

A CASE STUDY FOR CHANDRIKA

The Bribery (Amendment) Act, No. 20 of 1994, unanimously enacted by Parliament in October 1994, very clearly and precisely as set out in the specific dicta therein defined "corruption" as 'the causing of wrongful or unlawful loss to the government by a public servant or the conferring of any wrongful or unlawful benefit, favour and advantage by a public servant on himself or any other person.'

Section 16 of the said Act, No: 20 of 1994, also defined a "public servant", to include the Hon. Speaker downwards, all elected representatives of the people and officials in all government departments and institutions, including corporations and companies, in which the government had more than 50% shareholding. The executive President of the country, however, had not been included in such definition of a "public servant".

Simultaneously in October 1994, by the immediately preceding Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, also unanimously enacted by Parliament, a permanent Commission to investigate allegations of bribery or corruption was established. Accordingly, is it not this Commission, alone that has, inter-alia, been lawfully empowered, not only to investigate allegations of corruption, but also to determine whether, there has in fact, been any offence of corruption committed, as so defined under the said Act, No. 20 of 1994 ?

This permanent Commission is also empowered to prosecute in Courts of law to enforce punishment on such offence of corruption. Punishment stipulated under such law for the offence of corruption, is a maximum sentence of 10 - years imprisonment and/or a fine not exceeding Rs. 100,000/-. Although the maximum sentence of 10-year imprisonment, could have a salutary effect, would it not appear, that the maximum fine stipulated would not be an adequate deterrent against corruption?

STATUTORY AUTHORITIES ON CORRUPTION

Would it therefore not stand to reason, that no other person, not even the President of the country, or any other body of persons, is lawfully empowered and/or entitled to investigate or determine, as to whether or not, an offence of corruption has in fact been committed ? If so, if any person, whomsoever it may be, purports to so investigate and/or to make determination on corruption, would it not then tantamount to the unlawful usurping of the powers lawfully vested in the said permanent Commission ?

Ought not any public spirited person, who makes an allegation of corruption, communicate such allegation to such permanent Commission, as specifically provided for under Section 4 of the said Act, No: 19 of 1994 ? Would not the mere making of a public pronouncement of an allegation of corruption, with failure to so communicate to the permanent Commission, as lawfully provided for, only lead the public to believe, that such allegation is mere speculation and conjecture without foundation ?

Apart from such permanent Commission, under the previously enacted Special Presidential Commissions of Inquiry Law, No. 7 of 1978, the President of the country, may by Warrant gazetted, establish a Special Presidential Commission of Inquiry, consisting of Judges of Court. The said Law, No. 7 of 1978 empowers such Commission to investigate into the conduct of "public

officers" of "public bodies", as stipulated in such Presidential Warrant. Such Special Presidential Commission of Inquiry is empowered under the said Law No. 7 of 1978, to determine as to whether, any "public officer" has been guilty of any act of misuse or abuse of power, corruption or of any fraudulent act.

Section 22 of the said Law, No. 7 of 1978 defines a "public body" to include any Ministry, Government Department, Corporation or a Company mainly owned by the government and defines a "public officer" to include any Minister, Deputy Minister, Members of Parliament, State Officers and Officers of such "Public Bodies". The executive President of the country, however, is not included in such definition of a "public officer".

Accordingly, neither Act, No. 20 of 1994, nor Law, No. 7 of 1978 defines the executive President, wielding the highest executive authority in the country, to be a "public servant" or a "public officer", which definitions, however, include a Minister of government.

IMMUNITY OF PRESIDENT UNDER THE CONSTITUTION ?

Furthermore, the Constitution of the country provides immunity from suit, i.e. legal action, while any person holds office as the President — vide Article 35 (1) of the Constitution: "While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity"

Accordingly, does not Article 35(1) of the Constitution contemplate to debar, the institution or the continuation of a legal action against any person, only for the time being such person holds office as the President, in respect of conduct and actions, either in official or private capacity ?

Furthermore, does not Article 35(2) of the Constitution clearly contemplate, that the right to bring a legal action, against a person holding office as the President, is not debarred, affording such person full immunity from the law, but on the contrary, that such legal action may be instituted, after such person ceases to hold office as the President ? — vide Article 35 (2) of the Constitution: "Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law."

Therefore, is it not clear, that the period a person holds office as the President, has been specifically excluded, in calculating prescription by the lapse of time, within which proceedings of any description, i.e. any legal action, may be brought against such person, holding office as the President, thereby clearly implying, that the right to bring such action subsists and continues ? Accordingly, is it not the position, that the person holding office as the President, could be sued, for example, for the offence of defamation committed during the period such person holds office as the President, but such legal action being instituted, only after such person ceases to hold office as the President ?

Therefore, is it not the position, that the immunity afforded under Article 35(1) of the Constitution, is not from the offence or the law, but only from being prosecuted for the time being, on any offence under the law, only as long as such person holds office as the President and that such period of immunity from such legal action being instituted against such person, is specifically stated not to be taken into account for the legal prescription of any cause of action, thereby enabling such cause of action to be sued upon, after such person ceases to hold office as the President ?

IMMUNITY OF PRESIDENT AS A MINISTER ?

The other pertinent and cogent issue is, that even such immunity from legal action being instituted against a person whilst holding office as the President, is not applicable to any legal proceedings in relation to the exercise of any power by a person holding office as the President, pertaining to any subject or function, assigned to such person, as a Minister of the government - vide Article 35 (3) of the Constitution: "The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44.... Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney General"

Article 44 (2) of the Constitution reads: "The President may assign to himself any subject or function and shall remain in charge of any subject or function not assigned to any Minister under the provisions of paragraph (1) of this Article or the provisions of paragraph (1) of Article 45, and may for that purpose determine the number of Ministries to be in his charge, and accordingly, any reference in the Constitution or any written law to the Minister to whom such subject or function is assigned, shall be read and construed as a reference to the President."

