Rule of law and Human Rights in Asia

Human Rights Correspondence School
Asian Human Rights Commission (AHRC)

Rule of law and human rights in Asia

Human Rights Correspondence School
Asian Human Rights Commission (AHRC)

Asian Human Rights Commission 2006

ISBN-10 : 962-8314-27-0
ISBN-13 : 978-962-8314-27-0

Published by

Human Rights Correspondence School
Asian Human Rights Commission (AHRC)
19th Floor, Go-Up Commercial Building
998 Canton Road, Mongkok, Kowloon
Hong Kong SAR, China
Telephone: +(852) 2698-6339
Fax: +(852) 2698-6367
Email: hrschool@ahrchk.org / ahrchk@ahrchk.org
Web: www.hrschool@ahrchk.org / www.ahrchk.net

February 2006

Cover illustration by Nick Cheesman

Layout and printing by

Clear-Cut Publishing and Printing Co.
B1, 15/F, Fortune Factory Building
40, Lee Chung Street, Chai Wan, Hong Kong

Contents

Introduction **v**

Chapters

I. Launch of discussions on drafting Asian Charter on the Rule of Law **1**

II. Rule of law and human rights implementation **7**

III. The role of the police in human rights implementation **37**

IV. The role of the prosecution in human rights implementation **71**

V. The role of the judiciary in human rights implementation **113**

Introduction

Human rights—From articulation to implementation

At a time of increasing natural and man made disasters, it is necessary to discuss the nexus between the rule of law and human rights. The aftermaths of both the December 2004 tsunami and the February 2005 Nepalese royal coup are a clear indicator that not only does Asia suffer from a breakdown in the rule of law, but that without it, only chaos and violence are possible. The past year has seen unequal aid distribution, the use of outdated injections in hospitals, an absence of arrest records in police stations and palpable hunger faced by people whose countries boast of food surpluses, all of which are symptoms of a collapse in the rule of law. Another symptom, seen in many countries, is the absence of democracy and accountable governance.

All of these ills can be attributed primarily to the fact that in Asia, little connection is made between rule of law and human rights. After the establishment of the Universal Declaration of Human Rights in 1948, the concepts regarding both rule of law and human rights developed largely in western countries. In the decades since then, Asia has had little serious discussion regarding international legal principles and their implementation. While governments may ratify numerous international covenants articulating human rights principles, corresponding provisions are not introduced domestically to implement these rights. Until these provisions are introduced into domestic justice systems, there can be no improvement in the human rights standards within the region. This is clearly indicated by the fact that while recent years have seen changes in Asian dictators and governments, their legacies of flawed systems and abusive institutions remain.

In order to address this situation, what is needed is the reform of these systems and institutions and the mobilization of a popular movement. It

is quite clear, in almost all Asian countries, that the institutions responsible for the enforcement of the law and the protection of people's rights are malfunctioning, resulting in further rights violations. In particular, these include the police, prosecution and judicial institutions. It is also clear that these reforms can only occur through a popular movement.

The folk school methodology, as formulated through the work of NFS Grundtvig, holds that all people are equal, that knowledge is not the privilege of the elite and that when ordinary people come together to discuss their problems, they are likely to also come up with solutions to these problems. Following this methodology, the Asian Human Rights Commission (AHRC) believes that the support of the ordinary folk throughout Asia, whose lives are most affected by the defective justice systems, is invaluable in building a movement for justice reform and the establishment of the rule of law.

It is this belief that has led to the AHRC's launch of discussions on developing an Asian Charter on the Rule of Law. Such a charter would focus on the implementation of rights through the establishment of justice mechanisms able to enforce the rule of law. The discussions should comprise of ordinary people as well as intellectuals, judges, activists and teachers coming together to document the causes and consequences of ineffective rule of law. These discussions should clearly spell out what laws and structures are needed to ensure the enjoyment of rights and what mechanisms are possible to ensure this on a national or even regional level.

This publication is an attempt to begin the discussions and documentation. It consists of a series of lessons, prepared by the Human Rights Correspondence School, a project of the AHRC, on the relationship between the rule of law and the implementation of human rights in Asia. The four lessons deal respectively with the rule of law and human rights implementation, the role of the police, the role of the prosecution and the role of the judiciary. Together, the lessons speak to the flaws in each of the justice mechanisms—the police, prosecution and judiciary—and using specific cases from different Asian countries, are able to show

how these flaws prevent the realization of people's rights. The cases include prison officials in India setting a prisoner on fire for daring to complain about poor prison conditions, a torture victim in Sri Lanka killed one week prior to testifying in court against his torturers, court orders in Nepal routinely ignored by the military and the attorney general of Indonesia refusing to investigate and prosecute gross human rights violations. The value of these cases—as they speak to systemic flaws—is enhanced by the inclusion of relevant international and domestic provisions as appendices.

The lessons are preceded by the AHRC's statement regarding the Asian Charter on the Rule of Law. The AHRC hopes that this publication will focus discussion on reforming justice mechanisms and developing a charter that is as practical as it is principled. The progression from human rights articulation to implementation is long overdue.

Hong Kong, 2006

Peaceful protesters marking international human rights day in Sri Lanka, 2005.

Launch of discussions on drafting Asian Charter on the Rule of Law

With a view to drafting an Asian Charter on the Rule of Law, the Asian Human Rights Commission (AHRC) is launching a series of discussions on the relationship between the rule of law and the implementation of human rights. Wide consultations are planned to be held before writing and approving a final draft of this charter. This work is a follow up to the Asian Human Rights Charter – A Peoples' Charter, declared in Kwangju, South Korea, May 1998.

The radical themes of the Peoples' Charter need to be further developed from the perspective of the implementation of rights. The AHRC has in its work consistently identified the prevailing breakdown in the rule of law throughout Asia as the primary obstacle to the achievement of human rights. It is hoped that the discussion being launched will provide an opportunity for a detailed articulation of the problems relating to the breakdown of the rule of law by ordinary people as well as concerned groups and academics throughout Asia. These observations and recommendations will subsequently be compiled into a document that reflects the common problems being faced by people in all Asian countries and would suggest means through which these problems could be addressed and remedied.

Democracy, human rights and rule of law

There have been numerous attempts to promote democracy all over Asia, largely unsuccessful. Their failure lies in the absence of accompanying strategies to establish or enhance the rule of law. As a result, defective

---

* This was released as a statement by the Asian Human Rights Commission (AS-104-2005) on 7 October 2005.

rule of law systems are able to distort and even destroy democratic institutions and practices. An election held without the rule of law for instance, will merely become a farce legitimizing the power of those individuals able to manipulate the process. A parliament will become fraudulent when legislative power is abused to the detriment of basic freedoms. The absence of rule of law creates avenues for corruption, which spreads cancerously into the democratic system. All attempts to promote democracy must therefore be associated with equally strong attempts to establish and promote the rule of law.

Similarly, all human rights recognized today as universal depend on the existence of operative rule of law for their implementation. The right to life for instance, depends largely on state institutions that are meant to respect, protect and fulfill people's fundamental rights. If these obligations are not met, hunger, disease and the collapse of educational institutions will take place. The lack of effective investigation, prosecution and judicial mechanisms can also threaten people's rights to life and liberty: innocent people can be subjected to arbitrary punishments including death. Therefore, despite the proclamations of rights in national constitutions or through states becoming parties to international covenants, people will be deprived of the enjoyment of rights in the absence of rule of law. The common article 2 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognizes this when it obligates state parties to take legislative, judicial and administrative measures to uphold human rights.

Breakdown in rule of law and key institutions

Vast obstacles are faced in all countries of Asia by those attempting to uphold or promote the rule of law. In some countries the principle of the rule of law itself is rejected on the premise of maintaining order with or without law. To this effect, the law is regarded by officials and bureaucrats as an obstacle to a country's development and social stability and is at times superseded by way of executive orders. One consequence of this is the transformation of law enforcement officers into order enforcement officers. Another consequence is that barbaric acts—massacres, large scale disappearances, extrajudicial killings and torture—

are committed by the police and other authorities regardless of legal or constitutional restraints. Many governments also neglect to provide the basic financial and other resources for the proper functioning of law enforcement agencies and even the judicial system (courts). These include staff salaries and benefits, training facilities and facilities needed for investigations such as forensic science equipment. This means that even when laws exist on paper, they cannot be enforced because personnel in many institutions claim that they are incapable of carrying out their mandates due to resource limitations.

The primary institutions responsible for the administration of justice such as the police, prosecution and judiciary are now facing significant problems. Some of these are caused by the historical development of these institutions, which may have been hampered by colonialism, feudal traditions, inherent societal discrimination and periods of internal conflict or civil war. Others are related to the lack of independence enjoyed by these institutions to perform their duties with competence and integrity; often attempts are made by political authorities to manipulate the institutions for their own interests, thereby affecting their objectivity and impartiality. Without studying these causes and making deliberate attempts to develop these institutions, it is not possible to prevent the institutions from becoming obstacles to effective rule of law. It is also important to study how the necessary political environment for the rule of law to flourish can be created. Such studies should thus be an important component of this series of discussions.

The defective policing institution in many countries is a key obstacle to the actualization of the rule of law. Police behavior often resembles that of the military or paramilitary forces. Such policing is unfriendly to civilians and tends to use force as its working method. Torture often becomes a common and endemic practice as a result of such policing.

Prosecution mechanisms also have fundamental problems that affect their upholding of the rule of law. In some countries the prosecution is directly controlled by the state and used for political purposes; false charges against political opponents of the state are a common occurrence. Similarly, the prosecution mechanism in many places bases its decisions not on the rule

of law, but on extraneous factors such as political pressure. Such pressure is greater in systems where no separate prosecution function exists, so that the same department is responsible for state affairs as well as criminal prosecution. At times of civil conflict, practices contrary to international norms such as state prosecutors acting as defense counsel for military and police officers accused of gross human rights abuses have occurred in certain prosecution systems. These officers have then been advised by their counsel to fabricate statements and other evidence, which in turn affects the overall morale and credibility of the prosecution department.

The judiciary is another faulty institution which needs to be addressed when considering obstacles to the rule of law. Several Asian countries do not recognize the principle of an independent judiciary. Where the principle is recognized, there is often a lack of competent and qualified judges. In other countries political regimes impose severe restrictions on the judiciary, even bringing about constitutional limitations on judicial powers. The appointment and promotion of judges as well as other administrative processes are used as leverage, preventing them from acting independently.

Supervisory mechanisms to ensure the rule of law and human rights must also be studied. In some countries such mechanisms do not exist at all, while in other countries their actual capacity for intervention is limited. Many such mechanisms suffer from limited mandates and a lack of resources.

Together with institutions, the justice and legal systems in Asia must also be scrutinized. The problems faced by marginalized sectors of society in obtaining legal redress are a significant aspect of the breakdown in the rule of law. These groups, which in fact are a majority in the region, are often entirely excluded from the legal process. Some of these exclusions have occurred throughout history. Women, Dalits, indigenous peoples and religious minorities are often those deprived of all access to law.

Anti-terrorism and emergency laws are another aspect of the increasingly repressive nature of legal systems in Asia. The use of such laws removes all forms of legal protection; it is for this reason that torture, mass killings

after arrest and disappearances have taken place while such laws are in operation.

Towards an Asian Charter on the Rule of Law

The issues mentioned above as well as many others make it essential for there to be a genuine consideration of what is involved and what is needed to make the achievement of human rights a reality. The purpose of conducting Asia wide discussions on this issue is thus to document these problems in detail and to debate these matters publicly, in order to promote local education as well as to educate the international community about the real problems that need to be addressed if the rule of law and human rights are to be realized in Asia.

The AHRC calls upon everyone to take an interest in order to contribute to making this project—of taking concrete steps to promote the rule of law—a success. While focused discussions will be held in various countries, the possibility of having discussions through email networks, the internet and other print media will also be explored. All comments and suggestions in regard to this proposal are welcome.

Monument for the Disappeared at Seeduwa, Sri Lanka

Rule of law and human rights implementation

For any society to be governed by the rule of law requires that it recognize the supremacy of all law and that all individuals are held equal before the law. Not only does this mean that the law itself must conform to the highest principles of human rights, but also that state agencies and officials themselves must be held accountable to this law. Only then can human rights be legally protected and remedies made available for the redress of rights violations.

This chapter consists of two sections. The first gives an overview of the collapse of the rule of law throughout Asia and its implications for the realization of human rights, while the second examines the factors that determine effective rule of law within any society.

I. An overview of the collapse of the rule of law throughout Asia and its implications for the realization of human rights

A. Un-rule of law

In countries throughout Asia there is a lack of adherence to the law, both domestic and international. What results is that those in power—political or institutional—do as they please, with no one to account to. Ordinary people live in instability and fear, lacking basic security for a normal existence. The institutions responsible for protecting people's rights are malfunctioning, in many instances being themselves responsible for violating rights, as indicated in the cases below, all of which were issued as urgent appeals by the Asian Human Rights Commission (AHRC).

---

* This text is adapted from Lesson Series 40 of the Human Rights Correspondence School, 'Rule of law and human rights implementation'.

Brutality of state officials

Mr Abhijnan Basu was doused with diesel fuel and set on fire by officers of the Presidency Jail in Kolkata, West Bengal, India on 12 November 2004. The reason for this brutal act was that Abhijnan had allegedly complained about the quality and quantity of food the prisoners were being provided. Needless to say, the prison officials did not take kindly to such defiance from a prisoner. On the morning of November 12, Abhijnan was approached by the jailor and several prison wardens, who quickly overpowered him and doused him in diesel. They immediately set Abhijnan on fire, who fled the scene shouting in agony.

Abhijnan was taken to the MR Bangur Hospital before being transferred to the SSKM Hospital, where he remained in a critical condition for eight days, having suffered burn injuries to 90 per cent of his body. He succumbed to his injuries and died in hospital on November 19.

While an inquiry is in progress in relation to this case, it is being carried out by prison officials, and therefore its legitimacy is questionable. Before the inquiry being completed however, the Inquiring Officer has already provided a statement to the media that the jail authorities are not at fault.

According to the prison authorities, Abhijnan committed suicide and was not set on fire by others. Despite such a claim, the authorities could not explain how Abhijnan came to possess diesel and matches inside the jail premises. The authorities also referred to a psychological disorder that Abhijnan suffered from, but could provide no medical evidence of it [See further: AHRC UA-166-2004, 26 November 2004].

Such brutality exists not only in India. The police in Sri Lanka are well-known for their abusive behaviour, of which Mr Koraleliyanage Palitha Tissa Kumara was one victim of many. A prominent 31-year-old artisan, Tissa Kumara was brutally assaulted outside his house at 8:30am on 3 February 2004 by Sub-Inspector (SI) Silva, before being put into a jeep and taken to the Welipenna police station, Kalutara District. En route, the police picked up Galathara Don Shantha and several other young persons.

After arriving at the police station, the police took Tissa Kumara to SI Silva's room, where he was told to sit on the floor, while the others were taken to the cells. A little later, Galathara was brought in and made to sit opposite him. Then SI Silva took a cricket post and started hitting Tissa Kumara repeatedly, telling Galathara, "Look—this is how the others will also be treated." Tissa Kumara's wife, P Rajitha recalls what her husband later told her had been done to him:

> There were several others who had also been arrested along with my husband on suspicion of robbing a boutique nearby. However the others had confessed to their involvement, so they had not incurred the wrath of the police. Palitha refused to confess, as he was not involved. One Sarath had been apprehended on suspicion and had falsely implicated Palitha as revenge [thinking that Tissa Kumara was somehow to blame for his arrest].
>
> My husband told me that SI Silva severely assaulted him, demanding information and shouting, "Give me the bombs, give me the weapons and tell about the robbery." He had been beaten all over his body, especially over the chest and heart. While hitting Palitha on the heart SI Silva had remarked, "I am going to kill you." After each beating, Palitha had also been dragged and soaked with cold water. He also said that SI Silva made Sarath, who was a co-suspect in the case for which Palitha was arrested, and who had been suffering from tuberculosis, spit into my husband's mouth, saying, "You too will be dead within two months from today due to TB."
>
> After the spitting incident, another policeman had given Palitha some water with which to rinse his mouth. This same policeman had taken pity on him and given him a mattress to sleep on. However, SI Silva had subsequently arrived and had taken the mattress away, thus forcing my husband to spend the night on the floor.

The beating went on for possibly two hours, and in that time Tissa Kumara recalls being hit about 80 times, on all parts of his body, soaking his clothes with blood. The blows were often so forceful and wild that the officer also hit and smashed an electric bulb on the ceiling. Throughout this time, Galathara was watching in terror. Tissa Kumara noticed that he had involuntarily urinated on seeing the manner in which he was beaten

up. After this, even other officers became concerned at the relentless beating and savagery of the attack. Another came in and said to SI Silva, "Are you trying to kill this man? Stop this hitting." However, he did not stop. Then the officer left and came back with about eight other officers, and one of them literally had to pull the cricket post out of SI Silva's hands. It was after this that SI Silva brought Sarath and forced him to spit into Tissa Kumara's mouth.

Tissa Kumara was first kept in the cell for about three days. In that time he often vomited, and could not eat or drink. Each time he tried to stand up, severe pain in his right ear caused dizziness and disorientation. On the third day SI Silva came and told him to get up, raise his arms and bend down. He found it very difficult, and so the officer punched him in the chest about 13 times, and once in the face. While punching him he said, pointing, "This is where your heart is and I am hitting so that you will die in two months." On another occasion SI Silva came and handcuffed Tissa Kumara to a bar of the cell door, and then pulled the door open and shut, injuring his wrist.

The police later filed two fabricated cases against Tissa Kumara, for possession of a grenade and for robbery, causing him to be remanded at Kalutatra Remand Prison, where he received no treatment for his injuries. Throughout this time his wife visited him regularly, and describes his condition then as follows:

> He was treated as some kind of a 'special' remand detainee, segregated from the rest. During his period of remand, he had been taken to the Colombo National Hospital for an X-ray and several medical tests. He had also been operated on for a boil on his buttocks, at the prison hospital. This boil was a result of his assault at the Welipenna police station. I continued to give him Panadol and Siddhalepa [popular local ointment for aches and pains] for his ailments every time I visited the remand prison. I also did this while he was at the police station.
>
> When I visited him on April 24 he complained of chest pain and of coughing up blood. He also gave me a prescription for certain medicines.

> He had received the prescription from the prison hospital. The prison hospital had also told Palitha that he might be suffering from tuberculosis when he reported to them that he had been coughing up blood.
>
> I purchased these medicines from a private clinic and sent them to my husband on April 27. On April 29, I met Palitha after he had been taken to the Nagoda hospital, where again he had been treated. He told me that two blood samples and his phlegm had also been taken to be tested at the Nagoda hospital. I visited him again on May 3 but his condition had not changed. I have not yet been able to know the results of these tests.
>
> My husband also told me that he had been warded at the prison hospital ever since he started coughing blood with his saliva and complained of chest pains. Since then, he has been confined to a secluded room [formerly reserved for chickenpox patients] and for all intents and purposes, kept in isolation. Even his food is passed to him from under the door.

The test at Nagoda General Hospital confirmed that Tissa Kumara had in fact contracted tuberculosis.

The preliminary hearing of the fundamental rights petition in Tissa Kumara's case submitted to the Supreme Court was heard on May 10. On May 24, the state counsel, appearing for the Attorney General, said that he is satisfied that the allegation of torture is true, and that the Special Investigation Unit (SIU) is conducting an inquiry to prosecute the perpetrator under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Act, No. 22 of 1994.

Tissa Kumara has also been alternately bribed and threatened to drop the formal complaints he has made against SI Silva. On June 16, he had a visit from a 'socially important person' who carried a message from the police that he would receive 500,000 rupees if the cases filed on the basis of his complaints were withdrawn. Meanwhile, in a separate incident, he received a message through a third party that his wife and child would be crushed to death by a vehicle if the complaints were not withdrawn.

The Matugama Magistrate's Court finally released Tissa Kumara on bail on June 28, some five months after he was originally taken into custody [See further: AHRC UA-18-2004, 13 February 2004; UP-21-2004, 30 April 2004; UP-22-2004, 3 May 2004; UP-28-2004, 24 June 2004 and also 'Urgent Appeals File: Tissa Kumara', *article 2*, vol. 3, no. 3, June 2004, pp. 41-48].

Violence against women and children is also common in a large number of Asian countries. Janaki and Chinki Chaudhary, two 16 and 14-year-old girls of Mahadev village, Belawa-5, Bardiya District, Nepal were working as day labourers in the building construction site of the Armed Police Force in Rajhena, Banke District. On the night of 27 September 2003, both of the victims and one male worker named Sarju were sleeping in a dormitory room at the construction site when seven Armed Policemen came to the room, switched off the light, threatened the male worker and forced the girls to go outside with them.

The policemen took the girls to a nearby garden and gang-raped them. Three different policemen raped each of the two girls and one policeman raped both of them. While they were raping the girls, the policemen threatened to kill them if they shouted or made any noise. After the rape, the policemen told the victims to go back to the dormitory and remain quiet and work as normal.

Although the perpetrators were remanded in custody on October 25 after inquiries were made into the complaints lodged against them by the girls, some police officers of the District Police Precinct suggested the victims to settle the case. The perpetrators offered 5000 rupees to each girl to withdraw the complaint, and threatened that they would have difficulties if they challenged the police.

Furthermore, the Superintendent of Police, Shri Bahadur Ghale, said that he thought the policemen had consensual sex with the girls, even though the perpetrators had at first admitted to the crime. They only denied it later, insisting that the contractor was using the two girls to make false accusations against them because of previous bad relations [See further: AHRC UA-66-2003, 27 October 2003 and 'Missing and

maimed: Case studies of forced disappearances and torture committed by the Nepalese security forces', *article 2*, vol. 3, no. 6, December 2004, pp. 35-6].

Judicial incompetence and partiality

Not only must victims suffer such abuse and brutality from state officials, but they are further denied their rights when they attempt to seek redress. When Ko Khin Zaw and U Ohn Myint for instance, filed a complaint for forced labour in the Henzada Township Court, Ayeyawaddy Division, Burma in July 2004 after being jailed for failing to do sentry duty at a village monastery, their complaint was summarily thrown out of the court. Furthermore, the same judge then entertained a complaint of criminal defamation against them by the vengeful local administrative officials. The two villagers were found guilty, and were offered a fine or six-months' imprisonment. In an act of defiance, the two men chose jail.

Although the widespread practice of obligating citizens to do manual work in Burma was recently prohibited under an agreement with the International Labour Organisation (ILO), the practice still occurs routinely. The agreement with the ILO envisaged that the means for complaints and investigation of forced labour allegations could be established. In practice though, when villagers attempt to make complaints, they are consistently rejected. Complainants then face counter-allegations of defaming public officials or refusing to carry out their instructions, for which they are sentenced to jail terms as a warning to others [See further: AHRC UA-112-2004, 3 September 2004].

In Nepal, even prior to the February 2005 coup by King Gyanendra, there existed little rule of law in the country, to the extent that Supreme Court orders were routinely ignored by the police and military. A Supreme Court order to release Jivan Shrestha on 16 November 2004 from the Central Jail in Kathmandu saw Jivan released but immediately rearrested on the same day, outside the prison compound by police from Bhaktapur. He was not given an opportunity to talk with his wife or lawyer, both present at the time, and was put straight into a police van.

Jivan, a 38-year-old permanent resident of Wana-1, Sankhuwasavha District, was initially arrested at his Kathmandu shop on 15 September 2004 by Royal Nepalese Army personnel deployed from Singhanath Barracks, Suryabinayak, Bhaktapur. Bhola Limbu, who was staying with Jivan, was also arrested. After searching the premises, the soldiers also took Jivan's mobile phone and 8000 rupees.

After the arrest, both Jivan and Bhola were kept at the Singhanath Barracks for six days. Jivan was then produced before the Chief District Officer, Bhaktapur on September 22, who ordered him detained under the Terrorist and Disruptive Activities (Punishment and Control) Act. He was subsequently sent to the Central Jail, Kathmandu.

In prison, Jivan told lawyers from Advocacy Forum, a human rights organization, that he had been tortured while in the army barracks and forced to confess to being a Maoist and being involved in extortion. A habeas corpus writ was filed on his behalf on October 7, in response to which the Supreme Court ordered that he be released on November 16.

After having been rearrested, Jivan was found the following day at the District Police Office in Bhaktapur. Police inspectors at the office said that he was arrested by order of the Royal Nepalese Army, and that they did not know what the army wanted to do with him next. He was subsequently transferred back to the Singhanath Barracks.

Another writ of habeas corpus was filed in the Supreme Court on November 18, and Jivan was at last released on November 24, but only on condition that he report back to the barracks on December 15. He dutifully went with his wife and another relative on the appointed date, and was taken inside while the others were told to wait. Incredibly, after some time his wife was told that her husband would be detained again. In a desperate state, his wife went back to the barracks the following day, but was told that she could not meet her husband. Again she went on the third day, pleading for his release. At this point the soldiers told her that if she appeared before the barracks again, she too would be put inside. They also blamed her for filing habeas corpus writs in court and for telling human rights groups about what had happened to her husband.

