

COMMISSION OF OMISSIONS?



Old office of the 'bribery commission'; a new office has also come up — perhaps to tackle the case overload?

No sooner it assumed office in August 1994, in keeping with one of its major planks on the election platform, that of corruption, the People's Alliance government in October 1994 enacted legislation to deal with corruption, as defined in the new legislation. As a consequence, the Permanent Commission to Investigate Allegations of Bribery or Corruption was established. In heralding the legislation in Parliament, Justice Minister, G.L. Peiris, the architect thereof, asserted that the offence of "corruption" was to be prospective and not retrospective, in keeping with the policy of not enacting retrospective legislation.

The new legislation defined the offence of "corruption" thus –

"Corruption: 70

Any public servant who, with intent, cause wrongful or unlawful loss to the government, or to confer a wrongful or unlawful benefit, favour or advantage on himself or any person, or with knowledge, that any wrongful or unlawful loss will be caused to any person or to the government, or that any wrongful or unlawful benefit, favour or advantage will be conferred on any person –

- (a) does, or forbears to do, any act, which he is empowered to do by virtue of his office as a public servant;
- (b) induces any other public servant to perform, or refrain from performing, any act, which such other public servant is empowered to do by virtue of his office as a public servant;
- (c) uses any information coming to his knowledge by virtue of his office as a public servant;
- (d) participates in the making of any decision by virtue of his office as a public servant;

(e) induces any other person, by the use, whether directly or indirectly, of his office as such public servant to perform, or refrain from performing, any act,

shall be guilty of the offence of corruption and shall upon summary trial and conviction by a magistrate be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one hundred thousand rupees or to both such imprisonment and fine."

The legislation enacted in October 1994 not being retroactive was accordingly intended to deal with corruption under the tenure of office of the People's Alliance government and thereafter. Thus having committed her government to conduct its affairs governed by such anti-corruption legislation, thereafter, President Chandrika Bandaranaike Kumaratunga made the cause to fight corruption, a major national issue in the Presidential Election campaign that followed in October and November 1994.

CORRUPTION COMMISSION NOT ACTIVATED

Therefore, ought it not have been expected for either President Kumaratunga or Justice Minister G.L. Peiris to have referred to the Permanent Commission to Investigate Allegations of Bribery or Corruption, instances, where there had been any slightest hint of alleged corruption pertaining to transactions that have been carried out by the People's Alliance government, particularly those coming within their own Ministry of Finance. How many such instances have either of them referred to the Permanent Commission to Investigate Allegations of Bribery or Corruption, notwithstanding several media exposures pertaining to transactions that came within the purview of their own Ministry ? Such referral would have been purely to have investigated instances, where prima-facie there appeared to be some element of doubt or question and in no way could it have implied, that there in fact had been any corruption.

The People's Alliance government's policy guidelines on bidding on large scale public sector projects and tenders, where foreign companies participating in such projects and tenders have been restricted to having as local agents, only listed public companies with a market capitalisation of Rs. 200 million or local liaison offices directly owned by such foreign companies were dealt with. Such policy guidelines according to the cabinet memorandum thereon apparently had been because the People's Alliance government had deemed it important and necessary, that local agents of foreign companies bidding on such projects and tenders, do not unduly influence public officials or resort to corrupt practices in concluding deals, which at times are unfavourable to the government.

Therefore would it not lead to the logical deduction, that there had been some corruption or corrupt practices in concluding deals sometimes unfavourable to the government, during the 4-year tenure of the People's Alliance government ? Otherwise, what was the necessity to have enforced such restrictive guidelines ? On the other hand, if so, why had such cases not been referred to the Permanent Commission to Investigate Allegations of Bribery or Corruption, which had been established for the very purpose of dealing with such circumstances to be a deterrent to corruption ? The question begs repetition, as to how many such instances have been referred by the People's Alliance government to the Permanent Commission to Investigate Allegations of Bribery or Corruption, particularly given the media exposures on the dubiousness of several transactions ?

