article 2
of the International Covenant on Civil and Political Rights
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focus

the rule of law & human rights in Asia

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

The meaning of article 2: Implementation of human rights

Since the adoption of the Universal Declaration of Human Rights in 1948, the human rights movement has worked hard to spread its gospel. The development of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) was a major milestone. Numerous other conventions and declarations have further improved and enhanced the body of human rights principles, and articulated them to the global community. United Nations mechanisms have provided a base for monitoring the observance of rights.

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

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things. In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

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

Legislation on human rights also does not by itself result in improvements in rights. Legislation can work only through the administration of justice. If justice institutions are fundamentally flawed then legislation remains in the books and is used only to confuse monitoring bodies into believing that conditions are improving. For example, a constitution may provide for fair trial, however the criminal investigation, prosecution and judicial systems may not have reached a credible standard. Such legislation then only mocks the victims and cynically manipulates monitoring bodies and the international community.

article 2 aims to draw global attention to article 2 of the ICCPR, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads as follows. [*Continued on back inner cover*]

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Towards the elimination of corruption and executive control of the judiciary in Asia

First consultation for the Asian Charter on the Rule of Law, Hong Kong

Twenty-three persons from Cambodia, China, Bangladesh, India, Indonesia, Philippines, South Korea, Sri Lanka and Thailand gathered in Hong Kong from 16-21 February 2006 for the first consultation towards the Asian Charter on the Rule of Law. In October 2005 the Asian Human Rights Commission (AHRC) proposed that the charter be drafted, having realized from years of work that discussions on protecting human rights have limited meaning if they do not address the obstacles to developing the rule of law.

The purpose of having wide consultations prior to the drafting of this charter is to enable as many persons as possible to voice their experiences regarding the rule of law and human rights. It is hoped that the participants at these consultations will detail the manner in which the rule of law is being subverted in their countries and suggest various means through which these problems can be addressed, both by governments and independent organizations.

The first of these consultations saw intense discussion on the collapse of the rule of law in Asia. The participants—including senior retired judges, practicing lawyers and human rights advocates—went deeply into the issues affecting their different jurisdictions. They raised problems facing many institutions in their respective countries, particularly judicial institutions. They discussed the harsh realities faced by ordinary people—as well as judges and lawyers--due to defects in the policing, prosecution and judicial systems.

Midway through their deliberations the participants realized that the issues needing to be most discussed were those regarding corruption and executive control of the judiciary. They then went into the causes of judicial corruption and executive control, the manner in which this corruption and control takes place, and suggested remedies.

The participants broadly agreed that this gathering opened up new areas for further discussion, which they would take back to their countries: not just to the cities, but also the rural areas. There was also consensus to continue the discussions regionally and internationally through meetings as well as by way of print and electronic media.

> "Independence of the judiciary has been a common topic in Asia... However, most talk about the judiciary has followed the model of western textbooks"

The importance of discussing the judiciary

The independence of the judiciary has been a common topic in Asia, as well as in other places. However, most talk about the judiciary has followed the model of western textbooks, enumerating the characteristics of judicial independence, such as legal provisions for the separation of powers, financial independence by drawing money from a regular fund not subjected to political control, adequate remuneration for judges, and security of tenure. In recent decades there have even been gatherings of chief justices from different countries, resulting in the declaration of certain principles relating to this issue (i.e. The Bangalore Principles of Judicial Conduct, 2002).

The first consultation towards the Asian Charter on the Rule of Law took a completely different approach. By shifting the discussion from the principle of judicial independence to the need to eliminate judicial corruption and executive control, the consultation began from the day in and day out experience of people in different countries, and thereafter mapped out possible ways to eliminate the practices that negate judicial independence. It resulted in the lively debate needed to begin addressing the scale of these problems.

All the participants at the consultation based their comments and suggestions on the experiences they have had in their countries. The list of issues arising from the discussion follows. The participants articulated their problems in detail, and the substantive points identified by them have been retained.

Areas covered:

I. Definition of judicial corruption

II. Causes of judicial corruption and executive control

III. Characteristics of judicial corruption

IV. Consequences of judicial corruption and executive control

V. Recommendations for the prevention of judicial corruption and breaking of executive control

I. Definition of judicial corruption

Judicial corruption pertains to acts or behavior or attempts that impair either the search for or the submission of the truth in the delivery of justice. It covers any act or omission from any source, whether bribery, intimidation or any other act committed with the intent or reasonably foreseeable result that judicial or quasi-judicial orders, judgments and other issuances and judicial treatments will result in corruption. Judicial corruption includes

the acceptance of patronage offered by people in power leading to subversion of the administration of justice. This definition covers investigation and pre-trial processes in addition to the actual trial process. The consequence is unfairness in the criminal process from start to end.

"As judges are appointed by the executive and endorsed by politicians, this creates a debt of gratitude that they feel obliged to repay"

II. Causes of judicial corruption and executive control

1. No separation of powers

Without separation of powers between the judiciary and executive there are politically motivated appointments, transfers, dismissals and disciplinary control of judicial officers. As judges are appointed by the executive and endorsed by politicians, this creates a debt of gratitude that they feel obliged to repay. Judges are then called upon to perform functions and duties that are not judicial in nature. Those who refuse to oblige may be threatened. Or the judiciary may be completely subverted by emergency and anti-terrorist laws. Under such circumstances, closed hearings and secretive tribunals may be held in violation of the principle of open court. Sitting and retired judges are offered, and accept, extrajudicial positions. This situation causes insecurity and fear among judges. However, there are no measures set in place to address it.

2. Problems in appointments, remuneration and disciplinary control

Bodies with powers to appoint, promote, transfer and discipline judges are often non-functioning or malfunctioning. Judges are promoted on the basis of connections rather than merit. For this and other reasons they tend to favour the powerful over the poor and marginalized. Their tenures may also be extended beyond pensionable age, causing confusion about when retirement is mandated. Many undertake various assignments while serving because of uncertainty about conditions once they retire. Some are appointed to or near areas where they have properties and residences, causing partiality. Others hold the same post for extended periods, thereby opening many more possibilities for corruption. Judges and court staff are paid badly, but the financial pressure they experience that may affect their work is not addressed. Various perks are offered to them in order to influence the judicial process.

Some grave concerns over disciplinary control of the judiciary include that judges and lawyers interact outside of court at religious and social events, that judges have private relationships with other court staff, that relatives of judges practice in the same courts, and that judges hear cases in which they have conflicts of interest, including those of their friends or relatives.

The incompetence and arrogance of judges, sometimes caused by defects in judicial training, is also a serious concern. In complicated cases where special technical knowledge is required

judges may not be capable of reaching a decision, but they may also not call expert witnesses or have lists of unbiased specialists available for the court.

However, complaints against judicial officers are not addressed promptly, very often because of the absence of any disciplinary procedure. Especially in the case of the higher judiciary and other senior judicial officers (such as ombudsmen) the lack of a disciplinary procedure—apart from impeachment—means that they enjoy impunity. There is a lack of public audits of the assets held by judges and there may also be no measures in place to confiscate assets found to have been obtained through corrupt practices.

"Complaints against judicial officers are not addressed promptly, very often because of the absence of any disciplinary procedure"

Contempt of court is used by judges as a weapon with which to exploit or abuse their power. Other methods may also be used to intimidate the public and deny legitimate criticism. The public may be ill-informed or uninformed about court process and proceedings and so be unable to open a debate on judicial discipline. This situation is accentuated in jurisdictions where there are no juries. Persons who dare to criticize or expose wrongdoing may have no protection.

3. Procedural and material issues

Constitutional provisions provide scope for judicial corruption and executive control. Due process is thereby denied for numerous reasons. Procedural laws have not been brought into line with human rights standards. Retrospective legislation may be introduced. Defective investigations may prejudice adjudication even before it is begun: scientific facilities, such as those for forensic evidence, may be underused or non-existent; there may only be partial investigation of complaints. Courts may also lack basic equipment like fax machines, computers and recording devices. Cases are not managed impartially: benches may be fixed so that particular judges sit in particular trials, and available evidence may not be presented or properly analysed by expert witnesses. Courts may be used to harass and intimidate persons, particularly the poor, by charging them repeatedly on various related offences. Prior records may be used against such persons unfairly. Civil matters may be subjected to criminal investigation and trial. Patently innocent persons may be prosecuted, while patently guilty ones may go free. This is particularly the case where prosecution is under control of the police, or where no investigating agencies exist to address specific laws. Judges may be denied the right of judicial review and interpretation of law, thereby diminishing the importance of the judiciary in the constitutional process. Legal aid may be inadequate or non-existent, especially for foreigners and minorities. Cases may be delayed unnecessarily, sometimes due to overwork, or due to constant interruptions. Courts may be deliberately overloaded with more cases than they can hear, or be pressured to dispose of cases at an unreasonable speed, leading to unfair dismissals. Procedural gaps may be exploited to have cases closed without hearing. Judges may be given wide

discretion with few guidelines on granting of bail, sentencing and punishment. Limits on retrials may culminate in miscarriages of justice. Persons who evade court after getting bail may not be pursued. Judicial orders may be obstructed by other parties.

"Judges tend to accept police versions of cases uncritically, despite common knowledge of police corruption and dishonesty"

III. Characteristics of judicial corruption

Judicial corruption and malpractice take many forms. Judgments may be given in exchange for money or other rewards, or under duress (including after retirement). Higher courts may bully lower courts, including by instructing on how cases are to be decided, or reversing lower court judgments without reason. Lower courts may subvert the appeal process and powers of summons. Judges may force unprincipled settlements, perhaps by mediating between parties in order to settle a case out of court, may intimidate lawyers by direct or indirect means to prevent them from providing proper services to clients, may fail to follow procedures of making and writing judgments, in order to refuse application in an arbitrary manner, and may make judgments without reading of evidence and incorporating evidence into court records. They may also admit evidence gained through unconstitutional means and in violation of human rights, decide cases purely on technical issues without going into substantive matters, particularly where the public interest is concerned, misuse judicial discretion—including discretion to interpret laws or evidence—as a cover for conclusions arrived at by corrupt means to favour certain parties, and devote judicial time to other matters. Judges fail to sit at required times and pay little attention to the rights and conveniences of litigants and lawyers, hand over judicial functions to non judicial officers, like assistants or lawyers, show favour to individual lawyers or groups of lawyers, and make false travel claims and travel with persons with whom there is a professional relationship in the court, such as police officers. They incorrectly record witness statements, fail to record motions and applications by lawyers, meet with parties to hearings prior to opening court, obtain files only from one party and take the role of prosecutor during hearings. Judges may put leading questions to defendants to prevent them from presenting exhaustive evidence or challenging the evidence presented against them, not give equal opportunities to all parties to a case to present their positions in court, hear cases where there is a personal interest or other grounds for partiality, fail to observe rules relating to medical examinations of torture victims, thereby allowing police to continue with corrupt practices, and issue remand orders without seeing the detainee in court. They also tend to accept police versions of cases uncritically, despite common knowledge of police corruption and dishonesty. Some keep links with alleged criminals or otherwise inappropriate persons. Where international human rights law has been made part of local law through ratification of international instruments and customary law they may nonetheless ignore it and also the recommendations of international human rights bodies, to favour the executive authority. Some show ethnic, racial, gender or

religious bias, take part in court auctions, and manipulate the auction process in favour of friends, relatives or others, and subscribe to a political view even if the court challenge is based on a constitutional right.

> "As a result of judicial corruption litigants who have been dealt unjust judgments must go through lengthy successive appeals or give up their efforts to obtain justice through the courts"

IV. Consequences of judicial corruption and executive control

As a result of judicial corruption and executive control litigants who have been dealt unjust judgments must go through lengthy successive appeals or give up their efforts to obtain justice through the courts, leading to brutal forms of retribution and vengeance—including gang killings—and parallel systems to obtain justice. The rule of law is further undermined. Society becomes demoralized. There is no public confidence in courts, judges, laws and lawyers. Judges and lawyers lose interest in their profession, which attracts increasingly unqualified and incompetent persons. Corruption and hopelessness spreads. Social development is undermined. The weakest sections of the society are worst affected. Human rights violators stand far beyond the reach of their victims. Collective memory of constitutionality and legality is eroded. New generations are brought up without any practical understanding of justice. Constitutional and human rights principles are meaningless. Instead, fear is endemic. The door is open for tyranny, as the reason for the existence of courts has itself been completely displaced and the separation of powers lost. The state itself is weakened and loses credibility at home and abroad.

V. Recommendations for the prevention of judicial corruption and breaking of executive control

1. Separation of powers

The separation of the judiciary from the executive is the basis upon which all rules relating to the judiciary should be developed. Therefore, the executive shall not decide which judges may sit to hear a particular case and the legislature shall not reverse a judicial decision with retrospective effect or invade the domain of the judiciary by pronouncing judgments, such as a bill of attainder. Judicial independence must be guaranteed and protected by law, as well as in practice, by the provision of an adequate budget for the judiciary, managed by the judicial arm itself. Judges must be given adequate security to ensure that they are able to fulfill these functions and maintain independence accordingly.

2. Appointments, remuneration and disciplinary control

To check and arrest growing corruption in the judicial system a social audit is necessary. For this purpose an ombudsman or equivalent should be appointed from among persons with the highest degree of integrity and honesty by the senior-most court of the country. There must also be a direct avenue for complaints of judicial malpractice to be lodged and investigated with sufficient opportunity for all parties to have their side heard. It must be

easily accessible. National institutions on human rights can also play a useful role in creating discussion about judicial corruption and executive control.

"Proper values and a bias for integrity and human rights should be cultivated deeply and meaningfully in judges' training and at law schools"

An independent body must manage judicial appointments and transfers, consisting of suitably qualified and impartial persons. All of its members must have equal rights to participate and none must be prevented from fulfilling his or her duties, either due to internal or external obstacles. Judges should be made to declare their assets before appointment, and have them reviewed periodically. Existing judges must have their assets investigated and publicly reported upon. No judicial office shall be abolished while it has a substantive holder. The salaries and benefits of judges shall be rationalized so that persons of unquestionable integrity who are physically and mentally fit can be inducted, without discriminating against persons with disabilities. The records of judicial candidates should be tracked and the person's integrity, capability and also human rights record and background be given full consideration. All trial judges should be elected from among lawyers of good standing of the same territorial jurisdiction, and with regards to ensuring that appointments are not politicized. Salaries and benefits shall not be reduced. Judges should be provided housing and other facilities, including education for their children, within their area of jurisdiction. The retirement age of judges should be brought up to international standards and adequate measures should be taken so that judges do not undertake any office for profit within ten years after the date of retirement. No sitting judge shall under any circumstances accept any office that requires the performance of non-judicial functions. Prior to the appointment of senior judges, especially the chief justice, public opinion should be solicited and taken into consideration.

Judges need to be aware of their obligation to society in consonance with the aspiration of individuals and requirements of the society. Their performances should be periodically assessed to determine that they are acting accordingly, and a report made public. The higher judiciary must not behave coercively towards the lower judiciary. Judges of the superior courts must respect their peers. Likewise, judges must behave towards lawyers, defendants and witnesses in a courteous and professional manner. All forms of bullying by judges, among themselves and towards lawyers and other persons in the court, should be treated as misconduct and the offenders punished. The judge is further responsible to ensure that any accused is brought to the court in a dignified manner that does not violate human rights, and take special steps where necessary to guarantee this. In this respect, proper values and a bias for integrity and human rights should be cultivated deeply and meaningfully in judges training and at law schools. The formation of cliques among judges with a view to getting unfair advantages should also be treated as misconduct and discouraged by appropriate punishment. Judges should be excluded from duties of protocol, such as waiting on politicians and dignitaries. Nor

should they have political affiliations. Bench-fixing should be treated as a serious breach of discipline. Judges should be entitled to apply for review of any case where they believe they have been disciplined or transferred unfairly.

