10th November, 2014

HIS EXCELLENCY THE PRESIDENT

OPINION

By a reference dated 03 November 2014, Your Excellency currently serving the second term as President, have made a reference to this Court in terms of Article 129(1) of the Constitution for consideration by this Court of two questions of law and fact, which are questions of such nature and of such public importance that it is expedient to obtain the opinion of this Court.

The two questions are as follows:

(a) Whether, in terms of Article 31(3A)(a)(i) of the Constitution, as amended by the 18th Amendment, I, as the incumbent president, serving my second term of office as President, have any impediment after the expiration of four years from the date of commencement of my second term of office as President on the 19th November 2010, to declare by Proclamation my intention of appealing to the people for a mandate to hold office as President by election for a further term; and,

(b) Whether, in terms of the provisions of the Constitution, as amended by the 18th Amendment, I, as the incumbent President, serving my first term of office as President, and was functioning as such on the date the 18th Amendment was enacted, have any impediment to be elected for a further term of office.

The second question was later amended by a fresh reference which deleted the words "second term" in the third line and substituted therefor the words "first term".

In order to answer these two questions, it is pertinent to recite the history of the relevant provisions of the Constitution and juxtapose them *viz-a-vis* the facts and circumstances that are admittedly established in regard to the office of the current President serving his second term. In terms of the 1978 Constitution, as it stood originally, Article 31(2) of the Constitution reads as follows:

> *"No person who has been **twice elected to the office of President by the People** shall be qualified thereafter to be elected to such office by the People."*

It has to be noted that the reference to the words ***the office of President by the People*** in Article 31 (2) as it originally stood is referable to Article 30(2) the first ever article that uses the word ***office*** in Chapter VIII of the Constitution entitled **The Executive -The President of the Republic.** This Article namely Article 30 (2) clarifies the word ***the office*** in Article 31 (2).

> *The President of the Republic shall be elected by the People, and shall **hold office for a term of six years.***

It is observed at the very outset that the phrase ***twice elected to the office of President by the People*** with the definite article ***the*** before the word office must connote unequivocally the term of office referred to in Article 30 (2) which extends to six years from a particular date to a future date. Before we delve into this question more fully, suffice it to say that the date of declaration of election of Your Excellency for a 2nd term namely 27th January 2010 is not coterminous with the commencement of the 2nd term. In fact this Court has quite conclusively ruled in SC.Ref (E) No. 1/2010 that the 2nd term of office of Your Excellency began on 19th November 2010.

Repeal of Articles 31 (2) and 92 (c)

Whilst Section 2(1) of the 18th Amendment to the Constitution repealed Article 31(2), consequent to a suggestion by this Court in SD 01/2010, the cognate Article 92(c) was also repealed by Section 15 of the 18th Amendment. It is pertinent to observe that the repeal of Article 31 (2) had to necessarily culminate in the abrogation of Article 92(c) since the language of Article 92 (c) mirrored identically the words used in Article 31 (2).

Article 92(c) went as follows in setting out one of the disqualifications for a President to be elected to the office of President:

"If he has been twice elected ***to the office*** *of President by the People."*

Before this Court examines the effect of the repeals of these two cognate articles which impinge on our answers to the questions posed, let us scrutinize the evolution of another important article namely Article 31(3A)(a)(i) as it currently stands after the 18th Amendment.

Article 31 (3A) (a) (i)

Originally it was by the 3rd Amendment to the Constitution that the following new provision was added immediately after Article 31(3) as Article 31(3A)(a)(i):

"Notwithstanding anything to the contrary to the proceeding provisions of this Chapter, the President may, at any time after the expiration of four years from the commencement of his ***first term of office****, by Proclamation, declare his intention of appealing to the people for a mandate to hold office by election for a further term."*

Section 2(2) of the 18th Amendment amended Article 31(3A)(a)(i) as follows:

(a) By the ***substitution*** *for the words "at any time after the expiration of four years from the commencement of his* ***first term of office****" of the words "at any time after the expiration of four years from the commencement of his* ***current term of office****" and*

(b) by the substitution for the words "by election, for a further term":

Provided that, where the President is elected in terms of his Article for ***a further term of office****, the provisions of this Article shall mutatis mutandis apply in respect of any* ***subsequent term of office*** *to which he may be so elected.*

Thus one could see that following the 18th Amendment to the Constitution, the phraseology of Article 31(3A)(a)(i) has now been amended, in such a way that in place of its prior wording "from the commencement of his first term of office", the words "from the commencement of his current term" has been substituted.

According to these amendments, the intention of the legislature as could be gleaned is evident. The Constitution no longer recludes an incumbent President from seeking re-election for more than two terms (effect of repeal of Articles 31 (2) and 92 (c)) and it dispenses with any previously held distinction between a "first" and "second" term. The corresponding amendment to Article 31(3A)(a)(i) strengthens and recognizes the constitutionally bestowed qualification that a President may be re-elected for more than two terms and therefore adopts the broader terminology relating to the incumbent President's current term, whichever one it may be.

