

## International Anti-Corruption Day falls on 9<sup>th</sup> December

### Rule of Law and Anti-Corruption: Challenge and Opportunity

#### *Nihal Sri at International Conference on Anti-Corruption at Panama City*

Sri Lanka's public interest activist, Nihal Sri Ameresekere, made the following presentation at the 7<sup>th</sup> International Anti-Corruption Conference of the International Association of Anti-Corruption Authorities held in Panama City recently, preceding the 5<sup>th</sup> Conference of the State Parties to the UN Convention Against Corruption held at Panama City, where about 1500 Delegates, from around 140 State Parties and International and Regional Organisations had participated. The UN Convention Against Corruption was adopted in December 2003 in Merida, Mexico, and entered into force in December 2005, when it was ratified by 40 State Parties, with Sri Lanka having been the very 2<sup>nd</sup> country to have ratified the UN Convention Against Corruption in March 2004. Ameresekere had participated at the UN Conference of the State Parties, as a Delegate of the International Association of Anti-Corruption Authorities.

#### Historical Perspective

Historically man ruled human society, including involving the ugly *spectre* of slavery, with the hapless poor merchandised into slavery; a practice condemned and rejected by contemporary human society. Of course, historically there have been women too who ruled in such bygone *eras* ! Social behavioral order in human society was then upheld, maintained and enforced through means of such leadership; whether it was tribal or community leaders, or council of elders, or kings or rulers, it is they, who, through their pronounced '*dicta*', laid down, as to how human society should behave and function, whilst being governed by them. The '*king shall do no wrong*' was an accepted norm at one time during human civilization – though King Herod's '*dicta*' recorded in the Christian Bible came to be condemned universally, as *atrocious* and unacceptable by mankind !

Through the passage of time, the concept of the '*rule of law*' gathered a momentum of *inertia* in human society, with the law formulated by human society, themselves, emerging as supreme, whereby, whether it be the ruler or those being ruled, were all alike before the law, and were all ruled by the law and were below the law; resulting in the growth of the concept of the '*rule of law*' and its supremacy. Accordingly, human society progressively became to be ruled by the law, and not by man or woman. Those being charged with the governance of human society were cast upon with the sacred task to enforce the '*rule of law*', to maintain social order and behaviour in human society; *with punishments as per the law for disobedience or breaking the 'rule of law'*.

The basic tenet, *vis-à-vis*, the '*rule of law*' and corruption, has been recorded in Sri Lankan history, as far back as 300 BC, when the famous Indian Emperor Asoka's son, Ven. Mihindu Thera, advented into Sri Lanka, to propagate the philosophy of the emancipated Buddha, he preached to the then King Devanampiyatissa of Sri Lanka thus – "*Oh mighty King, all the resources you perceive in the kingdom, do not belong to you, but such resources belong to all the people of the kingdom – you are merely the trustee of all such resources, and stand duty bound to deal with such resources in trust for and on behalf of the people of your kingdom*"; thus even the King became *inherently* accountable to the people.

In contemporary civilized human society, such historic concept so preached, as far back as 300 BC, has come to be accepted – that the resources of human society belong to the people of such human society, and that those in governance of the people, so govern such resources, in trust and for and on behalf of such people, and are accountable to the people.

#### Contemporary Interpretations of the 'Rule of Law'

Contemporary interpretations of the *'rule of law'* was propounded upon by a 7 Judge Bench of the Supreme Court of Sri Lanka, citing several international authorities, *inter-alia*, pronouncing the following dicta:

- "The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust' that is implicit in the conferment of power has been stated as follows:

*"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended" – (Administrative Law 8<sup>th</sup> Ed. 2000 – H.W.R. Wade and C.F. Forsyth p, 356)"*

- "A.V. Dicey in Law of the Constitution" postulates that *'rule of law'* which forms a fundamental principle of the Constitution has three meanings one of which is described as follows:-

*"It means, in the first place, the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone .... "*

- *"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 an Indian Judgment)
- The *'Rule of Law'* postulates the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power. In the picturesque language of the famous British Chief Justice Lord Coke whose dicta and writings contributed to the early growth of English Constitutional Law, the principle of legality which underpins the Rule of Law assures that the powers of Government will be exercised in accordance with *"the golden, and straight met wand"* of law, as opposed to the *"uncertain and crooked cord of discretion"*.

### **Judiciary and the 'Rule of Law'**

The Greek philosopher Aristotle referred to this concept of being *ruled by the law* in pronouncing, as translated, that – *"it is better for the law to rule society, than the society to be ruled by one or more of the citizens"*, and propounded that – *"even those who ruled are guardians of the law and are expected to respect and obey the law themselves"*. This led to the evolution of the concept that *'one cannot be a judge in his own cause'*. The UK Law Lord Justice Blackburn is attributed with the *'dicta'* – *"it is contrary to the general rule of law, not only in this country, but in every other, to make a person a judge in his own cause"*. This sent into oblivion the *medieval* concept that – *'the king shall do no wrong'* ! The concept of the *'rule of law'* was simply that 'laws' formulated by human society, themselves, must be the 'ruler' and 'rule' one and all equally, with all citizens of such human society being equal before such 'law', and subordinated to be ruled by such 'law', which was supreme, with no citizen, whomsoever, being above such 'law'; thus there can never be the practice of anyone being immune from the *'rule of law'*.

The function of enforcement of and adherence to and/or acting in conformity with the *'rule of law'* by citizens of human society was entrusted to a select branch of that society, referred to as the 'judiciary',

with the 'judiciary', themselves, not being above the law, whilst being called upon to discharge independently, fearlessly and impartially, the function of ensuring the adherence to and/or acting in conformity with the law by the citizens of that human society, with one and all, *be it the ruler, or the commoner, being equal before such law*. Therefore, all persons being equal before the law, and entitled to the equal protection of the law, they should have *unfettered* access, *sans any fear or favour*, to invoke the law enforcement judicial process, against any other person, regardless of the status and standing of such person/s, with the judiciary entrusted with the *onerous* task of impartially enforcing the '*rule of law*' equally on one and all. Thus the symbol of the judiciary, bearing a '*sword*' and '*even scales*' is depicted, as a '*blind-folded*' figurine, thereby *posturing* the concept that law is to be enforced equally, *regardless* and '*being blind*', as to the social status and/or standing of the persons before the judiciary, in enforcing the adherence to and/or compliance with the law; *with the law reigning supreme*. In the foregoing circumstances, the celebrated words of the Roman poet Juvenal – "*Quis custodiet, ipsos custodes ?*", i.e. '*who will guard the guard themselves ?*' in other words, "*who will judge, the judges themselves ?*" comes into focus.

In actual reality, contemporary human society has witnessed many instances of members of the judiciary, themselves, having had to be *arraigned* before the very law, which they, themselves, had been entrusted to enforce. Thus, there arises the undisputed need to hold members of the judiciary, through public review and scrutiny, transparently equally accountable, perhaps even with a greater degree of force. The Latimer House Principles and the UN Bangalore Principles of Judicial Conduct formulated for the strengthening and protecting the independence of the judiciary, should not, in any manner, whatsoever or howsoever, be permitted to be used, as a *shield* by the judiciary to avoid and evade such public review and scrutiny, and to be held transparently accountable for their acts and deeds, which should not be *shrouded* in secrecy, *with pretense of hallowed sanctity* !

