

06 Aug, 2009

An article from Sri Lanka Guardian, forwarded by the Asian Human Rights Commission

## **SRI LANKA: When law becomes comic - part 1 & 2**

### **Constitutional change without constitutionalism?**

By Basil Fernando

(August 05, Colombo, Sri Lanka Guardian) How much sterile and empty debate people can engage in is illustrated by Sri Lankan debates about the 17th Amendment and to the 13th Amendment to the Constitution. Throughout long years of debate, the question as to whether there can be a constitutional amendment when constitutionalism itself doesn't exist does not seem to have occurred to anybody.

At least the 17th Amendment was an attempt to recreate constitutionalism by indirect means. It aimed to bring reduction of the power of the president that the Executive Presidential system in Sri Lanka has given.

In 1978 Sri Lanka walked out of the orbit of constitutionalism as known to the liberal democratic world. The document that was adapted as Sri Lanka's constitution was not a constitution when judged from the fundamental basis of a democratic constitution.

That "constitution" was mumbo jumbo, correctly described by late Dr. Colvin R. De Silva as the type of constitution made by Jean-Bédél Bokassa of Central Africa. This comic figure once declared himself the emperor of his country and made a "constitution" to suit just himself.

What the experiments in the 17th Amendment proved at the end was what any intelligent person should have known at the very beginning: that when constitutionalism is absent, constitutional change is but a mirage. While there is a lot of bitterness about the failure of the 17th Amendment, there does not exist sufficient realisation that the end result of that Amendment could not have been any better.

Constitutional amendments derive legitimacy as well as vitality only when the body of principles which constitute constitutionalism is incorporated into the constitution. The 1978 Constitution, instead of incorporating such principles, ejected such principles out of the body of the paramount law of the country.

The 1978 Constitution aimed to lift the Executive outside the law of the country. By virtue of the constitution, the executive freed itself from the liabilities related to its functions. To achieve that, the "constitution" had to be a document which did not create obligations but gives freedom to act without worrying about legal consequences. The extent to which such freeing from obligations allowed was demonstrated by the referendum of 1982, which freed the government from holding elections for the seats in parliament. Even this terrible joke did not register in the minds of Sri Lankans, including its most vocal persons.

The situation that exists in the country can be compared to the psychological phenomena that is now known as phantom limb. Many amputees who may have lost an arm or a leg continue to imagine that they still have the lost limb in the right place. They may even feel pain and imagine illnesses associated with the lost limb. This well-known psychological phenomenon also exists in other areas of life.

These days there is much talk about the 13th Amendment. There is serious talk for and against it. Some talk with passion and fury about this Amendment and it is made out as if some momentous event of hitherto unknown historical importance will take place due to this Amendment. Some try to make it as a big dream and others try to present it as perhaps the greatest catastrophe. Some even declare that they will lay down their life to prevent the realisation of this Amendment. No one seems to see the comedy that is played around this Amendment.

This brings to mind a story of two neighbours. One neighbour describes to the other that from his estate he can pluck thousands of coconuts. From then on, the other neighbour starts counting in his mind how many coconuts he would have from his estate. However, this person does not have any estate to grow coconuts on.

The government policy to extrajudicially exterminate criminals

(August 06, Colombo, Sri Lanka Guardian) The killing of alleged criminals is being considered as a cheaper method of dealing with them, rather than going through due process in courts. It is also considered to be quicker, and less risky to the officers who carry out the operations. In fact, the police, military or anyone acting under such agencies, who may themselves be underground elements, could assure themselves of complete impunity because of the secretive process of abductions taking place instead of arrest as required by law, carrying out the operation in places and time of their own choice. The numbers of persons who have already been subjected to this mode of "justice" are now a few hundred. The promise is that all criminals will soon be eliminated.

The official spokesman for the Sri Lankan police was interviewed by the Sinhala BBC service on such extrajudicial executions, in which cases the police report more or less always is that some persons were taken by the police so as to discover some weapons or other objects which such persons have divulged to have been hidden in some place. They are taken, handcuffed. However, at a crucial moment, when they are to show this evidence, they get bombs or other weapons and try to harm the officers accompanying them. The officers, in their turn, shoot them dead in self-defense.

The BBC correspondent asked the official spokesman for the police as to why the police officers do not take precautions when they are taking criminals out for investigations, and how people in handcuffs could manage to attack the policemen. This spokesman told the BBC to not underestimate these very extremely efficient fellows who could do anything despite of handcuffs or any other restraints. The creation of this image of criminals being superhuman is also a necessary element in the propaganda supporting extrajudicial elimination of alleged criminal elements.

