

## **IMMUNITY OF A PRESIDENT**

It is understood that several lawyers' chambers are now closely examining the constitutional provisions and the laws pertaining to the questions of immunity afforded to any person, who holds office as the President of the country. Such intense interest and activity has been as a consequence of the analytical exposures, focussing upon such subject and raising very cogent and pertinent questions pertaining to the issue of immunity from suit of the person holding office as President.

It had been pointed out that Article 35 (1) of the constitution, affords immunity to any person, who holds office as the President, from being sued only for the time being, he or she holds office as the President, whilst Article 35 (2) of the constitution clearly stipulates, that the period such a person holds office as the President, shall not be taken into account in calculating the period of time prescribed by law, within which proceedings of any description may be brought against any such person, who holds office as the President, thereby enabling legal action to be instituted, after such person ceases to hold office as the President.

Whilst Article 35 (1) and 35 (2) of the constitution contemplate, the conduct and actions of a person holding office as the President, Article 35 (3) of the constitution, however specifically excludes such immunity from suit, for the time being, conferred on a person holding office as the President, in respect of conduct and actions of such very person, in the exercise of any power pertaining to any subject or function of a minister, which ministerial function or subject is assigned to such person holding office as the President. It would therefore follow, that legal action could be instituted against a person holding office as the President, in the context of conduct and actions of ministerial portfolio held by such a person. However, the constitution specifically requires that such legal action has to be instituted against the Attorney General.

The cogent and pertinent question, that had been posed was, whether not such conduct and actions, in the exercise of power as a minister, by a person holding office as the President, would be liable to be investigated by the permanent commission to investigate allegations of bribery or corruption, that was set up by the People's Alliance government, itself, in October 1994, with the unanimous support of parliament ?

### **LEGAL VIEWS SOLICITED**

Legal circles are of the view that legal action could be instituted against a person, who holds office as the President, after such person ceases to hold office as the President, even in respect of any conduct and actions of such person, during the period such person held office as the President and further, that the permanent commission to investigate allegations of bribery or corruption could deal with complaints in relation to conduct and actions in the exercise of power pertaining to a ministerial subject or function, assigned to the person holding office as the President. Whilst many eminent lawyers are of the opinion that this would be the correct constitutional and legal position, no one has so far expressed a contrary view thereto.

In the given scenario, in the public interest any contrary views are solicited on this matter, from legal experts, particularly from the Attorney General, Sarath Silva, President's Counsel, who normally obliges with clarifications to the media and also from the eminent Oxford scholars, Foreign Minister, Lakshman Kadirgamar President's Counsel and Justice & Constitutional Minister G.L. Peiris, former professor of law, who are prominent among the legal "think tanks" of the People's Alliance government and who invariably are the government spokesmen on various

issues. Non receipt of any views to the contrary, particularly from such quarters, would only reinforce the analysis expounded Minister G.L. Peiris and Attorney General, Sarath Silva being actively involved in the drafting of the proposed constitution, the public of this country, no doubt, would expect them to make clarifications on the several issues that had been focused upon.

### **G.L. PEIRIS ON BRIBERY & CORRUPTION**

In presenting to parliament on October 4, 1994, the commission to investigate allegations of bribery or corruption Bill, Justice & Constitutional Minister G.L. Peiris, inter-alia, stated [English translation of the Sinhala] - vide Hansard columns 280, 281, 283, 284, 286, 406: —

"Hon. Deputy Speaker, this is the first Bill that is being presented to this parliament by the People's Alliance government. The objective of this is to establish a systematic foundation to eradicate bribery and corruption from our country. At the elections held on August 16 of this year, our people gave a mandate to the present government with great anticipation and hope. Similarly, there was another objective. That was to pursue a fruitful process of action in relation to the situation of bribery and corruption that had taken root in the country. Similarly, the people of this country relied sincerely, that the People's Alliance government would honestly endeavour to fulfil this task."

"Hon. Deputy Speaker, though there is a longstanding history and intrinsic value of the concept of parliamentary privilege, the present government strongly believes, that such privilege should be used very carefully. If you consider British history, such parliamentary privilege has been used for the benefit of the public. If parliamentary privilege is used for the benefit of the members of parliament, we could only describe it as a course of action against public policy and legal tradition. Therefore, in such an instance, where there is an allegation against a member of parliament, if the approval of the Speaker, is required by law as a condition to investigate into such allegation, we believe that it is a totally wrong concept. Hence, the present government by this Act, has taken expeditious steps to remove such legal requirement from the Sri Lankan law."

