August 2003 ▪ Vol. 2 , No. 4

article 2

2(3). Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

A sister publication of Human Rights SOLIDARITY

About *article 2*

article 2 aims at the practical implementation of human rights. In this it recalls article 2 of the International Covenant on Civil and Political Rights (ICCPR), which reads,

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

This is a neglected but integral article of the ICCPR. If a state signs up to an international treaty on human rights, it must implement those rights and ensure adequate remedies for persons whose rights have been violated. Mere talk of rights and formal ratification of international agreements has no meaning. Rights are given meaning when they are implemented locally.

Human rights are implemented via institutions of justice: the police, prosecutors and judiciary. If these are not functioning according to the rule of law, human rights cannot be realized. In most Asian countries, these institutions suffer from grave defects. These defects need to be studied carefully, as a means towards strategies for change.

Some persons may misunderstand this as legalism. Those from countries with developed democracies and functioning legal systems especially may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

After many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia. Relevant submissions by interested persons and organisations are welcome.

Contents

Pakistan's law on preventive detention defies the Constitution

Ijaz Ahmad, Judicial Magistrate, Pakistan

Every one of us has to abide by the rules and regulations of our society. This not only ensures our safety as individuals but also the integrity of our communities. A national constitution should serve as the guide, establishing both the rights and obligations of citizens. And indeed, the Constitution of Pakistan has introduced regulations and extended fundamental rights to its citizens intended to ensure a just and stable society. However, over the past 55 years, laws have been introduced containing provisions that negate the fundamental rights of citizens guaranteed at independence. Among these are the regulations on preventive detention in the Criminal Procedure Code.

Being part of the judiciary, I have some personal observations about the provisions of Pakistan's criminal law, its practical application, and what can be done by way of reform. But before going into those details it is necessary to begin by noting some of the constitutional provisions alluded to above.

Fundamental rights under the Constitution

The 1973 Constitution of Pakistan makes clear that any law running contrary to its provisions shall be invalid. Under Chapter II, on fundamental rights, article 8 stipulates that

> (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law, which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

Article 8 was inserted not only to deal with legislation introduced after the Constitution, but also with those laws already in existence that violate fundamental rights. In either case, such laws would be void to the extent of the inconsistency. On preventive detention in particular, article 10.4 provides that

> No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services, and no such law shall authorise the detention of a person for a period exceeding three months [amended to one month in 1975] unless the appropriate Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of [one] month, unless the appropriate Review Board has reviewed his case and reported, before the expiration of each period of [one] month, that there is, in its opinion, sufficient cause for such detention.

"Chapter XIII of the CrPC totally negates the spirit of the Constitution as it allows a person to be locked up for failing to submit a bond"

Article 10.4, then, governs preventive detention by

- First, explaining under what circumstances preventive detention is permitted;
- Secondly, prohibiting the making of laws for preventive detention that fall outside of these circumstances;
- Thirdly, limiting the period of preventive detention to three months unless certain conditions for judicial review are met.

Preventive detention under the Criminal Procedure Code

In spite of the above directives, Pakistan's Criminal Procedure Code (CrPC) contains sections that permit preventive detention in defiance of the Constitution.(For further discussion on the Criminal Procedure Code, see Ijaz Ahmad, 'Pakistan criminal law needs amendments: A proposal', *article 2*, vol. 1, no. 5, October 2002, pp. 10–17.) If the Constitution is to be followed in its true spirit then they ought to be deleted, for the police and courts following them are violating citizens' fundamental rights. In fact, the number of arrests under preventive detention provisions now exceeds arrests for substantive offences. The lower judiciary—lacking any powers, as the power under article 199 of the Constitution lies with the High Courts—has to obey the CrPC, even if in so doing it violates the fundamental rights of an individual and acts inconsistently with the Constitution.

Chapter XIII of the CrPC, pertaining to security for keeping peace and good behaviour and preventive actions, totally negates the spirit of the Constitution as it allows a person to be locked up for failing to submit a bond. Sections 107–10 empower a magistrate to take cognizance against a person with regards to whom information has been received that this person is likely to commit a breach of the peace, disturb tranquility or do any wrongful act. Action may also be taken against such a person as conceals his or her presence for the commission of an offense or is an habitual robber, receiver of stolen property or similar. The magistrate then requires this person to show cause as to why he should not be ordered under section 112 to execute bonds for keeping the peace for three years in cases under sections 107, 109 & 110, and one year under section 108. The person against whom the information is received is required to submit bonds in two stages:

"The Constitution does not mention anything about preventive detention for failure to provide a security bond; on the other hand, it has clearly ordained that any law inconsistent with the citizens' fundamental rights is void to the extent of such inconsistency"

- First, under section 107 a bond must be submitted to keep the peace until the conclusion of an enquiry about the information;
- Secondly, under section 118 if the information is proved bonds must be submitted for the periods specified above under sections 107–10.

Under section 117, when a magistrate orders a person to furnish bonds but for whatever reasons the order is not met, this person can be kept under preventive detention and is imprisoned until all requirements are satisfied. If the enquiry is not concluded within one year, for instance, the person remains behind bars. On conclusion of the enquiry, if the information is proved correct the magistrate is bound under section 118 to ask for fresh surety. If again the person defaults, under section 123 imprisonment follows for the period for which the surety is to be given under sections 107–10. There is no provision for a person who has already been kept in preventive custody under section 117 to be exempt from imprisonment in default of a bond under section 123.

Article 10.4 of the Constitution does not mention anything about preventive detention for failure to provide a security bond. On the other hand, it has clearly ordained that any law inconsistent with the citizens' fundamental rights is void to the extent of such inconsistency. In this case, sections 117 & 123 of the CrPC have abridged the fundamental right to freedom of movement, and it should be deleted.

The criminal law relating to preventive actions also has no regard for the key legal principles of *auterfois convict* and *auterfois acquit*. Under *auterfois convict*, a person who has been detained for default on a security bond who later commits the offence for which he or she was preventively detained should have the period of preventive detention deducted from the subsequent sentence. Under *auterfois acquit*, where a magistrate has found the information leading to an initial order to be false, if the accused person later commits the offence about which the information had previously been given, this person can use the magistrate's acquittal order in his or her defence. Neither of these principles is available to persons subject to preventive orders. The rationale for this denial is that extension of *auterfois convict* and *auterfois acquit* to persons subject to preventive actions would then give such persons a free hand to commit the offence, and proceedings under sections 107–10 would prove compelling rather than preventive.

A comparison with 'anticipatory crimes' under American law

Under American law, preventive actions are called 'anticipatory crimes'. Anticipatory crimes include certain activities relating to the criminal act itself. These include attempts, solicitation and conspiracy to carry out the said act. Under American common law, the crime of attempt consists of the intent to commit an act

or to bring about certain consequences that would amount to a crime, and some act in pursuance of that objective, which goes beyond mere preparation. One may not later be convicted of both the contemplated crime and an attempt to commit it: the latter is said to merge into the former. For its part, solicitation includes efforts to advise, incite, order or otherwise encourage a person to commit a crime.

In the criminal law and procedure as is in vogue in South Carolina, these acts are punishable because the persons who engage in them have shown themselves to be dangerous and must be discouraged from committing the crime in future. Also, since the anticipatory offence is itself punishable, it is permissible for the police to intervene and arrest the accused before the substantive offence has been committed. This early police intervention can save lives and property by nipping the criminal enterprise in the bud.

By contrast, under section 151 of the CrPC of Pakistan the police are empowered to make arrests without warrants if they claim to know of a design to commit any cognizable offence, irrespective of whether or not the person involved has committed any anticipatory crime. Yet legally speaking any arrest must be justified by probable cause, which means that the arrestee must have committed the crime for which he is being arrested. If a person is arrested under section 151 and the police later recover evidence suggesting that the person was guilty of the alleged crime, this recovery should be inadmissible, as evidence of probable cause must precede, not follow, the arrest. However, in Pakistan any alleged act that leads to a preventive order is treated as a substantive crime in itself, in contrast to the American law, which only knows conspiracy attempt and solicitation as anticipatory crimes.

Conclusion

All of this leads to the conclusion that crime in Pakistan could be prevented without Chapter XIII of the CrPC, and that the provisions it contains are designed not to stop criminals but rather to harass innocent people who cannot otherwise be targeted. The framers of the Constitution explicitly banned legislation relating to preventive custody except for that permitted by the Constitution itself. Unfortunately we take things as they are. We do not pay heed to the implications.

Is the supposed prevention of crime more sacred than our fundamental rights? Then it should be written into policy that all citizens of Pakistan must furnish security bonds for their entire lives, to maintain peace and tranquility. The parents of a newborn baby would submit security on the child's behalf until age of maturity, when the obligation would transfer to the adult person. Presumably, such a policy of absolute prevention would ensure a crime-free tranquil society. It would at least uphold the principle of equality before the law.

"Is the supposed prevention of crime more sacred than our fundamental rights? Then it should be written into policy that all citizens must furnish security bonds for their entire lives, to maintain peace and tranquility"

In law there is no crime until an offence has been committed. To oblige a person to furnish a security bond simply on the grounds of supposed information on a possible offence—and then to imprison such a person in the event of default—is unjust. The parts of the Criminal Procedure Code of Pakistan that permit such preventive actions urgently need the attention of law reformers. They must be struck down as violations of the Constitution, the cardinal principles of criminal law, *auterfois convict* and *auterfois acquit*, and Pakistani citizens' fundamental rights.