Finally, Jivan was again released, but only on the condition that he again report to the barracks, this time with written proof that the writs issued against the security forces have been withdrawn [See further: AHRC UA-159-2004, 22 November 2004; AHRC UP-84-2004, 24 December 2004 and 'Missing and maimed: Case studies of forced disappearances and torture committed by the Nepalese security forces', *article 2*, vol. 3, no. 6, December 2004, pp. 31-2].

B. The justice system and human rights

A society's justice system is what determines the effect of its rule of law. This system is comprised by the police, prosecution and judicial mechanisms. The functioning of these mechanisms will affect the response of the justice system to the needs of society. When the system is able to respond adequately, the rule of law in that society will be effective.

The perversion of laws and the malfunctioning of institutions the cases above portray are only too common throughout the region. Amazingly, the collapse of effective rule of law in the region and its bleak human rights situation are rarely looked at as two sides of the same coin. In fact, the obstacle of ineffective rule of law is disconnected from that of human rights. As soon as such a disconnection is made however, human rights become a meaningless subject to the ordinary citizen.

For the ordinary people, particularly those who have been victims of human rights abuses, the system that violates their rights is the same one that denies them access to justice and effective remedies for their violations; for them, there is an indivisible link between rule of law and human rights. In the case of Ko Khin Zaw and U Ohn Myint, not only were their rights violated when they were forced to do labour, but they were further denied their right to seek redress. Abhijnan was killed for making a complaint to the prison authorities, clearly pointing to the lack of effective complaint mechanisms. In Jivan Shrestha's case, even a Supreme Court order did not deter the police and military from detaining him.

In all these cases not only were laws being violated—thus leading to human rights abuse—but the persons committing the violations are

themselves responsible for the safeguarding and enforcement of the law. In such circumstances, there can be no remedies for human rights violations. Thus, only effective rule of law can hold the perpetrators of abuse accountable for their actions and give redress to the victims. The absence of such rule of law will perpetuate violence, corruption and fear in society, with the perpetrators at large and the victims denied justice.

The exposure of the link between the rule of law and human rights together with the active engagement to establish the rule of law—and the corresponding justice mechanisms—are thus essential preconditions for the realization of human rights. Today, the struggle for one cannot be separated from the other. It is for this reason that the Asian Human Rights Commission (AHRC) highlighted UN Secretary General Kofi Annan's statement of 21 September 2004 regarding the centrality of the rule of law, in which he observed that

> "We must start from the principle that no one is above the law and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad and every nation that insists on it abroad must enforce it at home. Yes, the rule of law starts at home. But in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse, and the powerful manipulate laws to retain power and accumulate wealth. At times even the necessary fight against terrorism is allowed to encroach unnecessarily on civil liberties."
>
> This statement is of utmost importance for Asia…[where] the collapse of the rule of law is most visible in the poor quality of basic state services provided through the policing, prosecution and judicial arms of government. These arms suffer from insufficient budgetary allocations, the absence of responsible leadership, and oftentimes deliberate efforts to precipitate institutional breakdown [AHRC AS-35-2004, 22 September 2004].

In April 2005, Kofi Annan further emphasized the need for implementation within the human rights movement.

> The address to the United Nations Commission on Human Rights by the UN Secretary General Kofi Annan this April 7 is a wake-up call to the global human rights movement. This speech marks a moment in the development of global human rights standards of far greater importance than the Vienna Conference of 1993.
>
> For the reasons identified by the Secretary General, the global human rights movement has ossified. Instead of fighting for meaningful change, it has grown cynical and withdrawn from many of the critical issues facing our time. Among his remarks on the need for bold and comprehensive changes to the UN approach to dealing with human rights, the Secretary General at last laid emphasis firmly on implementation. He stated that
>
> "The cause of human rights has entered a new era. For much of the past 60 years, our focus has been on articulating, codifying and enshrining rights. That effort produced a remarkable framework of laws, standards and mechanisms–the Universal Declaration, the international covenants, and much else. Such work needs to continue in some areas. But the era of declaration is now giving way, as it should, to an era of implementation" [ALRC AL-02-2005, 8 April 2005].

Without an emphasis on implementation there can be no improvement in the human rights situation of millions of people throughout the region. This implementation requires the establishment of effective rule of law and functioning police, prosecution and judicial mechanisms. It is the justice system—comprising of these institutions—that must defend and protect human rights. If the system is malfunctioning, nothing but abuse can be expected.

These issues have been detailed by the ALRC in an open letter to the human rights community in 2002, reproduced below.

Open letter to the global human rights community: Let us rise to article 2 of the ICCPR

-Editorial board, *article 2*, vol. 1, no. 1, February 2002

The inauguration of *article 2* is an occasion to address the global human

rights community on a matter of primary importance: the need to deal with problems of human rights implementation, rather than confining our work merely to the propagating of ideals.

Since the adoption of the Universal Declaration of Human Rights in 1948, the human rights movement has worked hard to spread its gospel. The development of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights was a major milestone. Numerous other conventions and declarations have further improved and enhanced the body of human rights principles, and articulated them to the global community. United Nations mechanisms have provided a base for monitoring the observance of rights, not least of all through the establishment of the High Commissioner on Human Rights.

All over the world extensive programmes are now taking place to educate people on human rights. States engage in this work to varying degrees, United Nations agencies facilitate them, and academic institutions participate. The most important education work is done by human rights organisations, predominantly voluntary bodies. As a result, today there exists a vast network of persons and organisations firmly committed to human rights: more than at any other time in the history of humankind.

Yet the actual situation is that human rights continue to be monstrously violated all over the world. The most visible abuses take place where the majority of the world's population lives: the so-called 'Third World', or 'Underdeveloped World'.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things. In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge - no amount of repetition of human rights concepts - will by itself correct the defects. Rather, they need to be

studied and corrected by practical actions. Hence research and intimate knowledge of micro-level issues must become an integral part of human rights education and related work. This is the key issue in promoting and protecting human rights.

The work of human rights monitoring mechanisms is mainly focused on the correction of individual violations. This approach is inadequate when dealing with systemic breaches. For example, a country may be condemned for acts of torture, mass murder, crimes against humanity and other violations, and a monitoring body may make some recommendations to correct these. However, monitoring bodies have neither the mandate nor capacity to engage in studies on the actual functioning of components within the justice system--the police, prosecutors and judiciary--through which such recommendations have to be achieved. Thus, even if one person or another is punished, the actual system allowing violations remains, and may even get worse.

Another wrongly held belief is that enacting legislation on human rights will by itself result in improvements of rights. Legislation can work only through the mechanisms for administration of justice in each country. If those mechanisms are fundamentally flawed then legislation will remain simply in the books and will be used merely to confuse monitoring bodies into believing that actions have been taken to improve conditions. For example, a constitution may provide for fair trial, however the criminal investigation, prosecution and judicial systems may not have reached a credible standard. Such legislation then only mocks the victims and cynically manipulates monitoring bodies and the international community.

article 2 is being inaugurated to draw global attention to article 2 of the International Covenant on Civil and Political Rights (ICCPR), and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. Sadly, article 2 has become the forgotten component of the ICCPR. There is a dearth of relevant international jurisprudence, and hardly any mention of it in the enormous volumes of annual literature on human rights.

There is a reason for this neglect of article 2. In the 'Developed World', the existence of basically functioning judicial systems is taken for granted. This does not mean that these systems are perfect; in some instances there may be important challenges to them. However, to assume that these systems exist even minimally in other parts of the world is to ignore reality. A person coming from a 'developed' country may have many problems understanding this. We human beings are often prisoners of our own histories: conditions outside our upbringing and experience may be incomprehensible. Even an open-minded person may not have the means to abandon her or his framework for understanding society.

Other difficulties also arise. One is the fear to meddle in the 'internal affairs' of other countries. State parties especially can create many obstacles for those trying to go deep down to the roots of problems. Thus, inadequate knowledge of actual situations may be guaranteed by the nature of interactions in the monitoring system itself. A further and quite recent disturbing factor is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with issues related to article 2. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

To overcome these difficulties, human rights movements in different parts of the world should cooperate closely in analysing and solving their respective problems. Cooperation can bring much needed in-depth knowledge of systemic obstacles to human rights implementation. Without cooperation it will not be possible to address some of the key questions facing the global human rights movement today.

After many years of study and work on these issues, the Asian Legal Resource Centre has decided that it is time to ring the alarm bells. We hope that the global human rights community will respond positively to this publication by looking into its own limitations and by trying to improve the human rights situation in different parts of the world. In the meantime, *article 2* will lead the call to arms.

Discussion points (taken from HRCS Lesson 40)

1. Would you describe your society as one governed by the rule of law? Give examples.
2. Are you aware of human rights violations perpetuated by law enforcement agencies in your own country? In such instances, how can victims obtain redress?
3. Discuss the link between rule of law and human rights protection.

II. Factors that comprise and determine effective rule of law within a society

Effective rule of law in any society is comprised of numerous factors, which are discussed below.

A. Political

Political will and power have a significant effect on the rule of law in any society. Governments in Asia tend to be authoritarian, with close links to the military and police. Those in power are much more interested in consolidating and retaining their power than in promoting democracy. For this reason, effective rule of law is not a priority for them; in fact, they are more interested in attempts to subvert the law to ensure their own interests. They are interested in promulgating laws and practices that will help them do this, even if these are contrary to rule of law principles: societies throughout Asia live under various forms of internal security laws, as well as strict legislation regarding contempt of court and criminal defamation.

Governments can also make use of state institutions to further their aims, a common characteristic in many Asian countries. In India for instance, politicization and communalism affect all state institutions, particularly the police. This means that rather than following the rule of law, the institutions follow the rule of the politicians. This can be seen in the periodic communal riots and massacres in which the police play a

complicit role. The greatest affected groups are inevitably the marginalized and minority groups, as the AHRC pointed out in its human rights day statement of 2004.

> The persons who come off worst are those belonging to the lowest castes and other most marginalised social groups. As the rule of law has ebbed away, a tide of communal violence and intolerance has swept India. Invariably, such violence are attempts against those persons who have been structurally excluded from most parts of society, notably the 300 million or so Dalits, when they try to assert their rights and rise above their socially-prescribed status. Similarly, religious intolerance has been directed particularly towards Muslim communities. This violence is often manifested in state actions ostensibly undertaken with legal backing. It includes forced eviction and denial of access to state facilities and resources. It is also evidenced in the lack of efforts to alleviate extreme poverty, which is itself often brought about directly by the actions of government agents. Despite the fact that India has consistently declared a food surplus over the last few years, thousands from Dalit and tribal communities are starving to death, and millions suffer from malnutrition.
>
> One example that illustrates how hunger is manifest through the negative actions of state authorities directed against marginalised groups, beginning in 2003 and continuing to the present, is in the 7000 persons evicted from an area of land under the control of the municipal authorities known as Bellilious Park, in greater Kolkata. The eviction occurred in February 2003, and was tacitly sanctioned by the courts. During the eviction the affected persons were physically assaulted and had all their meagre possessions either destroyed or looted by the police and other government agents. Since then, at least six persons are known to have died of starvation or related illnesses. Large numbers of the survivors are now living in subhuman conditions near a municipal dumping ground and a train line, while most of the land from which they were vacated stands idle. The authorities' sheer denial of their humanity stems primarily from the fact that they are all Dalits. Despite strong efforts locally and from abroad to have some kind of commitment towards their rehabilitation and compensation for losses suffered, nothing has been forthcoming from government agencies at any level. Even humanitarian organisations such

> as the Indian Red Cross Society have not deigned to lift a finger in support. Under the current circumstances, the inaction of these agencies is tantamount to a death sentence for more persons in the community who will die of illness associated with a lack of nutritious food, clean water and health care, all brought on by callous and arbitrary actions of local authorities [See further: AHRC AS-60-2004, 8 December 2004].

The military is another institution used by governments to keep order and stability, as well as ensure that the ruling elite's aims are met, without regard to the rule of law. These governments further make use of the military in civil conflict, as seen in Nepal, Indonesia and even Thailand. In these situations, governments suspend normal laws by way of security regulations and grant the military significant powers to control people. The military are almost never held accountable for violations committed.

The governments, in fact, even attempt to cover up such military abuse, further demonstrating its lack of commitment to the law. In Nepal for instance,

> The government has gone so far as to help the security forces to conceal grave human rights violations, particularly disappearances. Even the highest court of the country and the National Human Rights Commission have been directed not to discuss violations committed by the military, thereby denying any possibility of relief for the victims…
>
> With the expiry of the Terrorist and Disruptive Activities (Punishment and Control) Act – 2058 last October 12, the government of Nepal has introduced a more severe version of the same law in its stead: the Terrorist and Disruptive Activities (Control and Punishment) Ordinance – 2061. This legislation clearly signals that the government has surrendered its authority to the military, and given it a green light to continue with arbitrary detentions, torture, disappearances, and extrajudicial and summary executions [See further: AHRC AS-60-2004, 8 December 2004].

In Thailand as well, the three generals identified as being primarily responsible for the killing of at least 85 persons in Narathiwat province on 25 October 2005 have been exonerated simply because 'there is no

disciplinary penalty for those holding the rank of general'. That the government allowed a military investigation instead of independent inquiries and that no further proceedings have been initiated is indicative of the impunity granted to the perpetrators of violations.

Regardless of practice, most civilian governments will at least give lip service to the rule of law. This is missing from military governments though, for whom law holds little importance, as in Pakistan.

> The continued dominance of the military over all public institutions in Pakistan in 2004 has done nothing to improve the human rights situation there. Apart from the president's refusal to step out of uniform, the increasing number of serving and retired military officers being brought into the civil service is sabotaging efforts at participation by the civilian public. The hand of the military is seen increasingly in the work of the police, prosecution and judiciary. Recent incidents in Okara, where people were brutally assaulted and tortured into signing agreements to hand over land for a military farm speak to the extent of control the army now feels free to exercise over the country.
>
> Pakistan still lacks a legitimate constitution. Since its foundation, opportunists and power-mongering groups seeking personal advantage in the name of the greater good and law and order have manipulated the constitution. Consequently, generations have grown up knowing only the law of the jungle. They relate to gangs, personality-oriented political parties, sects and clans to attain their sense of security and identity. The concept of a civilised society is all but absent. Principles of the rule of law and a social ownership of public institutions—necessary for the protection and promotion of human rights—are non-existent.
>
> Where the leadership of society has been taken over by the groups and individuals who use religion, sect, clan, class and other partisan bases to mobilise others for their personal political and social benefits, even the discussion of human rights become a challenge. The most common belief pushing disappointed youth is that given the anarchy, injustice and disrespect of human integrity prevalent in Pakistan, the only purpose in

> life is to die for a greater good. Economic deprivation and low literacy are certainly elements in the mixture, but more importantly, without remedies for human suffering, disillusioned and frustrated individuals look for recognition of their existence by making themselves available for use in violence and criminality. This trend is only exacerbated by the militarization of society, which encourages violence as a means to addressing problems…
>
> It has been observed that ordinary people in rural areas of Pakistan know very little of the institutional changes that are being trumpeted as successful from offices in the capital. To the ordinary person in Pakistan, what matters most is that should he require a response from the police he can get it without having to ask his local member of parliament or feudal lord. He also wants that should police officers commit a crime or abuse against him, he or relatives can seek redress without fear that political heavyweights will get involved. And he requires that if he ends up in police custody, he will be treated as innocent until proven guilty and not summarily killed because a local feudal lord wants it to be so. The ordinary citizen want that should she enter a police station, she will not be intimidated, tortured, and kept in arbitrary custody. As a woman, she wants special provisions to protect her from harassment. Minorities are also particularly concerned that they will not become the easy targets of fabricated and falsified cases to boost records of police efficiency. These are the concerns of most people in Pakistan, which persist despite the grand blueprints for change drawn up by government bureaucrats and their international partners [AHRC AS-60-2004, 8 December 2004].

Such militarization and political influence have a negative effect on the institutions responsible for maintaining rule of law, as well as on the development of legal principles. Throughout Asia the rule of law is being threatened by the destruction of its institutions; existing institutions are being displaced, while there is a refusal to build new institutions, or rebuild old ones. Once these institutions are rendered dysfunctional, those in power are free to act without controls. They make arbitrary decisions that affect the daily lives of millions, who have no place to go to complain or seek redress. Those who dare complain are told to go to the legal authorities, which have been incapacitated.

B. Legal

Jurisprudence

In order for there to be the establishment of effective rule of law in society, there must exist laws that serve the public and defend human rights principles. The purpose of all law must be to protect and defend the lives and liberties of people, not the repression of them. In recent years however, many fundamental principles to the rule of law are being slowly eroded. These relate in particular to fair trial and judicial independence. Internationally, there have been calls to abolish the Geneva Conventions on war crimes. Domestically, there have been numerous proposals to reform legal systems in a manner that would seriously undermine the rule of law.

At the same time, harsh laws are being enforced, whose purpose is the domination and repression of society. These laws are increasingly being passed as national security or anti-terrorism measures, but in fact are widely used to suppress dissent and deviation. Arbitrary detention is a continuing problem in many countries including Malaysia, where around 100 persons are being detained under the Internal Security Act over the last three years. This law, which has been the subject of widespread condemnation both inside and outside the country over numerous years, permits unlimited successive two-year periods of detention without trial. Detainees are in many cases subjected to ill treatment and torture, including beatings, sexual humiliation and psychological abuse. Many of the victims have died. This is a direct result of the impunity that perpetrators of violations continue to enjoy; the few investigations of abuses that occur, fail to result in criminal prosecutions, with deaths explained as having occurred due to failed escape attempts.

Moreover, such internal security laws result in the suspension of many other laws that protect people from illegal arrest, detention, privacy, the protection of their living quarters, and other matters.

Another harsh law used to repress public opposition is Thailand's obsolete criminal defamation law, which is being increasingly deployed to silence

public criticism of government policies. With the exception of one television channel, owned by the prime minister's corporation, the state holds a monopoly on electronic broadcasting in Thailand. Attempts to address this imbalance in accordance with provisions under the 1997 Constitution have been vigorously attacked by vested commercial and political interests. One case of particular concern relates to criminal defamation charges pending against a media reform campaigner, Supinya Klangnarong, whose research has demonstrated that the profits earned by the companies managed by the family of the prime minister have increased inordinately since he took office. Her case is going to court in 2005, and will be of historic importance for people in Thailand at a time that their right to express themselves freely on matters of public concern is very much under threat.

In other situations, laws do not exist to protect basic human rights, as in the case of torture and disappearances. When they do exist, they are not enforced properly, allowing them to be violated. Thailand for instance, has no specific legal provision penalizing torture as it has yet to ratify the UN Convention against Torture. While Sri Lanka has ratified the Convention and has adequate domestic legislation, to date there have been few prosecutions under this, with only two convictions, even though the country faces serious police torture.

Basil Fernando sums up the situation of law and justice throughout the region thus:

> There is often resistance to development of the law. For example, in Cambodia even more than seven years after the UN-sponsored elections the country has no penal code or criminal procedure code. The reasons for this deficiency are more political than technical. Development of the law is seen as disruptive to the type of social order maintained in the country. Many activities carried out by the newly rich would become impossible if there were an expansion of the law and law-enforcement.
>
> In the second case, in some countries, development of the law is confined to some areas, such as commerce, and restricted in regard to personal liberties. Malaysia and Singapore are good examples of this: economic and

> commercial development has not brought the people in those countries civil and political rights. In fact, in Malaysia the detention of political opponents to the current regime under the draconian Internal Security Act indicates how deteriorated the situation is there.
>
> A third category is where very basic laws are suspended on the pretext that such laws are detrimental to order. In Sri Lanka, even laws relating to the reporting of deaths to the courts were suspended to allow the police to engage in acts of large-scale murder and the disposal of bodies [Basil Fernando, 'The police, judiciary and rule of law in Asia', *article 2*, vol. 2, no. 5, October 2003, p. 28].

Institutions

When principles are undermined, this will inevitably affect the related institutions. When it comes to effective rule of law, the three institutions that are responsible are the police, prosecution and judiciary. These three institutions form the institutional framework of any society's justice system and are responsible for ensuring that the law is upheld and people's rights protected.

A clear pointer that these institutions are malfunctioning however, is their failure to ensure effective remedies to human rights violations, which is described in a written statement to the 58th session of the UN Commission on Human Rights made by the ALRC, reproduced below.

Implementing article 2 of the ICCPR to ensure effective remedies for human rights violations in Asia (E/CN.4/2002/NGO/65)

1. Failure to ensure effective remedies for violations of human rights is itself a basic violation of rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR). Most neglected in this Covenant is article 2. In fact no agency or mechanism has consistently monitored the implementation of article 2. Nor is there a specific item on the agenda of the Commission for its discussion.

2. The neglect of article 2 may be related to the differences between

remedies available in countries called 'developed democracies' and those falling outside this category. In a developed democracy, once ratification of a convention takes place its implementation can be ensured through the existing mechanisms of law enforcement. However, this is not the case in countries where the law enforcement mechanism itself is defective.

3. Most law enforcement mechanisms in Asia impede the implementation of effective remedies under article 2 of the ICCPR. In many countries criminal investigation 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.

4. 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.

5. While there are many rhetorical condemnations of impunity, it is not often realised that without independent criminal investigation and prosecuting authorities it is not possible to overcome impunity. Impunity can safeguard itself through defective mechanisms even when there are laws against it. Typically what occurs is that after a violation takes place the criminal investigation authorities either do

not pursue the matter at all, or do so unsatisfactorily. The prosecutor then claims that there is little or no evidence to act against the perpetrators. Even if under pressure the prosecutor takes the case to court, with insufficient evidence the perpetrators are released. In some instances the perpetrators then claim that their own human rights have been violated. Thus the absence of adequate criminal investigation and prosecution mechanisms creates a vicious circle in which the work of human rights organisations is defeated by the very legal mechanisms upon which they rely.

6. In recent times many Asian governments—under heavy pressure from the international community—have appointed governmental commissions or committees to look into violations of human rights. These are mostly bodies performing mere public relations exercises. Without addressing the basic defects of the criminal investigations and prosecution mechanisms the work of these agencies does not produce any positive results in ensuring the implementation of article 2. Unfortunately the same observation is valid regarding most national human rights institutions in Asia.

7. Accordingly, the Asian Legal Resource Centre urges the international community to pay greater attention to problems relating to the implementation of article 2 of the ICCPR. It should facilitate studies and develop recommendations on this issue. Special financial and non-material support must be provided to countries to reform and develop their criminal investigation and prosecution mechanisms, to ensure proper implementation of article 2. The Asian Legal Resource Centre also urges all UN human rights mechanisms to pay special attention to article 2, particularly by ensuring proper criminal investigations and prosecutions. Those of particular relevance are the Special Rapporteur of the Commission on Human Rights on the question of torture, Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, the Special Representative of the Secretary-General on the situation of human rights defenders, the Special Rapporteur of the Commission on Human Rights on the

independence of judges and lawyers and the Special Rapporteur of the Commission on Human Rights on violence against women, its causes and consequences. This issue is also very relevant to all groups working on economic, social and cultural rights, and the Independent expert of the Commission on Human Rights on the right to development. Finally, we urge all civil society organisations, international human rights groups and bodies involved in the promotion and protection of human rights to take special note of issues relating to the implementation of the article 2. Without it, much of the work they do will produce little or no result in altering the patterns of human rights violations, particularly in countries not falling within the category of developed democracies.

* * * * *

It is not only their lack of effective remedies to human rights violations that render the police, prosecution and judicial mechanisms throughout Asia dysfunctional; rather, it is the very fact that in many cases it is these mechanisms themselves which commit human rights violations, as indicated by the cases mentioned at the beginning of this chapter.

The police for instance, are seen as criminals in most Asian countries rather than law enforcers. They are largely associated with intimidation, political influence, violence and impunity, which encourages crime and corruption in society and destroys people's faith in legal redress.

The prosecution system is also defective in most countries. A prosecutor's duty is to uphold the principles of due process by acting on their basis alone. Applying criminal principles defined by law, the prosecutor must examine evidence and charge those where there is sufficient evidence of the commission of a crime. To do this, the prosecutor must have legal and actual power. In many Asian countries however, this is not the case.

The judiciary in Asia is largely seen to have compromised its independence. Judges, particularly those in lower courts, collaborate with the police and give no justice to victims. Corruption within the judiciary is widespread. In Indonesia, a former Supreme Court judge has himself recognised

that the main obstacle to the effective functioning of the judiciary is the widespread corruption among its ranks.

This being the situation of the police, prosecution and judicial mechanisms in Asia, it is obvious that the obligation undertaken by way of article 2 of the ICCPR to establish functioning judicial, legislative and administrative mechanisms and provide remedies has not been honoured.

C. Social

Social and cultural practices

There are many cultural factors that affect the establishment and implementation of rule of law in Asia. In many societies legal reforms were brought in from the outside, and have thus remained at a superficial level, without affecting the daily lives of people. For instance, while equality is the principle upon which rule of law is based, in many societies inequality is rife, with certain sectors of society living lives of great oppression and poverty, such as women and Dalits.

