

## 2.0 AHRC statement: Protection of human rights in non-rule of law countries

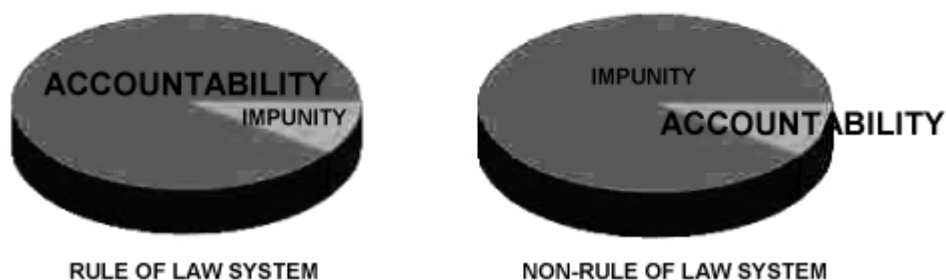
The celebration of the 60th anniversary of the Universal Declaration of Human Rights is a grim reminder that even after 60 years of its adoption, the gap between what is declared and what is actually achieved in terms of human rights protection is enormous. Both in the fields of civil and political rights as well as economic, social and cultural rights, people living outside developed democracies have so little to celebrate. It would therefore be prudent, on this occasion, to critically examine the real situation faced by the people and resolve to address the problems depriving them of their declared rights rather than celebrating in a self congratulatory fashion.

A meaningful discourse on working towards the realization of the rights declared in the Universal Declaration requires that distinctions are made regarding problems faced in countries other than developed democracies, as well as the way to resolve them. The grave impediments to the realization of human rights in these countries need to be articulated, agreed upon and resolved through global efforts.

A major such impediment in Asia is the defective justice administration system in most countries. There is a clear distinction between the justice administration system in countries where the rule of law exists, and the system found in many Asian countries, as depicted below.

### 2.1. A comparison between the administration of justice system in a rule of law country and those found in non-rule of law countries

#### A comparison between the administration of justice system in a rule of law country and those found in non-rule of law countries



This diagram shows that even in a developed rule of law system, defects can exist, as indicated by contemporary experiences about the Guantanamo Bay detention centre, the introduction of laws in most European countries and the United States restricting bail conditions for suspected terrorists, the introduction of various modes of surveillance, as well as the failure of courts to strongly defend individual freedoms.

Despite this, to compare justice administration systems in many Asian countries with the system found in a developed democracy would be misleading and would prevent a proper analysis of the problems faced in these jurisdictions.

As indicated by the diagram, while there can be defects within a rule of law system, these can be dealt with within a well established policing, prosecution and judicial framework, supported by viable public opinion and protest. In the non-rule of law model however, there is a situation of overwhelming lawlessness, with only a few institutions maintaining a semblance of rule of law. In such systems, institutions and individuals operate in a framework where rule of law is not considered important at all. Limited past developments regarding the rule of law are modified by political systems seeking absolute power.

What is important to note here, is that there can be no meaningful comparison of the limitations on individual freedoms within the two systems described above. To elaborate, let us take the case of Guantanamo Bay. The Guantanamo Bay detention centre was established to deprive prisoners taken by US agencies of the rights available within the US justice system. In other words, a strong and comprehensive justice system exists in the US, but certain persons are deliberately being denied the rights available within that system. Those wanting to fight against such denial have many alternatives, foremost being the abolition of the detention centre and bringing its detainees under US law. To achieve this objective, individuals and groups can resort to various avenues available for the freedom of expression, recourse to the courts as well as the electoral system. In the recent presidential elections, both candidates promised to abolish the Guantanamo Bay detention centre.

Dealing with a similar problem in a non rule of law system is far more difficult, with few avenues for redress available. Moreover, in many countries arrested persons are not kept in illegal prisons like Guantanamo Bay, but are forcibly disappeared or extrajudicially killed. Remedies such as habeas corpus and other applications to courts are defeated by delays in adjudication, witness intimidation and the destruction of evidence. Ultimately, a non rule of law system has no avenues to resolve politically motivated illegal arrests and detention. In such a system, the space available for creating and expressing public opinion is also limited. Newspapers and electronic media are subjected to severe restrictions, while limitations of the legal system, combined with restrictions on freedom of expression allow the state to develop propaganda justifying its actions and to label dissenters as traitors.

The electoral process is so manipulated in these systems, that far from being used to change governments, it is used by authoritarian regimes to secure their power.

