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

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

1. *Centre for Policy Alternatives (Guarantee) Limited,*
   No. 6/5, Layards Road, Colombo 00500

2. *Dr. Paikiasothy Saravanamuttu,*
   No. 3, Ascot Avenue, Colombo 00500

Petitioners

SC (FR) Application No: 262/2022 **VS**

1. Hon. Attorney General,
Attorney General's Department,
Colombo 01200.

2. Hon. Attorney General,
Attorney General's Department,
Colombo 01200.

Respondents

TO: <u>HIS LORDSHIP THE CHIEF JUSTICE AND THE OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

INTRODUCTION

1. These written submissions are filed further to the oral submissions already made, and further to the preliminary written submissions (prior to argument) filed on behalf of the Petitioners. For the convenience of Your Lordships' Court we have consolidated the content of the preliminary written submissions in these submissions, and therefore the original (preliminary) written submissions can be disregarded.

SUMMARY OF SUBMISSIONS

2. These submissions will deal with the issues involved under the following headings:

   A. Background [Paragraph 3 - 16]
   A.1 The Two previous States of Emergency in 2022 (*para 3 – 12*)
   A.2 The Promulgation of The Impugned Regulations (*para 13 – 16*)

   B. The Applicable Law in relation to States of Emergency and Emergency Regulations [Paragraph 17 - 18]

   C. Jurisdiction of Your Lordships' Court to determine the Validity of the Proclamation [Paragraph 19 - 41]

A. BACKGROUND

A.1 The Two previous States of Emergency in 2022

3. Previously, on 1st April 2022, a State of Emergency was purportedly declared [first State of Emergency of 2022] by a Proclamation purportedly under section 2 of the Public Security Ordinance, No. 25 of 1947 (as amended), and published in Gazette Extraordinary No. 2273/86.
4. The former President of the Republic did not cause the proclamation of Emergency of April 2022 to be brought before Parliament, as mandated by the Constitution, but instead, revoked the said Proclamation, by a further Proclamation dated 5th April 2022.

5. Thereafter, on or about the 6th May 2022, a State of Emergency was purportedly declared once again [second State of Emergency of 2022], by a Proclamation purportedly under section 2 of the Public Security Ordinance, No. 25 of 1947 (as amended), and published in Gazette Extraordinary No. 2278/22. The said Proclamation was purportedly signed by the former Secretary to the President, on the Command of the former President of the Republic.

6. With this declaration, Regulations made by the President under section 5 of the Public Security Ordinance (Chapter 40) [Emergency (miscellaneous Provisions and Powers) regulations, No. 1 of 2022] had purportedly been gazetted in *Gazette Extraordinary No. 2278/23* on the 6th May 2022.

7. 6th May 2022 was the first date after the lapse of the mandatory thirty-day period following the end of the 1st April declaration of Emergency on which a new State of Emergency could have been declared, as stipulated in Article 155(7) of the Constitution.

8. Several and repeated attempts were made by the Hon. Attorney General to bring to the attention of Your Ladyship's and Lordships' Court the incidents / wide spread violence that erupted on or about 9th May 2022. Matters which had not been pleaded in their objections.

9. In this light it is important to note that the said events occurred when this second State of Emergency was in place. Despite the existence of a State of Emergency and despite the existence of other laws which would require the State to prevent the aforementioned violence, no meaningful action was taken to prevent the aforementioned violence against peaceful protestors on 9th May 2022.

10. Furthermore, On or about 21st May 2022, the 2nd Petitioner became aware of a statement by the Presidential Secretariat that the "emergency had been abolished with effect from 20th May 2022", which appeared to mean that the second State of Emergency of 2022 had been revoked (despite the violence in the aftermath of 9th May).

11. Thus, within a period of five weeks, the former President declared States of Emergency twice, and on both occasions did not cause the proclamations declaring the said States of Emergency to be placed before Parliament for its approval. Thus, neither of such Proclamations were approved by Parliament.

12. In these circumstances, the 2nd Petitioner filed a Fundamental Rights Application No 197/2022, challenging *inter alia* the *mala fide* declaration of the State of Emergency (of May 2022) and the unconstitutional and overbroad Emergency Regulations. Leave to proceed was granted, and the matter is fixed for argument (vide SCFR 197/2022).

A.2 The Promulgation of The Impugned Regulations

13. On or about 17th July 2022, the incumbent President, in his then capacity as Acting President, declared a State of Emergency by way of Extraordinary Gazette No 2288/30 dated 17th July 2022 [**P5**] (the third State of Emergency).

14. Thereafter on or about 18th July 2022, the impugned Regulations promulgated by the Acting President, under section 5 of the Public Security Ordinance (Chapter 40) were gazetted by way of Extraordinary Gazette No 2289/07 dated 18th July 2022 [**P6**].

15. These regulations were virtually identical to the regulations by the same name that former President Gotabaya Rajapaksa brought into effect in May 2022 [the second emergency of 2022] by *Gazette Extraordinary No. 2278/23* and which had been impugned by the 2nd Petitioner in *SC FR 197/2022.*

16. However, two differences made the incumbent President's regulations more draconian in effect, namely:
    (a) Adding Sections 408-426 of the penal code to the list of offences under regulation 12, and
    (b) Increasing the period of detention of a suspect before production before a magistrate under regulation 17(2) from 24 hours to 72 hours.

B. DECLARATION OF A STATE OF EMERGENCY AND PROMULGATION OF EMERGENCY REGULATIONS: APPLICABLE LAW

17. Chapter XVIII of the Constitution **(Article 155)**, read together with the Public Security Ordinance No. 25 of 1947 (as amended) (PSO), provides the guidelines for the exercise of emergency power under our law. Accordingly;
    (a) In view of the existence or imminence of a state of public emergency, if the President is of opinion that it is expedient so to do in the interests of public security and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, then he may declare a State of Emergency by way of Gazette. (Section 2 of the PSO).
    (b) Once such a State of Emergency has been declared, the President is able to promulgate Emergency Regulations. (Section 5 of the PSO).
    (c) Such Emergency Regulations may have the legal effect of overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution. (Article 155(2) of the Constitution).
    (d) Article 15 of the Constitution provides limited instances in which Fundamental Rights may be restricted, and accordingly, the exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 may be subject to such restrictions as may be prescribed by law or emergency regulations under the PSO, in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. The exercise and operation of the fundamental rights declared and recognized by Articles 13(5) and 13(6) can be restricted by law or emergency regulations under the PSO on the ground of national security.
    (e) These are the only rights which can be restricted by Emergency Regulations. Even in such instances Your Lordships' Court has decided in several cases that the power to impose such restrictions is subject to judicial scrutiny (as morefully described below).

(f) The Declaration of a State of Emergency by the President must be approved by Parliament within 14 days, and in the event of the failure to do so, the declaration shall expire. (Section 2(4) of the PSO / Article 155(6) of the Constitution).

(g) Once approved by Parliament, the State of Emergency shall be in place for one month and can be extended thereafter for a month at a time.

(h) If the declaration lapses, any Regulations made thereunder too will lapse.

(i) There is no provision in the Constitution which requires the Emergency Regulations be approved by Parliament (unlike the proclamation declaring a State of Emergency by the President which has to be approved by Parliament)

18. Accordingly, Article 155 of the Constitution, read together with the Public Security Ordinance grants the President discretionary powers, but the Courts have recognised that this is not an unfettered discretion, and that the exercise of this power is subject to judicial review

C. JURISDICTION OF YOUR LORDSHIPS' COURT TO DETERMINE THE VALIDITY OF THE PROCLAMATION

C.1 Article 154J(2) not a ouster of jurisdiction

19. The learned Counsel for the Respondents submitted that in view of Article 154J(2) of the Constitution, Your Lordships' Court had no jurisdiction to determine whether the declaration of the State of Emergency was lawful.

20. The Respondents' submission was that Article 154J(2) is a stand-alone provision that has general application. However, it is respectfully submitted that this position is untenable.

21. **Article 154J of the Constitution provides that:**

(1) Upon the making of a proclamation under the Public Security Ordinance or the law for the time being in force relating to public security, bringing the provisions of such Ordinance or law into operation on the ground that the maintenance of essential supplies and services is, threatened or that the security of Sri Lanka is threatened by war or external aggression or armed rebellion, the President may give directions to any Governor as to the manner in which the executive power exercisable by the Governor is to be exercised. The directions so given shall be in relation to the grounds specified in such Proclamation for the making thereof.

(2) A Proclamation under the Public Security Ordinance or the law for the time being relating to public security, shall be conclusive for all purposes and shall not be questioned in any Court, and no Court or Tribunal shall inquire into, or pronounce on, or in any manner call in question, such Proclamation, the grounds for the making thereof, or the existence of those grounds or any direction given under this Article."

22. It is respectfully submitted that the aforesaid Article was enacted by the Thirteenth Amendment to the Constitution and appears in Chapter VII A of the Constitution. The powers regarding the declaration of a State of Emergency appear in Chapter XVIII of the Constitution **(Article 155).**

23. Secondly, sub-Article (1) of the aforesaid Article clearly refers to the manner in which the Governor's power is to be exercised.

24. Thus, it is respectfully submitted that Article 154J (2) specifically applies in relation to the Provincial Councils and the Governor, and does not have a general application.

25. The legislature did not think fit to make such an amendment, or introduce an ouster of jurisdiction, into the Chapter on Public Security. In fact the Thirteenth Amendment to the Constitution did amend Chapter XVIII of the Constitution **(Article 155)** by adding a new Article 155 3A. As such the choice of placing of Article 154J (2) in Chapter VII A of the Constitution was deliberate.

26. Thus it is respectfully submitted that in enacting the Thirteenth Amendment to the Constitution, the legislature did NOT intend the provisions of Article 154J (2) to be applicable to the general powers of the President in relation to Public Security [Chapter XVIII of the Constitution **(Article 155)]** and only intended the provisions of Article 154J (2) to specifically apply to situations relating to the Provincial Councils and the Governor.

27. In the one reported occasion in which the question whether the declaration of a State of Emergency can / cannot be reviewed by the Supreme Court was canvassed, Your Lordships' Court held that it was irrelevant to go into the matter in those proceedings, but did not hold that the proclamation could not be challenged. The question was therefore kept open in ***Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections And Others [1991] 1 Sri LR 157***, at pages 178-179:

> "*However, the question whether this Court had jurisdiction to review the Proclamation and the Regulation did arise. It was only towards the conclusion of the oral argument that reference was made to Article 154 J (2), which may oust the jurisdiction of this Court in regard to the Proclamation. Without the benefit of a full argument, I am reluctant to rule on that matter. As I am of the view that the impugned Regulation was invalid, the application can be disposed of without considering the vires of the Proclamation.*"

28. This position was maintained even PRIOR to the enactment of the Nineteenth Amendment to the Constitution. It is respectfully submitted that Article 35 of the Constitution has been amended twice by the 19th Amendment and the 20th Amendment to the Constitution which further undermine the Respondents' argument.

C.2 Article 35 as amended by the Nineteenth and Twentieth Amendments provide for judicial review.

29. Presidential immunity as contained in Article 35 of the Constitution were subject to change in the Nineteenth and Twentieth Amendments.

