

**'EXTRACTS' FROM NIHAL SRI AMERESKERE'S FUNDAMENTAL RIGHTS APPLICATION ON THE  
'EXPROPRIATION LAW' : PART 2**

**Independence of the Judiciary & Role of Attorney General**

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

1. In my D.C. Colombo Case No. 3155/Spl instituted on 13.9.1990 *vis-à-vis* the major fraud perpetrated on HDL and the Government, as its Guarantor, the Defendants were very politically powerful and influential parties. District Judge, P. Wijeyaratne demonstrating the independence of the judiciary was simply blind and cared not, as to who those Defendants were.

Thus District Judge, P. Wijeyaratne issued Interim Injunctions on 28.10.1991 in the aforesaid Case restraining payments to the Japanese Consortium, also by the Government under the State Guarantees, *inter-alia*, observing that;

- # *"persons are exercising the influence, that they have gained in society, acting together with the Company, to prevent the raising of the questions concerning the matters of the work in connection with the Contracts, the Prospectus ..."*
- # *"they having prevented such correct examination, were attempting to, howsoever, effect the payment of monies."*
- # *"the significance, that is shown herein, is that generally, the Company which has to pay money, would be raising questions, in respect of such situation, and would not allow other parties to act arbitrarily...If the position, that explains this is correct, then this actually, is an instance of acting in fraudulent collusion".*

In the instant matters before the Supreme Court, the cogent question arises, *as to whether persons who have gained influence and power, are acting in a manner to subvert the rule of law ?*

2. In like manner, District Judge, S.J.W. Ambepitiya in his Order of 30.7.1998, in my D.C. Colombo Case No. 19849/MR, filed against then Minister of Justice & Deputy Minister of Finance G.L. Peiris, *inter-alia*, observing as follows, *struck out the Justice Minister's Answer and fixed my Case for ex-parte Trial - viz:*

- # *"A fact that is evident thereby is that, whilst the Defendant on the one hand, states that the documents relevant to the case in his capacity as a contesting party in the case, are in his possession, on the other hand states that they are not in his personal possession. It is the conclusion of this Court that the Defendant is not entitled to hold on to both these arguments at one and the same time."*
- # *"According to the facts set out hereinabove, this Court holds that the Defendant has defaulted complying with the order made by this Court under Section 102 for declaration of documents. Accordingly, in terms of my application, acting under Section 109(1), I strike out the Defendant's answer and fix the case for ex-parte trial. I entitled to recover costs of this inquiry from the Defendant."*

3. The Court of Appeal granted Leave to Appeal in CA LA Nos. 206 & 208/1991 against District Judge, P. Wijeyaratne's Order, having wrongly permitted the Attorney General, representing HDL, and Counsel, representing K.N. Choksy P.C., M.P., to participate in the Court of Appeal, notwithstanding that they had not participated in the District Court inquiry, *observing that the Court of Appeal normally grants Leave in most cases !*

4. Nevertheless, the Supreme Court Bench comprising Justices Tissa Bandaranayake, K.M.M.B. Kulatunga and S.W.R. Wadugodapitiya in SC (Spl) LA Nos. 18 and 19/1992 on 27.5.1992 upheld the objections of my Senior Counsel H.L. de Silva, P.C., and sternly refused to permit the Attorney General and Counsel representing K.N. Choksy P.C., M.P., to participate and be heard, asserting that they were not necessary parties.
5. Consequently, the Supreme Court, Bench in SC Appeals Nos. 33 & 34/1992 comprising Chief Justice G.P.S. De Silva and Justices A. R. B. Amerasinghe and K. M. M. B. Kulatunga, after an Hearing delivered Judgment on 2.12.1992, upholding the Order of the District Judge P. Wijeyaratne and the issuance of the Interim Injunctions, *inter-alia*, observing that;

# *"I had a reasonable and real prospect of success, even in the light of the defences raised in the pleadings, objections and submissions of the Defendants"*

# *"my prospect of success was real and not fanciful and that he had more than a merely arguable case"*

# *"Interim Injunctions were granted to prevent the "syphoning out of money" from HDL and the Country"*

# *"**it might be pointed out that it could not entirely be a matter of indifference to the Government** ..... the Government made itself eventually responsible for the repayment of the monies borrowed by HDL" (Emphasis added)*

6. The words **"it could not entirely be a matter of indifference to the Government"** succinctly demonstrated the independence of the judiciary, and *its right to arrest any wrong-doing on the part of the Government*, and to state that – **'the Government can do no wrong'**, demonstrating the task of the judiciary of keeping every organ of the State, within the limits of the law, and thereby making the rule of law meaningful and effective, as had been determined by a 7 Member Bench of the Supreme Court in October 2002.
7. Often cited are the fearless words righteously told to his very close personal friend President J.R. Jayawardene by Chief Justice Neville Samarakoon – *"JR our friendship is at home – please don't interfere with my duties as Chief Justice !"*
8. The Bar Association Law Journal Vol. 1 Part IV 1984 on the Centenary of the Attorney-General in Sri Lanka 1884 - 1984, *inter-alia*, had stated as follows:

"In civil proceedings also, the Attorney General's function is to assist the Court to reach the correct decision and not to endeavour to somehow obtain a judgment in favour of the State. When appropriate, it is his duty to promote conciliation of disputes between government department and citizens if that would meet the ends of justice.

In advising the government, he has to form his opinion after considering the legal principles as well as the practical effect of his advice. This does not mean that his advice should besides being correct be somehow favourable to the government. Thus where any question in respect of which his advice is sought has arisen out of political, controversy or has political overtones, his opinion should be objective and fair to the parties affected. No doubt he must have due regard to the desire of any government to realise its legitimate aspirations and the political problems ministers have to contend with. However, it is his duty to advise the government to act within the law in implementing its policies."

9. Article 134 of the Constitution mandates that the Attorney General be noticed and be heard in the Supreme Court in the exercise of its jurisdiction under Articles 120, 121, 122, 125, 126, 129(1) and 131 of the Constitution, presumably as *amicus curiae*. The question arises, as to whether the Attorney General could play a role of duality in such instances ?
10. In SC (FR) Nos. 158 & 209/2007 wherein the Supreme Court annulled the privatizations of SLIC & LMSL as wrongful, unlawful, illegal and fraudulent the Attorney General having been noticed as mandated as aforesaid, appeared for the miscreants and opposed the said Applications, whilst in the instance case, the Attorney General had made submissions ironically to support the impugned Bill targeting alleged wrongful privatisations !

In SC (FR) 404/ & 481/2009 the Attorney General opposed my Applications on the illegal purported Oil Hedging Deals, and consequently I understand that the State has incurred costs over Rs. 300 Mn., in foreign legal costs, air travel, etc. The Current Expenditure Budgets for 2012 for Judges of the Superior Courts is Rs. 146.5 Mn., (2009 - Rs. 46.5 Mn.) and for the Attorney General's Department Rs. 371.7 Mn. (2009 - Rs. 380.9 Mn.)