article 2
of the International Covenant on Civil and Political Rights
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fifth consultation on the
Asian Charter for the Rule of Law

concerns about the legal profession *in Asia*

including articles on

Bangladesh · Indonesia
Pakistan · Philippines

article 2 of the International Covenant on Civil & Political Rights:

"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"

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FIFTH CONSULTATION ON THE
ASIAN CHARTER FOR THE RULE OF LAW:
CONCERNS ABOUT THE LEGAL PROFESSION IN ASIA

Dealing with difficult problems through dialogue

Basil Fernando, Director, Asian Human Rights Commission & Asian Legal Resource Centre, Hong Kong

The Asian Human Rights Commission held the fifth consultation on the Asian Charter for the Rule of Law in Hong Kong from 20 to 24 April 2009, around the theme of concerns about the legal profession in Asia.

From the intense discussions among the participants of 16 countries and territories, what became clear is that the struggle for the rights of lawyers simply to perform their jobs and fight against impunity is in many places at an extremely critical and dangerous stage. Those people who have joined the fight and are faced with considerable difficulties even in their mundane day-to-day activities carry in themselves very deep frustrations and some suffer from depression. Such feelings affirm the honesty and dedication of those persons who are engaged in these efforts.

Under these circumstances, one of the first steps towards arriving at some more enlightened ideas on how to deal with our problems is to openly admit them and to articulate our frustrations. Often there is a feeling that to admit difficulties or even to talk about them is in some sense a betrayal to the cause, or a sign of weakness. However, when fellow travelers share their frustrations and do so in an effort to search for common solutions, we can join together on a path towards greater self-discovery, as well as greater awareness of what needs to be done to address the obstacles to justice in our societies.

Hearing one's own voice articulating inner feelings about the difficulties we face, one communicates with others and also oneself on the deeper aspects of the problems that usually we only consider superficially. The very fact that people gather together and find space in which to talk is itself liberating.

Associated with opportunities for open speech on matters that are usually kept inside is the need for documentation to share the ideas that emerge with others who may not be directly involved. Proper documentation is another liberating act, hence

this edition of *article 2* ('Concerns about the legal profession in Asia', vol. 8, no. 2, June 2009). Sharing of documentation in turn encourages more dialogue. This is not the type of documentation that is made for the purpose of proving a case or building evidence that could one day be presented in a court of law. When in very difficult situations such as those in which many of us are working around Asia justice is still a faraway dream, a more important type of documentation is that which will create opportunities for people to come to terms with what is happening in their societies, and create opportunities for at least some sections of those societies, as well as people abroad, to understand these problems in greater depth.

"One of the first steps towards more enlightened ideas on how to deal with our problems is to openly admit them"

The fifth consultation towards an Asian Charter on the Rule of Law was organized according to this understanding of dialogue and documentation, and we hope that it will have motivated participants to undertake similar exercises within their own countries and communities. It is critical that around the region we create more opportunities for people who face very difficult human rights and legal problems to talk things out and then find ways to document their ideas so as to move towards ways to solve these problems.

Ultimately, resolving difficult problems depends on political will. Political will is not a thing that develops in a vacuum. Nor does it materialize from above, in isolation from what is going on in the society. Even in the most authoritarian states, ordinary citizens articulate their problems in large and small ways. We need to take the trouble to document and disseminate this dialogue if we wish to create the political will required to deal with the many difficult problems that we face today throughout the region.

Some participants in the consultation

Concerns about the legal profession in Asia

Asian Human Rights Commission, Hong Kong

From 20 to 24 April 2009 the Asian Human Rights Commission organized the fifth consultation on the Asian Charter for the Rule of Law in Hong Kong, on the theme of concerns about the legal profession in Asia. This special edition of *article 2* ('Concerns about the legal profession in Asia', vol. 8, no. 2, June 2009) contains just a little of what was discussed and agreed upon among the 27 participants from Bangladesh, Burma, Cambodia, Canada, China, India, Indonesia, Japan, Korea, Mongolia, Nepal, Pakistan, Philippines, Sri Lanka and Thailand, as well as from Hong Kong itself.

The Asian Charter for the Rule of Law is a unique initiative of special importance. It is planned as a template for the rule of law that Asian states could use in the future. To formulate such a charter it is imperative to understand the real issues that adversely affect state institutions in the region and impede the rule of law, and to arrive at some consensus on certain basic issues that need to be identified and articulated in the charter. With this intent, prior consultations addressed themes of judicial corruption and executive control of the judiciary; delays in adjudication; and prosecution systems in Asia.

It is impossible to protect, promote and fulfill human rights without a properly functioning justice mechanism. One of the essential components of a justice mechanism is the legal profession. In most jurisdictions, legal practitioners assuming different roles—as lawyers, prosecutors and judges—make up around two thirds of the entire justice delivery system. In other words, the quality of the legal profession often determines the quality of the entire system. An active legal profession can play a critical role in shaping or altering the destiny of a country, and particularly the enjoyment or denial of human rights among its citizens. Human rights organisations, victims and perpetrators all equally depend upon the services of lawyers. Lawyers play a pivotal role, be it in safeguarding or contributing to abuses of fundamental human rights; however, the importance of this role is often overlooked.

Ideally, lawyers can where necessary criticise the law or the way in which it is practiced in order to make improvements. But ideals are often far from reality. In Asia, lawyers along with other citizens are often denied rights to free expression, even on strictly professional matters. In some jurisdictions, political allegiances take primacy over principles of law and justice. In jurisdictions where the development of jurisprudential theory is stunted, the role of the legal profession in social progress also becomes negligible.

"Where the development of jurisprudential theory is stunted, the role of the legal profession in social progress also becomes negligible"

Some issues put forward at the start of the consultation

1. Public perception of lawyers: In most countries the public has a negative perception of lawyers. In many parts of Asia the modern legal profession and laws have their origins in colonial governments and lawyers are sometimes identified as part of a heritage of collaboration with these regimes and with the colonial-style elites that emerged after independence. In some countries where lawyers were once respected for their role in leading independence movements, the profession has lost respect. In many countries lawyers are accused of causing delays in justice, which in countries like India can cause trials in ordinary cases to run for ten or more years. They are accused of adjourning cases with intention to claim more fees. Often adjournments are sought by lawyers and granted by courts where both the court as well as the lawyer is aware that the case will not be taken up on the date to which it has been adjourned.

2. Lack of accessibility and transparency: While in a few Asian countries professional habits have developed to ensure proper consultations between lawyers and clients, keeping of records and transparency, in most countries such concepts do not exist. Lawyers do not inform their clients about what is happening in court. There are few functioning professional bodies to maintain discipline in the legal profession or investigate complaints. In countries where professional bodies exist, they generally fail to do their jobs. There is a general view that lawyers will not conduct proper inquiries into allegations against one of their own.

3. Threats and attacks on the legal profession: In recent years the restrictions imposed on lawyers have increased. Governments commonly intimidate and threaten lawyers who appear in human rights cases, or those who represent their political opponents. Killings, physical attacks and publicity campaigns against lawyers have become commonplace in some countries. The need for strategies to deal with these types of threats has grown. Lawyers have been killed and some have to carry weapons for their defence or hire private guards. Professional bodies can do little if anything to defend their members. In some cases professional bodies even turn against their own where lawyers appear for suspected terrorists. The scale of threats and attacks on lawyers has not been properly discussed, documented or brought into focus.

4. Limitations imposed by different parts of the system:

"When a justice system is geared towards injustice it is not possible for lawyers to perform their functions"

a. Police: The police are a critical part of the complaint receiving and investigating system. When the police function badly, lawyers face serious impediments in discharging their professional obligations. For example, if the police refuse to take complaints or to investigate crimes, there is very little that lawyers can do to pursue their cases. Additionally, police may be eager to develop lawyers as collaborators, which is welcomed by some lawyers. When these lawyers are favoured, it creates problems for others in the profession. In many countries too lawyers do not have the right of representation at police stations. Confession statements are extracted from detainees in the absence of lawyers.

b. Prosecutors: In many countries, prosecuting agencies refuse to acknowledge lawyers and afford them their professional privileges. While some lawyers may have special access to prosecutors, others get shut out. Petitions by lawyers to prosecutors' offices often go unanswered. Prosecutors fail to give reasons for not prosecuting or taking up appeals where warranted.

c. Judiciary: Arbitrary behavior among judges often intimidates lawyers. Contempt of court laws are misused. There are open and often proven accusations of corruption against some judges but it is extremely rare for any one of them to be punished for corruption. This has a heavy demoralising effect upon lawyers. Those issues of public importance that should be central to debate are among the least discussed in most jurisdictions.

Some issues that emerged during the consultation

It was agreed that lawyers across Asia are facing very serious problems arising from the low priority given to the administration of justice in the region. Although among ordinary citizens there is a visible growth of consciousness about their rights and a greater willingness to assert these rights that has accompanied educational and cultural change, this is coming into conflict with the low priority that states assign to their justice systems. As a result, authorities increasingly resort to violence to suppress people who demand justice, creating further social unrest and conflict. State policies placing top priority on improvements to the administration of justice could lead to greater social harmony and overall advancement of Asian societies, economically, socially and culturally. The backwardness of most states in the region when it comes to administration of justice needs to be challenged and addressed.

When the administration of justice is defective, lawyers themselves become victims of the system. They cannot play the role that they are supposed to play in protecting the rights of individuals and looking after the needs of their clients. When a justice system is in fact geared towards injustice it is not possible for lawyers to perform their functions as provided by law. Under these circumstances, some lawyers may participate in perpetrating the very injustices that have become characteristic

of the system, while the majority of lawyers will feel helpless and compromised. Under these conditions, self-confidence falters and demoralisation sets in. At the same time, the notion in wider society of the role of lawyers as protectors of individual rights is lost.

"Bad policing is a matter of social policy"

Some specific problems identified during the consultation included the following:

a. Police subverting justice

Police around Asia subvert justice in many ways. These include: failure to receive and investigate complaints; discouragement of persons from making complaints into crimes and violations of rights; incorrect recording of complaints or deliberate distorting of complaints to make it impossible for complainant to obtain justice; making of compromises with complainants to protect the perpetrators of crimes for various reasons; and, arrest, detention and investigation, if any, for profit.

Sometimes people with political or economic power and influence pressure the police to favour their interests; sometimes the police voluntarily favour those with monetary or other clout against ordinary citizens. Police also fail to investigate because of lack of training, or lack of money resulting in lack of equipment and transport. However, it should be noted with caution that this lack of training and money is often part of an overall strategy to keep the police corrupt, inept and badly paid. Inefficient policing is often used as a method of social control, by allowing officers to terrorize the population.

To deal with these types of problems, it is necessary to go into the social and political shape and expectations of a policing system and its milieu. Traditionally, most Asian societies used disproportionate and collective punishment as a means of social control. Many Asian societies are yet to see any significant transformation to more modern modes of thought and practice in their policing and punishment. Despite modern arrangements, there has been no displacement of old ideologies for social control, which have prevailed for thousands of years.

Ultimately, bad policing is a matter of social policy. As the development of a policing system based on the rule of law and democratic norms and standards may be perceived as disadvantaging those who benefit under present conditions, there is a tacit consensus to deny possibilities for change.

b. Lawyers also subverting the system for private gain

The legal profession can function effectively only where the rule of law is established to a minimal extent through laws and legal procedures. For the legal profession to function properly, it is essential that lawyers themselves as well as the society as a whole clearly identify the obstacles to the establishment of the rule of law. Yet, often lawyers instead of exposing and fighting against abuse adjust to and profit from an environment where abuse of the law is the norm. Such lawyers connive in the destruction of the legal profession itself.

"When lawyers stop representing clients and instead act as brokers for bribes, vested interests take over"

In many countries lawyers have developed a subculture to take advantage of the defective legal process for personal gain. Real or perceived connections with members of the judiciary are used to get extra money from clients and sometimes even from the opposing side. For instance, the son-in-law of a superior court judge in one country gets exorbitant amounts of money by creating the impression that through his connections he can get cases favourably and promptly heard. This is one way in which equality before the law is denied to citizens. The concomitant effect is a general decline in public faith in the work of the judiciary and a perception that judges are corrupt and not impartial, which in turn fuels further wrongdoing.

