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feature

dysfunctional systems *of* justice

with articles on
Burma & India

AHRC ANNUAL REPORT

THE STATE OF HUMAN RIGHTS 2011

On the annual International Human Rights Day, held on December 10, 2011, the Asian Human Rights Commission (AHRC) released reports on the human rights situations in ten Asian countries:

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THAILAND: Consolidating internal security state, complaisant judiciary

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How can lawyers deal with dysfunctional systems of justice?

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The theme for this discussion is that,

> Countries transitioning to democracy often have to cope with fragile and dysfunctional political, economic and legal institutions. In the face of regulatory frameworks either completely lacking or totally unsuited for the "democratic refit", constitutional and criminal law reforms are crucial for establishing solid foundations for emerging democratic States. Addressing the shortcomings of the legislative system on a day-by-day basis, the organized legal profession has a unique contribution to offer in promoting, stimulating and guiding legislative and institutional reforms aimed at ensuring that constitutional and ordinary legislation reflect contemporary human rights principles and standards.

Perhaps a way to introduce this theme is to reflect briefly on the meaning of 'fragile and dysfunctional political, economic and legal institutions'. Although the theme places dysfunctional political, economic and legal systems together, these three factors need not always be linked. The economic factor in particular need not be the major factor in a dysfunctional justice system. Furthermore, some aspects of a legal system, for example administration relating to commercial and civil administration may still be functional, while the system of criminal law and constitutional law may become dysfunctional. It is invariably the political factor that creates the conditions for making the legal system dysfunctional. Consequently, in the fight to bring about reforms to give vitality to a justice system political aspects play an important role, as I will explain.

The meaning of dysfunction

The dictionary meaning of 'dysfunctional' is "abnormal or impaired functioning, especially of a bodily system or social

This is slightly revised text of a speech delivered at the Second ICJ Geneva Forum of Judges and Lawyers, held in Geneva on 5-6 December 2011.

group". In modern usage, particularly influenced by the understanding of mental health, dysfunction has come to mean the kind of mental illness that makes it impossible for the person who is suffering from it to carry out the functions that a normal and rational person does. In the political sense it means a chaotic situation within which society cannot achieve its positive objectives. The sense in which the word is used in this presentation is a situation of a legal system that has turned against itself, and within which rule-of-law principles cannot operate. Aleksandr Isayevich Solzhenitsyn in his Gulag Archipelago characterizes the extreme form of this situation in Russia under Joseph Stalin as "abysmal lawlessness".

"It is invariably the political factor that creates the conditions for making the legal system dysfunctional"

From the civil and political rights point of view we may describe a dysfunctional system as one in which a state party has failed to comply with article 2 of the International Covenant on Civil and Political Rights (ICCPR). Under this article the state party is obliged to provide for legislative, judicial and administrative measures to make the realisation of rights possible for the people of a nation. Where a state party substantially fails in implementing article 2 of the ICCPR it results in a situation within which the justice system cannot function and deliver justice as envisaged under international frameworks and standards. As far back as 2002 the Asian Human Rights Commission issued an open letter to the international community drawing attention to this issue (see *article 2*, vol. 1, no. 1).

Case studies of dysfunction

We can illustrate dysfunction through some case illustrations:

1. Phyo Wai Aung is an engineer who is now a political prisoner in Burma (Myanmar). He was incarcerated on fabricated charges and has had no hope at all of a fair trial. The Asian Human Rights Commission has set up a webpage on his case (http://www.humanrights.asia/campaigns/phyo-wai-aung). While in prison he was met by the UN Special Rapporteur on human rights in Myanmar, Tomás Ojea Quintana, to whom he later wrote a letter regarding his observations on the circumstances of his arrest and detention:

Phyo Wai Aung

> About torture, we all know about that system used by authorities. In our country especially in this prison most have been tortured in ways. Myanmar Police interrogation methods are only hitting and killing. We cannot solve this system without sufficient salary and education of personnel, modern science against crime and policy.
>
> For the prison institution the amount of personnel is not sufficient. The ratio of personnel to prisoners is approximately 1:200 and it causes stress on personnel. The quality of personnel is very low. Ordinarily one gets only Kyats 15,000 a month, approximately USD15. Sustaining a family is very difficult. To change the prison department these two issues must be solved.

We may also recall that the Special Rapporteur mentioned that on a visit to another prison he asked the inmates he met whether they had had lawyers at trial or received their services. Some of the prisoners could not understand what to have a 'lawyer' meant. "None of the prisoners with whom the Special Rapporteur spoke had been represented in the court by legal counsel. Many did not even know the definition of the word 'lawyer'", he wrote in his 11 March 2009 report to the UN Human Rights Council.

