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