

# DEVIOUS ATTEMPT TO SANCTIFY & PEDDLE

## **FRAUD & CORRUPTION !**

### *ABORTED BY SUPREME COURT PRONOUNCEMENT*

it would, no doubt, be a compulsion to reflect upon one of the biggest frauds and an act of corruption perpetrated on the people of this country, through a deceptively titled "Tax Amnesty", which not merely granted an Income Tax Amnesty, as was purported, but also granted pardon and/or immunity from prosecution on various offences, including non-bailable criminal offences, already committed or to be committed in the future.

A 5-Member Bench of the Supreme Court unanimously pronounced that this perverse law, not only was inconsistent with the Constitution, but also was violative of fundamental rights, and violative of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, and was antithetic to the Rule of Law, and had defrauded public revenue causing extensive loss to the State.

The Supreme Court pronouncement, exercising consultative jurisdiction vested in it in terms of Article 118 of the Constitution, was as a consequence of a Reference made under Article 129(1) of the Constitution, on a question of law and fact of such nature and public importance, by President Chandrika Bandaranaike Kumaratunga, who had taken a steadfast stance against this perverse law since early 2003, forwarding a Note to the Cabinet of Ministers in July 2003, urging that this law be suspended forthwith and repealed; but the Cabinet of Ministers acted otherwise.

Nevertheless, the then Cabinet of Ministers of Prime Minister Ranil Wickremasinghe continued to facilitate the defrauding of public revenue causing extensive loss to the State, in addition to condoning the commission of serious and grave offences eroding the Rule of Law, in total disregard to the Directive Principles of State Policy and Fundamental Duties set out in Chapter VI of the Constitution, which had been sworn and affirmed to be upheld and defended, as Members of Parliament.

Section 70 of the Bribery Act introduced in October 1994 by the then Minister of Justice & Constitutional Affairs, G.L. Peiris, defined "corruption" as an offence of causing wrongful and unlawful loss to the State and conferring benefit, favour or advantage on oneself or on any other person. Nothing more aptly fits this definition, than the perverse 'Tax Amnesty Law' of 2003, which the Supreme Court, itself, had pronounced had defrauded public revenue causing extensive loss to the State, whilst granting inequitable privileges and benefits by way of immunities and indemnities to the very persons, who had contravened the laws of the land.

Ironically, Minister G.L. Peiris having crossed-over was the Minister of Constitutional Affairs, whilst this perverse law had been surreptitiously conceived in December 2002, and enacted in March 2003, sans any public debate or deliberation thereon, with significant amendments introduced during the Committee Stage in Parliament; as a blatant affront to 'corruption'.

Even more ironically, representations in this regard made to Dr. Peter Eigen, Chairman, Transparency International, Berlin, Germany, with copy to Transparency International, Sri Lanka, had no response, whatsoever, except a short lukewarm e-mail intimating that Transparency International, Sri Lanka, is precluded from taking up individual issues, but that the matter will be considered for future action. However, regrettably no concrete action was transparently and effectively taken in such regard !

How Transparency International pontificating to deal with corruption deemed this to be a mere individual issue, whereas it was a grave and major public interest issue of national and public importance, concerning the conceal and cover-up of the cancerous menace of corruption, is most confounding !

This perverse law not only concealed and encouraged corruption, but also went to the extent of including secrecy provisions in the law preventing even the Commission to Investigate Allegations of Bribery or Corruption from ascertaining the identity and/or particulars of declarants, who were granted absolute and secretive immunity to cover-up ill-gotten gains. If the Commissioner General of Inland Revenue was to violate such secrecy provisions he was liable to be prosecuted, with consequential fine and imprisonment.

Significantly, Transparency International, the 'watch dog' on corruption was unconcerned of such serious intrusion to the endeavours to lawfully deal with bribery and corruption. This was also notwithstanding that, this perverse law was also violative of the United Nations Anti-Corruption Convention to which Sri Lanka became a signatory, and also international conventions, *vis-à-vis*, money laundering and anti-money laundering legislation being enacted, which were proactive endeavours by the international community to combat the very cancerous menace of corruption.

