article 2

of the International Covenant on Civil and Political Rights

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feature

2008

five countries in review

Bangladesh · Cambodia · India
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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

All over the world extensive programmes are now taking place to educate people on human rights. 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.

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.

article 2 aims to do this by drawing attention to article 2 of the International Covenant on Civil and Political Rights, 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 in part:

> 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. One reason for this is that in the 'developed world' the existence of basically functioning judicial systems is taken for granted. Persons from those countries may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. And as these persons guide the global human rights movement, vital problems do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise with article 2. One is the fear to meddle in the 'internal affairs' of sovereign countries. Governments are creating more and more many obstacles for those trying to go deep down to learn about the roots of problems. Thus, inadequate knowledge of actual situations may follow. 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.

Thus 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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Bangladesh 2008: Insidious militarisation and illegal emergency

Asian Human Rights Commission, Hong Kong

Bangladesh has struggled with poverty, environmental disasters, deeply entrenched corruption and a range of grave human rights violations since its independence in 1971. The lack of an independent judiciary has engendered a culture of impunity, which in turn increases the demoralization and fear in which those without power live. Furthermore, there is little interest at the international level for the plight of Bangladesh's population, with the United Nations Human Rights Council, in which Bangladesh holds membership, remaining all too silent in the face of grave and widespread abuses.

Illegal arrests, arbitrary detention, ill-treatment and torture in police custody are commonplace and constitute the means through which the authorities exert their control. Torture and ill-treatment are a core component of interrogation and criminal investigation. The police routinely abuse their power to extract money and "confessions" from detainees by using force while a person is in their custody. The fabrication of charges against detained persons is also used to threaten and punish persons. This is enabled by the lack of institutional checks and balances, notably as concerns the judiciary. Colonial-legacy laws and institutions re at the root of many problems, but the failure by the authorities to reform these, compounded by their willingness to abuse the powers granted as a result, make for an incendiary combination.

This article consists of extracts from the Asian Human Rights Commission's *State of Human Rights in Asia 2008* report. Contents of the report are available in PDF format by country online at the AHRC website, www.ahrchk.net. Interested persons may contact the AHRC to obtain printed copies of the full report. Please also refer to the earlier special report published in *article 2*, "Lawless law enforcement and the parody of judiciary in Bangladesh" (vol. 5, no. 4, August 2006, 140pp), available on the *article 2* website in PDF or HTML formats, www.article2.org).

The country has never had an independent judiciary; it has had a disposable prosecution, with many members of the judiciary being replaced each time of one of the two main competing political parties comes to power. The justice system, as is the case with the police and other state institutions, is used as a weapon by the group in power against the other, with the people of Bangladesh caught in the crossfire. In September 2008, the authorities announced the establishment of a National Human Rights Commission (NHRC). In reality, the top three appointments of the NHRC, including its chairperson and two members, were only made in late November. The institution lacks staff, other than a few bureaucrats who have been assigned to it, and, in addition, the law establishing the commission does not allow the body to function effectively and competently. Ultimately, there is no competent institution in the country that is functioning to provide redress to the victims of human rights abuses.

"Under the state of emergency, fundamental rights have been suspended, mass arrests have taken place, and militarization leaves Bangladesh on the verge of absolute military control"

The country began its three-year membership as a founding member of the UN's Human Rights Council (HRC) in June 2006. However, during this period, human rights have been seriously undermined in the country. In 2008, the human rights situation in the country has degraded to a new low due to an ongoing unjustifiable and unconstitutional state of emergency, which has enabled the military to gain a stranglehold on power and the further subjugation of individuals' rights. Under the state of emergency, fundamental rights have been suspended; mass arrests have taken place, with thousands having been subjected to ill-treatment or torture; and the pervasive militarization of state institutions leaves Bangladesh on the verge of absolute military control. The state of emergency was actually imposed on 11 January 2007, and has caused a significant decline in the human rights situation throughout 2007 and 2008.

The country is party to six major international human rights instruments, but its implementation of the rights enshrined therein remains superficial and the victims of violations of these rights have virtually no access to remedies at the domestic level. For example, the country is party to the International Covenant on Civil and Political Rights (ICCPR), but has extrajudicially violated the right to life of hundreds of persons in recent years, with impunity. It has arbitrarily deprived hundreds of thousands of persons of their right to liberty. It is party to the Convention Against Torture, but torture remains endemic and perpetrators go unpunished.

Prior to its election to the HRC, Bangladesh pledged to protect and promote fundamental rights, but has since suspended many of these rights and violated many more. It pledged to separate the judiciary from the executive, but it has, in reality, consolidated the executive's control. To promote its election bid, it cited constitutional guarantees, among them equality before the law, protection of life and liberty, and the freedoms of speech, assembly and association, but has since violated all of these rights on a

grand scale and has severely undermined the constitution through the unjustifiable state of emergency, accompanied by illegal laws and actions.

"Extra-constitutional bodies have been established to provide clemency to persons that the government is seeking to protect from prosecution"

The emergency has provided an opportunity for the military to consolidate its power and control in the country. For example, the National Coordinating Committee (NCC) was formed comprising senior generals of the army and several top officials. This included of a retired general occupying the position of adviser to the government. In this role, the retired general in question decides which allegations of corruption against politicians and businessmen will be filed and who will be charged. The NCC, which exercises supreme authority over all other institutions of the country regarding corruption cases, was established without any legal provisions enabling it to take up this role. In this way, the NCC illegally superseded the Anti-Corruption Commission (ACC), which is the legally-mandated body concerned with fighting corruption in the country.

The armed forces remain deployed across the country. Military officers have insidiously taken up roles in the civil administration, diplomatic offices and at the local level. The whole nation, from the local operational administration to the national policymaking levels, is now under the grip of the armed forces. The development activities of all sectors of public administration have been curtailed. The justice delivery system has effectively collapsed, notably concerning any illegal actions perpetrated by the armed forces during their crackdown on the population.

The police and paramilitary forces such as the Rapid Action Battalion have also been responsible for abusing human rights on a grand scale. Illegal arrests, arbitrary detention, fabrication of charges against detainees being held under emergency laws, denial of judicial remedy, torture, ill-treatment and extrajudicial killings of persons while in custody have increased during the state of emergency. The longstanding problem of overcrowding in prisons has also worsened.

The Ministry of Home Affairs, the ACC and the NCC have ordered massive arbitrary arrests and detentions. Criminal charges have been lodged against many of these persons, including around 200 politicians and heads of business institutions. Special Tribunals have been set up to prosecute persons targeted by the authorities, which are evidently incapable of providing public access and fair trials. Conversely, extra-constitutional bodies, such as the Truth and Accountability Commission, have been established to provide clemency to persons that the government is seeking to protect from prosecution. Furthermore, in 2008 the higher judiciary created controversy by abdicating its inherent constitutional power to provide legal remedies concerning cases lodged by the State under the emergency instruments. Judicial standards and the rule of law have repeatedly been undermined as the result of the releases of high-profile political persons through executive order that bypass the courts. The freedoms of expression and opinion have repeatedly been denied, notably for journalists and human

rights defenders. The media has been monitored by the intelligence agencies and the armed forces, censoring any news and opinions critical of the actions of the government.

"Police illegally arrest individuals without any specific complaint; the motive is to extract money"

Failure of rule-of-law institutions

The chronic human rights problems that are encountered in Bangladesh stem from the failings in the institutions that are meant to protect the country's citizens and instead contribute to their repression. On the frontline between the state and the people is the police force, which in Bangladesh is corrupt, violent and undermines rather than enables the rule of law.

The police

The members of Bangladesh's police force are notorious for abusing their power in order to earn money. At the local level, the police regularly illegally arrest individuals without any specific complaint, justification or legal basis. The motive is to extract money from the detained persons or their relatives, who often, ironically, belong to the poorest sectors of society. Such persons are subjected to threats and ill-treatment during arrest. At the police station the police officers demand bribes, which are typically beyond the capacity of the arrested persons. Failure to pay typically results in severe ill-treatment or torture. Such abuses are not the exception but the rule.

Ill-treatment and torture is not the end of the victims' suffering, but rather can be the beginning of a process of abuse. Beyond physical abuse, the police use intimidation and threaten to implicate arrested persons in pending cases or fabricated charges concerning serious crimes, if the bribes are not paid. In case of partial payment, the police use torture to compel the person to pay more. If the person survives this and his relatives manage to get more money to the police as well as the intervention of persons in a position of power, they may produce the person before a magistrate's court on the basis of a minor offence, such as theft.

In many incidents, however, the police implicate innocent persons in pending serious cases, including robbery, murder, and possession of illegal arms or drugs. If there is considerable and irresistible pressure exerted by influential political groups or members of locally well-known rich families, the arrested person may be produced before a magistrate's court under section 54 of the Code of Criminal Procedure, 1898, which allows the police to arrest people on suspicion. This can enable the arrested person to secure release more easily than if charged directly with a serious offence. At best, the person may be released from the police station without any valid records of the incident, with the victims having been forced sign blank papers ensuring impunity for those responsible.

The police abuse the powers to arrest granted to them under section 54 of the Code of Criminal Procedure. In most cases, the police officers appeal to the magistrate's court seeking a person's remand under section 167 of the code with the intention of

detaining people to extract bribes by applying torture, ill-treatment and intimidation. The same police that conduct criminal investigations handle the prosecution in the magistrates' courts. Magistrates generally grant the remand applications.

"The police have increased the use of extrajudicial killings and threats of killings as an extreme form of extracting money from citizens"

The police investigators interrogate the alleged accused persons under section 161 of the Code of Criminal Procedure. This is one of the most abused clauses of the law, under which the police routinely pressurize the detainees to give confessional statements. The police also intimidate the suspects to deliver a prescribed statement before the magistrate, when the Magistrate officially records statements under section 164 of the Code. In such prescribed statements the police implicate various persons, often arbitrarily and at the behest of those whose interests they serve.

At each step in the criminal investigation the police officers compel those involved to pay bribes. A police sub inspector who was assigned as an Investigation Officer in Narsingdi district told the Asian Human Rights Commission (AHRC),

> I was asked to recover a dead body from some submerged land at around 10 o'clock in the night. The place was around 10 kilometers away from the police station. I went to the scene of crime on my personal motorbike. I found the decomposed body floating on the water. Nobody could go close to the body due to the bad smell. I called some local people to help me to recover the body. Everyone was avoiding me. Then, I shouted at the villagers that if they do not come to help me, I would fabricate cases against all of them. After the threat a few people came and I was able to send the dead body to the Narsingdi district hospital for a post mortem by rickshaw. Altogether I had to spend around Taka 1200 for transportation and other related costs like buying a mat to cover the dead body.

When the police officer was asked who paid the money, he replied, "The complainant of the case!" The policeman added,

> I cannot pay money from my pocket. The government does not pay us sufficiently for accomplishing our official works. The authorities do not allocate an adequate budget for the fuel of our official car let alone my personal motorbike. The investigation officer has to buy paper and pen with his own money. So, we extract money from the parties involved in the cases. That's the way!

Recently, the police have increased the use of extrajudicial killings and threats of such killings as an extreme form of extracting money from citizens. The hundred of extrajudicial killings carried out with impunity by the Rapid Action Battalion (RAB) have likely inspired this practice. An example of how this works is as follows: a man is arrested and accused of alleged involvement in a criminal gang or underground political party. The police threaten to kill him and cover it up by making it look like he was killed in a crossfire incident unless a significant bribe is paid. Insufficient payment leads to the man being killed.

By forcing victims to sign blank papers, the perpetrators of these abuses ensure they are protected from any legal proceedings initiated by the detainee. In many cases, especially

in those involving the RAB, impressions of fingers and palms are taken in order to manipulate evidence against the detainees. Such methods are also used to ensure the continuing intimidation of victims of abuse, leading to very few complaints being registered.

Corruption in the police is multifaceted. For example, a young man (whose identity shall not be disclosed here for security reasons) told the AHRC that his family had become worried about the security of his niece following sexual harassment that she had been subjected to on a regular basis. He went to the local police station to lodge a complaint out of concern for the security of his niece. At the police station he met a sub inspector and wished to lodge a complaint against the alleged perpetrators. In response, the police officer discouraged him from recording a complaint and offered to help him personally saying: "Just give me 20,000 Taka [USD 290] and the name, address of the culprit with photo, if possible; removing my uniform I'll wear plain clothes, take a gun and finish the bastard within few days!"

Local feudal leaders can effectively use the police as hired guns to do their bidding, further their business interests or settle conflicts with rival persons or communities. The police can also withdraw their support from a particular person or group if they receive a larger amount of money from elsewhere, ensuring that law-enforcement in the country is nothing more than a mercenary force, working for the interests of the richest and most powerful. These arrangements particularly penalize groups from ethnic or religious minorities. There are numerous examples of the police intervening in land dispute cases upon receiving bribes from locally influential groups, and suppressing the poor or minority groups involved, despite the fact that there have been cases pending before local civil courts concerning which there had been orders for the maintenance of the status quo.

Political interference in the work of the police is another factor that prevents it from functioning as envisioned. In an official workshop held in late 2007, the commissioner of the Dhaka Metropolitan Police (DMP) accused politicians of exerting unwarranted influence and pressure on the police administration, jeopardizing its freedom. He also stated that the main cause of harassment by the police is the decades-old absence of rules, for which the police is not responsible. The officer also observed that one of the main causes of public harassment by the police results from the appointment of inefficient persons as police officers. The commissioner further admitted that professional inefficiency and lack of knowledge within the police department made things worse and that the police sometimes arrest people without reason, and they intimidate innocent persons with arrest and abuse of law, particularly section 54 of the Code of Criminal Procedure and the DMP Ordinance 1976.

"Political interference in the work of the police is another factor that prevents it from functioning as envisioned"

"The Ministry of Home Affairs is now proposing a bill to address the problems in policing in Bangladesh"

Such interference is indeed a major contributing factor to the breakdown of policing in the country, and is not limited to high-profile cases. In fact, the police force makes use of this interference as an additional source for corruption and is therefore open to it being used in even petty cases.

In 2004, the United Nations Development Programme in collaboration with DFID and the Government of Bangladesh initiated a USD 13,380,953 project called the "Police Reforms Programme" (PRP). The PRP "aims at improving the efficiency and effectiveness of the Bangladesh Police by supporting key areas of access to justice; including crime prevention, investigations, police operations and prosecutions; human resource management and training; and future directions, strategic capacity and oversight". According to the information on the programme's website, it

> Complements other initiatives for reform in the broader justice sector and is designed to assist Bangladesh Police to improve performance and professionalism consistent with broader government objectives. Support to a functioning, accessible and transparent criminal justice system, institutions and services (including legal aid) means that poor people and other disadvantaged groups have protection, representation and recourse to hold the resource-rich accountable for commitments services included in the MDGs [Millenium Development Goals] and their targets.

In the rationale of the PRP, it was mentioned that

> An accountable, transparent and efficient policing service in Bangladesh is essential for the safety and well being of all citizens, national stability and longer-term growth and development, particularly the creation of a secure environment which is conducive to consumer and investor confidence. The Needs Assessment Report clearly outlines the rationale for a PRP to support the Bangladesh Police. In summary:
>
> ·Significant problems exist with law and order, corruption, rule of law and access to justice in Bangladesh, and these issues adversely impact on the poor and vulnerable especially women and young people;
>
> ·The problems are so profound that they have serious implications for the social and economic well being of Bangladesh; and
>
> ·The police alone cannot solve these problems and need to work in close collaboration with the Ministry of Home Affairs, Government of Bangladesh, relevant Ministries, other agencies in the broader criminal justice sector, civil society and NGO and media, development partners and the community.

The Ministry of Home Affairs is now proposing a bill to address the problems in policing in Bangladesh and there are concerns that the powers provided to the police under sections 104 to 111 and the punishments proposed in sections 129 and 130 could easily be abused. In spite of the provision of a Police Complaint Authority under section 71 headed by a retired appellate division judge or a person having a high standing, and comprising four more persons, two of whom are to be retired police and civil officers, this system is unlikely to improve the situation concerning grave violations of rights. Complaints are to be dealt with as general complaints or serious complaints, but there is

no definition concerning what these categories mean, which will leave room for the police officers to manipulate the complaints system.

Under the PRP, the authorities declared a number of police stations as "Model *Thana* [police stations]" with the aim of

> Demonstrating how pro-people policing can benefit the community and ensure their needs and expectations can be met. Personnel of this model Thanas will be gender inclusive and trained to enhance skill levels and prepare them to implement a more pro-people policing approach in their engagements with the local community. Standard Operation Procedure (SOP) would be developed for the model Thanas through workshops that are being held at each model Thana. People from various walks of life, government officers, representatives from various NGOs and local government department have been participating in the Model Thana workshop and contributing in preparation of SOP. Usually all model Thanas would be conducted following the SOP.
>
> To run the model Thanas effectively and efficiently logistic support such as vehicles, Motor Cycles, walkie-talkies, fax, computer systems, investigation kits, camera etc. are being provided. As per SOP regular training programme would be conducted to the model Thana officials.

In reality, the people's expectations have not been met. Abuses of power, the use of torture in custody, and the fabricating charges have not diminished as a result of the PRP. The Boalia Model Police Station in Rajshahi city is an example among many. The officers of the Boalia Model Police Station recorded a fabricated charge against Jahanagir Alam Akash, a journalist and human rights defender based in Rajshahi, following instructions by the RAB, which illegally arrested, detained and tortured Akash in 2007.

The judiciary

The above methods of abuse perpetrated by the law-enforcement agencies are enabled by the failure of checks on their powers and activities, notably as a result of a lack of an independent and functioning judiciary. Bangladesh has never had an independent judiciary. The judiciary, from the Supreme Court down, has been weakened through politically-motivated appointments made by successive regimes, in order to ensure that the judiciary acts in the interest of those in power. In its pledges to the HRC in 2006, Bangladesh promised to "separate the judiciary and the executive as soon as is feasible." Despite the directions of the Appellate Division of the Supreme Court on December 2, 1999, this has still not happened. Since the above pledge was made, the judiciary has instead been placed under greater control by the government, despite promises that it would separate the lower judiciary from the executive on November 1, 2007. The separation has been made on paper but not in reality.

Successive governments of Bangladesh have manipulated and rendered ineffective the criminal justice system by politicizing its institutions, notably through appointments of judges and magistrates. Selection and promotions of judicial officers depend on the interests of ministers and parliament members and the

"Bangladesh has never had an independent judiciary"

loyalty of the candidates to the incumbent regimes. This system undermines the establishment of justice and favours those who pander to the wishes of those in power in the executive. In particular, judges and magistrates take care of the interests of lawyers belonging to the ruling parties as well as police officers working for them. This makes the prospect for victims seeking redress as the result of violations perpetrated by the police or those in power virtually impossible.

"There are allegations of military intervention in the proceedings of the Supreme Court"

Bangladesh has three tiers of courts—the Supreme Court, judges' courts and magistrates' courts—with a long heritage of control by the executive branch over the judiciary. In October 2007, the government made a gazette notification that the subordinate judiciary—the magistrates' courts and courts of sessions and district judges—would be separated from 1 November 2007. The Supreme Court of Bangladesh, which was established according to the provisions of articles 94 to 113 in chapter I, part VI of the country's constitution, has retained some independence from the executive since the inception of the country.

The magistrates' courts have been operated under the Ministry of Home Affairs. Recruitment to the Supreme Court has been through the Ministry of Law, Justice and Parliamentary Affairs. In practice, appointing or confirming judges in the High Court Division of the Supreme Court have been a political choice made by the incumbent regime. Following the separation of the judiciary from 1 November 2007, the Judicial Magistracy has officially been separated from the Ministry of Home. However, the same magistrates have been deputed or assistant judges have been transferred as judicial magistrates to fill up magisterial vacancies. There has been a fresh recruitment of around 200 magistrates since the separation.

There are frequent instances of arbitrary supersession concerning the appointment of Supreme Court judges in the Appellate Division and concerning the selection of a chief justice. The most recent instance was on May 25, 2008, regarding the appointment of M M Ruhul Amin as chief justice, superseding Justice Mohammad Fazlul Karim, who was the senior judge in the Appellate Division during this period and should therefore have been appointed chief justice. The Supreme Court Bar Association protested the supersession and abstained from its customary welcome to the new chief justice on the occasion of his assuming office.

The Supreme Court of Bangladesh has been divided in its rulings during the state of emergency, with the High Court Division ruling in line with the constitution and fundamental rights of persons detained under emergency powers, while the Appellate Division has stayed many of these orders upon requests by the attorney general, thus violating individuals' rights.

Furthermore, there are allegations of military intervention in the proceedings of the Supreme Court. Senior barrister, Rafiqueul Haque, publicly stated that an army major had been occupying

a room on the second floor of the Supreme Court and had been deciding which case was to be heard by which judge. There has been no response to this allegation from the government or the armed forces.

"Younger and less-experienced lawyers seek appointment as prosecutors through personal and political channels"

The prosecution

Bangladesh effectively has a disposable prosecution service. Whenever a new government has taken over power, all prosecutors have been removed from their offices, and new ones have replaced them.

The prosecution system in every district consists of the posts of public prosecutor, government pleader and special public prosecutor. These law officers are accompanied by assistants, whose numbers vary depending on the number of courts they must cover and the size and population of the district. There are no particular rules to appoint them. The recruitment process is based on the political choice of the ruling political party of the day. Local parliamentarians, influential political leaders associated with the ruling party or bar association leaders with political affiliations, or perhaps all of these, make lists of lawyers to serve as prosecutors. They send these lists to the Ministry of Law, Justice and Parliamentary Affairs through the office of the local deputy commissioner, who is the ex-officio district magistrate, or directly to the ministry by 'selectors', depending on the extent of their power and influence.

The government appoints prosecutors from among those recommended. Younger and less-experienced lawyers seek appointment as prosecutors through personal and political channels. Those persons with the right connections can get one for free, but otherwise a down payment, or at least a guarantee of suitable payments at a later date, is needed to secure a post. Prosecutors often have inadequate knowledge of law and experience in legal practice as a result, but have clear political affiliations. On the other hand, senior lawyers are reluctant to serve as prosecutors because of the lack of facilities and remuneration.

However, under the present military-backed interim government a slightly different type of procedure has been followed. In some cases, interested lawyers have sent applications to the offices of deputy commissioners to seek positions and the government has made its choices after inquiries conducted through the intelligence agencies as well as in view of the relationships between the applicants and officials in those agencies. The political affiliations of some prosecutors are less pronounced than before, although they are still screened in order to ensure a level of reliability concerning the government's purposes.

The president appoints the attorney general under article 64 of the constitution and sections 492 to 495 of the Code of Criminal Procedure. The appointee must have the same qualifications as a judge of the Supreme Court, and serves the president. However,

in reality the president has no power to select the appointee but merely formally approves the government nominee, who is selected for the same sorts of political reasons as ordinary prosecutors. The additional attorney general, assistant attorney general and a number of deputies serve the attorney general. As in other cases, there are few criteria for their selection and little screening. The only real condition is that they be lawyers capable of pleading cases individually.

"There are also frequent complaints of prosecutors having won a hearing in the lower court where they have pleaded for the state reappearing in the appellate court representing the other party as private lawyers"

Public prosecutors use their positions to advance their private practices, which results in unseemly events in court such as the appearance of a group of witnesses without any prosecutor on hand to examine them or prosecutors who have not prepared for a hearing who confuse and intimidate their own witnesses. Unsurprisingly, such cases result in acquittals. There are also frequent complaints of prosecutors having won a hearing in the lower court where they have pleaded for the state reappearing in the appellate court representing the other party as private lawyers.

Ironically, one cause of public prosecutors' ill discipline and tendency to engage in private practice when they are supposed to be working for the state is that they are independent. They cannot be sanctioned or punished if they fail to appear at their offices or in court. Only assistant and additional prosecutors are liable to their immediate superiors.

Under sections 492(2) and 495 of the Code of Criminal Procedure, the government assigns police to conduct the prosecution in the magistrates' courts, which deal with around 70 per cent of all cases in the country. A police officer at the rank of sub inspector normally deals with the prosecution of cases before the court, although these officers do not have law degrees or training in prosecution; they are just transferred from a police station to the job, sometimes as punishment. In cases that are tried with police as prosecutors, the battle is imbalanced because the prosecution either fails to prove the charges or the accused are convicted on faulty evidence and reasoning and are acquitted on appeal.

National Human Rights Commission established

Calls for the establishment of an institution to address human rights problems and provide effective remedies to the victims had led to the establishment of the National Human Rights Commission (NHRC) of Bangladesh. The military-controlled government promulgated an ordinance on 23 December 2007, announcing its establishment. On 1 September 2008, the government made an official announcement that the National Human Rights Commission had been in effect since that date. Amirul Kabir Chowdhury, a retired judge of the Supreme Court of Bangladesh, was made chairperson, and Professor Niru Kumar Chakma, a teacher of the Department of Philosophy of Dhaka University, and Munira Khan, former chairperson of the Fair

Election Monitoring Alliance (FEMA), a local NGO, were appointed members. The government asked the newly appointed officials to begin their terms in office on 1 December 2008.

Many aspects on the methods of work and powers of this body give serious doubt as to whether it will be effective. The National Human Rights Commission Ordinance, 2007, which enables the government to establish the NHRC, allows the commission (under section 13) to give its recommendations to the government to file cases, if mediation or arbitration attempts fail. Section 14 allows the commission to recruit a mediator who will solve the problems of human rights abuses through arbitration between the perpetrators and the victims of abuses. Section 15 authorizes it to investigate allegations of human rights abuses through issuing summons to the respondents, without any obligation for the relevant authorities to provide evidence and information. There is also no clarity about what happens when the summons are ignored. The commission, under section 16, can make recommendations to the government based on its findings in an investigation; however, it is expected that these will be ignored, as there are hundreds of examples available in Bangladesh in which the authorities did not carry out the orders of the Supreme Court. Furthermore, under section 16(4), the government and relevant authorities can deny or express their inability to implement the recommendations in a reply letter.

"The government, which is responsible for gross violations of human rights, is using a toothless rights body as a shield to protect itself from criticism"

Under section 17(2), any statement to the commission confessing the crime of human rights abuses cannot be used as evidence in any criminal or civil court against the person who confesses the crime. Under Section 27, the commission can formulate its own rules in order to perform its duties after getting approval from the president. This means that executive will dominate what should be included or excluded in the rules. Under section 20(3), the government will determine the salaries and benefits of the staff of the commission until the rules are finalized. This situation will likely compel it to make or agree to a weak set of rules instead of those that would enable independent functioning.

While a national human rights institution had been demanded by rights groups and victims for decades, this has now been established by a military-controlled government working beyond its legal jurisdiction under a state of emergency. The government, which is responsible for gross violations of human rights, is using the establishment of a toothless rights body as a shield to protect itself from criticism.

The state of emergency, biggest elephant in the room

Although Bangladesh faces chronic human rights problems, an evaluation of the situation of rights in 2008 has to focus primarily on the state of emergency, as it and the ordinances and powers it provides to the authorities have been the main causes of abuses and impunity in 2008. At the international level,

the government has repeatedly denied committing abuses, and has even attempted to threaten and harass non-governmental organizations that attempt to bring up these matters. Despite being a member of the Human Rights Council and a party to six major international human rights instruments, the government of Bangladesh is not only failing to live up to its obligations under these instruments, but is actively flouting them.

"The High Court Division ruled that the president of an unelected government does not have the constitutional authority to promulgate ordinances"

The state of emergency was proclaimed on 11 January 2007, ostensibly due to violence prior to elections scheduled for January 22. Elections were to take place six months later. Under the Constitution of Bangladesh, an emergency may last for a maximum of 120 days. However, after nearly two years, it remains in force and is creating a human rights and constitutional crisis in the country. It is now supposed to last until the end of 2008, with elections expected on 29 December 2008; however, there were concerns at the time of writing that these may again be pushed back. Regardless, any elections held under the emergency will likely not be free and fair. Local elections held on 4 August 2008 provide evidence of this, as many politicians from the past ruling party remain in detention, and there are numerous reports of vote manipulation by the authorities.

Under article 141A(1) of the constitution, a state of emergency can only be imposed under certain conditions, and it requires the counter-signature of the prime minister. This signature was not obtained for the current emergency, making it unconstitutional from the outset. Furthermore, an emergency may only last for 120 days, under section 141A(2)(c) of the constitution. However, due to a loophole requiring action on the part of the parliament (which was dissolved on 24 October 2006), this illegal emergency is still continuing.

Human rights violations have resulted primarily as the result of draconian powers provided by the Emergency Powers Ordinance, 2007, supplemented by the Emergency Powers Rules, 2007, and the Special Powers Act, 1974. On June 11, 2008, the military-controlled government also imposed the Anti-Terror Ordinance, 2008, supposedly to combat terrorism, under which further abuses are taking place.

The High Court Division of the Supreme Court of Bangladesh on 13 July 2008 ruled that the president of an unelected government such as that currently in power does not have the constitutional authority to promulgate ordinances unless such ordinances relate to general elections. The same court also declared all ordinances made by the present military-controlled government to be *ultra vires* and unconstitutional. However, the Appellate Division of the Supreme Court on 21 July 2008 stayed this order for one month. The military-government has promulgated at least 96 ordinances, most of which run contrary to the constitution.

During the state emergency all state actors that are perpetrators of human rights abuses are given impunity under Section 6 of the Emergency Powers Ordinance, 2007, which reads:

6. Indemnity

(1) no action, done by a person in good faith, according to this ordinance or any rule under this ordinance or any provision under such rule, may be challenged in civil or criminal court.

(2) no action, done in good faith by the government, according to this ordinance or any rule under this ordinance or any provision under such rule, and any resultant damage due to the action, may be challenged in civil or criminal court.

The AHRC has been informed that the military-controlled government of Bangladesh has been negotiating with the political parties prior to the general election, to ensure that any future elected government validates through the parliament the actions taken by the pro-military regime under the state of emergency. Bargaining with the major political groups vying for election has also reportedly centred on seeing who will ensure complete impunity to them following the elections. In the past, successive governments of Bangladesh have provided impunity to the perpetrators of human rights abuses by enacting laws in parliament. The reports of the current military regime's pressure upon politicians raises serious concerns that impunity for current abuses will be secured regardless of the results of the planned elections.

"The militarisation of law-enforcement has taken place through new joint forces being established, comprising military intelligence agents alongside police"

Militarisation of civilian institutions

The emergency has been used by the military to permeate the state and its civil administration. This encroachment will likely have a significant detrimental effect on democracy, security and human rights in the country for years to come. Current and retired officers have been appointed to top public service positions and autonomous institutions. Even sporting bodies have not been spared. The militarisation of law-enforcement has taken place through new joint forces being established, comprising military intelligence agents alongside the police. The courts suffer from military surveillance and interference. High-profile individuals, including former prime ministers, ministers and legislators, have been detained for months for alleged corruption, often without specific charges against them. Some have been released through executive orders, bypassing judicial processes. For example:

1. Abdul Jalil, the General Secretary of the Bangladesh Awami League was arrested on 28 May 2007 in the afternoon from his office and was released on parole on 2 March 2008. Jalil was reportedly released on parole for 30 days but the authorities imposed a number of conditions on him if he goes abroad for treatment. He has to communicate the Bangladesh mission every three days after his arrival in a country for treatment and must not be involved in political activities or business there.

2. Sheikh Hasina, former Prime Minister and President of the Bangladesh Awami League, was arrested on 16 July 2007, early in the morning from her house in Dhaka and detained in

the official residence of the chief whip of the parliament declaring it a "sub-jail". She was released on 11 June 2008, on parole lasting eight weeks.

> **"If courts release persons that the military government does not want released, they are usually re-arrested, often under fabricated charges"**

3. Arafat Rahman Koko, the younger son of former Prime Minister Khaleda Zia, was arrested along with his mother on 3 September 2007. The government released him on 17 July 2008 on parole. Local press reports claim that the government ordered his temporary release from prison purely on humanitarian considerations.

These releases resulted not from court decisions but rather from political negotiations. If courts release persons that the military government does not want released, they are usually re-arrested, often under fabricated charges.

Prior to the proclamation of the state of emergency, the armed forces were only deployed to aid the civil administration in dealing with political violence between rival groups. After the emergency was declared, the State of Emergency Ordinance, 2007 was promulgated and supplemented by the Emergency Power Rules, 2007 with effect from the date of imposing the emergency. Under these new instruments, the armed forces were redefined as a "law and order maintaining force" equivalent to the police. These laws have empowered soldiers to arrest whomever they wish, without a warrant from a competent court. The emergency laws also ensure blanket impunity to the armed forces for all of their actions. According to the government, around 60,000 soldiers have been deployed around the country, in all headquarters of the country's 64 districts, since the beginning of the emergency. The deployed military frequently intervene in areas in which they have no competency and should have no power, including in the activities of the media and NGOs, leading to fear and demoralization amongst these sectors' professionals. As a consequence of regular interventions by the armed forces in their work, they cannot contribute to society and in their respective fields.

The national deployment of the military was in place until 4 November 2008, prior to a presidential order to withdraw the military, which came as part of the government's negotiation with political parties in the run-up to elections and international pressure, notably a in a joint motion for resolution on the situation in Bangladesh in the EU parliament in Brussels on July 9. However, at the time of writing, military re-deployment was expected on 20 December 2008, prior to the general election, which was scheduled for December 29.

In addition, the Rapid Action Battalion paramilitary force known for hundreds of extrajudicial killings in recent years has also been reinforced by officers from the armed forces and deployed extensively at the district and *upazilla* levels. In this way, the police, who are supposed to be responsible for maintaining law and order in the country, are being supported and supplanted by the armed forces and paramilitary forces that should not be engaged in policing, under the state of emergency.

This has unavoidably resulted in a large number of human rights violations. For example, concerning the massive arbitrary arrests that have taken place since the beginning of the emergency, common people only have access the police stations when enquiring about the whereabouts of arrested and detained persons. They rarely receive responses. When the armed forces and RAB arrest, detain and torture people, the police remain out of the picture and the police stations do not record information concerning such cases.

Given the climate of military supremacy and consequent fear, lawyers rarely agree to assist victims by drafting and lodging complaints with magistrates' courts, which are the only other resort for people seeking redress following a denial of assistance by the police. According to reports, armed forces officers frequently make phone calls to magistrates and judges regarding pending cases, to influence them in favour of the military's interests. Magistrates fear for their security and that of their relatives, and as a result only disclose such threats off the record. The situation of prosecutors is even worse than that of the judges and magistrates. Members of the intelligence agencies and, in special cases, officers of the armed forces, have been placed in the offices of prosecutors and attorneys, and direct them to lead proceedings in line with these agencies' wishes.

"Under the emergency, a so-called 'task force' comprising of military officers has also been placed in the country's courtrooms"

Under the emergency, a so-called "task force" comprising of military officers has also been placed in the country's courtrooms and relevant offices of the courts before, during and after trials, in order to monitor and direct the cases to suit their interests. There can hardly be a more blatant indicator of a lack of an independent judiciary than this. The provisions in the emergency ordinances and the control of the judiciary combine to ensure complete impunity for the military and those that serve its interests.

While civil servants find it difficult to enter into political roles, military officers of a similar rank are systematically included in mainstream political parties following retirement. A retired general would typically be included in the cabinet of the ruling party or in a policymaking forum when the party is out of power. The military-controlled interim caretaker government has gone further and increased the placement of members of the armed forces in the civil administration. Major General (retired) M A Matin heads the Ministry of Home Affairs. Major General (retired) Ghulam Quader, former director general of National Security Intelligence, has been made adviser to the Ministry of Communications. Brigadier General (retired) M A Malek is the Special Assistant to the Chief Adviser for Ministries of Social Welfare and Telecommunications. The founding Director General of the Rapid Action Battalion and former head of the Bangladesh Police, Anwarul Iqbal, who is allegedly responsible for hundreds of extrajudicial killings, has taken the position of adviser to the Ministry of Local Government, Rural Development and Cooperatives. Major General (retired), ASM Matiur Rahman, who

previously occupied the Ministry of Health, was later asked to resign from his position for poor performance, although this should be seen as an exception, especially for someone from the military. The previous Army Chief, Lieutenant General (retired) Hassan Mashud Chowdhury, is the chairperson of the Anti-Corruption Commission, while Colonel Hanif Iqbal occupies the position of Director General (Administration).

"The Bangladesh Army has been given official responsibility to prepare the voter list for the whole country"

Brigadier General (retired) Muhammad Sakhawat Hussain is in a key constitutional position as commissioner of the Election Commission. Through him, the Bangladesh Army has been given official responsibility to prepare the voter list for the whole country. The armed forces now know who is voting where under which constituency. If they want to intimidate any group or community to vote for someone or not to vote, they can do so easily. During the election, members of the military will be authorised to arrest any person they suspect of "anti-election activities" without a warrant of arrest issued by a court.

The army assigned its Principal Staff Officer (PSO) of the Armed Forces Division, Lieutenant General Masud Uddin Chowdhury, to the Ministry of Foreign Affairs where he had been serving as the chief coordinator of the National Coordination Committee and deciding on corruption cases. Following this, he was appointed as the High Commissioner of Bangladesh to Australia. On 2 June 2008, Lieutenant General Abu Tayeb Mohammad Zahirul Alams was assigned to the Ministry of Foreign Affairs and was appointed as an ambassador; however, before this could take place, he was also assigned to the position of force commander in the UN Peacekeeping Mission in Liberia, and returned to the service of the armed forces on 7 October 2008. Brigadier General Fazlul Bari was made Defence Attaché in the Bangladesh Embassy in Washington DC during October 2008.

Major General (retired) Manzurul Alam chairs the Bangladesh Telecommunication Regulatory Commission (BTRC), while Colonel Md. Saiful Islam has taken the position of BTRC director general and Lieutenant Colonel Shahidul Alam is the director of the BTRC's Spectrum Management Department. Lieutenant Colonel Shahidul Alam has been appointed as the project director of a World Bank-funded project under the BTRC, while Major Rakibul Hassan is a Deputy Director of the BTRC's Systems & Services Department.