India's graduate schools of crime

Bijo Francis, Advocate, Kerala, India

The condition of the jails in India is deplorable even in comparison to any of its other basic public facilities. The money spent on jail reforms and development of their basic amenities is negligible by comparison to the amount spent renovating the residences of "honourable" ministers and restructuring their legislative assemblies. The government of India organizes welfare schemes for cows, but ignores the plight of millions of citizens languishing in custody under horrifying conditions. It is common to find convicts and pre-trial prisoners held together in crowded cells, without proper facilities for basic human existence like fresh air, moving space, decent food, clothing, medical attention and communication. Many experience murder, torture and other abuses at the hands of cellmates and the authorities. This article outlines just a few of the daily abuses that go on within India's prisons, based on the personal observations of the author, and authoritative accounts by others.

Juvenile prisoners

The Prisoners Act of 1900 (Act No. 3 of 1900) regulates India's prisons and all aspects of prisoner management to this day. State governments may also legislate wherever permitted by this Act. Apart from the Prisoners Act, all states except for Nagaland have acts on children that provide for management of juvenile prisoners.

Despite having legislation to protect juvenile prisoners, children committed to prisons in India experience extreme cruelty and neglect. Many are locked away with hardcore criminals; by the end of their sentences they have been molded into repeat offenders. These children may be sexually abused and compelled to do hard labour. Often they must work alongside elder convicts, who make the young ones do the heavy work allotted to them. This happens in connivance with jail officials. It also goes on despite a Supreme Court ruling that care be taken to ensure such practices do not occur:

> There is possibility of contact between the hardened criminals and the juvenile delinquents if there is no proper segregation in assignment of work. We direct that due care shall be taken to ensure that the juvenile delinquents are not assigned work in the same area where regular prisoners are made to work. Care should be taken to ensure that there is no scope for their meeting and having contacts… (*All India Reporter 1988*, Supreme Court, p. 414)

"Even while imprisoned, privileged inmates may be set free to go commit an offence"

Legal provisions for counseling of children are often ignored. The government does not concern itself with appointing mental health professionals to vacant posts, and where it does invariably the persons filling them are inexperienced and ill-motivated, and so the very purpose of counseling is defeated. Children are frequently denied access to their parents, causing unnecessary mental trauma. It is also common for prison officials to demand 'gifts' from parents coming to meet their young ones.

Organized criminals

India's jails serve as lodging and recruitment centres for organized criminals. This is not merely the case after convicts are released at the end of a sentence: even while imprisoned, privileged inmates may be set free to go commit an offence and come back. Obviously, this is only possible with the knowledge and blessings of the prison officials, many of whom are on criminal payrolls. Corrupt prison officers also arrange preferential treatment for prisoners with connections to crime bosses. Such treatment may be the provision of entertainment—including sexual pleasures, often at the expense of another inmate's liberty and body—unrestricted movement inside the jail, and uninterrupted visitor sessions. Meanwhile, common convicts in the same jail will be denied even basic facilities.

This writer has himself witnessed organized criminals flouting prison regulations. On one visit to Viyyur Central Jail, Kerala, to interview a prisoner in judicial custody, it was astonishing to find the prisoner sitting on the edge of the jail warden's table. He was an affluent person facing an investigation on a charge under the Explosive Substances Act. He was being given special treatment together with two liquor barons who were in custody for having laced their local brews with a medical sedative, diazepam. Together these three were making a mockery of the entire system. Their food was bought from outside, and included a select menu from the best hotels in town, a share of which went to the officials and other designated inmates. The prisoner admitted spending a lot of money on food, since the number of people he had to cater for was a bit large, but said he was "managing" with some help from his two peers. Additionally, the three enjoyed freshly ironed clothes brought from home twice daily, the use of mobile phones, and comfortable beds with pillows and mosquito repellants. Meanwhile, other prisoners under petty charges were sleeping on the floor with nothing provided.

Complaints

Jail rules often provide for inspections by higher officials, and sometimes by judges or the State or National Human Rights Commissions. During these inspections, however, inmates are not in a position to make complaints, since jail officers accompany the visitors. Anyone daring to make a complaint faces the consequences once the inspection is over. In a case reported from the Viyyur Central Jail, contraband drugs were allegedly seized from a convict. However, at the trial none of the prison officers could explain how the accused might have come into possession of the drugs. The defense counsel argued that the accused was being falsely implicated because he had tried to lodge a complaint about prison conditions when a local magistrate made a visit to the jail. The judge acquitted the accused and blamed the jail authorities for victimizing inmates who dared to complain. He urged the government to take adequate steps to put an end to this practice.

In Kerala, every jail houses a complaint box. The lock and key of the complaint boxes, however, remained in the custody of the jail wardens or superintendent, who would deliver its contents only after a thorough inspection and filtering. When some judicial officers also in charge of the jail inspection panel noted this, they issued orders that the lock be sealed, and only opened in court under the inspection of the court registrar. They also made orders to ensure that paper and pencils be provided with which to write complaints, as these had often been deliberately ignored by prison officials.

Civil rights

In a country where the privacy of free citizens is often at stake, it comes as no surprise that prison inmates have virtually none at all. Jail wardens read all letters coming in and going out. Although done on the pretext of ensuring security, this is an unquestionable intrusion into inmates' civil rights.

Prisoners are also denied the right to vote while in jail. Referring to the provisions of the Representation of People's Act and the Constitution of India, the Supreme Court rejected an appeal against this ruling, holding that

> The right to vote is subject to the limitations imposed by the statute, which can be exercised only in the manner provided by the statute. The challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of challenge to the validity of sub-sec. (5) of S. 62 of the Act is, therefore, not available. (*All India Reporter 1997*, Supreme Court, p. 2814)

Ironically, while convicts—or even just those being detained pending an inquiry into a petty offence—are being denied the right to vote, many of those holding seats in legislative bodies have criminal backgrounds. Prior to an amendment brought into section 8 of the Representation of People's Act, a person could contest elections even if they just walked out of jail. The

"Ironically, while convicts are denied the right to vote, many of those holding seats in legislative bodies have criminal backgrounds"

"The courts directed state governments to make provisions for an adequate wage for prison labour, but it is often not even seven per cent of the minimum wage legislated for non-convicts"

amendment prescribed a six-year period of limitation on convicted criminals seeking retrial. It is a silent admission of the fact that many legislators have criminal backgrounds. However, these persons have little difficulty in finding their way back into politics. For instance, in Bihar the former Chief Minister Mr Laloo Prasad Yadav could not contest his election since he was facing several charges, and in Tamil Nadu too, the Chief Minister Ms Jayalathia faced a similar problem. Both managed to get a puppet candidate to contest the election on their behalf. While the minister from Bihar could not manage the tangle he was in, the minister from Tamil Nadu had her charges quashed. She immediately had one of her associates resign, staged a by-election, and is now again enjoying the post of Chief Minister. If the criminal behaviour of the political elite can be excused through technicalities, what worse could happen if prisoners are simply allowed to cast their votes?

Economic exploitation

Prisoners are also good business. In Tihar Jail, women inmates are taught knitting and sewing, and their products are sold outside, even abroad. Ms Max, whom some inmates describe as a social worker-cum-business woman, brings the raw materials and pays the inmates according to their work. Some inmates manage to earn up to Rs 1000 [US$ 22] a month. A pair of multi-coloured stockings earns Rs 70, while each glove knitted with jute fetches Rs 40. Last year the inmates made 3000 pairs of stockings between April and December to meet an export order. This year they are making gloves, and samples for Christmas stockings as well. The inmates do not know how much Ms Max gets at the other end. Although this could be viewed as an example of rehabilitation, it also has a hidden profit motive of pure business.

While the prisoners in the above case are getting some remittance for their work, most inmates are not so lucky. Forced prison labour is common throughout India. When the practice was challenged in the Supreme Court, it ruled that prisoners are also entitled to minimum wages, and directed states to make the necessary provisions accordingly. When the question was argued at length, counsel appearing for the state argued that state governments should be allowed to deduct a certain amount for providing basic amenities to prisoners. The implication of this argument was that it is not the duty of the state to keep the prisoner, but rather the obligation of the prisoner to pay for himself. Upon final consideration, the court directed state governments to make provisions for an "adequate wage" for prison labour (*All India Reporter 1998*, Supreme Court, p. 3164). Unfortunately, the "adequate wage" is often as little as Rs 14 for skilled labour and Rs 9 for unskilled labour, that is, not even seven per cent of the minimum wage legislated for non-convicts.

