

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

In the matter of an application made under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.F.R. Application No: 256/2019

1. Centre for Policy Alternatives (Guarantee) Limited,
No. 6/5, Layards Road,
Colombo 00500.
2. Dr. Paikiasothy Saravanamuttu,
No. 3, Ascot Avenue,
Colombo 00500

PETITIONERS

Vs.

1. H.E. Maithreepala Sirisena,
(Former President of the Democratic Socialist Republic of Sri Lanka)
No.61, Mahagamasekara Mawatha,
Colombo 00500

- 1A. Hon. The Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 01200.

2. Dr. P. B Jayasundera,
Secretary to the President,
Presidential Secretariat,
Galle Face,
Colombo 00100

2A. Gamini Sedara Senarath,
Secretary to the President,
Presidential Secretariat,
Galle Face,
Colombo 00100

2B. E. M. S. B. Ekanayake,
Secretary to the President,
Presidential Secretariat,
Galle Face,
Colombo 00100

2C. Dr. Nandika Sanath Kumanayake,
Secretary to the President,
Presidential Secretariat,
Galle Face,
Colombo 00100

3. Hon. Nimal Siripala de Silva,
Minister of Justice, Human Rights and
Legal Reforms,

Ministry of Justice, Human Rights and
Legal Reforms,
Superior Court Complex,
Colombo 01200

3A. Mr. M. U. M Ali Sabry PC,
Minister of Justice, Ministry of Justice,
Superior Court Complex, Colombo 01200

3B. Dr. (Mrs.) Sudharshani Fernandopulle,
State Minister of Prison Reforms and
Prisoners' Rehabilitation,
No.40, Buthgamuwa Road,
Rajagiriya

3C. Hon. Lohan Ratwaththe,
State Minister of Prison Reforms and
Prisoners' Rehabilitation,
No.40, Buthgamuwa Road,
Rajagiriya

3D. Dr. Wijeyadasa Rajapakshe,
Ministry of Justice, Prison Affairs and
Constitutional Reforms,
No. 19, Sri Sangaraja Mawatha,
Colombo 01000

3E. Dr. Harini Amarasuriya,
Minister of Justice, Public Administration,
Home Affairs, Provincial Councils, Local
Government and Labour,
Ministry of Justice, Public Administration,
Home Affairs, Provincial Councils, Local
Government and Labour,
No.19, Sri Sangaraja Mawatha,
Colombo 01000

3F. Harshana Nanayakkara,
Attorney-at-Law,
Minister of Justice and National
Integration,
No.19, Sri Sangaraja Mawatha,
Colombo 01000

4. J.J Rathnasiri,
Secretary, Ministry of Justice,
Superior Courts Complex,
Colombo 01200

4A. M. M. P. K. Mayadunne,
Secretary,
Ministry of Justice,
Minister of Justice, Prison,
Superior Courts Complex, Colombo 01200

4B. Wasantha Perera,
Secretary,
Ministry of Justice, Prison Affairs and
Constitutional Reforms,
No.19, Sri Sangaraja Mawatha,
Colombo 01000

4C. M. N. Ranasinghe,
Secretary, Ministry of Justice, Prison Affairs
and Constitutional Reforms,
No.19, Sri Sangaraja Mawatha,
Colombo 01000

4D. Pradeep Yasarathna,
Secretary,
Ministry of Justice,
No.19, Sri Sangaraja Mawatha,
Colombo 01000

4E. Ms. Ayesha Jinasena, PC,
Secretary, Ministry of Justice and
National Integration, No.19, Sri Sangaraja,
Mawatha,
Colombo 01000

5. Ven. Galagoda Aththe Gnanasara Thero,
No.615,
Saddharma Rajitha Viharaya,
Nawala Road,
Rajagiriya.

6. T. M. J. W. Thennakoon,
Commissioner General of Prisons,
Department of Prisons,
Prison Headquarters,
150, Dr. Dannister De Silva Mawatha,
Colombo 00900

6A.Thushara Upuldeniya,
Commissioner General of Prisons,
Department of Prisons,
Prison Headquarters,
150, Dr. Dannister De Silva Mawatha,
Colombo 00900

RESPONDENTS

In the matter of an application made under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sandhya Ekneligoda,
No. 136/2,
Suhada Mawatha,
Hiripitiya, Pannipitiya.

PETITIONER

S.C.F.R. Application No: 257/2019

Vs.

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. Rev. Galagodaaththe Gnanasara Thero,
No 615,
Saddharma Rajatha Viharaya,
Nawala Road,
Rajagiriya.
3. Mrs. Thalatha Athukorala,
Hon. Minister,
Ministry of Justice and Prison Reforms,

Superior Courts Complex,
Adhikarana Mawatha,
Colombo 01.

3A. Hon. Lohan Ratwatte,
State Minister of Prison and Prisoner's
Rehabilitation,
State Ministry of Prison Management
and Prisoner's Rehabilitation Affairs,
No. 40, Buthgamuwa Road,
Rajagiriya.

3B. Mr. Wijedasa Rajapaksha,
Minister of Justice, Prison affairs, and
Constitutional Reforms,
No. 19, Sri Sangaraja Mawatha,
Colombo 01.

3C. Mr. Harshana Nanayakkara,
Minister of Justice and National
Integration,
No. 19, Sri Sangaraja Mawatha,
Colombo 01.

4. Mr. T.G.Uduwara,
Prison Superintendent,
Welikada Prison,

Dr. Danister De Silva Mawatha,
Colombo 01.

4A.U. P. Walisundara,
Prisons Superintendent,
Welikada Prison,
Dr. Danister De Silva Mawatha,
Colombo 01.

4B. Mr. B. D. M. G. B. Dissanayaka,
Prisons Superintendent,
Welikada Prison,
Dr. Danister De Silva Mawatha,
Colombo 01.

4C. Mr. R. M. S. Bandara,
Prison Superintendent,
Welikada Prison,
Dr. Danister De Silva Mawatha,
Colombo 01.

5. Mr. Udaya Ranjith Seneviratne,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo Rd,
Colombo 10.

5A. Mr. E. M. S. B. Ekanayake,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo Rd,
Colombo 10.

6. National Authority for the Protection of
Victims of Crimes and Witnesses,
No. 428/ 11 A,
First floor,
Denzil Kobbekaduwa Mawatha,
Battaramulla.

7. Mr. Pujith Jayasundara,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

7A. C. D. Wickramaratne,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

7B. Tennakoon Mudiyansele
Wanshalankaa Deshabandu Tennakoon,
Inspector General of Police,
Police Head Quarters, Colombo 01.

7C. Mr. Priyantha Weerasooriya,
Inspector General of Police,
Police Head Quarters,
Colombo 01.

8. Mr. S. M. Wickramasinghe,
Acting Inspector General of Police,
Police Head Quarters,
Colombo 01.

9. Mr. Mathripala Sirisena,
Former President,
C/O Sri Lanka Freedom Party,
No. 307, T.B. Jaya Mawatha,
Colombo 10.

10. Mr. Nimal Siripala de Silva,
Hon. Minister of Justice, Human Rights
and Prison Reforms,
Superior Courts Complex,
Adhikarana Mawatha,
Colombo 12.

10A. Mohamed Ali Sabry, PC,
Hon. Minister of Justice,
The Ministry of Justice,
Superior Courts Complex,

Adhikaram Mawatha,
Colombo 12.

10B. Hon. Wijedasa Rajapakse,
Minister of Justice,
Prisons Affairs and Constitutional
Reforms, Ministry of Justice and Prison
Reforms, Superior Courts Complex,
Adhikarana Mawatha,
Colombo 01.

10C. Dr. Harini Amarasuriya,
Minister of Justice, Prisons Affairs and
Constitutional Reforms,
Ministry of Justice and Prison Reforms,
Superior Courts Complex,
Adhikarana Mawatha,
Colombo 01.

11. Dr. P. B. Jayasundera,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo Rd,
Colombo 01.

11A. Gamini Sedara Senarath,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo Rd,
Colombo 10.

11B. Mr. E. M. S. B. Ekanayake,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo Rd,
Colombo 10.

11C. Dr. Nandika Sanath Kumanayake,
Secretary to the President,
Presidential Secretariat,
Galle Face, Colombo Rd,
Colombo 01.

RESPONDENTS

Before : **Hon. Janak De Silva, J.,**
Hon. Dr. Sobhitha Rajakaruna, J.,
Hon. Sampath B. Abayakoon, J.

Counsel : Viran Corea, PC with Luwi Ganeshathasan for the
Petitioner in S.C.F.R. No. 256/2019

Asthika Devendra with Wasantha Widanage for the
Petitioner in S.C.F.R. No. 257/2019

Faizer Musthapha, PC with Pulasthi Rupasingha and
Zaneta Ragel for the 1A and 9th Respondents

Thishya Weragoda with Iresh Senevirathna, Sanjaya
Marambe, Ms. Chamodi Wijeweera and Ms. Kalani
Dassanayake for the 2nd Respondent in S.C.F.R. No.
256/2019 and for the 5th Respondent in S.C.F.R. No.
257/2019

Rajitha Perera, DSG with Sajith Bandara, SC for the
Hon. Attorney General

Written Submissions : 23.05.2025 by the 1A Respondent

11.08.2025 by the 5th Respondent in S.C.F.R. No.
256/2019

27.09.2024 and 04.08.2025 by the Petitioner in S.C.F.R.
No. 257/2019

Argued on : 26.08.2025

Decided on : 10.09.2026

Janak De Silva, J.

The Petitioners in both S.C.F.R. 256/2019 and 257/2019 are impugning the pardon granted by the then President Maithreepala Sirisena, 1(A) Respondent in S.C.F.R. 256/2019 and 9th Respondent in S.C.F.R. 257/2019, to Rev. Galagodaaththe Gnanasara Thero, 5th Respondent in S.C.F.R. 256/2019 and 2nd Respondent in S.C.F.R. 257/2019.