The BBC correspondent further questioned the police spokesmen and asked how they assess these people as criminals when they are only suspects in alleged crimes. True to his element, the police spokesmen said that according to them (that is, the police), they are criminals and not suspects. According to the law of Sri Lanka, anyone undergoing interrogation is a suspect, and not even named an accused. A person is named as an accused only when the charges are filed before courts. However, the official spokesman for the police does not accept this distinction. Since what he says represents the official position of the Sri Lankan police, then the police themselves have taken the power to convict. Thus, the presumption of innocence is no longer a factor of any significance. Nor is judging a person and imposing punishment any longer the sole prerogative of the judiciary.

The comic manner in which this practice of abduction instead of arrest and what follows can be abused was illustrated in two incidents which came to public notice this week. An assistant coordination officer working under the centre for management of the ministry of disaster management and human rights was abducted from his house. After receiving frenetic calls on his behalf, the minister of this ministry made telephone calls all over and managed to locate this person in the custody of some police group. The police accused this person of being a dangerous criminal and a leader of a criminal gang. They also, according to reports, have stated that T56 firearm and ammunition have been found from his house. The minister himself has to make a public statement condemning the kidnapping.

A further published report states thus: Ravindra, a schoolgoing son of the director of the Colombo Criminal Investigation Division (CID), had a quarrel with another schoolmate named Chamie. Chamie attended a test in the school on the fourth of July, and then went with a friend of his, Nipuna, to have tea. While they were having tea, Ravindra came and tried to provoke a fight. And when they came out of the teashop and were walking towards their boarding house, a police jeep followed them. The jeep turned and blocked their path.

About four persons, carrying firearms, got out of the jeep. They held Chamie, pressed him against the wall and put a pistol to his head. They held a pistol also to the head of Nipuna. When they were trying to attack Chamie, Nipuna shouted to let go of Chamie to let go of Chamie and to take him instead. Then, these policemen took Nipuna to the jeep and took him to the house of Ravindra. He was asked to get down and forced to crawl. While he was crawling, he was beaten with poles. The marks of such beatings were later shown to the media, after Nipuna was rescued. Nipuna also complained that the mother of Ravindra, who is the wife of the director of the CID in Colombo, stood on his body and asked, "Do you know my weight now?" Nipuna was only rescued due to the quick intervention of his relatives when they got the information from Chamie and reported the matter to the Inspector General of Police (IGP) and other authorities.

Nipuna was taken to Paliyagoda Criminal Investigation Division, where, according to relatives, the father of Ravindra, the director of CID in Colombo, himself joined in. According to Nipuna, he was threatened to be produced in front of a court on the charge of possession of bombs, and he was told that the only way to avoid that is to sign a statement. However, the only statement the police took from him was his

name, his address and his ID card number. The boy's life was saved only due to quick intervention from his family, who were able to get assistance from outside.

The horror story of extrajudicial killings under the pretext of crime prevention takes even a more sinister turn due to some practices which have evolved in the Magistrate's Courts, where in most instances the magistrates declare "justifiable homicide" purely based on the report of the incident as filed by the police. The police spokesman at the BBC interview said that obviously no such killings of criminals are taking place in the country because the judges themselves have confirmed these as justifiable homicide.

When magistrates conduct inquests and other inquiries, they are expected to follow the legal procedure in the country. The criminal procedure code obligates investigations into all suspicious deaths, particularly in cases where the police conduct itself is suspicious. Such investigations should be carried out by independent investigating units that are able to resist the pressures from police of local areas. It is the duty of the magistrates to ensure that proper legal process is carried out in all cases of suspicious deaths.

The scales of these killings are such that it points a finger serious defects existing in the Magistrate Court inquiries. As these killings are so well known, it is the duty of the Supreme Court of Sri Lanka to inquire into the manner in which magistrates conduct such inquiries. Given the seriousness of the situation, the Supreme Court needs to lay down guidelines stating the basic legal obligations of the magistrates. It is also the Supreme Court's duty to ensure proper supervision of the manner in which the magistrates carry out their obligations.

To an outsider, such a policy of elimination of criminals through extrajudicial killings may sound fictitious. However, after over forty years of using police and military to engage in extrajudicial killings under the pretext of suppressing terrorism, what is law and what is fiction is no longer clear in Sri Lanka. The central task of recreating the authority of law in Sri Lanka is to deal with the police's arbitrary use of power, which has become a menace to the country. When the guardians become the violators, it is only the society's strong reaction to such violations that can pave way for police reforms. If the horror-creating police of Sri Lanka cannot be reformed, then there is hardly any reason to be hopeful for the country's future.

The original version of the article published in Sri Lanka Guardian could be viewed here.

###

About AHRC: The Asian Human Rights Commission is a regional non-governmental organisation monitoring and lobbying human rights issues in Asia. The Hong Kong-based group was founded in 1984. The above statement has only been forwarded by the AHRC.

-----

Asian Human Rights Commission

19/F, Go-Up Commercial Building,

998 Canton Road, Kowloon, Hongkong S.A.R.

Tel: +(852) - 2698-6339 Fax: +(852) - 2698-6367

Please consider the environment before printing this email.