Violence, torture and death

Maltreatment of convicts is common throughout India. In Kerala, for example, every male convict entering prison must face the ordeal of 'jail call'. Immediately on arrival, the prisoner is told to bend down, after which a few heavy blows are delivered, causing serious pain along the length of the victim's spine. The inmate's cries of pain can be heard throughout the prison, and so this is known as the 'jail call'. While female inmates do not get this treatment, they suffer continuous ill treatment throughout custody, often including sexual harassment and rape. In fact, a judicial commission of enquiry in Kerala found that not only female inmates but even female visitors are sexually exploited by prison officials, the latter having to gratify the authorities to get permission to visit their dear ones. The commission also found that the Viyyur Central Jail doctor had not turned up for a year, and that pretrial prisoners and convicts were being put together. One inmate was under solitary confinement even though in judicial custody. Before leaving, a member of the commission ordered the authorities to remove the prisoner from solitary confinement, which they agreed to do immediately. A surprise inspection the next day revealed the same person in the same cell, held alone. One of the members of the commission, Justice Cheriyan Kuriakose, observed in his report that

> The present intramural institutionalization of an offender has proved to have done much harm than good, especially in the case of short-termers, as they come out after their detention period with a diploma in crime.

"In Kerala, every male convict entering prison is told to bend down, after which a few heavy blows are delivered, causing serious pain along the length of the victim's spine"

The inhumane conditions within jails often result in riots, such as that reported in Chennai Central Prison on 17 November 1999, which resulted in at least nine dead inmates and around 100 injured. In that instance, the torture and murder of prisoners, and generally appalling conditions at the jail, precipitated the violence. According to a report by the International Environment Law Research Centre,

> The prisoners claimed to a fact-finding team that the rebellion had already come under control when anti-riot police were brought in and prisoners were indiscriminately targeted. For instance, a prisoner who was physically disabled, and could not have posed any threat to the police, was shot at point blank range (International Environment Law Research Centre, 'Human Rights in India: A mapping by Ms. Usha Ramanathan', IELRC Working Paper No. 2001-3)

The UN Convention against Torture condemns all forms of inhuman treatment, including custodial torture. Despite pressure from the international community and non-governmental organizations, India has not taken any steps to ratify this Convention. The lame excuse often put forward is that the Criminal Procedure Code, Evidence Act, and Constitution have built-in defences against torture. In this regard, the Supreme Court has held that

"The Indian prison system has been run down into a rut of neglect and inertia"

> Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rules of Law... Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government became lawbreakers, it would be bound to breed contempt for law and would encourage lawlessness, and every man would have the tendency to become a law unto himself, thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic "No". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law… (D K Basu vs. State of West Bengal, in *All India Reporter 1997*, Supreme Court, p. 610)

If this solitary judgment is expected to provide the answer and remedy to the situation then the following questions also need some credible answers:

1. How far can a person depend upon the same department and same system of investigation if that person suffers custodial violence?
2. Can the victim expect an impartial inquiry?
3. How could the system, which ultimately depends upon the police charges, be able to deliver justice to the victim in such a case?
4. Given the financial and other conditions of an average Indian citizen, how far can a person fight a legal battle and expect justice if the whole prosecution case in an allegation of torture depends upon a police charge?

The questions are rhetorical, but there is one valid answer. India has to ratify the Convention against Torture and legislate upon it.

When the police are blamed for gross human rights violations, many stories are brought to light by courageous relatives of the accused. By contrast, the suffering within Indian prisons is much less easily exposed. Despite repeated intervention by State and National Human Rights Commissions, and even by various constitutional courts, the Indian prison system has been run down into a rut of neglect and inertia. Within it, our fellow human beings sink unattended and violated, their lives entirely subject to whatever fates await them.

Unconventional and arbitrary detention in Burma

Burma Issues & Altsean-Burma

Across Burma [Myanmar] people are arbitrarily detained on suspicion of supporting illegal associations. In Burma's conflict zones these arbitrary detentions are inextricably linked to accusations of support to ethnic nationality opposition groups. Those accused are detained, tortured and sometimes killed with no warrant, charge or legal process.

There are various international laws and covenants that cover the treatment of detainees and prisoners. These regulations can be seen as broad and lacking specific definition. They are nevertheless indicators of how authorities should treat persons detained or imprisoned, and should be backed up by more specific national laws.

In Burma the implementation of such national law lacks adherence and current relevance, particularly to areas of ongoing civil war and related conflict. The Jail Manual consists of codes of treatment and management within Burma's prisons system. Its implementation, though, is far from satisfactory or adequate. Detention or imprisonment in unconventional detention centres such as military bases and villagers' homes, lacks acknowledgement of both Burmese and international law.

The length and place of detention are not defined in international regulations relating to arbitrary detention such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. However, according to the UN Working Body on Arbitrary Detention, the deprivation of liberty is arbitrary when a case falls into three categories: when there is no legal basis to justify the deprivation of liberty, when the deprivation of liberty violates certain articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and when international norms relating to the right to fair trial are ignored or only partially observed.

This article was compiled using material from a report issued by Burma Issues and Altsean-Burma, *Uncounted: Political prisoner's in Burma's ethnic areas*, this August 2003.

"Places of detention include houses, temples, chicken coops, holes in the ground, and public spaces such as the village football ground"

Military bases

Military bases in Burma operate in a closed environment. The torture in them goes unseen and the personnel are unaccountable for their actions, not only within the confines of their bases but also in the general community. They are free to punish at will and extract information by whatever means they desire. For example, four men from Myitta Relocation Camp in Myitta township, Tenasserim Division were accused of supporting the Karen National Union (KNU) in December 1999. They were detained by Major Theung Kyi from Military Intelligence and had plastic bags placed over their heads to suffocate them. The soldiers then rolled bamboo along their shins and afterwards kicked them in the shins. They were tortured like this for two days.

The International Committee for the Red Cross has gained access to detainees in conventional centres under Burma's Ministry of Home Affairs, such as prisons and some labour camps and police stations. It has been given some freedom to monitor the treatment of detainees in such centres, although it still encounters some problems and limited access. Unfortunately, even this limited mandate does not extend to those detained in the military bases of Burma's border areas.

An added problem is the structure of the Burmese military and the rotating battalions that come and go from these bases. A battalion responsible for detention, torture and killing during one month may not be at the same base by the next month. Light Infantry Battalions come to an area for a short period of time: a week, a month, and then move on to other areas. When villagers complain of actions by the military they are confronted with denials that the accused battalion was even in the area at the time.

Villages and other locations

If persons detained are not taken away to military bases then they are usually detained in villages. Places of detention include houses, temples, chicken coops, holes in the ground, and public spaces such as the village football ground. Persons detained by the military in villages are usually kept and tortured there as an example to others. In these cases, torture and detention are intentionally performed in front of other villagers. These acts are intended to reinforce the power and authority of the military over villagers. The key is for these acts to be witnessed by others. Usually, they are distinguished by their sheer brutality. Reported acts of torture have included binding a man naked and then tying his penis to his neck in front of other villagers, and putting a man in a hole in the ground with coconut shavings to attract red ants. In another case involving Major Theung Kyi, a victim was reportedly ordered

> To be strung to two trees like a hammock, face down, with his legs tied to one tree and his arms to the other. He was left strung like this for two days during which time Major Theung Kyi forced soldiers and villagers to sit on him like a hammock. After two days of this he died and then they threw his body into a rock hole near the relocation camp.

At the same time the man's two-year-old daughter was tied up by her legs and hung upside down. They then lit a fire under her. She was eventually cut after suffering burns.

Charges

In some cases formal charges are laid upon persons accused of supporting ethnic nationality opposition groups, but in most cases the military makes verbal accusations and no charges are actually laid down on paper. The lack of evidence to back up the charges is a major factor. There is also often a language barrier: many villagers in remote areas do not understand Burmese, and the military make no attempt to translate an accusation or charge. Many villagers are also barely literate, so written charges will not be understood.

Where charges are laid alleging that the detained person has supported an illegal organization, they are usually under Section 17/1 of the Unlawful Associations Act, which reads:

> Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, or in any way assists the operations of any such association, shall be punished with imprisonment for a term [which shall not be less than two years and more than three years and shall also be liable to fine].

Although the scope of the Act can encompass virtually any act of opposition to the government, the military tends to limit charges under this Act to those with substantiated evidence of guilt. These are usually people in areas of the country where there are also basic functioning judicial procedures, and those areas where there is a relatively greater level of monitoring of detainees. Under any circumstances, anyone charged under this Act will be detained indefinitely while awaiting sentencing, and will be sentenced without access to representation or fair trial.

In some cases, detention before trial is extended to allow friends and relatives of the detained time to raise money to pay for their release. For example, starting in October 2001 four village headmen were detained in Thantlang police station, Chin State, for four months without trial. Villagers were told to pay 700,000 Kyat (US$700) for their release, but even after the payment was made the headmen were not released. The major in charge asked for more money before he would agree to their release.

"In some cases, detention before trial is extended to allow friends and relatives of the detained time to raise money to pay for their release"

In other cases, villagers and village headman have tried to approach local military authorities through formal complaint procedures in attempts to hold the military accountable for their actions. This has received mixed responses. In many cases the military will simply ignore the request for action and in some cases added harassment and abuse will occur against the person

who has dared to question military authority. In a few cases those detained have eventually been released after complaints by village headmen or proof that the person they have detained is not guilty of the accusation. Still, there continues to be a complete lack of punishment or accountability of perpetrators of arbitrary detention, torture and extrajudicial killings.

