**IN THE SUPREME COURT OF THE**

**DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.**

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

**SC FR Application No. 221/2021**

1. Hirunika Eranjali Premachandra
   507/A/18 Privilege Homes,
   Maharagama Road, Arangala,
   Hokandara North.

**PETITIONER**

Vs.

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

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

1. C. (Former) President Gotabaya
   Rajapaksa
   26A Pengiriwatta Road,
   Mirihana.
   and also at
   308, Malalasekara Mawatha,
   Colombo 07.

2. Arumadura Lawrence Romelo
   Duminda Silva,

40/8, Perera Mawatha,
Pelawatta,
Battaramulla.

3. Hon. M. U. M. Ali Sabry PC,
Minister of Justice,
Ministry of Justice,
Superior Courts Complex,
Colombo 12.

3. A. Hon. Dr. Wijeyadasa Rajapakshe,
Minister of Justice,
Ministry of Justice,
Superior Courts Complex,
Colombo 12.

4. Saliya Pieris PC,
President,
Bar Association of Sr Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

**RESPONDENTS**

**SC FR Application No. 225/2021**

1. Sumana Premachandra
A1/ F12/ U6,
Treasure Trove,
Dr. N. M. Perera Mawatha,
Colombo 08.

**PETITIONER**

Vs.

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

1. A. (Former) President Gotabaya
   Rajapaksa
   26A Pengiriwatta Road,
   Mirihana.

2. Arumadura Lawrence Romelo
   Duminda Silva,
   40/8, Perera Mawatha,
   Pelawatta,
   Battaramulla.

3. Hon. M. U. M. Ali Sabry PC,
   Minister of Justice,
   Ministry of Justice,
   Superior Courts Complex,
   Colombo 12.

3. A. Hon. Dr. Wijeyadasa Rajapakshe,
   Minister of Justice,
   Ministry of Justice,
   Superior Courts Complex,
   Colombo 12.

4. Saliya Pieris PC,
   President,
   Bar Association of Sr Lanka,
   No. 153, Mihindu Mawatha,
   Colombo 12.

5. Rajeev Amarasuriya
   Secretary,

Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

**RESPONDENTS**

**SC FR Application No. 228/2021**

1. H. Ghazali Hussain
Attorney-at-Law
No. 30, Jayah Road,
Colomnbo 04.

**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. C. (Former) President Gotabaya Rajapaksa
26A Pengiriwatta Road,
Mirihana.
and also at
308, Malalasekara Mawatha,
Colombo 07.

2. H. M. T. N. Upuldeniya
Commissioner General of Prisons,
Prison Headquarters,
No. 150, Baseline Road,

Colombo 09.

3. Hon. M. U. M. Ali Sabry PC,
Minister of Justice,
Ministry of Justice,
Superior Courts Complex,
Colombo 12.

4. Arumadura Lawrence Romelo
Duminda Silva,
40/8, Perera Mawatha,
Pelawatta,
Battaramulla.

5. A. Saliya Pieris PC,
President,
Bar Association of Sr Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

5. B. Rajeev Amarasuriya
Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

5. C. Isuru Balapatabendi
Secretary,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

6. Hon. Dr. Wijeyadasa Rajapaksa
Minister of Justice

Minister of Justice, Prison Affairs and Constitutional Reforms,
Superior Courts Complex,
Colombo 12.

**RESPONDENTS**

**Before:** **P. PADMAN SURASENA J**
**E. A. G. R. AMARASEKARA J**
**ARJUNA OBEYESEKERE J**

Counsel: **SC FRA No. 221/21**

M. A. Sumanthiran PC with Suren Fernando, Niranjan Arulpragasam & Khyati Wickramanayake for the Petitioner.

Nerin Pulle PC ASG with Vishmi Ganepola SC, Medhaka Fernando SC & M. B. M. Sajith Bandara SC for the 1A 1B & 3A Respondents.

Gamini Marapana PC with Navin Marapana PC, Kaushalya Molligoda and Uchitha Wickremasinghe for the 2nd Respondent.

Dr. K. Kanag-Isvaran PC with Lakshmanan Jeyakumar and Aslesha Weerasekara instructed by G. G. Arulpragasam for the 4th Respondent

**SC FRA No. 225/21**

Eraj de Silva with Daminda Wijayarathne & Janagan Sunderamoorthy instructed by Dimuthu Kuruppuarachchi for the Petitioner.

Manohara de Silva PC with Harithriya Kumarage, Kaveesha Gamage, Nadeeshani Lankathilake and Sasiri Chandrasiri instructed by Senal Mathugama for the 2nd Respondent.

Nerin Pulle PC ASG with Vishmi Ganepola SC, Medhaka Fernando SC & M. B. M. Sajith Bandara SC for the 1st and 3A Respondents.

Dr. K. Kanag-Isvaran PC with Lakshmanan Jeyakumar & Ms. Asleesha Weerasekara instructed by G. G. Arulpragasam for the 4th & 5th Respondents.

**SC FRA No. 228/21**

Geoffrey Alagaratnam PC with Vishakan Sarveswaran instructed by Shammas Ghouse for the Petitioner.

Anuja Premaratna PC with Naushalya Rajapakshe & Tarangee Muthukumarana for the 4th Respondent.

Nerin Pulle PC ASG with Vishmi Ganepola SC, Medhaka Fernando SC & M. B. M. Sajith Bandara SC for the 1A, 1B & 2nd and 6th Respondents.

Dr. K. Kanag-Isvaran PC with Lakshmanan Jeyakumar & Ms. Asleesha Weerasekara instructed by G. G. Arulpragasam for the 5A & 5B and 5C Respondents.

Ruwantha Cooray for the 1C Respondent.

Argued on: 07-02-2023, 20-03-2023, 18-05-2023, 19-05-2023, 26-06-2023

Decided on: 17-01-2024

**P Padman Surasena J**

**BACKGROUND**

The Attorney General had indicted the thirteen accused mentioned in the indictment which has been produced (marked **P8**) in case SC FRA No. 225/2021 in the High Court of Colombo under 17 counts. Some of the counts in the said indictment had alleged that the accused had committed the murder of one Bharatha Lakshman Premachandra who is the father of the

Petitioner in SC FRA No. 221/2021 and the husband of the Petitioner in SC FRA No. 225/2021. The names of the accused who had stood indicted as per the said indictment are as follows:

i. Vithanalage Anura Thushara de Mel;
ii. Hetti Kankanamlage Chandana Jagath Kumara;
iii. Sri Nayaka Pathiranage Chaminda Ravi Jayanath;
iv. Kodippili Arachchige Lanka Rasanjana;
v. Wijesooriya Arachchige Malaka Sameera;
vi. Vidanagamage Amila;
vii. Kovile Gedara Dissanayake Mudiyanselage Sarath Bandara;
viii. Morawaka Dewage Suranga Premalal;
ix. Chaminda Saman Kumara Abeywickrema;
x. Dissanayake Mudiyanselage Priyantha Janaka Bandara Galagoda;
xi. Arumadura Lawrence Romelo Duminda Silva (the recipient of the pardon):
xii. Rohana Marasinghe; and
xiii. Nagoda Liyana Arachchi Shaminda.

The trial against them was conducted and concluded before a Trial-at-Bar (High Court Case No. HC 7781/2015) comprising of three Judges of the High Court.

The High Court-at-Bar had delivered two judgments on 08-09-2016. The High Court-at-Bar by majority judgment (by two Judges) convicted the 1st, 3rd, 7th, 10th and 11th accused and acquitted 2nd, 4th,5th, 6th, 8th, 9th, 12th and 13th accused. The other Judge in the minority judgment acquitted all the accused from all the charges. The conviction and sentences imposed by High Court-at-Bar on the several accused are set out in the chart below.[1]

| Accused | Conviction | Sentence |
|---|---|---|
| 1st Accused | Convicted | Count 1: Six months Rigorous Imprisonment and a fine of Rupees 10,000 (default of which 3 months simple imprisonment)<br>Count 5-8: **Death Sentence**<br>Count 9: Twenty years Rigorous Imprisonment<br>Count 17: Life imprisonment |
| 2nd Accused | Acquitted | - |

[1] Vide SC judgment in SC/TAB/2A-D/2017 produced marked **P 10A** in case No. 225/2021 (vol II).

| | | |
|---|---|---|
| 3rd Accused | Convicted | Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple<br>Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 5-8: **Death sentence**<br>Count 9: 20 years Rigorous imprisonment<br>Count 10: Life imprisonment |
| 4th Accused | Acquitted | - |
| 5th Accused | Acquitted | - |
| 6th Accused | Acquitted | - |
| 7th Accused | Convicted | Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple)<br>Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 5-8: **Death sentence**<br>Count 9: 20 years Rigorous imprisonment<br>Count 10: Life imprisonment |
| 8th Accused | Acquitted | - |
| 9th Accused | Acquitted | - |
| 10th Accused | Convicted | Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple |

| | | |
|---|---|---|
| | | Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 5-8: **Death sentence**<br>Count 9: 20 years Rigorous imprisonment<br>Count 10: Life imprisonment |
| 11th Accused (The recipient of the pardon) | Convicted | Count 1: 6 months Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple)<br>Count 2: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 3: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 4: 2 years Rigorous Imprisonment and a fine of Rs. 10,000 (default of which 3 months simple imprisonment)<br>Count 5-8: **Death sentence**<br>Count 9: 20 years Rigorous imprisonment<br>Count 10: Life imprisonment |
| 12th Accused | Acquitted | - |
| 13th Accused | Acquitted | - |

The High Court-at-Bar in the course of the trial appears to have recorded the evidence of over forty witnesses.[2] This indicates that the High Court-at-Bar had undoubtedly spent tremendous number of judicial hours/resources to conduct and conclude the trial in that case. This can be

[2] Vide pages 11 and 12 of the majority judgment of the High Court dated 08-09-2016 produced marked 2R1(b) in SC FR A 225/2021.

seen both from the judgment of the High Court-at-Bar[3] as well as the judgment of this Court pronounced after hearing the appeal of that case.[4] The first, third, seventh and eleventh accused, who were convicted by the High Court-at-Bar, being aggrieved by the said convictions and the sentences, had thereafter appealed to the Supreme Court. The tenth accused who was tried in absentia and who was also convicted by the High Court-at-Bar had not appealed. The Supreme Court, as has been required by law, had taken up that appeal before a bench comprising of five Justices of this Court presided by the then Hon. Chief Justice.

The judgment pronounced by this Court indicates that the five Judge bench of this court had considered that Appeal, the hearing of which, had run throughout fifteen judicial days. It was thereafter that the said bench had pronounced the final judgment of that Appeal on 11-10-2018 which consists of 51 pages[5]. The said five Judge bench of this court, having considered the said appeal, had affirmed the conviction and sentences imposed on the accused convicted by the majority judgment of the High Court at Bar except the conviction and sentence imposed on them on count No. 17.

As the convictions and the sentences imposed on the accused convicted in that case stand affirmed (except the conviction and sentence on count No. 17), even after they had exhausted their right of appeal provided by law, they had commenced serving their respective sentences in prison. As far as the death sentence of the convicted accused are concerned, they were kept in Prison awaiting the implementation of their death sentences. It was thereafter, that 1C Respondent in SC FRA No. 221/2021, 1A Respondent in SC FRA No. 225/2021 and 1C Respondent in SC FRA No. 228/2021 (who will hereinafter sometimes be referred to as "the former President of the Country" or "the former President") had granted a pardon only to the 11th accused named in the afore-stated indictment. The said 11th accused is Arumadura Lawrence Romelo Duminda Silva (who will hereinafter sometimes be referred to as "the recipient of the pardon" or "the recipient"). He, the recipient of the pardon stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and stands as the 4th Respondent in SC FRA No. 228/2021. The Petitioners in all three instant Fundamental Rights Applications, have challenged the afore-stated pardon granted to the recipient by the former President of the Country. It is in this backdrop, that the Petitioners in their respective Petitions have prayed *inter alia* for a declaration that the former President by the grant of the Pardon

[3] Supra.
[4] Judgment of the Supreme Court dated 11-10-2018 produced marked P10(A) in SC FR A 225/2021.

[5] This judgment has been produced marked **P10A** SC TAB 2A-T17 dated 11-10-2018 annexed to the petition filed in SC FR 225/2021.

to the recipient, has violated the Fundamental Rights guaranteed to them by Article 12(1) of the Constitution and certain other consequential relief.