"There is an offence defined under the law today as bribery and corruption. However its scope is limited and restricted. In certain instances those who have committed wrong, have been those, who had squandered the wealth of our country and those, who have acted dishonestly and do not get caught within the scope of such crime. Therefore, the government has decided to define a new offence referred to as corruption. In today's law there is no such widely defined offence. .... There is a foundation and a policy rationale for such widely defined offence of corruption. The policy rationale could be described as follows: Any person cannot use public office for the purpose of private gain. That is the basic principle. ... "Hon. Deputy Speaker, you are aware that there is a great resentment and hatred in our country concerning bribery and corruption. Therefore, it is the duty of the government to formulate laws in conformity with public opinion."

"Apart from the financial implications, there is also the question of an overweening sense of cynicism discerning discriminating thinking people in our country have expressed profound dissatisfaction with the extent to which corruption and bribery have taken root in our country. If this spirit of cynicism is not addressed there is a definite danger to the stability and tranquility of political and social institution in our country. That is why the government was convinced that there should be a vigorous response to the issues of bribery and corruption"

In his response, the Leader of the Opposition and the Leader of the United National Party, Ranil Wickremasinghe, a former Prime Minister prefaced his statement, thus - vide Hansard columns 401:— "In fact, the whole question of bribery and corruption raises many fundamental questions in a democratic society. We have all got to recognize that corruption is a cancer of democracy, as one of the biggest problems that we faced, when elected representatives and officials of the Government who are also public servants - when their decisions are effected not by matters of political consideration but by pecuniary gains and financial gains"

### **CRITICISM OF OTHERS, BUT OWN PERFORMANCE ?**

In the context of several analytical scandalous exposures it is left to the intelligence of the public to consider, as to what action, let alone vigorous, the People's Alliance government has taken to effectually enforce the corruption law, irrespective of the status of the personalities concerned and their political loyalties, or as to whether, on the contrary, there has been total inaction and nary a word on such scandalous exposures that warranted investigations, since prima-facie, they appeared to have transgressed the very corruption law, so enacted by the People's Alliance government, itself.

On December 15, 1994 tabling in Parliament Gazette Extraordinary notifications Nos. 828/1 of July 18, 1994, 830/7 of August 3, 1994 and 842/6 of October 26, 1994 in respect of import duty exemptions that had been granted by the previous United National Party government, Minister G.L. Peiris, inter-alia, stated - vide Hansard columns 1662, 1663 - ".....It looks as if this system of granting duty waivers has been used by the previous regime as a means of granting favours to their friends and cronies. .... The loss of revenue to the country on this account amounts to around Rs. 3,000 million. .... I cannot understand how any government would have countenanced such a practice, which is tantamount to a gross misuse of the National Treasury. .... Never did we expect to come across an example of financial chicanery of this magnitude. The situation is profoundly unsatisfactory. This has corrupted a large section of people, who have come to accept the negotiation of a duty-waiver with their political masters as a fundamental right in this country for them to make a profit. ...."

Having taken such high profile ground then, three and a half years in the office of government, as an active and influential minister, particularly moreso as the Deputy Minister of Finance, under the purview of whose ministry many a financial transactions of the government have taken place, moreso particularly, the privatisations that have been carried out by the Public Enterprise Reform Commission [PERC], Minister G.L. Peiris has been ominously silent and dumbfounded for words, in the face of the several scandalous exposures, particularly on the privatisations, which has caused much more losses to the country, raising the issue of the magnitude of financial chicanery, moreso also by way of private treaty with selected parties, devoid of open competitive bidding on the trading floor of the Colombo Stock Exchange, for the sale of majority shareholdings disposed of.

Minister G.L. Peiris, who is generally never lost for words, having severely so criticised and castigated the previous United National Party government for financial chicanery of magnitude, causing losses to the government, by granting favours to friends and cronies, is now questionably silent on such very issues exposed, supported by data and documents, pertaining to financial transactions of this very government, with G.L. Peiris, functioning as the very Deputy Minister of Finance, under the purview of whose Ministry, such transactions have taken place.

## GOT INTO A QUAGMIRE ?

Under the Special Presidential Commissions of Inquiry Law No. 7 of 1978, a Special Presidential Commission of Inquiry of 1995 was appointed under and in terms of a presidential warrant, formulated and submitted to President Chandrika Bandaranaike Kumaratunga by Justice Minister G.L. Peiris, to inquire and investigate into alleged malpractices during the previous United National Party government, as stipulated in the Schedule to the warrant, as per Gazette Extraordinary No. 858/4 of February 14, 1995, published in the *Daily News* of February 20, 1995. [See Box]. It to the intelligence of the public, to consider as to whether, the Justice Ministry has ensured, that such inquiries and investigations have been vigorously pursued in the light of the public stance taken by both President Kumaratunga and minister G.L. Peiris on fraud and corruption ?