Conclusion

In remote areas of Burma, places of detention are unconventional and access to detainees for information and monitoring of their treatment is very limited. Unlike the central regions, prisoners are usually not subject to any type of legal process and are not charged under any type of law. Often detention is not prolonged, making it difficult for the international community to take a course of action such as campaigning for the release of the prisoner.

The government of Burma rules through a severely compromised legal system that defies international law and standards on civil freedoms and human rights. Yet people in Burma's conflict areas are not even given the option of this deficient and archaic legal system. Here, the military rules entirely without accountability, adequate policing and trial procedures. In every respect, treatment during arrest and while under detention violates both domestic and international regulations.

Chained and segregated in Korean prisons

Kim Soo A, Urgent Appeals desk,
Asian Human Rights Commission

On 23 May 2002 Mr Bae, 34, committed suicide in a disciplinary segregation cell at Busan Penitentiary. At the time of his death, he had already been in solitary confinement for four months, with four more months of such confinement ahead. Prison officers had sentenced him to a total of eight months segregation on four different accounts of bad behavior. In addition, at the time of his death he had been kept chained and handcuffed for over 100 hours. During his four-year imprisonment, he had been disciplined 15 times and had been in solitary confinement for over two years.

Many cases of inhumane treatment and punishment of prisoners have been reported on by human rights organizations in the Republic of Korea. It is not surprising that during its inaugural year (2002), 30.9 per cent of human rights violation complaints received by the National Human Rights Commission (NHRC) related to detention facilities and the abuse of disciplinary power and tools of restraint. Over the last ten years, on average 8–9 prisoners have committed suicide in solitary confinement annually, and over a hundred such prisoners have attempted suicide while in segregation cells. Additionally, about 22 prisoners die every year from neglect. Although prisoners in Korea have been systematically denied their basic human rights, the public has been indifferent to their plight as they are isolated and perceived as socially undesirable.

The practice of consecutive solitary confinement in Korean prisons has been of particular concern to human rights groups. Prison authorities commonly use segregation cells to discipline inmates. Under article 46(2)(5) of Korea's Penal Administration Law, the period of solitary confinement must be limited to two months. However, in reality prison officials have routinely imposed consecutive periods, thereby effectively isolating prisoners for whatever period they see fit. Professor Kwak Nohyun, a former member of the NHRC, has described the practice as follows:

> Once placed into disciplinary cells, Korean inmates are prohibited from going out for physical exercise, meeting family and friends, reading books and newspapers, writing letters or petitions, watching television, and purchasing goods from canteens. In short, disciplinary segregation cells are the highest security confinement within prisons... The unrestricted practice of consecutive segregation periods results in extreme cases of indefinite deprivation of sunlight and speech, amounting to slow murder. ('The National Human Rights Commission of Korea: An assessment after one year', *article 2*, vol. 1, no. 6, p. 50)

"Mr Goh was locked away for nothing more than uttering curses, kicking doors and talking with a prisoner in the next segregation cell"

Article 7 of the International Covenant on Civil and Political Rights (ICCPR), to which Korea is a party, states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. General Comment 20 on this article notes that the prohibition of torture and ill treatment, "Relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim [and] prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7." The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Korea has also ratified, likewise forbids torture and the infliction of severe pain or suffering. Therefore, the practice of consecutive solitary confinement is in violation of the ICCPR and CAT.

One of the problems with placing so much disciplinary power in the hands of prison authorities is that it is used without discretion, often being imposed for petty violations, sometimes as a means to 'get even' with prisoners. Research conducted by a Korean human rights origination in 2002 suggested that in the majority of cases where prison authorities resort to disciplinary actions, they use solitary confinement.

The case of Mr Goh, a prisoner at Cheongsong Penitentiary, is indicative. On 30 May 2002, Mr Goh, in his mid-30s, hanged himself in a disciplinary segregation cell. He had been there for all but 55 days of the year he had been in prison. Ten days after he finished his first two months segregation period, the prison officers imposed another two months. While in the cell, prison officers handed him three more counts of bad behaviour, amounting to another six months. Two weeks after he finished that eight-month period, he was again sentenced to a further two months in solitary. He finally committed suicide during that period. He was also chained and handcuffed for weeks at a time while in isolation. Mr Goh was locked away for nothing more than minor infringements, such as uttering curses, kicking doors and talking with a prisoner in the next segregation cell. He had a record of mental disorder but he received no psychiatric treatment, let alone a medical checkup during his imprisonment. Moreover, he had previously attempted suicide while in prison.

Like Mr Goh, many prisoners are also physically restrained while in solitary confinement. Excessive use of chains and handcuffs can irreparably damage a prisoner's psychological and physical health. The Standard Minimum Rules for the Treatment of Prisoners states that, "Instruments of restraint, such as

handcuffs, chains, irons and straitjacket, shall never be applied as a punishment." Despite this, prison officers in Korea typically use such devices for this purpose.

"Mr Jeong was restrained with leather belts and handcuffs for 466 days"

One prisoner who experienced extreme punishment with instruments of restraint was Mr Jeong Phil-ho. Mr Jeong, 40, was restrained with leather belts and handcuffs for 466 days, from 8 March 2000 until 18 June 2001, in Gwangju and Mokpo Penitentiaries. In February 2000, he escaped from the Gwangju District Court during his trial, and injured a prison officer. On March 7 he was re-arrested. After he was returned to Gwangju Penitentiary he was handcuffed and restrained with leather belts. He was kept bound for 26 days without break. After the initial period, he was untied only once or twice a week. He could not freely wash, eat, sleep or carry out any other normal human activity. Even after being transferred to Mokpo on 2 April 2001, he was kept bound in leather belts and handcuffed. When questioned, prison officials said that they restrained him to prevent escape and self-injury, and claimed that their actions were legal. However, human rights organizations suspected that the prison officers punished him as revenge. Mr Jeong submitted a petition to the Constitutional Court and the NHRC. The NHRC could not proceed with the case, on the technical ground that it is before the Constitutional Court, however it submitted a written opinion to the court to the effect that

1) The continuous use of restraining devices not only breaches criminal law, but also is unconstitutional.

2) The use of leather belts to bind the entire upper half of an inmate's body amounts to torture.

Prison officers also segregate prisoners without considering prisoners' physical or mental health, even though the Penal Administration Law notes that prisoners in solitary confinement must receive medical checks. Mr Seoh, 37, committed suicide in a disciplinary segregation cell at Andong Penitentiary the day after he was handed 40 days in solitary confinement, on 1 May 2003. Fifteen days earlier he had inflicted an injury on himself in an argument with a prison officer. The prison segregated him knowing full well that he had a strong possibility of self-injury or suicide, but did nothing to prevent it.

This June, after Mr Seoh's death, the new Minister of Justice, Ms Kang Kum-sil, instructed prison officers to cease the practice of consecutive solitary confinement. While this was a good step, it will only be of use if followed by amendments to the Penal Administration Law, to bring it into line with Korea's international obligations. It must also be accompanied by strong and speedy prison reform to ensure that prison officials recognize the human rights of prisoners. On August 27, the Asian Human Rights Commission issued a statement (AS-29-2003) recommending that the Ministry of Justice

1. Outlaw consecutive solitary confinement and limit the use of

solitary confinement to the most extreme circumstances.

2. Establish concrete and objective guidelines for determining the period of solitary confinement.
3. Stop the use of chains and handcuffs as a punishment.
4. Allow inmates to engage in activities that would connect them with the outside world during solitary confinement.
5. Assess and constantly monitor the physical and psychological health of inmates under solitary confinement.
6. Create an independent working group to examine and monitor prison reform.
7. Educate all law enforcement personnel on the international standards for treatment of inmates.

The most expedient way to achieve the above would be through explicit implementation of the CAT in domestic law. The Minister's first step should be followed by further progress in this direction without delay.

All people deserve that their dignity and human rights be respected. Prisoners are not an exception. Human rights apply to all people regardless of nationality, race, religion and social status. Indeed, the civility of a people can be measured by its treatment of the most marginalized and defenseless. When prisoners in Korean jails are maltreated, it is not only their dignity that is at stake: the entire Korean society is degraded.

Obstacles to prisoner complaints in Hong Kong, Thailand and Malaysia

Audrey Wolffs, Researcher,
Asian Legal Resource Centre

The right to an effective remedy under article 2 of the International Covenant on Civil and Political Rights (ICCPR) applies to all persons, irrespective of whether they are at liberty or in jail. However, for prisoners to exercise this right requires that special channels be made available to them by the institutions responsible for their detention. Although most countries in Asia have created avenues for prisoner complaints, in practice there are many obstacles facing inmates seeking to complain. To illustrate, this paper compares procedures in Hong Kong, Thailand and Malaysia. Each is examined first in terms of its compliance with international standards, and secondly in terms of what happens when a prisoner wants to complain.

Compliance with international standards

The international treaties most relevant to rights of prisoners are the ICCPR and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). The Universal Declaration of Human Rights (UDHR) sets certain general standards. The Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles) and the Basic Principles for the Treatment of Prisoners (Basic Principles) establish guidelines for the management of prisoners.

