THE 'UNCERTAIN AND CROOKED CORD' OF JUDICIAL DISCRETION

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I Introduction

THE SUPREME Court of Sri Lanka scales some dizzying new adjudicatory heights in a recent decision[1] invalidating as violative of the rule of law and the Constitution a whole set of capital-intensive arrangements and transactions relating to the privatization of bunkering services in Colombo port. The Court cancelled the common user agreement between the Government of Sri Lanka, Sri Lanka Ports Authority, Ceylon Petroleum Corporation and Lanka Marine Services (Private) and John Keells Holdings (JKH) PLC, the Presidential Grant of eight acre land to the company, and the tax relief given to the company by the Board of Investment of Sri Lanka. The Court further imposed various degrees of restitution on the JKH.

The Sri Lankan public response to the bunkering decision (BD) remains indeterminate. Sarath N. Silva, CJ, who wrote the opinion of the court, remains a complex beleaguered figuration.[2] Even so, some have welcomed BD as an attempt to restore 'good governance' or even as an aspect of PIL-induced adjudicative war on corruption in high public places. The Lankan Left has regarded it as a move against the three Ds of neoliberal agendum - denationalization, disinvestment, and deregulation. In contrast, some business–friendly media commentators have queried the overall viability of the judicial approach in this case, and in particular the 'unfair' treatment accorded to what they describe as a publicly tendered transparent privatisation. The silent partners remain the law academics and economists.

Does the BD signify an act of judicial courage or emerge as an example of retrograde judicial activism? Opinion on this issue may of course vary. A plain reading suggests that the BD is not an act of judicial courage if

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1. *Vasudeva Nanayakkara* v. *K.N. Choksy & 33 others* (2008, as yet unreported.) References to page numbers in the text are from a certified copy of the judgement.

2. See, Victor Ivan's, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* (2007).

only because it does not articulate any finely-honed adjudicatory approach towards constitutional outlawry of acts of neoliberal state pursuits. To be sure, BD insists on governance transparency; yet it fails to reach the threshold of adjudicative transparency. The decision based on the constitutional principle of equality does not even fully present arguments canvassed by all sides, especially the JKH; it does not with any scrupulous care provide finely crafted grounds or basis of judgment; if governance transparency is an esteemed virtue, this may not be best promoted thus. A decision of the gravest nature here localizes itself intensely; it announces no extraordinary adjudicatory doctrine or even technique; and it rather bases itself on partial narratives of complex facts. As now articulated, the BD may not even enjoy a substantial Sri Lankan constitutional shelf-life.

No doubt, both social action litigation [SAL] in India, and public interest litigation [PIL] in Sri Lanka articulate some unusual assertions of the 'will to judicial power' ushering in a different kind of constitutional politics where appellate justices, and especially apex court justices, question both the immunity and impunity of representative politics, in creative but non-partisan partnership with activist lawyers and social action groups, as also with related professionals. Primarily thriving on the pathologies of governance, SAL/PIL liberalizes and democratizes the colonial doctrine of *locus standi*; innovates procedures for fact finding; devises new specific remedies; expands the scope of constitutionally enshrined fundamental rights and accompanying freedoms; re-scripts or reinvents human rights; and where strictly necessary even re-writes the Constitution. All this is by now rather well-known.

The 'will to judicial power,' however, manifests itself as Janus-faced, not always inherently people's democratic rights-friendly. Both in Sri Lanka and India, it remains poignantly clear that even as activist justices pursue with some remarkable vigour causes such as protection and promotion of social and economic rights, governance corruption, and environmental jurisprudence,[3] they also legitimate the confiscation of elementary human rights, and accompanying freedoms, in states of public 'emergency' and the ongoing 'terror' wars. The self-same activist justices remain all too often partners with an overweening executive in draconian security and public order performances and legislations.[4] This is not to say that that SAL/PIL

3. See, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008) and Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (2009).

4. See as concerns India, S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2002); Shylashri Shankar, *Scaling Justice*: *India's Supreme Court, Anti-Terror Laws, and Social Rights* (2009) and Ujjwal Kumar Singh, *The State, Democracy and Anti-Terror Laws in India* (2007).

present any poisoned chalice; nor, by the same token, may judicial activism dispense any providential elixirs![5] The task of devising socially responsible critique of judicial activism constitutes thus a troubled terrain.