Recently, the Chief Justice of Sri Lanka was impeached, and such endeavour attracted *blithe* objections from several quarters of the international community, particularly those associated with the judiciary, ironically even though they, themselves, had been *blissfully unaware* of the reality of the totality of the facts involved. Being intimately aware of the real facts involved, I, as a public interest activist combatting corruption, publicly and fearlessly supported and *espoused* the successful impeachment of the Chief Justice, on a matter of principle. My experience in such endeavor unfolded before me the *appalling* reality in the contemporary international community, that certain segments of society, perhaps unintentionally, are deemed to be *sacred cows* above the law, thereby rendering nugatory the concept of the '*rule of law*' and all being equal before the law; with the condemned concept, that the '*king shall do no wrong*', showing *semblance of resurgence*. A Queen's Counsel in the UK proffered an Opinion, on behalf of the Bar Human Rights Committee of England and Wales, without having taken into cognizance my representations specifically submitted in that regard, though acknowledged by the Bar Human Rights Committee of England and Wales, that my such representations would be taken into reckoning and dealt with, *thereby only displaying the perception of bias* !

## **UN Review Mechanism**

Hitherto a total of 168 State Parties comprising the international community have ratified the UN Convention Against Corruption, which came into force in December 2005, with duties and obligations on their part to be performed and fulfilled thereunder, for the effective combatting through the due and proper enforcement of the '*rule of law*', of the cancerous menace of corruption, both within the territory of the State Parties, or multilaterally within two or more State Parties.

After the Conference of the State Parties held in Marrakesh, Morocco in October 2011, a '*review mechanism*' was introduced by the United Nations, for the rotational review of a randomly selected

number of State Parties, by other randomly selected State Parties, to document, examine and evaluate, the extent to which such State Parties have implemented and given effect to, the duties and obligations to have been performed and fulfilled on their part under the UN Convention Against Corruption. Such 'review mechanism' is akin to a 'peer review' system, where State Parties are called upon to review other State Parties, on a rotational basis, without taking into reckoning the capacity and the status and standing, *vis-à-vis*, the combating of corruption by those State Parties selected on such rotational basis to conduct such reviews of other State Parties. Here again, the concept of '*Quis custodiet ipsos custodes*?', i.e. '*who will judge the judges themselves*?', comes into focus and reckoning, there being no public scrutiny by civil society of such reviews conducted of State Parties, to afford transparent public accountability of the discharge of the *mandatory* duties and obligations on the part of the State Parties to have been performed and fulfilled in terms of the UN Convention Against Corruption.

No doubt, such 'review mechanism' is a laudable small step in a difficult long journey. Nevertheless, it must develop public confidence and gain the satisfaction of the citizenry of human societies; otherwise, such 'review mechanism' would only become a mere *façade*, particularly in the background of corruption at the highest levels in State Parties, including also by State Agencies, for the achievement of economic, regional and global objectives, which cannot be curbed and/or arrested and/or acted upon by public officers, coming under the purview and control of the *hierarchy* of such State Parties.

The recent unfolding of large scales of ill-gotten monies being stashed away in 'tax havens' spread out globally by the *hierarchy* and those of upper echelons of State Parties, which got exposed due to courageous '*whistleblowing*' for the public good, and subsequently probed due to the fall in revenues by certain State Parties, would be a cogent issue to be taken into reckoning in the 'review mechanism', ironically with those in one State Party having *aided* and *abetted* in hiding the proceeds of crime and corruption of those in other State Parties; and thereby regardlessly, having made *unjust profits* on such *ill-gotten monies misappropriated* and *syphoned*, robbing the hapless poor.

### **Challenge and Opportunity**

Combatting corruption in the upper echelons of society, commonly referred to as 'mega corruption', invariably involving political corruption, becomes a challenging and a daunting task. It is indeed a reality in the contemporary world, that a few citizens of a society, exploit the resources, which rightfully and lawfully belong equally to all the citizens of that society. Those wielding power and influence, exploit and unjustly gain wealth, through solicitation and/or extortion by the abuse of power and the misuse of office, admittedly through corrupt means, *antithetic* to the 'rule of law', and the UN Convention Against Corruption. The foregoing conduct is not only in blatant violation of the commitments made by State Parties, who have ratified the UN Convention Against Corruption, but also is in breach of the basic tenet, that the resources of human society are managed in trust on their behalf by those in governance of such resources, but contradictorily act with scant regard to the blatant breach of such trust.

The UN Convention Against Corruption clearly encompasses with equal force, the dealing with and prevention of fraud and corruption, both in the public and private sectors. The recent financial scandals in the private sector causing financial crisis to State Parties, burdening the tax payers and the poor, as a result of *unbridled greed* by such private sector, exposes the truth and reality that the private sector had not been effectively dealt with by the State Parties, in contravention of the *mandatory* duties and obligations under the UN Convention Against Corruption; notwithstanding the UN Convention Against Corruption mandate such obligations by the use of the words – "*the State Party shall .....*"

Even professionals have been exposed to be well and truly involved in such dubious frauds and scams and have been subservient to the *lucre* of professional fees, handsomely paid out of such *ill-gotten*

*gains*, and thereby frustrating the due enforcement of the 'rule of law' equally to be a daunting task. Even the fearless independence of the judiciary, often pontificated upon, is invariably brought into question, in breach of the norm, that all are equal before the law, with equal protection under the law. It is vividly seen that though high noble values are pontificated and propounded upon at many an international fora, such pontifications and propoundings are mere rhetoric and make belief, as a *façade* to cover up the truth and reality. When the 'rule of law' is not effectively and speedily enforced, not only with stringent prosecution against those corrupt at the upper echelons of society, but also for the prevention of the pillage and plunder of the resources of the poor masses by a privileged few; then the 'rule of law' is rendered *nugatory*.

The foregoing results in further impoverishing the poor, seeding social injustice, thereby leading to social rebellion, ironically due to the very absence of the 'rule of law', or in not having the 'rule of law' effectively enforced, as the laudable concept had intended; and the consequent denial of basic essentials for the livelihoods of the poor, which tantamount to the violation of *human rights*. This culminates in a severe indictment on those entrusted with the tasks of governance, law enforcement and the judiciary; exposing the blatant breach of the commitments made under the UN Convention Against Corruption. The consequent social rebellions, which *spring* due to such blatant breach of the 'rule of law', results in turmoil, often with insurrections, terrorism, *et al*, leading human societies to sheer *anarchy*, due to the simple reality of the absence of the due and proper equal enforcement of the 'rule of law', and where the law did not rule supreme, but *despots* and their *lackeys* did, to be overthrown by the power of the people, whose resources had been so pillaged and plundered by such *despots* and their *lackeys*.