Article 35 of the Constitution provides:

(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.

Article 33(g) of the Constitution provides:

In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law, the President shall have the power:

…

(g) to declare war and peace"

30. The Nineteenth and Twentieth Amendments are later laws, and thus reveal the present position on the matter.

31. Therefore, at the present time, it is clear that ALL actions and omissions of the President in his official capacity (with the exception of ONLY the declaration of war and peace) are subject to fundamental rights jurisdiction of Your Lordships' Court.

32. In ***Sampanthan and. Others v. The Hon. Attorney General and Others, SC FR 351-356/ 2018 S.C.M. 13th December 2018,*** His Lordship H.N.J. Perera CJ stated (at pages 33 – 35) that;

"The position is very different now with the introduction of the first proviso to Article 35 (1) by the 19th Amendment to the Constitution which states "Provided that nothing in this paragraph shall 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"…Thus, immunity, even in its former absolute capacity, would only have shielded the person of President from punitive consequences and not the acts that stem from the Office of the Executive." (page 33)

"Since the proviso to Article 35 (1) grants the right to challenge acts or omission by the President "in his official capacity" only by way of the specific procedure of making a fundamental rights application under Article 126 of the Constitution, it follows that "executive or administrative action" by the President "in his official capacity" may be challenged in terms of the proviso to Article 35 (1). That is because Article 126 (1) stipulates "The Supreme Court shall have 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 or language right declared and recognised by Chapter III or Chapter IV." (page 35)

33. In ***Sampanthan's Case*** *above,* H.N.J. Perera CJ further stated (at pages 41 – 42) that;

> *"Applying the rationale expounded by this Court in the several decisions referred to earlier, I see no reason why the powers vested in the President under Article 33(2) of the constitution should be regarded as anything other than executive action by the President. While the president may when exercising those powers be doing so qua Head of State in a historical sense, any such flavour of acting as Head of State does not detract from the core feature that the President is exercising executive powers.*
>
> *This conclusion is fortified by the specific exemption from this Court's jurisdiction of the President's power to declare War and Peace under Article 33 (2) (g) of the Constitution. The maxim expressio unius est exclusio alterius enunciates the principle of interpretation that the specific mention of only one item in a list implies the exclusion of other items. Referring to this maxim, Maxwell [12th ed at p. 293] states "By the rule usually known in the form of this Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class…" Similarly, Bindra [7thed. at p 147] states, "The express mention of one thing implies the exclusion of another. This maxim is the product of logic and common sense…"*
>
> *…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.*
>
> *No doubt some of the powers vested in the President by Article 33 (2) may not, in practice, be reviewable by an application under Article 126 depending on the facts before court. For example, it is hard to think of instances where the performance by the President of a purely ceremonial function [as under Article 33 (2) (b)] would be amenable to review by this Court. On the other hand, it is conceivable that several of the other executive powers vested in the president by Article 33 (2) (c) [other than under Article 33 (2) (g) which is expressly excluded] could be, in appropriate circumstances, subject to challenge under a fundamental rights application under Article 126."*

34. ***In Re the "Twentieth Amendment to the Constitution", SC SD No. 1/2020 – 39/2020***, it was held (at pages 37 – 38) that;

> *"Thus, it is seen that our Constitution which is founded on rule of law does not tolerate non-justiciability. It is premised on the very basic tenet that every injury must be remedied. If the avenue for redress is to be taken away, that is a matter that directly impinges on the "fundamental rights" of the People as found in Article 3 of the Constitution…*

…Submissions were made by the Attorney-General that immunity is essential for the efficient and unimpeded discharge of functions. However, these submissions failed to establish a cogent and rational nexus between non-justiciability of President's act and the effective discharge of functions and duties.

Clause 5 of the Bill, removes the right of any person to invoke jurisdiction of the Supreme Court, in relation to any alleged infringement of a Fundamental Right due to the conduct of the President. The alternative processes referred to by the Attorney-General and the Intervenient Petitioners in their submissions in our view do not provide the nature of protection guaranteed to the People through the existing provisions in the Constitution.

Therefore the removal of the existing right guaranteed through the Constitution to the People to invoke the jurisdiction of the Supreme Court under Article 126 in relation to acts of the President is inconsistent with Articles 3 and 4 of the Constitution. Hence we determine that Clause 5 in its' current form require the approval of the People at a Referendum.

However this inconsistency would cease, if Clause 5 is suitably amended and, make provision for the People to invoke jurisdiction of the Supreme Court under Article 126; in instances where there is an alleged violation or an alleged imminent violation of a Fundamental Right, due to an act of the President."

35. Therefore, the promulgation of the impugned emergency regulations is subject to the fundamental rights jurisdiction of Your Lordships' Court under Article 126 of the Constitution.

C.3 The Record produced by the Respondents does not bear out any justification for the declaration of a State of Emergency.

36. The correspondence in the Record demonstrates that any situation which may have prevailed could have been dealt with by recourse to the ordinary criminal justice system, coupled with the declaration of curfews, and calling out the armed forces, if necessary.

37. The declaration of a State of Emergency was clearly in bad faith and a tool to stifle dissent.

38. The President, who declared such state of emergency, has not thought it fit to apprise Your Lordships' Court as to the reasons which, in his view, justified such a course of action.

39. As such, the inescapable conclusion is that the state of emergency was declared for a collateral purpose.
40. Since there was no valid State of Emergency in the eyes of the law, the promulgation of the emergency regulations would, *ipso facto,* amount to a nullity in law.

41. Therefore, for this reason as well, the Petitioners are entitled to the relief prayed for in the Petition, that the promulgation of the Emergency Regulations was *ultra vires* and null and void, and violated the Petitioners' fundamental rights.

D. VALIDITY OF THE PROMULGATION OF EMERGENCY REGULATIONS

42. Although Your Lordships' Court may not be required to delve into the validity of the promulgation of the emergency regulations in the absence of a valid State of Emergency (as in the absence of a valid State of Emergency, the conditions necessary for the promulgation of Emergency Regulations will not arise), the Petitioners urge that the issue be addressed nonetheless, as:
    (a) there has already been a violation of fundamental rights (further elaborated below), and
    (b) there is precedent demonstrating that the State REPEATEDLY promulgates the same emergency regulations, thus warranting that the validity of these regulations be adjudicated on.

43. Without prejudice to the above, EVEN IF material was produced to support that the declaration of the state of emergency was necessary, the impugned regulations, as a whole, are disproportionate, vague and overbroad.

44. The Petitioners' position (***vide paragraphs 19 and 21 of the Petition***) is that the Regulations in their entirety are vague, overbroad, irrational, arbitrary, unreasonable, and promulgated with the collateral purpose of stifling dissent and the freedom of assembly, and not to address any legitimate public security concern. The Petitioners' contended that such was an abrogation of fundamental rights, and did not constitute permissible restrictions on fundamental rights.

45. Additionally, the Petitioner impugned numerous individual regulations contained in **P6** in this Application. Submissions will be made separately on the individual regulations.

46. The power to make Emergency Regulations must also be exercised reasonably. As such, Emergency Regulations must in effect, scope and duration be proportionate to the objective that they seek to achieve, especially when they have the effect of curtailing the Fundamental Rights guaranteed to the people under Chapter III of the Constitution.

47. In the case of ***Wickremabandu v. Herath and others [1990] 2 Sri LR 348*** five judges of Your Lordships' Court held as follows (at page 358);

    "*Article 15(7) permits, inter alia, restrictions in the interests of national security and public order: The learned Attorney-General contended that the Court could not interpolate "reasonable" into that provision, and hence could not inquire into the reasonableness of a restriction. It is not a matter of interpolation, but of interpretation:* ***can we assume that the power conferred by the Constitution was intended to be used unreasonably, by imposing unreasonable restrictions on fundamental rights****? The State may not have any burden of establishing the reasonableness of the restrictions placed by law or Emergency Regulations,* ***but if this Court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Article 15(7).***

    Further (at pages 362-363), it was held that;

Wade (Administrative Law, 5th ed., pp 393-4, 399) observes that the Minister may be a free agent to the extent that no objective test is possible, and even where it is a question of discreditable or unreasonable conduct the court may hold that the facts supporting the exercise of discretion are not open to review because of the nature of the legislation ; the evident intention of words such as "if the Minister is satisfied" is to make the Minister the sole judge of the existence of the conditions which make the power exercisable : they indicate that instead of judging objectively whether the conditions in fact exist, the court is merely to judge subjectively whether the requisite state of mind exists in the Minister. ***Nevertheless the courts are able to penetrate behind the ostensible "satisfaction" and deal with the realities: the Minister must act reasonably, in good faith and upon proper grounds, but in some situation it is plain not only from the language but also from the context, that the discretion granted is exceptionally wide, the most obvious example being that of emergency powers, particularly in time of war****. Wade discusses the tests applicable in detail (ibid. 362-5).*

"Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into the merits..... Two reasonable persons can perfectly reasonably come to opposite, conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. 'Re W(16)
"It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come". Lynch,(17)" Demetriandes v. Glasgow Corporation (18) 'so unreasonable as to be perverse'.

"A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant ..... there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority ..... the example of the dismissal of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and in fact all these things run into one another. "Wednesbury Corporation"(19).

"Unreasonableness is a generalised rubric covering not only sheer absurdity or caprice, but also illegitimate motives and purposes, a wide range of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classified as self-misdirection, or addressing oneself to the wrong question.""

48. In the case of ***Joseph Perera alias Bruten Perera v. The Attorney General and Others [1992] 1 Sri LR 199***, it was further held (at pages 216-217) that;

"Section 5 of the Public Security Ordinance as amended by Law No. 6 of 1978, enables the President to make regulations "as appears to him to be necessary or expedient in the interests of public security and preservation of public order." The regulation owes its

validity to the subjective satisfaction of the President that it is necessary in the interest of public security and public order. He is the sole judge of the necessity of such regulation, and it is not competent for this court to inquire into the necessity for the regulations bona fide made by him to meet the challenge of the situation. ***But under Article 15(7) of the Constitution it is not all regulations, which appear to the President to be necessary or expedient in the interests of public security and preservation of public order, made under section 5 of the Public Security Act which can impose restrictions on the exercise and operation of fundamental rights. It is only regulations which survive the test of being in the interests of national security, public order ..." in terms of Article 15(7). In a contest regarding the validity of a regulation the President's evaluation of the situation, that the Regulation appeared to him to be necessary or expedient is not sufficient, to lend validity to the regulation.***

Under Article 15(7) the Regulation must in fact be in the interest of national security, public order ... The Regulation to be valid must satisfy the objective test. Though the court may give due weight to the opinion of the President that the regulation is necessary or expedient in the interests of public security and order, it is competent to the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by emergency regulation and the object sought to be achieved by the regulation. If the court does not find any such nexus or finds that activities which are not pernicious have been included within the sweep of the restriction, the court is not barred from declaring such regulation void as infringing Article 155(2) of the Constitution.*"*

49. In view of this judgement, two tests have been established, which the State must satisfy in order to demonstrate that the said Emergency Regulations are justifiable in the circumstances.
    - **The first test is subjective**; the President must have formed the opinion that it was necessary and expedient in the circumstances to promulgate such regulations.
    - **The second test is objective**; the Court will thus determine whether the President's view was reasonable.