Given the consensus that non-rule of law systems do in fact function in the manner outlined above, there is little meaning in holding up a superior model and stating that it should be adapted. Such an approach is intellectually evasive and morally timid; anyone with even some ground knowledge of these systems is aware that the mere restatement of ideals cannot alter existing realities. In fact, using such an approach is to behave like a patient with the phantom limb syndrome, where an individual believes that

an amputated limb is still attached to their body. To live in a non-rule of law system and work as if it is a rule of law system amounts to the same form of delusion.

Rather, it is necessary to accurately articulate the problems faced in these systems, such as brutal policing, politicized prosecutions, corrupt judiciaries, authoritarian political systems and restricted freedom of expression. Only with a thorough understanding of the problems, can attempts to resolve them be made.

## **2.2 Institutional reform key for human rights protection**

The serious defects in Asia's justice administration mechanisms mean that human rights work in the region should focus primarily on institutional reforms for the police, prosecution and judiciary. Previously, human rights related work has concentrated on education and the search for redress for individuals. These may make sense in developed rule of law systems, but have little impact in countries where institutional flaws defeat the possibility for individual redress, or for education and training to be put to good use.

Government human rights initiatives often request donor agencies to provide various forms of training, including for the police, prosecution and judicial institutions. When institutional defects are so overwhelming that the training of a few individuals is irrelevant to the normal (dys)functioning of the institution, such investments do not produce the expected results. Police officers who are given training in forensic science can do little investigative good for instance, if the system they work within does not operate on the basis of equality before law, granting impunity to many offenders, and ensuring their crimes are never even investigated. No amount of forensic training can alter this institutional practice of setting some persons above the law. Similarly, human rights education being imparted to state officers is of no value when the institutions meant to protect human rights are so politicized that they work to violate the rights of certain categories of persons. Experiences from several countries demonstrate a waste of resources invested in such reforms.

National institutions within the region, known as national human rights commissions, indicate a similar problem. Fundamental flaws in justice institutions leave little room for these commissions to work towards human rights protection; they cannot take the place of the police, prosecution and judiciary. The European concept of the ombudsman, developed after a well established system of justice administration was in place, cannot work in countries where basic justice institutions are flawed.

The considerable investments made by donors in such national institutions were thus doomed to failure due to basic institutional defects that must first be addressed. In fact, these national human rights commissions in a non-rule of law country can be nothing but a phantom limb.

It is thus clear that without improving the functioning of the police, prosecution and judiciary, there can be no effective promotion and protection of human rights. Improving these institutions requires an understanding of the political, social, cultural and legal aspects that have created the obstacles preventing their proper functioning. It also requires public support, for which human rights groups need to engage civil society by exposing the defects and creating relevant debates. Such exposures should include both the wrongdoings and the omissions of the justice system. These have to be thoroughly researched and documented, to ensure that the government cannot easily deny these violations as

inaccurate or false. Human rights groups need to develop sophisticated mechanisms allowing them to communicate these exposures to large audiences locally and globally.

## **2.3 Policing institution's preeminence has damaged the justice system**

A well functioning justice administration system ensures a balance between the investigations into crime, the prosecutions of crimes and the criminal trials where a judicial function is exercised. Such a balanced system has been envisaged in the legal texts of many Asian countries, most of which were introduced under the influence of colonial powers, and which make use of progressive and democratic jurisprudential developments. These texts therefore include safeguards against the police gaining a preeminent position within the system and diminishing the effectiveness of the prosecution and judicial branches. There is a vast gap however, between the legal text and actual day to day operations throughout the region.

The extent to which the police dominate the justice system in many places is scandalous, and leaves little room for the proper implementation of law or obtaining justice. Police abuse of power encourages widespread corruption and easy exploitation of the policing system by political and other elements of society. In many cases for instance, there is a close nexus between criminals and the police, posing serious threats to people's security.

The police investigating capacity can be undermined through the complaint receiving mechanism and the criminal investigations. The receipt of complaints is the beginning of any inquiry into crimes; unless complaints are received promptly and efficiently by a user friendly mechanism, much of the information and evidence needed to prove a crime can be lost. There are various ways in which the police can place obstacles in the making of complaints, from extortion to a lack of protection for victims. Indirectly, when people realize they may face greater reprisals after making complaints, or making complaints does not lead to any positive result, people often refuse to make complaints. This is actually more effective in maintaining silence and a climate of fear than any direct obstacles.