Due to fear and/or favour, the *hierarchy* of the State Parties are very rarely *arraigned* before the law, though warranted as being subjugated to the 'rule of law', however they are so *arraigned* before the law, only after their fall from grace and/or having been thrown out of power, for their blatant and patent *robbery* of the peoples resources. Ironically, the deals of such leaders get exposed, even by a large segment of the *media*, only thereafter, which is an indictment of the lapse of public duty on the part of the *media* ! To achieve such '*phenomenon*' of the law being supreme and effectively enforced on one and all equally, though only a dream, one must necessarily strive to make true that dream, for the greater good of human society and mankind.

*Nihal Sri Ameresekere is a Professional Consultant, a Certified Fraud Examiner, an Associate Member of the American Bar Association, a Member of the International Consortium on Governmental Financial Management, and a Member of the International Association of Anti-Corruption Authorities.*

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Nihal Sri and Lilamani Ameresekere with new President of UN State Parties Conference Against Corruption Adigail Benzadon Cohen and Dr. Ye Feng, Secretary General of International Association of Anti-Corruption Authorities at a function in Panama

### Historical perspective

Historically man ruled human society, including involving the ugly spectre of slavery, with the hapless poor merchandised into slavery; a practice condemned and rejected by contemporary human society. Of course, historically there have been women too who ruled in such bygone eras! Social behavioural order in human society was then upheld, maintained and enforced through means of such leadership; whether it was tribal or community leaders, or council of elders, or kings or rulers, it is they, who, through their pronounced 'dicta', laid down, as to how human society should behave and function, whilst being governed by them. The 'king shall do no wrong' was an accepted norm at one time during human civilisation – though King Herod's 'dicta' recorded in the Christian Bible came to be condemned universally, as atrocious and unacceptable by mankind !

Through the passage of time, the concept of the 'rule of law' gathered a momentum of inertia in human society, with the law formulated by human society, themselves, emerging as supreme, whereby, whether it be the ruler or those being ruled, were all alike before the law, and were all ruled by the law and were below the law; resulting in the growth of the concept of the 'rule of law' and its supremacy. Accordingly, human society progressively became to be ruled by the law, and not by man or woman. Those being charged with the governance of human society were cast upon with the sacred task to enforce the 'rule of law', to maintain social order and behaviour in human society; with punishments as per the law for disobedience or breaking the 'rule of law'.

The basic tenet, vis-à-vis, the rule of law and corruption, has been recorded in Sri Lankan history, as far back as 300 BC, when the famous Indian Emperor Asoka's son, Ven. Mihindu Thera, advented into Sri Lanka, to propagate the philosophy of the emancipated Buddha, he preached to the then King Devanampiyatissa of Sri Lanka thus – "Oh mighty King, all the resources you perceive in the kingdom, do not belong to you, but such resources belong to all the people of the kingdom – you are merely the trustee of all such resources, and stand duty bound to deal with such resources in trust for and on behalf of the people of your kingdom"; thus even the King became inherently accountable to the people.

In contemporary civilised human society, such historic concept so preached, as far back as 300 BC, has come to be accepted – that the resources of human society belong to the people of such human society, and that those in governance of the people, so govern such resources, in trust and for and on behalf of such people, and are accountable to the people.

Contemporary interpretations of the 'Rule of Law'

Contemporary interpretations of the 'rule of law' was propounded upon by a 7-Judge Bench of the Supreme Court of Sri Lanka, citing several international authorities, inter-alia, pronouncing the following dicta:

- "The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust' that is implicit in the conferment of power has been stated as follows: "Statutory power conferred

for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended” –

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- “A.V. Dicey in Law of the Constitution” postulates that ‘rule of law’ which forms a fundamental principle of the Constitution has three meanings one of which is described as follows: “It means, in the first place, the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone...”
- “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 an Indian Judgment)
- The ‘Rule of Law’ postulates the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power. In the picturesque language of the famous British Chief Justice Lord Coke whose dicta and writings contributed to the early growth of English Constitutional Law, the principle of legality which underpins the Rule of Law assures that the powers of Government will be exercised in accordance with the golden, and straight met wand of law, as opposed to the uncertain and crooked cord of discretion.

## Judiciary and the

### ‘Rule of Law’

The Greek philosopher Aristotle referred to this concept of being ruled by the law in pronouncing, as translated, that – “it is better for the law to rule society, than the society to be ruled by one or more of the citizens”, and propounded that – “even those who ruled are guardians of the law and are expected to respect and obey the law themselves”.

This led to the evolution of the concept that ‘one cannot be a judge in his own cause’. The UK Law Lord Justice Blackburn is attributed with the ‘dicta’ – “it is contrary to the general rule of law, not only in this country, but in every other, to make a person a judge in his own cause”. This sent into oblivion the medieval concept that – ‘the king shall do no wrong’! The concept of the ‘rule of law’ was simply that ‘laws’ formulated by human society, themselves, must be the ‘ruler’ and ‘rule’ one and all equally, with all citizens of such human society being equal before such ‘law’, and subordinated to be ruled by such ‘law’, which was supreme, with no citizen, whomsoever, being above such ‘law’; thus there can never be the practice of anyone being immune from the ‘rule of law’.

The function of enforcement of and adherence to and/or acting in conformity with the ‘rule of law’ by citizens of human society was entrusted to a select branch of that society, referred to as the ‘judiciary’, with the ‘judiciary’, themselves, not being above the law, whilst being called upon to discharge independently, fearlessly and impartially, the function of ensuring the adherence to and/or acting in conformity with the law by the citizens of that human society, with one and all, be it the ruler, or the commoner, being equal before such law.

Therefore, all persons being equal before the law, and entitled to the equal protection of the law, they should have unfettered access, sans any fear or favour, to invoke the law enforcement judicial process, against any other person, regardless of the status and standing of such person/s, with the judiciary entrusted with the onerous task of impartially enforcing the ‘rule of law’ equally on one and all.

Thus the symbol of the judiciary, bearing a ‘sword’ and ‘even scales’ is depicted, as a ‘blind-folded’ figurine, thereby posturing the concept that law is to be enforced equally, regardless and ‘being blind’, as to the social status and/or standing of the persons before the judiciary, in enforcing the adherence to and/or compliance with the law; with the law reigning supreme. In the foregoing circumstances, the celebrated words of the Roman poet Juvenal – “Quis custodiet, ipsos custodes?”, i.e. ‘who will guard the guard themselves?’ in other words, “who will judge, the



Nihal Sri and Lilamani Ameresekere with Prof. Cao Jianming, President of the International Association of Anti-Corruption Authorities at a function in Panama

judges themselves?” comes into focus.

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themselves, having had to be arraigned before the very law, which they, themselves, had been entrusted to enforce. Thus, there arises the undisputed need to hold members of the judiciary, through public review and scrutiny, transparently equally accountable, perhaps even with a greater degree of force. The Latimer House Principles and the UN Bangalore Principles of Judicial Conduct formulated for the strengthening and protecting the independence of the judiciary, should not, in any manner, whatsoever or howsoever, be permitted to be used, as a shield by the judiciary to avoid and evade such public review and scrutiny, and to be held transparently accountable for their acts and deeds, which should not be shrouded in secrecy, with pretence of hallowed sanctity!

