Sinnadurai Sundaralingam & Balendra
Attorneys-at-Law & Notaries Public
#367 4/1 Dam Street, Colombo 01200
P: 011 25 444 00 E: lawyers@sblaw.lk

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

In the matter of an application under and in terms of Articles 17, 35 and 126 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

PETITIONER

SC FR Application No. 353 /2018

Vs

1[A]. Honourable Attorney General
(in terms of the requirements of Article 35 of the Constitution)

1[B]. Honourable Attorney General
(in terms of Article 134(1) of the Constitution read with Supreme Court Rule 44(3))

Attorney General's Department
Hulftsdorp, Colombo 01200

2. **Mahinda Deshapriya**
   Chairman – Election Commission

3. **N. J. Abeysekara P.C**
   Member – Election Commission

Sinnadurai Sundaralingam & Balendra
Attorneys-at-Law & Notaries Public
#367 4/1 Dam Street, Colombo 01200
P: 011 25 444 00 E: lawyers@sblaw.lk

4. **Professor S. Rathnajeevan H. Hoole**
   Member – Election Commission

   all of
   Election Commission, Election, Secretariat
   Sarana Mawatha, Rajagiriya

5. **Honourable Karu Jayasuriya**
   Speaker of Parliament
   Speaker's Resident
   Sri Jayawardenapura Kotte

RESPONDENTS

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

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

Background of the Application

1. The President (Respondent 1A), purported to remove the sitting Prime Minister and purported to appoint Member of Parliament Mahinda Rajapaksa as Prime Minister on 26th October 2018. (**Vide Paragraphs 15 – 26 of the Petition**)

2. A day later, on 27th November 2018, Parliament was arbitrarily prorogued by the President, despite objections by a majority of MPs and the Speaker of Parliament. (**Vide Paragraphs 27 – 33 of the Petition**).

3. Thereafter, the President (Respondent 1A), purported to dissolve Parliament on 09th November 2018, by impugned Gazette Notification marked **P16**. (**Vide Paragraphs 44 – 48 of the Petition**)

4. The Petitioners, however, made this application to Your Lordships' Court, complaining that the said actions of the President were illegal, arbitrary and infringed the Petitioners' Fundamental Rights, as more fully set out in the Petition and these submissions.

5. Due to the grave urgency in the matter, Your Lordships' Court took up and heard this matter on the question of Leave to Proceed and interim relief on 12th and 13th November 2018.

6. Parties to the application, including the Hon. Attorney General appearing as Respondent 1[A] on behalf of the President and Respondent 1[B] were given the opportunity to make submissions, consequent to which Your Lordships' Court was pleased to grant Leave to Proceed in terms of Article 12(1) of the Constitution, as well as grant several interim reliefs,

without which irremediable harm and damage would have been caused to the Petitioners and the citizens of Sri Lanka.

7. As directed by Your Lordships' Court, these written submissions are made prior to the making of oral submissions by Learned Counsel for the Petitioners at the hearing of this application, which stands fixed for 04th, 05th and 06th December 2018, with interim relief granted until 07th December 2018.

8. These written submissions are structured in the following manner:

   A. Legal provisions on dissolution of Parliament – before and after the 19th Amendment to the Constitution
   B. Impugned dissolution of Parliament and Article 70(1) of the Constitution
   C. Interpretation of the provisions on the dissolution of Parliament
   D. Ability of the President to usurp, subvert or suppress powers of Parliament
   E. Importance of the franchise and representative democracy
   F. Challenging laws that have been passed
   G. Conclusion

A. Legal provisions on the dissolution of Parliament – before and after the 19th Amendment to the Constitution

9. The Nineteenth (19th) Amendment to the Constitution was enacted to reduce and restrict some of the powers of the Executive President. The said Nineteenth Amendment was enacted on the 15th of May 2015 with the certification by the Speaker. The Amendment was enacted to address consistent concerns and criticisms made in respect of the broad powers of the Executive President under the Second Republican Constitution ever since the Office of the Executive President was constituted. The Amendment was thus a response to the recognition of a need to curtail these powers. (**Vide paragraphs 10 – 14 of the Petition**)

10. Accordingly, the Nineteenth Amendment introduced putting in place safeguards against abuses of executive power and was passed *almost unanimously* in Parliament (212 voting in favour, 1 voting against, 1 abstaining and 10 absent), with MPs from all sections of the political spectrum voting in favour of it.

    (The relevant extracts of the Hansard dated 28th April 2015 of which judicial cognizance may be taken, are annexed hereto marked **X1**).

11. Among the restrictions placed on the holder of the office of Executive President under the Nineteenth Amendment is the constitutional restriction of the ability to dissolve an elected Parliament during its term. The term itself was reduced from six years to five years. It is respectfully submitted that thus a constitutional curtailment of the ability of the Executive President to effect dissolution was made in no uncertain terms. The aforementioned intention of the Nineteenth Amendment is reflected and demonstrated through several speeches and documents issued by the President (Respondent 1A) himself. (**Vide P3**, **P4(A)** and **P4(B)**).

