the Parliament. The police had obtained a Magisterial order (presumably under section 106 of the Code of Criminal Procedure Act) on certain individuals prohibiting them from participating in the proposed protest.

iv. Law enforcement authorities as well as officials of the Parliament may have entertained the apprehension that protesters having initially converged at the Polduwa junction may later forcibly gain entry into the Parliamentary complex and prevent the election taking place on the 20th July 2022.

v. The Secretary to the Ministry of Defence by his letter dated 16th July 2022 ("R2"), had suggested to the President that a Proclamation be issued under section 2 of the PSO. His letter does not contain a justification for his request, particularly given that other law enforcement options were available. Whereas, both the

Minister of Public Security and the Inspector General of Police had by their letters dated 16th July 2022 ("R3") and ("R1") requested from the President a declaration of only a curfew by declaring a state of emergency.

117) On the other-hand, the following factors also prevailed:

i. The Executive arm of the State (including the police and the Defence establishment) was not in a state of paralysis. Had it been so, it would not have been possible for the police and the armed forces to successfully repulse the protest that took place on 13th July 2022. Nor was there any evidential basis to conclude that there was an imminence of the execution of the writ of governance about to be paralysed.

ii. There is no evidence that outside Colombo and Sri Jayawardenepura Kotte, there were any protests or acts of violence during this time.

iii. The protesters as well as other members of the Public did not obstruct the supply of essential services and supplies. If at all the scarcity of essential services and supplies was due to the severe dearth of foreign exchange that was required to import medicine, petroleum, gas and certain other essentials.

iv. Unlike during the protests in the Colombo Fort on 12th July 2022, after the protest of 13th July 2022 at the Polduwa junction at Sri Jayawardenepura Kotte was repulsed, there was neither a mobilisation of the masses nor an ongoing continuous protest near the Parliament.

v. Due to the improvement in the situation, the duration of curfews that had been declared on 13th and 14th July 2022 had been gradually reduced. If there was a perceivable uncontrollable situation brewing as at 17th October 2022, a reduction of the duration of curfew would not have taken place.

vi. The former President acting in terms of section 12 of the Public Security Ordinance had continually called out the armed forces to assist the police in its law enforcement duties, and the last such order made was in force as at July 2022.

vii. Even if the northern end of the Galle Face Green, the Presidential Secretariat, President's House, the Prime Minister's Office and

the Prime Minister's Residence (*Temple Trees)* remained occupied as at 17th July 2022, let alone evidence being placed, there was not even a suggestion made by learned counsel for the Respondents that having recourse to section 12 to clear such locations and premises was insufficient.

viii. There is no evidence of the existence of an obstacle towards executing the writ of governance either throughout or in any part of the country.

118) In this backdrop, from an objective standpoint, it is highly doubtful (although the run up to the 17th July 2022, there was an extraordinary situation), whether the ground situation that prevailed as at 17th July 2022 amounted to 'a state of public emergency'. No effective evidential method was adopted by the Respondents to satisfy this Court as to how the situation which prevailed as at 17th July 2022 came within the ambit of the earlier mentioned definition of 'a public emergency'. However, in deference to the Acting President's opinion on the matter, I am ready to assume that the ground situation amounted to 'a public emergency' and consider the matter further. Even assuming that 'a public emergency' existed as at 17th July 2022 and the Acting President had in fact entertained a genuine belief that 'a public emergency' existed, or there was an imminence of such public emergency to arise, could the Acting President have acting in good faith, objectively, diligently and reasonably concluded that <u>it would be expedient</u> in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, to issue a Proclamation under section 2 of the PSO and thereby bring into operation Part II of the PSO for the purpose of making Emergency Regulations under section 5?

119) This takes the Court to the imperative need to understand the intention of the Parliament when it used the term *'expedient'*. In my opinion, from the perspective of the law, the term *'expedient'* as contained in section 2 of the PSO, must be understood as conferring upon the President a measure of evaluative subjective discretion to determine whether, in light of the existence or imminence of a state of public emergency, a declaration of a Proclamation under section 2 is (i) **suitable or desirable,** (ii) **proportionately necessary,** and (iii) **appropriate** to secure the objectives of protecting the interests of public security, public order, or the maintenance of essential supplies and services. While it must be appreciated

that the term *'expedient'* is broader than the terms *'necessary'* and *'essential'* and thereby lowers the requisite threshold relating to the state of mind contemplated in section 2, it permits the President to make a choice (elect) from among reasonable and efficacious alternatives. However, the conferment of that discretion does not authorise either unfettered, unreasonable, arbitrary or capricious decision-making. The discretion conferred on the President by the Parliament to determine whether it would be expedient in the circumstances of the situation to issue a Proclamation under section 2 of the PSO, though can be based on his subjective opinion, must be exercised by him (a) in good faith, (b) with due diligence, (c) rationally, (d) on the basis of an objective consideration of relevant material, and (e) in pursuit of the legitimate purposes for which the power has been conferred on him (as enumerated in the section itself). Therefore, in the context of the factual scenario relevant to these Applications, in order to judicially review the opinion, the President has been authorised by the Parliament to arrive at, I would consider the following:

i. Whether the factual circumstances which prevailed as at 17th July 2022 disclosed a situation of exceptional gravity threatening the legitimate interests protected by the Ordinance?
ii. Whether the President's opinion that it was expedient to declare a state of Emergency (by issuing a Proclamation under section 2), was formed on an objective, rational and demonstrable basis?
iii. Whether the measures contemplated were proportionate to the threat posed?
iv. Whether the invocation of emergency powers aligns itself with the constitutional principles of legality, objectivity, proportionality, good faith and public interest?

The essence being, to determine whether the President's view on the matter was reasonable and non-arbitrary. Thus, in my view, the term *'expedient'* though worded using subjective language, operates not as a shield against judicial review, but as a measure of responsive and effective good governance for the purpose of protecting public interest and for no other purpose.

120) In answering the afore-stated four questions, the following must in my view be taken into consideration:

i. The entitlement of the police to have had recourse to sections 95 (dispersing an unlawful assembly), 98 (obtaining of a Magisterial order to *inter alia* remove an obstacle on a public thoroughfare), and 106

(obtaining of a Magisterial order to *inter alia* prevent an offence being committed) of the Code of Criminal Procedure Act (CCPA) to prevent or stop the scheduled protest on 19th July 2022 taking the form of any unlawful or illegal activity or any protest on 20th July 2022 at the Polduwa junction amounting to a transgression of the law. When an unlawful assembly takes place, in terms of section 95 of the CCPA, any Magistrate or police officer not below the rank of an Inspector of Police may command such unlawful assembly to disperse. Further, section 98 of the CCPA empowers a Magistrate to *inter alia* direct that an unlawful obstruction or nuisance be removed from any way (which would include a road), which may be lawfully used by the public. However, not resorting to sections 95 and 98 does not prevent the police from making an application to a Magistrate to make an order under section 106 of the CCPA. It is necessary to note however that, when making an application to a Magistrate to issue an order either under section 98 or section 106, as well as when making an order as requested by the police, both the police as well as Magistrates must be acutely conscious of the *de facto* fundamental right to protest and demonstrate, and should curtail it to the minimum extent possible, and do so in greater public interest and for the maintenance of public order.

ii. Since the armed forces had been called out under section 12 of the PSO, to secure their assistance to augment the police in law enforcement for the purpose of preventing a transgression of the law, arresting and taking into custody those who commit offences and thereafter initiating criminal justice measures.

iii. Declaring curfew in the period running up to and covering the duration of the election scheduled for 20th July 2022 as a means of preventing a blockade of the gateway to the Parliament and intimidation of Members of Parliament.

iv. Invoking the provisions of the Code of Criminal Procedure Act and the Police Ordinance in respect of possible instances of intimidation, harm, obstruction, wrongful restraint, or wrongful confinement of Members of Parliament and thereby dealing with those who conspire, attempt, commit and abet the commission of offences in terms of the law.

v. Particularly given the fact that the State (admittedly) had advance notice of the calling of a protest on 19th July 2022 and their ability to predict that such protest may flow over to the 20th, it was certainly feasible for

the police to have put in place an effective and measured law enforcement strategy to ensure that the scheduled election in Parliament takes place without any unlawful hindrance.

vi. Both the Inspector General of Police and the Minister of Public Security merely requested the Acting President to declare curfew by declaring a state of emergency. They provided no justification for their request for the declaration of a state of emergency.

vii. The Secretary to the Ministry of Defence who suggested taking action to declare a state of Emergency not having given reasons for his view and not having indicated as to why the other alternated courses of action (referred to above) in his view would not be effective.

121) In the circumstances, to put it simply, His Excellency the President had the following four options to choose from:

(i) Direct the enforcement of the routine law in an effective manner to restore normalcy and/or respond to the emerging situation and restore normalcy.

(ii) Have recourse to Part III of the Public Security Ordinance to respond to the emerging situation and restore normalcy.