This article is an internal critique of the BD in its own stated terms—the concern for legality as articulated by Sarath N. Silva CJ. Recalling the famed phrases of Lord Coke CJ that legality consists in the exercise of public powers in accordance with the 'golden and straight metwand of law' opposed to 'the uncertain and crooked cord of discretion'[6] here starkly signifies that the discretion his lordship has in view is *executive* not *judicial* discretion. The claim here is that judicial interpretation monitoring executive discretion may itself never be arbitrary but remains rather fully Constitution-governed. The BD performance illustrates the futility of this contrast because it is simply not the case that judicial discretion remains always *judicious* and executive discretion likewise always *expedient*.

II Expanding PIL standing

The BD itineraries were launched by Vasudeva Nanayakkara, a veteran Left politician, and a legendary PIL figuration, often regarded as one-person embodiment of the answer to the desperate question: Who can we complain to? Challenging the public interest standing of Nanayakkara itself was an uphill task. Even so, dismissing JKH's objections to standing deserved more than gesture of summary judicial dismissal as both 'misconceived' and 'myopic.' JKH made four arguments. First, it urged that the 'particular philosophy' of the petitioners has no 'place' in neoliberal economic policy agendum. To state this is to indicate its nature as a forensic necessity but no more.

Second, it contested that PIL petitioners may not have a 'right to represent (interests or rights of) all citizens in the country.' Thinking PIL in these terms remains fraught with major difficulties. If 'representation' is thought of in terms of the monopoly over definition of 'the' public interest only by the elected state officials, this would exclude the role of unelected citizens, including justices, in determining what may or may not constitute constitutional public interest distinguished from mere regime need or convenience. Further because the project of universal political

5. The Sri Lankan PIL has a rich and varied history within which the BD needs to be appraised. Further, reading the voluminous written submissions in this case is no substitute for access to the leading petitioners in this case and even to their lordships.

6. Their Lordships may have benefitted here by some recourse to Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade* (1998).

representation of all peoples remains mythical, all we can achieve is partial or fragmentized representation. An articulate activist court would have sized the opportunity to jurisprudentially expound the bases of political representation.

The third argument that the BD petitioners ought to have shown due diligence was by no means either 'myopic' or 'misconceived.' The entire transaction was not exactly a public secret; given this, the PIL petitioners owed obligations for avoiding a more timely intervention, rather that proceed to assail a completed government contract. This contention surely deserved serious judicial attention. PIL petitioners may not move the courts just as and when they please, which in this case was five years after the completion of the bunkering transactions. If they had, however, good reasons for *post facto* judicial recourse, surely this claim merits some strict judicial scrutiny in matters of national economic importance. By no means, it can be suggested that the doctrine of *laches* may mindlessly extend to apply to PIL/SAL regimes; yet, it is not entirely unreasonable to maintain that the Court should have in this case demanded some petitioner accountability for not calling its attention at the outset of the publicly implemented privatisation or on being aware of the widely reported alleged 'scam' preferring instead to assail the final outcome. Placing this kind of burden or onus of public interest responsibility may further well determine judicial determination of what may or may not be done with some already executed governmental contracts.[7]

Even in situations of any justifiable yet unreasonable delay by SAL/PIL agents, courts may not be powerless to shape adjudicative relief. In the BD, such a relief may have been *prospective*, rather than *retroactive.* The Court may thus have fully justified in offering some judicially enunciated norms of procurement processes, without unsettling the already completed/ executed government contracts. By a summary dismissal of this objection, the court forfeits ways of disciplining public interest standing and also of devising alternative forms of adjudicatory redress.

Fourth, the court does not fully examine the argument that it may not go beyond the express remit of article 126(1), conferring jurisdiction to 'the infringement or imminent infringement by the executive or any administrative action of any fundamental right enunciated by the Constitution.' This test obviously does not tell the court *what* to decide but provides a sure guide to *how* it should proceed to decide. Article 126(1) 'infringement' test provides a more chastened scope for expansion of judicial

7. See, as to this the provocative offering by Eric Posner, "Courts Should Not Enforce Government Contracts," The Chicago Working Paper Series *available at* http://www.law.uchicago.edu/Lawecon/index.html (2001, visited April 22, 2009.)

power, unlike the 'benefit of people' criterion adopted by the court.