50. It is also respectfully submitted that if the first test has not been satisfied, Your Lordships' Court is not required to delve into whether there are circumstances that warrant a declaration of a State of Emergency or the promulgation of Emergency Regulations. In such circumstances, the regulations must be declared invalid.

51. Accordingly, while the Constitution read with the Public Security Ordinance (PSO) gives the President discretion to make regulations, such power cannot be exercised in an arbitrary manner. If the President exercises this power in a manner that is unreasonable, or *ultra vires*, Your Lordships' Court can exercise jurisdiction and declare such unreasonable exercise of power void.

52. Furthermore, we respectfully submit that the impugned Emergency Regulations are unreasonable as they have been promulgated for an illegitimate purpose, and not for the purpose that they purport to be promulgated for, nor for a purpose permitted in terms of the Public Security Ordinance, as they;
    (a) do not address the economic and political crisis faced by the country;
    (b) are vague and/or overbroad and/or are irrational, arbitrary, and unreasonable and have been designed and/or promulgated with the collateral purpose of *inter alia* stifling dissent and the freedom of assembly and not to address any legitimate public security concern.

53. The Petitioners' allegation with regard to the above (morefully described below) have not been refuted by the Respondents.

54. Due to this collateral purpose the said Emergency Regulation No.1 of 2022 as a whole infringe *inter alia* Articles 12(1) and/or 14(1)(a), (b), and (c) of the Constitution.

55. It is submitted that as a whole the Emergency (Miscellaneous Provisions and Powers) Regulation No.1 of 2022 (**P6**) constitute an abrogation of the fundamental rights guaranteed under the Constitution and that the said Emergency (Miscellaneous Provisions and Powers) Regulations No.1 of 2022 are overbroad and vague and do not constitute permissible restrictions of fundamental rights.

E. THE BURDEN OF JUSTIFYING THE DECLARATION OF A STATE OF EMERGENCY AND PROMULGATION OF EMERGENCY REGULATIONS IS ON THE STATE

56. Faced with the allegations made by the Petitioners with regard to the *mala fide*, arbitrary, irrational, unreasonable, and *ultra vires* exercise of power, the Respondents (Attorney General and President - represented by the Attorney General in terms of Article 35 of the Constitution) chose not to file any Affidavit themselves.

57. A purported Affidavit was filed by the present Secretary to the President, who was neither the Secretary to the President at the relevant time, nor a Respondent to this Application. Mr. E. M. S. B. Ekanayake was appointed as Secretary to the President with effect from 21st July 2022 (by way of Extraordinary Gazette No. 2290/04 dated 25th July 2022), while the **P5** is purportedly signed by Gamini Senarath on the 17th of July 2022.

58. In this regard the attention of Your Lordships' Court is most respectfully drawn to the case of ***Wijesundara Mudiyanselage Naveen Nayantha Bandara Wijesundara v. D. N. R. Sirirwardena, SC FR 13/2019, S.C.M. 18th October 2022***, where His Lordship Surasena J stated (at page 18) that;

    "The affidavit dated 27th March 2019 has been submitted by Zhejiang Yunnan who has not been given any authority to sign affidavits or produce documents by the 2nd Respondent company. Thus, I hold that ***the affirmant Zhejiang Yunnan is a person who does not have any connection to this case and hence has no locus standi to***

present the affidavit *dated 27th March 2019. For the above reasons,* ***I reject the affidavit*** *affirmed on 27th March 2019 by Zhejiang Yunnan.*

The above conclusion results in a situation where there is ***no evidence to substantiate aforementioned factual positions*** *taken up on behalf of the 2nd Respondent. Thus, in view of my decision to reject the affidavit, I hold that the 2nd respondent has* ***failed to substantiate any of the aforementioned positions it had taken up in this case.****"*

59. Therefore, we respectfully submit that the Affidavit filed by the Secretary to the President Mr. E. M. S. B. Ekanayake is not admissible and/or relevant for the matters under consideration.

60. The Secretary to the President is not a party in these proceedings and has no *locus standi* to tender Affidavits pertaining to these proceedings.

61. In any event, Mr. E. M. S. B. Ekanayake was NOT the Secretary to the President at the time when the State of Emergency was declared, and the Emergency Regulations were promulgated. As such, lacking personal knowledge, the Affidavit is, in any event, worthless.

62. Further, the Attorney General, being possessed of the importance of this matter, and representing the President of the Republic in these proceedings, chose to file very limited material, through the purported Affidavit of the Secretary to the President.

63. At the outset it is respectfully submitted that, in such circumstances, Your Lordships' Court would not look beyond the material duly filed by way of objections, as justification for the impugned conduct of the Respondents.

64. Pursuant to a direction of Your Lordships' Court, the Record maintained at the Presidential Secretariat relating to this matter was produced before Your Lordships' Court.

65. A perusal of the said Record demonstrates that:
    -In the Minute Sheet some entries are typed, while others are handwritten, suggesting that they were included later;
    -Minute 2 was later changed into 3, suggesting the inclusion of a new Minute 2;
    -Documents at pages 15 and 28 are in the wrong locations chronologically/sequentially given the date of receipt, suggesting that documents have been inserted later.

66. Thus it is respectfully submitted that it is unsafe to rely on the purported record itself.

67. In any event, the record does not provide evidence of the basis and the reasoning for the opinion and the decision of the President to declare a State of Emergency and promulgate Emergency Regulations.

68. As such, the state of mind of the President at the time of declaring the state of emergency and promulgating the impugned emergency regulations is not borne out by the purported record.

69. The record also shows that the Inspector General of Police (IGP) in a letter dated 16.07.2022 to the Secretary of the Ministry of Public Security (**R1**) was only recommending a declaration of a state of emergency and curfew and NOT the promulgation of emergency regulations. Curfew can be declared under the PSO without Emergency Regulations being promulgated. This recommendation is reiterated by the Ministry of Public Security (**R3**).

70. The Secretary of Defence in **R2** makes a bald 'suggestion' that Emergency Regulations be promulgated, but no reason for same is evident.

71. Therefore, considering that the IGP is supposed to be the expert / top public officer in the field of Law & Order, and both the IGP and Ministry of Public Security have not suggested a need for promulgating Emergency Regulations, the Record is entirely devoid of any justification for the promulgation of Emergency Regulations.

72. Thus, it is respectfully submitted that the record cannot be relied on by the Respondents, and that the record in fact supports the position of the Petitioners.

73. As such, the Respondents have failed to produce ANY admissible material to support the assertion that the promulgated Emergency Regulations were necessary.

74. Furthermore, in these proceedings, Your Lordships' Court would look at whether the President had formed a reasonable opinion that the promulgation of Emergency Regulations was necessary. In ***Joseph Perera's case*** Your Lordships' Court held (at page 216) that:

> *"**But under Article 15(7) of the Constitution it is not all regulations, which appear to the President to be necessary or expedient in the interests of public security and preservation of public order, made under section 5 of the Public Security Act which can impose restrictions on the exercise and operation of fundamental rights. It is only regulations which survive the test of being in the interests of national security, public order ..." in terms of Article 15(7). In a contest regarding the validity of a regulation the President's evaluation of the situation, that the Regulation appeared to him to be necessary or expedient is not sufficient, to lend validity to the regulation.***"

75. More recently, Your Lordships' Court has ruled that presidential powers must be subject to an objective test of reasonableness. In ***Hirunika Eranjali Premachandra v. The Hon. Attorney General and others, SC FR 221, 225, 228 / 2021, S.C.M. 17th January 2024***, where Your Lordships' Court first ruled that the presidential power of pardon was reviewable, His Lordship Surasena J (at page 50) stated:

> "*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.*"

76. In the instant Proceedings the President has not explained what, in his view, necessitated:
    (a) promulgation of Emergency Regulations; and
    (b) promulgation of Emergency Regulations of the type so promulgated.

77. In the absence of such material (or at least a bald assertion that such was necessary), it must necessarily be presumed that the promulgation was not necessary or expedient.

78. On the value of oral evidence in a trial, E.R.S.R. Coomaraswamy states (*'**The Law of Evidence (With Special Reference to the Law of Sri Lanka)**' Lake House Investments Ltd. 1989 Vol II – Book 1*) at page 5 –

    "Oral evidence, if worthy of credit, ***is sufficient without documentary evidence, to prove a fact****, unless it is a matter which requires documentary proof.* ***There is no rule that oral evidence is of less value or weight than other forms of evidence, unless it is excluded by special rules of law.****"* (emphasis added)

79. On matters inducing proof, Coomaraswamy states (Vol I, at page 118) –

    "An illustration of a matter before court, which can influence a court under Section 3 is afforded in Edrick de Silva vs. L.C. de Silva, where H.N.G. Fernando, C.J. stated that where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, ***the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff and is then an additional "matter before the court" which the definition in Section 3 requires the court to take into account, namely, that the evidence led by the plaintiff is uncontradicted****."* (emphasis added)

80. The Respondents have not contradicted the assertion of the Petitioners, supported by Affidavit, as to the *mala fide* objective of the Regulations, and such position would prevail.

81. In fact, prior to the promulgation of these Regulations, it appears that there was a trend towards the reduction of any security measures, rather than the increase of such measures. On 13th July 2022 (by way of Gazette Extraordinary No. 2288/21) the (acting) President declared a curfew for the whole of the country. However, thereafter on 14th July 2022 (by way of Gazette Extraordinary No. 2288/22) he reduced the applicability of such curfew, the Administrative District of Colombo and adjacent territorial waters.

82. This demonstrates the actual position which was prevalent in the country at the time of declaring Emergency, and Emergency Regulations over the whole of the country.

F. INDIVIDUAL REGULATIONS VIOLATIVE OF FUNDAMENTAL RIGHTS

83. Numerous Regulations contained in **P6** have been individually impugned in this Application as they are violative of Fundamental Rights. They are as follows;

F.1 Essential Services

84. **Regulations 8 and 9** deal with essential services, *inter alia* purportedly allowing for the appointment of a Commissioner General of Essential Services, allowing for the declaration of services as essential services, and creating offences relating to the obstruction of such services.

85. **Regulation 8** provides that:

(1) The President may, by order, appoint any person by name or by office to be the Commissioner - General of Essential Services for the whole of Sri Lanka. It shall be the duty of the Commissioner – General of Essential Services to execute and co - ordinate all activities relating to the supply and maintenance of essential services.

(2) The Commissioner - General of Essential Services may appoint, by name or by office, such Additional Commissioners, Deputy Commissioners or Assistant Commissioners as may be necessary for the performance of his duties under these regulations.

(3) The Commissioner - General of Essential Services may delegate to any Additional Commissioner, Deputy Commissioner or Assistant Commissioner appointed under paragraph (2) any power, duty or function conferred or imposed on, or assigned to such Commissioner - General by or under these regulations.