In view of the substantial identity of the factual background and the legal issues arising for determination in both these applications, and having regard to the express consent of the parties to be bound by a common judgment, these applications were argued conjointly. Accordingly, this judgment shall govern and dispose of both S.C.F.R. 256/2019 and 257/2019.

For brevity, the then President, Maithreepala Sirisena, shall hereinafter be referred to as “1(A) Respondent” and Rev. Galagodaaththe Gnanasara Thero, shall hereinafter be referred to as “5th Respondent”.

Factual Background

In or about March, 2016, the Court of Appeal commenced Contempt of Court proceedings in CA (CC) Application No. 04/2016 against the 5th Respondent consequent to receiving a letter dated 18.03.2016 from the learned Magistrate of Homagama along with the proceedings conducted before him in case bearing No. MC Homagama 40042.

The charges framed against the 5th Respondent (as they appeared in the original charge sheet in Sinhala) are as follows:

1. වර්ෂ 2016 ක්වු ජනවාරි මස 25 වන දින හෝ ඊට ආසන්න දිනයකදී හෝමාගම මහේස්ත්‍රාත් අධිකරණයේදී ගලගොඩඅත්තේ දොණසාර වන යුෂ්මතා එකී අධිකරණයේ පැවති කිසිදු නීති කෘත්‍යයකට කිසිදු නෛතික සම්බන්ධතාවයක් නොමැතිව හෝ එබදු කෘත්‍යයක පාශවකරුවෙකු නොවෙමින් හෝ අධිකරණය ඇමතීම සඳහා අධිකරණයේ නිසි

අවසරය ලබා ගැනීමකින් තොරව හිනාමනාම සහ ඕනෑකමින්ම අධිකරණය ඇමතීම මගින් අධිකරණ කටයුතු වලට බාධා කිරීමෙන් සහ එම අධිකරණයේ ආධිපත්‍යයට සහ ගරුත්වයට අහියෝග කිරීමෙන්, අගෞරව කිරීමෙන් හා අවමන් කිරීමෙන් සහ යුක්තිය පසිඳලීමට අධිකරණයට ඇති බලයට අර්නථකාරී වන ලෙස හැසිරීමෙන් ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 105 වන ව්‍යවස්ථාව යටතේ දඬුවම් ලැබිය හැකි අධිකරණයට අපහාස කිරීමේ වරද සිදු කර ඇත.

2. ඉහත පළමුවන චෝදනාවේ සඳහන් ස්ථානයේදී, වෙලාවේදී හා එම ක්‍රියාකලාපයේදීම යුෂ්මතා අධිකරණය විසින් ලබා දෙනු ලබන නියෝග පිළිනොගන්නා බවට සහ රටේ පවත්නා නීතිය අනුගමනය නොකළ යුතු බවට කිසිදු නීත්‍යානුකූල අවසරයකින් තොරව හිනාමනාම ඕනෑකමින්ම ප්‍රසිද්ධියේ විවෘත අධිකරණයේ පැවසීම මගින් එම අධිකරණයේ ආධිපත්‍යයට සහ ගරුත්වයට අහියෝග කිරීමෙන්, අගෞරව කිරීමෙන් හා අවමන් කිරීමෙන් සහ යුක්තිය පසිඳලීමට අධිකරණයට ඇති බලයට අර්නථකාරී වන ලෙස හැසිරීමෙන් ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 105 වන ව්‍යවස්ථාව යටතේ දඬුවම් ලැබිය හැකි අධිකරණයට අපහාස කිරීමේ වරද සිදු කර ඇත.

3. ඉහත පළමුවන චෝදනාවේ සඳහන් ස්ථානයේදී, වෙලාවේදී හා එම ක්‍රියාකලාපයේදීම යුෂ්මතා අධිකරණය යුෂ්මතා පවසන පරිදි කටයුතු කළ යුතු බවට පවසමින් අංක B 7417/10 දරණ නඩුවේ සැකකරුවන්ට ඇප ලබාදෙන ලෙසට කිසිදු නීත්‍යානුකූල අවසරයකින් තොරව හිනාමනාම සහ ඕනෑකමින්ම අණකර සිටීම මගින් අධිකරණ කටයුතු වලට බාධා කිරීමෙන් සහ එම අධිකරණයේ ආධිපත්‍යයට සහ ගරුත්වයට අහියෝග කිරීමෙන්, අගෞරව කිරීමෙන් හා අවමන් කිරීමෙන් සහ යුක්තිය පසිඳලීමට අධිකරණයට ඇති බලයට අනර්ථකාරී වන ලෙස හැසිරීමෙන් ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 105 වන ව්‍යවස්ථාව යටතේ දඬුවම් ලැබිය හැකි අධිකරණයට අපහාස කිරීමේ වරද සිදු කර ඇත.

4. ඉහත පළමුවන චෝදනාවේ සඳහන් ස්ථානයේදී වෙලාවේදී, හා එම ක්‍රියාකලාපයේදීම යුෂ්මතා අංක B 7417/10 දරණ නඩුවේ පැමිණිලිකාර පාර්ශවය වෙනුවෙන් පෙනී සිටි ජ්‍යෙෂ්ඨ රජයේ අධිනීතිඥ දිලීප පීරිස් මහතාට කිසිදු නීත්‍යානුකූල අවසරයකින් තොරව

හිතාමතාම සහ ඕනෑකමින්ම පරිභවනමක වචනයෙන් ඇමතීම මගින් එනම් "නපුංසක රාජ්‍ය නිලධාරියා" ලෙස පැවසීම මගින් එම අධිකරණයේ ආධිපත්‍යයට සහ ගරුත්වයට අහියෝග කිරීමෙන්, අගෞරව කිරීමෙන් හා අවමන් කිරීමෙන් සහ යුක්තිය පසිඳලීමට අධිකරණයට ඇති බලයට අර්නථකාරී වන ලෙස හැසිරීමෙන් ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජන රජයේ ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 105 වන ව්‍යවස්ථාව යටතේ දඬුවම් ලැබිය හැකි අධිකරණයට අපහාස කිරීමේ වරද සිදු කර ඇත.

The English translation of the charges is as follows:

1) that he, on or about 2016-01-25, at the Magistrate's Court of Homagama, without having any lawful connection to, or without being any party to any proceedings before that Court, deliberately and intentionally addressed the Court without obtaining any permission thereto, and obstructed the proceedings in Court, challenged the authority of Court, disrespected the authority of Court, and conducted himself in a manner prejudicial to the power and authority of Court to administer justice and thereby committed an offence of contempt punishable under Article 105 of the Constitution.

2) that he at the place, time and in the course of the same transaction referred to in the 1st count above, obstructed the proceedings in Court, challenged the authority of Court, disrespected the authority of Court, and conducted himself in a manner prejudicial to the power and authority of Court to administer justice by deliberately and intentionally stating, without obtaining any permission, in open Court, that he would not accept the orders of the Court, and that the law of the country should not be followed, and thereby committed an offence punishable under Article 105 of the Constitution.

3) that he at the place, the time and in the course of the same transaction referred to in the 1st count above, obstructed the proceedings in Court, challenged the

authority of Court, disrespected the authority of Court, and conducted himself in a manner prejudicial to the power and authority of Court to administer justice, by deliberately and intentionally stating, without any lawful permission, in open Court, in the form of a direction, that the Court must grant bail to the suspects in the case No. B 7417/10 and thereby committed an offence punishable under Article 105 of the Constitution.

4) that he, at the place, the time and in the course of the same transaction referred to in the 1st count above, challenged the authority of Court, disrespected and degraded the authority of Court, and conducted himself in a manner prejudicial to the power and authority of Court to administer justice by deliberately and intentionally, without any lawful permission, addressing in open Court, the Senior State Counsel who appeared for the prosecution Mr. Dileepa Pieris, as an impotent state officer "නුපුංසක රාජ්‍ය නිලධාරියා" and insulted him and thereby committed an offence punishable under Article 105 of the Constitution.

The Court of Appeal found the 5th Respondent guilty of all the charges and convicted him on all four counts. The following sentences were imposed:

Count 1: Four years rigorous imprisonment

Count 2: Four years rigorous imprisonment

Count 3: Six years rigorous imprisonment

Count 4: Five years rigorous imprisonment

The Court of Appeal directed that all the above sentences should run concurrently.

The application made by the 5th Respondent seeking leave to appeal to the Supreme Court was refused by the Court of Appeal on 31.08.2016.

The Supreme Court on 05.10.2018 refused, by majority, the special leave to appeal application made by the 5th Respondent in SC/SPL/LA. No. 320/2018.

It is perhaps pertinent to mention in passing that Buddha instructed monks to comply with the law of the land. It is found in Vinaya Piṭaka, Mahāvagga, Khandhaka 3, Chapter 4, §3 (Mahāvagga III.4.3; Pāli Vinaya, Vin I 138).

The circumstances concerned King Seniya Bimbisāra of Magadha. The King wished the commencement of the monks' rainy-season residence (*vassa*) to be postponed and sent a messenger to the monks. The Buddha then laid down the rule:

“Anujānāmi, bhikkhave, rājūnaṃ anuvattitum.” (I allow you, monks, to follow/obey kings)

In or about 23.05.2019, the 5th Respondent received a pardon from 1(A) Respondent.

Position of the Petitioners

The Petitioners submitted that, under the 1978 Constitution (Constitution), Sovereignty is in the People and is inalienable, comprising the powers of government, fundamental rights and the franchise. Sovereignty is to be exercised in the manner prescribed by the Constitution through the Legislature, the Executive and the Judiciary, and, where expressly provided, directly by the People.