The BD proceeds on the premise that right to equality obligations under article 12 ought to extend to all government contracts because the principle of equality before the law may be infringed by any or all decisions and transactions in which the government is a party. And 'government' is widely construed as including autonomous statutory corporations like the PERC (Public Enterprises Reform Commission of Sri Lanka.) Does this principle extend to all government contracts or merely some spectacular ones? If the former, may the disappointed business rivals act through a friendly PIL petitioner, or (with great respect also with a friendly Bench) to deploy article 12 simply as a way of doing business and trade? If the latter, how may the court distinguish the quotidian from the exceptional government contracts for the purposes of strict judicial scrutiny? In either case, what standards of judicially manageable/efficient enquiry remain at hand to ascertain the 'facts' of a highly complex decisional process, and to determine whether acts or omissions of state officials were *ultra vires* or *mala fides?*[8] Must these be writ large on the decision/transaction or be made legible by serious judicial interpretive exertions, as in the BD?

Pandora's box

Democratization of standing is like the Pandora's box. The box may not be partially opened; nor once opened be closed by justices, bewildered by is contents, just as they please (the mythical Pandora's box allows no closure!) It remains notoriously unclear whether the BD may in future continue to extend to each and every measure of disinvestment/privatization. To proceed thus would also entail some enormous future adjudicatory burdens.[9] If otherwise, it may well invite the indictment of adjudicative arbitrariness.[10]

8. Further, the crucial question of fashioning appropriate relief (constitutional and legal remedies is not at all addressed by the so-called 'benefit of people' criterion.

9. The Indian Supreme Court's example may be here pertinent : initially it conferred SAL standing only on behalf of Indian's discriminated, dispossessed, and disadvantaged citizens but subsequently enlarged the standing to all manner of public causes, only with the caveat that public interest standing may not be used for promotion of private of specific political gains. This enabled the Court to phenomenally expand its judicial review powers. The Sri Lankan story is broadly similar.

10. The context of BD remains astonishing indeed impaling a wide variety of state actors — including a former Prime Minister, all sorts of incumbent and other incumbent and superannuated government secretaries and other statutory officials, and even an assortment of Sri Lanka Police and Bribery Commission officials! Such an extraordinary roving judicial enquiry remains rather unparalleled in PIL/SAL annals.

Of course neither Lord Coke CJ nor the authors of the Sri Lankan Constitution anticipated the kind of judicialization of economic policy considerations involved in the privatization of bunkering services in the Colombo port. Nor could they have anticipated a situation in which a latter-day successor chairperson of the PERC-Nihal Amarasekera-not merely extends 'active' support to the citizen petitioner but also makes 'scathing remarks' directed against his predecessor–P. B. Jayasundera. The Court fully acknowledges that 'it is clear that the bundles of documents produced in the case would not have surfaced if not for the probing scrutiny by Amarasekera.' In this sense, the BD seems all about the conduct of the predecessor P.B. Jayasundera as for the most part exposed by his latter-day successor in office. It is not appropriate here to comment on the issue of how far conscientious PIL may thus proceed in Sri Lanka.

Even so, as a general proposition, there is some, even compelling, merit for an argument that allowing successors to statutory office to audit or reopen completed transactions may weaken the integrity of statutory bodies. Surely, judicial indulgence may not encourage some internecine feuds amongst high echelons of bureaucracy; this may not be the best way ahead, if only because higher bureaucracy also knows well how to close its ranks against an activist judiciary.

To say this is not at all to suggest that public officials are beyond scrutiny. In this very case, as the court itself notes, the Parliamentary Committee on Public Enterprises,[11] had already pronounced the verdict that 'this transaction had been executed blatantly without cabinet approval, with several flaws causing loss and detriment to the government, and demonstrating it to be a questionable 'fix', and is therefore *ab initio* bad in law, null and void.'

It is obvious that committee proceeds to here issue a pre-judicial verdict, based even on brief and sketchy reports. Rather than warranting a large-scale adoption by the BD court, it may have well directed an authoritative reconsideration, backed by the full advice of the Attorney General, by a speaking decision of the cabinet, subject of course to further judicial scrutiny. The court could have well directed such a process in a time bound manner, leaving the petitioners to approach the court in case of non-action. Instead, it here takes upon itself the burdens, aborting further legislative/ executive consideration, of establishing complicity and collusion between PERC and JKH and to, in effect, implement the Parliamentary Committee's conclusion. The rush to judgment here remains rather un-explicated.