(iii) Act under section 2 of the PSO, issue a Proclamation in respect of the areas of Colombo and Sri Jayawardenepura (a localised Emergency) and bring into force Part II of the PSO and thereby make Emergency Regulations under section 5 of the PSO only in respect of those two areas.

(iv) As done on the impugned occasion, act under section 2 of the PSO, issue a Proclamation in respect of the entire country (as was done in the impugned occasion – an all-island Emergency), bring into force Part II of the PSO and thereby promulgate Emergency Regulations under section 5 of the PSO in respect of the entire country.

122) As pointed out previously, the Acting President has not presented to this Court, an Affidavit explaining his point of view. Even the Affidavit of Saman Ekanayake does not provide a substantial or profound explanation as to why the Acting President was of the opinion that it would be **expedient** for him to issue a Proclamation under section 2 of the PSO and to do so in respect of the entire country. The mere repetition of the phraseology contained in section 2 of the PSO

cannot be accepted as an explanation or a valid reason. There is no explanation before Court as to why the Acting President did not have recourse to any one of the first three options contained in the preceding paragraph as a viable alternative to the adoption of the fourth option of issuing a Proclamation under section 2 of the PSO and thereafter making Emergency Regulations under section 5 of the PSO for the entire island.

123) As pointed out by some of the counsel for the Petitioners, even *ex-post-facto,* the then Acting President has not offered any explanation for his decision to have acted under section 2 of the PSO and issued a Proclamation bringing into force Part II of the PSO in respect of the entire island.

124) In ***Peduru Arachchige Janaka* Pushpakumara *vs. Director General (Electric and Electronic Division) Sri Lanka Navy Headquarters and Others*** *(SC FR 452/2011, SC Minutes of 06.07.2021),* Justice Janak De Silva expressing the unanimous view of the Division of this Court which heard that case, held that when the Fundamental Rights jurisdiction of the Supreme Court is invoked, the decision-maker must disclose reasons for the decision to Court, and even where no reasons have been given to the affected party, the departmental file must contain reasons for the impugned decision. Following on those lines, in ***Dinga Thanthirige Jayalath Perera vs. Karannagoda, Commander, Sri Lanka Navy and Others(Navy Court Marshall case)*** *[SC Appeal 11/2017, SC Minutes of 11.01.2023]* pronouncing the minority view of this Court, I have expressed the view that there is a duty cast on public functionaries who are decision-makers exercising power conferred on them by law to discharge a public function, to give reasons for their decisions, ideally recorded in the decision itself or contemporaneously recorded in official documentation and provide to Court when their decisions are challenged. Expressing the majority view, Chief Justice Jayantha Jayasuriya, PC observed that administrative authorities are bound to take decisions based on reasons and no capricious or arbitrary decision can be allowed to stand. Therefore, even if the reasons are not disclosed at the time the decision is communicated, disclosure of such reasons at a time of judicial review satisfies this requirement. The importance of contemporaneous recording of reasons for the decision has been highlighted in all three Judgments of this Court pronounced by the three Justices in ***Women & Media Collective vs. The Attorney General*** *(cited above)*. It is necessary to note that it is common practice in any matter involving judicial review of executive or administrative decisions or actions, for the decision-maker to place

before court the position of such decision-maker (who in this instance is the then Acting President) by way of an Affidavit together with contemporaneous notes (if any) prepared or maintained by him and other relevant material explaining reasons for his impugned decision. Such an explanation (reasons for the decision) is not available in the instant matter.

125) This Court has been hamstrung by the approach adopted by the Attorney General's counsel, who did not present to this Court an Affidavit from the then Acting President containing explanations (reasons) for his decision. In the circumstances of this matter, the only conclusion the Court can arrive at is that, the Attorney General as counsel representing the President considered the available material, obtained necessary instructions and concluded that there are no valid reasons to present to this Court. What is available is (i) an Affidavit of the Secretary to the President (who was not the Secretary as at the time the impugned decision was taken) which contains hearsay information, (ii) three letters received from the Acting President (from the Inspector General of Police, Minister of Law and Order, and Secretary to the Ministry of Defence), and (iii) a communication sent to the Speaker of Parliament by the Acting President notifying the former of the making of the Proclamation. Even the file called for by this Court from the Presidential Secretariat and examined by this Court, adds no value as regards the reasoning the Acting President may have entertained in his mind as at the time the impugned Proclamation had been made. Therefore, this Court does not have the benefit of the Acting President's analysis of the situation that prevailed and his line of thinking. In the circumstances, it is not possible for this Court to review why the Acting President concluded that it would be expedient to act under section 2 of the PSO. In the circumstances, the only conclusion the Court can arrive at is that, the Acting President's decision was not reason-based and that he did not arrive at a subjective judgment of his own on whether in the given circumstances of the situation it was expedient to act in terms of section 2 of the PSO. That makes the exercise of power by the Acting President an instance of abuse of power.

126) In view of the foregoing, I conclude that there is **no basis in law** to conclude that the Acting President when making the Proclamation under section 2 of the PSO had acted objectively, in good faith, with due diligence, reasonably and without any arbitrariness. Conversely, in these circumstances, the irresistible inference is that **the Acting President had acted <u>without</u> necessary objective consideration of all relevant factors, and had been unreasonable and arbitrary**

in issuing the impugned Proclamation. While concluding that there is no evidence to conclude (the onus having been on the Petitioners to produce) that the Acting President's decision was orchestrated by *mala-fide* intent or collateral motives, **I hold that, the impugned decision to issue a Proclamation under section 2 of the Public Security Ordinance was illegal and is therefore a nullity**.

127) Prior to departing from this Judgment, it is necessary to place on record that this Judgement should not be seen as amounting to a situation where the view formed by the President has been found to be different from the view of the Court. That is not the approach adopted by this Court when judicially reviewing the impugned decision. What the Court did was to consider and determine on an objective footing the following questions:

i. Did the President act in good-faith, with due diligence, objectively, reasonably and in a non-arbitrary manner in deciding to invoke a 'state of public emergency' by making a Proclamation under section 2 of the Public Security Ordinance?
ii. Particularly given the four (4) options the President had before him, did the President have a valid basis to conclude that in the given factual circumstances, it would be expedient for him to act in terms of section 2 and declare a state of Emergency and do so island-wide?
iii. Did the President exercise discretion conferred on him by section 2 of the PSO in accordance with established principles of law?

To these overlapping questions, due to the foregoing reasons set-out in this Judgment, the Court arrived at **answers in the negative**. Thus, it must be emphasised that **this Court has not imposed its own judgment over that of the President, on whether or not the ground situation warranted and justified the President to act under section 2 of the Public Security Ordinance**. Thus, **this was not an instance of judicial review based on the merits of the impugned decision**.

128) In view of the afore-stated finding that the making of the impugned Proclamation under section 2 of the PSO is a nullity, the need to consider the *vires* of the individual Emergency Regulations promulgated under section 5 of the PSO impugned in these proceedings does not arise. Doing so will only be of academic importance. Pronouncing on matters though having legal significance but not

necessarily related to the judicial adjudication of the dispute before Court, must be avoided by Courts of law, unless doing so is imperative. Nothing recognised as containing any force of law or legal effect, stems out of what is declared by Court to be a nullity. Thus, the need to pronounce on the *vires* of the President's exercise of power under section 5 of the PSO and determining the legality of the impugned Emergency Regulations titled *Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2022* contained in *Gazette Extraordinary* No. 2289/07 of 18th July 2022 ("P8(a)") though would be a useful exercise, would not be unnecessary. It would however, be necessary for this Court to uphold the existing principle of law relating to judicial review, that Emergency Regulations are subject to judicial review founded upon the principles of Constitutionalism including the Rule of Law, and the principles of necessity, proportionality, reasonableness, rationality, and respect for non-derogable fundamental rights.

129) However, it is necessary to observe that this Court noted much merit in the submissions made by learned Counsel for the Petitioners with overwhelming cogence, that particularly during the states of Emergency declared in 2022, the Emergency Regulations promulgated purportedly under section 5 of the PSO fit into a particular template, and that Regulations had been made in a stereotypical and repetitive manner, disregarding the actual purpose for which they were required to be made. Furthermore, the Court noted that most such Regulations would not withstand judicial review due to being overbroad, vague, arbitrary, in excess of restrictions that may be imposed under Article 15 of the Constitution on the exercise of fundamental rights and incompatible with standards relating to the Rule of Law.

Declarations and Orders of Court

130) In view of the foregoing, this Court declares that, by issuing the Proclamation dated 17th July 2022 [produced marked "P6(a)"] purportedly under section 2 of the Public Security Ordinance, the then Acting President His Excellency Ranil Wickremasinghe has infringed the fundamental rights of the Petitioners, and by extension, the fundamental rights of the People of Sri Lanka guaranteed under Article 12(1) of the Constitution.

