article 2
of the International Covenant on Civil and Political Rights
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an essay on

abysmal lawlessness & the zero status of Sri Lankans

any person whose rights or freedoms are violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities

The meaning of article 2: Implementation of human rights

All over the world extensive programmes are now taking place to educate people on human rights. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things.

In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

article 2 aims to do this by drawing attention to article 2 of the International Covenant on Civil and Political Rights, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads in part:

> 3. Each State Party to the present Covenant undertakes:
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> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
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> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Sadly, article 2 is much neglected. One reason for this is that in the 'developed world' the existence of basically functioning judicial systems is taken for granted. Persons from those countries may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. And as these persons guide the global human rights movement, vital problems do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise with article 2. One is the fear to meddle in the 'internal affairs' of sovereign countries. Governments are creating more and more many obstacles for those trying to go deep down to learn about the roots of problems. Thus, inadequate knowledge of actual situations may follow. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

Thus after many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia.

Relevant submissions by interested persons and organizations are welcome.

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The distinction between genuine and counterfeit actions for justice

Leo Tolstoy once wrote that the art of his time in Europe was counterfeit. In counterfeit art, the artist believes himself to be creating a work of art but is in fact only creating impressions of art. These impressions are derived from an understanding of some external qualities of art, which the artist tries to recreate. The work produced in this manner appears to have the external characteristics of genuine art. By imitation, artwork was mass-produced to suit the appetites of people willing to pay for it.

The analogy is relevant for the protection and the promotion of human rights. Do activities really address the problems towards which they are directed? Do they really go into the deeper qualities or are they merely restricted to the superficialities? This depends upon the extent to which the real problems are addressed through mature use of judgment. It depends on the extent to which the solutions are real ones, not mere imitations of other works.

In counterfeit human rights work the actor begins on the basis of some training or some understanding gained from observation or reading on the general nature of some problems and assumes that there is no need at all to develop specific knowledge about the specific problems that they may encounter in real life, in the particular circumstances in which they have to work.

It is possible for someone to gain some knowledge of what other people have done to resolve some problems without understanding the particular reasons as to why those things were done in those other circumstances. The person might get some impressions about those activities and then try to replicate them. Externally, the replicated activities will have some of the qualities of the original. They may have the appearance of genuine human rights efforts, but will in fact be mere counterfeits.

In a particular country, disappearances, extrajudicial killings, torture, illegal arrest and detention may have taken place on a large scale. Well-intentioned and highly motivated citizens may demand that impartial and competent bodies investigate and prosecute perpetrators. If these demands are made within a country where criminal justice institutions genuinely exist, then there will be results sooner or later. But if these institutions do not exist at all or are completely dysfunctional, however long demands for justice are made nothing will happen, because there are no institutional possibilities. Even with regime change, institutional capacity will not be automatic.

Under such circumstances, the honest citizen who engages in work with the best of intentions can make demands for many years but not attain results. The citizen may think that he or she has done as much as possible, on the basis of impressions gained from others who have dealt with similar problems in other circumstances. Both in terms of attempts and in terms of failure, the citizen's honest activity remains a mere imitation.

"Where institutional impediments to justice exist, it is the task of anyone who desires justice to struggle for the creation or improvements to its institutions"

Where institutional impediments to justice exist, it is the task of anyone who desires justice to struggle for the creation or improvements to its institutions. Particular methods and strategies need to be developed with comprehensive knowledge of the local context. Lessons learned or impressions gathered from others can be useful, but are no substitute for knowledge of the actual circumstances.

For some years, the Asian Legal Resource Centre (ALRC) and its sister organisation the Asian Human Rights Commission (AHRC) have through *article 2* and other publications attempted to bring this point home very firmly with regards to the human rights situation in Sri Lanka. Just a few of the major reports and other publications that it has produced towards this end include: *Sri Lanka: Disappearances and the collapse of the police system,* AHRC, 1999; "Torture committed by the police in Sri Lanka", *article 2*, vol. 1, no. 4, August 2002; "Endemic torture and the collapse of policing in Sri Lanka", *article 2*, vol. 3, no. 1, February 2004; *An exceptional collapse of the rule of law*, AHRC, 2004; "UN Human Rights Committee Decisions on Communications from Sri Lanka", *article 2*, vol. 4, no. 4, August 2005; *An x-ray of the Sri Lankan policing system & torture of the poor*, Basil Fernando & Shyamali Puvimanasinghe (eds), AHRC, 2005; *The other Lanka*, by Meryam Dabhoiwala & Rob Hanlon (eds), AHRC, 2006; *Sri Lanka's dysfunctional criminal justice system*, by Jasmine Joseph (ed.), AHRC, 2007; *Conversations in a failing state,* by Patrick Lawrence, AHRC, 2008; *Recovering the authority of public institutions*, by Basil Fernando (ed.), AHRC, 2009; and, *A baseline study of torture in Sri Lanka*, by Basil Fernando & Sanjeewa R. Weerawickrame, AHRC, 2009. Most of these are available online at the *article 2* website (www.article2.org) or the AHRC bookstore (http://www.ahrchk.net/pub/mainfile.php/books/).

> **"What exists in Sri Lanka today is a situation of abysmal lawlessness, resulting in the zero status of citizens"**

From these publications and the work that it has conducted with partners in the country over the last 15 years, the centre has concluded that what exists in Sri Lanka today is a situation of abysmal lawlessness, resulting in the zero status of citizens. The word "abysmal" is here used in its ordinary meaning to mean limitless, bottomless, immeasurably bad and wretched to the point of despair. Lawlessness of this sort differs from simple illegality or disregard for law, which to differing degrees can happen anywhere. Lawlessness is abysmal when law ceases to be a reference. What would normally be crime ceases to be thought of crime and lawlessness becomes routine. This kind of abysmal lawlessness manifests itself in "arrests", "detentions", and "trials" that require no legal justification.

Under these circumstances, the idea of legal remedy or redress also ceases to have any meaning. All legal systems are built around the idea of legal redress. Laws and procedures are meant to make redress possible, to one degree or another. Abysmal lawlessness implies a complete loss of the linkage between redress and whatever that may be called law.

The situation of abysmal lawlessness will not be changed through the victory over the Liberation Tigers of Tamil Eelam (LTTE) that the military finally achieved this year. The suppressing of violence does not in itself guarantee that human rights will be better protected. In fact, the military victory can easily be utilized to further strengthen authoritarianism and to suppress democracy and the rule of law even more.

With this perspective, this edition of *article 2*, "An essay on abysmal lawlessness and the zero status of Sri Lankans" (vol. 8, no. 4, December 2009), is organised according to the following themes:

1. The lost meaning of legality: how the notion of legality itself has been defeated, accompanying the collapse of institutions for justice and leading to the zero status of citizens to which the title alludes; the loss is associated with the suspending of criminal procedure law through antiterrorism and emergency laws.

2. The predominance of the security apparatus: with the decades of conflict and final victory over armed groups in the country, the security apparatus is now both the paramount and most comprehensive agency for political and social control in Sri Lanka; it is unbound from conventional rules that once at least delimited its sphere of activity and extent of its authority thanks to the use of the emergency and antiterrorism laws; it can act with unlimited secrecy and without challenge, on the pretext of national security.

3. The disappearance of truth through propaganda: with the first two elements of the state in Sri Lanka, the government propaganda machinery is no longer bound by any rules of truth or falsehood; even the distinction between the two is completely lost.

4. The superman controller: a constitutional and political arrangement that allows a single person to manipulate the three elements above as he or she wishes; the superman controller was created through the political and legal vacuum of the 1978 Constitution, in which the rule of law could not survive, but has over time accumulated even greater powers through the combination and manipulation of the three elements.

5. Destroyed public institutions: the institutions for the administration of justice are completely destroyed through the combination of the four elements; this is the feature of life in Sri Lanka today on which a great deal of the earlier work of the ALRC has turned, so as to document and demonstrate this fact and in order to arrive at the understanding of the present situation in terms of the four elements; there is nothing sacrosanct or predetermined about any institutional practices now, and the citizen who goes before public institutions knows not what to expect.

6. The zero status of citizens: Sri Lanka's citizenry, while believing that nothing has significantly changed, is doomed by the four elements and the consequences of its destroyed institutions; due to conflict on the island, at present the hundreds of thousands of persons detained in camps outside the framework of law and without legal status are suffering the greatest consequences of this zero status, but in fact it is a feature of the situation in the country that is common to all citizens to one degree or another.

"Sri Lanka's citizenry, while believing that nothing has significantly changed, is doomed by the consequences of destroyed institutions"

The material used for this essay has been variously drawn and adapted from the ALRC's and AHRC's statements and other appeals, articles by the organisations' director, Basil Fernando, on online websites, including the *Sri Lanka Guardian* and *Ground Views*, and some outside sources, which are cited in the text.

The lost meaning of legality

At one time it was common for lawyers and judges, and even some politicians, to boast about Sri Lanka's long tradition of law, of judiciary and of its legal profession. Books have been written on the history of its modern legal system; however, they are hardly read today. In their place, in the corridors of courts, in the chambers of lawyers, and even in general conversation are just curses about an accursed system in which legality has lost its meaning and citizens are reduced to zeroes.

The law in Sri Lanka today is an exercise in futility. After 31 years of the 1978 Constitution, it is not even possible to recognize what is law and what is not. When the executive president placed himself above the law, there began a process in which law gradually diminished to the point of no significance. This is unsurprising. The constitution itself destroyed constitutional law, by negating all checks and balances over the executive. When the paramount law declares itself irrelevant, its irrelevance penetrates all other laws. Thereafter, public institutions also lose their power and value.

The consequences would be comical were they not life threatening. Take the whole debate on the 17th and 13th Amendments to the Constitution. Debate goes on endlessly about these amendments because of an underlying false assumption that a constitutional amendment to an irrelevant constitution is a matter of some significance. There is unwillingness to accept that the grafting of a living branch to a dead tree brings life neither to the branch nor to the tree.

Today, underground elements have taken over the functions of law enforcement agencies, guided by the institutions of administration of justice. For example, if a debtor does not pay back his loans, the creditor may turn to a reputed criminal to get his money back. The criminal is able not only to get the money back, but also to do so quickly, whereas the legal process is so beset with delays that a creditor may have to wait years and spend more money than what is owed to have the same result. The criminal is far more efficient in this setting than the legal process.

Politicians too rely more on criminal elements than they do on legal agencies. Every election is a contest between criminals supporting this or that party. Instead of a democratic process to persuade voters about policies for the improvement of their lives, there is a coercive one to intimidate voters about the risks of not choosing this candidate or that.

"The conceptual basis of judicial independence has been completely displaced in Sri Lanka"

When there is a loss of meaning in legality, terms such as "judge", "lawyer", "state counsel" and "police officer" are superficially used as in the past; however, their inner meanings are substantially changed. Those who bear such titles no longer have similar authority, power and responsibility as their counterparts had before, when law still had meaning as an organising principle.

For instance, under normal criminal procedure in a society based on the rule of law there is an obligation to investigate all crimes, and the methods of investigation are standardised. Now there is no such obligation in Sri Lanka. Where investigations are carried out, they are done so manipulatively. If someone desires to destroy another person, completely bogus inquiries can be conducted. The criminal investigation process ceases to be a mode of maintaining law and order, and becomes a mode through which to victimise and terrorise citizens.

The diminishment of the lawyers' role is also indicative of the loss of meaning of law. Today, even constables run roughshod over lawyers who intervene on behalf of their clients at police stations, or in magistrate courts. Bribing policemen is a better method for getting bail than following procedures and insisting on legal rights. Questioning police illegality will only provoke harassment of the client as well as of the lawyer him or herself. When the law loses meaning, the quality of legal practice naturally diminishes. No one will waste energy on futile exercises. If people can be arrested, detained and punished without trial, without recourse to the protection of the Criminal Procedure Code, then lawyers too can do no more than look for methods that are outside of the normal process. In this way their role too ceases to have legal meaning.