Bangladesh Navy Captain A K M Shafiqullah has been appointed as director general of the Department of Shipping, while Commodore A K M Alauddin occupies the position of the department's chief engineer and ship supervisor. Navy Captain Yeaheya Sayeed is a director of Chittagong Dry Dock Limited, an enterprise of the Bangladesh Steel & Engineering Corporation and also a member of the Chittagong Port Authority. Captain SY Kamal is a Member (operations) and Captain Ramjan Ali is deputy conservator of the Chittagong Port Authority. Captain Zahir Mahmood is deputy conservator of the Port of Chalna Authority in Khulna.

Brigadier General Md. Rafiqul Islam is the director (signals) of the Bangladesh Telecommunications Company Limited. Colonel Mr. Farukh Ashfaq has been serving as the chief engineer of the Dhaka City Corporation. Major General (retired) Manzur Rashid Chowdhury has been made a member of the newly formed Truth and Accountability Commission.

"The government has forced the closure of at least 160 newspapers"

An alarming indicator of how deep this military encroachment has gone can be seen in sporting authorities. The current Army Chief, General Moeen U Ahmed, has taken the positions of chairman of the National Sports Council and president of the Bangladesh Olympic Association. The Chief of the Air Force, Vice-Marshal Ziaur Rahman Khan, heads the Bangladesh Hockey Federation, while Naval Chief Admiral Sarwar Jahan Nizam heads the Swimming Federation. Major General Ahsab Uddin, the General Officer Commanding of the 9th Infantry Division, is the president of the National Shooting Federation. The Army Chief of General Staff, Major General Seena Ibn Jamali, is the president of the Bangladesh Cricket Board, with Lieutenant Colonel (retired) Md. Abdul Latif Khan as vice president. Lieutenant Commodore A K Sirker is general secretary of the Basketball Federation. Colonel (retired) M A Latif was made vice president of the Squash Federation, while Major General Mr. Sadik Hassan Rumi was "elected" uncontested as president of the Archery Federation.

These are but a few examples recorded by the AHRC of the many military appointments that have been made under the aegis of the military-backed government and its unconstitutional state of emergency. Information about these appointments is being suppressed as much as possible by the authorities to avoid international criticism.

Increasing violations under the emergency

Rather than countering a threat or ensuring stability, the state of emergency has led to greater insecurity and human rights violations. Fundamental rights, including the freedom of association and expression, have been suspended; a significantly greater number of serious violations are being perpetrated; total impunity is being guaranteed for perpetrators; and avenues for victims seeking remedies have been virtually obliterated. All discussions of human rights that do not first address the state of emergency, the critical undermining of the civilian, democratic systems of the state, and the constitutional crisis in Bangladesh, are meaningless.

The government has forced the closure of at least 160 newspapers, and television news channel CSB News during the state of emergency. Any criticism of the actions of the government has been stymied in this way. NGO activists and journalists have been harassed, threatened, and detained by law-enforcement and the military, and faced fabricated charges, in order to discourage any criticism of the arbitrary actions and violations of rights and the constitution by the authorities under the emergency.

Arbitrary arrests and detention

"Law-enforcement agencies do not follow due process when arresting and detaining persons; warrants are rarely, if ever, produced at time of arrest"

It is estimated that since 11 January 2007, a staggering 500,000 individuals have been arbitrarily arrested and detained for differing periods. When questioned during the official proceedings of the Human Rights Council by a member of the AHRC's sister organisation, the Asian Legal Resource Centre (ALRC), the representative of Bangladesh could only state that Bangladesh did not have enough space in its prisons to accommodate this many persons. Furthermore, the Inspector General of the Bangladesh Police (IGP), on 9 June 2008, publicly admitted that the police had been arresting an average of 1667 persons every day. This contradicts the attempt at a denial made by Bangladesh's representative at the council and raises serious questions about further overcrowding in the country's detention facilities, which was already a serious problem before the mass arrests under the emergency. In addition, the IGP admitted that the authorities are arresting persons under rule 16(2) of the Emergency Powers Rules, 2007, instead of under section 54 of the Code of Criminal Procedure, as under the former suspects cannot be granted bail.

Bangladesh's law-enforcement agencies do not follow due process when arresting and detaining persons. Arrest warrants and information regarding the charges against persons are rarely, if ever, produced at time of arrest. Persons rarely have access to legal counsel following arrest. Under article 33(2) of the constitution, arrested persons must be brought before a magistrate within 24 hours. However, at present, individuals are being detained in police stations or military camp for days, weeks or even months, without any official records being kept or having any access to courts. This is resulting in endemic torture that in turn frequently leads to killings.

A High Court Division comprising Justice Nozrul Islam Chowdhury and S M Emdadul Hoque on 22 April 2007, declared that the High Court Division of the Supreme Court had the constitutional power to grant bail to the persons implicated and detained under the Emergency Power Rules, 2007. The court declared it following a writ petition filed by Moyezuddin Shikdar, a businessman of Khulna, who was arrested by the armed forces and detained in prison.

The Appellate Division abdicated the Supreme Court's own power to entertain the bail petitions under the emergency rules. On 23 May 2008, the full bench of the Appellate Division, presided over by Chief Justice Mr. Mohammad Ruhul Amin, of the Supreme Court overturned the verdict of the High Court Division declaring that the highest court of the country had no jurisdiction to entertain bail petitions when the petition was charged under the Emergency Power Rules, 2007. The Supreme Court Bar Association and its senior members protested against the verdict and urged the Appellate Division to review its verdict.

Torture

The use of ill treatment and torture by the law-enforcement agencies is endemic in Bangladesh. This is perpetuated by the impunity that accompanies these violations. Torture is a tool of political and governmental repression and an inseparable part of methods of law-enforcement in the country. Torture is used in order to extract money, to force persons to sign false confessions, to repress the poor, and against persons in opposition to those in power, or their allies. All law-enforcement and intelligence agencies operate torture cells, where people are tortured as part of so-called interrogations.

"Torture is used in order to extract money, to force persons to sign false confessions, to repress the poor, and against persons in opposition to those in power"

The AHRC has recorded numerous cases of torture and assault, either by the armed forces, the police, paramilitary forces, or a combination of these actors, since the beginning of the state of emergency. Methods typically include: beating a person that has first been hung from the ceiling or a tree; electrocution; pouring hot and cold water into the mouth and nostrils (in the summer or winter seasons respectively); inserting nails or needles under the fingernails or toenails or other sensitive parts of the body. Persons are also typically subjected to humiliating and abusive treatment during arrest. Some examples of ordinary assault in public include:

1. On 19 January 2008, at around 10 am, an army team led by Major Mizan came to the Rahmania Offset Press at Paikgachha upazilla town in Khulna district. Major Mizan looked for the owner of the press. Md. Bayezid Hossain, a 32-year-old press staff member who was operating a machine inside came out and told the army officer that his boss was out of the office at that time. The major asked Bayezid to remove the signboard of the press. Bayezid told the officer that as an employee it was not possible for him to remove the signboard without the permission from his employer. He assured Major Mizan that he would inform his boss first and the owner's consent would enable him to remove the signboard. As soon as Bayezid said this, Major Mizan and his colleague Warrant Officer Tajul Islam and several other solders started beating Bayezid with sticks and fists. Bystanders removed the signboard. Before leaving, Major Mizan told Bayezid to go to the army camp along with his boss. Locals then took Bayezid to the Paikgachha Upazilla Health Complex for treatment. Bayezid received serious injuries to his right hand, which had still not healed at the end of 2008.

2. On 5 February 2008, Altaf Hossain, a rickshaw puller, went to Kopilmuni Bazar, transporting goods and passengers. At around 10 am, Altaf was pulling his rickshaw through the main road of the rural commercial hub. Due to traffic congestion Altaf was late in giving way to an army vehicle. Soldiers got out of their car and proceeded to beat Altaf indiscriminately with a stick. He sustained serious injuries to his neck, back, hands and legs. Bystanders assisted Altaf to a local hospital, where he received treatment for months but has failed to recover from the injuries. To pay for the treatment, Altaf sold his rickshawn and he and his wife have borrowed Taka 40,000 from a rural microcredit

association with 20 per cent interest. Kamrul Islam, a 38-year-old, was caught up in the incident and was also beaten despite being an innocent bystander, as a result of which he lost consciousness. He was taken to Kopilmuni hospital where he stayed for around a week to receive treatment for the injuries he sustained, notably to his spine.

"Police claim that because there is only one policeman for every 1200 citizens, torture is acceptable"

3. On 15 February 2008, at about 8am, army personnel visited farmers Depak Nath (48) and Deleep Nath (45), who are brothers, in Kashimnagar village in the Paikgachha upazilla in Khulna district. The soldiers abruptly started beating Depak and Deleep in front of their wives and children, and then arrested them and took them to the army camp at Shovna in the Dumuria upazilla. The soldiers detained the two brothers for the night and tortured them. They were beaten with sticks and boots in several occasions. On the following day, the army officers handed them over to the Dumuria police. The police falsely implicated Depak and Deleep in a pending robbery case, resulting in them being detained in Khulna prison for six months, where they received no medical treatment. The Dumuria police forced the brothers to pay Taka 25,000 as a bribe to have them removed from the investigation report. Despite receiving the money, the police submitted a charge sheet to the court accusing the two brothers in the alleged robbery. Their family mortgaged three parcels of land to collect money for their release. In August 2008, they managed to get bail from court.

The officers of the Bangladesh Police claim that because there is only one policeman for every one thousand two hundred citizens, torture is acceptable. They argue that the police force is very poorly financed and has inadequate logistical capabilities and is therefore required to work tirelessly. Under such circumstances, they claim that the police's performance cannot be faulted, justifying torture. The officers of the RAB and the armed forces argue with human rights defenders that law-enforcement and maintenance of peace and security in the society requires the use of torture.

The country's politicians, legislators and civil servants repeat the position of the law-enforcement agencies and security forces concerning torture. The claim has also been made during discussions with civil society that torture is a useful tool for maintaining law and order in the context of Bangladesh. Defending the arguments of the police, they have even added that as criminals are well equipped and innovative, the only option for the police is to use torture. When, during discussions, the need to follow due process of law, notably concerning the police's duty to inform persons being arrested about the reason for the arrest and to show them a warrant of arrest as per section 80 of the Code of Criminal Procedure, the politicians have commented that it is too ambitious in Bangladesh to expect the police to follow the due process of law. This is symptomatic of beliefs held more widely in the ruling elite.

The use of torture does not engender any prosecutions against or punishment of those who perpetrate it. Torture is not a crime in national legislation in Bangladesh. Any person serving in the law-enforcement forces are not prevented, and therefore are tacitly encouraged, to use torture by default as part of their professional responsibilities.

> **"In the 23-month-long emergency around 315 persons have been killed extrajudicially"**

Extrajudicial killings

The number of extrajudicial killings has been increasing in Bangladesh during the state of emergency. In the 23-month-long emergency around 315 persons have been killed extrajudicially, out of which the deaths of more than 250 persons were blamed on "crossfire" incidents by the law-enforcement agencies, such as the Rapid Action Battalion, the police and the armed forces.

The RAB, which is dominated by the military but also comprises of the police and border security agency personnel, was created in 2004. It has perpetrated an estimated 500 extrajudicial killings since its creation. It attempts to justify these killings by claiming there were accidental deaths that occurred as the result of the victims being caught in the "crossfire" although the AHRC has documented numerous cases that instead show these deaths result from torture and extra-judicial killing (see further details in Nick Cheesman, "Fighting lawlessness with lawlessness, or, the rise and rise of the Rapid Action Battalion", *article 2*, vol. 5, no. 4, August 2006, pp. 30-42). Shockingly, the authorities have shown their support for these killings by awarding the country's Independence Day Award to the RAB on 23 March 2006, for "outstanding performance in maintaining law and order". In 2007 the government awarded 28 RAB officers with police medals. All of these officers have allegedly been involved in grave human rights abuses, including extrajudicial killings. The RAB has continued to act with complete impunity as a result.

Interagency rivalry has led to the police seeking to compete with the RAB, and they have allegedly perpetrated several hundred arbitrary, extrajudicial killings. They also claim these resulted from crossfire, encounter, gunfight, in the line of fire, or shootout incidents.

During the state of emergency the police, RAB and the armed forces have been deployed across the country, ostensibly to "aid the civil administration" with maintaining the law and order. In this hierarchy, the military is the dominant force, the RAB is next and enjoys privileges over the regular police force, the latter of which is officially responsible for law and order.

Violations resulting from the counter-terrorism ordinance

Further to the already significant list of arbitrary powers granted to the authorities in 2007 under ordinances issued by the authorities under the state of emergency, on 11 June 2008, the military-controlled government imposed the Anti-Terror Ordinance, 2008, supposedly to combat terrorism.

"Persons can be charged with providing financial or other forms of support for loosely defined 'terrorist activities' on the basis of mere 'reasonable suspicion'"

Section 6 of the ordinance includes provisions for rigorous imprisonment of a minimum of three years to a maximum 20 years life-term, as well as the death penalty, for various crimes including: killings; serious attacks; abductions or kidnapping; causing damage to property; and possession of explosives, listed dangerous chemicals or firearms, with the "intention to harm the unity, harmony, security or sovereignty of Bangladesh and create panic among its people or any segment of the population". Persons can be charged under section 7 with providing financial or other forms of support for loosely defined "terrorist activities" on the basis of mere "reasonable suspicion". Section 39 asserts that the crimes under this ordinance are non-bailable.

Section 54 of the Code of Criminal Procedure and section 86 of the Dhaka Metropolitan Police Ordinance, 1976, already allow the police to arrest any person on suspicion. These powers have previously been abused to arrest people en masse. Under the new ordinance, the penalties and sentences for the various crimes are higher. The police can hold persons in remand for interrogation for ten consecutive days, which can be extended for a further five days by magistrates, under section 26. Magistrates typically follow the instructions of the government and other influential groups. Furthermore, multiple fabricated charges produced sequentially are used to ensure lengthier remand periods.

As with corruption charges that are being tried in special, military-government-appointed tribunals, charges under the Anti-Terror Ordinance are tried by Anti-Terror Special Tribunals. There are serious concerns about such tribunals' ability to deliver fair trials, as they are held in camera, without the presence of the public even the accused persons' relatives. Under section 32, a magistrate or judge cannot grant bail "unless satisfied with reasonable grounds that the accused person might not be convicted". This suggests that the judge must pre-judge the case before it has been heard in full, which evidently goes against the fundamental principles of justice as accepted under international norms and standards.

According to section 41, the government may transfer, on "reasonable grounds", any case relating to crimes under this ordinance, from any sessions court or tribunal to any special tribunal, or from any special tribunal to any sessions court, at any stage prior to the completion of depositions. This power allows the government to interfere in any case it wishes and completely erodes any notion of the independence of the judiciary. In a criminal proceeding, the government is a party to the dispute. If such a party is given statutory power to transfer cases at a whim, it is likely that it will exploit this power, resulting in delays and/or travesties of justice.

Unconstitutional Truth and Accountability Commission

During the state emergency the government initiated a "fight against corruption", detaining at least 170 politicians and businessmen under new powers, notably the Emergency Rules,

2007. The government is prosecuting them in closed Special Sessions Judges' Courts, to which public and media access is denied. The government formed the Truth and Accountability Commission on 30 July 2008, headed by former High Court Judge Habibur Rahman Khan, with retired Comptroller General Asif Ali and retired Major General of the Bangladesh Army Manzur Rashid Chowdhury as members. Suspects are supposed to disclose information to the cabout any corruption they have committed and declare the amount of assets and money earned through illegal means. These assets are then handed over to the state and the commission issues a certificate, which acts as an exemption from any future criminal prosecution or punishment for these acts. Such persons are barred from contesting elections and holding public or corporate offices for five years. However, the whole process is confidential, apparently to preserve the persons' social dignity.

"The constitution clearly asserts that every citizen has right to enjoy equality before the law, but the military-controlled government manipulates the system with laws *ultra vires* to it"

The lack of transparency of this system is a serious concern, notably as the authorities have detained a number of politicians and businessmen during the state of emergency on charges of corruption, many of whom have been convicted for a minimum of three years by special tribunals in secretive trials, which are monitored by the military and do not meet international standards.

The Constitution of Bangladesh clearly asserts in article 27 that every citizen has right to enjoy equality before the law, but the military-controlled government manipulates the system with laws *ultra vires* to the country's constitution. These commissions are designed in order to ensure impunity for current government officials and those connected to them for past corruption, ensuring they cannot be held responsible for any of their actions, while opponents of the regime continue to be pursued for similar offences.

On 13 November 2008, a High Court Division Bench comprising Justice Mir Hashmat Ali and Shamim Hasnain passed a verdict declaring the Truth and Accountability Commission under the Voluntary Disclosure Ordinance, 2008 "unconstitutional and void in its entirety". After hearing a writ petition filed by local rights groups the court declared this verdict. The court did not give any legitimacy to the activities done by the quasi-judicial body. However, on November 16, Justice M A Matin, Appellate Division Chamber Judge, stayed the High Court's verdict for one month after hearing a provisional petition filed by the government. Prior to the High Court's verdict the Truth and Accountability Commission had received 389 applications for leniency regarding crimes of corruption; 192 applications forwarded by the Anti-Corruption Commission, 167 by the National Coordination Committee, 20 applied directly and 10 forwarded by courts. Human rights defenders and relevant professional groups are concerned about the fate of the decisions to come from the Appellate Division on this case.

Democratization and human rights in Bangladesh: An appraisal of the military-controlled Fakhruddin interregnum

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The latest military coup in Bangladesh, in the guise of a state of emergency under the constitution, was staged on 11 January 2007. Almost one-and-a-half decades of democratic failure, seen in the criminalization of politics, abuse of state institutions, massive embezzlement of public wealth and, in the final stages, deadly political standoff between rival political parties over the issues of the ninth parliamentary election, provided "perceptive legitimacy" to the military controlled government. But once the military substantiated its position in government, its earlier pledge to hold a free and fair national parliamentary election by December 2008 has seemingly been relegated to the backseat, while repressive measures, widespread arrests, unilateral institutional reforms and crafty games with the political parties have become the prime agenda, raising questions both about the fairness and even certainty of the election within the stated deadline.

The fall of longstanding military autocrat General H M Ershad in the 1990 mass upheaval heralded a historic opportunity for Bangladeshis to opt for democracy. Subsequently, Bangladesh witnessed three democratic regimes through three national parliamentary elections in 1991, 1996, and 2001 respectively. All these elected regimes understood democracy in terms of a national election every five years subject to the constitution, not in terms of institutionalizing the democracy they fought for during the autocratic regime.

For further commentary on the contents of parts of this article and related issues, kindly see Md. Shariful Islam, "Political events prompting the Proclamation of Emergency 2007 in Bangladesh: A Search for Constitutional Interpretation", *Bangladesh Political Science Review*, vol. 5, no. 1, December 2007).

While the autocratic regime's persistent denial of democratic rights prompted the nation to forge an overwhelming unity, the subsequent democratic regimes virtually divided the nation into two confrontational camps. Major state institutions turned politically divided and the streets became preferable to parliament for political leaders pressing demands on the government. After 1990, political parties led by the two opposed giants, the Awami League (AL) and Bangladesh Nationalist Party (BNP), became the perpetrators of massive human rights violations, imposing devastating political programs like *hartal* (general strike) and blockade. Neither the government nor opposition respected the spirit of democracy; ironically democracy was invoked as a means for violent political programs. Hatred and mistrust between the political camps reached its climax over the issues of the 2007 parliamentary election, making space for the inevitable anticlimax marked by the latest military intervention.

"Bangladesh's constitution has been an embodiment of paradoxes: supreme respect for democracy and human rights on the one hand, and unbridled power in the hands of power groups on the other"

The military-controlled regime in its honeymoon period apparently sought to wage a crusade against root-and-branch corruption, and moved to "democratize" the institutions that the democratic regimes had failed to do. It observed that had corruption not been a persistent factor, the full economic potential of Bangladesh could have been realized at a much faster rate and the benefits dispersed widely and more evenly throughout the population, rather than to a corrupt and favored few. The regime eyed salvation in a "Bangladeshi Brand Democracy". As General Moeen U Ahmed, Chief of Army Staff, observed at the Sheraton Hotel in Dhaka in a speech on 2 April 2007 marking his first public appearance after the coup, "Bangladesh will have to construct its own brand of democracy recognizing its social, historical and cultural conditions with religion being one of several components of its national identity" (Speech given at *The Challenging Interface of Democracy and Security*, conference jointly organized by Bangladesh Political Science Association and International Political Science Association).

It remained for few days a point on the table as to what actually had been meant by the sort of democracy the regime sought: an internationally-accepted pluralistic pattern or a military-dominated authoritarian model as has been a feature across South Asia over the past few years. Very soon the regime itself became the answer: nothing but an autocratic and extra-constitutional regime, unique in the country's history.

The objective of this article is to critically study the background of the silent coup and the subsequent developments in Bangladesh politics, from the perspectives of democratization and human rights, and to make an appraisal of the military-controlled Fakhruddin interregnum.

Funeral of democracy under democratic leadership

Bangladesh's constitution has been an embodiment of paradoxes: supreme respect for democracy and human rights on the one hand, and unbridled power in the hands of the "power groups", alienated from the people, on the other. The latest fall of democ-

racy in January 11, 2007 was, in a sense, an outcome of the partisan interpretations of the constitution by the two arch-rival political camps regarding the appointment of the chief adviser, whose appointment is determined under article 58C of the Constitution of the People's Republic of Bangladesh (as modified up to 31 May 2000):

> (3) The President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired last and who is qualified to be appointed as an Adviser under this Article:
>
> Provided that if such retired Chief Justice is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Chief Justices of Bangladesh retired next before the last retired Chief Justice.
>
> (4) If no retired Chief Justice is available or willing to hold the office of Chief Advise, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired last and who is qualified to be appointed as an Adviser under this Article:
>
> Provided that if such retired Judge is not available or is not willing to hold the office of Chief Adviser, the President shall appoint as Chief Adviser the person who among the retired Judges of the Appellate Division retired next before the last such retired Judge.
>
> (5) If no retired judge of the Appellate Division is available or willing to hold the office of Chief Adviser, the President shall, after consultation, as far as practicable, with the major political parties, appoint the Chief Adviser from among citizens of Bangladesh who are qualified to be appointed as Advisers under this Article.
>
> (6) Notwithstanding anything contained in this Chapter, if the provisions of clauses (3), (4) and (5) cannot be given effect to, the President shall assume the functions of the Chief Adviser of the Non-Party Care-taker Government in addition to his own functions under this Constitution.

"Tension spread across the political parties that the alliance government had placed partisan persons throughout the administration to make sure that it would be favoured in the general election"

On the dissolution of the eighth parliament and the expiry of the BNP-led four-party alliance government of Khaleda, the president was supposed to invite the immediate past Chief Justice of Bangladesh K M Hasan to hold the office of the chief adviser of the Non-Party Caretaker Government, as per the above options. Meanwhile, tension spread across the political parties that the alliance government had placed partisan persons throughout the administration to make sure that it would be favoured in the upcoming general election. The AL believed that the BNP regime had increased, while in power, the age limit of Supreme Court judges from 65 to 67 so that the office of the chief adviser would go to K M Hasan, who had been a BNP man before his profession as a judge. At least three persons, including two alliance leaders, were killed and more than 200 injured as violence flared up in the capital city and elsewhere as power was set to be handed over from the four-party ruling coalition to the caretaker government, and the previously launched BNP-AL dialogue on electoral reform proposals failed (*The New Age*, 28 October 2006). The deadlock eased after K M Hasan formally expressed his unwillingness to take the post amid massive political turmoil on his perceived political affiliation.

The situation took a new turn with the president coming up with the proposal that he would swear as the chief adviser of the caretaker government under the constitutional provisions and the AL rejected the proposal of the "BNP-made president". The AL argued that the president had bypassed the constitutional obligation to invite two more constitutionally deserving persons before him, namely Justice Mahmudul Amin Chowdhury and Justice Hamidul Haque. The BNP-led alliance stressed that Mahmudul Amin Chowdhury was not at all the next retired chief justice before K M Hasan and rather it was Mainur Reza Chowdhury, who had already died. The alliance leaders also argued that the third option of the constitution, the last retired judge of the Appellate Division, M A Aziz, was holding a constitutional office as Chief Election Commissioner and that Hamidul Haque who retired before Aziz falling into the fourth option of the constitution expressed his unwillingness as all the parties did not agree on him (*The New Age*, 30 October 2006).

"The president chose to be sworn in as the chief adviser to the caretaker government, ... it was 'a point of no return'"

In a move to the fifth constitutional option, October 29 daylong talks between the president and the four major political parties (BNP, AL, Bangladesh Jamaat-e-Islami, and the Jatiya Party) were aborted as the parties failed to reach a consensus on an honest and neutral person. So, finally the president chose to be sworn in as the chief adviser to the caretaker government, with the AL abstaining from attending the swearing-in ceremony.

Since the incorporation of this option into the constitution in 1996, this was for the first time that the president took over as the head of a caretaker administration. It was "a point of no return" and any failure on the part of the government would leave devastating consequences and pave the way for the army to step in. Interpretation of the constitutional provisions by lawyers like Dr. Kamal Hossain, Barrister Amirul Islam and Barrister Rokanuddin Mahmud in favor of the AL-led alliance with which they were affiliated (for example they named Justice Mahmudul Amin Chowdhury as the second option), and the president's move to grab power in favor of the BNP-led alliance, led to unusual power politics, with the "Chief Adviser in Bangabhaban", that is, the office-cum-residence of the president. Violent clashes during the transition meanwhile took the lives of around 26 people and left several hundred injured across the country.

According to sources in Bangabhaban, the president asked the attorney general, the chief law officer of the country, to advise him on whether he would appoint Justice Mahmudul Amin Chowdhury, who retired before Justice Mainur Reza, or appoint a retired judge of the Appellate Division. Mohammad Ali immediately sent his written legal opinion on the issue to the president, observing that the president should go by article 58C(4), as the Constitution does not have a provision to appoint any other chief justice other than last retired two (*The New Age*, 30 October 2006).

"The president in an unprecedented move to gain a non-partisan image appointed ten advisers from the two major political camps"

Constitutionally a titular head of the state, the president enjoys significant power under the same constitution during the interim period of 90 days of the caretaker regime. One of the grounds making the president all-powerful is found in article 61, which reads:

> The supreme command of the defence services of Bangladesh shall vest in the President and the exercise thereof shall be regulated by law and such law shall, during the period in which there is a Non-Party Caretaker Government under Article 58B, be administered by the President.

Now thanks to the assumption of office by the Chief Adviser, constitutionally he became the source of overwhelming power but functionally the most meek and submissive one to his political master, ex-Prime Minister Khaleda. But the president in an unprecedented move to gain a non-partisan image appointed ten advisers from the two major political camps. When under the constitutional stipulations the president was not supposed to appoint the ten advisers from the lists of nominees provided by the two political camps, why did he do so? This was partly a trust-gaining measure but it also spoke to the total collapse of trust among the political parties. It was widely perceived that now the two wings of politically appointed advisers in a non-partisan government would indulge in clashes over reforms of the election commission. *The New Age* made an important prediction:

> The Presidential consideration, apparently a pragmatic one, may well prove to be suicidal for the President at the end of the day, no matter how constitutionally powerful he is. Pragmatic because, the President, under the present dispensation, would have the scope to make efforts to resolve the conflicts of opinions of the BNP and AL policymakers within the cabinet by way of having constructive dialogue between their representatives. Yet, the composition could prove counterproductive, because the Advisers of either group might even quit the government, *at the call by their political mentors*, in case they fail to forge effective negotiations within the cabinet on disputed issues – the most crucial among them being the reconstitution of the Election Commission. [Nurul Kabir, "Cabinet needs to weather EC storm", 2 November 2006, emphasis added]

Soon the AL came up with another movement, pressing for Chief Election Commissioner Aziz to quit. For the AL this was a political game on the ground that Aziz was appointed by the Khaleda regime, and if it met success in another movement on this issue it would mark the party's overwhelming command of politics in the country. In the typical political culture of Bangladesh, fortune in the election has always favoured the party most active in the streets rather than in parliament. It is also typical that whatever is articulated by one political alliance must be opposed by the opposite alliance. Consequently, very soon Aziz discovered himself backed by the BNP-led alliance in the form of street movements in favour of his constitutional post. Ostensibly embarrassed, Aziz reiterated his non-affiliation with any of the political camps and reminded the opponents about his unquestioned honesty while serving as a Supreme Court judge in the past.

The relevant constitutional stipulations on the election commissioner include article 118(3), which reads that, "Subject to the provisions of this Constitution the term of office of an Election Commissioner shall be five years from the date on which he enters upon his office" The next three clauses read:

> (4) The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law.
>
> (5) Subject to the provisions of any law made by Parliament, the conditions of service of Election Commissioners shall be such as the President may, by order, determine:
>
> Provided that an Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court.
>
> (6) An Election Commissioner may resign his office by writing under his hand address to the President.

"Dhaka turned into a phantom city of feuds, deaths, anarchy and violent political programs"

The major allegation against Aziz put forward by the AL was that he was going ahead with a controversial voter list. The AL asked why the commission should not update the 2000 voter list rather than make a fresh one. Following a writ petition to the Supreme Court, the court issued a guideline asking the Election Commission to update the 2000 voter list. Aziz had to go on with updating the previous voter roll rapidly to meet the constitutional obligation for election within the 90-day time span of the caretaker regime, resulting in huge flaws and prompting the AL-led alliance to gain more strength in its movement. Dhaka turned into a phantom city of feuds, deaths, anarchy and violent political programs. Aziz stepped aside in the form of three months official leave to extricate himself from the electoral process. The AL-led alliance claimed a victory for its street movement while the BNP-led alliance saw a victory for its constitutional backers.

The AL and its allies now launched a sit-in around Bangabhaban to press for the resignation of the president from the post of chief adviser, the total reconstitution of the Election Commission, and cancellation of the already-declared January 22 poll date. It justified its movement when the Bangladesh chapter of the US-based National Democratic Institute (NDI) unveiled its survey reports on the hurriedly prepared updated voters' roll, finding that some 12.2 million or 13 per cent of the names were either excess or duplicates. The survey on the "integrity of the voters' list" revealed that of the 13 per cent, six per cent were excess voters enrolled incorrectly and seven per cent were duplicate registrations, which meant the names were listed twice or more. The survey also found that 2.5 per cent of eligible voters were left out of the roll. The NDI survey identified migration of people as a major cause for the flaws on the list, which contained about 93 million voters; however, neither the US Ambassador in Dhaka, Patricia A. Butenis, nor the NDI observed fraud or manipulation as the cause of excess registration (*The New Age*, 3 & 4 December 2006). In any event, the AL and its alliance invoked the NDI report to back up their cause and finally went so far as to boycott and resist the January 22 parliamentary

polls and press home the demand for the President to quit. Violent resistance in the form of ceaseless blockading of transport, laying siege to Bangabhaban and vandalism left some 70 people dead across the country. The death toll of hospital patients, pregnant mothers, people fatally injured in accidents and others who died incidentally to the turmoil remained beyond the statistics.

> **"A state of emergency and a reshuffle of advisers of the caretaker government all happened seemingly under the terms of the constitution"**

In hindsight, the military intervention, in the fall of a perverted democracy and massive violations of human rights by political parties, may seem inevitable and expected; however, this would be to omit the evidence of how some military generals laid the groundwork to legitimatize their assumption of power.

The disguised coup takes place

It never seemed like a coup! A state of emergency and a reshuffle of advisers of the caretaker government all happened seemingly under the terms of the constitution.

The president at midnight on 11 January 2007 resigned from the post of chief adviser to the caretaker government, declaring a state of emergency after 16 years since the restoration of democracy through a mass upheaval. Nine advisers to the caretaker administration simultaneously resigned from their posts while Justice Fazlul Haque, the senior most among the advisers, was given charge as chief adviser. The president said that a new council of advisers would be reconstituted in a day or two to hold a credible election within the "shortest possible time", as the January 22 election had been postponed (*The Daily Star*, 12 January 2007).

The declaration of emergency came after daylong hectic negotiations among the political parties, diplomats and caretaker government advisers to resolve the growing political crises following president's assumption of the office of chief adviser on 29 October 2006. The declaration came in the wake of widespread international criticism about the president's defiant attempt to hold the January 22 polls. Officials of the United Nations and European Union had already made it clear that they would not support or monitor the election due within 11 days (*The New Age*, 12 January 2007). A circular issued by Bangabhaban said, "As it is to the President's satisfaction that a grave emergency exists in which the security or economic life of Bangladesh is threatened by internal disturbance, a Proclamation of Emergency was issued throughout the country until further order under Articles 141A (1), (2), (3), 141B, 141C (1), (2) and (3) of the Constitution" (*The Daily Star*, 12 January 2007). The president can proclaim a state of emergency using his authority as provided under article 141 of the constitution.

The emergency automatically suspended all fundamental rights as enshrined in the constitution. According to article 141B of the constitution, its proclamation suspends operation of the fundamental rights to freedom of movement, freedom of assembly, freedom of association, freedom of thought and conscience, and of speech, freedom of profession and occupation and rights to

property, all enshrined in articles 36, 37, 38, 39, 40 and 42. Article 141C(1) stipulates that while a proclamation of emergency is in operation, the president may, on the written advice of the prime minister, suspend the right to move in any court for the enforcement of such of the rights conferred by part III of the constitution and keep them suspended for the period during which the proclamation is in force or for a shorter period as specified in the order. Every order made under the article must be laid before parliament under article 141C(3). The president has also been provided with the power to revoke the proclamation of emergency at any time according to article 141A(2)(a).

"Some ambitious generals had been engineering a military takeover from the very beginning of the crisis and were looking forward to seeing the crunch come rather than its avoidance"

While the AL-led alliance observed the declaration of emergency as "so far so good", the BNP and its alliance asked the government to take effective measures to hand over power to the elected government soon (*The New Age*, 13 January 2007). While Khaleda and the BNP-led alliance leaders abstained from attending the new chief adviser's swearing-in ceremony, Sheikh Hasina and the AL-led alliance leaders attended the function. This was an event diametrically opposed to that of 29 October 2006, when President Iajuddin Ahmed took over as chief adviser. The BNP and its alliance attended the swearing-in ceremony while the AL and its alliance abstained. The president reconstituted the non-party caretaker administration by appointing a former central bank governor, Dr Fakhruddin Ahmed, as the new chief of the caretaker government on 12 January 2007 and other advisers within the next few days.

However, the political leadership still didn't comprehend the game being staged and the players behind it. Actually, some ambitious generals had been engineering a military takeover from the very beginning of the crisis and were looking forward to seeing the crunch come rather than its avoidance. According to a *Daily Star* report of 14 November 2006, almost two months prior to the declaration of emergency:

> On Sunday (November 12, 2006), President and Chief Adviser Iajuddin Ahmed decided to deploy army across the country in aid of the civil administration to maintain law and order. A letter was sent to the divisional and deputy commissioners to facilitate matters for the military forces. The letter signed by Home Secretary SM Jahurul Islam reads, 'The government has decided to deploy military forces to aid the law enforcement agencies in maintaining the law and order.' But a late night handout signed by a joint secretary of the home ministry said: 'In fact, regarding the army deployment the government has decided that the troops might be deployed after taking into consideration the situation. Since no such situation has arisen, the decision to deploy the army has not yet been taken.' The President/Chief Adviser did not mention even for once the decision to deploy army during two and half hours of his meeting with the Advisers. Just when everyone was preparing to sign off, he said he wants to invite the home secretary to hear about the latest situation regarding the 14-party blockade. The home secretary came in and casually said the Chittagong Port has become inoperative and this may necessitate military deployment. The suggestion greatly annoyed the Advisers, who said the implications of any such decision might be very grave both nationally and internationally. The secretary did not

> tell them that the decision to that effect had already been made and communicated to the local administration. The Advisers left the meeting with the impression that it was just a plan and came to learn about the truth from the media afterwards.

"Almost a hundred students and teachers were wounded as they fought battles with the police, protesting against the presence of the army on campus"

The content of the news appeared somewhat peculiar and implied something undiscovered beneath the surface, embodied in a *New Age* news commentary of the same day:

> Government insiders have further claimed that the decision to rescind the order was also fuelled by the military's refusal to take to the streets. The sources claimed that the military top-brass on Sunday evening categorically advised Iajuddin that they should only be called in to maintain law and order if the regular law enforcing agencies failed to do so.

The generals' ambition appears more evident in an International Crisis Group report published in the aftermath of the declaration of emergency:

> As party leaders were meeting the diplomats, the armed forces chiefs presented the President with three options: order Khaleda and the BNP, in front of the generals, to put an end to election rigging; declare martial law; or impose a State of Emergency while postponing the elections. As the President was unwilling to confront his political master, and the military was unwilling to go for full martial law, they opted for a State of Emergency. The generals forced Iajuddin Ahmed to resign as Chief Adviser (although he remained President), dissolve the Care-taker Government, impose the Emergency on 11 January 2007 and delay the January polls. The next day, the army installed a new Care-taker Government headed by Fakhruddin Ahmed, a former central bank governor and World Bank official. ["Restoring Democracy in Bangladesh", Asia Report No. 151, 28 April 2008]

The Dhaka University resistance and government responses

The first resistance to the military-controlled regime came from the University of Dhaka (DU). The army generals, aware of the history of resistance from the university and its role in shaping mass upsurges against tyranny and misrule at all decisive points, deployed a number of troops in a makeshift camp in the DU gymnasium grounds from the early days of its takeover.

On 20 August 2007, almost a hundred students and teachers were wounded as they fought battles with the police, protesting against the presence of the army on campus. The acting vice chancellor and the proctor of the university were also injured in police action as they came to the spot seeking a solution. The initial cause of the demonstrations was an incident when army personnel mercilessly beat three DU students and humiliated a teacher over a petty dispute concerning comments passed by spectators watching a soccer match at the university ground where the army camp was situated (*The Daily Star*, 21 August 2007). The students' protest continued for the next few days, prompting the teachers to stand beside them. The army withdrew its camp from the DU campus but the protest advanced to demand the lifting of the state of emergency and pressure for democracy.

Under curfew, the army went for brutal assaults on students and teachers. Four prominent DU professors and some from Rajshahi University (RU) were detained and charged with conspiracy. In 33 cases filed with police stations across the country, more than 87,000 people were charged.