131) The Court declares that in view of the foregoing, both "P6(a)" and "P8(a)" being respectively the Proclamation dated 17th July 2022 and Emergency

Regulations dated 18th July 2022 are a nullity and is deemed to have never had the recognition of the law.

132) The Attorney General is directed to, within three (3) months from the date of this Judgment incorporate the principles of law contained in this Judgment into a detailed legal advisory, and forward such advisory to the Office of His Excellency the President for necessary consideration. A copy of that advisory is to be filed of record in this Court.

133) Though this Court has not pronounced on the legality of individual Emergency Regulations that have been impugned (as the need to do so did not arise), the Attorney General is directed to pay due regard to the substance of the submissions made in that regard by learned counsel for the Petitioners, and advice the Office of His Excellency the President in a fitting manner.

134) Learned brother, Honourable Justice Arjuna Obeyesekere shared with me the draft of his separate opinion regarding this matter. I have considered it in great detail. I find myself in respectful disagreement with his approach leading to the final conclusion he has reached, due to among others the following reasons:

(i) In my opinion, it would be incorrect to proceed on the footing that once the President has formed an objective view that a 'public emergency' exists, he need not consider other options available to him, and can immediately proceed to issue a proclamation under section 2 of the Public Security Ordinance. If that be the case, what would be the meaning to be attributed to the term 'expedient' in section 2?

(ii) The enactment of Part III of the Ordinance is clear proof of the Parliament having considered the availability of other options. If the only course of action to respond to a public emergency was the making of the Proclamation under section 2 of the Ordinance, then why did the Parliament by an amendment to the original Ordinance introduce Part III of the Ordinance?

(iii) There may be certain public emergencies that can be responded to effectively without issuing a proclamation under section 2 of the Public Security Ordinance and promulgating Regulations under section 5 of the

Ordinance. This Judgment contains three other options that were available to the Acting President.

(iv) The circumstances that prevailed as at 17th July 2022 indicates amply that the Acting President had sufficient time to consider other options referred to in this Judgment.

(v) A series of judgments of this Court has amply demonstrated the fact that, 'vires' and 'unreasonableness' are not the only grounds upon which decision-making by the Executive would amount to the infringement of Article 12(1) of the Constitution.

(vi) I most respectfully find myself unable to accept my learned brother Justice's approach wherein he appears to have deviated from the contemporary administrative law requirement of the duty to give reasons by the decision-maker in cases where the decision-maker is the President. In my view, the Rule of Law requires Courts to apply the same standard of judicial review, notwithstanding the protocol standing or profile of the decision-maker. Furthermore, as a judicial policy aimed at the protection of the fundamental rights of the People and the Rule of Law, this Court must insist on compliance with the duty to give reasons, unless the applicable statute has negatived that common law duty. Non-insistence of compliance with the duty to give reasons, is in my view a panacea for the abuse of authority and arbitrary exercise of power.

135) In view of the foregoing, these Applications are allowed.

136) The Petitioners shall be entitled to recover the costs of litigation from the State.

Judge of the Supreme Court

Murdu Fernando, PC, CJ.

I agree.

Chief Justice

Arjuna Obeyesekere, J.

I have had the benefit of reading in draft, the judgment of my learned brother, Hon. Justice Yasantha Kodagoda, PC, with which Her Ladyship, the Hon. Chief Justice has agreed.

I very respectfully disagree with the majority opinion that the impugned Proclamation is arbitrary, an abuse of power, illegal, and hence a violation of the fundamental rights of the People of this Country guaranteed by Article 12(1) of the Constitution, since my own evaluation of the facts and the applicable law has led me to a different conclusion. It is therefore necessary that I set down my reasons in a separate opinion.

The majority, having set out in detail the events that took place from January 2022 until 20th July 2022 when the then Acting President was elected by Parliament as President, has concluded as follows at paragraph 47:

> "*In view of the foregoing facts and circumstances, and the other evidence placed before this Court, I conclude that as at 17th July 2022, when the President declared a state of Emergency with effect from 18th July 2022,* ***an extraordinary situation which had serious security implications, existed in Sri Lanka****. I also conclude that the situation on 13th July 2022 which culminated in one of the roads leading to the Parliament being blocked and thereafter the Parliament being virtually encircled by protesters (by blocking the other roadways as well), if not brought under control in a timely and effective manner, had the possible effect of thwarting the holding of the scheduled election in Parliament on 20th July 2022 in terms of Article 40(1)(C) of the Constitution.* ***Thus, as at 17th July 2022, in my view, there was a serious situation involving a deterioration of law and order in the country***." [emphasis added]

The majority has thereafter held that according to the structure of Section 2 of the Public Security Ordinance, as amended [the Ordinance], the legal authority to act in terms of Section 2(1) arises only if there is a state of public emergency or the imminence of a state of public emergency. I agree that the existence of such a state of public emergency or the imminence of a state of public emergency is a precondition to the President issuing a Proclamation in terms of Section 2(1) of the Ordinance.

I also agree with the view taken by the majority that an objective test must be applied in Court determining whether such a state of public emergency or the imminence of a state of public emergency existed at the time of the Proclamation. I am however not in

agreement with the majority opinion that on the facts and circumstances of this case, "*it is highly doubtful (although the run up to the 17th July 2022, there was an extraordinary situation) whether the ground situation that prevailed as at 17th July 2022 amounted to 'a state of public emergency'*". In arriving at my conclusion that there in fact existed a state of public emergency, I am guided by the material placed by the Petitioners, the factual scenario that prevailed as at 17th July 2022 and the affidavit of the Secretary to the President, the annexures thereto, and the communication of the Acting President to the Speaker.

The majority opinion thereafter proceeds to consider what may have been the position had the said precondition (of the existence of a state of public emergency) been satisfied, and goes on to hold that, at that point, the President has a discretion in choosing between Section 2 of the Ordinance on the one hand, and *inter alia* Sections 12, 16 and 17 in Part III of the Ordinance on the other, and that there is no evidence that the President weighed those options prior to making the Proclamation under Section 2(1). For reasons that I shall advert to, I am not in agreement that the President must consider other options once he is satisfied that there exists a state of public emergency.

In order to address our point of variance, I wish to set out at the outset, the statutory scheme of the Constitution and the Public Security Ordinance.

Constitutional framework

While the Constitutional framework governing emergency regulations is set out in Chapter XVIII of the Constitution (Article 155), it is silent in providing a formal definition of a state of public emergency. In such a backdrop, it is the Ordinance that provides the conditions that give rise to the need for emergency powers to be exercised and sets out the substantive powers that may be brought into operation by a proclamation of a state of public emergency. Thus, the Ordinance is considered as the statutory elaboration of the Constitutional framework in Chapter XVIII.

Section 2(1) of the Ordinance reads as follows:

> *"Where, in view of the existence or imminence of a state of public emergency,* ***the President is of opinion that it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community****, the President may, by Proclamation published in the Gazette, declare that the provisions of* ***Part II*** *of this Ordinance shall, forthwith or on*

such date as may be specified in the Proclamation, come into operation throughout Sri Lanka or in such part or parts of Sri Lanka as may be so specified."

While Section 2(2) sets out that the validity period of the Proclamation shall be one month from the date thereof, Section 2(3) requires the making of a proclamation to be communicated forthwith to Parliament. Where Parliament has been adjourned or prorogued during that time and which adjournment or prorogation is not due to expire within ten days, a proclamation shall be issued for the meeting of Parliament within ten days. In terms of Section 2(4), the Proclamation under Section 2(1) shall expire in fourteen days unless such Proclamation is approved by a resolution of Parliament.

The majority opinion has very aptly referred to, under the heading, "***Public Security Ordinance and related provisions of the Constitution***" the fact that, "*the scheme contained in sections 2 and 5 of the PSO is very much an extraordinary mechanism, particularly as the President from whom Executive power stems is empowered from outside Parliament to perform a function which ordinarily the Parliament is empowered to perform under the powers vested in it by the Constitution. The scheme is exceptional, as it results in the Executive in the performance of an executive function being empowered to make Regulations which have the force of law to empower the Executive and its agents to exercise executive power and to also engage in law enforcement. Thus, it is a significant departure from the doctrine of separation of powers*."

It is for this reason that while the President is empowered to make a Proclamation under Section 2(1), his power to do is fettered by the requirement that such Proclamation be communicated forthwith to Parliament, and for such Proclamation to be approved by Parliament within 14 days. This is the check that the legislature has imposed on the President in order to avoid any arbitrary exercise by the President of the power vested in him under Section 2(1) of the Ordinance.

Part III of the Ordinance contains three important sections.

The first is Section 12(1), which provides that, "*Where circumstance endangering the public security in any area have arisen or are imminent and the President is of the opinion that* ***the police are inadequate to deal with such situation*** *in that area, he may, by Order published in the Gazette,* ***call out all or any of the members of all or any of the armed forces for the maintenance of public order*** *in that area*."