In other words the cumulative effect of the amendments namely repeal of Article 31 (2), 92 (c) and substitution of and addition of a proviso to Article 31(3A)(a)(i) occasioned by the 18th Amendment to the Constitution, as one looks at the chronology of events, could be summarized as follows- With effect from the date on which the Hon. Speaker assented to the 18th Amendment, i.e. as of 09th September 2010, Article 31(2) and Article 92(c) stand repealed, whilst Article 31(3A)(a)(i) stands partly substituted. It is important to note that Article 31(3A)(a)(i) was amended not only by way of substitution, but by an addition, namely, the proviso. This distinction, as will be set out later, has significant implications to the interpretation of the constitutional questions before this Court.

This Court reiterates the fact that both the 3rd Amendment and the 18th Amendment received the unequivocal imprimatur of the Supreme Court. Whilst the 3rd Amendment was challenged under Article 121 of the Constitution, consequent to which this Court made its determination in SC 2-5/82 SC Minutes of 23-8-1982, the 18th Amendment was referred to this Court as an urgent Bill under Article 122(1)(b) [SC/SD 01/2010]. In both determinations, the Amendments effected to Article 31 were declared to be consistent with the Constitution as they enhanced the franchise of the People enshrined in Article 4(e) of the Constitution and the choice given to the voters. The pronouncements made by this Court in the 18th Amendment determination in relation to **Article 31 (3A) (a) (i)** repay attention.

It is to be noted that the aforesaid Article 4(e) of the Constitution refers to the exercise of the franchise of the People and the Amendment to Article 31(2) of the Constitution, by no means would restrict the said franchise. In fact, in a sense, the Amendment would enhance the franchise of the People granted to them in terms of Article 4(e) of the Constitution since the voters would be given a wide choice of candidates, including a President who had been elected twice by them. It is not disputed that the President is directly elected by the People for a fixed tenure of office. The constitutional requirement of the election of their President by the People of the Republic, strengthens the franchise given to them under Article 4 of the Constitution.

As could be seen from the foregoing it is patently clear that the Supreme Court made its declaration of eligibility of the incumbent President in no uncertain terms in the 18th Amendment determination itself as far back as August 2010. It saw no impediment to the incumbent President who had been elected twice to declare his intention to go before the People despite his election twice, and we would chorus in unison that the issue has been laid to rest by the said 18th Amendment determination in that a President who has been elected twice has been bestowed with a right to seek the mandate of the People for a further term at a future election. As will set out more fully later in this opinion there was cogent reason for the Supreme Court to have asserted so eloquently about the eligibility of the incumbent President. What did the 18th Amendment seek to achieve by effecting these amendments namely, the repeal of Articles 31 (2) and 92(c) which removed the term limit and the amendment made to Article 31 (3A) (a) (i) among other things? It removed the cap on the terms that a President could hold office and in the same breath empowered the President who was in his current term to declare his intention of appealing to his people, after the expiration of four years from the commencement of its current term of office, for a mandate to hold office, by election for a further term. There was a conscious and deliberate removal of the term limit on the one hand and on the other hand a facilitative empowerment of a President in his current

term to appeal to his people for a mandate at the expiration of four years from the commencement of his 2nd term. If the 18th Amendment that became a component part of the Constitution on 9th September 2010 is classified as futuristic and prospective and Article 31 (3A) (a) (i) of the Constitution applies to a President in his current term at the expiration of four years from the commencement of his 2nd term, this provision should become applicable to the incumbent President who completes his 4 years on 18th November 2014.

Attempts have been made to argue to the contrary when the Supreme Court itself recognized this constitutional empowerment as far back as August 2010 and this Court will presently subject this argument to an incisive analysis in order to arrive at our opinion. Before we proceed to do so, we wish to express the long-held views of this Court on the legal position of opinions and determinations such as the 18th Amendment determination delivered in the exercise of its several jurisdictions as set out in Article 118 of the Constitution.

We would observe that the 18th Amendment determination is entitled to the same weight and force as any other judgment of this Court as it has clearly recognized the right of the incumbent President to be qualified to be a candidate despite his election to office twice at the Presidential election. In the context of the legal standing or force accorded to judgments, opinions and determinations of this Court it is relevant to hark back to ***Bandaranayake v Attorney General*** 2 Sri LR 786, where Sharvananda J (as he then was) opined that the description 'determination', 'judgment', 'opinion', 'decision' and 'conclusion' are different labels for the same concept.

This Court had occasion to uphold this dictum in the **Determination on the Appropriation Bill 2013** [SC/SD 19/2013], and declared as follows:

> *"If the constitutionality of a Bill could equally be undertaken in the exercise of such jurisdictions of the Supreme Court as specified in 120, 121,122 and 129(1) of the Constitution, the difference in the nomenclature given to judgments of the Supreme Court such as opinions and determinations does not create a hierarchy which ranks one above the other and in fact, whichever name is given to a decision of Court in one jurisdiction, the decision would stand pari materia with another. As pointed out to Counsel by Court in the course of arguments, this matter was considered by Sharvananda J (as he then was) in Bandaranaike v Attorney General (1982) 2 Sri.L.R 786 at 792..."*

The above passages go to show the binding nature of the pronouncement in the 18th Amendment determination which has the same force as that of a Judgment of a Supreme Court. There are compelling reasons as to why advisory opinions proffered by the Supreme Court in the exercise of its jurisdiction in terms of Article 129 of the Constitution should not be treated any differently.