Is it not the unambiguous position, that since Article 35(3) of the Constitution, enables the institution of legal action against a person holding office as the President, in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge, specifically as provided for in Article 44(2) of the Constitution, the reference to the Minister in any written law, to be construed in such circumstances, as a reference to the President, as provided for in Article 44 (2) of the Constitution, would not preclude the institution of such legal action against a person holding office as the President ?

Therefore, under Article 35(3) of the Constitution, is it not the clear position, that a President being in charge of a subject or function of a Minister is not immune from legal proceedings in respect of conduct and actions, in the exercise of any power pertaining to such Ministerial subject or function, even whilst holding the office as the President, however, such legal action having to be instituted against the Attorney-General ? Nevertheless, would not such legal action, in any event, be in relation to the conduct and actions of the President in the exercise of any power pertaining to any Ministerial subject or function assigned to the President ?

In such circumstances, would it also not stand to reason, that such conduct and actions of a person holding office as the President, in the exercise of any power pertaining to any subject or function as a Minister, would fall within the ambit of conduct and actions of a "public servant" as defined in the Bribery (Amendment) Act, No. 20 of 1994 liable to any investigation and prosecution by the permanent Commission to Investigate Allegations of Bribery or Corruption and also fall within the

ambit of conduct and actions of a "public officer", as defined by the Special Presidential Commissions of Inquiry Law, No. 7 of 1978, which could be investigated by a Special Presidential Commission of Inquiry appointed by a future President ?

PRESIDENT AS FINANCE MINISTER

The Public Enterprise Reform Commission of Sri Lanka Act, No. 1 of 1996, that established the Public Enterprise Reform Commission [PERC], to handle the privatisation programme of government, specifically provides that PERC would function under a Minister and accordingly, PERC has been functioning, under the Minister of Finance, which subject and function has been assigned to and powers pertaining thereto have been exercised by President Chandrika Bandaranaike Kumaratunga, functioning as the Minister of Finance.

Accordingly, would not President Kumaratunga, as the Minister of Finance and the Deputy Minister Finance, G.L. Peiris, be accountable and responsible for the privatisation transactions that have been carried out by PERC, on which transactions, several analytical exposures that stand unrefuted, *inter-alia*, on questionable issues and losses caused to the government have been made in the public interest.

President Kumaratunga, also the Minister of Finance has been reported in the media to have summoned and have had discussions with the Cabinet Appointed Tender Board, chaired by B.C. Perera, Secretary, Ministry of Finance, together with the Technical Evaluation Committee, evaluating the tender for the procurement of 10 Diesel Locomotives for the Sri Lanka Government Railways. Consequently, President Kumaratunga having disagreed with the recommendations of the Cabinet Appointed Tender Board, a Cabinet Sub-Committee overturned such recommendation, giving rise to the question as to whether such decision was in the best economic interest of the country ? In such circumstances, certain extracts from the Report on the Nylon 6 Plant Inquiry by the Special Presidential Commission of Inquiry, 1995, appointed by President Kumaratunga are cited below:

At page 83 :

"In this connection Article 52(2) of the Constitution merits consideration. The said Article is as follows: 'The Secretary to the Ministry shall subject to the direction and control of his Minister, exercise supervision over the Departments of Government or other institutions in the charge of his Minister'. This provision undoubtedly permits the Minister to give directions and exercise control over the Secretary of his Ministry, who exercises supervision over the Departments or other institutions in the charge of his Minister. However, having regard to the appointment, constitution and the nature of the functions that were to be performed by the Divestiture Committee, in our view, it was not open and proper for the Minister to give directions and exercise control over the activities of the Divestiture Committee, since it was an independent body directly responsible and answerable to the Cabinet."

At page 96 :

"It is clearly seen, that the Respondent (Minister) has interfered with the functions of the Divestiture Committee. His interference has resulted in preventing the best offers being obtained from the investors for the Sale of the Shares of his company. It is our view that the Respondent (Minister) should have allowed the Divestiture Committee to perform their functions independently, without any interference on his part."

At page 101 :

“Even though the submission was made on behalf of the Respondent (Minister) that he did not take part in the discussions held with the Representatives of the TNC Ltd. is factually correct, there is sufficient material to infer that the manner in which the Respondent (Minister) conducted himself resulted in the Members of the Divestiture Committee entering into discussions with the Representatives of the TNC Ltd. to the exclusion of the other two Bidders recommended by the NDB.”

Arising from the questionable suspension of the Hilton Settlement, in the defamation Case, D.C. Colombo No. 19849/MR, filed by the former Advisor, Ministry of Finance, Nihal Amarasekera, against G.L. Peiris, Minister of Justice & Constitutional Affairs and Deputy Minister of Finance, at paragraphs 39 and 40 of his Answer filed in Court, G.L. Peiris has pleaded - "39. In any event and without prejudice to the aforesaid the Defendant pleads that at all times material he acted in his capacity as the Deputy Minister of Finance" - "40. In any event and without prejudice to the aforesaid the Defendant states that the publication in the "Daily News" referred to in the Plaintiff cannot have and maintain this action against the Defendant."

Such Answer has been by none other than the Justice & Constitutional Affairs Minister of this country, who had been a professor of law. He has pleaded that, as the Deputy Minister of Finance, he had acted on the directions of the President, who would have acted as the Minister of Finance, since under whose purview the Hilton Settlement subject came, seeking refuge under the purported immunity of the President, whereas the question of immunity afforded to the President under the Constitution has been focused upon, leaving it to the intelligence of the knowledgeable public of this country to draw their own conclusions.

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