> "Razzak was harassed both by the police and some powerful property owners and was held in prison on fabricated charges"

2. In Bangladesh a qualified law graduate, FMA Razzak, used to assist poor villagers to write various petitions to the police and other authorities regarding the injustices of which they complained. He was harassed both by the police and some powerful property owners and was even held in a remand prison on fabricated charges. He still continued his efforts, as he was a committed human rights activist. He sometimes sent reports to international organisations, which wrote to the government about the problems the people were complaining of.

Among Razzak's opponents was an army major. Army officers are quite powerful in Bangladesh. This major's family forcibly chased Razzak's family away from the family home. Razzak attempted to get support from the police, but they refused to investigate. While he was making these attempts to get justice, one morning he was surrounded by people connected to the major's family, including the officer's brother, who abducted him, then attacked him and beat him severely. They even tried to gouge his eyes out, saying that it would stop him from doing his activities. Due to the severe beating he appeared to be dead. He later got medical treatment, but after several months following the incident, he had lost sight in one eye and has only partial sight in the other. His legs were also severely injured and now he needs the support of others even to attend to the most basic tasks.

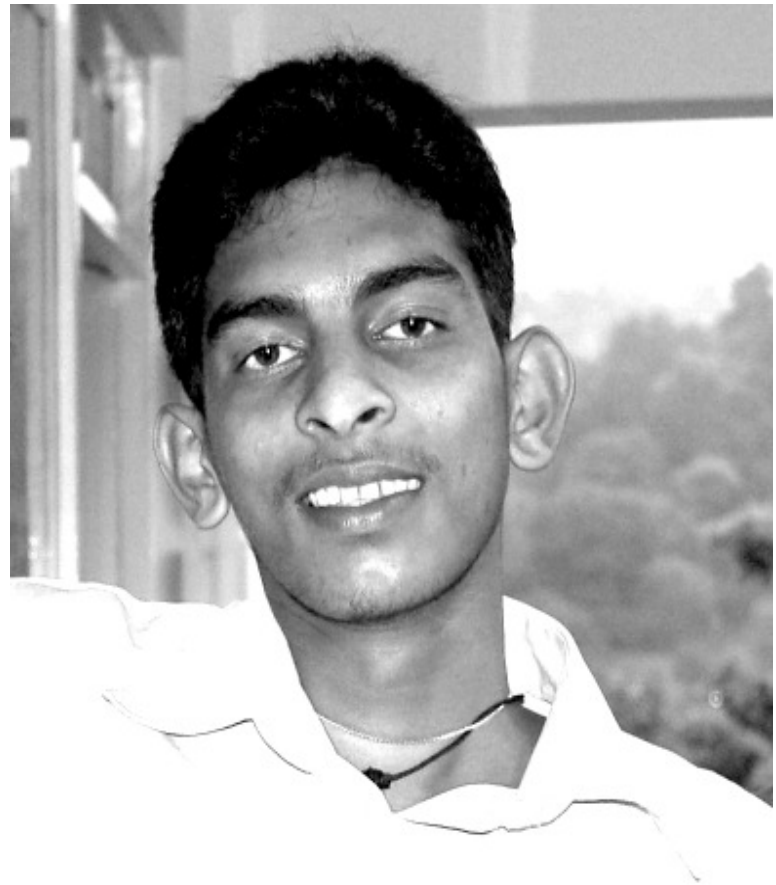
FMA Razzak

The incident provoked outrage and his supporters made complaints to the police and every other authority. The Asian Human Rights Commission (AHRC) published his story and also wrote to state authorities and UN agencies and also western embassies in Bangladesh to get support from them to ensure inquiries were made into the incident (see *article 2*, vol. 10, no. 2). Many other international organisations also supported these efforts. However, no independent inquiry has been conducted into the incident. When human rights organisations complained to the National Human Rights Commission (NHRC) of Bangladesh it did not even send an officer to record a statement from the victim. When pressure was mounted on the NHRC it handed the inquiry over to the local police who were acting in connivance with the culprit army major. The NHRC also requested an inquiry from the notorious Rapid Action Battalion (RAB), which is known for a large number of extrajudicial killings and the torture and ill treatment of citizens. The police and the RAB reported to the NHRC that Razzak's complaint was false and that there were no human rights violations. On the basis of this report the NHRC wrote to human rights organisations and the western embassies that Razzak's complaint was false.

