I beg your pardon, the grant of the President's Pardon.

Justice Anil Gooneratne

(Former Judge of the Supreme Court)

Constitutional provisions recognised the Grant of Pardon by the Head of State, as referred to in Article 34 of the Constitution. Article 34 includes 3 sub-paragraphs. Each of those sub-paragraphs need to be carefully considered to ascertain what intentions are attributed to them. This article explores the historical aspect of a 'pardon' and the consequences of its invocation, and further discusses the abuses of the power to 'pardon' and resulting impacts.

Article 34 of the Constitution reads thus:

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 anyone of such principal offenders, if more than one.

In all 3 paragraphs referred to previously, the general object and the subject matter are connected by the word "may". This would indicate that the power to pardon is a discretion vested in the Head of State, and is required to be exercised in accordance with the provisions of Article 34, as and when the necessity arises. The grant of Pardon by the President of the country to a convict is a very serious matter which should not be done in a haphazard manner. It needs to be undertaken only after serious consideration of all facts and circumstances and only if the law permits after a proper consultative process, while bearing in mind the security and safety of society. It should never be a decision which is politically motivated. This is because the criminal was convicted by a Court of competent jurisdiction after trial and/or upon when the conviction is affirmed by the Appellate Courts. As such, due process is presumed to have been followed and adopted. It is the Court that should decide on the guilt of a person and not the Executive. Thus, interpretation of Article 34 to determine if the requirements therein are mandatory or merely directory necessitates careful consideration of the following principles:

1) It is impossible to lay down any general rule for determining whether a provision is imperative or directory.

2) "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be constructed." [Maxwell, 'On the Interpretation of Statutes', 12th Edition, p 314]

3) Enactments which confer powers are so construed as to meet all attempts to abuse them, and so the court will always be ready to inquire into the bona fides of a purported exercise of a statutory power. The modern tendency seems to be against construing statutes so as to leave the person or body upon whom a power is conferred absolutely untrammelled in the exercise of it.

4) "'A discretion' said Lord Wrenbury, 'does not empower a man to do what he likes merely because he is minded to do so-he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.' In the words of Lord Macnaghten: 'It is well settled that a public body invested with statutory power …must take care not to exceed or abuse its powers. It must act in good faith. And it must act responsibly'". [Maxwell, 'On the Interpretation of Statutes', 12th Edition, p. 146]

Article 34 of the Constitution, and sub-paragraph (1) of the same refer to <u>any offence</u> where an offender is convicted by a court of law. As such, in a fit and proper case, the Head of State could act in terms

of paragraphs (a), (b), (c) or (d) of subsection (1) of Article 34.

However, the proviso to subsection (1) of Article 34 specifically refers to an offender who is given the capital punishment or condemned to suffer death penalty. In such circumstances, the Legislature has specifically contemplated a certain method to be adopted before the Head of State decides to act in accordance with paragraphs (a), (b), (c) or (d) of sub-section 1 of Article 34.

To commit the offence of murder is the most heinous and most serious crime. To let loose a convict of murder requires considerable scrutiny, and the Head of State needs to be mindful that a pardoned convict could be a danger to society. How can anyone guarantee that the convict, once released, would not commit another offence or the offence of murder? This is a difficult question to answer. Does the decision-maker take a risk, or is it done for extraneous reasons? Both may end up in disastrous consequences. Whatever the consequences, the Head of State should not grant mercy to an offender if there is an apparent risk and a likelihood of the society being put in any danger and/or a risk to the victim's family.

The proviso to subsection (1) of Article 34 requires that the Judge who issued the death sentence must provide a report to the Head of State, who will refer it to the Hon. Attorney General, who is required to advise the Minister of Justice on the above report of the Judge. The minister, in turn, is expected to consider the report, and make a recommendation to the President. No doubt the law contemplates that the decision to grant a pardon to a person on death row is considered by three institutions, i.e.: the Judiciary, the Attorney General, and the Minister of Justice. However, it is arguable that the Prisons Department should also be required to submit a report regarding the convict, on the basis that the Prisons Department would be the only source of direct contact with the prisoner. Notwithstanding the above, the Prison's Ordinance could grant a parole (Board of Paroles) to a prisoner, considering the prisoner's good behaviour. In any event, a very cautious approach is highly essential to ensure that society is protected.

I wish to observe that when it comes to 'any offender', (that is, where the offender has not received a death sentence) what would be the position of a convict guilty of rape, gang rape, or sexual offence? Can a pardon be extended as above? It would be difficult to fathom the prisoner's mental state and the possibility of a repetition of a sexual offence after a grant of pardon. We need to also consider the offence of theft, robbery, cheating, fraud, criminal breach of trust, offence against public property, etc. Each of these offences are considered serious crimes. Could the Head of State merely resort to Article 34 unless for health reasons, advanced age, or proven reformation of the prisoner? The Head of State needs to take an extra cautionary decision if and when he decides to act as contemplated by Article 34. If not, the society and the victim are bound to suffer. Such arbitrary grants of pardon will also be contrary to the public's interest if it is politically motivated. The law does not recognise absolute power of any authority, inclusive of the Head of State.