> "Freedom to expose judicial failings, such as by writing or satire, should be respected and protected"

3. Procedural and material issues

Due process and elimination of judicial corruption requires attention to numerous procedural and material issues in order to remove constraints on the judicial system that prevent the judiciary from performing its role satisfactorily.

Laws must be reformed to address gaps in procedure that allow for corruption, and ensure adequate and transparent coordination between investigators, prosecutors and the judiciary. Standards of evidence to prove graft and corruption for administrative and criminal actions should be lowered. Problems of overburdened judges must be addressed. Perjury must be punished. Double jeopardy must be absolutely prohibited. Contempt of court must be clearly defined, allowing for a liberal interpretation as provided for in more developed jurisdictions. Media freedom for reporting and commenting on judicial processes should be fully respected. The freedom to expose judicial failings, such as by writing or satire, should be respected and protected. Under no circumstances should a judge before whom contempt of court is alleged to have been committed be allowed to adjudicate the issue, either in the first instance or at appeal. All decisions in courts of first instance must be open to appeal. A court must exist with jurisdiction to review cases that are said to be in violation of the constitution. State agents and agencies must comply with court orders and be punished for failing to do so. International law and universal jurisdiction on human rights violations must be allowed in the courts. All countries should ratify the International Convention on Civil and Political Rights and its optional protocols. All countries should respect their international obligations under such treaties and put into effect the views expressed by monitoring bodies such as the UN Human Rights Committee and recommendations of treaty bodies and special procedures of the UN Commission on Human Rights.

In cases of gross human rights violations by state agents, the burden of proof should be on the alleged perpetrators, with due regard to their fundamental human rights. The victims of human rights abuses should also have access to preliminary remedies. Statutes of limitations on human rights abuses should be abolished, especially in fundamental rights applications under the constitution. All gross violations, including torture and enforced disappearance, must be criminalized and appropriate remedies introduced. A department should be established for compensation of victims, particularly of human rights violations, and support programmes also created.

Arresting and interrogating officers in criminal cases must be different, in order to enable objectivity in investigations. For example, a police officer who has tortured a victim and obtained

a confession may get a colleague who is known to him to perform the interrogation and so the torture victim may lose the opportunity to express what has actually taken place. Especially where there are allegations of torture and gross human rights violations by the police, independent teams that are not under the influence of the perpetrators should do the investigation. Interrogation centres should be outside of the control of the police or prosecutors. Practices such as the taking of signatures on blank papers and other forms of manipulation should be prevented by law, and documents that are liable to manipulation by the police should not be admitted as evidence. On the other hand, forensic science must be widely used in court, by establishing separate competent forensic science departments with necessary facilities, introducing laws to oblige their use, and reforming the medico-legal system.

"National plans are urgently needed to address the lengthy delays in some jurisdictions"

Court records must be properly maintained. The management and safe custody of records is the responsibility of the judge. However, judges must not be made to do clerical duties other than those strictly required for the performance of judicial functions. Interference with the official documents and registers should be treated as a serious breach of discipline. The times of court sittings must be fixed and if judges violate this rule without due cause they should be punished. The reasons for failure to keep on time must be recorded. Judges should promptly record the complaints of detainees against the authorities. Every judicial proceeding should be electronically recorded and also videotaped: modern technology must be widely embraced and used by the courts. Interpreters and legal aid must be provided to those persons who need them. National legal aid programmes should be well-funded. In trials of foreigners the court should take into consideration the legal system of the foreign nation when reaching a judgment and considering how it may be executed. In every case where a judgment is given a reason must be stated. Government policy shall not be included as a consideration in reaching judgments. Where trial judges have different opinions they should record their reasons in writing. Judgments should be made available in writing within one or two weeks of being given. After trial the concerned parties should have access to all files.

The principles to ensure effective judges should be applied to prosecutors. Prosecutors cannot be changed for political reasons. They must have security of tenure. They should not be moved in and out of a trial before its completion in a way that may affect the trial outcome. Appointment should be through an independent body and prosecutors should have a supervisory role in investigations of crimes

Unnecessary trial delays must be ended. National plans are urgently needed to address the lengthy delays in some jurisdictions. Appeal processes especially must be sped up.

Towards popular action for justice reforms

Widespread advocacy and popular action is needed to bring about justice reforms in Asia. In spite of legal protections on paper, people throughout the region, especially the poor and vulnerable, find their basic human rights routinely violated by state authorities. While the perpetrators are most often police and other law-enforcement officials, the judiciary is the custodian of the rule of law, responsible for seeing these perpetrators brought to justice. Therefore the role of judicial officers in promoting and protecting human rights must be routinely discussed, and education on protection of human rights engendered.

"The role of judicial officers in promoting and protecting human rights must be routinely discussed"

There are many avenues available to further popular action on justice reforms. For instance, all human rights organizations should prioritize work to eliminate delays in adjudication. Paralegals can be trained to operate throughout a country, and be involved in training programmes of police, professionals and other interested persons. International fact-finding and lawyer exchanges can be developed, and new associations of lawyers for human rights furthered. Advocacy work can concentrate on the need to establish an international mechanism to monitor and rule upon judgments in the highest national courts that affect human rights and speak to judicial corruption. A people's body can be created to recognize and award judges who are able to eliminate delays and who show great integrity and independence. An honour list of lawyers and judges who have sacrificed their lives for the cause of fair administration of justice and human rights can be drawn up.

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The rule of law and human rights in Asia

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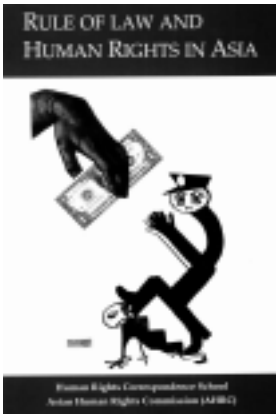
At a time of increasing natural and man made disasters, it is necessary to discuss the nexus between the rule of law and human rights. The aftermaths of both the December 2004 tsunami and the February 2005 Nepalese royal coup are a clear indicator that not only does Asia suffer from a breakdown in the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

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



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To address this situation requires the reform of these systems and institutions and the mobilization of a popular movement. It is quite clear that in almost all Asian countries the institutions responsible for the enforcement of the law and the protection of people's rights are malfunctioning, resulting in further rights violations. In particular, these are the police, prosecution and judicial institutions. It is also clear that reforms can occur only through a popular movement. The folk school methodology, as formulated through the work of NFS Grundtvig, holds that all people are equal, that knowledge is not the privilege of the elite and that when ordinary people come together to discuss their problems, they are likely to also come up with solutions to these problems.

"Throughout Asia there is a lack of adherence to the law, both domestic and international"

Rule of law and human rights implementation

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

In countries throughout Asia there is a lack of adherence to the law, both domestic and international. Ordinary people live in instability and fear, lacking basic security for a normal existence. The institutions responsible for protecting people's rights are malfunctioning, in many instances being themselves responsible for violating rights. Not only must victims suffer such abuse and brutality from state officials, but they are further denied their rights when they attempt to seek redress.

When Ko Khin Zaw and U Ohn Myint for instance, filed a complaint for forced labour in the Henzada Township Court, Ayeyawaddy Division, Burma in July 2004 after being jailed for failing to do sentry duty at a village monastery, their complaint was summarily thrown out of the court. Furthermore, the same judge then entertained a complaint of criminal defamation against them by the vengeful local administrative officials. The two villagers were found guilty, and were offered a fine or six-months' imprisonment. In an act of defiance, the two men chose jail. Although the widespread practice of obligating citizens to do manual work in Burma was recently prohibited under an agreement with the International Labour Organisation (ILO), the practice still occurs routinely. The agreement with the ILO envisaged that the means for complaints and investigation of forced labour allegations could be established. In practice though, when villagers attempt to make complaints, they are consistently rejected. Complainants then face counter-allegations of defaming public officials or refusing to carry out their instructions, for which they are sentenced to jail terms as a warning to others.

"Without emphasis on implementation there can be no improvement in the human rights situation of millions of people throughout Asia"

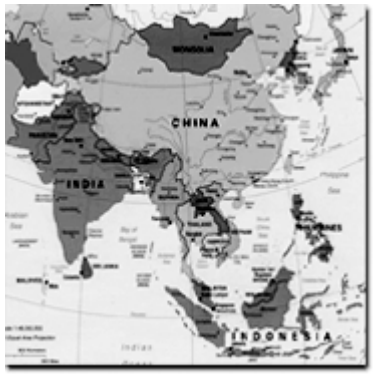
Abhijnan Basu was allegedly doused with diesel fuel and set on fire by officers of the Presidency Jail in Kolkata, West Bengal, India on 12 November 2004. The reason for this brutal act was that Abhijnan had reportedly complained about the quality and quantity of food the prisoners were being provided. On the morning of November 12, Abhijnan was approached by the jailor and several prison wardens, who quickly overpowered him and doused him in diesel, then set him on fire. Abhijnan was taken to the MR Bangur Hospital before being transferred to the SSKM Hospital, where he remained in a critical condition for eight days, having suffered burn injuries to 90 per cent of his body. He died in hospital on November 19. The subsequent inquiry was carried out by prison officials who even before completing their work exonerated their colleagues from blame and said that Abhijinan had committed suicide. Despite this claim, the authorities have not explained how Abhijnan came to possess diesel and matches inside the jail premises. The authorities have also claimed that Abhijnan suffered from a psychological disorder, but have produced no evidence to this effect.

In Nepal, even prior to the February 2005 coup by King Gyanendra, there existed little rule of law in the country, to the extent that Supreme Court orders were routinely ignored by the police and military. A Supreme Court order to release Jivan Shrestha on 16 November 2004 from the Central Jail in Kathmandu saw Jivan released but immediately rearrested on the same day, outside the prison compound by police from Bhaktapur. He was not given an opportunity to talk with his wife or lawyer, both present at the time, and was put straight into a police van. After having been rearrested, Jivan was found the following day at the District Police Office in Bhaktapur. Police inspectors at the office said that he was arrested by order of the Royal Nepalese Army, and that they did not know what the army wanted to do with him next. He was subsequently transferred back to the Singhanath Barracks. Another writ of habeas corpus was filed in the Supreme Court on November 18, and Jivan was at last released on November 24, but only on condition that he report back to the barracks on December 15. He dutifully went with his wife and another relative on the appointed date, and was taken inside while the others were told to wait. Incredibly, after some time his wife was told that her husband would be detained again. In a desperate state, his wife went back to the barracks the following day, but was told that she could not meet her husband. Again she went on the third day, pleading for his release. At this point the soldiers told her that if she appeared before the barracks again, she too would be put inside. They also blamed her for filing habeas corpus writs in court and for telling human rights groups about what had happened to her husband. Finally, Jivan was again released, but only on the condition that he again report to the barracks, this time with written proof that the writs issued against the security forces have been withdrawn.

A society's justice system is what determines the effect of its rule of law. This system is comprised by the police, prosecution and judicial mechanisms. The functioning of these mechanisms will affect the response of the justice system to the needs of society. When the system is able to respond adequately, the rule of law in that society will be effective. The perversion of laws and the malfunctioning of institutions the cases above portray are only too common throughout the region. Amazingly, the collapse of effective rule of law in the region and its bleak human rights situation are rarely looked at as two sides of the same coin. In fact, ineffective rule of law is not clearly seen as an obstacle to human rights. As a consequence, human rights are meaningless to the ordinary citizen. For the ordinary people, particularly those who have been victims of human rights abuses, the system that violates their rights is the same one that denies them access to justice and effective remedies for their violations; for them, there is an indivisible link between rule of law and human rights. In the case of Ko Khin Zaw and U Ohn Myint, not only were their rights violated when they were forced to do labour, but they were further denied their right to seek redress. Abhijnan was killed for making a complaint to the prison authorities. In Jivan Shrestha's case, even a Supreme Court order did not deter the police and military from detaining him. In all these cases laws were violated by persons themselves responsible for the safeguarding and enforcement of the law. Under such circumstances there can be no remedies for human rights violations. This is the link between the rule of law and human rights. Today, the struggle for one cannot be separated from the other. It is for this reason that the Asian Human Rights Commission (AHRC) highlighted UN Secretary General Kofi Annan's statement of 21 September 2004 regarding the centrality of the rule of law, in which he observed that

> We must start from the principle that no one is above the law and no one should be denied its protection. Every nation that proclaims the rule of law at home must respect it abroad and every nation that insists on it abroad must enforce it at home. Yes, the rule of law starts at home. But in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse, and the powerful manipulate laws to retain power and accumulate wealth. At times even the necessary fight against terrorism is allowed to encroach unnecessarily on civil liberties.

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



The role of the police

"Procedural violations by police together with deliberate falsification of records are among many of the problems in policing throughout Asia"

Human rights can only be protected when the rule of law flourishes, and thus there is a firm link between the behaviour of the police and human rights violations in the society. If the police refuse to file a complaint due to bribes, if they fabricate charges against someone for personal motives or if they threaten the life and liberty of those who are willing to fight for justice, they are not only violating individual human rights, but are giving lie to the justice system that is meant to protect citizens' rights.

The primary duties of any police force relate to the prevention and investigation of crime and the protection of citizens' rights, all of which are to be undertaken in accordance with the law. Failure to carry out these duties both causes human rights violations and is a crime.

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

The death of Kanai Santra in West Bengal occurred together with illegal arrest and detention. On 25 May 2004, 38-year-old Kanai Santra, of Chakdaulat-Kalitala village in West Bengal died at the Bangur Government Hospital. He had been brought to the hospital only hours earlier, after falling unconscious due to a brutal assault by several policemen stationed at the Alipur court lock-up, who used their fists, feet and sticks to beat Kanai so severely that he collapsed. The same policemen then used their authority to cover up the murderous act by filing a false complaint, claiming that other persons were responsible for Kanai's death. After learning of Kanai's death, the officer-in-charge of the lock-up, Mr Samir Mukherjee, lodged a false complaint with the Alipur Police Station, stating that Kanai had been assaulted by the other under trial prisoners with whom he shared a cell. Furthermore, a delay in registering the death led to a delay in the autopsy; although executive magistrate Mr Jiban Krishna Ghosh conducted an inquest on May 26, where multiple external injuries were found on Kanai's body, the Jadavpur Police did not take the papers to the Calcutta morgue for Kanai's post mortem until May 27, at around 3pm.

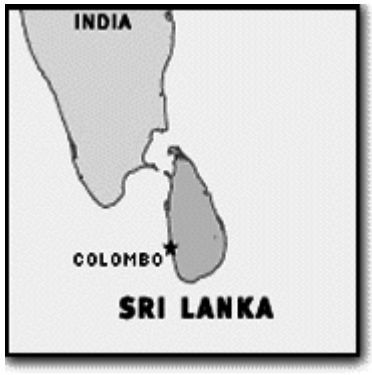
Procedural violations by police personnel together with deliberate falsification of records to cover up their crimes are among many of the problems that exist in policing in India, and throughout Asia. The police wield inordinate power, are not held accountable for their actions, and work in a system that gives wide scope for abuse. In India, the court lock-up is fully managed by the police personnel; in West Bengal the functions of the lower

criminal courts are managed by the police. The magistrates are also dependent on the police in their judicial functions. Court orders are written by police even before the case is heard.