"Lalith Rajapakse was subjected to torture for the purpose of obtaining a confession"

3. Lalith Rajapakse was a 17-year-old boy when he was arrested in 2002 by several police officers in Sri Lanka. During his detention he was subjected to torture for the purpose of obtaining a confession. The torture process, which caused serious injuries, was described as follows: "He was forced to lie on a bench and beaten with a pole; his head was held underwater for prolonged periods; he was beaten on the soles of his feet with blunt instruments; books were placed on his head, which were then hit with blunt instruments."

Lalith Rajapakse



Due to a head injury Lalith fell unconscious and in that state he was taken to a hospital where he remained unconscious for over two weeks. This incident was widely reported and human rights organisations took up the matter with Sri Lankan

authorities as well as with UN agencies. The then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment wrote to the Sri Lankan government on this issue, seeking a response. This led the government to refer the case to a Special Investigation Unit (SIU) of the Criminal Investigation Division. The SIU, after their investigation, found the complaint credible and submitted their report to the Attorney General's Department for prosecution under the Convention Against Torture Act of Sri Lanka (Act No 22 of 1994), which prescribes seven years of rigorous imprisonment and a fine of 10,000 Sri Lankan rupees on conviction.

"John Paul Nerio was tortured while being questioned without counsel at the Women and Children's Desk of Kidapawan City"

After a long delay, the Attorney General's Department filed indictments against two police officers. In 2004 Rajapakse filed a communication before the UN Human Rights Committee complaining that because of undue delays in the adjudication of his case his rights under articles 7, 9 and 2 (paras 3 and 7) of the ICCPR had been violated. On 26 July 2006 the HRC expressed its view on this communication and held that

> The facts before it disclose violations of article 2, paragraph 3 in connection with article 7; article 9, paragraph 1, 2 & 3, as they relate to the circumstances of his arrest, along and together with article 2, paragraph 3; and article 9 paragraph 1 as it relates to his right to security of person, of the Covenant and recommended that: a. the High Court and Supreme Court proceedings are expeditiously completed; b. the author is protected from threats and/or intimidation with respect to the proceedings; and c. the author is granted effective reparation. The State party [Sri Lanka] is under an obligation to ensure that similar violations do not occur in the future (CCPR/C/87/D/1250/2004, reproduced in *article 2*, vol. 4, no. 4).

The High Court completed the trial only on 9 October 2010. The High Court judge acquitted the accused on the basis that there was no evidence in the report of the Judicial Medical Officer (JMO) to show the alleged torture victim had been assaulted on his feet. However, the medical report of the JMO filed in court clearly mentioned contusions on the feet. The High Court judge had either not read the medical report and other evidence or for some reason deliberately misrepresented or ignored the facts that had been recorded. The torture victim filed an appeal before the Appeals Court and the court granted leave to appeal. However, the appeal is still pending. A Fundamental Rights Application filed before the Supreme Court has not yet been heard. Nor was any reparation paid in terms of the recommendations made by the HRC.

4. John Paul Nerio was a 17-year-old high school student in the Philippines when he was tortured in police custody on 11 December 2010. He was tortured while being questioned without counsel at the Women and Children's Desk (WCD) of Kidapawan City. Police officers falsely accused him of being involved in a fight at a bar. He suffered injuries to his chest. Due to the trauma he stopped going to school and is afraid whenever he sees policemen.

John did not tell his parents of his torture until March 2011. Upon learning what had happened, his parents pleaded with the local senior police officers to have their son's case investigated, but they were ignored. The police defended the policemen whom the family had accused of torturing their son. No investigation was conducted and no sanctions were imposed on the policemen involved, despite the fact that a formal complaint had been lodged.

It was only after the AHRC exposed the case in an Urgent Appeal (AHRC-UAC-063-2011, 18 March 2011) that it was investigated for violation of the Anti-Torture Act of 2009 by the Public Attorney's Office (PAO) in Kidapawan City and the Commission on Human Rights (CHR) in Cotabato City. The PAO then filed both criminal charges and administrative charges against the policemen for torturing the boy.

However, while the hearing on administrative charges was ongoing before the People's Law Enforcement Board (PLEB), the policemen used third parties to threaten the family of the victim and their witnesses. The PLEB, which had the power to provide provisional remedies to the complainants, like disarming and suspending the accused from service, did nothing to protect the complainants as they were legally obliged to. Despite the threats, witnesses and complainants were not given adequate protection, as required by the Anti-Torture Act.

