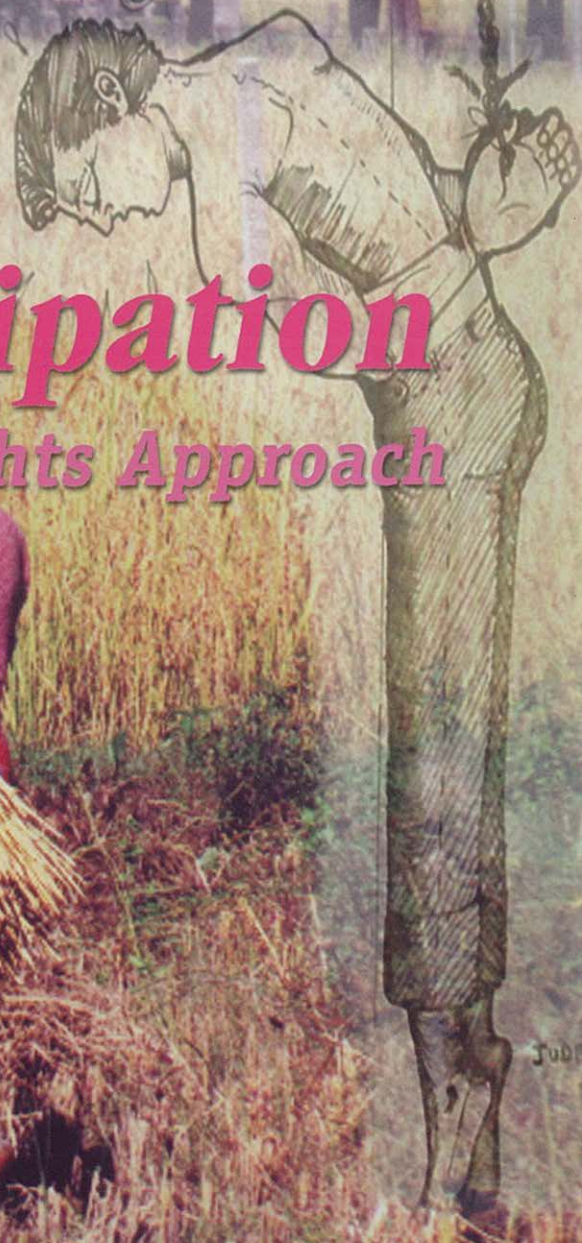


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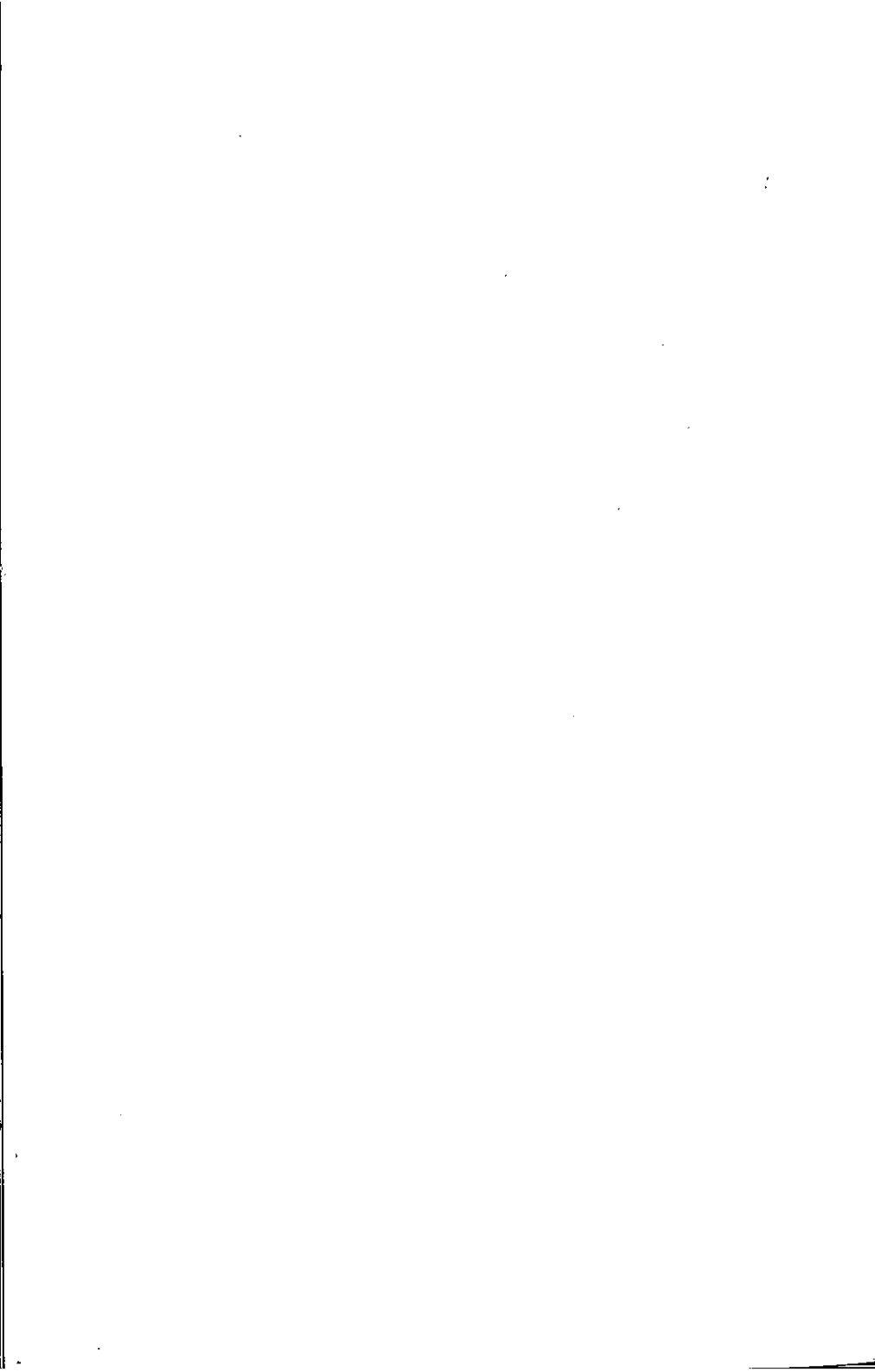
## *Human Rights Approach*



AN AHRC AND ALRC PUBLICATION



Protection *and*  
Participation



# Protection *and* Participation

## Human Rights Approach

An introduction to the  
Asian Human Rights Commission

Asian Human Rights Commission  
Asian Legal Resource Centre

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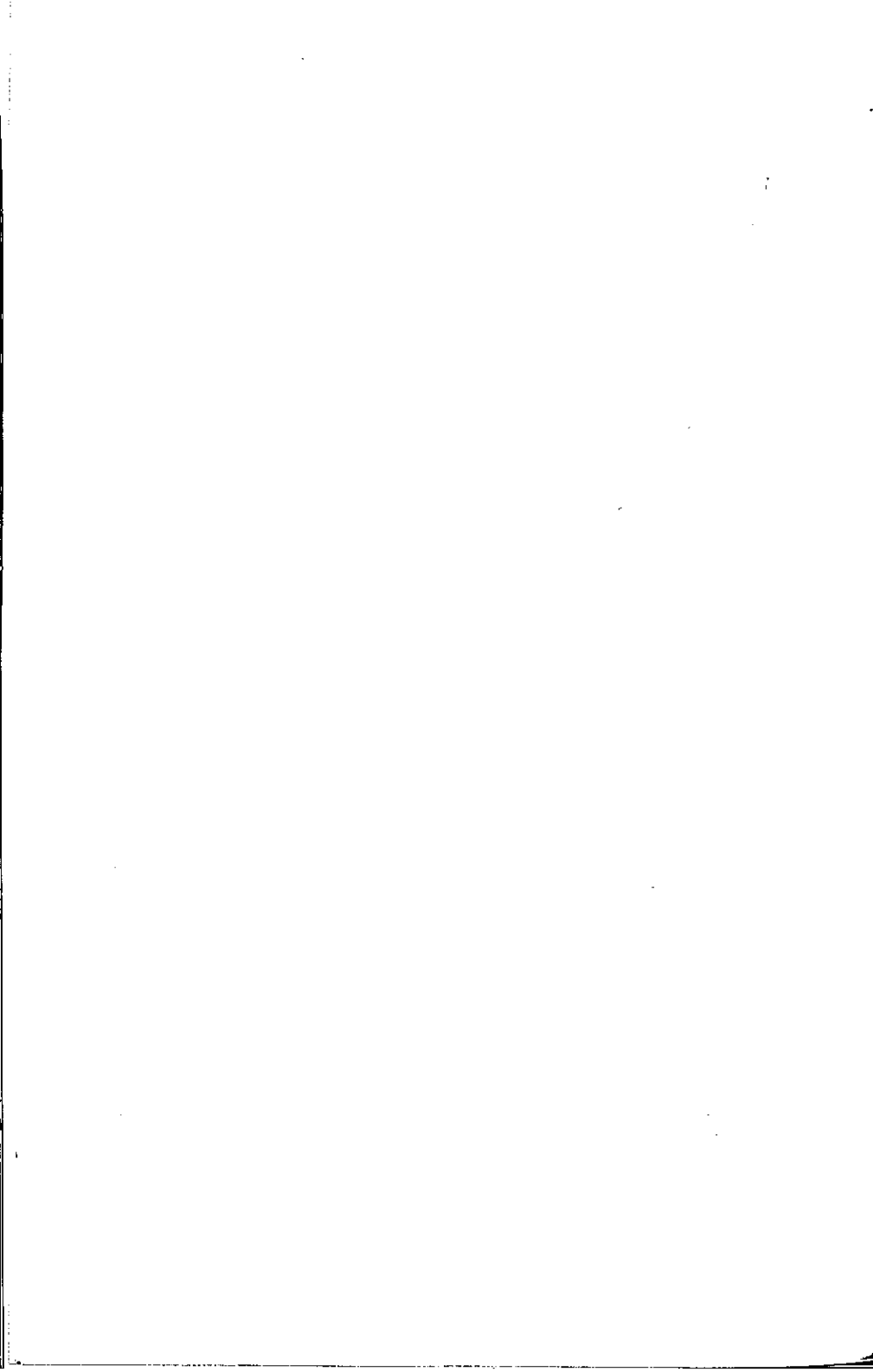
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# Introduction:

## Protection and participation

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All attempts to improve the lives of people, particularly those who live in wretched conditions, involve two elements: protection and participation. The latter depends very much on the former.

Discourses on development so far have almost always ignored the aspect of protection. The result is that talks on participation end up as rhetoric, incapable of achieving any results. Other buzzwords like “empowerment,” “self-help” and “sustainability” also suffer from the absence of concrete practical content. Where basic protection mechanisms have failed due to violence perpetrated by state agents such as police, or by goon squads and para-military groups under orders of local elites, the climate of intimidation that is created is not conducive to participation. Besides this, the absence of legal safeguards such as access to courts and other services makes such groups living in wretched conditions even more vulnerable. The result is that the fear of violence spreads deep among the more socially deprived people, and this obstructs their participation in finding solutions.

The linking of economic, social and cultural rights with civil and political rights very much depends on the way the contradictions between protection and participation are resolved. This principle must also be applied to the promotion of rights of women, where the

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factors of social repression and violence remains the same as before. In such situations the assertion of equality becomes practically impossible while legislation is sometimes passed intending to promote equality.

The work of Asian Human Rights Commission (AHRC) and its sister organization Asian Legal Resource Centre (ALRC) during the last 8 years has illustrated the link between protection and participation. We have worked extensively in several countries throughout Asia and we are in a position to demonstrate this link through practical experience.

This booklet is a small step in that direction.

*Basil Fernando*

*Executive Director*

*Asian Human Rights Commission – AHRC*

*6 September 2003, Hong Kong SAR, China*

# AHRC working principles

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## *One*

AHRC concentrates on the link between justice systems and human rights. It emphasizes that impediments to justice systems must be removed if societies are to achieve human rights. This applies to economic, social and cultural rights as well as civil and political rights

### *What this implies*

— To go beyond mere condemnation of human rights violations and demonstrate the link between such violations and defects in the justice systems of particular countries

— To examine how particular justice systems fail to implement human rights and reveal this to local partners and internationally, paving the way for strategies to overcome these problems

— As an integral part of finding solutions to human rights violations, to ALWAYS combine campaigning on individual cases or issues with lobbying for substantive reforms

— To introduce to the human rights community the concept of MONITORING INSTITUTIONAL PRACTICES (not only individual violations). In addition, we have to demonstrate HOW THIS IS DONE IN OUR OWN WORK

— To persistently use the lessons learned in OUR OWN WORK

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### ***Two***

The link between local elements and outside supporters must be made by AHRC

#### ***What this implies***

1. To promote and sustain local human rights groups there must be a link between them and outside supporters.

In such difficult situations, many people who want to fight for human rights feel isolated; they are confused by the silence of others. Outside supporters can do things which a local group is afraid to do for fear of repercussions. Through their efforts, outsiders can assist the insiders to come to know like-minded people and thus foster the development of a solidarity movement.

By undertaking campaigns against human rights violations vigorously from outside, external helpers can create the climate for local people and groups to slowly organise for change. When the outside movement does a great deal of work for a particular country, repression begins to lose its secrecy, which is very essential to repression.

When secrecy is difficult, extreme forms of repression become rather difficult. When extreme forms of repression are difficult, local people and organisations begin to feel it and slowly begin to be active again.