While international law provides that everyone has the right not to be tortured, including those arrested by the police and accused of crimes, police in Asia are known to routinely commit torture. In most Asian countries torture is not a crime, a punishable offence or even an act that requires compensation. India, for instance, adamantly refuses to ratify the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), stating that constitutional and other provisions exist to prevent torture. Kanai Santra and numerous others' experiences clearly show that this is not the case.

The registering of a complaint is the first step towards redress for a wronged person or victim of human rights violation. However, filing complaints at police stations is a complicated and even dangerous business for most victims in Asia. By contrast, the police and persons with influence find it easy to file false complaints.

W Inuka Prasad Kumara Alwis' neighbour filed a complaint against him at the Panadura North Police Station, Keselwatte, Sri Lanka after a dispute. His connections with Officer-in-Charge (OIC) Prasanna meant that before any investigation into the complaint was carried out, Alwis and his companion Sithura Nissanka were illegally detained and tortured. On 15 February 2005, after Alwis' neighbour filed the complaint, three policemen from the Panadura North Police Station came to Alwis' house. As he was not home, the policemen told Alwis' wife that her husband should report to the police station the next day. On February 16 Alwis went into the police station with his friend, Sithura Nissanka. A police constable began to question Alwis about a man named Jeevantha and his brother-in-law Rohan. When Alwis replied that he did not know where Jeevantha lived, the constable threatened him. Nissanka then queried why the constable was questioning Alwis instead of Jeevantha. Overhearing this conversation, OIC Prasanna ordered the constable to bring Alwis and Nissanka to his room, where he assaulted them both. OIC Prasanna then threatened them, boasting of how he had broken one person's arm and shot another person. Alwis was then told to leave the room, while Nissanka was further tortured. Alwis stated that his neighbour—who had filed the complaint—was present at the police station and watched him and Nissanka being tortured. Alwis was later brought to the OIC's room again, where he was threatened with false charges of illegal weapons possession, and forced to apologize to his neighbour.



Another Sri Lankan torture victim, Marasinghe Arachchige Anura Dissanayaka, found it impossible to file a complaint with the police regarding his assault by a drunken police sergeant. At 12:30am on 24 January 2005

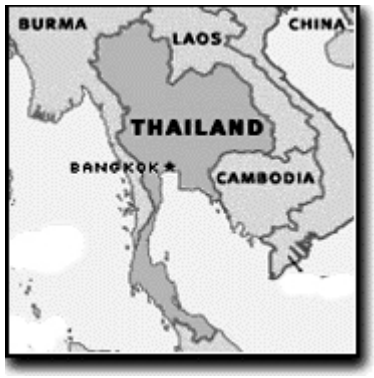
> "The lack of proper investigation is a prime cause for the increase in crime and impunity throughout Asia"

Dissanayaka was awoken and informed by a neighbour that a man was standing in front of his house. After identifying the man as Sergeant Nimal of the Wadduwa Police Station, Dissanayaka greeted him by saying 'hello'. Sergeant Nimal, who was in plainclothes and was drunk, immediately raged at Dissanayaka, saying, "Who the devil are you to call me hello?" He then hit Dissanayaka around the face and ears. At the time of assault, Sub Inspector Rajapaksha and four other officers from the Wadduwa Police Station were also present, but did nothing to prevent or stop the assault. Before leaving, Sergeant Nimal warned Dissanayaka not to inform any higher authorities about the incident. Regardless, at 10am on January 24, Dissanayaka went to the Wadduwa Police Station to lodge a complaint. Sub Inspector Rajapaksha requested him not to make the complaint, but he persisted. Police constable Upali refused to take down the complaint however, and directed the victim towards the officer-in-charge, who likewise refused to accept the complaint. Finally, Dissanayaka went to the Senior Superintendent of Police in Panadura and lodged a complaint on January 25.

In many Asian countries the police are heavily influenced by politicians and religious or communal elements, making it particularly difficult for some persons to file complaints and seek redress for injustices committed against them. Officers at the Tarun Police Station, Tehsil Bikapur, Faizabad, Uttar Pradesh, India refused to file the complaint of a Dalit ('untouchable') villager. On 8 July 2004 Babu Lal had his family assaulted, home destroyed and possessions looted by an armed gang that opposed the granting of land to Dalit villagers under a state scheme. Among the gang were Ramjeet and Mansha Ram, both of whom belong to the powerful Kurmi family. Although the attack took place during daylight, the attackers left the house without any fear or obstruction. After the incident, Babu Lal's family rushed to the Tarun Police Station—located within three kilometers from their house—to lodge a complaint. The police refused to file a case and allegedly said, "It is your problem. We would not like to be a party to your game. We don't want to come there even for urinating." Even when the head of the village administration approached the police to take action, they refused to do anything. Babu Lal then lodged complaints with the National Commission for Scheduled Castes, the Uttar Pradesh State Human Rights Commission, the Chief Minister of Uttar Pradesh and District Magistrate of Faizabad. After he took the case himself to the local court, the authorities took no action on the pretext that the matter is in court.

No complaints mean that there can be no investigations. However, even when complaints are registered, there may still be little investigation. This lack of proper investigation is a prime cause for the increase in crime and impunity throughout Asia. It also prevents victims of abuse from obtaining justice and redress.

In Thailand, corrupt and ineffective investigative practices result in innocent people being harshly sentenced. Chanon Suphaphan was traveling along a road near the Tantanote temple, Muang district, Singhburi province at around 6pm on 24 November 2002, when he was hailed by a local villager who asked him to assist a man injured in a motorcycle accident. Chanon helped the injured man, Thawatchai Nakthong, back to his feet and ensured that he was not seriously hurt. He did note that Thawatchai, who suffers a disability in his right leg, was incoherent and unable to stand or walk properly, but concluded that this was due to Thawatchai being drunk and not because of the accident he had just been involved in. On December 17, Chanon was summoned to the Singhburi District Police Station, where he was charged with robbery of Thawatchai. Although Chanon denied the charges and was released on bail, the police did not do anything to investigate this case. When Chanon and his parents, together with seven other witnesses, were at the police station to make bail on December 17, the police failed to take any statements from the witnesses. The same occurred when the witnesses returned on December 27. On January 10, when the witnesses tried for a third time to have their statements taken, the police agreed to take statements from just four of them. During this time, the police were also negligent in their duties of investigating the material evidence. On 3 April 2003 the public prosecutor filed a criminal case against Chanon. He was then appointed a lawyer. However, the lawyer did not study the case or meet with witnesses, but simply told them not to worry because they had a village headman as a witness. At no point did he visit the site of the incident or speak to any of the persons concerned. On 22 October 2004 the trial opened in Singbhuri Provincial Court and statements by the plaintiff and three witnesses were heard. None of the three were eyewitnesses to the event. The police did not present the witness statements taken on 10 January 2003. On November 26 the court found Chanon guilty of robbery and sentenced him to the maximum ten years in jail. Chanon has appealed against the case. Over 200 local villagers have signed a petition supporting his claim of innocence.



The role of the prosecution

The prosecution is responsible for ensuring that all law is enforced. When laws are violated and crimes committed, the prosecution must ensure that due process is followed and justice obtained. This is particularly important when it is law enforcement and government officials—those meant to be protecting citizens' rights—who are breaking laws and committing violations. In order for the prosecution to enforce the law, it must be institutionally independent, particularly from political and judicial influence. In most countries of Asia however, prosecutors enjoy neither this independence, nor effective power

to carry out the mandate of their office as stipulated under international legal principles. This inevitably has a detrimental effect on the rule of law and human rights within the region.

The investigation of crimes and collecting of evidence is crucial to the prosecution of perpetrators, without which there can be no justice. While it is usually the police who are at crime scenes and do the initial investigations, the prosecution department must take some responsibility to ensure that investigations are being done adequately, if at all, and that they are given enough information to proceed with filing charges.

The attorney general of Indonesia, however, not only refuses to undertake its own investigations, but further disregards investigations conducted by other groups such as the National Human Rights Commission, regarding the 1998 May riots, Trisakti shootings and Samanggi killings, which took the lives of over 1000 people, with many others suffering injury and damage to their property and possessions. The victims of these abuses have been awaiting justice for seven years. One of the reasons the attorney general refuses to act upon the Trisakti and Samanggi killings is that the Indonesian parliament concluded in 2000 that no violations of human rights had taken place. While this conclusion has been challenged and the parliament is set to reopen the investigation of these incidents, the attorney general's office cannot conclusively accept or infer to such political proceedings. Only judicial bodies have the authority to decide whether human rights violations have occurred or not, and it is the attorney general's responsibility to carry out investigations to this effect.

This lack of investigation by the prosecution becomes a greater liability when the case is proceeded with in court, as occurred in the Bindunuwewa massacre case, Sri Lanka, where all the accused were eventually acquitted by the courts due to a lack of evidence. On 25 October 2000, 27 young Tamils at a rehabilitation centre in Bindunuwewa were attacked and killed. Forty-one persons were charged with participating in the massacre. However, the courts gradually acquitted all of these persons due to lack of evidence. On 27 May 2005 the Supreme Court acquitted the remaining accused on the basis that the evidence against them lacked merit. That the massacre took place killing 27 detainees and injuring 14 others is not in doubt. That the modes of killing were ugly and cruel is also not in doubt. That the Sri Lankan government was responsible for the protection of these detainees is also well established. However, just who the actual perpetrators of this heinous crime were, the Sri Lankan justice system has been unable to resolve. The primary responsibility for this failure lies with the Sri Lankan police, who had the legal responsibility to investigate and provide the necessary evidence to secure a successful conviction. But there was also a failure on the part of the attorney general's department. The department

should not have filed indictments against persons if they did not have sufficient evidence to prove a case successfully before a court.

> "The absolute separation that exists between the criminal investigation and prosecution systems in many jurisdictions in Asia is highly detrimental to the protection of human rights"

The absolute separation that exists between the criminal investigation and prosecution systems in many jurisdictions in Asia is highly detrimental. Criminal investigation is solely in the hands of the police, with the prosecution usually having no power to conduct investigations. Given the policing systems in the region, this does not bode well for the protection of human rights. Not only is this problematic when dealing with crimes committed by ordinary people, but it becomes worse when the crimes are committed by law enforcement officials.

In Thailand, for instance, the control of the police over the investigation and filing of charges has led to numerous instances of police abuse remaining unaddressed in accordance with either domestic or international legal provisions. These include recent incidents of police shootings as well as the 25 October 2004 mass deaths in army custody in Narathiwat province. Under Thailand's Criminal Procedure Code, a death in custody must be followed by a post mortem autopsy and investigation into the cause of death. Under section 150, three agencies must be involved: the forensic doctor, investigating officer, and public prosecutor. After the autopsy has been completed and report submitted, it is the job of the public prosecutor to approach the court for an inquest, with a view to entering into criminal proceedings if necessary. This process should not be delayed under any circumstances, such as a politically appointed inquiry also being under way. It is the role of the public prosecutor to investigate and prosecute all crimes, including those committed by government officers, without regard to other factors. The mass killing that occurred on 25 October 2004 in Narathiwat province, Thailand due to the brutality of police and military officers however, was not so investigated. Full autopsies were not conducted, nor were officials from the police or public prosecutor reported to be present.

A commonly held excuse by public prosecutors in many countries in Asia is that where autopsies are botched or police investigations inadequate, they are unable to proceed with the case due to procedural failings or lack of evidence, thereby permitting the perpetrator to escape criminal liability. But this is no excuse. It is the constitutional requirement of a public prosecutor to pursue investigations, obtain the compliance of other necessary agencies, and take the matter into the courts. Failure to do this amounts to failure to do the job altogether. There is no substitute for this role, and under no circumstances should the public prosecutor be obstructed from performing this duty.

The stalled investigation into the recent death of Sunthorn Wongdao is another example of the control assumed by the Thai police, with little room for the prosecution to manoeuvre. Sunthorn was found dead in Bang Yai district, Nonthaburi province, on 21 May 2005. Sunthorn is said to have hidden in a house after being accused of shooting his wife and father-in-law

in Bang Khunthien district, Bangkok. Police from that district claim that after they surrounded the house, Sunthorn committed suicide rather than surrender. But Sunthorn's brother believes that the police killed him. Investigators from the Central Institute of Forensic Science support this view; neither the condition of the victim's body nor the crime scene suggested a suicide. In fact, the victim had four bullets through a lung and one through his head. The gunshot wounds appeared to have been fired by another person at close range. Furthermore, the crime scene had allegedly been tampered with. The body of the victim seemed to have been turned over, and evidence organized to suggest a suicide. The police however, continue to insist that it was a suicide, and to get the matter before a judge it must go through the police. The power enjoyed by the Thai police in pursuing or neglecting cases is an enormous barrier to the exercise of basic criminal justice. In fact, this power completely subverts the whole judicial process.

"A common defect of the prosecution system throughout Asia is the considerable delay in indictments and hearings taking place"

Another common defect of the prosecution system throughout Asia is the considerable delay in indictments and hearings taking place. For Sri Lankan rape victim Rita, not only has this delay meant that the perpetrators continue to enjoy their liberty, but also that she has had to prolong her suffering with numerous hearings. Rita was a grade ten student when she was brutally raped by two young men, Rameez and Piyal Nalaka on 12 August 2001. Rita was forcibly abducted by the two men as she was walking home after attending Sunday mass and confirmation classes at St= Patrick's Church in Talawakelle at about 2pm on August 12. She was raped by both men inside a vehicle and dropped off near the Hindu Kovil in Talawakelle at about 6pm that evening. With great difficulty Rita managed to report the incident to the police and identify the perpetrators, who were then arrested. Rita was taken to the Kotagala Hospital and later to the Nuwara Eliya Hospital for a medical check-up and was discharged from the hospital on August 16. When the case was brought to court on August 28, although Rita's lawyer objected to bail for the perpetrators, the police did not object, influenced by political pressure. The judge thus ordered bail for the accused after a heated argument between the two counsels. Rita's case was heard in the magistrate court of Nuwara-Eliya numerous times between August-November 2002 and was finally committed to the high court in November 2002. But the case was never called at the high court. The attorney general's department was contacted on 26 July 2003 regarding the case, to which they responded on 19 January 2004, stating that they will take action. The case was then returned by the registrar of the Nuwara-Eliya Magistrate Court on the request of the attorney general's department on 22 October 2004 while it was being prepared to be sent to the Badulla High Court. There are suspicions that someone is trying to cause additional delays.