These sorts of practices also go on among prosecutors. In some countries, prosecutors' posts are auctioned, indicating that prosecutors believe that they can make more money with a higher position. Such prosecutors will easily compromise the rights of litigants.

Corruption among the police and judiciary is common in many Asian jurisdictions. In these places lawyers are called upon to act as intermediaries between clients and police or clients and judges. When lawyers stop representing clients and instead generally act as brokers for bribes, the very nature of the administration of justice is altered. Instead of an open process, it becomes a secret one in which vested interests take over and in which there is hardly any room for the proper practice of law.

c. Delays

Systemic delays indicate the absence of proper regulations and mentalities for the improvement of adjudication. Delays in hearings benefit not only the police: lawyers, judges and prosecutors may all benefit from delays in various ways. Many lawyers treat delays as a means of receiving fees from clients for long periods. As such, the lawyers of opposing parties may compromise to postpone cases.

In common law countries one of the major factors that contributes to delays is abuse of the adversarial process. An underlying impression built into legal practice and adjudication is that it is possible to succeed in cases on behalf of one party by subverting the legal process in one way or the other. There is a triumphant attitude about the beating of the system. Lawyers unscrupulously use the competition between parties to outdo each other in order to score a victory by any means. For example, in the course of long delays vital witnesses may pass away, disappear, lose interest or be unable to stay involved. Witnesses' memories may fail, judges may be transferred several times, and evidence may be distorted or lost, all contributing to further delays. When these sorts of things become part of the fabric of judicial process, it is impossible even for an honest lawyer or judge to influence the course of trial in the interests of justice.

The development of regulatory frameworks for trial processes with adequate resources for their enforcement is essential to the ensuring of justice and the proper working of lawyers within acceptable norms and standards of their profession. Such a regulatory framework needs to be accompanied by proper ethical standards cultivated on the part of all those involved in the administration of justice. However, an ethical framework detached from a proper regulatory framework, lacking sanctions for those who abuse the process, is of little use. Where a system is geared to the rewarding of the unscrupulous there is no point in educating for ethics alone. Once again, the matter comes back to the providing of adequate funds for the administration of justice. Study of budgetary allocations for justice systems and the making of recommendations for the improvement of funding is important in working towards the elimination of delays and the corresponding improvement of the legal profession.

"Judges and lawyers rely on backward interpretations of legal principles to justify impunity and the abuse of judicial process"

d. Interpretation of jurisprudence to justify impunity

Often judges and lawyers rely on backward interpretations of legal principles to justify impunity and the abuse of judicial process. There is justification for use of torture as necessary to discourage criminals. The abuse of emergency and anti-terrorist legislation is also often justified as necessary for national interests and security. Courts have refused to allow legal challenges to this sort of legislation. International law is criticised as infringing on national sovereignty. Serious opposition is expressed directly and indirectly in many Asian countries to the inclusion of international norms and standards in domestic legal affairs. The abuse of arrest and detention is used to silence political opposition on various pretexts. Actions against state agents who have violated the law or infringed on human rights are discouraged as threatening national security and are even characterised as a form of ingratitude towards officers who have difficult jobs to do. Complaint against powerful persons is discouraged lest it open floodgates for many more complaints. Freedom of expression itself is also often treated as a subversive notion.

e. Threats to lawyers

There are increasing threats to lawyers who practice with integrity, particularly when they are opposed to state agencies and abuses of power. In the Philippines, for instance, 22 lawyers have been killed as a result of their work since 2001. The house of a Sri Lankan lawyer who appeared in human rights and corruption cases was recently attacked with grenades. A defence ministry website described such lawyers as traitors for defending persons accused of terrorism. Faced with such threats, lawyers like other citizens lack avenues for legal complaint and self-protection. Their professional associations also often prove ineffective in defending their members and may even distance themselves from them in order to avoid negative repercussions.

> "Many 'traditional' methods for dispute settlement are feudal systems that were organised to preserve the authority of ancient elites against the rural poor"

One of the rare examples of a legal community that has fought hard at great risk to preserve the independence of the judiciary and the integrity of the legal profession is that of Pakistan, which struggled under the banner of the Supreme Court Bar Association for over two years around the issue of the dismissal of the Chief Justice Iftekhar Choudry, who has now once again been reinstated in his office due to the massive protest movement that the lawyers spearheaded. The lawyers' movement of Pakistan needs to be studied closely for the purpose of developing proper strategies with which to fight for the rights of the lawyers.

f. Parallel systems of dispute settlement

In several countries, dysfunctional legal systems have encouraged the emergence or strengthening of parallel systems for settling disputes. Sometimes they have taken the form of so-called traditional systems, such as village courts. Many "traditional" methods for dispute settlement are in reality feudal systems that were for centuries organised to preserve the authority of ancient elites against the rural poor. Landlords and their advocates were the beneficiaries of these systems. The reintroduction of their practices runs contrary to the basic freedoms of all, women in particular.

Besides these methods alternative dispute systems are also being pressed into use in dealing with criminal cases. These are not based on legally accepted principles, but in Asia are mostly used to enforce the will of the powerful against the weak and poor in order to make compromises and strike deals so that perpetrators escape punishment. On the other hand, alleged offenders coming from that same part of society find themselves subject to punishment in the form of faked encounter killings or cross firing, and vigilante killings, where the accuser, judge and executioner are one and the same: the police, military or paramilitary forces.

g. Undermined judicial independence

The rights of lawyers depend upon the acceptance and perception of independence of the judiciary. In many countries this independence has been undermined or totally rejected. In some countries the judiciary is subordinate to the executive and is in no way allowed to make any judgment against the interests of the executive.

In other countries the constitution or subordinate laws strictly delimit judicial power. Judicial review of executive actions is often very limited. By interference in the appointment, promotion and transfer of judges the independence of the judiciary is not only undermined, but also the perception of the judiciary as independent and concerned with public interests is greatly diminished. Interference also comes through various forms of politicisation. On issues in which the state has an interest, the judiciary is often expected to favour the state and where a judge refuses he or she may be punished, either directly or indirectly.

Under these circumstances, judges can become antagonistic towards lawyers who insist upon proper exercise of legal process and may target these lawyers for reprisals. Judges may disregard the procedural rights of litigants and lawyers. When procedures are abandoned it is virtually impossible for a lawyer to pursue a case before court. The outcome of a case no longer depends on procedure. The lawyer may feel confused about what advice to give to clients.

> "When contempt of court is used as a form of censorship the beneficiary is the executive, which wants to curtail individual freedoms through misuse of the judiciary"

h. Censorship of discussion about professional integrity

Lawyers exercise self-censorship about their professional obligations as well as their difficulties. Their professional associations rarely engage in open and honest discussions about the scale and type of systemic obstacles they face in the course of their ordinary work. Lawyers have not among themselves publicly acknowledged the scale of corruption, delays, loss of judicial independence, procedural defects, and other problems affecting their practices.

Sometimes threat of contempt of court is also used to discourage such discussions. Unscrupulous use of contempt of court powers obstructs discussions on the judiciary. Some judges use contempt of court to prevent the discovery of their own defects. When contempt of court is used as a form of censorship rather than as intended, to protect the administration of justice, the beneficiary is the executive, which wants to curtail individual freedoms through misuse of the judiciary. The judiciary alienates itself from the public and also from lawyers. Other methods to stifle public discussion are used too. The media also very rarely takes up such problems relating to the administration of justice in a sustained and serious way, both out of fear of the consequences and lack of understanding of the issues.

i. Militarisation

In some countries of Asia, there have been military regimes in power for long periods. In others although the military has not become the front political authority, it has obtained extraordinary influence over the political process from behind the scenes. In some countries, civilian political regimes are removed on the basis of military interests and objections.

A common excuse for military dominance is the need for the army to address internal conflict. In fact, the effect of military dominance is to ensure the continuance of violent internal conflict, by denying alternative means for solving important national problems. Disputes that emerge in the normal course of political life, which could be resolved via dialogue, instead turn into bloody conflicts for want of serious and genuine attempts to resolve them. In many countries, small disputes have been intentionally used to inflame larger ones. In others, prolonged neglect of internal discontent has resulted in armed resistance.

Instead of attempting to resolve these conflicts, states have resorted to the use of emergency laws and anti-terrorism laws in order to suppress them. In recent years, powers under

antiterrorism laws have enlarged to an extent that today they can be used to deny all basic rights to citizens. In addition to the legal expansion of powers granted under national security laws, there are also extralegal powers that the armed forces, the police and paramilitaries develop on their own in the course of national security operations. For example, no antiterrorism law may directly authorize disappearances; however, by utilizing provisions for prolonged detention in places that are not usually authorized for the purpose, the possibilities for disappearances are greatly expanded. Records allowing judicial authorities to examine what has happened after the fact also are less likely to be kept.

> "When civilian policing is marginalised, the power of courts and lawyers also is significantly reduced"

The increased militarisation of ordinary legal and criminal process displaces and diminishes civilian policing, which is that part of the system over which the judicial agencies are supposed to have greatest control. When civilian policing is marginalised, the power of the courts and of lawyers also is significantly reduced. The judiciary may end up as nothing more than an onlooker to the gross violation of human rights, in which event lawyers are also helpless to perform their task of safeguarding individuals' interests.

j. Extremist groups

In Asia, there are ruthless groups acting without any regard to the rule of law or democratic institutions in the pursuit of their aims. In fact, these organizations view the legal and the judicial processes as things that must be undone in order to obtain their objectives. They also consider all independent agents of civil society as their enemies. They try to control public expression and opinion to create the impression that their extremist views are popular. They transform cultural and religious discourse into pseudo-ideological forms that favour them. The control of public opinion, knowledge and information becomes the target of both the state as well as these non-state actors, either under the rubric of terrorism or counter-terrorism. Attacks on the law and courts come from both sides.

A secular discourse based on legal principles, norms and standards is a type of human discourse, rational and consensus-based, which is contrary to the interests both of militarised states and their extremist enemies. Therefore, understanding of the threat that this conflict between the forces of militarism and terrorism poses to humanity as a whole needs to be brought out more forcefully if we are to be protected from its possible consequences.

Some recommendations that emerged from the discussions

a. Governments must provide adequate funding for administration of justice

If there is no proper allocation of funds for the administration of justice, much of the talk about the problems faced, including those of lawyers, cannot be resolved. Work needs to begin to make

this issue a top political and social priority. Human rights organisations together with lawyers' groups should carry out studies on budgetary allocations and contribute to the building of a public debate on this matter. If these groups initiate discussion it is very likely to attract public attention, as the public is the victim of the bad administration of justice that exists now. If public interest is developed and sustained, it will not be easy for political parties to ignore.

> **"Corruption control agencies are mostly showpieces and have not been designed to be effective; on the contrary, most efforts are directed towards subverting their objectives"**

b. Effective mechanisms to eliminate corruption are essential

While there are corruption control agencies in many countries, they are mostly showpieces and have not been designed to be effective. On the contrary, most efforts are directed towards subverting their objectives. Again, we need to begin sustained advocacy on the building of effective mechanisms to eliminate corruption, beginning with studies and analyses of how useless institutions have been created across Asia instead of ones actually intended to succeed. This requires lawyers and human rights groups to do research, opinion making, lobbying and creating of opportunities for public debate. And again, where the advocacy is done seriously it is likely to attract media and public support from which pressure can be built for action.

c. Lawyers' right to represent their clients during investigation must be recognised

There are several countries in Asia where lawyers' right to represent their clients during arrest and detention has been established in law and in some it is even recognized as a constitutional right; however, in many others there are no laws to that effect. In some countries, there is a claim that this right has been established through practice, although there are no legal provisions to that effect.