The judiciary is the biggest loser of all. The conceptual basis of judicial independence has been completely displaced in Sri Lanka. In the early years of the constitution's operation, judges, lawyers and citizens still had thinking and behavioural patterns from earlier times that acted to buffer the courts against its impact. Now that resistance has been greatly diminished. As the system has adjusted itself to the executive presidency and everything that it entails, it has been emptied of significance.

The lost meaning of legality can be illustrated with reference to the government policy to abduct and kill alleged criminals—not those criminal elements working with politicians, but those identified as criminals to be eliminated for political advantage. The method of killing is, like the collecting of debts, now cheaper, quicker and less risky than going through the courts. The police,

military or anyone acting under them, including other criminal elements, are assured of impunity because of the secretive manner in which killings are conducted and the many protections afforded to the perpetrators. This is revealed in two incidents that occurred during 2009.

"Not only is it institutionally more convenient to kill, but also the very notion of killing as an illegal act has been lost"

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 made telephone calls all over and managed to locate this person in the custody of some police; it was the minister's intervention alone that saved him. The police accused the person of being a dangerous criminal and a leader of a criminal gang. They also, according to reports, stated that they found a firearm and ammunition in his house. The minister himself had to make a public statement condemning the kidnapping.

In another case, Ravindra, a school-going son of the director of the Colombo Criminal Investigation Division (CID), had a quarrel with another schoolmate named Chamie. When Chamie and a friend Nipuna were having tea, Ravindra came and tried to provoke a fight. When the two left the teashop and were walking towards their boarding house, a police jeep followed them. The jeep turned and blocked their path. About four persons with firearms got out of the jeep. They held Chamie against a wall and put a pistol to his head, and another to that of Nipuna. The latter shouted to let go of Chamie and to take him instead. Then, these policemen took Nipuna in the jeep to the house of Ravindra. He was told to get down and forced to crawl. While he was crawling, he was beaten with poles. The mother of Ravindra, wife of the director of the CID in Colombo, allegedly stood on his body and asked, "Do you know my weight now?" After that the police took Nipuna to the Paliyagoda CID, where the director himself allegedly joined in, threatening to charge him with possession of bombs, and telling him that the only way to avoid the charge was to sign a statement. In this case the boy's life was saved due to quick intervention from his family, who reported the matter to the Inspector General of Police (IGP) and other authorities.

Not only is it institutionally more convenient to kill, but also the very notion of killing as an illegal act has been lost upon the persons responsible for this policy. When the Sinhala BBC service interviewed the official police spokesman on the killings, the correspondent asked how the victims of killings are treated as criminals when in fact they are only suspects in alleged crimes. The spokesman said that according to the police, they are criminals and not suspects.

According to the law, anyone at or before the stage of interrogation is merely a suspect, and cannot be named as 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, through killing. Thus, the presumption of innocence is no longer of any significance, and nor is judging a person and imposing punishment any longer the sole prerogative of the judiciary.

The lost meaning of legality coinciding with the rise of extrajudicial killings under the pretext of crime prevention is not merely confined to the work and reasoning of the police themselves. It has also taken a sinister shape in the magistrate courts, where in most instances magistrates declare "justifiable homicide" purely based on the police's own incident reports. Thus the police spokesman told the BBC that obviously no such killings of criminals are taking place in the country because the judges have confirmed that these are justifiable homicides.

"In most instances magistrates declare 'justifiable homicide' purely based on the police's own incident reports"

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 is suspicious. It is the duty of the magistrates to ensure that proper legal process is carried out in all cases of suspicious deaths, including that independent investigating units, which are able to resist the pressure from police of local areas, should carry out these inquiries. The failure of magistrates to perform this duty is a further illustration of the loss of meaning of legality in Sri Lanka.

The predominance of the security apparatus

The security apparatus that arose through the conflict with the LTTE will continue to exist despite the declared end of the conflict. Judging by the statements of the government, the strategy is to strengthen and broaden this apparatus to cover the whole country. In the north and east this will be done on the pretext of preventing the LTTE from reappearing. Elsewhere, it will be done to ensure political control and to paralyse institutions for the advantage of the ruling regime.

The targets of the security apparatus are ordinary citizens. They include people engaged in simple protest, whether about wages, living conditions or other matters of societal importance. Everything is now under surveillance of this apparatus. Trade unions, journalists, civil society organisations and opposition political parties are all of special concern.

The security apparatus is particularly keen to control the electoral process. It targets the grassroots political activities of opposition parties so as to deny fair contest during elections. In fact, it acts to prevent any opposition group from operating freely at any time. It also targets groups within the ruling party itself, who compete for privileged positions in electoral lists or in local government bodies. The system of preferential votes encourages this. There is an assumption that those who receive a larger number of preferential votes may obtain higher positions as ministers or members of local governments. It in turn gives rise to intense competition among members of the ruling group.

Groups exist within the security apparatus for the purpose of activities that are not authorised by law. They monitor political leaders and any other persons whom the government targets, and abduct, torture, interrogate and kill with impunity.

The Prevention of Terrorism Act (PTA) continues to give very wide powers to the security apparatus. All legal safeguards available through normal law can be suspended through use of the PTA. Most of its provisions cannot be justified to deal with an emergency; their real purpose is to arbitrarily extend state power.

But the security apparatus does not feel limited to the provisions of the PTA. It can do anything whether the PTA allows it or not, because with the loss of the meaning of legality there

is nothing to stop it from acting completely outside the law. There is no way for the parliament or the judiciary to monitor or intervene.

Within the last few years there have been no investigations into complaints against the security apparatus. Calls to investigate are actively opposed. The mentality developed during the conflict is that demands for investigations are treacherous, analogous to acts of sabotage or the aiding and abetting of terrorism. The security apparatus has consistently attacked the media from this ideological position.

"The term 'security apparatus' refers not to the military and policing structures but to a whole political system and a way of life"

Today the term security apparatus refers not to the military and policing structures of the state in Sri Lanka, nor the laws that are supposed to guide their work, but to a whole political system and a way of life. The predominant position of this apparatus reflects the reduction of law to meaninglessness. This is why in various places during the last year the AHRC has referred to Sri Lanka as the Gulag Island.

Aleksandr Solzhenitsyn used the word "gulag" to describe a type of experience that is being repeated in many parts of the world. His own three-volume study was of Russia from 1918 to 1956. The dreaded Cheka, the security organisation, exercised the function of informer, arresting authority, interrogator, judge, executioner and even gravedigger. All these functions were exercised in complete secrecy with whatever procedures it chose to adopt. What the law in the country was and how it was implemented was almost completely left to the Cheka; only the communist party general secretary had greater authority. Within this system decisions of life and liberty were made casually, and without transparency or accountability.

The insurgencies in Sri Lanka from 1971 paved the way for the emergence of such an authority in the form of the security apparatus there. Tens of thousands of people from all parts of the country have been forcibly disappeared in a similar manner to what Solzhenitsyn described.

The recent investigations into an open letter that 133 well-known Sri Lankan citizens signed illustrate how the gulag is extending into and overwhelming all parts of the judicial process. The letter was published in newspapers to condemn the death threat against Dr. P. Saravanamuttu, a civil society activist. The president instructed the defence secretary to verify the facts, asking if there was such a threat or that there might be some international conspiracy against Sri Lanka. Officers from the CID then visited and questioned many of the signatories. The officers asked how they know of Dr. Saravanamuttu; whether there was any meeting of all the signatories; whether they had in fact seen the threatening letter, and who had sent it.

The CID visits and questions had no legal basis. They were direct interference into the basic rights of citizens to engage in any solidarity work within the law. The defence secretary has no legal authority to direct inquiries into the legitimate acts of

citizens. The CID officers have no duty to obey such orders. They particularly should not carry out political work to suppress those that the government considers its political opponents.

> "Lawyers are officers of the court; any attack on them in relation to their official functions amounts to contempt"

In this instance the letter containing the death threat was brought to the notice of the government and it was very widely publicized right from the start. But like in earlier similar cases, no investigations were carried out into the letter itself. Instead, when the prominent citizens published the letter condemning the threat and demanding protection for the target, it was they who were subject to investigation. In this manner the entire legal process has been turned upside down and inside out.

The defence ministry in 2009 also went to the stage of directly threatening lawyers who appear for clients against it in court. In mid year, the following article appeared on its website:

> Leader Publications (Pvt) Ltd, publishers of the Sunday Leader newspaper was charged with Contempt of Court for publishing an article comparing Secretary of Defence, Mr. Gotabaya Rajapaksa with Velupillai Prabhakaran, who was responsible for the death and destruction of over 100,000 civilians, despite extending an assurance in Court not to publish any defamatory content in reference to the Secretary Defence and the Sri Lanka Forces. The article in question was published minus a by line, which is a rarity in professional journalism.
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> Leader Publications (Pvt) Ltd was given time to show cause and the case was heard yesterday 9 July 2009 at the Mt. Lavinia Courts before the Additional District Judge Mohammed Macky. The original Defence team had voluntarily resigned from handling the case citing it was against their ethical and moral standing to oppose a national hero like the Secretary of Defence, with whose unwavering commitment and focus Sri Lanka is a free country today.
>
> A new team comprising of some who have a history of appearing for and defending LTTE suspects in the past, namely Srinath Perera, Upul Jayasuriya, S. Sumanthiran, Attorney-at-Law Viran Corea, Attorney-at-Law instructed by Athula Ranagala, Attorney-at-Law appeared for Leader Publications.
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> It was the observation of some senior independent Lawyers who were present in court that day, that this team of Lawyers share a common anti-patriotic sentiment fired by pro UNP activism and following. One such Lawyer speaking to the media mentioned his disbelief and shock at the manner in which these Lawyers had banded together in the face of prima facie proof of Contempt of Court. As a respected senior member of the legal fraternity, he opined that the behaviour of these Lawyers was an insult to the whole profession and totally unacceptable at a time when Sri Lanka is enjoying its veritable independence after 30 long years. He went to the extent of branding these Lawyers as traitors of the nation.

Lawyers are officers of the court. Any attack on them in relation to their official functions amounts to contempt. The publication of this article, with photographs of three of the lawyers, is an attack not only on them but also on their official function. The article calls these lawyers traitors simply because in this case they appeared against the defence ministry. It also implies that the status of a "national hero" before the law is unequal to that of other parties, even though the basic principle of the law is the equality of all citizens before it.

The disappearance of truth through propaganda

Over years of conflict the government has increasingly adopted a position that it alone should have a monopoly on information. A part of the military strategy was to create a single version of truth. The LTTE for its part claimed to be the sole representative of the Tamil people and from that position to be the single source for the true situation of the country and its history. The war was of arms and of interpretation. People were called to stand at one or the other of these two polarities.

Society has for the most part accepted the claim of the state to be the sole arbiter of what is true and false. Those who run the media also usually comply with demands to reproduce and disseminate government propaganda. Those who do not comply are threatened.

In this way, a cynical attitude has developed regarding the concept of truth. Accusations against the government are described as the conspiracies of international agents or opposition figures. No critic is regarded as a person with genuine intentions. At best he or she has unintentionally fallen into the traps set by people whose sole aim is to destroy the nation.

When the distinction between truth and falsehood is cynically disregarded, it leads to a lack of interest in information itself. People cease expecting to know the truth of anything. This cynicism then seeps down to the minute details of life. People do not know what to believe about a death even in their very neighbourhood. Was it natural, or a murder? Was it done for a political purpose or for no purpose at all? Was it suicide or some trick? Who knows?

Government spokesmen deny allegations of gross human rights abuses and accounts of crimes by replying simply that they have not seen any evidence of such incidents. They can take for granted that no one will really come forward to state whatever they know, either because of fear or out of a sense of sheer futility.