The United National Party in the opposition, however, has publicly referred certain transactions to the Permanent Commission to Investigate Allegations of Bribery or Corruption and one believes, that the United National Party would continue to do so, should they assume office of government at a future point of time. This ought to be expected to be so, in terms of the dicta of the resolution that had been adopted before the Working Committee, at the instance of the present United National Party leader, Ranil Wickremasinghe, stipulating that those holding elected public office, ought to adhere to high standards of conduct, free from and above suspicion of corruption, and that those who violate such standards will suffer consequences.

TRANSACTION DECRIED BUT NO INVESTIGATION

What has been put in issue is the fallacy of the presumption by the People's Alliance government, that local listed public companies with a market capitalisation of Rs. 200 million and local liaison offices directly owned by foreign companies do not unduly influence public officials or resort to corrupt practices in concluding deals which at times are unfavourable to the government, whereas on the other hand, that the rest of the large spectrum of the local private sector, comprising of proprietorships, partnerships, private/public companies and listed public companies with a market capitalisation of less than Rs. 200 million, in fact do resort to undue influence peddling of public officials or corrupt practices in concluding deals which at times are unfavourable to the government.

Reference was also made to the privatisations of the plantation companies, particularly Agalawatte, Horana, Kegalle, Kotagala, Bogawantalawa and Kelani Valley, considered to have been the most profitable plantation companies by the Public Enterprise Reform Commission [PERC]. The extensive exposures revealed that these privatisation transactions had not only been unfavourable to the government, but had also caused substantial losses, whilst conferring benefit, favour and advantage on exclusively pre-selected persons by PERC. The cogent question had been posed, as to whether or not such catastrophic transactions fell within the meaning of "corruption" defined in the People's Alliance government's new anti-corruption legislation?

The media exposure on the Kotagala privatisation transaction carried out by PERC caused a near public furore. Several facets were exposed of the Kotagala privatisation transaction with supporting documentations, which have stood unrefuted. President Kumaratunga had been reported to have stated at a press conference that –" No room will be left for this kind of dishonest and fraudulent action". Following an inquiry by the Exchange Control Department into the ramifications of this transaction, penalties had been reported to have been imposed, amongst others, on the Merchant Bank of Sri Lanka Ltd. and Lankem Ceylon Ltd. Do they not fall into the league of listed public companies with a market capitalisation of Rs. 200 million ?

Neither President Kumaratunga, nor Minister G.L. Peiris thought it fit to have the matter referred to the Permanent Commission to Investigate Allegations of Bribery or Corruption, to ascertain as to whether there had been any corrupt practices, falling within the definition of corruption in the new legislation ? Why, whereas, according to the facts revealed, prima-facie, there appeared to have been a substantial loss caused to the government and benefit, favour and advantage conferred on other persons ? Was it an instance of much decried socio-political cronyism ?

TRANSACTIONS FAULTED BUT NOT INVESTIGATED



President Chandrika Kumaratunga or Justice Minister G. L. Peiris would have been expected to refer cases with the slightest hint of corruption to the commission

Attention was drawn to the ingenious strategy of convertible debentures in the privatisation of the profitable plantation companies, whereby the respective exclusively pre-selected plantation management companies had acquired 60.8% shareholding of Agalawatte, Horana and Kegalle and 69.4% shareholding of Kotagala, 70.7% shareholding of Bogawantalawa and 71.2% shareholding of Kelani Valley, all at the nominal value of Rs. 10/- per share only. This had been on the basis of a ludicrously absurd pricing formula, where the sale price for such majority shareholdings had been questionably and incredulously based on the lowest price received on the fragmented sale of the 20% shareholdings of the respective plantation companies, whereas it ought to have been well known beforehand, that the lowest price receivable would in fact be the nominal value of Rs. 10/- per share only, as it so did actually happen.

Given the substantial losses incurred by the government and the benefit, favour and advantage conferred on exclusively pre-selected persons, the government promptly suspended the privatisation of the balance plantation companies on the basis of such ludicrously absurd formula, thereby conceding that the basis of privatisation of these plantation companies Agalawatte, Horana, Kegalle, Kotagala, Bogawantalawa and Kelani Valley was in fact very wrong. Nevertheless, notwithstanding the definition of corruption in the anti-corruption legislation enacted, the People's Alliance government did not deem that such privatisation transactions warranted referral to the Permanent Commission to Investigate Allegations of Bribery or Corruption, thereby begging the question, as to why such legislation was in fact enacted in the very first instance ?