This situation is not satisfactory, as there is hardly anything that a lawyer can do if refused access to a client or if subjected to police harassment. Uniform practice of ensuring that lawyers have access to clients when in detention is essential. Yet lawyers' associations and human rights groups have not taken up this issue as a matter of great importance. Therefore, studies, publications, and public education are again needed to draw attention to the problem and to make it a priority for local and international lobbying.

d. Exposure of the extent of threats to lawyers

Threats to lawyers engaged in human rights and other sensitive cases in Asia need to also come into the centre of public debate in the region and internationally if further incidents are to be prevented. Work in this regard should include thorough documentation on specific cases and its dissemination. Campaigns on this issue must be persistent and especially be aimed at breaking the apathy among lawyers themselves when colleagues are exposed to danger because of merely engaging in their professional activities in accordance with the law.

> When the judiciary falls prey to an overwhelmingly powerful executive branch, the bravery of individual judges in isolated cases will do nothing to ensure justice overall

e. How to stop lawyers being reduced to the role of brokers for bribery

One of the recurring themes of the discussion was how lawyers are in many places reduced to the role of brokers in negotiating and carrying bribes to judges and lawyers. To rescue the administration of justice from degeneration into dealings that betray all the principles of justice and fair play, and also to save the dignity of the legal profession, it is essential to work towards elimination of this practice. Some of the things that could be done, apart from putting judicial corruption into the public spotlight, include: documenting cases of bribe negotiating, carrying and taking, and putting these on the public record; encouraging lawyers' groups, the media and civil society organizations to develop their strategies to expose and report on such practices; and, better educate judges and lawyers on the problem and its consequences.

f. Education on international law concerning anti-terrorism and emergency regulations

There have been enormous developments in international law on the limits to which emergency and anti-terrorism laws can suspend ordinary legal process. This jurisprudence has not yet received much attention in the region. Therefore, effort needs to be taken to promote greater understanding of it and how it can be used domestically, including through publications and websites, and translations into local languages; incorporation into legal and civic education; popularising of this jurisprudence so that there is wider public awareness of it and its importance; and, the undertaking of legal actions for the purpose of making such jurisprudence part of the domestic law.

g. Struggles for judicial independence should be based on understanding of the complex problems facing countries in Asia

The traditional concepts of ensuring judicial independence through security of tenure, adequate salaries and the like are valid in circumstances where systems for the administration of justice are basically working. Where systems are thoroughly defective, it is essential to emphasise several other prerequisites for independence of the judiciary, including that there cannot be complacency about the role of the judiciary; that the judiciary is too precious to be left to judges; that the behaviour of a chief justice in a given jurisdiction reflects the behaviour of his or her institution; and that accountability is as important as independence.

When the judiciary falls prey to a political system under an overwhelmingly powerful executive branch, the bravery of individual judges in isolated cases will do nothing to ensure justice overall. Judges must therefore also contribute to the social discourse on this matter by frankly and openly stating the problems that they face in the discharge of their duties. To be knowingly compromised under these circumstances is itself a

betrayal of the judicial function. To this end, freedom of expression is critical for judicial independence, as no progress on this matter can be achieved without free and frank discussion of all the problems involved.

> "Powers to sanction persons for contempt must be strictly defined and delimited and above all must be monitored through ever-vigilant public interest groups and the media"

h. Contempt of court laws must be tightly delimited through statutory provisions

To prevent abuse of contempt of court, the powers granted to judges to sanction persons for contempt must be strictly defined and delimited and above all must be monitored through ever-vigilant public interest groups and the media. Modern communications can provide opportunities for alternative ways of exercising freedom of expression to undermine the abusive use of contempt, as the power of contempt only extends to the boundaries of a particular territory, which are overcome through modern communication techniques.

i. Some specific recommendations from Sri Lankan participants

The failure of the Sri Lankan president to constitute the Constitutional Council amounts to a serious violation of Sri Lanka's constitution. This failure directly impacts on judicial independence as it removes the constitutional safeguards against abuse of discretion. Therefore the president is urged to appoint the Constitutional Council, and to this end, donors should tie aid given to Sri Lanka to the appointment of the council and independent commissions. There must also be a widespread public awareness campaign on the importance of the Constitutional Council and independent commissions.

The failure of the government to arrest the attackers of members of the legal profession and to investigate effectively the attack on the residence of J C Weliamuna, attorney-at-law, and on the office of Amitha Ariyaratne, attorney-at-law, have been compounded by the publication on the defence ministry website of inaccurate information about the cases and names of lawyers appearing for detainees under the Prevention of Terrorism Act and the Emergency Regulations. Therefore, representations on these issues need to be made to the president and attorney general, such that the government of Sri Lanka promulgates amendments to the Judicature Act to protect the rights of the legal profession. The Bar Association of Sri Lanka must make representations on behalf of its membership in this respect, and a sustained awareness programme must be carried out nationally and internationally on the oppression of the legal profession in Sri Lanka, as well as building of awareness among the members of the Sri Lankan Bar on the need for a collective effort in protecting their professional rights. Finally, international groups should send a fact-finding mission to Sri Lanka to interview relevant parties and to document attacks on its legal profession.

j. Specific clauses to include in the Asian Charter for the Rule of Law

i. Define and protect the right and duty of lawyers to advocate for their clients free from harassment, interference or punishment. The UN Basic Principles on the Role of Lawyers and Basic Principles on the Role of Prosecutors can be used as references for this purpose.

ii. Provide for effective measures to protect lawyers threatened with danger as a result of their work through government intervention, backed with regional and international monitoring and guaranteed by the right of immediate access to a regional monitoring body when a serious threat to an advocate or professional body is identified. An international response model involving rights and professional groups as the first responders to attacks on lawyers or groups should also be incorporated.

iii. The right of access to an independent and impartial tribunal or judiciary must be a non-derogable right that cannot be displaced under any circumstances, including at times of emergency measures or armed conflict.

iv. Define, ensure and protect judicial independence by moving past constitutional references that fail to develop judicial independence beyond the mere idea. The UN Basic Principles on the Independence of the Judiciary and regional instruments from around the world on independent judiciaries can be used as a reference for this purpose.

v. Violations of the abovementioned rights must be addressed through provisions aimed at ensuring investigations that are timely, professional, impartial, transparent and accountable. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions could be used as a guide, but these principles alone are insufficient.

vi. Provide for a regional investigation body and court with power to monitor investigations and conduct prosecutions. Access to extra-territorial investigations and prosecutions could be available to individuals and groups, upon establishing that a state is either unable or unwilling to conduct these. The onus to establish ability and willingness should be on the state once the petitioner has established reasonable grounds.

vii. Give substance to rights to equality before the law and equal access to the protection of the law as per the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

viii. On the cessation of emergency measures, all provisions created during the period of emergency must be declared null and void and the law existing prior to the imposition of emergency be revived automatically.

Recollections of the Pakistan lawyers' movement

Aitzaz Ahsan, Senior Advocate,
Supreme Court of Pakistan

This account of the lawyers' struggle to defeat military dictatorship in Pakistan and restore the chief justice to his post was given by one of the lawyers who spearheaded the movement, Aitzaz Ahsan, at the fifth consultation on the Asian Charter for the Rule of Law in Hong Kong from 20 to 24 April 2009. Although the story has been told in many other places, mostly in third person, the speaker, a Senior Advocate of the Supreme Court and former president of the Supreme Court Bar Association, offered intimate first-person insights into how the movement found its way and finally succeeded in its goals. Here he takes up the narrative after the chief justice's initial removal and house arrest along with his family on 9 March 2007, for failing to cooperate with the demands of the president, General Pervez Musharraf, to extend his authoritarian rule. For detailed accounts and photographs of the movement, visit the Pakistan Lawyers' Movement website: http://pakistan.ahrchk.net/chiefjustice

There was a shockwave in the legal community. People were dumbfounded and confused. The general public didn't know what to do; however, the lawyers immediately provided the leadership and the strategy. It was announced on the 9th of March when the chief justice was arrested that he would appear before the Supreme Judicial Council on the 13th of March. We immediately gave a call to all lawyers in Pakistan to turn up before the Supreme Court to receive the chief justice, who would be arriving to appear before the Supreme Judicial Council.

At this time General Musharraf was very secure in his office. There was no challenge to him. The big popular leaders were all in self-exile when the lawyers raised the banner of revolt. Nobody thought that Pervez Musharraf's authority could be challenged. The army was with him. The judiciary was with him. All judges except the chief justice had sworn oaths of allegiance to Musharraf and were expected to side with the general rather than with the chief justice. Nobody even knew whether the chief justice would hold out or not in his resolve not to resign. Everybody

thought that he would hold out for four, five, six days. But it was the power of one: one man refusing to submit and purging himself of the sins of the past.

> "We did not know that we would have to sustain the movement for over two years"

We did not know that we would have to sustain the movement for over two years. We thought that either the chief justice would relent or the military would step back and the issue would be resolved within a matter of weeks or months. We did not know that we would be going through an intense movement that would last two years, starting on the 9th of March 2007 and concluding on the 16th of March 2009.

We were faced with several challenges. The first challenge was the selection of the forum in which to fight. Pervez Musharraf had selected the Supreme Judicial Council as the arena in which the legal battle would be fought against the chief justice. This was a hugely biased forum because it consisted of judges who were all in line to become chief justice and would profit by his removal. We had to decide whether to fight in this forum or move out to the Supreme Court. We ultimately took the decision to move to the Supreme Court. I'll explain more about that later.

Aitzaz Ahsan

The second challenge was, what role to give to the chief justice in the movement. He was iconic, but he could not go into the public and he could not perform any judicial or administrative functions because he had been suspended from office. We decided that we would ask him to address Bar Associations only.

Third, how to mobilize the people and get them behind us? We decided to take the chief justice to the Bar Associations by road and have him sit in the front seat so that he would be visible to the crowds. The driver would be a senior lawyer. I was chosen for that task.

The fourth was, when taking the chief justice around, how to keep him non-political? We decided that he would have no contact with the media, public and politicians, even though he sat in the front through those journeys.

We obviously were very apprehensive about the proceedings before the Supreme Judicial Council. On the first day that these proceedings took place, 13th March, the chief justice was manhandled. The event

occurred because the government wanted to give the impression to the world that the chief justice was back in form and was being driven to the Supreme Judicial Council hearing in full glory. The chief justice, as he came out of the house and was asked to sit in his car, saw a government television camera on a platform waiting to take the shot of him, and he refused to get into the vehicle. He started to walk, as it is just a kilometre from his residence to the Supreme Court. The police had orders to push him into the vehicle and tried to force him inside.

"The petition in the Supreme Court was unique; nowhere had a chief justice the occasion to petition against a president in his own court"

When the chief justice finally got to the Supreme Court he arrived in someone else's vehicle and around two thousand lawyers surrounded it. I was in the crowd when the chief justice spotted me and asked me to represent him as his lawyer in the Supreme Judicial Council. I said to him, "You can get any lawyer. All the lawyers in Pakistan will be available." He said, "No, in the four days I have been under detention the only thing I have been thinking of is who to engage as a lawyer when I come out, and I want you." I said, "Of course."

So we went up to the Supreme Judicial Council and the first issue was to determine whether they were capable of doing justice, and we realized that they were not. I pointed out that the chief justice had been manhandled by the police and said that, "He is your chief justice, take action." And they couldn't do that. They said, "He shouldn't have started walking, he should have got into the car and come." So I realized that they wanted to get rid of the chief justice as soon as possible. The presiding officer said, "Start the proceedings." And I said, "I don't know what the case is against my client. I just met him and he asked me to represent him." He said, "Don't delay. We have to decide in two, three days." I said, "Whether you have to decide in two, three days or not I can't defend him in two, three days." We had a heated exchange with the chief justice sitting quietly. One said, "Be careful, Mr. Ahsan, these proceedings are in camera." I said, "I can't help it if they're in camera or not, but one thing I will do is make sure that you don't convert yourselves into a kangaroo court." So then we started a heated exchange again. He said, "You're in contempt." I said, "You can sentence me for contempt and it would be a good thing because it would show your bias." Finally, when I was seeking an adjournment to study the case the presiding officer said, "Don't worry, have faith in God." I said, "I have faith in God, I don't have faith in you. That is my problem."