Outside helpers, by constantly remaining active, can provide a protective cover for the local movement to build and gather momentum.

2. The local movement can often be limited by the local capabilities for communication. Outside helpers can supplement local work by providing the use of more advanced communication facilities. As a result of this assistance, messages coming from local groups can reach the world without incurring extraordinary difficulties and costs to local groups.

3. Many local groups find it difficult to take their country situations to the United Nations and other international forums because of a lack of extra funds, a lack of expertise, fear of being exposed, and time constraints. In these areas, outside helpers can play an important role without facing the same obstacles and dangers. The repressive elements in the country will learn that acts of violence will receive a great deal of international publicity and will have repercussions from U.N. agencies, other governments and people. Consequently, they will begin to learn that such violence is counterproductive.

Initially, local groups have doubts about the usefulness of work at the international level. Some types of problems are insularity, a lack of tangible knowledge about international lobbying and their previous experience of being let down by outside groups. A reliable outside helper can assist the local group to gradually abandon such attitudes.

4. The lasting success of human rights work depends on winning a national consensus on human rights concerns. This development can only occur after particular issues and views receive national attention. When it comes to public attention, many debates take place from different points of view. When a substantial section of society begin to support a human rights approach, then there is consensus.

### ***Three***

AHRC must exploit modern communication facilities as a speedy and cost-effective mode of work

#### ***What this implies***

- Improve staff capacity in the use of modern communication
- Help local organisations understand and use these forms of communication
- Create ways for the speedy transfer of information from the grassroots level to AHRC communication networks

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— Train grassroots workers in methods of collecting and recording information that are useful to promoting and protecting human rights

— Create, improve and expand AHRC's networks

— Constantly monitor our communications so that the quality of the communication is kept at a high level

— Try to devise ways for easy understanding of the materials that are being communicated

— Create and improve web sites and data bases, both regionally and locally

### ***Four***

As a regional human rights NGO, AHRC is in a unique position to bring local issues to international attention and bring international discourse on human rights and democracy to the local level

### ***What this implies***

— Take local issues to the international community, U.N. forums and other international gatherings on a regular basis

— For this purpose, maintain and improve local case studies and research

— Help to generate local discussions, debates and policies which will culminate in discussions to improve the human rights situation in the country

— Help international groups ENGAGE IN INFORMED DISCUSSIONS of problems in different countries in Asia

— Encourage valuable discussions in the international arena, in which new policies and perspectives develop relating to countries with difficult human rights records and where democratic systems and structures are weak

## ***Five***

The poorer sections of society are a key concern in all of AHRC's work

### ***What this implies***

— Make conscious attempts to reflect human rights issues from the perspective of the poor and how they are affected by violations of their rights

— Organisationally, bring the ordinary folk into the movement and for this purpose seek to make their participation smooth

— Make issues such as torture a central concern, as it is the poor that are subjected to these violent practices most of the time

— Make concerns relating to the betterment of the poor, including the promotion and protection of economic, social and cultural rights, a priority; issues such as the right to food must be taken as a matter of major importance

## Seeking impact

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In recent years AHRC and ALRC activities have been geared towards achieving maximum impact in the protection and promotion of human rights with very limited resources. The impact of our activities has to be felt within a geographical area, Asia, where the implementation of human rights norms and standards is very difficult.

Our starting point is that we do not accept the difficulties faced as an excuse or insurmountable obstacle for seeking the implementation of rights. The difficulties must be taken as a given and the work must evolve to achieve maximum impact and surmount the difficulties.

### ***The way to achieve impact***

The impact of AHRC's work can be seen through the application of certain working principles.

#### ***a. The principle: Reveal the obstacles and difficulties***

This implies following a “no-nonsense approach” in stating the difficulties facing our work. Some people object to this, arguing that stating the difficulties too nakedly may lead to pessimism and become counter-productive. There are some who suggest a soft approach, and this is even presented as being diplomatic. However, we find that when we come to grips with actual problems and are able to explain them, we create more energy in many others to fight hard make things improve. In fact, many people want to know clearly why human rights



violations take place and how to overcome such obstacles in real terms. People do not take the “soft” sentimental approach seriously, but very much respect the truth being told.

***Application:***

It can be said without exaggeration that in Asia the work carried out by AHRC and ALRC to reveal human rights conditions has no parallel. It can be said both in terms of the quality and quantity of work. This conclusion can be reached not merely by measuring documents produced, but also by the comments of our partners and others involved in human rights in Asia.

***b. The principle: Learning the real situations***

To reveal the truth it is necessary that we learn about real situations. This requires working methods that lead to deeper understanding. On the one hand this requires a constant flow of information. On the other, it also requires sufficient background knowledge to interpret the new information. Mere collection of information from documents is not enough. It is our experience that some of the most acute human rights problems are not well-documented in normal media channels. Academic publications are even further removed from contemporary problems of human rights protection and promotion. This scarcity of information has to be countered by building a direct link with those who suffer violations of rights. The collection of direct information is thus a core activity when seeking impact to improve rights; along with the sharing of such information as widely as possible.

***Application:***

The learning of real situations takes place all the time. What we learn is usually very upsetting to us. The in-depth knowledge we have gained about real problems seems to many like horror stories. When we tell what we have learned to the international community, the initial reaction is often to be very sceptical about what we reveal. But, with

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time it helps us to establish common understanding on real problems, thus making it possible for us to look for common approaches to solve them. As a centre for real learning of actual human rights situations, the achievements of AHRC and ALRC are enormous.

### ***c. The principle: Develop practical interventions***

Without development of practical interventions it is not possible to change very brutal human rights situations. Impact lies in intervention. An intervention, in order to be practical, must combine the following characteristics: a sense of urgency, and clear short term and long term strategies and suggestions for easy methods of participation by as many as possible. Urgency requires that we avoid delay in making our interventions. Undue delay often leads to discouragement and defeatism. Quick interventions help to direct the energies of victims in a creative way. It creates hope and solidarity. Delays must be minimized, whatever the inconveniences it may cause us. Delayed interventions bring frustrations that are sharper than the inconveniences we may have in dealing with issues. A life that is saved, an issue that is freshly highlighted, a smile that reappears on the face of a person who—if not for quick interventions may suffer irreparable loss—is more than sufficient compensation for our little inconveniences. A combination of short term and long term objectives implies concern both for individual victims and the causes of their problems, including structural issues. A mere propaganda approach, without real worrying about the people concerned or the underlying issues, does nothing.

### ***Application:***

We are involved in practical interventions of many sorts all the time. The AHRC Urgent Appeals Programme makes constant interventions on individual cases. These include civil rights cases as well as economic and social rights cases. Some interventions are directed towards campaigns to establish national or international tribunals. There have been many successes in individual cases. We have the testimonies

of many persons saved from death or extreme danger due to our interventions. Many have been persons not directly known to us but on whose behalf we have appealed after receiving reliable information. Interventions are also made to bring changes in policies, such as to have a UN convention passed into domestic law or have undesirable legal proposals rejected. Interventions may take place locally or internationally. They may involve a very sophisticated approach or something as simple as postcard or letter writing.

***d. The principle: Once an intervention starts, keep it going as long as it takes***

One-time interventions may bring some results. However, lasting impact depends on repetition and consistency. Methods must be found to keep an issue alive till the aims are achieved. This also involves finding creative ways to keep up interest. If repetition means reproduction of the same material then interest is lost. Updated information must generate interest.

***Application:***

Some of our interventions have been kept alive for many years, such as the campaigns to eliminate torture, for criminal justice reforms, to improve the situation of Dalits, to deal with disappearances, for an international tribunal on the 1965-66 massacres in Indonesia, for basic legal reforms in Cambodia, on training of judges in China, for food security in Myanmar, and against “national security laws”. These campaigns have been kept going by constantly updating the situations, meetings to review progress, and finding new ways to keep up interest. As time goes by we have seen matters that initially interested only a few persons gaining the interest of many, and social attitudes changing. Ongoing campaigns are full of frustrations and surprises.

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### ***e. The principle: Combine sophisticated approaches with very simple and attractive forms of expression***

The ability to combine highly sophisticated approaches to solve problems with a simple and attractive expression and a large outreach is very important. Simplification without in-depth information serves no purpose. Sophistication without simplicity and attractive expression does not help participation. Without a vast outreach it is not possible to achieve change. In this regard, individual stories of rights violations and struggles against such violations are very important. Most careful studies into individual cases reveal all aspects of human rights violations in a country and the ways of fighting against them. Individual stories are powerful. They are also the best illustrations for people to understand human rights problems. In report writing, the most important reference must be to individual stories. In developing strategies for fighting against violations, careful scrutiny of individual cases must be first priority.

### ***Application:***

AHRC and ALRC reports, articles, publications and promotional materials are of high quality. The credibility of our material or analysis has not been challenged. We devote quite a lot of time to collecting information, and testing and discussing our proposals with ordinary folk. By using the ‘folk school’ method we have avoided an academic approach, or analysis distant from day to day interventions. At the same time, we have produced an enormous amount of materials that are easily read and understood. We produce colourful illustrations that can be seen in our materials. Above all, we meticulously study individual stories. We look for details in the lives of the people concerned and how in their day-to-day affairs people try to resolve their problems. In recent times, we have used advertisements in national newspapers with large circulation. We are able to achieve a lot in a short time due to such practices.

### ***f. The principle: Humanize the campaigns***

People need actual and physical solidarity. They need to talk and associate with others. They need help getting medical care, and often even need help for short term survival after a bad event. Sometimes they need places to live safely. Sometimes they need help to deal with a sense of shame or stigma that comes from being abused.

#### ***Application:***

In this too we have extensive experience. Our best experience is in Sri Lanka, where we can claim to have created one of the best solidarity networks between victims and the people in the region. Through it, victims have gained enormous self-confidence and have begun to participate actively in human rights organizations. We have seen the psychological impact of this networking with a large section of the country. We have seen a large awakening on moral issues, when people who were silent out of fear have come forward to assert themselves. The sick have been given shelter by people in their own houses, victims have been given protection far away from their perpetrators, young rape victims have been taken into good schools and concerned persons have accompanied them to keep vigil in courts, and journalists have taken moral positions on issues such as torture and abuse of power. In short, a strong protective wall has been built around the victims of human rights violations. Warm human rights relationships have grown while fighting against cold-blooded abuses.

### ***g. The principle: Try to reach as large numbers as possible***

In the past NGOs spent lot of time producing a report or publication that did not reach more than 500 persons or groups. Thus, a lot of effort was put towards producing some valuable material without achieving much. We have deliberately used modern media to constantly reach large numbers. Through email and Internet, we have been able to do this at low cost. We have also tried to use newspapers, radio and television networks. Through such practices we remain visible.

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### ***Application:***

All our key interventions have reached millions. We have done this through a combination of oral interventions among local groups and by a vast email network with the capacity to reach over 200,000 addresses at any time, and by getting the attention of larger networks such as OneWorld.Net and Yahoo News, the press, television networks such as CNN and Star TV, and radio networks such as BBC. We also create our own media, including CDs, audiocassettes and videos. We constantly create posters, postcards and other materials. We have also taken out advertisements in largely circulating newspapers to get attention to our messages. In fact, in terms of the vast publicity we create, our performance far exceeds the work of any NGO. We have developed many websites and they have been referred to by persons in all parts of the world. We run two regular publications, *Human Rights SOLIDARITY* and *article 2*, each bimonthly. We run weekly e-newsletters, which are country-based and issue-based. All these can be viewed on our websites.

### ***g. The principle: Emphasize the indivisibility of rights***

AHRC and ALRC have always tried to highlight the indivisibility of economic, social and cultural rights, civil and political rights, women's rights, and minority rights. Without these connections, work on human rights could not address the deeper forms of discrimination that exist. Women in Asia suffer intense discrimination and poverty. Lack of employment is often accompanied by a lack of family support. Private companies generally look at young women only as a source of cheap labour. Women suffer rights violations both as individuals and as members of families. They are often the victims of mass disappearances, torture and other violations. When the rights of male family members are violated, again they suffer. Thus, in real terms, most of the time human rights struggles are all about women's rights. Women desperately need the support of the human rights movement. For this reason they should also play an active role.

### ***Application:***

Issues like enforced disappearances may at first seem purely political rights issues. However, as we work closely on such concerns it becomes clear that they are also economic, social and cultural rights issues. Behind the vast number of disappearances in Sri Lanka, for example, was a move to introduce new economic policies that would impoverish many. Furthermore, disappearances leave families without breadwinners and can bring destitution. Thus we have conducted campaigns that encompass a range of issues.

In many of our campaigns, the active participants are also mostly women. We have tried to highlight economic issues facing these women. In many places our work has evolved due to the role of ordinary women, and we have seen their participation increase in all our projects.

### ***h. The principle: Combine human rights, the rule of law, and democratization***

It is necessary to combine all work on human rights with issues of democratization and the rule of law. In Asia, the rule of law is threatened all the time. During the Cold War, the rule of law was sacrificed for ideological and seemingly security reasons. It has since been sacrificed in the name of development, national security, anti-terrorism, and fighting organized crime. We have taken the position that to abandon the rule of law has direct consequences for the economy, society and individual lives. We have also argued that without the rule of law, genuine democracy is not possible. In most Asian countries, what exists is a façade of democracy. Social transformation towards genuine democracy requires firm foundations in the rule of law.