Because some of the accused policemen were known locally to have connections with hired-killers, illegal armed groups as well as the military, the threats on the family were real. Due to the continuing threats on the victim and his family, and the fact that they were not provided with any protection, they had no choice but to withdraw the charges and settle the case outside the court by accepting a monetary offer.

5. Haren Pandya was a deputy minister in the Home Department of Gujarat, India when the massive killing of Muslims took place in that state on 27 and 28 February 2002, orchestrated by the government of the Chief Minister, Narendra Modi.

After the killings, in 2003, an enquiry commission was set up under Justice Shrikrishna. Haren Pandya, who was removed from the ministry, is reported to have deposed before the commission. Though the session was held in camera, the news that he had deposed was leaked out. On 3 June 2003 Mr Pandya was killed inside his car, allegedly by a group of Muslim terrorists who had hatched a conspiracy to kill prominent Hindu leaders in revenge for the killing of the Muslims in February 2002.

Investigators built a case primarily on the basis of the account of a single "eyewitness" who made several contradictory statements regarding what he had actually witnessed. Mr Pandya's body had seven bullet wounds. His shirt had nine bullet holes. All the holes had gunpowder residue (blackening). The eyewitness claimed that he saw the assailant shooting Pandya through a small opening of the driver's side window. However,

the nature of the wounds, particularly a shot in which the bullet entered Pandya's scrotum and moved upwards, seriously challenged the witness's version. In addition there were several other anomalies, like the virtual absence of blood inside the car, recovery of only five bullets when Pandya had received seven wounds within the confines of the small vehicle and the divergence in the description of the appearance of the bullets recovered from his body at the time of the autopsy which had described the bullets being of "white metal" and by the forensic/ ballistic expert as "grey".

"The shift from rule of law to a law and order approach is used to describe any arbitrary means to keep order"

The trial judge ignored all these anomalies and contradictions. She also rejected the opinions of forensic science and ballistic experts brought before her by the defence. She ignored the evidence of surveillance of one of Mr. Pandya's cell phones by the state Criminal Investigation Division after his alleged deposition before the Shrikrishna Commission. On the basis of "confessions" given by the accused, though these were retracted by them and the account of the sole eye witness, the trial court judge had found all the accused guilty of murder and conspiracy to launch Jihad in India.

The High Court has upturned the trial court judgement and called it perverse (see CR.A/975/2007 111/111 Judgment, *Mohd.Pervez Abdul Kayuum Shaikh & Ors* v *State of Gujarat & One*). It has clearly said that the entire investigation was a virtual sham. However, both the state government and the central government are keeping quiet. It seems that murder of Haren Pandya will remain an unsolved mystery.

Some features of dysfunction

Literally thousands of cases may be cited which manifest similar and other problems as in the five cases mentioned above. The Asian Human Rights Commission has in its Urgent Appeals archives a large number of such instances. What are some of the features of dysfunction that we can discern from these cases?

1. The shift from "the rule of law" to a law and order approach, which is used to describe any arbitrary means that may be used to keep order, as understood by a ruling regime

Under this approach any illegality can be treated as legitimate if the government thinks it needs to be done to maintain order. For example, the extrajudicial killing of those who are considered bad criminals may be considered as a means to be used for achieving order. This runs against the rule-of-law approach, whereby, according to Tom Bingham, a law lord in the United Kingdom, "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts" (*Rule of Law,* Penguin Books, 2011, p. 8).

2. Placing the head of the state above the law

This is sometimes done by constitutional provisions, as in Sri Lanka, or by treating the constitution itself as an unimportant parchment, with little or no practical value, as in Cambodia, or by having no constitution at all, as in Burma throughout the majority of years in recent decades.

3. Limiting the power and the scope of judiciary

This may done by excluding the court's jurisdiction over public law and lifting or altogether excluding the court's power to adjudicate on matters relating to the constitution. Once the power of the judiciary is limited, it has flow on effects, such as non-cooperation by state agencies, causing extraordinary delays, and making remedies like writ jurisdiction, including the writ of habeas corpus, ineffective.

4. Creating a system of punishment without trial

This may be by way of extrajudicial killings followed by media statements that the person who was killed is a bad criminal. In such situations, extrajudicial punishment is accompanied by failure to investigate crimes, either due to defects in the investigation capacity or due to political or other extraneous reasons.