Ultimately we managed to get an adjournment, but we were so shaken that when we came back we had to make two quick decisions. One was to challenge the Supreme Judicial Council's proceedings before the Supreme Court. There was some debate on it. Even the chief justice thought that it might not be possible. I persuaded him that it was only a tribunal and that it was acceptable that it be subjected to review, even in the High Court, but we would take it straight to the Supreme Court because the chief justice was involved. And second, we decided that we would start taking the chief justice to address the Bar Associations across the country so that maybe we would be able to mobilize the people.

"When arguing the petition challenging the charge sheet, I said, 'I will demonstrate to the court that nobody has read the reference or the charge sheet; not the president, not the prime minister, not the law minister, not the law secretary, not the attorney general'"

The petition in the Supreme Court was unique. Nowhere, in the known history of the world had a chief justice the occasion to petition against a president in his own court. We excluded the possibility of the biased judges themselves sitting in the court by naming them as respondents. The remaining 13 members of the Supreme Court heard the case: a full court minus the members of the Supreme Judicial Council. The case lasted three months and there were hearings Monday to Friday, without a break. The judges were initially very hostile to my petition and they said that, "You are before the Supreme Judicial Council and they are the five senior-most judges, judges of rank and law who can examine the evidence." But ultimately I was able to persuade them, both on jurisdiction and on the merits of the defence on behalf of the chief justice. The court reached its unanimous verdict reinstating the chief justice on the 20th of July 2007.

When I was arguing the petition challenging the charge sheet, which was called a reference by the president to the Supreme Judicial Council, I said, "I will demonstrate to the court that nobody has read the reference or the charge sheet. Not the president, not the prime minister, whose signature is also on the sheet, not the law minister, not the law secretary, not the attorney general sitting here, not the senior lawyer sitting here, none has read the reference." So they asked, "How can you prove it?" And I said, "I'll prove intrinsically that they have not read the reference." In an earlier case a bench of the Supreme Court had decided that if the president had not applied his mind to the signature then it was not enough that he had said that the prime minister or someone else had applied his mind: if he had not applied his mind then the signature would be invalid. So I said, turn to paragraph 29, and we read paragraph 29 out loud, then came to paragraph 30, then paragraph 31, and they said, "What are you doing, joking with us?" Then I said, "Now kindly turn the page to paragraph 32." Paragraph 32 was a blank of ten lines, with "32" and "deleted" typed in front of it. And then there was paragraph 33, blank. I said, "Had the president gone through it, he would have drawn a line through this." And when they settled down I said, "Now go to paragraph 38." Paragraph 38: deleted. Then I said, "Go to paragraph 43." Paragraph 43: deleted. And this was the reference made by the president against the chief justice, signed by the prime minister.

Then there was another charge—I don't know how they made it up—that in Appeal No. 1432 of 2003 the chief justice gave a judgement dismissing the appeal in open court but a month later when the judgement went on the formal record the appeal had been accepted, and so he must have made a deal. I said, "I have two answers to this charge. I have affidavits from both senior lawyers who appeared in this case that the charge is false and that the appeal had been dismissed. But nevertheless, they got this from somewhere, so the judgement is also annexed, and let's take a look at the judgement." It was four pages and I let them go through the judgement and then they said, "What does

that prove for any party?" And I said, "It doesn't prove anything for any party but it does prove that nobody read the documents relating to the reference." They said, "How can you prove that?" I said, "Look at the bench. The bench does not include the chief justice, only seven justices. And if the charge is correct then why not you, you, you and you are not also in the dock defending yourselves instead of the chief justice and why am I defending him in front of you?"

When I concluded my argument, incidentally, we were in Courtroom No. 1, and that is the courtroom of the chief justice, the largest of the Supreme Court. And there are portraits on both sides of all the former chief justices. I said, "My Lords, please look at these portraits." I pointed out some of them, the more famous ones. Then I said, "Each man has selected his own photograph or portrait. That space is empty. It is for the current chief justice. Mr. Iftekhar Choudry has been chief justice since the 5th of June 2005. Even if you remove him today, his portrait must go up there. It's your decision, your call to remove him or not. My call is to select the portrait which goes up." And I said, "The photograph of the chief justice being manhandled is the one that will go up if you do not reinstate him."

"Without the chief justice demonstrating that the people of Pakistan were with him, the judges might not have given a decision in our favour, and certainly not a unanimous decision"

As to the chief justice's travel, it was very important as a twin strategy, because without the chief justice demonstrating that the people of Pakistan were with him, non-violently, peacefully, the judges might not have given a decision in our favour, and certainly not a unanimous decision. The chief justice pulled such dense crowds along the way that the journeys took long hours. From Islamabad to Peshawar, a hundred miles, it took 15 hours; 150 miles to Lahore was 26 hours, and this is not a narrow road but an eight-lane highway. I did all the driving and most of it was non-stop. And all of it was covered. All around the road, everyone came out to see the chief justice, wanted him to stop and address them; he would not, I would make short speeches along the way. And every inch, every minute, was covered by live television, even though we ourselves did not use any facilities. Even BBC, CNN were breaking their coverage to give details.

As we would reach the Bar Association premises, the gates would open, the chief justice and I and other lawyers would enter the premises and the gates would close behind us with tens of thousands of people who would just stay outside. And they accepted it, willingly, because we explained to them from day one that the chief justice could not address a public gathering. He could only speak through a judgment or through a Bar Association. There are three duties of a chief justice in Pakistan, one, to deliver judgements; two, to administer the court; and three, to maintain good relations between the bar and the bench. And it was this third function that he was performing. And we kept these people waiting for 10, 12, 15 hours and they as supporters of the cause even accepted being excluded from the functions, so that we kept the politics out of it even though political movements supported us.

The journey of 150 miles to Lahore started at 7am on the 5th of May. We reached Lahore at about 9:30 the next morning to address a Bar Association that we were supposed to address on the 5th at 4 o'clock. We actually addressed it at 10am the next day and people had waited in the lawyers' convention, had kept awake by making speeches and so on for this 26 hours. They were watching the television screens and at 4pm knew that we were still a hundred miles away but they kept sitting, playing songs, making speeches, dancing, and they stayed there.

"The lawyers' leadership was at all times subject to the brute force of the state and terrorist actions performed by the state that it would attribute to terrorists, which in Pakistan is very simple to do"

We had one additional problem. The government knew that this was going to be a long journey as we had already done a hundred miles to Peshawar in 15 hours because of the popular outpouring onto the motorway. So the government persuaded the Supreme Court, which was Musharraf's at that point of time, to direct the chief justice to take a flight to Lahore and the government would charter a plane with an additional 40 seats for people like me to travel with him. The chief justice was very upset and I said, "Just give me 15 minutes and we'll find out how to get around it." It was going to be a crucial turning point and we knew if the crowds came we could win. So, Lahore has three big towns on the way. None of them has an airport but each has a Bar Association. I rang up the president of each Bar Association and said, "Please immediately fax me an invitation for the chief justice to address the Bar Association." Within 15 minutes I had the three invitations and I brought them to the registrar of the Supreme Court and explained that, "There are no airfields in these places, so the chief justice has no option but to drive."

All these were weekend journeys. We'd start on Saturday and return on Sunday to prepare the arguments and I'd be standing on my feet every Monday to defend the chief justice before the Supreme Court.

There was violence and there were death threats. The lawyers' leadership was at all times subject to the brute force of the state and terrorist actions performed by the state that it would attribute to terrorists, which in Pakistan is very simple to do. These actions showed the desperation to ward off the lawyers' movement and remove the chief justice. On the same day as the chief justice was manhandled, the leading channel that showed most of what had happened was attacked by the police and fired at; people were held hostage. On the 7th of May there was firing at the house of Muneer Malik [then president of the Supreme Court Bar Association], one of the leaders of the movement. About 23 lawyers were very seriously burned when as they were carrying torches on the road at night the police sprayed them with kerosene. On May 12 the chief justice and myself were going to address the Karachi High Court Bar Association and the government's allies, the MQM [a coalition party], blocked the roads with shipping containers so that we could not leave the airport—we had to fly there as it is too far from Islamabad to return in two days—and there were shootouts all over. There were 50 dead on that day. On the 17th of July a bomb was detonated in a convention which the chief justice was to address in Islamabad. Twenty people died. It was detonated five minutes before the chief justice

and I arrived. We were on our way and the crowd was with us when we heard the big explosion about 500 yards away. On the 29th of September the lawyers were again badly beaten and stoned by the police.

Senior military officers directly warned me many times, on behalf of the president, that if I didn't stop driving the chief justice or arguing the case then something very bad could happen. I got through this time having told my wife and children where to bury me and not to keep me on a life support system for more than two days. I think what gave us strength was the large, enthusiastic crowds that we could pull. They gave a huge kick, so that even seeing a bullet coming one would put one's head in front of it rather than pull away.

"The collective leadership was very important; it was not the work of a single individual"

We later created a fund and entrusted it to retired judges who were not working directly with us, for distribution to the victims and families of victims of the violence, and we hope to generate more funds for this purpose.

On November 3rd, 60 judges—again including the chief justice—were arrested, and an emergency was imposed. The chief justice was detained with his children inside his house, inside the building, by orders of General Musharraf. All doors were locked except the kitchen door where the supplies would come, and there were four policemen posted outside that door. Thousands of lawyers were also arrested. I was one of them. Many were released from time to time. I was kept in detention for as long as the chief justice was detained.

The lawyers' movement was a democratic movement. We hold elections in different Bar Associations usually around January or February and despite the detentions and brutality, all Bar Associations elected their leaderships and voted for the leaders of the movement. That meant that the movement could be maintained. The collective leadership was very important. It was not the work of a single individual. All these lawyers had the highest integrity and willingness to sacrifice with unwavering commitment to the cause. The decision-making also was collective. We made decisions through the All Pakistan Lawyers Conference, with representatives of all Bar Associations involved.

Except for the long marches, one in June 2008, the other in February and March 2009, we did not call for funds. For those, we needed funds for busses and transport, which were distributed among local Bar Associations. Rich and poor contributed, and we kept full accounts with proper receipts. What remained we put in a fund, and some of the money was returned. The rest of the movement was spread out all over the country. The Thursday rallies went ahead in every district by themselves. The conventions that the chief justice addressed were locally financed: sometimes the Bar Associations themselves paid, sometimes, local contributors. There was no central funding.

It was not easy for lawyers to strike. From November 3rd until the 13th of January there was a complete boycott of the courts. But then we decided that we would lose the support of the general

public, and public sympathy, if we continued the complete boycott, although it was very effective. So then we decided that we would strike on one day in the week, Thursday. Other days, we would go to court. I was one of the few who decided not to go to court. I didn't appear in a single court for the two years of the movement, because I refused to recognize the pretender chief justice.

"The young lawyers especially were inspired and inspiring and without their motivation it might not have been possible to win"

In 1980 and 81 I spent time in jail under an earlier military government for being vigorous in a lawyers' movement, starting on the 20th of June 1980 and lasting until 1983. While the leadership was kept in jail it petered out because we did not connect with the people. We had learned our lesson then. This time, we had decided to consciously make the people's dreams our objectives, and to spell these out in simple terms. And people reacted. The chief justice couldn't say anything directly, because he spoke only to the Bar Associations on purely constitutional issues. But in my speeches I pointed out how an independent judiciary is essential to foreign investment and how this is linked to improvements in other areas, to building of schools. We linked our demands to the problems and desires of the people. We translated our problem into a problem of the people themselves.

So the lawyers made a truly plural and national alliance. When I say plural, we were from all different political and religious persuasions. It was not easy to do that. You can't imagine sitting in a meeting of 300 lawyers' representatives and the first thing is that someone stands up and says, "Why is so-and-so sitting next to you, sir? What right does he have to sit there?" It was very painful, but it gave me great hope and confidence in Pakistan that we came through it. But when some types objected to others, I went for them. I said, "What kind of Pakistan do you have in mind? I'll not take it, I'll walk out!" Every second step we had something like this, because we were virtually a political movement but we were keeping it insulated lest the chief justice become politicized: an apolitical movement that was political, and a political movement that was apolitical, and diverse and plural, and with no pecking order. Everybody had their leaders outside the movement and was taking orders from outside as well as from within and at times they were conflicting orders, and yet we kept it going, even into baton-charges, when there was every reason to opt out of the movement. When a wall of policemen is standing in front of you, the choice is clear-cut.