Hong Kong

Hong Kong is bound both to the Torture Convention and ICCPR. In general, it complies with these laws to the minimum extent necessary, and prisoners in Hong Kong suffer from a number of serious difficulties. One problem in recent years has been overcrowding. Where two prisoners are forced to sleep in a cell built for one, there is unnecessary tension that can threaten personal security. Another problem is that the Correctional

"Torture is a part of daily life in Thai prisons; inmates are abused both by prison guards and other inmates"

Services Department strictly limits prisoner communication with the outside world. Under Prison Rule 48, only two visits are permitted each month, with no more than three visitors at a time, not exceeding 30 minutes. Although in practice two further visits may be permitted, such limited contact with the outside certainly does not contribute to prisoner rehabilitation. Visitors are also required to wait lengthy periods before getting access, and are never sure if they will be allowed in, because they do not know how many visitors the prisoner has already received. Additionally, prisoners have no right to use telephones. They may request permission, but must give a legitimate reason. Prison officers have the authority to decide whether or not the reason is 'legitimate'. Therefore, the prisoner is dependent on the officers' goodwill. Foreign prisoners, who rarely—if ever—receive visitors, are particularly affected by this unreasonable restriction on contact with family and loved ones.

Thailand

Thailand has ratified the ICCPR but not the Torture Convention. The ICCPR also prohibits torture under article 7, however, prisons in Thailand do not comply with this provision, or with the guidelines in the UDHR and other documents. In fact, torture is a part of daily life in Thai prisons.[1] Inmates are abused both by prison guards and other inmates.[2] They are routinely beaten and kicked for alleged violations of petty rules. For instance, if a prison officer passes a prisoner, the prisoner has to bow his head. If he does not, he will be hit with a wooden baton. After that, he has to thank the officer.[3] Due to overcrowding and shortages of prison staff—the prisoner to officer ratio is currently as low as 25 to one[4]—some prisoners are employed to discipline other inmates, in violation of rule 28.1 of the Standard Minimum Rules. These trusties are entitled to privileges denied other inmates. They have the power to search prisoners and their belongings in the absence of a guard, and are allowed to carry sticks and beat other inmates, thereby creating tension in the yards.[5]

Restraints and solitary confinement are routinely used as punishment in Thailand's prisons. Prisoners accused of quarreling or shouting are forced to wear leg chains weighing more than 20 kilograms, in violation of rule 33 of the Standard Minimum Rules, which stipulates that instruments of restraint shall not be used for punishment. This shackling in heavy leg irons is imposed on all death row prisoners in Bang Kwang Prison, although it is not permitted under domestic law.[6] Besides shackling, solitary confinement is frequently imposed. Before being confined, the prisoner is forced to sign a paper stating that he accepts the punishment. He is then put into a dark room for three months, although the duration is typically extended beyond this time, and most prisoners finish the punishment with some type of skin disease.[7]

The general conditions in Thai prisons also are of such a low standard that it is hard to see how the authorities could argue that they are treating prisoners with humanity, as required by article 10 of the ICCPR. The food and water is of such low quality that it clearly violates rule 20 of the Standard Minimum Rules, stipulating that adequate food of nutritional value and drinking water be provided. To survive, prisoners have family or friends bring them food; perhaps around only 30 per cent actually eat the prison rations.[8] Prisoners who can get money but not help from outside pay officers to buy things for them; the officers keep 20 per cent of the money for themselves.[9] Prisoners can also lease or buy space. In one prison, for instance, ordinarily around 25 prisoners are crammed into dormitories of four by six metres.[10] But as a prisoner explained, "We lease a dormitory with ten persons that normally accommodates about 24. Four times a year we go to a particular officer and give him an envellope with the money."[11] Inmates can also buy medicines from prison medical staff at highly inflated prices. As medical care is negligible—the Central Prison Hospital receives less than US $5 per patient per year[12]—many prisoners without means die from curable diseases.

> "The Hong Kong Prison Rules and JP Ordinance permit JPs to talk privately with prisoners, make surprise visits, and investigate by themselves; however, JPs fail to exercise their authority"

Malaysia

Not only has Malaysia ratified neither the ICCPR nor the Torture Convention, it also fails to comply with international guidelines, and has domestic laws that contradict global human rights standards. It divides prisoners between those detained under the Internal Security Act (ISA) and those who are not. ISA prisoners can be detained for two years without trial, and this period may be extended. They are also subject to different rules while in detention, including denial of access to a lawyer in the first 60 days of detention. To date the Human Rights Commission of Malaysia (Suhakam) has concentrated its efforts on conditions for these prisoners, however evidence suggests that all prisoners in Malaysian jails face serious human rights violations, such as overcrowding, malnutrition and a lack of medical care. Unfortunately, as Suhakam is the only independent body permitted access to prisons in Malaysia—and, as discussed below, its activities are tightly restricted—reliable and detailed reports on conditions are difficult to obtain.

What happens when a prisoner wants to complain?

Hong Kong

On paper, Hong Kong has many channels for prisoner complaints, including the Ombudsman, Complaints Investigation Unit, officers on duty, and Justices of the Peace (JPs). The last is the main avenue for complaints, and JPs have a special mandate to monitor prison conditions. The Prison Rules and JP Ordinance permit JPs to talk privately with prisoners, make surprise visits, and investigate by themselves. However, JPs are generally unfamiliar with prisons, and fail to exercise their authority. On

> "Prisoners are certain to face retaliation from officers if they try to complain"

average, official JPs (holders of public office) visit prisons only three times per year, while non-official JPs visit less than twice per year. These visits are also not likely to be to the same prisons, and therefore they fail to monitor implementation of recommendations made with regards to prisoner complaints, and fail to deepen their knowledge about conditions in general and individual cases in particular.

Prison officials in Hong Kong also have ample techniques to ensure that inmates are unable to lodge complaints. They sometimes conduct mandatory drug testing when a JP visits.[13] Alternatively, they may simply lock a prisoner away during that time.[14] Prisoners also fear retaliation after making a complaint: "Afterwards they give you a very hard time", remarked one.[15] The Prison Rules are sufficiently ambiguous that officers can punish inmates for unspecified violations. Under Prison Rule 61.p, "Every prisoner shall be guilty of an offence against prison discipline if he... In any way offends good order and discipline." This nebulous regulation allows for punishments (under Prison Rule 63) that include separate confinement, forfeiture of privileges, deprivation of earnings or transfer to another facility, including from a lower security prison to a higher security prison.[16] Prison officers can also readily crack down on activities that are technically prohibited but ordinarily tolerated, such as gambling or selling of meals.[17]

Under any circumstances, the chances that complaints will be substantiated are virtually none. Once a JP has recorded a complaint, it is taken up by the Complaints Investigation Unit, which is an internal non-independent channel. Most complaints cannot be proven because of a 'lack of evidence'. Naturally, prison officers protect each other, and prisoners are afraid to come forward in support of other prisoners for the reasons indicated above.

Thailand

For prisoners in Thailand, the only mechanism available to complain through is the newly established National Human Rights Commission (NHRC). The NHRC is empowered to receive complaints from prisoners and make recommendations to the government. However, commissioners do not routinely visit prisons and talk to inmates. The government also is not obliged to follow the recommendations, and has also recently attacked the NHRC for implied criticism of a "shoot to kill" policy regarding alleged drug dealers, threatening at least one of its members with impeachment.[18] Finally, even if the NHRC had the resources to monitor prisons around the country—which it does not—as it has no real authority to enforce its findings it is hard to see how inmates in Thailand have any avenue for effective complaints.

Apart from the practical difficulties of even getting a complaint to the ineffective NHRC, prisoners are certain to face retaliation from prison officers if they try to complain. Guards have many methods at their disposal to silence their charges, some of which

were described above. In addition, complaints may simply lead to the imposition of stricter regulations, rather than improved conditions.

> "Hong Kong, Thailand and Malaysia all have mechanisms on paper to permit complaints; however, none of these are effective"

Malaysia

Like Thailand, in Malaysia the human rights commission, Suhakam, is the sole mechanism available to prisoners seeking to make a complaint, and like Thailand, massive political pressure renders it all but useless. Although commissioners are empowered to conduct investigations and make recommendations, the state tightly controls them at every step. Commissioners may be denied access to prisoners.[19] They are not permitted to talk in private, in violation of principle 29 of the Body of Principles.[20] In addition, recommendations made by Suhakam are not taken seriously, and not even discussed by the Parliament, to which they are submitted annually.[21] The government also controls commissioners by limiting appointments to two years, and dismissing outspoken commissioners at will. Last year three were dismissed, although they had simply performed their duties according to law. The new appointees were ex-civil servants with little or no background in human rights.[22] In practical terms then, there exists no avenue for complaints by prisoners in Malaysia, be they detained under the ISA or otherwise.

Conclusion

Prisoners, like other persons, have a right to an effective remedy for violations of their human rights. Hong Kong, Thailand and Malaysia all have mechanisms on paper to monitor prisons and permit complaints. However, none of these are effective, and in Thailand and Malaysia are actively obstructed by political interests.

In Hong Kong, the possibility for an effective remedy in keeping with article 2 of the ICCPR exists in principle, but not in practice. Of the three mechanisms reviewed, it would be the easiest to reform in the short term: there is no reason that there should be political opposition to improvements in the way JPs monitor prisons. For instance, a small number of JPs with relevant backgrounds could be selected to investigate and act upon complaints from prisons exclusively. Improvements to the way that the JPs are operating would involve minimal, if any, extra expense.