5. Manipulation of powers of arrest and detention for reasons of corruption

Where police powers are heavily manipulated for moneymaking purposes, they are accompanied by the rise of mafia and the underworld, working in conjunction with police agencies, which has further profounds effect on the entire society and on the entire system of administration of justice. Sometimes, criminal elements perform functions that are usually assigned to legal agencies, such as debt collection, ejection of tenants and even providing security to VIPs. Police also often fabricate charges, sometimes on the basis of confessions obtained through severe torture or ill treatment.

6. Political control of institutions

Politicization is accompanied by loss of authority in key institutions, like the prosecutor's office, and the absence of an effective system of command responsibility within the police, since officers increasingly develop relationships with outside patrons that serve their interests independent of their standing in relation to superiors.

7. Militarization

In some instances, the civilian policing function itself does not exist, either due to rule by the military or to due prolonged militarization, and in these circumstances even the memory of civilian policing is lost.

“Politicization is accompanied by loss of authority in key institutions, like the prosecutor's office, and the absence of an effective system of command responsibility in the police”

8. Mishandling of cases under trial

> **"Threats are made to the independence of lawyers, which cause divisions among lawyers and lower their morale generally"**

Vast delays in litigation lead trials in some places to take five or 10 years on average and in some countries even 20 years. On the other hand, sometimes cases are administratively speeded up and due process is completely ignored. 'Judgements' arrived at in this manner only reflect the version of events given by executive officers. To issue such verdicts, judges ignore requirements of procedural justice and often manipulate the process. Some do not give reasons for their orders. Judges may also attempt to bring pressure on lawyers and litigants in criminal trials not to go to trial but to agree to make guilty pleas or do deals, with promises of lesser sentences and or threats of giving harsher bail terms or even refusal of bail, if they refuse to agree. Judges at times sit to hear the appeals from their own judgments. And, contempt of court law is often abused in order to intimidate lawyers or litigants.

9. Various absences

These include: absence of witness protection laws and programmes, absence of budgets for administration of justice: policing, prosecution and prisons, and absence of effective mechanisms to investigate and prosecute in cases of violations of human rights. Consequently, another absence also is the absence of a perception of justice, in society, and also among lawyers, judges and police and others. This is often replaced by cynicism and negative comments about justice.

10. Professional decline

Threats are made to the independence of lawyers, arising out of the factors mentioned above, which cause divisions among lawyers and lower their morale generally, weakening professional associations, due to deep divisions as more lawyers begin to adjust to negative systemic changes. Consequently, professional bodies fail in their supervisory responsibilities, further lowering esteem of the profession among the general public and encouraging the withdrawal of talented lawyers due to tensions arising from the abovementioned factors.

All of the above points, it should be noted, describe the administration of justice in a dysfunctional system as it works in 'normal times'. When there are exceptional times such as when emergency regulations and anti-terrorism laws operate, the situation becomes much more brutal. Abductions take the place of arrests, prolonged detention without court orders become possible, forced disappearances and various other kinds of extrajudicial killings often take place in large numbers, judicial inquiries into deaths can be suspended, convictions can take place solely on the basis of confessions, usually obtained through torture and ill treatment and habeas corpus actions become ineffective.

Some of these factors are noted by international observers and human rights organizations due to the increasing number

of complaints. However, what the international observers and human rights organizations often do not notice is that the sheer cruelty of the exceptional situation is made possible only due to routine cruelty that exists in the normal situation.

"It is this distance from parchment promises to actual enjoyment of rights that is the key issue when we are talking about dysfunctional systems"

Dealing with dysfunction

The problem that faces lawyers, human rights activists and every person concerned with the reform of dysfunctional systems essentially is about the nature of the public institutions of justice. There have been many attempts to articulate and to theorize about these problems but perhaps one of the more succinct explanations has come from an American lawyer, Gary Haugen, chief executive of the International Justice Mission. Answering the question as to why these public justice systems so massively fail the poor (in fact, everyone), he offers the following explanation which points to a fundamental problem that lies with the international human rights project itself:

> One can see that two generations of global human rights work have been predicated, consciously or unconsciously, upon assumptions of a functioning public justice system in the developing world which, if incorrect, effectively undercut the usefulness of those efforts for their intended beneficiaries. Now, absent an effective enforcement mechanism, the great work of the first two generations of the international human rights movement can deliver to the poor only empty parchment promises (Speech delivered at University of Chicago Law School, 2010).

The global human rights project has, since the establishment of the Universal Declaration on Human Rights, devoted most of its time to articulating international norms on human rights and has made attempts to get domestic acceptance and pass legislation relating to these international norms. However, such efforts have not resulted in the actual possibility of people in less developed countries achieving these rights through their public justice systems.