This Court having heard the submissions of the learned counsel for all three Petitioners as well as the submissions of the learned counsel for the Respondents in these three petitions, by its order dated 31-05-2022 had granted:

i. Leave to Proceed in respect of the alleged infringements of the Fundamental Rights of the Petitioners guaranteed under Article 12(1) of the Constitution, and;
ii. an interim order as per prayers (b) and (c) of SC FRA No. 221/2021, prayers (e) and (f) of SC FRA 225/ 2021 and prayers (d), (f) and (h) of SC FRA 228/ 2021.

The Petitioners have cited Hon. Attorney General as 1A Respondent in SC FRA No. 221/2021 and SC FRA No. 228/2021 and cited Hon. Attorney General as the 1st Respondent in SC FRA No. 225/ 2021, in terms of Article 134(1) of the Constitution read with Rule 44 of the Rules of the Supreme Court.

The Petitioners in SC FRA No. 221/2021 and SC FRA No. 228/2021 have again cited Hon. Attorney General as 1B Respondent on the basis that the Fundamental Rights of the Petitioners have been infringed by the act of granting the afore-stated pardon by the President of the country acting in his official capacity and the Petitioner in SC FRA No. 225/ 2021 has also cited Hon. Attorney General as the 1st Respondent, on this basis as well. This is in terms of Article 35 (1) of the Constitution.

The 3rd Respondent in all three Petitions was the Hon. Minister of Justice at the time relevant to the granting the afore-stated pardon by the Former President of the country. The 3A Respondent in SC FRA No. 221/2021 and SC FRA No. 228/2021 as well as the 6th Respondent in SC FRA 228/ 2021 is the incumbent Hon. Minister of Justice. The 4th Respondent in SC FRA No. 221/ 2021 and SC FRA No. 225/2021 and the 5A Respondent in SC FRA No. 228/2021 is the former President of the Bar Association of Sri Lanka, who has been made a respondent to these Petitions in his official capacity.

The 5th Respondent in SC FRA No. 225/2021 and the 5B Respondent in SC FRA 228/ 2021 is the former Secretary of the Bar Association of Sri Lanka, who has been made a respondent to that Petition in his official capacity.

Since the issue this court has to decide in all these cases (i.e., SC FRA No. 221/2021, SC FRA No. 225, SC FRA No. 228/ 2021) is the same, all the learned counsel who appeared for all the

parties in all three cases, concurred that these three cases could be amalgamated and heard together so that they would make composite submissions and it would suffice for this Court to pronounce one composite judgment in respect of all these three cases. Hence this judgment will contain the material, arguments, reasons and conclusions which would be composite in nature and common to all three cases.

**REVIEWABILITY OF GRANT OF PARDON BY COURT.**

Mr. Manohara De Silva PC appearing for the 2nd Respondent in SC FRA No. 225/2021 at the commencement of his submissions, clearly stated to court that it is not his position that the Supreme Court cannot review a pardon granted by the President. However, for the reasons he adduced in his oral submissions and also in the written submissions subsequently filed, it was his submission that this Court should not exercise its powers of review in the instant case.

Both Mr. Gamini Marapana PC appearing for the 2nd Respondent in SC FRA 221/2021 and Mr. Anuja Premaratne PC appearing for the 4th Respondent in SC FRA 228/2021 informed Court that they would associate themselves with the submissions made by Mr. Manohara De Silva PC in regard to the reviewability of grant of pardon by court. Mr. Nerin Pulle PC ASG appearing for the 1A, 1B & 3A Respondents in SC FRA 221/2021, for the 1st and 3A Respondents in SC FRA No. 225/2021 and for the 1A, 1B, 2nd and 6th Respondents in SC FRA No. 228/2021 also took up a similar position with regard to the reviewability of grant of pardon by court.

The position taken up by Mr. Manohara de Silva PC is that 'any power entrusted with any person is reviewable and this includes the President but the nature and extent to which the judiciary may intervene would differ from case to case'.[6] Focusing on the question of reviewability of the orders of the President, Mr. Manohara de Silva PC sought to segment President's powers under the four following headings:

i. Statutory powers exercised by the President qua President.
ii. Constitutional powers exercised by the President qua President.
iii. Constitutional/ statutory powers exercised by the President qua member of the cabinet.
iv. Constitutional powers exercised by the President qua Head of State.

[6] Vide post argument written submissions filed with the motion dated 04-08-2023 by the 2nd Respondent in SC FRA 225/2021.

It was his submission that whilst the first three categories referred to above, are reviewable on its merits, the fourth category namely, the exercise of constitutional powers by the President qua Head of State, isreviewable by court only to ascertain whether exercise of such powers has been done in accordance with the constitution. It is his position that Court cannot review the exercise of such powers, on their merits. It is also his position that the powers of the President that needs to be exercised qua Heads of State are incorporated in Articles 33 and 34 (1) (c) of the Constitution. Further, it is also his position that the powers enumerated in Art 33 (a) to (h), are all traditional powers that are to be generally exercised by the Head of State.

Having formulated the above argument, Mr. Manohara de Silva PC then sought to argue that the granting of a pardon to an offender as per Article 34 of the Constitution, is traditionally a power given to the Head of State and when the President grants a pardon to an offender he does so in the exercise of his powers as the Head of State. Thus, it was Mr. Manohara de Silva PC's argument that the Court's power of Judicial Review must be limited in this instance, only to examine whether the president, as the Head of State, has exercised his power of granting pardon to the offender in accordance with the Constitution.

Relying on Articles 3 and 4 of the Constitution, Mr. Manohara de Silva PC sought to justify the above position equating the power of granting pardon to an act of sovereignty exercised by the Executive. In order to examine this position, let me reproduce here, Article 3 and 4 of the Constitution.

Article 3 of the Constitution

> *"In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."*

Article 4 of the Constitution

> *"The Sovereignty of the People shall be exercised and enjoyed in the following manner :—*
>
> *a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*

*b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*

*c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law;*

*d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; and*

*e) the franchise shall be exercisable at the election of the President of the Republic and of the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being qualified to be an elector as hereinafter provided, has his name entered in the register of electors."*

According to Article 4 of the Constitution, the People can exercise and enjoy their Sovereignty which consists of their legislative power, their executive power, their judicial power, their fundamental rights and their franchise in the five ways described therein. Thus, I can state at the outset, that Articles 3 and 4 of the Constitution have made it unequivocally clear that the Fundamental Rights are part and parcel and embedded in the Sovereignty which is vested in the people. Thus, Fundamental Rights of the people cannot under any circumstance be pushed to a 'second row'. This is because according to Article 4, all five items set out in sub-Articles (a) to (e) i.e., their legislative power, their executive power, their judicial power, their fundamental rights and their franchise are all equal components of the Sovereignty of the People. The People can exercise and enjoy them in the manner set out in Article 4. Thus, none of the five components of the Sovereignty of the People is second to any other.

Article 4(d) not only unequivocally calls upon all the organs of government to respect, secure and advance, the Fundamental Rights which the Constitution has declared and recognized, but also calls upon all the organs of government not to abridge, restrict or deny, save in the manner and to the extent provided in the Constitution. When considering the above legal obligation on all the organs of government one must not forget the fact that according to

Article 3 of the Constitution, the Sovereignty of the People includes the powers of government. Thus, none of the organs of government can distance itself and move away from the Sovereignty of the People.

Undoubtedly then, the only way to protect and preserve both the components of Sovereignty set out in Article 4(b) and 4(d) in their original positions which the Constitution expected them to be, is by ensuring compliance of the provision in Article 4(d) when exercising sovereign power of people provided for in Article 4 (b) by the President of the Republic who is elected by the People.

This Court has consistently taken the above stand to which some of the judicial precedence quoted below would bear testimony. In *Edirisuriya* Vs. *Navaratnam*,[7] a case decided by this Court in 1984, Ranasinghe J stated the following:

> *"Article 126 (1) of the Constitution has conferred upon this Court sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right declared and recognized by Chapter 3 of the Constitution. The right to invoke such jurisdiction by an aggrieved person is set out in Article 17, which has been given the status of a fundamental right itself. Article 4 (d) of the Constitution has ordained that the fundamental rights which are declared and recognized by the Constitution should be respected, secured and advanced by all the organs of government and should not be abridged, restricted or denied save in the manner and to the extent provided by the Constitution itself. A solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage. It, therefore, behoves this Court to see that the full and free exercise of such rights is not impeded by any flimsy and unrealistic considerations".*[8]

In *Mutuweeran* Vs. *The State*,[9] a case decided by this Court in 1987, this Court was called upon to consider the Attorney General's preliminary objection that the petition in that case had been filed out of time i.e., out of one month prescribed by Article 126(2). This Court

[7] 1985 (1) SLR 100.
[8] At page 106.
[9] Sriskantha's Law Reports Vol V 126.

having observed that the Petitioner had been prevented from making his application within the permitted one-month period due to his detention which had prevented him from having access to his lawyer in order to access this Court, proceeded to hold that his delayed application for relief under Article 126 should not be ruled out, if he had made his application as soon as he became free from those constraints. Sharvananda CJ in that case stated the following:

> *"It is significant that Article 17 which provides that every person shall be entitled to apply to the Supreme Court as provided by Article 126 in respect of the infringement by executive or administrative action of his fundamental right, is itself included in the Chapter on fundamental rights. Because the remedy under Article 126 is thus guaranteed by the Constitution, a duty is imposed upon the Supreme Court to protect fundamental rights and ensure their vindication. Hence,* ***Article 126(2) should be given a generous and purposive construction****".*[10]

While being in agreement with the above views taken by this Court from time to time, I also agree with the submission of Mr. Manohara de Silva PC, that the Constitution has (placed in it), inbuilt checks and balances against each stakeholder of the powers, namely, Executive, Legislature and the Judiciary and it is these checks and balances which ensure the smooth functioning of the country according to the provisions of the Constitution. Thus, I would always be mindful of that aspect when I deal with the complaints made by the Petitioners in these cases.

Learned counsel who appeared in the instant cases, cited and referred to number of judgments both local and foreign. Foreign judgments may only have interpreted the provisions of law prevailing in those jurisdictions in keeping with the systems, conditions and other requirements prevailing in those jurisdictions. Thus, they may only have a persuasive value for us. The local judgments cited before us must be identified carefully as falling into two categories: first being the judgments decided before the 19th Amendment to the Constitution which were decided on the basis that Article 35 of the Constitution had conferred immunity on the President; and the second being the judgments decided after the 19th Amendment to the Constitution which permitted any person to challenge the President's action through a Fundamental Rights Petition filed under Article 126 of Constitution. In other words, it was for the first time in the constitutional history of this country that the Constitution itself has deliberately brought in a provision (by the 19th amendment to the Constitution) to specifically

[10] At page 130; emphasize is mine.

recognize the right of any person to challenge any action or omission done by the president in his official capacity, through the jurisdiction conferred on the Supreme Court under Article 126 of the Constitution making the Attorney General a respondent in the relevant petition.

At the same time, one must bear in mind that even when there was full immunity given to the President before the 19th Amendment to the Constitution, Courts have reviewed actions of the President on the basis that such immunity conferred by the then existed Article 35 of the Constitution covered only the President as a person but did not cover his actions. Vide *Visualingam Vs. Liyanage* .[11] It was also held in *Karunathilaka* Vs. *Dayananda Dissanayake,*[12] that the immunity in its former absolute capacity only shielded the person i.e., the President and not the President's acts.

In *Visualingam's* case, one of the issues that came up for consideration and decision before nine judges of this Court which sat as a Full Bench of this Court was whether this Court is empowered directly or indirectly to call in question or making a determination on any matter relating to the performance of the official acts of the President. This was sequel to the learned Deputy Solicitor General who appeared in that case raising a preliminary objection to that effect. All the nine judges of the Full Bench of this Court which heard *Visuvalingam's* case, had pronounced separate judgments; some of them, albeit brief. The said Full Bench of this Court, by majority, had overruled the said preliminary objection.

Out of the nine judges of the Full Bench of this Court in *Visuvalingam's* case, Wimalaratne J,[13] Ratwatte J,[14] Soza J,[15] Abdul Cader J,[16] had agreed with the following part of the judgment of Sharvananda J (as he then was):

> *"Before concluding my judgment I must refer to a preliminary objection raised by the Deputy Solicitor General. It was contended by the Deputy Solicitor General that this Court is precluded from directly or indirectly calling in question or making a determination on any matter relating to the performance of the official acts of the President. He supported this objection by reference to Article 35 of the Constitution. I cannot subscribe to this wide proposition. Actions of the executive are not above the law and can certainly be questioned in a Court*

[11] 1983 (1) Sri. L. R. 203.
[12] 1999 (1) Sri. L. R. 157.
[13] At page 257.
[14] At page 260.
[15] At page 261.
[16] At page 293.