The State has to guarantee the safety and security of all citizens. Equal protection of the law is guaranteed under Article 12 (1) of the Constitution. If a grant of a pardon is made under Article 34 of the Constitution it could be challenged in the Supreme Court if it violates a person's fundamental rights, as embodied under Chapter III of the Constitution.

The power to pardon is subservient to the rule of law.

The basic law of the country, the Constitution, safeguards and guarantees the fundamental rights of a person. Thus, subjects of the law are protected from executive and administrative violations. It emanates from the rule of law.

In the case of **Elmore Perera vs Major Montague Jayawickrema [1985] 1 Sri L.R. 285**, it was held by Chief Justice Sharvananda that "[o]ur Constitution is certainly founded on the rule of law. The rule of law has a number of different meanings and corollaries. The primary meaning is that everything must be done according to the law. No member of the executive can interfere with the liberty or property of the subject…Another meaning of the rule of law, is that it implies an absence of wide discretionary powers in the Government, to encroach on personal liberty or private property. An absence of discretionary power is thus kept in check. Rule of law requires that the Court should prevent such abuses."

The equal protection clause of the Constitution is a powerful tool to prevent abuses of executive acts. It has universal application and has been developed over the years, not only in Sri Lanka, but also in other jurisdictions. Thus, executive acts can be questioned and reviewed by Courts, inclusive of the power to grant a pardon by the Head of State. The following important case law directly or indirectly supports my views, though the then judges of the Supreme Court were called upon to decide questions on different subject matters to a grant of pardon, and the dicta in those cases would apply equally to a grant of pardon as they question the executive powers.

In the decisive judgment in **Visuwalingam vs Liyanage [1983] 1 Sri L.R. 222**, it was held by Nevil Samarakoon CJ 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 of Parliament

(b). Executive power to the President

c). Judicial power through Parliament to the Courts

Fundamental rights and franchise remain with the people and the Supreme Court has been constituted the guardian of such rights. 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."

In the same decided case Parinda Ranasinghe J, as he was then, though dissenting, held at page 205 as follows:

"Actions of the Executive are not above the law and can certainly be questioned in a Court of law. Those words can certainly be questioned in a Court of law. 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 actions. But that is a far cry from saying that the President's acts cannot be examined by a court."

In another case, **Bandaranayake vs Weeraratne [1978 -79] 2 Sri L.R. 412**, it was held that where the President of the Republic of Sri Lanka, purporting to act under the Special Presidential Commissions of Inquiry Law (No.7 of 1978), issued a warrant to establish a Special Presidential Commission of Inquiry to inquire into events prior to the coming into force of such law, the warrant was declared to be invalid.

In **Bandula vs Almeida [1995] 1 Sri L.R. 309** Wadugodapitiya, J held at page 332 that "…Where the President… is of opinion that any particular land is urgently required for the purpose of carrying out an urban development project…the President may by order… declare that such land is required for such purpose. An order of the President in circumstances where there were in fact no such urban development project in existence, was quashed by the Supreme Court because "The vital ingredient is that there should exist a project. If no project orders itself, is inoperative and nothing flows"…"

MDH Fernando, J stated in **Karunatileka vs Dayananda Disanayake at [1999] 1 Sri L.R. 177** that "I hold that Article 35 only prohibits the institution of legal proceedings against the President while in office. It imposes no bar whatsoever (a) Against him when he's no longer in office, and (b) other persons at any time…. 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 case. It does not exclude Judicial review."

Whoever has power, irrespective of whether he is the Head of State with extraordinary powers or another body or person empowered by statutes, needs to always be reasonable, cautious and extra careful not to utilize that power against the interest of the public and society. Further, those who utilize such powers need to be mindful of their consequences not to harm the larger interest of society. Hema Basnayake, Chief Justice in **Herath vs AG 60 NLR 193** observed at page 224 that those who exercise power must "…show the greatest care in exercising such powers entrusted to them, then as a sacred trust and show the greatest consideration to the rights of the citizens, they should always give close attention and due consideration to the

representations of those affected by the exercise of those powers, even mindful of the fact that it is not every citizen that has the means to assert his rights…The greater the powers entrusted to a statutory functionary the greater should be the care with which they are exercised."

Today, there are many misguided politicians who think no end of power, forgetting the fact that power corrupts. Even the Heads of State who are elected by the people, and once elected, could abuse their authority and power unless checked by the Court or the people. As stated famously by Aesop, "fools take to themselves the respect that is given to their office".

The exercise of executive power is another statutory functionary, subject to challenge and review by the Superior Courts, and provisions contained in Article 34 of the Constitution need to be kept in view for the sake and benefit of the Society.

Other limbs of Article 34

I would wish to remark about subsection (2) of Article 34 after considering subsection (3) of the same, as subsection (2) seems to be somewhat controversial. In any event sub-article (3) of Article 34 is certainly essential to assist the criminal justice system. This is where the President could grant a pardon to an accomplice, who provides information as shall lead to a conviction of the principal offender or offenders. This I would say is welcome having regard to all circumstances of a criminal case.