Your Excellency has sought to invoke the consultative jurisdiction of this Court regarding a matter of public importance in which you require our considered and valued opinion as the resolution of the questions impacts on the franchise of the people as guaranteed by the Constitution. Your Excellency as the custodian of the executive power of the people have thought it fit to invoke a jurisdiction which will provide Your Excellency the direction or the path that should be taken in a matter which Your Excellency thinks has generated a public debate. It is our solemn duty to emphasize the fact that the effect of our opinion is no different to a judgment that we would pronounce in any one of our jurisdictions. It is one of the constitutional mechanisms that has been made available by the Constitution in the resolution of a question of law and fact regarding which Your Excellency has expressed concern. The written submissions tendered by some of the parties seem to suggest that this is a lesser mechanism than others. This court pronounces in the most emphatic terms that the opinion

expressed by this Court in the exercise of its consultative jurisdiction must be received with the same authoritative stamp as any other judgment of the Supreme Court. No good reason exists for not treating advisory opinions like any other judgment of this Court and the fact that this Court did have a strength of ten judges to pronounce this opinion must well be regarded as authoritative advice.

Having taken a survey of the amendments made to the specific provisions of the Constitution and the pronouncements made by this Court in respect of them, we now proceed to indulge in an analysis of the issues that have led to the reference being made. In this process we intend to look at the effect of these amendments from several angles that would eventually throw light on the resolution of questions of law and fact that require answers.

A factual matrix of the timelines pertaining to the incumbent presidents election and assumption of office in respect of his two terms would be a convenient starting point to begin this analysis.

- **19.11.2005** - Date on which the President took oaths as per the Fourth Schedule to the Constitution, on assuming his first term of office.
- **26.01.2010** - Date of Presidential election for his second term.
- **27.01.2010** - Date of Declaration of the election result by the Commissioner of Elections.
- **09.09.2010** - Date on which the 18th Amendment was certified and came into operation (during the President-elect still serving his first term as President).
- **19.11.2010** - Date on which the President-elect took oath under the Fourth Schedule to the Constitution **as amended by the 18th Amendment** and assumed his second term of office-As adverted to ante, the Second term of the incumbent President commenced on 19th November 2010-please see SC Ref(E)No 01/2010.

It is not without significance to highlight that when the results of the Presidential Elections held on 26.01.2010 was announced on 27.01.2010, the Commissioner of Elections declared the incumbent President elected to the office of the President under and in terms of Section 56 (2) of the Presidential Elections Act No 15 of 1981. Thus the incumbent President became a President elect to the office of the President which was to begin on 19th November 2010. As we commented ante, it was during the intervening period between 27.01.2010 and 19.11.2010 that the Supreme Court pronounced upon the constitutional validity of the 18th Amendment consequent to which the 18th Amendment became a constitutional settlement on 09.09.2010 . Several irrefutable deductions flow from this chronology. The incumbent President was still serving his first term when the 18th Amendment became law on 09.09.2010. The 18th Amendment was already in place when the President commenced his second term of office on 19th November 2010.

Since the President's second term of office commenced after the 18th Amendment to the Constitution was enacted by Parliament and certified by the Speaker, it became obligatory for the President in making and subscribing the affirmation he undertook, to uphold and defend the Constitution which has since incorporated the 18th Amendment. What in effect the 18th Amendment has accomplished by way of its Amendment to the Constitution binds the President to the strict terms of its intent and content and we hasten to observe that quite contrary to the views expressed in some of the written submissions tendered to us, this reference is not a private consultation between the incumbent President and this Court on a purely private matter. The reference focuses on a matter of public importance which concerns the irreducible components of sovereignty as are specifically spelt out in Articles 3 and 4 of the Constitution and when the repository of the executive power of the people seeks an opinion of this Court on a matter touching upon aspects of sovereignty, this Court itself being the custodian of judicial power of the people cannot flippantly dismiss the questions as a private matter and refuse to exercise our jurisdiction vested in this Court.

We have already commented on the cumulative effect of the constitutional amendments effected to Articles 31 (2), 92(c) and 31 (3A) (a) (i). These constitutional events take place at one and the same time. The prospective nature of these constitutional provisions brings about a synchrony which is referred to as constitutional symbiosis

The next question is what effect these amendments had on the incumbent President who commenced his second term on 19 November 2010.

It is indisputably admitted that Articles 31 (2) and 92 (c) which placed a disqualification were effectively and expressly removed on 9th September 2010. On the same momentous day a legal empowerment by way of Article 31 (3A) (a) (i) was bestowed on a President serving his current term to appeal to his people at any time after the expiration of four years from the commencement of office.

