

Rule of law in Sri Lanka and colonialism by default

by Dr K V S K Nathan

The credibility of two reports from the International Bar Association and the Sri Lankan Marga Institute are considered by the author, who comments on issues raised by them – such as violations of human rights, political leadership, constitutional and judicial reforms, and the performance of the legal profession – in the context of similar problems faced by the developed world.

Developing countries for the most part have benefitted from the legacy left behind by the colonial powers in many areas of economic and social activity. The legal and judicial systems the powers left behind have endured for many decades and the concept of the rule of law had been deeply impressed upon the intellectuals and elite, if not upon the entire body of politicians, bureaucrats and the police. The people expect to be governed by the rule of law, but over the years, in most countries, those in power have uniformly ignored the absolute nature of the rule of law and, for one reason or another, considered themselves as the equivalent of law and ignored or changed the systems for the worse in the name of economic progress and civil stability.

The people were presumed not to know what was good for them. In a way, this is also a relict of the colonial past although the colonial rulers were careful to maintain a semblance of order and the rule of law by invoking their home country legislation or simply amending the law in a methodical way to protect their own interests and security. The human and civil rights of the natives were often overridden by such legislative acts buttressed by neatly-worded decisions of appellate courts in their home countries. Some of those old laws, called “ordinances” by the English because they were not passed by a democratically elected Parliament, still remain on the statute books in some ex-colonies and are even invoked or copied from time to time to this day. The rule of law was one thing in the colonies and quite another in the home countries.

Recently, a friend of mine in Sri Lanka sent me two impressive sounding reports by the International Bar Association and the Sri Lankan Marga Institute published in 2002. The IBA report focuses almost exclusively on violations of civil and human rights by law enforcement agencies and political leadership in Sri Lanka and the case for constitutional and judicial reforms, and the Marga report details the results of a market research on the

performance of the legal profession, the judiciary and the police.

It is particularly difficult for me to accept the credibility of the report by the IBA because much the same criticism it makes in its report can be made of some judges and the police in the UK, India and Malaysia from which the members of the mission have been drawn, and in the USA where I lived for nearly 20 years. There are many examples in those countries of miscarriages of justice and the brutality of the police. As in Sri Lanka, almost all the examples are the outcome of the exercise of political power and or elements of conscious and unconscious racism and bigotry.

An example that comes to my mind is the imprisonment of IRA supporters in England for several years – I believe for nearly two decades – before they were released on grounds of police fabrication of evidence. Some months ago, a High Court judge was arrested for being drunk and disorderly. BBC TV has aired a programme documenting evidence of institutional racism among the police in England. There are horror stories in the US of the unfortunate experiences of blacks at the hands of the police, and some judges and juries. In Malaysia, criticism was levied against Prime Minister Mahathir in the matter of the former finance minister who was in prison for criminal offences. It was alleged by UK and US commentators that he was prosecuted for his opposition to the decision by the prime minister to control foreign currency flows against the recommendations of the UK and US governments and the World Bank and IMF. India is lower in ranking than Sri Lanka in the least corrupt country league table published by Transparency International.

COMMITMENT TO THE RULE OF LAW

But the reason civilian life in those countries is technically stable is not so much because the standards of justice and police conduct are exemplary in the absolute

sense, but because of their strong or promising economies which no segment of the society wants to disrupt, and the commitment to the rule of law in the narrow sense. By this I mean the acceptance by everyone, including the government, of judgments rendered in the courts – especially at the highest appellate court level – however unpleasant these judgments might seem to be to political and legal analysts and civil and human rights observers. An extreme example is the US Supreme Court decision on the last US presidential elections, despite the fact that the voting practices in some Florida counties were discriminatory. A decision like that in Sri Lanka would have resulted in chaos and bloodshed.

That is not to say that the IBA report is not an honest and valid report and that I, in any way, wish to impugn the integrity of the three IBA mission members, but I believe doubt can be cast on the practical value and effectiveness of their sweeping proposals for constitutional and judicial reforms. I am reminded of the World Bank appraisal missions to developing countries where, at the end of a two weeks visit, the missions are expected by World Bank management to identify and recommend solutions to all sectoral problems in the country concerned based on a superficial understanding of the underlying causes. The World Bank staff have been doing that again and again in successive missions to the same country for more than 50 years, frustrating both the country and themselves. I used reluctantly to lead many of those missions because I felt that World Bank loans and credits were primarily a vehicle to market goods and services from the developed countries.

