

Interference with the Judiciary ?

Exercise of Judicial Power of the People & Litigation in the Public Interest

© *Nihal Sri Ameresekere, F.C.A., F.C.M.A., C.M.A., C.F.E.*

As a person actively and committedly involved in litigation in the public interest, for quite sometime in the country, even though I am not a professional Lawyer, nor purporting to be one, I cannot be a silent dumbhead or spectator, to the concepts propounded, and opinions expressed by *Deshamanya* Dr. R.K.W. Goonesekere, in his recent oration at the Colombo Law Faculty, admittedly in the background of the recent Judgments of the Supreme Court, which he, himself, has admitted to be 'popular' in a recent media interview. Inherent in such admission of popularity of such Judgments is that the people have received satisfaction, consequent to the exercise of their judicial power, which is their inalienable constitutional right.

I refer to the final paragraph of the questionably timed oration, which solely and exclusively hinges on Article 11 of the Constitution, which guarantees, freedom from torture, cruelty, inhuman or degrading treatment or punishment. If governance of a country is to be solely and exclusively depended on such 'dicta' of in Article 11 and it alone, then how can there be space and room, for punishment for offences under the Penal Code and several other Statutes, or the ongoing offensive against terrorism ? Basic tenets of development of civilized societies, have been on the foundation, that good conduct of those, who conform to expectations of society are recognized and rewarded, whilst those, who do wrong or act in bad conduct antithetic to the expectations of society are reprimanded and punished, naturally causing pain of mind and humiliation for such acts, that society deem to be unacceptable.

The exercise and enjoyment of rights and freedoms stipulated in Article 11 and other Articles, is inseparable from the performance of duties and obligations, as stipulated in Article 28 of the Constitution, which, *inter-alia*, include the obligation on every person to protect public property and to combat misuse and waste thereof. Hence, would not the rights and freedoms in Article 11 of the Constitution be prohibited from being enjoyed by those, who pillage and plunder public resources in blatant violation of the duties and obligations on their part to be performed under Article 28 of the Constitution, which in such circumstances, imposes an injunction prohibiting such persons from enjoying such freedoms ? On the other hand, having blatantly and knowingly violated an obligation imposed by one Article of the Constitution, can one seek refuge under another Article of the Constitution ?

The gravamen of the complaint in the said last paragraph of the oration of causing mental pain, suffering, humiliation and affront to dignity, clearly and evidently is in relation to the several recent public interest litigation cases, heard by the Supreme Court and Judgments delivered, which are cited just preceding such pathetic complaint. How is it that such complaint, arises only in relation to those of upper echelons of society, socio-politically powerful and influential, whilst no such complaint, even of a whimper arises, in the case of the many hapless poor people, who are hauled up before courts of law for wrong-doings antithetic to the 'rule of law', sometimes for robbery due to sheer desperate economic compulsions, whilst the rich do so out of sheer 'greed'.

The pillage and plunder of public resources by those socio-politically powerful and influential, abusing power and position, further impoverishing the poverty stricken people, causes not mere mental pain, suffering, humiliating treatment and affront to dignity, but causes them unbearable pangs of hunger and desperation, even leading to suicide; with the denial of their right to basic food, clothing, shelter, health care, education, *et al*. It would appear that such traumatic pangs of pain of the down trodden poor, is of no concern whatsoever, but what is of prime and only concern is the mental pain, suffering, humiliating treatment and affront to dignity, caused to those, who are taken to task for the pillage and plunder of public resources, which rightfully belong to the poor people of the country, further aggravating their misery.

Such medieval 'phenomena' was the case during times of disgraceful and despicable 'slavery', where 'slaves' had no rights, whatsoever, and for them no mental pain, no suffering, no humiliating treatment, and no affront to dignity, which only the masters of the 'slaves' supposedly had, on the principle that the 'king can do no wrong' ! One is reminded of the marquis, whose horse carriage ran over and killed a child of a peasant, and he just threw a few coins, as and by way of compensation for loss of life of the child. There was no 'rule of law' enforced, presumably due to affront to the dignity of the marquis ! Such concepts are simply out of time and out of place in contemporary civilized society.