The 18th Amendment removed a disqualification on the one hand whilst on the other hand it bestowed a constitutional right on an incumbent president *in esse*. The removal of disqualification and the conferral of a qualification took place on the same day namely 9th September 2010. On 19th November 2010 the incumbent President took office having taken the solemn pledge to uphold and defend the very Constitution which had just removed the disqualification and conferred a qualification. So the totality of the relevant amendments brought in by the 18th Amendment were both extinctive of a disqualification (Article 31 (2) and 92 (c) as well as enabling and facilitative of the incumbent President (Article 31 (3A) (a) (i)). If the 18th Amendment is futuristic and prospective, the effect of these provisions should be uniformly applicable to a sitting President without any exception if he was serving his term after the passage of the 18th Amendment. It goes against the grain of reasoned deduction to idly contend goaded by ulterior motives that these provisions should be dis-applied when it comes to the current President. It will be a fairy tale if this Court were to deduce that the

constitutional right given to an incumbent President serving his current term by way of Article 31 (3A) (a) (i) is not available to Your Excellency who is in his current term, no matter whatever term it is, second or otherwise. There are several reasons for this Court to arrive at this conclusion. The 18th Amendment Determination has already recognized this right. We recall the pregnant words of the Supreme Court in SC (Special Determination) No. 01/2010.

> *"The Amendment to Article 31(2) of the Constitution, by no means would restrict the said franchise. In fact, in a sense, the Amendment would enhance the franchise of the People granted to them in terms of Article 4(e) of the Constitution since the voters would be given a wide choice of candidates,* ***including a President who had been elected twice by them."***

As we have stated before, the reason for this interpretation is manifold. When two provisions were repealed with a view to taking away a disqualification and another provision was substituted and proviso added thereto facilitating a President in his current term to appeal to his people for a further mandate, the repeal of the disqualification and conferment of the qualification have to be interpreted harmoniously. If Article 31 (3A) (a) (i) confers a qualification on the incumbent President, a disqualification cannot be kept alive. To contend otherwise is to do violence to all canons of constitutional interpretation as will be apparent in the course of this opinion. The specious contention of some ivory tower intellects that a disqualification attached to the incumbent President on the day he was declared elected on 27 January 2010 is based on an erroneous assumption and runs counter to the conferral of a right on the current President to issue a proclamation to appeal to his people for a further term. For reasons we adumbrate later on in this opinion based on our main reasoning that leads to the conclusion that the supposed disqualification would never attach to any President on the day he was declared a second time, we declare that the assumptions of these public debaters and self - appointed

educators of the people are devoid of merit and should deserve no scrutiny but we do venture in this opinion to demonstrate the falsity of that argument. We pose the question as to how a supposed disqualification that allegedly began on the day of election can continue to exist to date when the incumbent President has been enabled and empowered to offer himself again as a candidate by virtue of Article 31 (3A) (a) (i) ? We reject and repudiate this argument straight away for reasons we deduce later based on the interpretation we make of the phrase **"elected to office"** which is critical to the resolution of the questions posed by Your Excellency.

However we also seek to explain away the fallacy of the wrong argument through the following analysis on the established facts and law.

The contention of a continued disqualification will not hold water in the light of the fact that the incumbent President has been empowered in Article 31 (3A) (a) (i). Could the framers of the 18th Amendment have intended to suspend the provisions of Article 31 (3A) (a) (i) in order to debar the incumbent President from issuing a Proclamation to appeal to his people when Article 31 (3A) (a) (i) is an enabling provision that permits the incumbent President? Such an erroneous interpretation advanced by interested parties goes counter to the well established principle that mandates the interpretation of different parts of the Constitution harmoniously and in consonance with the canons of holistic interpretation stipulated for constitutional interpretation as we would now allude to.

There are well-known canons of interpretation that have been employed in the engagement of Courts with constitutional statutes. A striking statement appears from the judgment of Justice Dickson in the case of ***Hunter et al vs The Southam Inc 1984 11 DLR 641 at 649.***

> *The task of expounding a Constitution is crucially different from that of construing statutes mind the social context in which the amendment had been brought about. A statute defines present right and obligations. It is easily enacted and easily repealed a constitution , by contrast , is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental*

> *power and, when joined by a Charter of Rights, for the unlimiting protection of individual rights and liberties. Once enacted its provisions cannot easily be repealed or amended. It must, therefore be capable of growth and development overtime to meet new social, political and historical realities often and unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these conditions in mind.*

The above passage demonstrates unmistakably that the principles and assumptions involved in the interpretation of a Constitution are different from those which apply when interpreting a statute or an ordinary piece of legislation. It is unfortunate that there are ill-conceived statements made on erroneous assumptions, quite oblivious to this vital distinction highlighted by Justice Dickson in the above case. They seem to be hide-bound by the antiquated view that the basic rules or guidelines such as those contained in the Interpretation Ordinance apply to all types of statutes and documents.

The *sui generis* character of constitutional interpretation has been recognized in a number of commonwealth jurisdictions. *Dhavan J in* ***Moinuddin vs state of Uttar Pradesh AIR 1960 All 484*** *stated at 491-*

> *The choice between two alternative construction should be made in accordance with well recognized canons of interpretation.*
>
> *Firstly , court must adopt one which will ensure smooth and harmonious working of the constitution and eschew that which would lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory,*
>
> *Secondly, constitutional provisions are not to be interpreted and applied by narrow technicalities, but as embodying the working principles for practical government,*

Thirdly, constitutional provisions are not to be regarded as mathematical formulae and that their significance is not formal but vital. Hence practical considerations rather than formal logic must govern provisions which are obscure.