The population of Thailand and international community alike are aware of the subhuman conditions in jails there, but the government has faced no pressure to improve them. The massive systemic problems in Thai jails will take considerable effort to resolve, and the simple writing into law of the NHRC in no way offers an effective remedy in accordance with article 2. Clearly, the government has no interest in ensuring the rights of inmates are protected. International efforts at getting it to reform also have been limited and ineffectual. The initiative for reform must

come from the people of Thailand, however to date most do not seem to sympathize with the prisoners. Without a growing interest in the welfare of these persons among the general public, there is not likely to be progress on this issue.

"The standard set by article 2 of the ICCPR is not simply whether or not a means for remedies exists, but whether or not it is effective"

Whereas prisoners in Thailand are at least on paper afforded some protections, those in Malaysia have virtually none. Malaysia has ratified neither of the international treaties governing treatment of prisoners, and the ISA is contrary to international standards. Suhakam also cannot operate independently, and like the NHRC in Thailand does not amount to an avenue for an effective remedy. To date, campaigns to outlaw the ISA and undertake other related reforms in Malaysia have been unsuccessful, and the government has used the police force and judiciary like arms of the executive, to enforce arbitrary policies and intimidate opponents, rather than see them operate according to rule of law principles.

The manner in which Hong Kong, Thailand and Malaysia alike manage prisoner complaints is informative. Whereas at first glance each is to a varying degree concerned to ensure that inmates' human rights are protected, in fact in none of the three countries does an effective remedy for rights violations exist for prisoners. That this is the case throws into doubt the true intentions of the said governments: each, and particularly the latter two, appears more concerned with window-dressing to satisfy rudimentary examination by the international community, rather than genuine protection of human rights. The standard set by article 2 of the ICCPR is not simply whether or not a means for remedies exists, but whether or not it is effective: regrettably, by this standard Hong Kong, Thailand and Malaysia have all failed.

End Notes

[1] Human Rights Watch, 'Prisons', [http://www.hrw.org/wr2k2/prisons.html] (17 December 2002).
[2] Amnesty International, 'Widespread abuses in the administration of justice - 11 June 2002', [http://www.web.amnesty.org/aidoc/aidoc_pdf.nsf/index/ASA390032002ENGLISH/$File/ASA3900302.pdf] (27 December 2002).
[3] Prisoner interview by author.
[4] Department of Corrections, 'GUTS Baton: New Weapon for Thai Correctional Staff', [http://www.correct.go.th/news/new-eng5.htm] (3 July 2003).
[5] Prisoner letter.
[6] Amnesty International, 'Widespread abuses'.
[7] Human Rights Internet, 'Thailand', [http://www.hri.ca/fortherecord1999/documentation/commission/e-cn4-1999-61e.htm] (28 December 2002).
[8] Prisoner interview by author.
[9] Prisoner interview by author.
[10] Prisoner interview by author.
[11] Prisoner interview by author.
[12] Amnesty International, 'Widespread abuses'.

[13] Hong Kong Human Rights Monitor, 'Recommendations: Reforming the Justice of the Peace system - 16 April 2000', [http://www.hkhrm.org.hk/english/reports/2000jpreform.html] (1 February 2003).
[14] Prisoner interview by author.
[15] Prisoner interview by author.
[16] Prisoner interview by author.
[17] Prisoner interview by author.
[18] See further, Nick Cheesman, 'Murder as public policy in Thailand', *article 2*, vol. 2, no. 3, June 2003, pp. 36–7.
[19] Aliran Executive Committee, 'An Affront to Parliament', *Aliran Monthly*, vol. 21, no. 3, 27 April 2001.
[20] *Human Rights Commission of Malaysia–SUHAKAM–Annual report 2001*.
[21] On 19 June 2002, Parliament rejected two motions to debate human rights issues arising from Suhakam's *Annual Report 2001*, submitted to Parliament. Aliran, 'We will be vigilant, NGOs end 100 days of disengagement with Suhakam – 2 August 2002', [www.aliran.com/monthly/2002/8a.html] (17 March 2003).
[22] Aliran, 'No engagement with Suhakam for 100 days', [http://www.aliran.com/monthly/2002/4j.html] (20 March 2003).

Dealing with the tremendous problem of torture in India

Consultation on the Convention against Torture, Kerala, India

1. Torture is widespread and has routinely been practised at police stations in India. Unchallenged and unopposed, it has become a 'normal' and 'legitimate' practice all over.
2. Torture often leads to custodial deaths, disappearances and deaths in 'encounters'. The numbers of reported custodial deaths are quite high and keep escalating.
3. Besides this, there are also fatal injuries, permanent disabilities, mental derailment, loss of faculties and psychological trauma.
4. With the emergence of new sanctions for torture—like the Prevention of Terrorism Act, Terrorism and Destructive Activities Act (Prevention), and Essential Services Maintenance Act—that justify or legalize any amount of torture, the police enjoy enormous freedom to have recourse to any such crimes.
5. The use of extremely crude and filthy language is very common at police stations. It amounts to cruel, inhuman or degrading treatment, grossly derogatory to the dignity of the human person. We are ashamed of being told of the existence of a directory of vulgar words, widely used by police personnel, published by a police officer in one of the southern states.
6. Torture has also been practised on women and girls, in the form of custodial rape, molestation and other forms of sexual harassment.
7. Torture has been inflicted not upon the accused only, but also on bona-fide petitioners, complainants or informants. The police deliberately delay submitting First Information Reports and unnecessarily harass and torture such persons.

A group of human rights defenders from across India gathered at Thrissur, Kerala, India, from 15–18 August 2003 to discuss torture in India. They discussed the need to launch a campaign in India for ratification of the Convention against Torture. This is their concluding statement.

Fighting torture is very difficult and risky. The reasons are many.

8. There is no impartial mechanism for receiving complaints against torture. The complaints must be made to police authorities themselves. This only allows the police to bring pressure and harassment onto the victims, who are de facto complainants. The Convention against Torture requires impartial investigations. Unfortunately, in India the police force is not independent. The National and State Human Rights Commissions, and other national institutions of India, have neither the power nor the provisions to deal with torture effectively. The National Commission for Police Reforms many years ago recommended that police in India should be made independent. The National Human Rights Commission itself has gone to the Supreme Court with a plea that the recommendations of the National Police Commission be implemented. However, the absence of political will has meant that these attempts have failed.

9. Torture and fabrication of cases are closely linked. In attempting to save offenders for obvious reasons, the police implicate innocent people and impose any amount of cruelty and torture on them until a 'confession' is extracted.

10. Torture is not treated in India the way required by the Convention against Torture. Only two sections in the Penal Code (sections 330–1) deal with punishment for use of force in obtaining confessions. However, if torture is to be dealt with effectively, it is essential that it be made an offence in terms of the Convention. This also involves provisions for adequate punishment against torture. Thus, the law against torture in India is extremely defective in terms of international understanding and social jurisprudence. To mention two examples, in Hong Kong the offence of torture carries a life sentence, while in Sri Lanka it carries a sentence of 7 years only.

11. The prosecution system as it exists now in India only militates against the rights of victims of human rights violations. The prosecutors act in many ways to protect the perpetrators. Prosecutors should be independent, competent, and appointed through a judicious process to scrupulously uphold the cherished values enshrined in statutes.

12. In the present criminal justice system in India, the victims or complainants have no decisive role in seeking redress. Everything depends on the mercy of the investigating officer and the state prosecutor, who are often subject to manipulations and malpractice. Therefore, the de facto complainants or victims, if they are resourceful and confident, should be allowed to appoint their own lawyers to conduct prosecution on their behalf.

13. India not having ratified the Convention against Torture, its citizens do not have the opportunity to find recourse in

remedies that are available under international law. Indian practices with respect to torture do not come under international scrutiny. Access to the UN Committee against Torture, and other mechanisms, is effectively denied people living in the largest democracy in the world. Since the country has also not signed the Optional Protocol to the International Covenant on Civil and Political Rights, its citizens also do not have the right to make individual complaints to the UN Human Rights Committee. The victims are trapped with the local system, which in every aspect militates against their rights. Many victims conclude that a justice system accessible to the poor of the land does not exist at all.

14. Despite its many human rights groups, an effective and powerful campaign for the elimination of torture has yet to be developed in India. If we fail to protect ourselves from torture, which is the basis for all other fundamental rights, we will not be able to vindicate any other rights.

15. "Human Rights Court" is a misnomer. What exists is an additional duty appended to the already overworked judges. Thus, adjudication on human rights matters is trapped within the same cycle of delay and neglect that affects other cases. The general principle that 'justice delayed is justice mocked' equally applies to these courts. The concept of Human Rights Courts needs to be revamped and re-envisaged so that an effective mechanism can be introduced. Judges who sit in such courts need to have a thorough knowledge of human rights law and should be endowed with a deep sense of the sublime supremacy of human life over all else.

16. The Malimath Committee recommendations will not only undo the practice of fair trial, but also will enhance the power of police to an absolute level. They have to be checked and carefully resisted if human rights are to have any meaning in India.