The second is Section 16, in terms of which, "*Where the President considers it necessary to do so for the maintenance of public order in any area, he may, by Order published in the Gazette,*

direct that, subject to such exemption as may be made by that Order or by any subsequent Order made under this section, ***no person*** *in such area* ***shall****, between such hours as may be specified in the Order,* ***be on any public road, railway, public park, public recreation ground or other public ground*** *or the seashore except under the authority of a written permit granted by such person as may be specified in the Order*."

The third is Section 17, which provides that, "*Where the President considers it necessary in the public interest to do so for the maintenance of any service which, in his opinion, is essential to the life of the community, he may, by Order published in the Gazette, declare that service to be an essential service*."

None of the above three sections require there to be a state of public emergency for an order to be made under those sections, and at the risk of stating the obvious, there is no requirement for a state of public emergency to exist when the ordinary laws are to be exercised. However, the essence of a Proclamation in terms of Section 2(1) is the existence or imminence of a state of public emergency.

Accordingly, in view of the existence or imminence of a state of public emergency, if the President forms an opinion that it is expedient in the interests of the matters provided in Section 2(1), the President may bring Part II of the Ordinance into operation.

The exercise of powers under Part II of the Ordinance is therefore predicated upon the existence of the most serious situation contemplated by the Ordinance, i.e. a state of public emergency or an imminence of a state of public emergency. Once the President has come to the conclusion that a state of public emergency exists, there is no purpose in mandating a consideration of other options. The very existence of a state of public emergency or an imminence of a state of public emergency renders any further evaluation of options, which are options that may be exercised in situations where there is no such state of emergency, redundant. No doubt, in theory, it is possible that the careful use of ordinary legal powers or the powers under Part III of the Ordinance may be adequate to resolve a public emergency. But the very nature of the situation of public emergency requires a decision maker to act decisively and within a short space of time. The state of public emergency is required to be reviewed within a very short period of time by Parliament, which again is indicative of the urgency and immediacy surrounding the power. Requiring the President to embark on whether the ordinary laws or various other provisions or options would be adequate to deal with a public or national emergency would be unreasonable and an unprecedented step.

It is appropriate at this juncture to consider the wisdom in the words of Lord Denning in **Secretary of State v ASLEF (No.2)** [(1972) 2 All ER 949] where, in dealing with a matter that involved urgent decisions, he stated that:

> "*After all, this is an emergency procedure. It has to be set in motion quickly, when there is no time for minute analysis of facts or of law. The whole process would be made of no effect if the Minister's decision was afterwards to be conned over word by word, letter by letter, to see if he has in anyway misdirected himself. That cannot be right.*"

Thus, Lord Denning, while affirming the power of Courts to examine executive decisions, and also adverting to the fact that the matter at hand dealt with a threat to the national economy and that the measures did not affect life or liberty, required judges to be mindful of the inherent unfairness in an approach that advocates over-scrutiny of matters, long after the fact, and that which is bereft of the urgency the decision maker was faced with. I wish to stress that urgency is not a carte blanche for any arbitrary action. However, it is an important factor that a Court must take into account when examining whether a decision maker had the luxury of evaluating every option. In essence, I hold that when a situation of public emergency exists, the President is not required at that stage to evaluate all remaining options prior to making a proclamation under Section 2(1) of the Ordinance.

I am fortified in my view by several matters. The first is the urgent review of the decision that is required to be carried out by Parliament, as adverted to earlier. Second, in the absence of any provisions in the Ordinance that directly or impliedly require the President to carry out an analysis of the different options available, it would be judicial overreach to mandate such an analysis. Third, this Court can safeguard the rights of citizens by reviewing the specific regulations and acts carried out thereunder, without unduly intruding on the decision-making powers of the Executive.

In the above circumstances, I hold that where a state of public emergency has been established on an objective basis this Court cannot insist upon a mandatory review of all the options available to the President.

Declaration of a State of Emergency – the Proclamation

On 17th July 2022, the Acting President issued a Proclamation under Section 2(1) of the Ordinance bringing into operation Part II of the Ordinance for the whole of the island with effect from 18th July 2022. Such proclamation is generally termed a "declaration of emergency", though the Ordinance does not use such language. The said proclamation was published in Gazette Extraordinary No.2288/30 dated 17th July 2022. The day after, by Gazette Extraordinary 2289/07 dated 18th July 2022 the Acting President promulgated Emergency (Miscellaneous Provisions and Powers) Regulations, No.1 of 2022 in terms of Section 5 of the Ordinance. Both the Proclamation of Emergency and the Emergency Regulations were subsequently approved by Parliament on 27th July 2022.

The Petitioners, collectively, have invoked the jurisdiction of this Court in terms of Article 126(1) of the Constitution challenging (a) the said Proclamation by the Acting President on the ground that it is arbitrary, unreasonable and contrary to law, and (b) the Emergency Regulations that were promulgated pursuant to such Proclamation on the basis that they are overbroad and violative of the fundamental rights guaranteed by Articles 12, 13 and 14. While all the Petitioners have challenged the Emergency Regulations, only the Petitioners in SC (FR) Applications Nos. 246/2022 and 276/2022 have challenged the Proclamation itself.

Before I proceed to consider if a conclusion can be reached on an objective basis that there existed a state of public emergency, and whether the issuance of the impugned Proclamation was within the terms of the law, I shall lay down the scope of review in an application of this nature.

Article 12(1) – scope of review

In **Wickremasinghe vs Ceylon Petroleum Corporation and Others** [2001 (2) Sri LR 409], Chief Justice Sarath Silva stated as follows:

> *"The question of reasonableness of the impugned action has to be judged in the aforesaid state of facts. The claim of each party appears to have merit when looked at from the particular standpoint of that party. But, reasonableness, particularly as the basic component of the guarantee of equality, has to be judged on an objective basis which stands above the competing claims of parties.*
>
> *The protection of equality is primarily in respect of law, taken in its widest sense and, extends to executive or administrative action referable to the exercise of power vested in the Government, a minister, public officer or an agency of the Government. However, the*

Court has to be cautious to ensure that the application of the guarantee of equality does not finally produce iniquitous consequences. A useful safeguard in this respect would be the application of a basic standard or its elements, wherever applicable. The principal element in the basic standard as stated above is reasonableness as opposed to being arbitrary. In respect of legislation where the question would be looked more in the abstract, one would look at the class of persons affected by the law in relation to those left out. In respect of executive or administrative action one would look at the person who is alleging the infringement and the extent to which such person is affected or would be affected. But the test once again is one of being reasonable and not arbitrary. Of particular significance to the facts of this case, the question arises as to the perspective or standpoint from which such reasonableness should be judged. It certainly cannot be judged only from a subjective basis of hardship to one and benefit to the other. Executive or administrative action may bring in its wake hardship to some, such as deprivation of property through acquisition, taxes, disciplinary action and loss of employment. At the same time, it can bring benefits to others, such as employment, subsidies, rebates, admission to universities, schools and housing facilities. It necessarily follows that reasonableness should be judged from an objective basis.

When applied to the sphere of the executive or the administration the second element of the basic standard would require that the impugned action, is based on discernible grounds that have a fair and substantial relation to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority.

Therefore, when both elements of the basic standard are applied it requires that the executive or administrative action in question be reasonable and based on discernible grounds that are fairly and substantially related to the object of the legislation in terms of which the action is taken or the manifest object of the power that is vested with the particular authority. The requirements of both elements merge. If the action at issue is based on discernible grounds that are fairly and substantially related to the object of the legislation or the manifest object of the power that is vested in the authority, it would ordinarily follow that the action is reasonable. The requirement to be reasonable as opposed to arbitrary would in this context pertain to the process of ascertaining and evaluating these grounds in the light of the extent of discretion vested in the authority."

Thus, a determination by this Court that the right to equality guaranteed to the Petitioners by Article 12(1) has been violated would have to be preceded by a finding that the Acting

President acted unreasonably when he issued the impugned Proclamation, and that his action is therefore arbitrary.

Grounds of review and unreasonableness

In **Council of Civil Service Unions vs Minister for the Civil Service** [1985 AC 374] [the GCHQ case], Lord Diplock stated that one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground was 'illegality', the second was 'irrationality' and the third was 'procedural impropriety'. There is no dispute that the President has the power in terms of Section 2(1) of the Ordinance to issue the impugned Proclamation, and thus, the *vires* of his decision is not an issue. Similarly, there is no dispute that the procedure laid down in the Ordinance has not been followed and thus, there is no irregularity with the procedure followed.

Lord Diplock thereafter went on to state that, "*By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' [Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 (1) KB 223]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*."

The standard adopted by Lord Diplock in the GCHQ case is intrinsically linked to Lord Greene's dicta in the case of **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation** [1948 1 KB 223] which was the birth of Wednesbury unreasonableness and one of the first instances where English Courts recognised that there was no requirement to justify judicial intervention on the basis of a mistake of law, inferred or otherwise, where the decision was '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority*.' The famous example of the redhaired teacher who was dismissed because of the colour of her hair, illustrates the threshold for 'unreasonableness' that was expected.