In the Philippines as well, delays in cases are common and are a result of either direct or indirect actions by the prosecution. For instance, five young men who were arrested, tortured and

illegally detained in 2003 are still awaiting a verdict from the court, as their trial has been continuously postponed or cancelled over the last two years. Tohamie Ulong and Ting Idar (both minors), together with Jimmy Balulao, To Akmad and Esmael Mamalangkas, were arrested on 8 April 2003 in separate joint police and military operations in connection with bombings at the Davao International Airport and Sasa Wharf in Cotabato City. Upon arrest, they were tortured into admitting involvement in the bombings. They were blindfolded, subjected to electric shocks, beaten, and experienced dry and wet methods of suffocation. They were then illegally detained at the headquarters of the Criminal Investigation and Detection Group in Davao City for several months before being turned over to the city jail. It was only in the latter part of 2004 that the victims were arraigned. A pre-trial was set for 2 December 2004, but was postponed. Since December 2004, the pre-trial has been postponed on several occasions. On 4 January 2005, it was postponed due to the existence of two sets of suspects in the same case. The judge had to order the City Prosecution Office (CPO) to decide who among them would be tried first. On January 7, the CPO decided that the five torture victims would undergo trial before the new suspects. On January 18, the hearing was cancelled due to the absence of the prosecutor, who was in hospital. Finally, on March 31 Judge Paul T Arcangel of the Regional Trial Court Branch 12, Davao City ruled that the trial should proceed. The next hearing, set for June, was also postponed, as the police and their witnesses failed to appear because they did not receive notice or a subpoena from the court. A July 25 hearing was again postponed for the same reason: the prosecutor's failure to ensure the appearance of the complainants and witnesses at scheduled hearings.

Yet another reason for the delay in prosecution in many countries can be attributed to the lack of infrastructure and personnel. In its recent written statement to the 61st session of the UN Commission on Human Rights, the Asian Legal Resource Centre (ALRC) noted that in India many courts do not have sufficient prosecutors to represent cases as and when they are taken up. In a local Magistrate Court in Wadakkanchery, Kerala State for instance, prosecutions were stalled for years due to the fact that the only prosecutor available was on deputation from another court. Only when this officer had enough spare time would he turn up at the Wadakkanchery court. By the end of one year the number of criminal cases pending disposal before the court was so large that it will take several years to clear off these cases, given the fact that every year the number accumulates to the existing backlog. The lack of basic infrastructure within the entire justice system is another crucial issue that causes delays and inefficiency. When a prosecutor's office wants to communicate with a particular police station, there is no mechanism available other than the initiative of the prosecutor to spend from his own pocket or to make the interested party pay

for this communication if the entire proceedings are not to be stalled. This lack of basic infrastructure not only results in the delay of proceedings but is also a root cause for corruption.

"Adequate witness and victim protection is essential for prosecutions to be successful"

Adequate witness and victim protection is essential for prosecutions to be successful. Furthermore, it is the prosecutor's responsibility to ensure that if and when threats are made against those involved in legal proceedings, the perpetrators are punished. But although threats to witnesses in order to protect the accused are common in many Asian countries, particularly when persons are witnesses and/or victims of crimes committed by law enforcement agencies, few countries are able to provide effective protection to their citizens.

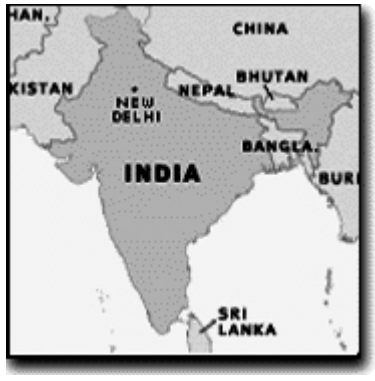
While the Philippines law provides for witness protection, it is not being enforced. In a 31 May 2005 letter to the AHRC, Police Director of the Directorate for Investigation and Detective Management at the national police headquarters Marcelo Ele Jr admits that the main obstacle to solving two recent killings in Camarines Norte, Luzon is the lack of witnesses. In the case of Ernesto Bang, an organizer in a peasant organization who was shot dead at the door of his house on May 10, "Relatives of the victim… are no longer interested in filing the case due to the absence of a witness", Ele states. As for Joel Reyes, a political party organizer who was shot dead by a gunman posing as a passenger in his tricycle, "no witnesses had come out in the open for fear of reprisal". In a May 30 letter, Paquito Nacino, regional director of the Commission on Human Rights in Tacloban City, Visayas revealed that it had set aside its investigations into three murders there for the same reason. According to the Commission, a witness to the March 14 killing of human rights lawyer Felidito Dacut "is nowhere to be found". Meanwhile, the relatives of peasant movement leaders Fr. Edison Lapuz and Alfredo Malinao, who were killed in a May 12 shooting in Leyte have been "uncooperative and shown unwillingness to make any written statements". The wife of Fr. Lapuz, who witnessed his killing, "requested to give her more time to decide [about complaining] as the assailants are still unknown to [the family]".

Sri Lanka does not have a witness protection programme and it has been stated that in 85 per cent of criminal cases, witnesses do not show up as they fear for their lives. This fear is founded on the recent killings of several witnesses and complainants against the police: Gerald Perera was killed just a few days before he was to give evidence in a police torture case. The culprits have now been arrested: three police officers who are the accused in the torture case. Another torture victim, Channa Prasanna, in whose case an inquiry was being conducted, was kidnapped and narrowly escaped a murder attempt. While two cases regarding these incidents were ongoing in the Magistrate Court of Negombo, a further attempt was made on his life at midnight as he was sleeping, but Channa awakened and was able to run away. Complaints have been made regarding this as well. In the case of Lalith Rajapakse, there were numerous threats on his

life and he is at present in hiding, while there is a police guard to protect his family and neighbor ULF Joseph, who was also threatened with death for helping the torture victim. Amarasinghe Morris Elmo De Silva, who was allegedly tortured by some officers of the Ja Ella police station, had to flee the country due to threats to him and his wife because of a case filed against the perpetrators at the Negombo High Court. Despite the numerous appeals and complaints in the above cases, government agencies have failed to provide adequate witness protection ensuring the security and well being of the victims. They have also failed to interdict the officers against whom inquiries are pending. The brutal and criminal behavior of such officers is thus allowed to take place with impunity, while the personal security of citizens is callously abandoned.

Prosecutors must be independent and impartial and must focus on achieving justice, particularly when dealing with crimes committed by law enforcement officials, which are graver in nature and consequence than those committed by ordinary civilians. When their work is based not on legal principles but on political or other influence, they are abusing their power; unfortunately, this is a common occurrence within Asia.

Partha Majumdar disappeared on 5 September 1997 after witnessing the shooting of Suresh Barui in Akrampur, West Bengal, India by police officers from the Habra Police Station. During the police firing, Partha was injured in his leg and was taken away by the police. In the days that followed, the victim's family made many efforts to locate him, to no avail; the police claimed that Partha had never been arrested by them. In January 1998, the West Bengal High Court ordered the West Bengal Human Rights Commission (WBHRC) to undertake an investigation of the family's claims. The WBHRC recommended the West Bengal government to instruct the Criminal Investigation Department (CID) to initiate a case against those responsible for Partha's disappearance. The CID began investigating this case, but it did not make any serious effort to arrest the accused. Instead, 11 accused police officers were granted anticipatory bail on 12 December 2000 without any objection from either the CID or the public prosecutor, even though their charges were non-bailable. Since then, the main accused Sunil Haldar has held the post of Additional Superintendent of Police, Malda, Murshidabad district. All the other accused are also still working as police. After several preliminary hearings, on 4 September 2004 the Additional District and Sessions Judge, 1st Court at Barasat, North 24 Parganas finally decided that the 11 officers should be tried. Partha's family alleged that during those hearings the prosecutor deliberately made mistakes regarding the date of the incident and the names of the places in the legal documents, to create confusion and delay. Furthermore, the prosecutor did not object to the defense counsel appearing for the accused being state government empanelled advocates, even though under



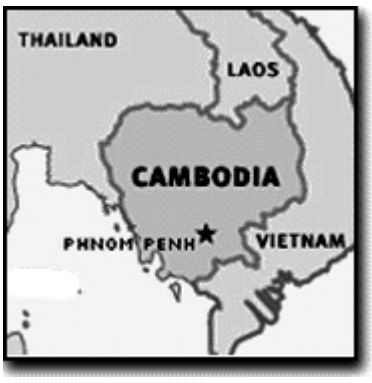
domestic law public prosecutors are prohibited to represent the police in a private capacity. Partha's family also stated that in court on September 4, the prosecutor allegedly threatened the victim's mother and elder brother in court. In response, Partha's brother, Mr Dipankar Majumdar, submitted a complaint to the Calcutta High Court. Although the high court ordered the removal of the public prosecutor and security for the complainants, nothing has been done.

The role of the judiciary

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

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

Institutional independence requires the judiciary to be able to function without any influence from the government or other state agencies. This is usually necessitated by either the constitution or other legal provisions in all but socialist countries or those with military dictatorships. However, throughout Asia, it is the practical realization of this principle that is more problematic. This can either be because legal provisions themselves are shaky, or that they are not being enforced as they should be. In its written submission to the 61st session of the Commission on Human Rights for instance, the ALRC stated that in Sri Lanka the Constitution of 1978 shifted power very much in favour of the executive president, to the detriment of the parliament and the judiciary. Though the constitution theoretically accepts the separation of powers, in actual fact the type of power arrangement it contains relegates the judiciary, including the Supreme Court, to a lesser position. The judiciary has very limited powers over judicial review.



Similarly in Cambodia, while the constitution accepts judicial independence, the political and legal structure that existed prior to the temporary UN government of the early

1990s remains in place. In other words, the courts function as an arm of the government. The present-day judges have associations with either the military or political parties; they are bound by circulars from the ministry of justice; most are not properly qualified; socialist trials are still the norm—it is presumed that if a person has been arrested, there is enough evidence to find them guilty. Furthermore, both the appeals and supreme courts are ineffectual.

> "When the judiciary participates in the abuse of power—as is common in many parts of Asia—it becomes a serious impediment to the implementation of human rights"

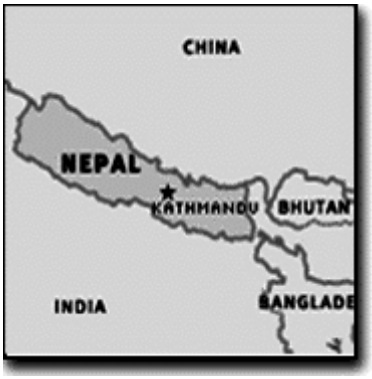
In India on the other hand, while the principle of judicial independence is accepted legally, there is no implementation. For instance, although the Criminal Procedure Code was rewritten in 1973 with the express intention that the judiciary be severed from other parts of the government, in West Bengal the lower judiciary is largely controlled by the police. In fact, the police there control almost all aspects of criminal proceedings, whether arrest, conviction, imprisonment or death.

The Beldanga police in Murshidabad district, West Bengal blatantly disregarded March 2005 court orders regarding the filing of a complaint and subsequent investigation of the death of Saidul Mullick, a potato vendor. The police ignored two separate court orders regarding this case, and finally even stated that they had no intention of carrying out investigations as they had decided that Mullick's death was a case of suicide. Mullick left his house on 29 November 2004 with two business partners and Rs 70,000 (USD 1600) in his pocket to purchase potatoes. When Mullick had not returned in three days, his wife lodged a complaint with the Beldanga Police Station. The next day, his dead body was found on the railway tracks near the Rezinagar Railway Station. The railway police seized the body and registered an unnatural death after conducting a post mortem. However, the post mortem report did not reveal the actual cause of death, nor whether it was a murder or suicide. When Dilruba went to the Beldanga Police Station to claim her husband's body and to file a First Information Report against his business partners, she was not only refused by the police personnel but also threatened that they would impose false charges on her if she did so. Dilruba then took the case to the district magistrate and Indrila Mukherjee, the Sub-Divisional Judicial Magistrate, directed the Beldanga police to register a case and submit a report, which they failed to do. On 29 March 2005, Dilruba complained that the police were refusing to file her complaint regarding her husband's murder and were trying to cover it up by insisting that it was a case of suicide. Sub-Divisional Magistrate Yasmin Fatema then ordered the Beldanga police to file the complaint, conduct an enquiry and report back to the court. However, the Beldanga police deliberately disobeyed the court's order and made an excuse that the officer-in-charge, Arun Kumar Das, was on leave and it was not possible to pursue the matter in his absence. It was later found that he had been on duty at the time. When a local human rights group spoke to him, he categorically stated that though the Beldanga police received the judicial orders, they had not complied with them and would not do so in future because the

case was one of suicide. In the meantime, the Superintendent of Police for Murshidabad District said that the inquiry was over and it was found to be death by suicide and not murder.

Even the Supreme Court of India is not exempt from such undermining of its authority, as evidenced by the Uttaranchal state government's non compliance with its orders regarding land rights. Over eight months after the Supreme Court declared that around 150 Dalit families in the Ambedkhar settlement have legal rights to over one thousand acres of land in Kashipur sub-district, Uttaranchal, the state government has not yet complied with the order. Although the Dalit community of Ambedkhar settlement had been legally tilling the land in question for over thirty years, in 1992 a local government official declared it to be 'surplus land' under state law, which means that legal rights to the land could be granted to the villagers. However, after that a local company called M/s Escort Farms Ltd contested the granting of title in the Allahabad High Court. In the meantime, the director of the company used his local influence to have the villagers violently and illegally evicted in 1993 with the help of local police and officials, and their village demolished. Over 80 of the villagers were detained for eight days on charges of disturbing the peace. Nonetheless, in May 1995 the court decided against the company and ordered it to pay one million rupees in compensation, to be used for the rehabilitation and resettlement of the villagers. The company appealed, and the case went to the Supreme Court, which finally gave its decision, also in favour of the Dalit villagers, in February 2004. The court ordered unequivocally that the state take control of the land with a view to returning it to the affected community. However, the state government has to date failed to act to see that the land is returned, despite the efforts of local human rights organizations to raise attention to the matter.

The judiciary in Nepal is undermined to the extent that court orders to release those arrested and detained arbitrarily by both police and military forces are simply ignored, with the persons being immediately detained as soon as they step outside the courts. In fact, many individuals have stated they prefer to remain in police or judicial custody, rather than be released only to be immediately rearrested, particularly by the military. In June 2005 at least 32 political activists and human rights defenders had been rearrested in violation of court orders since King Gyanendra's coup of February 2005. Even prior to the coup, however, Nepal's judiciary was weakened. For instance, four persons were arrested as soon as they stepped out of the judge's chambers at the Morang District Court on 14 July 2004, while in the presence of four lawyers from the local bar association. The four persons Yek Raj Basnet, Khagendra Sambahamfe, Ram Bahadur Ingaram and Tek Bahadur Bista were initially arrested nine months earlier and held for 'preventive detention' under the Public Security Act. That the judiciary cannot safeguard the



authority of its decisions or prevent the security forces from abusing the legal process indicates the failure of the judicial system in Nepal.

> "It is essential that judges are guaranteed the independence to undertake their work effectively"

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

For instance, public opinion in Sri Lanka sees Chief Justice Sarath Silva responsible for the lack of justice within the country and the collapse of rule of law. Lawyers typically claim he intimidates them when in court, and threatens to debar them from practice, especially in human rights cases. Others accuse him of manipulating panels and dates of hearings in a manner that casts doubt on the objectivity of proceedings. In a lengthy book entitled *The Unfinished Struggle for the Independence of the Judiciary* (2002), prominent journalist Victor Ivan has exposed extensive misconduct and abuse of authority by Silva both as Attorney General and Chief Justice. Most recently Nuwara Eliya District Judge Prabath de Silva resigned in protest against the Chief Justice. In November 2003, not for the first time, an impeachment motion was filed against the Chief Justice—the only avenue by which he may be investigated—with the signatures of about one hundred members of parliament. However, the Sri Lankan President exercised her political power to protect him. Thus, serious allegations against the highest judicial officer in the land were reduced to political bargaining chips. Meanwhile, a survey conducted by a reputable organization found that the public perceives the judiciary to be the second most corrupt institution in the country. The Sri Lankan judiciary is thus incapable of addressing its own institutional defects. With its highest member defending himself from allegations of misconduct, internal reforms cannot even begin. The judiciary's inability to respond to widespread criticism is demoralizing both the profession and the country's citizens. As a result, people are increasingly seeking to resolve their grievances outside the law, and so crime is on the increase.