> *of Law. Rule of Law will be found wanting in its completeness if the Deputy Solicitor General's contention in its wide dimension is to be accepted. Such an argument cuts across the ideals of the Constitution as reflected in its preamble. An intention to make acts of the President non-justiciable cannot be attributed to the makers of the Constitution. Article 35 of the Constitution provides only for the personal immunity of the President during his tenure of office from proceedings in any Court. The President cannot be summoned to Court to justify his action. But that is a far cry from saying that the President's acts cannot be examined by a Court of Law. Though the President is immune from proceedings in Court a party who invokes the acts of the President in his support will have to bear the burden of demonstrating that such acts of the President are warranted by law; the seal of the President by itself will not be sufficient to discharge that burden".*[17]

Samarakoon CJ and Wanasundera J in *Visuvalingam's* case, although not specifically agreeing with the above sentiments of Sharvananda J, had nevertheless not upheld the aforesaid preliminary objection raised by the learned Deputy Solicitor General who appeared in that case. Ranasinghe J and Rodrigo J in their dissenting judgments had gone on the basis that the time limit of one month specified in Article 126 is mandatory and therefore the Court did not have jurisdiction to entertain that application any longer. Thus, the above view expressed by Sharvananda J in *Visuvalingam's* case, stands as the view of the Full Bench of this Court.

Let me now turn to the case of *Karunathilaka and another* Vs. *Dayananda Dissanayake, Commissioner of Elections and others (Case No. 1)*.[18] The two petitioners in that case complained to this Court that the failure of the 1st respondent (the Commissioner of Elections), and the 2nd to 13th respondents (the Returning Officers of the twelve districts) to hold elections to the five Provincial Councils, on and after 28-08-1998, was an infringement of the Fundamental Rights guaranteed to them under Articles 12 (1) and 14 (1) (a).

In *Karunathilaka's* case, the five-year terms of office of those Provincial Councils of the Central, Uva, North-Central, Western and Sabaragamuwa provinces came to an end in June, 1998. Notices under section 10 of the Provincial Councils Elections Act, No. 02 of 1988 were duly published in June 1998 fixing 28-08-1998 as the date of poll. It was not disputed that all the

[17] At pages 240-241.
[18] 1991 (1) Sri. L. R. 157.

returning officers had given notice that postal ballot papers would be issued on 04-08-1998. The petitioners had averred that *"by telegram dated 3.8.98, the respective returning officers had suspended the postal voting that was fixed for 4.8.98 . . . and no reasons were given for such suspension".*[19] The respondents had admitted that position. The very next day, on 04-08-1998, the President had issued a Proclamation under Section 2 of the Public Security Ordinance bringing the provisions of its Part II into operation throughout Sri Lanka, and made the following Regulation under Section 5 which was impugned in that case:

> *"For so long, and so long only, as Part II of the Public Security Ordinance is in operation in a province for which a Provincial Council specified in Column I of the Schedule hereto has been established, such part of the Notice under section 22 of the Provincial Councils Elections Act, No. 2 of 1988, published in the Gazette specified in the corresponding entry in Column II of the Schedule hereto, as relates to the date of poll for the holding of elections to such Provincial Council shall be deemed, for all purposes, to be of no effect."*[20]

The petitioners in *Karunathilaka's* case filed their petition on 03-09-1998, alleging inter alia, that:

a. the Proclamation was an unwarranted and unlawful exercise of discretion contrary to the Constitution, not made bona fide or in consideration of the security situation in the country or the five provinces, but solely in order to postpone the five elections;
b. the Proclamation and the impugned Regulation constituted an unlawful interference with and usurpation of functions vested in the Commissioner of Elections, under the Constitution and the Act, and compromised his constitutionally guaranteed independent status.

One of the arguments put forward by the learned Solicitor-General in *Karunathilaka's* case was that since the President could not be made a party by virtue of the then existed Article 35, and since the petitioners in that case had not cited as respondents any other persons who could answer the allegations pertaining to the *vires* of the impugned Proclamation and Regulation, this Court should make no pronouncement pertaining to their validity. Fernando J having held that the making of the Proclamation under section 2 of the Public Security Ordinance, the Regulation under section 5 thereof, and the conduct of the respondents in that

[19] At page 157
[20] At page 163

case, in relation to the five elections, had clearly constituted "executive action" over which this Court would ordinarily have jurisdiction under Article 126, went on to consider the question whether that jurisdiction is ousted by the presence of the then existed Article 35, or by the failure to join necessary parties, or by any relevant ouster clause. The approach taken by this Court to that issue at that time is reflected in the two following paragraphs quoted from Fernando J's judgment.

First paragraph.

> *"The immunity conferred by Article 35 is neither absolute nor perpetual. While Article 35 (1) appears to prohibit the institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35 (3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires that proceedings be instituted against the Attorney-General. What is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law"…*[21]

Second paragraph.

> *"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the*

[21] At page 176.

> *President, in order to justify his own conduct. It is for that reason that this Court has entertained and decided questions in relation to emergency regulations made by the President (see Joseph Perera v. AG[22], Wickremabandu v. Herath[23], and Presidential appointments (see Silva v. Bandaranayake[24]). It is the respondents who rely on the Proclamation and Regulation, and the review thereof by this Court is not in any way inconsistent with the prohibition in Article 35 on the institution of proceedings against the President".*[25]

The two judgments of this Court relied upon by Mr. Manohara de Silva PC, i.e., *Edward Francis William Silva President's Counsel and three others Vs. Shirani Bandaranayake and three others* ,[26] *Victor Ivan and others Vs. Sarath N. Silva and others,*[27] are judgments decided by this Court before the 19th Amendment to the Constitution. Therefore, this Court had decided those cases on the basis that the then existed Article 35 of the Constitution had conferred immunity on the President leaving no room for any person to file a petition under Article 126 in respect of anything done or omitted to be done by the President.

Let me first consider *Edward Francis William Silva's* case. The petitioners in that case, had challenged the appointment of a Judge to this Court on the basis that the President had made that appointment without consultation or any other form of co-operation with the judiciary namely the Chief Justice. Let me first refer to the minority judgment of that case. In refusing Leave to Proceed in that case, the minority judgment by Perera J with two other judges agreeing with him, had proceeded on the then existed Article 35 of the Constitution to hold that an act or omission of the President is not justiciable in a Court of law, more so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party because it is only the President who could furnish details relating to the said appointment. In the minority judgment Perera J had further held that the said matter cannot be canvassed in Court when the Constitution had specifically prohibited the institution of proceedings against the President, and the challenge to that appointment cannot be isolated from the President in those proceedings since the basis for that appointment falls within the purview of an act or omission of the President.

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[22] 1992 (1) SLR 199, 230.
[23] 1990 (2) SLR 348, 361, 374.
[24] 1997 (1) SLR 92.
[25] At page 177.
[26] 1997 (1) SLR 92.
[27] 2001 (1) SLR 309.

In *Edward Francis William Silva's* case, in the majority judgment of the seven Judge bench of this Court refused Leave to Proceed in that case, on the basis that the petitioners in that case had not only failed to establish, prima facie, that there was no co-operation between the President and the Chief Justice but had also failed to indicate how they propose to supply that deficiency. It was on that basis that Fernando J in that case, in the majority judgment of this Court held that it was futile to grant Leave to Proceed in respect of the alleged infringement of their Fundamental Rights under Article 14(1) (g), which the petitioners in that case had alleged as having resulted from that alleged want of co-operation. Even in that case, Fernando J in the majority judgment of this Court had stated the fact that this Court in common with Courts in other democracies founded on the Rule of Law, has consistently recognized that there are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public; to be used for the public good; the propriety of the exercise of such discretions should be judged by reference to the purposes for which they were so entrusted. It is noteworthy that the majority of the seven Judge bench of this Court did not opt to base their decision to refuse to grant Leave to Proceed and dismiss that case on the basis adopted in the minority judgment. Thus, the majority of the seven Judge bench of this Court in that case, had opted not to endorse the view that an act or omission of the President is not justiciable in a Court of law on the then existed Article 35 of the Constitution.

Wade & Forsyth in their work on Administrative Law (Twelfth Edition) has also highlighted the fact that the other democracies founded on the Rule of Law, has recognized that there are no absolute or unfettered discretions in public law (as referred to above, by Fernando J in *Edward Francis William Silva's* case). This could be seen in the following two paragraphs quoted from that work:

> *"Judicial control, therefore, primarily means review, and is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. But there are many situations in which the courts interpret Acts of Parliament as authorising only action which is reasonable or which has some particular purpose, so that its merits determine its legality. Sometimes the Act itself will expressly limit the power in this way, but even if it does not it is common for the court to infer that some limitation is intended. The judges have been deeply drawn into this area, so that their own opinion of the reasonableness or motives of some government action may be the factor which determines whether or not it is to*

*be condemned on judicial review. The further the courts are drawn into passing judgment on the merits of the actions of public authorities, the more they are exposed to the charge that they are exceeding their constitutional function. But today this accusation deters them much less than formerly, particularly now that Parliament has licensed more intrusive review by the courts via the Human Rights Act 1998.*

*It is a cardinal axiom that every power has legal limits. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward their case, the act may be condemned as unlawful. Although lawyers appearing for government departments have often argued that some Act confers unfettered discretion on a minister, they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review".* [28]

Let me now turn to *Victor Ivan's* case. The petitioners in *Victor Ivan's* case, had challenged the appointment of the then Chief Justice made by the President under Article 107(1) of the Constitution, alleging that their Fundamental Rights guaranteed under Articles 12(1) of the Constitution had been infringed by reason of the said appointment. Court in that case heard three petitions together and the Petitioners in all three applications had cited the then Chief Justice as the 1st Respondent (the main Respondent), and alleged that their Fundamental Rights guaranteed under Articles 12(1) of the Constitution had been infringed by reason of the appointment of the said 1st Respondent as Chief Justice. Thus, all three Petitioners had mounted a direct challenge to the validity of the appointment of the 1st Respondent as the Chief Justice in all three cases. However, in view of the provisions in then existed Article 35 of the Constitution, none of the petitioners had sought to name as respondent, the President who in fact made that appointment; in view of the same Article, none of the petitioners had sought to institute proceedings against the Attorney-General for the purpose of representing and defending the President. Therefore, in all those three cases, the Attorney-General had appeared only on his own behalf.

The provision in the then existed Article 35(1) which this court had to consider in *Victor Ivan's* case is as follows:

[28] Wade & Forsyth's Administrative Law (Twelfth Edition) page 16.

> *"While any person holds office as President, no proceedings shall be instituted or continued against him in any Court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity."*

The five Judges of the bench of this Court in that case, was unanimous and proceeded to hold thus: *"Although the President's immunity remains inviolable, her acts under certain circumstances, may not."* The judgment (by Wadugodapitiya, J) proceeded to further state as follows:

> *"This case confirms the proposition that the President's acts cannot be challenged in a Court of law in proceedings against the President. However, where some other official performs an executive or administrative act violative of any person's fundamental rights, and in order to justify his own conduct, relies on an act done by the President, then, such act of such officer, together with its parent act are reviewable in appropriate judicial proceedings."* [29]

In the course of arriving at that conclusion, Wadugodapitiya J in *Victor Ivan's* case,[30] stressed the point that the President, even though he holds high office, is, nevertheless by virtue of Article 42 of the Constitution, responsible to Parliament for the due exercise, performance and discharge of her constitutional powers, duties and functions.

As has already been mentioned above, both the above cases (*Edward Francis William Silva's* case and *Victor Ivan's* case) relied upon by the learned President's Counsel who appeared for the recipient of the pardon in the instant case, are judgments decided by this Court before the 19th Amendment. Then existed Article 35 of the Constitution had at that time conferred immunity on the President leaving no room for any person to file a petition under Article 126 in respect of anything done or omitted to be done by the President. Thus, it was in the presence of that provision that this Court had proceeded to hold that some acts or omission of the President cannot be challenged under certain circumstances. Therefore, those judgments are not directly relevant to Article 35 of the Constitution in the present form. However, we agree with the submission made by the learned President's Counsel for the recipient of the pardon that it is important for this Court to ensure maintaining the comity between the Judiciary and Executive as has been stressed in *Edward Francis William Silva's*

[29] At page 324.
[30] At page 322.

case. Thus, as has already been mentioned before, I would always be mindful of that aspect when I deal with the complaints made by the Petitioners in these cases.