(4) For the purpose of the performance of duties under these regulations, the Commissioner – General of Essential Services may exercise any power conferred on any authority or officer to whom any power under these regulations have been delegated.
(5) The Commissioner - General of Essential Services may give to—
(a) any authority or officer, to whom any power has been delegated under these regulations;and
(b) any Coordinating Officer appointed under regulation 40,
such directions as may be necessary for ensuring the maintenance of essential services, and it shall be the duty of such authority, officer or coordinating officer as the case may be, to comply with every such direction.

86. **Regulation 9** provides that:

(1) The President may by Order published in the Gazette, declare any service to be an essential service, if it appears to be so necessary for the maintenance and preservation of public order and for the maintenance of supplies and services essential to the life of the community.

(2) Any person engaged or employed in any work, in connection with a service declared to be an essential service by the President in terms of paragraph (1), who –
(a) fails or refuses without lawful excuse after the lapse of one day from the date of such Order,
to attend at his place of work or employment or such other place as may from time to time be designated by his employer or a person acting under the authority of his employer; or
(b) fails or refuses without lawful excuse to work or keeps away from work, without working during the full period or any part of the normal working day as is required by him in accordance with the terms and conditions of his employment in such service; or
(c) fails or refuses without lawful excuse after the lapse of one day from the date of such Order to perform such work as he may be directed by his employer or a person acting under the authority of his employer; or
(d) being a person engaged or employed in a specified service, fails or refuses without lawful excuse to perform such work as he may from time to time be directed by his employer or a person acting under the authority of his employer, to perform at such time or place within such periods as may be specified by such employer or such person for the performance of such work (whether such time or place or period is within or outside normal working hours or on holidays), notwithstanding that he has failed or refused to so attend or to so work in furtherance of a strike or other organized action, shall be deemed for all

purposes to have forthwith terminated or vacated his employment notwithstanding anything to the contrary in any other law or the terms and conditions of any contract governing his employment and in addition, be guilty of an offence.

(3) Where any service is declared to be an essential service by the President, by Order published in the Gazette -
(a) any person who, in any manner whatsoever –
(i) impedes, obstructs, delays or restricts the carrying on of that service; or
(ii) impedes, obstructs, or prevents any other persons employed in, or in connection with the carrying on of that service to refrain from attending at his place of work; or
(iii) incites, induces or encourages any other person employed in or in connection with the carrying on of that service to refrain from attending at his place of work; or
(iv) compels, incites induces or encourages the establishment or maintenance of any other service in lieu of or parallel with that service being a government department or branch thereof; or
(v) compels, incites, induces or encourages any other person employed in, or in connection with, the carrying on that service, to surrender or depart from his employment (whether or not such other person does so surrender or depart in consequence); or
(vi) prevents any other person from offering or accepting employment in, or in connection with, the carrying on of that service;

(b) any person who, by any physical act or by any speech or writing incites, induces or encourages any other person to commit an act specified in sub paragraph (a) of this paragraph (whether or not such other person commits in consequence any act so specified), commits an offence and shall on conviction by the High Court be liable to imprisonment of either description for a term not exceeding three years.

(4) Any person who is deemed to have terminated or vacated his employment by reason of the operation of the provisions of paragraph (2) of this regulation shall vacate any quarters provided to him, by or on behalf of the government, within three days of such termination or vacation. Any person who fails to vacate such quarters within such period commits an offence under these regulations.

(5) Where any person is convicted by the High Court of any offence under this regulation, then, in addition to any other penalty that the High Court shall impose for such offence –
(a) all property movable or immovable, of that person shall, by virtue of such conviction, be deemed to be forfeited to the Republic; and
(b) any alienation or other disposal of such property effected by such person after the date of the coming into force of these regulations shall be deemed to have been and to be, null and void.

(6) Where any service is declared to be an essential service, by the President, by Order published in the Gazette, the services of any officer, servant, employee or agent employed in or belonging to any such service declared to be essential may, whenever deemed to be necessary, be requisitioned by the Secretary to the Ministry of the Minister assigned the subject of Defence or any officer authorized by him in that behalf, in consultation with the Secretary to the Ministry of the Minister to whom the relevant subject has been assigned.

(7) In this regulation-
"quarters" means any building or room or other accommodation occupied or used for the purpose of residence and includes any land or premises in which such building, room or other accommodation is situated; and

"specified service" means any essential service which is declared to be a specified service by the President under paragraph (1) being an essential service, in which a person employed or engaged in any work in connection with such service, may be required to work outside normal working hours or on holidays.

87. It is submitted that these regulations are vague and/or overbroad and thus infringe Articles 3 read with 4, Article 12(1) and Articles 14(1)(a),(b)(c) and (g) of the Constitution because *inter alia*;

i. The regulations create broad and vague offences.

The failure without lawful excuse to report to work is an offence [Regulation 9(2)].

Thus a person who fails to report to work due to attending a family wedding, or the big match, would be guilty of an offence, which entails imprisonment and

mandatory forfeiture of property! While some sanctions in the nature of employment law consequences MAY be appropriate (in an appropriate case where Regulations were justified), criminal liability should not attach in such situations, far less mandatory forfeiture of property.

ii. Upon the President declaring a particular service as an essential service, any action which "impedes, obstructs, delays or restricts the carrying on of that service" which would include all trade union action is prohibited [Regulation 9(3)]. Any person who engages in such action is deemed to have vacated post and committed an offence.

iii. A person who encourages another to refrain from attending work (even a wife who suggests that her husband take a day off to celebrate an anniversary! or vice-versa) would be guilty of an offence! [Regulation 9(3)a]

iv. The regulation is overbroad and vague and the deeming of the vacation of post does not require a court order.

v. The relevant authorities are permitted to evict a person who is deemed to have vacated post from quarters. [Regulation 9(4)]

vi. **If convicted of an offence (no matter how trivial) an individual's property is also liable to be AUTOMATICALLY forfeited to the State (Regulation 9(5)(a).** This takes away judicial discretion, and is disproportionate, thus violating Articles 3, 4 and 12(1) of the Constitution.

vii. Any person who "induces" etc another to refrain from working also commits an offence, and is subject to similar penalties.

88. These regulations are also similar to the provisions in the Essential Services Act, so it is also not necessary as there are offences relating to essential services under ordinary law. Further in the **Essential Services Bill, SC SD 58/1979**, the Supreme Court determined that not even with a 2/3rd majority would such provisions be permitted to be enacted into law (pages 65, 72-73). Therefore, similar provisions cannot be introduced as part of emergency regulations.

89. **Regulation 10** provides for *inter alia* the appointment of a competent authority, who in turn is empowered to exclude any person from entering any area, place or premises wholly or partly occupied or used for maintenance of essential services.

90. **Regulation 10** reads:

(*1) The President may appoint by name or by office a person to be a competent authority in relation to any essential service for the purpose of these regulations.*

(2) If a competent authority is of the opinion that special precautions shall be taken to prevent the entry of unauthorized persons into any area, place or premises wholly or mainly occupied or used for the maintenance of essential services, that competent authority may by Order direct that no person shall, subject to such exemptions as may be specified in the Order, enter or remain upon that area or place or those premises without the permission of such authority or person as may be specified in the Order.

(3) If any person is in any area, place or premises in contravention of an Order made under this regulation, then with out prejudice to any other action that may be taken against him, he may be removed there from by any police officer or any member of Armed Forces or by any other person authorized in that behalf by a competent authority.

91. This regulation is vague and/or overbroad as no guidelines are provided to the competent authority, and thus and otherwise infringes Articles 12(1), 14(1)(a), (b), (c) of the Constitution.

92. The failure to comply with a Regulation is *ipso facto* an offence, entailing consequences in terms of Regulation 24.

F.2 Powers of Search and Arrest

93. **Regulation 11** *inter alia* grants wide powers for search and arrest, vested in any police officer or member of the Armed Forces.

94. **Regulation 11** reads:

(*1) Any Police officer or any member of the Armed Forces may search, detain for purposes of such search, or arrest without warrant, any person who is committing or has committed or whom he has reasonable ground for suspected to have been concerned in, or to have committed an offence under any of these regulations or any offence in terms of sections 345, 354, 355, 356, 357, 358, 359, 360, 360A, 360B, 360C and sections 364, 365, 365A, 365B, and sections 427 to 446 of the Penal Code (Chapter 19), and may also search, seize, remove and detain any vehicle, vessel, article, substance or thing what so ever used in, or in connection with, the commission of the offence.*

(2) Any person arrested by a member of the Armed Forces under paragraph (1) shall, within twenty-four hours, be handed over to the nearest police station.

(3) Any person arrested by a police officer shall be taken to the nearest police station.

(4) Any person conducting a search under paragraph (1) may question any other person present in the premises, place, vehicle or vessel searched, or the person who is searched, in regard to any matter connected with or relating to the purpose of the search.

(5) Every person who is questioned under paragraph (4) shall furnish such information as is within his knowledge in regard to the matter on which he is questioned.

(6) The person residing in or in charge of any premises, place, vehicle or vessel which is to be searched under this regulations hall, on demand of the person conducting the search, allow him free ingress there to and afford all reasonable facilities for a search there in.

(7) A person conducting a search under this regulation may, in order to effect an entrance into the premises, place, vehicle or vessel to be searched, open or break open any outer or inner door or window.

(8) When ever it is necessary to cause a female to be searched, the search shall be made by another female.

(9) It shall be the duty of the arresting officer causing the arrest of any person within twenty - four hours of the arrest to report the arrest made under paragraph (1),where the arresting officer is a police officer, to the Officer in Charge of the Police Station in the area in which the arrest was made and where the arresting officer is a member of the Armed Forces, to the Commanding Officer of the area within which the arrest is made.

(10) Where any property is seized or detained under the provisions of this regulation a person effecting the seizure or detention shall issue a receipt in respect of such property to the person from whose custody such property was seized or detained.

(11) The President may from time to time by Order prohibit the holding of public processions or public meetings as may be specified in that Order in any area in Sri Lanka for such period and subject to such exemptions as may be specified in that Order.

(12) The Inspector General of Police may, in respect of any area in Sri Lanka, by Order direct that subject to such exemptions as may be specified in such Order that no person in that area shall between such hours or during such period as may be specified in the Order, be

on any public road, railway, park, recreation ground or any other public place, except under the authority of the written permit granted by Officer-in-Charge of a police station.