"The army chief commented that the country has 'tried both Presidential and Parliamentary government; now we should try to set up a balanced system'"

The allegedly military-influenced courts in Dhaka and Rajshahi placed the professors on remand after they were picked up from their campus residences on charges of breaking the Emergency Power Rules. General Secretary of the Dhaka University Teachers' Association (DUTA) Professor Anwar Hossain, DU Social Science Dean Professor Harun-or-Rashid, former RU Vice-Chancellor Professor Saidur Rahman, Convener of RU Progressive Teachers' Society Professor Abdus Sobhan and Management Department Professor Moloy Kumar Bhowmik were put on remand. This was the first-ever incidence that university professors were taken to remand due to their protest against any government standpoint.

The detained professors were released subsequently in an unprecedented "Presidential Mercy" even though the detainees had not begged for that, only when the military-controlled government smelled danger manifested in subsequent students' moves to free the detained teachers and students. The torture inflicted on a university professor described in his recent publication *Kath Gorai Dhaka Biswa Bidyaloi: Remand o Karagarer Dinlipi* (*Dhaka University in the Dock: Daily Notes of the Remand and Prison*) speaks much about what happens to common people while in the remand:

> Unknown person: Ei.....!!! [derogatory expression], what's your name?
>
> Professor Anwar (blindfolded): Dr. Md. Anwar Hossain.
>
> Unknown person: Say [serious humiliating expression], what's the meaning of your name?
>
> Professor Anwar remains silent.
>
> Unknown person: Say [same humiliating expression], what is the meaning of Dr.?
>
> Professor Anwar: Doctor of Philosophy.
>
> The unknown person hurled abuse and hurt Professor Anwar's right arm with a baton!!! (p. 28)

The president-versus-prime-minister power balance

The army chief commented at the Sheraton on 2 April 2007 that the country has "tried both the Presidential and the Parliamentary forms of government. Now we should try to set up a balanced system giving more power to the President, Ministers and other agencies to enable them carry out their tasks… Power must be balanced, not tilted towards any family and dynasty." That was the beginning. Then the general apparently stopped, but seminars and symposiums that were allegedly sponsored by the military marked Dhaka's aristocratic hotels, as did so-called

think tanks. A seemingly military-backed paper by S M A Sayeed presented in Dhaka observed the generals' idea to be a logical one and came up with some recommendations, among them that:

> **"The proposed 'Constitution Commission' exists nowhere in the constitution and stands completely *ultra vires*"**

> 1. Prime Minister shall not prepare and send a penal of his/her sole choice for any constitutional post to the President; instead, there shall be a commission to deal with matters related to appointment to constitutional posts and President shall appoint such persons in consultation with the Prime Minister.
>
> 2. President shall have 10 percent reserve quota in the administration which he will fill in consultation with the Prime Minister with qualified, experienced and honest persons, and 10 percent quota in the cabinet which he will fill, with or without consultation with Prime Minister, with qualified, honest and non-partisan persons.
>
> 3. President shall have the prerogative of declaring Emergency in the whole or in parts of Bangladesh whenever the security and economic life of Bangladesh will be in jeopardy without being advised by the Prime Minister.
>
> 4. President being the Commander-in-Chief of the armed forces shall meaningfully be consulted regarding appointments, transfers and promotions of the officers not below the rank of Brigadiers or equivalents. Even his consent may be binding while selecting the service chiefs.
>
> 5. Appointments, transfers and promotions of High Commissioners/ Ambassadors shall not be the sole domains of the Prime Minister; rather these shall be made through meaningful consultations with the President.
>
> 6. A Constitution Commission needs to be constituted to look into details to device a practicable, up to date frame of balance of powers between the President and the Prime Minister in the Parliamentary system.
>
> ["Striking a Balance of Powers between President and Prime Minister", at a seminar on *Constitutional Reforms: Rationale and Strategy*, 26 July 2007, Spectra Convention Center, Gulshan]

The proposed "Constitution Commission" exists nowhere in the constitution and stands completely *ultra vires*. Article 142(1) of the constitution clearly stipulates that:

> Notwithstanding anything contained in this Constitution-
>
> (a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:
>
> Provided that-
>
> (i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;
>
> (ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;
>
> (b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.

Again, article 142(1A) stipulates that any amendment regarding the preamble or article 8 or 48 (pertaining to the Office of the President) or 56 (pertaining to the prime minister and other ministers) will be subject to a nationwide referendum referred by the president.

"Is the Bangladeshi army proceeding towards a Pakistani model?"

In the face of severe criticism, government sources started to argue that the government might constitute such a Constitution Commission and the commission might only prepare a recommendation. They argued that based on the groundwork of such a commission, the next elected parliament would go ahead. Such statements added to the widespread suspicion that the military regime was preparing for to a rubberstamp parliament through poll engineering.

All this prompts a simple question: is the Bangladeshi army proceeding towards a Pakistani model? Because the military-sponsored provisions in the Constitution of Pakistan provide that the cabinet should hold office at the pleasure of the president, President Golam Ishaque Khan could dismiss the elected regime of Benazir Bhutto. The same president attempted the same thing against the elected government of Nawaz Sharif but was foiled with a historic verdict of the Lahore High Court.

If the idea gets implemented, the army, an already overdeveloped institution, will surpass all others in Bangladesh on the pretext of balancing power between the president and prime minister. It will totally destroy the democratic polity with a de facto "military-prime minister" power (im)balance. Some power-hungry generals will influence the Office of the President even by installing a handpicked person in the post. In that case the military will turn it into an institution diametrically opposed to the people's interest, engendering a new power equation: prime minister for the people and president for the vested quarters in military. In a parliamentary system, the question of a power balance between the president and the prime minister is absurd. The point should be how to make the Office of the Prime Minister more accountable to parliament. A drastic change in the Parliamentary Committee system could be an effective and an acceptable measure aimed at a more accountable prime minister.

Some aspirant generals will, most probably, choose to amend article 48(3) of the constitution, rendering the president independent of this article in terms of article 62, which reads:

> (1) Parliament shall by law provide for regulating-
>
> (a) the raising and maintaining of the defence services of Bangladesh and of their reserves;
>
> (b) the grant of commissions therein;
>
> (c) the appointment of Chief of Staff of the defence services, and their salaries and allowances; and
>
> (d) the discipline and other matters relating to those services and reserves.
>
> (2) Until Parliament by law provides for the matters specified in clause (1) the President may, by order, provide for such of them as are not already subject to existing law.

> **"If the power of the president is independent of the prime minister's advice, some generals will abuse the Office of the President, a non-representative and non-accountable office, unlike that of the prime minister"**

But this jurisdiction of the president is not unconditional, as article 48(3) stipulates that, "In the exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of Article 56 and the Chief Justice pursuant to clause (1) of Article 95, the President *shall act in accordance with the advice of the Prime Minister*" (emphasis added). Hence, if the power of the president in article 62(2) is independent of the prime minister's advice as stated in article 48, some generals will desperately abuse the Office of the President, a non-representative and non-accountable office, unlike that of the prime minister. It may, however, be sensible to empower the president in terms of article 106 of the constitution, which reads:

> If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the division may, after such hearing as it thinks fit, report its opinion thereon to the President.

The president can be empowered through an amendment in article 48(3) so that he can refer a vital question of public importance to the Supreme Court without any advice of the prime minister. Only an elected parliament can undertake such an initiative.

The question of the National Security Council

Apart from the president-prime minister power balance, another proposed innovation aimed at protracted military dominance is the proposed National Security Council (NSC). The Bangladesh Institute of Leadership and Security Studies (BILSS), observed the following factors in favour of establishing such an institution (Ataur Rahman, "National Security Council: Bangladesh Context" in *Roundtable on National Security Council*, organized by BILSS, Dhaka, 29 March 2008):

a) Geo-strategic location, stage of economic development, unique demographic profile pose multifaceted security challenges: political violence, destabilization, religious extremism, cross-border crimes, arms trafficking, drugs are more serious than inter-state conflict that also exist.

b) Bangladesh's security traffic is already heavy, and getting heavier as we are trying to harness our natural resources, like oil, gas, coal and water, and deal with energy, food and environmental security.

c) Weak capacity building in state institutions, limited vision of political leadership and incapacitated political institutions, particularly Parliament and parties have led to a situation that needs NSC as an integrated leadership model for national security and stability for sustained development.

As BILSS advocates in terms of the proposed NSC:

a) The NSC should ideally be a part of the constitution with a new article inserted, or could be enacted as an ordinance now and be incorporated into the constitution later.

b) If Bangladesh continues with a parliamentary system, the NSC should be located with the president to create an appropriate check and balance with the prime ministerial power.

c) The NSC needs to work with operational autonomy under overall civilian control.

d) In Bangladesh, there is a need to expand the NSC to include political leaders, military leaders, intelligence agencies, bureaucrats, businessmen and experts or eminent persons. It should be within the range of 9-13 persons.

"The military-controlled caretaker government seemingly opts for an NSC that would surpass the supremacy of the Office of the Prime Minister"

However, BILSS concluded that such a body ought to be constituted in consultation with the people and the keynote speaker of the roundtable at which these points were presented, Professor Rahman, concluded that the discussants' verdicts were in favour of the national parliament supervising the NSC. A *Daily Star* article by a retired army official, Shafaat Ahmad, advocated some legislative safeguards to be incorporated into the NSC provisions, including that the prime minister be bound to consult and be advised by the NSC and that preparation of NSC directives be mandatory once the prime minister has given a final decision ("National Security Council for Bangladesh", 24 March 2007).

Most of the arguments on the NSC from the ambitious generals start with an innocent face, but end with a proposed structure that would supersede the Office of the Prime Minister. In a parliamentary democracy, while people's aspirations are manifested through electoral choice, the proposed NSC structure demonstrates mistrust towards political or representative leadership.

All countries need institutions to address vital security issues. The idea of NSC, first initiated in the US in 1947, was substantiated through the hierarchical restructuring of President Eisenhower in 1953. The UK, India, Singapore, Malaysia and Korea have devised NSCs to address their respective issues. None of these countries let the NSC supersede the primacy of the chief elected representative of the country. In contrast, Turkey and Thailand have devised so-called civil-military relationships undermining the supreme elected posts that have ensured repeated setbacks to democracy.

The military-controlled caretaker government of Bangladesh seemingly opts for an NSC that would surpass the supremacy of the Office of the Prime Minister and be located with the Office of the President. In a parliamentary arrangement, such a setup is an obvious threat to democracy. Nowhere in the arguments advocating the NSC has its accountability been made clear. If such a body were installed, Bangladesh would enter a vicious circle leading ultimately to bloodshed in order to revive democracy.

National Human Rights Commission within a police state?

"The question remains, how the regime will coordinate between the irrationally protracted state of emergency and internationally accepted human rights standards"

An effective human rights body has been in the rhetoric of successive regimes. The military-controlled government has approved the long awaited National Human Rights Commission Ordinance 2007 (Ordinance No. 40 of 2007), during the most protracted state of emergency in the country's history. This body can investigate human rights violations, and is empowered under its rules 15 and 16 only to settle issues or refer them to court. Sub rule 3(1) of the ordinance reads, "The ordinance having been enforced, as soon as possible, a commission named National Human Rights Commission will be constituted in order to comply with the objectives of, and according to the rules of this ordinance."

Now the question remains, how the regime will coordinate between the irrationally protracted state of emergency and internationally accepted human rights standards. The military-led joint forces arrested more that 50,000 people, mostly without warrant, in May 2008, prompting human rights organizations across the world to strongly protest the government's moves (*The New Age*, 3 July 2008). The government has, in contrast to the rights commission ordinance, drafted a Police Ordinance providing the police with an unbridled power, apparently to suit the needs of the military regime. The home ministry has, however, asked the Police Headquarters to consult with stakeholders on the draft at *thana*, district and divisional levels.

Md. Golam Rasul, an advocate of the Judge Court, Dhaka, alleged in a letter of 20 March 2008 to the chief adviser that police have been compelling astute and articulate persons at grassroots levels to make favourable statements supporting the draft ordinance. Frightened people either stay quiet or give supportive opinions, fearing undue harassment and false cases. The draft ordinance empowers police to break into and raid any private compartment without a magistrate's supervision, in contrast to article 32 of the constitution, providing protection of right to life and personal liberty. The magistrate's power under the Code of Criminal Procedure sections 127 – 129 to permit public meetings and processions has been reduced and vested on the police.

Police action in the absence of a magistrate will provide them with an unbridled power and the space to abuse it. The police have been assigned, under rule 3(D) of the draft ordinance, to enforce the fundamental rights of the people, trespassing on the High Court's authority provided under article 102 of the constitution. There is also no civil control to probe the events of shootouts. A "security cell" to entertain allegations against the police has been proposed, but only from within the organization's own chain of command, which is not reasonable.

The legitimacy question

Article 58B(1) of the constitution defines the caretaker government:

> There shall be a *Non-Party* Care-taker Government during the period from the date on which the Chief Adviser of such government enters upon office after Parliament is dissolved or stands dissolved by reason of expiration of its term till the date on which a new Prime Minister enters upon his office after the constitution of Parliament. [Emphasis added]

"While the constitutional wording 'non-party' only makes sense in an apolitical-neutral regime for a temporary period, the president sought a political-neutral one"

The first "conceptual assault" on the caretaker government came from the president when he appointed the party-nominated advisers to demonstrate his impartiality to the confronting political camps. While the constitutional wording "non-party" only makes sense in an apolitical-neutral regime for a temporary period, the president sought a political-neutral one. Despite the political support in favour of the presidential move, it sowed the seeds for further assaults on the very concept of the caretaker system.

However, what is the constitutional status of the post-emergency military-controlled regime? Since the first address to the nation in January 2007, the chief adviser together with his fellow advisers and the chief of armed forces have been calling it a caretaker regime under the constitutional provision; however, the constitutional provision doesn't allow them to operate beyond the defined routine jobs. Article 58D reads:

> (1) The Non-Party Care-taker Government shall discharge its functions as an *interim government* and shall carry on the *routine functions* of such government with the aid and assistance of persons in the services of the Republic; and, except in the case of necessity for the discharge of such functions its *shall not make any policy decision*.
>
> (2) The Non-Party Care-taker Government shall give to the Election Commission all possible aid and assistance that may be required for holding the general election of members of Parliament peacefully, fairly and impartially. [Emphasis added]

The government, in contrast to the Constitution, promulgated almost 70 ordinances almost all of them beyond the routine jobs and electoral duties.

Again, Article 141A(2)(c) reads:

> [A Proclamation of Emergency-] shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament:
>
> Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its re-constitution, unless before that expiration of the meets after its re-constitution, unless before that expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.

The military-controlled regime is simply extra-constitutional as it exceeded the period of 120 days long ago. The nation will confront a fresh constitutional impasse if the first session of the next-elected parliament refuses to approve the ordinances issued by an extra-constitutional government. The elected parliament

itself will be a somewhat legitimate body emerging from an illegitimate government. If the parliament tends to question its own birth, it will need to arrange a fresh national election.

"Bangladesh is in a more critical time than before the military takeover, because previously it faced turmoil between two stakeholders but presently an anti-democratic third party is claiming a stake too"

The legality of the state of emergency proclaimed on 11 January 2007 has already been challenged in the High Court. The first-ever writ petition has been filed challenging the proclamation of emergency, and two Emergency Power Orders suspending fundamental rights, the Emergency Powers Ordinance and the Emergency Powers Rules (*The New Age*, 15 July 2008).

Concluding remarks

For some 20th-century scholars, militaries in power were viewed as modernizing agents, and an inevitable part of newly independent states in the developing world. Such assessments have been proven false when these nations have experienced bloody mass upheavals pressing for full-fledged popular democracy. Over several centuries of political experiences in the west and elsewhere in the world, it has been concluded that democracy has no alternative, and that the military, bureaucracy and other such institutions must be subservient to elected popular institutions.

The so-called civil-military relationship in "Bangladeshi brand democracy" is nothing but an anti-democratic innovation. Bangladesh is now in a more critical time than before the military takeover, because previously it faced turmoil between two stakeholders but presently an anti-democratic third party is claiming a stake too. Corruption in the army top brass most probably is nothing less than it was among the politicians, but it is invisible because of the absence of accountability, which makes it more dangerous. If the military appears to be the momentous solution, why did Bangladesh have the 1990 mass upsurge against nine years' of military autocracy?

Democracy may go through an uneven trajectory in the initial phases, and correct mistakes over the course of time. Most of today's consolidated western democracies faced such predicaments along with developments. Failure in democracy leads to perfection, but compromise leads to its demise. Democracy and human rights in Bangladesh must be safeguarded by electoral democratic institutions, through shifts in corrupt leadership in political parties, and never by military rulers.

Beyond the scholarly debates, evaluation of a given regime is widely perceived in terms of, first, the way it assumed power; and second, its effectiveness. The military-controlled Fakhruddin interregnum, in terms of its behavioural patterns, will be placed in the history of Bangladesh as an abortive project undertaken by some military and civil bureaucrats, alienated from the people. The regime is likely to hold the ninth national Parliamentary polls on 29 December 2008 as per the Election Commission's schedule. A burning question, however, remains as to whether it will be a fair election when the Election Commission has already lost its credibility over a number of controversial actions, including secret dealings with the government and endeavoring to split a major political party.

Cambodia 2008: A turn for the worse?

Asian Human Rights Commission, Hong Kong

In July 2008, Cambodia held a parliamentary election, the third after the UN-organised one in 1993. Eleven political parties were competing for the 123 seats in the National Assembly in 24 municipal and provincial constituencies. This election has been used to portray the country as a multiparty democracy. There was less violence than in the previous elections, and the National Election Committee (NEC) has won appreciation for its technical ability. Despite this appreciation, this election nevertheless felt short of key international standards. Reports of election monitors have highlighted the lack of respect for and the violations of many human rights that had been going during and outside the electoral process.

There was no particular complaint about denial of the right to stand for election. Yet, through its control of all state institutions, its control of the media and its overwhelming resources, the ruling party had a firm grip on the electorate and limited their freedom of choice. The other contesting parties could not campaign in freedom and peace. They were facing various obstructions from public authorities, including violence, threats and intimidation, and unequal treatment before the law.

The electoral process not only highlighted the lack of respect for and violations of the rights of the electorate and contesting parties, but it also served as an opportunity for abuses of other rights, namely land grabbing, corruption and the absence of the rule of law, to come to the forefront.

The July election had many features of a democratic election. Yet one party, the Cambodian People's Party (CPP) dominated the whole electoral process: the registration of voters, the activities of contestant parties, the media, the influence on the electorate, and the adjudication of election conflicts. The NEC is dominated by the CPP, its

This article consists of extracts from the Asian Human Rights Commission's *State of Human Rights in Asia 2008* report. Contents of the report are available in PDF format by country online at the AHRC website, www.ahrchk.net. Interested persons may contact the AHRC to obtain printed copies of the full report.

members being appointed by the CPP-dominated National Assembly. The CPP has a majority on the NEC and an overwhelming majority of NEC operatives are CPP members or supporters. The registration of voters is carried through CPP-dominated local authorities. The NEC is also an election dispute-adjudicating mechanism. Appeals against its judgments are heard by the Constitutional Council, on which the CPP has also an overwhelming majority. The CPP has effective control of the media, especially radio and TV, which were running news on the activities of CPP leaders and very little, if at all, on those of the other party's leaders. The CPP has control of all state institutions from the three branches of government down to the village chiefs and almost all positions in the civil service, the army and the police are staffed by its trusted members. At the grassroots level, almost all commune officials and village chiefs are its members and agents. All these officials and agents have exercised control over the electorate and limit the activities and influence of other parties.

"The electoral process not only highlighted the lack of respect for rights of the electorate and contesting parties, but it also served as an opportunity for abuses of other rights"

In the July election, the CPP introduced a new strategy to win popular support by assigning senior government officials to assist those commune and village officials to get the support of the electorate with actual or promised construction of various infrastructure or social projects, humanitarian relief handouts and money, and all these expenses were funded by those officials themselves. Although there is no computation of all parties' election expenses, some have privately estimated that these expenses could run into hundreds of millions of US dollars for an electorate of just over eight million in a country where the estimated GDP per capita was USD 571 in 2007.

Furthermore, the CPP gained more popular support when the government succeeded in getting the United Nations Economic, Social and Cultural Organisation (UNESCO) to list an ancient temple called Preah Vihear on the Thai border as a World Heritage site right in the middle of the election campaign. The news was greeted with festive ceremonies across the country, and aroused strong Cambodian nationalism and enhanced strong popular support for the ruling party, when Thai troops had entered and occupied the area around the temple following the listing announcement.

The CPP had "a landside victory" winning 93 out of 123 seats in the National Assembly, followed by the Sam Rainsy Party with 26 seats, the Human Rights Party with three seats, and FUNCINPEC and Norodom Ranariddh Parties with two seats each. However, two parties, Sam Rainsy and Human Rights, have rejected the results on the grounds that nearly one million legitimate voters had their names deleted from the electoral rolls while many illegitimate voters were issued papers to cast their votes allegedly for the CPP.

According to the procedure provided for in Cambodia's constitution of 1993, the new parliament should convene within 60 days of the election. It should begin with the adoption of its

standing orders and elect its speaker or chairman and two deputy speakers or vice-chairmen. Based on the same constitution, Cambodia is supposed to be a Westminster-modeled parliamentary democracy under a constitutional monarchy. But, in practice, unlike its Westminster-modeled counterparts, the Cambodian parliament pays no regard to the impartiality of its speaker and deputy speakers. It elects them among leaders of a party who have already been pre-selected by the dominant party. This party may allow the leader of another party to be one of these house speakers. Once its leadership has been elected, the same parliament should proceed to elect the chair and vice-chairs of its nine committees. Again, in practice, these leaders of committees have also been pre-selected by the dominant party. This party may allow leaders or members of other parties to chair several committees.

The next stage is for the parliament's chairman, in consultation with his deputies, to select a leader of the party with a majority to propose to the king to appoint as prime minister. This prime minister then presents his cabinet to the Parliament to get its vote of confidence. In the aftermath of the 2003, there was a stalemate in the composition of the leadership of the parliament and of its committees as well as that of the new government, when the dominant party could not secure the two-thirds majority of seats required for the election of those leaders and for the vote of confidence in the government. After a protracted stalemate for many months, the dominant party, the CPP, already in the government, introduced an additional constitutional law to institute voting in blocs for the pre-selected composition of the leadership of the National Assembly as well as for the pre-selected composition of the government. This bloc voting is to be done without any debates and by a show of hands. Through a coalition deal with the second party, FUNCINPEC, the ruling party forced the new National Assembly to adopt this law before this assembly had been properly convened.

"After a protracted stalemate, the CPP introduced an additional constitutional law to institute voting in blocs for the pre-selected composition of the leadership of the National Assembly as well as for the pre-selected composition of the government"

The objective of this law was to address the "necessity" to overcome the impasse that the dominant party in government had encountered at that time in having the government's composition of its liking. There were protests against it, claiming it was unconstitutional when the then new National Assembly had not properly convened, adopted its standing orders and elect its leadership and chairs of its committees in accordance with the 1993 Constitution. But the CPP-dominated Constitutional Council declared the law was constitutional. The dominant CPP then prepared beforehand the composition of the leadership of the National Assembly and its committees and also the composition of the new government, and submitted the whole package to the assembly to cast its vote by a show of hands to approve it without any debates.

In 2006, the two-thirds majority requirement provided for in the 1993 Constitution for the vote of confidence in any new government, for the election of the parliament's and its

committees' leaderships, and for the adoption of any law was amended and changed into an absolute majority. But when the new National Assembly convened on 24 September 2008 the CPP, which had secured over a two-thirds majority in the July election, still resorted to the same bloc voting when there was no "necessity" for it at all. However, by resorting to this bloc voting procedure, the CPP has denied the rights and freedoms of members of parliament as representatives of their respective constituents and the whole nation as provided for in the 1993 Constitution. Furthermore, the CPP, through the same package vote, has denied the other parties an active role in the leadership of the National Assembly when CPP members have assumed all the chairmanship and vice-chairmanship of the National Assembly and its various committees.

"The legislature in effect represents the CCP voters and not the entire nation"

The legislature in effect represents the CCP voters and not the entire nation. The National Assembly has effectively lost its status as a separate branch of government. It has been subservient to the government it has created, and through it, to the CPP. This branch of government has lost its power of checks and balances right from the beginning of its term. With the other branch of government, the judiciary, already under political control all checks and balances have been removed. Power will further concentrate in the hands of the executive, meaning in those of Prime Minister Hun Sen, the strongman of Cambodia, with all unknown consequences on the human rights and freedoms of the Cambodian people. Through that bloc voting and through the use of his power as prime minister, Hun Sen has now formed a government of altogether 463 members, one-third bigger than his previous government, to run 26 ministries and two government departments in a country which has 13.4 million inhabitants (March 2008 census). These members comprise one prime minister, nine deputy prime ministers, 16 senior ministers, 34 ministers, 198 secretaries of state, and 205 under-secretaries of state (non-cabinet members).

Hun Sen has not only bypassed the constitutional procedure for the election of the leadership of the National Assembly and its committees and for the vote of confidence in his government, but also overlooked the legality of action of his government. Article 3 of the Law on the Organisation and Functioning of the Council of Ministers (1994) says, "The Royal Government shall manage the general affairs of the State in compliance with the policies and plans of the State as adopted by the National Assembly." Hun Sen had not made any policy address announcing the policies and plans of his government and get the National Assembly to adopt them after securing its vote of confidence on September 25, before his government can implement them. Instead he made this policy address to his cabinet at its first meeting on September 26 and announced that his government was going to implement those policies and plans without securing the National Assembly's prior approval.

The NGO Law

After securing an overwhelming majority in the parliament, Prime Minister Hun Sen has reactivated the government's plan to regulate the activities of NGOs. The reactivation of the plan by the prime minister seems to reflect his frustration with continued criticisms of his government's records on human rights and the civil society's continued advocacy of observance of and respect for human rights under the government's international obligations. These obligations have issued from the Paris Peace Agreements of 1991 that put an end to the war in Cambodia. Under these agreements, Cambodia has undertaken, *inter alia*, "to ensure respect for and observance of human rights and fundamental freedoms in Cambodia; to support the right of all Cambodian citizens to undertake activities that would promote and protect human rights and fundamental freedoms;" to establish "an independent judiciary …empowered to enforce the rights provided under the constitution." Many in the government have showed their dislike of human rights defenders who have been vocal in their criticisms of corruption, logging and deforestation, land grabbing, political control of the judiciary, lack of freedom of expression and assembly, wide income disparity, high unemployment, and a whole host of other social ills.

"Many in the government have showed their dislike of human rights defenders who have been vocal in their criticisms of corruption, logging and deforestation, land grabbing, political control of the judiciary, lack of freedom of expression, wide income disparity and high unemployment"

Two days after the approval of his government, on September 26, Hun Sen already announced to his first cabinet meeting his plan to enact a law to regulate NGO, citing his concern that their funding could come from terrorist groups. He said: "We have a concern that sometimes under so and so NGO, financial assistance has been provided for terrorist activities, take for instance the Al Um Quran under which Hambali hid himself in Cambodia." The government has made this law one of the three laws it is going to enact as a matter of priority, the other two being the penal code and the anti-corruption law. This is a strategic package to dampen any criticism when both the civil society and the donor community alike have been pressing the government for the adoption of the two latter laws, especially the anti-corruption law, for a long time.

The previous government had floated on and off the idea of an NGO law for many years, and this idea has hanged over the heads of the civil society like a sword of Damocles ever since. Then in 2006 the government put out a draft for debate with the civil society. After several consultations this draft was shelved. Many in civil society are sceptical about the purpose of this law when virtually no NGO has caused any noticeable scandal. The NGO law may not be just another measure to fight terrorism in Cambodia. The fears of NGOs being funded by terrorist organizations are hardly founded, when financial activities of such organizations are adequately addressed in the anti-terrorism law that the government already enacted in 2007.

Since the idea of an NGO law was floated, it has been suspected that this law would be used to control the activities of human rights NGOs whose freedom of action has been already much curtailed by different executive orders. A remark made in 2006 by Heng Samrin, the president of the National Assembly and honorary president of the CPP when the first draft law was issue, is still haunting them. Heng said: "Today, so many NGOs are speaking too freely and do things without a framework. When we have a law, we will direct them." Since the July election Heng is still holding the two positions.

"Actually, the constitutional rights and activities of NGOs have already been much restricted via guidelines the Ministry of the Interior had issued in 2005"

Actually, the constitutional rights and activities of NGOs have already been much restricted via guidelines the Ministry of the Interior had issued in 2005. This guideline instructs all commune authorities (grassroots authorities), among other things, that all activities of non-governmental organisations, associations and civil society organisations "must have cooperation from provincial or municipal governors" and "all invitations to provincial, district and commune officials to attend any seminar or training sessions must have the approval" of these governors as well. These guidelines in effect restrict the activities of NGOs when members of which have to travel potentially long distances to the offices of provincial or municipal governors and get through lengthy bureaucracies to get such approvals. Cambodian local authorities have rigorously enforced the guidelines of the Ministry of Interior and have banned or interrupted many NGO activities, especially the holding of public forums for the public to debate issues affecting their livelihood. Thanks to public pressure from inside and outside the country the enforcement has been relaxed. Still not all local authorities have relaxed their control and ban.

Resignation of the UN Special Representative for human rights

On 1 November 2005 Professor Yash Ghai, from Kenya, was appointed Special Representative of the UN Secretary General for Human Rights in Cambodia, the fourth since the post was created in 1993 by virtue of the Paris Peace Agreements mentioned above. These agreements stipulate, among other things, that, after the end of the UN's peacekeeping operation and transitional administration of Cambodia, "The United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly..."

Based on his meetings with a wide range of people in the government, civil society, and victims of human rights violations, his visits to the scenes of violations of human rights, and recommendations made by his predecessors, Ghai had since made remarks about the human rights situation of Cambodia together with his own recommendations for its improvement. Among other things, he had made remarks about the lack of

judicial independence, its control by the executive, and its service for the rich and powerful at the expense of the poor and the weak, especially in land grabbing cases. He has gone further than his predecessors to make a remark on the concentration of power in the hands of one man, the Prime Minister, which he has further added is not conducive to respect for human rights.

All these truthful remarks very much irritated Prime Minister Hun Sen and his government. Instead of addressing the problems Ghai had raised, Hun Sen mounted continued attacks on his personality. Hun Sen called Ghai "short-tempered", "deranged", and "lazy". At one time, in 2006, Hun Sen called on the UN Secretary General to dismiss Ghai. He also threatened to close down the field office of the UN High Commissioner for Human Rights, calling its staff "long-term tourists". Hun Sen also made disparaging remarks about the representative's country, Kenya, calling it, among other things, "a killing field" when it was hit by ethnic violence after the 2007 presidential election there. The Cambodian government's Spokesman and Minister of Information, Khieu Kanharith, added further insults, calling Ghai "uncivilized" and "lacking Aryan culture". He also made disparaging remarks about the Kenyan people, calling them "rude" and "servants". The Cambodian leadership's dislike of Ghai at the end reached a point where they denied all meetings he had sought to raise human rights issue with them in compliance with his mandate. This personality assassination through such insults is a hallmark of the Cambodian leadership when they cannot not face the truth and seek ways of addressing the problems people call on them to solve. They simply use this it to dissolve them instead.

"The Human Rights Council and Cambodia's donors did little to support Ghai and his work, which encouraged the Cambodian leadership to be more arrogant towards him"

The Human Rights Council, the international community and Cambodia's donors themselves did little to support Ghai and his work, which encouraged the Cambodian leadership to be more arrogant towards him. Ghai offered his resignation on 16 September 2008, which the Cambodian leadership welcomed with glee, expressing their triumph over a senior UN official who had the temerity of telling the truth about human rights in Cambodia. With Ghai's resignation, the post has also been abolished and has been replaced instead by a post of Special Rapporteur.

Those who are working for human rights in Cambodia have felt Ghai's resignation is a setback. It is harder for them to think that the prospects for human rights in Cambodia might get better when the Cambodian government can defy its international human rights obligations and defeat the work of a senior UN official of high integrity who had the courage to call on the Cambodian government to address human rights issues for the benefit of the Cambodian people.

Land grabbing

Land grabbing has remained a hot issue, with the rich and powerful through illicit means continuing to acquire land belonging to weaker and poorer people. It has affected and continues to affect the livelihood of hundreds of thousands of

people in urban and rural areas alike, and those of the ethnic majority and minorities alike, when these people have been evicted or are likely to be evicted, most often by force, from their homes and lands without just compensation as the country's constitution has prescribed. Amnesty International estimated in a report published in February 2008 that "at least 150,000 Cambodians across the country are known to live at risk of being evicted in the wake of development projects, land disputes and land grabbing".

"The government has not ignored the issue of land grabbing; in fact it has feared that there might be 'peasant revolution' as a result of it"

In 2008 it affected people in many localities in Cambodia. The latest and most notorious case was the lease of a lake called Boeung Kak Lake and its surroundings and the ensuing eviction of some 4600 families of residents in Phnom Penh. The lake and its surroundings are public state property whose sale or lease is prohibited by law. But in 2007 the Municipality of Phnom Penh leased it to a development company, Sukaku, and in 2008 the government made the lake a private state property, which in law can be sold or leased. The lake was leased for 99 years for USD 79 million. The Municipality of Phnom Penh offered various forms of compensation, which many residents found "inadequate" and rejected. They resisted their eviction, and demanded compensation commensurate with the market price of their homes and lands. Meanwhile the company started to fill the lake.

The government has not ignored the issue of land grabbing. In fact it has feared that there might be "peasant revolution" as a result of it. An incident in early January 2008 could be seen as symptomatic of this feared revolution. A young man brutally beat an old parliamentarian from the ruling party with a steel pipe on the head. In his statement to the police, Ros said he had had no personal grudges against that man. His attack was his revenge against the powerful officials who had grabbed his land in Russey Sros village and deprived him of the only means that would have allowed his mother to pay for his wedding. Other victims have not resorted to such violence as yet. They have preferred a peaceful means to end the grabbing their land, to repossess it or to be paid just compensation as prescribed by the country's constitution. In 2008 they were more daring in their endeavours. They raised the issue with the top leadership of the country through various means including a march for land from a distant province to the capital. They have forced those leaders to address it head on. Forced evictions have continued, but they have been suspended in some localities.

Action by the authorities

In March 2007, a month before the local elections, Prime Minister Hun Sen declared a war against land grabbing. Immediately, several land grabbers were arrested or forced to give back the lands they had taken. This war soon lost momentum and Hun Sen remained quiet about the issue until almost exactly a year later when, at the approach of the July parliamentary election, he became active again and took a flurry of decisions to address the issue again. In March 2008 he went in person to

disputed land in the seaport town of Sihanoukville on the Gulf of Thailand to take 16 hectares of land from a grabbing company to give back the 125 families who had lost it. He offered them his apologies for the police action to evict them that caused injury to some and led to the later arrest of three of them. He also ordered the immediate release of these three accused. The next day, back in Phnom Penh, he ordered the governor of Banteay Meanchey province and his colleagues to resolve a dispute over a 20 hectare plot of land "within a week" or they would be sacked. In the same address he criticized the National Authority for the Resolution of Land Disputes (NARLD) for its "sluggishness" in resolving land disputes and threatened to wind it up. He then noted that land grabbing had the "character of a hot issue" when disputes had not been speedily resolved. He also noted that some plots of land had up to four different title deeds on each of them, and he warned the ministry to avoid the issuing of such multiple titles. He threatened to send NARLD officials to jail if found to be dishonest.

"Despite its name, the National Authority for the Resolution of Land Disputes is not a specialized court of justice or administrative tribunal for land disputes"

Despite its name, NARLD is not a specialized court of justice or administrative tribunal for land disputes. It was created in early 2006 by a sub-decree (an executive order signed by the Prime Minister), and was composed of political appointees from different relevant government ministries. According to a former member, Eng Chhay Eang, an MP from the opposition party who had resigned from NARLD, it has no power. It is more like a coordinating body entrusted with the tasks of receiving complaints and conducting investigation with the cooperation of relevant authorities. It mostly entrusts the task of settling the disputes to these authorities.

The creation of NARLD has undermined the jurisdictions of the cadastral commissions created under the 2001 land law for resolving disputes over unregistered land, and the courts of law for disputes over registered land. However, Hun Sen has preferred, as he put it when meeting with those 125 families in Sihanoukville on March 24, resolution of land disputes "outside the justice system". In his address to the meeting of the Ministry of Land Management the next day, Hun Sen was reported to accuse the courts of being corrupt. The following month, he displayed in public his anger with the rulings of two courts of first instance. The first one was the court of Banteay Meanchey province which ruled in favour of a company in its dispute with the government over its construction on public land. The second was the court of Kandal province which ignored his "notification letter" ordering the return of a disputed land to its occupants and the findings of an investigation by the provincial authorities, when it ruled in favour of a company which had claimed to have bought the land from those occupants (see Lao Mong Hay, Rule of law a better way to combat corruption in Cambodia than rule by decree, *article 2*, vol. 5, no. 5, October 2006, pp. 33-40).

Victims' action and responses from the authorities

"Land grabbing victims have banded together to organize protests or resistance to their evictions and garner support for their causes"

In the month of May 2008 this issue of land grabbing came noticeably to the forefront. In that month alone a radio station ran over 40 stories of land grabbing or related issues. These stories showed that land grabbing victims have become more resourceful and have pressed harder to repossess their land. For their part, the authorities have showed more concern and responded more positively, setting momentum for addressing land grabbing.

A group of land grabbing victims who had marched from Battambang province to Phnom Penh said they had no confidence in the courts of law and the provincial authorities, but only in their prime minister in adjudicating their land disputes in their favour. This group was a part of the resourceful villagers who, in May, set off from their province to Phnom Penh, over a distance of 291km, for the purpose of meeting with Hun Sen and requesting him to help them get their land back. Their march attracted a lot of publicity. They were halfway into their march when senior officials from the Ministry of Interior and from Battambang province hurriedly went to meet with them and offered to adjudicate the case in their favour. Having received such assurances, half of the marchers agreed to return home and abandoned the march. The rest were disappointed with the promise, and continued their journey by car to Phnom Penh. Joined by groups from other localities, they went to petition for the prime minister's intervention at his residence on the outskirts of Phnom Penh. Other groups of victims of land grabbing have gone before or after them to seek the same intervention from the prime minister.