However, by Section 256(1) and Section 257 of the Code of Criminal Procedure Act has also made the Attorney General can move to pardon an accomplice to an offense and direct the tender of pardon a by a Magistrate. There is also Chapter XXVI of the Code, which permits the President of the country to suspend, remit and commute any sentences imposed by a court of law.

The Indian position

Even the Indian Constitution does not provide such a specific provision pertaining to an accomplice. In fact, India refers to the powers of the President to grant pardons in Article 72 of its Constitution which has been drafted with much clarity, but with no reference to an accomplice.

Article 72 of the Indian Constitution reads thus:

"72. (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –

(a) In all cases where the punishment or sentence is by a Court Martial;

(b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) In all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor [9][* * *] of a State under any law for the time being in force."

Similarly, by virtue of Article 161 of the Constitution, the Governor of a State has the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The President can grant pardon to a person sentenced to death, but the Governor of State does not enjoy this power.

The question is whether this power to grant pardon is absolute or whether this power of pardon shall be exercised by the President on the advice of the Council of Ministers. The pardoning power of the President is NOT absolute. It is governed by the advice of the Council of Ministers. It has not been discussed in the Constitution, but it is the practical truth. Further, the Constitution does not provide for any mechanism to question the legality of decisions of the President or Governors exercising mercy jurisdiction. But the Supreme Court in the **Epuru Sudhakar** case has explored the possibility

of judicially reviewing the pardon powers of the President and Governors for the purpose of ruling out any arbitrariness. The Court has earlier held that it has retained the power of judicial review, even on a matter which has been vested by the Constitution, solely of the Executive.

However, it is important to note that India has a unitary legal system and there is no separate body of state law. All crimes are crimes against the Union of India and, therefore, a convention has developed that the Governors' powers are exercised for only minor offences, while the request for pardons and reprieves for major offences and offences committed within Union territories are deferred to the President.

I also note the following case law of India which may turn out to be very useful to Sri Lanka at some point in time. Both the President and Governor are bound by the advice of their respective Councils of Ministers and hence the exercise of this power is of an executive character. It is therefore subject to Judicial Review as held by the Supreme Court of India in the case of **Maru Ram v. Union of India [1980] INSC 213, 1981 (1) SCC 107**,. It was subsequently confirmed by **Kehar Sigh v. Union of India [1988] INSC 370, 1989 (1) SCC 204**,. In the case of **Epuru Sudhakar & Anr vs Govt. Of A.P. & ORS [2006] INSC 638**, it was held that "clemency is subject to judicial review" and that it "cannot be dispensed as a privilege or act of grace". The Court made these observations while quashing the decision of the then Governor of Andhra Pradesh, Sushil Kumar Shinde, in commuting the sentence of a convicted Congress activist.

In respect of sub-article (2) of Article 34; it was introduced in the 2nd Republican Constitution of 1978. I understand that the first Republican Constitution of 1972 does not cover a similar situation. It has been brought in to the 1978 Constitution possibly to permit the Head of State to grant a pardon and/or reduce the period of qualification, as stated in Articles 89 (d), (e), (f), (g), or (h) and 91 of the Constitution, or grant a pardon free or subject to conditions. Even the Indian Constitution does not refer to a similar provision, as in Article 34 Sub-section (2) of our Constitution. Article 89 refers to a disqualification to be an Elector. Article 91 (1) refers to a disqualification for election as a Member of Parliament. If one has to be qualified to be a Member of Parliament, he or she should be qualified to be an elector unless disqualified under Article 91. (vide Article 90)

If Article 89 and 91 are read in isolation, as regards the other provisions of the Constitution, one need not encourage a debate on the right to franchise. Article 89 (d) to (h) refers to a conviction of an offence necessarily tried by a Court of Law and by a Presidential Commission consisting of two judges from the Superior Courts and another from the High Court or the District Court [Article 89 (h)]. As such the disqualification arises after a due process according to accepted norms (other than the proviso to Article 89 (d) which has crept in as a consequence of Article 34).

Pardons can be extended by the Head of State to a Member or Parliament, in the case of a member having accepted a bribe or gratification and adjudged by a competent court or special Presidential Commission to have accepted such bribe or gratification as a member of the Legislature, prior to the commencement of the Constitution, or as a Member of Parliament.

Article 34(2) contemplates convictions which are pursuant to hearings and determinations by a Presidential Commission, which can nevertheless be pardoned by the Head of State. Pardoning of such convicts is rather questionable and gives rise to doubts of abuse of power and political manipulation. In any event, does the Head of State have absolute power to engage in this type of exercise merely because such power is derived from the Constitution? Should the law excuse any misuse or abuse of power in the guise of Constitutional provisions? As observed above, in Sri Lanka there can be no question of any royal prerogative. 'The prerogative power of pardon exists to remedy the miscarriages of justice which must occur from time to time in any legal system. Such occasions should be exceptional.'[Hood Philips, Constitutional and Administrative Law, 7th Edition, p. 374-

However, courts should have a right of review where the power has been improperly exercised for an unauthorised purpose, disregarding relevant considerations, in reaching a decision or taking into account irrelevant considerations. The power should not be used to frustrate the objects of the law. On the other hand, public interest has to be paramount under any circumstances and powers

used to frustrate public interest should be subject to review by a court of law.