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12. The Articles of the Constitution dealing with dissolution prior to and following the Nineteenth Amendment are juxtaposed for Your Lordships' convenience as follows:

Prior to the Nineteenth Amendment to the Constitution		**After the Nineteenth Amendment to the Constitution**	
	No corresponding provision	Article 33(2)	**(Under Chapter VII – The Executive)** (2) In addition to the powers, duties and functions expressly conferred or imposed on, or assigned to the President by the Constitution or other written law, the President shall have the power – (a) to make the Statement of Government Policy in Parliament at the commencement of each session of Parliament; (b) to preside at ceremonial sittings of Parliament; (c) **to summon, prorogue and dissolve Parliament;** (d) to receive and recognize, and to appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents; (e) to appoint as President's Counsel, attorneys-at-law who have reached eminence in the profession and have maintained high standards of conduct and professional rectitude. Every President's Counsel appointed under this paragraph shall be entitled to all such privileges as were hitherto enjoyed by Queen's Counsel; (f) to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other judges of the Supreme Court, the President of the Court of Appeal and other judges of the Court of Appeal, and such grants and dispositions of lands and other immovable property vested in the Republic as the President is by law required or empowered to do, and to use the Public Seal for sealing all things whatsoever that shall pass that Seal; (g) to declare war and peace; and (h) to do all such acts and things, not inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage the President is authorized or required to do.
Article 62(2)	**(Under Chapter X – The Legislature-Parliament)** (2) Unless Parliament is sooner dissolved, every Parliament shall continue for six years from the date appointed for its first meeting and no longer, and the expiry of the said period of six years shall operate as a dissolution of Parliament.	Article 62(2)	**(Under Chapter X – The Legislature-Parliament)** (2) Unless Parliament is sooner dissolved, every Parliament shall continue for five years from the date appointed for its first meeting and no longer, and the expiry of the said period of five years shall operate as a dissolution of Parliament.

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	(Under Chapter XI – The Legislature – Procedure and Powers) 70. (1) The President may, from time to time, by Proclamation summon, prorogue and dissolve Parliament: Provided that (a) subject to the provisions of sub-paragraph (d), when a General Election has been held consequent upon a dissolution of Parliament by the President, the President shall not thereafter dissolve Parliament until the expiration of a period of one year from the date of such General Election, unless Parliament by resolution requests the president to dissolve Parliament; (b) the President shall not dissolve Parliament on the rejection of the Statement of Government Policy at the commencement of the first session of Parliament after a General Election; (c) subject to the provisions of sub-paragraph (d), the President shall not dissolve Parliament after the Speaker has entertained a resolution complying with the requirements of sub-paragraphs (a) and (b) of paragraph (2) of Article 38, unless – i. such resolution is not passed as required by subparagraph (c) of paragraph (2) of Article 38; ii. the Supreme Court determines and reports that the President has not become permanently incapable of discharging the functions of his office or that the President has not been guilty of any of the other allegations contained in such resolution; iii. the consequent resolution for the removal of the President is not passed as required by subparagraph (e) of paragraph (2) of Article 38; or iv. Parliament by resolution requests the President to dissolve Parliament; (d) where the President has not dissolved Parliament consequent upon the rejection by Parliament of the Appropriation Bill, the President shall dissolve Parliament	70(1)	**(Under Chapter XI – The Legislature – Procedure and Powers)** 70. (1) The President may by Proclamation, summon, prorogue and dissolve Parliament: Provided that the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour.

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13. Your Lordships' attention is respectfully drawn to the fact that the changes made under the Nineteenth Amendment pertaining to the dissolution of Parliament accordingly are:

    i. To create a consolidated list of the duties, powers and function of the President as provided in Article 33.
    ii. To reduce the term after which Parliament is dissolved by operation of law from 6 years to 5 years as provided in Article 62(2).
    iii. Restrict the situations in, and prescribe the procedure by which, the President can dissolve Parliament, as per the provisions of Article 70(1).

14. In fact, Prof. G. L. Peiris, Member of Parliament, in a speech in Parliament on the 27th of April 2015 clearly stated that while earlier the President could unilaterally dissolve the Parliament after completion of one year of Parliament, under the provisions of the Nineteenth Amendment the President could not do so for four and a half years.

    (A copy of the Hansard containing a speech by Hon. G.L Peiris dated 27th April 2015 of which judicial cognizance may be taken, is annexed marked as **X2**)

15. The above Hansard clearly demonstrates an undoubted recognition and understanding by President Maithripala Sirisena (Respondent 1A) and others regarding the restrictions imposed by the Nineteenth Amendment on the ability of President Maithripala Sirisena (Respondent 1A) to effect a dissolution of Parliament within the first four years and six months (4 ½ years) of the first meeting of an elected Parliament.

B. Impugned dissolution of Parliament is contrary to Article 70(1) of the Constitution

16. Article 33(1)(a) of the Constitution, which was introduced by the Nineteenth Amendment stipulates that it is the duty of the President to ensure that the Constitution is respected and upheld. The President, like all other citizens of Sri Lanka, is thus duty-bound to follow and uphold the Constitution which is the Supreme Law of the Land.

