

AIR LANKA: STRANGE FLIGHTS

The Sunday Leader over the recent several weeks, exposing various facets, published an indepth analysis of the controversial Kotagala privatisation transaction, that had been carried out by the Public Enterprise Reform Commission [PERC]. The public of this country, would no doubt, be looking forward to the action, that the government would take now, against those, who had been directly and/or indirectly responsible for having structured and carried out such deal.

George Steuarts had been publicly rebuked and humiliated, apparently for no fault of theirs, as they appear to have entrusted the entire matter, to be handled by merchant banking and professional institutions, of which the then Chairman, PERC, Rajan Asirwatham, himself had been Chairman, whilst PERC, themselves had on their own decided to sell 51% controlling interest of Kotagala Plantations Ltd., at a certain price and on certain terms. How can one fault the buyer, for buying at the price and on the terms the seller had offered?

Should not the government, on the contrary, have found fault with the seller, i.e. PERC and Merchant Bank of Sri Lanka Ltd., both directly and indirectly government agencies/institutions? How could George Steuarts have been so publicly rebuked and humiliated, whereas the transaction had been structured and carried out by merchant banking and other professional institutions, the Chairman of which had been also the Chairman of PERC, whereas PERC had handled such very sale? Would not the parties, who so handled and structured such deal have been responsible for the same and not George Steuarts?

AIR LANKA PRIVATISATION

The Sunday Leader this week turns the focus on to the much talked about most recent privatisation transaction carried out by PERC, that of Air Lanka Ltd. From exposures in the media, unless otherwise contradicted, it would appear that the Air Lanka Board of Directors had merely afforded informations and that the actual negotiations and the finalisation of the privatisation transaction of Air Lanka Ltd., had been carried out by officials of PERC.

In fact, ironically the media had reported, that the Chairman, PERC, Dr. P.B. Jayasundera and Director-General, PERC, Mano Tittawela had briefed the Board of Directors of Air Lanka Ltd., upon the finalisation of the privatisation transaction. One would have expected Chairman, Air Lanka, Harry Jayawardena, a hard nosed self-made business entrepreneur, to have played an active role in the negotiations pertaining to such privatisation transaction, to ruthlessly have negotiated the best possible deal for the country. Curiously and questionably this does not appear to have happened. If so, why?

PERC'S POWERS TO ACT

Given such scenario, *The Sunday Leader* examined the Public Enterprise Reform Commission of Sri Lanka, Act No. 1 of 1996 [PERC Act], which in Part II sets out the functions and powers of PERC. Section 4 of PERC Act, sets out PERC's functions and powers. Section 5 of PERC Act, sets out the powers and duties that PERC may exercise and perform for the discharge of its functions.

Powers and duties of PERC	
For the purpose of discharging its functions the Commission may exercise and perform the following powers and duties:-	
(a)	to carry out surveys and studies to ascertain and determine the public enterprises which require to be reformed;
(b)	to formulate a framework for a sustainable and stable public enterprise reform strategy;
(c)	to make recommendations to the Government on the continuation, and efficiency, of public enterprises which are profit making and are of national importance;
(d)	to make recommendations to the Government, on the selection of public enterprises for conversion into public companies under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987;
(e)	to make recommendations to the Government on the sale or disposal to the public, of shares in, or assets of, companies registered under the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act, No.23 of 1987;
(f)	to manage, on behalf of the Government, companies registered under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987, in which the entirety of the shares are owned by the Secretary to the Treasury;
(g)	to monitor the performance of companies registered under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987, and majorities of the shares in which are owned by persons other than the Government, to identify weaknesses in their performance and to make recommendations to the Government, for the correction of these weaknesses;
(h)	to advise and assist the Government in regulating companies registered under the Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies Act, No.23 of 1987;
(i)	to assist the Government to create public awareness of Government policies and programmes on the reform of public enterprises with a view to developing a commitment by the public, to such policies and programmes;
(j)	to promote worker participation in the implementation of such policies and programmes and to ensure worker participation in the equity of the companies referred to in paragraph (e);

FUNCTIONS AND POWERS OF PERC	
The functions of the Commission shall be to advise and assist the Government on the reform of public enterprises with the following objects in view:-	
(a)	fostering and accelerating the economic development of the country;
(b)	improving the efficiency and competitiveness of the economy;
(c)	upgrading production and services with access to international markets on a competitive basis, by the acquisition of new technology and expertise;
(d)	developing and broadbasing the capital market and mobilizing long term private savings;
(e)	motivating the private sector;
(f)	augmenting the revenues of the Government, so as to enable it to better address the social agenda.