Judicial power is constitutionally vested in Parliament and exercised through the judiciary, save for the limited exception permitting Parliament to exercise judicial power directly in matters concerning its privileges, immunities and powers. It was contended that the Constitution does not permit the Executive to exercise judicial power, directly or indirectly, and that the constitutional framework is designed to safeguard the independence of the judiciary from executive interference.

The Petitioners further submitted that the Constitution establishes checks and balances to preserve the independence and efficacy of the judiciary, including its power to punish for contempt. They argued that contempt of court is distinct from an ordinary criminal offence, as the power to punish contempt is integral to maintaining the authority, independence and effective functioning of the judiciary, which exercises the judicial power of the People in trust on their behalf. Accordingly, it was contended that the President's power under Article 34 must be exercised consistently with the Constitution and in a manner that does not undermine the authority, dignity or independence of the judiciary.

It was submitted that acts of contempt strike at the authority of the courts, diminish public confidence in the administration of justice, and impair the judiciary's ability to discharge its constitutional functions. The Petitioners contended that Article 34 does not authorise the President to grant a pardon in a manner that undermines judicial independence, particularly in relation to a conviction for contempt of court. They further argued that the impugned pardon was granted without prior consultation with this Court or the Chief Justice regarding its implications for the independence and authority of the judiciary.

The Petitioners further relied on Article 33(1), submitting that the President is under a constitutional duty to respect and uphold the Constitution and to exercise executive power reasonably and in the interests of the sovereign People. They contended that, following the Nineteenth Amendment, the exercise of the President's powers, other than the power to declare war and peace, is amenable to judicial review in fundamental rights proceedings under Article 126.

The Petitioners argued that the pardon, granted in respect of a conviction arising from conduct involving threats and defiance directed at a Magistrate in the discharge of judicial functions, constituted an attack on the authority and sanctity of the judiciary. It was submitted that the pardon weakens both the actual and perceived effectiveness of the

judicial system by conveying that persons found guilty of contempt may evade judicially imposed sanctions through executive intervention, thereby frustrating the judiciary's ability to uphold its authority, dignity and the rule of law.

Accordingly, the Petitioners contended that the grant of the pardon undermined the separation of powers, imperilled the independence and dignity of the judiciary, violated the sovereignty of the People, and was ultra vires Article 34 of the Constitution, illegal, arbitrary, capricious, made without due consideration of relevant matters, and motivated by collateral political considerations.

Position of the 1(A) Respondent

The 1(A) Respondent submitted that the grant of a pardon to the 5th Respondent was preceded by requests from several distinguished members of the Buddhist clergy, including the Mahanayake Theros of the Malwathu and Asgiri Chapters of the Siyam Maha Nikaya and the Kotte Chapter of the Siyam Maha Nikaya, members of other religious denominations, representatives of civil society, and the Diyawadana Nilame of the Sri Dalada Maligawa. It was further submitted that inquiries revealed no adverse information regarding the 5th Respondent's conduct during his imprisonment and that the grant of a pardon had been recommended by the Assistant Secretary (Legal) to the President and the then Secretary to the President.

The 1(A) Respondent granted the 5th Respondent a full pardon on 21.05.2019 in terms of Article 34 of the Constitution, acting reasonably, in accordance with due process and the law. It was further submitted that the impugned pardon did not fall within the proviso to Article 34 and, accordingly, the President's discretion to grant the pardon was not constitutionally restricted. In any event, it was contended that such discretion had been exercised reasonably and lawfully.

Position of the 5th Respondent

It was submitted on behalf of the 5th Respondent that, during the period of his imprisonment, no complaint was made or investigation conducted in respect of his conduct in prison, and that, in the six years following the impugned presidential pardon, no criminal proceedings had been instituted against him by the State in relation to his conduct, which, it was contended, further justified the grant of the pardon.

It was further submitted that no legal distinction exists between a conviction for an offence under the criminal law and a conviction for contempt of court. Accordingly, the Petitioners were not entitled to curtail or circumscribe the powers vested in the President under Article 34 of the Constitution, and that the 1(A) Respondent had exercised his discretion reasonably and in accordance with the law in granting the presidential pardon to the 5th Respondent.

While emphasizing that the authority and sanctity of the Courts must be respected and that acts amounting to contempt of court warrant punishment, it was also submitted that several eminent members of the Buddhist clergy, including the Chief Prelates of the Malwathu, Asgiri, and Kotte Chapters of the Siyam Maha Nikaya, together with the Diyawadana Nilame of the Sri Dalada Maligawa and several members of the public, had requested the 1(A) Respondent to grant the 5th Respondent a presidential pardon. Reliance was further placed on the report dated 21.05.2019 submitted by the then Assistant Secretary (Legal) to the President to the 1(A) Respondent and the then Secretary to the President recommending the grant of a pardon, wherein, after considering Section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 (Section 3(q) of Act), it was concluded that there was no requirement to notify any other person prior to the grant of the pardon.

It was further submitted that, under the Constitution, the President possesses a discretionary power to grant a pardon upon consideration of sufficient material placed before him to enable a reasoned decision, and that such discretion is wider in cases where the offender has not been sentenced to death.

Without prejudice to the matters set out in his objections, the 5th Respondent expressed his unconditional regret and remorse in respect of the incidents that occurred on 25.01.2016 within the premises of the Homagama Magistrate's Court, and affirmed that he fully respects the authority of the judicial system and the due process of law in the country.

Leave to proceed has been granted under Article 12(1) of the Constitution.

Justiciability of a Pardon

In ***Hirunika Premachandra v. Attorney General and Others*** [S.C. (F.R.) Application No. 221/2021, S.C.M. 17.01.2024] and ***Women & Media Collective v. Attorney-General and Others*** [S.C. (F.R.) Application No. 446/2019, S.C.M. 06.06.2024] it was held that the decision of the President to grant or refuse a pardon is amenable to judicial review by this Court under Articles 126 and 17 of the Constitution, not merely on grounds of procedural ultra vires, but also in respect of the substantive merits of such decision.

In order to ascertain the scope and ambit of a presidential pardon under the Constitution, it is necessary to examine the legal effect of the grant of such a pardon. It is appropriate, at the outset, to consider the constitutional allocation of judicial power, as such an examination provides the necessary context for determining the legal effect and constitutional implications of the exercise of the President's power to grant a pardon.

Judicial Power under the Constitution

The interpretation of the relevant provisions of the Constitution must be undertaken in their constitutional and historical context. In ***Ratnasiri Perera v. Dissanayake, Assistant Commissioner of Co-operative Development and Others*** [(1992) 1 Sri L.R. 286 at 296], Fernando J. observed that the provisions of the 1978 Constitution were enacted against the background of the constitutional framework, judicial decisions, and unresolved constitutional issues that had evolved over the preceding three decades.

Prior to the 1972 Constitution, judicial power remained vested in the judiciary, as recognised by the Privy Council in ***Liyanage and Others v. The Queen*** (68 N.L.R. 265 at 282), which held that the constitutional silence regarding the vesting of judicial power was consistent with its continuing to reside exclusively in the judicature, and not with any intention that it should be exercised by, or shared with, the executive or the legislature.

Although the 1972 Constitution recognised the sovereignty of the People as inalienable, it did not embody the doctrine of separation of powers, with the National State Assembly being designated as the supreme instrument of State power and empowered to exercise the judicial power of the People through courts and other institutions established by law, save in matters relating to its own powers and privileges. Nevertheless, in ***Local Authorities (Imposition of Civic Disabilities) (No. 2) Bill*** [Decisions of the Constitutional Court of Sri Lanka, Vol. 6, p. 30], it was held that the National State Assembly was not competent to exercise judicial power directly, thereby recognising a functional separation of powers even under the 1972 Constitution.

The importance of maintaining a separation between the legislative, executive, and judicial branches of government has long been recognised in constitutional theory, as reflected in the writings of Montesquieu and Blackstone, both of whom emphasised that

judicial independence constitutes an essential safeguard against arbitrary government and is indispensable to the preservation of liberty and the rule of law.

The Report of the Select Committee of the National State Assembly on the Revision of the Constitution, concluded that the constitutional arrangements under the 1972 Constitution did not adequately safeguard the sovereignty of the People owing to the absence of effective checks on the legislature and the executive. The Draft Constitution accompanying the Report proposed the distribution of legislative, executive, and judicial powers among separate organs of government and expressly provided for the exercise of the judicial power of the People by an independent judiciary, secured through constitutional guarantees of judicial independence and security of tenure. Article 4(e) of the Draft Constitution substantially corresponds to Article 4(c) of the Constitution.

Article 4(c) of the Constitution recognises that judicial power originates in the People as an aspect of their inalienable sovereignty and is exercised by Parliament only through courts, tribunals, and other institutions established or recognised by the Constitution or by law, except in matters relating to the privileges, immunities, and powers of Parliament and its Members, where Parliament may exercise judicial power directly according to law. It was further contended that even this direct jurisdiction is limited by the provisions of the Parliament (Powers and Privileges) Act, No. 5 of 1978, as amended, under which Parliament's judicial power is confined to the matters specified in Part B of the Schedule, while other breaches of parliamentary privilege remain punishable by the Supreme Court.

Accordingly, Article 4(c) preserves the constitutional nexus between the sovereignty of the People and the exercise of judicial power by the courts through Parliament as the constitutional conduit, while ensuring the institutional independence of the judiciary. Therefore, under the Constitution, judicial power is vested in and exercised by the judiciary, save for the limited sphere of concurrent jurisdiction conferred upon Parliament and the Supreme Court in respect of matters specified in Part B of the Schedule to the

Parliament (Powers and Privileges) Act, a position which, has been consistently affirmed in the jurisprudence of this Court.

In ***Hewamanne v. De Silva and Another*** [(1983) 1 Sri.L.R. 1 at 20] Wanasundera J. held:

“Article 4(c) states that –

[...]