Pillage and plunder of public resources, which rightfully belong to the people, and which are managed on their behalf, in trust by governments in power, elected by the people, cannot be condoned, whereas on the contrary, such pillage and plunder necessarily have to be condemned, regardless of causing mental pain, suffering, humiliating treatment and affront to the dignity of those, who pillage and plunder public resources to unjustly enrich themselves, or those who act in cahoots with them. Are not those, who surreptitiously rob public property in crafty and sophisticated shady deals akin to those, who might put their hands and rob the 'tills' of poor beggars on the streets ?

The foregoing is the 'phenomenon' of 'economic terrorism', impoverishing the livelihoods of the down trodden poor hapless masses, which results in social injustice, social alienation, precipitating misery and desperate conditions, leading to social unrest, insurrection, and now even armed struggle and terrorism. Has not armed terrorism been given birth to by such 'economic terrorism', arising from consequential social injustice; whilst armed terrorists take the lives of the people, economic terrorists pillage and plunder the resources of the people ?

Article 28 of the Constitution also, *inter-alia*, mandates, among other obligations, that every person would uphold and defend the Constitution, and protect public property, and combat, misuse and waste of public property. All 'elected' and 'selected' public officers have made affirmation or oath, under and in terms of the Constitution to solemnly uphold and defend the Constitution. To act otherwise, would it not make a 'mockery' of such the affirmation or oath made under the Constitution ? 'Elected' and 'selected' public office is entered upon by persons, only and only upon, the making of such affirmation or oath, without which they cannot enter upon such office. Hence, would not the knowing and blatant breach thereof disentitle such holders of 'elected' and 'selected' public office from continuing to be in such public office ? In this context, would it not be sheer *tommyrot* to rely on 'terms of employment' in the contract of employment, since such contract of employment, simply cannot transcend the constitutional mandates?

The 1978 Constitution made the people supreme, not merely the elitist rich and socio-politically powerful and influential, intellectuals, academics and professionals, but also all the people of this country, yes, the downtrodden masses and minions. It is the sovereignty of all the people, including such masses and minions, that is exercised by the President, Parliament and Judiciary, acting in trust on behalf of the people. It is the judicial power of the people, that is exercised by the judiciary, including the Supreme Court. The Determinations by a 7-Judge Bench of the Supreme Court on the aborted 18th and 19th Amendments to the Constitution have lucidly dealt with the sovereign rights and powers of the people, being exercised in trust by the executive, legislature and judiciary, and the 'rule of law' being the basic premise of the Constitution as cited below:

- "Therefore the statement in Article 3 that sovereignty is in the People and is "inalienable", being an essential element which pertains to the sovereignty of the People should necessarily be read into each of the sub paragraphs in Article 4. The relevant sub paragraphs would then read as follows:
 - (i) the legislative power of the People *is inalienable* and shall be exercised by Parliament;
 - (ii) the executive power of the People *is inalienable* and shall be exercised by the President;and

(iii) the judicial power of the People *is inalienable* and shall be exercised by Parliament through Courts”.

- “These powers of government continue to be reposed in the People and they are separated and attributed to the three organs of government; the Executive, the Legislature and the Judiciary, being the custodians who exercise such powers in trust for the People.”
- “The powers attributed to the respective organs of government include powers that operate as checks in relation to other organs that have been put in place to maintain and sustain the balance of power that has been struck in the Constitution, which power should be exercised only in trust for the People.”
- “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”_ (Cited from *Indian Judgment*)”

Hence, when the peoples’ property is being pillaged and plundered, wrongfully, unlawfully, illegally and fraudulently, by those in power and the elitist rich and socio-politically powerful and influential, have not the people a right, to cause the exercise of their judicial power, to protect their property, which is being pillaged and plundered ? How could mental pain, suffering, humiliating treatment and affront to dignity of those persons, who have acted in a perverse manner, be estoppels to prevent the judiciary, more specifically the Supreme Court, from being caused to exercise the judicial power of the people ? Would not the alternative be riots, insurrection, insurgency, *et al* ?

Each and every one of us is a constituent co-owner of the consolidated fund and public property. Hence, cannot the wrongful, unlawful, illegal and fraudulent misappropriation of funds from the consolidated fund or public property, by those in wrongful control thereof, be prevented by any one person, acting on behalf of all the people of the country, and causing the judicial power of the people to be exercised by the judiciary, specifically the Supreme Court, to prevent such pillage and plunder of public resources, and to cause the wrong-doers to be dealt with under the prevalent laws, upholding the ‘rule of law’, which is the basic premise of the Constitution ? Therefore, would not any member of the public, who are co-owners of the consolidated fund and public property, stand entitled to derive a right to act on behalf of all the people of the country to protect the interest of the people ?