India is home to several million Dalits, or untouchables, the lowest strata of the caste system. This system dictates that inequality is inherent in the life of individuals. The system segregates people into certain 'castes', which are determined for life; these castes determine a person's occupation, education, social status and so on. For the majority of those who are seen as 'untouchable' by this harsh system, legal provisions within the country exist only to perpetuate injustice as well as serve as a façade for India's international obligations. The extent of caste prejudice pervading in social and governmental attitudes was made alarmingly clear in the wake of the December 2004 tsunami relief operations, as mentioned by the ALRC in a written statement made to the 61st session of the UN Commission on Human Rights.

> 2. Places such as Kadapakuppam and Pattipulam of the Kachipuram district in Tamil Nadu have received no relief whatsoever. This is despite 175 families in Kadapakuppam and 280 families in Pattipulam having felt the brunt of the disaster. Despite complaints by villagers in these two places,

> at the time of writing no government officials or aid agencies have gone to the assistance of these people. Likewise, in Pannanthittu village of Tamil Nadu's Chidambaram Thaluka, all 150 families affected by the tsunami have been denied aid. Villagers in MGR Thattu, meanwhile, protest that they are being discriminated against, as little relief has been provided to them.
>
> 3. Caste-based discrimination has also been evident in relief operations elsewhere. When burying the dead, Dalits have been brought in to handle the bodies, as 'traditionally' they have been obligated to do. Community kitchens, established to distribute food to victims, were divided into two: one for caste Indians and one for Dalits, as upper castes would not consume food prepared by Dalits. It is a sad reality that even in times of extreme necessity caste prejudices dominate social exchanges [ALRC, 'Caste-based discrimination in India', E/CN.4/2005/NGO/56].

Women throughout Asia are faced with violence and gender discrimination, inherent in the patriarchal societies they live in. For them as well, rule of law has no meaning beyond legal restrictions regarding their travel, education or employment. They associate police and other government officials with harassment and sexual abuse. Honour killings in Pakistan are a particularly brutal form of violence against women, while also being a practice that underlines how the absence of the rule of law has led to the perpetuation of jirgas—tribal councils.

> 4. The lives of millions of women in Pakistan are circumscribed by traditions that enforce extreme seclusion and submission to men, many of whom impose their control over women with violence. For the most part, women bear the traditional male control over every aspect of their bodies, speech and behaviour with stoicism, as part of their fate. In cases where a woman is believed to have 'dishonoured' her family by having a male friend, marrying a man of her choice or seeking a divorce, tribal councils—in some parts of the country known as jirgas—have decided that all those responsible be killed or otherwise punished. With the expansion of the notion of 'honour' and of what undermines it, not only alleged sexual misconduct of a woman but every act of perceived disobedience may amount to her 'shaming' her family and lead to action to restore 'honour'.

5. Many Pakistanis connect honour killings, tradition and religion, but in fact the jirga tradition has no relationship to religion, and many so-called traditions, particularly "Islamic laws," are not based on religion or tradition. Jirga law is rooted in tribal customs and in the power of elders. Many tribal leaders themselves are parliamentarians or members of the civil administration, or have family links to the administration. In their official capacity they talk about human rights for all, yet in their constituencies they participate in tribal courts. On the one hand they are talking about 'good governance' and 'real democracy', on the other they are handing down their punishments in violation of basic human rights principles, and running private prisons.

6. Although illegal, influenced by powerful clans and biased against women and the poor, the jirga is an institution in Pakistan's informal justice system that is condoned by corrupt police. The Government of Pakistan does not generally take action when jirga decisions lead to murder, rape or other abuses. State officials have also used tribal leaders to solve criminal cases that are pending in court. The state, willing to exchange some of its powers for social stability, has let these men take responsibility for many 'private' matters. This means, in practice, giving a small and relatively homogenous segment of the population absolute power over others, particularly women. The state permits the practice because the official justice system is seen to be ineffective and expensive. A high percentage of the rural population is illiterate and does not know how to approach the official justice system. Corruption in both police ranks and the judiciary also seriously compromises the official system. Presently Pakistan operates under a medley of common law, shariah law and jirga law, among others, but all seem to be ineffective when addressing violence against women and honour killings [ALRC written statement to the 59th session of the UN Commission on Human Rights, 'Honour killing' in Pakistan', E/CN.4/2003/NGO/95].

Public opinion and attitude

While social norms and practices will affect how a particular society views the rule of law and its principles, the malfunctioning of the justice system or the absence of effective rule of law will also have a significant effect on society's views. In Sri Lanka for instance, society has come to a

point where it believes law is no longer able to provide it with the security and stability necessary. For this reason,

> to extrajudicially do away with those who are hard-core criminals is an article of faith. Police officers claiming to have shot such a criminal are thus considered heroes. Leading monks appear in the press accusing persons in opposition to such acts to be collaborators of the criminals or persons lacking in patriotism.
>
> This call for the liberty to kill criminals is a clear manifestation of the loss of faith in the justice system. It is a common phenomenon in societies that have reached a high level of demoralization for tacit approval of extrajudicial killings as the solution to crime to develop. Any discussion on the rule of the law must take into consideration this mindset, which considers the law as a hindrance to personal security. The development of such a mental framework allows society to overlook that which a stable society would consider gruesome, inhuman and uncivilized. Sri Lanka has reached that point…
>
> The term 'law and order' is no longer a valid term in Sri Lanka. Rather, 'order' with or without law is the prevailing philosophy. In this case, if the law becomes an obstacle in achieving 'order', then the law must be discarded. This is not just a theoretical premise, but how practical policies are developed and pursued in the establishments that are supposed to uphold the law. It is common knowledge for instance, that there is a tacit agreement to ignore the law regarding corruption. As for torture, the prevalent premise is that the police are unable to carry out criminal investigations without the use of torture. The Convention Against Torture Act No. 22 of 1994 then becomes a hindrance to criminal investigations. 'Legal experts' thus argue against the enforcement of the Torture Act on two grounds: the police cannot function without the use of torture and that the people want the police to function, even if torture is to be used. Similar arguments legitimize extrajudicial killings of alleged criminals.
>
> In such circumstances, can Sri Lanka be called a society governed by the rule of law? While abstract answers may claim that it can, in reality what can be done under the pretext of law is now left to the executive and supporting

> institutions. What is perceived to be the wish of the people is now more important than the creation and enforcement of legitimate laws. This being the case, senior police or prosecution officials now have the right to decide what is 'the wish of the people' and then carry out such wishes, regardless of the law. They also have the power to authorize the commission of crimes such as murder, torture and kidnapping…
>
> If demoralization and disappointment has created 'a wish' to allow law enforcement agencies to ignore or violate the law, then the real arena for the fight of the re-establishment of the rule of law is public opinion itself. All efforts to re-establish the rule of law must convince the public that the critical examination of the problem is serious enough to allow for an effective remedy [AHRC AS-14-2005, 7 February 2005].

This situation is unfortunately not the case only in Sri Lanka, but in many other societies, whether articulated from the top or through the masses. Apart from a visible deterioration of the institutions meant to be protecting them, people will also lose faith in the system when there is a lack of protection for victims and witnesses of abuse. When complainants cannot find an effective remedy for the violation suffered, and when they are harassed or even threatened for attempting to seek redress, they will inevitably lose faith in the rule of law.

Discussion points (taken from HRCS Lesson 40)

1. Discuss the effectiveness of the police, prosecution and judiciary in your own country. What is their relationship to the rule of law?
2. Are human rights in your country protected legally as well as in practice? How may victims of rights abuse seek redress?
3. Compare your answers to the first two questions and discuss the links.

The role of the police in human rights implementation

When law enforcement officials themselves flaunt the law, there can be little hope for society to function under rule of law; rather, it will most likely function under fear, violence and oppression. Human rights can only be protected when the rule of law flourishes, and thus there is a firm link between the behaviour of the police and human rights violations in the society. If the police refuse to file a complaint due to bribes, if they fabricate charges against someone for personal motives or if they threaten the life and liberty of those who are willing to fight for justice, they are not only violating individual human rights, but are giving lie to the justice system that is meant to protect citizens' rights.

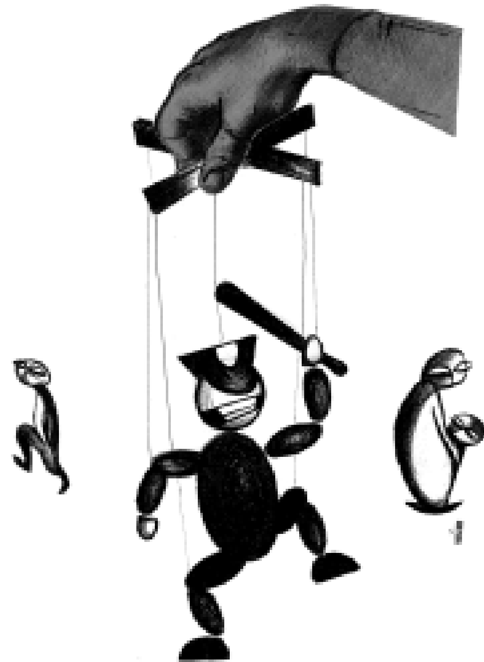


Illustration by Nick Cheesman

* This text is adapted from Lesson Series 41 of the Human Rights Correspondence School, 'Rule of law: The role of the police in human rights implementation'.

This chapter is split into three sections. The first consists of cases detailing police abuse of power and violation of laws in various Asian countries, the second describes various factors leading to impunity for the perpetrators of abuse and the third examines systemic flaws that allow police abuse and impunity.

I. Cases detailing police abuse of power and violation of laws in various Asian countries

The primary duties of any police force relate to the prevention and investigation of crime and the protection of citizens' rights, all of which are to be undertaken in accordance with the law. The following sections relating to arrest, detention, filing complaints and conducting investigations—all of which are central to effective policing are also particularly vulnerable to police abuse throughout the Asian region. Not only is this abuse a failure to carry out their duties, but also a crime.

A. Procedures of arrest and detention

Illegal arrest and detention are routine aspects of police behavior in too many Asian countries. Not only are police violating procedural provisions for lawful arrest and detention when they engage in these actions, but they are also—and more seriously—committing crimes by violating basic human rights. Some of these crimes include death and torture, which are grave abuses, particularly when committed by state law enforcement officials. The death of Kanai Santra in West Bengal, India was one such death, a result of illegal arrest and detention.

On 25 May 2004, 38-year-old Kanai Santra, of Chakdaulat-Kalitala village, West Bengal, India died at the Bangur Government Hospital. He had been brought to the hospital only hours earlier, following his falling into a state of unconsciousness due to a brutal assault. This assault was at the hands of several policemen, who used their fists, feet and sticks to beat Kanai so severely that he collapsed to the ground and never regained consciousness. The same policemen then used their authority to cover up the murderous act by filing a false complaint regarding the assault, claiming that other persons were responsible for Kanai's death.

The reason for the assault that led to Kanai's death was that feeling anxious and suffocated while in the Alipur court lock-up, Kanai had called out to the attending police officers to release him. Their response however, was to beat him so inhumanly that he fell to the floor unconscious. They then chose to abandon him in his cell.

Later that evening, when police officers from the Nodakhali Police Station—who had initially arrested Kanai—came to the court lock-up to take Kanai back to the police station as the court had rejected his bail application, they found that he was still lying unconscious. Only then was he sent to the Bangur Government Hospital, where he died as a result of his injuries at 8:40pm that evening.

The Nodakhali police committed numerous procedural violations during Kanai's arrest and detention. When he was arrested on 23 May 2004, Kanai was not informed by the police officers of the reason for his arrest. Nor was he provided with a memo of arrest, which the police are obliged to do. It was only when Kanai's family inquired into the matter that they learnt that Kanai was suspected of stealing ornaments from a nearby Kali temple. His family however, insist that the allegation was baseless, emphasizing that not only had the family donated a number of valuable ornaments to the temple, but Kanai had himself supplied all manner of electrical accessories to the temple and had installed them free of charge.

The police officers then illegally detained Kanai until May 25, when his case was produced before the Sub Divisional Judicial Magistrate (SDJM) Court in Alipur, Kolkata, even though article 22(2) of the Constitution of India states that arrested persons must be produced before the nearest magistrate within 24 hours of their arrest. A further violation of the Constitution as well as the Criminal Procedure Code, was the police's failure to physically produce Kanai before the magistrate; only legal papers were produced on his behalf, while Kanai remained in the court lock-up. Though it is common practice at the Alipur SDJM for Under Trial Prisoners (UTPs) to rarely be produced before a magistrate, such practice is illegal. Kanai's complaint regarding his prolonged detention in the court lock-up then led to his death.

After learning of Kanai's death, the Officer-in-Charge of the Alipur court lock-up, Mr Samir Mukherjee, lodged a false complaint with the Alipur Police Station, stating that Kanai had been assaulted by the other UTPs he shared a cell with at the court lock-up (Case No. 82 dated 25/5/2004 under sections 325/308 of the Indian Penal Code). Officers from the Alipur Police Station visited the Bangur Government Hospital after the complaint was registered, and after confirming Kanai's death, the Investigating Officer Mr S A Khan, added an additional penal section 304 IPC to the initial complaint (304 IPC is related to the case of unnatural death).

As the Bangur Government Hospital is under the jurisdiction of the Jadavpur Police Station, the Unnatural Death case of Kanai should be registered with them; the Jadavpur Police however, registered his case (No. 241) only on May 26 even though Kanai died on May 25. Furthermore, their negligence led to a delay in the autopsy; although executive magistrate Mr Jiban Krishna Ghosh conducted an inquest on May 26, where multiple external injuries were found on Kanai's body, the Jadavpur Police did not take the papers to the Calcutta morgue for Kanai's post-mortem until May 27, at around 3pm. The inquest had found bruises, cuts, haematoma on the left side of the chest, left eye, toes of left foot, fingers of right hand, left wrist, left knee, as well as other injuries [See further: AHRC UA-54-2004, 1 June 2004].

Such procedural violations by the police personnel involved in this case and their subsequent action in falsifying charges to cover up their own crimes, demonstrates many of the problems that exist within the police force in West Bengal—the police wield inordinate power; they are not held accountable for their actions; and they work within an environment that allows for abuse of the system. In India, the court lock-up is fully managed by the police personnel. Therefore, such incidents are not possible without police action. Principally the court lock-ups should be governed by the judiciary. However, in West Bengal the functions of the lower criminal courts are managed by the police. The magistrates are also dependent on the police in their judicial functions. The SDJMs are reluctant to obey the Constitutional provisions. In most cases, the order of the court is written by the police even before the case is heard.

Kanai's case is unfortunately common not only throughout India, but in various countries. From the moment of his arrest to his post-mortem, the police and other relevant authorities committed numerous violations and did their utmost to cover these up.

Police throughout the region arbitrarily arrest and detain innocent citizens, in many instances hoping to obtain confessions from them regarding crimes of which they know little. While international law provides that everyone has the right not to be tortured, including those arrested by the police and accused of crimes, police are known to routinely commit torture. The lack of adequate domestic legislation means that in some countries torture is not considered a crime, a punishable offence or even an act that requires compensation. India for instance, adamantly refuses to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), stating that constitutional and other provisions exist to prevent torture, and yet, as Kanai Santra and numerous others' experience clearly shows, this is not the case.

B. Registering complaints

Registering complaints is a focal point for investigations into crimes and abuses, and the first step towards redress made by those seeking justice. However, filing complaints at police stations is a complicated and even dangerous business for most victims in Asia. On the other hand, those with police and other influential connections find it easy to file even false complaints. W Inuka Prasad Kumara Alwis' neighbour for instance, filed such a complaint against him at the Panadura North Police Station, Keselwatte, Sri Lanka after a dispute. His connections with Officer-in-Charge (OIC) Prasanna meant that before any investigation into the complaint was carried out, Alwis and his companion Sithura Nissanka were illegally detained and tortured.

On 15 February 2005, after Alwis' neighbour filed the complaint, three policemen from the Panadura North Police Station came to Alwis' house. As he was not home, the policemen told Alwis' wife that her husband should report to the police station the next day.

Accordingly, on February 16 Alwis went to the police station with four friends. One of his friends, Sithura Nissanka, accompanied Alwis inside the police station while the others waited outside. Police Constable No. 22197 began to question Alwis about a man named Jeevantha and his brother-in-law Rohan. When Alwis replied that he did not know where Jeevantha lived, the constable threatened him. Nissanka then queried why the constable was questioning Alwis instead of Jeevantha.

Overhearing this conversation, OIC Prasanna ordered the constable to bring Alwis and Nissanka to his room, where he assaulted them both, stopping only when Alwis said he was suffering from a chest ailment. OIC Prasanna then threatened them, boasting of how he had broken one person's arm and shot another person. Alwis was then told to leave the room, while Nissanka was further tortured. Alwis stated that his neighbour—who had filed the complaint—was present at the police station and watched him and Nissanka being tortured.

Alwis was later brought to the OIC's room again, where he was threatened with false charges of illegal weapons possession, and forced to apologize to his neighbour. Alwis was then told to give a statement and leave, while Nissanka continued to be detained. Before Alwis and his friends—those waiting outside—left, their addresses were taken and they were ordered to report to the police station every Saturday; the police alleged that they were suspected of stealing from the complainant. The complainant however, was told to 'leave without fear' and was even promised police protection henceforth [See further: AHRC UA-43-2005, 15 March 2005].

Torture victim Marasinghe Arachchige Anura Dissanayaka however, found it impossible to file a complaint with the police regarding his assault by drunken Sergeant Nimal of the Wadduwa Police Station, Wadduwa, Sri Lanka. The assault was witnessed by five other police officers, none of whom stopped the assault, and further refused to file Dissanayaka's complaint the next day.

At 12:30am on 24 January 2005 Dissanayaka was awoken and informed by a neighbour that a man was standing in front of his house. After identifying the man as Sergeant Nimal of the Wadduwa Police Station,

Dissanayaka greeted him by saying 'hello'. Sergeant Nimal, who was in plainclothes and was drunk, immediately raged at Dissanayaka, saying, "Who the devil are you to call me hello? (kavuda yako mata hallo kiyanne?)" He then hit Dissanayaka around the face and ears, stopping only after Dissanayaka's wife intervened.

At the time of assault, Sub Inspector Rajapaksha and four other officers from the Wadduwa Police Station were also present, but did nothing to prevent or stop the assault. Before leaving, Sergeant Nimal warned Dissanayaka not to inform any higher authorities about the incident.

Regardless, at 10am on January 24, Dissanayaka went to the Wadduwa Police Station to lodge a complaint. Sub Inspector Rajapaksha requested him not to make the complaint, but he persisted. Police constable Upali refused to take down the complaint however, and directed the victim towards the Officer-in-Charge (OIC), who likewise refused to accept the complaint. Finally, Dissanayaka went to the Senior Superintendent of Police-Panadura and lodged a complaint on January 25.

The assault resulted in Dissanayaka's eardrums being ruptured, for which he is receiving treatment at Navaloka Pvt. Hospital, after initial treatment at Nagoda Government Hospital from January 27-31. His family live in a state of instability, unsure of what will happen next regarding the brutal assault by Sergeant Nimal. Even after finally filing a complaint, no serious investigation has been conducted into the case [See further: AHRC UA-21-2005, 8 February 2005].

In many Asian countries such as India, where the police are heavily influenced by politicians and religious or communal elements, minority and marginalized groups also find it particularly difficult to file complaints and seek redress for injustices committed against them. In a recent incident, officers at the Tarun Police Station, Tehsil Bikapur, Faizabad, Uttar Pradesh, India refused to file the complaint of a Dalit villager, stating that 'it is your problem'.

The complainant, Babu Lal, had his home destroyed and possessions looted by a group of armed villagers from the peasantry community on

8 July 2004, who opposed the granting of land to Dalit villagers under a state scheme. They reached his house in Balli Kripal Pur village, Tehsil Bikapur sub-district, Faizabad district, Uttar Pradesh, India at around 11am, when Babu Lal, a landless farmer belonging to the Chamar community of Dalits, was not at home. Only his wife Mantora, his son Prem Kumar and his daughter-in-law Kamlesh were present, all of whom were severely beaten by some of the armed villagers, while the others demolished the house and took all their possessions. Among them were Ramjeet and Mansha Ram, both of whom belong to the powerful Kurmi family, which is part of the village's peasantry community. Although the attack took place during daylight, the attackers left the house without any fear or obstruction.

After the incident, Babu Lal's family rushed to the Tarun Police Station—located within three kilometers from the victim's house—to lodge a complaint. The police refused to file a case however, allegedly saying, "It is your problem. We would not like to be a party to your game. We don't want to come there even for urinating." Even when the *sarpanch* (head of village administration) approached the police to take action regarding this matter, they refused to do anything.

Babu Lal then lodged complaints with the National Commission for Scheduled Castes, the Uttar Pradesh State Human Rights Commission, the Chief Minister of Uttar Pradesh and District Magistrate of Faizabad regarding the incident. Since then, Babu Lal took the case to the local magistrate court where it is currently pending, while the authorities have taken no action regarding the case under the pretext that the matter is in court. Babu Lal however, is skeptical as to whether his family can get justice; he says that the judicial system in India is too slow. Since the incident, Babu Lal and his family have lost all their possessions and live in a desperate situation. They are staying in a small hut together with another Dalit family. The family also lives in fear of a second attack by the perpetrators as they are pursuing the case in the court [See further: AHRC UA-29-2005, 24 February 2005].

Not only do the police in many Asian countries thus refuse to file legitimate complaints, but when it serves their personal gain they even harass those

who come to complain. This harassment has often taken the form of death threats, particularly when complaints are simultaneously being made to other agencies. Gerald Perera not only suffered from threats and pressure to withdraw his complaints against Sri Lankan police officers who allegedly tortured him brutally, but finally lost his life fighting against injustice. He was shot just a few days before he was to appear in court to testify against those who had tortured him. Those responsible for his death have been arrested; they are the officers accused of torture [See further: AHRC UP-14-2005, 16 February 2005].

C. Investigations

The refusal of the police to file complaints will simultaneously mean the lack of investigation. However, even when complaints are registered, there can still be little corresponding investigation. This lack of proper investigation is a prime cause for the increase in crime and impunity of perpetrators throughout Asia. It also prevents victims of abuse from obtaining justice and redress, which are not possible without adequate investigations and prosecutions. Apart from instances where the police deliberately refuse to investigate or manipulate the investigation, the police are also guilty of using torture and assault as a means to obtain confessions from the accused—these actions are then termed as practices of a routine 'investigation'.

In Thailand, a recently awarded 10-year sentence shows how corrupt and ineffective investigative practices of the police resulted in an innocent man being harshly sentenced. Chanon Suphaphan was traveling along a road near the Tantanote temple, Muang district, Singhburi province at around 6pm on 24 November 2002, when he was hailed by a local villager who asked him to assist a man injured in a motorcycle accident. Chanon helped the injured man, Mr Thawatchai Nakthong, back to his feet and ensured that he was not seriously hurt. He did note that Thawatchai, who suffers a disability in his right leg, was incoherent and unable to stand or walk properly, but concluded that this was due to Thawatchai being drunk and not because of the accident he had just been involved in. Thawatchai is known locally to be a drunkard and his state on that day was not unusual. Therefore, all parties involved, including

the nine persons who witnessed Chanon assist Thawatchai, left him by the roadside with his motorcycle and went their respective ways.

On 17 December 2002, Chanon was summoned to the Singhburi District Police Station, where he was charged with robbery of Thawatchai. Apparently, Thawatchai had complained to the police on December 2 that he was beaten and robbed by Chanon. He claimed that Chanon had asked him for three Buddha amulets, but he refused to give them. He also claimed that Chanon assaulted him at the site where he had fallen from his motorcycle.

Although Chanon denied the allegations and was released on bail, the police did not do anything to investigate this case. When Chanon and his parents, together with seven other witnesses, were at the police station to make bail on December 17, the police failed to take any statements from the witnesses. The same occurred when the witnesses returned on December 27. On January 10, when the witnesses tried for a third time to have their statements taken, the police agreed to take statements from just four of them.

During this time, the police were also negligent in their duties of investigating the material evidence. For instance, Pol. Sub-Lt. Sornsaran Kaensingh did not collect material evidence himself. A relative of Thawatchai took photographs of the site of the incident and Pol. Sub-Lt. Sornsaran certified them without going to the place in person. In fact, the photos were of the wrong location, around 50 metres from where the accident actually occurred.

On 3 April 2003 the public prosecutor filed a criminal case against Chanon. He was then appointed a lawyer. However, the lawyer did not study the case or meet with witnesses, but simply told them not to worry because they had a village headman—a government official—as a witness. At no point did he visit the site of the incident or speak to any of the persons concerned.

On 22 October 2004 the trial opened in Singbhuri Provincial Court and statements by the plaintiff and three witnesses were heard. None of the

three were eyewitnesses to the event. One was the superior officer of Pol. Sub-Lt. Sornsaran, Police Lieutenant Colonel Sirisak Naksuk. The second was Mr Nern Lukindra, a health care officer from the local public health centre who reported treating Thawatchai for injuries to his face the following day, November 25. He was not aware when he came to the court that he was being summoned as a witness for the plaintiff. The third was the aunt of Thawatchai, Mrs Samnao Indrarit, who met him the morning after the alleged assault.

