


Then there is the fear of private capital, again born out of moralistic considerations. 'Immorality' of capitalism apart, unproductive landed capital in the village has surely become nervous about the sudden onset of large scale rentier capital from the city, because landless villagers and unemployed educated youth might find the latter more attractive than the former.

There is also a fascinating political dimension to this conflict. The entire Dambulla chapter of the Sangha is reported to have taken a decision not to take part in any ceremony attended by government politicians. They are being supported with a similar resolution by the Sangha of the Sabaragamuwa province. This is indeed a serious business

- boycotting the ruler -, particularly at a time when that ubiquitous entity called the state has been transformed into a form of public spectacle, often visibly enhanced by the saffron robe. Increasing tension between the Sangha and the state—more correctly, the Premadasa administration—is a fact in Sri Lanka's politics in 1992.

Meanwhile, let us assume that the Sangha protests succeed in halting the hotel project in Kandalama. Will the Dambulla temple distribute its 20,000 odd acres of land among the poor Sinhalese Buddhist peasants who are now heroic spectators to a great conflict between the tradition and modernization? 

Sub-Judice?

sub judice (sūb jōō' dīsi or sōōb ū' dīka) a. Underjudicial consideration (*newspaper comment on cases sub judice is prohibited*); not yet decided, still debatable, (*the matter is still sub judice*). [L, = under a judge]

It was a caustic columnist on the *Sunday Island* who put it succinctly: "Sub-Judice..., the officially endorsed doctrine of silence on matters of public interest."

The legal definition, however, of the principle of sub judice is something else. When any matter or question is the subject of a pending judicial proceeding, it is said to be sub judice. Consequently, the discussion of such a matter or question at any public forum is either totally prohibited or subject to certain limitations.

The controversy around senior policeman Udugampola's 'disclosures' (see *Pravada*, March/April) has raised yet another issue of tremendous legal and political importance. Can a public discussion of a serious political issue be stalled, because some matters pertaining to it are before the courts, pending a judicial decision? While the government is firm on the applicability of the sub judice principle to the Udugampola revelations, the opposition thinks otherwise. Still more, emerging legal opinion on the issue is critical of the government's stand.

The brief history of this sub-judice episode is also the story behind Udugampola's Black Cat tales. When the newspapers published in early April excerpts of so-called affidavits circulated by Udugampola, the AG's department went into action, filing two cases, one against Udugampola himself, and the other against *Aththa*, the Communist party newspaper. The charges were framed under emergency regulations.

Now there are two more cases filed. *Yukthiya*, a weekly Sinhalese tabloid which published some of these controversial stories, is charged for defamation. A second case against Udugampola relates to the charge of incitement against the state.

For the opposition, which was gleefully hopeful of another opportunity to mount a vigorous campaign against the Premadasa regime, these legal actions created difficulties; the government

took cover under the sub-judice principle to say 'no' to even a parliamentary debate on the Udugampola disclosures. When the motion for such a debate was presented in parliament, the opposition MPs are reported to have made references to incidents described by Udugampola. However, these references will not appear in the Hansard, the official report of parliamentary proceedings; the sub judice principle, strictly applied, would mean that these references would be expunged from the Hansard.

The controversy about the feasibility of a parliamentary discussion on a matter under judicial investigation centres on the interpretation of Standing Orders. According to Standing Orders governing the business of Sri Lanka's parliament, no reference can be made to any matter which is under jurisdiction by a court of law or to any matter on which a judicial decision is pending.

However, the issues involved in this particular episode of sub judice are not ordinary ones. Whether substantiated or not, they entail profoundly political questions about the administration in power, human rights, civil and democratic rights, elections, political parties and the behaviour of the state apparatus. Therefore, it is natural that, sub judice or not, there already is a great deal of public interest in the tales popularised by this very senior police officer.

The opposition criticism of the government's deployment of state lawyers to file legal action against Udugampola and *Aththa* is that it was a political move to stall public discussion on a subject which was politically damaging to the government. But the term 'public discussion' is also rather amorphous. Or to put it in other words, the act of public discussion on an issue of great political appeal can take many forms. For instance, anybody who watched the joint-opposition May Day procession would have noticed that Udugampola and the Black Cats were themes that engaged public



attention and discussion. There were slogans, placards and even performances directly referring to the Udugampola disclosures. Not even live cats in black were spared (those poor cats had the rather unusual experience of being carried by slogan-shouting humans for many hours from Kirulapone to Borella) by opposition enthusiasts who used Udugampola's black cat stories to attack the Premadasa regime.