11. Paragraph 21 of January 12, 2007 Report.

III Finding the applicable law

As it turns out, the court has to voluminously supplement the grand generalities of article 12 as furnishing the standards of the 'applicable law' from the judicial excavation of a mass, or rather a morass, of other normative materials.

Of utmost importance remain the provisions of the Public Enterprises Reform Commission Act, 1996 (PERC.) The Act is a unique statutory instrument assigned a wide variety of tasks, including the task to 'assist the government to create public awareness of …policies and programmes on the reform of public enterprise with a view to developing commitment by the public' to these. Entrusted at one level with the tasks of advising and assisting public enterprise reform, the PERC at another level (per section 5(t) of the Act) stands designed to 'act as an agent of the Government, in Sri Lanka or abroad for the purposes of any matter or transaction, if so authorized.' The court is justified in insisting that public enterprise reform should never become a *'shadowy, slithering process.'* Precisely because of this, it remained necessary for the court to fully clarify circumstances in which the PERC may not act as an agent of the government without a prior executive decision. If it may not thus act at all, this must surely amount to a judicial repeal of the PERC Act! Unfortunately, this is what the BD decision finally accomplishes.

It remains imperative to descend to some technical detail, furnished by the labyrinthine normative materials. These stand congealed first in the series of policy instruments directing a well-ordered policy regime for the liberalization of bunkering process in Sri Lanka; second, the August 2000 Report of Committee of Officials;[12] third, the adoption of the report by the cabinet fully endorsing the modifications suggested by the Minister of Shipping; fourth, the action pursued by the PERC, and fifth (without being exhaustive) sundry but no less influential corpus of what the court names as the 'tenets of public sector procurement.'

The court refers to these frequently in order to decide whether the PERC acted outside its authority in this case but fails to provide any sense of justifiable hierarchical ordering of the mass of materials furnishing the applicable law. This must remain a cause for considerable concern.[13] Further, if as the chief justice himself says, the public enterprise reform which 'lay in the area of executive discretion came strictly into the legal domain as being a public process regulated by law,' certainly the PERC decisions ought to carry greater weight than any set of related executive decisions. To be sure, as the court says, mandatory duties under section 4 thus mean

12. Hereafter cited as the report.

that the government 'cannot carry out public enterprise reform without first receiving the advice and assistance of the PERC.' Yet, all along the way, the court consistently subordinates the statutory scheme to executive decisions!

The BD court remains unable to address the circular self- preferentiality of section 5(t) of the Act requiring that the PERC may act as an agent of the government '*if so authorized.*' This italicized phrase may mean either so authorized by the PERC Act or always as authorized by the cabinet decisions. The BD court simply fails to sort out two interpretive choices. This difference, indeed, matters. However, BD suggests for each and every step in the bunkering privatization process, the PERC would have to have explicit authorization.

Why then one may ask: Was the enactment of PERC at all necessary? Either it is an appendage of the executive or it remains an autonomous statutory authority. The court recognizes the latter role when it explicitly declines to invalidate the PERC sale of shares of Lanka Marine Services (Private) Ltd. Yet, it proceeds to invalidate several subsequent steps, such as the evaluation of assets, the process of competitive bidding adopted by the PERC, and the 'floor price' of Rs. 1,200,000,000 and related steps as being outside the scope of section 5. Much in BD discourse turns on the scope of the pertinent cabinet decisions. Without going into the complex textual histories of these decisions, it is at least clear that the Attorney-General's written submissions filed by on behalf of the Land Commissioner, Ports Authority, Petroleum Corporation, Secretary to the Treasury, state full well that the transaction was duly authorised. The court does not accord due dignity to this position, further suggesting an untenable position that the PERC becomes and remains a handmaiden of the executive,[14] entirely contrary to the legislative intendment of the Act of 1996.[15] The bleeding heart of the BD decision stands fully offered to view by *ad hoc* judicial readings of the cabinet decisions as much as by the eclectic judicial finding concerning the regime of 'applicable law.'