Fourthly, the one which avoids a result unjust or injurious to the nation should be preferred.

Fifthly, court must read the constitution as a whole, take into considerations of different paths and try to harmonize them

Sixthly, and above all court should proceed on the assumption that no conflict or repugnancy between different parts was intended.

It has to be recalled that in the context of a case that arose in relation to franchise in ***Sarath Jayasinghe and others vs the Attorney General*** (7 SCSD 26) the Supreme Court observed-

"The Constitution has to be looked at as an organic whole and its terms cannot be fixed to meanings that may have had at the time of the enactment."

The dicta of Krishna Iyer J. in the case of ***Fatehchand Himatlal V. State of Maharashtra*** (1977 Mah LJ 205) has conceptualized these principles of constitutional interpretation in the following terms :

"A constitution is a documentation of its founding fathers of a nation and the fundamental direction for their fulfilment. So much so, an organic, not pedantic approach to interpretation must guide the judicial process. The healing art of harmonious construction, not the tempting game of hair splitting, promotes the rhythm of the law."

Aharon Barak in *The Judge in a Democracy* (p 127) explains what is meant by a purposive interpretation of a Constitution -

> "The implied language conveys to the reader a meaning that is not derived from the dictionary meaning of the language. It is a language written in invisible ink, between the lines, and derived from the structure of the constitution."

These views pertaining to Constitutional interpretation are also reflected in the case of ***Ashok Tanwar Vs. State of Himachal Pradesh*** (2005 A.I.R 614) which held-

> *"The Constitutional provisions cannot be cut down by technical constructions; rather it has to be given* ***liberal and meaningful interpretation****. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the constitution."*

The above canons of interpretation show conclusively that Constitutional interpretation is different from statutory interpretation. Instead of the usually employed rules of interpretation such as the literal rule, golden rule and mischief rule which are specially meant for statutory interpretation, the above jurisprudence on Constitutional interpretation requires us to deviate from these rules and straight away look at the purpose of the constitutional amendment because our task in constitutional interpretation is to look for values that inform and pervade a Constitutional statute.

We are of the view that the mere reliance on the text used in a Constitution is not sufficient to ascertain the values that are embodied in a Constitution or its amendments. Common Law is redolent of Constitutional interpretation which is not premised on text alone. A text based interpretation will not enable a Court to ascertain the intent and purpose of a Constitutional amendment. We have to stray beyond the words used in a

Constitutional provision and look afar for the social imperatives that have given rise to the constitutional amendment. To that extent in order to accomplish this task we employ what will be called a **teleological approach or value coherent theory** towards interpretation. By way of this approach we look for the social values that germinated the amendment and in such a task we will not feel inhibited by the conventional rules of interpretation in the exercise of constitutional interpretation.

Let us at this stage refer to the distilled wisdom of renowned jurists of our time who have articulated their elaboration on the approaches to constitutional interpretation.

As observed by Kriegler J in *S v Makwanyana and another* 1995 (3) SA 391) the Judges of our courts are not sages, their discipline is the law, not ethics or philosophy, and certainly not politics. It is said that in interpreting a Constitution, the issues are legal questions. It is a mix of jurisdictions and has a significant influence on the judicial methods adopted by the Court. The uniqueness of the Constitution depends not only on the fact that it is the supreme law of the land, that it is the source of authority for the organs of government and guarantees matters of such importance, *inter alia* as that of franchise, but also in the way in which it is worded. A Constitution represents compromises between competing views. It is intended to be open textured, as the case is in many jurisdictions. There is a convenient vagueness. It gives judges very great and wide powers, and therefore in our view, imposes on judges the great responsibility to act with care. As was observed in the article, *Nature and Sources of Law* 2nd Edition 1921, whoever has an absolute authority to interpret any written or spoken law, it is he who is truly the law keeper, for all intents and purposes, and not the person who first wrote or spoke it.

In the case of ***Thornhill v A-G of Trinidad and Tobago*** (1981) AC 69, Lord Diplock delivering the opinion of the Privy Council said, that the rights were:

> *"not described with the particularity that would be appropriate to an ordinary act of Parliament, nor are they expressed in precise meanings as terms of legal art. They are principles of great breadth and generality, expressed in the kind of language more commonly associated with political manifestos or international conventions."*

It has been observed that the fact that Constitutions have been drafted in a broad and ample style, which lays down principles of width and generality appears to have led the Privy Council and the Courts in the Commonwealth to the view that in construing a Constitution, a broad, generous and purposive, rather than a narrow or legalistic approach is called for. Avoiding the austerity of tabulated legalism so as to give effect to the spirit of the Constitution. Moreover, although some of the rules, canons and presumptions that might be useful in the interpretation of ordinary Acts of Parliament, may not be applicable in the construing a provision of the Constitution. It does not however mean that there are no rules. It neither means that the principles applicable to the interpretation of an ordinary Act of Parliament are altogether irrelevant. Lord Wilberforce, in a matter relating to the interpretation of the Constitution of Bermuda (***R v Colsey, ex parte director of public prosecutions***, The Times 9th May 1931), said that "the Constitution is *sui generis* calling for principles of its own, suitable to its character, without necessary acceptance of all the presumptions that are relevant to legislation of private law. This is not to say that are no rules of law...respect must be paid to the language which has been used....."