17. Further, the oath of office the President as per Article 32 read with the 4th Schedule says that the President shall "*faithfully perform the duties swear the duties and* ***discharge the functions of the office of President in accordance with the Constitution of the Democratic Socialist Republic of Sri Lanka and the law****, and that I will be faithful to the Republic of Sri Lanka and that* ***I will to the best of my ability to uphold and defend the Constitution of the Democratic Socialist Republic of Sri Lanka***" [emphasis added]

18. The Preamble to the Second Republican Constitution gives expression to the fact that the Constitution is the Supreme Law of the Country by stating that *"WE, THE FREELY ELECTED REPRESENTATIVES OF THE PEOPLE OF SRI LANKA … do hereby adopt and enact this CONSTITUTION as the SUPREME LAW of the DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA".*

19. The fact that the Executive President is required to be subject to the limitations set out by the Constitution is borne out by the fact that any individual holding the office of Executive President may even be impeached and removed from office, if he *inter alia*, 'intentionally violates the Constitution' [Article 38(2)(a)(i)] or engages in 'misconduct or corruption involving the abuse of his powers of office' [Article 38(2)(a)(iv)].

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20. These provisions highlight the fact that in Sri Lanka, the Constitution of the Republic is Supreme, and even the President (Respondent 1A) must act in accordance with it, comply with it and thereby not fail to uphold it.

21. Your Lordships' Court has consistently upheld that the 'principle of the Rule of Law' is a bedrock principle upon on which our Constitutional order has been established. In ***Wijeyaratne v. Warnapala and others*** **(SCFR 305/2008) SCM 22.09.2009** at page 5, it was held by Sripavan, J (S. Tilakawardane, J. And P.A. Ratnayake, J Agreeing) that:

> *"**It has been firmly stated in several judgments of this Court that the "Rule of Law" is the basis of our Constitution.** (Vide Vishvalingam vs. Liyanage (1983) 1SLR 236; Premachandra vs. Jayawickrema (1994) 2SLR 90. "**If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective**" – Bhagwati Jin Gupta and Others Vs. Union of India, (1982) AIR (SC) 197."* [emphasis added]

(A copy of the judgement is annexed marked as **X3**)

In ***In Re the Eighteenth Amendment to The Constitution*** **[2002] 3 Sri LR 71** at **78,** it was determined by S. N. Silva, CJ (S.W B. Wadugodapitiya, J, Dr Shirani A. Bandaranayake, J. A. Ismail J, P. Edussuriya, J, H.S. Yapa, J, and A.N. De Silva, J agreeing) That:

> *"...in terms of Articles 3 and 4 of the Constitution, fundamental rights and franchise constitute the sovereignty of the People and is inalienable.* ***The Constitution does not attribute any unfettered discretion or authority to any organ or body established under the Constitution.*** *Even the immunity given to the President under Article 35, has been limited in relation to Court proceedings specified in Article 35(3). Moreover, the Supreme Court has entertained and decided the questions in relation to Emergency Regulations made by the President [Joseph Perera v. Attorney-General - (1992 - 1 Sri LR. pg 199)] and Presidential Appointments (Silva v. Bandaranayake – (1997)1 Sri L.R. pg 92)."* [emphasis added]

(A copy of the judgement is annexed marked as **X4**)

22. According to Dicey, who devised the principle of the **Rule of Law** in his book *Introduction to the Study of the Law of the Constitution,* the Rule of Law requires state institutions to act in accordance with the law. This means the ***various organs of the state including the Executive President must obey the law.***

23. While the President's power to dissolve Parliament is enumerated in the consolidated list of powers seen in Article 33(2) above, **the manner in which the power may be exercised** is clearly prescribed without ambiguity in the proviso to Article 70(1) of the Constitution, as follows:

> *"Provided that* ***the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months***

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> ***from the date appointed for its first meeting**, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour."* [emphasis added]

24. The President's power to 'summon, prorogue and dissolve Parliament' under Article 33(2) must be exercised in accordance with Article 70(1) as amended by the Nineteenth Amendment. Thus, the President does not have the power to unilaterally dissolve a given Parliament before the expiration of four years and six months (4½ years) of the date fixed for the meeting of that Parliament.

25. The President in issuing the impugned Gazette marked **P16** in respect of the Eighth Parliament has failed to follow and respect the provisions of the Constitution, and in so doing, has failed in his duty to ensure that the Constitution is respected and upheld, thereby also violating the Rule of Law. The purported Proclamation of dissolution of the Eighth Parliament in the impugned Gazette Notification is thus unconstitutional, illegal and *ultra vires*.

C. Interpretation of the provisions on dissolution of Parliament

26. Your Lordships' attention is respectfully drawn to the fact that the Constitutional provisions regarding the dissolution of Parliament are clear following passage of the Nineteenth Amendment. There is only one way in which Parliament can be dissolved, prior to its term of five years ending, as provided in Article 70 of the Constitution.

27. When this matter came up for Leave to Proceed, however, the Attorney General representing Respondent 1A (and several counsels for intervenient parties in connection SC (FR) 351/2018, which was taken together with this application) endeavoured to suggest that these abundantly unequivocal provisions of the Constitution could be interpreted in multiple ways. It is submitted with respect that this contention is untenable, inasmuch as no other sensible or reasonable construction that upholds the Rule of Law is possible.

28. It is respectfully urged that no doubt may be credibly admitted in respect of the fact that Parliament can only be dissolved by the President prior to completion of its five-year term if one of the two requirements in the proviso to Article 70(1) are met. i.e. if a term of four and a half years lapses, or if 2/3 of the Members of Parliament request the President to do so by way of a resolution.

29. It is a well-established rule of interpretation that a document must be read as a whole in order to ascertain the meaning of its separate parts. This means that parts of a statute cannot and should not be read in isolation in a manner that creates inconsistency and absurdity between its separate parts.