Granting of a pardon by the Head of State needs to be debated as it amounts to an act against democracy and the separation of powers. The three organs of the State machinery, the Executive, Judiciary, and the Legislature should act according to accepted principles, norms and not offend the rule of law which should support democratic ideals. The Judiciary would only convict an offender after a process of a proper trial and permitting an appeal from a conviction to the Superior Courts. As such the conviction needs to go through the hierarchy of courts. That is to say, to act according to the letter and spirit of the law. In Sri Lanka it could be very safely observed that there can be no question of any royal prerogative.

Pardons can also be seen in today's context as a source of controversy in extreme cases, and some pardons may be seen as acts of corruption by officials and the Executive in the form of granting effective immunity as political favours. This is what is more likely to happen and has happened in our country. The Head of State, in keeping with his political agenda (i.e., not acting as a statesman), extends a pardon to a convict, and the judicial machinery and process is ultimately whittled down, diluted and made to suffer. The judicial process involves judges, lawyers, and the court staff working together to achieve justice for all concerned in society by ensuring the verdict of the Court. It does not happen by the stroke of the pen but by a process, by long days and hours of hard work to achieve justice. Very often, judges and lawyers 'burn the midnight oil' to achieve justice. Very many in the judiciary, as well as counsel from the official and unofficial Bar, will support my conclusions as they would realise the hard work that needs to be put into a case.

Those learned counsel who appeared in jury cases before the Assize Courts and the High Court are aware of the day-to-day hearing before the judge, whereas the jury may reach its conclusion by maybe 9 PM or later (on a working day), as with the judges summing up, the case must conclude on that particular day itself, irrespective of the time factor and without postponement, as the jury need to be kept together to return their verdict. These practices have continued in our courts for a very long period, until legislation was introduced to make the jury system optional. This piece of legislation to make the jury system optional should have been debated fully by the Legislature to realise its pros and cons. I understand that some academics have failed to realise the usefulness of a Jury system which can only be fathomed by those members of the profession who are and who were in active practice.

Some aspects of our ancient judicial system. Could it be connected to a 'pardon'?

In our ancient history, Sri Lanka had several kings who were also responsible for the judicial system. These kings were, no doubt, also responsible in declaring war and peace. The kings ruled the country along with their confidants and subordinates. Whatever it is, was there a method adopted by the kings in the absence of prescribed laws?

"The king was the ultimate judicial authority. He had very wide powers which extended over all matters. The king exercised extensive jurisdiction in the following cases: suits arising between any principal servant or chief of his court, or where such a person was a defendant, and those relating to royal lands; suits between priests claiming rights to the incumbency of principal temples; serious crimes namely treason, rebellion and conspiracy against the king or his family and all homicides. The king could also try cases submitted to him by his officials or even where a petitioner approached him individually either directly or through a court official. [L.J.M. Cooray, An Introduction to the Legal System, Stamford Lake, p. 106]

The king being the ruler of the country, would have had the power to pardon a wrongdoer, as the king was at the helm of the judicial system.

The Buddhist influence on our laws and the grant of pardon

Our nation is predominantly a Buddhist country. The majority of the population comprises Sri Lankan Buddhists. Article 9 of the Constitution specifically refers and states that Buddhism be given **the foremost place** and that the State is bound to protect and foster Buddhism.

Lord Buddha's Dasa Raja – Dhamma (Ten royal Virtues) are very relevant in today's context, and applicable in all their force to the present day and the future for our leaders of Sri Lanka to realise what their duty and function should be.

Not only did the Buddha teach non-violence and peace; he also personally intervened in quelling disputes in the field of battle through His sublime Dhamma. For instance, He intervened in the case of a friction between the Sakyas and the Koliyas and prevented a deadly war. Again, King Ajatasattu who was about to wage war against the Vajjis was prevented from doing so, entirely on the valuable advice of the Buddha. Further, our chronicles (Mahavamsa and Dipavamsa) say that the Buddha visited Sri Lanka on three occasions, and having suppressed certain disputes through the Dhamma, established peace in the country, thereby.

Therefore, we see that while the Buddha put across His philosophy successfully, he also advocated the maintenance of peace and cordiality throughout, which was absolutely essential for spiritual development. He had shown how a country could become corrupt and unhappy when the heads of its government become corrupt and unjust. For a country to be happy, it must have a good and just government. How this form of just government is evolved is detailed in His recommendations entitled "Ten Royal Virtues". ("Dasa-Raja Dhamma" - Jataka Text).

The 'Ten Royal Virtues' are as follows:

1. Dana: liberality, generosity or charity. The giving away of alms to the needy. It is the duty of the king (government) to look after the welfare of his needy subjects. The ideal ruler should give away wealth and property wisely without giving in-to craving and attachment. In other words, he should not try to be rich by making use of his position.