95. This regulation is vague and/or overbroad and thus and otherwise infringe Articles 11, 12(1), 13 and/or 14(1)(a), (b) and (c) of the Constitution, because;

i. Police and Armed Forces are *inter alia* permitted to arrest without a warrant, persons who commit, or those reasonably suspected of having committed, or being concerned in, offences under the Emergency Regulations and certain specified Penal Code offences.

ii. There is no proximate nexus between the offences listed out in Regulation 11 and the context in which the Regulations were promulgated.

iii. No explanation is tendered by the State as to why sexual offences [sections 364, 365, 365a, 365B needed to be included in the Regulations, or why those other than law enforcement officers should arrest those committing such offences.

iv. No requirement is imposed to issue receipts to a family member / next of kin of a person arrested. However, provision is made to issue a receipt in respect of any property to the person from whose custody such property was seized or detained. (Regulation 11(1)).

v. Persons arrested by Armed forces personnel have to be handed over to nearest police station only within 24 hours. This effectively prevents the production of a Person arrested before a Magistrate within 24 hours, and also incentivises and / or fails to prevent torture in the interim, since the person would remain in the custody of the armed forces.

vi. This must be viewed in the backdrop of numerous judgments of Your Lordships' Court highlighting the continued use of torture and the problem of deaths in detention. For instance, in ***Nalika Kumudini, AAL (on behalf of Malsa Kumari) v. N. Mahinda, OIC, Hungama Police & Others, [1997] 3 Sri LR 331*** (at page 42) it was noted that:

> *"In many cases in the past this Court has observed that there was a need for the Inspector-General of Police to take action to prevent infringements of fundamental rights by Police Officers, and where such infringements nevertheless occur, this Court has sometimes directed that disciplinary proceedings be taken.* ***The response has not inspired confidence in the efficacy of such observations and directions****, and persuades me that in this case compensation is the appropriate redress.*" (emphasis added)

vii. Regulation 11(11) provides directly that President may ban processions and meetings in any area in Sri Lanka. Such power could not be exercised by the President under normal circumstances, EXCEPT by Emergency Regulations. However, the Regulation purports to grant the President the power to do so by means other than the promulgation of Emergency Regulations.

viii. Your Lordships' Court has clearly stated that the only regulations permitted to restrict fundamental rights under our Constitution are emergency regulations

made under the Public Security Ordinance. In ***Thavaneethan v. Attorney General [2003] 1 Sri LR 74***, at pages 95-98, it was held that:

> *"The word "includes" in Article 15(7) does not bring in regulations under other laws. "Law" is restrictively defined in Article 170 to mean Acts of Parliament and laws enacted by any previous legislature, and to include Orders-in-Council. That definition would have excluded all regulations and subordinate legislation. The effect of the word "includes" was therefore only to expand the definition in Article 170 by bringing in regulations under the law relating to public security.*
>
> *While at first sight "public security" may seem to cover much the same ground as "national security and public order", it is clear that "the law relating to public security" has been used in a narrow sense, as meaning the Public Security Ordinance and any enactment which takes its place, which contain the safeguards of Parliamentary control set out in Chapter XVIII of the Constitution. Article 15 does not permit restrictions on fundamental rights other than by plenary legislation - which is subject to pre-enactment review for constitutionality. It does not permit restrictions by executive action (i.e. by regulations), the sole exception permitted by Article 15(1) and 15(7) being emergency regulations under the Public Security Ordinance because those are subject to constitutional controls and limitations, in particular because the power to make such regulations arise only upon a Proclamation of emergency, because such Proclamations are subject to almost immediate Parliamentary review, and because Article 42 provides that the President shall be responsible to Parliament for the due exercise of powers under the law relating to public security. It is noteworthy that Article 76(2) expressly recognizes that Parliament may delegate to the President the power to make emergency regulations under the law relating to public security. Other regulations and orders which are not subject to those control made under the PTA and other statutes, are therefore not within the extended definition of "law".*
>
> *…*
>
> *I hold that there was thus no "law" validly imposing restrictions on the Petitioners' freedom of movement."*

This was also upheld in ***Vadivelu v. OIC, Sithambarapuram Regional Camp Police Post, Vavuniya [2002] 3 Sri LR 146*** (at page 153).

ix. Regulation 11(12) provides that IGP may in respect of any area in Sri Lanka prevent persons from being on any public road, railway, park, recreation ground or any other public place. Such power could not be exercised EVEN by the President under normal circumstances, EXCEPT by Emergency Regulations. However, the Regulation purports to grant the IGP the power to do so by means other than the promulgation of Emergency Regulations.

F.3 Offences

96. **Regulation 12** provides for a list of offences including offences already established under the Penal Code, which if committed attract trial and punishment in terms of the Regulation.

97. **Regulation 12** reads:

(1) Any person who–
(a) does, any act which causes the destruction of, or damage to, property, whether movable or immovable, or any such change in any such property, as destroys or diminishes its value or utility; or

(b) causes or attempts to cause death or injury to any person; or

(c) commits criminal intimidation or assault on any other person; or

(d) commits theft of any article in any premises which have been left vacant or unprotected or which have been damaged or destroyed; or

(e) commits any offence under sections 345, 354, 355, 356, 357, 358, 359, 360, 360A, 360B, 360C, 364, 365, 365A, 365B of the Penal Code (Chapter 19); or

(f) commits theft, extortion or robbery of any property; or

(g) commits any offence under sections 408 to 426 of the Penal Code (Chapter 19); or

(h) commits any offence under any of the sections 427 to 446 of the Penal Code (Chapter 19) or illegally removes or attempts to remove any goods or articles from any such premises; or
(i) is a member of an unlawful assembly as defined in section 138 of the Penal Code (Chapter 19) the object of which assembly is to do any act referred to in sub-paragraph (a), (b), (c), (d), (e), (f) (g) or (h); or

(j) commits any other offence under the Penal Code (Chapter 19) or under any other written law constituted by the same acts which he has committed under sub-paragraph (a), (b), (c), (d), (e), (f) (g), (h) or (i) of this Paragraph, Commits an offence and, not with standing anything in the Penal Code (Chapter 19) or in other written law or in these regulations shall, on conviction there of before the High Court, be liable to suffer life imprisonment or to imprisonment of either description for a term of twenty years.

(2) The provisions of Section 96 of the Penal Code (Chapter 19) which relates to the right of private defence of property and provide for the circumstances in which death or other harm can be caused to a wrong doer in the exercise of such right shall have effect as though the following was added at the end of that section:-
"Fifthly any offence under regulation 12 of the Emergency (Miscellaneous Provisions and Powers) Regulations, No.1 of 2022."

(3) (a) An indictment in respect of any offence under this emergency regulation may be forwarded by the Attorney – General to the High Court, if he is satisfied that the offence was committed in furtherance of or in connection with or in the course of a civil disturbance or racially motivated riots prevailing at or about the time of the commission of such offence:

Provided that, having regard to the circumstances relating to the commission of any offence, the Attorney-General may authorize the Inspector - General of Police to institute proceedings in respect of such offence or such category of offences as he may specify, in the Magistrate's Court. There upon the proceedings in respect of such offences may be instituted in the Magistrate's Court with the written authority of the Inspector - General of Police, and the provisions of Chapter XVII of the Code of Criminal Procedure Act, No. 15 of 1979 shall, mutatis mutandis, apply in relation to the trial in respect of such offences,

(b) Where the proceedings are instituted in a Magistrate's Court, the offender shall be liable to such punishment provided for in regulation 24 of these regulations.

98. The offences established by Regulation 12 are vague and/or overbroad and includes offences that have no rational nexus to the alleged public emergency. For instance, this regulation includes offences such as the Penal Code offence of mischief, though while the

Penal Code offence carries a sentence of upto 3 months, the identical offence in the Regulations attach a term of life or a term of twenty years.

99. Your Lordships' Court has recognized that when laws or regulations are vague, that in itself amounts to a violation of Article 12(1) of the Constitution. Describing the impact of vague regulations on Article 12, it was held in the case of ***Joseph Perera v. Attorney General [1992] 1 Sri LR 199*** (at page 230) that:

> *"Regulation 28 violates Article 12 of the Constitution. The Article ensures equality before the law and strikes at discriminatory State action. Where the State exercises any power, statutory or otherwise it must not discriminate unfairly between one person and another.* ***If the power conferred by any regulation on any authority of the State is vague and unconfined and no standard or principles are laid down by the regulations to guide and control the exercise of such power, the regulation would be violative of the equality provision because it would permit arbitrary and capricious exercise of power which is the antithesis of equality before law. No regulation should clothe an official with unguided and arbitrary powers enabling him to discriminate…*** *There is no mention in the regulation of the reasons for which an application for permission may be refused. The conferment of this arbitrary power is in violation of the constitutional mandate of equality before the law and is void. The exercise of the basic freedom of expression cannot be made dependent upon the subjective whim of the Police, without offering any standard of guidance.* ***Where power is entrusted to a State official to grant or withhold permit or licence in his uncontrolled discretion, the law ex facie impinges the fundamental rights under Article 12.****"*

100. Regulation 12(1)(a) make it an offence to do ***any act, which causes the destruction of, or damage to, property***… The Regulation is so badly drafted, that it would, on a plain reading, criminalise the lawful destruction of one's own property!

101. It would also bring within the scope of the Regulation / offence, any wrongful act which damages property, even if the damage is not in the course of any matter connected to the background in which the Regulations were promulgated. Thus, for example, a spouse who throws a plate in the course of a domestic disagreement and breaks it, would have committed an offence, and be liable to be punished, under the Emergency Regulations!

102. In terms of Regulation 12(1)(b) a person who causes or attempts to cause death or injury to another person commits an offence under the Regulation. This would apply regardless of whether there was a criminal motive / *mens rea*, and regardless of whether such act or attempt was in the course of any matter connected to the background in which the Regulations were promulgated.

103. Regulation 12(1)(d), (e), (f), (g) and (h) would apply regardless of whether or not the conduct was in the course of any matter connected to the background in which the Regulations were promulgated. It would be further appreciated that most of the offences specified therein can

have no proximate nexus to the alleged objective of the Regulations, and their inclusion is irrational.

104. The following demonstrates what the offences referred to are, and their corresponding section as contained in the penal code;

Section		Punishment in the penal code
345	Sexual harassment.	5 years
354	Kidnapping	7 years
355	Kidnapping or abducting in order to murder	20 years
356	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	7 years
357	Kidnapping or abducting a woman to compel her marriage	10 years
358	Kidnapping or abducting in order to subject a person to grievous hurt, slavery	10 years
359	Wrongfully concealing or keeping in confinement a kidnapped person	7 years
360	Kidnapping or abducting a child under ten years with intent to steal movable property from the person of such child.	7 years
360A	Procreation (for prostitution or sexual intercourse)	2-10 years
360B	Sexual exploitation of children.	5-20 years
360C	Human Trafficking	2-20 years (5-20 years if the victim is a child)
364	Rape	7-20 years
365	Unnatural offence (carnal intercourse) (subsequently deleted)	10 years (10-20 years where committed in respect of person under 16)
365A	Acts of gross indecency between persons (the offence used to prosecute sexual acts between persons of the same sex) (Repealed **after this Petition was filed**)	2 years (10-20 years where committed in respect of person under 16)
365 B	Grave sexual abuse (Repealed **after this Petition was filed**)	7-20 years (10-20 years if victim is a child)
408	Mischief	Up to 3 months
410	Mischief + damages above Rs 50	Up to 2 years
411/	Mischief + killing/maiming animal	Up to 2 years

412		
413 - 417	Mischief + damage to public property in various ways	Up to 5 years
418 - 422	More serious types of mischief including with explosives	Up to 7 – 20 years based on section
423 - 425	Wrecks – impeding saving vessel/removing wreck/taking wreck to foreign port	Up to 1 – 5 years based on section
426	mischief, having made preparation for causing to any person death or hurt or wrongful restraint	Up to 5 years
427	Criminal trespass	3 months
428	House-trespass	1 year
429	Lurking house-trespass	2 years
430	Lurking house-trespass by night	3 years
431	"House-breaking	2 years
432	"House-breaking by night	3 years
433 - 446	Variations of trespass, and house- breaking based on the intention, time etc they are committed.	
372 - 373	Extortion – corresponds to (f)	Up to 3 years
367	Theft – corresponds to (f)	Up to 3 years Up to 7 – 10 years based on circumstance
379 – 380	Robbery – corresponds to (f)	Up to 10 – 14 years based on circumstance
483	Criminal Intimidation – corresponds to (c)	

105. Regulation 12(1)(i) similarly, would apply regardless of whether or not the unlawful assembly had anything to do with the circumstances at which the Regulations are supposedly aimed. Unlawful assemblies should be dealt with under the general law, unless there is a nexus to the circumstances at which the Regulations are aimed.