The fact that this perverse law also blatantly contravened the United Nations Security Council Resolution 1373 pertaining to funds financing terrorists and terrorist activities *et al*, adopted in September 2001, immediately after the dastardly attack on the World Trade Center, New York, was of no concern to the then Government, and to international organisations, who exhort that universal action be taken to deal with acts of terrorism, as well as 'corruption', currently challenging the civilised world. This was notwithstanding representations made to the then Government and to such organisations, including the UN, IMF, WORLD BANK, UNDP, USAID, ADB, *et-al*.

It is in vogue in contemporary times for such international organisations to finance and fund poverty alleviation programmes and activities with much fanfare, to improve the living conditions of the poor down trodden exploited masses of the country. International research studies have revealed and it is an accepted fact, that through the cancerous menace of corruption the powerful and influential acquire ill-gotten wealth, impoverishing the people and causing poverty.

Are there not instances where corporates espousing social responsibility, have acted contrary to such espousals ? Hence, financing and funding poverty stricken people is in fact replacing the resources of such people, which have been pillaged and plundered. Thereby, are not such international organisations indirectly funding the perpetuation of fraud and corruption, itself ?

Even when the Reference was made to the Supreme Court by the President of the Republic, as a question of law and fact of such nature and public importance, there were those who intervened at the Supreme Court hearing to strenuously object to such hearing, including the Centre for Policy Alternatives (Guarantee) Ltd. The Counsel making submissions for the Centre for Policy Alternatives, whilst conceding the perverseness of the law, repeatedly urged the Supreme Court to refrain from making the pronouncement known before the then pending General Elections !

Ought not the conduct and actions of a Government elected by the people be exposed before the people, most pertinently before a General Election, so that the people could decide and hold such Government accountable for its actions and give the people's verdict thereon ? To have espoused to suppress the right of the people to know goes against the very basic principles and fabric of democracy, governance and public accountability. Governments are not elected by the people to defraud public revenues and resources, which in fact are held by Governments in trust for the people, who are the owners of such public revenues and resources.

Consequently the new Government elected by the people moved to swiftly repeal the perverse law, restricting it to a pure Income Tax Amnesty, with the Bill being referred by the Cabinet of Ministers, as an urgent Bill, to be determined upon by the Supreme Court, prior to being enacted in Parliament. In the Supreme Court determination communicated to the Speaker of Parliament, the Supreme Court reiterated its dicta in the pronouncement made previously, *inter-alia*, that such perverse law, which was to be repealed, was inconsistent with the Constitution, and that it had inequitably granted immunities and indemnities to persons, who had contravened laws and defrauded public revenue causing extensive loss to the State. In short, it was an act of 'corruption', as statutorily defined !

Notwithstanding, such Supreme Court determination being communicated to the Speaker and placed before Parliament, as to how the UNF and some Members of the Muslim Congress voted against the repeal of such perverse law, so determined upon and communicated to the Speaker, gives rise to a serious question of affront to the judicial power of the people, exercised by the Supreme Court, and the breach of the oath or affirmation taken to uphold and defend the Constitution. On the contrary, the TNA who acted respecting the Constitution, refrained from voting. Significantly, Act No. 10 of 2004 repealed the perverse Act No. 10 of 2003 with a 50 vote majority in Parliament, upholding the trust of the people.

There are those who now endeavour to take up an issue of retrospective legislation, without taking cognisance of the reality, that with the Supreme Court having determined the perverse Tax Amnesty law to be an illegality and a fraud on the public, that no right or legitimacy, whatsoever, could flow and/or be derived from such illegality and fraud. There are several instances of retrospective legislation, even without such inherent unconstitutionality and fraudulent illegality.