"Among the leading propagandists is Rajiva Wijesinha; the role of the so-called peace chief has been to spread the official version of truth"

The extent to which propaganda has overtaken the truth can be found in an episode around a letter from Justice P.N. Bagwati, the chairman of the International Independent Group of Eminent Persons (IIGEP), which was established to observe investigations into recent grave human rights abuses in Sri Lanka. Justice Bhagwati wrote his letter of to the president, Mahinda Rajapaksa, in response to the meeting of a number of members of the IIGEP with the president to discuss and clarify some of the issues arising from the public statement of the IIGEP, announcing its resignation from the monitoring mission due to the government's disregard for the group's mandate. In his letter, Justice Bhagwati wrote that

> I would like to point out to Your Excellency that if you would kindly look at the Public Statement at the relevant part you will find that IIGEP has not accused the Government of Sri Lanka of any lack of political will insofar as the functioning of [Commission of Inquiry into serious rights abuses] is concerned. What has been recited in the Public Statement is about "IIGEP's apprehension regarding absence of political will". IIGEP has never alleged that there was absence of political will on the part of the Government of Sri Lanka. It was merely an apprehension which was voiced by IIGEP in view of the facts before them.
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> IIGEP of course could not voice anything more than a mere apprehension because it was not within their jurisdiction to find whether there was absence of political will on the part of Government of Sri Lanka or not. That was not within their terms of reference which were confined merely to observing whether the proceedings before the Commission of Inquiry were transparent and in accordance with the international principles and norms.

The government propagandists thereafter used this letter to create the false impression that the IIGEP had retracted its April 15 final report (available online at http://www.ruleoflawsrilanka.org/resources/IIGEPnbspSTM.pdf). Nowhere in the letter is there any such retraction, neither of the apprehension of the lack of political will on the part of the government to uncover the truth, nor over conflicts of interest in the role of the Attorney General's Department or the problems of witness protection. The letter itself was not reproduced in the propagandists' materials or in the media in Sri Lanka.

Among the leading propagandists using the letter for this purpose was the secretary general of the government's Secretariat for Coordinating the Peace Process, Dr. Rajiva Wijesinha. The role of the so-called peace chief throughout this and other recent episodes has been to spread the official version of truth. In a statement responding to comments on the letter by another member of the IIGEP, Sir Nigel Rodley, Wijesinha accused Rodley of "sanctimonious bluster" and of not understanding the IIGEP's mandate.

Wijesinha particularly objects to the use of adjectives. He writes in response to the work of the AHRC that, "Basil Fernando cannot conceive of abuses, they have to be gross, a crisis must be acute, a situation must be abysmal, helplessness is utter.

The adjective 'political' is applied to lunacy, realism, intellect and disasters, plus another half dozen or so words." In reply Fernando wrote,

> The problem about adjectives is that when describing situations of the collapse of the rule of law it is difficult to find words that can adequately describe the actual depth of the tragic situation. Like some natural tragedies, for example the recent experience of the tsunami or manmade tragedies by way of wars and civil wars, language becomes an inadequate tool to describe the experience. One has unfortunately to rely on adjectives, which fall far short of expressing the enormity and human and social consequences of such tragic experiences. However, Rajiva Wijesinha, in his role of Squealer [from George Orwell's *Animal Farm*], objects to these adjectives for a very simple reason: he has to make out that no really big problems exist in Sri Lanka. His role is to deny or trivialize or understate the situation that the country is actually facing.
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> Orwell's argument in "Politics and the English Language" is that the bad language used is a result of the failure to think clearly. That is really the problem that one has to address in thinking about the continuing catastrophe in Sri Lanka. What I mentioned in my column is that there is a degeneration of the political intellect in the country and a lack of capacity to develop political realism that some of the political leaders in places like Nepal and Cambodia developed as a result of the sufferings caused by a prolonged crisis. Even bad leaders who have themselves contributed to the civil war in these countries realized that, even from the point of view of their own self-interest, some outside help was needed to bring an end to the ongoing civil war. The help obtained from the United Nations did not and could not solve all their problems. But it did help to bring the violence and civil war to an end. It is on those issues that clear thinking is needed in the country. And of course if one has opted to play the role of Squealer, then one has to abandon even the wish to think clearly.

"Cambodia and Nepal are examples of how an outside intervention helped to create a beginning for some kind of recovery, while in Sri Lanka the downward spiral has continued"

The point here is not that the situation in Sri Lanka is equivalent to that previously or presently in either Cambodia or Nepal. No country in conflict is the same as another. But the consequences of prolonged conflict on one place can be studied usefully for the purposes of understanding those in another. The effects of prolonged conflicts on notions of legality in particular deserve special study.

In this respect, Cambodia and Nepal are examples of how an outside intervention helped to create a beginning for some kind of recovery, however fraught, while in Sri Lanka the downward spiral has continued despite attempts at such intervention over some years.

Wijesinha is himself aware of the downward spiral. For many years he has been writing books and articles on the erosion of democracy in Sri Lanka. Among his best are the detailed analyses of J.R. Jayawardene's contribution to the collapse of democracy via the executive presidency and other measures when he because the first executive president. Unfortunately, Jayawardene's scheme is continuing with greater vehemence now, and, sadly, even some critics of that scheme such as Mahinda Rajapakse and Rajiva Wijesinha have also become its agents, as executive president and peace secretariat chief respectively.

"Wijesinha writes about the foot soldiers of the human rights army; he is a spokesman for the real army, therefore he sees his opponents in the same form"

Wijesinha also knows that questions of the sort raised by the IIGEP are not new to anyone who has followed the decline of the legal system in Sri Lanka. For a person who wrote a book entitled *Declining Sri Lanka*, the outcome of the IIGEP's work could not have caused any surprise. Therefore, his expressions of outrage in response to this type of international intervention can only be understood as part of his role as master propagandist-cum-peace chief.

Wijesinha also writes about the emotional language of what he calls the foot soldiers of the human rights army. The choice of this expression is no accident. He is a spokesman for the real army, therefore he sees his opponents in the same form. Like Don Quixote, Wijesinha as propagandist needs to invent armies that he can fight and conquer.

As propagandist he has also acquired the capacity to speak unemotionally about, for example, the massacre of 17 aid workers belonging to Action Contre La Faim. His comments on the issue to the effect that this French aid agency was itself responsible for the deaths caused embarrassment even to his employer, which through the foreign affairs minister clearly stated that his comments did not represent the view of the government. An appeal to be unemotional while talking about mass disappearances, extrajudicial killings, torture and lawlessness implies that one has to accept these things rationally as the unavoidable consequences of conflict, and as inevitable features of the security apparatus on whose behalf he is working.

This is quite a different Wijesinha from the one who once wrote emotionally about the killing of his schoolmate, Richard de Zoysa. In that article he exposed everyone involved in the killing, including the role of the then Attorney General, Sunil Silva, regarding the subsequent inquiries. Perhaps his school chum deserved different treatment from the aid workers as he was also a member of the aristocracy to which Wijesinha also thinks he belongs, and whom he likewise represents as propagandist. The elite are of course quite unemotional when talking about the disappearances, killings and torture of people belonging to classes in the south, north or east whom they have either never met or hope not to meet.

In a letter of 8 January 2009, Fernando addressed Raijva Wijesinha in his capacity as secretary in the Ministry of Disaster Management and Human Rights as follows:

> As a servant of an institution called the Executive Presidency that has ruined the parliament, the judiciary, the executive itself and all the public institutions of the country, you share the same guilt as anyone else who has contributed to the destruction of the Sri Lankan state and the spread of anarchy and lawlessness...
>
> All sorts of pettiness found in your letters indicate the type of mind that can participate in the political hooliganism that has ruined Sri Lanka. No issue of importance concerns you. The issues of witnesses being killed or intimidated would upset anybody who had even the slightest understanding of the rule of law and the administration of justice. You,

however, have been a propaganda agent to justify witness assassinations and witness intimidation. After all, to 'poo poo' all complaints and allegations about human rights abuses is your job and therefore you may claim that could not have done otherwise...

As we are writing this letter the news of the shooting of Lasantha Wickramatunga was brought to my notice. This, without doubt, is the work of your political clique and as a Sri Lankan I accuse you also as being complicit in the shedding of his blood. Of course, it would be foolish on my part to ask you to initiate inquiries into this attempted assassination. However, for the purpose of record I am bringing this matter to your notice as an issue on which you are officially obliged to act. I am doing this to forestall a future accusation that the matter was not brought to your notice.

As the issue of the attempted assassination requires my attention I will stop this letter at this point. My last reminder is a letter that I wrote to you personally when you falsified a personal conversation I had with you in Cambodia. That letter is available on my website for future reference. At that time I called you a liar. Despite of that we did try to communicate with you officially although we knew that you are neither willing nor capable to do anything on complaints about human rights except to deny the very existence of human rights abuses in the country. Therefore your threat that you will have no further communication does not invoke much concern on our part, because your position as an apologist for the government and our position as persons concerned with human rights are incompatible. There never was any real communication and there cannot be any now. But as a matter of routine and out of the sheer tradition in human rights, anyone holding a title relating to human rights will be informed about human rights abuses in the country and we shall send our letters to you or anyone else that might hold your post in the future. We are fully aware that you can do nothing more than to pass it to an officer and that, that officer will not respond.

"Your threat that you will have no further communication does not invoke much concern on our part, because your position as an apologist for the government and our position as persons concerned with human rights are incompatible"

—Basil Fernando to Rajiva Wijesinha

The superman controller

At the heart of the political, social and psychological problems of Sri Lanka is the executive presidency of the 1978 Constitution. It has turned into a political monster with virtually no parallel. The executive president is a person freed from any and every kind of check and balance. He is not under any constitutional, economic or social force. He is a power unto himself.

The executive president, while holding such power, is completely disconnected from the apparatus of the government. Since he alone has power, nobody else has real independence to run the institutions of state. He must run them. All below depend upon him. None have authority or entitlements of their own. This is unworkable. It is not possible for any single person to run all institutions all the time. Therefore, institutions malfunction, to the point of complete dysfunction in Sri Lanka to which the AHRC has adverted many times previously. The dysfunction characterising Sri Lanka's public institutions will continue for as long as the executive presidential system under the 1978 constitution is in effect.

Michael Roberts has described this style of misgovernment as a consequence of the 'Ashokan Persona':

> The Big Man (invariably male) has to control every fiddling little thing. My theory therefore highlights a deeply-rooted cultural tendency towards the over-concentration of power at the head of organisations and a failure (if not an ingrained inability) to delegate power.

Elsewhere, novelist Aravind Adiga has in *The White Tiger* brought out a similar idea of control through 'the rooster coop':

> The greatest thing to come out of this country in the ten thousand years of its history is the Rooster Coop. Go to Old Delhi, behind the Jama Masjid, and look at the way they keep chickens there in the market. Hundreds of pale hens and brightly coloured roosters, stuffed tightly into wire-mesh cages, packed as tightly as worms in a belly, pecking each other and shitting on each other, jostling just for breathing space; the whole cage giving off a horrible stench — the stench of terrified, feathered flesh. On the wooden desk above this coop sits a grinning young butcher, showing off the flesh and organs of a recently chopped-up chicken, still oleaginous with a coating of dark blood. The roosters in the coop smell the blood from above. They see the organs of their brothers lying around them. They know they're next. Yet they do not rebel. They do not try to get out of the coop. The very same thing is done with human beings in this country.

He thereafter explains why the rooster coop was made possible. He attributes it to the Indian conception of family and the system of punishment where entire families of the servant class are punished for any transgression of one member. Asking the reason for its existence and why no one tries to get out of it, he continues:

> The answer to the first question is that the pride and glory of our nation, the repository of all our love and sacrifice, the subject of no doubt considerable space in the pamphlet that the prime minister will hand over to you, the Indian family, is the reason we are trapped and fled to the coop. The answer to the second question is that only a man who is prepared to see his family destroyed — hunted, beaten, and burned alive by the masters — can break out of the coop. That would take no normal human being, but a freak, a pervert of nature.