Mr. Manohara de Silva PC referred us to Page 110 of the judgment of *Premachandra Vs. Major Montague Jayawickrema and another*,[31] where there had been some discussion on Monarchial prerogative powers in UK. The suggestion inherent in that submission is that the President, in his capacity as the Head of State, has a power somewhat similar to a power held by a monarch. Samarakoon CJ in *Visuvalingam's* case,[32] has emphatically rejected the proposition advanced on behalf of the Attorney General in that case that the President of Sri Lanka has "inherited the mantle of a Monarch". Samarakoon CJ in *Visuvalingam's* case, proceeded to state as follows:

> *"… Sovereignty of the People under the 1978 Constitution is one and indivisible. It remains with the People. It is only the exercise of certain powers of the Sovereign that are delegated under Article 4 as follows:-*
>
> *a) Legislative power to Parliament*
> *b) Executive power to the President*
> *c) Judicial power through Parliament to the Courts.*
>
> *Fundamental Rights (Article 4(d)) and Franchise (Article 4(e)) remain with the People and the Supreme Court has been constituted the guardian of such rights. (Vide Chapter XVI of the Constitution). I do not agree with the Deputy Solicitor General that the President has inherited the mantle of a Monarch and that allegiance is owed to him. The oath in terms of the Fourth Schedule which the Judges were required to take or affirm in terms of Article 107(4) swore allegiance to the Second Republican Constitution and the Democratic Socialist Republic of Sri Lanka. I cannot therefore accept this reasoning of the Deputy Solicitor General."*

Moreover, the following portion from the judgment of a Divisional Bench of this Court in the case of *Singarasa Vs. Attorney General*,[33] would also be relevant in that regard. In that case, Sarath N. Silva (CJ), stated as follows:

> *"The President is not the repository of plenary executive power as in the case of the Crown in the U.K. As it is specifically laid down in the basic Article 3 cited*

[31] 1994 (2) SLR 90.
[32] 1983 (1) Sri L. R. 203 at page 222.
[33] 2013 1 SLR 245 at 260.

> *above the plenary power in all spheres including the powers of Government constitutes the inalienable Sovereignty of the People. The President exercises the executive power of the People ….".*[34]

I also observe that this Court has repeated this position more recently in *R. Sampanthan's* case which I will deal with in more detail later in this judgment.

Further, I also observe that the questions referred to this Court in the case of *Premachandra Vs. Major Montague Jayawickrema and another*,[35] had primarily involved two basic issues of law which are as follows:

i. Is the exercise of the power vested in the Governor of a Province under Article 154F(4), excluding the proviso, immune from judicial review, either because it is a purely subjective discretion, or because it is intrinsically a political decision, the nature of which is not fit for judicial review ?
ii. In any event, has judicial review been excluded by Article 154F(2) or Article 154F(6)?

Thus, it was not a case in which this Court was called upon to consider the acts of the Head of the Executive, but only to consider some acts of a subordinate executive body (Governor of a province). Be that as it may, it is noteworthy that this Court even in that case stated the following:

> *"All statutory powers have legal limits; "the real question is whether the discretion is wide or narrow, and where the legal line is to be drawn"; and it is the Judiciary which is entrusted with the responsibility of determining those questions. When it comes to powers and discretions conferred by the Constitution, it is the special responsibility of the Judiciary to uphold the constitution by preventing excess or abuse by the Legislature or the Executive. Any exception to these principles must be clearly and expressly stated".*[36]

Having observed thus, this Court in that case has rejected the arguments advanced on behalf of the Governor such as: the phrase "in his opinion" had conferred on the Governor a purely subjective discretion; whom to appoint as Chief Minister was a matter solely and exclusively for the Governor's subjective assessment and judgment; the decision was essentially political in nature, and for that reason, too, it was not reviewable.

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[34] At page 74
[35] 1994 (2) Sri L. R. 90.
[36] At page 18 & 109.

We must decide the instant cases before us according to the provisions of the Constitution as it presently stands. This is because the alleged act of the President which is the subject matter of the complaint made by the Petitioners had occurred after the then existed Article 35 of the Constitution was significantly amended by the 19th Amendment to the Constitution. Article 35 of the Constitution now stands (after the 20th Amendment to the Constitution), in the following way:

> ***Immunity of President from suit***
>
> *35. (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity:*
>
> *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 paragraph (g) of Article 33.*
>
> *(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating the period of time prescribed by that law.*
>
> *(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 paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:*
>
> *Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.]*

Indeed, it was Article 35 which stood in the 19th Amendment to the Constitution,[37] which this Court was called upon to interpret in *Rajavarothiam Sampathan Vs. Attorney General* (*R. Sampanthan's* case).[38] It was also the submission of Dr Kanag Iswaran PC that, this Court in its seven Judge bench judgment in *R. Sampanthan's* case has rejected the argument of the Attorney General in that case that the powers conferred on the President by the Constitution in this country is similar to Royal prerogative. Dr. Kanag Iswaran PC appearing for the Bar Association of Sri Lanka, made his submissions widely on the following two aspects.

1) Nature of the power to grant pardon under Article 34 of the Constitution
2) Once such pardon is granted under that provision by the president, whether such grant of pardon can be reviewed by the Supreme Court (reviewability).

Dr. Kanag Iswaran PC in the course of his submission relied *inter alia* primarily on *R. Sampanthan's* case to which I would now turn.

This Court in *R. Sampanthan's* case heard nine petitions together and the petitioners in all nine applications complained to this Court that the President intentionally and/or willfully and/or unlawfully had violated the Constitution and/or committed an abuse of the powers of his office. They challenged before this Court, a proclamation made by the President dissolving the Parliament of the country before the lapse of four and a half years which was the criterion specified in the proviso to Article 70 (1) as it stood at that time. Some of the Respondents in that case including the secretary to the then President of the country and the Hon. Attorney General, had taken up the position in that case before this court, that this court had no jurisdiction to hear and determine the applications filed by the petitioners in that case. It was their position that the said proclamation was not subject to Judicial Review. One of the reasons set out by the said Respondents is that the procedure referred to in Article 38 (2), with regard to the impeachment of the President is a 'specific mode' prescribed by the Constitution and the Supreme Court should not disregard those specific provisions referred to in Article 38 (2) and proceed to exercise its jurisdiction to protect Fundamental Rights of citizens under Article 118 (b).

Pursuant to the above, one of the two preliminary objections raised by the Hon. Attorney General in *R. Sampanthan's* case was that the Supreme Court is precluded from exercising its Fundamental Rights Jurisdiction in respect of those applications because in such a situation

[37] The provision in Article 35 is substantially same in both the 19th Amendment to the Constitution and the 20th Amendment to the Constitution; the first proviso to Article 35(1) is similar in both those Amendments to the Constitution.
[38] SC FR 351-361/ 2018 (decided on 13-12-2018).

Article 38 (2) of the Constitution has provided a "specific mechanism" or "a specific procedure or mechanism" setting out the manner in which the Supreme Court can exercise jurisdiction with regard to the Petitioners' complaints of alleged intentional violation of the Constitution. Article 38 (2) of the Constitution is a provision under which a notice of resolution to initiate proceedings for the removal of the President on such allegations could be given. It was on that basis that the Hon. Attorney General had made extensive submissions in *R. Sampathan's* case that, the complaints made to this Court by the Petitioners in that case were 'not justiciable' under Article 126 of the Constitution.

The seven-judge bench of this court in *R. Sampanthan's* case had pronounced two judgements. One, with the concurrence of six judges and the other by the remaining judge. Both judgments reached the same conclusion and therefore there was no dissenting judgment in that case. Thus, both judgments in *R. Sampanthan's* case, have rejected the above argument put forward by the Hon. Attorney General. Six out of seven Judges of this Court had concurred with the then Chief Justice when he stated the following in his judgment:

> *"Finally, it has to be observed that the acceptance of the submission made by the Hon. Attorney General will render the first proviso to Article 35 (1) meaningless for the most part. That is because the President has an array of duties, powers and functions under the Constitution and many of the acts done or omitted to be done by the President in his official capacity will relate to his duties, powers and functions under the Constitution. Thus, if the submission made on behalf of the Hon. Attorney General is carried to its logical end, the result will be the emasculation of the first proviso to Article 35 (1). That cannot be permitted by this Court which must honour its constitutional duty under Article 4 (d) and vigorously protect the totality of its jurisdiction for the protection of fundamental rights conferred by Article 118 (b) read with Article 126 of the Constitution."*

The remaining Judge Hon. Sisira J de Abrew, J who pronounced his own judgment in *R. Sampanthan's* case, also rejected the above argument put forward by the Hon. Attorney General the basis for which could be seen in the following paragraph I have quoted from Hon. Sisira J de Abrew, J's judgment in that case.

> *"When Article 38 (2) of the Constitution is examined, it is clear that the mechanism provided in Article 38 (2) of the Constitution is only available to the Members of Parliament. This mechanism is not available to the other citizens of the country. In fact there are several petitions filed in this court seeking to quash the Proclamation dissolving Parliament. The said petitioners are not Members of Parliament. For the*

*above reasons, I reject the above contention advanced by the learned Attorney General".*

H. N. J. Perera CJ in *R. Sampanthan's* case, adopted *the 'maxim expressio unius est exclusio alterius'* which enunciates the principle of interpretation that the specific mention of only one item in a list implies the exclusion of other items in order to fortify his conclusion contained in the following paragraph:

> *"It appears to me that this is an appropriate instance in which the maxim should be applied to raise the inference that the exclusion of the power to declare War and Peace under Article 33 (2) (g) from the ambit of the Proviso to Article 35(1) of the Constitution denotes that all the other powers of the President which are listed in Article 33 (2) are, subject to review by way of an application under Article 126 in appropriate circumstances which demand the Court's review of those powers".*[39]

Thus, all seven Judges of this Court in the two judgments referred to above, in *R. Sampanthan's* case, have rejected the argument that there are some powers which are vested in the President which are not subject to review by this Court by way of proceedings under Article 126 of the Constitution in appropriate circumstances.

I agree with the above conclusion reached in the seven-judge bench judgment of this Court. I have no reason to disagree with Their Lordships. Thus, I reject the argument that the grant of a pardon to an offender by the President is not reviewable by this Court in terms of its jurisdiction under Article 126 read with the proviso to Article 35 of the Constitution.

In view of the previous conclusions arrived at by fuller benches of this court particularly in the more recent times in *R. Sampanthan's* case, I really do not have to consider in depth the foreign judgments cited before us by the learned President's Counsel who appeared for the Petitioners as well as for the Respondents. As I have mentioned before, the foreign judgments would have only a persuasive value in the absence of any clear conclusion by our Courts on a certain matter. But here, it is not the case. As has been shown above, the points agitated by the learned President's Counsel for some of the Respondents have been considered and clearly decided by this Court in its previous judgments. Thus, suffice it to repeat here that I agree with those previous decisions made by this Court.

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[39] At page 42 of the judgment of Hon. H. N. J. Perera CJ in R. Sampanthan's case.

Having come to the above conclusion, let me now examine the complaint of the Petitioners that their Fundamental Rights guaranteed under Article 12(1) of the Constitution have been infringed. That is the issue on which this Court had granted Leave to Proceed.

It would be convenient for me to list out at this juncture, the composite arguments advanced by the learned Counsel who appeared for the Petitioners in all three applications. They are as follows,

1. Since the former President of the Country had completely ignored the provisions in Article 35 of the Constitution, he has acted arbitrarily and outside the powers given to him by the Constitution.
2. In any case, the decision taken by the former President of the Country is irrational, unreasonable and cannot be supported by any reason.
3. The former President of the Country has failed to adduce any reason whatsoever to justify his decision.
4. The former President of the Country has infringed the Fundamental Right guaranteed to each citizen, in terms of Article 12 of the Constitution, when he chose to grant a pardon only to the recipient of the pardon in the instant case, ignoring the presence of the other convicted accused, who are undergoing similar sentences in the same case after their convictions by the Trial-at-Bar was affirmed by the Supreme Court, and also in view of the presence of many other convicts waiting in the death row of the prisons of this country.
5. The former president of the Country has completely ignored the provisions in Section 3 (Q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 as amended.
6. The former President of the Country had made a partisan decision when he chose to grant the pardon to the recipient of the pardon alone, who is one of his close friends and a political ally.
7. The instant grant of pardon to the recipient of the pardon, by the former President of the Country, totally erodes the confidence the public has reposed in the criminal justice system of the country.

**WHERE IS THE PARDON GRANTED TO THE RECIPIENT?**

In order to ascertain whether the former President had completely ignored the provisions in Article 34 of the Constitution and has acted arbitrarily outside the powers vested in him by the Constitution this Court at the outset would need to look at the impugned grant of pardon relevant to the instant case and the underlying reasons upon which the former President had decided or justified the granting of the said pardon.