The classic instance being when President J.R. Jayawardena caused the repeal of the Administration of Justice Law, restoring the Civil Procedure Code. The Civil Courts Procedure (Special Provisions) Law No. 19 of 1997 Section 4 (1) states thus: - "4. (1) The provisions of the Civil Procedure Code shall for all purposes, be deemed to be, and to have been, in operation as if the same had not been repealed and shall continue to be the law governing the procedure and practice in all civil courts". Indeed, the Civil Procedure Code had been deemed not to have been repealed, when in fact it had been repealed !

The critical need of the country today is the establishment of a multi-disciplinary fraud and corruption investigation and prosecution agency, like many other countries, such as Singapore, to effectively combat fraud, corruption and white-collar crime, and to deterrently deal with those who pillage and plunder corporate and public property, which is not necessarily only state property, as more fully set out in the Offences Against Public Property Act No. 12 of 1982, which too needs updating to cater to contemporary needs.

The mere espousal of the anti-corruption cause on podium and platform making belief in the public domain is of no avail, sans the enforcement of the Rule of Law, without fear or favour, as in Singapore.

### **Excerpts of Pronouncement by a 5-Member Bench of the Supreme Court**

#### ***"...thereby defrauded Public Revenue causing extensive loss to the State"***

A 5-Member Bench of the Supreme Court presided by Chief Justice, Sarath N. Silva, P.C., and comprising Justices Dr. Shirani Bandaranayake, Hector S. Yapa, Asoka N. de Silva and Nihal Jayasinghe, exercising consultative jurisdiction, has delivered their unanimous decision to President Chandrika Bandaranaike Kumaratunga under and in terms of Article 129 of the Constitution on the 'infamous' 'Income Tax Amnesty Law' of 2003.

The Supreme Court has held that the law violates the fundamental right to equality statutorily enshrined in terms of Article 12 of the Constitution, which is also a component of the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights [Article 2], which provides for all persons to be equal before the law and to be entitled to equal protection of the law, which is an injunction issued by the Constitution to the Legislature against enacting discriminately laws. [In terms of Article 3, read with Article 4, of the Constitution, Sovereignty, which includes fundamental rights, which shall be respected and not be abridged, restricted or denied, is in the People and is inalienable].

The Supreme Court has cited A.V. Dicey on Law of the Constitution - "That 'rule of law'.... has three meanings, and may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as apposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; ....It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law Courts; ...."

The Supreme Court has held that the indemnities and immunities granted by the Tax Amnesty law would not only be inconsistent with Article 12 (1) of the Constitution, but also antithetic to the Rule of Law being the underlying basis of the Constitution

The Supreme Court has further held that it has to be borne in mind that public revenue is held in trust for the people, who cannot be denied its benefit, and that the Tax Amnesty law has provided full immunity, not only from liability to tax, but also from any investigation or prosecution from any offence under any laws specified in the schedule ....and that these laws have been enacted from time to time; the integrity and the strength established thereby is dependent on due compliance and effective enforcement.

The Supreme Court has further held that, ironically, the basis of the differential treatment conferred by the Tax Amnesty law is the non compliance, the violation and the evasion of taxes and duties payable under the laws that are pivotal to the country's revenue, public finance and fiscal control, pointing out that the Performance Report of the Commissioner General of Inland Revenue for the Year 2002 states that the taxes in arrears as at 31<sup>st</sup> December 2002 is Rs. 68,723 million [which includes GST Rs. 19,027 million, Turnover Tax. Rs. 10,299 million, and National Security Levy Rs. 7,029 million] and that this would reflect the loss of public revenue in relation to tax recoverable by the Commissioner General Inland Revenue, and that no estimate has been made of the losses resulted from the immunity granted in respect of Custom Duty, Excise Duty and other dues.

The Supreme Court has finally held that the provisions of the Tax Amnesty law are inconsistent with Article 12(1) of the Constitution. ....in that, it grants immunities and indemnities to persons who have contravened the laws ..... and thereby defrauded public revenue causing extensive loss to the State.

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

*- Appeared in person, at the Supreme Court Hearing, to bring out the perverseness of the provisions of the 'Tax Amnesty' of 2003*