Section 5 (e) of PERC Act empowers PERC - "to make recommendations to the government on the sale or disposal to the public of shares in or assets of companies registered under the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No. 23 of 1987." [Conversion Act No. 23 of 1987]

Presumably, it is under such statutory provision, that PERC could make recommendations to the government on the sale or disposal to the public of shares in companies. However, Section 5 (e) of PERC Act, for some unknown reason, restricts the companies, whose shares can be sold, to those companies registered only under the Conversion Act No. 23 of 1987. In fact, Sections 5(f), 5(g), 5(h) also pertain to only such companies.

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What is of significance here, is that Air Lanka Ltd., is not such a company corporatised under the Conversion Act No. 23 of 1987. Air Lanka Ltd., is a company that had been incorporated in 1979 under the then Companies Ordinance. The subscribers to the Memorandum & Articles of Association, who had taken up one subscribers share each had been, G.V.P. Samarasinghe [then Secretary to the Cabinet], W.M. Tilakaratne [then Secretary, Ministry of Finance/Secretary to the Treasury], S.R. Wickramanayake [former Chairman, Air Lanka Ltd.], D.C. Wijesekera [Chartered Accountant], N. Wijewardena [then Chairman, Bank of Ceylon], M.L.D. Caspersz [then Chairman, Ceylon Shipping Corporation] and L. de Silva [then acting Chairman, People's Bank].

The pertinent and cogent question, that is brought into focus by *The Sunday Leader* is, as to whether under Section 5 (e) of PERC Act, which would appear to be the applicable provision, that empowers PERC to make recommendations to the government on the sale or disposal to the public of shares in or assets of companies, PERC could have so dealt with Air Lanka Ltd., which is a company not registered under the Conversion Act No. 23 of 1987, since the said applicable Section 5 (e) of PERC Act empowers PERC only to have dealt with companies registered under the Conversion Act No. 23 of 1987 ?

ULTRA - VIRES/LEGAL VALIDITY?

The question whether, PERC had acted *ultra-vires* its own PERC Act and the consequent question of the validity of such act, would be an issue, in addition to the question whether a sale of 40% shareholding to Emirates Airlines, constitutes a sale or disposal of shares to the public, within the meaning of Section 5 (e) of PERC Act?

Section 5 (c) of PERC Act, empowers PERC, "to make recommendations to the Government on the continuation, and efficiency, of public enterprises which are profit making and are of national importance".

Public enterprises under the PERC Act have been defined to include a company, wherein all shares or a majority of shares are held by the government, - "public enterprise includes a public corporation or a government owned business undertaking or a company where all the shares or the majority of the shares of such company are held by the Government".

The relevant and pertinent question is, whether the power to make recommendations to the government on the continuation and efficiency of public enterprises, which include companies in which the government owns all or majority of shares, which are profit making and of national importance, would include the power to make recommendations to the government on the sale of shares of such companies, in view of the fact that there is a specific provision in PERC Act, to make such recommendation on the sale or disposal of shares in companies under Section 5 (e) of PERC Act ?

Would not such an important issue be of major significance, in the context of the strong opposition, that has already been expressed by the UNP, against the privatisation of Air Lanka Ltd.?

QUESTIONS FOR THE JUDICIARY

The final determination of such a question would ofcourse ultimately be in the hands of the judiciary, if such question is put in issue, as to whether PERC's acts of negotiating and making recommendations to the government in respect of companies not registered under the Conversion Act No. 23 of 1987, is *ultra-vires* the powers conferred upon PERC under PERC Act, particularly Section 5 (e) thereof, thereby putting in issue the question of legal validity of such privatisation transaction, to be determined by the judiciary.