A common feature in these two cases is that for Courts to intervene, the decision of the public authority in question must not just be unreasonable, but must be manifestly unreasonable, which emphasises the fact that judicial scrutiny of decisions of public authorities, in the absence of illegality or procedural impropriety, should only be in exceptional circumstances.

However, there is growing precedence to show that English Courts have attempted to broaden the scope of Wednesbury Unreasonableness, particularly in light of the European Convention on Human Rights, to allow Courts to monitor and ensure a better quality of decisions by public authorities. In doing so, English Courts have adopted varying standards of Wednesbury Unreasonableness which demonstrates that Courts are concerned about ensuring that a correct decision is taken with due regard to the context, and that the Wednesbury standard is not 'monolithic' [Wade and Forsyth, Administrative Law, 11th Edition, page 304].

The case of **Secretary of State for Education and Science v Metropolitan Borough Council of Tameside** [[1977] AC 1014] decided prior to the GCHQ case, provides for what can be considered a more balanced test:

> *"In public law "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which* ***no sensible authority acting with due appreciation of its responsibilities would have decided to adopt****."* [emphasis added]

The test used in Tameside was cited with approval in the case of **R v Chief Constable of Sussex (Ex parte International Trader's Ferry Ltd)** [(1998) UKHL 40] [ITF Case], where it was held as follows:

> *"Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223, an apparently briefly--considered case, might well not be decided the same way today; and the judgment of Lord Greene M.R. twice uses (at 230 and 234) the tautologous formula "so unreasonable that no reasonable authority could ever have come to it." Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in Secretary of State for Education and Science v. Tameside Metropolitan Borough Council, the precise meaning of "unreasonably" in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court all succeeded in avoiding needless complexity.* ***The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock as "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt." These unexaggerated criteria give the administrator ample and rightful***

rein, consistently with the constitutional separation of powers." [emphasis added]

The above reasoning can thus be summarized as follows:

a) The threshold for judicial intervention set by Wednesbury is extremely high. The threshold in GCHQ, being intrinsically linked to Wednesbury has a similarly high threshold;

b) The test laid down in Tameside appears to be more realistic, and balanced, as it acknowledges conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, as being unreasonable;

c) It is the duty of Courts to consider whether a decision is reasonable in the light of the facts and circumstances of each case.

In paragraph 112, the majority opinion, having considered if deference must be shown to the decisions in matters pertaining to public security and the defence of the nation, has concluded that, "*this Court will rightfully show due deference to the opinion formed by the President particularly if he had formed such opinion objectively, in good faith and with due diligence.*" I am in agreement with the said view of the majority.

<u>The presence of a state of public emergency – the factual scenario</u>

The essence of the submission of the learned Counsel for the Petitioners was that the ground situation that prevailed on or about 17th July 2022 does not support a conclusion that there existed in the Country a state of public emergency, or the imminence thereof, and that the Acting President acted arbitrarily and unreasonably when he issued the impugned Proclamation. The Petitioners do not present any evidence to state that there was no state of public emergency. The Petitioners do not profess to have any special knowledge or expertise in matters of national or public security or in the maintenance of public order. While no specific reasons have been attributed for their view and no evidence has been presented with the petitions in support thereof, the reason for the Petitioners to take this view appears to be that the Acting President had a choice between Section 2(1) and Part III of the Ordinance, and that the President could not have resorted to Section 2(1) until all other options contained in Part III had been exhausted. In other words, the Petitioners argument is that there was no requirement to make the

Proclamation because the situation that existed in the Country could have been contained by the use of other options that were available to the Acting President.

This brings me to the question whether, viewed from an objective standpoint, was there a state of public emergency or the imminence of a state of public emergency on 17th July 2022.

The majority opinion has set out in great detail the factual scenario that existed prior to, and on 17th July, 2022 when the impugned Proclamation was made. While I shall not endeavour to restate the entire factual circumstances, I must, in order to give context to the conclusion that I shall reach, very briefly refer to such facts which I have taken mostly from the majority opinion, and the material placed by the parties before this Court.

Due to a serious depletion of foreign exchange reserves by the beginning of 2022, the economic situation of the country had rapidly deteriorated in a manner that was deeply felt by the public, as never before. It is common ground that this depletion of foreign reserves evolved into an unprecedented economic and financial crisis and resulted in severe shortages of basic amenities and necessities such as fuel, cooking gas, electricity, food items and medicine.

The shortage of foreign exchange resulted in the Government of Sri Lanka for the first time in its history defaulting in the repayment of its foreign loans, a very severe depreciation of the rupee, power cuts for 12 hours and more, and led to inflation rising to rates hitherto unseen.

Public protests commenced in early 2022 and gradually the number of the participants, the diversity of the social strata they came from, and the frequency of the protests increased. Public protests were initially limited to drawing attention to the economic hardship that the People were facing arising from the above. The protests gradually escalated into general issues of governance and reflected the People's disenchantment with the existing political system, rampant corruption and mismanagement of the country in general, and the economy in particular.

By April 2022, a site opposite the Galle Face Green, and adjacent to the Presidential Secretariat and the Shangri-la Hotel came to be "*permanently*" occupied by the protestors on a 24 x 7 basis. At times, due to protests and processions that were held, public thoroughfares were blocked or partly blocked. I must state that the protests were

peaceful, and were a true expression of the right of a citizen to protest, to show dissent, and express their freedom of expression without any fear. That these protests were welcomed by the majority of the People was evident by the support extended to the protesters by contributions by way of food, water, medicine, sanitation facilities, etc.

Things took a turn for the worse on 9th May 2022. Those who until then were engaged in a peaceful protest and exercising their freedom of expression and the freedom of peaceful protest were subjected to a vicious attack by a group of goons who had just left a meeting at the Temple Trees, the official residence of the Prime Minister. The attack on the protestors was totally uncalled for, especially since the protestors were not an organized group of people but comprised those who had joined each other due to a common interest of ensuring a secure livelihood for them and their families. This attack proved to be the spark that lit the tinderbox. The reaction to this attack demonstrated how sensitive the feelings of the protesters in particular, and the People in general, had become.

By afternoon that day, vigilante groups appeared on the streets of Colombo and commenced patrolling the streets, even going to the extent of checking the credentials of those travelling in cars and buses. Violence erupted soon after with buses by which the goons had arrived in Colombo being set on fire. By night, violence had spread to various parts of the Country and several houses belonging to Members of Parliament of the then ruling party situated outside of Colombo were set ablaze. Arsonists were thus at work. A critical moment was, perhaps, when a Member of Parliament and his Personal Security Guard were pulled out of their vehicle, set upon, assaulted, and eventually murdered in broad daylight.

Thus, the reaction of some of those who supported or participated in the *Aragalaya* was intense, overwhelming and on certain occasions violent. This was not the outcome that the vast majority of the protestors had wanted, but demonstrated how quickly things can go out of control. A single spark can result in a ravaging wildfire if the conditions are right. And the People of this Country witnessed what probably was a rehearsal of the anarchy that a state of lawlessness can bring about.

The above incidents of 9th May 2022 led to the resignation of the then Prime Minister and the appointment of a new Prime Minister. Meanwhile, the protests continued, and continued to grow, both in number and intensity, with the protesters continuing to enjoy the support of the People. It would not be an exaggeration to state that the protesters were, by this time, more organized than before.

On 9th June, 2022, the brother of the then President who had served as the Finance Minister until April 2022, and who was also blamed for the severe economic hardship that the People were enduring at that time, resigned from Parliament. The date "9th" appears to have achieved a symbolic status by this time.

Fast forward to 9th July 2022. A large group of protestors, numbering over a hundred thousand, arrived in Colombo from different parts of the Country. They converged in the Colombo Fort, and thereafter stormed the President's House, the official residence of the President, and occupied the said premises. The then President, who was occupying the President's House at this time, was evacuated by the Security Forces through the rear gate. The protestors thereafter forcibly entered the Presidential Secretariat, the nerve centre of administrative governance of the Executive and occupied the said premises.

In the late evening of 9th July 2022, a mob set ablaze the private residence of the newly appointed Prime Minister. The protestors also entered Temple Trees, the official residence of the Prime Minister. Perhaps the only action of the protestors that was foiled was the attempt made on 10th July 2022 to enter the official residence of the former Prime Minister who had resigned pursuant to the events that took place on 9th May 2022. The storming of the President's House, the Presidential Secretariat, and Temple Trees, and the arson committed on the private residence of the newly appointed Prime Minister as well as the attempt to storm the official residence of the former Prime Minister, demonstrated a wide range of strategic targetting by protestors. Thus, the stage was being set for the re-enactment of the anarchy witnessed on 9th May 2022, at possibly a larger scale.