On a plain reading of this provision, it is clear that the judicial power of the People can only be exercised by "judicial officers" as defined in Article 170, except in regard to matters relating to the privileges, immunities and powers of Parliament. I think no counsel before us disputed that these provisions indicate an unmistakable vesting of the judicial power of the People in the judiciary established by or under the Constitution and that Parliament acts as a conduit through which the judicial power of the People passes to the judiciary. Whatever the wording of Article 4 (c) may suggest, there could be little doubt that at the lowest this provision, read with the other provisions, has brought about a functional separation of the judicial power from the other powers in our Constitution and accordingly the domain of judicial power (except the special area carved out for Parliament), has been entrusted solely and exclusively to the judiciary.”

In ***Premachandra v. Major Montague Jayawickrema and Another*** (Provincial Governors’ Case) [(1994) 2 Sri.L.R. 90 at 107] it was held:

“[...] Although Article 4(c) vests judicial power in Parliament, yet there is a functional separation of powers inasmuch as judicial power can only be exercised by courts and other judicial tribunals, subject only to one exception in regard to Parliamentary privilege. And even in that field, when Parliament acts as an institution directly exercising judicial power, there is no express exclusion or

exemption from judicial review under Article 140 (cf. Dissanayake v. Kaleel(15)). The Superior Courts are thus functionally a separate and co-ordinate organ of government; its power of judicial review cannot be less than that of a body to Parliament; it is illogical to contend that "political questions" are excluded from review by the Judiciary if it is an organ of government co-ordinate with the other organs of government, but are reviewable by the Judiciary if it is a subordinate organ."

In ***Dr. Athulasiri Kumara Samarakoon and Others v. Ranil Wickramasinghe and Others*** [S.C. (F.R.) 195/2022 and 212/2022, S.C.M. 14.11.2023 (Economic Crisis case), at page 64], the majority (Jayasuriya C.J., Aluwihare,PC, J., Malalgoda,PC, J., Murdu Fernando,PC, J.) held:

"The Supreme Court is the highest and final Superior Court of record of the Republic. Article 4(c) of the Constitution recognizes that the Parliament exercises people's judicial power through courts created and established or recognized by the Constitution or created and established by law. However, the Parliament is empowered to exercise People's judicial power, directly, in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, according to law. Therefore, there is no doubt or ambiguity as to the power of Courts to exercise judicial power of the People in regard to all matters that are recognized by law other than the specific instance excluded by Article 4(c). The Constitution which is the Supreme law of the Democratic Socialist Republic of Sri Lanka assures that independence of the judiciary as an intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of Sri Lanka."

A plain reading of Article 4 (c) of the Constitution makes it clear that the Constitution does not seek to confer any judicial power in the executive. This view is fortified upon an examination of Article 34 of the Constitution which reads as follows:

“34. (1) The President may in the case of any offender convicted of any offense in any court within the Republic of Sri Lanka –

- (a) Grant a pardon, either free or subject to lawful conditions;*
- (b) Grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender;*
- (c) Substitute a less severe form of punishment for any punishment imposed on such offender; or*
- (d) Remit the whole or any part of any punishment imposed or any of any penalty or forfeiture otherwise due to the Republic on account of such offence...”*

The constitutional provisions relating to the President's power to grant a pardon do not evince any legislative intention that the grant of a pardon, respite, substitution of a lesser punishment, or remission has the effect of extinguishing or nullifying the conviction or sentence imposed by a court of competent jurisdiction.

Such an interpretation would be inconsistent with Article 4(c) of the Constitution, which does not vest judicial power in the executive. Where more than one interpretation is available, the Court is obliged to adopt the interpretation that accords with the Constitution.

Accordingly, I hold that the power conferred upon the President under Article 34(1) does not alter or set aside the judgment or sentence of a competent court but operates only to

relieve the offender from the execution of the sentence to the extent specified in the pardon.

Procedural Requirements

The Petitioners seek to impugn the pardon granted to the 5th Respondent, *inter alia*, on the ground that the procedure adopted in granting the said pardon was not in accordance with law. It is therefore appropriate, at the outset, to consider the decisions in ***Hirunika Premachandra (supra)*** and ***Women & Media Collective (supra)***, particularly with regard to the relevance and application of Section 3(q) of Act in the exercise of the power to grant a pardon under Article 34 of the Constitution.

Section 3(q) of Act provides that a victim of crime shall, in the event that any person in authority is considering the grant of a pardon or remission of the sentence imposed upon any person convicted of having committed an offence, have the right to receive notice thereof and to submit, through the Authority to the person granting such pardon or remission, the manner in which the offence committed has impacted upon his or her life, including his or her body, state of mind, employment, profession or occupation, income, quality of life, property, and any other aspect concerning his or her life.

In ***Hirunika Premachandra (supra)***, Surasena, J. (as he was then) held (at page 52):

“I agree that the provisions of the Constitution must prevail over the provisions of any general law. The question as to which prevails, whether the provisions in the Constitution or the provisions in general law, would arise only when they are in conflict with each other. In this situation I see no conflict between the provisions in Article 34 and Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act. I see no impossibility; no impediment; no contradiction between those two provisions. They certainly can co-exist together.”

In ***Women & Media Collective (supra)***, Thuraiaraja, P.C.,J. (at paras. 110 to 138) was of the opinion that there is no conflict between Section 3(q) of Act and the proviso to Article 34(1) of the Constitution. Just as the legislature has legitimately enacted ancillary procedures to make the power under Article 34 more meaningful, it may likewise tighten its limitations so far as it lends itself to the constitutional scheme. Kodagoda, P.C., J. (at paras. 585 to 603) also was of the opinion that Section 3(q) of Act is not inconsistent with procedure laid down in the proviso to Article 34(1) of the Constitution.

With the utmost respect, I am unable to concur with the aforesaid views. In my respectful opinion, the approach adopted therein results in an interpretation which is inconsistent with the provisions of Chapter XII of the Constitution governing the amendment of the Constitution. The question, in my view, ought not to have been approached solely by reference to whether there exists any inconsistency between Section 3(q) of Act and Article 34(1), but by reference to the structure and scheme of Article 34(1), read together with the provisions of Chapter XII of the Constitution. I shall now set out the reasons for my respectful disagreement.

Undoubtedly, Section 3(q) of Act is a salutary provision, enacted with the legitimate and commendable object of safeguarding the rights of victims of crime. Nevertheless, the question whether the said provision is attracted to, or governs, the exercise of the President's power of pardon under Article 34(1) of the Constitution cannot be answered merely by reference to the desirability of the provision or the beneficent object which it seeks to achieve.

The Constitution is the supreme law of the Republic, and it is the constitutional duty of this Court to uphold its supremacy. That duty is not episodic or contingent; it is a continuing constitutional obligation, which requires this Court, in determining the scope and operation of any statutory provision, to ensure that the supremacy of the Constitution remains unimpaired.

As the final and authoritative interpreter of the Constitution, this Court is constitutionally bound to discharge that responsibility by giving effect to its provisions in accordance with their true meaning, ascertained through a faithful, principled and constitutionally sound process of interpretation.

Article 34(1) comprises two separate and distinct parts. The substantive provision confers upon the President the discretionary power to grant a pardon to any offender convicted of any offence by any Court within the Republic of Sri Lanka. Significantly, the substantive provision does not prescribe any specific procedure governing the exercise of that power.

The proviso to Article 34(1), however, deals specifically with the grant of a pardon to an offender who has been sentenced to death by the judgment of a competent court, and expressly prescribes the procedure to be followed in such circumstances. Before exercising the power of pardon in a case falling within the proviso, the President is required to call for a report from the Judge who tried the case, obtain the advice of the Attorney General upon such report, and consider the recommendations of the Minister assigned the subject of Justice.

The structure and language of Article 34(1) demonstrate that, having conferred upon the President the discretionary power to grant a pardon to any offender, the Constitution has deliberately prescribed specific procedural requirements only in relation to the exercise of that power in respect of an offender who has been sentenced to suffer death by the judgment of a competent court. No corresponding procedural requirements have been prescribed in relation to the exercise of the power of pardon in respect of any other offender.

To read Article 34(1) together with Section 3(q) of Act, so as to require, in the exercise of the President's power of pardon, that a victim of crime be given notice that the competent authority is considering the grant of a pardon or remission of sentence, would

consequently be to add a new procedural requirement in granting a pardon to an offender who has been sentenced to suffer death by the judgment of a competent court and to introduce a new procedural requirement in relation to the grant of pardon to any other offender where the Constitution itself has prescribed no such requirement.

Moreover, the requirement of notice cannot, in substance, be regarded as an end in itself. The right to receive notice would be devoid of meaningful effect unless it carries with it a corresponding obligation upon the authority exercising the power to receive and consider the views of the victim of crime before granting a pardon or remission of sentence.

Such an interpretation would, in substance and effect, amount to an *addition* and therefore an *amendment* of Article 34(1). Let me clarify further.

Article 82(7) states that, in Chapter XII, "amendment" *includes* repeal, alteration and *addition*. It is an inclusive definition. According to Bindra [Interpretation of Statutes, 10th ed., page 1646], it is a well-known rule of interpretation that the word "include" is used as a word of enlargement and ordinarily implies that something else has been given beyond the general language which precedes it. When it is so used these words or phrases must be construed as comprehending, not only such thing as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and "its ordinary, popular, and natural sense whenever that would be properly applicable."

Re The Thirteenth Amendment to the Constitution and The Provincial Councils Bill [(1987) 2 Sri LR 312], the question arose whether Clauses 154 G(2)(b) and (3) (b) in the Thirteenth Amendment amounted to any amendment to Article 83.

