

Recognizing the evils of a 'non-rule of law system' : Changing ourselves and our governments

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Book review of Sri Lanka; Impunity, Criminal Justice and Human Rights, by Basil Fernando, published by the Asian Human Rights Commission (March 2010).

For years, much of the work by human rights practitioners in the Asian region had been directed towards challenging their governments. To that end, much energy had been expended on theoretical critiques of what had gone wrong with constitutions, laws and systems of governance. The fact that theoretical critiques had to be buttressed by solid documentation on the ground or ordinary peoples' experiences with rights was recognized as important. However, not much thought was given to the manner in which that documentation could influence, and most importantly change, the basic nature of the theoretical critique itself.

Increasingly though, it is becoming evident that this interaction is core to the success of human rights activism. Challenging governments alone will not do. Rather, a transformative change needs to take place in the very manner in which human rights activism is engaged in, if the process is to result in concrete changes in our societal environments.

The most recent book authored by Basil Fernando and published by the Asian Human Rights Commission (AHRC), appropriately titled *Sri Lanka; Impunity, Criminal Justice & Human Rights* makes an important contribution to this process of transformative change. Its focus is directed not only at the failings of governments, but also at encouraging critical thinking on the need to change strategies of human rights activism within the human rights community itself. Its contents are especially important to Sri Lanka and merit reflection one year after the ending of active war in the North and East, when the deterioration of civil liberties has been aggravated and not lessened.

The direction that the book takes is hardly surprising, considering that strong advocacy based on ordinary peoples' experiences with the systems and procedures that are supposed to protect them but seldom do, has been an unflinching characteristic of the AHRC's work during previous decades. In that regard, it has been successful in creating a strong documentation base of

endemic human rights violations and failures in laws, systems and procedures that a hostile government has not been able to break due to its fundamental fact-based approach.

What this particular book does is to collate some of these experiences and then take the analysis to a separate level. Its consistent warning is that there is little effective point talking of the protection and promotion of human rights in the absence of serious institutional reforms focusing on the police, the prosecution and the judiciary. A mere focus on education and training has no impact where the institutional defects are so great as to subvert the very meaning of the institutions that exist. For example, as the author reminds us, “human rights education being imparted to state officers is of no value when the institutions meant to protect human rights are so politicized that they work to violate the rights of certain categories of persons” . This is equally true of national human rights commissions. Where fundamental flaws in justice institutions leave little room for these commissions to work towards human rights protections and where these commissions cannot take the place of the police, the prosecution and the judiciary, how can we expect them to succeed by any stretch of the imagination?

The analysis compels the reader to confront the unpleasant fact—as posed through ordinary persons’ experiences with the law and the legal system—that Sri Lanka has become a ‘non-rule of law’ system. In other words, it is not that theoretical constitutions, laws and practices do not exist in the country; rather, they do exist but are so subverted and deprived of actual meaning that the reality is as if they do not exist in practice. This is an important distinction between what prevails in non-rule of law systems and that in flawed-though-functioning rule of law systems.

The difficulty lies in comprehending the extent of the gravity of institutional failure in a ‘non-rule of law’ system. In flawed rule of law systems, individuals and groups are able to challenge injustice (perceived or actual, as the case may be) without fear of physical or other harm to oneself or their loved ones. In ‘non-rule of law’ systems, this is not possible. Legal remedies do not have much meaning. Critical remedies such as habeas corpus (producing the body) are rendered without value, as the author specifically states, by “delays in adjudication, witness intimidation and the destruction of evidence” . Judges become chronically lax in their duties.

The primary reason custodial deaths go unpunished in Sri Lanka for instance, is due as much to the laxity of the magistrate as it is to the excessive actions of the police. In many cases, the deaths are due to police torture of the suspects, disguised in fictitious explanations such as that he was attempting to run away or that he was resisting arrest. However, magistrates do not assume a very pro-active role in the stringent questioning of police actions in these circumstances. On the contrary, a verdict is entered of justifiable homicide without any questioning of police actions.

Though the law and judicial interpretation thereof specifies that reasons be given for arrest, this caution is not observed in practice. Family members are not informed of the arrest and are often denied access to detainees. They are unable to obtain legal representation for the suspect due to financial difficulties in retaining lawyers and as a result, the police are encouraged to fabricate stories of involvement in grave crimes and request remand from the magistrate. Sometimes, linkages between the police and criminal lawyers prevent a suspect from being represented adequately.

Further, due to the magistrate not questioning the police adequately, fabricated stories serve to put a suspect unjustifiably in remand. Even if the suspect is granted bail, this serves little purpose as an adequate surety cannot be furnished. A further problematic development is the production of a suspect at the home of a magistrate or an acting magistrate, where in many cases decoys or impersonators are produced.

While public pressure to effectively address the high rate of crime is manifested, the response on the part of the police department is not to engage in systematic and sustained law enforcement efforts but rather, to allow police officers to penalize marginalized individuals who cannot defend themselves or to persecute persons accused of nothing more than petty theft. Ironically, many actual major criminals escape without sanctions; the linkages between the police and the underworld, including drug barons, are reported commonly in newspapers. In several cases documented by activists, individuals have been beaten up for refusing to give money to police officers by way of bribes for carrying on illicit liquor sales; when these sales were stopped and the bribes ceased, they were subjected to abuse.

In 'non rule of law' societies, vibrant public opinion is severely limited. Newspapers and the electronic media are restricted. Electoral processes do

not result in change of government; rather, they are used by authoritarian regimes to consolidate their own power.

Potently, the author warns that in this type of situation, there is no point in holding up superior models of governance and merely pontificating that they should be adopted. Such an approach is “intellectually evasive and morally timid” . The mere restatement of ideals cannot change existing realities. On the contrary, the approach of human rights practitioners should be directed towards documenting, criticizing and articulating the problems of “brutal policing, politicized prosecutions, corrupt judiciaries, authoritarian political systems and restricted freedom of expression” from every day experiences of ordinary people and bringing this debate closer to the very persons who have to cope with these problems as everyday occurrences in daily life.

Consistent themes that are dealt with in this book include, the lost meaning of legality, the predominance of the security apparatus and the superimposition of emergency law over the ordinary law, the disappearance of truth through propaganda, the superman controller (for which, read the Executive President), destroyed public institutions and the zero status of citizens. These are all themes that are intensely familiar to Sri Lankans in the current political context.

Considered reading of the contents of this publication will be of immediate value not only to Sri Lankans but also to South Asians grappling with their own peculiar problems of how best to confront and minimize the democratic deficit in their own countries.

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