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### ***Application:***

In our work we consistently raise the rule of law and democratisation as absolutely necessary if human rights are to be achieved. *Voice of the Hungry Nation*, the report of the People's Tribunal on Food Scarcity and Militarization in Burma, highlighted the link between the rule of law and food. We have produced and shared a large amount of material to show how in recent decades the rule of law and democracy have deteriorated, and how the search for solutions is linked to economic problems. We have also created awareness that the justice system is an integral part of a democracy. By raising our concerns on these issues we have improved understanding and practical actions on these issues.

### ***i. The principle: Link the rule of law and elimination of poverty***

We aim to highlight the connections between human rights, the rule of law and the elimination of poverty. While there is a lot of talk about the elimination of poverty, it is having no effect. One of the main reasons is that the link between the rule of law and elimination of poverty is not taken seriously. In fact, there is a tendency to regard displacement of the rule of law as a condition for economic growth, which is presented as the way out of poverty. However, a closer look at most countries that have taken this approach shows that besides law and order chaos, they are also economically backward. Without the rule of law it is impossible to think of a strategy to move out of economic limbo.

### ***Application:***

This is related to the discussions on the two issues above.



### ***j. The principle: Link local, regional and international aspects of human rights***

AHRC always works to link the local, regional and international aspects of human rights work. As a regional organization, its impact depends very much on how it is able to build and maintain such links.

#### ***Application:***

AHRC has brought the human rights issues of many countries in Asia into regional and international forums. In fact, we do this every day. The list of issues undertaken in our Urgent Appeals, statements, interventions and other activities illustrates the diversity of issues affecting many countries that we address. Furthermore, it is necessary to seek outside assistance to solve human rights problems. This method helps to break the isolation, fear and discouragement that some local groups and individuals may feel. As a regional NGO, AHRC must keep track of what is happening all around in detail, and act to promote regional human rights as a matter of routine. As a regional NGO we undertake a very large quantity of work. We are also in a position to know about events more quickly than groups at other levels, and therefore we can react to things faster. Even the work of the UN depends largely on the work of regional organizations that raise country issues. Often country-based organizations have to face up to lot pressures and violence. Authoritarian regimes can find many ways to intimidate and suppress local activists. But when local organizations join with regional bodies, there are much greater possibilities. In the past, there was no such organizational framework in Asia, except on an ad hoc basis. We can now claim to have created one, thanks to our proper utilization of communication networks and dogged persistence. Even in global terms, ours is one of the most developed networks.

# **Development cooperation on human rights**

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The following considerations are based on the experience of the AHRC and ALRC in recent years:

1. The absence of effective justice mechanisms is a core problem in promotion of human rights in many countries: by justice mechanisms we mean the police, prosecution system and judiciary;

2. The obligation to maintain an effective justice mechanism is based on Article 2 of the International Covenant on Civil and Political Rights;

3. Development cooperation to improve justice mechanisms will go a long way to improve human rights;

4. Components of such cooperation must be as follows: (a) governments (b); civil society organizations, which can educate the public to seek necessary policy changes to improve the juridical framework and also develop civil capacity for human rights implementation;

5. Development cooperation should address the need for international understanding of how human rights can be advanced by developing and reforming justice systems.

# Democratization: Transitions and conflicts in Asia and the Pacific

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*W J Basil Fernando*

To begin any discussion on democratization it is necessary to have some common understanding of what this word means. Over many years I have developed a working definition of democratization that can be expressed as follows: democratization is a process whereby people engage in constructing a state for their own benefit with social equality as its core principle, working through an elected government operating under the rule of law, supported by functioning institutions subject to a constitutional framework incorporating international norms and standards as set out in United Nations' human rights treaties and covenants.

This definition is a bit lengthy, but not without good reason. It is based on literally thousands of discussions I have participated in throughout Asia and the Pacific. It incorporates the most critical characteristics of democratization revealed to me through those discussions. These elements I will now outline in more detail, before turning to some observations flowing from the definition, and concluding with illustrations of democratic transitions and conflicts in Asia and the Pacific.

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### ***The elements of democratization***

First, democratization is a process that people enter into to create a state for their own benefit. Many governments in the region have been disowned by a large section of their societies because the costs they impose on the people outweigh the benefits.

An important requirement for this element of democratization is genuine sovereignty. Sovereignty implies the capacity to use natural resources and other sources of wealth primarily for the nation's own benefit. Thus, it is contradictory to suggest that a colonial power can 'create democracy.' Colonizers rule over countries for their own benefit, and the kind of 'democracy' they introduce has the same characteristics.

Unfortunately, throughout Asia today there is an overwhelming feeling that development of economic policies for the people's benefit is virtually impossible. The global economy subordinates national interests to its own wider interests. This situation has had a devastating effect on democratization in Asia. Instead of a sense of sovereignty there exists widespread feelings of powerlessness.

Many conflicts arise as a result. One is between the local elites who perceive their own interests to be tied to external powers, and the people who suffer because of this attitude. Sometimes these conflicts give rise to struggles for self-determination. Many of the claims to self-determination made by the separatist movement in Aceh, for instance, stem from complaints that the local people have not seen the benefits of resources extracted from their bountiful territory. Many indigenous peoples in the region, for example the Melanesian people, also find their way of life threatened by global and regional developments that have scant regard for their centuries of cultural and social development.

Secondly, my definition of democratization deepens its meaning beyond the shift towards mere formal democracy. The presence of formal democracy is often mistaken for genuine change. By formal democracy I mean the holding of elections whereby regimes are

endorsed through the ballot box. This kind of 'democracy' legitimizes the ruling elite, but does not hold that elite accountable through an effective system of law enforcement. It in fact offers people few opportunities to participate in political life, other than the periodic ratification of the status quo. It also denies people opportunities to intervene in order to stem abuses of power and rampant corruption. At worst, entire elections may become farcical. Under such circumstances, the 'rule of law' is nothing more than the rules of the rulers designed to safeguard and perpetuate their power at the expense of popular freedoms. In many countries in the region formal democracy was introduced by the colonial powers. Decades after the demise of colonial regimes, peoples throughout Asia are struggling to expand and develop rudimentary democratic structures. In fact, elite groups who have happily manipulated and benefited from what was left by colonial powers strongly resist attempts towards more substantive democracy. Such resistance again results in many conflicts.

Thirdly, people who are democratizing are simultaneously constructing their state. A common misconception is that states are conceived via constitutions, born at independence or some other important occasion, and are then ready to serve their peoples' interests. Yet often constitutions establish ideal visions of state and social institutions which do not even exist at the time of independence. Although usually interrelated, the making of a constitution and the making of a state are two entirely different activities. This is very important to understand when considering countries in Asia, where the terminology of democracy adopted from the west often amounts to little more than confused and meaningless jumble. Even apparently simple words like 'parliament,' 'court,' 'judge,' 'accountability' and 'human rights' are used and understood in dramatically different ways. A parliament may be the place where the views of one person or a small minority are rubber-stamped. A court may be the place where sanctions are imposed on ordinary citizens while the executive operates with impunity. A judge may be a person without legal qualifications, or a mere party stooge. Accountability may be a mere word without

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any effective mechanisms to ensure that it is practiced. Human rights may be concepts ratified and agreed to on paper, without any genuine efforts to see them implemented. Hence, there may be a huge gap between the principles of statehood outlined in a constitution, and the realities of statehood that the citizens know from their day to day lives. It follows that democratization necessitates tireless efforts to build a state that is capable of enforcing its principles.

Fourthly, social equality is at the heart of genuine democratization. This may seem obvious to people brought up in the west, where social and political revolutions displaced earlier feudal models of statehood premised on social inequality. In Asia, however, feudal models and mentalities remain deeply entrenched. While again the constitutions of newly independent states readily expressed the principle of equality, an enormous gap persists between constitutional rhetoric and social reality. In India this was recognized even from the first instance, when the chairman of the Constitutional Committee, Dr B R Ambedkar, stated in parliament that with the inauguration of the new constitution “we will have equality in politics and inequality in social and economic life”.<sup>[i]</sup> He continued, “We must remove this contradiction at the earliest moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.”<sup>[ii]</sup> The inability of Asian states to realize constitutional acceptance of equality remains the source of many conflicts.

Equality is affected by both internal and external factors. Inequality in international relationships has in itself become a major source of conflict in the region. When a nation is impoverished due to global arrangements, it cannot function democratically. Elected governments overburdened with external debts and unreasonable demands from international agencies find themselves simply incapable of resolving internal social and economic problems, and soon lose popularity. That subject of so much propaganda, terrorism, is also rooted not so much in ethnicity or region as it is in social inequality.<sup>[iii]</sup>

Fifthly, democratization involves everybody. It is an engagement

that brings together all social groups. It is the flow of ideas between all sections of society that gives sustenance to substantive democracy. Historically, as colonial rulers handed power over to their indigenous counterparts, democracy was understood as a transfer of power between elites. Often the state and its basic institutions were the products of colonial administrations. In such circumstances people had very little opportunity to help shape the institutions that would govern them. As a result, in the words of one scholar, “The institutions were not strong enough to mould and retain the concepts and retreated in the face of other ideas and concepts stronger than themselves”.<sup>[iv]</sup> Rather than pursue the concept of democracy, elite groups found it easier to behave autocratically. This style of governance inevitably leads to conflict. Thus democratization mandates the constant soliciting of, and respect for, the views of all people in the society at the political level.

The conflicts that have arisen between elite groups and others in society since independence have also had much to do with the unjust accumulation of wealth by those in positions of power. This again speaks to the role of social equality in democratization. When democratizing, historically based inequalities must be addressed. Often this is done by popular initiatives. When state institutions fail to protect people from exploitation, they develop ways to protect themselves. These may include collective programmes to safeguard economic resources, including land, crops and cattle. Groups may organize to monitor and lobby against attempts by an elite group to expropriate basic resources such as drinking water, staple foods and public transport. Community actions may also be developed to defend people’s rights, such as through solidarity work to protect women from being trafficked and treated as mere goods in business transactions. Even under the worst circumstances, an authoritarian state cannot fully subdue its people. Resistance always bubbles up somewhere, however subtly. Whatever the action, if democracy is to be rooted in society, such initiatives must have a central position in rebuilding efforts, lest it be regarded as simply imposed from above.



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Sixthly, democratization requires adherence to the notion of the rule of law, backed by institutions designed and prepared to enforce it. Many elected governments have done away with one or more aspects of the rule of law. This may be via martial law or draconian emergency regulations that exceed the limits imposed by the International Covenant on Civil and Political Rights. It may be via national security laws, introduced on various pretexts intended to suspend basic rights and stifle political opposition. It may be via the absence of any effectively functioning judiciary; judicial powers may be restricted or suspended, or cases may undergo delays of a decade or more. It may be because governments have tacitly permitted or actively established police forces that themselves constitute a major threat to the rule of law. In other cases, prosecution systems are so defective as to all but guarantee impunity to perpetrators of human rights violations. The bureaucracy also can be so beset with corruption and inefficiency that no one seriously expects it to respect principles of fairness and objectivity. Under such circumstances, a government may pretend to ensure the rule of law by establishing or pointing to institutions ostensibly established to uphold it. But where the most corrupt persons in a society set up a commission against corruption it cannot be expected to have any good results. Where those who operate with the greatest impunity staff a judiciary with incompetents and cronies, it will defeat the purpose of the rule of law. Thus the presence of effectively functioning institutions to ensure the rule of law is a critical element in democratization. The mere existence of a certain institution does not mean that it is functioning to uphold the rule of law.

Often there is resistance to the rule of law. Many times, some form of authoritarianism is advocated as a necessity for the early stages of development. Where state ideology is based on legitimization of one or another form of authoritarianism, democracy is portrayed as an obstacle to development and a source of internal conflict. In fact, this portrayal of democracy as anarchy is quite common in Asia.



Seventhly, democratization requires that state institutions be held responsible through a constitutional framework that incorporates international norms and standards as set out by United Nations' human rights treaties and covenants. This is a most important condition, as invariably laws are used not to enhance freedoms but rather to restrict them. Forced expropriation of crops, eviction of people from their lands, massive deforestation, arbitrary detention, widespread disappearances and many other human rights violations have been undertaken with legal sanction. The requirement that a state must conform to some basic norms and standards arises from the need for working criteria to eradicate unjust laws and undemocratic practices. These standards, expressed in the body of international law developed over many years, are intended to nullify arbitrary practices that may have the appearance of law, and a state that is serious about democratizing is obliged to incorporate them into its domestic structure.[v]

### ***Some observations flowing from the definition***

There is little benefit in simply classifying countries in Asia as 'democratic' or 'authoritarian'. Countries with a surface appearance of democracy may have many authoritarian characteristics. Singapore and Malaysia are two examples of this. Singapore has a draconian system of social control. The separation of powers exists only in name: there is virtually no power of judicial review over state actions. Elections are far from free and fair; opposition parties are given no chance to gain power. For its part, Malaysia has developed many authoritarian characteristics since the late seventies. The independence of the judiciary has been undermined, and there is virtually no genuine freedom of the press. In both countries internal security laws are used mainly against political opponents of the ruling parties. However, there has been very little support for political dissidents in these two countries, as for a long time both have been seen as allies of the West. [vi]

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Apparently then, what often determines a country's status as 'democratic' or 'authoritarian' is the extent to which it is seen as friend or foe of the West. The Suharto regime in Indonesia and Marcos in the Philippines were two other good examples of this principle. For a long time outside parties did not treat these regimes as authoritarian, though local populations knew better. Both were overthrown by popular uprisings, however in each case the effect of regime change has been limited, as the legacy of dictatorship still continues with devastating consequences for those seeking true democratization. [vii]

At what point can a country be characterized as 'democratic' after an authoritarian regime has been overthrown? Regime change is in itself no evidence of democratization. Since the UN-sponsored elections in Cambodia during 1993, for instance, the government has held power under a liberal democratic constitution. Yet in reality an extremely brutal and undemocratic regime still controls the country. Basic institutions such as an independent judiciary, civil service, and functioning parliament hardly exist. By way of another example, the West has welcomed changes made in China over recent decades, particularly those that have led to a market economy and new global alliances, especially with the United States. However, the party-based bureaucracy has remained firmly in control of all aspects of administration and decision making. Efforts to introduce legal reforms have to date had some small progress, but have had no greater effect that may lead to an independent judiciary there at any time soon. [viii]

A better way of assessing a shift towards democracy may be to study the creation and maintenance of institutions of justice. These are the organs that make a crucial difference between formal democracy and a truly democratic society. A citizen can participate in the political life and day to day affairs of a country only when he or she can challenge obstructions to participation. To do this requires truly independent judicial institutions with powers to provide effective remedies and the necessary resources to ensure their mandate. Additionally, the judiciary cannot work effectively unless there are

similarly equipped and functioning police and prosecution agencies. With these conditions in place, the situation in all of the countries mentioned above would be very different.