2. Sila: morality - a high moral character. He must observe at least the Five Precepts and conduct himself both in private and in public life as to be a shining example to his subjects. This virtue is very important, because, if the ruler adheres to it, strictly, then bribery and corruption, violence and indiscipline would be automatically wiped out in the country.

3. Comfort Pariccaga: Making sacrifices if they are for the good of the people - personal name and fame; even the life if need be. By the grant of gifts etc. the ruler spurs the subjects on to more efficient and more loyal service.

4. Ajjava: Honesty and integrity. He must be absolutely straightforward and must never take recourse to any crooked or doubtful means to achieve his ends. He must be free from fear or favour in the discharge of his duties. At this point, a stanza from 'Sigalovada Sutta. (Digha-Nikaya), a relevant declaration by the Buddha comes to my mind:

   "Canda, dose, bhaya, moha - Yo dhammam nativattati. Apurati tassa yaso - Sukkha pakkheva candima")

   Meaning: If a person maintains justice without being subjected to favouritism, hatred, fear or ignorance, his popularity grows like the waxing moon.

5. Maddava: Kindness or gentleness. A ruler's uprightness may sometimes require firmness. But this should be tempered with kindness and gentleness. In other words, a ruler should not be over - harsh or cruel.

6. Tapa: Restraint of senses and austerity in habits. Shunning indulgence in sensual pleasures, an ideal monarch keeps his five senses under control. Some rulers may, using their position, flout moral conduct - this is not becoming of a good monarch.

7. Akkodha: Non-hatred. The ruler should bear no grudge against anybody. Without harbouring grievances, he must act with forbearance and love. At this instance, I am reminded of how a certain royal pupil, an heir to the throne, who had been punished by the teacher for an offence, took revenge by punishing the teacher after he became King! (Jataka Text). Political victimization is also not conducive to proper administration.

8. Avihimsa: non-violence. Not only should he refrain from harming anybody, but he should also try to promote peace and prevent war, when necessary. He must practice non-violence to the highest possible extent so long as it does not interfere with the firmness expected of an ideal ruler.

9. Khanti: Patience and tolerance. Without losing his temper, the ruler should be able to bear up hardships and insults. On any occasion, he

should be able to conduct himself without giving in-to emotions. He should be able to receive both bouquets and brickbats in the same spirit and with equanimity.

10. Avirodha: Non - opposition and non-enmity. The ruler should not oppose the will of the people. He must cultivate the spirit of amity among his subjects. In other words, he should rule in harmony with his people.

The Buddha in his dispensations has emphasised the fact that the nature of the subjects depends largely on the behaviour of their rulers. Therefore, for the good of the people at large He set out these Ten Royal Virtues - 'Dasa-Raja-Dhamma' to be practiced by the rulers of men.

After the advent of Buddha Sasana to Sri Lanka, in the reign of King Devanampiya Tissa, in the 3rd century B.C, the long line of Buddhist Kings would have kept to 'Dasa-Raja — Dhamma' in fostering good governance. It is also interesting to note that in India's foreign policy the 'Five Principles' or 'Pancasila' (which is itself a Buddhist term) are in accordance with Buddhist principles Dharmasoka, the great Buddhist Emperor of India, who was contemporary and a good friend of King Devanampiya Tissa of Lanka had applied to his administration Buddhist principles the authenticity of which is proved by his Rock Edicts available in India and seen even today.

All ten virtues are connected to the law and practice, especially Virtues 4 through 10, and could be considered as an initial step introduced to decide whether to grant a pardon or not to a wrongdoer with much emphasis on the will of the people, and consequently to protect society from all evils. There is no direct reference to a grant of pardon in the Ten Virtues, but one could fathom and surmise what exactly Lord Buddha preached to guide the king and the rulers of the country to follow the rule of law in the above ten royal virtues. In our country the presidential grant of pardon is recognised, but seems to have been abused. The maxim 'the king can do no wrong' does not apply to Sri Lanka. We have a system of government where the Head of State is elected by the people of our country. He or she who is elected as the President of Sri Lanka, is not a "king" or a "queen", nor does Sri Lanka have a royal prerogative of mercy. As observed, there is no royal prerogative in our country, nor do we have a monarch. Further, the King or Queen is above the law and cannot be tried in a court in the United Kingdom. In the UK, authorities suggest that a royal pardon does not remove the conviction itself, but only the penalty, or the punishment imposed. In a way, it is fair and transparent, and does not disturb the conviction imposed by court as the function and procedure of the court is not diluted, unlike Sri Lanka.