It has been further observed that Judges ought to remember that their office is *jus dichere* (to interpret) and not *jus dare* (not to make law). Judges have, for a long time, ceased to deny that they have a creative function that takes them beyond the interpretation of the law. In a pithy observation Lord Reid (1951 4 AC 482/ 52 NLR 293) said –

> *"those with a taste for fairy tales seemed to have thought that in some Aladdin's cave, there is hidden the common law in all its splendor, and that on a Judge's appointment, there descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when the Judge has muddled the password and the wrong window opens. But we do not believe in fairy tales anymore."*

Lord MacMillan expressed the same view in the article *Law and other things* at p.48, when he said that in almost every case, it would be possible to decide the issue either way with reasonable legal justification. There is no doubt that Judges exercise a creative role as interpreters of the law. Equally, there is no doubt that Judges cannot roam at will, as Justice Cardozo put it,

> *"the Judge even when he is free is still not wholly free. He is not to innovate at pleasure* [as some Constitutional pundits seem to suggest at their leisure hours]. *He is not a knight-errant roaming at will in pursuit of his own ideas of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague an irregular benevolence. He is used to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."*

Justice Bhagwati expressed a similar sentiment:

> *"It must be noted that when the Court is interpreting the Constitution and the law, it is not open to Judges to do what they like. The Judge is not like a knight in armour, free to roam where he wills. There are in-built restraints* [which some judges no not seem to appreciate, who do not quite appreciate the virtue of resignation], *which keep Judges from straying away from their proper judicial functions."*

It has therefore been observed by Jurists of repute that interpretation is a rational activity giving meaning to the legal text. This can be done by interpretation, or by filling in a gap. Interpretation constitutes a process whereby the legal meaning of a text is extracted from its semantic meaning. In other words, where we translate human language into legal language. The key question therefore is, what is the proper system if interpretation. All interpretative systems must resolve the relationship between text and context; between the word, and its spirit. It must adopt a position on the relationship between the real and the hypothetical intention of the author. It is also important to find out the purpose for which interpretation is used. The intention of interpretation is to realize the purpose of the law. The aim in interpreting a legal text, such as the Constitution, is to realize the purpose the text serves.

It must be borne in mind that a Constitution is a unique document. It incorporates a very special kind of norm and stands at the zenith of the normative pyramid. It shapes the appearance of the state and its aspirations throughout history. It determines the states fundamental and political values. It lays the foundation for its social values and as Justice Dixon of the Supreme Court of Canada observed,

> *"The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution, by contrast, is drafted with an eye to the future. It's function is to provide a continuing framework for the legitimate exercise of governmental power."*

The original intent of the framers at the time of drafting is important. It must contend with the needs of the contemporary person. Therefore, in determining the Constitutions purpose through interpretation, once must also take into account values and principles that prevailed at the time of interpretation, seeking synthesis and harmony between past intentions and present values. As Professor Lawrence Tribe pointed out, "there are no

criteria external to the Constitution that determines the proper order of priorities among the different considerations."

Lord Justice Brennan expressed this idea in the following remarks:

> *"We current Justices read the Constitution in the only way we can, as 20th Century Americans* [as 21st Century Sri Lankans]. *We look to the history of time of framing and the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our times?"*

It has been aptly observed that the genius of the Constitution rests not in any static meaning. It might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs of our country. What the Constitutional fundamentals meant to the wisdom of other times cannot be *their* measure to the vision of *our* time. Similarly, what those fundamentals mean for us, our descendants will learn cannot be *their* measure to the vision of *their* time. The implied language conveys to the reader a meaning that is not derived from the dictionary meaning of the language. It is a language written in invisible ink, between the lines, and derived from the structure of the Constitution.

When we employ these rules of interpretation, the defective premise of the argument of the proponents that a so-called disqualification attached to the incumbent President on the date of declaration of his election result becomes apparent. The disqualification could not attach on 27th January 2010 and continue to date because this argument is based on the wrong premise with regard to the repeal of Articles 31 (2) and 92 (c). Let us now allude to the social values and imperatives that gave rise to 18th amendment that led to the repeal of the disqualifying provisions.

It would appear that having regard to the fact that a two time victor at a Presidential election has garnered the popular support of the majority of the people as a political leader at successive elections, such a mandate holder should not be fettered with the sanction of a bar for a third term in accordance with the vision of that time. The imposition of such a disqualification is anathema to popular sovereignty as recognized in the

Determinations of the 18th Amendment. It would appear that it was in these circumstances that the legislature thought it fit to remove such a bar in a manifestation of its commitment to take the nation to great heights on the anvil of reconciliation and reconstruction.