In the meantime, the democratically elected President left the Country. The newly appointed Prime Minister was appointed to act as President while the President was away. The People were anxiously waiting from 9th July for that moment when the incumbent President would resign from office, which was a primary demand of the protestors. Four days later, on 14th July 2022, the Speaker announced that the President had resigned, triggering the critical need to put in motion the Constitutional requirements to enable Parliament to elect a new President.

With it being clear that Parliament must meet as required by the Constitution to elect a new President, the hub of the protests, which until then had been centered around Colombo, the President's House and the Presidential Secretariat saw a shift from the

centre of the Executive to the Legislature. This shift of focus to the Parliament occurred on 13th July 2022, just prior to the much anticipated announcement of the resignation of the then President, when a large number of protestors gathered at the Polduwa junction in Sri Jayawardenapura where the main roadway to the Parliament is situated. The protest had turned violent when the attempt of the protestors to proceed towards Parliament was prevented by law enforcement authorities. This probably turned out to be the catalyst for the impugned Proclamation.

The same day, another group of protestors had invaded the State owned television station situated in Colombo 7, and had for a brief moment forced producers of a live programme to allow them to air their views directly to the Public.

With the announcement of the resignation of the President, the Acting President assumed duties on 15th July 2022. Parliament was convened to meet on 20th July 2022 to elect a new President, as provided for by the Constitution. In the interests of democracy and the vital need to prevent the country from descending into anarchy, it was of utmost importance that the election of the new President by Parliament took place on 20th July, 2022 and the Rule of Law reestablished in the Country. Thus, it was important that Members of Parliament converge for the special sitting scheduled for the 20th without the threat of an attack on Parliament looming over their heads. Though obvious, it merits mention that Members of Parliament would have to arrive in Sri Jayawardanepura from all parts of the country. A focus on the Polduwa Junction would be futile if Members of Parliament could not safely travel from their respective constituencies.

It is in this background that on 17th July 2022, the Acting President issued the impugned Proclamation under Section 2(1) of the Ordinance, bringing Part II of the Ordinance into force with effect from 18th July 2022.

Two important events that took place on the 18th demonstrate the continuity of the intensity of the protests, and, perhaps, portend a potential crippling of Parliament as well. The first was when a large mob forcibly entered the Prime Minister's Office situated in Colombo 7, and occupied the said premises. The second was the announcement of a largescale protest by the Inter University Students Federation for the 19th July 2022 to take place at the Polduwa Junction calling for the resignation of the Acting President.

These are the factual circumstances that gave rise to the impugned Proclamation. I must perhaps at this stage refer to the following matters from the majority opinion:

(1) The events of 2022 referred to by both the Petitioners and the Respondents associated with the '*Aragalaya*' and in respect of which some amount of evidence has been placed before this Court are certainly unprecedented in the annals of the history of this Country. [paragraph 41]

(2) Court cannot brush aside the fact that the key events referred to by the parties to these applications are matters so etched even in our memory. That is particularly due to we too being citizens of this country who led our lives the way any other citizens lived during that era and not in ivory towers or silos. There are picture-perfect images in our own memory of the key events referred to by both the Petitioners and the Respondents. [paragraph 42]

(3) In view of the foregoing facts and circumstances, and the other evidence placed before this Court, I conclude that as at 17th July 2022, when the President declared a state of Emergency with effect from 18th July 2022, **an extraordinary situation which had serious security implications, existed in Sri Lanka**. I also conclude that, **the situation on 13th July 2022** which culminated in one of the roads leading to the Parliament being blocked and thereafter **the Parliament being virtually encircled by protesters (by blocking the other roadways as well), if not brought under control in a timely and effective manner, had the possible effect of thwarting the holding of the scheduled election in Parliament on 20th July 2022** in terms of Article 40(1)(C) of the Constitution. Thus, as at 17th July 2022, in my view, **there was a serious situation involving a deterioration of law and order in the country** [paragraph 47; emphasis added]

While I agree that a serious situation involving a deterioration of law and order in the country had arisen, the majority opinion goes on to conclude that there was no evidence placed by the Acting President to establish that this serious situation had given rise to the existence of a state of public emergency. This is where the divergence of views between the majority opinion and myself starts, as I take the view that the events that I have just narrated, viewed from an objective standpoint, points to the existence of an unprecedented state of public emergency, and that, viewed from a subjective viewpoint, it was expedient in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community for the Acting President to have issued the impugned Proclamation.

Case of the Respondents

This brings me to the version of the Respondents that warranted a proclamation in terms of Section 2(1).

I have before me an affidavit of Mr. E M S B Ekanayake, Secretary to the President filed in SC (FR) Application No. 246/2022. In paragraph 3(a) thereof, he has stated as follows:

> "*I state that the* ***necessity to declare a State of Emergency*** *and promulgate Emergency Regulations* ***was considered in the backdrop of incidents that took place on 9th May 2022, 9th July 2022 and 13th July 2022***.
>
> *I state that on 9th May 2022 and its immediate aftermath there were reports of clashes between groups of people resulting in serious bodily injuries caused to people, and damage to properties including the public transportation system, arson, destruction of property in several places in the country, and one reported death.*
>
> *In or about two months later, i.e.,* ***9th July 2022, an unrest of greater magnitude was witnessed by the country that resulted in severe damage being caused to public property including the Presidential Secretariat, the Official Residence of the President, and the Official Residence of the Prime Minister****. The breakdown of public order extended even to the sudden disruption of Sri Lanka Rupavahini Corporation.*
>
> *In or about 4 days later, i.e.,* ***13th July 2022, there was a civil unrest that took place near Parliament*** *that led to a group of organised people violently confronting the security officials, and, in the said process, forcibly acquiring 2 T56 guns, 3 magazines and 60 bullets from security personnel.*"

Thus, the Secretary to the President has captured in one paragraph the factual scenario that existed in the Country as at 13th July 2022, which the majority opinion has set out in detail, and to which I too have briefly referred to.

The Secretary goes on to state that, "*it was in the said context that His Excellency the President received letters from the Inspector General of Police, and the Secretary to the Ministry of Defence recommending to declare a State of Emergency and take action to maintain peace and order.* "

The letter sent by the Inspector General of Police, dated 16th July 2022 [**R1**] to the Secretary, Ministry of Public Security, reads as follows:

"මහජන ආරක්ෂක පනත යටතේ හදිසි තත්ත්වයක් ප්‍රකාශයට පත් කර, ඇඳිරි නීතිය පැනවීම සම්බන්ධයෙන් පියවර ගැනීම

විවිධ සමාජ මාධ්‍ය ඔස්සේ සහ සංවිධානාත්මකව පුද්ගලයින් රැස් කර පාර්ලිමේන්තුව හා ඒ අවට ප්‍රදේශය අත්පත් කර ගැනීම සඳහා දහසකට ආසන්න පුද්ගලයින් පිරිසක් 2022.07.13 වන දින උත්සාහ කරන ලද අතර, එම උත්සාහය ශ්‍රී ලංකා පොලිසිය සහ ත්‍රිවිධ හමුදාවේ ද සහාය ඇතිව ව්‍යාර්ථ කිරීමට සමත් විය.

මෙම අවස්ථාවේ දී එම පුද්ගල කණ්ඩායම් විසින් යුද්ධ හමුදාවේ සහ පොලිසියේ නිලධරයන් ගණනාවකට පහර දී බරපතල තුවාල සිදු කරන ලද අතර, ටී 56 ගිනි අවි 02ක්, එම පතරොම් ගැබ් 03 ක් හා එම පතරොම් 60 ක් කොල්ලකන ලදි.

මෙම සංවිධානාත්මක කණ්ඩායම් විසින් ඉදිරියේ දී පැවැත්වීමට නියමිත පාර්ලිමේන්තු සැසිවාර වල කටයුතු ව්‍යර්ථ කිරීමට සහ ප්‍රජාතන්ත්‍රවාදී ලෙස ජනාධිපතිවරයෙකු තෝරා පත් කර ගැනීම සඳහා පාර්ලිමේන්තුව විසින් ගනු ලබන පියවරවලට විවිධ ආකාරයේ බලපෑම් එල්ල කරමින් පාර්ලිමේන්තු මන්ත්‍රීවරුන්ගේ වරප්‍රසාද උල්ලංඝණය කිරීමටත්, එම මන්ත්‍රීවරුන් වෙත විවිධ ආකාරයේ අනීතික බලපෑම් කිරීමටත් කටයුතු සංවිධානය කරන බවට තොරතුරු ඇත.