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

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

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

The nexus between judiciary, police and government officials is most clearly visible in Burma. The ALRC stated to the 61st session of the UN Commission on Human Rights that

> The experience of U Ohn Myint and Ko Khin Zaw, both of whom were charged with criminal defamation for complaining of forced labour is indicative. Although the Government of Myanmar outlawed the use of forced labour in 1999, reports of the practice continue to be widespread, and attempts to lodge complaints in accordance with existing legal provisions have proved futile. When Ko Khin Zaw and U Ohn Myint filed a complaint in the Henzada Township Court, Ayeyawaddy Division in July 2004 after being jailed for failing to do sentry duty at a village monastery, their complaint was summarily thrown out of the court. However, the same judge then entertained a complaint of criminal defamation by the vengeful local administrative officials. The two villagers were found guilty, and were offered a fine or six-months' imprisonment. In an act of defiance, the two men chose jail.
>
> In another instance, on 18 April 2004 Police Corporal Aung Naing Soe came to Thida Street, in Thida Ward, Kyinmyindaing Township, and began to clear away homeless people present in the vicinity, including one Ma San San Htay, a betel nut seller, who quarrelled with him. He then hit her in the mouth, grabbed hold of her hair and before many witnesses dragged her along the road while she cried out for help. When 26-year-old Kyaw Min Htun intervened, the police officer hit him, whereupon Kyaw Min Htun hit back, breaking the officer's nose.

> Kyaw Min Htun was then taken and charged under section 333 of the Penal Code with inflicting violence on a public servant while in performance of his duties. On 24 June 2004, the Kyinmyindaing Township Court found Kyaw Min Htun guilty, and sentenced him to two years imprisonment with hard labour...

This lack of impartiality connotes a lack of institutional and individual independence. Judges in Burma are rarely appointed on the basis of merit or qualifications, rather, they are appointed based on their relationship with those in power. Without this independence, it is impossible for the judiciary in any country to function as it is meant to. If it does not function in this manner, there is no hope for the rule of law to flourish, and instead violence and impunity will be rife. Furthermore, if citizens do not have faith in their judicial institutions, they themselves will seek other ways of obtaining justice, which may in turn lead to more violence. It is for this reason that it is as crucial for the judiciary to be seen as being independent as it is for it to actually be so.

The way that judicial appointments are made and discipline enforced greatly affects the institutional environment. The appointment, promotion, dismissal and discipline of judges should be based on professional qualifications, merit and personal integrity, not on any other influences or bases. The same can be said for security of tenure and finance. However, at present there is a great lack of judicial accountability in many Asian countries due in part to the lack of standardized procedures for their appointment and discipline.

“There is a great lack of judicial accountability in many Asian countries due in part to the lack of standardized procedures for their appointment and discipline”

The absence of the rule of law in so many Asian countries means that there is no supremacy of law, as well as that the law does not meet the highest standards of human rights, but rather is becoming increasingly repressive. For this reason, all institutions of justice are suffering. The deterioration of these institutions together completely undermines the administering of justice, and with it, fundamental human rights.

A flawed approach to national implementation of human rights

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Asian Human Rights Commission &
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State parties to United Nations conventions are obliged to protect and promote human rights in their countries, while international organizations contribute to the national implementation of human rights by monitoring and offering assistance. Very often these agencies concentrate their energies on building and supporting national institutions for protection of human rights. The multitudes of academic courses on human rights that have sprung up in recent years also spend a lot of time dwelling on these institutions.

But what are national institutions for protection of human rights? In recent years they have come to be synonymous with national human rights commissions or their equivalents. Considerable time is devoted to the study of these commissions, and UN agencies often recommend their improvement as a primary means to protect and promote human rights nationally.

This is a flawed approach to national implementation of human rights, caused by deep misunderstanding, and neglect of article 2 of the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights. It is also an approach that indirectly denies the right of people to express their real frustrations at the lack of respect for human rights in their countries.

Article 2 makes it the primary obligation of the state "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kin". It spells out these obligations:

> 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 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 are violated shall have an effective remedy, not withstanding 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 the legal system of the State, and to develop the possibilities of judicial remedies.

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

Article 2 captures the essence of what is meant by national implementation of human rights. It holds that the state must be able to protect human rights by ensuring competent and impartial investigations into violations and by taking other measures to protect persons in need of protection. It requires functioning and credible policing, impartial and speedy prosecutions and due process. It obliges the state to provide adequate facilities for the police, prosecution and judiciary to work accordingly. It points to the need to amend laws to remove hindrances and encourage the better functioning of these institutions for protection of human rights. In short, it puts the primary onus for protection of human rights on state agencies.

"Academic programmes and UN bodies alike should emphasize national implementation of human rights via policing, the prosecution and judiciary"

Academic programmes and UN bodies alike should emphasize national implementation of human rights via policing, the prosecution and judiciary. Students brought to measure human rights in terms of the effectiveness of these agencies will be much better equipped to raise and contribute to discussion on pertinent issues of human rights implementation, now and in the future. However, the vast numbers of research papers that are these days completed by students in human rights courses hardly ever pay any attention to policing and prosecution agencies. And to the extent that the judiciary is mentioned, it is more in terms of general principles rather than the specific problems it poses to the protection of human rights in a particular country. Students therefore fail to see and grapple with the real defects that must be addressed if there are to be improvements.

The established method of teaching and espousing human rights is that if ideal principles of human rights and law are taught then these can slowly displace bad systems and end violations. This method has been proved wrong by over a century of instruction about separation of powers, independence of the judiciary and so on in countries around the world that had been ruled by Europeans: first by the colonial powers themselves and later by local intellectuals. Generations of students have been taught about the independence of the judiciary in countries where the judiciary is a tool of the executive power, or where it has subtly adjusted itself to the needs of the executive. The lessons they have been taught have not equipped them in any way to address the enormous levels of judicial corruption and the extent of decrepitude that persist today.

"Under even the best conditions the functions of national human rights commissions are necessarily limited"

So what can be expected of national human rights commissions? Most in Asia have been formed within the last decade with the expectation that they set out to protect and uphold human rights. International agencies and academic programmes have placed great store in this. But under even the best conditions the functions of these institutions are necessarily limited. Under the circumstances described above—without any practical measures taken by state parties to address judicial, police and prosecution corruption and ineptitude—it is absurd to expect that these commissions can make meaningful contributions, let alone serve as the main force for human rights protection in their respective countries.

This situation can be partly addressed by a concerted change in the methods of studying and teaching human rights adopted by universities and international agencies. What is needed is far greater input by persons knowledgeable about first the reality of human rights non-implementation in their countries, and then the principles. These persons must themselves be deeply committed to the promotion and protection of human rights by contributing to change locally. Such persons could do much to mend the present flawed approach on national implementation of human rights by meaningfully connecting the real problems that obstruct generally understood principles from becoming operative.

Persons who will spend their lives working to address not only individual violations of human rights but also a thoroughly corrupted legal culture must not be confined to learning and talking about principles that cannot be found in practice in their countries: they must begin with reality, and the=n with the principles and institutions needed to cause change. It is not difficult to begin with reality. Hardly anybody in Asia does not have some inner frustration that is linked to violations of human rights, whether it is about freedom of expression, police violence, working conditions, the environment or treatment of women. However, most of the time these frustrations remain private: perhaps shared among family and friends.

Human rights courses and international agencies, among others, could play a sorely needed role in giving voice to these frustrations, which can rarely be brought out to the fore in newspapers and electronic media, as these usually try to discourage the appearance of excessive discontent in a society: or simply prohibit such expressions altogether. So-called moral and ethical norms may also be invoked to deny expression.

Instead of persisting with their flawed approach to national implementation that starts with general principles, academics and international experts should be making a conscious effort to learn the detailed stories of individual violations and then connecting these to the institutional and systemic problems associated with article 2. This takes time. But over time, it leads

to a meaningful understanding of why and how violations occur and what can be done to address them. When that happens, the shallow discussion about human rights that at present goes on in most universities and international agencies will be greatly enriched, and these institutions will in turn make a far greater impression on the wider narrative of human rights than they do at present.

Institutions for the rule of law and human rights in Cambodia

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A brief reference to Cambodia's recent history is required for an understanding of its institutions of the rule of law and their functioning. Cambodia used to be an empire that dominated almost the whole of mainland Southeast Asia. The influence of Indian culture and civilization was catalytic in its rise to dominance, and in all probability Cambodia had adopted the Indian legal system based on the laws of Manu. Cambodia's power declined continuously from the 14th century onwards, while Vietnam and Thailand were on the rise. From early to mid 19th century Cambodia fell under joint suzerainty of Vietnam and Thailand. In the second half of the 19th century, alongside Vietnam and Laos, Cambodia fell under French colonial rule.

In the early 1920s the French introduced a penal code and civil code modeled on their Napoleonic codes. However, some Cambodian customs such as polygamy were also incorporated into these codes. Later, the codes of procedure and other laws were gradually introduced. In 1947 while still under French rule, Cambodia adopted a constitution that transformed it from an absolute to a constitutional monarchy with a multi-party democratic system of government. The constitution also recognized and protected the basic rights and fundamental freedoms of the Cambodian people. However, up to the end of French rule there were two justice systems operative: one for French and other foreign nationals, and the other for the indigenous Cambodian people. This dual system was abolished after Cambodia recovered its independence in 1953.

After the French departure, Cambodia seemed to have inherited the basics of the rule of law. Though the codes and laws were amended with the change of times, the French civil law system continued to function until 1975 when the Khmer Rouge rose to power and created a new communist state, in which Cambodia was swept clean and there was no law. The Khmer Rouge issued just one single law: the constitution, which they did not even care to respect themselves. They collectivized everything, including food. There was no private property, no

currency and no market. The whole country was turned into a giant work camp where people were forced to work like slaves under very harsh discipline. People found misbehaving, deviating from party directives, stealing or idling were punished with harsh reprimands, starvation, imprisonment, torture, but mostly death.

The Vietnamese troops ousted the murderous Khmer Rouge regime from power in 1979 and a new communist regime, the People's Republic of Kampuchea (PRK), was put in place. The Khmer Rouge put up resistance and Cambodia was in war again. Gradually, the Vietnamese troops and the PRK asserted their control over almost the whole of Cambodia.

A type of justice system modeled on the Vietnamese-Soviet system was introduced by the PRK. Courts were created and judges were appointed. A constitution was adopted in 1982. It reflected the communist character of the regime: the dominance of the Kampuchean (or Khmer) People's Revolutionary Party, a Marxist-Leninist party founded in 1951, which ran all government institutions from top to bottom; collectivization of factors of production; absence of private property; and regimentation of social life. In 1989 a constitution was adopted to supersede the 1982 Constitution. The PRK was transformed into the State of Cambodia (SOC) which became less communist with the introduction of a degree of liberalism and a market economy. Private ownership of farmlands that had been distributed to members of farm collectives was now constitutionally recognized. Private ownership of other factors of production was also recognized. State owned enterprises were now being privatized.

After the adoption of the 1982 Constitution the government successively enacted a number of laws or decree-laws such as the family law, contract law and land law. However, there were no laws on the rules of procedure for both criminal and civil cases. Judges and prosecutors were mostly sent to Vietnam for training. Students continued to enroll in law courses and some were sent to study in Soviet bloc countries: most to the Soviet Union. However, in the communist days to study law was a student's last choice. It was only after they had failed to get places in other courses that they enrolled to study law. Courts were part of the communist government and judges were placed under provincial governors or ministers depending on the level of those courts. The police were also superior to courts. People could be locked up for years sometimes without any trial, or jailed with summary trials.

In 1991 the protracted war in Cambodia came to an end. At the end of a prolonged peace process, the warring factions, together with representatives of another 18 countries, including the big five powers, signed two peace accords at the end of a conference held in Paris. These accords provided for the presence of a UN peacekeeping force named the United Nations Transitional Authority in Cambodia, or UNTAC, for 18 months in 1992 and 1993. UNTAC was charged with keeping the peace, running the country and organizing a general election.

> "After the French departure, Cambodia seemed to have inherited the basics of the rule of law; though the codes and laws were amended with the change of times, the French civil law system continued to function until 1975"

"According to the Paris Peace Accords, Cambodia was to be a liberal democracy respecting human rights and governed by the rule of law"

According to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Cambodia was to be a liberal democracy respecting human rights and governed by the rule of law. The agreement emphasized that, because of Cambodia's tragic recent history, "special measures" were required "to assure protection of human rights, and the non-return to the policies and practices of the past" (last paragraph of preamble). The participants in the conference offered, among other things, to "commit themselves to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia, as embodied in the relevant international instruments to which they are party" (Final Act of the Paris Conference on Cambodia, para. 12). Cambodia undertook to respect human rights and fundamental freedoms, adhere to all relevant international human rights instruments, and support the right of all Cambodian citizens to undertake activities which would promote and protect these human rights. For its part, the UN Commission on Human Rights undertook to monitor closely the human situation in Cambodia after the end of the transitional period. It should be added that the international community also pledged to help rebuild and develop the devastated country. There was also a commitment to create an independent judiciary to protect human rights.

Under the same accords a Supreme National Council of Cambodia or SNC was formed, comprised of the four warring factions: the SOC, Khmer Rouge, Khmer People's National Liberation Front (KPNLF) and Funcinpec (Front Uni National pour un Cambodge Indepéndant, Neutre, Pacifique et Coopératif). During the transitional period the SNC was the embodiment of the sovereignty of Cambodia. In order for it to accomplish its mission, the SNC was to delegate to UNTAC powers of direct control over five key areas of national administration: foreign affairs, defence, finance, public security and information. UNTAC found existing Cambodian legislation wanting, and in order to ensure the rule of law, it got the SNC to enact, in 1992, a criminal law and procedure for the transitional period, officially known as Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period. This piece of legislation has since been commonly known as the UNTAC Law. The following year, the SOC enacted its own Law on the Criminal Procedure, commonly known as the SOC Law.

Parallel with its other activities UNTAC then conducted a mass human rights awareness campaign. It ran a radio station for this purpose and others. Human rights NGOs and free press were born as a result of wanting to join in these tasks. In May 1993 the election of a constituent assembly was successfully held. However, the Khmer Rouge, the second strongest warring faction, withdrew from the peace process, ceased cooperation with UNTAC and boycotted and disrupted the election. Four out of 20 parties won seats with Funcinpec holding 58 and the Cambodian People's Party (CPP), the reinvented SOC, 51. The CPP in effect held control over the administrative and security apparatus

throughout most of the country. In September 1993 the Constituent Assembly adopted a constitution and turned itself into the National Assembly. A new national government of all four parties under the collegial leadership of Funcinpec and the CPP was formed. UNTAC ended its mission and departed, leaving a small team behind. Its work on human rights was handed over to the Geneva-based UN Centre for Human Rights, which opened its office in Phnom Penh. A special envoy of the UN Secretary-General for human rights in Cambodia was appointed.