17. The early ratification of the Convention against Torture is imperative if we wish to defend the human rights of torture victims. It is mandatory for any attempt at reforms in the police system as an effective mechanism for law enforcement and administration of justice.

18. Most countries in the world have ratified this Convention and India being a signatory has no excuse for not ratifying it. In fact, the unwillingness of the Indian government to ratify the Convention brings only discredit to its people and places the country in a very shameful situation.

19. The citizens have a civic responsibility to campaign for ratification of the Convention. In fact, the National Human Rights Commission has already recommended and urged it to do so. Many high-profile organizations and eminent citizens of international repute also have pressed the government on this issue.

20. Meanwhile, it is highly necessary to document torture cases in a meticulous way. The lack of proper documentation only permits the unfettered continuance of barbaric methods of torture and acquittal of the culprits. Had there been proper documentation, it would not have been possible to hide the colossal and devastating atrocities of the police, whose constitutional mandate is to protect the people. NGOs should undertake scientific and systematic documentation of torture and follow-up on it.

21. Modern communication systems offer tremendous opportunities for victims of torture to expose it to the rest of the world. Urgent Appeals have been quite successful at coordinating and combining domestic and international efforts to resist this atrocious encroachment on human rights. Hence human rights defenders and activists should be equipped and conversant with what information technology offers for the promotion of human rights activity anywhere in the world, less expensively and with greater efficiency.

22. The communal and caste divide in India is closely linked with torture. Police and law enforcement agencies have been instrumental in much of the recent communally charged violence in the country. Torture remains unaccounted for and not prosecuted. It leads to total anarchy and the rule of vandalism and lawlessness. When police become a party to such violence, it becomes a state-sponsored crime against the people. Therefore, the fight against communalism and caste should start with the fight against torture.

Signatories:

Bharathi G Parekh, Karnataka
Dr Francis Xavier, Kerala
Subramannian G, Tamil Nadu
Tomy Mathew, Kerala
Geo Jose, Kerala
Dr K Umadevi, Andhra Pradesh
Adv. Bijo Francis, Kerala
Adv. Johnson Ainikal, Kerala
Kirity Roy, West Bengal
Vinaya, Kerala
Adv. Stephan Mathew, Kerala
Mallela Seshagiri Rao, Andhra Pradesh
George Pulikuthiyil, Kerala
K G Sankara Pillai, Kerala
A Amaraiah, Andhra Pradesh
Adv. Shaji George, Kerala
Adv. E V Joshy, Kerala
G Kurinji Shanmugasundaram, Tamil Nadu
A B Prasad, Kerala
Dr George Mathen, Kerala
Adv. Leonard Fernando, Tamil Nadu
K Balasundaram, Kerala
Adv. P P Vineeth, Kerala
Paul Joseph Kattookkaren, Kerala
T K Naveena Chandran, Kerala
Adv. Faritha Ansari, Kerala
Adv. Jasmine Joseph, Kerala

19 August 2003, Thrissur, Kerala, India

Genocide in Gujarat: Government and police complicity

Concerned Citizens Tribunal – Gujarat 2002

The state government

The complicity of the state government is obvious. And, the support of the central government to the state government in all that it did is also by now a matter of common knowledge.

Within hours of the Godhra arson [when the partial incineration of a train on 27 February 2002 was blamed on Islamic militants as a pretext for the massacre that followed] an organised carnage was planned and ruthlessly executed over the next 72 hours in 15 of Gujarat's 25 districts. It was apparent that thanks to the instructions from the state government, the administration and the police stood paralysed as the brutal massacres were clinically executed.

It was the Chief Minister [of the state] who declared that the Godhra incident was pre-planned when the investigating agencies had not reached such a conclusion. Shri Modi's cabinet, notably the Minister for Home, Shri Gordhan Zadaphiya, reiterated strongly that Pakistani hands were behind the Godhra act. These statements were irresponsible, given the sensitivity of the situation and the anger that they generated. Once they generated a climate ripe for apportioning blame, for the acts of a few criminals, the entire Ghanchi Muslim community of Godhra was branded. This led to a feeling of justifying the systematic massacre, plunder, loot and cultural decimation of the entire Muslim community in Gujarat thereafter.

This is the second in a series of edited excerpts from the *Crime against humanity* report of the Concerned Citizens Tribunal beingpublished in *article 2*. The first was published in *article 2*, vol. 2, no. 1, February 2003. The entire report is available online, at [http://www.sabrang.com/tribunal].

The Asian Legal Resource Centre is taking steps to highlight the report and the work of the Tribunal out of concern that the scale and horrendous nature of the massacre, combined with the extent of planning and state complicity, has not been adequately addressed regionally and internationally. The international community is now beholden to respond.

On February 27, hours after the Godhra tragedy, the Prime Minister said in Parliament that from the preliminary reports it appeared that the incident was the result of slogan shouting. On April 4, when he visited the Shah-e-Alam Camp, he bemoaned the burning alive of women and children, the rapes and killings and urged the Gujarat government to observe its duty. But only a fortnight later, at his party's national executive meeting in Goa on April 22, he said the Gujarat carnage would not have occurred but for the Godhra arson. Thereafter, he bemoaned India's loss of face in the international community. He termed the Gujarat carnage as "a blot on the nation". His statement at his party's national executive in Goa bears mention: "Wherever there are Muslims, there is a problem".

"In some cases, ministers themselves were leading the mobs"

The role of the then union Home Minister and now Deputy Prime Minister, Shri L K Advani appears to be patently partisan. His dogged refusal to acknowledge within the country that the Gujarat carnage was an inhuman, shameful act on the part of the communal elements among Hindus, yet accepting it as a blot on the country during his foreign jaunt in England, makes people wonder whether he is a spokesman of the party which he represents or the Home Minister/Deputy Prime Minister in the government of India?

In the past, communal riots had been mostly an urban phenomenon that did not spread to the villages. But this time, due to the sectarian politics of religion, it spread to the villages as well. One of the worst incidents was at Sardarpura village where 38 villagers were hacked and torched [to death]. This is what Shri Modi had to say about the gruesome killings on March 1: "Due to rumours, due to suspicion, due to mistrust, due to tension on both sides, there was an *incident* (emphasis added) in the Sardarpura village." He took no steps to nip the rumours in the bud.

Other ministers in the state cabinet displayed the same attitude. Electoral constituencies of ministers in the state cabinet were more prone to violence; in some cases, ministers themselves were leading the mobs. The Minister for Revenue, Shri Haren Pandya, led the mobs enthusiastically in Ahmedabad. Residents of Paldi, from where Shri Pandya was elected, actually saw him lead arson attacks. Shri Pandya's election promise the last time was "to wipe any trace of Muslims out of Paldi".

The utter disregard for the loss of life and property and the anguish that a section of the citizenry suffered due to unprecedented violence could be seen in the fact that until Prime Minister Shri Atal Behari Vajpayee flew into Ahmedabad and visited the Shah-e-Alam Camp, Shri Modi had not visited a single one. This, despite the fact that there were as many as 66,000 persons, according to collector's figures, huddled in camps in Ahmedabad, while independent assessments put the figure at close to 98,000. Instead of providing succour and assistance, which is the fundamental duty of a government towards its citizens, terror tactics through baton-wielding policemen were

employed with the residents of these camps. In areas of Gujarat outside Ahmedabad, too, there were as many as 60,000 persons internally displaced, living in terrible conditions. But the government and the administration did precious little to give them prompt and adequate relief.

> "Not only the criminal justice system, but the entire administration has failed"

The attitude of the government showed it had no regard for the life, well-being and future of students from the minority community. Traumatised and distressed students had requested a postponement of the annual examinations. But the state government, and later even the Gujarat High Court, rejected their plea. On April 10, the Gujarat government took a decision to shift out all examination centres located in the minority dominated areas, out of concern for the lives of students belonging to the majority community. However, minority community children were still expected to travel to examination centres located in majority dominated areas.

On March 1, the Chief Minister announced a judicial commission of inquiry into the Godhra tragedy alone, appointing retired judge Shri K G Shah at its head. Again, only after widespread protests did he announce the inclusion, in the terms of reference of inquiry of the judicial commission, of the post–Godhra carnage (on March 5). The appointment of the K G Shah Commission was the subject of serious controversy because of the conduct of this particular judge in an earlier matter and also on the simple ground that due to the situation in Gujarat, where judges, academics, professionals and others live under threat of fanatic groups who have become a law unto themselves, *the criteria of a free, fair and independent inquiry demands the appointment of a senior judge (preferably judges) from outside the state.*

Not only the criminal justice system, but the entire administration has failed. Indian Administrative Service and Indian Police Service officers who are supposed to be independent have succumbed to the pressure of the religious groups. "There is no civil service left in Gujarat," said the former Indian cabinet secretary Shri T S R Subramanian (*The Indian Express*, April 10*).*

Role of the Chief Minister and his ministerial colleagues

The facts mentioned in this report clearly establish that Chief Minister Shri Narendra Modi is the chief author and architect of all that happened in Gujarat after the arson of February 27, 2002. It is amply clear from all the evidence placed before the Tribunal that what began in Godhra, could have, given the political will, *been controlled promptly at Godhra itself.* Instead, the state government under Chief Minister Shri Narendra Modi took an active part in leading and sponsoring the violence against minorities all over Gujarat. His words and actions throughout the developments in Gujarat show that he has been openly defying the Constitution and indulging in actions which are positively detrimental to the interests of the country.