Lord Buddha's teachings are a universal concept and their approach emphasises the maintenance of peace for all human beings. The above virtue, number ten, broadly refers to cultivating the spirit of amity among subjects, and to rule in harmony with the people. To achieve this end, a dangerous criminal and a convict's position cannot be taken very lightly by the Head-of-State who has to give his/her mind to protect society, not only in the interest of families or individuals and political parties. As such, the grant of a pardon is a very serious question to be addressed by the Head-of-State in a very cautious, far thinking manner, and should not be done in a narrow-minded approach, merely to serve a purpose not connected with peace. The will of the people prevail at all times as referred to in the above ten virtues. Unfortunately, successive Heads-of-State, at various periods of time in Sri Lanka have abused the Constitutional provisions to grant pardons to some convicts. The release of a Buddhist priest who was convicted of contempt of court, and sentenced by a court of competent jurisdiction by the Head-of-State in recent times was obviously a political move simply to satisfy maybe a group or a small section of the Buddhist clergy and not done in the way Lord Buddha addressed the ten royal virtues. Such an act of the Head-of-State directly dilutes the process of administration of justice. This no doubt dilutes the judicial process and powers recognised by the Constitution. The consequences that flow lead to non-adherence of the separation of powers by the authority concerned.

It is certainly, in this instance, against all acceptable norms in our country. The grant of pardon is being abused and used as a political tool, not for the betterment of the country, but for the Head-of-State to achieve a personal benefit. It is nothing but political expediency, rather than a correction of judicial error. Another way to look at it is that accepting a pardon would mean an admission of guilt and/or acceptance of a confession of an offence, which cannot be erased so easily from all rational and right-minded people, who are the

majority of our population.

"Contempt of court" is a separate matter, where a court of law is ridiculed, and the accused is sentenced after a proper hearing before court. The Head-of-State cannot be heard to interfere in an offence of this nature for extraneous reasons. This is nothing but a clear violation of the principle of separation of powers and the independence of the judiciary. Thus, the previous Head of State has violated the provisions of the Constitution and one or more of the Ten Royal Virtues, by granting a pardon to the monk. It is a clear case of abuse of power. Another being the recent pardon of the accused in the Royal Park murder case. In doing so, did the President follow the procedure conveyed in the Constitution? If so, what about all the other prisoners currently on death row?

The traditions of the UK on the royal prerogative of mercy and the position of other jurisdictions

It is stated in the Gazette of the Law Society of the United Kingdom dated 06 November 2015 that the English tradition of the Royal prerogative of mercy is one of the historic royal prorogations reserved for the British monarch. The following extract from the Gazette should be noted and would be of great interest to any reader of this article:

"*The most recent example of the Royal Prerogative of Mercy [RPM, commonly referred to as a Queen's Pardon] is the now well-known case of Alan Turing who was convicted on 31st March 1952 of gross indecency with another man. Tragically, shortly after his conviction, this war hero, who cracked the German Enigma code thereby shortening the war by two years and saving countless lives, died. A verdict of suicide was recorded. When the RPM was thankfully, and at long last granted, a Ministry of Justice spokesman said: "Uniquely on this occasion a pardon has been issued without either requirement having been met, reflecting the exceptional nature of Alan Turing's achievements". So, what are the usual requirements and what does the RPM actually mean? In the English tradition, the RPM is one of the historic royal prerogatives reserved to the British monarch, in which she can grant pardons to persons convicted of criminal offences. The original use of the RPM arose as a result of the imposition of the death sentence; the RPM then being used to commute such a sentence to a less draconian form of punishment. Today, it can be used to change any sentence or penalty imposed upon a person. Today, the justice secretary has responsibility for recommending the use of the RPM to Her Majesty the Queen. The defence secretary is responsible for military cases. The RPM is now exercised sparingly and only in cases of great exceptionality. A decision by the justice secretary to recommend the use of the RPM is usually restricted to cases where:*

1. *it is impractical for the case to be referred to an appellate court; and*
2. *new evidence has arisen, that has not been before the courts, which demonstrates beyond any doubt that no offence was committed; or*
3. *that the defendant did not commit the crime.*

There are two types of pardon that may be granted: (i) a Free Pardon; and (ii) a Conditional

Pardon.

There are two types of pardon granted according to the material available in the above gazette

1. *Free pardon*
2. *Conditional pardon.*

The effect of a Free Pardon is that the conviction is disregarded to the extent that, as far as possible, the person is relieved of all penalties and other consequences of the conviction. However, the conviction is not quashed; only the courts have the power to quash a conviction. The criteria for determining whether to recommend that Her Majesty the Queen grant a pardon respects the constitutional position that only the courts, and not the government, may determine a person's guilt. In addition to a so-called Free Pardon under the RPM there is also a Conditional Pardon. A Conditional Pardon is used to substitute the court's original penalty with a lesser sentence. The use of a Conditional Pardon has been historically limited to cases when the death penalty required by law had been imposed so as to commute that sentence to one of life imprisonment [See R v Home Secretary, ex parte Bentley [1994] QB 349; [1994] 2 W.L.R. 10].