30. In the case of ***Land Reform Commission v. Rev. Ganegama Sangarakkita Thero*** **[1987] 2 Sri LR 411** at **415**, Dheeraratne, J (Viknarajah, J agreeing) held that:

> ***"I am of the view that any attempt at construing the correct meaning of the word possessed in section 42A could hardly be expected to succeed by looking at that section in isolation and that the whole Land Reform Law should be examined to discover the legislative intent in using that word**. Craies on Statute Law (7th Edition), at page 100 states:*

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#367 4/1 Dam Street, Colombo 01200
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"In Colquhoun v. Brooks ((1889) 14 App. Cases 492, 506.) Lord Herschel said, it is beyond dispute, too, that we are entitled and indeed bound, ***when construing the term of any provision found in a statute, to consider any other parts of the act which throw light on the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be alone and apart from the rest of the Act.*** *And Lord Davey in Canada Sugar Refining Co. v. R (Canada Sugar Refining Co. v. R. – [1898] AC 735, 741) said* ***Every clause of a statute should be construed with reference to the context and other clauses in the Act, so as, as far as possible, to make a consistent enactment of the whole or series of statutes relating to the subject matter."***

Bindra's Interpretation of Statutes (7th Edition) gives expression to the same view at page 303 in the following words:-
"It is a fundamental principle in the construction of statutes that the whole and every part of the statute must be considered in the determination of the meaning of any of its parts. In construing a statute as a whole the Courts seek to achieve two principal results to clear up obscurities and ambiguities in the law and to make the whole of the law and every part of it harmonious and effective. It is presumed that the legislature intended that the whole of the statute should be significant and effective. Different sections, amendments and provisions relating to the same subject must be construed together and read in the light of each other" [emphasis added]

(A copy of the judgement is annexed marked as **X5**)

31. Further, Maxwell in *The Interpretation of Statutes* (12th Edition by P. St. J. Langan) states that:

"It was resolved that in the case of Lincoln College ((1595) 3 Co. Rep. 58b, at p 59b) that ***the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself'. Every clause of a statute is to 'be construed with reference to the context and other clauses of the act, so as, as far as possible, to make a consistent enactment of the whole statute'*** *(Canada Sugar Refining Co. Ltd v. R (1898) A.C 735 per Lord Davey at p.741.)"*

[at page 47]

"Passing from the external aspects of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself *(Turquand vs. Board of Trade (1886) 11 App.Cas. 286, per Lord Blackburn; Att.- Gen Vs. Brown (1920) 1 KB 773, per Sankey J.)"*

(i) ***Individual words are not considered in isolation, but may have their meaning determined by other words in the section in which they occur*** *(Jewish Blind Society Trustees v. Henning (1961) 1 W.L.R. 24; Ratcliffe v. Ractliffe (1962) 1 W.L.R 1455; Cumberland Court (Brighton), Ltd. v. Taylor (1964) Ch.29; R v. Pric (1964) 2 Q.B 76)*

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(ii) ***The meaning of a section may be controlled by other individual sections in the same Act*** *(Smith v. Adams (1855) 24 L.J Ch 258; Thompson v. Farrer (1822) 9 Q.B.D 372; Mercer v. Denne (1905) 2 Ch. 538)*

[at page 58]
[emphasis added]

(Relevant extracts from Maxwell's *The Interpretation of Statutes* 12th Edition are annexed hereto for Your Lordships' convenience, marked **X6**)

32. It is respectfully submitted that to consider Article 33(2)(c) of the Constitution in isolation without considering the fact that it would render Article 70 of the Constitution redundant is wholly incorrect and would lead to a situation of absurdity in the Constitution where particular provisions can be read with complete disregard to other relevant provisions. Such a situation would undermine the true intention of the Constitution to exist as a whole.

33. It is further submitted that such an interpretation would have the effect of deleting an entire sub-article of the Constitution and would further lead to the absurd proposition that the President could dissolve Parliament at any time of their choosing for any reason.

34. The fact that Article 33(2)(c) and Article 70(1) must be read together is further strengthened by the presumption of statutory interpretation *'Generalia specialibus non derogant'* – The presumption that a general provision does not detract from specific provisions. In other words, a general provision is qualified by specific provisions on the same subject. The proviso of Article 70(1) qualifies and limits the power granted by Articles 33(2) and 70. Reading them in isolation would result in the ludicrous result of effectively a general provision rendering any specific provisions redundant.

35. It is submitted that it is of critical importance that Constitutional construction should not be effected so as to give rise to absurdity or render redundant the effect and import of any Article of the Constitution.

36. It is further respectfully submitted that if your Lordships' Court upholds the interpretation put forward by the Hon. Attorney General, acting for and on behalf of Respondent 1A and others seeking to support the impugned dissolution, that Article 70 can be completely disregarded when dissolving Parliament under the purported alternative procedure in Article 33(2)(c), it would render Article 70 redundant and/or ineffectual, defeating its whole purpose. Thus, it is respectfully submitted that the Constitution would not be upheld by arriving at such a finding.