On October 26, the accused and two witnesses were heard. The police presented the complaint and photographs to the court in evidence, but did not present the witness statements taken on 10 January 2003. At no time were these statements mentioned. The appointed defence attorney also did not raise this issue. Outside the court, Chanon's relatives asked the police why they did not present the witness statements for the defence, but the police did not respond.

On November 26 the court found Chanon guilty of robbery under section 339(3) of the Penal Code and sentenced him to the maximum ten years in jail. It also ordered the return of the three amulets, or payment of 500 Thai baht, to the injured party. Chanon has now appealed against the case. He is obtaining alternative legal assistance. Over 200 local villagers have signed a petition supporting his claim of innocence [See further: AHRC UA-40-2005, 9 March 2005].

There have also been several recent cases in Thailand of the police using torture to obtain confessions as a means of conducting investigations. On 2 November 2004, Mr Ekkawat Srimanta, 21, was arrested by officers at Phra Nakhon Si Ayuttaya Station in Aytthaya Province, on allegations of robbery. After being taken into custody, Mr Ekkawat had a hood draped over his head and was then brutally tortured by 12 police officers in their attempt to have him confess to robbery. However, when he did not confess Mr Ekkawat was transferred to Uthai Police Station, as the stolen goods were meant to be in the area of its jurisdiction. Upon his arrival, Mr Ekkawat was mercilessly electrocuted by 11 police officers from that station, who applied electrical equipment to his genitalia. As a result of this torture inflicted by the 23 police officers (all of whom are

ranking police who hold the position of sergeant or higher), Mr Ekkawat suffered severe burns to his testicles, penis, groin and toes. He also had bruising on his back, swelling to his face, throat and thighs and was bleeding from his eyes. Despite the police officers' determination to gain a confession, they never did so and Mr Ekkawat was released without charge [See further: AHRC UA-153-2004, 9 November 2004].

Police in Sri Lanka are also known to arrest and torture people on mistaken identity and wrong information. In fact,

> The type of assaults committed… show that police officers are not making an attempt at all to collect information relating to crimes in an independent or rational manner, as the law requires them. In all these cases, and many others, the very first thing the police seem to do is to beat people mercilessly with the hope some information may come out from suspects. However, the frequently extraordinary level of torture makes the victim incapable of remaining normal.
>
> Gerald Perera's case demonstrates the problem very clearly. The police were inquiring into a triple murder that had taken place some time before his arrest. The police apparently were under enormous pressure to show the results of the investigations into this very serious crime. They were unable to deal with forensic evidence. They were also not qualified in the use of rational methods for discovering information. They seem to have been arresting people on unverified information. All these added together resulted in some major consequences. One of the first persons to be arrested in this triple murder case was a three-wheel taxi driver. He was harassed into admitting involvement in the crime. He has since attempted to commit suicide, unable to bear the harassment and accusations, about which he knew nothing…
>
> The second victim was Gerald Perera, who also has subsequently been declared absolutely innocent. In his case, as so many others, no evidence of any sort existed against him at the time of arrest. Someone's casual remark was enough. No statements were recorded from anyone making accusations. A belief that beating people is the path to discovering the truth was all that these criminal investigators went by…

> Most disconcerting is the popular perceptions that develop among the people regarding police stations. The atmosphere in police stations is one of terror, and that does not in any way help to obtain the type of cooperation from the public that is very essential for criminal investigations. On the one hand, there is an extreme breakdown of cooperation between the public and the police. On the other hand, as a result, there is even more torture, which results in a further loss of confidence and contact with the people. The criminal investigator thus functions in a vacuum [Basil Fernando, 'Trying to understand the police crisis in Sri Lanka', *article 2*, vol. 1, no. 4, August 2002, pp. 42-3].

The above cases describing the way police conduct arrests, file complaints and carry out investigations clearly speak to the absence of rule of law in these countries. The police blatantly violate legal procedures and ignore citizens' rights without fear of reprisal.

Discussion points (taken from HRCS Lesson 41)

1. Have you heard/come across similar instances of police behaviour? What is the situation in your country regarding
   a. Filing complaints at police stations
   b. Police conduct of arrest and detention
   c. Police investigations
2. Discuss reasons for police misbehaviour: What is the relationship between rule of law and police abuse; between procedural violations and human rights abuse?

II. Factors that lead to impunity—and thereby further encouragement—for the perpetrators of abuse

The main reason that the abuses described at the beginning of this chapter continue is the impunity given to the perpetrators. That the police are not held accountable for their actions has led to people having little confidence in the very institution meant to uphold the law and protect their rights, while at the same time giving free reign to the perpetrators to continue their abuse.

Before examining the various factors that contribute to this impunity, it is essential to understand that in the majority of Asian countries, there is a significant difference between what is known as law enforcement officers and the police. In fact, in most of these countries, maintaining law and order are two different things. While the intellectual or theoretical premise—which may be realized in more developed democracies in other parts of the world—is that all order to be established must be done in lawful ways, this premise means little in the context of Asian society. The reality is that order must be established at any cost, with or without the law. Rule of law is thus sacrificed under the pretext of maintaining order.

Order enforcement vs. law enforcement

1. The concept of order-enforcement is not derived from that of the rule of law. The concept of law-enforcement, on the other hand, is based on that of the rule of law.
2. Law enforcement mandates criminal investigations to prove that crimes have been committed, undertaken through the submission of evidence. Order enforcement, however, does not require investigations or proof according to the law. This distinction has huge implications for the understanding of policing functions.
3. Criminal investigations require training, which requires basic education. Investigations also require facilities, such as forensic labs. These are not required by a police force designed to keep order through whatever means.
4. Law enforcement makes the elimination of use of torture and degrading punishment a possibility. Among order-enforcers this is not possible, and such officers have even been used to commit extrajudicial killings--sometimes on a large scale.
5. In law enforcement, policing is a function subordinated and controlled by the judiciary and prosecutors. Officers who are mobilised simply to maintain order, however, are free from such controls.
6. Law enforcement presupposes equality before the law. Order enforcement has no such prerequisite, and in fact unequal treatment is inherent in the system.
7. Order enforcement is associated with impunity while law enforcement is not.

8. Law enforcement can be a transparent process, and transparency can be maintained by procedural means, such as by keeping the required records. Order enforcement does not have such a requirement. Indeed, often an order enforcement officer is discouraged from keeping records.
9. Communication between the hierarchy and subordinates in a law-enforcement agency is usually based on written codes of ethics and discipline. Order enforcement does not require such codes, either written or unwritten [Basil Fernando, 'An Overview of the Police and Rule of Law in Asia', *Monitoring The Right for an Effective Remedy For Human Rights Violations,* (Hong Kong: AHRC, 2001) pp. 9-10].

This distinction between law and order enforcement helps to understand the factors granting impunity to the majority of police officers in Asia, seen as 'order enforcement officers', described in detail below.

Politicization of the police

Authoritarian regimes and corrupt politicians will use the police as a tool for their own ends. In this case, they will do everything possible to ensure that the law is not followed. This can even involve getting rid of police officers who insist on doing their jobs ethically and lawfully, as in Pakistan, when a police officer was transferred for investigating an honour killings case.

District Police Officer Fida Hussain Mastoi, the officer dealing with the murder case of two teenage girls Aabida and Tahmeena, killed on the pretext of honour killing for visiting their grandparents without permission, was given notice of his transfer on 12 August 2004. It was alleged that Mr Ghous Bux Mahar, a national assembly member (MNA) from Shikarpur, present Cabinet Minister and a landlord of the Mahar tribe, was instrumental in getting District Police Officer Fida Hussain Mastoi transferred as was another MNA from Shikarpur, Dr Muhammad Ibrahim Jatoi.

Mr Ghous Bux Mahar had been supporting the primary accused, Abdul Rasheed Bhutto from the beginning of the case, and headed the jirga that established the murder of the two girls as 'honour killings'. It is

essential to note that the jirga in this case was called *after* Abdul Rasheed Bhutto and his eight accomplices killed the two girls. At the jirga meeting, the murder of the two girls was labeled as honour killings through an agreement among all the perpetrators, six of whom have yet to be arrested by the police: Abdul Rasheed, Younis, Jamaluddin, Hajji Abdul Karim, Ghulam Sarwar and Sanaullah.

An FIR was lodged regarding this case on 4 May 2004, the day after the two girls were killed. It was registered under sections 302, 201, 147, 148, 149 and 506.2 of the Pakistan Penal Code. All these sections are bailable. (Later, the case was registered at the Anti-Terrorist Court). Only three of the nine accused were arrested on May 7 and are currently still being detained without securing bail: Hajji Nazeer, Hajji Shafi Mohammad and Sulaiman.

As the case was challenged in the District Sessions Court of Shikarpur and as there was more attention given to the case by the press and human rights groups, DPO Mastoi constructed a Special Investigation Cell consisting of five police officers, strictly directed at recovering the dead bodies of the victims and arresting the perpetrators.

The police found that the bodies were buried in Abdul Rasheed Bhutto's fishpond and after obtaining permission for the exhumation and post-mortem inquiry of the bodies, on May 14 the bodies were exhumed from the identified location and handed over to the victims' relatives after the autopsy.

The victims' families have been given about Rs. 200 000 and ten acres of cultivation land as compensation, and are continually being pressured to withdraw the case and to seek reconciliation by the perpetrators. This pressure and the transfer of the DPO does not bode well for the obtainment of justice for the victims' families. Unless those agencies and individuals working towards implementing the April 2004 decision of the Sindh High Court banning all jirga trials as illegal are resolutely supported and interference in their work prevented, progress will not be made in improving Pakistan's justice mechanisms and human rights

situation [See further: AHRC UP-46-2004, 17 August 2004; UP-23-2004, 27 May 2004; FA-12-2004, 11 May 2004].

In many instances, politicization of the police force takes a much more overt tone, as described in the Concerned Citizens Tribunal report regarding the Gujarat pogrom of 2002.

> **The police**
>
> Evidence before the Tribunal clearly establishes the absolute failure of large sections of the Gujarat police to fulfil their constitutional duty and prevent mass murder, rape and arson—in short, to maintain law and order. Worst still is the evidence of their connivance and brutality, and their indulgence in vulgar and obscene conduct against women and children in full public view.
>
> To start with, the Godhra incident would not have taken place had the police taken due precautions right from the beginning. Once the Godhra tragedy had occurred, the Gujarat police made no preventive arrests.
>
> It was obvious that the situation was tense and could get out of hand. The minimum that the state does in similar situations is to effect preventive arrests of persons who are likely to cause violence. Section 151 of the Criminal Procedure Code (CrPC) permits preventive arrests by the police…
>
> On February 28, former Congress MP, Shri Ashan Jafri from the Gulberg society in Chamanapura, made repeated frantic calls pleading for police assistance against a huge mob in a murderous mood. He kept calling the control room for several hours, until, finally, with no one to check the mob, he was charred to death along with 65 of his relatives and neighbours. Pleading anonymity, police officials who met the Tribunal confirmed that Shri Jafri had also made frantic calls to the Director General of Police, the Police Commissioner, the Chief Secretary and the Additional Chief Secretary (Home) among others. Three mobile vans of the city police were on hand around Shri Jafri's house but did not intervene… It was only *nine hours* later that the Rapid Action Force (RAF) of the central government intervened, by which time it was far too late.

"The police tried their best, but they couldn't stop the mobs. They were grossly outnumbered when the mobs grew," Ahmedabad's Police Commissioner, Shri P C Pandy had pleaded. But in most cases, inadequacy of forces is a mere excuse touted by serving police officers who fail in their primary duty. Even in Gujarat this time, in several cases where good officers held out against political pressure, the same small deployment was enough to act decisively and control the situation. In the vast majority of cases, however, the police either did not act or acted on behalf of the mob.

The Gujarat police force has finally admitted that it killed more Muslims than Hindus in its ostensible attempts to stop what was clearly targeted Hindu violence against Muslims. Of the 184 people who died in police firing since the violence began, 104 are Muslims, says a report drafted by Gujarat police force itself.

Apart from targeting sections of the Muslim population with bullets, the Gujarat police have further blackened their conduct by indiscriminate arrests of innocent young Muslims all over the state. The Tribunal has recorded details of these arrests and we estimate that at least 500 innocent Muslims languish in police lock-ups and jails of the state.

The overtly partisan behaviour of the Gujarat police can be assessed from the language contained in the charge sheets related to the major incidents of mass massacre. For instance, the charge sheet filed in the Gulberg society killings, where no less than 60-70 persons were brutally killed, virtually begins with a defence of the accused and paints the victims as instigators.

In a similar misrepresentation, the Tribunal records with horror the way the Naroda Patiya charge sheet reads: "The unruly crowd at Naroda Patiya went on the rampage after a mini-truck driven by a Muslim ran over a Hindu youth and the mutilated body of a Hindu was recovered from the area… the crowd was anguished by the incident." …

Police conduct after the Gujarat carnage, with regard to the registration of crimes, conducting of investigations etc., has been marked by a desire to please political bosses and an utter disregard for the law of the land. The Tribunal has evidence of the police bullying victim-survivors into filing

> First Information Reports wherein only mobs are mentioned, without naming the assailants and mob leaders whom the victim-survivors had clearly recognised during the incidents of violence ['Genocide in Gujarat: Government and police complicity', (ed) *article 2*, vol. 2, no. 4, August 2003, pp. 35-7].

The political responsibility for the actions of the police thus ensures that police officers themselves are not held accountable. As the government wanted to incite communal violence, the police not carrying out their duties effectively was necessary.

Similarly, the Thai government used rewards and punishments to ensure the police cooperated with its 2003 drug war. The Thai police were directed to organize murder through policy memos.

> Between February and April 2003 the Thai government incited police and public officials to organize and endorse murder in the name of ridding the country of drugs. Through a series of official orders and public statements, the government pushed officials to massively overstep their normal authority. It also set up numerous positive and negative incentives, including promises of financial rewards and promotions, and threats of transfers and dismissals. By May, more than 2000 persons were killed, and the country's key institutions for the protection of human rights were seriously compromised.
>
> **Administering murder**
>
> On January 28 the Prime Minister of Thailand, Thaksin Shinawatra, set the anti-drug crusade in motion. Prime Minister's Office Orders 29/2546, 30/2456 and 31/2546, effective from February 1, aimed to combat the enormous drug manufacture, trafficking and use in Thailand "quickly, consistently and permanently". They ordered the establishment of the National Command Centre for Combating Drugs, chaired by Deputy Prime Minister Chavalit Yongchaiyuth, to oversee the "Concerted Effort of the Nation to Overcome Drugs" campaign. They set out its basic responsibilities, including planning, coordination and reporting, and established an administrative structure and tasks throughout the country.

The orders gave the programme the “highest priority”, indicating to officials that they would be closely monitored, and that the government was prepared both to reward high performers and punish laggards. The Prime Minister boosted incentives in two sets of regulations issued on February 11. One of those was the Prime Minister’s Office Regulations on Bonuses and Rewards Relating to Narcotics (No. 3). This document amended two earlier reward regimes, and effectively encouraged the murder of drug suspects by providing grades of bonuses where the most efficient and expedient means for officials to be rewarded was simply to kill the accused…

At later dates, certain rewards were increased so that, for instance, a state official seizing property that had been purchased with drug money could get up to 40 per cent of its value.

Public statements enabled and encouraged what was on paper. The Prime Minister consistently portrayed drug dealers as sub-humans deserving to die. He also played down the deaths relative to the apparent successes of the campaign, wondering aloud why the killing of thousands of people who had not yet been proven guilty of any crime should be worthy of public attention or scrutiny. Even in reiterating the official line, that most deaths were just cases of “bad guys killing bad guys”, or “killing to cut the link”, he stated that the government had no responsibility to protect these undesirable citizens. This position, however, was already quite a step-down from remarks he reportedly made to senior government officials from across the country at a meeting in the lead-up to the campaign on January 15. “We have to shoot to kill and confiscate their assets as well, so their sinful inheritance will not be passed on,” he is reported to have said, adding, “We must be brutal enough because drug dealers have been brutal to our children. Today, three million Thai youths are into drugs and 700, 000 are deeply addicted. To be cruel to drug dealers is therefore appropriate. ” The Prime Minister’s remarks were supported at all levels of government, not least of all by the Interior Minister, Wan Mohamad Noor Matha, who remarked memorably that drug dealers “will be put behind bars or even vanish without a trace”. The language used by the Prime Minister and his officials throughout the campaign also sought to evoke a feeling of being at war, such as in a March 2 address when he said, “Don’t be moved by the high death figures. We must be adamant and finish this war... When you

> go to war and some of your enemies die, you cannot become soft-hearted, otherwise the surviving enemy will return to kill you." He also referred to drug dealers and their accomplices as "traitors". Over time, this language found its way into policy documents, such as Prime Minister's Order No. 60/2546, which states in its preamble that "the 'Concerted Effort of the Nation to Overcome Drugs' is specifically regarded as a state of war".
>
> Provincial governors and police chiefs were motivated to act according to a strict timetable. Their performance was measured by statistics on drug dealers 'removed' from society on a month by month basis, starting with 25 per cent of the total by the end of February, 50 per cent by the of March, and 100 per cent by the end of April. The final figure was later reduced to 75 per cent, and a plan drawn up to deal with the remaining 25 per cent at a more leisurely pace by the King's birthday in December. Underachieving provinces were announced publicly and senior officials openly threatened with the sack or transfers. Clearly an enormous amount of pressure was applied to meet unreasonable and arbitrary targets. And it was not enough for officials merely to present figures of arrests, convictions and deaths of dealers: they had to target thousands of specific persons, whose names were on lists [Nick Cheesman, 'Murder as public policy in Thailand' *article 2,* vol. 2, no. 3, pp. 30-1].

Such explicit instructions to the police show how those in power expect the police to become their tools in achieving their policy aims. When these aims are met through unlawful means, or when the aims themselves are unlawful, the complicity of the police seriously undermines the principles of justice and human rights.

Similarly, the recent comment on national television by a senior Thai police officer that torture is acceptable, is an affront to the same principles. Police Lieutenant-General Amarin Niamsakul, the Commissioner of the Immigration Bureau, said on a popular talk show in 2004 that the police everywhere beat up people or torture them to extract information and confessions, so it is alright for this to be the practice in Thailand. He also said that more important than the law itself, is the ability of the police to punish bad people, for which torture is again necessary. While the Minister of Justice spoke out against his remarks, it is obvious from the number

of police torture cases that occur throughout Thailand that there exists an underlying acceptance of torture and forced confessions.

Furthermore, if the police were ever to be held accountable for their abuse, their superior officers—including politicians and government officials—would also be implicated. To prevent this, the police are granted impunity.

Militarization

Political manipulation of the police can even lead to a blurring of lines between the police and security forces, which is common when a government is preventing 'terrorism' and protecting 'national security', or when the country is under a state of emergency. In these situations, what happens—linked to the above mentioned 'order enforcement'—is that the police, who are meant to be a civilian force, become para-military institutions. They either become intelligence agencies for the military, or undertake some of the functions of the military, thereby using greater force and weapons than normal for a civilian institution. In the South of Thailand and Nepal for instance, the police operate together with security forces under joint command units. In these circumstances the roles to be played by respective police and military officers become confused.

In a recent special report, 'The mathematics of barbarity and zero rule of law in Nepal', *article 2*, vol. 3, no. 6, December 2004, the Asian Legal Resource Centre documented numerous cases of abuse by the Nepalese security forces, including the joint units.

> While many of the arrests, torture and disappearances are ostensibly aimed at addressing the insurgency, these cases speak to the fact that in many instances people are taken at random, and—particularly in cases of torture in urban areas —often on accusation of involvement in conventional crimes. The victims are also taken without discrimination: they include children, elderly, women and the handicapped…
>
> Criminal suspects are routinely tortured. The methods of torture described by victims speak to the fact that they are totally institutionalised in policing

> in Nepal. Additionally, as the lines between various security agencies have been blurred, the army also engages in horrific torture of detainees who are accused of ordinary crimes, like Narayan Nepali, who was electrocuted on the forehead. The blurring is also evidenced by the fact that the police are reported to carry out arrests on instruction of the army, without knowing for what purpose, such as in the case of Upendra Timilsena ['The mathematics of barbarity and zero rule of law in Nepal', pp. 15-6].

Narayan Nepali was arrested by Royal Nepalese Army soldiers on 31 March 2004 and taken to the Jagadal Barracks, where they beat him with pipes and sticks and gave him electric shocks. Only on April 23 was he taken to the district police office and then on April 26 produced before the court on drug charges. It was also found to be common for the army to thus brutally torture a victim and then send them to the police station for bogus legal proceedings, usually after the external effects of torture had gone.

Another aspect of joint operations is that it is unclear which group or department the security officers belong to, thereby having nowhere to place responsibility for the actions committed. This further encourages abuse.

The impunity granted to the police thus comes with the manipulation of the police by other actors; it is necessary to ensure the police are not held accountable in order not to implicate those giving the orders. This serves to legitimize any violence committed by the police, be it ordered from above or not.

Discussion points (taken from HRCS Lesson 41)

1. How do you think ordinary people would describe policemen in your country?
2. What is the most significant factor influencing police behaviour in your country?
3. Discuss the greatest obstacle preventing the police from upholding the law and protecting the rights of the people. How can this be overcome?

III. Systemic flaws that allow police abuse and impunity

The justice system throughout Asia has numerous defects that not only hinder the protection of human rights, but in fact give leeway for the violation of rights, particularly by the police. These are examined below.

A. Criminal justice system

Existing laws, particularly with regard to the country's criminal justice system will affect the behaviour and outlook of the police force. In its 2003 human rights day statement, the Asian Human Rights Commission (AHRC) warned of the increasing politically expedient laws and practices that are being favoured over international law throughout the world.

> In recent years… the absolute prohibition against torture has been steadily undermined, under the guise of the war against terrorism. Alarmingly, in more developed democracies, particularly the United States, several centuries of international jurisprudence are being brushed aside in favour of politically expedient and highly dangerous policies and regulations.
>
> The argument that torture is justified has both corrupted intellectual debate and led to increased torture throughout the world. While in the United States torture is proposed as a means to defeat terrorists, in other countries it is justified on many grounds, such as a means to fight growing organised crime. As a result, other abuses—particularly extrajudicial killings—are also on the rise, and are likewise openly justified by the perpetrators. Behind these developments lies a change in the way punishment is itself being understood. Torture, murder and other extrajudicial means are being openly advocated as a means to deter others from crime. The guilt or innocence of the accused is of little relevance. Law enforcement agencies are being freed from the need to produce evidence of guilt, and from the fear of punishment should it be found that they acted outside of their authority. Impunity is becoming ideologically acceptable. The draconian powers enjoyed by investigators and prosecutors in earlier centuries are being steadily reinstated [AHRC Human Rights Day Statement, 10 December 2003].

It is for this reason that throughout Asia, laws intended to violate rather than protect human rights are being perpetuated: the Internal Security Act in Malaysia and Singapore, the National Security Law in the Republic of Korea and the Prevention of Terrorism Act in India all permit detention without trial and threaten the rule of law. These laws are inevitably used widely and indiscriminately, as has been seen in numerous instances in the region.

As for punishment of crimes, Sri Lanka has reintroduced the death penalty as an irrational means to abolish the increase of crime within the country. Under Malaysian law, whipping and caning are acceptable punishments to be exercised by police officers.

In Nepal, while the Torture Compensation Act prohibits torture, it does not consider it a criminal offence. Thus, the act in no way inhibits police and security forces from committing torture. Furthermore, complaints made against the act are treated as civil cases and the amount of compensation to be awarded is minimal.

Nepal's domestic legislation regarding torture is thus weak even though it has ratified the CAT. India on the other hand, has yet to ratify. Although custodial torture and death are enormous problems in India,

> The Indian government often excuses itself from ratifying the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) on the ground that all the provisions of the CAT are already in the constitution. The argument is spurious. For a constitutional remedy, a victim must go to a High Court or Supreme Court. Such action is beyond the means of most persons in the country, and certainly these courts could not manage even a fraction of the existing torture cases in India today.
>
> There is no specific legislation on torture whereby a case can be filed at a local court. Under the Indian Penal Code, torture is not mentioned as a crime. There is only a section providing that 'excesses committed by a police officer' or forced confessions are illegal. However, under this section it has to be proved that the offence was committed in conjunction with the

> person's authority in order to demonstrate the gravity of the act. Under the Criminal Procedure Code, a magistrate can order an inquiry into a complaint of torture. However, this inquiry will likely be undertaken by the same police station where the accused is on duty. The result of such an inquiry is easy to imagine. For these reasons, few complaints are ever filed, and even fewer are actually taken to court.
>
> Despite some judicial interventions against torture committed by the police, such as the Supreme Court's recommendations in the D K Basu case, the situation has not improved. Even though India is a common law country, in practice, the D K Basu recommendations are not followed. There is also some question as to how many police officers are actually aware of these recommendations. In any case, the Indian government must come up with actual remedies to address torture, which can only be done by effective domestic legislation, in other words, ratifying and implementing the CAT.
>
> In the rare instances that cases of torture are actually heard in court, minimal compensation is awarded, and after a very lengthy procedure: in one case, it took the victim 25 years. Under any circumstances, compensation alone is not redress for torture. If a police officer is ordered merely to pay compensation, the gravity of torture has not been addressed. Therefore, there should be a procedure whereby the perpetrator is tried for having committed a heinous offence, and punished accordingly. The Indian government should establish a special unit to take and investigate complaints of torture, and prosecute the perpetrators accordingly ['Bringing the Convention against Torture to India', *article 2*, vol. 3, no. 2, April 2004, pp. 27-8].