Also, the lawyers' leaders themselves took all the risks that they expected of their followers. The young lawyers especially were inspired and inspiring and without their motivation it might not have been possible to win the day. They never retreated and stood firm every time to accept any challenge from the authorities. There was also widespread and strong support from civil society. The media played a very important role. Lawyers' groups and human rights' groups around the world also sustained and supported us enormously. Today there are these players who are ready to move for social change if they recognize the cause and if there is a core leadership to take things forward.

Use of the legal process to curtail the rights of advocates and activists in the Philippines

Remigio D. Saladero, Jr., human rights lawyer, Philippines

The following article is from a talk given by Remigio D. Saladero at the University of Hong Kong on 23 April 2009, drawing on his own experiences as a labour lawyer and political detainee to highlight the current use of the legal process in the Philippines to suppress dissent. Further details on his and other similar and related cases in the Philippines can be found at the Asian Human Rights Commission's Philippines webpage: http://philippines.ahrchk.net.

Last Monday, *The Standard*, one of the English newspapers here in Hong Kong, carried the following headline: "Lawyers fear for their safety". According to the news item, the Hong Kong authorities plan a cost-cutting measure to change police officers with security guards in keeping the peace at lower courts. So, lawyers believe that security guards lack the proper and necessary training and dedication in dealing with violent incidents and would not be able to provide the lawyers and magistrates with protection.

This reminds me of what is happening in the Philippines today. Lawyers in our country also fear for their safety. But this fear is based not only on the failure of the Philippine government to provide them with the necessary protection but also because of the unwritten policies of the government to harass, intimidate, jail and even kill lawyers who are representing forces adverse to the interests of the government.

From 2001 to 2008, 22 lawyers have been brutally murdered in the Philippines. Forty-nine lawyers have either been beaten or imprisoned; 41 of them were human rights defenders or public interest lawyers. Unfortunately, the last on the list of the lawyers who were harassed happens to be myself.

It cannot be disputed that lawyers play an indispensable role in the administration of justice. In a civilized society, every person has a right to the due process of law. And this means that a

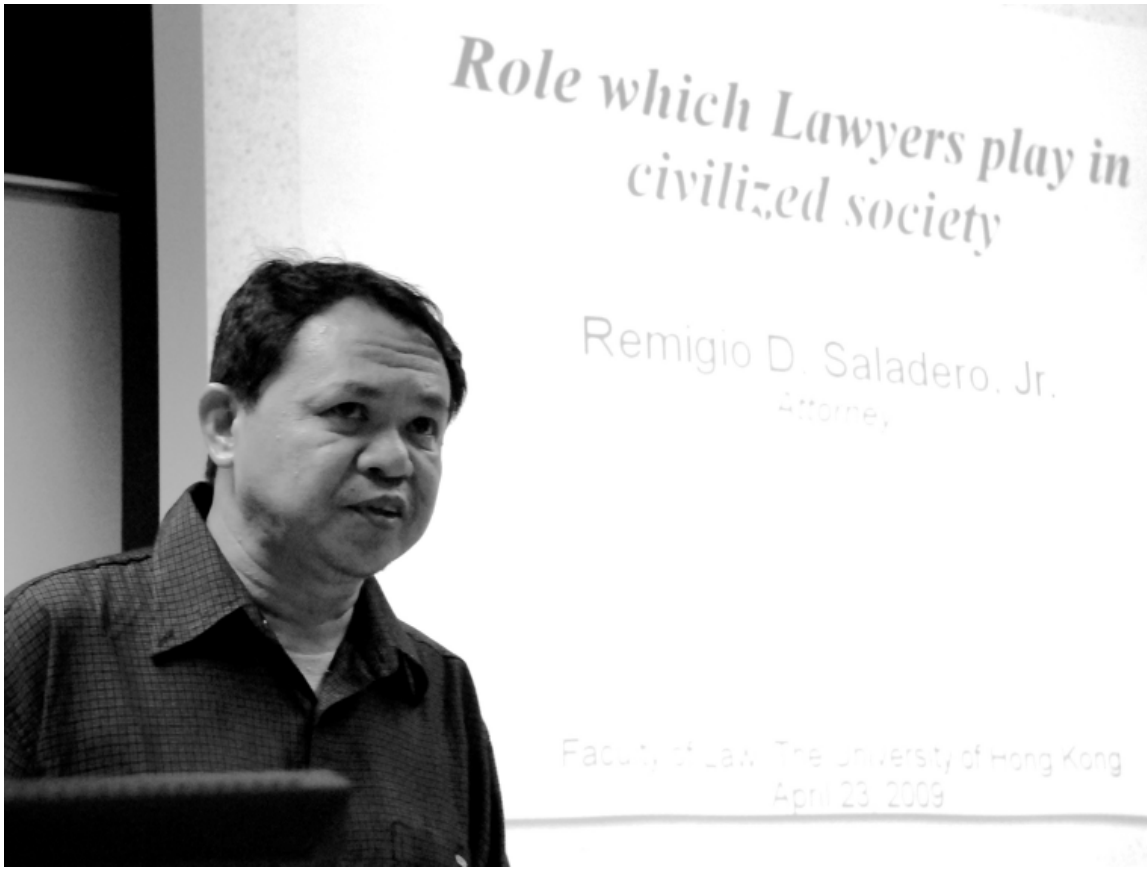
> **"I could not prevent a warrant of arrest from being issued against me, but the government did not follow normal procedure in filing the criminal cases"**

lawyer must represent a person accused of a crime; however, with lawyers being attacked, people are deprived of their right to competent legal representation. In effect they are deprived of the right to due process, because there may be nobody to represent them before the court. An attack on lawyers, especially public interest lawyers or human rights lawyers, makes it difficult for poor people to avail themselves of the right to counsel, to avail themselves of the services of lawyers, and consequently the administration of justice suffers.

I had this experience in my case, when I was in jail. Due to my absence, many of my clients were not able to file their appeals on time. Many were not able to file their court papers on time. Many of them lost their cases. Many of them also were not able to consult me for important legal advice. This is because the police jailed me in Mindoro, an island quite far from Manila, where I am based and where most of my clients are based. Considering that most of my clients are penniless workers, they could not afford to travel to this island to visit me. Some of them became desperate. Some had to borrow money from loan sharks to pay for the services of other lawyers. Others were forced to accept paltry amounts as settlement of their labour cases.

Incidentally, when I was released many of my clients came back to me, but there were many who did not because they had lost confidence in a lawyer who goes to prison ahead of his clients.

Remigio D Saladero Jr.



Well, I could not prevent a warrant of arrest from being issued against me, but then again the government did not follow normal procedure in the filing of criminal cases against me. It made a mockery of the right to due process and of my right to be informed of the charge against me, and of my right to submit counter evidence at the prosecution inquiry before the judge issued the warrant of arrest.

You see, in the Philippines the criminal justice system consists of two stages. We first have the preliminary investigation stage. In this stage, an accused, or rather, the respondent, is provided with a copy of the charge sheet and the evidence supporting the charge, and is given the right to refute the charge. Now, the prosecutor on the basis of the evidence before him determines if there is probable cause, if there is ground to believe that an offence has been committed and that the respondent is probably guilty. If the prosecutor does not find probable cause, the case is dismissed. If the prosecutor finds probable cause, it is transmitted to the judge, and again the judge makes a preliminary evaluation, to see if there is really probable cause, in which case the warrant of arrest is issued. So, only after the determination of the judge should a person be arrested.

In my case, this was not done. The administration made a mockery of the criminal justice system, to ensure that I and my companions—there were 72 of us who were charged—did not get a copy of the charge sheet nor a copy of the evidence record. How was this done? Well, they used erroneous addresses. My address, as I said, is in Metro Manila. But they made it appear that I lived somewhere in a province, hundreds of miles away, so I was not able to receive the evidence made by the complainant against me. This notwithstanding, the prosecutor transmitted the case for preparation of the warrant of arrest. Incidentally, my name as given in the complaint against me was also wrong. There was some difference in spelling, but still they considered it to be me.

And when the records reached to the judge, he did not perform the necessary evaluation. He accepted all the findings of the prosecutor and issued a warrant of arrest against me.

I was arrested in a Gestapo-like manner. The police ensured that no one would witness the arrest. I was alone in my office doing some work when someone came, pretending to be an indicted, looking for a lawyer, and I said that I was willing to take his case. He said that he was going to get some papers out of his motor vehicle and went out, and when he returned he was accompanied with several burly men in civilian clothes, not having any ID. They turned out to be police officers, and when they were positive that I was the person that they were looking for, they handcuffed me and whisked me to their vehicle, which was also an unmarked vehicle, without any registration number. They took away my laptop, they took away my PC; they took away my case folders, cell phones and other personal belongings. Then they took me to a police camp and they subjected me to what is called “tactical” interrogation.

“Someone came, pretending to be looking for a lawyer, and he returned accompanied with several burly men; they turned out to be police officers, and they handcuffed me and whisked me to their unmarked vehicle”

Incidentally, I later asked the police department for the list of names of those responsible for my arrest, but up to now my request has fallen on deaf ears. I'll just persist in asking them and maybe the time will come that I'll file a case in court to compel them to give the names of those policemen.

"The government counterinsurgency program has targeted the leaders of mass organizations and prominent social activists on the left of the political spectrum for assassination, abduction, illegal arrest and torture"

Under Philippine law, I was supposed to be represented by a lawyer of my own choice at the interrogation. So I kept on demanding my right to have a lawyer, to be allowed to call my lawyer, but they repeatedly refused. So they subjected me to tactical interrogation for more than four hours and it was only after those four hours that I was allowed to make a call to my lawyer. Why was this so? By that time, the news concerning my abduction was already being flashed on two major TV stations in the Philippines and they were afraid that because the public was already aware of it that something bad might happen, so they allowed me to use the phone to call my lawyer. I spent the next three-and-a-half months in detention.

I was dumped in prison in a province quite far from home, and had to live in a cell with around 65 other detainees. The detention place was maybe ten square metres, and we had to sleep with two persons in the same bed. It was very hard in the morning to take a bath. We had to take baths with other inmates, due to the lack of facilities, and very fast, in about one minute, due to the limit of water. And we had to eat at a budget of seven Philippine Pesos per meal or less.

How did it happen? How did it happen that a lawyer like me could go to jail ahead of his clients? The answer lies in the counterinsurgency program of the Arroyo government. Several months after President Arroyo assumed power, the World Trade incident happened and George Bush made his call for a war on terror. This global campaign eventually redefined the word "terrorist" to refer to anyone opposed to the Bush government's hegemonic policies. President Arroyo was the first to follow Bush's war. By aligning herself with the war on terror, her government received strong military backing from the Bush administration. Arroyo labeled all opponents to her regime either terrorists or "destabilizers". So critics of the Arroyo administration were made targets in the violent drive to quash mounting popular opposition.

Instead of declaring formal martial law like President Marcos in 1972, Arroyo adopted a counterinsurgency program that unleashed her own brand of state terrorism. The counterinsurgency program was designed in 2002 to cripple the armed communist movement by 2006. This program trained the guns of the armed forces and the police on the legal, aboveground people's organizations, in other words, against social activists. The objective was to instill fear in the supporters of these mass organizations, which are critical of the Arroyo regime.

Of course, this counterinsurgency program is not different from other anti-insurgency programs of past administrations, but it added a new, vicious feature. It targeted the leaders of mass organizations and prominent social activists on the left for assassination, abduction, illegal arrest and torture.

From the time that Mrs. Arroyo assumed power in 2001 up to 2008, more than 900 leaders of mass organizations were killed. In the same period, 201 people were victims of enforced disappearances and 1852 persons were illegally arrested. There are at present a total of 270 political prisoners languishing in various parts of the Philippines. But the armed communist insurgency continues to this day, so something is wrong with this counterinsurgency policy. But then again, Mrs. Arroyo is quite hard headed.