The IBA fact-finding mission was in Sri Lanka for three days only (August 28–31). How did the mission members manage to conduct in-depth interviews of all those people they mention in the report to enable the mission to make such comprehensive proposals? Their uncontrolled statistics can be misleading and unfair to the Sri Lankan judiciary. It is a testimony to the Sri Lankan government, even though the government was destructive in many ways during its tenure, that it allowed the IBA mission to freely carry out its mission and that the Chief Justice himself cooperated, albeit in a limited fashion. The Chief Justice has been subject to relentless criticism for his alleged on-court and out-of-court behavior. These allegations are not uncommon even in the developed countries – very recently, an English High Court judge was arrested for taking indecent pictures of children. The proper course of action if the allegations against the Chief Justice have substance, is a thorough inquiry followed by criminal prosecutions, civil and disciplinary actions as appropriate, and I understand from press reports that steps are being taken in that direction.

My severe criticism of the IBA mission is reserved for its text book approach to the subjects of independence of the judiciary and the rule of law in Sri Lanka. The mission could have benefitted from a comparison with the judiciary

and law enforcement agencies of the developed countries and the countries from which they were drawn and from their own experiences. That would have introduced some practical value to their recommendations. As the report presently stands, the IBA report conclusions for the most part are a reproduction of what any law student learns in the LLM courses on constitutional law, jurisprudence and civil and human rights in Leeds, London and Kent Universities – and there are so many LLMs and PhDs in law in Sri Lanka.

JUDICIAL BIAS

There is no part of the world where the judiciary is, or can be, absolutely independent of the politics of the day and the sitting government. Judges are drawn from and serve the societies they live in, and are directly or indirectly appointed by the leadership of political parties. Lord Brennan QC, a signatory to the IBA Report, should know that. The Lord Chancellor, who presides over the House of Lords when it is constituted as the final appellate court in the UK, is appointed personally by the Prime Minister. Mr Blair appointed his former head of the chambers to the position. All judges in England are appointed by the Lord Chancellor, who is himself a political appointee and who attends the inner Cabinet meetings at Downing Street during his term. The judges in the US Supreme Court are all nominees of the President, and some of them rarely practised in the courts of law. US judges and chiefs of police at state, county and district levels campaign for office in elections as party nominees.

I have myself cited examples of judicial bias in England in my articles “Barristers in England – Paragons of Virtue or Just Being Boys” and “Why Did You Not Get The Right Arbitrator” in the December 1999 and July 2000 issues of the International Arbitration Report. The first involved an English Commercial Court decision by Mr Justice Rix in *Laker Airways v FLS Aerospace Ltd and Burnton et al.* to the effect that a party nomination of a barrister as an arbitrator in an arbitration in which the counsel for the party was a fellow barrister in the same chambers was perfectly legitimate. Imagine what would have happened if two Sri Lankan attorneys-at-law sharing the same address appeared as counsel and arbitrator in the same dispute in Sri Lanka. That would have been hailed as another example of corruption. Laker Airways challenged the appointment of the party nominated arbitrator with no success. The assumption in government circles is that English barristers and judges are paragons of virtue – which they emphatically are not.

In *AT & T Corp v Saudi Cable Co* the English Court of Appeal upheld an award by an arbitral tribunal presided over by a Canadian QC who was a director of, and held shares in, a company which had an interest in the outcome of the arbitration. I wondered in my article if the court would have decided otherwise had the arbitrator been from a developing country and/or is not a QC. What the

above means is that judicial bias, conscious or not, is not peculiar to Sri Lanka, and the English court judges go further than their Sri Lankan counterparts in displaying bias even in commercial cases where the reputation of their fellow barristers or their institutions is impugned. I have suggested elsewhere that non-academic titles should not be used in international arbitrations or even in domestic courts. The market will decide on a day to day basis as to who is good and who is not. Titles such as QC merely increase litigation costs and intimidate witnesses and judges; and there is no guarantee that a QC sustains his or her quality for ever. Besides, those who confer these titles are often motivated by irrelevant considerations.