සාමාන්‍ය මහජනතාව සාමකාමී අරගලයකට සහභාගි කර ගන්නා බව හඟවමින්, යම් රාජ්‍ය විරෝධී කටයුතුවලට සහ විවිධ ප්‍රචණ්ඩ ක්‍රියාවලට යොමු කර ගනිමින් මහජන අරගලයක් පැවැත්වීමේ මුවාවෙන් ප්‍රචණ්ඩ ක්‍රියා සහ අපරාධ සිදුකිරීමට ඇතැම් රාජ්‍ය විරෝධී කණ්ඩායම් විසින් ගනු ලබන උත්සාහයන් ව්‍යාර්ථ කිරීම සඳහාත්, පාර්ලිමේන්තුවේ කටයුතු සාර්ථකව පවත්වාගෙන යාමට සහාය දීම සඳහාත්, වඩාත් ශක්තිමත් නීතිමය පසුබිමක් ඇති කිරීම අත්‍යවශ්‍ය කරුණක් වේ.

ඒ අනුව, ගරු ජනාධිපතිතුමා වෙත පැවරී ඇති බලතල ප්‍රකාරව, මහජන ආරක්ෂක පනත යටතේ හදිසි තත්ත්වයක් ප්‍රකාශයට පත් කිරීමත්, අවස්ථාවෝචිතව ඇඳිරි නීතිය ප්‍රකාශයට පත් කිරීමත් සුදුසු බව නිර්දේශ කරමි.

මේ සම්බන්ධව සුදුසු පියවර ගැනීම සඳහා මෙම වාර්ථාව කාරුණිකව ඉදිරිපත් කරමි."

Thus, the Inspector General of Police was drawing the specific attention of the Secretary, Ministry of Public Security to the impending election by Parliament of the President scheduled for 20th July 2022. In paragraph 10 of the petition in SC (FR) Application No. 246/2022, the Petitioner has stated that she, "*is aware that a large scale protest march had been organized by the Inter University Students Federation to be held on 19th July 2022, calling for the resignation of the then acting President.*", thereby confirming what the Inspector General of Police had stated in R1.

On the same date, the Secretary, Ministry of Defence sent the following letter to the Secretary to the President [**R2**]:

"*Declaring a State of Public Emergency and making Emergency Regulations under the provisions of the Public Security Ordinance*

1. *It is requested to make necessary arrangements to publish an Extraordinary Gazette notification that the provisions of Part II of the Public Security Ordinance shall come into operation throughout Sri Lanka with effect from 16th July 2022 by virtue of the powers vested in the President.*

2. *Further, it is suggested to make Emergency Regulations as provided under Section 5 of the Public Security Ordinance."*

The Minister of Public Security too had sent the Secretary to the President on 16th July 2022, the following letter [**R3**]:

"මහජන ආරක්ෂක පනත යටතේ හදිසි තත්ත්වයක් ප්‍රකාශයට පත් කර, ඇඳිරි නීතිය පැනවීම සම්බන්ධයෙන් පියවර ගැනීම

උක්ත කාරණය සම්බන්ධව පොලිස්පති විසින් 2022.07.16 දිනැතිව අංක IGP/P/SEC/MPS/OUT/547/22 යටතේ යොමු කරන ලද ලිපිය සමඟ මහජන ආරක්ෂක අමාත්‍යාංශ ලේකම් විසින් 2022.07.16 දිනැති අංක PS/09/02/679/2022 දරණ ලිපිය මගින් මා වෙත යොමු කර ඇති නිර්දේශය හා සබැඳේ.

ඒ අනුව, පොලිස්පති විසින් ඉදිරිපත් කර ඇති තත්ත්වයන් ද සැලකිල්ලට ගෙන **2022 මැයි මස 09 හා 10 දිනවල රට තුළ ඇති වූ ආකාරයේ අවාසනාවන්ත තත්ත්වයක් නැවත ඇති වීම වළක්වා ගැනීම සඳහා**, වහාම ක්‍රියාත්මක වන පරිදි මහජන ආරක්ෂක පනත යටතේ ගරු ජනාධිපතිතුමා වෙත පැවරී ඇති බලතල අනුව දිවයින පුරා හදිසි තත්ත්වයක් පනවා, අවස්ථාවෝචිතව ඇඳිරි නීතිය පැනවීමට පියවර ගැනීම සුදුසු බවට නිර්දේශ කර, අවශ්‍ය ඉදිරි කටයුතු සඳහා කාරුණිකව ඉදිරිපත් කරමි."

Thus, available before the Acting President were three letters, one each from the Minister of Public Security, the Secretary, Ministry of Defence, and the Inspector General of Police. All three of them were urging, or practically begging the Commander-in-Chief to declare a state of public emergency, with the necessity for such a course of action being clear from the letter sent by the Inspector General of Police, and the Minister of Public Security. Given the extremely volatile ground situation that existed on 17th July 2022, one must recognise that what was called for by the Acting President at that stage was decisive and immediate action.

I must perhaps at this stage refer to the judgment of this Court in **Vidanage v Pujitha Jayasundera, Inspector General of Police and others** [SC (FR) Application No. 163/2019; SC minutes of 12th January 2023; the Easter bomb case] where this Court observed that, "*The petitioners complained that procrastination in proscribing the terrorist groups and non-declaration of a state of emergency as a vital preemptive strike, contributed in no small measure to the growing menace of terrorism resulting in the most gruesome bomb blast and massacres that this country witnessed on the 21st of April 2019.*"

Responding to this submission, this Court observed that:

> "*The allegation of executive inaction springs from security warnings, intelligence messages, concept papers and correspondence that took place among some principal protagonists of the executive branch i.e Nilantha Jayawardena (the then Director, SIS), Sisira Mendis (the then Chief of National Intelligence, CNI), Pujith Jayasundera (the then Inspector General of Police) and Hemasiri Fernando (the then Secretary to the Ministry of Defence). The Petitioners make the pinpointed allegation of executive inertia against the then President Maithripala Sirisena for not taking steps to avert the bizarre mayhem and destruction and they contend that it was within his powers to have ensured the personal liberty and security of the people and prevented the precarious slide into anarchy*." [page 70]
>
> "*… it is for this reason Public Security Ordinance clothes him with awesome powers. The citizenry is entitled to the protection that the Constitution and laws accord them*." [page 106]

This Court has then recognized the importance of the "awesome powers" vested in the President under the Public Security Ordinance, and the need for the President to take timely steps to implement the protection afforded by such powers. In the event the Acting President did not take decisive steps and further elected representatives were murdered or Parliament was stormed, this Court may have had to consider whether there was a dereliction of duty in failing to act on the advice of pivotal officers responsible for maintaining law and order. This Court would have anxiously scrutinised the failure on the part of the President to ignore such plaintive cries for his intervention by the three main officials tasked with public security, had the President not taken steps. While rubber-stamping the requests of subordinates would amount to an abdication of duties, it should be noted that the immediate history of the preceding two months and the Acting President's letter to the Speaker are more than adequate to establish the fact that the Acting President had addressed his mind to the situation. This is certainly a case where,

in the face of the unprecedented activities taking place, inaction rather than action that should have been put under the microscope.

I am in agreement with the majority opinion that a decision maker must provide reasons for his or her decision. However, this is no ordinary case where what is being challenged is a simple decision taken by an administrative officer pursuant to an inquiry where the facts of such inquiry are not before Court but yet the Court is called upon to decide on its *vires* and reasonableness. To the contrary, this case is extraordinary, in that the events that gave rise to the issuing of the Proclamation unfolded before the very eyes of the People, as borne out by the narration in the majority opinion, and was therefore public knowledge, thus requiring no further elaboration.

I must at this stage refer to the two media statements issued by the Bar Association of Sri Lanka produced by the Petitioner in SC (FR) Application No. 276/2022.

The first is marked P4, does not contain a date, and reads as follows:

> "*Appeal not to resort to violence*
>
> *The BASL appeals to the people not to resort to violence and not to cause harm to the persons and property of individuals. It appeals to the people not to allow such acts to be committed. Setting fire and causing damage to property will defeat the purpose of the peaceful protests. It will cause untold damage to the country and will seriously affect its economy and the people of this country. The BASL condemns all such acts including the setting of fire to the private residence of the Prime Minister."*

The second is P5, dated 12th July 2022, and reads as follows:

> "*The need to adhere to Constitutionalism and the Rule of Law*
>
> *The events of July 9th, 2022 are unprecedented in the history of our nation reflecting the deep dissatisfaction of the public, drawing hundreds of thousands of protesters to Colombo. The protests have led to the impending resignation of President Gotabaya Rajapakse. The party leaders meeting has announced that the election of his successor will be held on July 20th 2022.*

The Bar Association of Sri Lanka [BASL] reiterates its call for a smooth and peaceful transition of power and welcomes the short time frame adopted by the party leaders which should be adhered to.

The contribution and sacrifices made by the people seeking a real change in Sri Lanka during the last few months are immeasurable.

Whilst it is important to keep in focus the demands and aspirations of the protesting public, it is equally important to ensure an orderly transition, continued respect for the Rule of Law and to Constitutionalism in Sri Lanka. Respect for the Rule of Law and to Constitutionalism is essential to protect the rights of the people of Sri Lanka and their livelihoods.