Let me at this stage, reproduce one of the interim orders this court had made on 31/05/2022 as per paragraph (b) of the prayers of the petition dated 19-07-2021 in SC FR 221/2021. The said prayer is as follows:

*b) Direct any one or more of the Respondents and in particular, the 1A and/or 1B and/or 3rd and/or 4th Respondent, to submit to Court, the Record pertaining to the impugned Pardon, including but not limited to, the decision to pardon the 2nd Respondent and all antecedent documentation relevant to the granting of a Presidential Pardon to the 2nd Respondent, including communications sent by the President, and recommendations/advice tendered in respect of same, including but not limited to:*

*I. Any petition for release/pardon submitted by or on behalf of the 2nd Respondent;*

*II. The Report(s) (if any), caused to be made to the President, by the Hon. Judges who tried the case pertaining to the 2nd Respondent as required by the proviso to Article 34(1) of the Constitution;*

*III. The advice of the Hon. Attorney General (if any), pursuant to the proviso to Article 34(1) of the Constitution in respect of the 2nd Respondent who was sentenced to death, and the documentation that was forwarded to the 3rd Respondent Minister;*

*IV. The recommendation of the 3rd Respondent Minister (if any), pursuant to the proviso to Article 34(1) of the Constitution in respect of the 2nd Respondent who was sentenced to death as submitted to the President along with any other documentation so submitted;*

*V. Correspondence between the Bar Association of Sri lanka and the President pertaining to the above;*

*VI. A true copy of the Gazette, Proclamation or document containing the decision for and/or grant of the pardon in respect of the 2nd Respondent.*

Pursuant to that interim order, the Hon. Attorney General, by his motion dated 28-07-2022, submitted before this Court, only the following documents,

1. The request made by the mother of the 2nd Respondent marked as **1R1**,

2. The request made by the Members of Parliament marked as **1R2**,

3. The letter by the Secretary to the President addressed to the Hon. Attorney General along with the reports of the Judges of the Trial-at-Bar marked as **1R3**,

4. The reports of the Judges of the Trial-at-Bar marked as **1R4(a)**, **1R(b)** and **1R4(c)**;

5. The advice of the Hon. Attorney General marked as **1R5**,

6. The recommendation of the Hon. Minister of Justice marked as **1R6**,

7. The Letter of the Secretary to the President addressed to the President of the Bar Association marked as **1R7**.

By making the interim order made by this court on the date of support i.e., 31-05-2022, as per paragraph 3 of the prayers, this Court expected the relevant Respondents to submit to this Court for its perusal, the record pertaining to the impugned pardon, including a copy of the Gazette, Proclamation or document containing the decision for and/or grant of the pardon in respect of the recipient of the pardon in the instant case.

Although this court has ordered the Respondents in particular 1A and/or 1B Respondents (in SC/FR/221/2021), to submit to this court, the decision to grant the impugned pardon the said Respondents have failed to submit to this court the said decision to grant the impugned pardon by the former President of the country. The only document which indicates that such pardon has been granted to the recipient is the letter produced marked **1R7** dated 05-07-2021. We note that the Petitioners had filed these cases to challenge the impugned pardon on 20-07-2021 (SC/FR/221/2021). **1R7** is a letter written by the Secretary to the President Mr. P.B. Jayasundara addressed to the President of the Bar Association which had only answered a request made by the Bar Association from the President to convey the basis upon which the President had decided to grant the impugned pardon. The Petitioner in SC FRA 221/2021 has

produced a copy of this request marked **P8** with her petition. The letter by the Bar Association **P8** is dated 24-06-2021; it is this letter **1R7** that has referred to the letter dated 24-06-2021. Thus, it is clear that this letter **1R7** has been written very much after the conclusion of granting the impugned pardon. Even in **1R7**, the Secretary to the President has neither divulged as to when the former President had granted the impugned pardon nor divulged the reasons upon which it was granted.

Leave alone reasons for granting the impugned pardon to its recipient, shouldn't the relevant Respondents have produced before this court, at least a minute in the relevant file (if there was any), for the perusal of the court, before making submissions to justify that it was for good reasons that the former President had made such a decision? Thus, it is the situation before us in the instant case that we have to start looking for the decision of granting the impugned pardon before we venture to consider the underlying reasons for such decision, both of which have not been produced before Court. In these circumstances, I have to hold that the relevant Respondents in the instant case have failed either to produce the decision of the former President of the country to grant the impugned pardon to the recipient or the underlying reasons attached to it.

We have already held that the grant of a pardon to an offender by the President is reviewable by this Court in terms of its jurisdiction under Article 126 of the Constitution. As has already been mentioned above, the President of the Republic is duty bound to ensure the compliance of the provision in Article 4 (d) when he exercises sovereign power of people provided for in Article 4 (b) as he is elected by the People. As Ranasinghe J stated in *Edirisuriya* Vs. *Navaratnam*,[40] a solemn and sacred duty has been imposed by the Constitution upon this Court, as the highest Court of the Republic, to safeguard the fundamental rights which have been assured by the Constitution to the citizens of the Republic as part of their intangible heritage. How can this Court safeguard the fundamental rights of the citizens of the Republic when neither the decisions nor reasons thereto, are produced before Court. The Nineteenth Amendment to the Constitution has deliberately brought in Article 14A specifically giving the citizens of the Republic the right to access to any information as provided for by law, being information that is required for the exercise or protection of citizens' rights held by the State authorities. According to Section 7(1) of the Right to Information Act No. 12 of 2016, it shall be the duty of every public authority to maintain all its records duly catalogued and indexed in such form as is consistent with its operational requirements which would facilitate the right of access to information as provided for in that Act. This right of the citizens of the

[40] Supra at page 106.

Republic to access to any information can be denied only if such information falls under such categories specified in Section 5 of the Act and neither the decisions nor reasons relating to the granting of the impugned pardon to its recipient falls under Section 5 of that Act. As per the above provisions of law, the President is obliged under law to maintain not only all the records, but also the reasons pertaining to granting of any pardon to any offender exercising the powers vested in him by the Constitution.

Hon. Attorney General in his letter (**1R5**) to the Hon. Minister of Justice, had also highlighted several salient features namely: the fact that the recipient of the pardon along with twelve others were charged before the High Court at Bar on seventeen counts on the information exhibited by the Attorney General; the fact that those counts included charges of being members of an unlawful assembly and allegations of committing offences of criminal intimidation; the fact that those counts included charges in relation to causing the murders of four persons, attempting to murder another person, possession of a T-56 automatic gun an offence punishable under the Fire Arms Ordinance whilst being members of the said unlawful assembly; the fact that at the trial, 47 witnesses had testified; the fact that the High Court-at-Bar had also received in evidence around 170 documents and productions etc. I have earlier adverted to the fact that the judgment of the High Court-at-Bar has indicated that it had spent tremendous number of judicial hours/resources to conduct and conclude the trial in that case. Thereafter, as has already been mentioned above, the five Judge bench of this court had considered the appeal relevant to that case throughout fifteen judicial days before it proceeded to pronounce the final judgment of the said Appeal which consisted of 51 pages. I need to emphasize here that it is in the exercise of the judicial power of the People of this country that these judgments have been pronounced by those Courts and that is how the people of this country have exercised their sovereignty (judicial power) which is inalienable. Having regard to the above circumstances, when neither the decision nor the reasons relating to the granting of the impugned pardon to its recipient is made available, how can the People of this country ascertain or be satisfied that the President has lawfully exercised the executive power of the people? Thus, such granting of a pardon without either the decision or the reasons thereto, cannot be identified as a lawful exercise of the executive power of the people. To say the least, such an action could only be identified as an arbitrary act on the part of its doer which would be an insult to the sovereignty of the people.

**REASONS/JUSTIFICATIONS FOR THE PARDON GRANTED TO THE RECIPIENT**

Let me nevertheless next consider whether there have been valid reasons for such a decision. The only Document produced before this Court by the Hon. Attorney General which has mentioned about a decision of the President, to grant the impugned pardon, is the letter **1R7** dated 05-07-2021 (written very much after the conclusion of the impugned granting process). I have already explained previously what this letter is all about. It has been written by the Secretary to the President and addressed to the President of the Bar Association of Sri Lanka (4th Respondent in SC FRA No. 221/ 2021 and SC FRA No. 225/2021, and 5th Respondent in SC FRA No. 228/2021). The said letter is brief enough so that I can reproduce it below:

> *"I refer to your letter dated 24th June 2021, on the above subject addressed to His Excellency the President.*
>
> *I am instructed by His Excellency the President to inform you, that due process as per Article (34)1 of the Constitution of the Democratic Socialist Republic of Sri Lanka has been followed in granting pardon to Mr. Duminda Silva. Accordingly, reports from the Trial Judges, recommendation from Hon. Attorney General and the Minister of justice were called prior to granting of the pardon to Mr. Duminda Silva.*
>
> *Mr. Silva's pardon was given due consideration following the appeal made by his mother Mrs. Romain Malkanthi Silva on 6 th December 2019."*

Other than **1R7**, there is no other document before Court to enable the bench even to attempt to fish out any possible reason which had prompted the former President to decide the grant of the impugned pardon. The document **1R7** being the only document available, has only stated two things. The first is the fact that the due process as per Article 34 (1) of the Constitution has been followed in granting the impugned pardon. The second is that the impugned pardon was given upon the consideration of the appeal made on 6th December 2019 by its recipient's mother Mrs. Romain Malkanthi Silva.

Although **1R7** is the only document submitted by the Hon. Attorney General in regard to any decision/reason/justification for the granting of the impugned pardon, the former president has submitted his affidavit dated 03-02-2023 to this Court in these proceedings. The said affidavit is as follows:

> *"I, Nandasena Gotabaya Rajapaksa of No. 26A, Pangiriwatta Road, Mirihana being a Buddhist do hereby solemnly, sincerely and truly declare and affirm as follows,*
>
> *1) I am the affirmant above named.*

2) *I affirm to the matters set out herein below from my personal knowledge and upon perusal of documents and records available to me.*
3) *I state that I received notices in respect of the captioned matter before Your Lordships' Court.*
4) *I state that at all times material, I acted bona fides and in the interest of the country.*
5) *I specifically deny the insinuation that I granted the pardon due to personal or political affiliation.*
6) *I state that I caused a report to be made by the Judges who tried the case and forwarded the said reports to the Hon. Attorney General with instructions that, the Hon. Attorney General having advised thereon the reports together with the Hon. Attorney General's advice to be sent to the Minister in charge of the subject of Justice who shall intern forward the said reports, the advice of the Hon. Attorney General with his recommendations to the President.*
7) *I state that the due process was duly followed.*
8) *I state that in the said circumstances having considered the material placed before me, I duly and properly exercised powers in terms of Article 34 of the Constitution.*
9) *I state that I exercised my discretion correctly.*
10) *I further state that I have the highest respect for the Supreme Court and will abide by any decision given by Your Lordships' Court.*
11) *I state that the documents relevant to the captioned matter are not with me at present, but I do recall that there have been medical reports that were tendered to me which stated that his medical condition required him to be out of prison. I also recall there were several other representations that were made to me on various other grounds asking that he be pardoned. I also recall that there were several material that necessitated his pardon.*
12) *I state that, the said documents that were tendered to me should be at the Presidential Secretariat.*
13) *I emphasize that I have duly followed the process.*
14) *I state that I cannot be of any further assistance as I do not have access to any of the relevant files.*
15) *In the said circumstances, with respect I state that there is no necessity for me to participate any further in these proceedings.*

*16) In these circumstances I urge that I be excused from participating in these proceedings."*

I need to mention here that my endeavor at this stage, is to try and find reasons which may have prompted the former President to make the decision to grant the impugned pardon. Four such reasons can be gleaned from **1R7** and the above affidavit filed by the former president. They are as follows:

i. He had acted bona fide and in the interest of the country.
ii. He had followed the due process.
iii. He had considered the material placed before him.
iv. He had exercised his discretion correctly.