As Arroyo persisted with this policy, the Philippines became the centre of attention of the international community for violating human rights. Several fact-finding missions were formed to investigate these extrajudicial killings, the most prominent of which was the investigation made by Professor Philip Alston, the UN Special Rapporteur on extrajudicial killings. And one of his recommendations was that the Arroyo government should not lump together the armed insurgents with the legal mass organizations, and it should make genuine efforts to stop and investigate all these extrajudicial killings.

So for a time the killings dropped a little, but on 17 July 2006 the Arroyo administration added the filing of trumped-up charges against social activists as one of its tactics, and usually non-bailable ones like murder and arson. On that date the administration created the Interagency Legal Action Force, with an initial budget of 50 million Pesos, which is quite a large amount. On paper, the purpose of this force is to investigate, prosecute, monitor and handle cases concerned with national security. However, its unwritten primary objective is to organize the systematic filing of fabricated cases against activists critical of the Arroyo administration. And as I mentioned, the latest of these cases involved me, and my co-respondents.

The main reason for the cases against me was that I was a lawyer for some labour organizations that are critical of the Arroyo government. I am also a lawyer for some alleged members of the New People's Army, and there were several cases that I handled involving these persons, but in the end not one of these persons were found guilty in the courts. In short, the authorities wanted to get even with me, and also wanted other people to be discouraged that, "You see, your lawyer can be arrested so how much more will happen to you?"

There were actually three related cases filed against us. In the first case, which was for arson and inciting rebellion, there were 27 respondents who supposedly conspired to blow up a cell site owned by the Globe Telephone Corporation. This supposedly happened in Batangas Province, several miles from Metro Manila. In the second case, for multiple acts of murder, the 72 of us were involved. This was supposedly for the murder of three police officers and wounding of three others, because supposedly we ambushed them. In the third case, again for murder, 63 of us were accused of killing one person in an ambush, 63 ambushing one.

"The authorities wanted to get even with me, and also wanted other people to be discouraged that, 'You see, your lawyer can be arrested so how much more will happen to you?'"

"There is no showing that the government has ended these 'legal offensives', in fabricating cases, undermining the due process of law to keep social activists in jail"

In all these cases, the authorities subverted the criminal legal system. How? First, they used wrong addresses for each of us in each of the three different cases. I had a wrong address in the arson case, another wrong address in the multiple murder case, and another wrong one again in the third case. I had three sets of wrong addresses. The same was true for my co-respondents. Second, the prosecutor did not conduct a genuine preliminary investigation. He accepted all the police allegations and transmitted these to the judge for issuance of warrants of arrest without any preliminary investigation as required under Philippine law. And the judge also did the same. He also failed to uphold his duty to conduct an evaluation of the evidence to determine whether there was really probable cause against us before issuing the warrants of arrest.

Anyway, our lawyers filed a motion to quash, challenging the validity of the charges based on technical grounds, especially the lack of preliminary investigation. But the judge to whom our case was assigned sat on it and failed to act on the motion after several months. So what we did was have each of the labour federations whose members were among the accused address a letter to the judge asking him to decide our cases fairly and without delay. This letter was published in the newspapers, and there was even a caricature of the judge as a puppet of the military.

Then the judge was deluged with letters. Every day hundreds of letters poured in, some from Canada, from France. One day he called me from my prison cell. I came to my office and he told me that according to him he was supposed to deny our motion to quash, but because of the public pressure he had decided to withdraw from the case. The case was transferred to another judge, and again the letters started pouring in, but the second judge also sat on our motion.

One day the president of the Integrated Bar Association of the Philippines, an association composed of all lawyers in the archipelago, came to visit me in prison and announced that he was entering his name as a lawyer for me. Strangely enough, about one week after his visit the order came from the judge approving the motion to quash. The case was dismissed, here I am now, and I have no intention of stopping my work.

But the danger still remains. The danger remains not only for me but also for thousands of social activists in the Philippines. There is no showing that the Philippine government has ended the use of these "legal offensives", in fabricating cases, in undermining the due process of law to keep social activists in jail and immobilized. So the Arroyo administration must be made to stop this practice, must be made to stop its counterinsurgency program, which fails to distinguish between armed rebels and unarmed social activists, must be made to stop the practice of subverting criminal procedure and filing of trumped-up cases against social activists. For this goal to be achieved, international pressure is also necessary.

Two lawyers' views on the rule of law and their profession in Bangladesh

Tanvir Parvez & Mohammod Hossain,
human rights lawyers, Bangladesh

Tanvir: In any state, lawyers have a role in upholding the rule of law. Bangladesh is no exception; however, how far its lawyers have been able to perform this responsibility should be carefully considered from different viewpoints, such as whether the common people view lawyers as acting to promote the cause of justice or rather to place impediments in its way. In this paper I take up this question with reference to the lower judiciary in Bangladesh (the courts which are subordinate to the High Court Division), and basically from my own experience.

Mohammod: Rule of law is one of the basic features of the Constitution of Bangladesh, as enshrined in the preamble. Article 27 ensures equality before law and article 31 provides for treatment in accordance with law. Aside from this I am not referring to any other law here because from the pictures given below the reader will be able to guess what the law should be and how it is being violated.

Public perceptions of lawyers

Tanvir: Lawyers have played a vital role in shaping the social and political life of Bangladesh. Most of the frontline leadership for independence was from the legal profession. The role of lawyers did not end there. In all subsequent events of national importance, when citizens' rights and individual liberty have been at stake, lawyers have remained staunch defenders of the rule of law and basic human rights.

Yet in spite of the lawyers' invaluable contribution to national life, the general perception of lawyers is not very high. There is a common notion that lawyers are masters of sophistry who earn their living by causing harm to innocent people. One of my father's friends once told me that in his opinion the legal profession is incompatible with Islamic injunction, since a person cannot earn his living in it without resorting to falsehood. When I chose to

study law, the mother of a friend commented with a mocking tone that it is very easy to earn money in this profession by uttering a few false words before the court.

Mohammod:
"The public is not happy with lawyers; most new friends ask a lawyer why he chose the profession of liars"

But I must also mention the honour and respect that I have received as a lawyer. In my locality, when I come out of my residence I am greeted by many, both known and unknown to me. People of the locality ranging from young adolescents to the elderly seek my advice on many matters that do not have even the remotest connection with law. It is interesting to note that many of those who initially discouraged me to study law later turned to me and sought my assistance. My father was also a practicing lawyer, and from my early childhood, I had seen that he too was a respected figure in the area, and was often invited to preside over various social gatherings. Thus, it can be said that the public perception of lawyers might not be very good but there is a considerable portion of people who believe that lawyers are holding up the scales of justice for them and therefore should be respected.

Mohammod: The public is in general not happy with lawyers. Whenever a lawyer is introduced to a new friend he must hear, "Are you a lawyer or a liar?" Most new friends ask a lawyer why he chose the profession of liars. Landlords try not to rent their houses to lawyers. Three years back it was unearthed that more than a hundred lawyers obtained their law certificates from a university by practicing fraud, as they had failed in exams. A judge of the High Court Division of the Supreme Court had to sign off his job on the same allegation. After this incident, the image of lawyers was reduced to dust.

Litigants frequently allege that they have lost their cases as the other side purchased the lawyers. This allegation is not always true, but few losing litigants try to understand the defects of their cases. One reason is that their lawyers usually feel reluctant to disclose the demerits of a case, apprehending that the client may not proceed and income will be lost.

Nowadays, more businesspeople are trying to push their children into the profession, probably in order to get them to assist their parents in evading tax, grabbing land, and stealing gas, electricity, water, etc.

Lawyers and delays in trial

Tanvir: Delays are one of the greatest barriers to the dispensing of justice. Unfortunately, the lower judiciary in Bangladesh is notorious for causing delays. In the court premises there is a common saying that has almost gained the status of a proverb, which is that unless five parties are in agreement, no case can proceed, and the five parties are the judge, the lawyers of both sides, and the plaintiff(s) and defendant(s). To some extent lawyers cause delays. Generally, in the subordinate judiciary lawyers are paid on the basis of days of appearance. This means a lawyer can take the greatest benefit by simply lingering on a case. Apart

from that, many cases are concentrated among a handful of lawyers, and these lawyers adjourn cases simply because it is not practically possible for them to deal with all cases on the same day.

Bangladesh inherited its legal system from the British, and the adversarial mode of proceeding still dominates. As such, parties may linger on a matter by arguing about strict compliance with procedure, and often cases are taken to the superior courts challenging an interim order of the trial court on the ground that proper procedure has not been followed. Once a party goes to the superior court on such a ground, the superior court is very likely to grant a stay order, which means that the matter will remain suspended for years. I am personally involved in an eviction case in which an order of the trial court passed in 1996 was challenged before the High Court Division, and the main proceeding was stayed. Thereafter, in 2005, the High Court Division after hearing the matter refused to interfere and vacated the order of stay. Challenging that judgment, the tenant appealed to the Appellate Division, and the matter is yet to be heard by that division. The trial court is not proceeding lest the Appellate Division decide otherwise. The tenant has also stopped paying any rent on the ground that this is a subjudice matter.

Tanvir:
"Parties may linger on a matter by arguing about strict compliance with procedure, and often cases are taken to the superior courts challenging an interim order of the trial court on the ground that proper procedure has not been followed"

Aside from the lawyers, judges are in many cases inclined to grant adjournments due to heavy workloads and the lack of vital personnel and materials, such as stenographers and law books. For these and other reasons, judges often find it hard to deliver judgments even though hearings might have been completed long before. It is not very unusual for a judge to re-fix a date for re-hearing even though neither party has requested it. This is because due to the time that may have elapsed after the completion of the hearing the judge has forgotten what was argued. In one of my cases where I moved an injunction petition, the judge twice fixed the date for re-hearing but still the re-hearing did not take place on the specified dates, since the judge was overburdened with work. Almost seven months from the date of first hearing the order was passed, and it was against me. In the meantime my need for an injunction had become useless, and an appeal appeared not to be a good option.

Under Bangladeshi laws there are stringent provisions for reducing delays. According to the Civil Procedure Code 1908 (as amended) a party to a suit cannot take more than three adjournments at the final hearing stage. If any person takes more than three adjournments, then if a plaintiff the case will be dismissed and if a defendant the defence will be struck off. However, in one of my cases where the plaintiff took more than six adjournments and I placed an application invoking that provision of law and praying for the suit to be dismissed the judge found that it would be contrary to the ends of justice if the suit were dismissed. Thus an express legal provision was flouted in the name of justice.

Another cause of delays is that judges are not given proper training on the practical aspects of law, including the latest pronouncements of the higher judiciary, or even about the significance and impact of precedent. As a result, they are not quick enough to catch the real points of concern to a case and tend to stick to what they learned many years before in classroom lectures, no matter how outdated.

Mohammod: **"Although a lawyer can delay a case, he cannot expedite one unless the lawyer for the opposition is cordial and the court is strict"**

One reason that judges are not kept up to date with the law is that in Bangladesh to keep track of changes in law is a formidable task. There is no government initiative to compile laws, rules and regulations with amendments, or even to provide monthly updates. Of late, under the auspices of the CIRDAP, a Canadian origanisation, a 38-volume 'Bangladesh Code' comprising all the existing Bangladeshi laws up to 2006 has been published. But no initiative has been taken to do the same for the relevant rules, regulations or laws made under various statutes, and as such judges and lawyers often have to grope around for them. In one of my recent cases, I was searching for rules made under the Telegraphy Act 1885, and I was surprised to find that even the law officers of the telegraph office don't know where to find them. This is an acute problem, as judges are often passing judgments without being properly acquainted with the exact law. Despite such limitations, Bar Associations over the country are trying their best to provide good law libraries and judges are also allowed to borrow books from these.

Mohammod: Lawyers in the higher courts do not want to delay disposal of cases. Usually, litigants give instructions to make delays when they feel that they may ultimately lose the case. Sometimes lawyers become lethargic when they do not receive proper fees. But in the subordinate courts lawyers are against quick disposal of cases as they think that the longer a case goes, the more money they can get.