Land grabbing victims have also banded together as communities to organize protests or resistance to their evictions and garner support for their causes. In June 2008, representatives of 12 such communities from 24 municipalities and provinces met with the director of the Cambodia Office of the High Commissioner for Human Rights to hand over a petition containing some 40,000 thumb prints, requesting him to intervene with Prime Minister Hun Sen to address the grabbing of their land.

Victims have also used their ballot papers as leverage to get the authorities to end the grabbing of their land. In the middle of May, villagers of the Phnong indigenous minority in Mondolkiri province, frustrated by broken promises from the provincial authorities, said that if these authorities could not keep their promises, they would take their complaint against the grabbing of their communal land by two development companies to Phnom Penh and would not go and cast their votes at the forthcoming election. The provincial authorities ended the grabbing and returned the land to them. Around the same time a group of villagers in Kratie province, with the same frustrations, said they would lose all motivation to go and cast their votes if the provincial

authorities did not end the grabbing of their land by an army unit posted in their locality. The governor of the district then diligently investigated their case for settlement in their favour.

In May the governor of Siemreap province began to conduct investigations into a land grabbing case involving 363 families, some three months after receiving an order to that effect from the Ministry of Interior and four months after those families had filed their complaint to that Ministry. On the same day a deputy governor of Battambang province decided to conduct investigations the day after 60 villagers representing 105 families had protested in front of the provincial government office the day before against the grabbing of villagers from another district.

"In May the governor of Siemreap province began to conduct investigations into a land grabbing case involving 363 families"

Officials of the ruling CPP have also showed concern over the negative impact of land grabbing on their party at the election. In the land grabbing case by an army unit in Kompong Speu province, a CPP commune councilor in May publicly voiced his worries that villagers would not vote for his party when they lost their paddy fields to the Army Tank Unit and faced hardships afterwards. A land grabbing case in Kampot province compelled the CPP provincial task force to intervene also in May and request Hun Sen to rescind an order giving 72 hectares of land to four persons that belonged to a community of 680 families. In the same month, Sar Kheng, a deputy prime minister and minister of interior, also reacted publicly to land grabbing. He expressed his unhappiness with NARLD and other adjudicating authorities. He then proposed the empowerment of provincial authorities, which are under his authority, so that they can resolve land disputes in their respective provinces. Legislation is needed though for the provincial authorities to have any adjudicating power, and Sar Kheng could not have his way. In October, the prime minister appointed a new NARLD. Meanwhile, evictees have continued to stage protests in front of the prime minister's residence and in front of the National Assembly to seek their help to back their demands for just compensation or official title deeds on lands they have occupied for many years.

Continued pressure on victims

The action prior to July had an electioneering character and served as a safety valve to avoid that the "peasant revolution" that the government has most feared. It was not at all a due process under the country's Land Law (2001) and other laws. Nor has it done much to ease land grabbing and the use of various forms of pressure on those who have put up resistance to it. In 2008 there were less brutal forced evictions. More subtle means were used, such as blockades to deny food supplies to recalcitrant evictees, or even floods to pressure them to leave their homes and lands.

The authorities still also resorted to arrests and physical threats as a means to repress resistance to eviction. In January, as part of the eviction of the residents of the Dey Kraham community in Tonle Bassac commune, Chamcar Mon district, Phnom Penh in favour of the 7NG company, the authorities of

"The authorities still resorted to arrests and physical threats as a means to repress resistance to eviction"

the area notified stallholders of the "garden" market inside the Dey Kroham zone, on which the livelihood of the evictees depends, to dismantle their stalls and clear out. The authorities claimed their trade affected the environment, hygiene, health and public order, and that they were going to rebuild the garden. On top of this dismantling of stalls, the 7NG company sent its workers to place oil drums to be filled with water to block all access roads to the zone and supplies to the market. A mixed group of 30 to 40 armed police officers were posted at the edge of the zone to protect the workers. The evictees again resisted the blockade by pushing the oil drums out of the way and preventing the workers from filling them with water. A confrontation between the two sides over the blockade ensued, in which a truck belonging to the local authorities parked at the blockade was set on fire. The authorities had already filed lawsuits against a dozen of Dey Kraham residents following previous resistance successive attempts to evict them since 2005. They charged them with damage to property, battery, defamation and fraud. One of these accused was convicted in September. The others were summoned to appear in court at the end of October and early November. However, thanks to pressure from inside and out the country, first the authorities suspended the eviction order, and secondly, the court granted bail to the accused, which is a positive development, considering the practice of arrest and imprisonment upon appearance in court in Cambodia.

In the same month of January the authorities also set up a blockade of food supplies to force 180 families of disabled war veterans, widows and orphans out of their homes and lands at Kro-Year commune, Santuk district, Kompong province, in a forced eviction to hand over the land to a rubber company, when these vulerable people had protested against their eviction. In August, in their attempt to evict recalcitrant Boeung Kak Lake residents in Phnom Penh, the development company and the Phnom Penh Municipality resorted to a set of draconian measures: they began filling the lake, which raised the level of the water and flooded their homes, destroyed their floating vegetable farms; turned off the fresh water supply, and threatened to cut off power supply as well. Unable to continue to live in flooded homes, some residents "voluntarily" accepted the inadequate compensation. In April an army unit began to build a development zone for handicapped veterans in Chhouk district, Kampot province. In subsequent months it began to evict over 400 families from one end of a village and move them to another end. In this process it forced over 700 families living in this end to reduce their living space to accommodate those displaced families. In June some 30 villagers protested and over 100 soldiers and military police officers beat the protesters and arrested four of them on charges of the robbery of a mobile phone and wrongful damage to property. In August about 40 soldiers, many of them armed, attempted to evict 19 families from their homes on more

than two hectares of land in Steng Treng provincial town, to be relocated in rural areas. The army had begun to evict these residents in 2005.

Corruption

Corruption has been a big issue in Cambodia, and this issue has been continuously raised at least since the mid-1990s, and successive governments, when taking oath of office, have pledged to combat all forms of corruption. They have even included the enactment of an anti-corruption law in their respective policy addresses and in their promises to donors. However, none of these pledges have translated into concrete action.

A survey by Transparency International (TI) released in February 2008 showed that 72 per cent of Cambodians reported paying a bribe to receive a public service within the year 2007. TI said that this percentage was the highest in the Asia-Pacific region and second only to Cameroon (79 per cent) internationally. The majority of respondents had expected no decrease in corruption in the next three years to come. In 2008 Cambodia ranked 166 out of 180 countries in the TI Corruption Perception Index.

> **"Corruption is pervasive across the entire public sector and, to a less extent, in the private sector as well; a bribe is expected for the delivery of any public service"**

Corruption is pervasive across the entire public sector and, to a less extent, in the private sector as well. A bribe is expected for the delivery of any public service. Right from the early 1990s there has been a persistent demand on the Cambodian government to enact the long-awaited anti-corruption law whose draft has been written and rewritten over dozen of times. In 2008 an anti-corruption movement across the country was formed to mobilize public opinion to combat corruption and press the government to enact the law. Just prior to the July parliamentary election, this movement succeeded in collecting signatures of some one million people on a petition to hand to the parliament, requesting it to enact that law. It also received pledges from all competing parties, except the ruling party, to enact within six months after the election.

The government felt the pressure and, in his political programme announcement to his cabinet in September, Prime Minister Hun Sen said that the anti-corruption law had already been approved by his government and would be sent to the parliament for adoption after the penal code had been adopted. However, this anti-corruption law is not likely to meet the standards set by the UN Convention against Corruption or have much effectiveness in tackling the issue, when Hun Sen has already discarded comments from the civil society, saying: "The [anti-corruption law] will come out no matter what comment some NGOs would make."

Press freedom

"In 2008 press freedom was badly marred by some events affecting journalists and the media as a whole"

Press freedom is a constitutional right in Cambodia. Yet over the years, journalists have been facing threats and intimidation, confiscation of their newspapers, cameras and notebooks, and lawsuits for criminal defamation and/or disinformation. However, over recent years Cambodian media has seemed to enjoy a degree of freedom compared with its counterparts in other countries in the region. In 2007 Freedom House classified Cambodian press as "partly free" and ranked Cambodia 122 out of 195 in its Freedom of the Press World Ranking. In the same year Reporters Without Borders ranked Cambodia 85 out of 169 countries in its World Press Freedom Index (71 out of 139 in 2002; 81 out of 166 in 2003; 109 out of 167 in 2004; 90 out of 167 in 2005; 108 out of 168 in 2006). With this degree of press freedom, Cambodian journalists have been able to relax their self-censorship and write "high-risk stories" like those on corruption, injustice, illegal logging and land grabbing committed by powerful officials and rich businessmen.

However, in 2008 press freedom was badly marred by some events affecting journalists and the media as a whole. In early July, Khim Sambor, a journalist for the *Monasikar Khmer* (*Khmer Conscience*) newspaper known to have affiliation with the opposition was gunned down in broad daylight together with his son in Phnom Penh. No perpetrator had been apprehended at time of writing, despite assistance from the US Federal Bureau of Investigation. This slaying followed the arrest of the same newspaper's editor a couple of weeks earlier for defamation and disinformation for reporting the opposition leader's remarks that two senior government ministers had been affiliated with the Khmer Rouge regime in the past, one of whom was head of one of its prisons. Both the slain journalist and his newspaper had been writing on high-risk issues. Following the slaying of that journalist and the arrest of his newspaper's editor, a local English newspaper wrote that, "Cambodian journalists feel that they are not safe."

Journalists had not been any much safer and the media had not been any freer from government action prior to the two events. A journalist for Radio Free Asia, Lem Pichpisey, known by his on-air pseudonym Lem Piseth, received renewed threats on and off from January to April, through text messages, phone calls from unknown people to fix rendezvous at dubious places, throwing of assault rifle AK47 bullets at night in the yard of his house in Battambang province and also threatening gestures from a group of motorcyclists while he was riding his own motorcycle in a street in Phnom Penh. He received these threats after his return from a short self-exile abroad because of previous threats and after he had investigated a drug trafficking case. In May, unable to put with these threats anymore, Lem decided to flee the country, this time for good.

In the same month of May, the Ministry of Information revoked the licence it had granted to a radio station called Angkor Ratha Radio located in the capital of Kratie province for selling its airtime to four political parties that were to compete in the parliamentary election to be held in July. The ban on this radio station was inconsistent with the ministry's permission to its affiliate radio station in Siemreap province and to Phnom Penh-based Radio Beehive to sell their respective airtime to those same political parties.

> **"The Cambodian authorities have not lifted a ban on peaceful public demonstrations"**

Freedom of expression and assembly

The Cambodian authorities have not lifted a ban on peaceful public demonstrations, although the right to assemble freely is among all the human rights that Cambodia has undertaken to observe and respect as part of its obligations under the Paris Peace Agreements of 1991. All these human rights are binding on Cambodia as its constitution of 1993 has recognized them and as its Constitutional Council confirmed this much in a ruling of July 2007.

The police have enforced this ban with the use of force. In December 2007 riot police armed with shields and batons chased and assaulted a group of Buddhist monks who went to hand a petition to the Vietnamese embassy in Phnom Penh demanding the release of their fellow monks of the same indigenous origin from prison in Vietnam. In the same month another police force in Rattanakiri province used force and water cannon to disperse a procession of indigenous people protesting against illegal logging and deforestation in the province.

The police have not relaxed the enforcement of the ban, but they have seemed to resort less to violence. In January they banned the holding of a genocide memorial ceremony in front of the Khmer Rouge Torture Centre in Phnom Penh to raise an awareness of the situation in Darfur, Sudan. The ceremony was organised by several Cambodian NGOs as well as the Dream for Darfur organisation, with participation from many local NGOs as well as from an international delegation led by the famous American actress Mia Farrow. They charged that Farrow had planned to use the ceremony to press China, which was one of Sudan's major trading partners and was to host the Olympic Games, to use its influence with the Sudanese government to end abuses in Darfur. The Cambodian government called the whole ceremony a political stunt to smear China, which is one of its great supporters.

In February in Svay Loeu district, Siemreap province a village chief named Kim San of the ruling Cambodian People's Party used physical threats to prevent a member of parliament of the opposition Sam Rainsy Party from holding a meeting with villagers. The MP, Ke Sovannaroth, organised the meeting to listen to the villagers' complaints regarding land-grabbing cases but the village head allegedly forcibly dispersed the villagers and threatened the MP. Ke Sovannaroth filed a complaint, but no action was taken against Kim San.

"Cambodia has not created any national mechanism for the prevention of torture; nor has it adopted any specific anti-torture law yet"

In August the authorities banned a public demonstration organised by the Free Trade Union of Workers of the Kingdom of Cambodia (FTU) and the Cambodian Independent Teachers' Association at the head office of the FTU. They deployed a riot police force armed with batons, shields, and tear gas to crackdown on hundreds of people who joined the demonstration to demand the withdrawal of Thai troops from the Cambodian territory along the border they had occupied since June 2008. The next day FTU President Chea Miny received a death threat email, which was apparently linked to that demonstration. The police said "this riot, or demonstration, could cause disorder and bigger problems because in the past, illegal demonstrators burned down the Thai embassy [in January 2003], making the government pay tens of millions of dollars back to Thailand".

The police and local authorities have seemed to be more tolerant towards the holding of public forums held in different provinces and have not used violence when enforcing their ban. For instance, the Cambodian Centre for Human Rights, an NGO, organized 48 forums for ordinary people to talk about the issues of their concern from January to October. For seven of these forums, held separately in Siemreap, Prey Veng, Koh Kong, Kampot and Kompong Chhnang, it encountered threats and obstructions, but it succeeded in holding them. Two of the forums, held separately in Kompong Chhanang and Kampot, were completely banned. In October a human rights NGO, ADHOC, succeeded in securing "permission" from the Ministry of Interior to hold the demonstration in the capital of Rattanakiri province after failing to secure it from the authorities of this province.

Torture & cruel or inhuman treatment

Cambodia has been a party to the UN Convention against Torture (CAT) since 1992 and the Optional Protocol to this convention (OPCAT) since 2007. Yet over a year after the ratification of OPCAT, Cambodia has not created any national mechanism for the prevention of torture through visits to places of detention as required. Nor has it adopted any specific anti-torture law yet. Torture is made a crime in the current draft penal code, and the government has committed to creating that preventive mechanism to visit places of detention as soon as possible.

Part of the concern for the prevention of torture has already been addressed in the code of criminal procedure, enacted in 2007. This code gives power to the prosecutor general and public prosecutors to inspect prisons and judicial police units. But these judicial officers have not been given enough resources to conduct such inspection, as they would wish.

In reality, torture and ill treatment of suspects and accused persons is still practiced, but a senior lawyer has observed that it is "on the decline". For instance, the police in Kirisakor district, Koh Kong province, allegedly beat a young man, Taing Thavy, with a rifle when they arrested him in February 2008. The police

beat him again in the detention cell. On both occasions Taing was badly injured and also lost consciousness, but the police denied him any immediate medical treatment. Taing sued the police officers that attacked him, but they were not apprehended. In the same month a police officer named Pring Pov was arrested and allegedly tortured and ill treated in police custody in Kep seaside town. He was later confined to a windowless cell and shackled at night. Despite having wounds on his body, he was denied access to medical treatment. While in detention he was consistently pressurised to vacate the land on which his house stood and give it up to a senior government minister. Thanks to public pressure, Pring Pov was later released and went back to his job.

"An improvement in the conditions of certain prisons has been noticed, especially the ones on the outskirts of Phnom Penh and the newly built ones"

Ill-treatment: The civilian and military police have also abused their power. In May, 62 victims of land grabbing who had come from the village of O Voalpreng, Khnay Romeas commune, Bovel district, Battambang province were attempting to hand over a petition to Prime Minister Hun Sen to seek his intervention to get their land back. The police ordered them to move to another place, an order that they refused. A police officer then used his portable radio set to beat six of the demonstrators injuring them about the head. In July a military police officer, Nget Vutha alias Kin, slapped a journalist, Ros Phina, in the face for reporting on his facilitating of the transportation of protected timber. This incident happened in the district military police headquarters in Stung Hav district, in the seaport town of Sihanoukville. Nget was later disciplined for his assault on Ros. In October the same police force in Battambang district, Battambang province, assaulted vendors twice respectively in Sar Kheng Garden and near Hun Sen Bridge in Rumchek IV village, Rattanak commune, Battambang distict. One victim suffered a fractured rib, another severe injuries on the forehead.

The rich and powerful have abused their positions to ill-treat poorer and weaker people. In January 2008, the bodyguards of some unknown high-ranking personality beat the driver of a truck in the middle of the road on the outskirts of Phnom Penh for obstructing the traffic and hold up the passage of their boss's car. In May, Noeu Noeuy, who is chief of Banteay Chhmar South village, Banteay Chhmar commune, Thmar Puok district, Banteay Meanchey province and also the CPP village committee chairman kicked and beat Hem Poeu, who is chief of a group of houses in the village, when Hem refused to join the CPP. In July, Prime Minister Hun Sen's nephew, Hun To, ordered his bodyguards to physically attack a member of parliament named Nuon Vuthy in an overtaking incident at the ferry pier of Prek Kdam in Ponhea Leu district, Kandal Province. Nuon filed a lawsuit against Hun To for battery, while Hun To filed a counter-lawsuit against Nuon for defamation.

Prison conditions: An improvement in the conditions of certain prisons has been noticed, especially the ones on the outskirts of Phnom Penh and the newly built ones. Shackling prisoners is still practiced though as in the prison of Kompong

Thom province, and overcrowding, squalid conditions, inadequate food and lack of medical care are still endemic problems in all prisons. In March 2008 a woman named Chan Heu held in pre-trial detention in the prison of Battambang province fell seriously ill and was taken to hospital in Batttambang city for treatment. There she was chained to her bed. She could not make any movement, which worsened her condition. Thanks to public pressure, she was given bail and had proper medical treatment. In April 2008 a young man named Yan Sok Kea died due to lack of medical treatment both in pre-trial detention in Prey Sor Prison on the outskirts of Phnom Penh and at a hospital where he was admitted when seriously ill. In August, an unnamed pre-trial detainee in the prison of Kampot province suffered from beriberi for lack of adequate food, could not walk and had to be carried by fellow inmates into the courtroom to stand trial. That prison had just five rooms to house 250 inmates of which 12 are women. Like all other prisons across the country, the food ration there is 1500 riels (USD 0.37) per inmate.

"Periodically the authorities have rounded up the homeless, beggars and sex workers in the capital and sent them to the 'social centres' run by the Ministry of Social Affairs"

Conditions in "social centres": Periodically the authorities have rounded up the homeless, beggars and sex workers in the capital Phnom Penh and sent them to the "social centres" run by the Ministry of Social Affairs. It is known that there are two such centres, one is Koh Rumduol Social Centre on Koh Kor island in the Bassack River, in Sa-ang district, Kandal province, the other is Prey Speu Social Centre in Chom Chao commune, Dankor district on the outskirts of Phnom Penh.

Officially, these centres are rehabilitation centres for homeless and other poor people. However, in 2008, a human rights NGO, LICADHO, discovered that there were being "used for the systematic unlawful detention of sex workers, homeless people, beggars and others arbitrarily arrested on Phnom Penh streets". They were unlawfully detained in "appalling conditions". At Prey Speu, there were some 50 detainees. These detainees suffered from physical and sexual abuse, including alleged beatings to death of at least of them and gang rapes of women. At Rumduol, there were 20 persons detained together in the same room. They suffered from various diseases. Despite criticism of unlawfulness and appalling conditions in those centres, the authorities have continued to round up homeless people, beggars and sex workers. As the Water Festival held in Phnom Penh November was approaching, the Municipality of Phnom Penh began its roundup of those people to be sent to those centres. In the first day it arrested at least 40 homeless people, including two children. The reason for this roundup was for the beautification of the city. A municipal official said: "We arrest them only for big national celebrations to keep order and create a good atmosphere during the celebrations, especially the Water Festival." It was feared that those people would suffer the same abuse and ill-treatment as LICADHO had discovered n those "social centres".

The rule of law

According to its constitution, Cambodia is supposed to be a liberal democracy governed by the rule of law with separation of powers and an independent judiciary. Yet in reality, 15 years after its promulgation, not only this constitution has not been fully implemented, but some of its provisions have been violated altogether, and the establishment of the rule of law has made little progress.

> **"There has been little progress on the adoption of the law on the status of judges and prosecutors, a law which is specifically prescribed by the constitution and whose enactment has been promised by successive governments"**

Constitution ignored

In September and October, the constitution suffered a serious battering on several occasions. After their July election victory, the winning party proceeded to form the new government in breach of the procedure prescribed by the country's constitution. Then in the most serious violation of the constitution, the Prime Minister Hun gave an ultimatum to Thailand on October 14 to withdraw its troops by the next day from a piece of Cambodian territory near a temple called Preah Vihear on the Cambodian border, an area which Thai troops had occupied since 15 July 2008.

Hun Sen told reporters that he had told the visiting Thai foreign minister and had also instructed Cambodian army leaders, including commanders at the frontline that "this place is a life and death battlefield". Hun Sen's warning to Thailand and instructions to the Cambodian army commanders amounted to nothing short of a declaration of war, which it was when, the next day, October 15, Cambodian and Thai troops engaged in a brief battle causing death and injuries on both sides. Hun Sen's action violated the Cambodian constitution according to which only the king, the supreme commander of the armed forces, can make a declaration of war after both houses of parliament have approved it. However, there is no remedy for the unconstitutionality of the government's action when the country's Constitutional Council is under political control.

Judiciary as a tool for the rich and powerful

There has been little progress on the adoption of the law on the status of judges and prosecutors, a law which is specifically prescribed by the constitution and whose enactment has been promised by successive governments. This law should ensure at least some degree of the independence of those judges and prosecutors. The continued delay in enacting this particular law is a prolonged violation of the principle of separation of powers and judicial independence as the constitution has prescribed, and also the maintenance of de facto political control over the judiciary. As a consequence of this omission and violation, the courts have not able to discharge the constitutional duty to protect the rights and freedoms of the Cambodian people.

Political control over judges and prosecutors starts right from their training. Their school, the Academy of Judicial Profession, is placed directly under the Office of the Council of Ministers. Its leaders are members of the ruling party. In the last July election

judge and prosecutor trainees were taken out to a dinner party to be told to support and vote for that party. Over the years there has been increasing evidence that the courts are used by the rich and powerful to protect and promote their own interests. In a report on the judiciary, LICADHO, a human rights NGO, said that " the primary functions of the courts continue to be: [1] To prosecute political opponents and other critics of the Government; [2] To perpetuate impunity for State actors and their associates; [3] To promote the economic interests of the rich and powerful." These observations made in December 2007 remained true in 2008.

"Over the years there has been increasing evidence that the courts are used by the rich and powerful to protect and promote their own interests"

In April Hor Nam Hong, deputy-prime minister and foreign minister, filed a defamation lawsuit against Dam Sith, the editor of a local newspaper, for reporting a remark by Sam Rainsy, a Member of Parliament and opposition leader. Sam said that Hor had been chief of a Khmer Rouge prison in the past. Since defamation is not punishable by jailing, Hor additionally charged Dam with disinformation, for which he could be imprisoned. In June, Dam was jailed for his reporting. However, due to intense national and international pressure for his release, Hun Sen acted to release Dam on bail. Hor also filed the same lawsuit against Sam Rainsy for defamation and disinformation. While the parliamentary election was approaching, the court acted promptly on this lawsuit and summoned Sam to appear before it on May 22, while it has not acted with the same promptness on cases of violence against opposition parties and their activists. This has prompted further doubts about not only this particular court's but also all Cambodian courts' lack of independence and impartiality. If convicted, Sam could be sentenced to between six months and three years in prison for disinformation, and also fined for each count. Any such imprisonment would cripple his party, which is the second largest after the CPP. Soon after Dam was freed on bail, the court in Phnom Penh sought to lift Sam's parliamentary immunity in order to put him in jail. Because of national and international pressure not to mar the ongoing electoral process, this attempt to lift his immunity was deferred.

Another court case involved Prince Norodom Ranariddh, former leader of the FUNCINPEC party, CPP's current coalition partner in the government, and leader of a newly formed party, the self-named Norodom Ranariddh Party. He is one of Prime Minister Hun Sen's arch political rivals who was sued for breach of trust, a criminal offence, by his former party in the handling of that party's assets. Fearing a negative outcome, Ranariddh fled the country. He was convicted and his chance to lead his new party in the parliamentary election was ruined. In the aftermath of the election, through a political deal with the winning Cambodian People's party, he was granted a royal pardon and was able to return to Cambodia. Ranariddh has since abandoned his political career.

Protests against pretrial detention

The arrest and the ensuing imprisonment of suspects together with the rarity of release on bail have created immediate fears among suspects who are summoned to appeal in court either for trial or for investigation. Following the arrest in June of the four villagers in Kampot province in a land grabbing case, some 20 fellow villagers went into hiding fearing the same arrest and imprisonment. More recently, nine residents of Dey Kraham in Phnom Penh, and fellow residents, had the same fears after receiving summonses to appear in court for trial and for investigation. Relatives and sympathizers have also had such fears. But some have joined forces to express their solidarity with the accused and have gone to court to protest against any eventual arrest and imprisonment of the accused. In July nine villagers in Battambang province were summoned to appear in court following a land dispute. Fearing they would face arrest and imprisonment, some 40 of their fellow villagers banded together and went with them to court to protect them from such eventuality. The court just took their statements and let them go back home. In the case of an arrest in October of villagers in Siemreap province following a land dispute with a senior army officer, some 200 villagers also banded together and, some two weeks after that arrest, they went to protest against their arrest and imprisonment, and also demand their release at the office of the provincial governor. Their collective protest seems to have some effect: the provincial governor reportedly offered the protesters help to solve the land dispute and get the release of their fellow villagers. Due to this help, the court seemed to be willing to release the accused on the condition they would agree to vacate the land.

Rule by decree

Over the last 15 years Cambodia's successive parliaments have passed many laws, but these parliaments have not exercised their oversight authority to ensure that all these laws are effectively enforced and that the government has issued regulations in accordance with them or with any policies and plans they have adopted or approved. For its part, the government does not seem to be so much inhibited by the country's constitution, and laws, policies and plans that the successive parliaments have adopted. It seems to be at liberty to arbitrarily issue executive orders or regulations.

One particular order is a "notification letter" issued by the prime minister himself or a senior official at the Office of the Prime Minister. This notification letter serves as a simple notice to concerned persons of the decisions made by the prime minister or his office over cases submitted to the prime minister for adjudication. It has no official status as an executive order or a regulation, such as a royal decree signed by the king, a sub-decree signed by the Prime Minister or a ministerial order signed by ministers, and is not subject to parliamentary oversight or judicial review. Widely known in Cambodia by its Khmer language

"The government does not seem to be inhibited by the constitution, laws, policies and plans that the successive parliaments have adopted"

> "Rule by decree is unconstitutional, where institutions other than the courts have the power to adjudicate disputes"

acronym "Sor Chor Noh", this notification letter has the majesty of a law with authority to even overrule a court judgment. In October 2008, the largest newspaper *Reaksmei Kampuchea* used this Khmer acronym as the title of one of its commentary, "God Indra's Notification Letter" ("Sor Chor Noh Roboh Preah Ind"), to propose the sending of mischievous members of Cambodian society to the frontline to fight the Thai troops occupying Cambodian territory around Preah Vihear temple.

In April this year the Office of the Prime Minister issued a notification order to award 72 hectares of land to four private individuals. The land belonged to a fishing community of 64 families in a coastal area of Kampot province, and its ownership was thus transferred without reference to the country's Land Law (2001). The affected families protested against the award. To counter any negative impact on the popularity of the ruling party when the parliamentary election was approaching, in early June, some six weeks before the election, the Office of the Prime Minister annulled that letter and the affected families got back their community land. However, in their efforts to have their community land back, more than 200 families living in a village on the outskirts of Phnom Penh were not that fortunate but suffered instead from such a notification order. In July 2005, the Supreme Court awarded that land to them, but in November 2006, a fellow villager who had lost the case secured a notification letter from the Office of the Prime Minister. This letter has since stalled the execution of the Supreme Court's judgment that had awarded that community land. The villagers have since protested against the continued possession of their community land by the fellow villager. In September 2008, hundreds of villagers gathered and put their thumbprints on a petition to Hun Sen, requesting him to do justice to get their communal land back. This form of rule by decree is unconstitutional, where institutions other than the courts have the power to adjudicate disputes. Furthermore, it is an offence of interference in the judicial functions of courts and appears in the current draft of the Cambodian penal code. It has bred corruption and contributed to the centralization of power in the hands of the prime minister.

Remedies

The Cambodian government with support from donor countries has developed a set of reform programmes including a legal and judicial reform programme. However, the government is least serious about the latter programme and it has been dragging its feet over it. Successive governments have pledged to enact a law on the status of judges and prosecutors to determine their functions and independence and another law on the organization of the judiciary. They have also pledged to reform the supreme judicial body called the Supreme Council of the Magistracy to make it more functional and more effective in disciplining of judges and prosecutors and in insuring judicial independence. In 2008, none of these proposals saw the light of day.

Successive governments have not allocated adequate resources to the courts and the prosecution offices to do their jobs properly; the Court of Appeal has no fax machine and no email address. The judiciary still lacks independence when almost all its members are members of the ruling party. The chief justice of the Supreme Court and an ex officio member of the Supreme Council of the Magistracy is still a member of its standing and central committees, and all but two of the members of the same council are also its members.

"In October 2008, the government announced plans to reform the court system"

However, thanks to continued training, informal and formal, under or outside the legal and judicial reform programme, the adoption of several codes (civil code, civil procedure code and criminal procedure code), monitoring and criticisms, the competency of judicial officials has noticeably improved since the communist days. Judges and prosecutors are generally more competent; have more knowledge and understanding of laws and procedure; are more articulate, more open to debates, keener to learn more; are more insistent with regard to evidence; are for compliant with the criminal procedure; less submission to and more assertive in their relations with the police; trial judges inform the accused of their rights. There are efforts to enforce the code of criminal procedure, including the prosecutor general's instructions to prosecutors to investigate torture when finding indication of it on suspects and the police's increasing submission to the authority of the prosecution offices. The government and the United Nations Development Programme have established justice centres, or mobile courts, in an increasing number of provinces to enable people to have more access to justice. It remains debatable, though, whether they will be sustainable when UNDP ceases its cooperation and funding, and whether all these are simply expediencies and divert the attention and resources away from the establishment of a functional and independent judiciary.

In October 2008, with increasing criticisms of the lack of judicial independence, the government announced plans to reform the court system. A deputy prime minister, Sok An, announced that the government "will be preparing a workshop the law and courts", saying that the government had heard "bad rumours about courts in Cambodia" and it was going "to work very hard to change that". He added that the government "needed to enforce discipline and make sure that the courts are independent". This statement is in itself a violation of the principle of separation of powers and the independence of the judiciary as stipulated in Cambodia's constitution. The discipline of judges and prosecutors and the independence of the judiciary are the jurisdiction of the king with assistance from the Supreme Council of the Magistracy, which he chairs. Furthermore, such a statement has now become familiar when it has been made again and again since the government had introduced the set of reform programme some ten years ago.

Conclusion

"The situation shows no strong indications of any real precondition under which human rights can flourish in the future"

More than two years ago, in March 2006 at a press conference in Phnom Penh to wrap up his second mission in Cambodia, former UN envoy Yash Ghai said he was "quite struck with the enormous centralization of power, not only in the government but in the one individual [Hun Sen]". In 2008 power in Cambodia was further centralised in the ruling Cambodian People's Party through a parliamentary election it very much controlled.

Hun Sen's ruling party is a former communist party and it has had control over the state institutions since the communist days. It has been able to effectively squeeze out rival parties that began emerging in the early 1990s. With his victorious confrontation with Ghai leading to the latter's resignation and the subsequent downgrading of the UN mandate in the country, Hun Sen has also been able to marginalize the UN on human rights issues. He has further moved to use law to control and subdue civil society, the local bulwark of human rights, which he and many in his party have found irritating.

The human rights situation described above is not comprehensive, but it shows no strong indications of any real precondition under which human rights can flourish in the future. The rule of law that is essential for the protection of human rights, as recognized by the Universal Declaration of Human Rights, is simply not there when Cambodia is essentially ruled by decree. The concept of equality before the law and equal protection by the law has not taken root in Cambodia yet. Courts have yet to gain independence and be imbibed with impartiality and have yet to discharge their constitutional duty to protect human rights. They have yet to assert themselves as state institutions and not serve as a tool for the rich and powerful to promote and protect their interests at the expense of opposition to the government, the poor and weak. Cambodian authorities, the Cambodian Bar Association, civil society, the field Office of the High Commissioner for Human Rights, the Special Rapporteur on Human Rights in Cambodia, and donor countries should make more efforts and concentrate these efforts first and foremost on establishing the rule of law and building strong, functional institutions for it in Cambodia. The Special Rapporteur should be given more support than Ghai received, and donor countries should renew their efforts to effect change for the better, for human rights in Cambodia.

Establishing an independent national human rights institution in Cambodia

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When the Cambodian warring factions and the concerned countries met in Paris, France, in 1991 to conclude a set of agreements to end the war in Cambodia, they recognized that "Cambodia's tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past." As part of these measures, Cambodia has undertaken, among other things, to adhere to the international human rights norms and standards and establish an independent judiciary duly empowered to enforce human rights.

In 1993 Cambodia began in earnest to honour its international obligations. It integrated these international human rights norms and standards in its constitution, adopted the principles of separation of powers and established an independent judiciary in the same constitution.

In September 2006 Prime Minister Hun Sen, in an address to a conference on the establishment of a Cambodian national human rights commission, committed his government to the creation of this body based on the Paris Principles relating to the status of national institutions for protection and promotion of human rights. The key criteria of these principles are: (1) independence, guaranteed by statue or constitution; (2) autonomy from Government; (3) pluralism including membership; (4) a broad mandate based on universal human rights standards; (5) adequate powers; and (6) adequate resources.

The message form the government set a momentum for the success of that conference which ended up with a set of resolutions including a progamme of work for stakeholders in the government and the civil society. A civil-society working group soon came up with a rough draft law on the establishment of the Cambodian national human rights commission, which it submitted to its counterpart in the government.

> "This year there were criticisms over the lack of effectiveness of the many institutions created to resolve land disputes"

Parallel with the commitment of its highest leadership, Cambodia has benefited from the experience of sister national human rights institutions in the region and beyond, and the expertise of international organisations, whose representatives and experts have offered a helping hand and shared their experience and expertise with Cambodian stakeholders.

However, if the political climate is favourable, assistance is forthcoming, and progress has been achieved in the form of a draft law for further debates, there are still many hurdles, several of which need to be address as a matter of priority at an early stage of the process to put in place this important national human rights body.

First, stakeholders need to work out ways of fitting the new body into the existing institutional settings when there are already public human rights institutions that have had little effectiveness in the promotion and protection of human rights. Under the Paris Peace Agreements, the judiciary is empowered to enforce human rights, and under Cambodia's constitution it is charged with the task of protecting these rights. Besides the judiciary, the king is also the constitutional guarantor of human rights. Should the new institution assist the king in his constitutional duty to guarantee human rights the same way as the supreme judicial body called Supreme Council of the Magistracy assists him in ensuring the independence of the judiciary?

On top of the judiciary and the king, there are the human rights committees respectively of the National Assembly, the Senate and the Government. All these human rights institutions are widely seen as political organisations but, as Prime Minister Hun Sen insisted in the same address September 2006, are to be preserved.

There have been some developments, positive and negative, concerning all existing human rights and other institutions, developments from which there are useful lessons for the establishment of a new human rights institution.

The Senate's Human Rights Committee, which has not so far been very active, might want to follow the footstep of its Legislation Committee, which lately decided to conduct a commendable inquiry into the workings of the judiciary. The National Assembly's Human Rights Committee might also want to be more active in investigating human rights cases.

At one time this year there were criticisms over the lack of effectiveness of the many institutions created to resolve land disputes: the courts, the cadastral committees, and the National Authority for the Resolution of Land Disputes. One criticism concerned the multiplication of these institutions. It was followed by a suggestion to allow the provincial authorities to resolve them. There are lessons to be learned from the pitfalls of these institutions for the resolution of land disputes.

The challenge is how to shape and fit in all these jigsaw pieces together and design the new institution to ensure there is synergy between all existing human rights institutions, which are to form as a strong, cohesive system, instead of them competing with one another or duplicating their work. An option could be the creation of a new human rights body that is independent and has power of coordination and supervision over the three human rights committees. These three could address minor human issues while the new body could deal with the major ones.

"Without an independent judiciary, it is questionable whether the new human rights institution can be operationally effective"

The second concern is the independence and impartiality of the new human rights body. Prime Minister Hun Sen said that the establishment of the new body was to be based on the Paris Principles, The acceptance of these principles, especially the independence and autonomy of national institutions for the protection and promotion of human rights, is a positive shift in Cambodian political culture, and the law on the establishment of the new body should reflect and protect this independence and autonomy.

In this regard, lessons should be drawn from the development of the judiciary. According to Cambodia's constitution, courts are independent and impartial. A duty of these courts is to protect human rights; however, they have been widely been perceived as lacking independence and failing to protect human rights, especially in land disputes.

However, lately the government has renewed its efforts to reform the legal and judicial system and make the judiciary independent. In October 2008, in an address at the Royal School of Administration, Deputy Prime Minister Sok An said: "We will be preparing a national workshop to reform the law and courts", adding that, "We hear bad rumours about courts in Cambodia, and we are going to work very hard to change that. We need to enforce discipline and make sure the courts are independent" (*The Phnom Penh Post*, 17 October 2008).

Without an independent judiciary, it is questionable whether the new human rights institution can be operationally effective.

The third concern is the quasi-judicial power of the new human rights institution. In this regard it should be noted that Cambodia's justice system is a civil law system and its criminal justice is supported by a police force called the judicial police whose duty is to control crimes, arrest accused offenders and collect evidence. Judges and prosecutors belong to the same body of magistrates.