"The 1978 Constitution was meant to dismantle the rule-of-law system"

From this perspective we can return to the problem of the superman controller in the 1978 Constitution. This constitution was meant to dismantle, or at least to undermine seriously, the rule-of-law system introduced by the British so that the 'rooster coop' could resurface. It was meant to remove barriers against corruption, undermine every possible avenue—including judicial intervention—to abuse of authority and not to have any system at all except the direct use of force on all, trade unions, and opposition political parties, young radicals looking for new avenues and on everyone else. A further important component was to close the electoral map.

The survival of the constitution was greatly enhanced by the rise of militancy in the south from the mid 1980s and Tamil nationalism, which finally came under the grip of the LTTE. It was possible to deflect the attention of people to the need for repressing terrorism and thereby to ensure that no real democratic challenge was made against the constitution itself.

Roberts correctly points out that, "What the Sri Lankan President gives as a constitutional gift, he can withdraw too"; the 17th Amendment is an example of this. This remains possible as long as the constitution is premised on the notion of the superman controller rather than the balance of powers. In a place where the law has little meaning and the supremacy of the law has been removed and replaced with the supremacy of the 'Big Man' all that can happen is the continuance of the 'rooster coop'.

In a piece first published on the *Sri Lanka Guardian* website and reproduced in *article 2* (vol. 8, no. 3, September 2009), Fernando explored the problems created by the superman controller through a fictional conversation among a group of imaginary characters: a journalist; a senior police officer; a retired judge; a political scientist; and, a philosopher. The conversation included an account of the political concept of Gyges Ring in terms of the current conditions in Sri Lanka:

> **Political scientist:** The Greeks talked about Gyges' ring. When one wears this ring one becomes invisible. Then you can do whatever you like. You can even rape the queen. Now we seem to have developed a home grown Gyges' ring. We have replaced the paramount law with it. In that transformation the 1978 Constitution played a very significant role. Perhaps we need to discuss this more.

Philosopher: At this stage, I think it is better to recall the legend of Gyges' Ring. According to the legend, an ancestor of Gyges of Lydia was a shepherd in the service of King Candaules. After an earthquake, a cave was revealed in a mountainside where Gyges was feeding his flock. Entering the cave, Gyges discovered that it was in fact a tomb with a bronze horse containing a corpse, larger than that of a man, who wore a golden ring, which Gyges pocketed. He discovered that the ring gave him the power to become invisible by adjusting it. Gyges then arranged to be chosen as one of the messengers who reported to the king as to the status of the flocks. Arriving at the palace, Gyges used his new power of invisibility to seduce the queen, and with her help he murdered the king, and became king of Lydia himself.

Political scientist: Now, the moral of the story is that a typical person would not be moral if he or she did not have to fear the consequences of their actions. If anyone can be invisible, it is possible to do things that one may not be willing to do because of bad publicity and other adverse consequences.

Senior police officer: I think I understand this legend and what it tries to say. But, I cannot agree that we should encourage our officers or leaders to follow the moral of this story. If we have to become visible, we cannot do anything. We will become powerless. How can we ask our officers to kill undesirable people, bad criminals, if they have to do that openly? If their wives and children know these things, they will think they are bad people. Ordinary folk need to observe morals. If they know what we do, they will try to emulate us and then there will be more problems. We need to have the capacity to do many things in an invisible way.

Retired judge: Some people might say that what our police officer says is wrong. However, he is simply saying honestly what everybody knows to be happening.

Political scientist: Now, let us go back to our original question. In 1978 when the executive presidential system was created, the president got Gyges' Ring. We rejected western democracy and created our own thing.

Philosopher: What you mean, I think, is that we replaced the paramount law idea with the idea of the paramount persona. Large, big, tall, fat personae as we see them in ancient statues are really our idea of who the powerful person should be.

Senior police officer: Let us be frank. Do you think that we can persuade people to work for the government and hold high office if they are to be told that they have account for every rupee they spend, that they have to keep books and be audited, that they can't use their official position to help their family or friends and the like? If we ask our officers to bring every suspect before judges, that they should not torture people who do not give information, or that they have to produce every dead body before a magistrate to have a post mortem, will they do anything? We will have to pay officers who do nothing.

Retired judge: I think what you are saying is that we must be more flexible. We must give people room to exercise power, more freedom. Freedom of those in authority is more important than the so-called people's freedom. People are free only if they obey rulers and respect rulers.

Philosopher: So this is what has happened since 1978. This is our new order.

Destroyed public institutions

The AHRC and ALRC have over a number of years emphasised how the destruction of Sri Lanka's public institutions has been related to the collapse of the rule of law. In this section some aspects of the problem are again taken up through recent writings on the police, the Attorney General's department and the judiciary.

An article by retired Senior Deputy Inspector General (DIG) Gamini Gunawardane, "What is wrong with the police?" was published on the Sinhale Hot News website on 7 September 2009; the following is an extract that speaks to the problems of policing attendant to the loss of meaning of legality in Sri Lanka today:

> The police department in its existence for the last 142 years has passed through several stages of evolution: 1. A colonial police (1867-1948) 2. A post-colonial police (1948-1972) 3. Political interference stage (1972-1988) 4. Politicization stage (1988-2001) 5. Reduction to a status of a virtual private security service of the party in power (2001-to date). Though specific years are given for convenience, they really overlap, because it is an evolutionary process.
>
> Of course, there is a strong reason among others for the rapid passage in to the latter three stages. It is the damage caused to the police service while it was going through the socio-political trauma owing to the coup d'etat in 1962 and the 3 insurgencies that occurred in this country since 1971.
>
> In fact, after the post-colonial stage we should have evolved ourselves into a 'people's police' as vaguely envisioned by the Mr. Osmund de Silva IGP [Inspector General of Police]. But [because of] the rapid political developments since his time followed by the insurgencies, the police instead became militarized and in the process, many sound policing practices of the post-colonial era fell by the wayside.
>
> Owing to the fifth stage above, even the most junior police constable knows that [the] people are not the primary client of the police, but that his top client really is the politician. Politician's requirement always takes priority. Though the politician is supposed to be only a representative of the people, the peoples' requirement came only after his requirement. Sometimes some members of the public with political clout do get their things done when they too approach the police through a government party politician. That is how the parents of the SLITT student were able to stop the police from doing what they intended to do with their abducted son. The parents moved fast through a relative who

> was a Minister. The people of Angulana had no such luck. The parents of the deceased youth had to be consoled after the event, by an embarrassed President, having being invited to his residence. Naturally, one is embarrassed when one's domestics misbehave.

"Around the country members of parliament work hand in glove with the local police"

The Angulana case to which the former senior DIG refers is indicative of the extent to which abuse of police power in Sri Lanka is associated with corruption. The Angulana police murders of two youths, Dinesh Tharanga Fernando and Danushka Udaya, shook the whole area and led to violent protests. The army and Special Forces had to be sent in to restore peace, while the local officers were transferred out. According to the mother of Tharanga, speaking to the BBC Sinhala service,

> That gentleman [the Officer in Charge, OIC, of the police station] can't stand the sight of young boys. He arrests them and takes them to the police station and assaults them. Parents go to the police station and pay money to get the boys released. He arrests the boys in order to make money. We also went to the police station when we heard about the arrest of our son, and we took money to give him. But we were not shown the boy and we were unable to rescue him.

The father of the boy said, "When we went to the police station we found that all the police officers were heavily drunk." Jeevan Kumaranathunga, the Angulana parliamentarian, told the BBC that he had received many reports about the drunkenness of police at the Angulana police post and that he had made representations to the relevant authorities about this situation, but because no action had been taken, this unfortunate tragedy occurred.

Drunken police misbehaviour is not exceptional to the Angulana police. It happens everywhere, like torture, extrajudicial killing and bribery. It is the duty of the member of parliament of an area to receive complaints about state officers, including policemen. It is also his or her duty to intervene promptly on behalf of citizens whom the police harass.

However, in the Angulana case there is no indication that the families of the boys rushed to the house of their member of parliament to get his intervention so as to save the lives of their children. In so many other cases also, people do not go to their members of parliament seeking protection when events such as these occur, due to a loss of confidence and alienation of citizens from their supposed representatives.

One reason for this alienation is that around the country members of parliament work hand in glove with the local police. Since people know of these close relationships, there is a general feeling that it is futile to complain to a parliamentarian about police abuses. It is also well known that local politicians intervene to save suspects when they are supporters of their party. The illicit liquor sellers, drug dealers and others who engage in all kinds of seedy businesses get the patronage of the local politicians. The ordinary citizens who come into contact with the police without breaching any law get into serious trouble and find no support from the politicians.

If the member of parliament for Angulana had received information on the drunkenness of the local police, it was his duty not just to make some representations to authorities—knowing well that nothing would come of it—but rather to take all the measures that he is empowered to take as the representative of the people in order to protect their rights. If his initial protests were not heeded, he could have made representations to the higher police authorities, such as the IGP and the National Police Commission. He could have done so in writing. If that also did not work, he could have taken up the matter through his political party, which is in government.

"The role of the AG's department as a co-conspirator in abuses goes back some way"

Even if all these methods had failed, he could have made a statement in parliament. He could have called for an inquiry. He could have sought the intervention of the president. And as a member of the parliament he has access to the media and any statement by him on the drunkenness of policemen at a police station should have created sufficient pressure to get some action.

Thus, looking into the causes of the murders of the two young persons from Angulana and the police abuse that is rife across the island requires some examination not only of the police's own behaviour but also of the responsibility of the member of parliament of the area.

Another agency that should be acting to counter-balance the authority of the police but instead has for years also worked closely with them to the detriment of the system is the Department of Attorney General (AG's department). One feature of the close relationship between this department and the police has been its complicity in cases of police violence and torture.

To reduce torture, complaints must be investigated. However, it is a long-established practice that investigations are deliberately sabotaged. The main saboteurs are of course the police themselves and the AG's department in its capacity as prosecutor.

The role of the AG's department as a co-conspirator in abuses goes back some way. In the late eighties, for instance, 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. Magistrates were deprived of the rights to conduct inquests into all suspicious deaths by giving police officers 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 whom police or related agencies had killed were not brought before a magistrate, and were buried without autopsy. This was a regulation designed to permit mass murder.

There is reason to believe that AG's department was involved in advising on the draft of these regulations. There is also no evidence at all to indicate that the department in any way opposed them, or pointed to the illegality of arranging for and permitting mass murder. Similarly, when Tamil prisoners were killed inside the Walikada prison in July 1983, officers from the AG's department participated in the inquest proceedings not in order to prosecute the offenders but so as to hush up what really took place.

"When Tamil prisoners were killed inside the Walikada prison in July 1983, officers from the AG's department participated in the inquest proceedings not to prosecute the offenders but to hush up what really took place"

A case that became famous in the 1990s illustrates the point further. Richard de Zoysa—a well-known film actor, author and journalist and a popular socialite—was abducted from his house, and several days later his body was found washed up on a beach. It is speculated that after he was arrested and tortured, his body was dumped from a helicopter into the sea in the hope that it would never be recovered.

The news of the killing was one of the most shocking events that influenced politics at the time. Local and international media coverage was extensive and fingers were pointed at the security forces, which were then engaged in wiping out an insurgency in the south in which tens of thousands of people were similarly abducted and killed.

Despite enormous pressure, the government of the day persisted in covering up de Zoysa's murder. On the first anniversary of his death, the Liberal Party—which no longer exists—took up de Zoysa's case. A whole volume of the Liberal Review was devoted to his assassination.

That volume included a long letter written by the party to the government, analysing the manner in which the inquiry had been sabotaged. The letter blamed the police and the AG's department for failing to investigate. The party called for a commission to inquire into the murder. The reasons it gave are revealing:

> There is a significant possibility of the complicity of elements of the police in this crime and the apparent unwillingness of the Attorney General and his department to act impartially in this case, which prompts us to suggest the appointment of a commission of inquiry.