18 years ago, on the advice of late P. Navaratnarajah Q.C. and K. Kanag-Isvaran P.C., I launched a *quasi*-public interest action to prevent a fraud being perpetrated on the company in the construction of the Hilton, and a fraud on the government, as a consequence of the government having given state guarantees on behalf of the company. Then too, a person considered to be a legal luminary, K.N. Choksy P.C., an influential member of the then government, as a Director of the company, opposed my action on the legal premise, that I did not have the requisite percentage shareholding in terms of the Companies Act.

Overruling such objection, a Supreme Court Bench, presided by the then Chief Justice G.P. S. de Silva with Justices A.R.B. Amerasinghe and K.M.M.B. Kulatunga, upheld my action, that any one shareholder can bring an action to prevent a fraud being perpetrated on a company or an illegal act being committed by a company, which is controlled by ‘wrong-doers’. This landmark Judgment was reported in the Commonwealth Law Reports of 1992. I subsequently learnt that such derived right for one shareholder to act on behalf of all shareholders was a well established principle of law in several other jurisdictions; and today is a statutory right enshrined in the new Companies Act No. 7 of 2007. Is it not the same principle that is being extended to any citizen, entitling such citizen to derive a right to act for and on behalf of the people, to prevent them being defrauded by those in control, acting wrongfully, unlawfully, illegally and fraudulently ?

The warrant of the Special Presidential Commission of Inquiry, to inquire into the foregoing fraud on the State i.e. the people, was mysteriously not extended, even though the Commission, assisted by the CID, after intensive examination and inquiries, found sufficient irrefutable evidence of criminality, for the Hon. Attorney General, with the concurrence of the Commission, to have framed charges against certain persons, including K.N. Choksy P.C., *inter-alia*, on grounds of fraud against the government. The CID investigations which commenced in 2004 are yet to be proceeded with and concluded. Hence, ought not the focus have been on the reality of socio-political influences stultifying and stymieing the law enforcement authorities from discharging their warranted duties in the public interest, upholding the 'rule of law', without 'mis-focusing' on the Supreme Court, which is making endeavour to rectify such wrong in society, by making 'just and equitable' directions, in such circumstances, in terms of Article 126(4) of the Constitution ?

In terms of Article 121 of the Constitution, in the national and public interest, I challenged the perverse Amnesty of 2003, given under the 'guise' of a Tax Amnesty. I could not proceed since the Hon. Attorney General objected on the grounds that my Application was not made, within the 7 days of the Bill being placed on the Order Paper of Parliament, as mandated in Article 121 of the Constitution. This resulted in the Supreme Court declining to exercise its judicial power. Consequently, in terms of Article 129 of the Constitution, I caused the then President to refer the said statute for an Opinion of the Supreme Court. A 5-Judge Bench of the Supreme Court, having also heard me, pronounced that the impugned statute was inimical to the 'rule of law', and granted immunities and indemnities to persons, who have contravened laws that had been referred to in such statute, and that it has defrauded public revenue causing extensive loss to the State.

Was not such extensive loss being caused to the people of the country ? Such pronouncement was reiterated in the Supreme Court Determination on the consequent Bill to repeal such perverse statute. Would this not demonstrate the critical need for judicial review of statutes, even after enactment, inasmuch as, sometimes statutes are hastily enacted, without due and proper examination and public review thereof, thereby frustrating and/or alienating the legislative power of the people. A classic example is the *parate execution* powers exercised by Boards of Directors of Banks, performing the 'triple roles' of being the complainant, judge and executioner, at one and the same time, invariably acting on the recommendation of an officer, who could act wrongfully, arbitrarily or capriciously; thereby denying the right of the people to enforce their rights, with access to the judiciary, in terms of Article 105 of the Constitution. In the Supreme Court Determination challenged by me on an amendment to the principal enactment, a 5-Member Bench of the Supreme Court determined that such provision was violative of Article 105 of the Constitution.