Although a lawyer can delay disposal of a case, he cannot expedite one unless the lawyer appearing for the opposition is cordial and the court is strict. Sometimes a combined effort of all the parties fails owing to reconstitution of the court. In the Supreme Court there is no fixed court to hear specific matters. After every vacation or every occasion that new judges are appointed, the courts are reconstituted and jurisdictions are changed. If the hearing of a case is not completed before a change of jurisdiction, the judge or judges are to wait till the chief justice asks them to hear that part-heard matter on a later occasion. If the judge or judges fail to complete the matter on the later occasion, in most cases they let the matter be heard by another judge having jurisdiction. The low number of judges compared to number of cases pending is another reason for delay.

Judges take time to draw judgments or orders. Sometimes it takes weeks to draw a two-page order, or months to draw a ten-page judgment. In one case I conducted, it took two years to get a ten-page order. By the time that an order of the court has become available it may have lost its necessity.

Difficulties that lawyers face in performing their duties

Tanvir: Though article 33 of the Constitution of Bangladesh has declared that a person arrested should not be denied the right to consult a lawyer and has a right to be defended by one of his or her own choice, in practice the police deny people these rights. In some cases, not all papers necessary for trial are supplied, and even if a lawyer intends to challenge the decision of a lower court before the High Court the concerned official may refuse to issue a certified copy of the order, thus causing impediments to the administration of justice and hindering lawyers from performing their duties to the fullest capacity.

Tanvir:
"Judicial officers also harass lawyers, mostly by making insulting and degrading remarks from the bench"

In Bangladesh when police interrogate an accused, a lawyer is not allowed to be present. As a result, people are often severely physically and mentally tortured in police custody, in some cases resulting in death.

Judicial officers also harass lawyers, mostly by making insulting and degrading remarks from the bench. In some exceptional cases, the harassment may go further. In such cases there are no statutory mechanisms for redress. But the Bar Associations play a very important role in making protests, and raising such issues before the level of judiciary (generally the district judge) with administrative control over the officer concerned. Eventually some actions ensue.

Mohammod: In the Supreme Court there is a procedure to mention some items for extension of interim orders like order of bail in criminal cases. We have found that there are few judges to hear twenty or fifty lawyers at the mention hour for extension of bail. Usually junior lawyers make room for senior counsels. Due to this practice, all the senior lawyers get the opportunity of mentioning their items but junior counsels are deprived of the opportunity of mentioning their cases if the quota of twenty or fifty is exhausted. But there is no law that only twenty or fifty cases should be heard a day for extension of bail, and as many cases as are mentioned should in fact be accepted for extension.

Some judges extend an interim order for a certain period, directing the petitioners or appellant to get the case heard within the given time, as the interim order would end there. Although the lawyers put their efforts into getting matters heard, they fail. Sometimes there is no court to hear the case of a particular year; sometimes the courts refuse to hear a case on the ground that they are overburdened. As a result, the interim order comes to an end without any fault of the litigant or the lawyer.

Negligence, misconduct and accountability of lawyers

Tanvir: The practice, etiquette and norms in the legal profession of Bangladesh are very much shaped by the British tradition. After the decision of the House of Lords in Arthur J S Hall *v* Simons [2000], lawyers are no longer immune from any action brought against them on grounds of negligence. The same principle

applies in Bangladesh. To ensure accountability of the lawyers, there is a statutory body, the Bangladesh Bar Council, which has the power to receive complaints about misconduct and take appropriate action. The problem with this system is that people are ignorant about the complaint procedure, and others do not lodge any complaint out of fear of antagonising the legal community. I have come to learn about one case in which a former vice chairman of the Bar Council was himself accused of gross professional misconduct, but in which the concerned litigant did not dare to file any complaint.

Mohammod: **"Lawyers are not accountable for the bad consequence of cases; therefore, the majority of cases fail"**

Mohammod: Some lawyers receive cases giving assurances of one hundred per cent success and charge huge fees. Some misrepresent to the litigants that they will pay the lion's portion of the fee to the judges, but if successful in obtaining a remedy for the litigants they keep the entire amount of money and if they fail they refund the money, keeping a portion as expenditure. For this reason, sometimes clients offer money with which they believe we can bribe the judges.

Lawyers in Bangladesh are not accountable to their clients for the bad consequence of cases. They do not have to pay the costs from their own purses and hence most lawyers take every case they can get. Therefore, the majority of cases fail. As a result, the profession as a whole is losing public faith. The delay in disposal of cases is also making people scared of court. I have found some people giving up their cases due to delays. It is the solemn duty of lawyers to give proper advice and speedy relief for the sake of their own profession.

When a lawyer commits professional misconduct, a litigant can complain to the Bar Council. But in practice people do not lodge complaints against lawyers because of ignorance; because they are afraid of harassment at the Bar Council if they complain, and because if they consult another lawyer in order to lodge a complaint the new lawyer may also discourage the person due to fellow feelings for the lawyer accused of misconduct.

Where a judge commits misconduct, no lawyer will make a complaint, apprehending that other judges may become angry and his or her career will be ruined.

Relationship between lawyers, law-enforcing agencies and prosecutors

Tanvir: Law-enforcing agencies are respectful to members of the legal profession. They are prompt to respond to any assistance sought by a lawyer. My personal experience is that once the police or members of other law-enforcing agencies come to know that I am a lawyer, that person will behave with respect and courtesy. But it appears that in the lower judiciary, the relationship between lawyers and law-enforcing agencies is mainly determined by corruption. In magistrate courts, the prosecuting officers are from the police force, and the equation is simple: if you give the prosecuting officer whatever is demanded, the officer will not oppose your motion.

In the lower judiciary, the relationship between judges and lawyers is not very cordial. One reason is that judicial officers in the lower judiciary are transferred frequently and they are often moved before becoming acquainted with members of the bar. However, many lawyers develop relationships out of personal initiative, for the most part motivated by immoral considerations.

Tanvir:
"In the lower judiciary, the relationship between judges and lawyers is not very cordial; however, many lawyers develop relationships out of personal initiative, motivated by immoral considerations"

Mohammod: There is not a single segment of our society, except the perpetrators of crime, which has a good relationship with the police. Police maintain good relationships with robbers, extortionists, drug peddlers, etc., and take fixed shares from them. Nowadays some police constables have been deployed as security personnel for judges. Each judge has one constable. When a lawyer succeeds in getting a relief from a court, the guard demands tips from the lawyer, even though he has no function in the court.

In police stations, lawyers do not get any respect. Even if a lawyer goes to a police station to lodge a complaint, be it on his or her cause or on behalf of a client, the lawyer has to give bribes or he or she will not be attended at all. Some police officers maintain good relationships with particular lawyers for monetary gain. Whenever an accused is arrested the policeman will tell the accused that he knows a good lawyer who can bail him out within a day. Then he introduces the accused with the lawyer, who gives a fixed percentage of the fee to the police officer. Even then the accused may not be bailed out in a day, because that depends upon the gravity of the case and mood of the judge. In other types of cases, police hate having lawyers present, thinking that opportunities for unofficial income may be hampered by their presence.

Even the son-in-law of a senior member of a district Bar Council did not get help from a single police officer when made victim of law enforcers' harassment. Md. Jahangir Alam Akash, the son-in-law of the lawyer, is a promising journalist and an activist. When he was working as a TV reporter, the Rapid Action Battalion (RAB) arrested a person by firing a bullet into his leg. Akash prepared a report and the TV channel telecast it, which is what made the RAB team leader angry. The team leader threatened him over the telephone, which Akash brought to the notice of various authorities and groups, including the Asian Human Rights Commission (AHRC). After the AHRC issued an urgent appeal, the government asked police headquarters to enquire into the matter. When the enquiry was going on, the RAB team leader had a false criminal case filed against Akash by a person who had enmity towards him because he had written a newspaper report on the misdeeds of that person's father. On the same date the RAB arrested Akash and subjected him to inhuman physical torture in front of his wife and five-month-old son. Thereafter, the RAB managed to bring the case under the Emergency Powers Rules 2007, a law framed during the recent state of emergency. The AHRC referred the matter to me and I filed a writ petition before the High Court Division and got the

proceedings in the case stayed. Upon withdrawal of the emergency, the writ petition become infructuous and now the case is running under ordinary law.

Mohammod: "Good lawyers disrespect corrupt judges, but a corrupt judge and a corrupt lawyer make a pair of inseparable friends"

As to the relationship between prosecutors and lawyers, in magistrate courts it is police officers that prosecute the accused, but in the sessions courts prosecutors are appointed from among lawyers. The government makes these appointments from among the members of the political party in power, and on change of government the prosecutors are changed. Some lawyers of the ruling political party who are not appointed as prosecutors have good relationships with the prosecutors, but other lawyers do not get any cooperation. Prosecutors are not interested in unearthing the truth of a case. Rather, they always try to convict the accused irrespective of guilt or innocence. They do not consider whether the police have investigated correctly or not. Whether the right person has been sent for trial or not is also not their concern. In some cases, prosecutors play a lenient role if they receive bribes.

The relationship between judges and lawyers in the Supreme Court is happily healthy, although there are a few lawyers who underestimate the judges. Some months ago, a senior lawyer reportedly became angry with a judge of the High Court Division when the judge was going to pass an order against the lawyer's client. The lawyer allegedly used some objectionable words and the court issued a rule of contempt upon him and directed him to appear before the court in person on a certain date. The said lawyer did not appear before the court on that date and the case is awaiting an uncertain fate. There are also a few judges who misbehave with lawyers, but we take it as their personal character.

Some judges in the subordinate courts are jealous of lawyers as they receive a small salary while lawyers of comparable age, if sincere in their profession, may earn much more than the judges do. The poor salaries of judges lead them to corruption. The good lawyers disrespect the corrupt judges, but a corrupt judge and a corrupt lawyer make a pair of inseparable friends.

Professional organisations and the rule of law

Tanvir: In my view, the Bangladesh Bar Council has failed to raise its voice or make any mark in cases where the rule of law has suffered its greatest setbacks. It has confined itself to activities like enrolling advocates and arranging some training programmes. In some cases it has cancelled or suspended the enrolment certificates of some advocates due to professional misconduct. It has a Human Rights Cell, but the cell's activities are not very prominent. In cases where it raises its voice or takes a stand for the rule of law, it is often motivated by political considerations. It lacks neutrality. All in all, it may be said that the Bangladesh Supreme Court Bar Association has done much more to uphold the rule of law rather than Bangladesh Bar Council. Even some of the voluntary lawyers' organisations are doing more substantive work for the rule of law than the Bar Council has ever done.

Mohammod: The Bangladesh Bar Council has turned into an agency in the service of a political party. For a decade the members of a particular political party have represented it. Advocates try to enroll people to the council affiliated with that political party first. A party man is enrolled easily, although he is not qualified for enrolment, and therefore we are getting some lawyers of low caliber.

The Supreme Court Bar Association does not play any role to uphold the rule of law either. Its members' main business is receiving briefs through use of their positions. Litigants are eager to engage the president or secretary of the association, thinking that the courts will give them extra face value. Some junior lawyers also like to appoint them as senior counsels. This association has become a political association too. Only the political, no matter good or bad, are elected as members. A non-political lawyer is never elected, although he or she may be a good lawyer. The association allocates some cubicles to lawyers but a lawyer not affiliated with the political party ruling the bar never gets a cubicle, even if a good senior lawyer. There are also allegations that a few ex-office bearers misappropriated Supreme Court Bar Association funds.

The Judicial Service Association of Bangladesh too has been formed with sole objective to secure the interests of its members. The secretary general of the association, Masdar Hossain, achieved the separation of the lower judiciary from the executive by filing a writ petition. But that writ petition was also filed out of self-interest, i.e. to snatch judicial power from the executive. Apart from this achievement, the association has done nothing for the rule of law. It does not even speak against corruption. The honest and good judges are doing justice of their own volition and according to their own consciences. The only thing this association does is to hold a conference every year to raise its demands to the government. It publishes a souvenir booklet, taking donations from businesspeople and publishing their advertisements, for which the former attorney general, Mahmudul Islam, strongly criticised the group.