Ranasinghe, J. (as he was then) went on to hold (at page 385) as follows:

“Clauses 154 G(2)(b) and (3) (b) in the Thirteenth Amendment set out the manner in which a Bill for the amendment of Chapter XVIIA, and a Bill in respect of any matter set out in the Provincial Councils List respectively shall become law, in the event of one or more Provincial Councils not agreeing either to an amendment or repeal of the said Chapter onto the passing of such Bill, as the case may be. In each of these instances the manner and the form for the process of amendment is as required by the provisions of Article 83; for the amendment of either that Article itself or any of the other Articles, viz: 1, 2, 3, 6, 7, 8, 9, 10, 11, 30(2) and 60(2), set out therein.

*In the Constitution all the articles which should be amended only by a 2/3 majority and by a Referendum, have been grouped together in Article 83. In Article 83 are included all the Articles of the Constitution which are entrenched in that special way; and, in order to prevent an amendment of Article 83 itself in the ordinary way, and thereby taking the Articles so grouped together in Article 83 out of the category of Articles which require such special manner and form for amending them, Article 83 itself has been made alterable only by the self-same process of a 2/3 majority and a Referendum. That is the effect of the provisions of Article 83. The resulting position then was that once the Constitution came into operation, any amendment of the provision of Article 83, could be effected not in the ordinary manner by a simple majority, but only in that special manner and form of a 2/3 majority and a Referendum so expressly and clearly set out in Article 83. This then is the scheme of the Constitution. Thenceforth any amendment of the Constitution, which constitutes an amendment, either expressly or by necessary implication, of an already entrenched provision such as Article 83, could be validly effected only by compliance with the procedure so laid down in Article 83. That being so, **any steps***

taken thereafter to entrench any other Article, included or to be included in the Constitution by laying down the self-same special process for amendment would in truth and in fact, amount to an 'addition' to the existing provisions enumerated in the said Article 83. Sub-Article (7) of Article 82, which is in the same chapter as Article 83, provides that in this Chapter 'amendment' includes repeat, alteration and addition'. The, introduction therefore, of any such new Article to the Constitution without having recourse to Article 83 and expressly including such new Article too in the list of Articles already included in, and entrenched by the said Article 83, would have the effect of adding a new provision to the Articles already set out in Article 83: and would, in law, amount to an 'implied amendment' of Article 83. It would amount to an amendment by implication. The term 'implied amendment' has been used by Courts in determining whether the Constitutional requirement as to the form of an amendatory Act has been violated (Bindra: Interpretation of Statutes (7 ed.) p. 915). It is not in my opinion, open to state that, because the new provision carves with it an ultimate appeal to the People; the legal Sovereign under the Constitution; such provision could be entrenched in the Constitution separately and independently of Article 83. Such an approach would not be in keeping with the spirit of the Constitution either. The intention of the makers of the Constitution seems also to have been that, after the date on which the Constitution comes into operation., no provision was also to be entrenched in the Constitution without it being expressly approved by the People. That the provisions of only a Sub-Article of an Article in a Constitution could be entrenched without the rest of the Article being entrenched is clear law A.G. of Trinidad v. McLeod, [1984] (1) AER 697. Any attempt to have a. new Article entrenched in the Constitution without reference to Article 83 and without having recourse to the special manner and form required by Article 83 would be

tantamount to doing indirectly what cannot be done directly. Such a procedure is not permissible.

In this view of the matter, I am of opinion that the provisions of Clauses 154G(2)(b) and (3)(b) of the said Thirteenth Amendment to the Constitution constitute an amendment of Article 83, and that, therefore, it is an amendment which shall become law only if passed in the manner and form spelt out by the provisions of the said Article 83.” (emphasis added)

Clauses 154G(2)(b) and 154G(3)(b) were held to constitute an *addition* to, and consequently an implied amendment of, the Constitution. The basis of that conclusion was that those provisions introduced a special procedure for the amendment of Chapter XVIIA of the Constitution, analogous to the procedure prescribed by Article 83. In substance and effect, therefore, those provisions amounted to an *addition* to the existing provisions of Article 83.

Chapter XII of the Constitution sets out the provisions governing the amendment of the Constitution. Article 82(1) is couched in mandatory terms. It provides that no Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament unless the provision sought to be repealed, altered or added, together with any consequential amendments, if any, is expressly specified in the Bill, and the long title thereof describes it as an Act for the amendment of the Constitution.

In the present instance, there is no express specification of Article 34 in the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015. Equally, the long title of the said Act does not describe it as an Act for the amendment of the Constitution.

Article 125 vests this Court with sole and exclusive jurisdiction to interpret the Constitution. In the exercise of that jurisdiction, the provisions of the Constitution cannot properly be considered in isolation. They must necessarily be construed harmoniously and

with due regard to the constitutional scheme governing the amendment of the Constitution.

In that context, particular significance attaches to Article 82(6), which expressly provides that *no provision in any law shall, or shall be deemed to, amend, repeal or replace the Constitution or any provision thereof, or be so **interpreted or construed**, unless it has been enacted in accordance with the requirements of the preceding provisions of Article 82.*

I am mindful that Article 80(3), on the other hand, provides that no Court or tribunal shall inquire into, pronounce upon, or in any manner call in question, the validity of such Act on any ground whatsoever. That provision, however, cannot be construed in isolation or independently of Article 82(6).

The language employed in Article 82(6) is explicit. Its scope extends not only to a provision which expressly purports to amend, repeal or replace the Constitution or any provision thereof, but also to a provision which is sought to be *interpreted or construed* as having such effect. Such an interpretation or construction is constitutionally impermissible unless the provision has been enacted in accordance with the requirements prescribed by the preceding provisions of Article 82.

Thus, the constitutional prohibition embodied in Article 82(6) extends to any provision of law which is sought to be interpreted or construed as having the effect of amending, repealing or replacing the Constitution or any provision thereof. A provision contained in an Act cannot, consistently with Article 82(6), be interpreted or construed as having such effect unless the requirements prescribed by the preceding provisions of Article 82 have been duly complied with.

The unanimous decision in ***Hirunika Premachandra (supra)*** and the majority opinions in ***Women & Media Collective (supra)*** did not consider the application of Section 3(q) of Act from this perspective.

I am mindful of Article 33(h) of the Constitution, which provides that, *in addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law*, the President shall have the power to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage he is required or authorised to do.

The effect of this provision is that the President is empowered, in addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law, to do all such acts and things as he is required or authorised to do by international law, custom or usage. However, the exercise of such power is expressly subject to the condition that such acts and things are not inconsistent with the provisions of the Constitution or *written law*. In my view, however, Article 33(h) does not have the effect of qualifying the discretionary power vested in the President under Article 34(1) to Section 3(q).

For the foregoing reasons, I hold that Section 3(q) of Act cannot be interpreted as imposing a procedural requirement into Article 34(1) or adding a further procedural requirement to the proviso.

I hasten to add that this does not, in any manner, lead to the conclusion that ***Hirunika Premachandra (supra)*** or ***Women & Media Collective (supra)*** were wrongly decided. Those two decisions rest upon several other grounds upon which the impugned pardons were held to be invalid.

Discretionary Power

The 1(A) and 5th Respondents submitted that Article 34(1) vests the President with a discretionary power. I agree. However, it cannot be gainsaid that, in a modern democratic society, no power vested in an organ of government is unfettered. Every such power is subject to inherent limitations.

Under the Constitution, the President exercises the executive power of the People. As the repository of that executive power, the President holds such power in trust for and on behalf of the People. It follows that the exercise of such power must be directed towards the public interest and cannot be permitted to be exercised for any personal, political, or other self-serving interest.

As Tilakawardane, J. held in ***Sugathapala Mendis and another v. Chandrika Kumaratunga and others (Waters Edge Case)*** [(2008) 2 Sri LR 339 at page 374]:

*“While the exercise of Presidential power is a duty that must accord with the Rule of Law, such compliance should also come from one's own conscience and sense of integrity as owed to its People. This means that whilst they can use their private power and their private property in an unfettered manner when granting any privileges or favours and, even in an overwhelming act of great generosity, give all their private property away, their **public power must only be used strictly for the larger benefit of the People**, the long term sustainable development of the country and in accordance with the Rule of Law.”* (emphasis added)

The nature of the power itself reinforces this conclusion. A pardon is not a private act of grace exercised for the benefit of the President or for the advancement of any personal, political or other self-serving interest. It is an exercise of a constitutional power derived from the sovereignty of the People and must, therefore, be directed to an end which is consistent with the public interest.

In ***Women & Media Collective (supra)***, this Court recognised that the purposes for which the power of pardon may legitimately be exercised are not capable of exhaustive enumeration, and may include considerations relating to rehabilitation, social reconstruction, and other matters which serve the public interest; the Court further

observed that, even where policy considerations arise, the exercise of the power remains one which is to be understood as an exercise in the public interest.

Thus, while the President is entrusted with a broad discretion under Article 34(1), that discretion is a constitutional trust and not a personal prerogative. The decisive consideration is not merely whether the President possesses the power to grant the pardon, but whether that power has been exercised for a constitutionally permissible purpose and in furtherance of the public interest. An exercise of the power for an ulterior, improper or self-serving purpose would fall outside the legitimate bounds of the discretion conferred by Article 34(1) and would be inconsistent with the Rule of Law and the constitutional scheme.

In this context, the nature and character of the offence of contempt necessarily assume relevance in determining whether the grant of a pardon to a person convicted of such offence is in the public interest.

Contempt of Court

Let me begin with a comparative exposition.

In ***AG v. Leveller Magazine Ltd.*** [(1979) AC 440 at 449] Lord Diplock held that although criminal contempt of court may take a variety of forms, they all share a common characteristic; they involve an interference with the due administration of justice, either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.