Furthermore, the Committee on Reforms of the Criminal Justice System, set up by the Government of India in November 2000, supposedly to assess and propose changes to the way criminal trials are conducted, has proposed measures that allow the police greater control over the judiciary and prosecution, while at the same time curtailing the rights of the accused. For instance, the Committee has suggested that an officer at the rank of Director General of Police be appointed as Director of Prosecution. This appointment would virtually end the separation of the criminal investigation and prosecution functions, as both would be in the hands

of the police. This proposal together with the suggestions that the burden of proof be changed from "proof beyond reasonable doubt" to a "clear and convincing" standard of proof as well as that confessions be made admissible by amending section 25 of the Evidence Ordinance, would mean that the police would have greater room to abuse their power and the rights of victims. From what has already been described about the police, no one interested in effective rule of law and human rights principles would say that such proposals are the way towards ensuring justice.

B. Disciplinary procedures and codes of conduct

Any institution is governed by its mandate and code of conduct, both of which will be affected by the reasons for its establishment. The police force too, is an institution established for specific reasons, which then shape the behaviour and attitude of those within it. In many Asian countries the police force was created during the colonial era. According to a 1947 commission looking into the Sri Lankan police,

> The old order of society in this Island neither required, nor produced a Police Force. Such an institution was new-TO US. It was not a natural growth within the social order, but was introduced under the British regime for specific purposes.
>
> After the British occupation of this Island in 1815 a Malay Regiment was imported to maintain civil order. The Police Force in Ceylon, as it exists today, is the lineal descendant of these mercenaries. Their main task was to suppress rebellion and so enforce the laws established in this country by the new Government…
>
> While, in a sense, the Police Force in Britain was the creation of public opinion in that country, and has been repeatedly reformed and modernized with the approval and support of the public in England through the various Royal Commissions that were appointed for the purpose, in Ceylon, the Police Force continued to expand and develop under an impetus unaffected by public opinion.

The 1861 Police Act in India—which to this day is the guiding legislation over the Indian police force—is an authoritarian instrument devised to suit the specific needs of the colonial rulers. The Indian police force was conceived in the aftermath of the 1857-58 uprising and was "obliged to quell dissent and enforce obedience whatever the costs. [The] basic duty was to provide an ambience of peace and tranquility for the single-minded exploitation of the enormous resources of raw materials and a captive market" [Manoje Nath, 'Human rights and the police', *Policing India in the new millennium,* P J Alexander (ed.), Allied Publishers, New Delhi, 2002, p. 463]. The current government also confers arbitrary power to the police on the pretext of maintaining law and order, thereby legitimizing human rights violations. It follows that there would seem to be little difference between the motives giving birth to the Indian police 150 years ago, and present-day motives for using it to maintain the status quo.

The use of such archaic mandates together with conflicting political stances is the reason that policing institutions throughout Asia are lacking in discipline. Unless this breakdown in discipline is addressed, little can be done to improve the effective functioning of the police, as well as regain public confidence in the institution.

Disciplinary control requires clear guidelines for appropriate action and behaviour of the police, as well as strict sanctions for those who do not comply. In instances where the codes of conduct of the police are centuries old and do not address current circumstances, such as in the case of Sri Lanka, amendments must be made. The Establishment Code, which governs the discipline of all government officials including the police, was also created under colonial rule, when fundamental rights were not recognized. For this reason, there are no provisions regarding fundamental rights violations. Therefore, a prevalent view within the police establishment is that a finding against any police officer by the Supreme Court of Sri Lanka on a fundamental rights application filed under Section 126 of the Constitution has no impact on the officer's promotion or dismissal. To claim that a law enforcement officer can violate rights—which are not only recognized by the Constitution but for which legal remedies are made available constitutionally—and not face disciplinary

procedure is an absurdity. Furthermore, whether any police officer found guilty of human rights abuse should ever be promoted or allowed to be a policeman at all, must be considered from a moral standpoint.

The lack of discipline is also the reason for the corruption that is rife in policing institutions throughout Asia, as well as the links police have with criminals. In the Asian Legal Resource Centre's March 2005 alternative report on Thailand to the Human Rights Committee, 'Institutionalised torture, extrajudicial killings & uneven application of law in Thailand' it is stated that,

> 13. …It is well known that the police in Thailand are both highly corrupt and highly politicised. This is public knowledge. During 2003, a nightclub kingpin who has now turned politician went so far as to hold a series of press conferences during which he played guessing games with the media about how much he had paid entire police stations to run illegal businesses. In November 2004 a group of academics reported on a study of police stations across Bangkok that found every rank in every police station engaged in some kind of graft on a daily basis [See further: http://www.alrc.net/doc/mainfile.php/unar_hrc_th_2005/].

The Independent Commission Against Corruption (ICAC) in Hong Kong is an example of an independent monitoring body that for the first three years of its existence focused exclusively on eliminating corruption within the police force. This was due to its firm belief that unless the police, the guardians of law, were held accountable for their actions under the very same law they were meant to protect, there could be no improvement in the rule of law situation in the rest of society.

Independent monitoring bodies

If the police are to sacrifice the rule of law, there is no need for any independent body that monitors the police to exist. Without such a body, there is also no way for complaints made against the police to be adequately addressed; one can easily imagine what would occur if an individual went to a police station to lodge a complaint of abuse or harassment against an officer of the same station. Even if a different police station

was approached, it is highly unlikely that objective and efficient procedures would be carried out regarding complaints against fellow police officers.

An example of such a body would be the National Police Commission of Sri Lanka (NPC), which although has some defects, is a useful institution. In fact, the power of the NPC under the constitution and its own mandate is quite significant. The Sri Lankan constitution was amended in order to allow for the establishment of the NPC. Under article 155G (1)(a) of the Sri Lankan Constitution as amended, disciplinary control of police officers other than the Inspector General of Police (IGP) is vested with the NPC. Article 155G (2) further states that "The Commission shall establish procedures to entertain and investigate public complaints and complaints of any aggrieved person made against a police officer or the police service, and provide redress in accordance with the provisions of any law enacted by Parliament for such purpose."

As the Asian Human Rights Commission noted in one of its statements,

> The disciplinary control of the police is, as envisaged by the Constitution, a far more important matter than even appointment, promotion and transfer of police officers. This is particularly so given the history of the country in the last few decades. It is an incontrovertible fact, the understanding of which is reflected in the NPC Chairman's speeches during the last year. It is a fundamental obligation of the NPC to ensure full control of the discipline within the police service. If the Chairman of the Commission claims there is no legal provision granting the Commission power over the lower ranks of the police, this is a clear misunderstanding of the law as enshrined in the 17th Amendment. However, if the Commission itself has handed back this power to the IGP then this is a completely different matter. If the Commission has done so this is a decision which is fundamentally flawed. However, what seems to be the actual case is that the NPC has not seriously taken any practical steps to use the power it has for the disciplinary control of the police. Its time has been mainly spent on matters relating to appointments, promotions and transfers.

> It is suggested that the NPC face up to its Constitutional responsibility to exercise direct disciplinary control over all officers. The major problem with the Sri Lankan police is the breakdown of discipline. Nothing can save the institution until this very serious problem is adequately addressed. There is no Constitutional authority other than the NPC that can address this important task. To abdicate from this role is an act of colossal neglect particularly at a time when the country is faced with very serious problems of social instability and increase of crime. Discipline, particularly within the lower ranks of the police is an essential condition for proper criminal investigations directed towards the deterrence of crime. If the NPC neglects to take its proper responsibility for the disciplinary control of such officers, the fight against crime has very little possibility of success (AHRC AS-21-2004, 20 July 2004).

The lack of such a body ensures greater impunity to the police. With no one to check their actions, and with little hope for victims who complain due to systemic loopholes as well as the support—even if it is only silent or passive—of the perpetrators' colleagues and superior officers, police officers are left to ensure order as they wish. This can take the form of abusing those they or their supporters have grievances against, or delivering 'justice' in exchange for monetary gain.

With regard to authoritarian regimes or extremist ruling parties, a lack of independent monitoring means the use of the police as tools of repression, such as in Nepal, Pakistan, Indonesia.

C. Police training and facilities

The lack of qualified criminal investigators hampers the criminal investigations in Sri Lanka, the Solicitor General of Sri Lanka was quoted as saying on 5 September 2004. This statement, on which there is complete consensus by officials and political leaders as well as the public, is commonly identified as the reason for the failure to detect crimes and arrest the perpetrators, as well as why unqualified officers engage in torture. Little has been done to resolve the problem however.

Linked to a lack of criminal investigators, is the forensic facilities that are terribly lacking in the majority of Asian countries. Without these facilities, it is not possible for the police to use scientific methods to investigate crimes and arrest perpetrators, leading them back to using their muscle rather than mind.

Torture is the cheapest method of criminal investigation

One of the most common justifications of torture is that it is the cheapest method of criminal investigation. Though not expressed openly, this view is shared by the state, though publicly--and particularly for international audiences--it expresses the opposite view.

How has torture become the cheapest method of criminal investigation? By relying on cheap labour. The average police officer in Sri Lanka counts among the least educated persons in the country. Becoming a lawyer, doctor, or even a teacher takes years of education. Achieving some prominence in these or another profession requires many years of patient practice. No such basic education is necessary to be a police officer. (This is not to deny there are a handful at the top who have a basic degree, and a few with longer training.) Those police officers with hardly any basic skills associated with an inquiring mind are the investigators of crime under normal circumstances. Their sensibilities are so underdeveloped that engaging in acts of brutality does not create much of a problem for them. "The rougher the person, the better", is an underlying principle of selection, though this is not openly expressed. The recruitment, use and manipulation of cheap labour are primary elements of policing in Sri Lanka. The result is that no real selection criteria are applied in practice, though they may be used for publicity purposes.

Professional training of police in many countries now takes several years, after which they are selected on the basis of particular criteria. In some countries it takes three to four years. No such expense needs to be spent when the aim is simply to use cheap labour for policing. Just three months of 'training', if any--most of which is spent on physical exercises--is all there is. In fact, this may be a matter of policy. How can a better-trained officer adjust to the rough and brutal practices that go on in police stations?

> Both the elements of cheap labour and inadequate training explain why it is difficult for the institution to impose a high degree of discipline on the average police officer. The subject is not really capable of such discipline. Thus cheap labour implies a high degree of tolerance of corruption within the police institution.
>
> Under such circumstances, nothing more than cheap investigations can be expected. Cheap labour in policing means use of muscle, rather than the mind. Thus, the whole police institution becomes a monster that challenges every principle of decent social dealings and shows its fist to everyone, saying, "If you have us cheap, you have no grounds to complain about what we do" [Basil Fernando, 'Trying to understand the police crisis in Sri Lanka', *article 2*, vol. 1 no. 4, pp. 46-7].

There was a case in 2004 where a police recruit committed suicide while at training camp in Kerala, India due to the torture and harsh conditions he was made to undergo. Manu K Paulson, a 27-year-old police constable trainee at the Kerala Armed Police Battalion, Maniyar Police Camp in Pathanamthitta District found the rigorous training physically and psychologically excruciating and started using painkillers to ease his pain. When his superior came to know about this, he seized the medicine and accused the victim of consuming drugs. Manu was taken to the camp commandant and subjected to torture under the supervision of the camp officers. Finding the situation intolerable, Manu applied for leave and left for home. He later extended the leave for a few more days and finally committed suicide on 16 February 2004. Manu's relatives allege that he was a jovial person with high spirits and had no other reason to commit suicide but for the horrendous torture he faced in the police training camp, in the name of strict training.

The training programme for new recruits at the Kerala Armed Police camps is brutal. The camps lack basic amenities including water. The training often occurs in treacherous conditions with the new recruits left at the mercy of their commandants, who often push the recruits to their limits and abuse their power. Any failure to obey the commandants will be dealt with further brutality in the name of discipline.

While human rights training is also given to the new recruits, this training has little value in the face of their physical and combat training; while the human rights sessions may speak of respecting human life, their armed training focuses on committing severe torture without causing external injuries. The very nature of police training and the lack of room for complaints gives the trainees their attitude for future service [See further: AHRC UA-19-2004, 17 February 2004].

Discussion points (taken from HRCS Lesson 41)

1. How would you describe the rule of law situation in your country? What role do the police play in this situation?
2. Discuss domestic and international laws governing police behaviour. Are these implemented? If not, discuss the reasons and how these can be overcome.
3. In your opinion, what is the role played by other institutions such as the prosecution and judiciary in the rule of law situation?

The role of the prosecution in human rights implementation

The prosecution mechanism is responsible for ensuring that all law is enforced. When laws are violated and crimes committed, the prosecution must ensure that due process is followed and justice obtained. This is particularly important when it is law enforcement and government officials—those meant to be protecting citizens' rights—who are breaking laws and committing violations.

In order for the prosecution to enforce the law, it must be institutionally independent, particularly from political and judicial influence. In most countries of Asia however, prosecutors enjoy neither this independence, nor effective power to carry out the mandate of their office as stipulated under international legal principles. This inevitably has a detrimental effect on the rule of law and human rights within the region.

This chapter consists of two sections. The first gives an overview of the prosecution mechanism throughout Asia and the second discusses the role and characteristics of the prosecution as envisaged under international law.

I. Overview of the prosecution mechanism throughout Asia

With regard to upholding the rule of law and protecting people's rights, the prosecution mechanism has certain primary responsibilities: investigating crimes and complaints to see whether the law has been broken and by whom, prosecuting those responsible for committing crimes, and ensuring that justice is ultimately served by way of a fair trial and the punishment of the perpetrators according to law. However, for various reasons the prosecution mechanism in the majority of Asian countries is lacking in all these responsibilities, as indicated below.

---

* This text is adapted from Lesson Series 42 of the Human Rights Correspondence School, 'Rule of law: The role of the prosecution in human rights implementation'.

AHRC poster, 2001

A. Ineffectual prosecution

Investigation

The investigation of crimes and collecting of evidence is crucial to the prosecution of perpetrators, without which there can be no justice. While it is usually the police who are at crime scenes and do the initial investigations, the prosecution department must take some responsibility to ensure that investigations are being done adequately, if at all, and that they are given enough information to proceed with filing charges. The attorney general of Indonesia however, not only refuses to undertake its own investigations, but further disregards investigations conducted by other groups such as the National Human Rights Commission, regarding the 1998 May riots, Trisakti shootings and Samanggi killings, which took the lives of over 1000 people, with many others suffering injury and damage to their property and possessions. The victims of these abuses have been awaiting justice for seven years.

> One of the reasons the attorney general refuses to act upon the Trisakti and Samanggi killings is that the Indonesian parliament concluded in 2000 that no violations of human rights had taken place. While this conclusion has been challenged and the parliament is set to reopen the investigation of these incidents, the attorney general's office cannot conclusively accept or infer to such political proceedings. Only judicial bodies have the authority to decide whether human rights violations have occurred or not, and it is the attorney general's responsibility to carry out investigations to this effect…
>
> The indifference and lack of action by the attorney general of Indonesia—the department responsible for bringing criminals to justice—to prosecute the perpetrators of the May 1998 riots and subsequent abuses is a clear violation of domestic and international law, as well as a violation of the prosecution department's own mandate. One of the key roles of the prosecution and judicial institutions is to provide an effective remedy to victims whose rights have been violated. This is done through prosecuting the perpetrators and punishing them in accordance with international legal principles, as well as awarding suitable compensation to the victims. Not

> only do these actions serve to redress the wrong done to the victims, but in punishing the perpetrators, a clear message is sent to society that such abuses will not be tolerated. The attorney general of Indonesia however, seems to be sending the message that perpetrators of crimes can walk free, and thereby encouraging future violations [AHRC AS-73-2005, 29 June 2005].

This lack of investigation by the prosecution becomes a greater liability when the case is proceeded with in court, as occurred in the Bindunuwewa massacre case, Sri Lanka, where all the accused were eventually acquitted by the courts due to a lack of evidence.

It is the responsibility of the prosecutor to ensure that persons are not implicated without cause and that cases do not proceed in court without sufficient merit.

On 25 October 2000, more than 25 young Tamils at a rehabilitation centre in Bindunuwewa were attacked and killed by a Sinhalese group. Forty-one persons were charged with participating in the massacre.

However, the Sri Lankan courts gradually acquitted all of these persons due to a lack of evidence. The last of these occurred on 27 May 2005 when the Supreme Court acquitted the remaining accused on the basis that the evidence against them lacked merit.

That the massacre took place killing 27 detainees and injuring 14 others is not in doubt. That the modes of killing were ugly and cruel is also not in doubt. That the Sri Lankan government was responsible for the protection of these detainees is also well established. However, just who the actual perpetrators of this heinous crime were, the Sri Lankan justice system has been unable to resolve.

The primary responsibility for this failure lies with the Sri Lankan police, who had the legal responsibility to investigate and provide the necessary evidence to secure a successful conviction. Obviously the investigators failed in their task. There is clearly also a failure on the part of the prosecutors in Sri Lanka; a failure that lies with the attorney general's

department itself. The department should not have filed indictments against persons if they did not have sufficient evidence to prove a case successfully before a court. To the accused, it is a great injustice to bring them before a court without sufficient evidence. To the survivors of the massacre and the relatives of the dead, such prosecutions amount to deception.

Successful prosecutions are not possible without a functioning criminal investigation system that is able to conduct professional and thorough inquiries before proceeding to court. Additionally, there must be a prosecuting system that thoroughly measures the evidence before prosecutions are filed [See further: AHRC AS-57-2005, 30 May 2005].

The absolute separation that exists between the criminal investigation and prosecution systems in Sri Lanka is thus highly detrimental. The criminal investigation is solely in the hands of the police, with the prosecution usually having no power to conduct criminal investigations, and being dependent on the information given to them by the police. They are dependent to the extent that only when the police inform them of a given crime or complaint, can they take any further action in the case. This situation in fact exists in many Asian countries. Given the situation of the policing systems in the region, this does not bode well for the protection of human rights. Not only is this problematic when dealing with crimes committed by ordinary people, but it becomes worse when the crimes are committed by law enforcement officials.

In Thailand for instance, the control of the police over the investigation and filing of charges has led to numerous instances of police abuse remaining unaddressed in accordance with either domestic or international legal provisions. These include recent incidents of police shootings as well as the 25 October 2004 killings.

Under section 148 of Thailand's Criminal Procedure Code, a death in custody must be followed by a post mortem autopsy and investigation into the cause of death. Under section 150, three agencies must be involved: the forensic doctor, investigating officer, and public prosecutor. After the autopsy has been completed and report submitted, it is the job of

the public prosecutor to approach the court for an inquest, with a view to entering into criminal proceedings if necessary. This process should not be delayed under any circumstances, such as a politically appointed inquiry also being under way. It is the role of the public prosecutor to investigate and prosecute all crimes, including those committed by government officers, without regard to other factors.

The mass killing that occurred on 25 October 2004 in Narathiwat province, Thailand due to the brutality of police and military officers however, was not so investigated.

> After October 25, what has happened? Four doctors from the Forensic Science Institute conducted partial examinations of the 78 victims removed from army trucks, and took samples for further testing. They played a critical part in exposing the scale of the tragedy at a time that the military might have preferred to conceal it. However, full autopsies were not conducted, nor were officials from the police or public prosecutor reported to be present. Questions may then arise as to the consequences of their investigation, and its significance for the role of the public prosecutor.
>
> A commonly held excuse by public prosecutors in many countries in Asia is that where autopsies are botched or police investigations inadequate, they are unable to proceed with the case due to procedural failings or lack of evidence, thereby permitting the perpetrator to escape criminal liability. But this is no excuse. It is the constitutional requirement of a public prosecutor to pursue investigations, obtain the compliance of other necessary agencies, and take the matter into the courts. Failure to do this amounts to failure to do the job altogether. There is no substitute for this role, and under no circumstances should the public prosecutor be obstructed from performing this duty.
>
> So what is the public prosecutor doing in this case? Has an investigation been opened? Have the reports been sought from the forensic doctors? If there is confusion about the procedure relating to the autopsies, have steps been taken to deal with this as quickly and expediently as possible? If there are other agencies opposed to the public prosecutor investigating the case in accordance with the law, how can they be overcome? In short, are

> the necessary questions being asked to bring criminal proceedings against those persons responsible for the deaths in custody of October 25? It is the job of the public prosecutor to address these questions and to take a leading role in the business of obtaining answers without further delay, and all other government agencies are obliged to admit to that role…
>
> Deaths in custody and extrajudicial killings of any kind are grievous violations of human rights. They go to the heart of the responsibility of the state and its agents to its people. Deaths in custody of such a large number of people as occurred in Thailand this October 25 are not only morally outrageous, they also challenge the very institutions existing to protect and uphold the rights of all persons of the country under both local and international law. It is therefore the primary responsibility of the public prosecutor to ensure that all deaths in custody and extrajudicial killings are fully examined, the perpetrators identified, and held to account for their actions [AHRC AS-47-2004, 5 November 2004].

The stalled investigation into the recent death of Sunthorn Wongdao is another example of the control assumed by the Thai police, with little room for the prosecution to manoeuvre. Sunthorn was found dead in Bang Yai district, Nonthaburi province, on 21 May 2005. Sunthorn is said to have hidden in a house after being accused of shooting his wife and father-in-law in Bang Khunthien district, Bangkok. Police from that district claim that after they surrounded the house, Sunthorn committed suicide rather than surrender. But Sunthorn's brother believes that the police killed him. Investigators from the Central Institute of Forensic Science support this view; neither the condition of the victim's body nor the crime scene suggested a suicide. In fact, the victim had four bullets through a lung and one through his head. The gunshot wounds appeared to have been fired by another person at close range. Furthermore, the crime scene had allegedly been tampered with. The body of the victim seemed to have been turned over, and evidence organised to suggest a suicide. The police however, continue to insist that it was a suicide, thus stalling the investigation.

The decision as to whether the forensic pathologists—whose job it is to examine a case purely on the basis of scientific facts and give an opinion

that can be backed by these—are right in concluding that the victim's wounds could not have been caused by a suicide must be left to the courts, not the police. It is ridiculous for the police to claim that they are in a position to accept or reject the views of independently operating forensic pathologists. To do so is an affront to criminal justice and to scientific investigation of crimes.

To get the matter before a judge however, it must go through the police. If the police prefer for a case not to arrive in court in a manner upon which it may be properly judged, they may take steps to obstruct it. This is a grave defect in how criminal investigations are conducted in Thailand. Particularly in relation to alleged extrajudicial killings such as this, the power enjoyed by the Thai police in pursuing or neglecting cases is an enormous barrier to the exercise of basic criminal justice. In fact, this power completely subverts the whole judicial process [See further: AHRC AS-64-2005, 16 June 2005].

Delays in prosecution

Another common defect of the prosecution system throughout Asia is the considerable delay in indictments and hearings taking place. For Sri Lankan rape victim Rita, not only has this delay meant that the perpetrators continue to enjoy their liberty, but also that she has had to prolong her suffering with the numerous hearings.

Rita was a grade ten student when she was brutally raped by two young men, Rameez and Piyal Nalaka on 12 August 2001. Rita was forcibly abducted by the two men as she was walking home after attending Sunday mass and confirmation classes at St. Patrick's Church in Talawakelle at about 2pm on August 12. She was raped by both men inside a vehicle and dropped off near the Hindu Kovil in Talawakelle at about 6pm that evening.

From a poor estate-worker's family, Rita does not speak Sinhalese. With great difficulty however, she managed to report the incident to the police and identify the perpetrators, who were then arrested. Rita was taken to the Kotagala Hospital and later to the Nuwara Eliya Hospital for a medical

check-up and was discharged from the hospital on August 16. The suspects were held in police remand until August 28.

A public protest was held in the town of Hatton on August 26, demanding justice for Rita.

When the case was brought to court on August 28, although Rita's lawyer objected to bail for the perpetrators, the police did not object, influenced by political pressure. The judge thus ordered bail for the accused after a heated argument between the two counsels.

Since then Rita's case was heard in the magistrate court of Nuwara-Eliya numerous times between August-November 2002 and was finally committed to the high court in November 2002. These numerous hearings—a means to delay the case and harass the complainant—caused repeated suffering to Rita. After all this, the case was never called at the high court. The attorney general's department was contacted on 26 July 2003 regarding the case, to which they responded on 19 January 2004, stating that they will take action. Needless to say, nothing has yet been done. It is the prosecution's duty to ensure that the right to fair trial—which includes speediness and effectiveness—is upheld.