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#### UN Review Mechanism

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#### Challenge and opportunity

Combating corruption in the upper echelons of society, commonly referred to as 'mega corruption', invariably involving political corruption, becomes a challenging and a daunting task. It is indeed a reality in the contemporary world that a few citizens of a society, exploit the resources, which rightfully and lawfully belong equally to all the citizens of that society. Those wielding power and influence, exploit and unjustly gain wealth, through solicitation and/or extortion by the abuse of power and the misuse of office, admittedly through corrupt means, antithetic to the 'rule of law', and the UN Convention Against Corruption. The foregoing conduct is not only in blatant violation of the commitments made by State Parties, who have ratified the UN Convention Against Corruption, but also is in breach of the basic tenet, that the resources of human society are managed in trust on their behalf by those in governance of such resources, but contradictorily act with scant regard to the blatant breach of such trust.

The UN Convention Against Corruption clearly encompasses with equal force, the dealing with and prevention of fraud and corruption, both in the public and private sectors. The recent financial scandals in the private sector causing financial crisis to State Parties, burdening the tax payers and the poor, as a result of unbridled greed by such private sector, exposes the truth and reality that the private sector had not been effectively dealt with by the State Parties, in contravention of the mandatory duties and obligations under the UN Convention Against Corruption; notwithstanding the UN Convention Against Corruption mandate such obligations by the use of the words – “the State Party shall...”

Even professionals have been exposed to be well and truly involved in such dubious frauds and scams and have been subservient to the lucre of professional fees, handsomely paid out of such ill-gotten gains, and thereby frustrating the due enforcement of the ‘rule of law’ equally to be a daunting task. Even the fearless independence of the judiciary, often pontificated upon, is invariably brought into question, in breach of the norm, that all are equal before the law, with equal protection under the law. It is vividly seen that though high noble values are pontificated and propounded upon at many an international fora, such pontifications and propoundings are mere rhetoric and make belief, as a façade to cover up the truth and reality. When the ‘rule of law’ is not effectively and speedily enforced, not only with stringent prosecution against those corrupt at the upper echelons of society, but also for the prevention of the pillage and plunder of the resources of the poor masses by a privileged few; then the ‘rule of law’ is rendered nugatory.

The foregoing results in further impoverishing the poor, seeding social injustice, thereby leading to social rebellion, ironically due to the very absence of the ‘rule of law’, or in not having the ‘rule of law’ effectively enforced, as the laudable concept had intended; and the consequent denial of basic essentials for the livelihoods of the poor, which tantamount to the violation of human rights. This culminates in a severe indictment on those entrusted with the tasks of governance, law enforcement and the judiciary; exposing the blatant breach of the commitments made under the UN Convention Against Corruption. The consequent social rebellions, which spring due to such blatant breach of the ‘rule of law’, results in turmoil, often with insurrections, terrorism, et al, leading human societies to sheer anarchy, due to the simple reality of the absence of the due and proper equal enforcement of the ‘rule of law’, and where the law did not rule supreme, but despots and their lackeys did, to be overthrown by the power of the people, whose resources had been so pillaged and plundered by such despots and their lackeys.

Due to fear and/or favour, the hierarchy of the State Parties are very rarely arraigned before the law, though warranted as being subjugated to the ‘rule of law’, however they are so arraigned before the law, only after their fall from grace and/or having been thrown out of power, for their blatant and patent robbery of the peoples resources. Ironically, the deal of such leaders get exposed, even by a large segment of the media, only thereafter, which is an indictment of the lapse of public duty on the part of the media! To achieve such ‘phenomenon’ of the law being supreme and effectively enforced on one and all equally, though only a dream, one must necessarily strive to make true that dream, for the greater good of human society and mankind.

(Nihal Sri Ameresekere is a Professional Consultant, a Certified Fraud Examiner, an Associate Member of the American Bar Association, a Member of the International Consortium on Governmental Financial Management, and a Member of the International Association of Anti-Corruption Authorities.)

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## Today is International Anti-Corruption Day



**Nihal Sri Ameresekere**

Sri Lanka's public interest activist, Nihal Sri Ameresekere, made the following presentation at the 7th International Association of Anti-Corruption Authorities held in Panama City recently, preceding the 5th Conference of the State Parties to the UN Convention Against Corruption held at Panama City, where about 1500 delegates, from around 140 State Parties and International and Regional Organisations had participated.

# RULE OF LAW AND ANTI-CORRUPTION CHALLENGE AND OPPORTUNITY

The UN Convention Against Corruption was adopted in December 2003 in Merida, Mexico, and entered into force in December 2005, when it was ratified by 40 State Parties, with Sri Lanka having been the very 2nd country to have ratified the UN Convention Against Corruption in March 2004. Ameresekere had participated at the UN Conference of the State Parties, as a delegate of the International Association of Anti-Corruption Authorities.

## Historical Perspective

Historically man-ruled human society, involving the ugly spectre of slavery, with the hapless poor merchandised into slavery; a practice condemned and rejected by contemporary human society. Of course, historically there have been women too, who ruled in such bygone eras! Social behavioural order in human society was then upheld, maintained and enforced through means of such leadership; whether it was tribal or community leaders, or a council of elders, or kings or rulers, it is they, who, through their pronounced 'dicta', laid down, as to how human society should behave and function, whilst being governed by them. The 'king shall do no wrong' was an accepted norm at one time during human civilisation - though King Herod's 'dicta' recorded in the Christian Bible came to be condemned universally, as atrocious and unacceptable by mankind!

Those being charged with the governance of human society were cast upon with the sacred task to enforce the 'Rule of Law', to maintain social order and behaviour in human society; with punishments as per the law for disobedience or breaking the 'Rule of Law'.

Through the passage of time, the concept of the 'Rule of Law' gathered a momentum of inertia in human society, with the law formulated by human society, themselves, emerging as supreme, whereby, whether it be the ruler or those being ruled, were all alike before the law, and were all ruled by the law and were below the law; resulting in the growth of the concept of the 'Rule of Law' and its supremacy. Accordingly, human society progressively became to be ruled by the law, and not by man or woman. Those being charged with the governance of human society were cast upon with the sacred task to enforce the 'Rule of Law', to maintain social order and behaviour in human society; with punishments as per the law for disobedience or breaking the 'Rule of Law'.

The basic tenet, vis-à-vis, the 'Rule of Law' and corruption, has been recorded in Sri Lankan history, as far back as 300 BC, when the famous Indian Emperor Asoka's son, Ven. Mihindu Thera, advented into Sri Lanka, to propagate the philosophy of the emancipated Buddha, he preached to the then King Devanampiyatissa of Sri Lanka thus - "Oh mighty King, all the resources you perceive in the kingdom, do not belong to you, but such resources belong to all the people of the kingdom - you are merely the trustee of all such resources, and stand duty bound to deal with such



Nihal Sri and Lilamani Ameresekere with new President of UN State Parties Conference Against Corruption, Madam Adigal Benazod Cohen and Dr. Ye Feng, Secretary General of International Association of Anti-Corruption Authorities at a function in Panama.

resources in trust for and on behalf of the people of your kingdom"; thus even the King became inherently accountable to the people.