Why is it that these agencies are so important? Elite-controlled parliaments are able to limit democracy to mere formalities by denying judicial challenges to their rule. They put up obstacles to prosecutions for abuse of power and corruption. Thus, politicians often pave the way for corruption in business and abuse in civil administration. The de-politicization of civil administration is one means by which challenges to elite power may be expanded, by way of judicial actions, prosecutions and criminal investigations.

Why is it that the combined role of the judiciary, prosecution agencies and police does not enter into many discussions on democratization? The mistake is in the artificial division between 'legal' issues, versus the 'political' issues, which are taken to mean elections and styles of governance. However, justice institutions are at the core of any system of governance, as they have the capacity to control political actors and keep them on a democratic path. Western observers often take these institutions for granted. In the West, justice institutions have developed along with political institutions over centuries. Therefore when 'political' discussions are held, the presence of effectively functioning justice institutions is simply assumed. It is wrong to make that assumption elsewhere. One of the major reasons that democratic institutions in post-colonial counties have failed is because the role of the justice institutions has been neglected. If this deficiency can be addressed, it may resolve many of the flaws in some of the countries mentioned above.

Conflicts between the state and individuals, between particular groups, and between the state and a particular group, often escalate into violence when judicial institutions are too weak to intervene, or are unable to do so impartially. Once such conflicts get under way, they are difficult to stop. The massive violence that has occurred throughout Asia since the 1950s is a testament to this. Lasting solutions

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cannot be found through mere political deals. Conflict resolution requires strong recognition of the role that a justice system must play in bringing about and maintaining a democratic society.

The absence or weakness of institutions of justice also affects civil administration, thereby fermenting or accelerating conflict. Where civil administration can be subjected to the judicial inquiry, it is obliged to be less arbitrary in its behaviour. Yet civil administration is scrutinized in only a handful of Asian countries. Democratization, however, will require that civil administration be brought under the watchful eye of a competent justice system.

### ***Some positive examples of democratization in Asia and the Pacific***

Having drawn this outline of how we may understand the concept of democratization, I now look into some of the democratic transitions and related conflicts in Asia and the Pacific. I begin with two relatively successful examples, one at a national level—South Korea—the other institutional—the Independent Commission Against Corruption in Hong Kong. I then turn to an example of an ongoing struggle for social equality: the Dalit movement in India. After that I examine some of the avenues that have been used towards greater democratization: third party intervention, constitutional measures, human rights campaigns, and international forums. In the latter discussion I refer to: Cambodia, Fiji, the Philippines, Thailand and East Timor.

Among Asian nations, South Korea can be considered something of a democratization success story. A number of factors contributed to this success. To begin with, the movement towards democracy there was greatly bolstered by the popular movement that rose against the military dictatorship of 1980 to 1996. The resistance movement against the military immediately arose in response to the coup. The dramatic resistance of the Kwangju people and brutal suppression of their uprising spurred a nationwide movement that finally brought the

two dictators to trial and conviction. But alongside this top-level transformation, institutional changes have taken place at every step in the administration, leading to reforms of the policing, prosecution and judicial systems. Transparency and accountability have become national ideals and have naturally had a direct impact on political life. State officials are increasingly appointed on the basis of merit rather than favour, indicating that the nation is attempting to break away from entrenched cultural habits that may debilitate democratic change. The institutional developments in South Korea have also not been imposed from above. They have grown out of an intense debate at all levels of a society in which the majority of people have begun to understand and appreciate democratic norms. One factor that has greatly contributed to this exchange of ideas is the communications revolution, as the use of computers and other electronic mediums is now widespread. As a result, numerous e-newsletters and other forums constantly keep people informed and offer avenues for participation.

The Independent Commission Against Corruption (ICAC) in Hong Kong is an example of an institution that has been able to instill a culture of accountability and transparency throughout a large and vibrant society, ensuring a high level of economic development and efficient provision of basic services. The ICAC was set up in 1974 in response to public protests against the rampant corruption that plagued the public sector of Hong Kong at that time, when even ambulance attendants would demand tea money before picking up a sick person. Offering bribes to the right officials was also necessary to obtain access to public housing, schooling and other public services. Corrupt police officers covered up vices such as gambling and drug activities. With adequate resources, full autonomy, legislative will and popular support, the ICAC has carried out a widely publicized programme to eliminate corruption in Hong Kong via investigation, prevention and education. It has had marked success, and Hong Kong is now one of the least corrupt places in the world. As corruption remains one of the major obstacles to democratization in many countries of Asia and the Pacific, the ICAC deserves serious examination and emulation by other states.

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Under certain circumstances, third party intervention may be an effective step towards democratic solutions to deeply entrenched problems. Cambodia is a case in point. Beginning with the American bombing in 1969-70, Cambodia fell into an unparalleled catastrophe. The Paris Peace Accords of 1989 enabled the United Nations to supervise the cessation of conflict, the holding of elections and writing of a new constitution. However, in this case the third party—the international community through the United Nations—did not have the resolve to continue with its intervention until it was well established. Cambodian society had been utterly destroyed by war and famine. The mere writing of a democratic constitution, as discussed above, by no means guaranteed its implementation. The United Nations failed to fulfill its mandate and help establish basic institutions of justice, such as an independent judiciary, competent police, an impartial prosecution system and a functioning civil service. A decade on, none of these institutions are functioning effectively, and as such they lack public confidence and support.

The UN also intervened in East Timor after the people's fierce resistance to Indonesian occupation finally succeeded. The new democracy must face massive poverty and widespread social problems left by decades of civil war and misrule. Its natural resources are plentiful, but are threatened by large economic powers. On the occasion of the first year of the newly elected government of East Timor, Shannana Gusmao, the President of East Timor, at a BBC interview admitted the economic situation of the country is very bad despite the freedom achieved through the elections. The justice system also must be rebuilt. Among local people there is a feeling that "there is no justice in East Timor." [ix]

Another avenue for third party intervention, addressing crimes by authoritarian regimes, is by extending the jurisdiction of international judicial institutions to countries in Asia. To date, Cambodia, East Timor, Fiji, Mongolia, Nauru, the Republic of Korea and Samoa have all ratified the Treaty for the International Criminal Court (ICC). [x] The



ICC is likely to prove a very useful instrument for democratization in the region over coming decades.

In some instances, constitutional measures have been used in order to safeguard democracy. In Fiji, for instance, a coup in 2000 ousted the democratically elected government. In an interesting move, the coup's legitimacy was challenged in court. The challenge was upheld and the coup brought to a peaceful end via constitutional means. The domestic legal maneuvering against the coup was strengthened by enormous international condemnation. Thus the coup gained neither local nor international legitimacy and it could not be sustained. Indeed, the importance of using both internal legal mechanisms and also building international pressure against undemocratic actions is increasingly understood in Asia and the Pacific.

A number of other recent examples illustrate how a constitutional approach may be effective. The removal of President Joseph Estrada of the Philippines on corruption charges was one instance of constitutional powers being used in response to popular pressure. Estrada resigned in January 2001 after prolonged controversy arising from impeachment proceedings on charges of bribes related to gambling. These proceedings were accompanied by mass protests against the president that were in their last stages backed by religious leaders and former presidents. In Thailand, the 1997 Constitution and establishment of the Constitutional Court of Thailand had also attempted to expand the avenues for protection of democratic values. In a response to the waves of popular frustration felt over decades of coups, counter coups, attempted coups, political instability, cronyism and patronage politics, the new constitution imposed anti-vote buying and anti-corruption measures. It established new institutions to oversee and control authorities and to enhance democracy. The constitution also introduced measures to ensure the rights and liberties of citizens, and ended the feudal culture that had dominated Thai political life in earlier decades in which there was no concept of rights.

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Perhaps one of the most innovative constitutional approaches to correct the state institutions of some entrenched practices of corruption and politicization is in the Seventeenth Amendment to the Constitution of Sri Lanka. This amendment was passed in 2001 as a way to stop political interference in the working of several important government institutions. It established the Constitutional Council and several commissions: the Public Service Commission, Election Commission, Judicial Service Commission and National Police Commission. The Constitutional Council appoints commissioners to the other four bodies. Once appointed, the commissioners have the power of appointments, promotions, dismissals and disciplinary control of the personnel in their respective institutions. The aim of this amendment is to deny cabinet ministers the right to make these appointments, as they typically appoint persons on political grounds rather than objective criteria. These commissions have very wide powers and as they are constitutional bodies they can be abolished only by way of another constitutional amendment, which requires a two-thirds majority in parliament.

Increasingly, human rights measures are being adopted as a means to consolidate the rule of law and democracy. Many countries in Asia and the Pacific have introduced human rights bills. Some have provisions to enforce these rights. However as compared to some South Asian countries, in Southeast Asia constitutional developments for enforcement of human rights are insignificant.

Certain movements and organizations are also using United Nations forums and other international bodies to canvass for greater democratization in particular countries. Given the kind of experiences referred to above, an increasingly common belief is that local pressures are not in themselves sufficient to gain a greater measure of democracy. Many organizations now routinely approach the UN Commission for Human Rights and other UN agencies and committees. Representatives of these bodies often pay visits to different countries, collect information and take up issues with the governments concerned, which may in turn lead to steps for institutional reforms.



## ***Conclusion***

Democracy must bring benefits and not costs. Mere formal democracy has not brought such benefits. Democratization must emphasize improvements in institutions of justice and civil administration, rather than electioneering. Reforms in these institutions can realize equality, the core value of democracy.

There is no automatic transition to democracy among the countries of Asia and the Pacific. Those societies that have sought democratization have inevitably faced many complex problems, which in turn have led to numerous, sometimes bloody, conflicts. Comprehensive study of these experiences is very enriching, and necessary for an understanding of the complex processes at work, if meaningful institutions that will enhance the local possibilities for democratization are to be developed. Only critical studies of actual situations—but a few of which have been mentioned above—can guide measures that may help to solve the manifold conflicts plaguing regional transitions towards democracy.

However, global developments are threatening democratization and limiting the initiatives of local actors. The dominant global ideology of recent times, though it uses the word ‘democratization,’ implies something very different: domination. This is the enemy of democracy. Local partners in this global ideology threaten the rudiments of the rule of law and undermine democratic institutions of justice. As a result, even past achievements are now being eroded. More than ever, those persons with a commitment to the spread of genuine democracy must be critically aware of the dangers inherent in this trend.

### **End Notes**

- i. B. R. Ambedkar, ‘On the completion of the third reading and adoption of the Constitution of India’, in *Thus Spoke Ambedkar: Selected Speeches*, vol. 2, Bhagwan Das (ed.), Buddhist Publishing House, Jalandhar, undated, p. 188. [Back to content ]
- ii . Ambedkar’s prediction has been vindicated in contemporary India. There, the Dalit movement continues to be engaged in a struggle towards democratization,

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against centuries-old social inequalities. The Dalits, formerly known as ‘untouchables’, form about 16 per cent of India’s population. In a society entirely based on caste hierarchy, to be untouchable was to be without caste, sub-human. While the lowest within the caste hierarchy have over centuries suffered great discrimination, the position of the outcastes has been far worse. Over the last hundred years there have been many attempts to address the most extreme aspects of this inequality. The Dalit movement has adopted a twofold approach, on the one hand using constitutional and legal means to break down discrimination and enhance equality, on the other, educating their own people to be aware of their rights and to see and think of themselves as social equals with others. Constitutionally, some affirmative actions were adopted to overcome discrimination, reserving places in educational institutions and state jobs for Dalits and other traditionally excluded groups. Untouchability was outlawed and other measures introduced to address caste-based atrocities. These measures have led to improvements. Self-education programmes and self-respect movements have broken the silence these people were forced into in the past. They themselves have become participants in the democratization of their country.