106. Regulation 12(1)(j) is simply vague, and in any event has nothing to do with the circumstances at which the Regulations are supposedly aimed.

107. As Your Lordships' Court observed ***In Re Bureau of Rehabilitation Bill, SC SD 54 – 61 / 2022*** (at pages 9-10):

> "*Vague provisions prevent persons from understanding the ambit of the law. Citizens will not have the knowledge of what is permissible and what is not. Governmental authorities cloaked with powers under vague provisions will not know the ambit of their powers and as such the implementation of such powers would become necessarily*

*arbitrary. As was held by this Court in the **Prevention of Terrorism (Temporary Provisions Amendment Bill** [SC (SD) Application Nos. 13-18/2022]:*

"When a provision of law is vague, it would only benefit the wrongdoer. Such a provision would not uphold the Rule of Law" [at page 22].

"This Court has stated time and again that vagueness must be avoided in the bills in order to make such provisions consistent with Article 12(1) of the Constitution" [at page 23]."

108. Furthermore, the punishment is potentially higher than under the ordinary penal law, which also is arbitrary.

109. Thus and otherwise it is submitted that the said Regulation 12 infringes Article 12(1) of the Constitution.

110. Furthermore, **Regulation 12 (1)** provides that if a person "Commits an offence and, notwithstanding anything in the Penal Code (Chapter 19) or in these regulations shall, on conviction thereof before the High Court, be liable to suffer life imprisonment or to imprisonment of either description for a term of twenty years" thus it establishes a higher penalty than under ordinary law.

111. This is further exacerbated by **Regulations 24 and 34**. Regulation 24 makes it an offence to fail to comply with any of the regulations in the impugned Emergency Regulations. Regulation 34 allows any such offence committed under these Emergency Regulations to be tried in the High Court on indictment by the Attorney – General.

112. This attaches harsh / excessive punishment and is disproportionate.

113. Regulation 12(3) refers to racially motivated riots, and appears to be a reproduction of Regulations which may have prevailed during racially motivated riots.

114. The inclusion of criteria which has nothing to do with the present circumstances / background (and no connection is borne out by the Record) is itself arbitrary, irrational, and a violation of Article 12(1).

115. Thus and otherwise the said Regulations 12, 24 and 34 thus and otherwise infringe Article 12(1) of the Constitution.

F.4 Prevention of Disaffection

116. **Regulation 13** relates to disaffection. It provides that:

No person shall-
(a) endeavour to cause disaffection among persons who are-

(i) public officers; or
(ii) engaged in the service of the Republic; or
(iii) engaged in the performance of essential services; or

(b) endeavour to induce any person referred to in paragraph (a) to do or omit to do anything in breach of his duty as a public officer or as a person as aforesaid would constitute such a contravention.

117. Disaffection is already criminalised by section 120 of the Penal Code. The Penal Code being pre-Constitution legislation cannot be reviewed for constitutionality.

118. However, when such offence is included in a new law or regulation, the Court can scrutinise same.

119. ***In Re Special Goods and Services Tax Bill, SC SD 1 - 9/ 2022,*** Your Lordships' Court comprehensively dealt with this argument and stated (at pages 19-20) that;

"*It is the paramount and sacred duty of all organs of the State to uphold constitutionalism. Subject to the sovereignty of the People, it is the duty of the organs of the State to uphold the Constitution, and always act in accordance with it.*

… in view of Article 80(3) of the Constitution, this Court is precluded from calling into question or commenting upon the validity of any Act on any ground whatsoever. ***However, that would not preclude or inhibit this Court from fulfilling its constitutional duty of determining the constitutionality of Bills before Parliament.***

In ***New Wine Harvest Ministries (Incorporation) Bill (SC SD 2/2003)*** *the Supreme Court has observed that when exercising jurisdiction under Article 123 of the Constitution, this Court cannot examine the validity of past legislation. Nor can the Court take their contents as a standard of consistency with the provisions of the Constitution. The Supreme Court has observed that when the constitutionality of a Bill is challenged, the task of the Court is to examine the clauses of the Bill and determine whether they are inconsistent or not with the provisions of the Constitution*."

120. The Regulation has an adverse bearing on the freedom of speech and expression guaranteed by Article 14(1)(a) of the Constitution.

121. The Regulation is also couched in very broad terms, and not restricted to specific acts (e.g. distribution of life saving drugs), and as such is an overbroad restriction on fundamental rights.

122. In any event, the material before Court does not show that there are justifications for a limited restriction of the freedom of expression.

123. Thus and otherwise the said Regulation 13 infringes Articles 14(1)(a) and Article 12(1) of the Constitution.

F.5 Displaying Posters etc Prejudicial to Public Security, Public Order, or Maintenance of Essential Supplies and Services

124. **Regulation 14** provides that:

> *No person shall affix in any place visible to the public or distribute among the public any posters, hand bills or leaflets, the contents of which are prejudicial to public security, public order or the maintenance of supplies and services essential to the life of the community.*

125. The freedom of speech and expression could legitimately be exercised in a manner which suggests that members of the public do, or refrain from doing, acts which are prejudicial to the maintenance of essential supplies and services.

126. For example the public may be urged to boycott employment due to corruption by the government.

127. Similarly, the public may be urged to engage in a protest march, which would cause traffic blocks - a public order issue.

128. The material before Court does not show that there are justifications for even a limited restriction of the freedom of expression.

129. Thus and otherwise the said Regulation 14 infringes Articles 14(1)(a) and Article 12(1) of the Constitution. related to disaffection.

130. The Regulation is also couched in very broad terms, and not restricted to specific acts (e.g. distribution of life saving drugs), and as such is an overbroad restriction on fundamental rights.

131. In any event, the material before Court does not show that there are justifications for a limited restriction of the freedom of expression.

132. Thus and otherwise the said Regulation 13 infringes Articles 14(1)(a) and Article 12(1) of the Constitution.

F.6 Dissemination of Information

133. **Regulation 15** provides that:

> *No person shall, by word of mouth or by any other means what so ever, including digital means or social media, communicate or spread any rumour or false statement or any information or image or message which is likely to cause public alarm, public disorder or racial violence or which is likely to incite the committing of an offence.*

134. Regulation 15 thus makes it an offence *inter alia* to communicate or spread **any information** or image or message which is **likely to cause public alarm**, public disorder or racial violence or which is likely to incite the committing of an offence.

135. Thus the Regulation is not limited to the spread of false information, but even the spread of truthful information which may cause public alarm is criminalised.

136. Sharing information on an imminent shortages of essential goods (fuel, medicines), or information about the state of the economy (that the economy is about to collapse) would amount to the commission of an offence under this Regulation.

137. This is a completely unjustified restriction / negation of the freedom of speech.

138. We would further respectfully submit that EVEN the spread of false information, which may cause panic, should not be criminalised, UNLESS there was incitement to commit an offence.

139. In any event, the State cannot have an exclusive monopoly to answer the question 'what is truth?'. The Regulation (even if it only criminalised false statements) would permit the State to detain persons on the basis of 'false' statements, until some unspecified future date at which a Court determined that the statement was not false!

140. In ***Amaratunga v. Sirimal [1993] 1 Sri LR 264 (Jana Ghosha case)***, His Lordship Fernando J held (at page 271):

"*The right to support or to criticize Governments and political parties, policies and programmes is fundamental to the democratic way of life, and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions …*

Criticism of the Government, and of political parties and policies, is per se, a permissible exercise of the freedom of speech and expression under Article 14 (1)(a)."

141. In ***Channa Pieris and others v. Attorney General and others [1994] 1 Sri LR 1 (Ratawesi Peramuna Case)*** Your Lordships' Court explained the importance of the Freedom of Expression in a democratic society as follows (at pages 133-134);

"***And in between elections it is only through free debate and exchange of ideas that the elected majority can be made to remain responsive to and reflect the will of the people. In respect of a few, exceptional matters the Constitution insists that the people shall directly decide the matter at a Referendum. However there are many other matters of public concern which arise in between elections*** *which cannot be decided by universal suffrage but are nevertheless matters on which the individual citizen must communicate his ideas if representative democracy is to work. The election of representatives does not imply that such representatives may always do as they will. Members of the public must be free to influence intelligently the decisions of those persons for the time being empowered to act for them which may affect themselves. Every legitimate interest of the people or a section of them should have the opportunity of being made known and felt in the political process.* ***Freedom of speech ensures that minority opinions are heard and not smothered by a tyrannising majority. It is the only way of enabling the majority in power to have an educated sympathy for the rights and aspirations of other members of the community****. The health of a society of self--government is nurtured by the contributions of individuals to its functioning. It is the way that makes possible the valuable and distinctive contribution of a minority group to the ideas and beliefs of our society. ….*

The unfettered interchange of ideas from diverse and antagonistic sources, however unorthodox or controversial, however shocking or offensive or disturbing they may be to the elected representatives of the people or any sector of the population. however hateful to the prevailing climate of opinion, <u>even ideas which at the time a vast majority of the people and their elected representatives believe to</u>

be false and fraught with evil consequences, must be protected and must not be abridged if the truth is to prevail. *Freedom of speech does not mean the right to express only generally accepted, but also dangerous, aggravating and deviant ideas which the community hated and from which it recoiled. As Justice Jackson of the United States Supreme Court once observed: "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." Wide open and robust dissemination of ideas and counter thought are essential to the success of intelligent self-government*."

142. In the said ***Ratawesi Peramuna Case*** cited above Your Lordships' Court went on to point out the danger of allowing any group to have a monopoly over the truth (at pages 134-135):

"*No person or group of persons, not even majorities, can claim to have a monopoly of good ideas. Many a strange and singular idea has in time, through argument and debate, had the power to get itself accepted as the truth. Most people once believed Galileo to be a dangerous food and a large number of people with fanatical zeal behind the iron curtain once founded their systems of Government on the philosophy of Marx and Lenin until Glasnost opened the way to the free flow of information and ideas and the collapse of a repressive system. There is a vital societal interest in preserving an uninhibited market place of ideas in which truth will ultimately prevail. (Red Lion Broadcasting Co. v. FCC) (159). An assumption underlying Article 14(1) (a) is that speech can rebut speech, propaganda will answer propaganda and that free debate of ideas will result in the wisest policies at least for the time being.*

Indeed, the initial justification for a system of free speech was its value in preventing human error through ignorance. In 1644, John Milton, during his battle with the English censorship laws, in his tract, ***Aeropaqitica, A speech for the Liberty of Unlicensed Printing to the Parliament of England, said****:*

"Though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worse in a free and open encounter?""

