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SRI LANKA: When the law becomes comic - Part 10

Undoing the small reforms of the former Attorney General, KC Kamalabayson

By Basil Fernando

(August 17, Colombo, Sri Lanka Guardian) KC Kamalabayson, PC, was the Attorney General of Sri Lanka from 15th October 1999 to the 7th of April 2007. As compared to several Attorney Generals before him, beginning particularly with Sunil Silva, and those who followed, KC Kamalabayson is remembered as a relatively more politically neutral person, who attempted to keep a fine balance in a situation where rule of law and the legal institutions were much under threat.

Let it be said clearly that KC Kamalabayson was not a great reformer. In fact, particularly since 1978, things have gone so fundamentally wrong on all matters relating to law, and executive control has spread so much, that the room for independence for the Attorney General's department has been very much restricted. As several previous Attorney Generals have willingly cooperated with the existing regimes, there was not much of an effort to maintain the institution's independence. Despite the colossal attack on constitutionalism and all the best-known principles of a rule of law, no Attorney General thought fit to demonstrate their opposition to the fundamentally wrong legal positions of several regimes. No one has gone on record by way of resignation to register a protest against the downsliding of the most basic norms of law in the country.

By the time KC Kamalabayson became the Attorney General, the country had witnessed some of the most colossal human rights abuses in its entire history as a modern state. From the late '80s to the early '90s, at least 30,000 disappearances took place, according to official figures. There are many sources that claim the numbers to be much higher. As pointed out by Commissions of Inquiry into Forced Disappearances, the term disappearance in Sri Lanka meant arrest taking place by way of kidnapping and interrogation, often in places which are not recognized legally as places of detention, gruesome torture, done mainly to get names of other persons, killings, and then secret disposal of bodies. Killing persons after securing arrest is a distortion of all legal norms relating to criminal justice. But this had become a normal practice by then.

It was a difficult time to become an Attorney General for anyone who had some integrity and a conscience. Of course, recent history has shown that a sense of integrity and possession of a conscience are not necessary requirements to become a Sri Lankan Attorney General. KC Kamalabayson, for his part, was aware of the great contradiction facing himself, wearing the mantle of the Attorney General, and also the problem facing the institution of which he was the leader.

It cannot be said that KC Kamalabayson contributed decisively to deal with the problems facing the institution in terms of the rule of law. He was unable to even prosecute effectively many of the cases of disappearances against police and military officers, against whom the Commissions of Inquiry had reported to have adequate evidence to prosecute. The matter of prosecuting police and military officers for disappearances was a highly sensitive political issue. Perhaps it would have taken a giant to withstand the pressures and to do as required by law the task of the prosecutor.

Despite of many limitations, KC Samalabayson showed that he was aware of the acute problems facing the country's rule of law system. In a speech made on the second of December 2003, on the occasion of the 13th Kanchana Abhayapala Memorial Lecture, he spoke of many problems facing the country's rule of law system. Among these he highlighted the absence of a witness protection law and program, delays in courts, lack of legal provisions protecting the victims of crime, lack of investment on administration of justice by allocation of sufficient funds, and even the inadequacy of the staff at the Attorney General's Department itself to deal with its functions.

KC Kamalabayson was aware of the tremendous crisis facing the country's criminal investigation function, which is exercised through the police. His most remarkable contribution was the decision to prosecute cases under the Convention against Torture and Other Cruel and Other Inhuman and Punishment Act (CAT Act), No. 22 of 1994.

Procedurally, he did this by referring all the complaints of torture received from UN agencies or local agencies to a Special Inquiry Unit (SIU) of the Criminal Investigation Division (CID). Within a short period of time, several SIUs investigated a large number of cases and submitted files to the Attorney General's department for the prosecution of officers for the crime of torture. This crime, according to the CAT Act, carried a mandatory sentence of 7 years rigorous imprisonment and a 10,000 rupee fine. During this time, there were over sixty files which the AG's department decided it had adequate evidence to prosecute. In many of these cases, the department filed indictments in High Courts. Most of these cases are still pending before trial courts or before Appeal Courts.

However, after the retirement of KC Kamalabayson, it did not take a long time for the Attorney General's department to change the policy in relation to the referral of complaints through SIUs. The result is that there is no longer any high level of inquiries into the allegations of torture. Even where there is some evidence by other means, the department most of the time follows the procedure of referring the cases to the Magistrate's Courts to be prosecuted under the Penal Code under simple hurt.

Thus, the clock has been turned back the time prior to the CAT Act and prior to a serious policy of prosecution on torture cases. CR De Silva as Attorney General often mentioned that the department would not bow to the pressure of NGOs, meaning that prosecuting cases under the CAT Act is some sort of a bowing to external pressures. AG department officers also made reports to UN agencies, including the UN CAT committee, stating that there is no serious problem of torture in Sri Lanka.

This policy adopted during CR De Silva's time is still being followed. What is more, in one case before the Supreme Court, the Attorney General's department recently appeared in a fundamental rights application for an alleged perpetrator, thus deviating from the earlier policy of the department not to provide legal representation for officers who are facing petitions relating to torture.

As mentioned above, it would be an exaggeration to speak of KC Kamalabayson as a great reformer. However, it can be said in all fairness that he saw that in relation to the executive, the Attorney General's department should not be playing a partisan role to any regime. That was also perhaps the reason why he was not given an extension, something that is usually given to officers of his rank at the age of retirement.

It was to his credit that he saw that the prosecutor's role in relation to torture can only be effectively done by insisting on proper inquiries into allegations of torture, which can only be done by competent and impartial investigators. Given the fact that torture involves investigation into the conduct of police or military officers, such an impartial unit can only be the SIU of the Criminal Investigation Division.

A friend of KC Kamalabayson narrated an incident at the time of his retirement. When asked what he thought of the legal system in the country, he is said to have remarked that he saw nothing anymore that can be called a legal system, and that he sees only some buildings.

In the Kanchana Abhayapala lecture he posed the following question: "I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards, spending literally millions of dollars, rather than to have a peaceful and a law-abiding society where rule of law prevails?"

How will the Attorney General's department now answer this question?

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