Shri Modi was the one who took Godhra to the rest of Gujarat. He was the one who directed the police and the administration not to act.

He refused shelter and succour to the victims of the carnage.

He refused, and continues to refuse, basic human amenities and was using coercion and other tactics to wind up refugee relief camps.

He has refused to buy land and rehabilitate persons in new locations or to give transparent accounts of the Rs 150 crore [1 crore = 10 million] rehabilitation package announced by Prime Minister Shri Atal Behari Vajpayee during his visit to the state on April 4, 2002. He has no remorse for the rapes, the butcherings, the loss of properties, the agony of displacement and the acute insecurity and lack of belonging felt by large numbers of the people of Gujarat.

As late as September 3, 2002, the international working president of the Vishwa Hindu Parishad (VHP), Shri Ashok Singhal made a shocking statement that received wide publicity, in which he described Gujarat as a "successful experiment" and warned that it would be repeated all over India. Shri Singhal further stated that the success of the Gujarat exepriment lay in the fact that entire villages were "purged" of Islam and Muslims. This outrageous and pathetic statement was not only anti-constitutional but also in violation of the law itself, for which he could be prosecuted. But Shri Modi, by not expressing any outrage at Shri Singhal's remarks, and by indulging in blatant minority-bashing himself, appears to have accepted Shri Singhal's warning.

It is unfortunate that all Shri Modi's ministerial colleagues have toed his line with no regard to the oath that they took under the Indian Constitution. They are, therefore, equally guilty of the commissions and omissions committed by the Chief Minister.

> "Evidence before the Tribunal clearly establishes the absolute failure of large sections of the Gujarat police to prevent mass murder, rape and arson; worse still is the evidence of their connivance and brutality"

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. Worse 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. It reads: "151(1). A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a magistrate and without a warrant, the person so designing, if it appears to such officer that the offence cannot be otherwise prevented."

"In most cases, inadequacy of forces is a mere excuse touted by police officers who fail in their primary duty"

Such lists are available with all police stations. Leave alone other parts of Gujarat, the preventive arrests made on February 27 in Ahmedabad itself throw a light on the intentions of the police:

Naroda	0
Kalupur	0
Gaekwad Haveli	0
Gomtipur	0
Shaherkotda	0
Vejalpur	0
Ellis Bridge	0
Navrangpura	0
Naranpura	0
Ghatlodia	0
Astodia	2

The two persons arrested at Astodia were both Muslims.

On the night of February 27, some companies of the State Reserve Police (SRP) were rustled into action, but they were split into groups of four or five personnel each, which rendered them largely ineffective against the mobs that went on the rampage on February 28.

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. Finally, when he came out of his house with folded hands and appealed to the crowd to spare all the others who had taken shelter in his house, the marauders cut him to pieces and then consigned him to flames. They also set fire to the house in an attempt to burn alive all those who were in the house. 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.

"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"

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."

Progress of Major Cases

Sardarpura massacre, Mehsana district: Thirty-three persons, mostly women and children, were burnt alive in a small room in Sardarpura village in Mehsana district. In all, there are 46 accused and they have been released on bail following four different applications filed before the additional sessions judge, Mehsana Judge D R Shah.

Deepla Darwaja, Visnagar, Mehsana district: Eleven persons were hacked or burnt to death. Thereafter, with a view to destroy the evidence, the culprits collected their remains and dumped them in a lake situated in a Patel community area. Two cancellation of bail applications have been filed against the 43 accused who were released on bail. Predictably, the same [public prosecutor] (Shri Trivedi who is also general secretary of the district VHP) who never objects to bail applications by the VHP and the BJP (Bharatiya Janata Party), had registered his 'no objection' to bail being given to the accused.

Best Bakery Case, Vadodara district: In the Best Bakery Case in Vadodara, where 12 persons were killed by a mob of around 1000 people, the police have played a shocking role by booking one Muslim, Shri Yasin Alibhai Khokhar, among others, and charging him with murder, robbery and arson.

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.

‘Modi-tva’ and Indian nationalism since Gujarat

Meryam Dabhoiwala, Human Rights School desk,
Asian Human Rights Commission

15 August 2007 will mark India’s 60th Independence Day celebrations. Hopefully those celebrations will truly be celebratory in nature, fulfilling the promises of the Constitution of India and living up to the ideals of its founders: true secularism, plurality and equality.

That was clearly not the case this year. On 15 August 2003 the Chief Minister of Gujarat, Narendra Modi, celebrated Independence Day with Hindu rituals at the ancient capital of Patan, rather than at the 15th century fort built by Ahmed Shah, the founder of Ahmedabad, the site of earlier celebrations.

After five decades of independence, why is Hinduism now entering into India’s national celebrations? The answer lies in Narendra Modi’s understanding of ‘national’: he and his Bharatiya-Janata Party have been among India’s most prominent exponents of Hindutva ideology (Hindu reawakening), which calls for the return of India to the Hindus. In this, Modi seems to have overlooked his oath to India’s secular Constitution.

National and international human rights activists, citizens’ tribunals and other organizations alike have underlined Modi’s role in the Gujarat massacre of 2002, described in the preceding article, ‘Genocide in Gujarat: Government and police complicity’. Riding a wave of Hindutva extremism after the massacre, Modi campaigned for the December 2002 election on an anti-Islamic platform that painted the state’s half-million Muslims as terrorists with connections to Pakistan. The BJP won by a landslide. Its officials are now keen to repeat the “Gujarat experiment” throughout the country. Modi is being touted as a future Prime Minister. According to recent media reports, Modi has also now written to the man currently in that position, requesting a ‘compilation of details of all major incidents of group clashes and communal riots in the country since Independence’.[1] The point he is seeking to make is that nothing out of the ordinary happened in Gujarat, and that in the past such cases have not been pursued through the courts, hence, nor should they be in

this instance. His letter was in response to the decision of the National Human Rights Commission (NHRC) to approach the Supreme Court for a retrial of the Best Bakery case.[2]

"While communal riots have been used time and again as a political strategy, never before has either the state or a political party so blatantly exploited communal relations to further its own agenda"

That a man can demonize a minority group and instigate a crime against humanity in order to promote his political fortunes points to something seriously wrong with India's 'democracy'. While communal riots have been used time and again as a political strategy, never before has either the state or a political party so blatantly exploited communal relations to further its own agenda. Never before have party officials publicly spoken of Hindutva 'experiments'. As prominent Indian intellectual Ramachandra Guha has said, "What has happened in Gujarat is original in the sophistication and completeness of its articulation."[3]

While the Indian government has failed miserably in its obligations to protect and afford redress to the Gujarat victims, civil society groups and individuals across the country have worked to document the atrocity and support those who have suffered. These efforts must be continued, and directed towards making the state accountable for its failure. In particular, the NHRC and Indian courts must play a more active role in bringing the planners and perpetrators of the massacre to trial. Independent tribunals and human rights organizations have already amassed a great deal of evidence against state officials; it must be used. The NHRC in particular has to date worked almost exclusively on only one case (Best Bakery). One way it could broaden its activities would be to call on the resources of regional and international human rights organizations. Other agencies, such as the National Commission for Women, also should play a role in the rehabilitation and assistance of female victims. Such agencies should build links with doctors, lawyers and other professionals, and work together to help the victims of this tragedy as well as to prevent more disasters from occurring.

In contrast to the massacres in the former Yugoslavia and Rwanda of recent years, the muted international response to the Gujarat massacre has also been deeply troubling. International agencies must do much more to raise their concerns about the lack of accountability after this event, both with the Indian government and in international forums.

Far from being a day of celebration, this year's Independence Day in Gujarat was a day of national shame. Only the prevention of systematic human rights violations and the enforcement of the effective rule of law will make India's Independence Day celebrations worthy of their name.

End Notes

[1] 'Carnage, what carnage?' *Hindustan Times*, 7 August 2003.
[2] Amnesty International press release, 'India: Best Bakery case – concerns for justice,' ASA 20/018/2003. 9 July 2003.
[3] Luke Harding, 'Dark days for India', *Guardian*, 16 December 2002.

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.

15.4.a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.

15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.

15.4.c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.

15.4.d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

In this issue of *article 2*

Focus: Detention and imprisonment

India

article 2 is published by the Asian Legal Resource Centre (ALRC) in conjuction with *Human Rights SOLIDARITY*, a publication of the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

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

For further details, email the editor:
editor@article2.org

Back issues of *article 2* available online:
www.article2.org

Annual Subscription Fee*

Hong Kong HK$250
Asian Countries US$35
Outside Asia US$50

*Subscription fee includes 6 issues of *article 2* and 6 issues of *Human Rights SOLIDARITY*

Asian Legal Resource Centre
Unit 4, Level 7
Mongkok Commercial Centre
16 Argyle Street, Kowloon
Hong Kong SAR, China
Tel: +(852) 2698-6339
Fax: +(852) 2698-6367
E-mail: editor@article2.org
Website: www.article2.org