Let me now turn to the above mentioned first reason. When the former President decided to grant the pardon which is impugned in the instant case, what is the interest of the country he had taken into consideration? To my mind, two sources can reveal this to Court. Firstly, the former President himself because it is only he who knows as to what he himself has stated in his affidavit. Secondly, the documentation that the former President would have left in the Presidential Secretariat when he relinquished his office. Indeed, the former President in his affidavit, has stated that the documents that were tendered to him should be at the Presidential Secretariat. However, Pursuant to the interim order made by this Court on 31-05-2022, Hon. Attorney General had only submitted to this Court, the documents **1R1** to **1R7** which I have already set out above. Although the said interim order has directed the Hon. Attorney General to submit to this Court, the record pertaining to granting of the impugned pardon, other than the above documents, there is no such record submitted by the Hon. Attorney General for the perusal of this Court. Be that as it may, none of the documents submitted by the Hon. Attorney General has ever indicated that the granting of the impugned pardon was based on such a reason. Such basis is not discernible even as an underlying reason. Thus, this position taken up by the former President is not supported either by himself or by the other documentation before this Court. Therefore, I am unable to accept that the former President had acted in the interest of the country when he decided to grant the impugned pardon.

The second reason above mentioned is the fact that the former President had followed the due process. The former President has asserted this, both in paragraph 06 and 07 of his affidavit. While paragraph 07 is a straightforward sentence, formulation of paragraph 07 appears to have been carefully couched in the exact wordings found in the Proviso to Article

34(1) of the Constitution. It is true that the due process to be followed is set out in Article 34(1) of the Constitution. However, the issue is whether that procedure has been followed when the decision to grant the impugned pardon was made by the former President. This issue, I would proceed to discuss later in this judgment.

The third reason is the fact that the former President had considered the material placed before him before he exercised his discretion correctly in terms of Article 34 of the Constitution. According to paragraph 11 of the affidavit submitted by the former President, the material placed before him before he exercised his discretion are not with him at present. In paragraph 12 of his affidavit, the former President states that the documents tendered to him must be at the Presidential Secretariat. It was on that basis that the former President states in paragraph 14 of his affidavit that he cannot be of any further assistance in these proceedings as he does not have access to any of the relevant files. As has been mentioned above, Hon. Attorney General has forwarded to this Court, only the documents I have identified above. Apart from the reports of the judges who heard the case at the High Court at Bar, the advice of the Hon. Attorney General and the recommendation of the Hon. Minister of Justice, there are only two other documents submitted by the Hon. Attorney General which could be regarded as material placed before the President for his decision. Those two documents are **1R1** and **1R2**. The document **1R1** is the appeal made on 06-10-2019 by the recipient's mother Mrs. Romain Malkanthi Silva which is the appeal referred to in the letter (**1R7**) written by the Secretary to the President Mr. P.B. Jayasundara addressed to the President of the Bar Association. The letter **1R2** is also a request dated 19-10-2020 made to the President by 117 Members of Parliament requesting a grant of pardon to the recipient. I would be dealing with the documents submitted by the Hon. Attorney General later in this judgment when I deal with the issue whether the due process set out in Article 34 (1) of the Constitution has been followed when making the decision to grant the impugned pardon.

The fourth reason is the fact that the former President had exercised his discretion correctly. In paragraph 11 of the affidavit, the former President has stated that he recalls that there were several other representations that were made to him on various grounds asking that the recipient be pardoned and also recalls that there was several materials that necessitated his pardon. However, we do not find any such material other than **1R1** and **1R2** amongst the documents submitted by the Hon. Attorney General for the perusal of this court. The question whether the former President had exercised his discretion correctly is closely linked to the issue whether he had considered the material placed before him. Therefore, the question

whether the former President had exercised his discretion correctly is also a matter to be seen later in this judgment.

## WHETHER THE FORMER PRESIDENT HAD FOLLOWED THE DUE PROCESS

It is the position of Mr. Manohara De Silva PC appearing for the 2nd Respondent in SC FRA No. 225/2021, Mr. Gamini Marapana PC appearing for the 2nd Respondent in SC FRA No. 221/2021, Mr. Anuja Premaratne PC appearing for the 4th Respondent in SC FRA No. 228/2021 and Mr. Nerin Pulle PC ASG appearing for the 1A, 1B & 3A Respondents in SC FRA 221/2021, for the 1st and 3A Respondents in SC FRA No. 225/2021 and for the 1A, 1B, 2nd and 6th Respondents in SC FRA No. 228/2021,, that this Court should not exercise its powers of review in the instant case as the due process in relation to the granting of the impugned pardon has been followed. The former President has also re-iterated that he had followed the due process when deciding to grant the impugned pardon. Although Article 33 has listed the duties powers and functions of the president, it has to be highlighted that the power of the President to grant pardon to any offender convicted of any offence by any Court within the Republic of Sri Lanka, has been dealt with in the constitution in a separate Article. The said Article being Article 34 has fully dedicated itself for that subject. Thus, the due process which should be followed by the President when deciding to grant a pardon to any offender who is under death sentence imposed by court, is set out in Article 34 of the Constitution which is self-explanatory on the matter. It is as follows:

***Article 34***

> *"(1) The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka—*
>
> *(a) grant a pardon, either free or subject to lawful conditions;*
>
> *(b) grant any respite, either indefinite or for such period as the President may think fit, of the execution of any sentence passed on such offender;*
>
> *(c) substitute a less severe form of punishment for any punishment imposed on such offender; or*
>
> *(d) remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence;*

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

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

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

*(b) reduce the period of such disqualification.*

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

There is no dispute that the Constitution has vested such power in the hands of the President to grant a pardon to an offender who is under death sentence imposed by court in terms of Article 34(1) of the Constitution. The complaint made before this Court by the Petitioners in these Petitions, is that there is a fetter on the said power vested in the President. The proviso to Article 34 (1) of the Constitution in unambiguous terms has made this position clear. Accordingly, the President is bound by the proviso to Article 34 of the constitution, to follow the steps mentioned therein, before he decides to grant a pardon to an offender who has been sentenced to death by a court. It is prudent to identify the said steps which I proceed to mention below.

i. President shall cause a report to be made to him by the Judge who tried the case.

ii. The President shall forward such report to the Attorney-General with instructions that after the Attorney-General has advised thereon, the report shall be sent together with the Attorney-General's advice to the Minister in charge of the subject of Justice.

iii. The Minister in charge of the subject of justice shall forward the report with his recommendation to the President.

The documents tendered by the Attorney General include, the reports tendered by the judges who heard the case before the High Court-at-Bar. It is relevant at this stage to quote the operative parts of the reports of the two learned High Court Judges, who by majority judgment convicted the recipient of the pardon. They are as follows,

**Conclusion of the report by High Court Judge M. C. B. S. Morais on 04-05-2021.**

> *"I understand that the prisoner was a politician. The role of a Politicians in a democratic society is to lead people and to set an example to the others by conduct. In this incident 4 persons were murdered and another was attempted to murder in addition to possessing an illegal firearm. In my view, any pardon considered for the prisoner, would not tally with the norms of a Democratic society.*
>
> *In the light of the above, I do not recommend any pardon being considered presently. However, as Your Excellency has a Constitutional discretion, I leave it at Your Excellency's hands."*

**Conclusion of the report by (Retired) High Court Judge Padmini N. R. Gunatilake on 11-05-2021.**

> *"In the aforesaid circumstances, it is my view that Mr. Duminda Silva was correctly and lawfully convicted and sentenced to death, and therefore, I cannot recommend that he be pardoned by Your Excellency."*

The learned High Court Judge who decided to acquit all the accused after the trial, for obvious reasons, in his report, had merely reiterated his decision to acquit all the accused and left it at that.

After the receipt of the reports by the three Judges who heard the case before the High Court-at-Bar, the Secretary to the President by letter dated 31-05-2021 (produced marked **1R3**), had forwarded the said reports to the Hon. Attorney General requesting him to provide his advice on the matter to the Hon. Minister of Justice.

The Hon. Attorney General by his letter dated 21-06-2021 (produced marked **1R5**), had advised the Hon. Minister of Justice. In doing so, Hon. Attorney General in **1R5**, had at the outset, highlighted the following salient features of the case:

1. *The recipient of the pardon along with twelve others were charged before the High Court at Bar on seventeen counts on the information exhibited by the Attorney General. Those counts included charges of being members of an unlawful assembly; commiting offences of criminal intimidation; murder of four persons; attempting to murder another person; possession of a T-56 automatic gun an offence punishable under the Fire Arms Ordinance whilst being members of the said unlawful assembly,*
2. *At the trial, 47 witnesses had testified. The High Court-at-Bar had also received in evidence around 170 documents and productions. The accused including the recipient of the pardon had also given evidence,*
3. *The counts upon which the recipient of the pardon was convicted included four charges of murder, one count of attempted murder and two charges of criminal intimidation,*
4. *The recipient of the pardon was sentenced inter alia to death in respect of each count of murder; and, to a term of 20 years' rigorous imprisonment on the count of attempted murder.*
5. *Both the convictions and sentences on the recipient of the pardon and three others were upheld by a five judge Bench of the Supreme Court on 11th October 2018, in SC/TAB/2A-D/2017.*

Having set out the above salient features of the case, Hon. Attorney General had then advised to the Hon. Minister of Justice on the issue of granting the pardon. The following can be extracted from **1R5**, as those pieces of advice.

1) *In the above context, it may be noted that the exercise of the said power of pardon by His Excellency the President under Article 34 of the Constitution, is the subject matter of several Fundamental Rights cases presently pending before the Supreme Court.*
6. *Therefore any exercise of the such power of pardon by His Excellency the President under Article 34 of the Constitution should be capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria.*
7. *As enunciated by Justice Holmes of the United States Supreme Court in the case of Biddle v. Perovich, [71 L. Ed. 1161 at 1163]:*

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

*Further, the classic exposition of the law relating to pardon is to be found in Ex Parte Philip Grossman where Chief Justice Taft stated:*

*"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgements. [69 L. Ed. 527] "*

5. *Accordingly, from the forgoing it emerges that power of pardon, remission can be exercised upon discovery of an evident mistake in the judgment or undue harshness in the punishment imposed.*

After receipt of the Hon. Attorney General's advice, the Hon. Minister of Justice has sent the letter dated 23-06-2021 (produced marked **1R6**), to the President. The perusal of the said letter **1R6** reveals that the Hon. Minister of Justice also had not made any positive recommendation to grant the impugned pardon.

The above material show that two of the learned High Court Judges who convicted and sentenced the recipient of the pardon had not recommended to the former President to grant the impugned pardon in this instance. The report submitted by the learned High Court Judge who decided to acquit all the Accused in his judgment is not helpful with regard to the question of propriety of granting the impugned pardon. The letter produced marked **1R3** is only a letter presented by the Secretary to the President which had forwarded the reports submitted by the learned High Court Judges to the Hon. Attorney General. In the letter **1R5**, the Hon. Attorney General had clearly advised the Hon. Minister of Justice about the correct legal position with regard to the decision-making process relating to the granting of a pardon by the President. This is set out in no uncertain terms in paragraph 3 of that letter which reads as follows: *"As such, the exercise such power of pardon by His Excellency under Article 34 of*

*the Constitution in the above circumstances should be capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria."*

As has already been mentioned above, Hon. Attorney General has gone to the extent of citing the two dicta taken from the judgments cited in his letter. Contents of those dicta (which I have previously reproduced in this judgment) indicate that Hon. Attorney General had deliberately drawn the attention of the Hon. Minister of Justice to those two dicta with a view to highlight the fact that it is not open under our law for the President to make a subjective decision to grant the impugned pardon particularly when it does not pass the test of rationality, reasonableness, intelligible and objective criteria.