The approach in the US to contempt of court and the ability of the executive President to pardon such an offender is discussed by Ready¹ as follows:

“It is the function of the judiciary to declare and enforce private and public rights. The power to punish for contempt is an inherent power to enforce its orders and decrees and, in general, to enable it to perform the functions for which it was created. The founders of our government intended that the three branches of our government – legislative, executive and judicial – should be distinct and independent; that in the exercise of their respective Constitutional functions each should be free from interference on the part of every other. The judiciary, more than any other department of the government, should be immune from outside influence and interference. If the governor is permitted to pardon those guilty of contempt of court, the judicial branch of the government is, to that extent, made dependent on the executive branch. It is obvious that the judicial branch of the government cannot effectively perform its functions in the administration of justice unless its authority and dignity are accorded the highest respect, and its dignity and authority are imperilled when the executive branch possesses a veto power over the exercise of its power to punish for contempt and disobedience.”

The public interest in the due administration of justice was examined in ***Advocate General, Bihar v. M.P. Khair Industries [(1980) 3 SCC 311]*** where Chinnappa Reddy, J. held (at 1178C-E):

“The public have an interest, an abiding and a real interest, and a vital stake, in the effective and orderly administration of justice, because, unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the administration of justice and,

¹ Francis T. Ready, ‘Pardon for Contempt’, Notre Dame Law Review, Vol. 5, Issue 1, October 1, 1929 at 32.

so, it is entrusted with the power to commit for contempt of Court, not in order to protect the dignity of the Court against insult or injury as the expression “Contempt of Court” may seem to suggest, but to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with.”

Let me conclude with the decision in ***Chandradasa Nanayakkara v. Liyanage Cyril [(1984) 2 Sri L.R. 193]***, which merits consideration in the present context, as it concerned, as does the present case, an act of contempt of court committed in a Magistrates’ Court.

Atukorale, J. (at pages 195-6) sought to explain the nature of the offence of contempt of court committed in a Magistrates’ Court as follows:

*“A Magistrate’s Court is one of the institutions created and established for the administration of justice in this country. For this purpose a Magistrate is entrusted with the performance of important judicial functions and duties. In the course of the performance of such functions and duties he is called upon to make various decisions and orders. There is no decision or order he can make which cannot be challenged. But the challenge must be by an appropriate application or proceeding made to this court in accordance with law. It cannot be challenged by a violent display of verbal threats or open defiance directed at the Magistrate himself. Of all contempts committed against the lawful authority of courts of law the most heinous are those which involve actual or threatened injury to the person of a judge with a view to intimidating him into revoking or altering an order or decision made by him in the discharge of his judicial duties. **The outrageous nature of the acts committed by the respondent constitutes not only an affront to the dignity and authority of the court but also a direct challenge to the fundamental supremacy of the law itself. It is a type of contemptuous conduct which appeared to us to be unprecedented in the annals of the courts of this country. It is absolutely***

imperative that such conduct, whenever or in whatever court it occurs, should be dealt with speedily, firmly and unmercifully. People like the respondent who have but scant respect and regard for law and order and the courts of the land must be made to realise that the arm of the law is sufficiently long and sufficiently strong to repel any attempts at undermining the authority of courts. It is our duty in situations such as have arisen in the instant case to uphold and vindicate, not the personal reputation of the holder of the particular office, but the sanctity and supremacy of the authority of courts so as to secure the preservation of law and order and to ensure the protection of the future administration of justice. Viewed in this light the circumstances of this case call for very deterrent punishment on the respondent.” (emphasis added)

Time Line

The 2(B) Respondent has tendered two files bearing Nos. PS/LD/Podu/24-30/2019, comprising Minute Sheets I–IX and documents numbered 1 to 30, and PS/CSA/00/9/3/88, comprising Minute Sheet I and documents numbered 1 to 10. It has been pleaded on behalf of the 2(B) Respondent that these files contain the documents pertaining to the grant of pardon to the 5th Respondent. Accordingly, the Court has the benefit of examining the documentary trail leading to the impugned pardon.

The file bearing No. PS/LD/Podu/24-30/2019 appears to have been opened first. According to the Minute Sheet, the file was opened on 22.01.2019 following a telephone discussion between the then Additional Secretary (Legal), Lakshmi Jayawickrema, Attorney-at-Law (Additional Secretary (Legal)), and Rev. Witharandeniye Nanda Thero, which discussion had taken place on the advice of the then Secretary to the President, Udaya Seneviratne. Rev. Witharandeniye Nanda Thero had informed the Additional Secretary (Legal) that the relevant court proceedings would be handed over on the same day. Thereafter, at 4.15 p.m. on the same day, the Additional Secretary (Legal) made a

minute recording that a complete copy of the Court of Appeal proceedings had been received.

According to the next Minute, also dated 22.01.2019, made by the Additional Secretary (Legal), she had spoken with the 1(A) Respondent in the presence of the then Secretary to the President. The Minute records that further action was to be taken in the future and not at that stage.

The next Minute is dated 02.02.2019. It refers to a request made by the Chief Prelates for the grant of a pardon to the 5th Respondent. The letters submitted by the Mahanayake Theros of the Malwathu and Asgiri Chapters of the Siyam Maha Nikaya are dated 20.12.2018, while the letter of the Mahanayake Thero of the Kotte Chapter of the Siyam Maha Nikaya is dated 16.12.2018. There is, however, no contemporaneous Minute recording that these letters had been brought to the attention of the 1(A) Respondent.

Nevertheless, the Minute dated 15.02.2019, made by the Additional Secretary (Legal) and addressed to the Secretary to the President, states that the 1(A) Respondent had been informed by her on 22.01.2019 of the aforesaid letters. She further records that the 1(A) Respondent had also been informed of the letter sent by the Diyawadana Nilame making a similar request. It is further recorded that a request had been received from Jainudeen Ameer, Co-ordinating Secretary of the Sri Lanka Freedom Party, Muttur, for the grant of a pardon to the 5th Respondent on Independence Day, in recognition of the services rendered to the Muttur area. There is no Minute indicating whether the Secretary to the President had been made aware of the Minute dated 15.02.2019.

The next Minute is dated 01.03.2019. By that Minute, the Additional Secretary (Legal) informed the Secretary to the President of the contents of a letter dated 01.02.2019, which was unsigned but contained several names, requesting the 1(A) Respondent not to grant a pardon to the 5th Respondent. This was brought to the attention of the Secretary

to the President, who, by his Minute dated 15.03.2019, directed that it be submitted later so as to be brought to the attention of the 1(A) Respondent.

On 21.05.2019, one day prior to the grant of the impugned pardon, the Additional Secretary (Legal) informed the Secretary to the President that she had been advised to call for a detailed report from the Prison and submitted a letter for his signature seeking such report. The Minute is silent as to the identity of the person who had advised her to call for such report.

The said letter, under the hand of the Secretary to the President, was faxed on the same day.

The next entry, also dated 21.05.2019, records that the report from the Prison had been received.

The next Minute, also dated 21.05.2019, was made by the Additional Secretary (Legal) and addressed to the 1(A) Respondent and the Secretary to the President. This Minute assumes particular significance in relation to the grant of the pardon to the 5th Respondent. In view of its importance, I reproduce it below:

අතිගරු ජනාධිපතිතුමනි / ජනාධිපති ලේකම්තුමනි,

සිරකරුගේ නම : පූජ්‍ය ගලබඩඅත්තේ ඤාණසාර හිමි

සිර අංකය : ඩබ්ලිව් 17640

බන්ධනාගාරය : වැලිකඩ

ඉහත නම් සඳහන් සිරකරු සම්බන්ධයෙන් අද දින බන්ධනාගාර මූලස්ථානය වෙතින් වාර්තාවක් කැඳවන ලද අතර, එකී වාර්තාව නිල් (16) ලෙස ඉදිරිපත් කරමි.

ඒ අනුව උක්ත නම් සඳහන් සිරකරු හට නඩු අංක දෙකක් පවතින බව වාර්තා වී ඇත.

පළවන නඩුව

හෝමාගම මහේස්ත්‍රාත් අධිකරණයේ 11309

එකී නඩුවෙන් උක්ත විත්තිකරුට බරපතල වැඩ සහිතව මාස හය බැගින් සිර දඩුවමක් එකවර ගෙවී යන ලෙස නියම කර ඇති අතර, එකී නඩු තීන්දුවට එරෙහිව මහාධිකරණයට අභියාචනය කිරීමෙන් අනතුරුව (මහාධිකරණ නඩු අංකය එච්.සී. 28/2018) එකී සිරදඩුවම වසර පහකට අත් හිටුවා ඇත.

එබැවින් එකී දඩුවම මෙම අවස්ථාවේ දී ක්‍රියාත්මක නොවන අතර, ඉදිරි වසර පහ තුළ තදාත්තර වරදක් සිදු කරන්නේ නම් ඉහත හය මාසයක දඩුවම් කාලය ද ගෙවීමට සිදු වනු ඇත.

දෙවන නඩුව (අධිකරණයට අපහාස කිරීම)

හෝමාගම - 40042

එකී නඩුවෙන් අවුරුදු 19 ක සිර දඩුවමක් වසර 6 කින් ගෙවී යන පරිදි මහේස්ත්‍රාත් අධිකරණය විසින් නියෝග කර තිබුණු ද ඊට එරෙහිව අභියාචනා අධිකරණ වෙත ඉදිරිපත් කරන ලද සියලු අභියාචනා නිෂ්ප්‍රභා කර ඇති බැවින් එකී වසර 6 ක සිර දඩුවම ක්‍රියාත්මක කිරීම සඳහා බන්ධනාගාරගත වී ඇත.

ඒ අනුව, බන්ධනාගාර සියලු සමා සහිතව 2022 ජූලි 28 වන දින එම සිර දඩුවම අහෝසි වීමට නියමිත ය.

එසේම නිල් (10) සඳහන් පරිදි 2015 අංක 4 දරණ අපරාධයක වින්දිතයන් සාක්ෂිකරුවන් හට සහාය දීමේ හා ආරක්ෂා කිරීමේ පනතේ 3(1)(ට) වගන්තිය කෙරෙහි අවධානය යොමු කරමින් යම් බලධරයෙකු විසින් සමාව ප්‍රදානය කරන අවස්ථාවක දී ඒ පිළිබඳව වින්දිතයෙකු හා සාක්ෂිකරුවෙක් ලෙස ඇය දැනුවත් වීමට අයිතියක් ඇති බව සඳහන් කර ඇත.