37. Further, in the Madras High Court case of ***A.Ram Mohan v The State by The Inspector of Police CLR. R.C No. 265 of 2015***, it was held that:

> ***"In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.***
>
> *The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read*

> *something into it which is not there. It cannot rewrite or recast legislation.* ***It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used.***"

It was further held that:

> *"It is true that this Court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute and, therefore, it will be useful at this stage to reproduce what Lord Diplock said in Duport Steels Ltd. v. Sirs [(1980 (1) All.ER 529] (All ER at p. 542c-d):*
>
> *It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest."*

(A copy of ***A. Ram Mohan v The State by The Inspector of Police*** obtained from < https://indiankanoon.org/doc/7149604/> is annexed hereto for Your Lordships' convenience marked as **X7**)

D. Ability of the President to usurp, suppress or subvert the powers of Parliament

38. The doctrine of the **Separation of Powers** articulates the basic philosophy of our constitutional system of government. It establishes a system of checks and balances to protect any one branch of government from the overreaching power of any other branch. This is the spirit in which the restriction of the President's ability (as the Head of the 'Executive' arm of government) to dissolve Parliament (the 'Legislative' arm of government) prior to four years and six months was introduced by the Nineteenth Amendment. **This restriction on the President's power enables the legislature to continue its functions as mandated by the electors without the undue threat of being dissolved at the will of one individual.** It also assures continuity and certainty of tenure for the Legislature and gives it the ability to function without undue obstruction or oppression by the Executive, a critical element in a functioning democracy.

39. The Constitution sets out the manner in which the separation of powers is to be exercised between the different organs of government. The supreme law has been enacted with the mandate of the people, and this is true also true of the changes brought in through the Nineteenth Amendment which had the overwhelming support of the representatives of the people in Parliament. If any person howsoever exalted by high office is allowed to override important constitutional safeguards, it will severely undermine both the Constitution and the Parliament of the People, consisting of their *elected* representatives.

40. Members of Parliament should be free to act as such to carry out their respective mandates as given by the people for a clear constitutionally assured term without fear of that term being arbitrarily cut short by the Executive on an arbitrary whim, fancy or surmise, in contravention of the Constitution. This is somewhat akin to constitutional protections provided to the tenure of judicial officers under the Constitution and the law to ensure they can carry out their

Sinnadurai Sundaralingam & Balendra
Attorneys-at-Law & Notaries Public
#367 4/1 Dam Street, Colombo 01200
P: 011 25 444 00 E: lawyers@sblaw.lk

functions without fear of interference, suppression or oppression. To subject, the tenure of the holders of office in one organ of government to the untrammelled pleasure of another severely erodes the independence of the other organs of government and will lead to a complete deterioration of democratic norms and principles.

41. It is submitted with respect that while the President (Respondent 1A) is also elected by the People, he is thus elected to uphold the Constitution and ensure that it is respected (for which he must lead by example). Thus, the mandate granted to the elected President is to act and exercise discretion within and in terms of the Constitution, and not contrary to its requirements. Thus, his actions must necessarily conform to the provisions in the Constitution and must not entail infringement of any fundamental rights guaranteed to citizens (as voters) of Sri Lanka. This is clear from the very meaningful oath he must subscribe to in order to assume the high office of the Presidency, even if (hypothetically speaking) he had been elected with 100 per cent of the votes cast at a valid Presidential Election.

42. Thus, under the principle of the separation powers, a branch of government, even when elected by the People, may not unduly interfere in the functions of another (in this instance also an elected) branch, and to do so would infringe their fundamental rights guaranteed under Article 12(1) and Article 14(1)(a) of the Constitution as well as undermine the will of the People and thereby, their Sovereignty. Accordingly, the President (Respondent 1A) has the authority to dissolve Parliament only under and in terms of the requirements of the Constitution.

43. Given this context, prior to the Nineteenth Amendment, an anomaly existed in respect of checks and balances between the two elected branches of government – where one branch (the Executive) could dismiss another (the Legislature). By the Nineteenth Amendment, the Legislature was strengthened to be able to give effect to the Franchise of the People to exercise legislative power without a 'sword of Damocles' hanging over its head for four and a half years. This is a clear check and restriction imposed on the holder of the office of Executive President in the context of persistent concerns with regard to the lack of such checks and restrictions ever since the Second Republican Constitution was enacted. Accordingly, the Constitution now seeks to ensure that no branch of government can unduly or arbitrarily interfere with the functions of another.

44. It is submitted that if the President's decision to dissolve Parliament is to be considered constitutionally permissible, then the office of the Executive President (elected by the People of the country) would be afforded a power that Parliament (also elected by the same People of the country) does not possess. It is indeed noteworthy that Parliament cannot unilaterally dismiss the President and thus interfere unduly with the functions of the Executive Presidency. The Parliamentary procedure for the impeachment of the President as prescribed under Article 38(2) of the Constitution is rigorous; involves the other branch of government (the judiciary, as represented by your Lordships' Court); and moreover, involves the exercise and expression of the discretion of all Members of Parliament, and not simply the unilateral decision of one individual.

45. Thus, by the Nineteenth Amendment the meaningfulness of the Franchise (recognised in Article 3 of the Constitution as an integral part of Sovereignty) was strengthened as the ability of the elected Legislature of the People of Sri Lanka to give effect to the Mandate given at a Parliamentary Election was assured, as provided in Article 70(1).