The letter was written in February 1991. From then until now, nothing has happened to improve confidence in either the police or the AG's department with regard to independent and impartial inquiries into human rights abuses of this sort. One of the major reasons for this failure remains the complicity of the police and the prosecutors, who work to prevent proper inquiries into serious crimes.

Today, the position of the police is much worse than it was in the late 1990s. Everyone acknowledges this, even high-ranking police officers that have made public statements expressing bewilderment about the situation.

In current times, even a person accused of murder can continue to work as a police officer. Suresh Gunaratne, a police sub-inspector accused in the murder of torture victim Gerald Perera, continues to work as an investigator at the Gampaha Police Station. Many others accused of serious crimes are not even subjected to investigation. One of the known pastimes at many police stations is to intimidate witnesses who make complaints against police officers.

"Even a person accused of murder can continue to work as a police officer"

What is more shocking is the way the AG's department has undermined its duty to help prevent torture. There were some positive developments in the early part of this century when the department filed a large number of torture indictments against police officers. These were made under the then AG, K.C. Kamalasabayson, who was not one of the destroyers of institutions in Sri Lanka but rather a captive to the destruction.

Kamalasabayson held the post from October 1999 to April 2007. Compared to others, he tried to be more politically neutral and to keep some balance even as the ship of state tossed and turned. By the time Kamalasabayson became the AG, the country had already witnessed some of the most colossal human rights abuses in its modern history. It was a difficult time for anyone with some integrity to hold the post. Kamalasabayson did not deal decisively with the threats to his institution. He was unable even to prosecute effectively many cases of disappearances concerning police and military officers, against whom commissions of inquiry were reported to have adequate evidence. As the prosecuting of police and military officers for disappearances is a highly sensitive issue it would perhaps have taken a giant to withstand political pressure and do his job according to law.

Kamalasabayson was not a giant, but he did show that he was aware of the acute problems caused by the collapsed rule of law. Giving the 13th Kanchana Abhayapala Memorial Lecture on 2 December 2003, he spoke of many of 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 in administration of justice, and even the inadequacy of staff at his department. He was also aware of the crisis over the country's criminal investigation function, exercised through the police.

His most important decision was to prosecute cases under the Convention against Torture and Other Cruel and Other Inhuman and Punishment Act, No. 22 of 1994. Procedurally, he did this by referring all the complaints of torture received from United Nations agencies or local channels to a Special Inquiry Unit (SIU) of the CID. Within a short time, several SIUs investigated a large number of cases and submitted files to the AG's department for prosecution of officers. The department held over sixty files on which it had decided that it had adequate evidence to prosecute. In many of these cases, it filed indictments in High Courts.

> "The tacit policy today is not to eliminate torture but to protect perpetrators"

Most cases are still pending. After Kamalasabayson retired it did not take long for the department to change policy on the referral of complaints through SIUs. His successor, C.R. de Silva, often mentioned that the department would not bow to the pressure of NGOs, meaning that prosecuting cases of torture is somehow something that is a result of pressure that should be resisted. Under him, there ceased to be any high-level inquiries into allegations of torture. Even where evidence emerges by other means, the department now most of the time refers the cases to magistrates to be prosecuted under the Penal Code as simple hurt. Departmental officers have also made reports to UN agencies, including the Committee against Torture—which monitors the convention—stating that there is no serious problem of torture in Sri Lanka.

Even in cases where fundamental errors have been made in the facts and application of the law, the AG's department has refused to file appeals or revisions, despite requests on behalf of aggrieved victims. The tacit policy today is not to eliminate torture but to protect perpetrators.

As a consequence, policemen who arrest, detain and torture for the purpose of getting money are common throughout the country. The well-publicized case of Sugath Nishantha Fernando of Negambo illustrates how adventures relating to bribery can lead to so many other police crimes.

Nishantha Fernando initially complained about a police inspector who had sold him a lorry of which he claimed to be the owner, while in fact it was a stolen vehicle. His complaints led to the fabrication of charges against him. He had to pay bribes and to promise payment of more in order to get the charges dropped. Finally, when the demands were too much, he complained to the Bribery Commission. The commission, after inquiries, filed charges against a police inspector.

Thereafter, Nishantha and his wife were pressured not to give evidence in the case. When they failed to pay heed, about 20 police officers, including the OIC of the Negambo police station, surrounded their house and assaulted them and their two young children, and took them to the police station. Later, the family filed a fundamental rights application regarding torture of all the four family members, and the Supreme Court granted leave to proceed. The family named 12 police officers as respondents.

Then, some unknown persons visited the family and told the couple to withdraw the fundamental rights application in 24 hours or the whole family would be killed. Nishantha complained to the IGP and all the Sri Lankan authorities, including the Ministry of Disaster Management and Human Rights.

On 21 September 2008, two gunmen shot Nishantha Fernando in front of his young son (see "The price of fighting the state in Sri Lanka" by Julianne Porter, *article 2*, vol. 8, no. 1, March 2009). No one has yet been arrested and there seems to be no inquiry at all about this murder. The mother and the two children

received further death threats and they had to move from house to house over several months for security. The family has remained in hiding.

Hundreds of cases of this sort, arising not from security concerns but from the adventures of policemen abusing their authority to make a profit, can be narrated on the basis of cases that the AHRC and its partners have documented over the last few years. The fundamental rights cases before the Supreme Court alone together tell a tale of enormous cruelty and of abuses of power that neither the police authorities nor the government have made any attempt to stop.

"There is no hope that the character of the police will be allowed to develop oriented towards people as its chief client, despite lip service to current world trends"

—Senior DIG (retd.) Gamini Gunawardane

In all discussions relating to development as well as peace in Sri Lanka, radical reform of the police should have a significant place. However, as retired DIG Gunawardane points out, this is not likely to happen any time soon:

> Judging by what is going on at present, no government is likely to change this arrangement with regard to the police. In the short term it is advantageous to the party in power to be able to directly manipulate the police. For, this is the direct exercise of civil coercive power. The party in power only realizes the adverse effects of this when they become the opposition. They then dare the party in power to hold elections having implemented the 17th Amendment etc. But when they get back into power they do not wish to change this set up, in the interest of the people whose sovereignty they exercise. Neither is there a strong movement by the people to have this situation changed. It is doubtful whether even the public wants a totally independent police or whether they would like a police manipulatable through politicians depending on which side of the law one is placed in a given situation! No proper research has been done on this question. Thus, the saying 'people get the police they deserve.'
>
> In these circumstances, there is no hope that the character of the police will be allowed to develop oriented towards people as its chief client, despite lip service to current world trends such as community oriented policing etc. So the police are compelled to work within this latest paradigm. Hence, public interest will be only marginal.
>
> Now I come to my point. I see a problem for the police to function effectively as an organization even under this paradigm. It is really a structural and a managerial defect. Of late, the Senior DIGs who form the Top Management team of the IGP are posted to the provinces, to the forward headquarters. He sits over and above the local DIG in the provincial capital. He is thus drawn towards the ambit of the sphere of activity of the DIG, as the most senior officer present. He is thus compelled to encroach on the work of his DIG. Similarly, the DIG is drawn to do the some of the work of the SSP [Senior Superintendent of Police]. The SSP in turn is led to do some of the work of the ASPs [Assistant Superintendents of Police].
>
> And the ASP is very often seen doing the work of the OIC. Thereby the supervisory function at each level suffers. The OIC in the meantime has not much work to do other than to be present at the many occasions of a VIPs who visits his area. In view of the political character and also owing to the security concerns, the entire local hierarchy tend to be present, mainly to be seen by the VIP. Thus the OIC has not much time to supervise his men or look at his records or do any court work. The snowballing effect is that most senior officers are found to be immersed in office work, working late into the night, mostly doing their subordinates'

> **"To facilitate upward mobility and protection for incompetence, one needs political clout; efficiency is not the criterion"**
>
> ***—Senior DIG (retd.) Gamini Gunawardane***

work. As a result of the senior officers doing the work of their subordinates the subordinates miss the opportunity of acquiring more skill, experience and maturity at their different rank levels. Hence, as they go up the ladder, they possess less and less experience both to manage their jobs and to give appropriate directions to their subordinates. They also do not have sufficient confidence in the subordinate to discharge his responsibility. So superiors themselves do the work of the subordinates to ensure that there is no slip up. This is because, the responsibility of getting the job done falls ultimately on the senor officer. So to be sure, he does the subordinate's job himself! So the subordinate never learns. Thus the situation keeps on deteriorating in a counter snowballing effect. The senior officers on other hand, have no time pay attention to detail or to do any creative work in their higher capacity, beyond performing their routine tasks. The norm is, to get by each day. Neither the officer nor the subordinate is tested or held accountable. So no improvement, or deeper levels of supervision. The result is such as Malabe and Angulana incidents. Many more to follow.

Consequently, the officer levels lose the opportunity to develop their managerial and interpersonal skills though they may acquire the technical skills required for their survival. Thus, there is lacuna in the officering skills at the officer levels. This is the complaint of many subordinates of their superiors. This problem has become further complicated as a result of the absorption of the Police Reserve into the regular force, consequent to an election promise. The details of this problem could not be discussed here as it is beyond the scope of this essay.

In these circumstances mediocrities have a field day. Of course, to facilitate their upward mobility and protection for incompetence, one needs the political clout, for efficiency is not the criterion. Hence, out of necessity, they develop skills of 'politician management' as against personnel management etc.

Starting from here, problems escalate from one to the other and spread like a cancer. Thus, it is surprising that even the present level of service delivery is possible.

The article talks about some of the problems associated with management of the police hierarchy that had the system not been so heavily politicised for so long would not have emerged as serious threats to its coherence.

A policing system is a hierarchical institution. Those at the top have responsibility for the behavior of those in different layers within the institution. It is the job of those who are at the top to ensure that all those below do as expected of them. Departmental orders lay down the responsibilities of leadership and of supervision. They prescribe intricate arrangements for the maintenance of documents. The officer in charge of a police station is responsible for what happens within it; the ASP of an area inspects books, makes visits and takes his own notes, by which he keeps track of the work of all police stations under him; superintendents supervise and guide the work of the ASPs; senior superintendents exercise further monitoring and supervision; and deputies to the IGP look after the entirety of the institution.

That was how it was and that is how it is supposed to be. But now any police officer may think this is just a fairytale. Today, the police hierarchy from ASP to IGP cannot even arrange for the proper transport of an alleged suspect when he is escorted to find some material evidence. The oft-repeated story is that during the journey the handcuffed suspect takes a gun or bomb and tries to attack the police, who in turn shoot him dead.

"In the Supreme Court and high courts there are constant revelations of police tampering with documents"

Are the officers of the police hierarchy incapable of devising a system for the safe transport of criminals from one place to another for purposes of investigation? Surely it is not such a difficult task to design guidelines and instructions about the transport of suspects during criminal inquiries. All over the world such things are done quite safely. It does not require extraordinary intelligence to design and implement such a system; however, Sri Lanka's police hierarchy has proved incapable of doing this much.

Instead of command responsibility, complete carelessness has spread from top to bottom of the law-enforcement infrastructure. Take the case of Douglas Nimal and his wife. Nimal was a police inspector who took his job seriously and tried to arrest some persons involved in drug dealing. Some persons at the top moved against him, and finally he and his wife were killed. No one was arrested or prosecuted for killing a law enforcer who was discharging his duties.

In the Supreme Court and high courts there are constant revelations of police tampering with documents. In fact, there are hardly any cases relating to fundamental rights or torture complaints at high court trials where police have not tampered with books and made false entries. In all cases where arrested persons are later extrajudicially executed, the documents in the books are also manipulated. Had the ASPs and those above them exercised their supervisory powers as required by departmental orders such distortions would not be possible.

The police hierarchy is paid with public funds; however, it is not performing its public duties. There has not been sufficient scrutiny of its work in parliament or in the media. If the lawlessness that the country has descended into is to be addressed, the public must ask questions about what the IGP and his deputies are doing. If by not following legal and departmental procedures they are breaking the law, then who is there to safeguard law and order in the country?