Prosecutors supervise and monitor the activities of all judicial police officers in their territorial authority. The prosecutor general of the Court of Appeal supervises and controls the judicial police, and has disciplinary power over them.

The criminal system is based on judicial inquiry; that is, prosecutors or investigating judges conduct criminal investigations. The judicial police can arrest suspects of flagrant crimes, detain

them for up to 72 hours, make preliminary investigations and bring the suspects to the prosecutor to lay charges. The prosecutor can conduct further investigations or request the police to do so before laying charges and bringing cases for trial. In other cases the prosecutor can order the police to investigate and supervise their investigations.

"If the new human rights body is to have quasi-judicial power, it will come under the supervision of the prosecutor general; this could hamper authority over the office of the prosecution"

After laying charges, the prosecutor transfers cases to investigating judges for investigation, which is mandatory in felony cases. This judge can request the judicial police to conduct investigations. If there is a case against an accused, the case will be sent for trial by another judge.

If the new human rights body is to have quasi-judicial power and investigate criminal cases resulting from violations of human rights like the existing judicial police, it will come under the supervision and control, and the disciplinary power of the prosecutor general; and, prosecutors will supervise and control the activities of its investigators in their territorial authority. All this could hamper its authority over the office of the prosecution.

The legislation on the national human rights institution should be clear about the status of the judicial police of the new human rights body. There should not be any legal difficulty in integrating this body into the judicial police. The Cambodian Code of Criminal Procedure allows for it. One way of preserving the independence of the new body while exercising this quasi-judicial power is to give its investigators the status of judicial police officers, the same way the code gives specific government officials this status, apart from members of the civilian and military police forces.

The legislation should also determine as clearly as possible the jurisdiction of both this new body and the existing judicial police to avoid overlapping, duplication and competition. This is an issue that should be thought through in detail.

India 2008: Expectation, promise and performance

Asian Human Rights Commission, Hong Kong

Evaluating the human rights record of a country like India, with its varied culture, population and diverse demography is a challenging task. A thorough analysis of the human rights situation of any country requires more than peripheral knowledge about the country. The essence of a country is the sum total of its people, culture, justice mechanisms and polity. Within the limited scope presented by the knowledge gained through the work of a regional human rights organisation, an analysis that evaluates the entire spectrum of human rights issues concerning India is not possible.

The Asian Human Rights Commission (AHRC) through its continuous engagement in India has gained considerable insight into specific human rights concerns there. The issues taken up by the AHRC in India are largely concerning civil and political rights, some aspects of the economic social and cultural rights like land rights and the right to food, and rights against discrimination, particularly concerning caste-based discrimination. Throughout the discussion, emphasis is given to international norms and standards, as a yardstick to measure the promise and the performance.

Custodial torture

Custodial torture is the most commonly used investigative tool by the law enforcement agencies in India. Often the entire criminal investigation depends upon the confession statement extracted from a suspect. In the process of extracting confession, the law enforcement agencies employ different forms of torture. The practice is so widespread that often even the presence of a lawyer or a person interested in the suspect who turns up at a police station inquiring about the suspect does not serve as a deterrent for the law-enforcement agencies from torturing a suspect.

This article consists of extracts from the Asian Human Rights Commission's *State of Human Rights in Asia 2008* report. Contents of the report are available in PDF format by country online at the AHRC website, www.ahrchk.net. Interested persons may contact the AHRC to obtain printed copies of the full report.

"Widespread use of custodial torture has isolated the ordinary people from the law-enforcement agencies"

Torture is not a crime in India. The only provision in law that can be used to charge a law enforcement officer for resorting to torture are sections 330 and 331 of the Indian Penal Code, 1860 (Section 330: Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, ... shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine [section 331 relates to causing grievous hurt and the punishment is enhanced to ten years imprisonment]). Contrary to the gravity of the crime, being committed by a law-enforcement officer, the Penal Code does not attach any additional weight to the crime of torture. In addition, the fact that the crime is often committed within a police station that effectively rules out the possibility of an independent witness, and the absence of an independent investigating agency makes it almost impossible to successfully prosecute a crime of torture, a fact observed by the UN Human Rights Committee in its concluding observations on India under the International Covenant on Civil and Political Rights (CCPR/C/79/Add.81, 4 August 1997). The absence of successful prosecution and the relative difficulty of even lodging a complaint against a law-enforcement officer have provided law-enforcement agencies with a high degree of impunity. This has resulted in an alarming increase in the cases of custodial torture and other crimes committed by law-enforcement agencies in India.

Torture is practised mostly against the poor. The widespread use of custodial torture has isolated the ordinary people from the law-enforcement agencies. It is used as a tool for social control. Government officers indirectly endorse the use of torture. For instance, in June 2008 the speaker of the Kerala Legislative Assembly while addressing a gathering of police officers during the annual meeting of the State Police Association said that the state government does not agree with the argument that police officers must refrain from the use of force while investigating crimes. The minister further said that often use of force is the only way to "make suspects tell the truth" (see Bijo Francis, "India still tolerates torture", *UPI Asia*, 23 June 2008).

In most of the states in India where feudalism continues in its full vigour, torture and the fear created by the use of torture by the law-enforcement agencies are used to suppress peasant uprisings. Landlords thwart any attempts by the peasants to claim proper wages or own land by conniving with the local police. Landlords bribe police officers to raid peasant houses to pick up their leaders and register false cases against them. It is not rare in such raids for the police to molest or even rape peasant women. This situation in many parts of the country has become a catalyst to anti-state armed movements. The feudal lords and police target human rights defenders who speak up against such practices.

In addition to the absence of a legislative framework, there is no institutional framework in the country to prevent the practice of torture. For example, if a person needs to file a complaint against a police officer, the only remedy for the person is to file a complaint against the officer with the officer's superior. Superior officers, who directly and openly endorse the subordinate officer's action, often discourage such complaints. Such an attitude results in the complaint not being investigated at all. The next option available for the complainant is to approach the court. Though the court can direct an investigation, none other than a police officer conducts the investigation. This is because there are no other independent agencies within the country that could accept complaints against police officers. Even agencies like the Central Bureau of Investigation have a large number of police officers on secondment.

"Continued use of torture to subdue the public and command obedience by the law-enforcement agencies results in low morale of the law-enforcement agencies themselves"

The prime minister of India had in January this year issued a public statement that India would ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It was the first time for any prime minister to make such a statement. However, since then nothing has been heard from the government regarding this.

According to a June 2008 report of the National Human Rights Commission (NHRC) of India, in the past five years on an average at least four persons have died in custody every day in India, most of them from torture. Various sources within India have expressed concern about the alarming increase in the use of torture, including the NHRC, which has also recommended that the government must not only ratify the Convention against Torture as early as possible, but must also come up with domestic legislation/s to address this issue. The NHRC has further expressed the need to set up an independent agency in the country to investigate complaints against law enforcement officers, particularly concerning the use of torture.

The NHRC in its report to the Human Rights Council during the Universal Periodic Review of India had also recommended the same (summary prepared by the Office of the High Commissioner for Human Rights, A/HRC/WG.6/IND/3; 6 March 2008). In the National Report submitted by the government prior to the review, it assured the council and its members that the country would soon ratify the Convention against Torture (A/HRC/WG.1/IND/1, para. 38). The council in its concluding observations encouraged the government to ratify the convention and its Optional Protocol without any further delay (A/HRC/8/26, 23 May 2008). Reiterating its position, the government has further assured the Council that it will ratify the Convention soon (A/HRC/8/26/Add.2, 11 June 2008).

Continued use of torture to subdue the public and command obedience by the law-enforcement agencies results in low morale of the law-enforcement agencies themselves. Curbing and preventing the practice of torture is a prerequisite for the overall improvement of rule of law in any country and India is no

exception. A society otherwise deeply divided on the basis of caste, religion, language, culture and economy cannot afford a police force with low morale. Prohibiting torture and enforcing accountability on those who practice torture within the police is one of the primary steps that the administration must implement in India.

"Instead of posting officers on secondment to the central investigation agencies, a complete independent and competent agency must be created to investigate complaints against law-enforcement officers"

Instead of posting officers on secondment to the central investigation agencies, a complete independent and competent agency must be created to investigate complaints against law-enforcement officers. Rather than depending upon the two-century old, obsolete provisions in the Penal Code to punish officers practicing torture, a new law must be created to criminalise the practice of torture in tune with the internationally accepted norms concerning torture. As of now no steps in the above directions are visible or even debated in India. All that has been said and heard are occasional statements by the prime minister that India will soon ratify the Convention against Torture. It appears that the political will on this aspect is limited to this rhetoric. The sad reality is that the continuation of the rhetoric will not merely maintain status quo, but will in fact be a contributing factor to the further deterioration of rule of law in India and ultimately India itself.

Bonded labour

India is one of the founder members of the International Labour Organisation (ILO). It has ratified 41 ILO conventions and one protocol. It has legislated several domestic laws concerning the right to work like the Payment of Wages Act, 1936 and the Minimum Wages Act, 1948. To meet the treaty obligation under article 8 of the ICCPR, India has also enacted the Bonded Labour System (Abolition) Act, 1976, which prohibits the practice of bonded labour.

Under section 6 of the 1976 act, custom, tradition, contract or agreement cannot be held valid to justify the practice of bonded labour. But when each case of bonded labour is thoroughly looked into, one can find the employer justifying bonded labour precisely on these grounds.

A case reported by the AHRC concerning Gehru and Bothu Musahar reveals this phenomenon. Gehru and Bothu are from the Musahar community. Musahar literally means 'rat eater'. Musahar are a nomadic tribe in India. They live scattered in the northern states like Uttar Pradesh, Jharkhand, Uttranchal, Orissa and Bihar. Owing to the shrinkage of natural resources, the Musahar in the past two decades have started settling down in remote rural areas in these states. However, due to the lack of government care and proper support, the Musahar families have soon become dependent upon upper caste landlords for their survival.

Gehru and Bhothu had to borrow money from their landlord Rajendra Prasad Tripathi, for which Tripathi got them to work at his brick kiln. The wages paid were so low that they were unable

to repay the loan. It was just a matter of weeks that the families, including their children, were forced to work for Tripathi. As the work in the kiln demanded strenuous labour in all weather conditions, the more the families worked, the more they became sick. This forced Gehru and Bhothu to borrow further money. Until the case was exposed by the AHRC, Gehru and Bhothu along with their families worked for Tripathi.

"Of the millions employed as bonded labourers, almost 95 percent are from the Dalit community"

When the case was exposed, the Varanasi District Magistrate was under pressure to take action. The magistrate initially denied the case and its facts. Under pressure, he reluctantly ordered the local police to investigate. The police after accepting a bribe from Tripathi furnished a false report denying the case. The AHRC exerted more pressure, by following up the case through its Urgent Appeals Programme. The magistrate was finally forced to visit the kiln where he found not only Gehru and Bhothu, but almost the entire Musahar village, working as bonded labour. The Musahars were released from bonded labour and Tripathi directed to pay a fine.

Tripathi, finding his scheme exposed, threatened the Musahars and members of a local human rights group, the People's Vigilance Committee on Human Rights (PVCHR), that he would make sure that the Musahars were punished for their audacity to lodge a complaint with the PVCHR, and also the PVCHR for meddling with his business. Threats of this nature in the rural areas in India are to be taken seriously. And Tripathi did mean business. He bribed the police officers at the local police station to file fabricated cases against the PVCHR members and Gehru and Bhothu. The police did exactly what Tripathi wanted. This case is being currently being contested in the Varanasi Magistrate's Court.

Here is the interplay of caste, corruption, and the failure of the local administration leading to a series of rights abuses of the poor. Musahars being considered as untouchables found it impossible to find work elsewhere. This resulted in hunger deaths in the Musahar village. As of now the PVCHR provides life support to the Musahar village by finding short-term and long-term employment for them. Some of them, including Gehru, are now employed in another brick kiln where they earn a decent income.

Of the millions employed as bonded labourers, almost 95 per cent are from the Dalit community. In a survey conducted by an Indian NGO, the Mine Labour Protection Campaign, in 2003 about 95 per cent of the bonded labourers among the three million mine workers in Rajasthan alone, almost every one of them are from the Dalit community. Human Rights Watch estimated in 1999 that there were 40 million bonded labourers across India (*Broken People*, p. 139). The Government of India itself admits that about 85 per cent of bonded labourers are Dalit (Ministry of Labour, Annual Report 2000-2001, p. 181; quoted in Human Rights Watch, *Small Change*, January 2003, p. 41).

> "Convictions over religious violence in India are rare"

The ILO Committee of Experts observed in 2003 a "certain reluctance" by state governments in India to participate in efforts to identify and release bonded labourers. The former Labour Secretary for the central government, Dr L Mishra, was less circumspect. He noted at a presentation to the National Consultation on Forced Labour of 21-22 September 2000 that, "There have been cases where the magistrate has refused to issue a release certificate even after all the ingredients of bonded labour system have been proved beyond doubt."

Prevention of bonded labour is impossible without complete eradication of caste-based discrimination. The practices of caste-based discrimination and bonded labour cannot be eradicated in India without the effective implementation of domestic laws that prohibit these practices. Bonded labour and caste-based discrimination are crimes in India. To prevent these crimes, the only deterrence is effective investigation and prosecution of those who engage in these practices. This requires the active engagement of law-enforcement agencies in India. With the law-enforcement agencies and their functions in absolute chaos and ineptitude, these evil practices will continue.

Freedom of religion

Religion, and violence sanctioned by religion, is used as a tool for social control in India. Religion determines politics, shapes governments and decides their fates along with those of millions of Indians. It is the most common denominator of social identity. Yet in theory India is a secular and democratic republic.

Religious violence is a growing problem in parts of India. In the state of Orissa, governed by a coalition government that includes the Bharatiya Janata Party (BJP), Hindu extremists attacked Dalit Christian villagers and churches in the Kandhamal district over the Christmas holiday 2007. Approximately, 100 churches and Christian institutions were damaged, and 700 Dalit Christian homes were destroyed causing villagers to flee to nearby forests. More violence followed in August 2007 after the murder of a prominent Vishwa Hindu Parishad (VHP) leader. Led by a militant wing of the VHP, mobs torched churches and homes, displacing tens of thousands of Dalit Christians, many of who are still in relief camps. Since then, anti-Dalit Christian attacks have spread in the central state of Madhya Pradesh, Karnataka and Kerala in the south, and to Uttar Pradesh in the north. Some of the worst cases have occurred in Karnataka, which earlier this year voted in the Hindu nationalist party, BJP.

Unfortunately, convictions over religious violence in India are rare. In March, the UN Special Rapporteur on freedom of religion, Asma Jahangir, warned in a press release of 20 March 2008 after her visit to India that the minimal prosecutions and "political exploitation of communal tensions" put India at risk of more violence. In fact it did. In a two-month-long operation spreading through September and October this year, there were nationwide

arrests of 'suspected' Muslim terrorists in India. The terrorist attacks and bomb blasts sponsored by Islamic fundamentalist groups operating from inside and outside India that killed an estimated total of 400 persons in Uttar Pradesh, New Delhi, Rajasthan, Gujarat and Assam prompted state governments in these states to detain and quarantine about 1800 Muslims. The state administrations claimed that in the absence of any documentary proof to show their Indian citizenship, these are persons suspected to be overstaying with malicious intent in India after arriving from Bangladesh or Pakistan. In a country where an estimated 30 per cent of the population lacks any form of identity document, most of those who were arrested found it impossible to prove to which country they belonged.

"Lynching and looting of Muslims still continues in Assam, though it is rarely reported in the media"

To further deteriorate matters in Assam, the homegrown Assam for Assamese groups started attacking Muslims who had long-settled in that state. Most of their forefathers had arrived in Assam prior to 1947 as estate managers and plantation labourers for the British. Lynching and looting of Muslims still continues in Assam, though it is rarely reported in the media. The state administration, sensing the popular sentiment against non-Assamese, has done practically nothing to prevent the violence. This prompted the Muslims to form self-help groups to prevent destruction to their property and to save themselves from predominantly VHP-sponsored Assamese fundamentalists.

Even a relatively peaceful state like Kerala in the south of India is not immune to such problems. On November 23 this year the state police uncovered some 20 homemade bombs at the residence of a politician in Kerala. The bombs were found wrapped in plastic bags, placed in a bucket and buried in a hole on the property of Vipin Das, a leader of the Hindu-nationalist organisation, the Rashtriya Swayamsevak Sangh (RSS). The RSS is one of India's mainstream Hindu fundamentalist political parties. It claims a humanist platform aimed at revitalizing the spiritual and moral traditions of India. It requires only basic commonsense to understand that humanism and homemade bombs have nothing in common. In the Indian context, however, what is common is the unholy nexus between violence, religion and politics.

Examining the violent events in Orissa provides alarming insight into how the state administration failed to prevent the violence and once it started failed in curbing it. Even the NHRC and the central government acknowledge that the response of the state government apparatus, the police in particular, was intentionally slow (Reuters, 28 October 2008). There are confirmed reports that a Catholic nun was raped by a VHP mob while police officers were looking on ("Five cops suspended in the nun rape case", *Indian Express*, 31 October 2008). It is also widely acknowledged that had certain criminal elements in the VHP been booked and punished for the violence they had committed in the past, the 2008 violence in Orissa might not have happened.

> "Caste-based intolerance dominates the social and political spectrum in India"

Mainstream religions in India are all equally responsible for advocating violence, but given the extent of religious violence in India, which amounted to at least 30 high-intensity incidents in this year alone where more than one person lost life in each of these incidents, what stands out is the intolerance of the Hindu upper caste against the rest. This caste-based intolerance, which has spiraled out of control, dominates the social and political spectrum in India.

What is being witnessed in India is an uprising of fundamentalist Hindu forces against all challenges to traditional Hindu practices, particularly the caste system. It is natural for a system that exploited millions of people for more than 3000 years to find means to regain dominance. The caste system that exclusively benefited the upper caste Hindus, the Brahmins, Kshatriyas and the Vaishyas, might not have faced such an onslaught upon its status quo other than during the four hundred years that followed immediately after the life of Buddha. Since time immemorial the three Hindu upper castes have benefited from the caste structure and have deprived the lower castes, particularly the Dalits, from land, education and a better living. In short, the caste system maintains an enforced social order where the upper castes enjoy all privileges while the lower castes are not expected to claim equality of any form in society. Beneath the skin of communal unrest lives the beast of caste domination. The Hindu fundamentalist political parties operating in India are engaged in nothing other than making use of the frustration of the upper caste Hindu for political gains.

Fair trial

The right to speedy trial has been endorsed in almost all relevant international conventions, most notably the ICCPR, which India ratified on 10 April 1979. The ICCPR provides explicitly for the right to speedy trial. Article 9(3) declares that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release".

Right to fair trial without delay, though is not mentioned in the constitution, is a fundamental right in India. In *Hussainara Khatoon v. State of Bihar* [1980 (1) SCC 98] the Supreme Court explicitly held that speedy trial is part of article 21 of the constitution, guaranteeing right to life and liberty. In this case the court said,

> We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in *Maneka Gandhi v. Union of India*. We have held in that case that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is

deprived of his liberty under a procedure which is not "reasonable, fair or just", such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release.

"In India, neither the constitution nor any existing laws or statutes specifically confer the right to speedy trial on the accused"

In the Indian context however, it is a well-settled proposition that the international conventions and norms are to be read into domestic law in the absence of enacted domestic law occupying the fields, when there is no inconsistency between them. The Supreme Court of India in *Nilabati Behera v. State of Orissa* [1993 (2) SCC 746] took a view that in the absence of any specific domestic law an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under article 32, as distinct from the private law remedy in torts. One of the questions that the court had to decide was concerning compensation. The court said that there was no reason why international conventions and norms could not be used for construing the fundamental rights expressly guaranteed in the Constitution of India.

In India, neither the constitution nor any existing laws or statutes specifically confer the right to speedy trial on the accused. Most of the existing laws also do not provide any timeframe in which a trial must be concluded; in cases where some timeframes have been provided, the courts have held them to be "directory" and not "mandatory". In procedural law, for example the Code of Criminal Procedure, 1973, provides a statutory time limit to complete an investigation. Section 167 further provides that a failure to complete investigation within the statutory timeframe shall lead to release of the accused on bail. However, this in actual practice never occurs. In a real life scenario delay is synonymous with litigation in India. A decade of waiting is not much time in deciding a case in India (see examples in "Judicial Delays to Criminal Trials in Delhi", *article 2*, vol. 7, no. 2, June 2008). This is equally applicable to civil and criminal trials. The legal process in India is always protracted, with parties being made to spend an unlimited amount of money and to run from one place to another in pursuing their claims in court.

There are numerous reasons for this protracted process, which in fact could be eliminated by conscious efforts. In civil cases one such delay is primarily caused by technical snags and delaying tactics by the lawyers. The attitude of the judges once the case has finally been heard, resulting in the reservation of any open pronouncement of the judgement for years, is another contributing factor. In criminal cases the delay starts from the very inability and often refusal of the investigating agency to submit a charge sheet in time after the proper completion of an investigation. Even if the charge sheet is submitted, the prosecutors' office also plays a role in delaying the process. Often many courts do not have sufficient prosecutors to represent cases as and when they are taken up. In the Sessions Court, Thrissur, Kerala State for instance, prosecutions were stalled for years due to the fact that as on deputation from another court. By the end of one year the number of criminal cases pending disposal

before the court was so large that it would take several years to dispose these cases, given the fact that every year the number accumulates to the existing backlog. It is shocking to note that when the backlog of cases increases, judges connive with police officers and force people to plead guilty on charges so that cases can be summarily tried.

"The police in India are neither trained to gather evidence scientifically nor understand the importance of forensic evidence"

Another element causing delay in proceedings is the lack of infrastructure to deal with evidence. The police in India are neither trained to gather evidence scientifically nor understand the importance of forensic evidence. It is common for material objects to be wrapped in newspapers and bound by jute threads and then produced in court. The safety of the contents depends upon the quality of newsprint. Given the climatic conditions in India, this evidence can be easily damaged within a few months, often well before any preliminary hearing takes place. In cases where there is a need for forensic examination, the situation is even worse. The objects requiring forensic examination will be detained at the central or state forensic lab for anywhere up to 15 years. This reflects the facilities provided for these labs and also the work habits of the forensic technicians. The handling of human remains and dead bodies is equally bad. In cases where there is a requirement of finger print examination or handwriting examination, the minimum period required for the result to be sent back to the referral court from the forensic lab is ten years, only to the benefit of 'government recognised' private experts.

These technical hindrances that cause delay in court proceedings furthermore affect the quality of evidence given by witnesses. When a witness is required to testify about an incident she saw a decade earlier, her recollection of events will often be tempered by time. This may affect the quality of her testimony, as well as the entire trial. Evidence can also be affected due to the lack of witness protection provided to those willing to testify. More susceptible to threats and intimidation the longer a case is drawn out, chances are that witnesses may alter their evidence out of fear or even withdraw from the case.

The lack of basic infrastructure within the entire justice system is another crucial issue that causes delays and inefficiency. India has fewer than 15 judges per million people, a figure that compares very poorly with countries such as Canada (about 75 per million) and the United States (104 per million). In 2002, the Supreme Court had directed the government of India to raise the judge-population ratio to 50 per million in a phased manner. Indefensibly, successive governments have not done enough to address this issue; in the Tenth Plan, the judiciary was allocated a mere 0.078 per cent of the total expenditure, a small crumb more than the 0.071 per cent assigned in the Ninth Plan. Inadequate physical infrastructure, the failure or inability to streamline procedures in the Civil and Criminal Procedure Codes, the tardiness in computerising courtrooms, and the inadequate effort that has gone into developing alternative dispute resolution mechanisms such as the Lok Adalats, arbitration and mediation are a few more causes for court delays.

The backlog problem is most acute at the level of the subordinate judiciary. As former Chief Justice of India M N Venkatachaliah pointed out, the disillusionment with the judicial system has led to a dangerous increase in Jan Adalats, or kangaroo courts, in many parts of the country. It is time the nation took a serious and comprehensive look at the entire legal system with special attention to tackling the problem of backlog. Too much time has gone by and too little has been done to sort out a problem that undermines the rights of litigants and accused, damages the credibility of the judiciary, and weakens the very basis of the democratic order.

"Disillusionment with the judicial system has led to a dangerous increase in Jan Adalats, or kangaroo courts, in many parts of the country"

The UN Human Rights Committee in its review on India as early as 1997 has expressed concern about delays in Indian courts (CCPR/C/79/Add.81 para. 22). The Committee on the Elimination of Racial Discrimination expressed similar sentiments after reviewing India's State Party Report during its seventieth session held in February-March 2007 (CERD/C/IND/CO/19, 5 May 2007 para. 26), as did the Committee on Economic, Social and Cultural Rights (E/C.12/IND/CO/5 para. 13). During the Universal Periodic Review of India by the Human Rights Council the same issue was brought to the Council's attention; however, the government failed to respond.

The delay in the Indian justice-delivery system and the impact it has had on the country has been summarised in the Supreme Court's own observations. In *Hussainara Khatoon v. State of Bihar* [1980 (1) SCC 98] the court said that

> The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial...

Rights to food, health and education, and caste-based discrimination

From being a nation dependent on food imports to feed its population, India today is not only self-sufficient in grain production, but also has a substantial reserve. The progress made in agriculture in the last four decades has been one of the biggest success stories of free India. Agriculture and allied activities constitute the single largest contributor to the Gross Domestic Product, almost 33 per cent of it. Agriculture is the means of livelihood of about two-thirds of the work force in the country. Yet an estimated 22 per cent of the population lives in acute poverty. An equally alarming percentage of the population, particularly children, suffers from acute malnutrition. Almost 80 per cent of this 'underprivileged' population belongs to the Dalit community.

"The cases documented by the AHRC show a consistent and widespread pattern of administrative neglect that results in acute starvation and malnutrition-induced diseases in India"

The cases documented by the AHRC show a consistent and widespread pattern of administrative neglect that results in acute starvation, death from malnutrition and malnutrition-induced diseases in India. Each case documented by the AHRC has been immediately brought to the attention of the government of India and the respective state or provincial government. In each case, the response has been absolute denial. In spite of specific calls for administrative actions to address the issue of starvation and malnutrition, the government of India has done nothing credible thus far to address the situation.

Most deaths from starvation are reported from Dalit communities in the country. Discrimination within society owing to caste-based prejudices and poverty means that the benefits of government welfare programmes do not reach this community. In order to guarantee food security, which is a fundamental right in India, the government has constituted a public distribution network under the Ministry of Food and Public Distribution. However, this Public Distribution System (PDS) is plagued by rampant corruption, causing it to malfunction. Corruption in the PDS system promotes starvation. Coupled with the discriminatory practices in the government health service sector, the poor often die from malnutrition and malnutrition-induced sicknesses.

Khusbuddin died of malnutrition on 6 February 2008. Khusbuddin was four years old. He was living with his father Mohammad Matin, mother Jaharun Nisha, and elder sister in Mirzapur district of Uttar Pradesh. After his father's death, Khusbuddin's family moved to his maternal grand parents' home in Harpalpur village, Kashi Vidyapith Block, Varanasi district. Khusbuddin was diagnosed as suffering from Grade IV malnutrition, weighing 6.5 kilogram at the St. Mary's Hospital in Kourata. Khusbuddin's mother Jaharun was too poor to get Khusbuddin treated at a private hospital. On 5 December 2007, Jaharun took Khusbuddin to the Primary Health Centre (PHC) of Kanai Sarai in Kashi Vidyapith Block, which is about 12 kilometres away from Khusbuddin's house. Jaharun had to walk to the PHC since she could not manage the bus fare. However, the officer at the PHC did not provide any medical attention for malnourished Khusbuddin saying that there was no medicine at the centre at that time. Neither did Khusbuddin receive any food at the PHC. Jaharun could only give Khusbuddin some water and sugar on that day.

After Khusbuddin's death, Dr A K Sahaye of the PHC and Manish Srivastava, block officer in charge of a UNICEF programme, visited Khusbuddin's house and tried to obtain Jaharun's signature forcibly on a paper certifying that Khusbuddin did not die of malnutrition and was not ill treated at the PHC. Since they failed to obtain Jaharun's signature, they asked her neighbour to write her name on a blank paper. It was reported that the Auxiliary Nursing Mother (ANM) of Anganwadi Centre (childcare centre) of Harpalpur village who is supposed to be

responsible for the health care of the children has never visited Khusbuddin's house and has denied any support to the family so far. It was also reported that after Khusbuddin's death, the village head Mr. Salim delivered 1000 Indian Rupees (USD 25) to the victim's family under the order of the chief secretary of Uttar Pradesh. This is the only support that Khusbuddin's family has received from the government so far.

> **"The Indian judiciary has tried and failed to address the issue of food security"**

The health workers of the Anganwadi centre have important and direct roles to prevent poor children and women from dying from starvation and ailments related to starvation and malnutrition at the village level. All the ICDS services are provided through the Anganwadi workers in an integrated manner to enhance its impact on childcare. Under the ICDS, the Anganwadi workers should visit the village regularly to carry out health check-ups for the children. Once they identify a malnourished child, the child has to be registered at the Anganwadi centre in order to provide nutrition and health care for the child until the child's condition is safe. However, like the case of Khusbuddin, the negligence of the Anganwadi staff at Harpalpur village is one of the main reasons that starvation deaths occur in India. The case of Khusbuddin illustrates that the negligence of the medical officers at the PHC accelerates not only infant mortality in India but also facilitates corrupt practices to hide data regarding infant mortality.

In addition, it is a common practice in India to conceal deaths from starvation. This fact was noted in the report of the UN Special Rapporteur on the Right to Food, Jean Ziegler, immediately after his visit to India (E/CN.4/2006/44/Add.2 dated 20 March 2006). Whenever a case of starvation is reported, the Indian authorities try to silence the local organisation that reported the case. The condemnable practice of the Indian authorities is to threaten and intimidate the local organisation. Registering false cases against the organisation or the persons involved with such an organisation is a common practice.

Even the Indian judiciary has tried and failed to address the issue of food security. The Supreme Court of India, through a series of interim orders, has tried to address this issue. The court, finding that the government is clueless and non-responsive regarding the issue, mandated its own commissioners to investigate and report on the situation. The commissioners appointed by the court were also tasked with receiving and investigating complaints of starvation, malnutrition and corruption in the PDS system. Even after six years of this exercise, the situation of food security in India has not improved.

The Government of India has also tried several indirect means to ensure a day's meal for the poor. Schemes like the National Rural Employment Guarantee Act, 2005 (NREGA), the midday meal scheme, and the Targeted Public Food Distribution System are examples. It is true that the NREGA has generated rural employment. However, the payments for the employment have failed to reach the poor due to corruption. The corrupt caucus

between the law-enforcement agencies, landlords and their mafia, the local politicians and an inept, negligent and corrupt administrative set-up obstructs food security in India.

"The corrupt caucus between the law-enforcement agencies, landlords and their mafia, the local politicians and an inept, negligent and corrupt administrative set-up obstructs food security in India"

India's accession to the International Covenant on Economic, Social and Cultural Rights took place on 10 July 1979. Most of the rights enshrined in the covenant have been included in domestic law in India. Like the right to food, many of these rights are justiciable, yet people starve to death. The failure of the government to protect, promote and fulfill this fundamental human right is a blight on India's human rights record. India is one of the world's fastest developing economies and has a reasonably functioning justice system. India's courts have made commendable contributions to the development of domestic and international human rights jurisprudence. Indians have attained and continue to occupy enviable positions in international organisations, including the UN. India has offered assistance and developmental aid to other developing nations. Yet, an estimated 22 per cent of Indians in the country face malnutrition or even starvation.

The continuation of caste-based discrimination perpetuates poverty and deprivation of food. Caste-based discrimination also contributes to large-scale denial of the right to education and health. While the 83rd constitutional amendment recognizes education as a fundamental right of all Indian citizens, disparities continue to be pronounced between the various castes. People from the Scheduled Castes, previously referred to as the "untouchables", make up 16 per cent of the population and consistently fare poorer across various indicators related to primary education. As per the Census 2001, the total population of the Scheduled Castes (SC) in India is 166,635,700, which is 16.3 per cent of the total population. The population of SCs is unevenly distributed among the states in India, with nearly 60 per cent of all SC children of primary school-going age (6-10 years) residing in Andhra Pradesh, Bihar, Madhya Pradesh, Orissa, Rajasthan and Uttar Pradesh. The latter five states are among the most disadvantaged states in India across most social indicators. Dalit students are routinely humiliated and harassed at school. Many drop out because of this.

Caste discrimination is worse than slavery. The avenues for those who are born into lower castes are many in theory; however, in practice, none of these mechanisms work, especially if the person is poor. Caste follows a person from cradle to grave. A prohibition in law or a policy on paper will not prevent caste-based discrimination or starvation. For the real India to derive benefit from its constitutional guarantees, the government must ensure that constitutional promises concerning the right to food, education and health are in fact reaching the rural population. To this caste-based discrimination poses a formidable hindrance. To remove this requires political ill. This sadly is what is found least in India.

Public prosecution in India

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In organized societies, there is a public prosecution system to prosecute offenders who violate societal norms. The system in common law countries differs from that in the continental countries, but in both, this office is a centre of attraction, a power centre. It wields a lot of authority. It is the repository of the public power to initiate and withdraw prosecution. These powers are untrammeled in continental counties, where this office is called procurator. The word 'procurator' is derived from the Latin word 'procuro', which means 'I care, secure, protect'. Though the prosecutors in the common law countries do not carry these adulations, it appears the powers exercised by procurators are similarly understood to be available to the prosecutors in common law countries. However, many of the main powers are not available.

In continental countries the procurator is looked upon as the strict eye of the state. He prohibits, punishes and prevents. The defence lawyer is viewed as defender. One of the procurator's chief functions must be to protect citizens' legitimate rights and interests with actions, not words, as prescribed by the law. The impression that the procurator is independent and impartial is accepted in the common law countries though in fact in these countries they may not be impartial. Even in the face of statutory provisions to the contrary, their traditional rights like *nulle prosequi* are accepted. Therefore, generally speaking, it could be said that the prosecution system in common law countries works within the statutory provisions in the context of traditional powers and duties attached to this office in continental countries.

In India, we have a public prosecutor who acts in accordance with the directions of the judge. The control of trial is in the hands of the trial judge. Investigation is the prerogative of the police. The decision to prosecute—a function attributed to the

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procurator in continental countries—is taken in India by the magistrate on the report submitted by the police. Again, the withdrawal of the prosecution can also be done only with the permission of the court. However, it is generally believed that traditional right of *nulle prosequi* is available to the prosecutor.

"The prosecutor is supposed to lead evidence favourable to the accused for the benefit of the court, not conceal it to secure a conviction"

Being an officer of the court, the prosecutor is believed to represent the public interest and as such not to seek conviction of a party by hook or crook. The prosecutor is supposed to lead evidence favourable to the accused for the benefit of the court, not conceal it to secure a conviction. It is also believed that in a case of withdrawal of prosecution, if the prosecutor makes an independent decision to withdraw a case then the court should accept this and permit withdrawal under section 321 of the Criminal Procedure Code (CrPC).

Section 24 of the CrPC provides for appointment of public prosecutors in the High Courts and the district by the central government or state government. Subsection 3 lays down that for every district, the state government shall appoint a public prosecutor and may also appoint one or more additional public prosecutors for the district. Subsection 4 requires the district magistrate to prepare a panel of names of persons considered fit for such appointment, in consultation with the sessions judge. Subsection 5 contains an embargo against appointment of any person as the public prosecutor or additional public prosecutor in the district by the state government unless his name appears in the panel prepared under subsection 4. Subsection 6 provides for such appointment wherein a state has a local cadre of prosecuting officers, but if no suitable person is available in such cadre, then the appointment has to be made from the panel prepared under subsection 4. Subsection 4 says that a person shall be eligible for such appointment only after he has been in practice as an advocate for not less than seven years. Section 25 deals with the appointment of an assistant public prosecutor in the district for conducting prosecution in the courts of magistrate. In the case of a public prosecutor also known as district government counsel (criminal) there can be no doubt about the statutory element attached to such appointment by virtue of this provision in the CrPC 1973.

In this context, section 321 of the CrPC is also relevant. As already mentioned, it permits withdrawal from prosecution by the public prosecutor or assistant public prosecutor in charge of a case with the consent of the court at any time before the judgment is pronounced. This power of the public prosecutor in charge of case is derived from the statute and must be exercised in the interest of the administration of justice. There can be no doubt that this function of the public prosecutor relates to a public purpose entrusting the officer with the responsibility of so acting only in the interest of administration of justice.

The nature of the powers of the public prosecutor is sometimes doubted. At times, it appears to be executive power. In certain contexts, it may appear to be quasi-judicial. The principle that the Supreme Court laid down in *R K Jain's case* (AIR 1980 SC 1510), quoting *Shamsher Singh v. State of Punjab* [(1974) 2 SCC 831), as regards the meaning and content of executive powers tends to treat the public prosecutor's office as executive. But the conclusions of some courts create doubt as to its exact nature. To the suggestion that the public prosecutor should be impartial (a judicial quality), the Kerala High Court equated the public prosecutor with any other counsel and responded thus:

> Every counsel appearing in a case before the court is expected to be fair and truthful. He must of course, champion the cause of his client as efficiently and effectively as possible, but fairly truthfully. He is not expected to be impartial but only fair and truthful. [*Aziz v. State of Kerala* (1984) Cri. LJ 1060 (Ker)]

"Though the office of the public prosecutor seems to have the features of the executive, the judiciary does not appear to treat it so, because it does not approve of the appointment of police officers as public prosecutors"

In a subsequent decision, however, the same high court had to distinguish between a public prosecutor and a counsel for the private party thus:

> Public prosecutors are really ministers of justice whose job is none other than assisting the state in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to use the innocents go to the gallows. They are also not there to see the culprits escape conviction. But the pleader engaged by a private person who is a defacto complainant cannot be expected to be so impartial. Not only that, it will be his endeavor to get the conviction even if a conviction may not be possible. [*Babu v. State of Kerala* (1984) Cri. LJ 499 (Ker) at 502]

Though the office of the public prosecutor seems to have the features of the executive, the judiciary does not appear to treat it so, because it does not approve of the appointment of police officers as public prosecutors. The Punjab & Haryana High Court in *Krishan Singh Kundu v. State of Haryana* [1989 Cri. LJ 1309 (P&H)] has ruled that the very idea of appointing a police officer to be in charge of a prosecution agency is abhorrent to the letter and spirit of sections 24 and 25 of the Code. In the same vein the ruling from the Supreme Court in *SB Sahana v. State of Maharashtra* [(1995) SCC (Cri) 787] found that irrespective of the executive or judicial nature of the office of the public prosecutor, it is certain that one expects impartiality and fairness from it in criminal prosecution. The Supreme Court in *Mukul Dalal v. Union of India* (1988 3 SCC 144) also categorically ruled that the office of the public prosecutor is a public one and the primacy given to the public prosecutor under the scheme of the court has a social purpose. But the malpractice of some public prosecutors has eroded this value and purpose.

