

**‘EXTRACTS’ FROM NIHAL SRI AMERESEKERE’S FUNDAMENTAL RIGHTS APPLICATION
TO THE SUPREME COURT ON THE ‘EXPROPRIATION LAW’ : PART 3**

Fundamental Duties / Directive Principles & Constitutional Duties of Speaker & Supreme Court

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

1. I emphatically state that I am not against the policy and objective of Government, that privatized public enterprises must be accountable to achieve the objectives of such privatizations. In this regard, as PERC Chairman in 2004, I initiated a review of all the 98 privatizations carried out from 1986 to 2004, and identified to the extent possible ,the post privatization issues and post privatization litigations, as borne out by the PERC Annual Report 2004 to Parliament. Nevertheless, PERC was closed thereafter.
2. In fact, it is such investigations on the privatization of SLIC and LMSL, which led to the adverse COPE Reports thereon in 2007, resulting in SC (FR) Cases Nos. 158/2007 and 209/2007, wherein the Supreme Court annulled these privatization as wrongful, unlawful, illegal and fraudulent.
3. **Now ironically institutions have been listed violating norms of natural justice, as failed privatisations. But what about those persons who carried out these privatisations and had failed to monitor their performance to protect the public interest ?**
4. Regrettably, the rule of law was not enforced against the miscreants. I cite Section 214 of the Penal Code.

“214. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

On the contrary, persons who ought to have been arraigned before the law, have been appointed to public office, *making the rule of law a mockery.*

5. The Fundamental Duties stipulated in Article 28(d) of the Constitution to preserve and protect public property and to combat misuse and waste of public property had been correctly articulated, but this should not be mere pontification or a selective process; *all being equal before the law.*
6. The Offences Against Public Property Act No. 12 of 1982 is a very potent of law, but regrettably not enforced. The Offences Against Public Property Act No. 12 of 1982, stipulates that any person, whether public servant or otherwise, is liable for the following Offences:
 1. Mischief to public property.
 2. Theft of public property
 3. Robbery of public property
 4. Misappropriation or criminal breach of trust of public property
 5. Cheating, forgery or falsification in relation to public property
 6. Attempting to commit any one of the above offences

Punishment for any one of the above Offences is a fine of 3 times (i.e. 300%) the value of the public property in respect of which such offence was committed and imprisonment not exceeding 20 years.

“Public property” is defined in the said Act No. 12 of 1982 thus – “ *‘Public property’ means the property of the Government, any department, statutory board, public corporation, bank, co-operative society or co-operate union.*”

7. Attention is drawn to the following Articles 27(1), 27(2) (a), 27(2) (f), 27(4), 27(6), 27(15), 28(a), 28(d) and 28(e) are set out below:

“27.(1) The Directive Principles of State policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

(2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include-

(a) the full realization of the fundamental rights and freedoms of all persons;

(f) **the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka;**

(4) **The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.**

(6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

(15) The State shall promote international peace, security and co-operation, and the establishment of a just and equitable international economic and social order, **and shall endeavour to foster respect for international law and treaty obligations in dealings among nations.**

“28. The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka-

(a) to uphold and defend the Constitution and the law;

(d) to preserve and protect public property, and to combat misuse and waste of public property;

(e) **to respect the rights and freedoms of others;**

8. Article 82(3) of the Constitution states thus:

82. (3) **If in the opinion of the Speaker, a Bill does not comply with the requirements of paragraph (1) or paragraph (2) of this Article, he shall direct that such Bill be not proceeded with unless it is amended so as to comply with those requirements.**

Thus, the Speaker stands constitutionally bounden in duty to ensure that a Bill complies with the provisions of the Constitution prior to having placed the same on the Order Paper of Parliament.

I had by Letter dated 8.11.2011 put the Speaker on notice, particularly *vis-à-vis*, the Determinations by a 7 Judge Bench of the Supreme Court interpreting the Constitution and stipulating the limitations referred to therein.

Notwithstanding having been so put on notice the Bill has been proceeded with by the Speaker.

9. Article 123(3) of the Constitution stipulates thus:

123.(3) In the case of a Bill endorsed as provided in Article 122, **if the Supreme Court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution,** and the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.

Article 123(3) is specifically in relation to Bills endorsed as 'Urgent Bills' by the Cabinet of Ministers as per Article 122 of the Constitution.

Hence, whilst providing for an emergency / urgency, the Constitution has a specified check put in place, that **if the Supreme Court entertains a doubt** whether the Bill or any provision thereof is inconsistent with the Constitution, that it shall be deemed to have been determined that the Bill or such provisions of the Bill is inconsistent with the Constitution.

The threshold therefore is the question as to whether there is in fact any 'doubt'.