However, Dalit assertions of dignity and equality have brought with them new conflicts. The segments of society that had for centuries benefited from the subservient attitude of vast numbers of people have turned to violence in order to subdue the more vocal and organized Dalits. This has affected the nature of political parties and even the nature of political leadership in India. Law enforcement agencies too have often tried to defend the traditional power structure against this movement. But whatever their efforts, the growing participation of people in the nation’s political and social life who in the past had not participated at all has in itself exposed the flaws in India’s supposed democracy, and indicated where changes must be made. In a similar way, ‘minorities’ have become powerful forces for change in many parts of Asia and the Pacific. [ Back to content ]

iii . For more detailed discussion see, Basil Fernando, *Demoralization and Hope: A Comparative Study of the Ideas of N. F. S. Gruntvig of Denmark and B. R. Ambedkar of India*. Asian Human Rights Commission, Hong Kong SAR, 2000. [Back to content]

iv. C. G. Weeramantry, *Equality And Freedom*, Vishva Lekha Publishers, Sarvodaya, 1999, p. 3. The author was a Vice President of the International Court of Justice, The Hague. [ Back to content ]

v . For further comments see, ‘Open letter to the global human rights community: Let us rise to article 2 of the ICCPR’, *article 2*, vol. 1, no. 1, February 2002, pp. 2–4. Also available online at [www.article2.org](http://www.article2.org) . [ Back to content ]

vi . For a detailed study on social control in Singapore see, Christopher Tremewan, *The Political Economy of Social Control in Singapore*, Macmillan Press, London, 1994. For more details on repression in Malaysia see the chapters on ‘Administrative Detention

in Malaysia' and 'Fair Trial In Malaysia' in *Decline of Fair Trail in Asia* Asian Human Rights Commission, Hong Kong SAR, 2000. In the same publication see the chapter on 'Problems in Fair Trial in the Philippines'. [ Back to content ]

vii . For a useful discussion of some problems in the rule of law in Indonesia, see 'The Independence and Reform of the Judiciary in Indonesia', in *Ruler's Law: The Report of the International Commission of Jurists Mission to Indonesia*, International Commission of Jurists, October 1999. [ Back to content ]

viii . For an excellent discussion on criminal procedure in China see, *Empty Promises: Human Rights Protections and China's Criminal Procedure Law in Practice*, Human Rights in China, Hong Kong, 2001. [ Back to content ]

ix . From the author's personal notes during a training programme held in Dili, East Timor, 15-21 January 2001. [ Back to content ]

x . Coalition for the International Criminal Court website, <http://www.iccnw.org/countyinfo/worldratifications.html> . [Back to content ]

# **Effective rule of law and human rights implementation**

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*Researched by Meryam Dabhoiwala for AHRC*

Human rights discourse has been occurring most noticeably since the Universal Declaration of Human Rights in 1948. Since this time, there have been numerous bodies, covenants and organizations established to further the fundamental human rights of all peoples. There has been a corresponding amount of literature compiled on human rights. With covenants such as the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Prevention and Punishment of the Crime of Genocide, all of which are legally binding on states, the question arises as to why there has not been a parallel improvement in the human rights implementation, thereby affecting the human rights situation of so many people around the globe. The answer lies in a lack of the rule of law principle in so many countries, particularly in the developing areas of the world. Rule of law is central to any society that wishes to function effectively; without it violence, corruption and inequality will be rife. The rule of law is synonymous with the implementation of human rights; if a country is lacking in rule of law, it will be lacking in its implementation of human rights. It is damaging

that so little importance has been given to the implementation of human rights given that implementation is an inherent part of the ICCPR, as it is of other key human rights instruments. Article 2 of the ICCPR requires countries to ensure that domestic institutions and practices meet international law standards, thereby ensuring the upholding of rule of law. However, there is no supervisory mechanism to ensure that this in reality is the case.

The reason for the lack of rule of law is faulty justice mechanisms – the police, prosecution and judiciary. In most Asian countries, these systems

“are so fundamentally flawed that there are constant public complaints and the absence of faith in these institutions, such as in Pakistan, Nepal, Bangladesh, Cambodia and Indonesia. Sri Lanka is an extreme example of a totally collapsed system. Malaysia and Singapore are examples of countries that deny remedies by operation of “internal security acts.” In Myanmar criminal investigations and prosecutions are totally controlled by the military regime. Even India, which in the past had a developed law enforcement system, has suffered greatly due to the operation of various anti-terrorism and internal security laws.

In ensuring effective remedies for violations of rights and thus the proper implementation of article 2, the prosecutor’s function is very important. The absence of an independent prosecuting agency is a feature in several Asian countries. In China, Vietnam and Laos, despite many attempts to carry out legal reforms, the role of the independent prosecutor has not yet been recognized. In countries such as Pakistan, Nepal, Bangladesh, Cambodia and Sri Lanka, the independence of the prosecutor has been greatly undermined by higher political authorities. Concerning political issues, the prosecution systems in Malaysia and Singapore are also defective.

[...] without independent criminal investigation and prosecuting authorities it is not possible to overcome impunity [...] Thus the absence of adequate criminal investigation and prosecution mechanisms creates a vicious circle in which the work of human rights organizations is defeated by the very legal mechanisms upon which they rely.”<sup>21</sup>

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The reason for such problems in many Asian countries is the fundamental difference between the ‘rule of law’ principle, and the ‘rule of order’ practice. With reference to law enforcement, “the activities of police officers are not guided by what laws people are supposed to observe ... Moreover, police officers in all Asian countries are expected to use coercion - including torture - in criminal investigations.”<sup>22</sup> Law enforcement agencies are meant to keep ‘order’, with or without the law. Thus “the rule of law is often sacrificed under the pretext of maintaining order. Police officers are thus seen more as ‘order-enforcement officers’ rather than law-enforcement officers.”<sup>23</sup> The differences between these two categories are what give lie to human rights abuses:

— Order enforcement does not require proof of crimes committed, so investigations are never undertaken;

— It is the rule of law that requires the elimination of torture and degrading punishment: order enforcement has no such requirement;

— A system interested in maintaining order frees its police from the controls of the judiciary and prosecution, while keeping them under the influence of political powers;

— Order enforcement creates inequality and discourages transparency.

Human rights violations do not for the most part occur occasionally or as isolated incidents. It is necessary to look at the context they occur in; in other words, the system which allows them to occur. Sometimes the reason for systemic human rights violations is precisely due to the enforcement of harsh laws whose purpose is the domination and repression of society. Thus it is necessary to look at the laws of a country; in particular, those laws inherited from other times and societies—such as in Asia, where colonialism played a big role in the adoption of international law—need to be carefully examined for their contemporary relevance. Rule of law should translate into the enforcement of laws that serve the public, rather than dominate them.

Some general principles of such laws would be: *the principles of natural justice must be observed; all laws should be prospective, open and clear; the independence of the judiciary must be guaranteed; the discretion of crime preventing agencies should not be allowed to pervert the law.*

Such rule of law is central to the proper functioning of any society. Genuine democracy, the elimination of poverty, popular participation: none of these can occur effectively without the establishment of rule of law. While in many countries there is a tendency to displace rule of law as a prerequisite to economic growth, this only makes the economic situation worse, as well as worsening the plight of the poor and downtrodden. Poverty has to be fought with rule of law. Public participation will also be enhanced by the establishment of functioning justice mechanisms; participation has been a key element in development discourse, but it is overlooked that participation is unlikely without adequate protection. However, if the people are assured of protection from the relevant justice mechanisms, they are far more likely to participate and create solutions for their problems.

While the rule of law is itself implicit in the ICCPR, one of the reasons it has been brushed aside so easily is the fact that functioning judicial systems are taken for granted in the more developed nations of the world. Article 14.1 of the ICCPR states that everyone is equal before courts and tribunals, being entitled to hearings by a competent, independent and impartial tribunal; these factors are essential prerequisites to achieving rule of law. However, these factors are assumed by developed nations to be a given in the rest of the world as well, which is clearly an illusion. Without a functioning judicial system, there can be no effective rule of law, which in turn means that there is no mechanism in place to ensure the implementation of human rights or to correct human rights violations. Rather than looking at whether a country has merely ratified the ICCPR, the country's legal structure should be examined – does the country's legal system (even theoretically) meet the requirements of a system under the norms of article 2 of the ICCPR? If the system itself is flawed, there can be no expectations



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of compliance to the ICCPR. Thus it is first necessary to expose the legal mechanisms which allow human rights violations to take place.

The rule of law has not so far been an essential component of human rights of development discourse, largely because, as mentioned above, it is taken for granted in the more developed countries of the world. Under the illusion of functioning justice mechanisms in less developed nations, these countries focus on themes such as ‘democratization’ or ‘rural development. But money given for rural development is not much use if corruption at the level of government officials is rife. Presidential elections are worthless if voters are intimidated into choosing one candidate over another. Political will in itself is not enough to change the human rights situation and the lack of it is not an adequate explanation for rights violations. As Basil Fernando says, “many a government brought to power by popular upsurge against a tyrannical regime ends up unable to do much to halt continued violation of rights, despite good intentions. This is often due to ... structural problems that do not automatically change.”<sup>4</sup> To facilitate such change, what is needed are effective justice mechanisms which as institutions are independent – they should function effectively regardless of which government is in power.

Similarly, the recent trend of human rights awareness and education campaigns has not been particularly useful in improving conditions on the ground precisely because awareness without implementation will have little impact, if at all. In the wake of such campaigns there has been an increase in human rights conferences and legislation. Legislation on its own also cannot accomplish much – this legislation needs to be enforced for it to be effective.

Therefore, preventing human rights violations is indelibly linked to the establishment of rule of law. The judiciary, prosecution and police systems of a country must all be functioning effectively, to enable the monitoring and correction of human rights abuses. It is only combined with the rule of law that democratization and the elimination of poverty can be successful.



The following case studies of various Asian countries illustrate the link between the rule of law and human rights violations in more detail.

### ***Sri Lanka: Policing and torture***

The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines torture as an intentional act committed by state officials, which involves strong physical or mental suffering for the purpose of extracting information, as a punishment or for intimidation. Peter Baehr states that while the most common justification for torture is the necessity to obtain vital information, torture is also habitually used as a means of repression and intimidation.<sup>5</sup> This is the case with Sri Lanka. While Sri Lanka acceded to the CAT in February 1994, the country has made little progress in its deploring torture conditions. Article 11 of Sri Lanka's 1978 constitution states that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.<sup>6</sup> This is a fundamental right that applies to criminals and non-criminals alike. However, torture is practiced consistently in Sri Lanka; it is daily carried out by the police for reasons far more trivial than obtaining vital information – July 2003 saw the death of a 28 year old man due to custodial torture, for refusing to give the police a share of the lottery he had just won.<sup>7</sup> Ineffective prosecution and judicial systems add to the transgressions of a corrupt police force.

Torture is a violation of the most fundamental concepts of human dignity and integrity; Baehr states that “torture presupposes a fundamental inequality between the torturer and the tortured; the first denying the latter's very humanity.”<sup>8</sup> It is for this reason that the right to be free from torture is a *jus cogens* norm: a norm higher than customary international law and from which no derogation is possible.<sup>9</sup> Apart from the legal severity of torture, there are also grave social ramifications, which can be seen in the Sri Lankan society: the legitimization of violence, which results in making the act of torture

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relative; acts of torture in the public sphere inevitably lead to torture in the private sphere, especially in the form of violence against women and children; torture also destroys the ideals of democratic institutions, particularly law enforcement agencies and makes fair trial impossible.

The situation in Sri Lanka reached a point where the routine use of torture contributed to a culture of barbarity in policing at all levels throughout the country. There existed a “systemic crisis of immense proportions ... not confined to a particular part of policing or region.”<sup>10</sup> Such were the standards of ‘normal’ policing in Sri Lanka, as is illustrated by the torture of 17 year old Chamila Bandara, who has now permanently lost the use of his left arm. In his statement, Chamila said,

“Then they put my hands on my back and tied my thumbs together with a string, and they put a fibre string between the thumbs and hung me on a beam on the ceiling. One officer pulled the fibre string so that I was raised from the ground. When I was raised, my hands turned, and they became numb. Then the OIC [officer in charge] kept hitting me on my legs and soles with a cricket wicket. He hit me on my thighs. While hitting me in this manner, he asked me who my friends were. Because of the extreme pain, I said, “One is Roshan Deepal, and the other is Salier.” Because of the unbearable pain, I said, “Though I did not do any thefts, I am willing to admit to anything.”<sup>11</sup>

Such conditions gave rise to a sense of helplessness, leaving people resigned to their circumstances. As one Sri Lankan lawyer who has worked closely with AHRC said,

“I am amazed at what has been happening over the last three years. Before, people would say there is no point in talking about torture, it is too deeply rooted in our society. People will not support our fight. However, now the situation is very different. The public and media constantly talk of torture. Several officers have been arrested under the prevention of torture law, Act 22 of 1994. The Government had to promise that it will act to stop torture. Judges are giving higher compensation to victims and a national consensus is emerging to eradicate torture.”<sup>12</sup>

Sri Lanka is also a country troubled by the phenomenon of ‘disappearances’. Dissidents and opponents of the regime would suddenly disappear, with the authorities claiming to have no information about them. According to the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, disappearance constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and the right to life.<sup>13</sup> The UN Working Group on Enforced and Involuntary Disappearances has stated that Sri Lanka is second only to Iraq in terms of the number of disappearances caused in a country.<sup>14</sup> While government appointed commissions have reported on about 26 000 cases, prosecutions have been initiated for only about 400 cases of disappearances, and even this figure is disputed by many organizations.<sup>15</sup> These organizations have also concluded that most of these disappearances were killings after arrest and were carried out as part of a plan approved by the highest political authorities.