A writ of *mandamus* Application made by me to the Court of Appeal for the due enforcement of the provisions of the repealing Statute, and the provisions of the Inland Revenue Act, is still pending settlement, even though concurred upon by the Hon. Attorney General, as far back as 2004. Article 126(3) of the Constitution mandates the Court of Appeal to forthwith refer an Application for determination by the Supreme Court, if there is a *prima-facie* evidence of infringement of the fundamental rights stipulated in the Constitution. The said Application has been made in the public interest.

The oration specifically refers to the recent Supreme Court Judgment on the privatization of Lanka Marine Services Ltd., (LMSL) to John Keells Holdings Ltd., where one member of the public, on a derived right to protect public property, acted on behalf of all the people of the country. Having supported the Petitioner and made submissions in person in the Supreme Court, I am intimately knowledgeable of the facts of the Case, which are not fully borne out by the Judgment. If public transactions are carried out surreptitiously, away from the public glare and scrutiny, how then can a technicality of time bar, prevent institution of litigation ? Could some one, who surreptitiously and fraudulently obtains public property be protected to be the rightful and legitimate real owner of such stolen property, after a mere passage of 28 days, on a narrow academic interpretation of Article 126 of the Constitution ?

Would not, in the circumstances of the fact that the LMSL Case is still pending in the Supreme Court, awaiting the reporting of the actions taken, on the directions given by the Supreme Court, by the law enforcement authorities, namely, IGP, DIG-CID, Bribery Commission, DG-SEC and the Hon. Attorney General, to have made the specific criticism in the oration and the media, of the actions taken and being taken by the Supreme Court, which are still pending, tantamount to the interference with the judiciary, within the meaning of Article 116 of the Constitution, which is an offence ? It is a matter of reality, that these law enforcement organs of the government failed and neglected to act, even with the Petition, with voluminous documents having been served on them, thereby necessitating the Supreme Court to have made directions, for them to discharge their function and duties to enforce the 'rule of law'.

At the Annual Conference of the International Association of Anti-Corruption Authorities held in Ukraine in early October, whereat 110 countries and international agencies were represented, I made a presentation of the foregoing public interest litigations, and more particularly, on the recent Judgment in the LMSL Case and the subsequent Orders made therein by the Supreme Court, directing the law enforcement authorities, who had 'mysteriously' failed and neglected to act, to take warranted action under the prevalent laws, enforcing the 'rule of law'. The international community of law enforcement authorities present, acclaimed the action of the Supreme Court and recognized the judicial activism exercised by the Supreme Court, in that, this international association formed under the auspices of the UN Convention against Corruption, is to promote the combating of fraud and corruption, within states, regionally and internationally; including developing measures to recover pillaged and plundered property of the people of a country by politicians and those closely associated with them, such as in the instance of Pinochet, Marcos, Suharto, *et al.*

Judgment by the Supreme Court on a similar action, as the LMSL Case, that is, the privatization of Sri Lanka Insurance Corporation (SLIC) to the Distilleries Consortium is pending. Hence, whilst such Judgment is pending, I am constrained from making further elaborations *vis-à-vis* the oration and opinions made in the media, in relation to the right of the Supreme Court to entertain and hear such litigations in the public interest, and criticism made thereof and the judgments and directions made therein, including the awarding of compensation to be paid to the State, which simply put, is a payment to the people, since the State only manages the funds of the people. Having been a party, who appeared in person in support of the Petitioner in the SLIC Case and made submissions therein, I am constrained to raise the question, as to whether comments in the oration and in the public domain, on the eve of the SLIC Judgment, and whilst action on the LMSL Case is still pending could tantamount to, an affront to the Supreme Court, causing prejudice and/or inhibition, and be an interference with the judiciary, which is prohibited by Article 116 of the Constitution ?

I, appearing in person, have had the opportunity on several occasions to make submissions before 3-Judge and 5-Judge Benches of the Supreme Court. On every such occasion, I have been afforded a hearing very courteously by different Judges of the Supreme Court, and even opposing Counsel, having been extremely courteous. Though not a Lawyer, I have been made to feel quite welcome and comfortable. However, I am sure, that I would not have had such a hearing, had I not spoken cohesively, with relevance to the subject matter of the case, but indulged in wasting the time of Court, in endeavoring to articulate misleading irrelevancies.