A Free Pardon, which usually relates to miscarriages of justice, can be described as an "unconditional pardon". The exercise of the power is reviewable by the Divisional Court by way of Judicial Review: See R v Secretary of State for the Home Department, ex parte Bentley [1993] 4 All ER 442 which held: "The court had jurisdiction to review the exercise of the royal

prerogative of mercy by the Home Secretary in accord with accepted public law principles since the exercise of the prerogative was an important feature of the criminal justice system and a decision by the Home Secretary which was infected with legal errors ought not to be immune from legal challenge merely because it involved an element of policy or was made under the prerogative." In turn, and should the appropriate grounds exist, a decision made by the Divisional Court in an action for judicial review can be appealed to the Court of Appeal: See: Terence McGeough v The Secretary of State for Northern Ireland [2012] NICA 28. Historically, the principle of a pardon derives from the Act of Settlement 1700 which altered the law so that a pardon could not "stop an impeachment … but there is to be nothing to prevent the king from pardoning after the impeached person has been convicted and sentenced. "For a modern application of the law see R v Foster (Barry) [1985] QB 115; [1984] 3 W.L.R. 401]. In Foster it was held that the effect of a free pardon was to remove from the subject of the pardon "all pains, penalties, and punishments whatsoever that from the said conviction may ensue" but not to eliminate the conviction itself.

Watkins LJ pointed out [at p71] that counsel:

"…has reminded us that constitutionally the Crown no longer has a prerogative of justice, but only a

prerogative of mercy. It cannot, therefore … remove a conviction but only pardon its effects. The Court

of Appeal (Criminal Division) is the only body which has statutory power to quash a conviction. "A pardon is a common law extra judicial power, exercised by the crown under the royal prerogative of mercy. However, the prerogative of free pardon is consolidated in the CRIMINAL APPEALS ACT 1995 of UK, more particularly in section 16

"(1) Where the Secretary of State refers to the Commission any matter which arises in the consideration of whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction and on which he desires their assistance, the Commission shall

(a) consider the matter referred, and

(b) give to the Secretary of State a statement of their conclusions on it; and the Secretary of State shall, in considering whether so to recommend, treat the Commission's statement as conclusive of the matter referred.

(2) Where in any case the Commission is of the opinion that the Secretary of State should consider whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to the case they shall give him reasons for their opinion." In the case of Bentley [1994] QB 349 Watkins L.J commented that the prerogative power is: "A flexible power and its exercise can and should be adapted to meet the circumstances of the particular case … the prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchical right of grace and favour. It is now a constitutional safeguard against mistakes." [1994] QB 349 at 365. Thus, the power to pardon constitutes a broad and flexible constitutional safeguard against mistakes, encompassing Conditional as well as Free pardons. The modern statement of the doctrine is found in Watkins L.J judgment in the Court of Appeal in Bentley where he declared: "We understand the strength of the argument that, despite the fact that a free pardon does not eliminate the conviction, a grant of a free pardon should be reserved for cases where it can be established that the convicted person was morally and technically innocent." [1994] QB 349 at 364E

The key test is thus whether the person is "morally and technically innocent" of the offence. A former Justice Secretary, Kenneth Clarke, has previously stated that the subject of the pardon must not be "tainted with unclean hands". That test however is not definitive and it is important to counterbalance all prevailing and relevant factors. Former Home Secretary, Herbert Gladstone, classically advised the House of Commons in 1907: "It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations – the motive, the degree of premeditation or deliberation, the amount of provocation, the state of mind … character and antecedents … and many other [factors] have to be taken into account in every case."

The prerogative of pardon

The Royal prerogative of pardon is exercised by the Crown on the advice of the Home Secretary in cases from England and Wales and, in cases from Scotland, by the Secretary of State for Scotland. Each minister acts on his individual responsibility in giving his

advice to the Crown. A royal pardon could in law be used as a bar to a criminal prosecution being brought. But in British practice, a pardon is granted only after conviction when there is some special reason why a sentence should not be carried out or why the effects of a conviction should be expunged. Now that the right of an appeal in criminal cases is recognized, a pardon is not normally granted in respect of matters that could be raised on an appeal. Pardons under the prerogative are of three kinds: (a) an absolute or free pardon, which sets aside the sentence but not the conviction; (b) a conditional pardon, which substitutes one form of punishment for another (for example, the substitution of life imprisonment for the death penalty, which occurred when the prerogative of mercy was exercised in the days of capital punishment):" and (c) a remission which reduces the amount of a sentence without changing its character, and has been used to enable a convicted spy to be exchanged for a British subject imprisoned abroad, The prerogative power of pardon may not be used to vary the judgment of the court in matters of civil dispute between citizens. Under the Act of Settlement 1700, a pardon may not be pleaded in bar of an impeachment by the Commons, nor under the Habeas Corpus Act 1679 may the unlawful committal of any person to prison outside the realm be pardoned. Extensive use of the power of pardon could come close to being an attempt to exercise the royal power to dispense with laws which were declared illegal in the Bill of Rights 1689. The Home Secretary is answerable to Parliament for the advice which he gives to Parliament. Before the abolition of the death penalty, questions could not be raised in the House of Commons regarding a case while it was still pending. 12 By section 17 of the Criminal Appeal Act 1968, the Home Secretary may at any time after a conviction on indictment, (a) refer the whole of a case to the Court of Appeal, and the case will then be treated as if the convicted person had appealed or (b) if he desires the assistance of the court on any point arising in the case, refer that point alone for the court's opinion."