Finally, the Hon. Attorney General in his letter has advised the Hon. Minister of Justice that the *"power of pardon, remission can be exercised upon discovery of an evident mistake in the judgment or undue harshness in the punishment imposed."*

Next question is whether the Hon. Minister of Justice had considered and acted on the advice of the Hon. Attorney General. The only place where there is a reference to the advice of the Hon. Attorney General in the report submitted by the Hon. Minister of justice to the former President is the last paragraph of that letter. The report of the Hon. Minister of justice submitted to the President produced marked **1R6** is as follows:

> *"His Excellency Gotabaya Rajapaksa,*
>
> *President of Sri Lanka,*
>
> *Presidential Secretariat,*
>
> *Colombo 01.*
>
> *Your Excellency,*
>
> ***Grant of Pardon to Arumadura Lawrence Romelo Duminda Silva***
>
> ***High Court Case No. HC/7781/2015***
>
> *A.L.R.D. Silva along with twelve others was charged with being members of an unlawful assembly, criminal intimidation, murder of 04 persons, attempted murder of one person and possession of T56 automatic gun.*

*After trial, the High Court at Bar, acquitted eight accused and convicted the said A.L.R.D. Silva and four others. A.L.R.D. Silva was convicted on four charges of murder, one count of attempted murder and two charges of criminal intimidation. He was sentenced to death in respect of each count of murder and to a term of 20 years rigorous imprisonment on the count of attempted murder. The conviction and sentence were by a majority decision of 03 trial Judges of the High Court at Bar.*

*The presiding Judge wrote a dissenting judgment disagreeing with the majority decision and expressed the view that the testimonial trustworthiness of all eye witnesses of the prosecution was in issue.*

*Conviction and sentences on Silva and three others were upheld by a five Judge Bench of the Supreme Court. Hon. Justice Shiran Gooneratne in a communication to the Secretary to the President has expressed the view that all accused in this case should be acquitted of all counts on the indictment.*

*Hon. M.C.B.S. Morias, High Court Judge, in his report submitted under Article 34 of the Constitution with regard to the prisoner opined that in considering a pardon, H.E the President may consider whether the objectives of giving a pardon were achieved and the extent of such achievement. He noted that if the sentence is converted to years of imprisonment, it would be equivalent to 132 years of imprisonment and the prisoner has so far served only 4 years and 8 months approximately.*

*I have been advised by the Hon. Attorney General by his letter dated 21st June 2021 (copy annexed) to take the following factors into consideration when recommending to your excellency a pardon under Article 34 of the Constitution on the above-mentioned prisoner.*

*(a) Interest of the society and the convict;*
*(b) The period of imprisonment undergone and the remaining period;*
*(c) Seriousness and relative recentness of the offence;*
*(d) The age of the prisoner and the reasonable expectation of his longevity;*
*(e) The health of the prisoner especially and serious illness from which he may be suffering;*

*(f) Good prison record;*

*(g) Post-conviction conduct, character and reputation;*

*(h) Remorse and atonement;*

*(i) Deference to public opinion. ……*

*Accordingly, it is a matter for Your Excellency to exercise the discretion vested with Your Excellency under Article 34 of the Constitution. "*

Mr. Sumanthiran PC referring to the 3rd paragraph in that letter submitted to court that the assertion by the Hon. Minister of Justice that *"Hon. Justice Shiran Gooneratne in a communication to the Secretary to the President has expressed the view that all accused in this case should be acquitted of all counts on the indictment"* is false. The report [**1R4(a)**] submitted by the presiding Judge of the Trial-at-Bar Hon. Justice Shiran Gooneratne is a short report. It is as follows:

**මරණීය දඬුවම් නියම වී බන්ධනාගාරගතව සිටින අයට ජනාධිපති සමාව ලබා දීම.**

නම : අරමාදුර ලෝරන්ස් රෙමෙලෝ දුමින්ද සිල්වා

මහාධිකරණ නඩු අංකය : HC/7781/2015 මහාධිකරණය, කොළඹ 12

උක්ත කරුණට අදාළව ඔබගේ PS/CSA/00/9/3/115 අංක දරණ හා 2021 අප්‍රේල් මස 21 දිනැති ලිපිය හා බැඳේ.

ඉහත සඳහන් නඩුවෙහි ගරු පද්මිණී රණවක සහ ගරු චමත් මොරායස් යන විනිසුරුවරුන් සමග මම සභාපති විනිසුරු වශයෙන් කටයුතු කළ බව සනාථ කරමි. එකී නඩු විභාගය අවසානයේදී ගරු පද්මිණී රණවක සහ ගරු චමත් මොරායස් යන විනිසුරුවරුන් විසින් බහුතර තීන්දුවක් ප්‍රකාශයට පත් කරමින් ඉහත සඳහන් ඒ.එල්.ආර්. දුමින්ද සිල්වාට විරුද්ධව නාග ඇති චෝදනාවන්ට වරදකරු කරමින් දඬුවම් නියම කර ඇති අතර, මා විසින් ප්‍රකාශිත නඩු තීන්දුවේ සඳහන් හේතූන් මත සියලු චූදිතයන් නිදොස් කොට නිදහස් කර ඇත.

මෙයට- විශ්වාසී,

ඒ.එල්. ශිරාන් ගුණරත්න

ශ්‍රේෂ්ඨාධිකරණ විනිසුරු

Thus, I observe that Hon. Justice Shiran Gooneratne in his report **1R4(a)**, had not expressed the view that all accused in this case should be acquitted of all counts on the indictment. All His Lordship had stated in his communication to the Secretary to the President is the fact that he had acquitted all the accused from all counts in the indictment for the reasons he had set out in his judgment. Therefore, other than repeating the effect of his judgment which was by that time well known to everyone concerned, Hon. Justice Shiran Gooneratne had not expressed any fresh view on the matter. He is also silent about any recommendation with regard to granting or not granting of the impugned pardon. Therefore, on a strict interpretation, the statement by the Hon. Minister of Justice that *"Hon. Justice Shiran Gooneratne in a communication to the Secretary to the President has expressed the view that all accused in this case should be acquitted of all counts on the indictment"* contained in his recommendation [**1R4(a)**] to the President is not supported by the contents of the report made by Hon. Justice Shiran Gooneratne. I observe that a similar statement is found in **1R5** whereby the Hon. Attorney General had advised the Hon. Minister of Justice. Thus, it appears that the Hon. Minister of Justice had adopted this statement from **1R5**.

Although the Hon. Attorney General by **1R5** had advised the Hon. Minister of Justice to take into consideration the factors set out in (a) to (i) therein when making a recommendation to the President in relation to a pardon under Article 34 of the Constitution, I observe that the Hon. Minister of Justice had failed to make his own recommendations to the President on any of those factors set out in items (a) to (i) mentioned in the last page of **1R5**. The Hon. Minister of Justice had merely reproduced those factors in verbatim in the same form they are listed in the letter he had received from the Hon. Attorney General. However, the Hon. Minister of Justice had clearly recognized in his report as advised by the Hon. Attorney General, that those factors set out in his report must be taken into consideration when the President makes the decision to grant a pardon under Article 34 of the Constitution. Neither the Hon. Minister of justice nor the Hon. Attorney General has placed any material to convince us that either the Hon. Minister of justice or the former President had complied with this advice provided by the Hon. Attorney General.

The question arises as to which official (the stakeholders referred to in Article 34 of the Constitution) had recommended to the former President that the impugned pardon should be granted. The answer clearly is that no such stakeholder had ever recommended to the President that this offender must be granted a pardon.

What is the effect of the non-compliance of the Hon. Attorney General's advice to the Hon. Minster of Justice? The effect of such non-compliance has been mentioned by the Hon. Attorney General himself in **1R5**. The most important feature highlighted by the Hon. Attorney General in **1R5** is that in order to grant a pardon, the former President must have reasons which must be capable of being assessed objectively and those grounds should be capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria. The question then is whether the exercise of power by the former President under Article 34 of the Constitution in the instant case is capable of withstanding the test of rationality, reasonableness, intelligible and objective criterion as pointed out by the Hon. Attorney General. The Hon. Attorney General has made it clear that the pardon is not a private act of grace from an individual possessing power but is a part of the Constitutional scheme. The Hon. Attorney General is right. The Hon. Minister of justice had merely reproduced only a part of the advice provided to him by the Hon. Attorney General. Be that as it may, in the absence of any material I have to conclude that the former President for the reasons best known to him had opted not to take into consideration, at least any of those factors set out in (a) to (i) in **1R5**. Is this following due process? By any yard stick it is not.

The former President has not followed due process when making the decision to grant the impugned pardon; the former President had opted not to adhere to the Hon. Attorney General's advice; the former President had not at all considered what the law has required him to consider. Thus, I am unable to hold that the former President had exercised his discretion correctly.

**SECTION 3 (q) OF THE ACT NO. 04 OF 2015.**

Another Complaint made by the Petitioners is that the former president has completely ignored the legal provisions in Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 as amended. The said section reads as follows:

> "***3.*** *A victim of crime shall have the right :-*
>
> *a) ……..*
> *b) ……..*
> *c) ..*
>
> *……*

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

One of the four charges of murder upon which the recipient of the pardon was convicted and sentenced was in relation to the death of Bharatha Lakshman Premachandra. The Petitioner in SC FRA No. 221/2021 is the daughter of said Bharatha Lakshman Premachandra. The Petitioner in SC FRA No. 225/2021 is the wife of the said Bharatha Lakshman Premachandra. Section 46 of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 04 of 2015 has defined the term 'victim of crime' appearing in section 3 of the Act. The said definition is as follows:

*"46. In this Act, unless the context otherwise requires-*

*….*

*"victim of crime" means a person including a child victim who has suffered any injury, harm, impairment or disability whether physical or mental, emotional, economic or other loss, as a result of an act or omission which constitutes an alleged-*

*(a) Offence under any law ; or*

*(b) infringement of a fundamental right guaranteed under Articles 13(1) or (2) of the Constitution, and includes a person who suffers harm as a result of intervening to assist such a person or to prevent the commission of an offence, and the parent or guardian of a child victim of crime and any member of the family and next of kin of such person, dependents and any other person of significant importance to that person ;"*

Thus, in terms of the relationship the Petitioners in SC FRA No. 221/2021 and SC FRA No. 225/2021 have towards one of the deceased of the case, they must be considered as victims of that crime. Therefore, by virtue of the above provisions of law, those Petitioners are entitled to receive a notice by any person in authority considering the grant of the person convicted in respect of the crime in which they are victims.

Nether the learned President's Counsel who appeared for the recipient of the pardon in the instant cases nor Mr. Nerin Pulle PC ASG appearing for the 1A, 1B & 3A Respondents in SC FRA 221/2021, for the 1st and 3A Respondents in SC FRA No. 225/2021 and for the 1A, 1B,

2nd and 6th Respondents in SC FRA No. 228/2021 took up a position that the former President had in fact complied with Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015. Their argument in respect of this complaint is that the provisions in the Constitution, namely Article 34 must prevail over Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 which is an ordinary law. They cited certain judgments in support of the proposition that the Constitutional provisions must prevail over the provisions in ordinary law.

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. Thus, I am unable to accept the above argument as a justification for the former president's non-compliance/complete ignorance of the provisions in Section 3 (q) of the Assistance to and Protection of Victims of Crime.

Moreover, the complaint made to this Court by the Petitioners in the instant case, is that their Fundamental Rights guaranteed under Article 12 (1) of the Constitution for equal protection of law has been infringed by the acts of the President done in his official capacity. The Fundamental Right of equal protection of law, guaranteed to the people of this country by Article 12 (1) of Constitution necessarily means, that the citizens must be protected not only by the provisions of the Constitution but by the provisions of all general laws as well.
This Court has consistently held that the President is not only bound by law, but it is also the duty of the President to uphold the law. The law here not only means the Constitution but every other law also. Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act is yet another law passed by Parliament. Therefore, no one, including the President can ignore it. Why? Because the Parliament has exercised the legislative power of the people in as much as the President also exercises the executive power of the people. The sovereignty is vested in the people of this country and not in the President of the country.

The President of the country is bound, and it is his duty to uphold the law of the country. This is set out in Article 33(h) of the Constitution. Indeed, that Article calls upon the President not to do acts and things which would be inconsistent with the provisions of not only the Constitution or written law, but also international customs or usage.

Article 33(h) requires the President to do all acts and things in accordance with the provisions of the Constitution or written law. (The wordings used in that sub-article "*to do all such acts and things*"). Then the question arises as to what is meant by the wordings used in that sub-article "all such acts and things". The answer to this could be found at the beginning of Article 33(2) which states thus, "*in addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law, the President shall have the power"* to do the things set out in items (a) to (g). Thus, above phrase in Article 33 shows clearly that it is not only the Constitution but the written law also has set out *the powers, duties and functions* of the President. The provisions in section 3(q) of the Assistance to and Protection of Victims of Crime and Witnesses Act therefore does not violate or is contrary to the provisions of the Constitution.

On the other hand, the Constitution itself by Article 33 (h) has placed a fetter on the President not to do any act or thing which is inconsistent either with the provisions of the Constitution or the provisions in the written law. It is therefore not open to interpret Article 34 of the Constitution as giving an unrestricted power exercise of which can be done in violation of other laws. Thus, it would not be lawful for the President to exercise the power vested in him by Article 34 in a manner that is violative of any provision of the written law.

I also observe that this court in *R. Sampanthan's* case has adopted the above principle and held that the President has to comply with Article 33(h) even when exercising the power vested in him by Article 70 of the Constitution. The point I make here is that this court had held that this principle is applicable even when the President exercises the power under Article 70 which is not a power listed under Article 33. Thus, I conclude that Article 33(h) must apply not only to the items listed in Article 33 but also to all the powers exercisable by the President under the Constitution or any written law. To hold otherwise would be to erode and undermine the sovereignty of the people of this country and the rule of law in the country.