Furthermore, in this case the Sri Lankan prosecution may also be guilty of working under influence, and thus not being independent and impartial. It is alleged that the perpetrators of the rape are affluent persons who are using their position and wealth to manipulate the delays; Rita's case (No 32151) was returned by the registrar of the Nuwara-Eliya Magistrate Court on the request of the attorney general's department on 22 October 2004 when it was being prepared to be sent to the Badulla High Court, while other cases from the same magistrate court have already been referred to the high court. There are also suspicions that someone is trying to misplace the file and cause additional delays [See further: AHRC UP-82-2004, 21 December 2004; UP-16-2004, 13 April 2004 and UA-33-2001, 6 September 2001].

In the Philippines as well, delays in cases are common and are a result of either direct or indirect actions by the prosecution. A recent case taken

up by the Asian Human Rights Commission (AHRC) illustrates the problems clearly. Five young men, who were arrested, tortured and illegally detained in 2003, are still awaiting a verdict from the court, as their trial has been continuously postponed or cancelled over the last two years.

Tohamie Ulong (minor), Ting Idar (minor), Jimmy Balulao, To Akmad and Esmael Mamalangkas were arrested on 8 April 2003, in separate joint police and military operations in connection with the Davao International Airport (DIA) and Sasa Wharf bombings in Cotabato City.

Upon arrest, they were tortured into admitting involvement in the bombings. They were blindfolded, subjected to electric shocks, beaten, and experienced dry and wet methods of suffocation. They were then illegally detained at the headquarters of the Criminal Investigation and Detection Group (CIDG 12) in Davao City for several months before being turned over to the city jail.

Even then, no trial was conducted due to the slow progress in the conduct of reinvestigations and the prosecutor's unclear declaration of probable cause. Under Philippine law, before a case can go on trial the prosecutor should establish 'probable cause'. It was only in the latter part of 2004 that the victims were arraigned. A pre-trial was set for 2 December 2004, but was postponed.

Since December 2004, the pre-trial has been postponed on several occasions. On 4 January 2005, it was postponed due to the existence of two sets of suspects in the same case. The judge had to order the City Prosecution Office (CPO) to decide who among them would be tried first. On 7 January 2005, the CPO decided that the five torture victims would undergo trial before the new suspects.

On 18 January 2005, the hearing was cancelled due to the absence of the prosecutor who was in hospital. Succeeding postponements occurred as the prosecutor had not yet established 'probable cause'. Finally, on March 31 Judge Paul T Arcangel of the Regional Trial Court Branch 12, Davao City ruled that probable cause existed, and a trial should be proceeded with.

The next hearing, set for June, was also postponed, as the complainant represented by the CIDG 12 in Davao City and its witnesses failed to appear at the hearing because they did not receive notice or a subpoena from the court. The most recent hearing was scheduled for July 25, which was again postponed for the same reason: the prosecutor's failure to ensure the appearance of the complainants and witnesses at scheduled hearings.

All those accused of crimes have the right to a speedy and effective trial, and it is the prosecutor's duty to protect this right. Any obstacles in the protection of this right are in violation of the law. In addition, the prosecutor also has the duty to investigate all allegations of torture and initiate consequent proceedings [See further: AHRC UP-92-2005, 2 August 2005 and UA-69-2005, 26 April 2005].

Yet another reason for the delay in prosecution in many countries can be attributed to the lack of infrastructure and personnel. In its recent written statement to the 61st session of the UN Commission on Human Rights, the Asian Legal Resource Centre (ALRC) noted that in India,

> 5. …Often many courts do not have sufficient prosecutors to represent cases as and when they are taken up. In a local Magistrate Court in Wadakkanchery, Kerala State for instance, prosecutions were stalled for years due to the fact that the only prosecutor available was on deputation from another court. Only when this officer had enough spare time would he turn up at the Wadakkanchery court. By the end of one year the number of criminal cases pending disposal before the court was so large that it will take several years to clear off these cases, given the fact that every year the number accumulates to the existing backlog…
>
> 9. The lack of basic infrastructure within the entire justice system is another crucial issue that causes delays and inefficiency. When a prosecutor's office wants to communicate with a particular police station, there is no mechanism available other than the initiative of the prosecutor to spend from his own pocket or to make the interested party pay for this communication if the entire proceedings are not to be stalled. This lack of basic infrastructure not only results in the delay of proceedings but is also

> a root cause for corruption [ALRC, 'Delayed justice dispensation system destroying rule of law in India', E/CN.4/2005/NGO/107].

Witness protection

Threats to witnesses in order to protect the accused are common in many Asian countries. Protection is more crucial when persons are witnesses and/or victims of crimes committed by law enforcement agencies. Unfortunately, few countries are able to provide effective protection to its citizens. While the Philippines law provides for witness protection, it is not being enforced.

> In a May 31 letter to the Asian Human Rights Commission (AHRC) Police Director of the Directorate for Investigation and Detective Management at the national police headquarters Marcelo Ele Jr admits that the main obstacle to solving two recent killings in Camarines Norte, Luzon is the lack of witnesses. In the case of Ernesto Bang, an organiser in a peasant organisation who was shot dead at the door of his house on May 10, "Relatives of the victim… are no longer interested in filing the case due to the absence of a witness", Ele states. As for Joel Reyes, a political party organiser who was shot dead by a gunman posing as a passenger in his tricycle, "no witnesses had come out in the open for fear of reprisal".
>
> In a May 30 letter, Paquito Nacino, regional director of the Commission on Human Rights in Tacloban City, Visayas, revealed that it had set aside its investigations into three murders there for the same reason. According to the Commission, a witness to the March 14 killing of human rights lawyer Felidito Dacut "is nowhere to be found". Meanwhile, the relatives of peasant movement leaders Fr. Edison Lapuz and Alfredo Malinao, who were killed in a May 12 shooting in Leyte have been "uncooperative and shown unwillingness to make any written statements". The wife of Fr. Lapuz, who witnessed his killing, "requested to give her more time to decide [about complaining] as the assailants are still unknown to [the family]".
>
> A wife hesitates to complain about the killing of her husband in cold blood; a person runs for his life after the murder of his colleague and

> friend; a man is shot dead in a public street and no one can be found to identify the murderer. What is going on? Although provisions exist for witness protection in the Philippines, clearly they are not working. Republic Act 6981 guarantees that witnesses will be given the necessary protection, security and benefits. The Department of Justice is the agency responsible for arranging witness protection. So why isn't it doing its job? [AHRC AS-74-2005, 30 June 2005]

Sri Lanka however, does not have a witness protection programme and it has been stated that in 85 per cent of criminal cases, witnesses do not show up as they fear for their lives. This fear is founded on the recent killings of several witnesses and complainants against the police:

> Gerald Perera was killed just a few days before he was to give evidence in a police torture case. The culprits have now been arrested—three police officers who are the accused in the torture case.
>
> Another torture victim, Channa Prasanna, in whose case an inquiry was being conducted, was kidnapped and narrowly escaped a murder attempt. While two cases regarding these incidents were ongoing in the Magistrate Court of Negombo, a further attempt was made on his life at midnight as he was sleeping, but Channa awakened and was able to run away. Complaints have been made regarding this as well.
>
> In the case of Lalith Rajapakse, there were numerous threats on his life and he is at present in hiding, while there is a police guard to protect his family and neighbor ULF Joseph, who was also threatened with death for helping the torture victim.
>
> Amarasinghe Morris Elmo De Silva, who was allegedly tortured by some officers of the Ja Ella police station, had to flee the country due to threats to him and his wife because of a case filed against the perpetrators at the Negombo High Court.
>
> Despite the numerous appeals and complaints in the above cases, government agencies have failed to provide adequate witness protection ensuring the security and well being of the victims. They have also failed to interdict the officers against whom inquiries are pending. The brutal and

> criminal behavior of such officers is thus allowed to take place with impunity, while the personal security of citizens is callously abandoned [AHRC AS-05-2005, 26 January 2005].

It is thus essential for there to be adequate witness and victim protection in order for prosecutions to be successful. Furthermore, it is the prosecutor's responsibility to ensure that if and when threats are made against those involved in legal proceedings, the perpetrators are punished.

B. Abuse of power

Prosecutors must be independent and impartial and must focus on achieving justice, particularly when dealing with crimes committed by law enforcement officials, which are graver in nature and consequence. When their work is based not on legal principles but on political or other influence, they are abusing their power; unfortunately, this is a common occurrence within the region, as indicated by the following case taken up by the Asian Human Rights Commission in 2004, from West Bengal, India.

Partha Majumdar disappeared on 5 September 1997 after witnessing the shooting of Mr Suresh Barui in Akrampur, West Bengal by police officers from the Habra police station. During the police firing, Partha was injured in his leg and was taken away by the police. In the days that followed, the victim's family made all efforts to locate him, to no avail; the police claimed that Partha had never been arrested by them.

In January 1998, the West Bengal High Court ordered the West Bengal Human Rights Commission (WBHRC) to undertake an investigation of the family's claims. The WBHRC recommended the West Bengal Government to instruct the Criminal Investigation Department (CID) to initiate a case against those responsible for Partha's disappearance. The CID began investigating this case, but it did not make any serious effort to arrest the accused. Instead, 11 accused police officers were granted anticipatory bail on 12 December 2000 without any objection from either the CID or the public prosecutor, even though their charges were non-bailable: they were charged with abduction in order to murder

under Section 364/201/34 of the Indian Penal code. Since then, the main accused Mr Sunil Haldar is now the Additional Superintendent of Police, Malda, Murshidabad district. The other accused officers are working as outpost officers-in-charge in Jadavpur, Bali, Magrahat and Kaorapukur, West Bengal.

After several preliminary hearings, on 4 September 2004 the additional District and Sessions Judge, 1st Court at Barasat, North 24 Parganas finally decided that the 11 officers should be tried. Partha's family alleged that during those hearings the prosecutor deliberately made mistakes regarding the date of the incident and the names of the places in the legal documents, to create confusion and delay. Furthermore, the prosecutor did not object to the defense counsel appearing for the accused being state government empanelled advocates, even though under domestic law public prosecutors are prohibited to represent the police in a private capacity.

Partha's family also stated that in court on September 4, the prosecutor allegedly threatened the victim's mother and elder brother in court. In response, Partha's brother, Mr Dipankar Majumdar, submitted a complaint to the Calcutta High Court. Although the division bench of temporary Chief Justice Altamash Kabir and Justice Ashit Kumar Bishi ordered the removal of the public prosecutor and security for the complainants, nothing has been done [See further: AHRC UA-171-2004, 14 December 2004 and UP-35-2005, 31 March 2005].

Politicization

One of the main reasons that such abuse of power is so common within prosecution mechanisms throughout Asia is the high level of political and other influence exercised upon them. This is particularly noticeable in the appointment of senior prosecutors. The Prosecutor General in India for instance, is a political appointment, nominated by the ministry of justice. While the ruling party is in power, its members are thus assured of having their interests represented in any criminal prosecution. Their exit from power has usually come to mean the resignation of their appointees, although this is now being challenged. The assistant public

prosecutor's office, responsible for attending to prosecutions in court, is also subjected to political influence, whether in regard to appointments or the carrying out of duties.

It was through this process that the state government of Gujarat was able to ensure that the public prosecutors in the Gujarat massacre trials of 2002 were political supporters. In its written statement to the UN Commission on Human Rights in 2004, the ALRC noted that

> 3. …the authorities in Gujarat have demonstrated how utterly the system can be brutalized to further violate the rights of victims. In Gujarat, the same police force responsible for the atrocities has been charged with investigating the cases going to trial, and the government responsible for what occurred has been appointing the prosecutors. Although the National Human Rights Commission explicitly recommended that the Government of India permit independent agencies to investigate the cases, hear the trials in other states and provide witness protection, these recommendations were unheeded. Only in September 2003 did the Supreme Court state that it has 'no faith left' in the Gujarat government's handling of the cases arising out of Gujarat. It appointed a former solicitor general to sit as special advisor to the court in the Gujarat trials, and in November 2003, the Court stalled the proceedings in ten cases, including some of those mentioned above, while considering whether they should in fact be heard outside the state [ALRC, 'India: Genocide in Gujarat', E/CN.4/2004/NGO/40].

While in Sri Lanka such overt politicization does not exist at the level of public prosecutors in magistrate courts, the attorney general's department—which deals with severe crimes at the high courts as well as the supreme court—is largely influenced by politicians as well as police officers. For this reason, issues such as custodial torture and extrajudicial killings are only superficially addressed by the office, if at all. Additionally, it is the attorney general's office in Sri Lanka that represents or assists the state in international forums, for instance at a UN Human Rights Committee meeting.

Such political influence is made more effective by the poor conditions of the prosecution mechanism in most countries, including low pay and benefits and a lack of career prospects. The fact that public prosecutors in most Asian countries work for a fixed wage regardless of the cases they deal with or their outcomes further adds to the lack of accountability in their work; the prosecutor's office will rarely appeal against an acquittal in a criminal case, and it will just as rarely be challenged after an acquittal.

In response to this callousness, there is an increasing application at Indian courts for the appointment of special prosecutors by way of a *writ of mandamus* (judicial act allowing for private attorneys to prosecute a specific case).

In order to overcome all these obstacles to carrying out its mandate effectively, the prosecution mechanism must be institutionally independent. It must enjoy the same independence as enjoyed by the judiciary, instead of being constrained by political factors, if it is to work towards improving human rights within the region.

Discussion points (taken from HRCS Lesson 42)

1. What is the role of the prosecutor in upholding the rule of law in your country?
2. Discuss the prosecution mechanism in your country with regard to the following:
   a. What legal powers do they have;
   b. What role do they play in criminal investigation; and
   c. Are they institutionally independent?
3. What remedies are available to citizens when the prosecution fails to carry out its duties?
4. In light of the above, how could the role of the prosecution mechanism be strengthened?

II. The role and characteristics of the prosecution as envisaged under international law

Having seen the state of prosecution throughout the Asian region, it is important to study the role the prosecution mechanism *should* be playing in establishing effective rule of law and human rights under international legal principles. The primary sources of these will be the UN Guidelines on the Role of Prosecutors (Guidelines) and article 14 of the International Covenant on Civil and Political Rights (ICCPR), both of which can be found as appendices at the end of this chapter.

A. Roles and characteristics of the prosecution

Guidelines, para 4
Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles [equality before the law, presumption of innocence and the right to a fair hearing], thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime…

The prosecution mechanism has two primary functions: maintaining the rule of law and upholding fair trial. These functions must be undertaken with complete independence and accountability, based solely upon legal principles.

Maintaining rule of law

Prosecutors are responsible for the enforcement of all existing law, as well as proposing new laws or amending old ones when necessary. If the law defines crimes but persons who violate that law are not prosecuted, then the law itself has no meaning. Equality before the law and equal treatment by the law is one of the root principles of international law and prosecutors must ensure it is upheld—all those who violate the law must be held accountable, be they police officers, government officials or ordinary citizens, just as all those who seek redress before the law must be treated equally.

For prosecution to occur there must be competent officers with legal power to prosecute. This legal power should be combined with actual facilities for conducting such prosecutions. However, the role of the prosecutors in maintaining the rule of law goes further than just the prosecution—they are responsible for maintaining the rule of law from the time of investigation to the time of conviction or acquittal.

This maintenance must be done without influence from the executive government, the judiciary or the police. The prosecution must make its own decisions guided only by the law and it must also ensure that other justice mechanisms are doing the same.

Upholding fair trial

ICCPR, article 14
1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Fair trial is not only a basic human right recognized under international law, but also essential for the effective prosecution of human rights violations, the punishment of the perpetrators and the delivery of justice to the victims. The principle of fair trial encompasses all that is related to a fair trial before the trial in court actually occurs, such as the investigation of the crime and the collecting of evidence. It comprises positive and negative obligations. The positive aspect involves ensuring that all investigations into crimes and complaints are carried out properly, the necessary indictments filed and cases prosecuted according to the law. The negative aspect involves not implicating individuals without sufficient cause, not allowing cases to proceed in court without sufficient evidence and eliminating any abuse of power within the prosecution mechanism.

Pre-trial; investigation

Guideline 11
Prosecutors shall perform an active role in criminal proceedings, including institution

of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

Investigations are a crucial part of the prosecutor's duty. Without investigations, there cannot be adequate collection of evidence and naming of suspects. Furthermore, given the dire situation of the police investigations in the majority of Asian countries, it is imperative that the prosecution conduct their own impartial investigations, and supervise those conducted by the police. These must include post mortem examinations and forensic science inquiries as well as speaking to witnesses and having access to all relevant documents.

Though the function of criminal investigation and the function of prosecutions are different and should be independent from each other, there is still a significant link between the two. Any prosecution based on faulty investigations will most likely fail due to a lack of evidence; investigators can sabotage prosecutions either due to their ignorance and neglect or due to deliberate acts in not collecting available evidence. Thus, prosecutors should have legal capacity to review evidence and to direct the investigations in some manner so as to prevent faulty investigations.

Based on these investigations, it is the job of the prosecutor to file indictments or direct the police to do so. Following this is the prosecution of the case itself. It is important to ensure that the investigation, indictment and prosecution all occur in the shortest time possible; delays in any of these amount to a delay in justice and further violation of victims' rights.

The criminal investigators also have the ability to fabricate cases. In such instances, prosecutors have the duty to probe the evidence and to guarantee the basic rights of people by preventing such fabricated cases, as mentioned in guideline 14. In the context of countries where there are very grave abuses by the investigators, who are in fact policemen, this function of the prosecutors can prevent severe miscarriages of justice and pain caused to innocent citizens. The prosecutors also have the duty

to be fair to those who they prosecute. All norms and rules relating to fairness and the rights of the accused persons should be adhered to.

It is very important for prosecutors to check police investigations and ensure no illegal methods are being used, particularly torture. Guideline 16 emphasizes that if prosecutors come across information that torture or other illegal practices have been used to procure evidence, they must disallow the use of such evidence, inform the court and take action against the perpetrators. Article 14(3)(g) of the ICCPR further states that no one shall be compelled to testify against themselves or to confess to guilt.

Trial

The principle of the presumption of innocence is an essential one in the fight for justice. Article 14(2) of the ICCPR states that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". While this principle is predominant during the trial itself, it must also be upheld in the pre-trial stages. As noted by the Human Rights Committee in General Comment No. 13, the principle of innocence means that

> the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial [http://www.ohchr.org/english/bodies/hrc/comments.htm].

The principle of innocence, as well as all other principles involved in ensuring due process of law during the trial stage must be upheld by the prosecutor, who is bound to maintain the rule of law. This responsibility to the law also means that the prosecutor should not strive for a conviction; while a case should be firmly and fairly presented, there must be some restraint in how it is advanced. This is because the prosecutor is the representative not of any ordinary party to a controversy, but of a state.

The state's obligation to govern impartially is as compelling as its obligation to govern at all, and therefore, its interest in a criminal prosecution must be that justice is done, not that it shall win a case.

Another important principle to be upheld is article 14(3)(b) of the ICCPR, which provides that everyone is entitled to "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". This is strengthened by 14(3)(d), which says that all those accused of a crime must be provided legal assistance, without payment if they cannot afford it.

During the trial, the prosecution must also ensure that if the accused are being detained, their conditions of detention are not in violation of international or domestic law.

Similarly, the prosecution should also take the responsibility of providing adequate protection to witnesses and complainants. Witness testimony is usually essential in successful prosecutions, particularly in human rights violations. For this reason, witnesses are particularly vulnerable to attacks and intimidation by the perpetrators. A lack of protection will undoubtedly affect whether witnesses will come forward or not to testify and ensure the successful prosecution of the perpetrators; the conviction rate in Sri Lanka is a mere four per cent, largely due to the failure of witnesses to appear in court. Furthermore, when the prosecution is made aware of the fact that witnesses and complainants have been threatened, it must take effective action against the perpetrators.

B. Relationships with law enforcement and accused

Guideline 20
In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

The unique position of the prosecutor within the criminal justice system necessitates a working relationship with other parts of the system; the better the relationship, the better the working of the system as a whole.

However, it is crucial to note here that all these relationships must be based solely on legal principles. The purpose of the relationships is to pursue justice, which must be foremost in the mind of the prosecutor.

Law enforcement agencies

With regards to the police, it is important for the prosecution to have a relationship with them to ensure cooperation and collaboration, as mentioned above, regarding criminal investigations. However, such a relationship will also reduce the likelihood of police errors as well as ensure that as soon as the police receive any complaints or begin investigations, they inform the prosecution department or seek their advice. Regardless of the relationship though, it is the role of the prosecution to ensure that the police are working within the confines of the law and that due process is being followed.

When it comes to the courts, guideline 10 states that "the office of prosecutors shall be strictly separated from judicial functions." This is to ensure the independence and impartiality of the prosecution mechanism, which must however, inform the courts of all relevant matters. While it is the court that must ultimately decide on the outcome of a case, it can only do so based on the case in front of it; this will largely depend upon the work of the prosecution. Furthermore, it is the responsibility of the prosecutor to keep the court informed regarding violations committed by the police or others during the course of the case.

Accused

As mentioned earlier, the law provides for many rights for those accused of crimes. It is the prosecutor's duty to ensure that these rights are protected. However, again, the prosecutor must also remember that he is a public official, and as such must undertake his duty impartially, with a view to obtaining justice.

Discussion points (taken from HRCS Lesson 42)

1. What are the domestic legal provisions regarding the mandate of the prosecutor in your county?
2. Are there provisions regarding the discipline of prosecutors who fail to carry out their duties in accordance with the law?
3. In your opinion, are the international provisions mentioned in the lesson adequate? If not, what would you add/amend?
4. Discuss how such legal provisions can be practically implemented.

Appendix I:
Freedom of expression in Asia (E/CN.4/2005/NGO/37)

—A written statement submitted by the Asian Legal Resource Centre (ALRC) to the 61st session of the UN Commission on Human Rights, April 2005.

1. Discussion on freedom of expression usually centres on violations such as censorship, self-censorship, attacks on journalists, attacks on publications and the like. Little attention is paid to the suppression of freedom of expression through the legal process itself. This is because in developed democracies the legal system guarantees freedom of expression and offers various avenues for persons or groups who feel that their rights relating to freedom of expression have been violated to find redress. However, this is not the situation in most countries in Asia, where the legal system itself creates many obstacles for freedom of expression. Furthermore, defects in the legal system, when manipulated unscrupulously - either by the executive or the judiciary - can also create huge obstacles to freedom of expression and cause silence and submission among the people. In this statement, the Asian Legal Resource Centre (ALRC) wishes to examine a few of these obstacles.

2. Diminishment or curtailment of the freedom of lawyers to carry out their functions can virtually paralyse the freedom of expression in a society. When freedom of expression is violated lawyers have to canvas the matter before the courts. When matters are raised before courts, all violators are put on notice that their violations are under legal scrutiny. Once the lawyers raise questions after professional research and establishing the real grounds on which they go to court, their pleadings also provide good material for the media to take up the same issues. Thus, serious debate on all matters relating to freedom of expression in the courts takes place through the mediation of lawyers. If by direct or indirect means lawyers are prevented from playing their roles in the most effective and sophisticated manner, freedom of expression will be undermined.

3. There are many modes by which legal actions for the protection of freedom of expression can be curtailed by tampering with the rights of lawyers. One is to limit the remedies available in the law so that the capacity of lawyers to handle such matters is likewise limited. There are many countries in which the role of the lawyer is confined to minor criminal or civil matters, such as property or commercial disputes, and there is no room for public law. There are other countries where this role does exist but only marginally. This is the case in most former European colonies. Even though there may be constitutional expansion for legal canvassing against freedom of expression through bills of rights or other provisions introduced through the constitution, the actual capacity that exists for canvassing such matters is limited and is often also circumscribed by procedural limitations and habits in courts that were established through long years of practices under more limited legal remedies.

4. Worse still are the deliberate attempts to intimidate lawyers. Such intimidation can take many forms. The pretext of dealing with the workload of courts speedily may be intended to create an impression of professional lawyering as an obstruction to the speedy administration of justice. Lawyers are pressured to limit their interventions and surrender some of their basic professional freedoms on the pretext of court efficiency. If this pressure continues for long enough, as has happened in several countries in Asia, many lawyers also become demoralised. Opportunism may also grow in the legal profession itself, causing some lawyers to exploit the situation and unscrupulously subvert the basic practices of their profession and cause its degeneration.

5. Another way of silencing lawyers is to take legal action against them so that they are unable to practice either for a short time or indefinitely. While rules against unprofessional practice are essential to the functioning of any profession, such regulations must be applied only according to the best traditions of the profession itself. If the rules are used against lawyers on flimsy grounds over an arbitrary manner, this will have a chilling effect on the profession as a whole. When a lawyer feels that her dignity as a professional lawyer has been

diminished and that she can get into serious problems if she practices her profession in the manner required normally, then she may withdraw from performing her duties and accept a lesser role. For example, if the rules against lawyers are issued with ease, then a lawyer can only assume that she might be the next target. In these circumstances the whole profession is affected psychologically. What remains thereafter as a profession is only the external façade but not the profession as it should be.

6. This same effect can also be brought about by the easy use of contempt of court proceedings. Such proceedings can become an instrument for intimidation when one or two persons are punished without due process and all the requirements of law. The message is passed to the entire profession that it is a dangerous thing to be a good lawyer. Then lawyers stop taking controversial cases and do not advocate unpopular causes. Many will cease to take a brave position even in normal cases.