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P: 011 25 444 00 E: lawyers@sblaw.lk

46. Thus, under the Constitution after the Nineteenth Amendment, a valid constitutional dissolution of Parliament cannot be effected to the exclusion of the necessary participation of Parliament, whose resolution by a 2/3 majority to request the President to do so is mandatory for the President to dissolve Parliament for the four years and six months (4½ year) period set out in Article 70.

47. Without prejudice to the above, it is respectfully submitted that ***even where*** an authority is empowered to carry out a certain function – which in this instance the relevant authority, Respondent 1A (the President), is not for reasons set out herein – it is necessarily implied that the said function cannot be carried out for a *mala fide* or collateral purpose. Powers should not be abused but should be exercised for the purposes for which they have been enacted.

48. In that connection, Your Lordships' attention is respectfully drawn to the fact that in any event, Respondent 1A (the President) has not in this application adduced (or even sought to adduce) any credible substantiated evidence of any reasonable or proper factual grounds on which a decision for dissolution of Parliament could have been arrived at. This is even apart from the fact that the said Respondent 1A (the President) has *not* filed any valid, proper or admissible objections, as set out in the Petitioners' Counter-Affidavit.

49. It is respectfully submitted that the President appeared to purport to dissolve Parliament following the realisation that Hon. Mahinda Rajapaksa whom he appointed as Prime Minister did not command the confidence of the majority of the Parliament (**vide para 32 and 39 of the petition**). It is also submitted that this is apparent from the President's citation of the Speaker not recognising his appointment of Prime Minister as one of the reasons for the dissolution (on page 2 of the statement marked **1R1** annexed to the affidavit filed as the purported objections of Respondent 1A). This indicates that the President's decision to dissolve Parliament was not a decision planned when he began his course of actions set out in the Petition on 26th October 2018, but rather, one which was taken later in reaction to evolving political circumstances unfavourable to him in the context of repeated illegal and undemocratic actions by him, which are enumerated in the Petition but have not been duly refuted by objections by Respondent 1A (the President). The President's decision to purportedly dissolve Parliament cannot therefore, in any event, be characterised or cognised as having been taken in good faith.

50. In the case of ***Wijeyaratne v. Warnapala and others*** cited above, Justice Sripavan (as he then was) (S. Tilakawardane, J. And P.A. Ratnayake, J agreeing) states at page 5 that:

> *"When a power is exceeded or abused, any acts done in such excess or abuse of the power is done without authority.* ***The Courts will intervene not only to prevent powers being exceeded but also to prevent them being abused for a collateral object."*** [emphasis added]
>
> (A copy of the judgement is annexed marked as X3)

51. In the case of ***Sirisena and Others v. Kobbekaduwa, Minister of Agriculture*** **(1978) 80 NLR 166, 176** Justice Sharvananda states that:

> *".....in carrying out their task of* enforcing *the law, the* ***Court presumes that bad faith cannot be said to have been authorised by a statute and insists on powers being exercised truly for the purpose indicated by Parliament and not for any ulterior purpose. The Court is solicitous***

> ***that when the agency exercises the power, it shall not act mala fide or frivolously or vexatiously but shall act in good faith and for the achievement of the objects the enactment had in view.***" [emphasis added]

(A copy of the judgement is annexed marked as **X8**)

52. Article 33A of the Constitution provides and requires that "***the President shall be responsible to Parliament*** *for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.*"

53. It is respectfully submitted that in the premises set out in the Petition, it is evident that Respondent 1A (the President) has acted without due respect or regard for the provisions pertaining to the Constitution in purporting to dissolve Parliament through the impugned Gazette notification (**P16**). It is further submitted that the act of dissolving Parliament is a blatant attempt by the President to usurp the powers now granted by the Constitution to the People's Parliament, and constitutes an attempt to negate important safeguards to preserve the life and working of the Parliament through a complete and utter disregard for the Constitution as amended by the Nineteenth Amendment.

E. Importance of franchise and representative democracy

54. The Petitioners have consistently promoted the principle that the 'franchise' forms the bedrock of modern democracy. In fact, as aforesaid, 'franchise' is expressly recognised as a distinct component of the People's Sovereignty in Article 3 of the Constitution.

55. People's sovereignty is exercised through their vote, and this form of participation is how all citizens are given equal opportunity to have their voices heard in how they are governed for a legally set period in a representative democracy. Accordingly, the exercise of the franchise and the operation of free and fair elections must be conducted in accordance with the Constitution and procedures established by law. Elections which are not free and fair and contravene established Constitutional and legal procedures have significant implications on the right to franchise, erode democratic processes and impel a country towards authoritarianism.

56. In the paper "Stealth Authoritarianism" by Ozan O. Varol, it is explained that "*Stealth authoritarianism refers to the use of legal mechanisms that exist in regimes with favourable democratic credentials for anti-democratic ends ...* ***stealth authoritarianism erodes mechanisms of accountability, weakens horizontal and vertical checks and balances, allows the incumbents to consolidate power, exacerbates the principal–agent problem..... Stealth authoritarianism creates a significant discordance between appearance and reality by concealing anti-democratic practices under the mask of law"***

(Relevant pages of the said paper "Stealth Authoritarianism" by Ozan O. Varol are attached hereto, marked **X9**)

57. The Eighth Parliament under the Second Republican Constitution (*i.e.* the present Parliament) was voted in ***after*** the passage of the Nineteenth Amendment in 2015. Through their franchise, the people chose their representatives in the knowledge of, and with entitlement to assume assurance of, the important checks and balances instituted by the

Nineteenth Amendment at the Parliamentary Election held in August 2015. This includes in particular the entitlement to the assurance that they (the People) would be electing a Parliament that could function for a period of *at least* four and a half years without the Executive President taking steps to dissolve it – thereby effectively terminating the given mandate – without 2/3 of the elected Parliament resolving to request the President (Respondent 1A) to do so.