This was aptly demonstrated by this Court in the case of, *Sugathapala Mendis and Another Vs. Chandrika Kumaratunga and others (water's edge case),*[41] in which Shiranee Tilakawardane, J held as follows:

> *"The principle that those charged with upholding the Constitution – be it a police officer of the lowest rank or the President – are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of*

[41] 2008 2 SLR 338 at page 352.

*the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public Trust Doctrine" is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review (Vide De Silva v Atukorale;[42] Jayawardene v Wijaya tilake.[43])"*

Shiranee Tilakawardane, J in the above case, went on to cite with approval, a paragraph from the judgment of *Sarath N. Silva CJ* in*Senerath Vs. Kumaratunga,*[44]which could be more fully seen in the following quotation taken from Shiranee Tilakawardane, J's judgment in *Sugathapala Mendis's* case.

*"..His Lordship, Sarath N. Silva in Senerath v Kumaratunga, espoused in the context of inappropriate action by the 1st respondent, that:*

> *"The case of the petitioners is that the 1st respondent and the Cabinet of Ministers of which she was the head, being the custodian of executive power should exercise that power in trust for the People and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from this Court as to the infringement of the fundamental right to equality before the law".*[45]

*"I am in full agreement with the spirit of His Lordship's characterization of the 1st respondent's responsibility. The expectation of the 1st respondent as a custodian of executive power places upon the 1st respondent a burden of the highest level to act in a way that evinces propriety of all her actions. Furthermore, although no*

[42] 1993 (1) Sri L. R. 283, 296-297.
[43] 2001 (1) Sri L. R. 132, 149, 159.
[44] 2007 (1) Sri L. R. 59.
[45] At page 380.

*attempt was made by the 1st respondent to argue such point, we take opportunity to emphatically note that the constitutional immunity preventing actions being instituted against an incumbent President cannot indefinitely shield those who serve as President from punishment for violations made while in office, and as such, should not be a motivating factor for Presidents - present and future - to engage in corrupt practices or in abuse of their legitimate powers. That the President, like all other members of the citizenry, is subject to the Rule of Law, and consequently subject to the jurisdiction of the courts, is made crystal clear by a plain reading of the Constitution, a point conclusively established in Karunathilaka v Dissanayake by Justice Fernando:..".*[46]

Thereafter, having cited the dicta of Fernando J in *Karunathilaka* Vs. *Dayananda Dissanayake*, which I have previously cited in this judgment (Foot Note 19), Her Ladyship Shiranee Tilakawardane, J went on to observe the following as well:

*"Such a conclusion is unequivocal. To hold otherwise would suggest that the President is, in essence, above the law and beyond the reach of its restrictions. Such a monarchical/dictatorial position is at variance with (1) the Democratic Socialist Republic that the preamble of the Constitution defines Sri Lanka to be, and (ii) the spirit implicit in the Constitution that sovereignty reposes in the People and not in any single person".*[47]

It is apt at this stage to show how in *Senarath and others Vs. Chandrika Bandranayake Kumaratunga and others*,[48] Sarath N. Silva (CJ), had highlighted the fact that the executive power should not be identified with the President and personalized but should be identified at all times as the power of the People. The relevant portion from that judgment is as follows:

*"In the context of this submission it is relevant to cite from the Determination of a Divisional Bench of seven Judges of this Court in regard to the 19th Amendment to the Constitution.*[49] *The Court there laid down the basic premise of the Constitution as enunciated in Articles 3 and 4, that the respective organs of government are reposed power as custodians for the time being to be exercised for the People. At 96 the Court has made the following determination in regard to sovereignty of the People and the exercise of power.*

[46] At page 380.
[47] At page 381 and 382.
[48] 2007 (1) Sri L. R. 59 at 73 and 74.
[49] 2002 (3) Sri L. R. 85.

*"Sovereignty, which ordinarily means power or more specifically power of the State as proclaimed in Article 1 is given another dimension in Article 3 from the point of the People to include -*

*(1) the powers of Government.*

*(2) the fundamental rights; and*

*(3) the franchise.*

*Fundamental rights and the franchise are exercised and enjoyed directly by the People and the organs of government are required to recognize, respect, secure and advance these rights.*

*The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4(a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament, executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub paragraph that the legislative power "of the People" shall be exercised by Parliament, the executive power "of the People'" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People (at page 98). Therefore, executive power should not be identified with the President and personalized and should be identified at all times as the power of the People".*

The above legal literature makes it crystal clear that the President of the country is bound, and it is his duty to uphold the law of the country. As set out in Article 33(h) of the Constitution, it has only empowered the President to do acts and things which would not be inconsistent with the provisions of the Constitution or written law. Thus, in this instance I hold that the former President has clearly violated the provisions in Section 3 (q) of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015. This violation must be viewed

as a yet another violation which has happened in the course of the pardon-granting process relevant to the instant case where the former President had failed to comply with the due process in granting the said impugned pardon. This too would be another reason to reject the assertion by the former President that he had exercised his discretion correctly and he had followed the due process in granting the impugned pardon in the instant case.

When the granting of the impugned pardon is not capable of withstanding the test of rationality, reasonableness, intelligible and objective criteria as highlighted by the Hon. Attorney General in **1R5**; when the pardon is not a private act of grace from an individual possessing power but is a part of the Constitutional scheme as advised by the Hon. Attorney General in **1R5**; when taking into consideration the resources used by the State to administer justice in this case as demonstrated above; when there is neither a decision nor any reason for the granting of the impugned pardon; I have to accept the Petitioners argument that the instant grant of pardon to the recipient of the pardon, by the former President of the Country, has totally eroded the confidence the public has reposed in the criminal justice system of the country.

**REASONS/JUSTIFICATION SUBMITTED BY COUNSEL.**

Amongst the document the Hon. Attorney General has submitted to this Court pursuant to the interim order made by this Court, there are only two requests received by the President requesting that a pardon be granted to the recipient. They are the request made by the mother of the recipient of the pardon (**1R1**) and the request signed by 117 Members of Parliament (**1R2**). Although the learned President's Counsel who appeared for the recipient of the pardon referred to some other requests also, the Hon. Attorney General has not submitted any of such requests as those having received by the President. Therefore, I have to proceed on the basis that it was only those two requests which were placed before the President. On the other hand, the grounds upon which whoever may have made such requests are more or less similar and therefore no prejudice would be caused to the recipient of the pardon by such conclusion. This can be seen by the copies of some of such requests produced by the recipient of the pardon with his pleadings.

The grounds upon which the writers of those letters had requested that a pardon be granted to the recipient are as follows:

i. the fact that the recipient of the pardon had suffered head injuries due to gun shot injuries,

ii. the fact that the judgment of the High Court at Bar is partisan due to collusion between one of the judges giving the majority judgment and an interested politician as revealed by some telephone recordings,

iii. the fact that the Court had not arrived at a correct conclusion in view of the affidavit submitted by the driver of Bharatha Lakshman Premachandra referred to as "Bole" in 2012 to the Attorney General's Department,

iv. the fact that one of the judges delivering the majority judgment, Hon. M. C. B. S. Morais had simply agreed with the judgment of Hon. Padmini Ranawaka without analysing as to why he arrived at such a decision,

v. the fact that the verdict was divided.

It was on those grounds that the learned President's Counsel who appeared for the recipient of the pardon submitted that there was enough material before the former President to decide to grant the impugned pardon. They submitted that the Court cannot review that decision on the merits and substitute its decision on the matter with the decision of the President of the republic.

Mr. Anuja Premaratne PC, appearing for the 4th Respondent in SC FRA No. 228/ 2021 referring to the telephone recordings he had relied upon, sought to argue that such accusations of bias on the part of a judge giving the majority judgment could be a factor which the former President could have considered when granting the impugned pardon.

As has been mentioned at the outset in this judgement, the apex court had affirmed the conviction and the sentences imposed on the recipient of the pardon in the instant case. That is after carefully going through the evidence adduced in the case and after hearing the submissions of the learned Counsel including the learned Counsel who had appeared for the Accused-Appellants in that case. Thus, it is not open for the convicted accused to re-agitate such a final decision by Court. Moreover, what is alleged to have not considered is an affidavit submitted by the driver of Bharatha Lakshman Premachandra in 2012 to the Attorney General's Department. Therefore, I am unable to consider the argument that the Court had not arrived at a correct conclusion when it convicted the recipient of the pardon in the instant case.

The grounds of bias on the part of one of the learned High Court Judges is only a ground put forward by the learned President's Counsel who appeared for the recipient of the pardon. The former President in his affidavit has not stated that he had decided to grant the impugned pardon on that basis. In the absence of any material to that effect, I am unable to conclude

that the former President had indeed decided to grant the impugned pardon on that basis. In any case, I have held before that the Respondents have failed even to produce the decision of the President of the country to grant the impugned pardon to the recipient. I also have not been able to fish out a single reason as the basis on which the former President had decided to grant the impugned pardon to the recipient. In such a scenario, I find it impossible if not difficult to accept the reasons/justifications submitted by the learned President's Counsel who appeared for the recipient of the pardon as the reasons/justifications the former President may have had for his decision to grant the impugned pardon.

I have to hold the same in regard to the argument that the former President had decided to grant the impugned pardon to the recipient as he had suffered head injuries. It is relevant to note here that it is the Hon. Minister of Justice who would have been in a better position to ascertain the correct position regarding the health/treatment conditions of the recipient of the pardon since the Prisons come under the direct purview of his Ministry. However, the Hon. Minister of Justice in his report had not recommended that a pardon be granted to the recipient on such basis.

Since this Court had granted Leave to Proceed in the instant case for the complaint by the Petitioners that their Fundamental Rights guaranteed under Article 12 (1) of the Constitution for equal protection of law has been infringed by the acts of the President, it is relevant for me to mention about the presence of the other convicted accused in this case. If the recipient of the pardon stands wrongly convicted as claimed by him because one of the High Court Judges in the Trial at Bar was bias, it is needless to say, that all the other accused in this case also stand on similar circumstances. The question then arises as to why the former President picked on just one accused, namely the recipient of the pardon in the instant case out of many accused to grant a pardon on that basis. Does such a move stand the test of rationality, reasonableness, intelligibility and objectivity. The answer clearly is no. Such a move adopted by the former President would be more indicative of an arbitrary action rather than an objective decision. This is more so in the absence of any reason either for the decision to grant the impugned pardon or for picking on the recipient of the pardon in the instant case from amongst other accused of the case.

I do not think I have to deal in detail, the fact that one of the judges delivering the majority judgment Hon. M. C. B. S. Morais had simply agreed with the judgment of Hon. Padmini Ranawaka without analysing as to why he arrived at such a decision and the fact that the verdict was divided as they are common occurrences in our judicial system. Suffice to say that there is nothing unusual or wrong in them as that is the way they happen.

**CONCLUSION**

For the foregoing reasons, I have no legal basis or even a factual basis to uphold the decision made by the former President to grant a pardon to the recipient in the instant case. I hold that the said decision is arbitrary, irrational and has been made for the reasons best known to the former President who appears to have not even made any written decision and has not given any reason thereto. Futher, no reason can be discerned from any document submitted by Hon. Attorney General as forming part of the record pertaining to the impugned grant of pardon. The Petitioners are therefore entitled to succeed with their petitions.

I proceed to grant the following relief to the Petitioners in SC FRA No. 221/ 2021, SC FRA No. 225/ 2021 and SC FRA No. 228/ 2021:

a) declaration that the Fundamental Rights guaranteed to the Petitioners by Article 12(1) of the Constitution have been infringed by the act of granting the afore-stated pardon to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President) acting in his official capacity;

b) declaration that the decision to grant the pardon to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President) is null and void and of no force or avail or any effect in law;

c) declaration that the pardon granted to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President) is null and void and of no force or avail or any effect in law;

I proceed to quash the decision to grant the pardon to Arumadura Lawrence Romello Duminda Silva who stands as the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021 by the President of the country (former President).

I direct the Commissioner General of Prisons to take necessary steps in terms of law with regard to the implementation of the sentences imposed on Arumadura Lawrence Romello Duminda Silva (the 2nd Respondent in SC FRA No. 221/2021 and SC FRA No. 225/2021 and the 4th Respondent in SC FRA No. 228/2021) as per the judgments of Court (the judgment of

High Court of Colombo Case No. 7781/2015 read with the judgment of Supreme Court in case No. SC/TAB/2A-D/2017).

I make no order in relation to costs.

**JUDGE OF THE SUPREME COURT**

**E. A. G. R. Amarasekara, J**

**I agree,**

**JUDGE OF THE SUPREME COURT**

**Arjuna Obeyesekere J**

**I agree,**

**JUDGE OF THE SUPREME COURT**