එනමුත් ජනාධිපති සමාව ප්‍රදානය කිරීමට අපේක්ෂිත දෙවන නඩුවේ කේ. එම්. එස්. පී. එන්.නැලිගොඩ යන අය වින්දිතයෙකු හෝ සාක්ෂිකරුවෙකු නොවන අතර, එකී දෙවන නඩුවේ ඉදිරිපත් කර ඇති චෝදනා 4 ම අධිකරණයට අපහාස කිරීම සහ එකී නඩුව මෙහෙයවන ලද රජයේ නීතිඥ දිලීප පීරිස් මහතා ට පරිභවාත්මක වචනයෙන් ඇමතීමට අදාළ වන හෙයින් උක්ත වගන්තියේ අදාළත්වයක් මෙම අවස්ථාවේ දී නොමැත්තේ ය.

එහෙත් පළවන නඩුවේ දී එකී එන්.නැලිගොඩ යන අය සාක්ෂිකරුවෙක් හා වින්දිතයෙකු වන බැවින්, එම නඩුව සම්බන්ධයෙන් යම් සමාවක් දෙන්නේ නම් එකී කොමිෂන් සභාව විසින් ඉදිරිපත් කර ඇති කරුණු අවධානයට ලක් කිරීම සුදුසු වන නමුත්, මේ වනවිට එම නඩුව සම්බන්ධයෙන් අත්හිටවූ සිර දඬුවමක් පවතින බැවින්, ඉහත තත්ත්වය අදාළ නොවන බව හැඟේ.

කරුණු එසේ හෙයින්, අතිගරු ජනාධිපතිතුමන්ගේ අනුමැතිය මත මෙම සිරකරු හට පූර්ණ ජනාධිපති සමාව ලබාදීම සඳහා අදාළ නියෝගය අධිකරණ හා බන්ධනාගාර ප්‍රතිසංස්කරණ අමාත්‍යාංශය වෙත යොමු කිරීම මැනවි.

එබැවින් ඉහත නම් සඳහන් සිරකරුට ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 34(1)(ඇ) ව්‍යවස්ථාව ප්‍රකාරව දඬුවම මුළුමනින්ම නිෂ්ප්‍රභා කොට, දඬුවමින් නිදහස් කිරීමට අතිගරු ජනාධිපතිතුමාගේ අනුමැතිය ලබා ගැනීම සඳහා කරු. ඉදිරිපත් කරමි.

..... (අත්සන).....

නීතිඥ ලක්ෂ්මි ජයවික්‍රම

ජනාධිපති අතිරේක ලේකම්(නීති)

2019 මැයි මස 21 වැනි දින.

අතිගරු ජනාධිපතිතුමනි,

හෝමාගම මහේස්ත්‍රාත් අධිකරණයේ නඩු අංක 40042 සහ අභියාචනා අයදුම් පත් අංක C.A.(CC) 04/2016 යටතේ වරදකරු කරන ලද ඉහත නම් සඳහන් සිරකරු හට පූර්ණ සමාව ලබාදීම සඳහා අනුමැතිය ලබාදීම මැනවි.

(අත්සන)

අනුමත කරම්/නොකරම්

.....

(අත්සන)

ජනා.ලේ.

ජනාධිපති

2019 මැයි මස 21 වැනි දින

2019 මැයි මස 21 වැනි දින

Analysis

A plain reading of the contents of this Minute demonstrates that the pardon granted to the 5th Respondent was based upon the contents of the Minute made by the Additional Secretary (Legal). The Minute sets out reasons as to why Section 3(q) was applicable, albeit for reasons different from those which I have set out above.

However, the Minute does not disclose any reason as to why the 1(A) Respondent ought to have considered granting a pardon to the 5th Respondent. Notwithstanding this, the 1(A) Respondent merely approved the grant of a pardon to the 5th Respondent. No reasons for the grant of the pardon have been recorded by the 1(A) Respondent. Moreover, it is apparent that the 1(A) Respondent, by simply approving the recommendation of the Additional Secretary (Legal), acted mechanically and abdicated the exercise of the power and responsibilities vested in him. I shall now consider the legal consequences arising from these actions.

Reasons

Traditionally, the English Courts did not accept that the requirements of natural justice extended to a general duty to give reasons for administrative decisions [***Minister of***

***National Revenue v. Wrights' Canadian Ropes Ltd.* (1947) A.C. 109, 123; *R. v. Gaming Board for Great Britain, ex parte Benaim and Khaida* (1970) 2 QB 417; *McInnes v. Onslow-Fane* (1978) 1 WLR 1520; *R. v. Civil Service Appeal Board, ex parte Cunningham* [(1991) 4 All ER 310]**. However, in ***Cunningham* (supra)**, the Court of Appeal held that, although there was no general duty to give reasons for administrative decisions, such a duty could, in appropriate circumstances, be implied.

In ***R. v. Secretary of State for the Home Department, ex parte Doody* [(1994) 1 AC 531]**, Lord Mustill, whilst reiterating that the law did not, at that time, recognise a general duty to give reasons for an administrative decision, affirmed the approach adopted by the Court of Appeal in ***Cunningham* (supra)**, namely, that a duty to give reasons may arise in appropriate circumstances. Thus, ***Doody* (supra)** establishes that there are circumstances in which reasons for an administrative decision must be given.

Some of the circumstances in which such a duty has been recognised are the following:

(a) Once permission for judicial review has been granted, the defendant is under an obligation to disclose adequate reasons to the Court so that the legality of the decision may properly be evaluated [***R. v. Lancashire County Council, ex parte Huddleston* (1986) 2 All ER 941 at 945; *Cunningham* (supra)**].

(b) The absence of a right of appeal may suggest that reasons ought to be given [per McCowan LJ in ***Cunningham* (supra. pages 320-323)**].

(c) Conversely, the existence of a right of appeal may point towards a duty to give reasons [***Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (1947) A.C. 109, 123; *Minister of National Revenue v. Norton Tool Co. Ltd. v. Tewson* [(1973) 1 WLR 45, 49]; ***Alexander Machinery (Dudley) Ltd. v. Crabtree* (1974) I.C.R. 120, 122; *Bone v. Mental Health Tribunal* [1985] 3 All ER 330]**].**

(d) The principle of legitimate expectation may require reasons to be given more broadly [*R. v. Secretary of State for Transport, ex parte Richmond-upon-Thames London Borough Council (No. 4)* [1996] 1 WLR 1005 at 1020; *R. (Bibi) v. Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237 at [59]; *R. v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213].

(e) Fairness may dictate the giving of reasons even where the interests affected by the decision are not as fundamental as liberty or livelihood [*R. v. City of London Corporation, ex parte Matson* (1997) 1 WLR 765].

The development of the English common law on the duty to give reasons towards the end of the last millennium is reflected in the observations of Lord Clyde in *Stefan v. General Medical Council* [(1999) 1 WLR 1293], where he observed, (at page 1301), that “*There is certainly a strong argument for the view that what were once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions.*”

English common law has since moved towards the position that, whilst there is no universal obligation to give reasons in every circumstance, reasons should, as a general rule, be given unless there is proper justification for not doing so [*Oakley v. South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] 1 WLR 3765 at [30]; *Stefan v. General Medical Council* [1999] 1 WLR 1293 at 1301 A–B; *R. v. Secretary of State for Health, ex parte Scherer* [1998] EULR 1 at 16G–H; *R. v. DPP, ex parte Manning* [2001] QB 330 at [33]].

Craig [*Administrative Law*, (Sweet & Maxwell, 1999, 4th edition) pages 432 – 436] after examining the jurisprudence on this issue states that the general rule should be that reasons should be given, subject to exceptions where really warranted. He opines that the

jurisprudence of the English courts is coming close to this proposition and that it would do much to simplify and clarify matters if the legal rule could be expressed in this way.

De Smith's Judicial Review [2007, 6th ed., Woolf, Jowell and Le Sueur (eds.), pages 410 – 422] states that the failure by a public authority to give reasons or even adequate reasons for a decision, may be unlawful in two ways. First, it may be said that such a failure is procedurally flawed and unfair. Secondly, the failure to give reasons may indicate that the decision is irrational.

Wade & Forsyth (*Administrative Law*, (Oxford, 2014, 11th ed., page 440) concludes with the following words:

“The time has now surely come for the court to acknowledge that there is a general rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified as cases arise. Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them.”

Our law on this matter has developed on the same lines as English common law.

In ***Samalanka Limited v. Weerakoon, Commissioner of Labour and Others*** [(1994) 1 Sri L.R. 405], Kulatunga, J. held that in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to adduce reasons, provided that the decision is made after holding a fair inquiry.

Where there is a statutory conferment of a right of appeal against the decision of a tribunal, there is a duty on that tribunal to give reasons for its decisions [***Brook Bond***

Ceylon Ltd v. Tea, Rubber (etc) Workers Union (77 N.L.R. 6); *Ratnayake v. Fernando* (S.C. Appeal No. 52/1986, S.C.M. 20.5.1991); *Kusumawathie and Others v. Aitken Spence & Company Limited and Another* (1996) 2 Sri L.R. 18; *Lanka Multi Moulds (Pvt) Limited v. Wimalasena, Commissioner of Labour and others* [2003] 1 Sri. L.R. 143; *Central Bank of Sri Lanka and others v. Lankem Tea and Rubber Plantations (Pvt) Ltd.* (2009)]2 Sri. LR 75].