Before closing this introduction, it should be added that Cambodia was not abandoned to rebuild alone. State signatories to the Paris Peace Accords and other members of the international community have, since UNTAC times, continuously provided Cambodia with assistance amounting to some USD 500 million a year for reconstruction and development. However, until very recently the rule of law has not received as much attention and assistance as other areas of reconstruction and development.

> "The adoption of the additional constitution law has created an anomaly: some have seen it as another constitution; others have seen it as yet another step towards dictatorship"

The 1993 Constitution

The current Constitution of Cambodia is very short. When first promulgated in September 1993, it had 139 brief articles. It now has 158 articles after its amendment in 1999, which created an upper chamber of Parliament: the Senate. In 2004 there was again another change to the Constitution to break a deadlock in forming a new government.

After the 2003 general election no party had an outright two-thirds majority with which to form a government as required by the constitution. A protracted deadlock ensued until in June 2004 Funcinpec agreed to join the winning party, the CPP. The leadership of the two parties struck a deal and to ensure that they could get sufficient support from the National Assembly, they had the parliament adopt an "Additional Constitutional Law." This law was not an amendment to the Constitution; rather, it was a distinct piece of legislation adopted to create a "package vote" for the same leadership instead of separate votes as provided for in the 1993 Constitution. Under that previous arrangement, the National Assembly should first elect its president and two vice presidents separately, by two-thirds majority. These persons then unanimously nominate a person as premier for the king to appoint. The premier then selects a Cabinet with two-thirds approval from the National Assembly. Under the deal that led to the new law, this process was bypassed so that the former prime minister and president of the National Assembly could simply retain their positions.

The adoption of this additional constitution law has created an anomaly. It is not a constitutional amendment as its adoption did not follow the constitutional procedure, which requires a fully-formed National Assembly with its leadership in place first, as at the time the assembly had not been fully formed. Some have seen this additional constitutional law as another constitution and have questioned its constitutionality. Others have seen it as yet another step towards dictatorship.

"The 1993 Constitution is basically an exposition of principles rather than a constitution"

The 1993 Constitution, even with the additional constitutional law incorporated, is basically an exposition of principles rather than a constitution. It has left a lot of room for interpretation and detail. For instance, article 41 says that, "No one shall exercise this right [to freedom of expression, press, publication and assembly] ... to affect the good traditions of the society..." But what is meant by "good traditions"? Article 20 says that, "The King shall grant an audience twice a month to the Prime Minister and the Council of Ministers to hear their reports on the State of the Nation," but does not indicate who is responsible for seeking these audiences. Article 41 says that, "The regime of the media shall be determined by law," but in article 12 of the press law as adopted there is a provision prohibiting the press from publishing "information which may affect national security and political stability". The constitution itself prohibits the exercise of freedom of expression, press, assembly and publication that may affect "national security" but not "political stability". What is meant by "political stability" anyway?

The constitution has nevertheless fulfilled Cambodia's obligations under the Paris Peace Accords and, together with these accords, has served as the basis for the development of human rights, democracy and the rule of law in Cambodia. According to it, Cambodia is governed by the rule of law. It recognises and protects "human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights" (article 31). There is a clear separation of powers with an independent judiciary. Judges and prosecutors are independent from the government. A supreme judicial body called the Supreme Council of the Magistracy (SCM) chaired by the king is responsible for their appointment and discipline. The other two branches are the bicameral parliament: the National Assembly and Senate. The National Assembly is periodically elected by a universal suffrage. This assembly elects the government. The rule of law is further consolidated by the constitutional affirmation of basic rights and fundamental freedoms, including the presumption of innocence, the invalidity of evidence obtained by torture, the proof of guilt beyond reasonable doubt, and the clear responsibility respectively of the king and of the courts for the protection of the rights and freedoms of the Cambodian people.

The Constitutional Council

The 1993 Constitution has created a Constitutional Council modeled on the French equivalent to ensure the constitutionality of laws, rules and regulations. This council also serves as the court of final appeal for electoral disputes. It is composed of nine members, three of whom are appointed by the king, three by the National Assembly and three by the SCM.

The constitutional role of this supreme body seems anomalous right from the start. Article 136 of the constitution states that, "The Constitutional Council shall have the duty to safeguard

respect of the Constitution, interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate." It also "shall have the right to receive and decide on disputes concerning the election of deputies and the election of members of Senate". Then in article 150 it states that, "Laws and decisions by the State institutions shall have to be in strict conformity with the Constitution." However, the law concerning its organization and functioning has limited its role in ensuring the constitutionality of laws and interpreting the constitution and laws. As it stands, this law does not give the council any role to ensure the constitutionality of "decisions by the State institutions".

"It is impossible for citizens to directly raise issues of the constitutionality of laws with the council"

It is impossible to raise the issue of the constitutionality of such decisions when these decisions affect the rights of citizens. Furthermore, access to the council is limited to a number of institutions: the king, president of the Senate, president of the National Assembly, prime minister and the courts. Individual members of the Senate or National Assembly do not have this right unless their petitions are signed by at least one quarter of the total number of senators or one tenth of the total number of members of the National Assembly.

It is also impossible for citizens to directly raise issues of the constitutionality of laws with the council. They have to file their complaints through one of the legally entitled persons. Under article 19 of the 1998 Law on the Organisation and Functioning of the Constitutional Council, they may raise the issue of constitutionality if they are a party to a trial and consider that a law enforced by a court or a decision of an institution violates their fundamental rights and liberties. There is an anomaly whether the constitutionality of a decision of an institution may be raised with the council. Such a petition must be accepted by the concerned court, which then submits "the law" to the Supreme Court. The latter then examines its admissibility and submits its views to the council. It is not clear whether the concerned court and the Supreme Court would entertain cases of "decisions by state institutions" for the council to pronounce on their constitutionality.

On top of this procedural obstacle, the political nature of the institutions that facilitate access, except the king, creates another difficulty for potential petitioners. A petition will not be entertained by ruling party members when its outcome may run against laws or decisions adopted by the government or favourable to it. Opposition members may entertain it but then petitioners may be seen as siding with the opposition, which they may not like. Then there is the political affiliation of the council members themselves. Like all other institutions of the country, the council is composed of political appointees. The king is an apolitical institution and his three appointees are generally seen as having no political affiliation. But the other six members are affiliated to the CPP and have not shown their independence from their party so far. Almost all of them have limited knowledge of law or

experience in the legal field. None of them have any constitutional expertise. Several of its members do not have the constitutionally required qualifications (degree in law, administration, diplomacy or economics).

"Although Cambodia reverted to the French civil law system, many Anglo-Saxon trained Cambodians are challenging this system"

Since its creation in 1998, the Constitutional Council has received very few petitions, and almost all of them have been from the opposition party. None has come from a party to a trial in court. The council and its procedures for petitions are little known. In addition, perhaps only one of all petitions received has met with a positive decision. For instance, it ruled against a legal provision reserving the post of Minister for Women's Affairs for a woman. Its decisions are very brief and are not supported by any lengthy analytical reasoning. None of the decisions have been considered landmarks. Some petitions have been rejected on procedural grounds.

The justice system

With the collapse of communism in the world and of the Soviet Union itself, and with Cambodia's undertaking to adopt liberal democracy, the Soviet/Vietnamese-modeled system of justice needed to change. France, which sponsored and co-chaired the Paris Peace Conference, moved to restore its influence in its former colony. One of its strong entry points was the legal system. It began to provide technical assistance to the Ministry of Justice and to help reopen the Faculty of Law and Economics. This Faculty, which has now become a university, has since been linked to the French University of Lyon. In February 1993 the SOC enacted two laws: one on criminal procedure and the other on the organization of the courts. The criminal procedure is very much a shortened version of the French Criminal Procedure Code. The organization of the courts is again the basic structure of the French courts. The French also helped to draft a penal code and a code of criminal procedure. These codes are basically modeled on the French codes. These codes are still awaiting the Cabinet's approval and adoption by the Parliament.

The French then began to sponsor the training of the national police. They also provide training to another police force, the military police, which was modeled on their gendarmerie or provincial police force.

Due to that French help and to the familiarity with the French system of survivors of the Khmer Rouge regime, Cambodia reverted to the French civil law system. However, many Anglo-Saxon trained Cambodians are challenging this system and are advocating for the incorporation of elements from the common law system. Some have requested the abolition of investigating judges, the adoption of the accusatory system of trial and a law on evidence.

In its final provision, article 158, the 1993 Constitution has stipulated that past laws, rules and regulations that are not contrary to its spirit and letter are to remain in force. So far, their constitutionality has not been verified, affirmed, or

challenged. SOC laws, rules and regulations and the UNTAC Law have continued to be in force. Because of the lack of laws to meet the country's needs, some law officers have made references to laws dated from the pre-communist era, as has the law governing the trial of former Khmer Rouge leaders.

> "The three governments since 1993 have not had any plan for legislation in their political programmes"

Although new laws have successively been enacted since UNTAC times, the three governments since have not had any plan for legislation in their political programmes. Only external pressure and necessity of circumstances have compelled the government to enact laws. For instance, the first post-UNTAC government had to speedily enact an anti-drug law at the insistence of the American administration. The same government, when still facing the Khmer Rouge armed struggle, hastily enacted a law outlawing the rebels. A law to extend the detention of one Khmer Rouge general, Ta Mok, did not take many weeks. But an anti-corruption law has not been enacted yet even though all three governments have promised to do so. It has been drafted and redrafted about a dozen times over the last ten years. Lately, an anti-terrorism law has been drafted, as has a law on demonstrations, and these two bills seem to have higher priority.

The law-making process starts at the concerned government department. The draft then goes to the Cabinet. Cabinet gets its Council of Jurists to look at it before giving its approval or sending it to an inter-ministerial committee to review before Cabinet approval. After Cabinet approval the bill then goes to the National Assembly to be looked at by a specialized committee before it is submitted to the plenary session of the National Assembly for adoption. Earlier there was little or no public participation in the law making process. However, thanks to pressure from donor countries, public participation is now allowed. Yet, this participation is not a rule and, most of the time, bills remain secret. The draft anti-corruption law is perhaps an exception, for so far there have been at least a dozen meetings to talk about the issue and draft the law.

The law-making process is basically French:

1. There is no publication of draft laws or bills;

2. There are no definitions, except lately when some definitions have appeared after persistent demands from Anglo-Saxon trained lawyers;

3. There is no schedule enumerating provisions of other laws and/or laws that are amended or annulled by the new law;

4. There is no provision for the review of laws and no flexible timeframe for their enforcement;

5. There are limited details, and executive orders are needed for enforcement;

6. There is no parliamentary verification as to whether or not these executive orders are in conformity with concerned laws.

Once they have been enacted, laws are not readily disseminated: law enforcement officers have to secure copies of the law via their own ways and means. According to article 93 of the constitution, all laws must be published in the Official Gazette, but the gazette was not published regularly until 1998. A government publishing house is responsible for this publication, but it is not widely known. The government runs a Laws and Regulations website, but this site is not updated. Not many laws are posted there anyway.

"Cambodian lawmakers lack initiatives to enact new laws when circumstances require, even though they have national and foreign legal experts to help them"

Cambodian lawmakers lack initiatives to enact new laws when circumstances require, even though they have national and foreign legal experts to help them. So far, most laws already enacted or pending enactment have originally been drafted in English or French by foreign experts and then translated into the Khmer language. This has posed two problems: firstly, the problem of translation, and secondly, many Cambodians are finding it difficult to understand the new Khmer phrases created for the new laws. Most of the time the original drafts are drastically changed or heavily edited before relevant ministers and/or the Cabinet can accept them and give approval. The translation, the changes and the editing have at times made some points of these laws unclear or ambiguous, or difficult to enforce. At times some key points have been taken out altogether.

There is also a general apathy among law drafters, law makers and law enforcers to change or improve laws or alter some provisions to make them more just or easier to enforce when flaws and shortcomings have been spotted. For instance, under the UNTAC Law when one person steals without using violence or breaking into a habitation, shop or storehouse, the act carries a sentence of up to three years in prison. When two or more persons commit the same offence their crime carries a heavier sentence of five to 10 years, for which no bail is possible, and the sentence cannot be reduced below the minimum or made a suspended sentence. There have been many petty thefts committed by two or more persons and when arrested and found guilty they are sentenced to five years imprisonment or more. This punishment has been widely acknowledged as too harsh, yet no official concerned has cared to propose any change so as to make it more just. The crime of bribery in the same UNTAC Law, which was meant for members of the four Cambodian warring factions in the transition period, also needs to be changed to apply to the new conditions.

Somehow, with the push and shove and assistance, in the post-UNTAC period up to the end of 2005 Cambodia enacted some 180 new laws, the latest one being the anti-domestic violence law. Altogether they are not voluminous, though. An advanced law student of average intelligence, fluent in Khmer language, can cover all these laws within weeks, let alone months. Towards the end of 2005 the Cambodian Office of the High Commissioner

for Human Rights compiled them together with international human rights instruments in one single thick volume of some 2,650 pages for dissemination to law enforcement officers and lawyers. This should be the job of the government, not that UN agency.

The push and shove over the last decade is yet to get the government to enact some crucial laws. These laws include the penal code, the code of criminal procedure, the civil code and code of civil procedure, the law on the organization and functioning of courts, the law on the amendment of the Supreme Council of Magistracy, the law on the status of judges and prosecutors, and the law on anti-corruption.

And to have laws is one thing, but to enforce them is another. Law enforcement is an even more difficult task when a culture of obedience to law has yet to be built. In the minds of western people who have come to help Cambodia in the legal and judicial sector, there is an assumption that when laws are enacted, they are automatically and effectively enforced and the majority of citizens will abide by them. The Americans were satisfied with the enactment of the anti-drug law. The environmentalists were also satisfied when the environment protection law was passed and other laws and rules and regulations declared areas of the country "national parks." However, they were all disappointed when there was little effective enforcement of these laws. Drug trafficking has continued and spread; illegal logging in national parks has continued. It is believed that this lack of enforcement stems from corruption in government: law enforcers make efforts to enforce laws that could bring benefits to them, or when pressurized to do so.

"In the minds of western people who have come to help Cambodia in the legal and judicial sector, there is an assumption that when laws are enacted, they are automatically enforced and the majority of citizens will abide by them"

This complacency contrasts with the pre-war period. Then there were more efforts to enforce laws, rules and regulations, even though there was also corruption. The change may boil down to a change of culture. In those days, the culture of obedience to law was much stronger. People were scared of the police when they broke the law. Now there is hardly any such culture. The culture of obedience to law was thoroughly destroyed by the Khmer Rouge in the second half of the 1970s, the continued communist indoctrination and warfare in the 1980s and the ensuing misery and suffering. Survival instinct was—and still is—+very strong. It has been widely acknowledged by many Cambodians that there has been a sharp moral decline, a "moral breakdown" in their society. Without morality, it is difficult to expect any obedience to law. The absence of the culture of obedience to law and Cambodia's tattered value system is affecting the functioning of all state institutions and in particular the institutions of the rule of law.

The courts

"Of all national institutions, courts are among the worst equipped"

Like the law-making process, the features of law and the system of justice in Cambodia are very much based on their French counterparts, but the Cambodian system of justice differs from the French system in that it is a single system while the French system is a dual system. The French system is composed of administrative justice and judicial justice. In addition, Cambodia's system differs in that it has not as yet established separate specialized courts as in France.