Conclusion

When powers are exercised by the Executive, Legislature, or Judiciary, there has to be a legal limit. All citizens should be and are protected from the arbitrary exercise of executive powers. It is so when the basic law of the land vests sovereignty in the people and is inalienable (Article 3 of the Constitution). This exercise of sovereignty of the people takes place as in the manner described by Article 4 of the Constitution which contemplates the spread of separation of powers. There is at present, certain checks and balances for the benefit of the people of our country. Paragraphs (a), (b) and c) of Article 4, which set forth the three organs of the State, describe therein their need to take the required steps and function within their legal limits. If the executive or the legislature exceeds their legal limits specified by law illegally, unjustifiably or unreasonably, no citizen could be prevented from having recourse to a court of law with competent jurisdiction.

To throw more light on what I wish to emphasize on the question of legal limits, the following authorities need to be carefully considered.

"It should be emphasised that Parliament in Sri Lanka, unlike the British Parliament, is a statutory creation. It exists and functions only within the boundaries introduced by its creator - the Constitution. Any form of exit from those boundaries would be unlawful and would amount to be an act contrary to the law of the land. In such circumstances, it would be legitimate for the courts of justice in Sri Lanka to claim power and jurisdiction to keep Parliament within its lawful limits and redress those affected." [D.M. Karunaratne, A Survey of Law of Parliamentary Privileges in Sri Lanka, p. 168]

In **R. (applicant of Miller) v The Prime Minister (Rese) Cherry and other (Respondents) v Advocate General for Scotland (Appellate Scotland 2019 UK.SE 41)** it was held that:

50. For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament … will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification*, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene* if the effect is sufficiently serious to justify such an exceptional course

51. That standard is one that can be applied in practice. The extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions

and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts. The court then has to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having those effects. The Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary. Even in such a case, when considering the justification put forward, the court would have to bear in mind that the decision whether to advise the monarch to prorogue Parliament falls within the area of responsibility of the Prime Minister, and that it may in some circumstances involve a range of considerations, including matters of political judgment. The court would therefore have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution. Nevertheless, it is the court's responsibility to determine whether the Prime Minister has remained within the legal limits of the power. If not, the final question will be whether the consequences are sufficiently serious to call for the court's intervention.

As regards the Judiciary I wish to add that public confidence is the hallmark of an independent Judiciary. Judges need to function and act at all times to promote confidence in the integrity and independence of the Judiciary. A free society exists so long as it is governed by the rule of law.

To forgive and forget is a philosophy that any religion may adopt. To forgive is a good quality but it should be done not to erode the law of the land. A soldier who fought a war, if imprisoned for that reason alone, may be granted a pardon as a matter of policy not connected to political motives. Let no scoundrel take mean advantage and resort to patriotism to hide his heinous crimes. If a soldier commits crimes such as rape, murder, robbery, etc, he may not be pardoned if he does so under the guise of fighting war. The difference should be correctly understood. Let there be no thin and blurred line between crime and acts done in the name of patriotism. It is not at all prudent to draw war crimes into the powers of the Head-of-State to grant a pardon. It would reflect the ulterior motives of the Head-of-State if he/she does so for narrow political achievement. The bottom line should be a sacrifice done for the good of the people and the nation, which is done in an absolutely straightforward manner, with no recourse taken to any crooked or doubtful means to achieve whatever political ends. Do not deceive the country. Deceit drags man hither and thither. Buddhism adopts non-hatred, even to one's enemy. Hatred never ceases through hatred in the world. Lord Buddha preached the above in a religious context to laymen and in circumstances that could be best understood in the above Ten Royal Virtues. No misleading inference should be drawn to abuse his/her authority by the Head-of-State to grant a pardon.

In this regard the provisions contained in Article 33 A of the Constitution would also be important, as the President of the country is held responsible to Parliament for due exercise, performance, and discharge of his powers, duties, and functions by the constitution and any written law, inclusive of any law relating to public security. By the President's powers to grant a pardon, if a hardcore criminal or a convict is released for political gains, the security of society would be at great risk. The security of society and public interest is paramount. In other words, ensuring security of the nation is the prime duty and responsibility of the Head-of-State. There is no excuse. The general public needs to be vigilant and should resist any move if a pardon is granted to a convict for extraneous reasons.

Just as much the Judiciary is not beholden politically to the Government of the day, so are citizens. The Head-of-State is under God and law, so are the people. The people owe no allegiance to anyone other than to their own country and the law of the land. People need to be courageous to do what is correct, after all, the Head-of-State holds office in trust for the people of our country. He/she who is elected as President, has to function and do their duty for the people as per the Constitution and perform as a statesman.

The will of the people should never be opposed. It is essential to promote peace and prevent any hardships through the granting of pardon. The Head-of-State should cultivate the spirit of amity among his subjects. All this derives from the above Ten Royal Virtues.

Contentment is the greatest wealth.

May all beings be happy.