Sale of the shareholdings held by the government in Air Lanka Ltd., would be one issue, whereas the decisions pertaining to the business carried out by Air Lanka Ltd., and any procurement of aircraft, would no doubt be another matter, wherein responsibility would solely lie with the Board of Directors of Air Lanka Ltd., being a limited liability company.

In such context, *The Sunday Leader* brings into focus another cogent question, as to whether PERC under PERC Act, is empowered to handle and carry out negotiations and finalise same, usurping the statutory responsibilities entrusted on the Board of Directors of Air Lanka Ltd., conferred under the Companies Act No. 17 of 1982 and as established under applicable case law.

Whilst no doubt, PERC is recognised as the privatisation arm of government, nevertheless, moreso being an arm of the government established under an Act of Parliament, PERC would have to act within the ambit of such very statute that had been enacted to create PERC. Any deficiency or defect in PERC Act, however, cannot cure acts that may be deemed to be *ultra-vires* or legally invalid by the judiciary, in term of the express and explicit provisions of PERC Act. Similar concerns would no doubt also arise in the case of the privatisation transaction of Sri Lanka Telecom Ltd. In such circumstances, what would be the consequence for those, who had so handled such transactions?

COMMITMENT TO TRANSPARENCY ?



Harry Jayawardena

The question of transparency pertaining to both these major privatisation transactions have been put in issue by the media. In the case of Air Lanka Ltd., the Chairman of Air Lanka, Harry Jayawardena and its Board of Directors appear not to have been transparently fully aware of the negotiations of the privatisation transaction of its own organisation, including strategic decisions pertaining to its own future business.

On the contrary, in intervening to suspend the Hilton Settlement, Deputy Minister of Finance and Minister of Justice & Constitutional Affairs, G.L. Peiris, the erudite scholar, as described by the Bar Association President, Romesh de Silva P.C., pronounced and altruistically held out to the public thus: "The government's commitment to transparency is deep and unequivocal".

G.L. UNABLE TO ANSWER?

However, in the consequent, defamation case filed against Minister G.L. Peiris, former Advisor, Ministry of Finance, Nihal Amarasekera's lawyers, has served interrogatories on Minister G.L. Peiris, as ordered by Court, on such very statement, posing, inter-alia, the following pertinent questions:

- i. Do you not admit, that the Plaintiff had publicly placed all material documents and facts pertaining to the Hilton Settlement in evidence before the Special Presidential Commission, through the Solicitor General, before the Hilton Settlement Agreements were executed on 28th June 1995? If not, why not?
- ii. Do you not admit, that the Solicitor General with the concurrence of the Special Presidential Commission had given written approval for the execution of the said Settlement Agreements, prior to the execution thereof?
- iii. Do you not admit, that the Cabinet Memorandum dated 21st June 1995, approved by the Cabinet on 28th June 1995, inter-alia, stated - "The Solicitor General has kept the Commission apprised of this Settlement"?
- iv. Do you not admit, that the Plaintiff after the signing of the Settlement Agreements on 28th June 1995, has given evidence in public before the Special Presidential Commission, through the Solicitor General, on the Settlement Agreements that had been signed? If not, why not?

- v. Do you not admit, that thereby the Plaintiff had handled the finalisation and conclusion of the Hilton Settlement Agreements, with full disclosure, before the public hearing of the Special Presidential Commission of Inquiry, which proceedings had been given wide publicity in the media?
- vi. Do you not admit, such is not the normal practice and procedure, that the government follows in finalising and concluding government contracts, regardless of the government's deep and unequivocal commitment to uphold transparency?
- vii. Do you not admit, that several other contracts/agreements have been entered into by the government, without such degree of public disclosure and transparency, as much as the Hilton Settlement Agreements?

No doubt, the several other contracts and agreements that had been so referred to, would have been, amongst others, agreements relating to the privatisation transactions of Orient Lanka Ltd., Colombo Gas Co., Sri Lanka Telecom, Steel Corporation, etc. Minister G.L. Peiris, however, objecting through his Counsel Romesh de Silva P.C., has refused to answer these questions served through Court, giving rise to the serious issue of credibility of the government's publicly avowed policy of unequivocal commitment to transparency, as so publicly articulated by Minister G.L. Peiris?

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