Tanvir:
"The Bar Council has failed to raise its voice or make any mark in cases where the rule of law has suffered its greatest setbacks"

The lawyer as human rights defender in Indonesia

Bhatara Ibnu Reza, Human Rights Research Coordinator, Indonesian Human Rights Monitor (IMPARSIAL)

Who or what is a human rights defender? Most people think of a human rights defender as a person who works as an advocate or lawyer to defend poor people *pro bono* or as an activist who opposes the government position. The truth is that a human rights defender is not only an activist or *pro bono* lawyer but is an individual who promotes human rights. Human rights defenders come from many professions, such as journalists, teachers, lecturers, architects or common people. So long as someone defends his or her rights and other people's rights, that person is a human rights defender.

Recognition of the role of human rights defenders came in 1998 at the 85th United Nations General Assembly, when it adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which is also known as the Declaration on Human Rights Defenders. The declaration made clear that the state, individuals, and groups together have the right to protect human rights at the national and international level.

This is the first time in history that under international law rights have been coupled with responsibilities for action, not only for the state as the primary actor, but also for individuals. The declaration does not give a specific definition of a human rights defender; however, in its article 1 it states that,

> Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and national level.

One definition of a human rights defender is:

> Anyone who, individually or in association with others, promotes and strives for the protection and fulfillment of human rights and basic freedoms, whether at the national or international level, regardless of her or his role in society. (Forum Asia, *Towards More Effective Protection of Human Rights Defenders in Asia*, Forum Asia, Bangkok, 2000, p. 99)

Front Line, an international group based in Dublin, Ireland, gives another definition of a human rights defender as "a person who works, non violently, for any or all the rights enshrined in the Universal Declaration of Human Rights" (*Indonesia: Murder, Death Threats and Other Forms of Intimidation of Human Rights Defenders*, 1998 - 2002, Front Line, Dublin, 2003, p. 1). This definition allows for the full range of rights, not only civil and political rights, but also economic, social and cultural rights.

"Understanding the background of a law, its genealogy, philosophy and spirit are all important when considering how the law can be used as part of an argument and in order to appreciate the political features of the law"

The lawyer as human rights defender

Lawyers are human rights defenders; however, sometimes this role is not really reflected in their day-to-day work. It is typical in our society for lawyers to be noble brokers and not a noble profession. But there are lawyers who spend all their time to defend poor people, advocate for victims, and also educate people to defend their human rights as guaranteed by the constitution.

Some groups in Indonesia educate young law graduates in the field. The Indonesian Legal Institute Foundation (Yayasan Lembaga Bantuan Hukum Indonesia, or LBH) is a prominent group that gives opportunities for young students and law graduates to put their abilities towards human rights promotion and protection. This institution also has become a legend in the history of Indonesian politics as a locomotive for democracy. The young lawyers are supervised by their seniors and are instructed that they cannot ask for money from their clients or through other means when they practice *pro bono*. They also get political education so that they have a wide perspective when dealing with cases, rather than looking at them only in terms of legal matters. This is very important, because understanding the background of a law, its genealogy, philosophy and spirit are all important when considering how the law can be used as part of an argument and in order to appreciate the political features of the law.

Law No. 18/2003 concerning advocates created some problems. This is because the law has undermined groups like LBH, as it did not recognize them as places where graduates can obtain a formal internship. The law strictly states that to get a license to practice after passing the bar exam, apprentice lawyers should get an internship in a law firm for two years. However, the regulation has not really had an impact since the Indonesian Bar Association has already recognized the role of some groups such as LBH in educating young lawyers.

Patterns of violence and intimidation

The Special Representative of the UN Secretary General on the Situation of Human Rights Defenders, Hina Jilani, in her report on her visit to Indonesia in 2007 before the seventh session of the Human Rights Council in March 2008 explained that

> Despite visible progress in the country's democratic development, human rights defenders continue to experience serious constraints in conducting their activities for the protection of human rights. Such constraints are

imputable to the continuing activities of the police, the military and other security and intelligence agencies as well as religious fundamentalist groups that are aimed at harassing and intimidating defenders or restricting their access to victims and to sites of human rights violations.

"Besides threats from the state, Indonesian rights defenders also face threats from fundamentalist groups"

The common patterns of violence towards Indonesian human rights defenders include hunting down, arbitrary arrests, terror and intimidation, murders, attacks and property damage, raids and shutdowns, unlawful lay offs, criminalization and stigmatization.

In September 2004, Munir Said Thalib, a prominent Indonesian human defender and also a human rights lawyer, was assassinated by the Indonesian intelligence agency while on board a Garuda Airways flight. This case has already been heard and it has been shown that it involved high-ranking officers in the State Intelligence Body (Badan Intelijen Negara). However, the court failed in trying the case due to lack of experience in dealing with conspiracies. The prosecutor also lacked ability and self-confidence to make indictments. In December 2008, the Central Jakarta District Court freed the primary suspect, the former Deputy II, Major General (ret) Muchdi Pr. Based on that judgment, his lawyer tried unsuccessfully to sue witnesses who testified against his client. The failure to reveal what happened in the murder case of Munir has shown how weak Indonesian law enforcement agencies and courts are. This case not only shows how feeble the government's commitment to protect human rights is, but also how it has become a human rights violator as well.

State institutions responsible to enforce human rights have failed to fulfill the rights of human rights defenders. Numerous cases have shown that state institutions have in fact impeded, violated and disregarded human rights. It is clear that ratification of sets of rights in international law does not automatically develop the government's sense of these rights.

This is most obvious in a number of state institutions. The police force is a dominant actor in the patterns of violence. The military forces, *pamong praja* municipal police units (under command of the governor/regent; established by the Dutch Indies Supreme Court, the Hoogerrechetshof) and petty criminals and unknown people are also all involved in violence against human rights defenders around the country, especially in conflict areas such as Papua, where the latter are labeled insurgent supporters, sellers of human rights and recipients of foreign aid. The attorney general impedes and fails to accommodate cases of human rights violations.

Besides threats from the state apparatus, Indonesian human rights defenders also have to face threats from fundamentalist groups. The government fails to take the threats of fundamentalism toward human rights and democracy seriously. Fundamentalism pursues singular social and life systems by denying important rights and principles agreed upon in the

constitution. Its rise is evident from the amount of violence and threats by religious-based groups, which in many cases use intimidation and coercion toward different groups to enforce their beliefs. Moreover, they insist on making their belief system into regulations for the standardization of a diverse society.

Another recent pattern is for the state or non-state actors to use the law to criminalize Indonesian human rights defenders by accusing them of defamation. All lawyers in the Aceh Indonesian Legal Aid, for instance, face defamation accusations when they take up their cases. Since they all have to face the charges, they can practically not perform their duties as lawyers. This also happened in South Sulawesi, when Upi Asmaradan, a journalist, faced a defamation charge from the Chief of Police there. In that case the police used the Criminal Code rather than *lex specialis* under the Press Law.

"Another recent pattern is for the state or non-state actors to use the law to criminalize rights defenders by accusing them of defamation"

Conclusion

The lawyer as human rights defender in Indonesia has little protection. Lawyers as human rights defenders are vulnerable. The generators of violence, including agents of the state apparatus and non-state actors, easily attack and harass them. The state also uses law to stop lawyers advocating their human rights cases and accuses them of being criminals along with their clients. This situation contradicts the state's obligations to promote, protect and fulfill human rights.

Since recognition and protection of human rights defenders is very weak in Indonesia, triggered by the political assassination of Munir, Indonesian human rights defenders urged the parliament for a special law to recognize and protect their position. My organization, IMPARSIAL, led national meetings of human rights defenders in 2006 and 2007, in which it was concluded that Indonesian human rights defenders need to protect themselves if the state cannot give proper protection. IMPARSIAL also urged the establishment of a national network of human rights defenders throughout the nation. Finally, we have called on the UN Human Rights Council to urge the government of Indonesia to

1. Harmonize the Declaration on Human Rights Defenders with the national law of Indonesia and revoke all the laws and regulations that are contradictory to the Declaration;

2. Pass a law on the protection of human rights defenders;

3. End impunity toward the perpetrators of violence against human rights defenders by processing all crimes committed and punishing the actors without any exceptions; and,

4. Take follow-up actions in the investigation of the Munir case, and in all other cases involving human rights defenders.

Recognition of human rights defenders in Indonesia would embrace the spirit of the constitution to promote human rights. It is the time for Indonesian human rights defenders to go hand in hand in order to get full recognition and protection from the state.

Appendix: UN Basic Principles on the Role of Lawyers

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

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

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be

imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

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

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should

be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

(b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

(c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

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

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

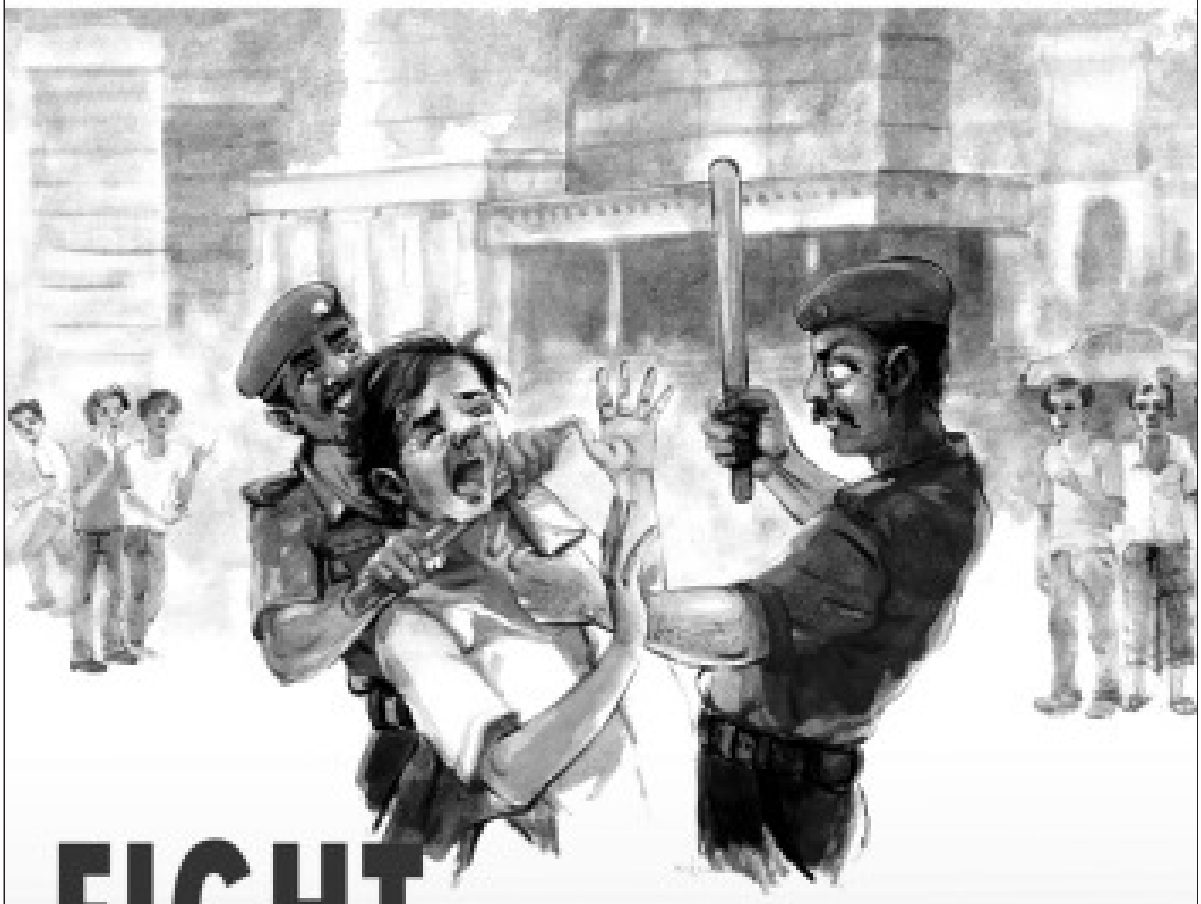
26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

IS TORTURE PUNISHED IN YOUR COUNTRY?



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