The special rule such as the teleological approach requires us to take cognizance of these inarticulate major premises which led to the 18th Amendment. We therefore, repudiate the erroneous assumptions of the proponents who seek to argue on fallacious grounds that despite the repeal of Articles 31(2) and 92 (c), the disqualification set in on the day of the declaration of the election result of the President and it still continues. This erroneous assumption has to be rejected as this assumption calls in aid an adherence to a textual approach or literal construction of Articles 31 (2) and 92 (c) which are declared to be ill-suited for Constitutional interpretation as observed by the jurists referred to above.

When Parliament as the creature of the Constitution enacted the 18th Amendment in the context of the social values that preceded the amendment, its intention was to enable the incumbent President to enjoy his right under Article 31 (3A) (a) (i) and in our view such a clear empowerment does not require a further reservation in express terms in the 18th Amendment. Assuming without conceding that the disqualification attached to the incumbent President on 27 January 2010 (this argument as we stated before is based on a wrong premise and which we since have rejected), we take the view that the express repeal of Articles 31 (2) and 92 (c) also took away the wrongly supposed disqualification that some of the proponents claim to have existed on the date of the election.

In this regard the effect of the repeal of a statutory provision without express savings has to be considere. The decision **in the Kay vs. Goodwin (1830) – English Reports 130 – Common Pleas; Bingham P 1403 at 1405,** should be drawn in aid. The observations of **Tindall CJ at page 1405** are worthy of mention.

> *"I take the effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if (583) it had never passed; and, it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law".*

This rationale is re-echoed in the case of **Surtees & Another vs. Ellison – English Reports – 109 (KB) – P 278 at 279 :**

> *"It has been long established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule; and we must not destroy that, by indulging in conjectures as to the intention of the Legislature ".*

The above passages make it quite clear that the express repeal of articles 31 (2) and 92 © without more, was sufficient to remove any ill-perceived disability. As the observations make it quite clear no transaction or prosecution or an offense was sufferance was contemplated in the disqualification spelt out in the repealed Articles 31(2) and 92 (c) and as such no reservation was ever necessary to preserve any qualification. It is this wrong premise that has given rise to the deliberately misconceived arguments that have been put forward by the proponents of the two term theorists.

We have to observe that it is the above jurisprudence that informs the principles embodied in the Interpretation Ordinance of 1901 and on this reasoning the invocation of the Interpretation Ordinance to bolster and otherwise an untenable argument is wholly misplaced and misconceived. In any event we would be making in this order a reference to this position based on the Interpretation Ordinance later on in this opinion.

MAIN ARGUMENT- What do the words "Elected to Office" in the repealed articles 31(2) and 92 (c) mean ?

We now proceed to interpret the words "Elected to Office" in the aforesaid articles which will be dispositive of the questions posed to us by Your Excellency.

The extrinsic aid such as the Hansard that records the debate on the 8th September 2010 also demonstrates the purpose and intent of the 18th amendment which was meant to give the incumbent President the empowerment referred to above. These debates demonstrate the fact that the legislature intended to give the President the right to appeal to his people at any time after the expiry of 4 years from the commencement of office. The speeches of the proponents of the bill are declaratory of such intention. This declaration, it has to be borne in mind, followed the unequivocal statement of this court in the 18th amendment determination.

The Parliamentary debate on 18th amendment makes it abundantly clear that the legislative intention behind the 18th amendment removing the two term limits on the Presidency was intended to apply to the incumbent President and it was for this reason that the 18th determination also alluded to this removal of disqualification Thus there is no impediment to Your Excellency contesting Presidency for a third term or more

It is for this reason that we have taken the view that no disqualification attached to the President on 27th January 2010, nor does any disqualification continue to date, We have condemned this fallacious and specious contention which is bereft of any substance or legal basis. This erroneous submission and misconception disseminated by some partisan, biased and interested parties emanate from their overzealous attempt to bolster these argument by wrongly emphasizing the words "twice elected" occurring in the repealed Articles 31 (2) and 92(C). The teleological approach or purposive construction we have adopted in this opinion

compels us to interpret the words " **elected to office**" occurring in those repealed articles, to mean **"elected to a term of office"**. We have already stated in the anterior part of this opinion that the word "office" that occurred in the repealed Articles 31(2) and 92(c) refers to a term of office that has a duration of 6 years.

It is clear that this term of office should be counted from the day the President assumed office by formally taking oaths. The term of office of the President must be counted form the day the President takes his oath of office and assumed the presidency. This interpretation is made clearer by looking at the words "at any time after the expiration of 4 years from the commencement of his current term of office". It is observed that it is not possible to identify a four year term without reference to a date of commencement of office. It is therefore our considered opinion that the term of office must be counted from the day Your Excellency took the oath and assumed office drawing in aid the canon of harmonious construction that has to be employed in interpreting a Constitution. It has to be noted that when the Commissioner General of Elections declared the incumbent President as the winner on 27th January 2010, the President became President elect to a term of office which began on 19th November 2010. The whole process of exercise of Franchise at a Presidential Election can be compartmentalized. It begins with a Proclamation followed by an election where a winner is declared as elected culminating in a term of office as prescribed.