58. Sanctioning the President's actions to dissolve Parliament by the impugned Gazette notification (**P16**) would amount to Your Lordships' Court effectively negating the import and efficacy of Article 70(1), conferring on the President the power to dissolve Parliament any time and at will – even if to evade impeachment under the Constitution. Such unfettered power has *never* been reposed in the Executive President under the Second Republican Constitution, even prior to the Nineteenth Amendment. Article 70(1)(a) before its amendment by the Nineteenth Amendment placed a bar of one year from the date of a General Election before the President could dissolve Parliament (unless requested to do so before by a resolution in Parliament). If the argument is made that the President can dissolve Parliament at any time at will in contravention of the present Article 70(1) of the Constitution is upheld, a situation then arises where Parliament can be dissolved by the President even one day after a new Parliament meets. This would amount to sanctioning the pathway towards dictatorship.

59. It is respectfully urged that an interpretation of this nature would lead to a situation of grave uncertainty and potential abuse with far reaching implications. It will provide broad unchecked powers to the President to act unilaterally in situations where he is in disagreement with the Prime Minister or in the eventuality of an impeachment motion being presented against the President or other such instances not to the liking or pleasure of the President. In such a context, the President can call snap elections to secure political advantage, dismissing the government and Parliament at any given moment. Such unchecked powers can lead to a situation where one individual wields excessive, dictatorial power that can impede other arms of government and severely undermine and erode democratic processes. Such powers, in the absence of safeguards, will solidify authoritarianism. Furthermore, the due constitutional exercise of the legislative power of the People by the legislature [as contemplated and mandated by Article 4(a) of the Constitution] would be rendered amenable to obstruction and impediment by the Head of the Executive (Respondent 1A).

60. When this matter was taken up and heard (along with other connected applications) in support of the grant of Leave to Proceed and interim relief some Learned Counsel were heard to submit that Your Lordships' Court has previously held that expediting elections can never negatively affect the franchise of the People. While it is respectfully submitted that this is a misrepresentation of what this Court has previously held, it is also said that the franchise of the people is in fact severely hindered when the peoples' choices are not duly respected and allowed to have effect for Constitutionally guaranteed periods, at the whim of the President (Respondent 1A). Moreover, an illegal and unconstitutional dissolution of Parliament to call for elections cannot be deemed an acceptable instance of "expediting elections".

61. It is respectfully urged that the Rule of Law exists to protect people from the abuse of power. The exercise of the franchise has the constitutionally assured consequence of a properly functioning Parliament; its undue truncation in contravention of the Constitution is a serious violation of the right to franchise and entails infringement of fundamental rights guaranteed under Article 12(1) and Article 14(1)(a) of the Constitution.

Sinnadurai Sundaralingam & Balendra
Attorneys-at-Law & Notaries Public
#367 4/1 Dam Street, Colombo 01200
P: 011 25 444 00 E: lawyers@sblaw.lk

62. It is also respectfully submitted that at the heart of a democracy is representation: the process of selecting representatives who may legitimately speak for the many. This process of representation is mediated by our political institutions, the rules and the structures of the political process. A democratically elected Parliament accountable to the People it serves is the true voice of the people and is the basic foundation of a democratic system.

63. In a representative democracy, it is the primary duty of elected representatives to make unbiased and informed judgements for the good of the country as a whole, at times even when the decision is unpopular among their constituents. People elect their representatives with that knowledge, as they believe such a person is best suited to represent their interests in future situations.

64. Parliament is therefore of crucial importance to the functioning of a democratic state. It has a decisive role in enabling the effective governance of the country and to act as a necessary check on the Executive. Denying through illegal means the opportunity for a legitimately appointed Parliament to function, or even through legal means used arbitrarily, does irreparable harm to the rights of the citizens in exercising their fundamental right of the franchise in electing their representatives to one branch of government.

F. Laws that have been passed cannot be later challenged

65. When this matter and connected matters were supported for Leave to Proceed, Learned Counsel seeking to defend the impugned actions of the President (Respondent 1A), suggested that a former determination of Your Lordships' Court had held that amending Article 70(1) required a referendum and thus the Nineteenth Amendment to the Constitution in 2015 could not reduce the President's powers without a referendum.

66. It is respectfully submitted that this argument is wholly incorrect, and if countenanced, would subvert the clear relevant provisions set out in the Constitution. The Nineteenth Amendment to the Constitution was passed in Parliament on or about 28th April 2015 in accordance with the determination of Your Lordships' Court. The amendment to Article 70(1) was included in the Bill which was challenged before Court, and after considering the said Bill, such clause was ***not*** held to require a referendum. In fact, the Hon. Attorney General himself did not submit at that hearing that a referendum was required for introduction by the enactment of that provision.