In contemporary civilised human society, such historic concept so preached, as far back as 300 BC, has come to be accepted - that the resources of human society belong to the people of such human society, and that those in governance of the people, so govern such resources, in trust for and on behalf of such people, and are accountable to the people.



## Contemporary Interpretations of the 'Rule of Law'

Contemporary interpretations of the 'Rule of Law' was propounded upon by a 7 Judge Bench of the Supreme Court of Sri Lanka, citing several international authorities, *inter-alia*, pronouncing the following dicta:

"The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust' that is implicit in the conferment of power has been stated as follows:

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended" - (Administrative Law 8th Ed. 2000 - H.W.R. Wade and C.F. Forsyth p. 356)

"A.V. Dicey in Law of the Constitution" postulates that 'Rule of Law' which forms a fundamental principle of the Constitution has three meanings one of which is described as follows:

"It means, in the first place, the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone .... " "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 an Indian Judgment)

The 'Rule of Law' postulates the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power. In the picturesque language of the famous British Chief Justice Lord Coke whose dicta and writings contributed to the early growth of English Constitutional Law, the principle of legality which underpinned the Rule of Law assured that the powers of Government will be exercised in accordance with "the golden, and straight met wand" of law, as opposed to the "uncertain and crooked cord of discretion".

## Judiciary and the 'Rule of Law'

The Greek philosopher Aristotle referred to this concept of being ruled by the law in pronouncing, as translated, that - "it is better for the law to rule society, than the society to be ruled by one or more of the citizens", and propounded that - "even those who ruled are guardians of the law and are expected to respect and obey the law themselves". This led to the evolution of the concept that 'one cannot be a judge in his own cause'. The UK Law Lord Justice Blackburn is attributed with the 'dicta' - "it is contrary to the general rule of law, not only in this country but in every other, to make a person a judge in his own cause". This sent into oblivion the medieval concept that - "the king shall do no wrong"! The concept of the 'Rule of Law' was simply that 'laws' formulated by human society, themselves, must be the 'ruler' and 'rule' one and all equally, with all citizens of such human society being equal before such 'law', and subordinated to be ruled by such 'law'; thus there can never be the practice of anyone being immune from the 'Rule of Law'.

The function of enforcement of and adherence to and/or acting in conformity with the 'Rule of Law' by citizens of human society was entrusted to a select branch of that society, referred to as the 'judiciary', with the 'judiciary', themselves, not being above the law, whilst being called upon to discharge independently, fearlessly and impartially, the function of ensuring the adherence to and/or acting in conformity with the law by the citizens of that human society, with one and all, be it the ruler, or the commoner, being equal before such law.

Therefore, all persons being equal before the law, and entitled to the equal protection of the law, they should have unfettered access, sans any fear or favour; to invoke the law enforcement judicial process, against any other person, regardless of the status and standing of such person/s, with the judiciary entrusted with the onerous task of impartially enforcing the 'rule of law' equally on one and all.

Thus the symbol of the judiciary, bearing a 'sword' and 'even scales' is depicted, as a 'blind-folded' figurine, thereby posturing the concept that law is to be enforced equally, regardless and 'being blind', as to the social status and/or standing of the persons before the judiciary, in enforcing the adherence to and/or compliance with the law; with the law reigning supreme.

In the foregoing circumstances, the celebrated words of the Roman poet Juvenal - "Quis custodiet, ipsos custodes?", i.e. 'who will guard the guard themselves?' in other words, "who will judge, the judges themselves?" comes into focus.

In actual reality, contemporary human society has witnessed many instances of members of the judiciary, themselves, having had to be arraigned before the very law, which they, themselves, had been entrusted to enforce. Thus, there arises the undisputed need to hold members of the judiciary, through public review and scrutiny, transparently equally account-

able, perhaps even with a greater degree of force. The Latimer House Principles and the UN Bangalore Principles of Judicial Conduct formulated for the strengthening and protecting the independence of the judiciary, should not, in any manner, whatsoever or howsoever, be permitted to be used, as a shield by the judiciary to avoid and evade such public review and scrutiny, and to be held transparently accountable for their acts and deeds, which should not be shrouded in secrecy, with pretence of hallowed sanctity!

Recently, the Chief Justice of Sri Lanka was impeached, and such endeavour attracted blithe objections from several quarters of the international community, particularly those associated with the judiciary, ironically even though they, themselves, had been blissfully unaware of the reality of the totality of the facts involved. Being intimately aware of the real facts involved, I, as a public interest activist combatting corruption, publicly and fearlessly supported and espoused the successful impeachment of the Chief Justice, on a matter of principle.

My experience in such endeavour unfolded before me the appalling reality in the contemporary international community that certain segments of society, perhaps unintentionally, are deemed to be sacred cows above the law, thereby rendering nugatory the concept of the 'Rule of Law' and all being equal before the law; with the condemned concept, that the 'king shall do no wrong', showing semblance of resurgence. A Queen's Counsel in the UK proffered an Opinion, on behalf of the Bar Human Rights Committee of England and Wales, without having taken into cognizance my representations specifically submitted in that regard, though acknowledged by the Bar Human Rights Committee of England and Wales, that my such representations would be taken into reckoning and dealt with, thereby only displaying the perception of bias!

## UN Review Mechanism

Hitherto a total of 168 State Parties comprising the international community have ratified the UN Convention Against Corruption, which came into force in December 2005, with duties and obligations on their part to be performed and fulfilled thereunder; for the effective combatting through the due and proper enforcement of the 'Rule of Law', of the cancerous menace of corruption, both within the territory of the State Parties, or multilaterally within two or more State Parties.

After the Conference of the State Parties held in Marrakesh, Morocco in October 2011, a 'review mechanism' was introduced by the United Nations, for the rotational review of a randomly selected number of State Parties, by other randomly selected State Parties, to document, examine and evaluate, the extent to which such State Parties have implemented and given effect to, the duties and obligations to have been performed and fulfilled on their part under the UN Convention Against Corruption.

Such 'review mechanism' is akin to a 'peer review' system, where State Parties are called upon to review other State Parties, on a rotational basis, without taking into reckoning the capacity and the status and standing, vis-à-vis, the combatting of corruption by those State Parties selected on such rotational basis to conduct such reviews of other State Parties.

Here again, the concept of 'Quis custodiet ipsos custodes?', i.e. 'who will judge the judges themselves?', comes into focus and reckoning, there being no public scrutiny by civil society of such reviews conducted of State Parties, to afford transparent public accountability of the discharge of the mandatory duties and obligations on the part of the State Parties to have been performed and fulfilled in terms of the UN Convention Against Corruption.

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## Rule of Law...

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No doubt, such 'review mechanism' is a laudable small step in a difficult long journey. Nevertheless, it must develop public confidence and gain the satisfaction of the citizenry of human societies; otherwise, such 'review mechanism' would only become a mere façade, particularly in the background of corruption at the highest levels in State Parties, including also by State Agencies, for the achievement of economic, regional and global objectives, which cannot be curbed and/or arrested and/or acted upon by public officers, coming under the purview and control of the hierarchy of such State Parties.