In *Sunil Kumar Pal v. Phota Sheikh* [(1984) 4 SCC 533] the Supreme Court was presented with a peculiar situation. In this case, some miscreants murdered the appellant's brother and there were virtually no subsequent proceedings against the

"Unless the state has an independent prosecution agency, the administration of justice might suffer irreparably"

accused for quite some time. The appellant was not present in India to pursue the case vigorously. When he came to India, he approached the state government to expedite things. Due to his persistence, one lawyer was appointed as a special public prosecutor. He approached the session court judge trying for an adjournment, as he had no records with him. He was granted only a day and he returned the briefs, as he did not have sufficient time to prepare for the case. Then the junior of the public prosecutor in the area was appointed as special public prosecutor for this case. He was also given a day for preparation before the commencement of the trial, in which it was astonishing to find that the nine accused were represented by the public prosecutor of the area! The trial was a farce. Supporters of the Communist Party of India (Marxist) assembled around the court and shouted slogans against the prosecution. Witnesses were intimidated and several did not turn up. Some turned hostile. The accused were acquitted. The appellant's prayer for leave to appeal was rejected. The Calcutta High Court also rejected his appeal under section 401. Then he approached the Supreme Court with special leave. The court set aside the order of acquittal after making a survey on the administration of the lower court and in paragraph 10 observed thus:

> The order passed by the learned additional sessions judge acquitting respondent nos. 1 to 9 obviously suffers from a serious infirmity and we do not think it is possible to sustain it on any view of the matter. There can be little doubt that the trial culminating in the acquittal of respondent nos. 1 to 9 was appallingly unfair so far as the prosecutions is concerned and was heavily loaded in favour of respondent nos. 1 to 9. It is difficult to understand how consistently with ethics of the legal profession and fair play in the administration of justice, the public prosecutor of Nadia could appear on behalf of respondent nos. 1 to 9. The appearance of the public prosecutor, Nadia on behalf of the defence does lent support to the allegation of the appellant that respondent nos. 1 to 9 were supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal and this would naturally give rise to apprehension in the minds of the witnesses that in giving evidence against respondent nos. 1 to 9, they would be not only incurring the displeasure of the government but would also be fighting against it. Moreover, it cannot be disputed that when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the Communist Party (Marxist) who were allowed to assemble in the court compound and who created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Though the appellant and the complainant as also the witnesses were intimated, no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the court. It is significant to note that quite a few witnesses turned hostile and that obviously must have been due to the fact that they apprehended danger to their life at the hands of respondent nos. 1 to 9 and their supporters. It is also regrettable that though at the time when the trial commenced on 22nd May, 1978, Shri S. N. Ganguly, who was appointed special public prosecutor to conduct the prosecution, asked for an adjournment of the trial in order to enable him to prepare the case particularly since he was appointed on 20th May, 1978, the trial was

> adjourned only for one day, with the result that S. N. Ganguly had to return the relief. Then late in the evening of 22nd May 1978 Shri S. S. Sen, additional public prosecutor was asked to conduct the prosecution and he had to begin the case on the very next morning on 23rd May 1971 without practically any time for effective preparation. We have no doubt that under these circumstances the trial was heavily loaded in favour of respondent nos. 1 to 9. The trial must in the circumstances be held to be vitiated and the acquittal of respondent nos. 1 to 9 as a result of such trial must be set aside. It is imperative that in order that people may not loose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process. That would be subversive of the rule of law.

"It has been the consistent policy of the appellate courts that it is the prerogative of the public prosecutor to recommend withdrawal of prosecution"

This decision reflects on the poor administration of criminal justice in India. A partisan government may cause a breakdown of the constitutional order. It also shows that unless the state has an independent prosecution agency, the administration of justice might suffer irreparably.

It has been the consistent policy of the appellate courts that it is the prerogative of the public prosecutor to recommend withdrawal of prosecution. Indeed, this prerogative right is to be exercised with the permission of the court. And it is the impression, having regard to the case law, that if the public prosecutor comes up with the proposal of withdrawal independently, i.e., without being influenced by the government, the court may grant permission. The courts reiterate this principle time and again, even in cases where permission is refused. In *State of Punjab v. Union of India* [1987 Cri. L.J 151 (SC)], the Punjab & Haryana High Court ruled that public prosecutor's withdrawal from prosecution could follow not only from the paucity of evidence but also in order to further the broad ends of public justice, which may include appropriate social, economic and political purposes. In *R K Jain v. State* (AIR 1980 SC 1510), the Supreme Court sketched out the contours of the public prosecutor's power for withdrawal of cases. In *Shonandan Paswan v. State of Bihar* [(1987) 1 SCC 288] and in *Mohd. Mumtaz v. Nandini Satpathy* [1987 Cri. L.J. 778 (SC)], the Supreme Court ruled that the public prosecutor can withdraw a prosecution at any stage and that the only limitation is the requirement of the consent of the court. Even when reliable evidence has been adduced to prove the charges, the public prosecutor can seek the consent of court to withdraw prosecution. The court specifically ruled that it should be seen whether application for withdrawal is made in good faith, in the interests of public policy and justice and not to thwart or to stifle the process of law.

The Madras High Court was confronted with a case wherein the same office of the public prosecutor that had a criminal case withdrawn with permission of the court after a change of government moved the court to reopen prosecution. Fortunately, the judge did not permit it, and added a sad commentary on the functioning of the public prosecutor thus:

> I feel that the same office of the public prosecutor which acted for the state to withdraw the cases, cannot come forward to set aside the order permitting to withdraw the cases, irrespective of the change in the ruling party as it will lead to uncertainty as to the finality of the proceedings when the government, ruled by a particular party, withdraws the prosecution and the successive governments, ruled by another party, wanted to set aside that order, what will be the situation, if there were successive changes in the ruling parties and if this request is allowed, certainly it will be a havoc and prejudice to the accused persons, without knowing the destination of the prosecution apart from the embarrassment to the public prosecutors. Therefore, I also feel that the state which moved for withdrawing the prosecution cannot seek to set aside the order of permission granting withdrawal of the prosecution. If a third party comes forward with such a prayer the position may be different. [*State of TN v. Ganesan*, 1995 Cri. L.J 3849 (Mad) at 3851]

"With the advent of partisan politics, political parties tend to interfere with administration of justice, including appointment of public prosecutors and determination of their functions"

The Supreme Court in a later case viz. *V. S. Atchulthanandan v. R. Balakrishna Pillai* [(1994) 4 SCC 299] allowed the petition of a third party to annul the High Court's order permitting withdrawal of prosecution against the respondent. It was with the active support of the state government that the prosecution against the respondent, a former minister, was permitted to be withdrawn. The opposition leader challenged this order in the Supreme Court. The court accepted his plea and set aside the order.

Of late, there has been a change of approach to public prosecution. With the advent of partisan politics, political parties tend to interfere with administration of justice, including appointment of public prosecutors and determination of their functions. The decisions in *Sunil Kumar Pal*, *Ganesan* and *Atchulthanandan* speak to the changes and the responses of the judiciary.

It seems that the office of the public prosecutor belongs to the executive. However, it is strongly felt that it is in fact not purely of the executive. As explained by the Supreme Court in the *Shamsher Singh*, it takes on judicial character and as such assumes a lot of importance in a democracy. The very establishment of this office presupposes the understanding that we cannot afford to permit private prosecution as it may result in utter chaos, particularly in the present political set up. However, while we adopt this office in the place of private prosecution, we cannot forget the interests of the victim. The public prosecutor may not share the concerns of the victim, or safeguard the victim's interests. The Indian CrPC therefore permits pleaders appointed by private persons to represent the interests of victims. However, the courts insist that they should work under the directions of the public prosecutor. This shows that the court gives more importance to the public interest.

The public prosecutor in India does not seem to be an advocate of the state in the sense that the prosecutor has to seek conviction at any cost. The prosecutor has to be impartial, fair and truthful, not only as a public executive but also because the

prosecutor belongs to the honourable profession of law, the ethics of which demand these qualities. The facts in *Sunil Kumar Pal* and *Ganesan* make us to open our eyes to the realities.

The difficulties arising where public prosecutors are appointed on the basis of political affiliations also came before the Supreme Court in *Kumari Srilekha Vidyarthi v. State of UP* [(1991) 1 SCC 212]. The Supreme Court deprecated this trend and said that appointment to such vital offices should not be allowed on the basis of political party preferences. But even today, state governments distribute these offices among their sympathizers. And after assuming office many incumbents feel that they need to look after the interests of the ruling party.

"State governments distribute offices among their sympathizers; after assuming office many incumbents feel that they need to look after the interests of the ruling party"

The parliament amended the CrPC so that state governments could adopt prosecution services consisting of a director of public prosecutions at the top and district public prosecutors and assistant public prosecutors at the lower formations. Section 25A inserted by Act 25 of 2005, section 4 (with effect from 23 June 2006) lays down that:

> 25A. Directorate of Prosecution – (1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.
>
> (2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.
>
> (3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.
>
> (4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.
>
> (5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.
>
> (6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.
>
> (7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.
>
> (8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.

The state governments are yet to implement these provisions. Reorganization of the public prosecution system in this pattern may help a lot in preventing police torture, harassment and delays. There would be more transparency in the police-citizen relationship if the public prosecutor were an independent functionary interposed between the police and the court.

Indonesia 2008: Torture, killings continue despite 10 years of reforms

Asian Human Rights Commission, Hong Kong

In 2008, Indonesia continued on the path to reform, but continued to stumble over issues such as religious freedom and indigenous people's rights. This year marks the 10th anniversary since the downfall of Suharto, and is accompanied by a degree of optimism and progress concerning human rights. However, cases of torture and extrajudicial killings continue to be reported. The Special Rapporteur on torture and other cruel and inhuman treatment recently visited Indonesia and published his report, which confirmed the ongoing use of torture in institutions of justice such as the police and prisons, despite the country's ratification of international law prohibiting the use of torture.

The end of Suharto's authoritarian rule saw the implementation of a series of human rights laws enshrining fundamental freedoms such as the freedom of thought, the freedom of expression, and many other such freedoms that were nonexistent during his thirty-year rule. Successive Indonesian governments have since made certain efforts to address the country's human rights situation, through the formal initiation of an ongoing reform period (known as *reformasi*). Amendments to the constitution, the implementation of human rights-related domestic laws and the signing and ratification of a number of major international agreements on human rights are all commendable attempts by the Indonesian authorities to address the country's human rights challenges.

Upon closer analysis, the government still has a long way to go in terms of achieving concrete improvements in the country's human rights situation. Ten years after the

This article consists of extracts from the Asian Human Rights Commission's *State of Human Rights in Asia 2008* report. Contents of the report are available in PDF format by country online at the AHRC website, www.ahrchk.net. Interested persons may contact the AHRC to obtain printed copies of the full report.

beginning of reformasi, Indonesia continues to suffer from serious human rights violations. Restrictions on religious freedoms have increased, despite the fact that Indonesia is a secular and democratic country, and most victims of these human rights abuses await justice. Although the Indonesian government continues to demonstrate willingness to move forward by making changes on paper, the actual implementation in reality of these rights remain elusive for the most part. Progress continues at a less-than-satisfactory pace and most human rights defenders are, as a result, only cautiously optimistic, if at all, about the future of human rights in Indonesia.

"That no obvious progress has been made is underlined by continuing reports concerning cases of torture in different parts of Indonesia"

Torture

It is apparent that the problem of torture by the police and brutality in Indonesia persists, despite numerous and repeated recommendations from various international institutions to the government to take immediate action in order to put an end to this. Most recently, the UN Special Rapporteur on torture has made a series of important recommendations (A/HRC/7/3/Add.7, paras. 73, 76).

The fact that no obvious progress has been made in this matter is underlined by continuing reports concerning cases of torture that are being committed by police officers in different parts of Indonesia. The AHRC has documented cases of torture in Indonesia for several years and has continued to receive such cases in 2008. These cases represent only a fraction of those actually taking place.

Despite Indonesia's ratification of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 10 years ago in 1998, torture remains an integral part of the police force's practices. It is used as a common method of interrogation. It is used mainly as a method for extracting confessions from suspected criminals. Torture is predominantly used against the poor and those from marginalized sections of society. It is possible for people who have the money to pay their way out of situations in which they may be subjected to torture. The threat of torture is also used to extract money.

The general public in Indonesia perceives torture by the police as being a normal occurrence. Being taken into police custody will likely lead to torture depending on your social class background. A lack of complaints by victims of torture is accentuated when the victim in question has actually committed a crime, due to feelings of guilt and the sense that they "deserved" the violent treatment.

In the July 2008 periodic review of Indonesia's compliance with the Convention against Torture, the Committee Against Torture noted several procedural shortcomings in its concluding observations (CAT/C/IDN/CO/2). Prolonged detention in police custody for up to 61 days, the absence of systematic registration of detainees, as well as restricted access to lawyers and independent doctors, allow for torture to take place not only

occasionally, but as reports show, in a widespread and systematised fashion. The committee re-emphasized the Special Rapporteur's earlier recommendations that

> Officials at the highest level should condemn torture and announce a zero-tolerance policy vis-à-vis any ill-treatment by State officials. The Government should adopt an anti-torture action plan which foresees awareness-raising programmes and training for all stakeholders, including the National Human Rights Commission and civil society representatives, in order to lead them to live up to their human rights obligations and fulfil their specific task in the fight against torture. [A/HRC/7/3/Add.7, para.76, March 2008]

"Currently there is no adequate definition of torture, and cases of torture that appear before a court do not receive adequate treatment or result in appropriate punishment"

Since no significant progress has been made with regard to police brutality, the authorities need to prioritise the following recommendations.

Firstly, torture must be criminalized under the Indonesian Penal Code. Currently there is no adequate definition of torture, and cases of torture that appear before a court therefore do not receive adequate treatment or result in appropriate punishment and reparation for the perpetrators and victims respectively. The Special Rapporteur on torture noted that, "all allegations of torture and ill-treatment should be promptly and thoroughly investigated ex-officio by an independent authority with no connection to the authority investigating or prosecuting the case against the alleged victim" (para. 77). However, due to the lack of such investigations, many officers remain immune to criminal procedures.

Secondly, the impunity enjoyed by police officers, especially with regard to the practice of torture, must be combated as a priority. Everyone, including government officials and law enforcers, must be equal before the law—the criminal justice system needs to be non-discriminatory. This is still not the case in Indonesia, where in fact no state official that is alleged to have used torture has been found guilty of related offences as a result.

Thirdly, the Indonesian police a culture of respect for human rights into their everyday work ethics. This transition will naturally take time, and the legal framework, as discussed above, is essential in steering this transition in the right direction. The maximum detention period of 61 days protects the perpetrators of torture from having medical evidence obtained against them by independent doctors. This period also increases the risk that a person in custody will actually be subject to torture and police brutality. As recommended by the Special Rapporteur on torture, the maximum detention period should be radically shortened, preferably to 48 hours, in conformity with international standards.

Killings

In 2008, the killing of civilians by the security forces continued. In such incidents, the civilians are usually unarmed, while the police or the military apply excessive force without limiting the

use of firearms. Such officers or soldiers do not adhere to international standards of interrogation, arrest and do not apply professional practices when encountering civilians. Extrajudicial killings through the open use of firearms continue, and bringing the perpetrators to justice is difficult, in particular in cases involving the military.

"Procedural safeguards to limit the use of weapons are not put in place or not applied"

Many of the reported cases of killings by the security forces, such as the police or the army, are related to disputes over land. With the economic development of Indonesia, private enterprises need increasing resources. State security forces while protecting such companies' interests encounter resistance from local villagers who try to protect their land and livelihood. In May 2008, a man in North Sumatra died with severe burns on his body after the police arrested him on charges of theft. He was accused of having stolen an oil palm nut.

In May 2007, navy forces shot unarmed villagers who tried to interrupt a cultivation process by a company on disputed land in Pasuruan (East Java). In March 2008, an autopsy during the trial in a military court confirmed that the three villagers that had been killed, had died from shots to the back of their heads. The navy forces were allegedly instructed to use "any means necessary" to protect the activities of that Rajawali Nusantara Corporation. While the military court convicted 13 navy personnel for murder, their punishment ranged from only one-and-a-half to three years' imprisonment. Only three were dismissed from the military and no compensation was paid to the victims.

In another case of military involvement in agricultural activities on disputed land, a military centre hired local staff who were ordered to attack protesting villagers. The order was given by a local village chief. One person died in the attack and several others were injured. The police investigation into the case has not taken the involvement of the military into account.

The use of firearms by the police often threatens the lives of civilians in Indonesia. Procedural safeguards to limit the use of weapons are not put in place or not applied. This leaves many police officers with the possibility of abusing power without fear. Regulations for identification, arrest and investigation are not normally practiced. The AHRC has, for example, received a case where a police officer in civilian clothes did not identify himself as a police officer or show his identity card but proceeded to search the bag of a suspect on a motorbike whom he had stopped. When the motorbike driver tried to escape from the scene that he interpreted as being a robbery by a civilian, the officer shot at him. The victim was brought to a police hospital and then changed to a public hospital, eventually surviving the attack. The arbitrary use of arms by law enforcement officials is of great concern. This case indicates how easily law enforcement officials can use arms even when the situation does not warrant it.

Human rights defenders

After a visit by Hina Jilani, the then-UN Secretary General's Special Representative for human rights defenders to his offices in Papua, Albert Rumbekwan, a prominent activist as well as a staff member of the National Human Rights Commission, was intimidated by members of the Indonesian military. This event revealed the hostile environment for human rights defenders in Indonesia, in particular in the sensitive region of Papua, where activists have even been subjected to torture, according to local sources.

"In 2008, the AHRC continued to receive cases of obstruction of the work of human rights defenders in other regions of Indonesia"

When Indonesia was reviewed by the Committee against Torture, the latter recommended in July 2008 that, "The State party should take all necessary steps to ensure that all persons, including those monitoring human rights, are protected from any intimidation or violence as a result of their activities and exercise of human rights guarantees, and to ensure the prompt, impartial and effective investigation of such acts" (para. 25).

In the easternmost region of Indonesia, the human rights situation continues to be hostile, and arrests and killings have increased over recent years. As the military presence in Papua has increased, so have the hostile actions against human rights defenders, including lawyers, civil-society activists and NGO workers. One of the most commonly used means against human rights defenders is branding them as being linked to independence movements in Papua. Such a claim opens the door for arrest, fabrication of charges and often results in detention. A climate of fear and avoiding public discussion on many human rights issues has been engendered as a result.

After her visit, Jilani recommended that,

> Legislation and procedures be instituted to prevent the prosecution of human rights defenders aimed at their harassment for conducting activities that are legitimately a part of their function for the defence of human rights. For this purpose, it is important also to sensitize judicial and prosecutorial officials as well as the police so that human rights activities are not criminalized. [A/HRC/7/28/Add.2, para. 90, January 2008]

Since then, no institutional improvements to provide safeguards for human rights activists have been put in place.

Also in 2008, the AHRC continued to receive cases of obstruction of the work of human rights defenders in other regions of Indonesia. Not only were no protective mechanisms set in place, the existing, flawed justice mechanisms were even used against human rights defenders. On 14 August 2008, eight staff members of the Legal Aid Institute in Aceh (LBH Aceh) were convicted and sentenced with imprisonment for distributing pamphlets about the activities of PT Bumi Flora, a plantation company operating in East Aceh. For many years, locals suffered from the companies' expansion, including being pressured to sell of their land for unreasonably low prices. The eight staff of LBH Aceh were convicted for disseminating hate material against

the government and for committing a violent act in writing against it. Such vague laws continue to leave wide room for abuse of judicial and prosecutorial powers.

"Repression of human rights work continues today, through intimidation and selective prosecution"

Repression of human rights work continues today, through intimidation and selective prosecution. These practices drain important human resources, distract organizations from vital projects, and threaten those who would speak out against injustice. In this environment, the creation of a vibrant civil society remains difficult to achieve, in particular in rural areas and against the economic interests of military-owned or supported companies.

The case of Munir

The murder of prominent human rights activist, Munir Said Thalib, is a recent example of a politically motivated killing in Indonesia. The investigation into the case, which is ongoing, is struggling to progress through the country's flawed justice system. The lack of progress in this high-profile case is causing pessimism about any major and imminent change in the overall human rights situation in Indonesia. Since the beginning of its investigation in 2004, the proceedings have thus far exposed a number of institutional flaws, including deep-set politicisation of the judicial process.

Munir died of arsenic poisoning on a Garuda Indonesian Airways flight en-route to Amsterdam on 7 September 2004. Four years on, the alleged involvement of high-ranking government officials in the conspiracy has yet to be clarified for reasons related to ongoing and widespread government impunity in the country. Over the years, the course of the investigation has brought with it a mixture of hope and disappointment, making it difficult to predict its final outcome.

One example of the erratic developments in the case can be seen in the changing fate of Pollycarpus Priyanto. In December 2005, Pollycarpus was indicted for the murder of Munir and was sentenced to 14 years in prison by the Central Jakarta District Court. In October 2006, the Supreme Court acquitted him of the murder charge, and charged him for faking documents instead. In January 2008, the Supreme Court then found him guilty for the murder of Munir, just as the district court had two years earlier, and sentenced him to twenty years in prison. Although justice has been served to an extent (Pollycarpus is only one piece in a much bigger puzzle), the inconsistencies during the investigation into his role in Munir's murder have diminished the confidence of human rights activists and supporters alike in achieving swift justice. Instead, progress in the case has been slow and stunted. It is therefore understandable when more recent developments such as the arrest of former National Intelligence Agency (BIN) deputy director, Muchdi Purwopranjono, in June 2008, though comparatively more significant, is only met with muted enthusiasm.

While many are reluctant to celebrate the developments in the investigation in the past year, for fear that any celebration may be premature, it is by no means a reflection on the real significance of the case. The case's significance firstly lies in its attempt to achieve justice for an individual who has been subjected to a serious human rights violation: a politically motivated killing. Munir was killed for reasons related to his work as a human rights defender, which included calling for the cessation of the dominance of the military, and speaking out for victims who had been tortured, killed, or who had disappeared in Indonesia.

"The origins of the country's extensive impunity can perhaps be traced to the 1965 massacre that preceded Suharto's presidency"

From a broader perspective, the case is significant for a number of reasons. It is significant in the fight against Indonesia's long tradition of government impunity. The process, and more importantly, the outcome of the investigation into Munir's death, will have an impact on determining the course of human rights development in Indonesia. It will be a telling indicator of any real commitment the government may have to promote and protect human rights in the country, as the removal of impunity is a key prerequisite for progress. This will be relevant for achieving justice in countless other cases of widespread killings, torture in Indonesia.

Impunity

As the murder of one prominent human rights activist has shown, impunity for state actors continues in Indonesia. To date, no top-ranking government official has been convicted for any human rights violations that have taken place, and continue to take place, in the country. Far from being demonstrative of the government's lack of involvement in the vast number of gross human rights violations that have occurred, it is indicative of a system that is failing to deliver justice when state actors are involved.

The exemption of government officials from any semblance of accountability, even at present in Indonesia's supposedly democratic environment, comes as no surprise. The origins of the country's extensive impunity can perhaps be traced to the 1965 massacre that preceded Suharto's presidency. Although the authoritarian dictatorship of the former president has long since fallen, the military coup that led to Suharto's thirty-year rule remains among the many gross human rights violations that have by-passed thorough investigation precisely because of government involvement.

The tradition continues to this day, where no justice or redress has been achieved for the estimated half a million to one million people that were detained, tortured and/or killed by the former military dictatorship, during the coup in which it took power, on grounds that they were suspected communists. Gross violations of human rights in Indonesia's past involving government officials, which are not limited to the 1965 massacre, but also include the events in East Timor in 1999 and many others,

hinder the present government's ability to introduce a system of genuine checks and balances that are a cornerstone of any democratic governmental system. The lingering burden of unresolved cases from the past detracts from attempts to investigate officials today. Furthermore, Suharto is still revered in certain quarters for Indonesia's rapid economic growth and development during his thirty-year rule, despite the level of human rights violations and corruption that frequently occurred under his reign. Any investigation involving the government under Suharto's rule would immediately put into question his former role, and ultimately open further inquiries into the legitimacy of his presidency. This has only served to exacerbate the difficulties encountered when unraveling the knots of governmental impunity that have long existed since the 1965 massacre.

"The jurisdiction of ad hoc human rights courts in the country is limited to gross violations, such as genocide and crimes against humanity"

Is it possible for the present government to move forward and combat the country's widespread problem of impunity without first addressing past violations? In order to address this question, it would be useful to first recount the major problems in the country's institutional framework that cause impunity, which have plagued Indonesia in recent years.

Human rights court law

One notable problem sustaining impunity in Indonesia is the limited jurisdiction of existing mechanisms put in place to address human rights issues. The jurisdiction of ad hoc human rights courts in the country is limited to gross violations, such as genocide and crimes against humanity. Even then, thorough investigations and due process in cases of gross violations, such as the May 98 riots, or Trisakti & Semanggi, have been rejected by the Office of the Attorney General in the past, and no justice has been achieved. The ineffective power of Komnas HAM, the national human rights institution, to conduct investigations beyond their initial inquiries, and the generally bureaucratic nature of the system, has meant that many cases are left unresolved.

Although findings made by Komnas HAM are transmitted to the Office of the Attorney General, it is the Office of the Attorney General that has the authority to reject or initiate criminal proceedings, no matter how significant the findings may be. Several such cases have in fact been rejected without reasonable justification. As the prosecutor general is still subject to appointment by the president, and many alleged perpetrators of justice continue to hold positions of power, the failure to launch investigations into gross violations of human rights has been seen as a political act rather than an outcome of a rule of law process. A Constitutional Court ruling in 2008 clarified that the Office of the Attorney General has to prepare a judicially acceptable investigation before the parliament would be in a position to then set up an ad hoc human rights court. These limitations allow impunity to persist in the country.

Past gross violations of human rights reported so far to Komnas HAM do not yet cover the full extent of past abuses in Indonesia. Other cases such as the 11 Tribes Massacre have not even been reported to Komnas HAM yet. Faltering progress in prominent cases and the continuing fear of reprisals for reporting politically sensitive cases is sufficient to force victims into remaining silent. Another problem that has served to exacerbate Indonesia's impunity is the lack of accountability of military and law enforcement officers.

No real effort has been made at this time to address the problem of impunity. It remains glaringly ever-present, given the number of unresolved cases that have accumulated in the past, as well as the countless number of cases that are currently disregarded because they do not qualify as being 'gross violations'. A recent move in October 2008 to revive the Special Committee on the 1997/1998 Abduction of Activists seems to indicate some effort towards addressing impunity in that case. The committee's plan to summon President Yudhoyono, as well as retired General Wiranto, retired Lieutenant General Prabowo Subianto, and retired Lieutenant General Sutiyoso for questioning is prima facie a serious demonstration of the atate's desire to eradicate impunity. However, given approaching general elections in 2009, the sincerity of these recent developments is put into question.

"A recent move in October 2008 to revive the Special Committee on the 1997/1998 Abduction of Activists seems to indicate some effort towards addressing impunity in that case"

It is clear that much more needs to be done if the deeply entrenched problem is to be successfully addressed in the near future. The government should consider extending the courts' jurisdiction over investigative proceedings. The attorney general should make full use of his mandate as restated in the recent Constitutional Court judgment instead of hiding behind dubious interpretations of the law. Finally, the institution of the attorney general as a whole is still too open to being influenced by political interests.

Military impunity

At the end of 2008, the government and the parliament were discussing a review bill of the law on military tribunals (Law No. 31/1997). The government has agreed to the parliamentary proposal that any ordinary criminal offences committed by the members of the military have to be brought to ordinary civil criminal courts. However, the government proposed that the investigations for such cases are to be conducted by the military police. Until such a bill is passed, crimes committed by members of the military will continue to be investigated and tried by the military, even though this presents a conflict of interest.

The death penalty

Indonesia has ratified the International Covenant on Civil and Political Rights (ICCPR), and thus has to guarantee the right to life for all citizens. A speedy abolishment of the death penalty is not likely according to the government's international position,

in which it referred to its sovereignty during the discussion of the Universal Periodic Review (UPR) outcome in 2008. In the process, Indonesia stated categorically that,

> The death penalty remains part of Indonesia's positive law, namely the Indonesian Penal Code. The provision related to capital punishment was retained by decisions democratically taken through a parliamentary process. The issue has also been the subject of various public debates, and only last year was brought to the Constitutional Court for review, which decided that the application of the death penalty remains fully compatible with the Constitution. [A/HRC/8/233/Add.1, para. 9, June 2008]

"In 2007, the UN General Assembly passed a resolution urging all states still practicing death penalty to put in place a moratorium on executions; despite being a member of UN Human Rights Council, Indonesia instead headed in the opposite direction"

The constitutionality of its application in cases of illicit drug trafficking has been challenged, as referred to by the government during the UPR process, at the Constitutional Court level. The Constitutional Court's judges voted six to three that the Law on Narcotics does not infringe upon the right to life, and in so doing, delivered a deplorable verdict. Professor Manfred Nowak, the UN Special Rapporteur on torture, concluded in his March 2008 report that the "death penalty should be abolished. While it is still applied, the secrecy surrounding the death penalty and executions should stop immediately" (para. 89).

In 2007, the UN General Assembly passed a resolution urging all states still practicing death penalty to put in place a moratorium on executions. Despite being a member of UN Human Rights Council, Indonesia instead headed in the opposite direction, and carried out executions in numerous criminal cases, ranging from murder to charges under the Narcotics Law. In the draft of the Corruption Eradication Law as well as in the draft of the Narcotics Law, Indonesia declared the death penalty as a maximum punishment. In the review draft of the Criminal Code, the death penalty is still provided for.

The justice process that can lead to the application of the penalty is facing problems. As part of the reform process and civil society engagement, it is apparent that there are serious flaws in the Indonesian justice system. The justice rendered by the system in Indonesia is often partial, susceptible to bribery, corruption and grave errors. This makes the sentencing to death highly questionable and fraught with risks of grave, irreversible travesties of justice. Ultimately, it is not the severity of the punishment that will deter crimes and bring justice for the victim, but it is the certainty that perpetrators will be convicted after a just and transparent trial in court, under a legal process that finds persons guilty based on evidence. Indonesia, as a state party to the ICCPR is expected to take progressive measures to abolish the death penalty, not to retain it.

Fair trial and criminal procedure

The obligations contained in the ICCPR with regard to fair trials and, as a result, to criminal procedure, are fully applicable to Indonesia. However, the implementation of some of the laws, including the Criminal Procedure Code, shows serious shortcomings in this regard. The weakness of the Indonesian

Criminal Procedure Code and its implementation has ensured that the country remains far from being able to guarantee fair trial. This is evident in the following example.

> "Indonesia has undergone several legislative reforms since the beginning of the reformasi era"

In 2008, David Eko Priyanto, Imam Hambali (alias Kemat), and Maman Sugiyanto were accused of the murder of a person called Asrori, a name connected by the police with a body found in a sugar cane field. The Jombang District Court sentenced Priyanto to 12 years' imprisonment and Kemat to17 years, while Sugiyanto is still under trial. In a second concurrent case, Very Idham Henyansyah (alias Ryan), a person accused of serial killing, admitted that Asrori was in fact one of his victims and was buried near his house. Initially, the police refused to accept the notion that they had committed a serious error in their investigation. Later the dead body found at the sugarcane field was re-identified as being Fauzin Suyanto. The police then arrested Rudi Hartono who was alleged to have murdered Mr. Suyanto. However, Priyanto and Kemat remain imprisoned and a judge continues with the trial of Maman Sugiyanto. No action has so far been taken by the Indonesian government, the Office of the Attorney General or the Supreme Court to correct this flagrant miscarriage of justice.

Protection of human rights

Indonesia has undergone several legislative reforms since the beginning of the reformasi era. New legislation such as the Human Rights Court Law, or the Law on Witness and Victims Protection, has equipped the country with new institutions.

In addition to legislation enacted on the national level, at the regional level within Indonesia, Sharia Law continues to be applied. Such law is applied for Muslims and is seen as not conforming with constitutional standards. The UN Committee against Torture in its July 2008 report advised that Indonesia "should review, through its relevant institutions, including governmental and judicial mechanisms at all levels, all local regulations in order to ensure they are in conformity with the Constitution and with ratified legal international instruments, in particular the Convention" (para. 15).

A newly elected judge in the Constitutional Court has already raised doubts about the legality of the ongoing application of Sharia Law at the regional level. Such laws, the judge explained, are unconstitutional. However, there has not yet been a review of the law.

The Aceh Criminal Code from 2005 introduced corporal punishment, which stands in contrast with the human rights reform ongoing in the rest of the country. This legislation needs to be reviewed as it contravenes constitutional rights as well as the ICCPR and the Convention against Torture. The Special Rapporteur on torture stated in his March 2008 report that "the Government should ensure that corporal punishment, independently of the physical suffering it causes, is explicitly criminalized in all parts of the country" (para. 75).

The Penal Code

"Torture cases are usually labelled as "maltreatment," and court cases against perpetrators of torture systematically end in dismissals or acquittals"

The Indonesian Penal Code has been criticised for years for lacking a proper definition of torture. The current version makes reference to "maltreatment" in articles 351-358, which differs from the definition of torture as provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The UN Special Rapporteur on torture in March recommended that "torture should be defined and criminalized as a matter of priority and as a concrete demonstration of Indonesia's commitment to combat the problem, in accordance with articles 1 and 4 of the Convention against Torture, with penalties commensurate with the gravity of torture" (para. 73).

Torture cases are usually labelled as "maltreatment," and court cases against perpetrators of torture systematically end in dismissals or acquittals. Minor sentences or acquittals cannot be reconciled with the grave nature of the crime of torture. The Committee against Torture in its July 2008 recommendations suggested that Indonesia either amend the existing Penal Code or adopt a stand-alone bill specifically on torture. Legislation on crimes of torture should "take into account their grave nature, as set out in paragraph 2, article 4, of the Convention" (para. 13). In that regard, the government announced during this year's UPR that it "is currently considering the amendment of article 351 of the Code on ill-treatment. In particular, this amendment will bring the formulation of the Code to cover the crime of torture as defined in the Convention against Torture, an instrument to which Indonesia is a party" (A/HRC/8/233/Add.1, para. 20, June 2008).

Article 160 in the Penal Code prohibits oral or written incitement in public to actions against the authorities or disobedience to statutory provisions or official orders under such provisions. Article 161 further criminalizes publicizing such material and allows professional licenses, such as the license to work as a lawyer, to be revoked. In 2008, cases were reported in which human rights defenders were charged under these vague laws and sentenced to imprisonment. Article 160 is often used to charge human rights defenders with offences when they question decisions and actions by local authorities. Such forms of public protest should instead be protected, in particular in the case of human rights defenders. Articles 106 and 110 have in the past been used to charge people with "incitement to separatist movements". In crisis regions like Papua, rights activists are frequently charged under these articles and have suffered years of imprisonment as a result.

The Criminal Procedure Code

The problems of Law No. 8 of 1981 on Criminal Procedure occur in both its substance and in its application. The first problem is the limited number of explicit and clear provisions that are provided for under the code. A second problem is the implementation of the law in practice. The code has loopholes

with regard to safeguarding a fair trial, for example. The length of the period of detention, the lack of guarantees of the rights of the accused, the absence of protection from torture, no adequate monitoring, and lacking provisions to challenge the trial mechanism, present serious obstacles when trying to uphold a justice process that conforms with international standards.

At this time, the Indonesian government is preparing a new draft of the Criminal Procedure Code. A new draft Code would have to repair the imperfections of the existing code and give emphasis to the protection on human rights and fair trial if it is to be considered an improvement.

"Despite continued reforms since 1998, the Indonesian police are still seen as discriminatory, unprofessional, unresponsive and discourteous"

The police

Starting in 1998, the Indonesian police force was to be radically reformed. However, 10 years after the reform period started, police brutality, corruption and a lack of accountability are still prevalent. What are the reasons for this?

Police Culture

The Indonesian police force is still struggling with the problems of a violent, militaristic history and the lack of a professional civilian approach to policing, despite an expressed aspiration for "cultural change". The general public still perceives the police as being brutal and they are generally distrusted and often even feared. Despite continued reforms since 1998, the Indonesian police are still seen as discriminatory, unprofessional, unresponsive and discourteous.

It is apparent then that the police culture needs to be changed. The ideal is a civilian police force: a professional, proportional, and democratic police force that has a high regard for human rights, transparency, accountability, and the supremacy of the rule of law. Cultural change must happen through interplay between institutional arrangements and educational avenues. For example, educational programmes in the Police Academy are a welcome initiative, but institutional arrangements, such as the criminalization of torture, must accompany the training. The National Police Commission receives hundreds of complaints every year and has developed an expertise on needed reforms and suggests disciplinary actions based on its findings. However, none of the valuable recommendations by the commission have a binding affect and reform attempts do not result in change.

Investigations

The Committee against Torture in its July concluding observations noted that Indonesia

> Should take the measures necessary to ensure that criminal convictions require evidence other than the confession of the detainee and ensure that statements that have been made under torture are not invoked as evidence in any proceedings, except against a person accused of torture, in accordance with the provisions of the Convention. The State party is requested to review criminal convictions based solely on confessions in

order to identify instances of wrongful conviction based on evidence obtained through torture or ill-treatment, to take appropriate remedial measures and to inform the Committee of its findings. [Para. 13]

"It has become obvious that the police internal complaints mechanism is not functioning satisfactorily"

However, to date, the Indonesian Police is still functioning according to confession-based logic. Such logic is highly susceptible to torture as a method for producing fast, though not necessarily true, confessions.