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13. For example, the report and the Shipping Minister's further endorsements are important aspects of the bunkering privatization policy formulation but only as preliminary steps towards the status of a cabinet decision.

14. The Supreme Court ignores three cabinet decisions which fully authorised the transaction and the transfer of the land.

15. This sort of interpretation also flies in the face of the recommendation made in para (b) of the report, as fully endorsed by the cabinet, authorizing the PERC to 'seek open tender process for bunkering from investors with local equity participation' and the 'necessary technical and financial ability and experience in bunkering. Admittedly, paragraph (e) of the report invited the PERC to 'initiate action accordingly' by way of making 'further recommendation to the cabinet regarding the process to be followed.'

IV Complexities of public sector procurement as an integral part of the applicable law

Perhaps, the only sensible way of reading the BD is that the PERC violated the 'tenets of public sector procurement' (as the court summates these). Public procurement norms have emerged as major arena of legal scholarship and policy studies given the accelerated pace of contemporary economic globalization. Procurement refers generally to governmental purchases of goods and services from national and global markets, and specifically to the use of private finance to resource public projects. Usually, procurement norms endeavour to bring about a modicum of integrity in governmental decision process or more specifically in the integrity of regulatory institutions and cultures[16] but this stands further re- thought in terms of achieving social justice and human rights.[17] The BD even as late as 2008 does not refer to this fascinating discourse; even so, perhaps, comparative law procurement scholarship or studies may still find it rewarding to engage with it.

The BD illustrates the moral public hazards of an *ad hoc* judicial excavation of a miscellany of procurement norms from pre-legislative hybrid sources. The court here entirely regrettably fails to even silhouette the possibility of constitutional 'justice' in mega-procurement situations in law-regions which fail to codify procurement norms.

Reading the tea leaves, as it were, suggests that the BD court is here conspicuously concerned with a judicial roving indictment of the Chairman of PERC, and the Director JKH , who according to the chief justice, … worked hand in glove to clinch … wrongful benefits' to JHK via an invocation of miscellany of norms of public procurement. When may a judicially discovered/invented regime invoking a miscellany of violation of un-codified public procurement norms reach such an extraordinary result? On matters such as the valuation of the divestiture public assets, the need to constitute CATB (Cabinet Approved Tender Board) and the TEC (Technical Expert Committee), the pre-bid and bidding procedures, the fixation of the floor price for bidding, etc., the general question here concerns the status

16. See, generally, Sue Arrowsmith and Martyn Trybus (eds.), *The Public Procurement* (2001); Sue Arrowsmith, "Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard,'' 53 *International and Comparative Law Quarterly* 17-46 (2004); Sue Arrowsmith (ed.), *Reform of the UNCITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* and Sue Arrowsmith and Peter Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009).

17. See, Christopher McCrudden, *Buying Social Justice: Equality, Procurement, and Legal Change* (2008).

of the undefined procurement norms. Even granting that violation of these customary norms, signifying best governmental practices, the question is: Whether these remain fully constitutionally mandated? Unfortunately, the court does not *even pose* this general question.

Let us take just a few salient examples. Do the 'basic tenets' of Sri Lanka public procurement actually require a CATB to be set up? The answer must be in the negative because this requirement was in the first place ushered in by none other than Jayasundera by a 1999 administrative public finance circular directed to 'enhance the effectiveness of pubic procurement procedure.' Had he not done so, would the court have been justified still to maintain, as it now fully does, that the CATB and the TEC are intended to 'ensure transparency, fairness, and honesty in the procurement process? ' Absent the circular, would the Court have gone so far to *de novo* super-add this requirement as an integral aspect of its decision? Would doing this have been so far justified as any retroactive dimension enabling the court to invalidate the entirety of the bunkering transaction?

Hoisting Jayasundera on his own petard, as it were may be somewhat justified as a PIL petitioner tactic; serious doubts surround the appropriation of this tactic as an adjudicative strategy. Indeed, in fact, he pleaded that his own circular did not apply 'in respect of the sale of government shares.' To this, the court provides a 'be that as it may' type (or neither-here-or-there) response when it says that on a wider interpretation, the CATB 'would have afforded the mechanism to redress the bitter grievance of a party in this case.' This remains deeply puzzling indeed because it entails the notion that positive PERC statutory obligations and functions must always not only *anticipate* but actually base its discharge of responsibilities on what PIL petitioners may or may not adopt as legal tactics in their future course of public lawyering.