The recent unfolding of large scales of ill-gotten monies being stashed away in 'tax havens' spread out globally by the hierarchy and those of upper echelons of State Parties, which got exposed due to courageous 'whistleblowing' for the public good, and subsequently probed due to the fall in revenues by certain State Parties, would be a cogent issue to be taken into reckoning in the 'review mechanism', ironically with those in one State Party having aided and abetted in hiding the proceeds of crime and corruption of those in other State Parties; and thereby regardlessly, having made unjust profits on

such ill-gotten monies misappropriated and syphoned, robbing the hapless poor.

## Challenge and Opportunity

Combating corruption in the upper echelons of society, commonly referred to as 'mega corruption', invariably involving political corruption, becomes a challenging and a daunting task. It is indeed a reality in the contemporary world, which a few citizens of a society exploit the resources, which rightfully and lawfully belong equally to all the citizens of that society. Those wielding power and influence, exploit and unjustly gain wealth, through solicitation and/or extortion by the abuse of power and the misuse of office, admittedly through corrupt means, antithetical to the 'Rule of Law', and the UN Convention Against Corruption. The foregoing conduct is not only in blatant violation of the commitments made by State Parties, who have ratified the UN Convention Against Corruption, but also is in breach of the basic tenet, that the resources of human society are managed in trust on their behalf by those in governance of such resources, but contradictorily act with scant regard to the blatant breach of such trust.

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ruption, both in the public and private sectors. The recent financial scandals in the private sector causing financial crises to State Parties, burdening the tax payers and the poor, as a result of unbridled greed by such private sector, exposes the truth and reality that the private sector had not been effectively dealt with by the State Parties, in contravention of the mandatory duties and obligations under the UN Convention Against Corruption; notwithstanding the UN Convention Against Corruption mandate such obligations by the use of the words - "the State Party shall ....."

Even professionals have been exposed to be well and truly involved in such dubious frauds and scams and have been subservient to the lucre of professional fees, handsomely paid out of such ill-gotten gains, and thereby frustrating the due enforcement of the 'Rule of Law' equally to be a daunting task. Even the fearless independence of the judiciary, often questioned, is invariably brought into question, in breach of the norm, that all are equal before the law, with equal protection under the law. It is vividly seen that though high noble values are pontificated and propounded upon at many an international fora, such pontifications and propoundings are mere rhetoric and make belief, as a façade to cover up the

truth and reality. When the 'Rule of Law' is not effectively and speedily enforced, not only with stringent prosecution against those corrupt at the upper echelons of society, but also for the prevention of the pillage and plunder of the resources of the poor masses by a privileged few; then the 'Rule of Law' is rendered nugatory.

The foregoing results in further impoverishing the poor, seeding social injustice, thereby leading to social rebellion, ironically due to the very absence of the 'Rule of Law', or in not having the 'Rule of Law' effectively enforced, as the laudable concept had intended; and the consequent denial of basic essentials for the livelihoods of the poor, which tantamount to the violation of Human Rights. This culminates in a severe indictment on those entrusted with the tasks of governance, law enforcement and the judiciary; exposing the blatant breach of the commitments made under the UN Convention Against Corruption. The consequent social rebellions, which spring due to such blatant breach of the 'Rule of Law', results in turmoil, often with insurrections, terrorism, et al, leading human societies to sheer anarchy, due to the simple reality of the absence of the due and proper equal enforcement of the 'Rule of Law', and where the law did not rule supreme, but

International Anti-Corruption Day falls on 9th December

# Rule of Law and Anti-Corruption: Challenge and Opportunity

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**Historical Perspective**

Historically man ruled human society, including involving the ugly spectre of slavery, with the hapless poor merchandised into slavery; a practice condemned and rejected by contemporary human society. Of course, historically there have been women too who ruled in such bygone eras! Social behavioral order in human society was then upheld, maintained and enforced through means of such leadership; whether it was tribal or community leaders, or council of elders, or kings or rulers, it is they, who, through their pronounced 'dicta', laid down, as to how human society should behave and function, whilst being governed by them. The 'king shall do no wrong' was an accepted norm at one time during human civilization - though King Herod's 'dicta' recorded in the Christian Bible came to be condemned universally, as atrocious and unacceptable by mankind!

Through the passage of time, the concept of the 'rule of law' gathered a momentum of inertia in human society, with the law formulated by human society, themselves, emerging as supreme, whereby, whether it be the ruler or those being ruled, were all alike before the law, and were all ruled by the law, and were below the law; resulting in the growth of the concept of the 'rule of law' and its supremacy. Accordingly, human society progressively became to be ruled by the law, and not by man or woman. Those being charged with the governance of human society were cast upon with the sacred task to enforce the 'rule of law', to maintain social order and behaviour in human society; with punishments as per the law for disobedience or breaking the 'rule of law'.

The basic tenet, vis-à-vis, the 'rule of law' and corruption, has been recorded in Sri Lankan history, as far back as 300 BC, when the famous Indian Emperor Asoka's son, Ven. Mihindu Thera, advented into Sri Lanka, to propagate the philosophy of the emancipated Buddha, he preached to the then King Devanampiyatissa of Sri Lanka thus - "Oh mighty King, all the resources you perceive in the kingdom, do not belong to you, but such resources belong to all the people of the kingdom - you are merely the trustee of all such resources, and stand duty bound to deal with such resources in trust for and on behalf of the people of your kingdom"; thus even the King became inherently accountable to the people.

In contemporary civilized human society, such historic concept so preached, as far back as 300 BC, has come to be accepted - that the resources of human society belong to the people of such human society, and that those in governance of the people, so govern such resources, in trust and for and on behalf of such people, and are accountable to the people.

**Contemporary Interpretations of the 'Rule of Law'**

Contemporary interpretations of the 'rule of law' was propounded upon by a 7 Judge Bench of the Supreme Court of Sri Lanka, citing several international authorities, inter-alia, pronouncing the following dicta:

• "The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust' that is implicit in the conferment of power has been stated as follows:

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**Judiciary and the 'Rule of Law'**

The Greek philosopher Aristotle referred to this concept of being ruled by the law in pronouncing, as translated, that - "it is better for the law to rule society, than the society to be ruled by one or more of the citizens", and propounded that - "even those who ruled are guardians of the law and are expected to respect and obey the law themselves". This led to the evolution of the concept that 'one cannot be a judge in his own cause'. The UK Law Lord Justice Blackburn is attributed with the 'dicta' - "it is contrary to the general rule of law, not only in this country, but in every other, to make a person a judge in his own cause". This sent into oblivion the medieval concept that - 'the king shall do no wrong'! The concept of the 'rule of law' was simply that 'laws' formulated by human society, themselves, must be the 'ruler' and 'rule' one and all equally, with all citizens of such human society being equal before such 'law', and subordinated to be ruled by such 'law', which was supreme, with no citizen, whomsoever, being above such 'law'; thus there can never be the practice of anyone being immune from the 'rule of law'.