There are three layers of courts:

1. The courts of first instance composed of two municipal and 20 provincial courts and a military court;

2. The Appeal Court; and,

3. The Supreme Court.

Cambodia is now planning for the creation of specialized courts, including a labour court and a commercial court. All the 20 provincial courts are located in provincial capitals. They are located far from people living in the rural areas and are not easily accessible. The single Appeal Court is overloaded and there is a plan to create several regional courts.

Of all national institutions, courts are among the worst equipped. Many are housed in shabby buildings. The provincial court of Banteay Meanchey is housed in two small two-storey shop houses. Almost all are so small that there are no proper rooms for judges, prosecutors and staff. They lack modern office equipment such as computers and proper filing cabinets. They lack even a proper room to store court files. Almost all court buildings need renovation or rebuilding. The state of courthouses and their equipment shows clearly that the judiciary has the lowest status of the three branches of government. For example, the budget for the whole judiciary, including the Ministry of Justice, is just three fifths of the budget for the Senate, which has only 61 members and does not have much work to do.

Judges and prosecutors

Like their counterparts in France, Cambodian judges and prosecutors are all magistrates. Judges are called sitting magistrates, while prosecutors are called standing magistrates. A judge can become a prosecutor and vice versa. Generally, judges and prosecutors of the same court have very close relationships. After all, their respective offices are located in the same courthouse.

Judges can be trial judges and investigating judges. However, investigating judges cannot be trial judges for cases they have investigated. Trial judges try both civil and criminal cases. There has been mounting demand for a separation between the trial and investigating judges, and for specialization among both trial and investigating judges as cases have become increasingly complicated and require advanced expertise. Recently the SCM heeded the demand for a separation of judges into two distinct

bodies: one for trial judges and the other for investigating judges. However, this separation needs to be legislated. It is going to be determined in the law on the status of judges and public prosecutors and/or the law on the organization of courts now being drafted. There has also been demand for separation of judges and prosecutors into two separate bodies as well.

> "The government does not like judges and prosecutors to be independent"

The government does not like judges and prosecutors to be independent. Lately, it has decided to amend the constitution so as to place prosecutors under the authority of the Ministry of Justice. This would be a step backward, going against the trend around the world. If the constitutional guarantee of independence disappears, there will no longer be any constitutional ground upon which to advocate for the independence of prosecutors. Without any constitutional guarantee of their independence, prosecutors could degenerate further until they resemble Stalin's Prosecutor-General Andrei Vashinski.

There are no specific qualifications required for a person to become a judge or prosecutor, as there is no law yet in place to address this issue. As a result, the backgrounds of the existing judges and prosecutors are very diverse. Apart from some 40 judges and prosecutors appointed after the promulgation of the new constitution, the rest, some 120, did not have any legal training, let alone a law degree, when they were appointed during the communist era. Their appointment was then based on their membership of—and loyalty to—the communist party. Some were teachers, others petty functionaries or ordinary workers in the pre-communist era. Some younger ones were sent to Vietnam for short or long-term training. All were instructed to serve the party. Those who were subsequently appointed were also compelled one way or another to join the current power, the CPP. The president of the Supreme Court is a member the Standing and Permanent Committees of the CPP. The presidents of the Appeal Court and Military Court have recently been made members of the CPP Central Committee. As members of the party, judges and prosecutors have to pay membership fees and regularly make additional contributions, especially when the party needs more resources for election. They also participate in party functions such as annual meetings and provincial committee meetings.

There have been continuous training programmes both inside and outside Cambodia to acquaint judges and prosecutors with legal principles and practices in advanced systems of justice. In most cases, they face a language barrier when undergoing training by western experts. Some are more fluent in Russian or Vietnamese than in English or French. Others are too old or have insufficient education to acquire new knowledge. Some are more receptive. However, many are reluctant to use newly-acquired skills and knowledge. Even reformist judges and prosecutors feel pressure from people at the top, and are not confident when the laws on their status and on the organization of the courts have not yet been enacted.

"Prosecutors feel pressure from people at the top, and are not confident when the laws on their status and organization of the courts have not yet been enacted"

Some people have pinned their hopes on newly-trained judges and prosecutors from the Royal School for Magistrates. The first group of 50 law graduates entered there in 2003. However, to produce 50 judges and prosecutors every two years cannot meet the immediate needs. A provincial court needs 40 judges and prosecutors when currently it has about 10. The school, now known as the Royal Academy for Judicial Profession needs to have a similar intake every year, not every two years. In addition, it should not be placed under political control. Currently it is under the Senior Minister for the Council of Ministers. More foreign experts should also be employed as long-term trainers, and there should be arrangements for trainees to undertake internships in foreign courts.

The Supreme Council of the Magistracy

In 1994 the Supreme Council of the Magistracy was created via the Law on the Organisation and Functioning of the Supreme Council of the Magistracy, again modeled on its French equivalent. Its constitutional role is to help the king to ensure the independence of the judiciary, to nominate judges and prosecutors for appointment by the king, and to discipline judges and prosecutors (articles 132 & 133). It is chaired by the king and has eight members:

1. The Minister of Justice;
2. The President of the Supreme Court;
3. The Prosecutor General of the Supreme Court;
4. The President of the Appeal Court;
5. The Prosecutor General of the Appeal Court; and,
6. Three magistrates elected by their peers.

The composition reflects the body's corporate nature since all but two of the members are from the same profession. Now, apart from the king and the prosecutor-general of the Supreme Court, all are members of the CPP. This composition is different from the composition of the French counterpart when the latter comprises, besides members of the judiciary, people from outside the profession and/or appointed by different institutions.

When the SCM was put in place, the three magistrates were appointed on a temporary basis as there is as yet no law on the status of judges and prosecutors. This has impaired its legitimacy. King Sihanouk, when on the throne, did not bother to chair its meetings—except on one casual occasion when especially requested by some leading members of civil society—and did not appoint any representative to chair in his place. He wanted to distance himself from this branch of government, which he acknowledged as corrupt: although not any more so than other branches of government. King Sihamoni, crowned in October 2004, started to chair it not long after his enthronement.

The SCM has received complaints and has disciplined magistrates. However, there is no clear and transparent procedure for complaints and for the disciplining of defendants. It has a small secretariat to help with its functioning, but there has been growing demand for its restructuring to include members from outside the judiciary and have clear and transparent rules, procedures and mechanisms for complaints and their adjudication. A draft amendment to the law on its organisation and functioning has been pending for a long time, but so far has not been approved by the government.

"The police force has a much greater presence across the country now than prior to the communist era"

As almost all of its members are from political parties, especially from the ruling party, the SCM has not been seen as an independent body. To make matters worse, the Ministry of Justice has moved to place the SCM secretariat under its authority, but the SCM has refused to yield to this pressure. This move has been seen as yet another step to consolidate the government's control of the judiciary.

The police

Cambodia's National Police is a department of the Ministry of Interior, but currently the director general is very close to the prime minister and has the rank of a minister. He is known to be more powerful than the two deputy prime ministers who are jointly in charge of the Ministry of Interior.

The police force has a much greater presence across the country now than prior to the communist era. It is spread out and down to the commune level. As a legacy of communism, its quarters at the provincial, district and commune levels are invariably located next to the headquarters of the ruling party's offices, which in turn are located close to the offices of the local authorities. Its combined strength is some 60,000 men for a population of over 13 million. They are armed with pistols and/or rifles when on duty.

Apart from the immigration police and border police, there are four different police forces: the economic police, traffic police, administrative police, and judicial police.

The economic police monitor the circulation of goods within the country. Their role overlaps with that of customs officers.

The administrative police are in charge of law and order, but as a legacy of the communist days they gather and keep statistics on the population in each commune and get to know the activities of all residents. The district police inspector is also the chief of the administrative police of the district. He issues books that register the address of each family and the names, dates of birth and occupations of family members, and also books that register the address of each house and the names, dates of birth and occupations of all residents. He also approves of any change to previous registrations. In the pre-communist days there were no such books at all.

"In practice the Military Police also deal with ordinary offences, thereby infringing upon the domain of the National Police"

The judicial police force deals with crimes. Its officers have powers to investigate, arrest, detain, interrogate and constitute first information reports on suspects, and send them to court. They comprise all senior officers at different levels under the direct authority of the Judicial Police Department. All provincial governors, district governors, commune chiefs and some specialized civil servants—such as customs officers, tax officers, forestry officers and fishery officers—are also made judicial police officers.

A special unit under the direct responsibility of the director general of the police is specially trained and equipped with weapons, dogs and electric batons to stamp out any riot or unauthorized demonstration. Impunity seems assured to this force and it is very much feared.

Another police force that has inspired fear is the Military Police: a militarized version of the French provincial police, the gendarmerie. It has a force of some 7000 well-armed men. It is under the authority of the Ministry of Defence, but like the Royal Cambodian Armed Forces themselves, is placed under the direct command of the prime minister. Its role is not very different from that of the National Police. Its structure is more or less the same, but its units do not exist in communes. The commanders and deputy-commanders of its units are made judicial police officers for *flagrante delicto* offences and for military offences. According to article 11 on military tribunals of the UNTAC Law, "Military offenses are those involving military personnel, whether enlisted or conscripted, and which concern discipline with the armed forces or which harm military property." But in practice the Military Police have not limited themselves to these offences. They also deal with ordinary offences, thereby infringing upon the domain of the National Police.

For instance, in 2005 a team of NGO court monitors conducted a parallel investigation into a woman's allegation of battery, illegal confinement, robbery and rape by her ex-husband. This ex-husband was arrested by a team of Military Police officers. The National Police officers at the provincial, district and commune levels did not react to the arrest, although the case was reported to the National Police first. The officers only said that both forces had good cooperation. They let the Military Police make the arrest, though the case falls outside their jurisdiction. The prosecutor in the court seemed to prefer the Military Police, regardless of whether the case should be under their jurisdiction or not.

From time to time there have been conflicts of jurisdiction that have led to tension between the military and national police, especially over cases where each side could draw some illicit benefits. But in general, the National Police tolerate infringements by the Military Police and are content to moan and groan in private that their military counterparts are better trained, better equipped, more effective and better supported by the prime minister.

With such a strong force, one might expect that policing in Cambodia is effective and that there is law and order across the country. Actually, the opposite is closer to the truth. Some people make jokes about policing: in the pre-communist days there was a much smaller police force yet there was law, order and security 24 hours a day; now with a force several times stronger, crimes have multiplied in variety and are on the increase.

The police are criticized for abusing powers, corruption, ill-treatment and torture of suspects. The police force has been accused of arresting weak and poor people, and ignoring the wrongdoing of the powerful and the wealthy. The risk of a peasant riding a motorcycle to town and being arrested is many times greater than that of a motorist in a luxurious car ignoring a red light.

"The risk of a peasant riding a motorcycle to town and being arrested is many times greater than that of a motorist in a luxurious car ignoring a red light"

The ineffectiveness of policing in Cambodia comes mainly from the absence of a culture of obedience to law in general, and from low pay, corruption, abuse of power, lack of training and ignorance of rules and regulations. All these deny the possibility of law enforcement and undermine the entire criminal justice process.

The legal profession

In 1995 the legal profession was created by an act of parliament passed in the same year. The Bar Association of Cambodia was then formed. Some Cambodians with law degrees or related qualifications or experience were admitted to register as lawyers. They were offered some training before being allowed to practice law. Now, the Bar has also created a Lawyer Training Centre. It recruits holders of law degrees through an entrance examination. Its training consists of various law courses over one year and an internship under the supervision of a senior lawyer for another year. There are now 450 registered lawyers, some of whom do not practice. Almost all of them are in the capital. Some have opened their own law firms, others are working with legal aid NGOs, and others still work for companies and the government.

Under article 1 of the Law on the Bar, the legal profession in Cambodia is supposed to be independent. In practice it is under government influence. Two years ago four political leaders, including the prime minister, were made lawyers. This resulted in widespread criticism and aroused further suspicion that the Bar was under political influence: not least of all because the prime minister had offered to allocate part of the budget to the Bar for its legal aid programme and also gave a public building to serve as its office.

Since early 2005 the Bar has been paralyz==ed by a protracted conflict between its incumbent chair, Ky Tek, a private lawyer known to be pro-government, and the newly elected chair, Suon Visal, an NGO lawyer known to be very much independent. Ky Tek has claimed fraud during the election and has refused to step down. The case was brought to court. The Appeal Court upheld Ky Tek's claim but the Supreme Court overturned this decision and sent the case back to the Appeal Court for trial. The case

has not yet been finally decided. But while the case was pending, sensing that the decision of the Supreme Court was in his favour, Suon Visal obtained the approval of the majority of the Bar Council to take over the office and get another official seal made for his use. Ky Tek filed a complaint in court accusing Suon Visal and his associates of forging the seal. The court then issued arrest warrants against Suon Visal and others, forcing them into hiding. Of late Ky Tek and Suon Visal have agreed to hold a new election.

"The Cambodian criminal justice process, like the justice system as a whole, is a shorthand version of the French system"

The Bar has had nothing much to show for its achievements apart from the number of lawyers it has admitted and trained, and the legal aid programme to help indigent litigants. It has not made any remarkable contribution to legal and judicial reform and the Khmer Rouge trial process. It has remained silent when the government has violated principles of law. In addition, it has done virtually nothing to enhance the professionalism and ethics of lawyers.

The criminal justice process

The Cambodian criminal justice process, like the justice system as a whole, is very much a shorthand version of the French criminal justice system. It is an inquisitorial system. Investigations are conducted by investigating judges. Trial judges use information on file from an investigating judge with which to question and cross-examine defendants and witnesses. Prosecutors just lay the charges and play a secondary role in the cross-examination. Defence lawyers are not given enough time to have access to case files and prepare, and do not have adequate resources to conduct thorough investigations. They are not given enough time to make submissions in defence of their clients or to cross-examine witnesses.

The courtroom arrangement reflects the pecking order, with the trial judge at the top sitting behind a desk on a high platform, then the prosecutor behind a desk on a lower platform, and then finally the defence lawyer behind a desk on the floor. Defendants stand in a dock in the middle of the court floor, with the trial judge, prosecutor and court clerk looking down on them from higher up as if they were guilty already.

Pre-trial investigations

When there is a complaint against a person for having committed a criminal offence filed with the police or the prosecution, or when the prosecution or the police have any suspicion that a person has committed an offence, the police conduct an investigation. In law, a prosecutor should supervise this investigation. The suspect may be arrested with an arrest warrant and must be brought to court within 48 hours. Within this period of time the police detain the suspect for interrogation.

The first information report together with any exhibit and the suspect will be sent to the prosecutor of the relevant court of first instance (a municipal/provincial court). This prosecutor interrogates the suspect briefly and then decides whether there

is a case or not. If so, he requests the court to assign an investigating judge, who then briefly hears the case and decides whether to detain the suspect in order to help him with the investigation. If so, he issues a detention order. The suspect is kept in the prison in the province or municipality.

> "There is no law of evidence and no detailed standard procedure for investigating judges to follow"

In law, all evidence—including the suspect's statements gathered and submitted by the police to court—is considered provisional. The police evidence is considered valid for convicting the accused if there is no other evidence to charge them or to challenge it in the trial. The use of this police evidence has aroused concern when there is no defence counsel at the police interrogation, and the prosecutor shows no concern and takes no action when hearing the accused denying a confession and alleging torture.