The BASL is deeply concerned of statements attributed to various parties including those who were part of the protest groups which appear to undermine the Rule of Law and Constitutional governance in Sri Lanka. ***The BASL unequivocally states that at this decisive time in our country it is absolutely necessary that all citizens respect the Rule of Law and Constitutional governance. It is not in the best interests of our country or its people to ignore the provisions of the Constitution which is the framework under which Sri Lanka is governed. Respect for the Constitution, its institutions and the Rule of Law will ensure the continuing functions of the Government which are vital to the life of the community and its people****.*

The BASL also notes that the President's House, Temple Tree, and the Presidential Secretariat are being occupied by members of the protest groups and that large crowds continue to visit the premises. The BASL is extremely concerned of reports of acts of vandalism at Temple Trees and the President's House. We call upon those occupying these premises to ensure that the proper authorities are given custody of these buildings. We also call upon those occupying them to ensure the protection of documents and other public properties, many of which are of archeological significance. We also call upon them to respect the sanctity of these buildings.

We urge all parties to continue to find solutions to the current economic and political instability in a democratic manner, through the existing constitutional framework and legal process and to advocate for changes in a manner that does not undermine the administration of justice."

It is in this background that one must consider paragraph 3(e) of the affidavit of the Secretary, which reads as follows:

> "*Having been apprised of the possibility of an outbreak of violence, and drawing from the immediate past experience, in particular having regard to the propensity for violence to quickly spread across the country, His Excellency the President [who was then the Acting President], declared a State of Emergency on 17th July 2022 with effect from 18th July 2022. The reasons for such declaration are contained in the Gazette itself, namely 'the interest of public security, the protection of public order and the maintenance of supplies and services essential to the life of the community.*"

I agree that the best evidence justifying the making of the impugned Proclamation would probably have been an affidavit of the Acting President. It was of course open for the Respondents, in the alternative, to have produced the file maintained at the Presidential Secretariat, if the opinion of the President had been documented in the said file/s. The Respondents did not do so, but this Court called for the file maintained at the President's Office. In that file, is the following letter sent by the Acting President under his signature to the Speaker on July 17, 2022, as required by Section 2(2) of the Ordinance:

> "*The Public Security Ordinance*
>
> *I have declared by Proclamation dated 17th July 2022, under Section 2 of the Public Security Ordinance (Chapter 40) that the provisions of Part II of the aforesaid Ordinance shall come into operation throughout Sri Lanka from July 18, 2022.*
>
> *The Parliament is hereby duly informed in terms of Article 155(4) of the Constitution that* ***the purpose of the above Proclamation is to the protection of Public Order*** *and the maintenance of supplies and services essential to the life of the community. "*

<u>The existence of a state of public emergency</u>

Thus, we have before us, the narration of the Petitioners themselves, the documents produced by the Petitioners, the press statements issued by the Bar Association of Sri Lanka, R1, R2 and R3 as well as a letter signed by the President communicating to the Speaker that he has issued a Proclamation under Section 2(1) and that the purpose of such Proclamation is the protection of public order. This is in addition to the Proclamation itself, where the President states that the Proclamation is being made since he is "*of opinion that by reason of a public emergency in Sri Lanka, it is expedient so to do, in the interests of public security, the protection of public order and the maintenance of supplies and services essential to the life of the community.*"

Although the contents of the letter and the Proclamation are only a reiteration of the grounds set out in Section 2(1), to my mind, it is evident that the Acting President was fully conscious of the requirements of the law that he was required to be satisfied prior to making a Proclamation under Section 2(1). To ask for further reasons for forming the opinion would therefore be an exercise in futility.

It is not the duty of this Court to evaluate the incidents that took place and decide whether the evidence justified the decision or to determine whether the incidents that took place constitute sufficient grounds to declare a state of public emergency. Instead, it is the duty of this court to determine whether the requisite state of mind of the President to declare a state of public emergency was "reasonable, in good faith and was on proper grounds". In other words this Court should determine whether it was 'reasonable' for the President to be satisfied on the facts that existed to form the opinion that a state of public emergency which threatens the life of the nation and which warranted a declaration of a state of public emergency has arisen. It must be kept in mind, as held by H. A. G. De Silva, J. in **Wickremabandu v Herath** [(1990) 2 Sri LR 348] that it is a different standard of reasonableness that is applicable here, as the opinion of the President does not relate to the commission of past acts as it is in the general circumstances, but to the future security of the nation.

When evaluating the incidents that took place prior to, and immediately prior to the declaration of emergency and drawing from the past experience and the destruction that was caused, the above explained test of reasonableness in the wide sense, urges me to conclude that any sensible/reasonable authority acting with due appreciation of its responsibilities could have decided to arrive at such a decision. Upon the facts known to the Acting President including the past experiences wherein clashes and mob violence escalated to destruction of life and property on a mass scale, it was 'not unreasonable or irrational' for him to have formed the opinion that a declaration of a State of emergency was a necessity. Therefore, in my view, the opinion formed by the President that there existed a situation of public emergency that warranted the declaration of a state of public emergency and the declaration made in the exercise of such subjective discretion with a view to prevent any occurrence/incident that is prejudicial to public security was necessary and reasonable. And if the decision is within the confines of reasonableness, it is no part of the Court's function to look further into the merits.

It is worthwhile to refer to the following view expressed by Ranasinghe, J [as he then was] in **Edirisuriya v. Navaratnam and others** [(1985) 1 Sri LR 100] in the context of making detention/arrest orders:

> "***Once the existence of facts and circumstances, upon which a reasonable man could have so acted is established to the satisfaction of the Court, the "judicial intrusion" should then come to a halt. It is not open to the Court to substitute its own opinion for that of the person who has been vested with the power to act.*** *It is only if the facts and circumstances, upon which the impugned order is sought to be justified by those who have exercised the powers in question, are such that it is clear that no reasonable man could have, in these circumstances, done what has been done, that the court can justifiably intervene."* [emphasis added]

Based on the material before me, I am of the view that it was reasonable for the President to have come to the conclusion that the situation that prevailed in the Country as at 17th July 2022 was certainly an extraordinary and serious situation which had serious security implications giving rise to a state of public emergency and the imminence thereof, and involved a deterioration of law and order in the country. Parliament was to meet on the 20th to elect a new President. If what occurred at the Polduwa junction on 13th July 2022 could have given rise to "*Parliament being virtually encircled by protesters (by blocking the other roadways as well)*," and "*if not brought under control in a timely and effective manner, had the possible effect of thwarting the holding of the scheduled election in Parliament on 20th July 2022*", then, it was imperative that steps as provided for by law be taken. In my view, democracy demanded the Executive to act swiftly and decisively.

Fresh in the minds of those in power would have been the manner in which the country witnessed what I have referred to as the rehearsal of the anarchy that was to come. It was therefore imperative that Parliament met as scheduled in a secure environment in order to fulfil its Constitutional responsibility of electing a President, and it was equally imperative that steps be taken to prevent the Country from sliding towards anarchy.

There are two other matters that I wish to advert to, before concluding.

The first is, I am of the view that a detailed analysis of the ouster clause in Article 154J(2) is unnecessary at this stage. However, I am not entirely comfortable with the interpretation given in the majority opinion to Article 154J(2) by limiting its application to situations of emergency that arise and result in directions being made by the President to the Governor. While the placement of Article 154J(2) does create serious questions, this

Court must also be mindful of the language of Article 154J(2) that casts a specific ouster on the declaration of a state of public emergency independent of the directions that may be given by the President under Article 154J(1). The Constitution is the source of the jurisdiction of this Court, and Constitutional ousters must be given anxious consideration since it is this Court that is called upon to interpret the Constitution.

The second matter that I wish to advert to is that this Court should be circumspect in circumscribing the ambit of a state of public emergency, particularly in the context of the threats in the modern world. I must also state that a situation that gives rise to a state of public emergency need not have a long duration and that even a temporary upheaval of the 'law and order' situation in the Country can justify action under Section 2(1).

Conclusion

In these circumstances, I am of the view that:

(a) viewed from an objective standpoint, there existed a state of public emergency as at 17th July 2022; and

(b) the opinion formed by the Acting President that it is expedient in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community to act under Section 2(1), is both rational and reasonable.

I would therefore hold that the fundamental rights of the Petitioners guaranteed by Article 12(1) have not been infringed by the making of the impugned Proclamation.

In view of my decision that the Proclamation is legal and valid, the next question that I would have had to examine would be the legality of the Emergency Regulations, which were the primary target of the Petitioners. It is clear that the Emergency Regulations were *prima facie* overbroad and arbitrary, in that significant amendments were introduced barely a few days after their promulgation. Furthermore, the Emergency Regulations were not extended beyond thirty days, and it has been accepted that no individual has been prosecuted thereunder. In the circumstances, it would be an academic exercise for me to scrutinize each individual regulation at this stage. Had any individual been affected by these Emergency Regulations, I would have had no hesitation in examining the offending regulations.

I would therefore proceed to dismiss all applications, without costs.

Judge of the Supreme Court