In Italy, a simple civil case can go on for some 10 years or more in the courts of law before a judgment is meted out. In my opinion, the power and influence of the Mafia can be partly attributed to the failure of the courts to ensure orderly conduct in the business and commercial world. Informal means of resolution of conflicts by force or otherwise are bound to crop up when the judicial systems are not efficient. Arbitration is itself a product of the inability of a judicial system by the very nature of control by the government to meet the special needs of particular sectors, especially the business sector.

No country is perfect, least of all, Sri Lanka. Its 1978 constitution is an unwieldy, divisive instrument which was rushed through a Westminster-style parliament by a party that had absolute power because of its large majority. Successive governments have gradually propelled the country into a society in which people do not trust each other and do not respect their own institutions including the judiciary – so much so that the people do not accept anything or any body as credible unless it or he or she emanates from a European country, and the people have surrendered their self respect and dignity. Regretfully, the government has established institutions to encourage people to leave the country in massive numbers, especially women, with potentially grave consequences to the social and moral fabric of Sri Lankan life, besides endangering the economy in the long run.

Bad but honestly rendered advice from experts from the World Bank, bilateral lending and credit institutions, official and non-official aid agencies and foreign diplomats is freely accepted by those in power, despite the existence of a large local professional and skilled manpower base and its opposition to partisan Government policies. The society has developed into a divisive self destructive one, and continues to be so despite the lessons of the past. There is no effort to negotiate in good faith and reach out to each other at a personal level, except stiffly through Norwegian and other foreign diplomats. The availability of these intermediaries merely keep peoples apart. The division of the country becomes absolute. There is an unhealthy tendency to look for glances of approval and honours from foreign commercial, diplomatic and political interests. Foreign exchange earned by hardworking Sri Lankan maids

in foreign countries is squandered by the Government on trips abroad and a lavish life style, while the World Bank quite happily encourages this dissolute way of public life by funding not only capital but also maintenance expenditures including local project staff salaries and emoluments to buy their support for the loans and credits.

JUDICIAL AND CONSTITUTIONAL REFORMS

Besides Sri Lanka, many developed countries are considering radical judicial and constitutional reforms. The English are currently debating the reorganization of the legal profession and the system of appointments to the bench, besides contemplating constitutional reforms to meet the demands of the Scots and the Welsh. The Italian Lega Nord is pressing for the creation of a federal constitution for their country with local autonomy for the northern regions, and the government has recently introduced some controversial reforms to the judiciary. But life goes on and their economies are growing from strength to strength, while the Sri Lankan economy is still weak and its capacity to sustain recent growth is in question.

What it all means is that the priority in Sri Lanka is not constitutional and judicial reforms *per se* but a change in the mentality of those entrusted with the task of leading the country and making appointments to the law enforcement agencies and the judiciary. In my opinion, the contribution of the IBA report lies in its reference to the training of judges rather than its detailed proposals for the appointment of judges and their emoluments. The point to remember is that the existence of laws themselves is not a guarantee that politicians, bureaucrats, police and the judges will conduct themselves according to the letter of the law, and laws are not perfect anyway. What binds people together is a collective determination that certain things are simply not done in a civilized society, namely, interfering with the independence of the bureaucrats, the police and the judges, and violating basic civil and human rights.

Therefore, in my opinion, the focus of training in judicial independence and conduct should not be confined only to judges, as the IBA report and World Bank judicial reform project envisage, but extended also to politicians, bureaucrats, and police and security organizations because they all perform quasi judicial functions. In my article on commercial law reform in the Russian Federation published in the March 2000 issue of *Amicus Curiae*, I write as follows:

“Much of judicial independence is affected by the political culture, politicians themselves and the bureaucrats, rather than any inherent lack of intellectual capacity on the part of lawyers and judges to understand and put into practice Western democratic concepts.”

This is also true of the situation in Sri Lanka.