It is this distance from parchment promises to actual enjoyment of rights that is the key issue when we are talking about dysfunctional systems.

Documenting dysfunction

The Asian Human Rights Commission became aware of this problem by the late 1990s and ever since has been making efforts to contribute to resolving it. The very first strategy that the AHRC adopted, together with its partners in several countries, was to document meticulously the actual manner in which the public justice system of each country functions. The method adopted was very similar to the one adopted by the historic anti-slavery movement in Britain, as demonstrated by the work of Thomas Clarkson and others who meticulously documented the conditions of the slaves, for example, the manner in which they were packed and brought in ships, which subjected them to scandalous inhumanity and cruelty. This information shocked the British population and their reaction lead to great efforts to illegalize slavery and end the practice altogether.

The AHRC was of the view that the meticulous documentation of dysfunction in public institutions of justice in different countries and the consequent suffering it imposes on the populations living in these countries would lead to a better recognition of the problem locally and internationally.

“ One of the major problems within the legal profession when the system has become dysfunctional is that there begin to arise deep divisions among lawyers themselves ”

This documentation has been prepared in many ways, one of which is through the close following of many cases. Cases relating to torture and ill treatment and other human rights abuses have been followed from the very start of a complaint being made up to the cases proceeding through the courts, often for many years. Through this method it has been possible to document the manner in which the policing system in a particular country functions, the nature of its complaint mechanisms as found in legislation and how these in fact function. Later the case is pursued through observation of how prosecution is conducted, how indictments are filed and trials are prosecuted. The close observance of prosecution departments enables the observer to assess how independent the institution of prosecution is and whether the actions of such institutions can be justified from the point of view of objective criteria that is acceptable for a functioning rule-of-law system. The case is then pursued into the courts, from courts of first instance to the appeals courts. By observing the courts it is possible to document the behaviour of the judges as well as lawyers themselves.

The predicament of lawyers within a dysfunctional system

There are many problems that need to be considered when discussing the role of lawyers within a dysfunctional system.

From a holistic point of view, lawyers lose their traditional role that they would play within a rule-of-law system. The very assumption on which the legal profession functions in such a system is that law is supreme and the judiciary independent. Within a dysfunctional system both of these important aspects are, to varying degrees, absent. This creates confusion among lawyers as well as society in general as to what role lawyers can legitimately play under the changed circumstances. As time passes there is also the problem of the loss of memory both among lawyers and also the public about the role that the lawyers were previously able to play when the system was functional.

One of the major problems within the legal profession itself when the system has become dysfunctional is that there begin to arise extremely deep divisions among lawyers themselves. Quite a large section of the legal profession begins to adjust to the changed situation and learns to survive under these adverse circumstances. Within a very short time the habits that are acquired through such adjustments may even be looked upon as acceptable behaviour. As a result, a serious crisis in ethical standards takes place. What were once considered ethical standards to which legal professionals should adhere begin to

be looked upon as unrealistic and demanding an impossible performance under the changed circumstances.

Besides this, the political forces that caused the system to become dysfunctional attempt to win over a section of the lawyers, if not all, to their point of view. Ideological justifications are created as to why the administration of justice needed to be changed and therefore, that there is a need to reconsider the norms and standards of a former time. The danger of this particular approach is that the dysfunctional legal system is presented as a better alternative to which national goals in the immediate period can be directed than the system that functioned earlier. These ideological changes, often couched in nationalistic jargon, begin to appeal to a section of the legal profession who then try to take advantage of the changed situation for their own ends.

"Added to the division among the lawyers are also the divisions among judges"

The effect of all this is that those who are committed to the profession, as understood within a functional system, begin to become isolated and the possibility of a common front among the larger section of the legal profession to fight against the dysfunctional system becomes extremely difficult.

Added to the division among the lawyers are also the divisions among judges. In the early stages when a system is becoming dysfunctional, the majority of judges are likely to resent the change and try to reassert their earlier positions and try to return if possible to the system as it was. However, as the dysfunctional system consolidates itself, the earlier resistance becomes less and many judges also begin to adjust to the changed system. Initially this may cause serious conflicts but as time passes only those who adjust to the system survive. Political pressures play a significant role in the process of selecting those who would comply with the changes and the exclusion of those who are resisting and attempting to reassert the ways of the functional system. The change that takes place within the judiciary also affects the legal profession, particularly those who still attempt to fight against systemic change.