Jayanthi Dandeniya, a Sri Lankan trade unionist, lost her boyfriend in this phenomenon of disappearances. Since then, she has worked hard to correct such systematic human rights violations. In her testimony, she said

“The UN Working Group on Disappearances made many recommendations to the Sri Lankan government to prosecute offenders. But these recommendations remained merely on paper, nothing was implemented. We were caught in a dead lock. Then during the late 1990s we came across AHRC. AHRC representatives told us that we must work to improve the implementation of human rights. They insisted on IMPLEMENTATION. We agreed that for implementation, we would need to bring forward the issue of disappearances in a big way. AHRC sent us to Kwangju, South Korea, where there is a very strong solidarity movement. We saw the big monument built for those who were killed in the Kwangju uprising of 1980. The people of Kwangju were strong in keeping the memory of the event alive and in attempting to prevent such an event from recurring. On our return we discussed that we too

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must do something similar, on a smaller scale. AHRC supported this move and helped us. We inaugurated the Monument for Disappeared Persons on 4 February 2000. February 4 is our national Independence Day. This event caught the imagination of the people. Many families of disappeared persons came together again. We are pressuring the government to prosecute offenders, and to use legal means to make the causing of disappearances a crime. We realized that we cannot only work on the disappearances issue, we have to work on larger issues like torture and the rule of law. We joined the AHRC network and began work on these issues as well.”<sup>16</sup>

Sri Lanka’s institutionalized practices of torture and disappearances have evolved with the country’s ongoing civil conflict. Governments have used the conflict to enforce draconian laws contradicting the constitution and international obligations, such as the Prevention of Terrorism Act (PTA) and the Emergency Regulations.<sup>17</sup> Under the PTA, a police officer may arrest someone connected with or suspected of being connected with unlawful, ‘terrorist’ activity, and keep them in detention for 72 as opposed to the usual 24 hours before bringing them before a magistrate. Such measures resulted in the mass disappearances of the period 1989-92, with unofficial estimates believing over 60, 000 persons to have disappeared.<sup>18</sup> These laws, together with Sri Lanka’s current justice system not only allow human rights violations, but prevent the prosecution of violators.

Sri Lanka’s current justice system comprises an absolute separation between the criminal investigation and prosecution apparatuses. Criminal investigation is entirely the job of the police and if they fail to investigate, the prosecutors can simply say there was insufficient evidence for a case.<sup>19</sup> It is necessary to create a link between the two departments, enabling joint action from the beginning of a case. Also, currently the prosecution apparatus lies with the Attorney General’s department, where lawyers are constantly shifting their work types.<sup>20</sup> Thus it is necessary for the creation of professional prosecutors, with adequate training and specialization, enabling them to conduct efficient prosecution cases.

ALRC claims that the major obstacle to the prosecution of the perpetrators is the lack of criminal investigations into the disappearances when they occurred – investigations were prevented by the enforcement of special emergency regulation laws, which created the background for mass disappearances. The bodies were allowed to be disposed of without any report being filed, or any inquest held. Most of the bodies were burnt, so examination of the bodies during belated inquiries is impossible. Furthermore, since the alleged perpetrators are law enforcement officials themselves, conducting credible inquiries through police agencies would be absurd.

It is clear that in order to address the issues of torture, disappearances and other related human rights violations, it is essential for Sri Lanka to improve its criminal justice system. A link must be established between the police and prosecution departments, in order to break the vicious ‘no evidence’ circle that currently exists, due to the responsibility of criminal investigation resting with the police. The prosecution needs to be involved from the beginning of the case, so they can suitably guide the police during investigation.

Both the prosecution and police departments themselves must be strengthened – the police need to be made more accountable, while there needs to be a professional category of prosecutors. With an increasing amount of crime and torture committed by police officers themselves, an independent agency should be established to deal with crimes committed by law enforcement officials. This will also make it easier for prosecutors to do their job more effectively. Prosecutors however, need to be more qualified and professional. Under the current system, prosecutors are simply attorneys-at-law. There is no training or specialization procedure, which is essential to competent prosecution of serious crimes. With the establishment of professional prosecutors, institutional habits within the prosecuting system will also be created, which will help ensure continuity to the proper conduct of prosecutions.

While many of these are structural changes requiring government initiation, there is much that can be done by civil society. As was shown

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in Jayanthi's instance, friends and relatives of victims can be important vehicles for change, as can victims themselves. They should be given the support of NGOs and other international bodies. By observing South Korea's solidarity, Jayanthi was given a moral boost that allowed a similar solidarity to occur in Sri Lanka. International civil society movements are crucial to developing better universal human rights mechanisms.

The Sri Lankan judiciary has its own role to play, as illustrated in the case of victim Gerald Perera, who was arrested on mistaken identity and then brutally tortured:

“The court held that victims' rights against torture, illegal arrest and detention is further violated in Sri Lanka, as courts award very low sums, most below US\$500 as compensation for torture. Only in a few cases has it gone up to US\$2000 or 5000. However, in this case the court awarded around US\$17,000 inclusive of medical expenses. It is a remarkable increase from a local point of view. Such awards will set precedence. Sri Lanka is a common law country where precedents have the effect of law.”<sup>21</sup>

With the judiciary insisting on accountability, it will be harder for the Sri Lankan police to affect impunity in committing torture and other human rights violations. It will also encourage more victims and citizens to speak up and defend their rights.

Training and funding will also be needed in improving Sri Lanka's criminal justice system - this is an area in which development cooperation is essential. Various governments and international agencies may work with Sri Lanka to set up appropriate training programs and send relevant expertise to the country; be it for the purposes of police or prosecution reforms.



## ***Cambodia: Absence of functioning justice mechanisms***

Cambodia is a country with no functioning legal system. Although in 1974 the United Nations Transitional Authority on Cambodia (UNTAC) was established, which produced some laws, these were administered to the country via a socialist system that was still in place. For this reason the laws never had any weight, and in large, members of the legal system were not able to even understand the concepts behind such laws. At the same time, the laws are largely inadequate: there is an “absence of organic laws [which] makes many other laws, including the constitution, inoperative.”<sup>22</sup> Cambodia does not have either an adequate penal code or a basic criminal procedure code, let alone laws relating to the judiciary or civil matters. The laws that do currently exist are defective or contradictory. For instance, while article 24(3) of the 1992 UNTAC Criminal Law and Procedure Act states that confessions under any form of torture may not be admissible as evidence of guilt, article 125 of the 1993 Law of Criminal Procedure Act unequivocally recognizes without any prohibitions, the reception of confession as evidence of guilt, whether made to a police officer or otherwise.<sup>23</sup> In other cases, it is the twisted interpretation of the laws that is to blame, such as the Ministry of Justice interpretation of UNTAC law stating that police may continue their investigation after 48 hours as meaning that the police may not do anything unless requested by the investigating judge or prosecutor.<sup>24</sup>

Although Cambodia is a party to the International Covenant on Civil and Political Rights (ICCPR) and the Cambodian constitution incorporates ICCPR principles such as protection of the right to life, the right to liberty and security, including freedom from arbitrary arrest and detention, the right to fair trial, these rights are consistently violated with no effective justice mechanisms to correct such violations.<sup>25</sup> This being the case, it is no surprise that impunity, torture, illegal arrests and detention, as well as forced confessions are regular incidents of Cambodian life. Cambodian legal aid organizations report that

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approximately twenty percent of all their cases involve forced confessions.<sup>26</sup> Lawyers have a hard time proving confessions are forced, as the police tend to keep victims in custody until signs of violence have disappeared. Victims tend to confess to prosecutors as the police threaten them with more violence if they do not confess. Therefore while article 38 of the Cambodian constitution states that “confession obtained by physical or mental force shall not be admissible as evidence of guilt,” confession is still the main technique of proof, and trials are held to simply get the confessions “obtained during police investigation confirmed by the accused at a public hearing.”<sup>27</sup> Torture is not an offence under law, and there is no legal procedure to establish that torture has occurred. Therein, Cambodia is also in breach of its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The legal system in Cambodia having proved itself incapable of dispensing justice, Cambodian citizens have resorted to ‘revenge’ killing, which the police either have no control over, or simply turn a blind eye to.<sup>28</sup> For example, on 19 August 2000, Rim Bros was taken from the Sam Pov Loun district police station, Battambang, while in police custody for an alleged rape; his penis was chopped off and he was beaten to death by a large mob with sticks and rocks. On 15 September 2000, Sna of Chankar Morn Section, Phnom Penh, was beaten to death at Dankor Market after attempting to escape from the police, having been accused of the theft of a gold watch.

Such practices are not simply the product of public outrage or mob violence; they are rooted in the failure of Cambodia’s criminal justice system, which encourages elements of the public to seek violent alternatives. The failure of the justice system is manifested in these ways:

### **Judiciary**

- Judges are too close to the military and political parties;
- Ministry of Justice influences judges through circulars which



judges have to respect as laws;

— Most judges are not fully qualified, especially with regard to international law principles;

— Socialist trials are still the norm; it is presumed that if a person has been arrested, there is enough evidence to find them guilty, so judges have already decided on the verdict prior to the trial;

— The Supreme Court is ineffectual – it has never conducted public hearings and only has the rights to read municipal court files and to recommend retrials by the same court, although these rights have never been exercised;

— The Appeals Court functions in the same way as the rest of the courts – the judge prepares the decision before the appeal opens;

— Trial judges are likely to conclude that the defendant is guilty since the prosecutor has sufficient evidence against them to go to trial.

### **Prosecution**

— Socialist trials have no function for lawyers;

— Public prosecutors are under the supervision of the Ministry of Justice, which can mean negative interference in prosecution affairs;

— Public prosecutors do not have the authority to investigate cases; they rely on the information given to them by the investigating judges;

— Most prosecutors are appointed and have little legal background;

— The state has not recognized its obligation to provide legal aid;

— Lawyers cannot claim the right to represent their clients at all stages and there is limited opportunity for them to intervene during pretrial stages.

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### **Policing**

— Law enforcement officers form no disciplined police force; criminal investigations are left to the military police and judicial police;

— Police have no power to investigate cases unless required by investigation judges;

— Police are under no obligation to record complaints, initiate investigations or send cases to court, they may stop investigations whenever they wish.

Underlying these manifestations of ineffective justice mechanisms is Cambodia's continued attachment to pre-UNTAC socialist structures. In a totalitarian society the approach to criminal investigations is influenced by a legal structure where the predominant interest is the protection of the State, as against the liberties of the individual.<sup>29</sup> For this reason the concept of investigation does not exist within a socialist system; it is the confession that is emphasized upon. Unlike criminal trials in liberal democracies, in a socialist system "the investigators, the prosecutor and the judge collaborate in gaining and perfecting a confession in a manner that the conviction of the accused becomes socially convincing."<sup>30</sup> This being the case, there is no real function for lawyers.

Former Cambodian Minister of Justice gave an honest account of trials in the country:

"The judge prepares his decision before the trial opens. Before the case opens, he already has a model. During the trials, issues may be brought up that modify the judge's decision. If the responses to questioning or testimony are slightly different than expected, the judge will modify the decision for 10 to 15 minutes at the end of the trial. If the events during the trial are very different, he must suspend the trial until a later date. At that time, he will look at additional evidence and write a decision. Judges always make a map of their decision after looking at the [pre-trial] evidence."<sup>31</sup>

This depiction of criminal trials clearly shows that the international law principles set out by UNTAC are not in practice within Cambodia. UNTAC's failure was primarily due to writing a constitution and provisional laws of liberal, democratic principles without purging the existing totalitarian structures. To correct this failure, Cambodia needs to build new justice mechanisms from scratch. This involves the enactment of comprehensive laws, which need to be made clear to public officials, as well as the general population. Primarily, Cambodia needs a new penal code and a criminal procedure code. The new laws should also cover the establishment and mandate for essential institutions such as the police, judiciary and prosecution. The existing judiciary, prosecution and police systems are not worthy of their titles. They are the result of a socialist system that has yet to be purged from the country. The establishment of new justice mechanisms goes hand in hand with the enactment of laws; one without the other is ineffectual.

Cambodia will need much international assistance to accomplish the monumental task of creating a new legal structure for itself. It will need financial assistance as well as legal expertise with regard to enacting laws – legal texts, documents, interpretations. While several NGOs have already done a great deal for Cambodia's legal aid system, much still remains to be done.

Funding and training will be needed also for the new police force, judges and lawyers, which international agencies can help with, both in terms of financial assistance as well as expertise. While under UNTAC training was given to a number of judges, this was ineffectual, as the system the judges worked in functioned under socialist principles. A lesson must be learned from this; abstract training is equivalent to no training at all. For the training to be effective, principles of international law must be seen to exist. All members of the justice system, be they police, lawyers or judges, must be familiar with not only the laws of Cambodia, but also human rights principles under various international covenants.

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To help with investigations, there should also be the development of forensic and other scientific facilities.

It is important for Cambodian civil society to play a role in the revamping of the legal structure, because otherwise it will be hard to legitimize the structure. As mentioned before, the Cambodian people have lost all faith in mechanisms of justice, thereby taking it upon themselves to commit ‘revenge killings’. These will not stop until the people sense positive changes occurring and acknowledge the authority of the legal structure. For this to happen, they must play some role in its creation themselves. The population needs to be mobilized into citizens’ tribunals, civil society movements, and other organizations. This can be helped by NGOs already present in Cambodia, as well as other international organizations.