A Shield?

Meanwhile, what do the lawyers and legal academics say about the application of the sub judice rule on matters that have serious political implications? The *Sunday Times*, on May 3, carried a symposium of legal opinions on the subject. Mr. K. N. Choksy, President's Counsel and perhaps President Premadasa's chief legal strategist, does not view the invoking of sub judice rule to the Udugampola affair as an attempt to 'shield' the government from opposition criticism. According to Mr. Choksy, "the rule is for the protection of the judicial system, and not to shield Parliament or the government."

Mr. H. L. de Silva, President's Counsel and a leading authority on constitutional law, takes a different view. Referring to Standing Orders that restrict parliamentary discussion on matters under judicial inquiry, he comments: "An unduly strict enforcement of these Standing Orders will stifle debate and suppress discussion and the right to be informed on important questions of public interest or public concern which is the legitimate function of parliament and indeed a national duty and responsibility."

Dealing with the political significance of a matter that has led to a criminal prosecution and on which the sub judice rule is invoked, Mr. de Silva observes:

In this kind of case, the very defense to the charges may raise questions of a distinctive political nature, human rights, social and economic questions, civil and political rights—all of which are essentially matters of national concern and eminently matters of discussion and debate at the highest level, namely parliament. The institution of criminal proceedings in such cases could become a device for avoidance of embarrassing disclosures that could affect the government's popularity.

Professor G. L. Peiris, an eminent jurist and the Vice-Chancellor of Colombo University, states that the rule must be applied in a manner which does not stifle or inhibit the basic democratic freedom of discussion. According to Professor Peiris, it is a 'mistake' to hold the view of the sub-judice principle that "inflexibly precludes discussion of any aspect of any matter which is connected with a case pending before a court of law." Precluded from public discussion are only those matters which call for an actual decision by the court. Even for a proper application of the rule, it is relevant only to jury trials where "the mind of laymen untutored in the law may well be made by what they read or hear."

It is quite clear that the government is using the sub-judice rule to prevent parliamentary discussion on the Udugampola disclosures. The opposition's reaction is to take the debate outside the

parliament. According to recent press reports, Mr. Mahinda Rajapakse, the SLFP MP from Hambantota, has said that the opposition was planning to raise the issue at the International Court of Justice in The Hague. Some other reports in the Sinhala press state that the opposition parties were organizing 'public tribunals' at various provincial towns to hear evidence of black-cat killings. The first public trial of black-cats is reportedly being planned in Matara, a Southern township where political killings had been particularly intense and vicious during 1988-90.

Opposition Campaign

The non-state-controlled press, meanwhile, has taken the Udugampola affair as the most potently sensational news story in recent times. Perhaps, this is also the first episode after the failed attempt to impeach President Premadasa last year to have aroused tremendous public curiosity and interest. Particularly for the tabloid press, which by the way has been asserting an unprecedented degree of independence *vis a vis* the government as a direct result of the impeachment controversy, the implications of sub judice on their coverage of the affair do not appear to be taken seriously. They have been publishing Udugampola 'affidavits' and even lists of names of those claimed to have been black-cat victims. *Rajaliya*, the organ of the Democratic United National Front, published in its inaugural issue a long list of such 'victims' in the Central Province. In fact, the tabloid press has become so vigorous in its sensationalized coverage of Udugampola controversy that President Premadasa himself admitted in a recent statement that he was being 'cut into shreds' by the press opposed to the government.

The debate, nevertheless, has two serious limitations. Firstly, there is the implication that *all* the political killings in 1988-90 had been carried out by the 'Black Cats' and pro-government vigilante groups; this is a position which amounts to exonerating the JVP from its own campaign of political killings and terror. In fact, many politicians and journalists in the opposition appear to have erased their memories of the JVP's complicity in creating and maintaining a reign of terror for nearly three years, not so long ago.

Secondly, almost all the critics of the government have personalized the entire political phenomenon of Black Cats to such an extent that it is primarily used to attack Mr. Premadasa. The actual political implications of informal vigilante groups and killer squads go far beyond this personalisation; they entail structures of the state, secret and subterranean, that need to be totally dismantled in any serious attempt to restore democratic norms of governance. The Opposition does not have a political critique of the state which has acquired, in response to multiple social rebellions, distinctly repressive structures and capabilities.

Neither does it have a serious commitment to a genuinely democratic programme. Hence the easiness with which the opposition is being outmaneuvered by the Premadasa administration on many issues of political importance.

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