As per the fourth interim report of the said Special Presidential Commission submitted to President Kumaratunga, published as Sessional Paper No. 1 - 1997 dated March 2, 1997, the Hilton Inquiry has been the very first Inquiry, No. 1/95, where 24 witnesses had testified and show cause notices under Section 9 of the said Law had been served on 4 persons. However, the Hilton Inquiry has not been pursued since end of 1996. The Commission at that time had made discovery, that the very amended Hotel Plan, that had been approved by the Urban Development Authority could not have been approved as a Plan, since the floor elevations depicted on the respective floor sheets had been at complete variance, with the corresponding floor elevations depicted on the cross sectional plans of the Hotel, with the 3rd and 4th floors given the same elevation of 24.5 meters and the 19th floor and the roof slab, given similar elevations of 72.7 and 72.5 meters, which the Commission had then observed as inherent, intrinsic impossibilities.

On December 15, 1995, vide Hansard columns 2954 - 2965, United National Party M.P. Dr. Rajitha Senaratne had asserted in Parliament, citing what Deputy Minister Lakshman Kiriella, whilst in the opposition had previously stated, that the Securities & Exchange Commission, which had then included Professor G.L. Peiris, had been indifferent to and had not taken any action on the matter of the Hilton and further, that the then Chairman, PERC, Rajan Asirwatham's Audit firm, Ford, Rhodes, Thornton & Co., had certified the accounts of this hotel company, notwithstanding the alleged fraud. One of the charges framed by the Commission in the show cause notices served on the Directors of the company is, the endeavour to adopt as authentic, the said accounts of the company with the object of suppressing the fraud.

On August 8, 1995 making a statement in Parliament pertaining to the Hilton settlement, Minister G.L. Peiris had, inter-alia, stated - vide Hansard columns 706,707: - "The People's Alliance promised to uncover the facts behind this episode during the election campaign and in keeping with its pledge, set up a Special Presidential Commission of Inquiry to inquire into the circumstances behind the transaction. It must be reiterated that this Commission will continue with its inquiries into this matter and that the Government will take all necessary action to ensure that the wrongdoers are dealt with under the laws of this country ... However, it must be reiterated that there was no intention or understanding whatsoever any stage, to either slow down or shelve the work of the Special Presidential Commission inquiring into the circumstances relating to the alleged fraud and misdeeds behind the Hilton project and that it remained the intention of the Government that if any wrongdoing is discovered or found by the Commission, such activity will be dealt with severely under the laws of the country."

A Presidential Commission chaired by leading President's Counsel P.A.D. Samarasekera, including Attorneys-at-law, H.M. Athula Tikiri Bandara Herath and P.A. Sunil Ranaveera had been appointed by President Kumaratunga to probe the activities of the World Bank funded Janasaviya Trust Fund [JTF]. The *Sunday Observer* of May 26, 1996 carried a report on its front page under the banner caption "Massive misuse of Janasaviya funds."

The said *Sunday Observer* report, inter-alia, stated - "The report of the Presidential Commission of Inquiry into the activities of the JTF, a copy of which was made available to the '*Sunday Observer*' indicates five major areas of irregularities on a massive scale: in tender procedure for contracts, unauthorised use of Fund assets and resources, unauthorised use of JTF fund for purposes outside the objectives of the JTF, unauthorised expenses for political purposes, and, irregularities and nepotism in the selection of 'partner organisations' who would benefit from JTF funding ... In addition to making use of the testimony of various experts, complainants and non-governmental organisations, the Commission also quoted extensively from the annual reports of the Auditor General and private auditors. Numerous financial transactions, involving scores of millions of rupees in public funds ostensibly allocated for the alleviation of poverty, have been queried in these auditors' reports ... The Commission also highlights serious irregularities ...."

Professor G.L. Peiris had been the Vice Chairman of the JTF under the then United National Party regime. Though the *Sunday Observer* report stated that the full report of the Presidential Commission would be published, it does not appear to have been published, nor does it appear to have been tabled as a Sessional Paper in Parliament in the public interest. In the name of transparency, why ? Had such slating report been submitted to the Attorney General for appropriate action ? If not, why ?

- *Published in The Sunday Leader on 25.1.1998 by Nihal Sri Ameresekere under the pseudonym 'Bismark'*