What lawyers within a dysfunctional system can do

It becomes obvious that once a system turns dysfunctional, those who want to fight for the professional status and rights available to lawyers within a functional system are faced with an enormous task. Turning the tide and returning to the ways of a functional system is not merely a matter of trying to preserve professional integrity but is a struggle to displace the political and social perspectives that have led to the system becoming dysfunctional. The fight is not a mere reassertion of values, ethical considerations and principles but also involves finding ways to undo the compulsions that created the dysfunctional system.

The following are some useful strategies:

> **"If lawyers train themselves to document their experiences in the dysfunctional system meticulously, this information could become a knowledge base for the local population as well as the international community"**

1. A dysfunctional system creates a vast number of persons with grievances that are not being addressed. Lawyers who support these persons despite their knowledge that at the end very limited results by way of justice may take place in the process may win the support of the public and also gain a vast amount of knowledge about the actual ways a dysfunctional system works and its consequences. The sense of solidarity with litigants who are deeply frustrated due to the absence of justice may provide lawyers the insights needed to understand, as well as to fight against, this situation.

2. If lawyers train themselves to document their experiences in the dysfunctional system meticulously, this information could become a knowledge base both for the local population as well as the international community in understanding the related problems. In this sense the example of the British anti-slavery movement and the achievements that were made through the dissemination of sensitive material gathered under difficult circumstances may be considered a good example. As from one incident to the next and one case to the next information increases, soon there may be credible material that those who are concerned about this problem cannot ignore.

3. Fighting against a dysfunctional system is not the sole task of lawyers. The entire society is involved in dealing with this problem. Given the fact that a dysfunctional system is a political and a societal creation, fighting against it would require close cooperation with many who may be fighting the same problem from different perspectives. A lawyer's contribution based on meticulously documented experiences could be a welcome instrument in the hands of all those who are fighting for change.

4. Even in the worst circumstances, many opportunities arise from time to time which if properly utilised could lead to positive changes. For example there are times of regime changes. There are also times when there are organised mass protests demanding greater space for justice. If a very conscious effort is not made under those circumstances to flag the problem of the dysfunctional nature of the system and the need for substantial changes, these moments can be lost. The involvement of lawyers with a comprehensive knowledge of systemic failures and weaknesses can contribute a lot to the articulation of reform programmes in order to ensure that a rule-of-law system can be re-established.

5. The lawyers and litigants in countries with dysfunctional systems are the persons who bear the brunt of the system's dysfunction on a day-to-day basis. Each of these persons carries in their memories a deep imprint of injustice and how injustice is manipulated through what is called a 'legal process'. In the minds and memories of these persons we have the greatest resource needed to compel the world for a commitment towards

the creation of functioning institutions of justice. These persons also include judges, prison officers and others associated with the 'justice process'.

6. In order to make an organised effort to accumulate and to articulate written material for public use out of the impressions of the minds and memories of people oppressed by a dysfunctional system of justice many activities need to be organised to bring such people together and also to provide opportunities for them to articulate their experiences. With modern communication facilities such as computers, tape recorders, cameras and other types of technology the transcription process from memory to written or other visual material is comparatively easy. However, such actions need initiators, who could be either individuals or organisations. With the facilities available in the Internet, communication of these materials has become easier and cheaper. Lawyers' organisations and also human rights organisations need to learn how to have close association with the victims of the system and to facilitate the articulation and dissemination of their input.

7. Aspects of experiences within a dysfunctional system will correspond from one country to the next. Similar experiences provide the basis for cooperation among lawyers and human rights groups of different countries so that they could share experiences and also develop common strategies in order to fight common problems. Such cooperation could begin with linkages of lawyers and others with their counterparts in neighbouring countries, and to regions as a whole. Already, some effort towards implementing this approach has been done in the Asian context, through the work of the Asian Human Rights Commission. By replicating these efforts and by producing a final product by way of report, books and other publications, as well as videos, these experiences could be shared with all concerned persons throughout the world.