### ***India: Institutionalized communalism/ discrimination***

India’s caste system continues to cast its shadow over the country’s secular and democratic constitution. Although article 17 of the constitution abolishes the practice of untouchability, and articles 14 and 15 call for equality and the prohibition of any form of discrimination, the call goes unheard. Social discrimination is rife in India and increasingly takes the form of police and state abuse towards scheduled castes, as well as other ethnic minorities. While India is a party to the International Covenant on Civil and Political Rights and while the Indian constitution incorporates many of the human rights stipulated in the Universal Declaration, there is an enormous gap between theory and practice, as illustrated by the daily human rights violations encountered by a large number of the population, as well as by the periodic communal riots and massacres that occur, killing terrifying numbers of people. In most of these incidents the police play a complicit role, with political powers using the events as electoral capital.

According to S K Verma, the Indian police “have been viewed as coercive in nature. Incidents of police violence, torture, custodial atrocities and excesses are reported daily in every leading newspaper, including the vernacular press of the country, and makes painful and shocking reading.”<sup>32</sup> Such excesses take the form of various practices: from selective registration of complaints, illegal detention, to the ‘manufacturing’ of evidence.<sup>33</sup> These practices exist due to the corruption of the police force, and a political unwillingness to hold the police accountable under the law.

P J Alexander writes that the Indian criminal justice system on paper is remarkable, to the extent that the British-enacted Indian laws “had in them rights which they [the British] did not enjoy in England and contained provisions for a fair trial and protection of the rights of the accused, almost parallel to present day concepts.”<sup>34</sup> Unfortunately, the system remains on paper. In practice, the police commit many human rights abuses, while the judicial system is not adequate for correcting such violations. Discriminatory attitudes are rife amongst law enforcement officials; the Indian police force is known for its communalism and political affiliations. What this means for the general public is the use of either bribery or political influence to register any complaint, or to move a case forward. For this reason, a large number of cases are never registered with the police, particularly by the weaker sections of society; the Indian police have a tendency to “violate the human rights of the people who are designated [by society] as lesser human beings.”<sup>35</sup> For this reason, scheduled castes do not lodge many complaints with the police, being apprehensive of threats, grudges and further atrocities against them.<sup>36</sup> When the police feel they have no choice but to register a case brought by a Dalit, they change the nature of the offence so that it can be tried under the Indian Penal Code, rather than the Protection of Civil Rights Act; as the IPC offers lesser punishments.<sup>37</sup> In the state of Karnataka, there has not been a single conviction regarding cases pertaining to the atrocities on scheduled castes and tribes for the last three years, even though the number of cases reported have been increasing.<sup>38</sup>

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According to the National Campaign on Dalit Human Rights, “every hour two Dalits are assaulted; every day three Dalit women are raped; every day two Dalits are murdered; every day two Dalit houses are burnt down. Large scale violations perpetrated on Dalits involve burning of homes and fields, murder, torture and beating of women, molestation, rape, death in lock-up and custody, and others [...] Dalits live in separate colonies, far away from caste Hindu localities. They do not have access to public wells or public eating-places. They cannot enter Hindu temples. Inter-caste marriages are prohibited, both by religion and practice. Atrocities against Dalits basically arise in the context of “keeping Dalits” in their place within the social hierarchy mediated by caste and untouchability [...] The rising consciousness of Dalits and resistance on a wide range of issues such as distribution of surplus land, minimum wages, dignity and justice have led to brutal caste violence against Dalits.”<sup>39</sup>

However, discrimination in India is not only towards Dalits; adivasis (indigenous tribal people), women and other minorities all suffer their share of discrimination. For instance, the adivasis are constantly being removed from their land, a recent incident being:

“On July 21 about one hundred police and security personnel demolished houses and destroyed crops belonging to indigenous Adivasi people in Maharashtra, India. They burnt down hundreds of huts and more than a thousand acres of crops. About two hundred families now have no homes, no food, no livelihood and no place to go. [...] The police and their accomplices were acting on orders of the Maharashtra State Farming Corporation, which holds title over the land the Adivasis are contesting. They carried out the destruction without giving notice and despite community leaders showing documents that an appeal over the title is pending before the Revenue Commissioner at Nashik. At least one leader was placed under detention without charge for the day.”<sup>40</sup>

Not only did the police violate laws of criminal procedure by failing to serve notice to the adivasis, but the acts of destruction were also in clear violation of the Maharashtra Agricultural Land Act of 1961, as well as India’s international obligations, such as the rights to food and adequate shelter.

Another example of police ill-treatment of adivasis, is a recent death of a tribal member in police custody:

“Mr Khemala was allegedly accused of theft. Police picked him up from his home in the early hours of 14 June. He was handcuffed and brutally beaten up in front of others who had been rounded up and brought to the police station. Consequently, Mr Khemala started vomiting blood. His brother Sayba, who had already been taken into police custody on similar charges, was witness to what happened to Mr Khemala. When Sayba tried to give his injured brother some water to drink, the local Sub Divisional Officer of Police (SDOP) who was apparently present there, kicked him in the stomach. [...] Soon after this, Mr Khemala fell unconscious. The police then dragged him out where he had been locked up. They subsequently took him to the local hospital, and later to the Budwani Government Hospital. However, by the time the body reached the hospital, the attending doctors pronounced Mr Khemala already dead. [...] Meanwhile, the police released the other inmates in their custody, who had been witness to the brutal beating inflicted on Mr Khemala. The police ordered these persons to go far away and not to be seen in the vicinity for the next 3-4 months. [...] It has been learnt that the police officials who were allegedly present during Mr Khemala’s physical abuse have now absconded. The tribals are demanding the immediate arrest of these police officials.”<sup>41</sup>

Needless to say, the government has yet to take action against the perpetrators.

Women are also victims of discrimination in India. Custodial rape is not an unusual phenomenon, and its conviction rate remains at zero. Rape committed by armed forces is also common in areas of insurgency, such as Northeast India, where rapes are usually carried out during combing operations. With immunity from prosecution granted by the Armed Forces Act of 1958, the perpetrators walk away free.<sup>42</sup> Many rape cases go unreported, with the victims’ fears of “being stigmatized, losing marriage opportunities, revealing lost virginity, or [being] reluctant to talk about a sexual act in public.”<sup>43</sup>

The threat of rape and physical abuse of female family members



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is also used by police officers to force suspects to confess. In countless instances, women have been compelled to present themselves at police stations, where members of their family are either being held or looked for, then threatened with being stripped, paraded nude in the streets or raped.<sup>44</sup>

Institutionalized communalism and discrimination also shows itself in the periodic communal riots and massacres that India is home to. While ethnic minorities make up approximately 80% of the Indian population, the Hindus are the majority and in large part make up the Indian government. Increasingly politicians have been spouting the Hindutva ideology, which means the Hindu ‘reawakening’ and calls for the return of a pure Chaturvarna-based society, from which all ‘others’ are excluded.<sup>45</sup> Communal tensions have been used time and again as political strategy. The latest in line was the Gujarat pogrom of 2002. This was a clear illustration of state and police complicity in the killing of more than 2,000 Muslims.<sup>46</sup> The Indian police are but a tool of oppression for state officials, offering little protection to citizens.

These manifestations of communalism and discrimination stem from the Law of Manu, under which India was governed for thousands of years prior to British rule. The Law of Manu was a set of social laws that introduced the rigid caste system. According to this system, Hindu society was divided into four varnas or categories, associated with particular social occupations. The Dalits have no legitimate place in such a society, as they do not belong to any of the four varnas. Their social occupation involves “skinning animal carcasses, tanning leather and making shoes and belts; butchery of animals; removal of human waste; attendance at cremation grounds.”<sup>47</sup> Such work is considered ‘polluted’ or ‘unclean’, and hence Dalits are considered to be a permanently polluted people. The Law of Manu entailed the social sanctioning of dire treatment to certain classes, such as the “poor, Dalits and women.”<sup>48</sup> Such sanctioning still exists and its basis lies in the fundamental belief in the inherent inequality and ‘difference’ of individuals. In the caste system, inequality is the ideological



basis for a good society; this being the case, “[c]aste society does not deny the practice of discrimination; it instead *rejects the concept of discrimination in itself*.”<sup>49</sup>

The Hindutva movement in India, which is calling for a return to the rigid caste structures of old, is also seeking the annihilation of the other. In a Chaturvarna society, there is no space for Dalits or other minorities, except as outcastes. It is unfortunate that the majority of the Indian political elite are espousing such ideology, and even more unfortunate that they have such a large influence on the police.

The Indian police force was established during British rule, to maintain ‘order’. This was not necessarily done through any legal means. Not much has changed: today, the state confers arbitrary power to the police under a similar pretext of maintaining law and order, and in so doing, legitimizes human rights violations.

The Indian police today are also a product of social prejudice and bias. Kumar writes that most police officers come from rural areas and middle class families, unable to easily divest themselves of certain preconceived notions; “it is this mental block that is the greatest hindrance towards faithful implementation and enforcement of social legislation.”<sup>50</sup> This explains the scenario of police officers being in league with upper caste persons, and inflicting atrocities on weaker sections of society, in many cases under the pretext of maintaining law and order. This is related to the fact that police training is “archaic in content and methods. The emphasis is still more on muscle than on the mind. Human rights, if at all, form an insignificant module in the training programme and there is hardly any emphasis on human rights in the training of constables, who form 85 percent of the force.”<sup>51</sup>

With these being the social and ethical constructs of Indian society, it is obvious there is a contradiction with international legal norms, as well as with the norms of the Indian constitution. This will explain why there are movements in India today who see the concessions made to the lower-castes in the constitution as mistakes that need to be rectified.

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In order to bring India back in line with its constitution, it is essential for the police force to become independent from state and political influence. The force needs to be reformed, with an emphasis put on human rights training. The police must be made to realize that they are accountable under law for their actions; the judiciary must exert its authority in such instances. The annihilation of the caste system, together with other forms of discrimination is a monumental task that will not be accomplished over night. Apart from the implementation of legal procedures to abolish discriminatory practices, what is also needed is a parallel social evolution. The exclusionary nature of the caste system means that it is not enough for one caste to open its margins, all castes must do so; “while one caste may make a decision to exit from its boundaries, entering into boundaries held by others requires their consent. As long as the most socially and politically powerful castes desire to remain enclosed, lower castes’ decisions to break open their own part of the system will have little effect.”<sup>52</sup>

It is obvious that the annihilation of such a system and corresponding mind-sets will not happen overnight. It seems equally obvious that any change in the system will have to come from civil society, as the Indian government and its institutions have failed. Justice H Suresh has suggested that people’s hearings, or jan sunvai, would be a good avenue for the advancement of Dalit rights; by communities taking the initiative to establishing tribunals to hear atrocities and try offenders, they are likely to advance their cause significantly.<sup>53</sup> Similarly, if groups of citizens were to work with state organizations such as the police, as well as with lawyers and national commissions, there would be greater transparency and motivation to act for the communal welfare, rather than for political pressure.

Police reforms are essential, although these cannot be brought about only by the people, but must be initiated by members of the police force and the government. The police must be given adequate training in criminal investigation, as well as being made aware of human rights principles and the socio-economic situation on the ground.

Greater resources for the development of scientific and forensic investigation should be allocated. The police force must be moved away from state and political influence: to this effect, an independent agency should be established to monitor the actions of police officers themselves, thereby making them more accountable.

International pressure and assistance can do much to lessen institutionalized discrimination in India.

### ***Hong Kong: Institutional independence***

The Independent Commission Against Corruption (ICAC) is an institutional success story, different from the previous three case studies. A key component of effective rule of law is institutional independence. The justice mechanisms of a country – the prosecution, police and judiciary – should all be independent of political influence and should be able to function on their own steam, in terms of both resources and ideology. Without this type of independence, the legal structure of a country will always be under threat, whether from political rivalry or vested interest groups. Such independence was the hidden success of the ICAC in Hong Kong.

The 1970s proved to be a difficult period for Hong Kong, with corruption levels increasing and permeating through all levels of society:

“At that time, the problem of corruption was very serious in the public sector. Vivid examples included ambulance attendants demanding tea money before picking up a sick person and firemen soliciting water money before they would turn on the hoses to put out a fire. Even hospital amahs asked for “tips” before they gave patients a bedpan or a glass of water. Offering bribes to the right officials was also necessary for the application of public housing, schooling and other public services. Corruption was particularly serious in the Police Force. Corrupt police officers covered up vice, gambling and drug activities. Social law and order was under threat. Many in the community had fallen victims to corruption. And yet, they swallowed their anger.

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Corruption had no doubt become a major social problem in Hong Kong. But the Government seemed powerless to deal with it. The community patience was running thin and more and more people began to express their anger at the Government's lukewarm attitude towards tackling the problem. In the early seventies, a new and potent force of public opinion emerged. People pressed incessantly for the Government to take decisive action to fight graft. Public resentment escalated to new heights when a corrupt expatriate police officer under investigation succeeded in fleeing Hong Kong. The case provided the straw that broke the camel's back."<sup>54</sup>

It is clear the rule of law was being undermined in Hong Kong, resulting in human rights violations. Public pressure demanded a government response to end such practices, and this pressure translated into the formation of the ICAC. Since its establishment, Hong Kong has become one of the least corrupt places in the world, and its residents are sure of the prosecution of illegal activities, regardless of the seniority/influence of the perpetrator. This is indeed an improvement from the previous situation, and should be studied to see if its emulation can take place elsewhere, particularly in the three countries discussed above. With this goal in mind, here is a synopsis of the structure and work of the ICAC.