The function of enforcement of and adherence to and/or acting in conformity with the 'rule of law' by citizens of human society was entrusted to a select branch of that society, referred to as the 'judiciary', with the 'judiciary', themselves, not being above the law, whilst being called upon to discharge independently, fearlessly and impartially, the function of ensuring the adherence to and/or acting in conformity with the law by the citizens of that human society, with one and all, be it the ruler, or the commoner, being equal before such law. Therefore, all persons being equal before the law, and entitled to the equal protection of the law, they should have unfettered access, sans any fear or favour, to invoke the law enforcement judicial process,

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against any other person, regardless of the status and standing of such person/s, with the judiciary entrusted with the onerous task of impartially enforcing the 'rule of law' equally on one and all. Thus the symbol of the judiciary, bearing a 'sword' and 'even scales' is depicted, as a 'blind-folded' figurine, thereby posturing the concept that law is to be enforced equally, regardless and 'being blind', as to the social status and/or standing of the persons before the judiciary, in enforcing the adherence to and/or compliance with the law; with the law reigning supreme. In the foregoing circumstances, the celebrated words of the Roman poet Juvenal - "Quis custodiet, ipsos custodes?", i.e. 'who will guard the guard themselves?' in other words, "who will judge, the judges themselves?" comes into focus.

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other randomly selected State Parties, to document, examine and evaluate, the extent to which such State Parties have implemented and given effect to, the duties and obligations to have been performed and fulfilled on their part under the UN Convention Against Corruption. Such 'review mechanism' is akin to a 'peer review' system, where State Parties are called upon to review other State Parties, on a rotational basis, without taking into reckoning the capacity and the status and standing, vis-à-vis, the combating of corruption by those State Parties selected on such rotational basis to conduct such reviews of other State Parties. Here again, the concept of 'Quis custodiet ipsos custodes?', i.e. 'who will judge the judges themselves?', comes into focus and reckoning, there being no public scrutiny by civil society of such reviews conducted of State Parties, to afford transparent public accountability of the discharge of the mandatory duties and obligations on the part of the State Parties to have been performed and fulfilled in terms of the UN Convention Against Corruption.

No doubt, such 'review mechanism' is a laudable small step in a difficult long journey. Nevertheless, it must develop public confidence and gain the satisfaction of the citizenry of human societies; otherwise, such 'review mechanism' would only become a mere façade, particularly in the background of corruption at the highest levels in State Parties, including also by State Agencies, for the achievement of economic, regional and global objectives, which cannot be curbed and/or arrested and/or acted upon by public officers, coming under the purview and control of the hierarchy of such State Parties.

The recent unfolding of large scales of ill-gotten monies being stashed away in 'tax havens' spread out globally by the hierarchy and those of upper echelons of State Parties, which got exposed due to courageous 'whistleblowing' for the public good, and subsequently probed due to the fall in revenues by certain State Parties, would be a cogent issue to be taken into reckoning in the 'review mechanism', ironically with those in one State Party having aided and abetted in hiding the proceeds of crime and corruption of those in other State Parties; and thereby regardlessly, having made unjust profits on such ill-gotten monies misappropriated and syphoned, robbing the hapless poor.

**Challenge and Opportunity**

Combating corruption in the upper echelons of society, commonly referred to as 'mega corruption', invariably involving political corruption, becomes a challenging and a daunting task. It is indeed a reality in the contemporary world, that a few citizens of a society, exploit the resources, which rightfully and lawfully belong equally to all the citizens of that society. Those wielding power and influence, exploit and unjustly gain wealth, through solicitation and/or extortion by the abuse of power and the misuse of office, admittedly through corrupt means, antithetic to the 'rule of law', and the UN Convention Against Corruption. The foregoing conduct is not only in blatant violation of the commitments made by State Parties, who have ratified the UN Convention Against Corruption, but also in breach of the basic tenet, that the resources of human society are managed in trust on their behalf by those in governance of such resources, but contradictorily act with scant regard to the blatant breach of such trust.

The UN Convention Against Corruption clearly encompasses with equal force, the dealing with and prevention of fraud and corruption, both in the public and private sectors. The recent financial scandals in the private sector causing financial crisis to State Parties, burdening the tax payers and the poor, as a result of unbridled greed by such private sector, exposes the truth and reality that the private sector had not been effectively dealt with by the State Parties, in contravention of the mandatory duties and obligations under the UN Convention Against Corruption; notwithstanding the UN Convention Against Corruption mandate such obligations by the use of the words - "the State Party shall ....."

Even professionals have been exposed to be well and truly involved in such dubious frauds and scams and have been subservient to the lucre of professional fees, handsomely



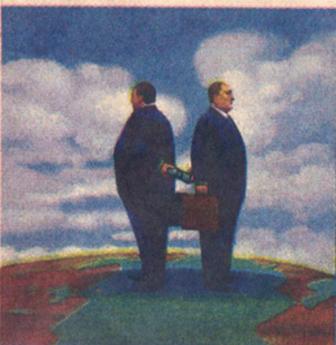
Nihal Sri Ameresekere

paid out of such ill-gotten gains, and thereby frustrating the due enforcement of the 'rule of law' equally to be a daunting task. Even the fearless independence of the judiciary, often pontificated upon, is invariably brought into question, in breach of the norm, that all are equal before the law, with equal protection under the law. It is vividly seen that though high noble values are pontificated and propounded upon at many an international fora, such pontifications and propoundings are mere rhetoric and make belief, as a façade to cover up the truth and reality. When the 'rule of law' is not effectively and speedily enforced, not only with stringent prosecution against those corrupt at the upper echelons of society, but also for the prevention of the pillage and plunder of the resources of the poor masses by a privileged few; then the 'rule of law' is rendered nugatory.

The foregoing results in further impoverishing the poor, seeding social injustice, thereby leading to social rebellion, ironically due to the very absence of the 'rule of law', or in not having the 'rule of law' effectively enforced, as the laudable concept had intended; and the consequent denial of basic essentials for the livelihoods of the poor, which tantamount to the violation of human rights. This culminates in a severe indictment on those entrusted with the tasks of governance, law enforcement and the judiciary; exposing the blatant breach of the commitments made under the UN Convention Against Corruption. The consequent social rebellions, which spring due to such blatant breach of the 'rule of law', results in turmoil, often with insurrections, terrorism, et al, leading human societies to sheer anarchy, due to the simple reality of the absence of the due and proper equal enforcement of the 'rule of law', and where the law did not rule supreme, but despots and their lackeys did, to be overthrown by the power of the people, whose resources had been so pillaged and plundered by such despots and their lackeys.

Due to fear and/or favour, the hierarchy of the State Parties are very rarely arraigned before the law, though warranted as being subjugated to the 'rule of law', however they are so arraigned before the law, only after their fall from grace and/or having been thrown out of power, for their blatant and patent robbery of the peoples resources. Ironically, the deal of such leaders get exposed, even by a large segment of the media, only thereafter, which is an indictment of the lapse of public duty on the part of the media! To achieve such 'phenomenon' of the law being supreme and effectively enforced on one and all equally, though only a dream, one must necessarily strive to make true that dream, for the greater good of human society and mankind.