The AHRC recommends that the Indonesian government take measures to introduce an evidence-based investigation system. This will reduce the incentives for the police to use torture as a method of interrogation. Additionally, the allocation of resources to the police would help in combating torture, to the extent that it is used as a cost effective method for achieving results under resource deprived circumstances. Anti-corruption measures must accompany greater resource allocation. Additionally, in order to facilitate this transition, courts have to stop considering confessions produced through torture as being valid evidence. Such evidence should, according to Indonesian law, not be considered as being valid, but in practice it is frequently used.

Detention and custody

A further area of concern with regard to the Indonesian police force is the lengthy duration of police custody, 61 days. The UN Special Rapporteur on Torture in March 2008 pointed out that, "As a matter of urgent priority, the period of police custody should be reduced to a time limit in line with international standards (maximum of 48 hours)" (para. 78).

Although the Indonesian Criminal Procedure Code authorizes this lengthy detention only under special circumstances, this has become the standard period of detention. This stands in direct opposition to international standards, and it is problematic for a number of reasons: it makes police abuse more likely, and the visible traces of torture are likely to have disappeared after such a long period of time. The Special Rapporteur further requested that, "The maintenance of custody registers should be scrupulously ensured." (para. 81). This recommendation had not been implemented at the time of writing.

Impunity

Other than the quasi-complaint mechanism PROPAM in the police, no other specific complaint mechanism is available. It has become obvious that the police internal complaints mechanism, PROPAM, is not functioning satisfactorily, as it is neither preventive nor remedial, nor is it specific to each case of torture. PROPAM also lacks transparency when it comes to the procedure and outcome of a complaint. Furthermore, the punishments meted out by PROPAM in torture cases are not severe enough, and therefore do not reflecting the gravity of the crime of torture. An alternative (or complimentary) approach would be the expansion of the mandate of Komnas HAM to enable it to further investigate individual cases of torture as human rights violations.

Another monitoring body concerning the police is the National Police Commission, which is mandated to recommend reforms to the police. The lack of any other effective complaint procedures has made them a target for hundreds of complaints every year and they now effectively act as a complaint receiving body without being specifically mandated or funded to do so. While its establishment was an important step forward, its lack of authority over the police makes it unable to perform adequately in ensuring human rights.

"In the last two years there have been many prosecutors convicted by the Corruption Eradication Commission"

Progress

Despite all the explained problems, some positive steps towards a more accountable and generally more humane Indonesian police force can be identified. Police officers are increasingly being trained in human rights and international standards; demilitarising training forms part of the Police Academy; a number of national mechanisms have been established to monitor ill-treatment by the police, including the National Police Commission; all police members who are charged with a criminal offence are now tried in civil courts, rather than in military ones. In addition, the government has established a complaints mechanism with regard to maltreatment on the part of public officers, and a telephone hotline has also been set up which is directly connected to the local police. These are all important initiatives, which deserve praise. However, the impact of these initiatives may, at least partially, depend on an amended Indonesian Penal Code, which has not yet materialized. The urgent need for an amended Penal Code, especially concerning the criminalization of torture and appropriate punishment therefore, can not be stressed enough.

The prosecution

In the last two years there have been many prosecutors convicted by the Corruption Eradication Commission on charges of corruption beyond IDR 500,000,000 (about USD 50,000). These cases indicate the extent of the problem of corruption in the country's prosecution system. The Committee against Torture in its July 2008 report pointed to the "collusion and nepotism in the public prosecution service" and recommended that,

> The State party should reform the Attorney-General's office to ensure that it proceeds with criminal prosecution into allegations of torture and ill-treatment with independence and impartiality. In addition, the State party should establish an effective and independent oversight mechanism to ensure prompt, impartial and effective investigation into all allegations of torture and ill-treatment. The State party should also publish, without delay, the reports of Komnas HAM investigations. [Para. 25]

The problem of corruption was also recognized by President Bambang Yudhoyono, who announced that the two biggest problems Indonesia faces are endemic corruption and gross violations of human rights. In the last few years the government has put unprecedented efforts into the fight against corruption. However, many Indonesian-based groups point out the neglect of gross violations of human rights in the president's working agenda.

"The main barrier to the launching of investigations appears to be one of willingness on the part of the Office of the Attorney General"

Besides working on ordinary crimes, the Office of the Attorney General also initiates judicial investigations and prosecutes cases of gross violations of human rights, such as past massacres, the May riots and other large-scale incidents of human rights violations. Beforehand, Komnas HAM typically prepares an inquiry report on the case and passes it to the office. Since findings made by Komnas HAM remain undisclosed to the public, there is no telling whether or not the reasons for rejection of cases by the office of the Attorney General are justifiable. The office has attempted to justify its rejection of cases on the basis of an alleged lack of clarity concerning the law with regard to whether the office should wait for a parliamentary decision before starting investigations.

The main barrier to the launching of investigations appears to be one of willingness on the part of the Office of the Attorney General. Article 43.2 of the Human Rights Court Law requires the parliament to recommend the setting up of an ad hoc court based on allegations of a violation, which is then made effective by a presidential decree. Such allegations are to be made by Komnas HAM, but in 2008, Komnas HAM's authority to make such allegations was challenged in the Constitutional Court. The Court ruled that for the investigation to be judicial, it has to be conducted by the Office of the Attorney General, which should therefore not wait for a parliamentary recommendation but conduct its investigation upon the submission of the inquiry report by Komnas HAM. Only this would bring the parliament in a position to act upon an allegation.

Political interference is suspected by civil society groups in both gross violation and individual human rights cases. Two recent cases exemplify this. An investigation produced enough evidence against former justice minister Yusril Ihza Mahendra concerning corruption. At the time of writing, the Office of the Attorney General had still not acted upon this evidence and launched a prosecution. Legal expert Romli Atmasasmita, who took part in drafting the Indonesian Corruption Court Bill and is recognized as having criticised institutions such as the office on several occasions, had, however, been arrested without delay on similar charges by the office.

The Prosecutorial Commission, a monitoring body set up by a presidential decree, has received numerous complaints of misconduct concerning the offices of several prosecutors around the country. The commission in question does not have the mandate to direct reforms, however. Strengthening the role of this commission with regard to disciplinary measures against prosecutors and reforms within the institution is a required to reduce political interference and to establish an effective, impartial Office of the Attorney General. The direct selection of the prosecutor general by the president is a second factor that limits the independence of his institution, notably when dealing with politically sensitive cases.

The judiciary

In Indonesia's court system, the Constitutional Court is widely seen as one of the most independent and competent courts in the country. District and provincial courts are often reported as giving poor judgments or delaying judicial processes.

> **"In many cases the Judicial Commission has recommended disciplinary action against judges to the Supreme Court; however, none of the hundreds of recommendations have been taken up"**

In a recent case, Hartoyo was harassed, tortured and seriously humiliated by police personnel due to his sexual orientation. The court sentenced the policemen to a fine of the equivalent of 10 US cents and imprisonment for a few weeks, which was not even applied. An appropriate punishment for degrading treatment and torture would include at least several years of imprisonment. Instead, Justice Sugeng Budiyanto, who was hearing the criminal case, justified the light punishment with the argument that "the perpetrators are police officers who are needed by their country, the perpetrators confessed their acts, both parties forgave each other, and the perpetrators committed a minor offence". In addition, the judge ordered the victim to review his moral standing concerning sexual orientation.

This is just one example of the lack of education, training, and familiarity with the concept of the rule of law among members of the judiciary. The Committee against Torture in its 2008 review of Indonesia's legal system explained that "as the State party continues its process of transition to a democratic regime committed to upholding the rule of law and human rights, it should strengthen the independence of the judiciary, prevent and combat corruption, collusion and nepotism in the administration of justice, and regulate the legal profession" (para. 22). Little implementation of this and other similar recommendations is noticeable.

The Judicial Commission, a monitoring body established by the constitution, has conducted investigations upon received complaints about cases of misconduct. In many such cases the Judicial Commission has recommended disciplinary action against the concerned judges to the Supreme Court, the authority responsible for issuing such actions. However, none of the hundreds of recommendations have been taken up by the Supreme Court, and the implicated judges continue to serve in their offices. The Supreme Court has only used such information when reviewing a judge's record when considering promotions, notably into the Supreme Court.

Witness protection

An effective witness protection program is a necessary requirement for a country suffering from serious human rights violations. The delays in bringing Indonesia's Witness and Victims Protection Agency into effect are of concern. The law defining the institution was enacted more than two years ago, however the president selected its commissioners only in 2008. The Committee against Torture in July 2008 denounced the "absence of implementing regulations, the mistreatment of witnesses and victims, and the insufficient training of law

enforcement officials and allocation of Government funds to support the new system" and requested Indonesia to "without delay, establish a witness and victim protection body, with all relevant measures required to implement Law No. 13/2006, including the allocation of necessary funding for the functioning of such a new system, the adequate training of law enforcement officials, especially in cooperation with civil society organizations, and an appropriate gender-balanced composition" (para. 31).

"Recommendations of Komnas HAM to prosecute cases are being ignored by the prosecutor general"

While commissioners have been elected, the institution has not resolved where it will physically locate its offices, or selected the staff to form its secretariat. In the climate of impunity that continues to prevail in Indonesia, and with the political influence that many of the alleged perpetrators of past human rights violations continue to have, many cases have not yet come to the fore, and this can be significantly attributed to the lack of effective witness protection, as witnesses are not confident enough to come forwards at present.

National Human Rights Commission

As a national human rights institution, Komnas HAM is unlike many others in the Asian region. While its strength lies in its credible work, independence and the commissioners' civil society backgrounds, its weakness can be attributed to limitations to its mandate and its weak link with the Office of the Attorney General.

The Committee against Torture requested in 2008 that "the State party should ensure the effective functioning of Komnas HAM by adopting adequate measures, inter alia, by strengthening its independence, mandate, resources and procedures, and reinforcing the independence and security of its members. Members of the government and other high-ranking officials should fully cooperate with Komnas HAM" (para. 24)

However, Indonesia's review under the UPR process in 2008 pointed out that in many cases, Komnas HAM relies on the prosecutor general's willingness to launch prosecutions. The recommendations of Komnas HAM to prosecute cases are being ignored by the prosecutor general. There is also no institutional requirement for the prosecutor to follow the recommendations of Komnas HAM.

Komnas HAM does not receive full support for its work from the government. The Committee against Torture noted concern "at the fact that members of the Government have stated that military officials should ignore the summons from Komnas HAM in connection with its investigations of gross violations of human rights, such as in the Talangsari, Lampung killing case (arts. 2 and 12)" (para. 24).

The prosecutor and prosecution system in Indonesia

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In the Indonesian organization of the state, which is regulated in the constitution, the Supreme Court and related bodies have functions of judicial authority (article 24, paragraph 1). Pursuant to the Law on Judicial Authority, the other bodies comprise of the police, prosecutor and other courts (article 41, Law No. 4, 2004). In the Law on the Attorney General's Office, it is also stipulated that the Prosecution Office is a governmental body that implements state authority in the prosecution sector (article 2, paragraph 1, Law No. 16, 2004).

Based on the above laws, the prosecution office is a governmental body having a judicative function. It is the only body with the authority to determine whether an alleged criminal action can be prosecuted or not. Even though currently there is a Corruption Eradication Commission that can also conduct prosecutions, in effect this work is also being done through the prosecutor's office, because the prosecutors at the Corruption Eradication Commission are recruited from the prosecutor's office to assist the commission within a certain period of time.

Prosecutor's office and prosecution system

The implementation of state authority over prosecutions is carried out via the Attorney General situated in the national capital, a high prosecutor's office in the capital city of each province and the district prosecutor's office situated at the district level (articles 3 and 4, Law No. 16, 2004). Pursuant to the applicable laws, the prosecutor's office must be free to carry out its tasks independent from any political or other influence, be it from the executive or legislative bodies or other state authorities.

The prosecutor's office has wide functions and authorities as:

1. General prosecutor,

2. Investigator of specific criminal actions,

Paper prepared for the Fourth Asian Human Rights Consultation on the Asian Charter of Rule of Law, on the theme of prosecution systems in Asia, held in Hong Kong from 17 to 21 November 2008.

3. Representative of the state in civil and administrative cases,

4. Advisor to government agencies on questions of law, and,

5. Representative of the public interest

(article 30, Law No. 16, 2004).

"A general prosecution is an act to render a criminal case before the relevant district court based on the procedures as stipulated in the applicable laws, accompanied with a request that the case be investigated and decided by a judge"

Structurally, a prosecutor is responsible to the prosecutor who in the hierarchy constitutes his or her direct supervisor. So, prosecutors at the district prosecutor's office are responsible to the head of the district, the head is responsible to the head of the high prosecutor's office and that head is responsible to the attorney general (article 8, paragraph 2 and article 18, paragraph 1, Law No. 16, 2004).

Based on the laws in Indonesia, a general prosecution is an act to render a criminal case before the relevant district court based on the procedures as stipulated in the applicable laws, accompanied with a request that the case be investigated and decided by a judge in a court. In the prosecution office, the general prosecutor has authority to:

1. Accept and verify the case investigation documents from the investigator and/or supporting investigator,

2. Hold a pre-prosecution inquiry in the event that there is a flaw in the investigation process, by giving directions in order to correct the investigation,

3. Order or extend detention, and/or change the status of a detainee after the case is handed over by the investigator,

4. Draft the accusation letter,

5. Hand over the case to the court,

6. Give notice to the accused of the day and time the case will be put on trial, accompanied by an invitation letter to the accused and to witnesses to attend the trial,

7. Conduct prosecution in court,

8. Close a case in the public interest,

9. Take any other action within the responsibilities and authority of a general prosecutor, and,

10. Execute the court judgment

(article 17, paragraph 2, Law No. 4, 2004).

Pursuant to the applicable laws, a prosecutor as an investigator generally has authority to:

1. Accept a report from a person on the occurrence of a criminal act,

2. Take first action at the site of the crime,

3. Conduct capture, detention, search and seizure operations,

4. Prepare letters of investigation and seizure,

5. Invite any person to be heard and investigated as a suspect or witness,

6. Invite an expert to assist with the investigation,

7. Stop the investigation, and,

8. Take any other actions based on the prevailing laws.

> "The enforcement of law and upholding of human rights are still impeded by the resistance of actors at each step"

Problems of the prosecution and upholding of human rights

Since the reform period, there has been major development in the human rights field in Indonesia. Based on the normative guarantees of the constitution, it is clear that the goal is to have a law-based country that guarantees and protects human rights and a state that wants to realize welfare and social justice. Apart from the constitution, in 2005 the commitment to protect human rights was enhanced by the ratification of the two basic covenants on human rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (via Law Nos. 11 & 12, 2005).

However, there are still specific matters pertaining to prosecution that need attention. This is because regulations are still weak, so the settlement of human rights cases is impeded, by, for example:

1. A back and forth of documents being submitted between the National Human Rights Commission and the attorney general,

2. The attorney general's refusal to investigate human rights violations that happened in the past, and,

3. Authority to recommend the formation of ad hoc human rights courts being vested in parliament.

Apart from problems with regulations, the enforcement of law and upholding of human rights are still impeded by the resistance of actors at each step. These actors are not only the parties who are suspected of having violated the law but also the law-enforcement officers who take advantage of the current system. Another impediment is public pressure on law-enforcement and human rights institutions based on ideology or orders from parties involved in cases.

Lastly, but also importantly, a major problem in prosecuting human rights cases arises from the internal problems of the prosecutor's office, be they organizational, technical or human resource-related. In certain cases (processed by the Corruption Eradication Commission) prosecutors have been proven to have bought and sold cases or received bribes from parties. In fact, according to the 2007 survey of Transparency International (Indonesia) the courts and prosecutors are the most corrupt bodies as they actively ask for money. Apart from that, the head of the Supreme Court has criticized the quality of the accusation letters fielded by certain prosecutors containing weaknesses and incomplete data, causing suspects to go free, especially in drugs and corruption cases. In one case where a prosecutor incorrectly referred to the law in preparing the accusation, causing two murder suspects to be freed under an interim judgment, members

of the public demonstrated at the prosecutor's office and—unable to control their emotions—ruined parts of the building. Prosecutors drafting accusation letters and preparing for trial also often suffer interference from their superiors. The head of a high prosecutor's office in a region may put some pressure on a general prosecutor to change the manner of conducting the case so that it will run contrary to fairness and the prevailing laws.

"The head of a high prosecutor's office in a region may put some pressure on a general prosecutor to change the manner of conducting the case so that it will run contrary to fairness and the prevailing laws"

These problems are exacerbated by certain other factors that feature in all law-enforcement bodies, including the prosecutor's office. These include:

1. Low integrity, little understanding of the practice of law, and little practical experience in carrying out trial. Therefore, serious attention must be paid to both the quality and quantity of prosecutors. Currently, their number is not proportional to the number of cases that they must handle, which contributes to these difficulties.

2. Lack of coordination between management and lower officers, causing inconsistency between the heads of district prosecutor's offices and high prosecutor's offices in applying policy, especially in corruption and drug cases.

3. Lack of coordination between prosecutors and police during investigation and prosecution. Misunderstandings in conducting their duties commonly result in a back and forth of the case documents with mistakes that are not immediately obvious, particularly in the investigation of corruption cases.

4. Problems in executing the judgment, caused by differences in perception between the judge and prosecutor, especially in the wording of the judgment.

Structural problems associated with the prosecution include the following:

1. Currently, there is a dilemma concerning the position of the prosecutor's office in the structure of the state. Pursuant to the Law on the Prosecutor's Office, the office is a government body that acts for the state authorities in the prosecution. This position will not become a problem only if in carrying out duties a prosecutor acts independently and does not suffer government interference.

2. The Law on the Prosecutor's Office does not elaborate on qualifications to become a prosecutor at successive levels, other than the base requirements. As a result, the qualification requirements for the attorney general and other senior prosecutors are low. The mechanism to elect the attorney general and deputy attorney general is not transparent or accountable and has few participants. The process is closed and falls under the authority of the executive, i.e. the president.

3. The promotion and transfer system in the prosecutor's office has not succeeded in pushing prosecutors with high credibility and integrity into management positions in the office.

4. Recruitment of prosecutors is potentially affected by nepotism, collusion and corruption. Prosecutors hold administrative positions even though they don't have professional expertise and are needed for prosecution activities.

5. The supervision system is not good enough to make objective appraisals of prosecutor integrity and quality.

Reform and recommendations

To date certain reforms have been announced and some implemented to restore public faith in the work of law-enforcement bodies, including the prosecutor's office. These were initiated with the statement of the President of the Republic of Indonesia in commemorating the agenda of the First 100 Days of the Indonesian Bersatu Cabinet, which in its chapter on Building a Fair and Democratic Indonesia, stipulated that

> Law enforcement must be made by any state which is willing to build a fair and democratic atmosphere. In Indonesia, certain efforts to have such atmosphere have been conducted through various means, especially by enhancing the courts institutions. It is believed that the enhancement of the court institutions will bring continuous effect which correlates to the law enforcement and development in other sectors, such as economy. Logically, the trading and the investment will not be developed if there is no certainty in the law enforcement.

In this regard, Presidential Instruction No. 5/2004 on the Acceleration of Corruption Eradication stipulated the following objectives:

1. To optimize investigation and prosecution efforts against criminal acts of corruption and impose sanctions against the responsible parties, and save state monies,

2. To prevent misuse of authority and impose clear sanctions, conducted by the general prosecutor/law-enforcement prosecutor,

3. To enhance cooperation between the State Police of the Republic of Indonesia, Development and Money Supervisory Agency, Money Transaction Analysis and Reporting Center and state institutions related to law enforcement, and mitigation of state losses resulting from criminal acts of corruption.

With regards to the above, the Attorney General's Office prepared certain programs in 2004-2005, so as to:

1. Introduce the basics for reform of the system and the internal mechanism of the prosecutor's office to enhance the outcomes of its work,

2. Conduct recruitment, promotion, and transfer of prosecutors based on objective criteria and the activities of the relevant officers (to diminish, put pressure on and eliminate nepotism, collusion and corruption in the above activities),

3. Enhance coordination with other law-enforcement bodies in accelerating the handling of corruption cases and other specific criminal acts,

"To date certain reforms have been announced and some implemented to restore public faith in the work of law-enforcement bodies, including the prosecutor's office"

"Six directives of the Attorney General's Office concerning a reform program announced on 12 July 2007 represent an important base for bureaucratic reform within the office"

4. Ensure that in the corruption cases, especially those that cause losses to the state and obtain public interest, the process is accelerated, from investigation to prosecution and from prosecution to trial,

5. To review the SP3s (Letters of Order to Stop Investigation) in corruption cases done prior to the existence of the Indonesia Bersatu Cabinet.

Apart from the above, 12 reform programs were launched in 2005 in the following areas:

1. Reform of the Organization and Work Procedure of the Prosecutor's Office

2. Reform of the Organization and Work Procedure of the Prosecutor's Office's Intelligence

3. Reform of the Prosecutor Recruitment System

4. Reform of the Prosecutor Education and Training System

5. Reform of the Prosecutor Career Development System

6. Preparation of the Minimum Standard of Prosecutor Utilities

7. Review and Development of the Budgetary System of the Prosecutor's Office

8. Budget Increase for the Handling of Cases related to Corruption, Human Rights, Terrorism, Money Laundering and Stealing of Sea and Forest Wealth

9. Increase of the Functional Benefit for Prosecutors

10. Development of Information Management System in Handling Cases

11. Enhancement of Cooperation between the Relevant Institutions in the Law Enforcement of Cases Having a Public Interest

12. Development of a Controlling System that is Transparent and Accountable

The six directives of the Attorney General's Office concerning a reform program announced on 12 July 2007 represent an important base for bureaucratic reform within the office. The six define reform programs in the areas of recruitment, education and training, minimum professional standards, career advancement, business practice, code of conduct and supervision mechanisms. Bureaucratic reform is the main avenue for the office to comprehensively improve its work at an organizational level, and includes but is not limited to improvements in the reward system and officers' welfare that should enable the prosecutors to perform their duties with high integrity, accountability and dignity.

According to the deputy attorney general at the launch of the reforms on 18 September 2008, they aim to:

1. Recover public trust in the Attorney General's Office and improve the public prosecution's image as a law-enforcement institution with high levels of professionalism and integrity,

2. Enable public access to information on corruption-related criminal cases and other cases that the office handles,

3. Increase the amount of money returned to the state treasury, derived from savings and penalties,

4. Increase remuneration for public prosecutors and staff of the office,

5. Decrease the number of individuals generating a negative public perception towards the office,

6. Improve the quality of service to the public, and,

7. Develop a standard operating procedure with some breakthroughs regarding the case-handling process, but still in accordance with existing laws.

There are also several important issues that will become subjects of policy in the future that will have a positive effect on the prosecutor office, which are:

1. In order to avoid conflicts of interest and misuse of the prosecutor's office by the executive, the office should remains part of the government, but to guarantee its independence the attorney general must be nominated and appointed by the president with the approval of the House of Representatives, and in conducting prosecution duties, prosecutors must be independent.

Good and strict criteria to determine the person that will become the attorney general and deputy must be drawn up so that these posts are filled with persons of high credibility and accountability. The mechanism to elect the attorney general must also be open, transparent and accountable, so that the public will be aware and involved and can give input on the credibility and integrity of the prospective attorney general. In addition to that, an independent team will give input to the president and receive input from the public on the candidates, through which nominations also will be able to be made.

2. Prosecutors should not fill administrative positions. Administrative professionals must be recruited for these posts and the capacity of the current administrative officers must be enhanced.

3. Parties outside the prosecutor's office must be involved in the recruitment process, such as persons from the universities who can assess potential and ensure that academic results will be the basis for recruitment. Other than that, recruitment must be conducted transparently and disclosed openly, supported by a good integrated computerized system so as to diminish the intensity of meetings between the prospective party and office.

4. The examination of the accusation and prosecution must be conducted in a more effective way.

"Prosecutors should not fill administrative positions"

Pakistan 2008: Defeat of a dictator and the movement for judicial independence

Asian Human Rights Commission, Hong Kong

The year started violently under General Musharraf's military regime, particularly for lawyers, political workers and civil society activists. Musharraf was sworn in for a second presidential term on 29 November 2007 under emergency rule, which he then lifted on 15 December 2007. Benazir Bhutto, former prime minister and the chairperson of the then-running Pakistan Peoples Party (PPP), was assassinated on December 27. General elections of the legislative assembly were then postponed (from January 8 until February 18) by the military regime, on the pretext of a crisis in law and order. About 80 persons were killed in riots following the assassination, mostly in crossfire between the police and citizens.

The year started with widespread confusion about whether elections would be held, due to a series of delays from the Musharraf government. A wave of bomb blasts at that time also slowed political mechanisms. However, the general elections were eventually held and a good turnout was recorded. The elections were also relatively free and fair thanks to pressure from political parties, civil society and from forces outside of the country.

In the run up to the elections, assertive action by the people and party members prevented much engineering of the vote, despite the administration's refusal to replace the long-serving chief election commissioner, who had tried and failed to deny the vote to about 380 million people. Finding results of the election very much against him, Musharraf handed power to the elected representatives months later, after considerable bargaining with individual party members.

This article consists of extracts from the Asian Human Rights Commission's *State of Human Rights in Asia 2008* report. Contents of the report are available in PDF format by country online at the AHRC website, www.ahrchk.net. Interested persons may contact the AHRC to obtain printed copies of the full report.

Under the new civilian coalition government, largely built from Bhutto's Pakistan People's Party and Nawaz Sharif's Pakistan Muslim League, there has been much more focus on the democratic functioning of the parliament by the representatives of the people. The new government started proceedings by including all the parties in the political process, showing tolerance and restraint. Unfortunately Sharif pulled out of the coalition in August in disagreement over the issue of Pakistan's deposed judges, whom the PPP have not sufficiently reinstated.

"The people of Pakistan have shown that resilient and determined struggle to oust the dictator from the post of president could be a success"

Dismissal of General Musharraf

General Musharraf, who had awarded himself with another term after declaring a state of emergency (3 November 2007), was democratically dismissed by the new government according to the constitution. Finding that his options were few—pressure from his allies in the army and overseas yielded little success—Musharraf resigned before being officially impeached.

The people of Pakistan have shown that resilient and determined struggle to oust the dictator from the post of president could be a success. This completely non-violent struggle of various sections of society, which included lawyers, judges, the ordinary folk, the media, as well as the legislators, is a clear example of the development of democracies on the basis of consensus. In the recent years there was clear consensus that the people did not want a military regime but instead a democratic government. Even the support that the military dictator received from the superpowers did not deter the people of Pakistan from pursuing their desire to see the end of militarism. It is a sad reflection on some democracies in developed countries that they failed to support the people in their struggle for democracy and instead supported a military general. Notwithstanding, the people have been able to push back the military agenda.

The lawyers' movement

The lawyers' movement for the independence of the judiciary has continued in spite of the new government's illegal, unconstitutional handling of the situation. Many judges, including Chief Justice Iftekhar Choudhry, were removed from their positions under emergency rule and have yet to be reinstated. On the first anniversary of emergency rule lawyers held countrywide protests against the suspension of the constitution. The government took the law into its own hands, charging more than 100 lawyers with agitation and suspending the licenses of more than five office bearers in various high court bar associations, including the presidents of the Peshawar and Multan high court bar associations.

The new government is resisting its duty to reinstate Chief Justice Choudhry, claiming that the lawyers' movement has started to take violent shape. Lawyers in various cities have locked judges inside the courtrooms. The new government had pledged verbally and in writing to restore the judiciary when it came into power. It has been dragging its feet on the issue ever

since, and at times has appeared to be backtracking. This response brings it closer to the country's previous dictatorial government, showing a similar lack of interest in building an independent judiciary.

"People are beginning to feel a kind of security in the military operation-ridden southern province of Balochistan, but air strikes and other forms of military activity continue in some parts"

The coalition government had first promised to restore the judiciary within 30 days of its formation, through a resolution in the national assembly, which did not happen. It then claimed that the deposed judiciary would be restored through a constitutional package; however it is now using a form of backdoor diplomacy, bargaining with the deposed judges to guarantee their 'loyalty'. After being coerced and intimidated most judges have been 'reappointed' with a new oath, rather than restored to their original constitutional position. There are five judges, including deposed Chief Justice Choudhry, who have refused to bow to pressure from the new government.

The lawyers' movement has been running since March 2007. They observe weekly protests by marching (one march was several hundred miles long), boycotting the courts, and picketing outside parliament and Supreme Court buildings. In a number of cases the people have joined them, showing a growing awareness and respect for the rule of law and the supremacy of the judiciary in the country. The government has faced defeats in the elections of different bar associations, including the Supreme Court bar association, which has put the government in a difficult position to get support from lawyers. In retaliation, government started squeezing lawyers through the Pakistan Bar Council and offices of the law ministry and attorney general.

The human rights situation

Overview

Since coming to power the government of Prime Minister Yousaf Raza Gilani has started to sift through the backlog of cases involving human rights violations, and it had released those arrested by Musharraf's government during emergency rule. This includes the deposed judges, all the lawyers, their leaders, civil society activists and political workers. It is in the process of commuting over 7000 current death sentences and has halted executions, working against popular conservative Islamic principles. The efforts should be applauded and the government is working hard to rally support from the political parties in parliament.

People are beginning to feel a kind of security in the military operation-ridden southern province of Balochistan, but air strikes and other forms of military activity continue in some parts, particularly Dera Bugti, Kohlo, Sui and Khuzdar. Many political workers from the area, some prominent, have been released from prison. A dialogue has been started between Baloch nationalist militant groups and the government and an atmosphere of reconciliation is starting to form.

The issue of missing persons is yet to be addressed by the government. State intelligence agencies are independent in their working, though it is declared that they are working under the prime minister. The ISI and military intelligence agencies are largely responsible for the arrest and disappearance of more than 4000 persons since the start of the 'war on terror', as reported by various nationalist groups and fundamentalist parties. In the nine months since the new government took power not more than a dozen people have resurfaced from intelligence agency custody. The interior minister has admitted that about 1000 people are missing from Balochistan province alone.

"Pakistan executes the most people in the world each year after China, Iran and Saudi Arabia"

The issue of torture in custody is not being properly handled by the government. Torture is still considered the best way of taking confessional statements by the police and making money through bribery, and this view is not being discouraged. During the last nine months at least fifteen people have died under police interrogation. There are currently no independent procedures for looking into such cases. There is also an alarming lack of sensitivity among legal professionals, particularly the lower judiciary, regarding the use of torture. The cost of using torture as a tool of law in Pakistan is underestimated and there has been a significant lack of development in criminal law jurisprudence in the country. There are 52 torture centres in Pakistan, all under the control of the army.

Religious minority people remain under threat from Muslim religious groups and law enforcement agencies. The blasphemy law is being increasingly used against them in ordinary feuds, and the charge carries an obligatory death sentence (though this can often be lifted with blood money). Though Muslims do fall foul of this law, Christians, Hindus and particularly the Ahmadis, a minority sect of Islam, are the main victims, and also suffer from attacks during worship, and from their daughters being abducted, forcibly married to Muslims and thus 'converted', often never to be seen again.

Right to life

On 2 July 2008, in a heartening step, the federal cabinet of Pakistan announced that it would commute current death sentences into life imprisonment, suggesting that debates on abolition may be possible in the coming year. However, the party has been very slow to start implementing the decision through legislation; at least four inmates have been hanged in the period since and black warrants continue to be served.

Pakistan executes the most people in the world each year after China, Iran and Saudi Arabia. There are more than 7200 people on death row, including 41 women and two children, and many have not received a fair trial. Although the Pakistan Juvenile Justice System Ordinance was extended to apply nationwide in 2004, implementation remains limited. Pakistan is one of just five countries in the world that have executed minor/juvenile offenders in the last couple of years; in one known case Mutabar

Khan was hanged on 13 June 2006 for a crime committed when he was 16, and authorities of another jail, Mach Central Jail, have acknowledged holding two juvenile offenders on death row. Often, after years of trial a defendant will have trouble convincing the judge that he or she was actually underage when he or she broke the law.

> "Many among the 7200 on death row are there as a result of the blasphemy law"

Many among the 7200 on death row are also there as a result of the blasphemy law. This is a crime that carries an obligatory death sentence but for which evidence is often tenuous and the law is often used in disputes over property or for political or personal vengeance.

Corruption throughout the legal system along with the widespread use of torture in police custody means that many innocent people are on Pakistan's death row. And whether innocent or not, many of the accused do not receive a fair trial. Zulfiqar Ali, 38, has been on death row for more than a decade and was scheduled to be hanged in October, despite the commutation announcement. Ali comes from a poor family and was unable to afford legal representation so he tried to mount his own defense, even though he can't speak English. Requests for clemency were denied by the president, but at the eleventh hour, Ali was given a fifteen-day stay. The stay has so far been extended, but no legal solution has been looked into regarding his unfair trial.

Under Islamic Sharia Law, a murderer can be pardoned by the victim's relatives, usually after a blood money payment called diyat, and the courts will often urge family members to resolve matters on the side; it's what many human rights NGOs call the 'privatisation of justice' and tends to give the wealthy a certain impunity. Because of diyat it is suspected that death penalties are dealt out more freely because judges assume a settlement will be found. However, in the case of 23-year-old inmate Umer Khan, a black warrant was issued in October 2008, even though the victim's family had pardoned him in writing before the court on 9 May 2007, after the payment of blood money. Fortunately, Khan received a stay on the final day.

In October 2008 President Zardari instructed that approximately 400 condemned prisoners in Adiala Jail, Rawalpindi, Punjab province be shifted from death cells to ordinary barracks, and some 250 condemned prisoners to be similarly relocated in Hyderabad, Sindh province. This suggests that further positive action is imminent and the government, in its political expediency, is taking time to commute death sentences into life imprisonment under tremendous pressure from religious parties and Chief Justice Dogar, appointed by Musharraf during emergency rule.

Pakistan recently signed the International Covenant of Civil and Political Rights (ICCPR) and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the UN. In article 6(1) the ICCPR states that "every human being

has the inherent right to life". However life in Pakistan can be taken by the government for a wide array of offences, from extramarital sex to drug trafficking, many of them introduced during military dictator Zia-ul-Haq's 'Islamisation' drive. According to article 6 (1) Pakistan should abolish the death penalty; at the very least those in power must revise the list of crimes met with death.

"Despite calls for the abolition of blasphemy law from inside and outside of the country, the government has yet to take any genuine steps to do so"

In order to prevent the execution of innocent Pakistanis an extensive overhaul of Pakistan's judicial system is necessary, plus the strategic abolition of custodial torture. People are still being executed despite the current government's stance, suggesting that the real decision-making machinery does not lie with the elected government. Those that were elected must take a strong position against the religious right, and move to join Pakistan with the majority of the world in abolishing the death penalty.

Religious freedom and minorities

Religious freedom in Pakistan remains tremendously restricted. Those that belong to religious minorities are second-class citizens and struggle to enjoy the rights of mainstream or orthodox Muslims. Local governments also tend to court popularity by cracking down on minorities in their areas, often referring to an old blasphemy law created in colonial times. The law originally banned insults directed against any religion, but in 1986 General Zia-Ul-Haq altered it to apply only to Islam. The Federal Sharia Court then made execution a mandatory sentence for blasphemy during Nawaz Sharif's term as prime minister. The law is most often activated to discriminate against Christians and those of the Islam-based Ahmadi sect (which was declared non-Muslim in 1974 under the Pakistan constitution).

Despite calls for the abolition of blasphemy law from inside and outside of the country, the government has yet to take any genuine steps to do so. Meanwhile, many citizens are being arrested, prosecuted and even killed under the law. In many cases it is used to settle personal vendettas or to grab land. Just as it continues to cause destructive tension between the country's mainstream Muslims and Pakistanis of other faiths, the law is also being used to stoke the power of religious conservatives, who can wield it against liberals.

While in power, President General Musharraf issued an order calling for Ahmadi sect members to be listed separately in the electoral system, a discriminatory action that singled them out for further attacks. In 2004 a Pakistan political party, the Muttahida Majlis-e-Amal (MMA), filed a motion to demand a debate on the government's deletion of religious information from electronic passports, claiming that the removal was an Ahmadi conspiracy to get around a ban on non-Muslims entering Mecca. Since 1984 (when statistics were first compiled) around 93 Ahmadis have been killed for their allegiance to their sect, which is based on the tenets of Islam. Four have been killed so far this year.

> "An investigation must be set up to gauge and combat the extreme religious prejudice found throughout the police, political parties and the judiciary"

In its pledge to be reelected to the Human Rights Commission in 2006 Pakistan noted that it is a part of all major global initiatives in promoting intercultural dialogue and harmony to facilitate universal respect of all human rights in all societies and cultures. It observed that, according to its constitution, minorities should enjoy equal rights and participate in mainstream politics both through joint electorates, and through the five per cent of seats reserved for them in the parliament and other elected bodies. Articles 9 to 29 of its constitution enshrine the promotion of human dignity, fundamental freedoms and human rights and the equal status of the followers of all religions. They prohibit discrimination on account of religion, race, caste or creed. However, it is clear that much of this is mere posturing. Those who commit crimes motivated by religious hate must be clearly and justly punished, and minority peoples in Pakistan must be assured of their right to a free, fair investigation of rights violations. Government workers need to set a strong example themselves; an investigation must be set up to gauge and combat the extreme religious prejudice found throughout the police, political parties and the judiciary. The blasphemy law can no longer be used as a tool of the orthodox and it must be withdrawn.

Some Muslim seminaries are encouraging young men to convert non-Muslim minorities to Islam. The young people generally kidnap young girls of non-Muslims and rape them. In cases where they are later arrested, they produce a certificate issued by any Muslim seminary that the kidnapped girls have adopted Islam and that they married the girls. Many of these girls are minors. However, the courts generally do not consider this fact and simply accept the certificates as legitimate. In some cases, such as that of Saba and Aneela, which went through the Lahore High Court from July 2008, young girls are kidnapped and forcibly converted for marriage. In this case custody was granted to the kidnapper of the older girl (aged 13), and the forced marriage was upheld.