An additional consideration urged by the court is that had the CATB been set up, the cabinet would not have 'clinched the deal' as allegedly Jayasundera seems to have done. If this were a probable scenario, the best course for the court, as already indicated thus far, would have been to mandate cabinet consideration of the Report of Parliamentary Committee on Public Enterprises.

To take a second example: Did the PERC fatally err in not re-coursing to the government chief valuer and by approaching a private bank? The PERC maintained that time was of essence; the court thunders: 'Whose deadline Jayasundera was trying to keep?' No doubt the chief valuer may have felt justified in asking that the PERC should provide for the due incentive rewards for her/ his staff, otherwise in principle already executively sanctioned. Surely, the Court would have been justified in some possible strictures against this work-to-rule type conduct by the chief valuer;

it would have been rights also to insist that Jayasundera should have met this pre-condition. Instead, it fully proceeds to attribute *mala fides* to the PERC on this ground, without any serious attempt at judicial finding establishing a precise statutory duty to secure incentive benefits for the staff of chief valuer.

A third example: In what ways did the PERC decision prescribing a floor price (here Rs. 1,200,000,000) for tendering violate procurement norms? The question needs to be considered beyond the facts of the case. Suppose that a CATB duly constituted may have reached a similar decision would this have been also liable to judicial invalidation on the ground that some customary practices of public procurement disallow this? Would the CATB endorsement of floor price stipulation still have been infested by overarching judicial suspicion JKH thoroughgoing alleged state capture? Even granting that the PERC acted with undue haste, responsible critics of the BD may permissibly ask whether activist judicial haste here may constitute any justified response.

Furthering aggravate illustrations may fully problematize the accelerated judicial pace invaliding comprehensively an already fully competed government contract transaction. Perhaps, it is sufficient to note here a fatal juridical narrative flaw when the court raises the concern about 'a lawful exercise of *executive power'* of the PERC. This phrase remains pregnant with jurisprudential mischief! For one thing, the *executive* power of the PERC are integral to its performance of its sway of its *statutory* powers; for another and as already noted if the new legal regime of PERC is to be regarded seriously, it ought surely to enjoy a certain measure of statutory autonomy beyond the scope of the executive cabinet decision. It is also noteworthy that the judgment talks mainly of the actions of Jayasundera and not that of PERC collective bias.

Moving ahead, the court here in an unconstitutional judicial haste already further erases the languages of administrative law which offer, as is well known, some cardinal distinctions concerning acting outside authority (the doctrine of *ultra vires*) and *mala fides* (acting with some perverse intent.) The BD does not manifestly establish *mala fides* and yet it suggestively marshals its full force. To say the least, this way of adjudicative proceeding merits the description of judicial 'despotism.'

V The problem of agency

Conventionally known as the problem of ostensible versus actual authority extending in the main to contractual relations,[18] the field becomes

18. See, for example, 6 *American Jurisprudence Proof of Facts* 457 (2008).

complex and contradictory when extended to sovereign public acts, concerning ostensible authority of a statutory public official such that would bind the state or the government. Put another way and in the BD contexts: How may statutory officials like the PERC in this case so act as an 'agent of government' as to justify the JKH pleading as an injured innocent third party, further claiming some equitable relief? The question thus posed goes beyond the conventional registers of concerns of the law of private contracts distinguishing between 'real' as opposed to 'apparent' or 'ostensible' authority of the agent owed to the principal or the company director type responsibilities to shareholders and the third parties to contracts if only because: (a) government contracts constitute an altogether different genre and (b) governance power here manifests itself as a public trust.

Approaching this question, the Sri Lankan Supreme Court fully reminds us about the fidelity towards the law and jurisprudence of the colonially constituted *Ceylon*. The chief justice indeed laments the fact, in this day and age, that the colonially fabricated truths of public responsibility thus furnished by the erstwhile Privy Council decisions remain 'forgotten' with 'the passage of time!' Yet, this lamentation of bygone colonial juristic pastimes may, after all, ill-serve postcolonial constitutional and human rights futures.