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## Challenge and Opportunity

By Nihal Sri Ameresekere | Sunday, 08 December 2013 00:00 | font size (-) (+) | Print | Email

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The corrupt have their adjuncts, the victims are unarmed. Brazilian riot police shoot an anti-corruption protestor with rubber bullets. (AFP)

### Rule of Law and Anti-Corruption

Historically human society was much ugly, with the practice of slavery being widespread. Of course, historically there have been women too who ruled in such bygone eras! Social behavioral order in human society was then upheld, maintained and enforced through means of such leadership. It is they, who, through their pronounced 'dicta', determined as to how human society should behave and function, whilst being governed by them. The 'king shall do no wrong' was an accepted norm at one time during human civilization in general.

Through the passage of time, the concept of the 'rule of law' gathered a moment of inertia in human society. With the law formulated by human society, emerging as supreme, whereby, whether it is the ruler or those being ruled, were all alike before the law, and were all ruled by the law and were below the law. It

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resulted in the growth of the concept of the 'rule of law' and its supremacy. Accordingly, human society progressively became to be ruled by the law, and not by man or woman. Those being charged with the governance of human society were cast upon with the sacred task to enforce the 'rule of law', to maintain social order and behavior in human society.

The basic tenet, vis-à-vis, the 'rule of law' and corruption, has been recorded in Sri Lankan history. As far back as 300 BC, when Emperor Asoka's son, Arahata Mahinda Thera, arrived in Sri Lanka to propagate the philosophy of the emancipated Buddha, he preached to the then King Devanampiyatissa of Sri Lanka thus: "Oh mighty King, all the resources you perceive in the kingdom, do not belong to you, but such resources belong to all the people of the kingdom. You are merely the trustee of all such resources, and stand duty bound to deal with such resources in trust for and on behalf of the people of your kingdom." Thus even the King became inherently accountable to the people.

## Law

Contemporary interpretations of the 'rule of law' was propounded upon by a seven Judge Bench of the Supreme Court of Sri Lanka, citing several international authorities, inter-alia, pronouncing the following dicta: "The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the 'trust' that is implicit in the conferment of power has been stated as follows:

"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way with Parliament when conferring it is presumed to have intended" – (Administrative Law 8th Ed. 2000 – H.W.R. Wade and C.F. Forsyth p, 356)"

A.V. Dicey in his "Law of the Constitution" postulates that 'rule of law' which forms a fundamental principle of the Constitution has three meanings one of which is described as follows:-

"It means, in the first place, the absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone .... "

"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 an Indian Judgment)

## Judiciary

Greek philosopher Aristotle referred to this concept of being ruled by the law in pronouncing, as translated, that – "it is better for the law to rule society, than the society to be ruled by one or more of the citizens", and propounded that – "even those who ruled are guardians of the law and are expected to respect and obey the law themselves".

The function of enforcement of and adherence to and/or acting in conformity with the 'rule of law' by citizens of human society was entrusted to a select branch of that society, referred to as the 'judiciary.' It is also not being above the law, whilst being called upon to discharge independently, fearlessly and impartially, the function of ensuring the adherence to and/or acting in conformity with the law by all citizens. All persons are entitled to the equal protection of the law.

In actual reality, contemporary human society has witnessed many instances of members of the judiciary, themselves, having had to be arraigned before the very law, which they, had been entrusted to enforce. Thus, there arises the undisputed need to hold members of the judiciary, through public review and scrutiny, transparently equally accountable, perhaps even with a greater degree of force.

Recently, the Chief Justice of Sri Lanka was impeached, and such endeavor attracted blithe objections from several quarters of the international community. Ironically they, had been blissfully unaware of the reality of the totality of the facts involved. Being intimately aware of the real facts involved, I, as a public interest activist combatting corruption, publicly and fearlessly supported and espoused the successful impeachment of the Chief Justice, on a matter of principle. My experience in such endeavor unfolded before me the appalling reality in the contemporary international community, that certain segments of society, perhaps unintentionally, are deemed to be sacred cows above the law, thereby rendering nugatory the concept of the 'rule of law' and all being equal before the law; with the condemned concept, that the 'king shall do no wrong', showing semblance of resurgence.

### **Review**

Hitherto a total of 168 State Parties comprising the international community have ratified the UN Convention Against Corruption, which came into force in December 2005, with duties and obligations on their part to be performed and fulfilled thereunder, for the effective combatting through the due and proper enforcement of the 'rule of law', of the cancerous menace of corruption, both within the territory of the State Parties, or multilaterally within two or more State Parties.

After the Conference of the State Parties held in Marrakesh, Morocco in October 2011, a 'review mechanism' was introduced by the United Nations, to document, examine and evaluate, the extent to which such State Parties have implemented and given effect to, the duties and obligations to have been performed and fulfilled on their part under the UN Convention Against Corruption (UNCAC).

No doubt, such 'review mechanism' is a laudable small step in a difficult long journey. Nevertheless, it must develop public confidence and gain the satisfaction of the citizenry of human societies. Otherwise, such 'review mechanism' would only become a mere façade, particularly in the background of corruption at the highest levels in State Parties.

The recent unfolding of large scales of ill-gotten monies being stashed away in 'tax havens' spread out globally by the hierarchy and those of upper echelons of State Parties, which got exposed due to courageous 'whistleblowing' and subsequently probed due to the fall in revenues by certain State Parties, would be a cogent issue to be taken into reckoning in the 'review mechanism.'

### **Challenge**

Combating corruption in the upper echelons of society, commonly referred to as 'mega corruption', invariably involving political corruption, becomes a challenging and a daunting task. It is indeed a reality in the contemporary world that a few citizens of a society, exploit the resources, which rightfully and lawfully belong equally to all the citizens of that society. Those wielding power and influence, exploit and unjustly gain wealth, through solicitation and/or extortion by the abuse of power and the misuse of office, admittedly through corrupt means, antithetic to the 'rule of law', and the UNCAC. The foregoing conduct is not only in blatant violation of the commitments made by State Parties, who have ratified the UNCAC, but also is in breach of the basic tenet, that the resources of human society are managed in trust on their behalf by those in governance of such resources, but contradictorily act with scant regard to the blatant breach of such trust.

The UNCAC clearly encompasses with equal force, the dealing with and prevention of fraud and corruption, both in the public and private sectors. The recent financial scandals in the private sector causing financial crisis to State Parties, burdening the tax payers and the poor, as a result of unbridled greed by such private sector, exposes the truth and reality that the private sector had not been effectively dealt with by the State Parties, in contravention of the mandatory duties and obligations under the UNCAC; notwithstanding the UNCAC mandate such obligations by the use of the words – “the State Party shall ..... ”

Even professionals have been exposed to be well and truly involved in such dubious frauds and scams and have been subservient to the lucre of professional fees, handsomely paid out of such ill-gotten gains, and thereby frustrating the due enforcement of the ‘rule of law’ equally to be a daunting task. It is vividly seen that though high noble values are pontificated and propounded upon at many an international fora, such pontifications and propoundings are mere rhetoric and make belief, as a façade to cover up the truth and reality.

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