143. This regulation 15 not only criminalises false information (which may nonetheless be a valid exercise of the freedom of speech), but also criminalises the dissemination of truthful information and political views (which may not be palatable to the government of the day) and is thus and otherwise vague and/or overbroad and/or grossly unreasonable and thus and otherwise infringe Articles 12(1) and/or 14(1)(a) of the Constitution.

F.7 Detention Orders

144. **Regulation 17** provides that:

(1) Any person arrested in terms of these regulations may be detained for the purpose of investigation in terms of an Order issued by a Deputy Inspector General of Police. Such person shall be detained in accordance with the conditions stipulated in such Order for a period not exceeding fourteen days.

(2) Any person arrested in terms of the preceding regulations shall as soon as possible be brought to a police station and detained therein for a period not exceeding seventy-

two hours and be produced before Magistrate, unless an Order for his detention has been made by Deputy Inspector General of Police in terms of those regulations

(3) A person remanded or detained under these regulations shall have the right to communicate with his relatives.

(4) An Attorney-at-Law representing a person detained under these regulations shall have right of access to such person and to make representations on behalf of such person subject to conditions determined by the Deputy Inspector General of Police who has made the Order of detention of such person.

145. **Regulation 17** thus provides for;

- **i.** A person to be detained after arrest for the purpose of investigation for 14 days on a Detention Order issued by a Deputy Inspector General of Police.
- **ii.** Upon a Detention Order being issued such Detainee is not required to be produced before Magistrate.
- **iii.** The Regulation makes no provision for the Police to inform family / next of kin of the Detainee of key information such as place of detention, period of detention, how to access Detainee etc.
- **iv.** There is also no provision made for a Magistrate to review the well-being of the person in detention, or review the basis on which the detention has been affected.
- **v.** Regulation 17(4) provides to access to an Attorney at Law, however this access is subject to conditions impose by Deputy Inspector General of Police.
- **vi.** Even where a Detention Order is not issued, production before a Magistrate is only required within 72 hours.

146. At the outset, especially in the present context (as borne out by the Record) there is no justification for providing for a Detention Order to be issued by a DIG.

147. Keeping persons in executive detention would incentivise torture.

148. The very threat of such detention could be a tool used to coerce the making of confessions or other statements.

149. The Regulation would permit the use of executive detention even for trivial offences, or offences not connected with the purpose for which the Emergency Regulations were supposedly framed, since it does not limit the scope of application of Regulation 17.

150. Non-production before a Magistrate removes judicial oversight, which is a cornerstone of the criminal justice system.

151. Not informing the family of the detainee also increases the risk of torture.

152. Access to an Attorney-at-Law is a basic right, recognised by sections 15 and 16 of the International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018 (Enforced Disappearances Act). Subjecting such to the whims and fancies of the relevant DIG is another tool by which false confessions / statements can be wrongfully extracted, and such a restriction is completely unjustified.

153. In an event (even if access to counsel was not in and of itself a right, which we strongly contend it is), the absence of criteria for the grant / refusal of access would itself offend Article 12(1).

154. Thus and otherwise, the provisions of Regulation 17 are vague and/or overbroad grant unfettered discretion to the Police, remove judicial discretion, and thus and otherwise infringe or will imminently infringe Articles 11, 12(1) and/or 13 of the Constitution.

F.8 Intimidation

155. **Regulation 18** provides that:

> (*1) No person shall attend at or near a house or place where any other person resides or works or carries on business or happens to be in, such a manner that amounts to intimidate any person in that house or place or to obstruct the approach there to or egress there from, or to lead to a breach of the peace.*
>
> *(2) In this regulation-*
> *"intimidate" means to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependents or of violence or damage to any person or property; and*
> *"injury" includes any injury or damage caused by a wrongful action to a person or to his business, occupation, employment or other source of income.*

156. **Regulation 18** thus makes it an offence to attend at or near a place where another resides or works in a manner that amounts to 'intimidate' any person in that place or obstruct their approach or regress. This regulation is vague and/or overbroad and thus infringe Articles 12(1) and 14(1)(a), (b) and (c) of the Constitution.

157. 'Intimidate' is defined to include an apprehension of 'injury'. 'injury' includes any damage caused by a wrongful act to a person. Thus 'injury' would include *injuria* / damage to *dignitas*!

158. Such a wide definition of 'Intimidation' in Regulation 18, is completely unjustified, and an unlawful restriction on the freedom of speech.

159. This is all the more so considering that criminal intimidation is recognised in Regulation 12(1)(c).

160. As with the other Regulations, there is no causal nexus between the alleged purpose for the promulgation of Regulations, and this particular Regulation. Certainly, none is apparent from the Record.

F.9 Acts Preparatory to the Commission of an Offence

161. **Regulation 21** would criminalise even acts preparatory to the commission of an offence. It provides that:

> *Any person who—*
>
> *(a) attempts to commit or does any act preparatory to the commission of; or*
> *(b) aids or abets another person to commit; or*
> *(c) conspires with another person, in the commission of,*

an offence under any emergency regulation shall himself be guilty of that offence and shall accordingly be tried in like manner and be punished with the same punishment as is prescribed for such offence under the emergency regulation.

162. Preparatory acts (falling short of attempt) are not criminalised in our legal system, and there is no justification for the criminalisation of same through the impugned Regulations.

163. This is quite apart from the fact that as with the other Regulations, there is no causal nexus between the alleged purpose for the promulgation of Regulations, and this particular Regulation. Certainly, none is apparent from the Record.

F.10 Assisting an Offender

164. **Regulation 22** provides that:

No person knowing or having reasonable cause to believe that any other person is guilty of an offence under any emergency regulation shall give that other person any assistance with intent thereby to prevent, hinder or interfere with the apprehension, trial or punishment of that person for the said offence.

165. In terms of this Regulation even an Attorney-at-Law who attempts to secure bail / anticipatory bail for an offender or provides legal representation at the trial, may be accused of giving **assistance**, with the **intent thereby to prevent, hinder or interfere with the apprehension, trial or punishment** of such accused.

166. A person who provides legal aid / pays for legal representation, may similarly be accused of breaching this Regulation.

167. As with the other Regulations, there is no causal nexus between the alleged purpose for the promulgation of Regulations, and this particular Regulation. Certainly, none is apparent from the Record.

F.11 Duty to disclose information

168. **Regulation 25** provides that:

(*1) Who ever becomes aware of an intention or an attempt of a preparation to commit, or the commission of an offence under any emergency regulation shall forthwith give information ther of to the nearest Grama Niladhari or to the Officer-in-charge of the nearest police station.*

(2) Any person who wilfully fails or refuses to give the information referred to in paragraph (1) shall be guilty of an offence.

(3) Any Grama Niladhari who has received any information of any offence under these regulations shall forthwith give such information to the nearest police station.

169. **Regulation 25** hence requires that whoever becomes aware of an intention or an attempt, or the commission of an offence under any emergency regulation shall forthwith give information thereof to the nearest Grama Niladhari or to the Officer-in-charge of the nearest police station, and the failure to do so is made an offence.

170. This regulation makes no exception for privileged forms of communication such as between attorney and client or between husband and wife.

171. Further, a person can be liable for an offence with no culpability, for instance, if a husband steals coconuts to feed his hungry children, a wife who disapproved of such act can be guilty of an offence if she doesn't report the same to the grama niladhari.

172. The Regulation applies to situation which have no connection to the alleged purpose for which the Regulations were promulgated.

173. Further, as with the other Regulations, there is no causal nexus between the alleged purpose for the promulgation of Regulations, and this particular Regulation. Certainly, none is apparent from the Record.

174. This Regulation is thus clearly overbroad and grossly unreasonable and thus and otherwise infringes Articles 12(1) and 13 of the Constitution.

F.12 Powers of Search and Seizure

175. **Regulations 26, 27 and 28** provide for extensive powers of search and seizure including the power to;

- **i.** Examine orally an**y person suspected to be acquainted with the facts** and circumstances of the offence and shall reduce into writing any statement made by the person so examined:
  Provided, however, any such statement shall be signed both by the person making it as well as by the police officer recording it:
  Provided further that in the case of a person refusing to sign any such statement, such refusal shall be recorded by the police officer;
- **ii.** Obtain specimen handwriting, photographs, fingerprints etc of such person;
- **iii.** Search such person or enter and search the dwelling house or the place of work of such person;
- **iv.** Enter and search any place, building, vehicle or vessel concerned in, or connected with, or suspected to be concerned in or connected with, any such offence;
- **v.** Allowing for any book, document or paper found in the possession, custody or control of a person suspected to be concerned in any offence under any emergency regulation shall be relevant in any proceedings against such person in respect of such offence and the contents of such book, document or paper shall be admitted in evidence, against such person without proof thereof.
- **vi.** The provisions of Regulation 26, 27 and 28 could apply irrespective of the capacity in which a person has received such information or knowledge of the contents of such document as specified therein.
- **vii.** The powers specified in Regulation 28, extend to not only Police officers but also to persons "duly authorized under the emergency regulations".
- **viii.** Regulation 28(1)(a) confers a right to take "any person" from place to place and is NOT limited to a person suspected of committing an offence.
- **ix.** Photographs, handwriting, fingerprints of any person acquainted with the facts (not merely a suspect) could also be obtained.

176. Thus the powers under Regulation 26 could be exercised against persons other than those suspected of committing an offence.

177. Regulation 27 would permit the content of material (allegedly) found on the person of a suspect to be admitted in evidence without proof thereof. This would be a gross perversion of the carefully thought out principles of the law of evidence.

178. Regulation 28 permits police officers or *other duly authorised persons* to have access to detainees, and to take them from place to place.

179. Providing such other persons with the right to take detainees from place to place incentivises torture, disappearances, and extra judicial executions, as has been seen EVEN in the ordinary criminal justice system, where those been taken to reveal evidence mysteriously try to escape or produce firearms/grenades, upon which they are killed by law enforcement officers acting in 'self-defence'.

180. Further, as with the other Regulations, there is no causal nexus between the alleged purpose for the promulgation of Regulations, and this particular Regulation. Certainly, none is apparent from the Record.

181. Thus and otherwise the provisions of Regulations 26, 27 and 28 are vague and/or overbroad and thus infringe Articles 12(1) and 13 of the Constitution.

F.13 Bail

182. **Regulations 34(2)** provides that no person suspected or accused of having committed an offence in terms of these regulations be admitted to bail except under exceptional circumstances.

183. This provision takes away the discretion of the Hon. Magistrate and/or the High Court Judge to decide on bail, based on the circumstances of a particular case particularly considering the broad and vague nature of the offences concerned.

184. Thus and otherwise the said Regulation 34(2) is vague and/or overbroad and thus infringe Articles 3 read with 4 and Articles 12(1) and/or 13 of the Constitution.

F.14 Powers of Armed Forces to cause persons to leave any area

185. **Regulation 36** permits a member of the Armed Forces not below specified ranks and a member of the police not below specified rank to require any person to leave any area.