The procedure is the same for *flagrante delicto* cases, but, in law, these cases can be heard by the court without any further investigation if the prosecutor judges that there is enough evidence to charge the suspect. In practice this procedure has not been used. All cases are investigated by investigating judges.

The detention of an accused cannot exceed four months. The investigating judge can extend this detention for a further two months only but he must give detailed reasons for this extension. The suspect can ask for bail. He can appeal against refusal of bail to the Appeal Court, and then to the Supreme Court. In law, bail is not allowed in felony cases. In practice there are many cases where detention exceeds the legally prescribed period of six months and there have been a lot of criticisms of this excess, which is punishable with one to 12 months imprisonment and a fine under article 57 of the UNTAC Law. However, so far no judge has been punished under this article.

There are many factors contributing to the longer detention periods: the inability to complete investigation in time due to workload, lack of expertise and resources, neglect, or unwillingness on the part of the investigating judge to let the accused out. In some cases, the cause is simply the lack of lawyers to defend the accused.

There is no law of evidence and no detailed standard investigation procedure for investigating judges to follow. Some investigating judges are more resourceful than others; some just rely on evidence gathered by the police. Some inform the accused of their rights and tell their lawyers of the dates and places of their interrogation. Others do not do that. There is no forensic expertise: they can rely only on witnesses, exhibits, physicians, and drug laboratory results. They cannot obtain phone call records unless authorized by the police. Therefore, both the police and investigating judges rely heavily on confessions. Some police officers have used physical torture to get these, but investigating judges are not reported to have used it. They may have used psychological torture.

Once finished, the investigating judge sends a case file to the prosecutor and president of the local court, requesting that charges be maintained or dropped. The prosecutor may object to the dropping of a charge and appeal against the decision. The president of the court then allocates the case to a trial judge, who then fixes the date of trial.

"Since investigating judges are supposed to conduct thorough investigations, there is an assumption that the evidence they have gathered will be convincing: hearings are a formality"

Trial

In law, no felony cases can be heard without a defence lawyer. The court must provide a lawyer if the accused cannot afford one. This is quite a problem in a country where there are not enough lawyers and legal aid is insufficient to pay the fees. Indigent defendants rely entirely on NGO lawyers for their defence, but there are not enough lawyers offering their services free of charge. The courts have other problems. There is a lack of smooth coordination with prisons in the transport of the accused to court on a particular date and time. At times trials have been delayed or postponed because an accused has been brought to court late or not at all. Another problem is that not many witnesses come to court as summoned. In some cases even the owners of stolen property do not bother to turn up. At times hearings of felony cases proceed without the required defence lawyers.

Since investigating judges are supposed to conduct thorough investigations, there is an assumption that the evidence they have gathered will be convincing. Hearings are a formality to ascertain the truth, and are short: from half an hour to several hours. Those lasting one day or longer are rare. Each starts with the trial judge's identification of the defendant and witnesses, if any, and enumeration of the rights of the defendant. Then the prosecutor reads the charge. After that the trial judge leads the questioning and cross-examination of the defendant and witnesses. The defence lawyer, if there is one, makes submissions and cross-examines prosecution witnesses, rebuts the charges laid by the prosecutor, and challenges the evidence. At times there is an exchange of arguments between the defence lawyer and the prosecutor.

The courts rely heavily on the confessions obtained by the police or investigating judge. There is also a lot of reliance on written statements made by experts. There is no insistence on the presence of eyewitnesses or expert witnesses, though they can be coerced to come to court to make statements and be cross-examined. When evidence presented to the court is not convincing or witness statements are not very consistent, the trial judge or prosecutor tends to cite statements of confession that the accused made earlier. If prosecution witnesses are absent, they cite their earlier statements, if any. The arresting police officers, and those who conducted the preliminary investigations, are rarely summoned. The concept of proof beyond reasonable doubt is not invoked.

The court clerk, who is supposed to record all the trial proceedings, has to interrupt this work when ordered to read out statements. In general court clerks lack the skills to record all proceedings. They leave blank pages and get the defendants and witnesses to sign or thumbprint on them to confirm what has been said and heard in court, and then fill them in later.

"In general the trial judge pronounces the judgment at the end of each hearing and after a short recess"

In many cases defence lawyers do not seem to be well prepared. Some take on cases just before trial. Many have not conducted any investigations, while others have made some efforts to get witnesses to court. They tend to seek bail without first challenging the charges against the client. They do not advise the client to remain silent during the investigation or even during the hearing. None ask the court to use the law to compel witnesses to appear for cross-examination, and readily accept the witness statements as recorded by the police or investigating judge. In general defence lawyers quickly admit the guilt of their client and request leniency even when guilt has not been proved beyond reasonable doubt. They have not questioned the constitutionality of certain legal provisions affecting the rights of the client. It is commonly known that some have resorted to bribes to win cases or get lighter sentences for their clients.

In general the trial judge pronounces the judgment at the end of each hearing and after a short recess. At times there is no such recess or the recess is not long enough—from 20 minutes to an hour—for the judge to go through all of the case facts. For instance, the hearing in an alleged murder of a renowned trade union leader lasted from morning until around 4pm. The trial judge retired to his room for about 20 minutes and returned to sentence the two accused to 20 years in prison, the next-heaviest sentence in Cambodian law, the heaviest being life imprisonment. Judgments are invariably brief, citing the charge, relevant provisions of law, a few main facts as heard and concluding with the verdict.

There is no restriction on petitions of appeal. Plaintiffs, the prosecution and the defendant all have the right to appeal the ruling of a court of first instance and a ruling of the Appeal Court. The Supreme Court is supposed to make decisions to correct errors of law, not details of facts, but it may send cases back for retrial by the Appeal Court and then hear a petition of appeal against a further ruling by that court. In the latter case it makes decisions according to both facts and law. Under such circumstances, a single case may be heard five times: by the court of first instance, Appeal Court, Supreme Court, then again by the Appeal Court and finally by the Supreme Court again. In criminal cases, there are also appeals against denial of bail. In practice, the hearing of a case is almost exactly the same whether it is heard at a court of first instance, Appeal Court or Supreme Court, or whether it is a trial or an appeal against the denial of bail. Facts are submitted in almost the same way at all courts.

"Through 2004 and 2005 a number of developments laid bare the true nature of the criminal justice system of Cambodia and indeed the regime ruling the country"

The criminal justice process can thus be very lengthy, but the Appeal Court has sought to hear cases before the period of detention of an accused exceeds the prison sentence for a crime. However, avenues for appeals and a lack of disciplinary measures against judges and prosecutors, if any, have fostered judicial unaccountability, especially in lower courts. At times courts of first instance have made arbitrary judgments and challenged protesting litigants or defendants to appeal because of corruption or executive control.

The functioning of the institutions of the rule of law in Cambodia, and in particular the judiciary itself, has many flaws and shortcomings whose examples cited above represent but a small sample. But these defects would not be so difficult to correct if those institutions were free from power politics. In fact, these institutions are used by the powerful more for repression than for the protection of rights and freedoms.

Institutions of repression

Through the second half of 2004 and the whole of 2005 a number of developments laid bare the true nature of the criminal justice system of Cambodia and indeed the regime ruling the country itself. Since 1993 Cambodia has organized three successive general elections, but these were not free and fair. The former communist party, the CPP, uses its extensive security and administrative structure and membership, its control of the media and vote buying to prevent other political parties from participating freely, in security and on an equal footing.

After the UNTAC organized election in 1993 Cambodians seemed to enjoy more freedom for several years. Then in 1997 the CPP led a coup that has since placed it at the fore of Cambodian politics. The old practices of communist days have reemerged. Prime Minister Hun Sen, vice president of the CPP, has gradually gained absolute control of his party and successive governments. In weekly meetings ministers listen to the prime minister's monologues and receive his instructions; some kneel in greeting upon entering his office. In the parliament, the CPP has increased its majority since the 1998 election. Because of its de facto inferior status, the parliament has never been able to control the government. Its committees for human rights and complaints are inactive and ineffective. The National Assembly has also never been able to call Prime Minister Hun Sen for questioning or debates at question time. He has never made any statement on national issues to the parliament. Since 1993, it has succeeded in calling in ministers for questioning not more than a dozen times.

The king has constitutional responsibility for the protection of human rights but lacks powers to discharge this responsibility. The fortnightly meetings between the king, prime minister and Cabinet as stipulated by article 20 of the constitution were never

held in King Sihanouk's time. The king did not make any direct suggestion or try to restrain Hun Sen's powers through official channels for fear of confronting him. He preferred to make indirect critical and mostly sarcastic remarks through the media, including his monthly bulletin of documentation and, over recent years, his own website. King Sihamoni has not yet proved more able to protect human rights and have Hun Sen follow a democratic path.

"Political neutrality is not a value in public administration in Cambodia"

The Constitutional Council is under the control of CPP appointees, who are the majority. It has not so far made any decision that could affect the policy of the government or protect the constitutional rights of the people. As mentioned above, access to the council is so difficult that no private citizen has ever requested it to examine the constitutionality of decisions by state institutions that have affected their rights.

The CPP and through it the prime minister also have effective control over the armed forces and all public administration, including the civil service, police, education and health bureaucracies and staff. The CPP does this both by consolidating its members' existing positions and appointing them to positions of responsibility. In Cambodia, political neutrality is not a value in either public administration or in the army.

Likewise, members of the CPP dominate the judiciary as judges and prosecutors. The government has had a legal and judicial reform programme since at least 1999. However, little has been achieved apart from the publication and launching of that programme and the strategy to implement it, talks, meetings, and promises upon promises.

In 2005 the real reason for the slowness in implementation of judicial and legal reforms became apparent: the prime minister wants to retain the judiciary and police as they are, and use them to destroy opposition and silence critics of the government.

In late July 2004 Hun Sen announced in a public speech later broadcast on TV and radio that the opposition Sam Rainsy Party (SRP) was organising an illegal army to overthrow him. His security forces identified Cheam Channy, a parliamentarian from that party, as the lead organiser of this army.

Not long after, Hun Sen and Prince Norodom Ranariddh (Funcinpec) filed lawsuits against Sam Rainsy and his colleague Chea Poch, also a member of parliament, for defamation, in relation to two claims. First, Rainsy had claimed that Hun Sen had been behind a bloody grenade attack on a demonstration he had led in 1997; and secondly, that Ranariddh had taken bribes from the CPP to make a deal with Hun Sen. Chea Poch was charged for the same claim against Rannariddh. In February 2005, in a closed-door meeting, the National Assembly lifted the parliamentary immunity of Cheam Channy, Sam Rainsy and Chea Poch. The latter two fled the country. Cheam Channy was

arrested and sentenced by the Military Court to seven years in prison for allegedly organizing an illegal army. Sam Rainsy was sentenced in absentia to 18 months in jail.

"The law, police, prosecution and judges continue to be used to silence government critics and spread fear among Cambodians: they have been turned into institutions of repression"

In October 2005, Hun Sen arrested Mam Sodando, the owner of Beehive Radio, for his live radio interview with a Cambodian border expert living in France critical of Hun Sen's signing of an additional border treaty with Vietnam. In the same month, Rong Chhun, leader of the Independent Teachers' Association, was also arrested for signing a statement critical of the same treaty, together with three other NGO leaders. At the end of December 2005 Hun Sen arrested Kem Sokha, director of the Cambodian Center for Human Rights (CCHR), and Yeng Virak, director of the Community Law Education Center, and a few days later Kem Sokha's deputy, Pa Nguon Teang, was also arrested. All three were held responsible for the display of a banner with small handwritten phrases critical of Hun Sen dating back to 2003 at the CCHR booth during a celebration for International Human Rights Day on 10 December 2005. A few other human rights activists were also charged for defamation, but they escaped arrest as they were already abroad or fled.

The arrest and trial of Cheam Channy was blatantly illegal. The Military Court that tried him had no jurisdiction over him as a civilian. His lawyers were not allowed to cross-examine prosecution witnesses and to present his witnesses. The UN Working Group on Arbitrary Detention said that the "deprivation of the liberty of Mr. Cheam Channy is arbitrary" (Opinion No. 39/2005, 25 November 2005). Actually, since his release at the start of February 2006 Cheam Channy has continued to claim his innocence.

There is also no proof beyond reasonable doubt that any others have criminally defamed anyone by simply exercising their right to freedom of expression over national issues. Recently, unable to resist worldwide condemnation of these arrests and criticism of his rule, Hun Sen withdrew his lawsuits and pardoned the opposition parliamentarians. His leniency is just a respite. The law, the police, the prosecution and the judges continue to be used to silence government critics and spread fear among Cambodians. These institutions of the rule of law and liberty have been turned into institutions of repression.

The "strong man" of Cambodia can use them against his critics and safely continue to consolidate his powers. The use of power for repressive objectives continues to be a hindrance to the current legal and judicial reform programme and to the development of democracy and the rule of law, and respect for constitutional rights in Cambodia.

Some recommendations

Cambodia's institutions of repression can be turned into institutions of liberty. Some measures that could be taken to this end include the following.

1. Cambodia should become a party to the Optional Protocol to the International Covenant on Civil and Political Rights, thus creating a new possibility for implementation of human rights.

2. The Cambodian Parliament should adopt as quickly as possible a criminal code, a civil code, a code of criminal procedure, a code of civil procedure, a law on the statutes of prosecutors and judges and a law on the administration of justice. These laws should incorporate the points recommended below.

3. Freedom of expression:

a. Defamation should be decriminalized and civil liability for defamation should be of such amount as not to ruin or bankrupt defendants;

b. The government should respect a free press and abandon its control over the electronic media; and,

c. The ban on demonstrations and other forms of assembly should be abolished.

4. The legal and judicial system should be depoliticized.

5. The police, prosecution office and courts should give priority to human rights, including the presumption of innocence, the right to challenge a charge and the right to remain silent.

6. Bail should be allowed in all misdemeanour cases.

7. Temporary detention centres should be completely separate from prisons, and detainees should be able to enjoy all of their rights.

8. The independence and impartiality of police investigators, prosecutors and judges should be respected by all, and

a. Politicians, including the prime minister, should not interfere in judicial matters;

b. The government and parliament should issue and order all their respective members not to interfere in judicial matters, have contact or be seen to have contact with prosecutors and judges over cases these judicial officers are handling; and,

c. Prosecutors and judges should not be members of any political party.

9. The Supreme Council of the Magistracy should be freely open and easily accessible for members of the public to make complaints against prosecutors or judges.

10. Investigators, especially investigating judges, should be given adequate resources and training to do their jobs properly.

11. The Bar Association and its members should uphold their independence and increase their professionalism.

12. Lawyers should discharge their duties not only to their clients but also for the administration of justice and should not hesitate to request changes to the law if it does not protect human rights or ensure justice.

13. Courts should give their cooperation and ample time to lawyers to prepare their defence.

14. The government should provide adequate legal aid to indigent litigants.

15. The government should provide monetary assistance and adequate protection to witnesses so that they can safely come to the courts and testify without fear.

[*Continued from front inner cover*]

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.

Sadly, article 2 is much neglected. There is a dearth of relevant international jurisprudence, and hardly any mention of it in the enormous volumes of annual literature on human rights.

There is a reason for this neglect. In the 'developed world' the existence of basically functioning judicial systems is taken for granted. This does not mean that these systems are perfect; in some instances they may face serious problems. But those from countries with developed democracies and functioning legal systems 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.

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

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.

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

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

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