Incompetence and impartiality will undermine the investigation process and reduce the possibility of achieving justice. Large numbers of policemen are often required for purposes other than investigation, such as providing security to VIPs. After lengthy periods of undertaking such duties, their investigative skills are underdeveloped. And yet, these same persons are given investigative responsibilities, while good investigators often face punishment transfers, other forms of reprisals or even death. Incompetence is thus not only a result of the absence of capable and trained personnel, it is also a result of deliberate internal policies that value political loyalty and compromise far more than competence and professionalism. It is not uncommon in many Asian countries to find investigations hampered by powerful interest groups and corrupt state officials.

Another instance when investigations are deliberately prevented are when the state itself encourages the police and military to engage in large scale rights abuse such as extrajudicial killings and torture. In these circumstances, the state directly or indirectly approves impunity by creating enormous obstacles for investigations into these abuses. This happens when emergency regulations and anti-terrorism laws are in place.

The possibilities for subverting both complaint-making and investigative procedures are directly related to the loss of effective command responsibility within the policing system. The police hierarchy often subordinates itself to politicians, thereby becoming an obstacle to rule of law. Such subordination may be due to the police believing circumstances to be beyond their control, or because they wish to acquire greater power and personal benefits. Once the chain of command responsibility is damaged, junior officers will also develop their own methods of gaining benefits from the system. In this way, personal gain and influence takes prominence over public interest.

The predominance of the police within Asian justice systems is the single most important factor obstructing the proper administration of justice. It is therefore not possible to achieve any improvement in the protection of the rights of individuals without addressing this factor.

## **2.4 Lack of funds allocated for justice administration**

When budgetary allocations for the administration of justice are compared to other areas, justice administration clearly appears as a neglected item. The funds allocated for proper policing, prosecution and an effective judiciary are so inadequate that they predetermine the failures of these institutions.

Military budgets often far exceed justice administration budgets, which has a doubly adverse impact. The vast allocation of funds lends the military national importance, while diminishing the police and other justice institutions. Like characters in Alice in Wonderland, the public image of the military grows taller, while the institutions of justice, education, health and the like grow smaller. At the same time, a climate of impunity is necessary for the military to gain the upper hand; this only serves to diminish the supremacy of law and its related institutions.

One of the reasons for the lack of adequate funding given to justice institutions is that they are seen as a hindrance in winning the war against terrorism. Sri Lanka's former junior minister of defence succinctly noted in parliament that counter terrorist measures "cannot be done through the law". Throughout the region, judicial independence is seen as an obstacle to the defeat of terrorism. The view taken by Great Britain during the Second World War, that victory could be assured only if the courts were independent and functioning, is not popularly shared today.

Similarly, rule of law and judicial independence are not considered essential for economic and social development. Given such views, it is not surprising that many governments willingly postpone any reflections regarding the improvement of the administration of justice.

It is therefore important for the human rights movement to prioritize the issue of adequate budgetary allocations for justice administration. Without better funding, much of the discussions and work on human rights will not result in practical results. Local and international advocacy should thus be directed towards achieving this goal.

## **2.5 Problems faced by the prosecution system**

A proper prosecution system requires the following conditions:

- A credible system of receiving complaints;
- A credible system of investigating complaints;

- A credible system of prosecution;
- A credible system of defence for the accused;
- A credible system of witness protection; and
- A credible system of judicial independence.

The absence of these conditions seriously affects the prosecution systems in Asia. In fact, in many cases these systems were not created to deal with state officers guilty of human rights violations, but merely to deal with criminals from mostly lower income groups.

Equality before law has not been realized in many societies, allowing powerful individuals and businesses to remain above the law. The prosecution systems of these countries do not have the will to address issues relating to wealthy and influential persons, or to deal with bribery and corruption, which is often linked to state officers. For this reason, the prosecution systems only deal with cases competently when they involve less powerful social groups. An increase in executive control of the prosecution also weakens the system.

In other instances, the prosecutor's failure to take effective action in various cases is justified by the misinterpretation of legal doctrines; for instance, prosecutors often justify their lack of action when police do not investigate a crime or rights violation and provide them with a case dossier, by stating that they are required to be 'neutral'. In fact, such a claim to neutrality allows prosecutors to perform their responsibilities in a selective manner. The different legal doctrines (mis)used by prosecutors should be documented and exposed.