Subsequently, within a few months thereafter, the government sold the majority shareholdings of the then loss making plantation companies, Watawala at Rs. 30/- per share, Maskeliya at Rs. 21/50 per share, Hapugastenna at Rs. 23/75 per share, Balangoda at Rs. 41/25 per share, and the plantation companies, Agarapatana at Rs 35/25 per share and Udupussellawa at Rs. 65/25 per share. The government ofcourse achieved such high price levels, having abandoned the ludicrously absurd pricing formula, that had been adopted by PERC previously resulting in the majority shareholdings of the profitable plantation companies having been sold at only the nominal value of Rs. 10/- per share , thereby causing substantial losses to the government and conferring benefit, favour and advantage on other persons. Who have been held responsible and accountable for such ludicrously absurd pricing formula ?

FAULTED TRANSACTION ACCLAIMED

It was also focused upon the written submissions made on August 1, 1995 by the then Chairman, Planters' Association of Ceylon, M.J.C. Amarasuriya to the then Chairman PERC, R.N. Asirwatham appealing to mitigate the Rs. 5 million that was required to be paid by the exclusively pre-selected plantation management companies (MAs) for a very valuable exclusive option to purchase the majority shareholdings of the respective plantation companies on such ludicrously absurd basis. In his written appeal to PERC, M.J.C. Amarasuriya, inter-alia, had stated –

"We are writing to appeal to you to re-consider the quantum of the non-refundable payment of Rs. 5 million, for the undernoted reasons ... insisting on this high guarantee might result in many MAs not taking up the offer and thereby, adversely affecting the privatisation of plantations. We are writing this letter on behalf of the plantation management companies to appeal to you to re-consider the Rs. 5 million guarantee and to reduce it to an acceptable level in order to ensure the success of the privatisation of plantations."

M.J.C. Amarasuriya, in addition to being the then Chairman, Planters' Association of Ceylon, in which capacity he had addressed such appeal on behalf of all the plantation management companies, was also the Deputy Chairman of Hayleys group, a company in which group, DPL Plantations Ltd., subsequently acquired 71.2% majority shareholdings of Kelani Valley Plantations Ltd., at the nominal value of Rs. 10/- per share only for the effective total purchase consideration of Rs. 142.3 million.

Chairman, Hayleys Group, Sunil Mendis, a co-director of then Chairman, PERC, R.N. Asirwatham on the Bank of Ceylon, in his Chairman's statement in the annual report for the year 1996 of Kelani Valley Plantations Ltd., as reported in the *Daily News* [May 13, 1997] had, inter-alia, described the privatisation of the plantations as a "courageous move by the government, which has been acclaimed as one of the largest privatisation schemes attempted in the agricultural sector world-wide."

Lehman Brothers, the well known international investment consultants in securities and commodities carrying out global equity research, based in New York, London, Tokyo and Hong Kong, in their report dated November 2, 1995 titled – "India and Sri Lanka Focus – Opportunities Await" had published an overview on the opportunities in the stock markets, both in India and Sri Lanka, giving profiles of certain companies in India and in Sri Lanka of John Keells, Aitken Spence, Development Finance Corporation of Ceylon, Hayleys and National Development Bank.

The Lehman Brothers' Report in its review on Sri Lanka by strategist Abhijit Chakrabortti had, inter-alia, stated – "The government has become increasingly aware of the need for foreign participation in the privatization program, and accordingly future issues are expected to be more attractively priced. These may present foreign investors with the most-attractive investment opportunities".

This Lehman Brothers report in its profile on Hayleys at page 56, inter-alia, had stated – "DPL Plantations Ltd., a wholly owned subsidiary of DPL [*Dipped Products Ltd.*], was formed to undertake estate management under the government's plantation restructuring program in June

1992. DPL Plantations is working in association with Agricultural Development Services (Singapore) Pte. Ltd."

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