186. The Regulation does not require that the Order be made only in specified situations (e.g. unlawful assembly aimed at committing violent acts against persons or property). In terms of the Regulation the armed forces could order a group of school girls having a picnic at the park to disperse, and the failure to do so could result in their arrest!

187. No conditions / criteria have been stipulated for the exercise of this power, and purports to grant unfettered discretion to the armed forces.

188. If such person does not leave then Regulation 36(2) permits arrest of such person or the use of armed force. This Regulations seriously hinders the freedom of movement and expression and it is submitted that this is an effort to stifle the right to protest.

189. Thus and otherwise the provisions of the said Regulation 36 are vague and/or overbroad and infringe Articles 12(1) and / or 13 and/or 14(1)(a),(b) and (c) of the Constitution.

F.15 Questioning and Detention by Armed Forces / Police

190. **Regulation 37** provides that:

(*1) Notwithstanding anything in any other law to the contrary, a person taken in to custody and detained under any emergency regulation may, during the period of such custody and detention, be questioned by any Police officer, or any other officer authorized by the Commander of the Army, Commander of the Navy or Commander of the Air Force and it shall be the duty of the person so questioned to answer the question addressed to him.*

(2) for the purpose of questioning any person taken into custody and detained under paragraph (1) or for any other purpose connected with such questioning, any officer referred to in paragraph (1) may remove such person from any place of detention or custody and keep him in the temporary custody of such officer for a period not exceeding seven days at a time.

191. Thus in terms of Regulation 37, a person detained under the Regulations can be questioned by the armed forces.

192. No justification for permitting the armed forces to exercise investigative functions is provided. The Record does not suggest any such justification.

193. Furthermore, a Police Officer or Member of the Armed Forces is permitted to take temporary custody of such a person for periods not exceeding seven days at a time.

194. As submitted previously, apart from incentivising torture as a means of 'expeditious investigation' there is no apparent justification for such a course of action.

195. Further, as with the other Regulations, there is no causal nexus between the alleged purpose for the promulgation of Regulations, and this particular Regulation. Certainly, none is apparent from the Record.

196. As submitted previously, given an unenviable record in this regard, permitting investigators to keep suspects in their custody for such periods would incentivise and pave the way for torture, if not disappearances and extra-judicial executions.

F.16 The impugned Emergency Regulations (P6) as a whole constitute an abrogation of the fundamental rights guaranteed under the Constitution

197. It is further submitted that, as a whole, the Emergency (Miscellaneous Provisions and Powers) Regulation No.1 of 2022 (**P6**) constitute an abrogation of the fundamental rights guaranteed under the Constitution and that the said Emergency (Miscellaneous Provisions

and Powers) Regulation No.1 of 2022 are overbroad, vague and violative of fundamental rights of the Petitioners and the citizenry of the country inasmuch as *inter alia*;

(a) It has no nexus to any emergency taking place in the country,

(b) It clearly based on an ulterior motive of stifling dissent

198. There is no causal nexus between the alleged purpose for the promulgation of Regulations, and individual Regulations.

199. Although there was a State of Emergency and Emergency Regulations in force, the multitude of events on the 9th of May, including the arson attacks, occurred. Evidently, the Emergency Regulations were of no substantial use, which raises the question as to why the regulations were actually promulgated. As the Respondents have failed to establish before Court the reasons for the promulgation of the regulations, an adverse inference must be drawn that it was based on an ulterior motive.

200. As submitted previously, the Record does not contain any justification for the promulgation of Emergency Regulations, quite apart from not providing justification for Regulations of the type sought to be promulgated.

201. Despite the lapse of the Regulations, as the State of Emergency was not extended, the regulations has violated fundamental rights of the Petitioners and the citizenry, as it has had a chilling effect on freedom of speech and expression, peaceful assembly, association, and movement.

202. Such a chilling effect itself amounted to a violation of the Petitioners' fundamental rights.

203. This is all the more so considering that fundamental rights have a collective aspect, and by preventing the exercise of such right by like-minded citizens too, the Petitioners' rights are further violated.

204. Your Lordships' Court recognised this collective aspect, most notably in ***Mediwake and Others v. Dayananda Dissanayake, Commissioner of Elections and Others [2001] 1 Sri LR 177*** where the Court held (at page 212) that;

> "*…the freedom of expression, of like-minded voters, when exercised through the electoral process is a collective one, although they may not be members of any group or association. This is by no means unique. A scrutiny of Article 14 reveals that many Fundamental Rights have both an individual and a collective aspect*."

205. Additionally, the purported promulgation of the Emergency Regulations was a *mala fide* exercise of power; arbitrary, irrational, grossly unreasonable, and *ultra vires*. As such the exercise of power was contrary to the public trust doctrine, which would require that the power only be exercised for the benefit of the people - not to stifle dissent against the Government.

206. In ***Premachandra v. Major Montague Jayawickreme [1994] 2 Sri LR 90*** His Lordship G.P.S. de Silva CJ held (at page 105):

"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****, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted."*

207. More recently, in ***Sampanthan v. Attorney General, SC FR 351/2018, S.C.M. 13th December 2018***, after considering the authorities on this point, it was held (at page 74)

"…this Court has, time and again, stressed that our law does not permit vesting unfettered discretion upon any public authority whether it be the President or any officer of the State."

208. Therefore, for this reason too, the promulgation of the Emergency Regulations is liable to be declared a nullity and a violation of fundamental rights.

209. In this regard Your Lordships' attention is respectfully drawn to ***Centre for Policy Alternatives and others vs. Attorney General and others, SC FR 91, 106, 107 / 2021, S.C.M. 13th November 2023*** where Your Lordships' Court was pleased to declare a set of Regulations in their entirety to be unconstitutional and null and void. In doing so Your Lordships' Court also concluded that "*It is not practically possible for this Court to suggest amendments to rectify the Regulations to align with all fundamental rights due to their inherent flaws*."

G. COSTS

210. As demonstrated by the consecutive declarations of emergency in the country, there is a trend of executive abuse of this power, which should not be tolerated.

211. For the reasons submitted above, it is respectfully submitted that the Petitioners are entitled to the relief prayed for in the Petition.

212. While the Petitioners have not specifically prayed for compensation, it is respectfully submitted that considering the many dates on which this matter had to be argued, Your Lordships' Court would be pleased to consider awarding high costs, including punitive costs, against the State.

213. Sri Lankan jurisprudence has shown that even in Judicial Review applications, punitive costs may be awarded. The Court of Appeal in ***Ceylon Petroleum Storage Terminals Limited v. Mr. B.K. Prabath Chandrakeerthi, Commissioner General of Labour and others, CA/WRIT/243/2021, C.A.M. 10th February 2022***, has held (at page 18):

*"Enid Campbell, Sir Isaac Isaacs Professor of Law, Monash University, who has done an extensive survey on awarding of costs in Judicial Review applications has stated in her article "****Award of Costs on Application for Judicial Review"*** *published in Sydney Law Review [1983] SydLawRw 3; (1983) 10(1) page 20 that;*

"Costs may be awarded in applications for supervisory Judicial Review whether they be applications for prerogative writs or like orders or for injunctions or declarations. In civil litigation the judicial discretion to award costs as between party and party is normally exercised in favour of the successful party. The discretion should not, it has been said, be exercised against the victor "except for some reason connected with the case.7"" _

214. It also cannot be alleged that such delays are not attributable to any bad faith on the part of the Respondents. Your Lordships' Court has also previously demonstrated that the presence of good faith in fundamental rights applications is immaterial. In ***W.S.L. Fernando and another v. S.A.S.U. Dissanayake and others, SC FR 17/19, S.C.M. 23rd March 2021***, it was held (at pages 27-28) that:

"*In view of my finding that the 7th to 17th Respondents have infringed the fundamental right of the Petitioners guaranteed in terms of Article 12(1) of the Constitution and since this Court should necessarily take judicial notice of the fact that the Petitioners would have expended a considerable sum of money to seek relief from this Court and has not received education for over two years from the school at which she was entitled to receive education, I declare that the Petitioners should be entitled to compensation. Taking into consideration the facts and circumstances relating to this matter, I direct the State to pay Petitioners a sum of Rs. 5,00,000/ as compensation to the 2nd Petitioner. It shall be the responsibility of the 17A Respondent to facilitate the payment of compensation.*"

215. In ***Design Team 3 (Private) Limited and another v. Urban Development Authority and others, CA/WRIT/491/2021, C.A.M. 06th May 2022***, the Court of Appeal referred to a judgement of Sarath N Silva J. on exemplary costs, at page 10:

Shirani Thilakawardane J. in Ranmenike vs. Senaratne (2002) 3 Sri. L.R. 274 referring to the case of K. Leela Violet v. I. P. Vidanapathirana and Others (1994) 3 Sri. L.R. 377 (decided by Sarath N. Silva J.) observes that the original concept of 'exemplary cost' _has come from the Indian case of Sebastian M. Hongray vs. Union of India (1984) AIR SC 1026. The Court in that case considered the charges of civil contempt which could have been preferred against the Respondents in dealing with exemplary costs. Such exemplary costs have a different identification than the Bills of Costs and Taxation of Costs mentioned in Supreme Court (Fess and Costs) Rules 1978 (Gazette Extraordinary No.12/11 dated 30.11.1978).

216. It is respectfully submitted that Your Lordships' Court in the exercise of the fundamental rights jurisdiction of Your Lordships' Court, is also discharging the duties placed by Article 4 of the Constitution to secure and advance Fundamental Rights.

217. In terms of Article 17 of the Constitution, every person has a fundamental right to "apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter".

218. Thus contained in Chapter III of the Constitution is also **a right to** vindicate the other fundamental rights recognised in the Constitution / a right to a remedy [See ***Centre for Policy Alternatives and others vs. Hon. Attorney General and others [SC FR 91/2021; 106/2021; 107;2021] S.C. Minutes of 13th November 2023 at Pg 8 – 10]***

219. Thus it is respectfully submitted that the Supreme Court in exercising this jurisdiction, both in terms of vindicating an existing right to a remedy and in terms of the obligations of the Constitution to secure and advance Fundamental Rights would be mindful / give due regard to the costs involved in the invocation of jurisdiction, and to ensure that delays in litigation and costs of litigation does not make it an avenue open to only a few.

220. In these circumstances it is respectfully submitted that Your Lordships' Court would consider the award of actual and / or punitive costs as a means of;

(a) Preventing the unnecessary prolonging of these proceedings by Respondents which would lead to increase of costs for would be Petitioners;
(b) Preventing the costs associated with fundamental rights litigation becoming prohibitive to public spirited litigants;
(c) Encourage the speedy disposition of such cases and prevent the unnecessary utilisation of judicial time and facilities by parties interested in prolonging such proceedings;
(d) Ensure that the right to a remedy, as recognised in Article 17, is not vitiated and/or substantially negated.

221. As such is respectfully submitted that Your Lordships' Court would be pleased to, in addition to granting the other substantive relief prayed for, make order awarding actual and / or punitive costs.

REGISTERED ATTORNEY FOR THE PETITIONERS

On this 30th day of August 2024

Settled by:
Khyati Wikramanayake

Luwie Ganeshathasan

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