7. By these and other means lawyers can be silenced. They may still remain vociferous and complain of the indignities they suffer within private circles. However, in the courts, the real arena in which they are expected to play their role, they will humbly submit themselves to an oppressive ethos. They thereby only lend support to a process that has partly or completely lost legitimacy. The very professionals that have the legal capacity to expose the hypocrisies through which various crimes and gross violations of rights take place become silent partners to the death of freedom of expression. This tremendously important means for suppressing freedom of expression needs to be documented and opposed, not primarily for the sake of lawyers, but for the sake of preserving the people's freedom of expression.

Appendix II:
Reform of the criminal investigations and prosecutions systems is the real key to reducing crime in Sri Lanka

—Asian Human Rights Commission, 11 January 2001

The recent decision of the Sri Lankan government to re-introduce the death sentence adds to the already very bad human rights record of the country. The argument that the increased crimes rate requires the reintroduction of the death sentence does not stand up to examination. There are fundamental failures in the criminal investigations and prosecution system in Sri Lanka that allow criminals to remain free, however serious their crimes. The Hangman can become a substitute for proper criminal investigators and competent prosecutors.

The present situation of increased crimes must be blamed on the criminal investigation authorities and on the prosecuting department which in Sri Lanka is the Attorney General's department. However, the relationship between these two departments themselves is inherently defective. As it exists now, criminal investigation is entirely the function of the police and if they fail to investigate, the prosecutors can wash their hands by saying that there is no evidence with which to prosecute. While this situation remains, all that the hangman can do is to send a few poor people to the gallows as a deterrent to others. This will only be a further mockery of justice in a country where justice is fast becoming a distant dream.

We instead call upon the government of Sri Lanka to seriously address the defects in the justice system that make the increase in crime possible and the increase in serious crime inevitable. The most vulnerable place in the system is the absolute separation between the criminal investigation function and the prosecuting function that exists. Without ending this separation, crimes will not only increase but more serious crimes will escape prosecution.

The reasons for such separation are as follows.

1. To end the absolute Gap that exists in Sri Lanka between the criminal investigation function and prosecution function:

The system as it stands now is for the police to investigate crimes and, in serious offences, to present the file to the Attorney General's department, which may thereafter prosecute the case. If the police do not investigate a crime or do so very badly, there is hardly anything that the prosecutor can do, except to say that there is no sufficient evidence to prosecute. Thus, the ultimate responsibility to prosecute a crime rests with the police. If the vicious circle that produces the 'no evidence' argument is to be broken, it is necessary to build a link between the prosecutors and the investigators from the very inception of a case. This would mean that from the receipt of the first complaint up to the finalization of investigations the prosecutors would be informed of the investigations and could take suitable steps to guide them.

2. To bring the Sri Lankan law into line with the developments of other common law countries:

The Sri Lankan practice of absolute separation between prosecutors and investigators is based on 19th century British practices. However in all of the major common law countries, including the United Kingdom, United States, Australia and India, no such separation exists. In these countries the prosecutor's departments have extension offices in all areas and the police departments coordinate their activities from the very inception of such inquiries. It would be useful for Sri Lanka's law drafters, legislators and the legal profession as a whole to study the developments that have taken place in other common law jurisdictions. In Civil law (the French system), the link between prosecution and investigation has always existed through the function of the investigation judge.

3. To create professional prosecutors:

The present practice of conducting prosecutions through the attorney general's department deprives the country of the development of

professional prosecutors. Under the present set-up, lawyers in the Attorney General's department spend a few years in prosecution work and then shift into other work. The Attorney General's department has many functions and its lawyers shift from one to another. However, the acquirement of professional prosecuting skills takes a long time, as with any other serious profession. Besides, this allows individuals the option to enter and stay in this profession for a long time. In any profession, personal aptitudes and choice are important. This also has an impact on training. If the prosecutors are going to be in this profession for only a short time, there is no purpose investing in training for them. However, modern day prosecuting involves a high level of training and specialization. The mere fact of being an attorney-at-law is no sufficient qualification to be a competent prosecutor of serious crimes.

4. To create institutional habits within the prosecuting system:

Professional habits are made with difficulty. The credibility of any institution of professionals will depend on the way, these habits are formed and transmitted. The present system as it operates throgh the attorney general's department is not conducive to development of such professional habits and to ensure a continuity to a tradition of proper conduct of prosecutions.

5. To address the problem of increase in crime:

The government admits that there is a vast increase in crime. The only real answer to this is proper criminal investigation and certainty of prosecution for all crimes. The system as it exists now fails to do this. It is an unavoidable fact that the system needs to be corrected.

6. To deal with crimes committed by law enforcement agencies:

It was just few months back that about 26 persons were massacred in the presence of about 60 armed police. Each day bring reports of crimes in which law enforcement officers are involved. Over 30,000 disappearances have put the countries among those with the worst records in the world. It is simply ludicrous to leave these crimes to be investigated

by the police alone. The repeated argument that comes up is that there is not enough evidence to prosecute these crimes. The evidence depends on competent investigations, which in turn depend on proper systems of accountability. To allow the present system of separation between prosecutions and investigations to continue is to connive with crimes done by law enforcement agencies.

7. To answer international criticism;

The United Nations' report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999) (E/CN.4/2000/64/Add.1) issued on 21 December 1999 and presented to the UN Commission on Human Rights Session in April 2000 contains, among other things, the following recommendations:

> "(a) The Government should establish an independent body with the task of investigating all cases of disappearance which occurred since 1995 and identifying the perpetrators;
> (b) The Government should speed up its efforts to bring the perpetrators of enforced disappearances, whether committed under the former or the present Government, to justice. The Attorney-General or another independent authority should be empowered to investigate and indict suspected perpetrators of enforced disappearances irrespective of the outcome of investigations by the police;"

In a statement from 2000, AHRC summed up the central problem relating to prosecution of those responsible for the disappearances in Sri Lanka as follows:

> "It is an elementary principle of Criminal Law that the investigation into crimes determines the prosecutions. Because of the lack of criminal investigations into cases of disappearance in Sri Lanka, the cases cannot be prosecuted. Thus, the first step towards any real prosecutions of these cases must be to begin criminal investigation."
> "As the police were mobilized to cause the disappearances, it is not possible to investigate through this apparatus. Thus, an independent body for conducting criminal investigation must be the first step towards the carrying out of prosecutions."

Thus the failure of the criminal investigation and prosecution system is now a well known fact world-wide. Sri Lanka has even been classified as one of the most dangerous places on earth. There can be no real answer to these criticisms until the defects inherent in the system, particular the absolute separation between criminal investigations and prosecutions, are done away with.

Appendix III:
Guidelines on the Role of Prosecutors

—Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper

performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors, Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be

brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.

2. States shall ensure that:

(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex. Language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or

consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

    (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

    (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

    (c) Keep matters in the* possession confidential, unless the performance of duty or the needs of justice require otherwise;

    (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines. Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Appendix IV:
International Covenant on Civil and Political Rights

—Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   (c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Illustration by Nick Cheesman

The role of the judiciary in human rights implementation

The judiciary is the last resort for citizens seeking justice, particularly when it is other government agencies that have violated their rights. When the judiciary itself ignores human rights and participates in the abuse of power—as is common in many parts of Asia—it becomes a serious impediment to citizens and an obstacle to the effective implementation of human rights in the region.

This chapter consists of two sections. The first discusses the independence of the judiciary while the second examines systemic and institutional obstacles to its effective functioning.

I. Independence of the judiciary

Independence of the judiciary stems from the notion of the separation of powers, whereby the executive, legislature and judiciary form three separate branches of government, which can constitute a system of checks and balances aimed at preventing abuses of power. This separation and consequent independence is key to the judiciary's effective functioning and upholding of the rule of law and human rights. Without the rule of law, there can be no realization of human rights, which has been the focus of discussion throughout this book. The role of the judiciary in any society must be to protect human rights by way of due process and effective remedies. This role cannot be fulfilled unless the judicial mechanism is functioning independently, with its decisions based solely on the basis of legal principles and impartial reasoning.

---

* This text is adapted from Lesson Series 43 of the Human Rights Correspondence School, 'Rule of law: The role of the judiciary in human rights implementation'.

This section gives an overview of the factors comprising judicial independence—institutional independence, individual independence, impartiality and accountability—through the experience of various Asian countries.

A. Institutional independence

Institutional independence requires the judiciary to be able to function without any influence from the government or other state agencies. This is usually necessitated by either the constitution or other legal provisions in all but socialist countries or those with military dictatorships. However, throughout Asia, it is the practical realization of this principle that is more problematic. This can either be because legal provisions themselves are shaky, or that they are not being enforced as they should be. In its written submission to the 61st session of the Commission on Human Rights for instance, the ALRC stated that in Sri Lanka,

> the Constitution of 1978 shifted power very much in favour of the executive president, to the detriment of the parliament and the judiciary. Though the constitution theoretically accepts the separation of powers, in actual fact the type of power arrangement it contains relegates the judiciary, including the Supreme Court, to a lesser position. The judiciary has very limited powers over judicial review [ALRC, 'The independence of the judiciary in Sri Lanka', E/CN.4/2005/NGO/42].

Similarly in Cambodia, while the constitution accepts judicial independence, the pre-UNTAC political and legal structure remains in place, which saw the courts forming an organic part of the executive branch of government. In other words, the courts functioned as an arm of the government, which was dominated by the military.

As the current political and legal system in Cambodia is maintaining the old structure while having a new constitution, it is not difficult to see why there is no democracy and human rights even today, more than ten years after UNTAC. The present judges have associations with either the military or political parties; they are bound by circulars from the ministry of justice; the majority of judges are not properly qualified; 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 the verdict prior to the trial. Furthermore, both the appeals and supreme court are ineffectual.

In India on the other hand, while the principle of judicial independence is accepted legally, there is no implementation. For instance, while the Criminal Procedure Code was rewritten in 1973 with the express intention that the judiciary be severed from other parts of the government, the AHRC has constantly pointed to the fact that in West Bengal the lower judiciary in particular is largely controlled by the police. In fact, the police there control almost all aspects of criminal proceedings, whether it be arrest, conviction, imprisonment or death. Numerous urgent appeals taken up by the AHRC clearly show the power held by the police, and their complete disregard for the institutional independence of the judicial and prosecution mechanisms.

Most recently, the AHRC reported the case of the Beldanga police in Murshidabad district, West Bengal who blatantly disregarded court orders regarding the filing of a complaint and subsequent investigation of the death of Saidul Mullick, a potato vendor in March 2005. The police ignored two separate court orders regarding this case, and finally even stated that they had no intention of carrying out investigations as they had decided that Mullick's death was a case of suicide.

Mullick left his house on 29 November 2004 with two business partners with Rs 70,000 (USD 1,600) in his pocket to purchase potatoes. When he had not returned till evening, his wife, Mrs Dilruba Bewa, went to Devkundu to look for him but she could not find any of the three persons. That same night, one of the business partners came to her house and told her that Saidul would be returning later. When Mullick had not returned in three days, his wife lodged a complaint of his being missing with the Beldanga Police Station on 1 December 2004.

The next day, Saidul's dead body was found on the railway tracks near the Rezinagar Railway Station. The railway police seized the body and registered an unnatural death after conducting a post mortem. However,

according to lawyer Hoshna Arrah (alias Bulbul), Dilruba's neighbour, the post mortem report did not reveal the actual cause of death, nor whether it was a murder or suicide.

When Dilruba went to the Beldanga Police Station to claim her husband's body and to file a First Information Report against Saidul's business partners, she was not only refused by the police personnel but also threatened that they would impose false charges on her if she did so. Dilruba then took the case to the district magistrate and Ms Indrila Mukherjee, the Sub-Divisional Judicial Magistrate (SDJM) at that time, directed the Beldanga police to register a case and submit a report, which they failed to do.

On 29 March 2005, Dilruba complained to the SDJM that the police were refusing to file her complaint regarding her husband's murder and were trying to cover it up, insisting that it was a case of suicide. At this time, the Sub-Divisional Magistrate, Ms Yasmin Fatema ordered the Beldanga police to file her complaint, conduct an enquiry and report back to the court. However, the Beldanga police deliberately disobeyed the court's order, merely making an excuse that the officer-in-charge (OC), Mr Arun Kumar Das, was on leave and it was not possible to pursue the matter in his absence. However, it was later found by reliable sources that the OC was in fact on duty at the time.

When local human rights group MASUM spoke to Mr Arun Kumar Das, he categorically stated that though the Beldanga police received orders of the SDJM, they had not complied with them and would not do so in future because the case was one of suicide. In the meantime, the Superintendent of Police (SP), Murshidabad District, said that the case inquiry was over and it was found to be death by suicide and not murder. As regards the court's directive the second time, the SP further said that the General Railway Police would be asked to conduct an inquiry into the case as 'the place of occurrence' falls under their jurisdiction [See further: AHRC UA-54-2005, 4 April 2005].

Even the Indian Supreme Court is not exempt from such undermining of its authority, as evidenced by the Uttaranchal state government's non

compliance with its orders regarding land rights, as reported in the AHRC's hunger alert of 27 October 2004.

Over eight months after the Supreme Court of India, the highest court in the country, declared that around 150 Dalit families in Ambedkhar settlement have legal rights to over one thousand acres of land in Kashipur sub-district, Uttaranchal, the state government has not yet complied with the order.

The Dalit community of Ambedkhar settlement had been legally tilling the land in question for over thirty years. In 1992, a local government official declared it to be 'surplus land' under state law, which means that legal rights to the land could be granted to the villagers. However, after that, a local company called M/s Escort Farms Ltd contested the granting of title in the Allahabad High Court. In the meantime, the director of the company used his local influence to have the villagers violently and illegally evicted in 1993 with the help of local police and officials, and their village demolished. Over 80 of the villagers were detained for eight days on charges of disturbing the peace.

Nonetheless, in May 1995 the court decided against the company and ordered it to pay one million rupees in compensation, to be used for the rehabilitation and resettlement of the villagers. The company appealed, and the case went to the Supreme Court, which finally gave its decision, also in favour of the Dalit villagers, in February 2004. The court ordered unequivocally that the state take control of the land with a view to returning it to the affected community.

However, the state government has to date failed to act to see that the land is returned, despite the efforts of local human rights organisations to raise attention to the matter. In fact, the illegal sale and occupation of the land by the company involved, in connivance with local authorities, is reported to have continued unabated. This is despite the fact that the Social Development Foundation has on at least one occasion directly approached state government ministers, together with the affected villagers, to inform them of these activities.

Meanwhile, hunger is prevalent in the community, which has struggled to survive since the eviction. Villagers such as Veer Singh, who works as a sugarcane cutter for under the minimum wage, do not eat until coming back from work at the end of the day. On a visit to the village by the Social Development Foundation he told them that, "One of my sons died due to lack of medication. I had no money for the doctor's fees. It is painful that sometimes we don't have money to buy anything. Many days we have to live without any rations."

Fifty-two-year-old Dhoom Singh, who has one son and four daughters, has been without land since the eviction, and his children have had to work as labourers. He has remarked that,

> The situation is difficult for us, as there is no work. I could never get my children educated. It is over 10 years now that we are out of our places and nothing has been done. We people have had faith in courts as people like you have been helping us, yet where do we go to get our livelihood. Poor people cannot wait. They have to arrange for their next day's meal and they have saved a lot and contributed for court cases. Till the Allahabad High court, still many people were around, but after the matter was in the Supreme Court, people completely lost faith in the judiciary. They cannot wait for so long. [See further: AHRC HA-05-2004, 27 October 2004. Also, see HRCS Lesson Series 38 for more information regarding the right to food and a related Supreme Court of India order].

The judiciary in Nepal is undermined to the extent that court orders to release those arrested and detained arbitrarily by both police and military forces are simply ignored, with the persons being immediately detained as soon as they step outside the courts. In fact, many individuals have stated they prefer to remain in police or judicial custody, rather than be released only to be immediately rearrested, particularly by the military. In June 2005 the AHRC reported that at least 32 political activists and human rights defenders had been rearrested in violation of court orders since King Gyanendra's coup of February 2005 [See AHRC UA-100-2005, 22 June 2005].

Even prior to the coup however, Nepal's judiciary was weakened—the AHRC has consistently reported on such cases. For instance, in July 2004 the AHRC issued an urgent appeal stating that for the third time that year it was reporting an instance of rearrest in violation of court orders. Four persons were arrested as soon as they stepped out of the judge's chambers at the Morang District Court on 14 July 2004. Four lawyers from the local bar association were also present at this time, but this did not deter the security forces in the least.

The four persons Yek Raj Basnet, Khagendra Sambahamfe, Ram Bahadur Ingaram and Tek Bahadur Bista were initially arrested nine months earlier, and held for 'preventive detention' under the Public Security Act (PSA), which can hold detainees up to 12 months without charges. According to our source, these four persons were afraid to be released and felt safer in prison because they thought that they would be executed or disappeared once they were released. Since last year, Nepal tops the number of enforced disappearances in the region. Fearing the forced disappearance of people, NGO groups in Nepal are advocating that detainees should not be released without the presence of their family members or civic group members [See AHRC UA-86-2004, 16 July 2004. For further cases of rearrest in violation of court orders see also AHRC UA-74-2004, 23 June 2004 and AHRC UA-51-2004, 24 May 2004].

That the judiciary cannot safeguard the authority of its decisions or prevent the security forces from abusing the legal process indicates the failure of the judicial system in Nepal.

Other elements of institutional independence can relate to administrative, financial and jurisdictional issues. While these are not discussed in this lesson, more information can be found in the various appendices at the end of the chapter.

Discussion points (taken from HRCS Lesson 43)

- When the orders of the judiciary are ignored or overlooked, what can be done?
- Do judges have the authority to take action against those who disregard their orders?
- If so, why do they not take action? If not, what can you propose?

B. Individual independence

Together with institutional independence, it is essential that individual judges are also guaranteed the independence to undertake their work effectively. The two are obviously linked, and if there is no institutional independence, there is little chance of there being any individual independence. Both entitle and require judges to ensure that judicial proceedings are conducted fairly and the rights of all parties are respected; both require that judicial accountability is upheld. This is particularly important when it comes to senior members of the judiciary, such as chief justices or the presidents of apex courts. They have greater power that can be abused, as well as the fact that their conduct will not only be observed by the public but by their junior colleagues.

For instance, public opinion in Sri Lanka sees Chief Justice Sarath Silva responsible for the lack of justice within the country and the collapse of rule of law. Lawyers typically claim he intimidates them when in court, and threatens to debar them from practice, especially in human rights cases. Others accuse him of manipulating panels and dates of hearings in a manner that casts doubt on the objectivity of proceedings. In a lengthy book entitled *The Unfinished Struggle for the Independence of the Judiciary* (2002), prominent journalist Victor Ivan has exposed extensive misconduct and abuse of authority by Silva both as Attorney General and Chief Justice. Most recently Nuwara Eliya District Judge Prabath de Silva resigned in protest against the Chief Justice.

In November 2003, not for the first time, an impeachment motion was filed against the Chief Justice—the only avenue by which he may be investigated—with the signatures of about one hundred members of parliament. However, the Sri Lankan President exercised her political power to protect him. Thus, serious allegations against the highest judicial officer in the land were reduced to political bargaining chips. Meanwhile, a survey conducted by a reputable organization found that the public perceives the judiciary to be the second most corrupt institution in the country. This may explain the premature resignation of the country's senior-most judge, Mark Fernando.

The Sri Lankan judiciary is thus incapable of addressing its own institutional defects. With its highest member defending himself from allegations of misconduct, internal reforms cannot even begin. The judiciary's inability to respond to widespread criticism is demoralising both the profession and the country's citizens. As a result, people are increasingly seeking to resolve their grievances from outside the law, and so crime is on the increase [See further: AHRC AS-06-2003, 1 April 2003 and AHRC statement of 10 December 2003].

Another aspect of abuse of power by senior judicial officers relates to judicial appointments and promotions; when there is no independent mechanism to do this job, it is left up to the chief justice. In many countries, this has led to allegations of nepotism. In a speech given at Sri Lanka's International Centre for Ethnic Studies, former UN Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy said

> Recent cases decided by the Supreme Court of India illustrate. The Constitution of India provides for the appointment of judges by the president after "consultation with the Chief Justice of India". In a 1993 case the court held that this 'consultation' must be genuine and not a sham. When there is a conflict between the opinion of the executive and that of the Chief Justice, the opinion of the Chief Justice should prevail… Controversy arose thereafter as to whether the power can be vested in just one person like the Chief Justice or whether it should require consultation with a plurality of judges. In 1998 the President of India referred this and

> other doubts caused by the 1993 judgment back to a full bench of the Supreme Court without the Chief Justice…
>
> Thus the Supreme Court, [held that] … the expression "consultation with the Chief Justice of India", read into the Constitution not only that the Chief Justice's opinion must be a collective opinion formed after taking the views of his senior colleagues but also that when that opinion conflicts with that of the executive the opinion of the judiciary "symbolised by the view of the Chief Justice of India" should have primacy [Dato' Param Cumaraswamy, 'Tension between judicial independence and judicial accountability', *article2,* vol. 2, no. 5, October 2003].

Abuse of power is not something that is only relevant while speaking of senior members of the judiciary however. In fact, a significant proportion of cases are dealt with by the lower judiciary, by judicial officers such as magistrates, session judges or district judges. In many instances, it is easier for them to abuse their individual independence, particularly when the system is such that no one is taking note of their conduct.

The infamous instance of an arrest warrant being produced for the President of India for a certain fee speaks to the pathetic situation faced by the Indian judiciary. On 13 January 2004, a Zee-TV Network reporter and cameraman approached two prosecutors of the Mehani Nagar Court in Ahmedabad, Gujarat and inquired whether it would be possible to obtain arrest warrants against rival businessmen. They were told that it would require a 40, 000 rupees fee, as well as 5000 rupees for the judge. The reporter submitted the names of the Indian president and chief justice, as well as the former chairman of the Bar Council. Warrants were issued accordingly after the magistrate was paid his fee.

Individual independence also requires that judges are free to make decisions based solely on legal principles, free from fear of criticism or reprisal. In several Asian countries, the main obstacle to this independence is the fear of reprisal. For instance, judges in Sri Lanka increasingly face threats in carrying out their duties, as the Asian Legal Resource Centre wrote to the 61st session of the UN Commission on Human Rights:

2. On 19 November 2004 a senior high court judge, Sarath Ambepitiya, was assassinated in Colombo. This was the first assassination of a high court judge in the history of the judiciary in Sri Lanka. A few months earlier, another high court judge was reported to have been attacked in an attempted rape. Both instances highlight the lack of protection for judges in Sri Lanka. In a statement by the Bar Association of Sri Lanka it was pointed out that Judge Ambepitiya had received threatening telephone calls in the days prior to the assassination. Although these calls were reported, no security measures were taken. In fact, three days prior to the killing, protection previously provided to the judge at his place of residence was removed. The Bar Association also stated that at the time of the murder the telephone lines of the judge's residence were disconnected; as a result there was a considerable delay in the police arriving at the scene of the crime. Later, during the investigations, it was revealed that the alleged mastermind of the murder had connections with several senior-level police officers. The Bar Association has called for a commission of inquiry into security matters related to this murder. In the case of the judge who was attacked, it was found that the police guard assigned to her residence for security purposes was asleep at the time of the incident [ALRC, 'The independence of the judiciary in Sri Lanka', E/CN.4/2005/NGO/42].

Most recently, former magistrate of the Wellaya Magistrate Court Janaka Bandara was sent death threats by telephone, demanding that he resign from the Judicial Service and refrain from attending an inquiry to be held on 13 July 2005. The inquiry was regarding Judge Bandara's indictment by the Judicial Service Commission, after he issued a warrant against Senior Superintendent of Police, Sherief Deen, who was alleged to be involved in a fatal accident case but whose driver was produced in court as the culprit. After hearing the evidence, Judge Bandara issued a warrant for Deen to be produced in court. However, he himself was indicted by the Commission.

His interdiction caused one of the most vocal protests by the Bar Association of Sri Lanka. The new Bar Association president fought his election campaign on the basis of ensuring a fair inquiry into this controversial case. It was thus no coincidence that the judge was subjected to death threats and told not to attend the inquiry.

At the time of the inquiry the AHRC noted,

> That a magistrate is facing death threats is an indication of the extremely dangerous security situation prevailing in the country. More often than not, death threats are carried out. Within the last 25 years the number of persons who have been slain in this manner can be counted in the thousands. Those who have been slain belong to a variety of social strata and include intellectuals, journalists, civil rights activists, politicians, and crime victims who are pursuing their cases in courts, particularly those involving complaints against state officers and political dissidents of various sorts. Just recently there was a public meeting organised by journalists to condemn death threats and to defy those who take such action.
>
> The magistrate's case is seen by the legal profession as a very important one as the magistrate has resisted cowing down to all pressures to demand justice in his case. The legal profession has viewed the action taken by the magistrate of issuing a warrant on an alleged suspect as an exercise of his legitimate duties. The legal profession also believes that any action taken against the legitimate use of power by a judicial officer threatens the independence of the judiciary itself. The legal profession has whole heartedly supported this magistrate's endeavor to seek justice. The general perception has been that if judges themselves are prevented from carrying out their duties, there cannot be any expectation of justice for any other citizen…
>
> The civil society of Sri Lanka should not underestimate the enormous implications of death threats issued against a judge. A death threat to any citizen is a gross violation of human rights and a threat to social security. However, the threat to the life of a judge is much more. It is a threat to the system of justice itself [AHRC AS-79-2005, 13 July 2005].