I fully agree with the IBA report's rejection of the application of the doctrine of necessity regarded by some – including the Norwegian mediators and some government negotiators – as a legitimate device to effect needed constitutional reforms in Sri Lanka provided, however, that the law recognizes certain fundamental obligations relating to civil and human rights as binding on the state. The Norwegians have introduced a dangerous doctrine into the country. Once you subscribe to the doctrine of necessity, the country puts itself on a slippery slope leading to anarchy. Sri Lanka will be confronted with successive coups on grounds of necessity, as in many parts of Africa and Pakistan. The consequences to economic development are incalculable. The rule of law is an absolute and should not be compromised at any cost.

However, rule of law does not simply mean that no one is above the law and everyone including the politicians and legal and judicial officers themselves must follow the law. In the Sri Lankan context, everyone without exception including the President and Prime Minister must respect and accept the judgments made in a judicial tribunal on an equal basis – even those made by imperfect judges. It must be understood that civilian life cannot halt while the authorities debate and introduce needed legal and judicial reforms, and there is no perfect solution anywhere in the world. People must discipline themselves to comply with the orders, decisions and judgments of judicial tribunals.

INSTANCES OF CORRUPTION AND INEFFICIENCY

The Marga Institute report reads like an opinion poll, and discloses concerns which should be addressed by the government and players in the legal and judicial system in the country. It is worthy of notice that instances of bribes and corruption in the ordinary sense of the word, meaning the exchange of promises of definable material benefits, have not been levied against or attributed in any way to the judges, although other players such as court officers have been implicated.

This takes place in the developed countries too at lower levels of the bureaucracy and judicial administration. Italy is notorious for it. Even at higher levels in developed countries such as the USA and England, bureaucrats cannot be relied upon, except to pursue the political interests of those who appointed them. We should certainly not condone such conduct in Sri Lanka but it is important to draw a distinction between purely administrative officials and those who exercise judicial functions such as the judges and law enforcement officers and senior members of the bureaucracy, who should be absolutely impartial and independent in their dealings with the public.

What is missing and relevant for our purpose is the evaluation of performance of judges at different levels of the judicial process, especially at the highest level, namely, the Supreme Court. I guess from the report that

inefficiency is increasingly evident as you go down the ranks of the judges. The report is not a sufficient basis for the quantum leap the authors have made in order to make specific recommendations for legal and judicial reforms. In particular, I see it as a regressive step to divide the legal profession into two branches as in England although, by and large, in England the dividing lines between the solicitors and barristers are increasingly blurry. In no other country in the world – including the common law countries such as the US, Australia and New Zealand – is the profession divided. The proposed division is a relic of the class-ridden society England still is to a significant degree.

In the end, however, blame primarily lies not at the doors of the institutions and systems in place but at the political leadership in the country. They set the style, tone and pace of justice and pride in the country. The laws and administration and enforcement of the laws themselves do not guarantee a secure, safe and proud democratic society without the adoption of conventions of proper and decent behavior and conduct in public life. They have the force of law and should bind us all, even if not embodied in laws passed by parliament. That is the difference between Sri Lanka and the developed countries – the conventions as distinct from law that govern those countries and bind the societies there – and not the laws and legal and judicial institutions as such. They are as imperfect as in Sri Lanka.

The trouble with both the IBA and Margot reports is that the recommendations are so outrageously theoretical that there is no practical way to implement them. The same can be said of thousands of reports made by World Bank missions, including legal and judicial reform missions in pursuit of their theoretical objectives. Simply put, a respect for the law and judicial institutions and decisions by judicial and quasi judicial bodies can be a start, provided political leadership can instill into the minds of the people as well as judicial officers and the police and bureaucrats that certain rights of the people are inviolable, and they themselves observe these rights to the letter even at personal cost.

President Truman, when he was accused of appointing a friend to the Supreme Court, remarked that: "...packing the Supreme Court simply can't be done. I have tried it, and it won't work. Whenever you put a man on the Supreme Court, he ceases to be your friend." Sri Lankan judges may well take their cue from President Truman's telling observation, and its meaning and significance. The meaning is that a judge does not identify himself or herself with the political authority that made the appointment directly or indirectly via appointing commissions, and the significance is that he or she should be absolutely independent in the exercise of his or her duties, and correct in his or her public and private conduct. 

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