67. Without prejudice to the aforesaid submission, ***even in*** the hypothetical event the said provision had been brought subverting the requirement of a referendum, it is submitted that Article 80(3) of the Constitution precludes the validity of same being questioned even indirectly thereafter as per judicial precedent set by Your Lordships' Court.

68. This position was upheld in the case of ***Gamage v. Perera*** **[2006] 3 Sri L.R. 354, 359**, where Hon. Chief Justice Shirani Bandaranayake (Dissanayake, J and Raja Fernando, J agreeing) held that:

> *"Article 80(3) of the Constitution refers to a Bill becoming law and reads as follows:*
>
> *"Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no Court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever"*

> *The aforesaid Article thus had clearly stated that in terms of that Article, the constitutional validity of any provision of an Act of Parliament cannot be called in question after the certificate of the President or the Speaker is given. Reference was made to the provisions in Article 80(3) of the Constitution and its applicability by Sharvananda, J. in re the Thirteenth Amendment to the Constitution and had expressed his Lordship's views in the following terms:*
>
> > ***"Such a law cannot be challenged on any ground whatsoever even if it conflicts with the provisions of the Constitution, even if it is not competent for Parliament to enact it by a simple majority or two-third majority."***. [emphasis added]

(A copy of the judgement is annexed marked as **X10**)

69. Such arguments brought to indirectly challenge the validity of Nineteenth Amendment which has been duly passed are thus bad in law, and are not in accordance with the Constitution, in terms of the precedent set by Your Lordships' Court.

G. Conclusion

70. In terms of the aforesaid submissions and other matters to be argued at the hearing of this application by Learned Counsel for the Petitioners, it is respectfully urged that the actions taken to purportedly effect a premature dissolution of Parliament and consequential steps in terms of the impugned proclamation in the Gazette marked **P16**:

    a. Is in violation of the provisions of the Constitution;
    b. Is totally contrary to the spirit of the Constitution as amended by the Nineteenth Amendment;
    c. Is in violation of the basic principle of the supremacy of the Constitution and the Rule of Law;
    d. Undermines the separation of powers and the checks protecting the elected representatives of the people (Parliament) from excessive, oppressive and undemocratic control by the Executive;
    e. Is based on collateral motivations which are *mala fide* and arbitrary;
    f. Violates the people's franchise by not duly respecting the mandate given at the Parliamentary Election held in August 2015; and
    g. If not held to be unconstitutional and illegal, would not permit elected representatives (present and future) to carry out their legislative mandate and functions, without fear of control and oppression by the Executive.

71. It is further submitted, that although leave to proceed was granted only in respect of Article 12(1) of the Constitution, the purported affidavit filed as on behalf of Respondent 1A (the President) seeks to deal with the allegations of infringement of Article 14(1)(a) as well which are also dealt with in the Counter Affidavit. Accordingly, it is respectfully urged that sufficient material is before court by the relevant parties to this application engaging the alleged infringement of Article 14(1)(a), too, to warrant the making of a declaration and/or finding in respect of the alleged infringement of the fundamental rights of the Petitioners and voting citizens of Sri Lanka in terms of Article 14(1)(a) of the Constitution as well.

Sinnadurai Sundaralingam & Balendra
Attorneys-at-Law & Notaries Public
#367 4/1 Dam Street, Colombo 01200
P: 011 25 444 00 E: lawyers@sblaw.lk

72. It is therefore respectfully submitted in conclusion that by the said impugned unconstitutional actions of the President, the citizens who exercised their franchise in the 2015 Parliamentary Election are being denied equal protection of the law in violation of Article 12(1). The said negation of franchise entails infringement and continuing infringement of the fundamental rights guaranteed under Article 14(1)(a). It is further submitted that in the given context unless Your Lordships determine this application in favour of the Petitioners, further infringement of the said fundamental rights, guaranteed by Article 12(1) and Article 14(1)(a) is imminent.

73. Your Lordships' attention is respectfully drawn to the fact that (as per Justice G.P.S De Silva in ***Premachandra v. Major Montague Jayawickrema and another*** **[1994] 2 Sri LR 90, at 112**), "*In Sri Lanka, however,* ***it is the Constitution which is supreme, and a violation of the Constitution is prima facie a matter to be remedied by the Judiciary".***

(A copy of the judgement is annexed marked as **X11**)

74. Your Lordships' attention is respectfully drawn, to the fact that the 4th Respondent (Prof. S. R. H. Hoole), Member of the Election Commission has been forthright enough to draw Your Lordships' attention to the serious unconstitutionality and violative, improper nature of the consequences of the purported Proclamation marked **P16**, emphasising the seriousness of the several infringements complained of through this application. The 2nd and 3rd Respondents, by opting not to file objections, have in effect admitted the same, albeit in a less forthright manner.

75. It is respectfully urged therefore, that in view of the serious infringement; continuing infringement; and imminent further infringement of the Fundamental Rights of the Petitioners and voting citizens of the country, as per the aforesaid submissions and other matters to be argued by Learned Counsel for the Petitioners at the hearing of this application, Your Lordships' Court be pleased to grant all the reliefs prayed for through this application.

Sgd. Sinnadurai Sundaralingam & Balendra

REGISTERED ATTORNEYS FOR THE PETITIONERS

On this 30th day of November 2018

Settled by:
Ms Inshira Faliq
Ms Khyati Wikramanayake
Ms Bhavani Fonseka
Viran Corea Esq.
Attorneys-at-Law

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