Another feature of the system that Gunawardane identifies is the ever-present danger of greater military control over policing. He notes that:

> There seems to be a line of thinking these days that since the military officers who did well under a capable leader, appointing an Army officer will be the panacea to all problems. The naiveté in this thinking is indeed astounding. Because each field is so specialized these days. The thinking seems to be that "you appoint the 'right 'man and the rest will fall into place." One shudders to imagine the consequences.

> **"A more militarised police may be what is needed to subject the population to greater controls and to displace the rule of law altogether"**

In fact, analyses of the country's police problems—from the Soertsz Commission Report in 1946, followed by the Basnayake Commission of 1970 and the Police Service Report of 1995—demonstrate that a central problem from the inception of Sri Lanka's police system has been its militarised rather than civilian policing style. Insurgencies since 1971 have further militarised it. The appointment of an inspector general from military ranks would only compound problems.

These days, anything and everything is possible within that system, however illegal. Whether police officers engage in drug dealing and protecting the drug dealers; whether they use their powers of arrest and detention to obtain bribes for themselves; whether they help politicians by putting their opponents behind bars under false charges, using anti-terrorism laws and anti-drug laws; or engage in any other type of illegality, there is hardly anything the system can do to stop it. Cosmetic measures such as arresting a few low-ranking officers do not make any difference.

How can these problems be resolved by appointing a military officer to head the police force? Can a military officer establish command responsibility for officers from the lowest to the highest rank? Will not the introduction of a military officer only help the errant superior officers even more, because they can easily mislead and even cheat their new leader, who is totally unfamiliar with the area of work in which they are engaged? Similar experiments elsewhere, where top posts have been given to people from completely different fields, provide enough examples of the distortions that can happen under such circumstances.

A policing system is a public service devoted to law enforcement. Thus, the relations with the public that are required of a policing system are of a completely different nature than those of the military. The political leaders who have proposed bringing an inspector general of police from the military are aware of this. Why, then, do they want to introduce a military leader into the already collapsed police system? They may have other ambitions. A more militarised police may be what is needed to subject the population to greater controls and to displace the rule of law altogether.

For a more militarised system, one need only look as far as Burma—whose military supremo in November 2009 visited Sri Lanka after the president had paid him a call in his own country. In this year, the junta again arranged to keep democracy party leader Daw Aung San Suu Kyi locked up in her house. That case is widely known and condemned globally. A court sentenced Aung San Suu Kyi to five years of rigorous imprisonment. Within hours the junta chief reduced the sentence to 18 months of detention in her own home. The sole exercise of this trial was to give a semblance of legality to an executive order for imprisonment so that this lady cannot participate in any events relating to proposed elections in her country.

In Sri Lanka the case of J.S. Tissainayagam, though not as well known as Aung San Suu Kyi's, also created waves internationally in 2009. The arrest, detention and trial of this man, a prominent journalist and a human rights activist, received the attention of many governments. The American president, Barack Obama, himself mentioned this case as an example of the repression of journalists throughout the world. All leading media organizations worldwide condemned the arrest, detention and trial and repeatedly called on the government for Tissainayagam's unconditional release.

"Tissainayagam was singled out for arrest, detention and prosecution solely to intimidate other journalists and newspaper editors publishing materials relating to the war"

Tissainayagam was charged with aiding and abetting terrorism and instigating racial violence by writing a few lines in an article that referred to the armed conflict then taking place in the north. Tissainayagam, who had been a veteran journalist and a human rights activist, had over a long period of time reported matters regarding internal conflicts in the south as well as the north and east. In the late eighties he helped the incumbent president, who was then in the opposition, by preparing and translating documents relating to disappearances and other atrocities in the south.

There was nothing in Tissainayagam's writing to indicate any attempt to instigate violence or promote racial hatred. There are thousands of similar pieces and none of their authors have been prosecuted. Tissainayagam was singled out for arrest, detention and prosecution solely to intimidate other journalists and newspaper editors publishing materials relating to the war. Several other journalists left the country after his case emerged.

Like the case of Aung San Suu Kyi, in the case of Tissainayagam there were no real grounds on which to base a criminal charge. In both cases the charges were fabricated. The issue before the court in both cases was to decide on the legality and the validity of the charges in the first instance. Both courts proceeded on the basis that fabricated charges had some basis in law and found the accused guilty.

Joseph Stalin's prosecutor, Andrei Vyshinsky, also conducted trials in which the outcome was predetermined. The trials of the 1930s were known worldwide as show trials. The accused were not really the targets of the proceedings. The accused were mere exhibits to be advertised before the rest of society in order to pass a message to the people. Vyshinsky's biographer Arkady Vaksberg wrote that the "purpose of the trial had not been to disgrace or, indeed, to annihilate some of the accused but to create a precedent and pave the way for a psychological attack on the population".

In a similar fashion, the prosecutor proceeded against Tissainayagam and the court sentenced him to 20 years. Previously the Supreme Court had asserted the rights of citizens to freedom of expression and publication. The court has also upheld the rights of citizens to criticize the existing government.

However, the High Court trying a case based on special regulations under anti-terrorism laws has gone completely against these traditions.

"Law is manipulated and twisted to get whatever result the prosecutor wants; prosecutors can even serve as defenders"

Sri Lanka's Ministry of Foreign Affairs has gone even further and in a communiqué stated that criticism of the judgment against Tissainayagam is a slur on the independence of the judiciary. However, in this case, like that of Aung San Suu Kyi, it is the destruction of the judiciary that is the problem, and to point to the court's non-independence is not a slur but a mere statement of fact.

When the Tissainayagam case came before the UN Human Rights Council in Geneva, the AG himself argued that the 20 years of imprisonment was a minimum sentence and that it was a decision of the court, since Sri Lanka respects separation of powers, just as the regime in Burma disingenuously insisted that the court, not it, was responsible for the Aung San Suu Kyi verdict. What was not placed before the council was that under the PTA—through which the conviction was secured—confessions are admissible as evidence, and acts that are not otherwise crimes are under this law considered offences.

Within Sri Lanka, this does not matter as the whole system of criminal justice is anyhow standing on its head. The law is manipulated and twisted to get whatever result the prosecutor wants. The prosecutors can even serve as defenders, particularly when they participate in preliminary enquiries and subvert the process by various means. For instance, on 30 July 2009 the Lanka News Web reported that,

> The Attorney General has requested courts to grant bail to two of the five respondents produced before courts for the alleged financial fraud amounting to Rs. 4,300 million at the Finance and Guarantee Company, which is a subsidiary of the Ceylinco Group.
>
> The reason for requesting to grant bail to the two respective respondents in the case according to the Attorney General is that they had cooperated with the inquiry into the company.
>
> However, it is learnt that the Attorney General's friendship with the respondents developed during the time he served as the Legal Advisor to the Finance and Guarantee Company is the reason for the request to grant bail to two of the respondents.
>
> The accused in the financial fraud case, who were produced before courts are Deputy Chairman and Chief Executive, Finance and Guarantee Company, Mervyn Jayasinghe, Financial Director Sunil Jayatissa, Executive Director Mohan Srinath Perera, Legal Officer Malini Sabharathnam and Deputy Financial Director Samanthika Jayasekera.
>
> Legal sources say that although the Attorney General wanted to get bail only for Sabharathnam, Jayasekera's name had to be included to avoid any suspicion.
>
> A team of lawyers led by Attorney Kalinga Indatissa appeared for the respondents when the case was taken before Colombo Chief Magistrate Nishantha Hapuarachchi.

Upon being told by the Attorney General that two respondents should be granted bail due to their cooperation with the CID investigation, Indatissa had challenged the Attorney General in open court to reveal how the said respondents aided in the inquiry.

He had further said the five respondents had equally cooperated with the investigation.

The Attorney General was represented by Deputy Solicitor General Yasantha Kodagoda.

Lanka News Web earlier revealed in a story that the Attorney General did not institute legal action against the respective company due to his close affiliations with it.

Following the Attorney General's request Sabharathnam and Jayasekera were released on a surety bail of Rs. 100 lakhs each and a financial bail of Rs. 1 lakh each. The other respondents were remanded till August 11.

"In September the AG requested the High Court withdraw an indictment against an accused charged with preparation of forged documents and misleading the CID"

In September the AG shocked the nation by requesting the High Court of Colombo withdraw an indictment against an accused charged with preparation of forged documents and misleading the CID. The accused, B.A. Abeyratne, is the principal of a well-known Colombo school who was indicted in 2008. The indictment stated that he had influenced an investigating police officer to accept a number of forged documents in an inquiry with regard to the admission of children to the school.

The request to withdraw the indictment was made on the basis of an affidavit filed by the accused, which stated that he would resign from his service at the school and in which he expressed regret about the damage caused to the school by his actions. Besides this, a number of persons wrote to the AG asking him to exonerate the principal, considering his service to the country, to the school and to the sphere of education. It was on the basis of this affidavit and the letters that the AG made the request for the withdrawal of the criminal indictment, despite of the fact that there was sufficient evidence to continue with the prosecution.

Although the High Court refused the request and ordered the trial, the very attempt to withdraw it raises disturbing questions. Are affidavits from accused persons promising good behaviour and letters by others about various services rendered now going to be grounds for the chief prosecutor to withdraw criminal charges? If these are valid criteria for not prosecuting then the AG should not prosecute anyone, as every accused will be willing to give an affidavit promising not to misbehave again. And these days, it would not be difficult for any accused to get letters of recommendation from even the highest places, requesting that an indictment be withdrawn. Only innocent persons, who have failed to develop connections with the corrupt and the powerful, might fail to get such letters.

Let us suppose that the judge allowed the application. Then the AG would argue that it is the court that has made this decision to not prosecute, not his department, and that Sri Lanka respects the separation of powers. Thus, the responsibility for the decision

would have been placed on the court. This is the manner in which the responsibility for the absence of investigations and prosecutions into extrajudicial killings at police stations has been explained away on many occasions, where the decision of a magistrate that a killing is "justifiable homicide" is used to exonerate all other parties and cease prosecution.

"Whereas at one time there existed a department called the Attorney General's department, today it exists only in name"

What is not discussed in these cases is that the investigative authorities and the prosecutors have invariably not placed all the circumstances relating to the killing before the court. With no impartial investigations into such killings and documents forged to give the police version of events, the courts only have the evidence that the police and the prosecutors place before them. Yet later when complaints are made over the absence of investigations and improper prosecutions, the magistrate's finding is pointed to as the reason for inactivity or inadequacy.

From the above it can be said that whereas at one time there existed a department called the Attorney General's department, today it exists only in name. It has lost its place as the government's legal adviser and lost its way as the prosecuting agency. From the way that the government acts now, it is not doing so on the basis of proper legal advice. And judging from the number of cases that constitute serious crimes that are not prosecuted, it is also not possible to say that there is a genuine and an authentic prosecuting agency in the country. Nor is it possible to say that the prosecutions in Sri Lanka are being undertaken on the basis of law.

The demise of the AG's department is a matter of grave concern because its functions are vital if a nation is to accord with the rule of law. By contrast, where legality itself ceases to have meaning, as in Sri Lanka, the department also becomes meaningless.

How did the 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 the opportunism of officers who were too eager to please the executive.

Some episodes are well known: under presidents Jayawardane and Premadasa, the department's legal advisory function was ignored. It did not resist the 1978 Constitution. There is no evidence to suggest that the department had given any advice to the government about the implications of this constitution for the legal system of Sri Lanka. When Jayawardane started a war on the judiciary, the department did not give advice to the government on the unconstitutional nature of his interference and its possible adverse consequences.

Under these two regimes, the AG's department persecuted political opponents. The case against Srimawo Bandaranayake and others had its full cooperation. During this time there were also several criminal cases file against SLFP politicians such as

Vijaya Kumaranatunga, the present president Mahinda Rajapaksa and others, purely for political reasons. Though these cases didn't end up in prosecutions, the initial steps were initiated through the department.