Less life threatening forms of reprisal are also common, such as the interdiction in the above case, as well as arbitrary dismissals or promotions, which are seen in Burma, India, Malaysia.

C. Impartiality

Judicial impartiality is another aspect of judicial independence; while

judicial independence requires that the judiciary be able to function effectively without undue interference from political or other agencies, judicial impartiality requires the judiciary to base their decisions on facts and in accordance with the law. Judges should thereby not have any preconceptions regarding issues they are deciding upon, nor should they favour either of the parties to the dispute. This includes the arbitrary use of contempt of court proceedings.

In 2004, the AHRC noted many cases where the nexus between the judiciary, police and government officials in Burma was clearly visible. The judgements being given were not only in favour of government officials and thus in violation of the principles of just decisions based on merit, but in reaching these judgments judges were making use of harsh and outdated laws. Furthermore, the decisions inevitably further violated the rights of victims who were seeking redress for previous abuse. The ALRC wrote to the 61st session of the UN Commission on Human Rights regarding this issue, stating that

> 2. The experience of U Ohn Myint and Ko Khin Zaw, both of whom were charged with criminal defamation for complaining of forced labour is indicative. Although the Government of Myanmar outlawed the use of forced labour in 1999, reports of the practice continue to be widespread, and attempts to lodge complaints in accordance with existing legal provisions have proved futile. When Ko Khin Zaw and U Ohn Myint filed a complaint in the Henzada Township Court, Ayeyawaddy Division in July 2004 after being jailed for failing to do sentry duty at a village monastery, their complaint was summarily thrown out of the court. However, the same judge then entertained a complaint of criminal defamation by the vengeful local administrative officials. The two villagers were found guilty, and were offered a fine or six-months' imprisonment. In an act of defiance, the two men chose jail.
>
> 3. Not only is the criminal defamation law used in this case problematic—in recent years criminal defamation has been condemned globally as offensive to basic rights and many countries have removed it from the statute books—but the case demonstrates the punitive actions taken against citizens in Myanmar attempting to exercise their rights. The fact that U

Ohn Myint and Ko Khin Zaw were recently freed after the fines imposed on them were reported to have been paid by military intelligence officers further highlights the absence of any rule of law in the country. U Ohn Myint and Ko Khin Zaw's complaints of forced labour are typical of the situation throughout the country, particularly in remote areas. The only difference is complaints from far-flung regions are little publicized, let alone heard in the courts.

4. In another instance, on 18 April 2004 Police Corporal Aung Naing Soe came to Thida Street, in Thida Ward, Kyinmyindaing Township, and began to clear away homeless people present in the vicinity, including one Ma San San Htay, a betel nut seller, who quarrelled with him. He then hit her in the mouth, grabbed hold of her hair and before many witnesses dragged her along the road while she cried out for help. When 26-year-old Kyaw Min Htun intervened, the police officer hit him, whereupon Kyaw Min Htun hit back, breaking the officer's nose. Kyaw Min Htun was then taken and charged under section 333 of the Penal Code with inflicting violence on a public servant while in performance of his duties. On 24 June 2004, the Kyinmyindaing Township Court found Kyaw Min Htun guilty, and sentenced him to two years imprisonment with hard labour.

5. This case demonstrates how local authorities operate to guarantee impunity for government officers under any circumstances in Burma. In reaching its verdict, the court did not assess the relative merits of the arguments on both sides, or even ask if there was any validity to the claims of assault against the police officer. While the court sentenced Kyaw Min Htun, it did not question whether hitting and dragging a woman along by her hair would be appropriate behaviour for an officer 'in the course of his duties'. It merely established that the accused hit the officer and sentenced him accordingly. This underlines the nexus that exists between local police officers, government officials, and the judiciary throughout Burma that denies the possibility of natural justice for any person challenging one or another of these authorities.

6. This nexus is particularly visible in the sentencing of Ma San San Aye, aged 16, and Ma Aye Mi San, both from Pyapon Township, Ayeyawaddy Division in October 2003 to four years imprisonment, for lodging a police

> complaint against U San Net Kyaw, a local official who raped them. The case is particularly disturbing because the guilty official was even charged with rape after a local tribunal conducted an investigation, but was not arrested by the district police, who instead referred the matter to the township law office. Upon instruction from the Pyapon District Law Office, the charges against him were dropped, but ironically the victims were charged and sentenced to four years hard labour for falsely accusing a government officer on 20 October 2003. Their current whereabouts are unknown…
>
> 8. It is thus of particular concern that not only do U Ohn Myint, Ko Khin Zaw, Kyaw Min Htun, Ma San San Aye, Ma Aye Mi San and countless other victims of human rights violations have no channel for effective redress, but they have to suffer further from the punitive action taken against them for attempting to exercise their rights. Moreover, the message delivered to the Myanmar public is that asserting their rights is both dangerous and meaningless [ALRC, 'Impunity and the un-rule of law in Myanmar', E/CN.4/2005/NGO/41].

This lack of impartiality connotes a lack of institutional and individual independence. Judges in Burma are rarely appointed on the basis of merit or qualifications, rather, they are appointed based on their relationship with those in power.

Without this independence, it is impossible for the judiciary in any country to function as it is meant to. If it does not function in this manner, there is no hope for the rule of law to flourish, and instead violence and impunity will be rife. Furthermore, if citizens do not have faith in their judicial institutions, they themselves will seek other ways of obtaining justice, which may in turn lead to more violence. It is for this reason that it is as crucial for the judiciary to be *seen* as being independent as it is for it to actually be so.

Discussion points (taken from HRCS Lesson 43)

1. Are these situations familiar to you? How would you describe the judiciary in your own country? Does it have the power to ensure the implementation of its orders?

2. What is the relationship between effective rule of law and the judiciary?
3. In your opinion, what is the greatest obstacle to the effective functioning of the judiciary? Discuss how this and other obstacles could be removed.
4. What are the international and domestic legal provisions available to protect and promote the effective functioning of the judiciary? How can they be enforced?

II. Systemic and institutional obstacles to the effective functioning of the judiciary

There are many systemic obstacles that have led to the deterioration of the judiciary in many Asian countries, some of which are examined below.

A. Institutional deterioration

Infrastructure

One basic problem that is faced by the judiciary around Asia is the inadequate facilities provided for courts as well as the small number of personnel working in these courts. Wages and benefits are also not very high.

There are numerous instances in courts around Asia where a lack of judges will be found. In India, this lack of personnel and facilities means increasing delays in court procedures, with cases lasting one or two decades. This lack of resources is both a cause and effect of inefficiency. The case of Hasna Mondal is indicative: Hasna was tortured and raped on 27 February 1995 and a complaint was lodged the next day. At present however, her case is indefinitely adjourned, since the court in which her case is to be heard has not had a presiding judge since 26 February 2004. Furthermore, after her complaint was finally investigated and a charge sheet submitted to the Sub-divisional Judicial Magistrate on 26 December 1996, the hearings went on till July 2003, when the last prosecution witness

was examined—seven years. Since then, the court assigned numerous dates for the examination of the investigating officer, with nothing happening. And now, as the Additional Sessions Court is vacant, it is unsure when the next hearing will take place [See further: AHRC UP-93-2005, 9 August 2005 and UA-07-2005, 14 January 2005].

The situation in many courts is such that resources are not available for court officers to communicate with other government agencies. For instance, in a general appeal, the AHRC drew

> the attention of the Sri Lankan government and all relevant authorities to the unnecessary suffering caused to people including extra days spent in jail by persons despite court orders to release them. This problem is due to a lack of infrastructure for communication from and to the court to the appropriate authorities in case a person is ordered to be released or in case any additional information is to be collected by the court where a petition requesting for the release of the person is filed in court. Providing fax machines to all the courts in Sri Lanka could solve this problem. The Magistrate courts, District courts and High courts can be much helped by providing this facility. It is unfortunate that the courts still do not have such a facility when even small businesses and many private individuals are using such facilities. As telephone facilities are available there is no hindrance to immediate introduction of fax machines to the court. The primitive communication systems still prevailing only show careless disregard for administration of justice and civil liberties of the people…
>
> The recently well published case of Koralaliyanage Palitha Tissa Kumara who was tortured and in whose mouth a TB patient was forced to spit into by a sub-inspector attached to the Welipenna police is one example. The response of the police when the victim complained was to fabricate two cases and to remand him on the excuse of these false charges. One charge was the possession of a bomb and the other was of armed robbery. After conducting inquiries, the National Police Commission was satisfied that the complaints against the police were true… [Although the Appeals Court ordered bail on 26 May 2004 and the High Court on July 16, the victim is still in remand, unable to obtain proper medical treatment.] The Magistrate Court states that the bail cannot be granted as the papers it has

> received from the Appeals Court have a typographical error. There is no easy way to correct the error as communication takes some time. He may still be in remand prison for a few more days. Had there been a fax machine in the Magistrate Court, the poor man by now would have seen a doctor despite typographical errors [UG-02-2004, 28 June 2004].

However, it must be noted that when necessary—as deemed by the courts or government agencies—courts are capable of overcoming these shortcomings, as seen in the murder trial of Sri Lankan judge Sarath Ambepitiya, which was the speediest trial into a serious crime ever conducted in the country, completed within 25 days.

Together, the criminal investigation and trial in the Ambepitiya case were completed within seven months, demonstrating that the typical delays in Sri Lanka's legal process can be overcome. It would be a slur on the judiciary if it were to be said that this case was considered as a special one and therefore some special procedure was followed. Everyone is equal before the law—the murder of a judge is therefore of no more importance than the murder of even the most humble of citizens in the country. In fact, more prominent persons have been assassinated in Sri Lanka previously, among them being a prime minister, a president and several cabinet ministers; however, on those occasions the trials were not so swift.

The reason that the trial in its entirety took 25 days was that the case was heard on a daily basis as cases used to be heard when jury trials were conducted. However, common procedure in Sri Lanka's high court trials today is that partial evidence is taken on one day and then the case is postponed for several months depending on the court's calendar. Thus, a case may be heard over 25 separate days with at least three months lapsing between each day of trial. This would mean that six years might pass before the court could reach a conclusion. An important lesson from the Ambepitiya case is that if criminal trials are heard from beginning to end in one session with daily hearings, it is possible to overcome the present impasse and to ensure speedy trial. Usually the spacing of dates is blamed on the court's work overload or lawyers finding excuses to have distant dates set. The Ambepitiya trial, however, shows that such

excuses are unjustified and that when a case is pursued with determination it is possible to overcome all other difficulties. In the case of judge Ambepitiya, three judges were involved as it was a trial-at-bar. If this could be done in his case, then surely this could be emulated in other trials where only one judge is present [See further: AHRC AS-75-2005, 7 July 2005].

Lessons from this trial can be learnt by many countries. In particular, it must be noted that the lack of infrastructure affects the morale of judges and provides reasons for corruption, as well as affecting the confidence of the public.

Appointments, discipline

The way that judicial appointments are made and discipline enforced will greatly affect the institutional environment. The appointment, promotion, dismissal and discipline of judges should be based on professional qualifications, merit and personal integrity, not on any other influences or bases. The same can be said for security of tenure and finance. However, this is not always the case, as already noted in some of the cases mentioned previously. To further illustrate,

> …Burmese judges operate in accordance with executive instructions and other exigencies rather than the laws even as they exist under the current regime. In fact, it is well recognised that most judges are appointed on the basis of their relationship to persons in the armed forces and administration, rather than training, and relatively few have proper legal qualifications. Even in the Supreme Court, earlier provisions stipulating professional requirements for judges were long-since removed in order that socialist party cadres of the earlier regime and persons close to the state leadership could take over the bench. Similar practices have continued today: in November, two Supreme Court judges and numerous other senior legal officials were sacked after the removal from power of the former prime minister, who was also the head of military intelligence. The judges were said to have either had connections with the former intelligence chief or had refused to give legal advice to convict him and his colleagues on corruption charges [AHRC AS-60-2004, 8 December 2004].

This situation is familiar not only to Burma, but to most countries in the region.

Furthermore, at present there is a great lack of judicial accountability in many Asian countries, partly due to the lack of standardized procedures regarding appointment and discipline. Judicial independence and accountability are firmly linked; they can be seen as two sides of the same coin. While the independence of the judiciary must be guaranteed, the judiciary like any other public institution must also be held accountable for its behaviour.

B. Justice system

Rule of law and collapsing institutions

The absence of the rule of law in so many Asian countries means that there is no supremacy of law, as well as that the law does not meet the highest standards of human rights, but rather is becoming increasingly repressive. This will unavoidably have a detrimental effect on institutions functioning under such a collapse of the rule of law. For this reason, it is not just the judiciary as an institution that is suffering, but also other institutions, in particular those relating to the administration of justice—the police and prosecution. The deterioration of these other institutions (as noted in the previous two chapters) plays a significant role in the functioning of the judiciary, as for the purposes of administering justice, all three justice mechanisms must work together.

To begin with the judiciary as an institution, the following statement by the AHRC regarding the Indian Supreme Court is indicative of the collapse that can be seen throughout Asia.

> In declining to use its powers to review the death sentence of Dhananjoy Chatterjee, the Supreme Court of India has today not only declined to take responsibility for the life that it has condemned, but also the principles which it ought to be representing.
>
> The Constitution of India establishes that, "No person shall be deprived

> of his life or personal liberty except according to procedure established by law." The Supreme Court has rejected the petition filed by Bikas Chatterjee, brother of the sentenced man, as his appeal for clemency to the President of India was already rejected. By this narrow reasoning, the procedure established by law has been met, and a man can be killed.
>
> But where was the procedure established by law when Dhananjoy Chatterjee was tried? A poor man who could not afford to engage good lawyers, the case against him was decided on circumstantial evidence. Just a few days ago prosecutors in the United States freed the 115th person condemned to death there, having finally proven his innocence on the basis of DNA testing. No DNA test has ever been conducted to prove the guilt of Dhananjoy Chatterjee, nor does the Supreme Court seem to feel that this standard of evidence is necessary to execute a man in India.
>
> Where was the procedure established by law during the last 13 years that Dhananjoy Chatterjee spent in solitary confinement? Precedents exist for the Supreme Court to commute the death sentence on the ground that the convicted person has already been punished enough due to an unreasonable delay in carrying out the sentence, and attendant suffering. The former Supreme Court Justice V R Krishna Iyer may have had these precedents—and the higher values they represent—in mind when he too appealed to the Court to overturn the sentence in this case. Regrettably, the current bench of the Supreme Court seems to subscribe to a lower standard of justice than did its predecessors [AHRC AS-25-2004, 13 August 2004].

In West Bengal, India all three justice institutions have collapsed to the extent that it is now the police that control both the prosecution and judiciary. Furthermore, delays in court cases typically go up to a decade or more. Such inefficiencies amount to a blatant mockery of justice, particularly when complainants at the courts are no longer around to witness the end of the farce that most cases become. Lakhichand Paswan for instance, died one day after the Calcutta High Court granted leave to prosecute the police officers who were allegedly responsible for the forced disappearance of his son. In such a case, what meaning does the court proceedings have?

Bhikari Paswan—Ten years of waiting for justice in West Bengal end with a funeral

On Wednesday, 28 July 2004, the Calcutta High Court took a short time to announce a decision on a matter that had stood before India's courts for a decade: it granted leave to prosecute police officers allegedly responsible for the forced disappearance of Bhikari Paswan in 1993. The following day, Bhikari's father, who had struggled for ten years to obtain justice, died. He had been in a coma since shortly before the court gave its decision.

The father, Lakhichand Paswan, will never know what officially happened to his son after he saw Additional Superintendent of Police (ASP) Harman Preet Singh and three of his men take Bhikari away in the early hours of 31 October 1993. He will never know where the body of his son was discarded. He was robbed of that knowledge, and the right to see the perpetrators punished, not by weaknesses in the case, but by an utterly callous and corrupted system.

Bhikari had been working as a labourer at a local jute mill during a time of serious industrial unrest. The mill workers were going virtually unpaid, and between October 18 and 21 a series of violent attacks occurred at the houses of politicians and complacent union leaders. On the night of October 21, police opened fire on a group of protesters, injuring three. In the ensuing melee, a constable was fatally injured.

At Bhadreswar Police station, a list of 22 names was drawn up on the First Information Report of the constable's death (Case No. 239/93), among them, that of Bhikari. It was at about 12:30am on October 31 that ASP Singh and his men entered Bhikari's house and took him away from his wife, Lalti Devi, his father, and other witnesses. Investigations by local groups have concluded that he was taken to Telinipara police outpost, where he was severely tortured, after which he was taken by jeep to Dharampur outpost, under the Chuchura Police station, where he died. His body has never been recovered.

Lakhichand Paswan spent all his available energy approaching everyone from the Chief Minister of West Bengal to the lowliest administrators at

the state government offices trying to find out about his son. His efforts attracted the attention of the media, opposition parties and human rights groups. Bhikari's wife and father then submitted a habeas corpus petition to the Calcutta High Court (No. 15487[W] 1993). On 8 June 1994 the court ordered the central Criminal Bureau of Investigation "to investigate the matter and report whether Bhikari Paswan was at all arrested or taken into the custody of the police on the aforesaid date".

A year later, on 12 June 1995, the Bureau submitted its report to the effect that, "Bhikari Paswan was indeed picked up by the police party from his residence on the night of 30/31-10-1993 at about 12-30am. His whereabouts since then are not known." The report also indicated that "the statements of the police officers, drivers and the [District] Magistrate, Hooghly are inconsistent with the records" kept at the police stations. In other words, police records were fabricated to cover up the crime and the stories of various officers and officials became confused in their tangled efforts to throw off the investigators. In fact, an officer of the Central Forensic Science Laboratory earlier invited to examine a carbon copy of the Report had already concluded that Bhikari's name had been deliberately obliterated by another name being written over the top (CFSL No. 94/D-998, dated 28 September 1994).

So, as far back as 1995 senior police investigators concluded that ASP Singh and his subordinates took Bhikari from his house that night in October: there was no question about the complicity of state agents; the questions that remained related only to what happened afterwards. Why was it then, that nobody was immediately arrested and charged? Because the Indian judicial system responded to the urgent needs of the case by snaring it in technicalities and further enquiries, while the perpetrators and their accomplices further tampered with documentary evidence and harassed the family, along with other witnesses and supporters.

Rather than immediately ordering the arrest of the perpetrators on the basis of the report it had commissioned, the Calcutta High Court proceeded at leisure with the writ before it. Finally, in March 1998, it effectively turned it into a ball that could be bounced endlessly from court to court, by directing the Chief Judicial Magistrate of Alipur to investigate the case,

under a procedure allowed for by sections 200 and 202 of the Criminal Procedure Code. The magistrate opened the case on May 11 (Case No. C-1046/1998), and on September 15 issued summons against the four accused police, Samar Dutta, Swapan Namhata, Harman Preet Singh and Satya Prasad Banerjee, under sections 364/120B of the Indian Penal Code, for conspiracy, and abduction with intent to murder.

All of the accused subsequently obtained bail, although the sections under which they were charged were non-bailable offences. Furthermore, the accused policemen were not only not suspended but were promoted, thereby demonstrating the contempt held by the state authorities for the serious charges against them.

In 2000, the case was passed to the District & Sessions Judge, Alipur, who in turn delivered it to the Additional Sessions Judge of the Vith Court, with the intention that a date should be fixed for trial. However, rather than proceed at that juncture, in April 2000 the judge referred the matter back to the Calcutta High Court on two technicalities: one pertaining to jurisdiction, the second, asking whether the government sanction was required to try Harman Preet Singh, who is an Indian Police Service officer. Masum has observed, however, that the action of the judge in referring the matter back to the high court could have been motivated only by a special intent to protect the accused, as the original order of the high court was sufficient to begin the proceedings. It was not, therefore, any business of the judge to raise further enquiries as to the legitimacy of the case.

The case lay at the doorstep of the high court until only through the gigantic efforts of human rights advocates and Bhikari's family the case finally saw the light of day in October 2003, when a special bench was called to consider it "immediately". Nine months later, the bench has held that government permission is not required to prosecute Singh, as 'kidnapping was not among his official duties as a police officer'. Thus it has taken the Indian judiciary ten years to decide a matter that any informed person with an iota of common sense would have resolved in a few minutes.

It is too late. A chief witness in the case, Bhikari's father, is now dead. With his passing, the congratulatory note struck by reports of the court's decision

is made nonsense. What meaning can ten years of such deliberations have, in view of this old man's death? The perpetrators of the case knew well that Lakhichand was ailing. They knew well that without income and other means for prompt and effective medical treatment, he could not survive long enough to outlast their legal manoeuvres. They knew well that no state agency would come to his assistance. What meaning can the proceedings against these men now have in the absence of Lakhichand Paswan? After ten years, the court's decision is a victory only for the accused [*article 2*, vol. 3, no. 4, August 2004].

Discussion points (taken from HRCS Lesson 43)

1. In your opinion, what is the relationship between the judiciary, prosecution and police in serving justice and promoting human rights?
2. What roles do the police and prosecution mechanisms in your country play in addressing human rights violations? How does this affect the judiciary?

Appendix I:
Basic Principles on the Independence of the Judiciary

—Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,
Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the

Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to

mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin,

property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under

an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Appendix II: The Bangalore Principles of Judicial Conduct

—Round table meeting of chief justices, The Hague, November 2002

Preamble

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:
INDEPENDENCE

Principle:
Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:
1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences,

inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the
judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:
IMPARTIALITY

Principle:
Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:
2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:
Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:
INTEGRITY

Principle:
Integrity is essential to the proper discharge of the judicial office.

Application:
3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:
PROPRIETY

Principle:
Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:
4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practice law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:
EQUALITY

Principle:
Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:
5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital

status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6:
COMPETENCE AND DILIGENCE

Principle:
Competence and diligence are prerequisites to the due performance of judicial office.

Application:
6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

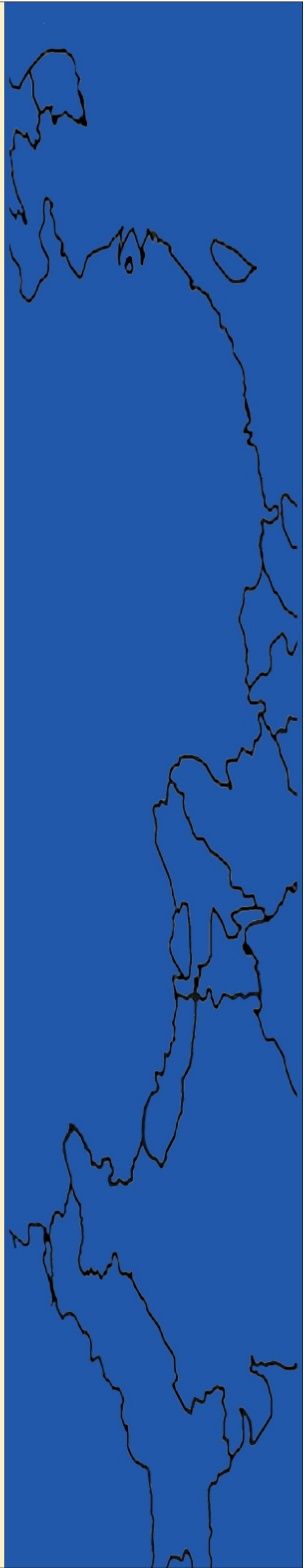
In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"*Court staff*" includes the personal staff of the judge including law clerks.

"*Judge*" means any person exercising judicial power, however designated.

"*Judge's family*" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"*Judge's spouse*" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.



This publication consists of a series of lessons, prepared by the Human Rights Correspondence School, a project of the AHRC, on the relationship between the rule of law and the implementation of human rights in Asia. The four lessons deal respectively with the rule of law and human rights implementation, the role of the police, the role of the prosecution and the role of the judiciary. Together, the lessons speak to the flaws in each of the justice mechanisms–the police, prosecution and judiciary—and using specific cases from different Asian countries, are able to show how these flaws prevent the realization of people's rights. The cases include prison officials in India setting a prisoner on fire for daring to complain about poor prison conditions, a torture victim in Sri Lanka killed one week prior to testifying in court against his torturers, court orders in Nepal routinely ignored by the military and the attorney general of Indonesia refusing to investigate and prosecute gross human rights violations. The value of these cases–as they speak to systemic flaws–is enhanced by the inclusion of relevant international and domestic provisions as appendices.

(*From the Introduction*)

Human Rights Correspondence School
Asian Human Rights Commission (AHRC)
19th Floor, Go-Up Commercial Building
998 Canton Road, Mongkok, Kowloon
Hong Kong SAR, China
Telephone: +(852) 2698-6339
Fax: +(852) 2698-6367
Email: hrschool@ahrchk.org / ahrchk@ahrchk.org
Web: www.hrschool@ahrchk.org / www.ahrchk.net