A deviation from this position is seen in *Karunadasa v. Unique Gem Stones Limited and Others* [(1997) 1 Sri L.R. 256], where Fernando, J. (at pages 62-64) observed as follows:

*“... Article 12(1) of the Constitution now guarantees the equal protection of the law. In the context of the machinery for appeals, revision, judicial review, and the enforcement of the fundamental rights, giving reasons is becoming, increasingly, an important ‘protection of the law’ (see, for instance, Bandara v. Premachandra) for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired. ...[at 62] To say that natural justice entitles a party to a hearing, does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision ‘may be condemned as arbitrary and unreasonable’; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent’s failure to produce the 3rd respondent’s recommendations thus justified the conclusion that there were no valid reasons, and that natural justice had not been observed. ... **The fact that the 3rd Respondent held a fair inquiry and otherwise acted within jurisdiction does not excuse the failure to give reasons. ... While the mere fact that the 3rd respondent held the inquiry does not vitiate the 2nd respondent’s order, the 2nd***

respondent's failure to give reasons is all the more serious because it was not he who held the inquiry. The judgment of the Court of Appeal that natural justice required that reasons be given, must therefore be affirmed."[at 63-64] [emphasis added]

In ***Lanka Multi Moulds (Pvt) Limited v. Wimalasena, Commissioner of Labour and others*** [(2003) 1 Sri. L.R. 143 at 152-153], Fernando, J. developed this principle further by holding that the conjoint effect of the machinery for appeals, revision, and judicial review, and the fundamental rights jurisdiction, is that as a general rule tribunals must give reasons for their decisions.

In ***Lankem Tea & Rubber Plantations (Pvt) Ltd. v. Central Bank of Sri Lanka and Others*** [(2004) 2 Sri L.R. 133 at pages 136-137] Fernando, J. explained the importance of giving reasons as follows:

"In the absence of reasons, it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law. In R v Mental Health Review Tribunal, ex parte Clatworthy, it was held that reasons should be sufficiently detailed as to make quite clear to the parties and specially the losing party as to why the tribunal decided as it did and to avoid the impression that the decision was based upon extraneous consideration rather than the matter raised at the hearing."

In ***Choolanie v. People's Bank and Others*** [(2008) 2 Sri L.R. 93] it was held that on a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Furthermore, in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily in coming to their conclusion.

In so far as decisions taken by the President, I am firmly of the opinion that, at a minimum, reasons must be documented and made available to the Court when a decision is impugned. Let me set out the reasons for this conclusion.

Under the Constitution, Sovereignty is vested in the People and includes the executive power of the People. The President exercises that executive power and, in doing so, holds it in trust on behalf of the People. Until the 19th Amendment, the President enjoyed immunity in respect of acts done *qua* President. The 19th Amendment removed that immunity and rendered acts of the President justiciable. The judiciary, in turn, exercises the judicial power of the People. It therefore constitutes a constitutional check upon the legislative and executive powers of the People, which are exercised by Parliament and the President respectively, albeit, in the case of Parliament, such judicial scrutiny is confined to the pre-enactment stage.

Such a constitutional check cannot be effectively exercised unless the President is accountable for the decisions taken in the exercise of his constitutional powers and is required to furnish reasons for such decisions. The requirement to give reasons is necessary to enable the Court to ascertain whether the power has been exercised within the limits prescribed by the Constitution, and to ensure that the exercise of such power remains amenable to effective judicial scrutiny.

In these circumstances, I hold that the President is under a duty to make a contemporaneous record of the reasons for the grant of a pardon under Article 34(1) and to make such reasons available any aggrieved party when requested, and to the Court when the decision is impugned.

As explained earlier, the record maintained at the Presidential Secretariat does not contain the reasons for the decision taken by 1(A) Respondent to pardon the 5th Respondent.

In ***Peduru Arachchige Janaka Pushpakumara v. Director-General (Electric and Electronic Division), Sri Lanka Navy Headquarters and Others*** [S.C. (F.R.) Application No: 452/2011, S.C.M. 06.07.2021, pages 5-6], I held that:

“[...] I have no hesitation in holding that once the fundamental rights jurisdiction of this Court is invoked, the decision-maker owes a duty to the Court to disclose the reasons for his decision. Even where no reasons have been given to the affected party, the departmental file must contain the reasons for the impugned decision. Where no such reasons have been recorded, the only conclusion the Court can draw is that the decision was taken devoid of any reasons and is hence arbitrary.”

There is a need in principle, for contemporaneous reasoned documents [***Nzolameso v. Westminster City Council*** [2015] UKSC 22 [2015] PTSR 549 at § 31-36; ***R (E) v. Islington LBC*** [2017] EWHC 1440 (Admin) [2018] PTSR 349 at § 114].

Moreover, the 1(A) Respondent has failed to state, in his affidavit, the reasons for the grant of the pardon. He merely states that the grant of a pardon to the 5th Respondent was preceded by requests from several distinguished members of the Buddhist clergy, including the Mahanayake Theros of the Malwathu and Asgiri Chapters of the Siyam Maha Nikaya and the Kotte Chapter of the Siyam Maha Nikaya, members of other religious denominations, representatives of civil society, and the Diyawadana Nilame of the Sri Dalada Maligawa.

Undoubtedly, due weight must be accorded to the representations made by the Mahanayake Theros of the Malwathu and Asgiri Chapters of the Siyam Maha Nikaya and the Kotte Chapter of the Siyam Maha Nikaya, having regard to the historical role played by Buddhism and the Mahā Saṅgha in the social, political and cultural life of Sri Lanka.

According to Magammana [A Historical Analysis of the Political Role of the Buddhist Monk in Sri Lanka during the Anuradhapura Period (3rd Century B.C. to 10th Century A.D.), Proceedings of the Peradeniya University Research Sessions, Sri Lanka, Vol. 16, 24th November 2011, page 201]:

*“The Anuradhapura period can be considered as the beginning of social, economic, political and cultural development in Sri Lanka. The evolution of the Sri Lankan political structure within a Buddhist framework can also be seen as a trend which emerged in this period. **Within this background. the Buddhist monk was able to function as leading characters in politics as the "Buddhist State" was integrated into society. They became not only the advisers of the rulers, but also teachers to the governing elite.** Moreover, since the coronation of kings, the contribution of monks was considered a highly important factor to maintain all political activities. It should be noted that monks served in a significant way in leading rulers to an ideological path that helped the well-being of the state. Thus, Buddhist monks can be identified as a community that has made strong contributions to the development of the political system of this country. It is clear that the role of the Buddhist monk was a key factor that clearly contributed to the development of the state on the one hand and the development of the Sangha community on the other hand.”* (emphasis added)

However, the question remains whether the impugned decision was, in fact, made upon due consideration of the requests made by the Mahanayake Theros. The Additional Secretary (Legal), in her Minute dated 15.02.2019, recorded that the 1(A) Respondent had been informed, on 22.01.2019, of the requests made by the Mahanayake Theros. If that was indeed the case, it becomes necessary to consider why, on that very day, the 1(A) Respondent informed the Additional Secretary (Legal) that further action was to be taken in due course, rather than at that stage.

What was intended by the reference to “further action” on 22.01.2019? Had the 1(A) Respondent, by that date, already formed a decision to grant the pardon, but considered that it was premature to do so? If so, what was the reason for deferring such action? Further, why were the representations made by certain parties requesting that a pardon not be granted to the 5th Respondent not brought to the attention of the 1(A) Respondent by the Secretary to the President? Did the 1(A) Respondent become aware of those representations at any time prior to the impugned decision being made?

Finally, what accounts for the flurry of activity on 21.05.2019, culminating in the grant of the pardon on 22.05.2019? These are matters which, in my view, require careful consideration in determining whether the impugned decision was reached upon a proper and lawful consideration of the relevant material.

The 1(A) Respondent had the benefit of filing his affidavit after copies of the files maintained at the Presidential Secretariat had been tendered to Court. Indeed, he specifically averred at paragraph 4(b) of his affidavit that all matters pleaded therein would be stated with reference to the documents annexed as 11BR1 and 11BR2 to the affidavit dated 8th April 2024 submitted by the then Secretary to the President. Notwithstanding this, the 1(A) Respondent has failed to address any of the foregoing matters, or any combination thereof, which would naturally arise for consideration by a reasonable person upon an examination of the material before Court.

Abdication

Wade and Forsyth [*Administrative Law*, 9th ed., page 322 (Indian Ed.)] states as follows:

*“Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. **The proper authority may share its power with someone else, or may allow **someone else to dictate** to it by declining to act without their consent***

or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void.” [emphasis added]

In ***Karunaratna Bandara v. P.B. Dissanayaka and Others*** [S.C.F.R. Application No.356/2016, S.C.M. 28.06.2018] it was held that such conduct of an authority amounts to an infringement of Article 12(1) of the Constitution.

In the present instance, the 1(A) Respondent merely approved the recommendation made by the Additional Secretary (Legal), thereby acting upon and submitting to the instructions contained therein.

For all the foregoing reasons, I hold that the pardon granted by the 1(A) Respondent to the 5th Respondent is arbitrary, in violation of the public trust and the rules of natural justice, *ultra vires* his powers and thereby infringes the fundamental rights guaranteed by Article 12(1) of the Constitution.

Accordingly, I declare that the pardon granted to the 5th Respondent, as reflected in the Minute dated 21.05.2019, is null and void and is of no force or avail in law.

I hasten to add that these conclusions do not, in any manner, signify that the President is precluded from granting a pardon to the 5th Respondent. Any such pardon may be granted only in accordance with the law and upon due consideration of all relevant material placed before the President.

I have given anxious consideration to whether any further orders ought to be made against the 1(A) Respondent.

The record indicates that he acted on the instructions provided by the Additional Secretary (Legal), which instructions were, in material respects, erroneous in law.

In these circumstances, I am not inclined to make any further orders against the 1(A) Respondent.

JUDGE OF THE SUPREME COURT

Dr. Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE SUPREME COURT

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE SUPREME COURT