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SRI LANKA: When law becomes comic - Part Six

ATTORNEY GENERAL'S DEPARTMENT IS A PHANTOM LIMB

By Basil Fernando

(August 12, Colombo, Sri Lanka Guardian) At one time there existed a department called the Attorney General's department. Its functions were to provide legal advice to the government on all matters of public interest, and to be the prosecuting agency in Sri Lanka. This agency still exists in name. However, substantially it has lost its place as the government's legal adviser and prosecuting agency. Judging by the way the government's acts now, it cannot be said that it is acting on the basis of proper legal advice. Judging from so many cases which constitute serious crimes and are not prosecuted, it is also not possible to say that there is a genuine and an authentic prosecuting agency in the country. Added to this, judging by filling of cases purely for political purposes, it is also no longer possible to say that the prosecutions in Sri Lanka are undertaken purely on the basis on law.

Virtual demise of the Attorney General's department is a matter of grave concern because the function of being legal adviser to the government and being the prosecutor are vital functions to a nation based on rule of law. However, Sri Lanka is no longer a nation based on rule of law. The Executive can do whatever it wishes. There is no law to obstruct arbitrary actions of the executive. The executive can kill, arrest, detain, kidnap, torture, and arbitrarily deprive freedom of expression and assembly. Above all it can plunder state property and use it for private purposes. The executive can ignore the constitution itself. There is no one to advise the government that all this is illegal. There is also no one to prosecute when the law is violated for political purposes, however blatant the violations may be.

How did the Attorney General's department lose its role and arrive at the present position of pathetic subservience to the executive? It did not happen within one day. It was a long journey in which the department leaders gave in to the wishes of the executive, some due to pressures, but mostly due to opportunism of those officers who were too eager to please the executive.

Some episodes of this descent are well-known: under the regimes of presidents J R Jayawardane and Premadasa the legal adviser's function of Attorney General was ignored. The 1978 constitution, which was directed to create a monster with absolute power, was not resisted by the Attorney General's department. There is no evidence to suggest that the department had given any advice to the government about the implications of this constitution on the rule of law system in Sri Lanka. When president Jayawardane started a war against the independence of judiciary, there is nothing to indicate that the department openly or confidentially gave any advice to the government on the unconstitutional nature of interference and the possible adverse consequences of this move. Detailed studies of illegal actions done during these periods would demonstrate the extent to which the department compromised all the basic principles on which the department was founded as an institution within the common law tradition.

During these two regimes, the Attorney General's department persecuted the political opponents of the regimes. The case against Srimawo Bandaranayake and others who were prosecuted under special commissions had the full cooperation of the department. During this time there were also several criminal cases file against SLFP politicians such as Vijaya Kumaranatunga and the present president Mahinda Rajapaksha and others, purely for political reasons. Though these cases didn't end up in prosecutions, the initial actions of arrest and detention were initiated through the Attorney General's department.

The 1982 proposal for holding a referendum to extend the term of the parliament for another six years would have shocked any legal department based on common law. However, Sri Lanka's Attorney General's department had no legal advice to offer to the government against this move. This completely destroyed not

only the country's electoral system, but also the very basis of law through which government derived legitimacy. By this move the parliament itself derived its legitimacy by a fake act of a referendum.

The best test of legal advice is the advice given on constitutional matters. The attempts by the executive to undo the very basis of constitutionalism, as happened under these regimes, should have been resisted by the Attorney General as the legal adviser to the government. If that led to the conflict, the legal adviser should have faced the conflict, rather than avoid the conflict by unconscionable compromises. Had the Attorney General resisted these unconstitutional moves of the executive, it would have been a warning of the serious attack on the legal framework of the country by the executive, though perhaps the holders of the position of the Attorney General may have had to face some consequences for opposing the illegal moves of the executive. However, the benefit of such opposition would have been the opportunities provided to the nation to reflect on these vital issues. Even if the executive would still have persisted in pursuing its illegal moves, it would soon have met the opposition from the people, and thus the catastrophe that the nation faces now may have been avoided if the Attorney General's department stuck to the law that it is their duty to protect.

In the late eighties, emergency laws were used to encourage extrajudicial killings. At least 30,000 persons, mostly from the south, disappeared during this period. The disappearances were caused through the emergency regulations, which were framed in a manner to make such extrajudicial killing possible. For example the magistrates were deprived of the rights to conduct inquests into all suspicious deaths by granting only officers of the rank of ASPs and above the right to grant permissions for burials. As a result of this regulation, which shifted the law that all suspicious deaths must be investigated, the bodies of people who have been killed by police or related agencies were not brought before a magistrate, and buried without autopsy. This was a regulation designed to permit mass murder. While there is all the reason to believe that AG's department was involved in advising on the draft of these regulations, there is no evidence at all to indicate that the department in any way opposed these regulations and pointed to the illegality of designing and facilitating mass murders.

When Tamil prisoners were killed inside the Walikada prison in July 1983, officers from the Attorney General's department participated in the inquest proceedings, not in order to prosecute the offenders, but in order to hush up what really took place. Details of such involvements have been well documented by several sources. This tradition of the Attorney General's department to participate in inquiries to protect alleged violators in crimes where state officers are the suspects came to be seriously criticized also by the IIGEP (International Group of Eminent Persons).

The narrative of the decay and degenerations of the Attorney General's department would take many pages. In fact, there is a lot that is written.

Today this department is similar to a phantom limb. Many amputees continue to believe that their lost limbs still exist. Similarly people in Sri Lanka keep on believing that the Attorney General's department as the legal adviser and prosecutor still exists as it used to exist. What exists today is however only the title of the institution. In trying to find the causes of lawlessness that prevail in the country, it is necessary to understand the transformation of this department. Return to the rule of law in Sri Lanka requires also fundamental reforms to this institution.

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