> **"The AG should have resisted executive moves to undo the basis of constitutionalism; if that led to conflict, the legal adviser should have faced the conflict, rather than avoid it by unconscionable compromises"**

The 1982 proposal for holding a referendum to extend the term of parliament for another six years would have shocked any legal department working according to common law traditions; however, Sri Lanka's AG had no legal advice to offer against this move. Not only was the country's electoral system completely destroyed, but so too was the very basis of law through which government derived legitimacy.

The best test of legal advice is the advice given on constitutional matters. The AG should have resisted executive moves to undo the basis of constitutionalism. If that led to conflict, the legal adviser should have faced the conflict, rather than avoid it by unconscionable compromises. Had the AG resisted, it would have set off alarm bells about the executive's serious attack on the legal framework of the country. Even if the executive would not have wavered from its path, it would have met opposition, and the complete destruction of the institutions of law could have been avoided.

While the AG's department failed to act to oppose extralegal executive actions done in the name of law, the judiciary was dramatically attacked and damaged from within thanks to the work of the former chief justice, Sarath Silva, who resigned mid-year. On 7 July 2009 *The Sunday Leader* published an article by telecommunications expert Dr. Rohan Samarajiva, "Curtain closes on the Sarath Silva saga" to mark the occasion, of which extracts follow:

> I recall a conversation with a telecom CEO when I returned to Sri Lanka in 1998 to work in government. I asked him what his blackest day was. He said it was the third or fourth day of the extended blackouts resulting from CEB unions trying to blackmail the government. He had used up his backup power, backups to the backups, and there was no diesel.
>
> He was trying to supply reliable telecom services; his day of black despair came when the external infrastructure he depended on failed. My nadir was the day I realised that the judicial system of Sri Lanka was failing. It is the external infrastructure for everything. My day of black despair came under the watch of Chief Justice Sarath Nanda Silva, who retired last Friday.
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> ...
>
> The Supreme Court is the final bulwark against assaults on the Constitution in any country. It is customary to say that the Constitution of a country is not what is written down in black and white on paper, but what it is said to mean by the highest Court. But how did the Silva Court safeguard the Constitution?
>
> Abject failure on the 17th Amendment. Selective enforcement on the 13th Amendment (annulling the ad hoc merger of the Northern and Eastern Provinces while turning a Nelsonian eye to the other egregious violations). Outright failure on safeguarding the principle of parliamentary control of public finance, something fundamental to the

> **"A friend of former AG Kamalasabayson said that when asked at time of retirement what he thought of the legal system he remarked that he saw nothing that can be called a legal system"**

parliamentary system of government and something written into our Constitution: "Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by parliament or of any existing law" (Article 148).

The 2006 budget allowed the Treasury to move funds around among different heads without parliamentary approval, blessed by the Silva Court.

The list goes on. Court tries to set petrol prices, infringing on the powers of the executive; executive refuses to implement court orders; court withdraws orders. Persons held on non-bailable offences are released without explanation by the highest court. The Constitutional terrain at the end of the Silva term looks like what Lanka must have looked after Lord Hanuman's tail was set on fire. No principles established; no doctrines for guidance; just random devastation.

...

The broad sweep of judicial activism has signalled to all who make economic policies and implement them that it is no longer enough to follow procedure, but to act in ways that would be acceptable to a future court... or to ensure that no one will be offended by the decision, thereby precluding a fundamental-rights challenge. These being impossible, the best course of action is inaction.

This is worse than what happened with government-personnel decisions a decade or so ago. But at least, people in government knew what the rule was and what it applied to: personnel decisions. Now, there is no such certainty or delimitation. All executive actions are fair game. The rule is that there is no rule; one has to guess what the Supreme Court would find acceptable.

Is it worthwhile trying to figure out what the present judges would decide? No, because the time limit on instituting cases has been thrown out. So the decision maker has to guess what would be acceptable to any court in the present and in the future.

So what is the end result? Policy paralysis, something we can ill afford in a fast changing world.

A friend of former AG Kamalasabayson said that when asked at time of retirement what he thought of the legal system of the country, he is said to have remarked that he saw nothing anymore that can be called a legal system; only some buildings. While the former AG tried to keep something of the system intact, the former chief justice played a part in its destruction. In the end, both of their institutions have fallen to zero, and with them, the status of the citizenry who depend upon them.

The zero status of citizens

When all legal entitlements are deprived to citizens their formal rights are insignificant. Anything can be done to them and no consequences will follow. Today every Sri Lankan citizen is a legal non-entity in this sense. Their entitlements on statute books but have no actual relevance. Abysmal lawlessness and individual rights cannot coexist.

The situation in Sri Lanka at present demonstrates this fact with great clarity. Even senior persons suffer from misunderstandings about this fact until they themselves are made victims of it. For instance, in several video clips Dayan Jayatilaka, a former ambassador to Geneva, talks about his removal from his post. He states that Sri Lanka has no foreign policy, as if it should be a surprise to learn that there is anything other than the abuse of power. He talks about his removal as irrational as if it should come as a surprise for the Sri Lankan state to act irrationally. In fact, everyone there is treated irrationally all the time. The concept of merit in appointments and rationality in decision-making is absent. The 17th Amendment failed for this reason. The parliament made an attempt to acknowledge merit in appointments, dismissals and transfers of civil servants. It did not succeed. The principle now is that irrationality in appointments, dismissals and all such matters is normal.

Why is it that many people still do not grasp that the system in the country has gotten so warped that it is not capable of rational behaviour? Here the notion of zero status requires further explanation. The word here is used in the sense that Solzhenitsyn used it in his masterpiece on repression, *The Gulag Archipelago*. Millions of Russian citizens were turned into zeroes just by somebody knocking on their doors or telling them that they were under arrest. Many citizens began to expect such a call at any time. However, the group that was surprised when such a call came and would never understand it, even after being brought into prisons, were the privileged sector that belonged to the party. Solzhenitsyn devotes an entire chapter to describe the plight of these people, who could not grasp how the system

could treat them so irrationally. It never occurred to them that the rest of the country was treated far more irrationally all the time. They had participated in the creating of a society of zeroes and were shocked to find that they too were counted among those with no status or value whatsoever.

"The irrationality of the entire country escapes the attention and comprehension of those from the more privileged sections of society, who still think that they have some kind of status"

This is why the irrationality of the entire country escapes the attention and comprehension of those from the more privileged sections of Sri Lankan society, who still think that they have some kind of status by virtue of their positions in the hierarchy and relative wealth. The problem for them is that when society is reduced to a zero through the devaluing and destruction of public institutions, then the rights on which the system is premised too have no meaning, and no more for them than for anyone else.

The murder of Lasantha Wickramatunga, a prominent journalist, can be used to illustrate. Wickramatunga was the chief editor of *The Sunday Leader*. Two gunmen shot him and one of the newspaper's senior journalists on 8 January 2009, as they went to work; the second man was wounded.

Wickramatunga was a prime target of the government and particularly the Secretary of the Ministry of Defence, Gottabaya Rajapakse, which had earlier tried to have him arrested. Thereafter a group of unidentified persons attacked and burned his paper's printing press; they were never arrested. It is widely believed that the ruling party sent the group, and that it was probably from some section of the armed forces.

Just two days earlier about 20 unidentified attackers raided the premises of Sirasa TV and caused huge damage to equipment. The group assaulted the staff and left a large Claymore mine. Sirasa TV is the most important centre for the independent media in Sri Lanka. The opposition leader said that the government was responsible for the attack and that members of a military unit carried it out. The attack provoked protests from journalists and opposition also from foreign embassies. Following the attack the AHRC issued a statement ("The attack on Sirasa TV an early warning of worse things to come", 7 January 2009), which predicted:

> The massive attack on the Sirasa TV station brings gloomy predictions of things to come in the very near future to a country, which is already bedeviled by lawlessness, violence and corruption. However, there is no rational basis to expect things to become any better but in fact reason to believe that worse things are yet to come. If there was to be political assassinations of opposition leaders, trade union leaders, journalists, human rights activists and others who stand for democracy, rule of law and human rights it would be the natural course of things arising out of a build up which has already taken place.

In less than 48 hours this prediction unfortunately proved true. Globally Sri Lanka has been declared as the second most dangerous place for journalists, the first being Iraq. It is also among the most dangerous places for anyone that the government suspects to be an opponent, as shown in the case of

Ranga Bandara, an opposition parliamentarian whose house was attacked and burned on 6 October 2009. Shortly after he gave a recorded interview to the AHRC, of which the following is a summary:

> **"It is a member of the provincial council who had given orders to the group of people who attacked my house"**
> ***—MP Ranga Bandara***

A group of people entered my premises on Sunday night, October 4 after breaking the decorations outside. They arrived in two vans. After entering my premises they spread highly inflammable liquid throughout the premises and set the premises on fire. The spread of the liquid had been done very carefully to ensure that they could raze the premises to the ground in the shortest possible time. Then they left the premises.

I was away attending to election work on behalf of my party at the time. I learned that the neighbours gathered immediately but were afraid to go in because they were aware of recent experiences where bombs were placed inside when this type of attack is done. The people tried to throw water from outside to stop the fire. It was only after one of my employees, a lady, rushed to the place and entered the premises that others also entered and tried to put out the fire. However, they could not do much to stop everything from being destroyed.

My house and office are situated next door to each other. All the documents relating to my work as a member of parliament was inside both premises. I also had five computers for the purposes of my work. There were many other pieces of equipment that were also used for communications. And there were also the household goods. All has been burned down and the total damage in monitory terms is about Rs. 11 million.

Immediately when the news about the fire had been spread the police were informed and they in turn informed the fire department of the Negombo area. The head of the fire department and the chairman of the provincial council were also informed. Initially, the fire department asked for Rs 15,000 as costs for putting out the fire. The police informed that they will pay the money but the order had not been given for the fire department to move. So, they did not come at any time to deal with the fire. In fact, during this same time the vehicles used by the fire department were seen in the roads in Negombo being used for putting up flags for the ruling party.

The police in the area of Negombo also have water bowsers but none of these were sent despite of the information that they had to help in putting out the fire.

After I arrived at the place with several others I received a lot of detailed information about who was involved. It is a member of the provincial council who had given orders to the group of people who attacked my house. According to the information I received they will be protected because he, the provincial council member, received these orders from high above. I have also been told about the names of several of the persons who participated in this attack. I have also got to know the number of one of the vehicles that were used for this attack.

However, there is a big problem. The people who confided in me and gave me this information are mortally scared. They don't want to take the risk of coming forward to give evidence in these matters because it means very serious trouble for them. Of course the fear is real and everybody in the country would understand that kind of fear.

Among those who talked to me were two police officers. They gave me a lot of information about whom and how this attack was carried out. However, the also told me that they simply have to keep quiet because if they try to do their duty in terms of the information they have received, they will lose their jobs. Once again this is not a surprising revelation.

> **"Now I have been reduced to a position below zero"**
>
> ***—MP Ranga Bandara***

A complaint about the incident has been made to the police and three witnesses have given statements regarding what they have seen at the initial stages of this incident. The police have said that they will also record a statement from me. I will make that statement. However, I do not have the least amount of faith that there will be any sort of credible inquiry. It is not simply possible for the police to do that kind of inquiry in Sri Lanka now because of the political directions that they have to work under.

So here we have evidence about who did this act and how, but what is the use of that information? The police are not going to do what they are expected to do under the law on the basis of such information. On the other hand these people who come forward to give information would be put at very great and real risk. That is the situation that I am facing about the investigations into this system and regarding that I do not know what to do.

I have no doubt at all that this is a completely political attack directed to ruin me completely, politically and otherwise. Now all that I had is lost. Even the basic equipment I used for my work has been burned down. I do not have any money at all to buy any of these things back.

Now I have been reduced to a position below zero.