Rights of women

The stance of the newly elected government bodes a little better for the future of women in Pakistan, with President Zardari posturing as pro-woman. He himself was married to a former president, Benazir Bhutto. There are 72 women in the National Assembly and more prominent positions are being held now by women than ever before, including the post of speaker of the National Assembly, federal minister for information and a number of deputy and provincial positions. None of these women wear *hijab*, suggesting progressiveness in the parties who have elected them.

Certain pro-women policies are also being implemented, for example, in the case of land distribution in the Lower Sindh, plots will be registered in the name of the woman in each family unit. The current government has spoken of creating more employment opportunities and of loan programs for women, but

has not yet acted in this respect, and in terms of what still needs to be done the proposals are minor. As a legacy of the last president, there is a 33 per cent quota in all electorate forums for women at local body level, but too few are being permitted to fill this as a result of social pressure. The number stands at 17.5 per cent in the National Assembly. However these women are not directly elected, they are merely placed into the positions by their parties, which limits their value as political figures.

"Incidents of violence against women remain very high, and not enough is done to discourage them"

Middle-class women generally have more social and economic freedom in Pakistan, but in rural and tribal areas an estimated 12.5 million women are still denied the right to vote. Many have little or no independence on any level. The advances at the top need to be taken into the villages and onto the street and practically enforced. Businesses and local authorities such as the police and judiciary remain profoundly male-oriented.

Incidents of violence against women remain very high, and not enough is done to discourage them. One recent report, 'Policy and data monitor on violence against women' from the Aurat Foundation, shows a sharp increase in acts of aggression against women in the second quarter of 2008. The report announced cases of violence to be up to 1705, compared with 1321 between January and March. Of these cases, the largest portion (20.9 per cent) was for the murder of women, the second largest was bodily assault (11.4 per cent) and so-called honour killings were at 7.9 per cent. Suicide and sexual assault statistics are also high. There were 107 cases of rape reported in this period, 66 of which were gang rape (up from 19). However statistics vary. Pakistan's Additional Police Surgeon (APS) Dr Zulfiqar Siyal recently announced that on average 100 women are raped every 24 hours in Karachi city alone, but tedious, inefficient medical and judicial systems, with few women working in either, discourage most women (up to 99.5 per cent, says Siyal) from reporting abuse and subjecting themselves to more unwelcome male attention and further potential assault.

According to a report by Human Rights Watch, ('Double jeopardy, police abuse of women')

> More than 70 percent of women in police custody experience physical or sexual abuse at the hands of their jailers. Reported abuses include beating and slapping; suspension in mid-air by hands tied behind the victim's back; the insertion of foreign objects, including police batons and chilli peppers, into the vagina and rectum; and gang rape. Yet despite these alarming reports, to our knowledge not a single officer has suffered criminal penalties for such abuse, even in cases in which incontrovertible evidence of custodial rape exists.

According to the same report, a senior police officer claimed that "in 95 percent of the cases the women themselves are at fault". If the mindset among the authorities is not challenged, little change can be expected in the general public.

Cases of domestic violence are so commonplace that most go unreported; there are still no laws to protect women from it. However in the last quarter of 2008 a domestic violence bill was

given to legislators, in the expectation that it will be passed. A harassment bill has been passed by the cabinet and waits with a committee. Similar bills were drafted by Musharraf's government, but polarisation and infighting among parties prevented many practical bills being passed.

"In the last six years over 4000 people have died in murders sanctified by illegal *jirgas*, or tribal courts, two thirds of them women"

Men in rural or tribal areas continue to abuse the rights of women to the extreme, especially in the north of the country. For instance, on 14 March 2008, a 17-year-old girl was abducted by police officials and kept for almost 16 days in private custody where she was raped and tortured to make her confess to involvement in the murder of her fiancée. Her elder sister was also brought in and held naked for three days to increase the pressure. The perpetrator was a sub inspector, who detained the girl outside of the police station until March 29 before she was produced before the first-class magistrate for judicial remand. In January 2007, a 15-year-old girl, Asma Shah of Layyah, Punjab province, was gang-raped by more than a dozen attackers, yet after she filed a complaint politicians and police continually coerced her to withdraw it. The persons who helped her file the case were allegedly attacked by the relatives of the perpetrators. Although the court ordered inquiries into the case twice, police were resistant; they claimed that the alleged perpetrators were innocent before any move was made to collect statements from the victim and witnesses. In one case in April 2007 it was reported that female opposition council members of the Karachi City government were attacked and threatened with rape by council members of the Muttehda Qoumi Movement (MQM), a member of the ruling alliance in General Musharraf's government and the ruling party of the City District Government Karachi (CDGK). Sindh police refused to register case against the ruling party council members and instead registered cases of hooliganism.

In the workplace women must still contend with lower salaries, and sexual misconduct is common. They are generally not paid according to the law and receive few benefits. The majority are not officially registered so are vulnerable to occupational abuse. It is mostly women that work in government factories and other informal sectors (unregistered under government laws), and here they have no labour law benefits, such as medical allowances, pregnancy allowances, or transport or childcare services from the factory management. Through a finance bill passed during the Musharraf government, most are now expected to work 12 hours rather than the original eight. In rural areas women are often required by employers or landlords to work all day alongside their husbands for little extra remuneration, often as bonded labour, to pay off loans.

'Honour killings' and the *jirga*

In the last six years over 4000 people have died in murders sanctified by illegal *jirgas*, or tribal courts, two thirds of them women. Their deaths have often occurred under barbaric circumstances. Many are considered 'black women', charged with

having relationships out of marriage (which are often fabricated claims) while others are victims of rape or are suspected of planning marriages contrary to those arranged for them by their families. This type of murder has become known as 'honour killing', and due to the ease by which an unjust sentence is passed, they have become a way of resolving property disputes, particularly by male family members who resent losing property to another family through marriage. In rural, strictly patriarchal areas women's lives are worth little. It is a matter of prestige to have more than one wife and young girls are often sold in to marriage to settle disputes.

"In rural, strictly patriarchal areas women's lives are worth little; it is a matter of prestige to have more than one wife and young girls are often sold in to marriage to settle disputes"

In March 2008 a 17-year-old girl in Sindh province was pressured by her uncle to convince her parents to hand over acres of farmland. On her refusal, the uncle and his accomplices brought in her father and made him watch as the girl was mauled by a pack of dogs and then shot. In May a jirga was arranged in which the dead girl was posthumously declared 'kari' (involved in an illicit relationship). The murderers were vindicated and a local man was forced to confess to being the illicit lover of the girl, and to pay Rs 400,000 as compensation. A government probe has done little to bring the perpetrators to justice.

In August 2008, eight women, three of them minors, were buried alive in Balochistan, reportedly by the same men. In the first case the three girls were allegedly on their way to another town with two aunts, for their weddings. The girls were reported to have been non-fatally shot and buried, and the aunts, on protesting, were buried alive with them. Days later, three local women who had protested against the incident met the same fate. Those responsible have close ties to the provincial government and to the police, and investigations into the case have gone through an array of delays and setbacks.

In October 2008 in Sindh province, under the orders of a jirga and with the knowledge and apparent acquiescence of the police, the daughter and nieces of a man (aged 10, 12 and 13) were handed over as compensation to a man who had openly killed his last two wives. The complainant had accused the father/uncle of having an affair with his last wife.

To conquer these practices, which go against the nation's constitution, Pakistan needs to look deep into its own system and make strong, confident changes. Creating new laws will not do much good, since they are not implemented. Instead there must be a bigger crackdown on illegal jirgas and those conducting them must be punished and brought before the law, without exception and with no leniency awarded as a result of blood money transactions. Those who have killed through jirgas must be tried for murder; a country should have only one law for murder, without distinctions or impunity. Furthermore, those who have conducted jirgas should be banned from holding public office, and those already in office must be ejected. Political will is required for curbing this practice. A clear signal should be sent that the constitutional law of Pakistan needs to be respected.

> "The forced 'disappearance' of political opponents by state intelligence services continues in spite of the newly elected government's claims that it will swiftly clean up the issue"

During the 2008 Universal Periodic Review Pakistan pledged to put an end to honour killings through the faithful and effective application of the 2004 Criminal Law Act; to remove abuses of the Hudood laws that violate women's rights (noting that the 2006 Prevention of Anti-Women practices [Criminal Law] Act was designed to end these practices, and the 2006 Amendments, which bring the laws relating to Zina and Qazf in line with the objectives of the Constitution and the injunctions of Islam) and to take legal and administrative measures to attack domestic violence.

The legal rights of the relatives of murder victims must be recognized and acted on. This includes the right to an investigation and trial. Under article 2 of the ICCPR, the state is obliged to take measures to protect rights and provide remedy for victims of rights violations. Those who carry out extrajudicial violence must see that it will no longer be tolerated. Victims must understand that there is a process by which they can seek justice. To make sure that these steps are taken an independent monitoring body needs to be established, funded and given free reign. Finally, it is the government's responsibility to educate, and a strong educational network must be created that can work against what has become an entrenched practice, particularly in tribal northern areas, which remain isolated, ideologically, from the rest of the country. If the government is genuinely serious about tackling honour killings and modernizing its legal system, this is the least it can do.

Arbitrary arrest and disappearances

The forced 'disappearance' of political opponents by state intelligence services continues in spite of the newly elected government's claims that it will swiftly clean up the issue. In the nine months since the PPP came to power no serious moves have been made to address it. On the contrary, the state intelligence agencies are operating freely with the knowledge of the government. In the past nine months about 52 persons have gone missing after their arrests, mostly in the southern province of Balochistan where military operations continue. Some religious organisations claim that more than 23 persons belonging to various religious groups, mostly young students, are still missing after their arrest.

The Asian Human Rights Commission (AHRC) has issued a report mentioning that at least 52 illegal detention and torture centres are being run by the Pakistan army. In one example, Dr Safdar Sarki, the nationalist leader of Sindh province and Muneer Mengal, managing editor of a television channel, were released during the first quarter of this year after they had been missing for more than a year. They were dumped by the intelligence agencies on the roadside with torture juries. Moments later, the police arrived and arrested them on several criminal charges.

The government has never made a serious attempt to stop the arbitrary arrests and disappearances, and has often hampered the judiciary in its efforts to clear the backlog of such human rights abuse cases. The state of emergency was called and the former chief justice was removed largely over this issue, meaning that more than 350 cases of missing persons were filed in the Supreme Court of Pakistan and have never been addressed. Those who have testified after being held incommunicado for months and then released have told the courts and the media that they were arrested by police and were handed over to intelligence agencies, who kept them in military interrogation cells and used torture to obtain confessional statements about alleged anti-state activities.

In the North Western Frontier province, where the Pakistani military and foreign forces are carrying out operations against militants, the media and political parties are claiming that more than 1000 persons are missing. The nationalist forces of Sindh province claim that about 100 persons have been disappeared, but that some of them were released after the intervention of the Supreme Court and the Sindh High Court. In Punjab province most of those arrested, around 100 persons, were from religious groups working in its southern and northwestern areas.

The government has shifted from a position of creating a committee for missing persons to suddenly shifting responsibility for this committee to a political party. By doing this, the government is distancing itself from one of the most important issues the country faces. For the newly formed government to now start back peddling on this issue rings warning bells for the future of human rights in the country. There have been no terms of reference described by the government and the committee does not have any constitutional or legal coverage.

"The government has shifted from a position of creating a committee for missing persons to suddenly shifting responsibility for this committee to a political party; by doing this, the government is distancing itself from one of the most important issues the country faces"

There has also been little clarification about the terms of reference of the committee, such as whether it will be independent of its party affiliations; what its jurisdictions are; whether it can visit places where missing people were generally kept (some of those released through the *sou moto* actions of Chief Justice Iftekhar Choudry later testified that they were kept in army torture camps and they themselves saw several persons in the camps); whether this committee has the authority to ask suspect military or police officers to report before the committee; and, what the legal and constitutional status of the committee for recovery of missing persons is.

Without the proper terms of reference, the formation of the committee is meaningless and will only serve as eyewash, rather than as a purposeful exercise for missing persons and their families. It is vital for the newly elected government to maintain the confidence of the people of Pakistan by forming a high-powered tribunal with all the independence, authority and material and financial resources necessary for the recovery of disappeared people. The jurisdiction of the tribunal should cover the whole country.

Police and custodial torture

"The most common methods of police torture in interrogations include beating with batons or whips, suspension by the ankles, burning with cigarettes and punches to the abdomen; women are likely to be raped in custody"

Torture in custody in Pakistan is a continuous, commonplace phenomenon. It is still widely considered the best means by which to obtain confessional statements. As yet, there have been no serious efforts by the government to make torture a crime in the domestic laws of the country.

The most common methods of police torture in interrogation situations include beating with batons or whips, suspension by the ankles, burning with cigarettes and punches to the abdomen. Women are likely to be raped in custody. Torture is also carried out to extort bribes or to show efficiency in an investigation.

Currently there are no independent investigation procedures in Pakistan to investigate cases of torture. To report cases, victims need to go through the authority responsible: the police. They must then contend with the lower judiciary, which is known to side with the prosecution in such cases. An extreme lack of sensitivity is commonly shown by prosecutors, law enforcement agencies like the police and also the judiciary, particularly the lower judiciary. The damage such practices cause the country and its ability to maintain the rule of law is understated. The development of criminal law jurisprudence has been effectively stunted.

It is in the day-to-day work of the lower judiciary that this underdevelopment is most visible. One example is the practice of the lower court judges of allowing detainees to be remanded in custody with ease, despite clear indication that torture has been used. This practice even fails to make use of the little space available to it in the current criminal law, in which a judge can demand a reason from the investigating agency for handing over the accused to such agencies, rather than keeping them in judicial custody.

Put simply, the practice of torture continues because there is no prohibition against it the domestic law of Pakistan. Police records and procedures are rarely followed, making cases difficult to monitor or legislate. Civil and political parties are not pushing hard enough for the proper implementation of police ordinance and the government has taken few steps, despite promising to reform the police and make it 'people friendly'. Without an honest police system a country has no hope of developing a free and fair rule of law.

Several lawyers, including the office-bearers of different bar associations were also tortured physically and psychologically during their detentions under emergency rule, including Munir A Malik, former president of the Supreme Court Bar Association, who was arrested on 3 November 2007 and provided with unknown medicine during his detainment, which served to poison him. Both his kidneys shut down and he suffered chronic renal failure. Imdad Awan, president of the Sukkur high court bar association, was arrested on November 4 after having a protest meeting with the lawyers and was beaten, denied sleep and denied medicine

for his diabetes and high blood pressure. Two female lawyers, Noor Naz Agha and Jameela Manzoor, were also arrested on November 3 and 5 respectively and were beaten and mishandled. A prominent human rights lawyer, Syed Hassan Tariq, was brutally tortured by the police upon instructions (allegedly from the provincial chief minister in Nawabshah, Sindh Province) after he was arrested on 8 November 2007. He emerged from custody with internal bleeding to his lungs, marks on his back and two ribs fractured.

"In some rural areas the practice of awarding children as compensation through tribal courts has become commonplace"

Children's rights

The biggest threats facing children in Pakistan today come from poverty and the risk of abduction. Pakistan has a very high population of street children, and despite the country's posture as an Islamic welfare state and provisions in the constitution that call for the care of vulnerable minors, there is little done for them. Care facilities such as orphanages are poorly regulated and under funded. Street children often come under the control of the mafia.

Cases of abuse and abduction remain high, particularly those resulting in sex slavery or conversion through forced marriage. Reported abduction cases totalled 418 in the first half of 2008, according to Sahil, a domestic NGO for the protection of children from sexual exploitation, which gathered statistics from 15 newspapers; 339 of those kidnapped were female. A high proportion of abducted children are raped and there were 177 cases reported of the gang rape of minors during this period. Figures were highest for sexual abuse in Punjab province, followed by Sindh.

Female children are still less valued than male children, and many are abandoned and left to die. Under Pakistan law such cases should be reported and investigated as murders, with post mortems conducted, but hospitals and police surgeons report few such requests, and the law allows doctors some room to issue a certificate based on observation rather than an autopsy.

Despite a ruling obliging juvenile prisoners to be kept separately from adults due to the high rate of abuse in prison, there are few facilities for juvenile offenders. There are two in Sindh province (Karachi, Hyderabad) and two in Punjab (Multan and Faisalbad). Minors should at least be kept in separate barracks, but in many places this is not the case. Some children are incarcerated with a guilty parent, but under the law this should only be able to apply to children under the age of six.

In some rural areas the practice of awarding children as compensation through tribal courts has become commonplace. The children will often be used for labour and sexually abused by their new owners, until old enough to be married or sold on, whether into marriage or sex slavery. The new minister of education, Mir Hazar Khan Bijarani, was himself ordered under arrest by former Chief Justice Choudhry in 2004 for his role in a tribal court that tried to use a number of children as compensation in an honour killing dispute.

The movement for judicial independence

> "The 19-month struggle of the lawyers has done much to raise the awareness of Pakistan's citizens regarding the rule of law, and has reinvigorated people power"

Pakistan's judiciary was deposed on 3 November 2007 by the then-chief-of-army staff, through the imposition of a state of emergency. Since coming to power the new civil and elected government has gone back on its written and verbal promises to restore it. Rather than follow through with a constitutional package and a legal restoration process, it has embarked down a road of intimidation and coercion, with the aim of dividing the movement. Willing judges have been 'reappointed' under new oaths, a procedure little different to that initiated by General Musharraf in the first place. A number of judges have refused to comply and remain deposed, including the former chief justice, Iftekhar Choudhry.

Meanwhile, judges who bent to the will of the government back in November and were awarded senior positions remain in those positions. Abdul Hameed Dogar, who was put in place by General Musharraf, is still working as the chief justice. At one point the government of Yousaf Gillani considered reducing his tenure as chief justice to 2009; however, Choudhry should remain in that seat until 2013, according to the constitution. The constitutional amendments made during the state of emergency remain part of the government. The ruling party displays no political will to restore the judiciary to its original formation (of 2 November 2007), before it was tampered with by Musharraf. In protest on this issue, the party of Nawaz Sharif left the coalition in August.

The 19-month struggle of the lawyers has done much to raise the awareness of Pakistan's citizens regarding the rule of law, and has reinvigorated people power. It is a struggle unprecedented in the history of the country. Citizens have witnessed and rallied behind the protests, in which lawyers have been beaten, fired upon, arrested and barred from their profession. Many lawyers have lost their livelihoods and the campaign is now escalating into aggression, as those fighting begin to realise that rule of law is still being used as a political tool, despite the change in governance. Those campaigning continue to be persecuted, and the present government's current agenda suggests that there is little hope that Chief Justice Iftekhar will be restored in the near future.

The lawyers' movement had long been under threat by the government of General Musharraf, whose coalition partners have been able to freely use violence against lawyers, particularly in Karachi, Sindh province, which is mainly ruled by the Muttahida Quami Movement (MQM), a political ethnic party. Brutal attacks during street protests on 9 April 2008 in Karachi claimed the lives of 14 persons, including a child. Six persons were burned alive, of which at least two were lawyers and two others their female clients. Nineteen lawyers went missing for days, before reappearing abused and in bad shape. More than 70 offices were ransacked and burned, including the office, house and vehicle of the general secretary of the Karachi Bar Association. The offices of the Malir Bar Association, 20km away from the Karachi city courts, were burned to ashes. More than 50 vehicles were burned

and smashed, most owned by lawyers. The media and sources close to the bar associations alleged that these attacks on the lawyers, looting, killing, burning and abductions were carried out by the members of the MQM. Prior to this on 12 May 2007 more than 40 persons were killed. The lawyers reported to the media that the attackers were in possession of incendiary weapons that exploded when thrown at a target.

The new government has fostered a relationship with the MQM, now part of the new coalition, with seeming impunity. The governments at federal and Sindh provincial levels have promised to investigate the attack several times, but have not followed through.

"Powerful religious and ethnic groups currently attack media houses, bully their staff and dictate their coverage unhindered due to political ties"

Freedom of the press

Pakistan claims that it has a free press. Before the latest government, there were greater restrictions like the PEMRA (Pakistan Electronic Media Regulatory Authority) Ordinance, through which several electronic channels were attacked and shut down by the authorities due to their coverage of the lawyers' movement. Many newspapers were prevented from publishing, and journalists covering protests were arrested and manhandled by the police. The new government has withdrawn the PEMRA Ordinance and thus its authority over the press, and the situation has greatly improved. However the government has yet to abolish the press and publication ordinance, 1963, which allows the government a variety of chances to intervene in the publication of news.

Powerful religious and ethnic groups currently attack media houses, bully their staff and dictate their coverage unhindered due to political ties. Since journalists feel at risk they tend to avoid coverage of certain topics, and submit to orders from these groups. For example, when one powerful ethnic group attacked lawyers and burned a number alive on two occasions, the name of the ethnic group was omitted from the media coverage. Those attacked and cowed include GEO TV, ARY ONE, AAJ TV, FM103 and almost all of the national newspapers.

There is still self-censorship in the media. Little news is broadcast of trade union activity, or about those who regularly speak against the army or the security forces, particularly about the military operations in Balochistan and the suppression of separatists and nationalist groups. This is in part because of intimidation, but is also due to a narrow patriotic mindset, and a wish to secure the ideological boundaries of the country; for example, editors tend not to cover cases of religious groups attacked by majority groups. Self-censorship is most commonly activated for events that might be seen as against the Pakistani nationalism, Islamic ideology and commercial interests.

During the year 2008 at least eight journalists were killed in Pakistan, including Qari Shoaib Mohammad on November 8 (killed by 'mistake' say security forces); Mohammad Ibrahim on May 21 after a high profile interview of Maulvi Umar, by unidentified gunmen, and Khadim Hussain Sheikh on April 14,

by unidentified gunmen. According to the report issued by the Pakistan Federal Union of Journalists, 33 journalists were killed during the nine-year rule of General Pervez Musharraf.

"Balochistan had been subject to large-scale military operations since 2000"

Military operations

Balochistan had been subject to large-scale military operations since 2000. During this period the Pakistan Army had used gunship helicopters and armoured cars against the civilian population, and the Pakistan Air Force used F-16 jet planes to bombard them. After the formation of the newly elected government in April an announcement was made to halt the operation. The prime minister and parties in the government apologised openly to the people of Balochistan. It has been alleged that more than 3000 persons were killed due to this operation in Balochistan province.

According to local newspaper reports, the military started to use heavy force in Dera Bugti, Bairoon Pat and the border areas of Jafferabad district again, and searched the houses without warrants from the court. During this operation, army officers killed 12 persons on July 19, 23 persons on July 20 and 36 persons on July 24. It is also reported that 30 persons were killed and seventy were injured on July 27 and 28. Villagers claim that the military used chemical gas against the villagers and they were taken to unknown places where they were shot dead.

The *Daily Jang*, the largest circulated newspaper of Pakistan, reported on August 21 that early that morning the army had deployed fresh contingents of troops in the areas of Bareli, Tukhmarh, Jhabro, Sano Gari, Andhari and Nisao Cheera. Seven innocent persons were killed and 18 persons were injured due to a whole day of aerial bombardments in the said areas. After a lapse of one day the military again started bombardments, which killed several, including 13 women and children. The federal minister of interior visited the area on August 20 and announced that the military operation would continue if separatists were protected by the people. The newspaper also reported on August 24 that the military operation began again in the areas of Balochistan and Kohistan-e-Marri.

The North West Frontier Province has been badly affected by the military operations since 9/11 on the pretext of the 'war against terror' and militancy from the Muslim militant groups, particularly by the local Taleban members, who are responsible for the worst of the violence, including hanging, stoning to death and killing of people through suicide bomb attacks. The civilian population is sandwiched between them, and there are reports of heavy casualties. The military operation in Swat valley will have be a year old in November, during the year the government claims that more than 700 militants were killed. According to the official news agency, the Associated Press of Pakistan, over the period of one year 1200 civilians were killed and more than 2000 injured. More than 700,000 persons have been displaced by the attacks from both sides: the military and Muslim fundamentalists.

The province of Sindh as a case study on the prosecution service

Justice Nasir Aslam Zahid, Supreme Court of Pakistan (retired) & Professor Akmal Wasim, Hamdard University, Pakistan

Prosecutorial services are generally governed by sections 492 to 495 of the Code of Criminal Procedure (CrPC), dating back well over a century, with necessary amendments from time to time. In criminal jurisdiction, the prosecution service is also regulated by the Sindh Law Officers (Conditions of Service) Rules 1940 and the Rules for the Conduct of the Legal Affairs of the Government. These rules superseded the rules made earlier in 1923. The change was necessitated on the separation of the Province of Sindh from the Bombay Presidency in 1937. From time to time indispensable amendments have been introduced into these rules.

The two provisions of the Sindh Law Officers Rules pertaining to conduct of the Legal Affairs of the Government i.e. Rules 9 and 10, are important, and exhibit the independence of the prosecutor in the conduct of criminal proceedings. The former rule provides for discretionary power to be vested in the law officers in conducting cases. However, the latter section retains the power of the government to issue any orders or directions to the concerned law officer, who is bound to act on such an order or directions. Rule 10 overrides any other section of the rules, including Rule 9.

The prosecution service throughout had remained under the home department, and had been regulated by the police, from which the public prosecutors and deputy public prosecutors were drawn from the ranks of deputy superintendents of police and inspectors. Under no condition was any officer below the rank of sub-inspector authorized to act as a prosecutor in any case.

In 1985, for the first time the prosecution agency was transferred from the administrative control of the police department and placed under the law department. This exercise took place in two phases: Karachi Division was placed under the law de-

Extract of a paper prepared for the Fourth Asian Human Rights Consultation on the Asian Charter of Rule of Law, on the theme of prosecution systems in Asia, held in Hong Kong from 17 to 21 November 2008.

partment immediately, whereas the rest of the divisions came under the law department from 1 July 1986. The designations of prosecutors working as public prosecutors and deputy public prosecutors were changed to district attorneys and deputy district attorneys on the recommendation of the Sindh Civil Service Commission and were inducted into the Provincial Civil Service. Their terms and conditions were then to be governed accordingly by the Sindh Civil Servants Act 1973, and the rules framed there under.

"The Sindh Criminal Prosecution Service Ordinance 2006 can be termed as the first-ever positive turning point in the political development of the prosecution services in Pakistan"

On 2 April 1994, interestingly, the prosecution service was by another notification transferred back to the administrative control of the police, removing it from the solicitor's department in the law department. No cogent reason was given for the reversal of this policy. The district attorney and other designated law officers were transferred back to the Police Department at the same level as deputy superintendents of police, inspectors and sub inspectors.

Finally, on 4 September 2001 restructuring of the Police Department began, and with it work on a separate prosecution service also commenced. In 2002 the Police Order was promulgated which repealed the Police Act 1861. Prior to the coming into force of the Police Order 2002, the prosecution service was again taken out of the administrative control of the police department and placed under the provincial law department, by notification of 31 December 2001.

In 2006, exercising powers under section 492 of the CrPC, the provincial government placed the services of all district attorneys and other law officers, such as public prosecutors and deputy public prosecutors, to work as prosecutors in accordance with the Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Ordinance 2006. The Rules governing the Appointment and Conditions of Service of the Prosecutors were also notified in 2006. This ordinance has been re-promulgated and kept on the statute book.

This ordinance can be termed as the first-ever positive turning point in the political development of the prosecution services in Pakistan.

The newly-introduced prosecution service is still in its nascent stage of stabilizing as an institution. However, to substantively qualify as an independent institution, the office will have to comply with the international standards of professional responsibility and the essential duties and rights of prosecutors. The Independent Standards of Prosecution place the following responsibilities on prosecutors.

> Prosecutors shall: at all times maintain the honour and dignity of their profession; always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; at all times exercise the highest standards of integrity and care; keep themselves well-informed and abreast of relevant legal developments; strive to be, and to be seen to be, consistent, independent and impartial; always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the

law or the requirements of a fair trial; always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.

The status of the prosecution service in Sindh was described in the *DAWN* daily of 21 January 2008:

> The fate of over 66,000 criminal cases pending in different courts across the province hangs in the balance since the Sindh Criminal Prosecution Service (SCPS) still awaits the appointment of the Sindh Prosecutor-General after the post was vacated when the first Prosecutor-General, Rana Shamim, was appointed as a Sindh High Court judge in the post-Nov 3, 2007, situation. Appointments to other essential posts including additional prosecutors-general, deputy prosecutors-general and assistant prosecutors-general, are also awaited.
>
> The SCPS was constituted by the Sindh Governor on May 13, 2007, with the promulgation of the Sindh Criminal Prosecution Services (constitution, functions and powers) Ordinance 2007. The department was to supervise police and other divisions' investigations into criminal cases in order to ensure the independent prosecution of cases where justice was doubted, the speedy disposal of cases that had been pending for many years and independent and efficient service for the prosecution of criminal cases. In this manner, it was thought, the justice system in the province could be improved.
>
> Mr. Shamim was appointed as the first prosecutor-general but was later elevated as a Sindh High Court judge after the imposition of a state of emergency on Nov 3, 2007, since when the post has been lying vacant. Meanwhile, no inductions were ever made for the posts of additional prosecutors-general, deputy prosecutors-general and assistant prosecutors-general.
>
> Ishaq Lashari, the SCPS secretary, told Dawn that the induction to these posts, as well as to the posts of district prosecutor, were in progress. "A commission, which is headed by the provincial chief secretary, will appoint the Sindh prosecutor-general and has called applicants in this regard," he said. "Meanwhile, a requisition has been sent to the Public Service Commission for the appointment of nine additional, 27 deputies and nine assistant prosecutors-general to deal with criminal cases in the Sindh High Court, the Federal Shariat Court and the Supreme Court of Pakistan."
>
> According to Mr. Lashari, 27 district public prosecutors would be appointed to prosecute cases before the province's district and session's courts, while 93 deputy district prosecutors would be appointed for assistant and additional session's courts. As many as 214 assistant district prosecutors would be appointed for the courts of the judicial magistrates.
>
> He told Dawn that 63 deputy district prosecutors had already been appointed while inductions for the remaining deputy district prosecutors, assistant district prosecutors and district public prosecutors were in progress. Mr. Lashari added that district public prosecutors would be appointed for prosecution in the 18 special courts in the province, including anti-terrorism courts, anti-corruption courts and anti-drugs/narcotics courts.
>
> 'Low conviction rates'
>
> The SCPS secretary pointed out that the country's conviction rate was very low, 11.66 per cent in Pakistan and 2 to 5 per cent in Sindh, because of inefficient investigations conducted by incompetent policemen and unskilled prosecutors. The conviction rate in other countries was much higher: 37.4 per cent in India, 39 per cent in South Africa, 90 per cent in

the UK crown courts and 98 per cent in the lower courts, 85 per cent in Australia, 85 per cent in US federal courts and 87 per cent in state courts, and 99.9 per cent in Japan.

Saying that the SCPS was currently lacking personnel in key posts, Mr. Lashari predicted that its performance would take off once the process of making appointments was completed.

The office of the Criminal Prosecution Service Department is housed in a portion of the old KDA building, Sindh Secretariat No.3, but the space available does not fulfill the requirements. According to the additional secretary of the SCPS, Iqbal Zaidi, offices have been acquired in the old State Bank Building, Sindh Secretariat No.6, and the renovation work being carried out there will soon be completed.

According to Dawn's sources, it is mandatory for the police and other investigation wings to send the Sindh prosecutor-general a copy of an FIR within 48 hours of it being registered. The SCPS is authorized to recommend strict departmental action against officials found responsible for registering defective or fabricated cases, and the department may also withdraw such cases.

"Due to elitist political growth, more and more reliance was placed on the police in the past so as to consolidate power"

The most recent figure available regarding jail inmates in the Province of Sindh as of 21 October 2008 (courtesy of the Legal Aid Office) are that the total number of detained is 18,162. Out of these, male convicts are 2266 and under-trial male prisoners are 15,634. There are 43 female convicts, and 133 under-trial female prisoners. There are 38 babies suffering incarceration along with their mothers. The jail population also includes 228 condemned prisoners, including one female; 32 male and one female detenues, and three male civil prisoners.

The problem of people snatched by the criminal justice system (victims as well as accused) does not end with investigations; another ordeal in waiting is the prosecutorial phase in the courts. The interconnections between officials further aggravate injustice. Due to elitist political growth, more and more reliance was placed on the police in the past so as to consolidate power. This further corrupted the police and in the process destroyed the very foundations of investigation and prosecution. The police reputation has declined to a point where even well connected and respected citizens are wary of dealings with them. They perceive police not as an instrument of the rule of law, but as a corrupt, militaristic, insensitive and a highly politicized force, operating mainly to guard the interests of the powerful.

An Asian Development Bank soft loan to Pakistan is de facto primarily responsible for the Access to Justice Program, in which the state is engaged "in improving justice delivery, strengthening public oversight over the police, and establishing specialized and independent prosecution services". In this we see the Police Act 1861 being replaced by the Police Order 2002 and new laws to constitute and provide for the functions of independent prosecution services in Pakistan, thus, divorcing prosecution from the investigative arm of the police. Arguably, more valid grounds can be cited for the creation of an independent prosecution service in Pakistan, being article 175(3) of the constitution, which mandates that "the judiciary shall be separated progressively from the executive within three years

from the commencing day". Thereafter, there was the appeal decided in *Govt. of Sindh v. Sharaf Faridi* (PLD 1994 SC 105), and finally, article 37(i), which notes that: "The state shall decentralize government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public."

"No more than five per cent of victims and complainants in cases of murder, armed robbery and other heinous crimes that take place all over the province get justice on account of the ridiculously low rate of conviction"

At this crucial juncture with the introduction of a comprehensively new and progressive prosecution system, what needs to be underscored is the difference in lawmaking and the law's implementation. Legislation per se does not solve problems; it is implementation which is the litmus test of good government, for it is in the implementation that the purpose and the objective of the legislation on the one hand, and transparency and accountability of the administration in the law's application on the other come under scrutiny. How far the new prosecutorial services are able to balance the rights of the accused vis-à-vis the victim will determine the elements of good government in the scheme's application.

Article 37(d) of the Pakistani constitution requires the state to ensure inexpensive and expeditious justice. The term "access to justice" in relation to crimes is generally correlated only to rights of the accused. But looking at the extremely low conviction rate in Pakistan, which hovers around 10 per cent (and in Sindh is less than five per cent), one is compelled to ask whether complainants and victims have "access to justice": is the judicial system fair to those against whom crimes are committed?

If in a specified period in any given area a thousand rapes are committed, it can be safely presumed that a very large number of them are not even reported to the police; perhaps a hundred will reach the formal judicial system, and with the conviction rate at less than five per cent, the total number of perpetrators found guilty of their crimes may be no more than five in that thousand. In reality, it has been reported that during the last four to five years not a single gang rape case has ended in conviction in Sindh. Similarly, no more than five per cent of victims and complainants in cases of murder, armed robbery and other heinous crimes that take place all over the province get justice on account of the ridiculously low rate of conviction. There is something radically wrong with our judicial system that is responsible for this pathetic state of affairs! And while the judiciary has to take some blame for this failure, it is not the only player in the system. Apart from the judiciary, the other main components are the police, (as the only investigation agency), the prosecution (which until recently was the police), and the prisons. Unless all these components work smoothly the results will always be disappointing.

It may be remarked that generally it is the poor, children, women, the have-nots, and vulnerable sections of our countries that don't get justice. Justice may seem to be open to all, but only in the same way as Harrods or Selfridges is "open to all": the doors are poised to welcome only those with the requisite financial stature. The black hole of such "unmet legal need" exists

not just with reference to a lack of access to formal courts, but embraces interaction with police, the prosecutors and the prison authorities. Lack of judicial access is compounded by profuse ignorance of legal rights. And scarce judicial resources are concentrated in urban areas to the alienation of the masses in rural sectors.

"The UK with a population of 60 million has some 30,000 lay magistrates alone, whereas 165 million Pakistanis are served by barely 900"

Access to justice needs to be given the same priority that is given to nuclear power development or the military budget in India and Pakistan. As noted earlier, the Asian Development Bank provided Pakistan with a loan of USD 350 million under an access to justice development initiative. As a result of this scheme, there has been considerable additional work on court buildings, furnishings and library stocks, but there has been no change in the quantity and quality of justice being dispensed. The prosecution has not been a beneficiary, nor have personnel numbers. The United Kingdom with a population of around 60 million has some 30,000 lay magistrates alone, whereas 165 million Pakistanis are served by barely 900 magistrates. The magistrates handle and look after around 75 per cent of the total criminal cases that enter the formal criminal justice system and even this small number is not supported by an acceptable prosecution service. Furthermore, the pool of candidates from whom the magistrates and judges emerge is also shallow. In Pakistan, legal education remains in the doldrums and the questionable quality of law graduates is passed onto the bench.

Contrary to popular belief, formal courts are not the ones primarily responsible for the lack of access to criminal justice. The real cronies are the seemingly behind-the-scene players with whom an aggrieved person (including the complainant or the victim) will first interact. After all, the dispensers of justice depend on the facilities of justice. In this context, it is the police (as the investigation as well as the prosecution agency) that work as the main filter mechanism between individuals (i.e. complainant/victim and the accused). The more cumbersome or troubling it is to file First Information Reports and the more police harassment and bribery that exists, the more cynicism is associated with the processes to follow.

Article 2 of the International Covenant for Civil and Political Rights requires the prosecution service in any criminal jurisdiction to be viewed and assessed through the kaleidoscope of human rights. Whether the prosecution service fulfils the requirements of article 2 depends on its capacity to protect the fundamental rights of the main parties, i.e. the complainant/ victim, the accused, and also the witnesses. The Sindh enactment of 2006 creating the Sindh Criminal Prosecution Service should be welcomed as a major step in the right direction. The new law *inter alia* visualizes the creation of an independent prosecution service that will be free from executive control and capable of protecting the rights of both the complainant/victim and the accused. As observed earlier, only time will tell whether or not this law will be implemented, but obviously vested lobbies and obscurantist forces will employ all their powers and tactics to make it extremely difficult to enforce.

60 Years Universal Declaration of Human Rights: Dignity and justice without rule of law?

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