The organization was established in 1974 on the principle that control of corruption must be a function separate from the police. Furthermore, initially a large part of ICAC's work consisted of holding the police accountable under rule of law; its very first case was against ex-Police Commissioner Godbar, who fled Hong Kong after making a fortune of about HK\$ 4 million, four times his life time salary. ICAC was able to get Godbar extradited and prosecuted. Although initially there were revolts by the police, ICAC's uncompromising stance led to a complete transformation in police discipline, which gradually made itself felt in all other sectors as well.

The three objectives of the ICAC are the enforcement of anti-corruption laws, the identification and elimination of opportunities

for corruption and the education of the community on the evils of corruption. In order to achieve these objectives several factors played an important role: political will to end corruption, which was willing to create an independent institution and provide it with adequate resources to “fight not only the battle but also the long-term war”; legislative support, giving the ICAC specific powers to attain their goals, such as S. 17 search warrant and S. 13 bank enquiries; professional and dedicated staff, who possessed the necessary integrity, efficiency and vigilance to do their job well and were given the necessary training and equipment to help them; public support, which translated into vigilance against corruption and the willingness to come forward with corruption complaints, due to the witness protection provisions made by ICAC.

For such an agency to effectively enforce anti-corruption laws and gain public support, it can in no way be linked to existing justice mechanisms or other vested interest groups. It is the independence of the agency that allows it to undertake its objectives; independence creates impartiality or objectivity, which is essential in effective rule of law. Such impartiality is what underlines the equality of all those before the law; if all are equal, corruption is of little use. However, at the same time, the independence of any institution should not lead to god like attributes – even the ‘watchdog’ needs monitoring. This was another key attribute leading to ICAC’s success; the checks and balances written into its structure ensured that even as the organization is independent, it is still monitored by other agencies, and is thus held accountable. For instance, the ICAC has advisory committees, an independent complaint committee, internal investigation unit, is looked over by the Department of Justice, courts, the media, and must abide by the Treatment of Detainee Order, as well as the Bill of Rights. ICAC is also monitored by various independent committees, each chaired by a non-official member. All of these characteristics ensure practices of transparency and accountability, which inevitably lead to greater efficiency, while minimizing the space in which corrupt practices and activities can occur.

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It is worth highlighting here the emphasis on a 'long term war'; the success of any institutional campaign or reform is linked to its consistency and comprehensiveness. Rather than focusing on a few individual cases of corruption, ICAC committed itself to investigating all complaints registered as well as investigating cases through detection, and to fighting corruption at all levels of society, enlisting public support and awareness in the process. Since its inception the Commission has constantly worked to improve its methods and outreach, examples being the establishment of the Hong Kong Ethics Development Center in 1995, and in May 2002 the introduction of a moral education web site hosting materials for teachers to use in educating children on moral issues, as well as providing a forum for the sharing of views and experiences.

International cooperation and experience sharing has also been a part of ICAC's work and success. The Commission's Operations Department works with organizations in China, as well as with other national law enforcement agencies on matters of mutual interest. Annual liaison meetings are also held with representatives of the Federal Bureau of Investigation of the US, Royal Canadian Mounted Police and Australian Federal Police, in order to enhance cooperation and mutual understanding. ICAC recently co-hosted a conference with Interpol on 'Partnership Against Corruption'.<sup>55</sup> Such cooperation is useful in terms not only of transnational crime and corruption, but also in terms of resources, strategies and expertise.

### ***Development Cooperation***

The above case studies have shown that effective rule of law is the key prerequisite to ensuring human rights implementation within national contexts. In the case of Sri Lanka, the habitual torture and violations practiced by the police are a result of the enforcement of emergency laws and the absence of professional prosecutors and effective judiciary. In other words, all three justice mechanisms of the country are failures, resulting in prevalent human rights abuses. The



Cambodian case study revealed the total absence of any functioning justice mechanisms, which is the reason for increasing crime and anarchy. India's situation reveals the enormous gap between the legal system on paper and in practice, explaining the pervasiveness of discriminatory practices. All the case studies have also illustrated that the existence of laws and legal structures per se do not equal effective rule of law. The case studies are also poignant examples of the indivisibility of rights. The violations of certain rights are almost always linked to the absence of other rights. For this reason, rule of law is essential for the implementation of all rights, whether civil or economic, social or political. Thus the first step in correcting human rights violations and improving the implementation of rights, is the establishment of effective rule of law. This should be combined with democratization and the elimination of poverty, but the primary emphasis must be on rule of law, without which nothing else can take root.

Article 2 of the ICCPR must be taken as the starting point, with the monitoring that all countries have justice mechanisms that can meet the required obligations of the covenant. Rather than monitory bodies and working groups who simply give recommendations based on individual violations, bodies able to study particular legal systems and expose structural flaws that allow violations to occur are needed. A micro-study approach will be the most useful, enabling the creation of solutions to specific problems. What is also needed is domestic pressure, rather than simply international pressure which takes the form of a UN recommendation or statement. While such international pressure is valuable in terms of international standing and governance, without corresponding domestic demands for change it is useless. Such domestic demand comes with the unity of civil society, whose strength compels governments to pay heed.

The mobilization of civil society can be enhanced through development cooperation. International governments, human rights organizations and civil society can all play a role in working with local groups to improve local implementation of human rights. The forming

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of grassroots movements, citizens tribunals, and networking with state and non-governmental organizations may need a push from international actors, particularly in countries where civil society movements are largely non-existent.

Financial assistance is obviously essential for countries to improve their implementation mechanisms, another role for international agencies to share. Funding is needed for necessary legal texts and materials, as in the case of Cambodia. The development of cost-effective legal aid systems is needed in Sri Lanka, India and Cambodia. Resources and expertise will both be needed in the development of model agencies, such as national human rights commissions and professional judges, police and prosecutors.

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# About AHRC

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## *The founding of AHRC*

The idea of setting up the Asian Human Rights Commission (AHRC) and the Asian Legal Resource Centre (ALRC) was put forward by the “Asian Lawyers for Justice and Human Rights” consultation held in October 1983. The consultation was organized by the International Affairs desk of the Christian Conference of Asia. It involved about 40 participants from 12 Asian countries, including judges, lawyers, law academics, human rights activists and church leaders. In the consultation, participants raised serious concerns about the consistent and systematic violations of human rights in Asian countries, especially of women, the poor and disadvantaged. The participants made the following observations about human rights in Asia:

1) In most Asian countries repression had become an integral part of the state policy and apparatus. Basic human rights were being denied on the pretext of “national security ideology”, or sometimes so-called development. Abject poverty confronted the vast majority of women, men and children in Asia.

2) The rapid militarisation of Asian societies due to increased social tension and internal armed conflicts was profound and resulted in greater repression.

3) The erosion of the rule of law in Asia had resulted in the

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denial of avenues for redress. The executive had steadily encroached on the powers of the legislature and also those of the judiciary. There was an increase in the numbers of decrees, proclamations, martial law orders and regulations. Judicial functions were being usurped by specially constituted tribunals and summary military courts.

At the same time, the governments of the region had repeatedly rejected any initiative to establish any form of regional intergovernmental human rights mechanisms.<sup>1</sup> To address the worsening situation in Asia, there was a compelling need for various groups, especially jurists and human rights advocates, to become involved in the regional struggle for human rights.

The setting up of AHRC was particularly valuable in three ways. First, it provided a regional human rights mechanism within Asia. Secondly, it represented an important initiative on the part of Asian people to take responsibility for dealing with our own problems rather than only relying on international and Western bodies. Thirdly, it provided a means—in some instances—of countering the arguments of certain governments that the investigations carried out by Western organizations were not credible as they failed to recognize the Asian perspective. The Commission, by fulfilling all three of these functions, was seen to add an important new dimension to the struggle for human rights within Asia.

After the consultation in October 1983, the Christian Conference of Asia International Affairs desk took charge of doing the preparatory work for setting up AHRC and ALRC. A preparatory group met in May 1984 to work out the operational details. After completion of the preparatory work the members of the Executive Committee of AHRC/ALRC met in Tokyo in December of 1984 for the inauguration. The Executive Committee was composed of prominent jurists and advocates in the region, such as Senator Jose W. Diokno from the Philippines and Justice P.N. Bhagwati from India. Finally, in April of 1986, AHRC and ALRC were registered in Hong Kong and established a joint secretariat.

In 1987 and 1988, AHRC organized several fact-finding missions to investigate human rights violations in the region, such as the fact-finding mission to Singapore after the arrest and detention of a group of social activists in 1987. Two consultations were held by ALRC, one on emergency regulations in Asia, another on the situation of Asian fishermen. However, in 1989 and 1990, because of a lack of staff, AHRC and ALRC could not carry out their normal functions.

At the end of 1990, the work of AHRC and ALRC was reactivated under limited staff and resources. From 1991 to 1994, AHRC brought out newsletters and some booklets to arouse concerns on human rights violations and issues in Asian countries. Campaigns and fact-finding missions were organized to arouse regional and international concern on the human rights violations in countries, such as Burma and Cambodia. In 1993, the AHRC initiated a process to draft an Asian human rights charter, which reflected the desire and the aspirations of Asian people for human rights, involving various local NGOs and individuals dedicated to human rights struggles in Asian countries.

Since the second half of 1994, the work of AHRC and ALRC has been revived, with the recruitment of Basil Fernando as the Executive Director, and a gradual increase in the number of staff.

The changes that then took place were based on certain assumptions about the situation in Asia. ASEAN had developed as a separate economic and political block. The ASEAN conception of development left little room for the concerns of the poor. The political ideology was one national security laws, which in essence meant suspension of democratic governance and limiting of the rule of law. The internal situation in many countries had become so controlled that it was essential for human rights groups to find ways for solidarity with other groups in Asia in order to defend basic rights. The situation was even worse in South Asian countries, where immense poverty and authoritarian government were rampant. The result was large-scale extra-judicial killings and civil wars. In South Asia too the local

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human rights groups were very much repressed and there was a need for a regional group take over many functions of support to local groups.

Meanwhile, one very important factor had great potential to help to develop support for the human rights movement: tremendous developments in communications. Most human rights solidarity work was conducted at snail speed by ordinary mail and sometimes by fax. Fax was rather expensive too, given the limited budgets of NGOs. Hong Kong offered the advantage of electronic mail facilities, particularly email, as a less costly means of communication with a very great speed. AHRC was determined to put this to maximum use and to find ways to overcome the difficulties arising from it. AHRC is today very much a product of this decision.

Greater speed in communication meant greater proximity to our partners in various part of Asia. Such proximity gives rise to many new demands from those who are victims of human rights violations. If an organization is unable to deal with this it loses usefulness to the partners. To respond adequately, AHRC needed regular staff attending to various tasks, and constant intellectual alertness to reconsider its strategies. AHRC has tried its best to achieve these things.

One very important way to keep in contact with local groups is to bring them together from time to time. Since 1995 AHRC has conducted over 50 consultations with participants from the region, and has participated in many more, as well as in monitoring and fact-finding missions. The lessons from these experiences have been shared with much larger audiences through direct circulation of materials, and through the media. This large number of consultations has helped AHRC build a big network of persons throughout the region who have come in direct contact with each other. This group forms the basis of our local work, and with its help the network can be expanded through various communication facilities.

## ***Principles Guiding AHRC Programmes***

— A victims-directed approach must be combined with structural reforms needed to prevent human rights abuse and to promote rights;

— Protest work must be combined with a community-based approach. In this, building of a support base among religious groups will be given priority;

— A UN-directed approach must be combined with regional and country-based human rights promotional activities;

— Human rights promotion must be combined with promotion of democracy and the rule of law;

— Poverty eradication, gender equality, caste, indigenous peoples' and minorities' rights must be brought into all programmes.

## ***AHRC Objectives***

— Protect and promote human rights by monitoring, investigation, advocacy, and solidarity actions;

— Work towards social equality, with particular emphasis on social groups who have suffered discrimination in the past, such as women and children and minorities, including Dalits;

— Develop a speedy communication system using modern communication techniques to encourage quicker actions to protect human rights, redress wrongs and prevent violations in future;

— Develop appropriate modes of human rights education and especially promote the folk school approach;

— Promote appropriate legal and administrative reforms, particularly judicial and police reforms;



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— Develop close links with the victims of human rights violations to promote solidarity with victims, to preserve the memory of the victims and to organize significant commemorations linking large sections of people for the purpose of eliminating human rights violations;

— Participate in peace making, reconciliation, conflict resolution, truth commissions and international tribunals;

— Develop cultural and religious programmes for the promotion of human rights;

— Encourage ratification of UN instruments and development of local legislation, law enforcement and judicial practices in keeping with such instruments, and assist the formation and functioning of national human rights commissions;

— Promote the United Nations, particularly its human rights agencies, and assist organisations and persons in Asia to utilize these agencies for better promotion and protection of human rights in Asia;

— Work towards the development of regional human rights mechanisms and encourage people's participation in this process by promoting the Asian Human Rights Charter.



All attempts to improve the lives of people, particularly those who live in wretched conditions, involve two elements: protection and participation. The latter depends very much on the former.

Discourses on development so far have almost always ignored the aspect of protection. The result is that talks on participation end up as rhetoric, incapable of achieving any results. Where basic protection mechanisms have failed due to violence perpetrated by state agents or paramilitary groups under orders of local elites, the climate of intimidation that is created is not conducive to participation.

The linking of economic, social and cultural rights with civil and political rights very much depends on the way the contradictions between protection and participation are resolved.

The work of Asian Human Rights Commission (AHRC) and its sister organization Asian Legal Resource Centre (ALRC) has illustrated the link between protection and participation. We are in a position to demonstrate this link through practical experience.



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