The political environment of today is such that opposition politicians are first exposed to such attacks to ruin them from engaging in their political activity. On the other hand there are constant death threats. My possible assassination by this regime is a very real threat. I have been under threat all the time. Earlier there were two occasions on which bombs were planted at my political offices in my electorate. On one occasion as I received information earlier I was able to get the bomb squad to disarm the bomb. However, the second one exploded on the same day.

While such attempts are made to intimidate me as a member of the opposition there have also been constant attempts to buy me over. This has happened at the very inception of my political career nine years back and it has continued until now. Persons coming on behalf of the present regime have offered me huge sums of money and positions if I join the government. A deputy minister approached me and offered me up to Rs. 20-50 million if I joined the government and also offered a deputy minister's post. Then another politician close to the president approached me with similar terms. Then there is a family known to me in Colombo. The lady who had connections approached me and offered me the same terms. I have informed all this to the leader of the opposition. I have also mentioned these things to some newspapers in the past.

Today, the existing political environment is a very dangerous one. The opposition political party members are not only prevented from doing their jobs but even the media is afraid to give us any space. Several media channels that earlier invited me to attend various public broadcasts no longer invite me. The media does not report what we say properly. Sometimes when the media try to do their jobs properly I was told they are called by someone from the top and severely warned to desist from giving such publicity.

I have a wife and three children. My son is 16 years old and my daughter 14 years old and they are both at school. The youngest child is very small. It is the political culture today to assassinate the wife and children if you cannot destroy the person who is your target. I am afraid that my family will be exposed to serious threats to their lives merely to teach me a lesson. That is how bad things are.

> For years I have been writing to the international bodies of parliamentarians and the international bodies of the UN complaining about the threats I have been facing. I have copies of all the letters written to them. The file containing all these letters is now about one and a half kilos in weight. Despite of all such threats I had to face this arson attack and the threats to my family, my supporters and I.
>
> I can do nothing but to appeal to all those people in the international community to come to my assistance and ensure protection to my family and I. There is no one else to appeal to. So I appeal to all persons with good hearts in the international community on this occasion for understanding of this situation and also to take steps for protection.

Another person targeted in 2009 for opposing the government was Stephen Suntharaj, 39, who had been working for Centre for Human Rights and Development (CHRD) since March 2008 as a program officer. He formerly worked for the Child Protection Authority in Jaffna, where he took up so many cases of child abuse that he was threatened and ultimately had to leave the area.

"The car that carried Stephen Suntharaj was stopped just close by the Buddhist Ladies college, with one man holding a pistol at the driver's side, while another man in uniform opened the side door, dragged Stephen out and pushed him into a white van"

In early March, a group of armed men in uniform took him from the front of the CHRD office in Aloe Avenue Kolpity, Colombo. A colleague witnessed the event. Immediately, CHRD sent its lawyer to nearby police stations and found Stephen at Kolpity police station. Stephen was kept at the Kolpity station for two months, under a detention order. During this period Stephen's wife and his lawyer had regular access, and he told them that he was treated decently but that the CID had interrogated him. On May 7, the Supreme Court (Halstrup) ordered his release and he went with his lawyer back to the office. Later Stephen's wife and three children joined him there, and a colleague volunteered to take them to her house. Since the Kolpity police had withheld Stephen's passport and national identity card, they went to the station and collected the documents. At this point the lawyer left.

But some minutes later the lawyer got a call from the colleague who had accompanied Stephen that a few men in uniform abducted Stephen in a white van. The car that carried Stephen was stopped by a motorbike just close by the Buddhist Ladies college (near Turret Road junction), with one man holding a pistol at the driver's side, while another man in uniform opened the side door, dragged Stephen out and then pushed him into a white van parked by the side of the car. There were many bystanders and Stephen's 8-year-old son begged the man in uniform not to hurt his father. Stephen's wife and others saw the men's faces, except for the man on the motorbike, whose face was fully covered. All were in uniform and armed with pistols. Despite this, the abduction remains unsolved.

There is no reason to believe that those who abducted Stephen were acting on any other instructions other than those from the people who authorised his detention in the first place. The entire responsibility for this abduction lies with the Sri Lankan government, as with those of tens of thousands of other victims of recent decades.

> **"By the chief justice's own declaration, the people in the camps have been held completely outside the domestic law; by the invocation of 'sovereignty' they have also been kept outside the purview of international law"**

The zero status of Sri Lankan citizens today has perhaps best been illustrated in the detention camps created completely outside the law to house hundreds of thousands of persons whose lives have been constantly and tremendously disrupted by civil conflict. If detention centres within the framework of the PTA had some form of legality, the new detention centres, by contrast, have no legality of any sort. The internally displaced people are completely outside legal jurisdiction—a fact that even the former chief justice, Sarath Silva, acknowledged in June before a gathering at a new court premises, just prior to his resignation.

Meanwhile, the Sri Lankan ambassador to the United Nations in Geneva responded to international concerns, stating that there was absolutely no problem with humanitarian access to the camps. He added that the high commissioner's offer of assistance would be accepted as soon as her office was "regionally a far more representative and transparent body". He further said that Sri Lanka is a sovereign country and would decide the degree of access it grants.

By the chief justice's own declaration, the people in the camps have been held completely outside the domestic law. By the invocation of "sovereignty" they have also been kept outside the purview of international law.

After the chief justice spoke, members of a Sri Lankan family who lost their home in the fighting and were among those in a tent camp filed a case with the Supreme Court, asking that their rights as citizens—including the right to freedom of movement—be respected. The petitioner claimed that these people had relatives and friends who were willing to take them into their homes, but the Sri Lankan authorities were holding them by force inside the squalid camps. The court granted leave to proceed with the case and posted it for November. In the same month it was announced that the remaining 135,000 occupants of the camps would be permitted to return home by January.

In another case, the AG's department objected in court to an application by a family divided in four camps to be united. The family moved the court to allow a 13-year-old girl suffering from injuries to be examined by a specialist doctor. Despite the AG's claim that she had already been taken to a hospital, the court allowed the girl to be taken to a specialist.

It is not clear on what legal grounds the department objected to the family's application to be united, but what is clear is that refugees and displaced persons are those who choose to leave their homes due to life-threatening dangers. The decision to leave, and later to seek government help for an alternative place to stay, is their choice, though compelled by circumstances. Anyone in such circumstances has the choice to seek refuge or to live by his or her own resources.

No government has the right to keep people forcibly in refugee camps if they choose to leave and find their own means of living. No government has the right to force people to live under

conditions to which they do not consent. Just as all citizens have the right of consent regarding what they do, whom they marry and under whom they work, they have the right of consent regarding their living circumstances. The only exception is people who have violated the law. Internally displaced persons are not criminals and therefore no government is entitled to treat them as such.

The Sri Lankan government pledged before the United Nations Human Rights Council that it would resettle internally displaced persons within six months. However, this has not been possible, and nor was it seriously expected to happen, not only because of the lack of means to resettle people but because the government's approach to the people has been to treat them as the enemy. It has continued its militaristic methods, motivated by security fears, even though the security threat that the LTTE formerly posed no longer exists.

More importantly, the chief justice, the highest judicial officer of the sovereign nation of Sri Lanka, stated categorically that the internally displaced people are outside the legal jurisdiction of Sri Lanka. This raises questions on the meaning of the word "sovereignty" as used with regard to these people. The position of the Sri Lankan ambassador to Geneva on sovereignty is problematic, given the chief justice's forthright statement that he and the law he represents have no jurisdiction.

What defines sovereignty is the law. Anything that is outside the purview of law in Sri Lanka and outside the jurisdiction of the courts is outside its sovereignty. The tent people in Sri Lanka have been, by the very declaration of the chief justice himself, held through naked political power that does not subject itself to the law. The high-sounding claims to sovereignty as a defence against international intervention are nothing more than abdications of responsibility for protection. Protection is guaranteed only within a framework of law. When the law does not exist, claims of sovereignty are nothing but rhetoric to justify neglect.

The neglect of citizens also is not an attribute of sovereignty. If a state claims that it has a sovereign right to neglect its people, if it wishes to treat them as zeroes, this is a corruption of the use of the word sovereignty.

Sovereignty does not exist by the mere counting of heads. It is not within the power of a majority of people, for example, to say by raising their hands that murder or rape will cease to be crimes in their country. The decision to starve or deny facilities to one section of the population also cannot be decided in this way. Perhaps under the present conditions the government may even be able to get the majority of people to say that prosecution for crimes committed against the opponents of the government is unnecessary. Would that be considered an exercise of sovereignty?

"Protection is guaranteed only within a framework of law; when the law does not exist, claims of sovereignty are nothing but rhetoric to justify neglect"

> **"The government argues that when compared to the risk to national security, the sufferings that internally displaced persons may have to undergo are of no importance"**

The Sri Lankan government has extended its disregard of the law to the international sphere. By arguing that human rights and humanitarian assistance should remain within the purview of sovereignty, it has made a mockery of the international process.

Not only were international monitors and agencies denied access to the camps, but also elected politicians have also encountered difficulty in getting access to them. The People's Liberation Party complained that access to the camps was restricted and that even handing over aid donated for people in the camps was proving difficult. The leading opposition party, the United National Party, had also repeatedly had to demand access to the camps and it has condemned the continued restrictions on their populaces.

The government argues that when compared to the risk to national security, the sufferings that internally displaced persons may have to undergo are of no importance. This is unsurprising, as it reflects their zero status as citizens in a country where public institutions also have fallen to zero. Whereas for centuries even the poorest people in Sri Lanka had learned to put up safe roofs over their heads when the rainy season arrived and live comfortably with warm cups of tea and homes arranged with their modest means, now even that much has been deprived to those in the camps.

This tragic drama of the camps is also a metaphor for the tragedy of all people in Sri Lanka, living without roof or comfort under a political system that demolishes the institutions that should afford some sort of protection and relentlessly rains down all manner of injustices. Devoid of avenues through which to have genuine complaints genuinely heard, all that Sri Lankans can do is suffer. Abysmal lawlessness is the handmaiden of citizens' zero status; it offers no refuge or relief.

REPEAL THE PTA: AHRC ONLINE PETITION

Dear Mr. President Rajapakse,

I have long been watching the tremendous suffering of the people in Sri Lanka with great anxiety.

When the government declared the defeat of the LTTE, I hoped that those within Sri Lanka's border would regain the protection of the law, and a sense of peace. Yet this hope has been betrayed by the continued operation of the Prevention of Terrorism Act. There is no longer justification for the PTA, and all it currently achieves is the large-scale deprivation of civilians' rights and the arbitrary use of draconian laws. These leave huge numbers of Sri Lankans without the right to demand humane treatment or legal protection - they lack logic or reason, they are against all principles of equality before the law and for many, they have made Sri Lanka a living hell.

I therefore urge the Sri Lankan government to immediately remove this cause of extreme suffering by restoring the rule of law and leaving the judiciary to its work. The judiciary must no longer be undermined by those with arbitrary, extraordinary power, the rule of law must be revived and all people must be given its protection, as is expected within a democracy.

Yours sincerely,
[fullname]
[location]

Sign the petition online at:
http://campaigns.ahrchk.net/repealpta/

In this issue of *article 2*

An essay on abysmal lawlessness & the zero status of Sri Lankans

By Basil Fernando, Director, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong, with staff of the commission

- The distinction between genuine and counterfeit actions for justice
- The lost meaning of legality
- The predominance of the security apparatus
- The disappearance of truth through propaganda
- The superman controller
- Destroyed public institutions
- The zero status of citizens

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ALRC invites submissions to ***article 2*** by interested persons and organisations concerned with implementation of human rights standards in the region.

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Asian Legal Resource Centre
Floor 19 , Go-Up Commercial Building
998 Canton Road, Mongkok, Kowloon
Hong Kong SAR, China
Tel: +(852) 2698-6339
Fax: +(852) 2698-6367
E-mail: editor@article2.org
Website: www.article2.org