The invocation by the chief justice of the Privy Council dicta, in *Attorney General* v. *A. D. Silva*[19] (entailing the legality of sale of certain articles by the Collector of Customs) may barely speak to conduct of PERC in this case because it limits the ostensible authority (or holding out the Crown) of public officer *unless he possesses some special authority.'* In later case, *Rowlands* v. *Attorney General*[20] the Supreme Court no doubt ruled that the doctrine of ostensible authority may be 'applied to enforce a liability against the state on the basis of an assurance given by the finance minister.'

However, in BD context, the assurances stood offered by a statutory authority— the PERC. The dilemma is : If there 'are no legal restraints on the contents of governmental contracts,' how may further understand the judicial valour still insisting that the 'government generally contracts only on the basis of certain fixed standard terms and conditions…?' Are financial actors bidding for divestiture of state assets obligated at all times to fully ascertain the claims of ostensible authority of the PERC via recourse to not always readily accessible histories of the cabinet decisions? Does the court after all rule that the PERC may never thus function under its

19. 54 NLR 529.
20. 72 NNLR at 385.

statutory authorization as an 'agent of government?' If so, the BD almost judicially repeals the PERC Act! If otherwise, JKH plea of its acting *bona fide* ought not so summarily dismissed as offering a 'shield for Jayasundera.'

It should not be revisited in each and every specific way with the court the narrative of JHK lack of *bona fides*, save saying that the court remains rather unpersuasive on this score. Suggestive remarks even when made by the highest court in the land need to be more amply judicially demonstrated than is the case here. No disinterested reader of the BD decision may ever be satisfied by this Supreme Court narrative of a wholesale JKH state capture. The judicial demonstration of the subversion of the rule of law, and article 12 of the Constitution, remains after based fully on the chief justice's *ipse dixit*, or commonsensical yet still unreasoned judicial say-so.

The judicial hot pursuit of an errant statutory Jayasundera (whom the court in a subsequent decision finally ousts from holding all public offices) raises some concerns about how far apex courts may after all displace otherwise constitutionally anointed public servants. Leaving this altogether aside, what remains most problematic the BD offers a novel judicial doctrine of 'guilt by association' wherein stands fully assimilated with a medley of judicial suspicion suggesting fully JKH-led virtuoso state capture! To say this is not to suggest at all that JKH may not have exercised any influence on pertinent decisions, nor that its business rivals would have hesitated to equally outperform JKH practices. However, exercising such influence may not always amount, outside *overwhelming* judicial finding, to orders of state capture by enactments of corporate governance.

VI Equality of law as discursive equality

When courts decide issues concerning the inestimable constitutional public goods – of equality before the law and equal opportunity of law – they owe some performances of discursive equality. Put another way, apex courts anywhere may not justifiably conduct themselves as functional equivalents of competitive doings of partisan politics. It is on this register then that considerations of discursive dignity come to the fore.

The BD puzzles because it fails altogether to mention the lead arguments by JKH counsel, and even by the Attorney General. What may have been argued by JKH counsel remains thus almost entirely unavailable to public view as a result, the decision reads more like an *indictment* than a reasoned *judgment* of an apex court. One has just to read paragraphs of the judgment saying the 'petitioners says' without any corresponding reference to what

the respondents may have said![21] Given the wider public concerns at stake, one must ask: Why so?

Further, the BD abounds harsh judicial strictures, which for the most part heavily invites its readers to think that the JKH fully privatised the PERC. The abundance and severity of judicial strictures here ill-serves the communicative power of dignified judicial reasoning upon which, after all, the legitimacy of an independent democratic judiciary depends considerably. Does this abundance of strictures as symptomatic of a deeper malaise: The adjudicative disability to extend equal opportunity before the law coequally to the parties in the case?

As the apex Indian justices were reminded of this malaise through writings and presence as petitioner-in-person before the Supreme Court of India, the author considers it deeply unfortunate to begin in much the same vein while writing on Sri Lankan PIL too.

21. Granting that the matter involving 31 parties is heard only for a few days and the decision proceeds on July 21, 2008, one would still expect a full and fair presentation of the respondent JKH position mainly based on written submissions filed in May. Even this does not occur! It is as if *no* worthwhile alternative grounds for judicial outcome were ever made by or on behalf of the directors of JKH!