The words "elected to office" must be interpreted to mean "elected to a term of office which culminates in an assumption on which date the term begins to run." In the circumstances the proponents of the twin term limit have turned a Nelsonian eye to this vital distinction as they have given the repealed articles a textual and restrictive meaning which is not in consonance with the principles of constitutional interpretation as referred to above.

It is therefore not difficult to understand the mindset of the detractors in seeking refuge in a 1901 Interpretation Ordinance which is inapplicable by its terms to interpret the 18th amendment.

This is a convenient stage to dispose of the erroneous argument that the provisions of the Interpretation Ordinance apply to constitutional interpretation. We have already observed that the rules pertaining to Constitutional interpretation are different to those of statutory interpretation. In this context it is relevant to quote His Lordship Justice Sharvananda CJ in his publication on Fundamental Rights in Sri Lanka (Arnold's International Printing House, 1993, Page 43 in the following terms :

> *"Though the Interpretation Ordinance does not apply to the Interpretation of the provisions of the Constitution as the Constitution was enacted in the exercise of Constitutional power and not in the exercise of Legislative Power of Parliament and hence is not written law within the meaning of Section 2 of the Interpretation Ordinance; it may be legitimately be referred to, to appreciate the concept of "person" in our law."*

Furthermore, Section 2 (g) of the Ceylon Legislative Enactments of 1956 which defines "enactment" also omits a reference to the Constitution. Therefore, the invocation of Section 6 (3) of the proponents of the two term theory once again seem to base their argument on the meaning of the words written law which appear in Section 6(3) of the Interpretation Ordinance. Therefore, the language of section 6 (3) of the Interpretation Ordinance which expressly restricts its application to "*any written law*" would, by the fact itself, in any event renders the provisions of section 6 (3) inapplicable to Constitutional interpretation.

In the circumstances we are of the opinion that the provisions of Section 6(3) has no application to the constitutional interpretation in issue. On this interpretation alone we do not have go into the question of any further applicability of the Interpretation Ordinance.

In any event the preservation of past acts done or suffered as referred to in the Interpretation Ordinance does not merit any examination but we wish to observe that in any event the formulation *past acts done or suffered* would not encapsulate the disqualification conceptualized in the repealed Articles 31 (2) and 92 (c) of the Constitution. The word "sufferance" as found in section 6 (3) of the Interpretation Ordinance would in no way connote the disqualification contemplated in the repealed articles of the Constitution. In any event the dicta of our Courts conclusively shuts out the applicability of the Interpretation Ordinance which position is clearly borne out in the decision in SC Reference 03/08 (HC Anuradhapura No. 333/04) where S N Silva, CJ along with N G Amaratunga, J. concurs with P A Ratnayake, J. who makes the determination that the constitutional provision stands at the zenith of the normative triangle. Comparable dicta is found in Peter ***Attapattu vs. People's Bank*** 1997 1 SRI LR 208 wherein the Supreme Court stated that where a contrary provision is found in the Constitution viz-a-vis the provisions of the Interpretation Ordinance the Constitutional Provisions will prevail over the provisions of the Interpretation Ordinance Interpretation Ordinance.

In our view Article 31 (3A) (a) (i) of the Constitution is an express contrary provision which enables the President to seek a mandate at any time after the expiry of four years from the date of commencement of his current term and it will prevail over the inconsistent provisions found in 6 (3) of the Interpretation Ordinance. In the circumstances the argument of the proponents must necessarily fail on that ground.

In any event for the reasons we have stated ante and the reasoning we have adopted in the course of this opinion we repudiate the position that the Interpretation Ordinance has any application to the interpretation of the Articles in contention in this reference.

people for re-election for a further term.

Thus we answer the two questions in the negative authoritatively reiterating the opinion that no impediment exists for the President to seek re-election for a further term.

We acknowledge the assistance given to us by the Hon. Attorney General and his team of officers and members of the Bar Association and the other citizens who filed written submissions.

We wish to observe that in the exercise of the jurisdiction in terms of Article 129 (1) of the Constitution this court may in its discretion grant to any other person or his legal representatives such hearing as may appear to this Court to be necessary and it is in the exercise of such discretion that this court thought it fit to call for written submissions. The said provision does not necessitate an oral hearing and we hasten to observe that we have carefully considered the written submissions and taken cognizance of their content. We also place on record that four submissions invited this Court to answer the questions affirmatively in contrast to the deluge of submissions that supported the contention that there was no impediment,

Thus Your Excellency shall exercise your right and power vested in you by virtue of Article 31 (3A) (a) (i) of the Constitution and seek re-election for a further term and there exists no impediment for Your Excellency to

BUWANEKA ALUWIHARE, P.C.
JUDGE OF THE SUPREME COURT

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JUDGE OF THE SUPREME COURT

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JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, P.C.
JUDGE OF THE SUPREME COURT

exercise the right and powers accorded to you under the Constitution to offer yourself for a further term.

MOHAN PIERIS, P.C.
CHIEF JUSTICE

K SRI PAVAN
JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE
JUDGE OF THE SUPREME COURT

PRIYASATH DEP, P.C.
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