## **2.6 Absence of effective witness protection**

Most Asian countries have no effective means of witness protection, without which it is nearly impossible for witnesses and victims to provide testimony, which in turn is a crucial component of the justice process. A major reason for this absence is that witness protection requires a credible policing system. When the policing system itself is used to kill and harass witnesses, there is no possibility of protection.

## **2.7 Attacks on lawyers**

The predominance of the police within the justice system serves to directly weaken the position of lawyers. Lawyers who want to be successful in criminal law need to collaborate with the police, and even have to act as intermediaries to carry bribes to the police and others.

Those who refuse to play such roles generally face harassment and intimidation, to the extent that their clients feel compromise is the only relief they can find within the system. The situation is worse for lawyers undertaking cases against state authorities, who become direct targets for attack by the police and others who feel threatened.

## **2.8 Pervasive corruption**

The overwhelming corruption affecting the administration of justice in the Asian region is clearly indicated by the following anecdote: at the end of a lecture on the prevention of corruption by a senior

lawyer, one law student asked, "Sir, when I join a chamber to practice law, if I am given some money by my senior lawyers to carry to the judge, what do I do?"

This question sums up the pervasiveness of corruption within the system, with it becoming a business that benefits the police, lawyers, their touts and even judges.

Corruption invariably worsens when dealing with human rights violations. A policeman accused of torture for instance, may develop a relationship with a judge directly or indirectly, providing him with various benefits, greater than what usual clients can provide. While a torture case may proceed in court therefore, the relationship between the judge and the accused police officer will negatively impact the case proceedings as well as the entire justice system.

It is hence impossible to weaken the predominant position of the police without developing anti-corruption agencies outside the policing system. The human rights movement should therefore make the struggle against corruption a core part of its agenda. The Independent Commission against Corruption of Hong Kong (ICAC) is looked to with enthusiasm by many parts of the world as a credible model to be assimilated into local legal systems.

## **2.9 Linking the promotion of economic, social and cultural rights with resolving the fundamental problems of justice administration**

The majority of Asian populations, belonging to lower income groups, are kept powerless by being denied justice within a functioning legal system. This denial also ensures that they have no capacity to assert their economic, social and cultural rights.

The question of entitlements in terms of economic, social and cultural rights is meaningful only when the justice system allows those deprived of these rights to express their grievances and seek redress. People deprived of their right to work need to find ways to highlight their condition and get the authorities to resolve them. People deprived of their rights to education and health need to have avenues through which they may influence public opinion and obtain the necessary measures that respect, protect and fulfill their rights. If the justice administration system is defective however, various reprisals will exist to suppress people who demand bread, medicine, schools and basic protection for their young. In another sense, maintaining a defective justice administration system also includes the maintenance of slavery-like living conditions.

It is quite obvious that without functioning justice systems, all attempts to improve human rights protection will appear as nothing but loud noises. Throughout the Asian region, ordinary folk react to human rights discourse with little enthusiasm due to their realization that their defective justice administration systems will not allow them to enjoy their rights.

We therefore urge the global human rights community to seriously consider this issue during this celebration of the Universal Declaration of Human Rights, and support a human rights strategy that prioritizes institutional development.

The passing of the 60th Anniversary of the Universal Declaration of Human Rights (UDHR) was a grim reminder that even after 60 years of the adoption of this great declaration the gap between what is

declared and what is actually achieved by in terms of the rights protection of people is enormous. Both in the field of civil and political rights as well as economic, social and cultural rights people in Asia, and in fact, the people who live outside developed democracies have so little to celebrate. Rather than selfcongratulation, it is necessary to critically examine the real situation faced by the people, improve understanding, and resolve to address the problems depriving people of the rights declared as theirs.

If there is to be a meaningful discourse on the future of the work towards realizing the rights declared in the Universal Declaration on Human Rights, sharp distinctions must be made about the problems faced in countries outside developed democracies and the way to resolve these. There are grave impediments to the realization of the UDHR in these countries, which need not only to be articulated and agreed upon, but also require global efforts to address them.

The major impediment to the realization of the rights declared in the UDHR in Asia is the seriously defective justice administration system in each of its countries. These serious defects of the administration of justice may be related to political and other reasons. However, without dealing with these defective systems the protection of human rights in the region will remain pie in the sky.

As a prelude to a discussion on dealing with this problem the Asian Human Rights Commission thinks it necessary to state this problem more clearly by setting out the distinction between the administration of justice system in countries where the rule of law exists as against those found in most Asian countries.