"Lawyers should be able to transcend the approach to human rights of the earlier two generations"

A new mandate for reform of dysfunctional systems

Lawyers from outside, particularly those from countries with functional systems, can assist lawyers living within dysfunctional systems to overcome their situations. Here we are, in fact, talking about some of the most sensitive areas in the international relationship among lawyers, as well as the international movement for human rights itself. We may mention some areas for cooperation, including the following:

1. Lawyers, including their organisations based in countries with functional systems, need to make the intellectual transformation that Gary Haugen has so well noted. That is to say, they should be able to transcend the approach to human rights of the earlier two generations that concentrated mainly on the articulation of international norms and standards and to

get domestic legislation for the implementation of these international norms. As Gary Haugen has pointed out, this work was done under the assumption that public institutions to those that exist in countries with functional systems exist elsewhere. Such an assumption is baseless. A shift needs to be made, however difficult it may be, to lay the highest emphasis on human rights work providing assistance to develop public institutions of justice. This work would require a complete reorientation of the human rights movement. However, even Kofi Annan has agreed that this shift needs to be made. If at an intellectual level this problem is grasped, lawyers from countries with functional systems and their organisations could play a great role in developing the theoretical foundations as well as the practical strategies for this work. I would emphasise the need for theoretical articulation as the first priority, as without it, mere action programmes will not adequately be able to resolve the great problems caused by a dysfunctional system of justice.

“ International agencies for human rights need to be aware that the formula that recommends governments conduct investigations into violations and have trials before competent and impartial courts is inadequate because of the absence of functioning institutions of the administration of justice in dysfunctional systems ”

2. International agencies for human rights, including UN agencies and international human rights groups, need to be aware that the formula that recommends governments conduct investigations into violations, ensure prosecutions and have trials before competent and impartial courts is an inadequate formula because of the absence of functioning institutions for the administration of justice in dysfunctional systems where extremely high levels of human rights abuses are found. These demands do not lead to any real response from the governments of countries with dysfunctional systems. Some countries, for various reasons, try to give an appearance of compliance, which is often highly appreciated by the persons from more developed countries thinking that such gestures are meant well and that the violations will at least be addressed to some extent. Increasingly, more governments of the less developed countries completely ignore the formula of the developed countries for investigation, prosecution and payment of compensation. The former UN Special Rapporteur on the question of torture, Manfred Nowak, on the basis of a review of recommendations made to several countries concluded that none of his recommendations had been implemented. Similarly, when one special representative for the UN Secretary General for Cambodia went to the country on one of his visits, the United Nations human rights centre presented a list of recommendations the representative earlier had made to the government. There were nearly 50 such recommendations. Against each recommendation there was a column under the heading ‘actions taken’. In that column, under each recommendation the comment recorded was: No action. If similar reviews were made into the recommendations of different human rights agencies of the United Nations to the governments of countries with dysfunctional systems of justice, the result would most likely to be no different.

3. Dealing with the problem of dysfunctional institutions for the administration of justice requires the allocation of adequate funds for this purpose. In the budgets of countries with dysfunctional systems, the allocations made are grossly inadequate for the maintenance of proper investigation mechanisms for crime in general and for human rights violations in particular. At the same time, in the granting of foreign aid by developed countries to less developed countries the issue of the reform of dysfunctional justice systems has not been considered, let alone treated as a priority. Gary Haugen has put it as follows:

> It is difficult to overstate the degree to which public justice systems in the developing world are broken, irrelevant and dangerous to the poor. In June 2008, a careful United Nations report estimated that a staggering 4 billion people live outside the protections of the rule of law. The stunning conclusion of the UN study was simply this: "most poor people do not live under the shelter of law." In the developing world, virtually every component of the public justice system – that is, the police, the lawyers, the prosecutors and the courts – generally diminishes the ability of the poor to enjoy the protection of the law.

4. International associations of lawyers such as international bar associations often make visits to less developed countries and make various recommendations. However, a study of many of these documents demonstrates that the international experts are reluctant to characterise the system they have monitored as dysfunctional. This may to some extent be due to diplomatic reasons. However, the failure to expose the depth of the problem and instead mention only some aspects of the problem does not contribute to solutions or even contribute to getting an adequate discussion internationally and locally on the actual crisis of law. If the international bar associations improve their perspective towards identification and providing assistance to dysfunctional systems, their reports and other expressions of views are more likely to contribute to a better understanding of the justice crisis and lead to greater initiatives towards resolving these problems. This would require that the monitoring missions develop their mandates in a way that will not hinder the experts engaged in the missions from probing into the systemic problems and making recommendations that address such problems. Such a change of approach would require dealing with many sensitive issues, such as the issue of respect for the sovereignty of a country. A dysfunctional justice system fundamentally denies the sovereignty of the people and also the capacity of the state to fulfill international obligations relating to human rights.

"International experts are reluctant to characterise the systems they have monitored as dysfunctional: this may to some extent be due to diplomatic reasons; however, the failure to expose the depth of the problem does not contribute to solutions or even contribute to getting an adequate discussion on the actual crisis of law"

5. An important change in the practice of human rights that gives priority to the creation of functioning public institutions of justice in countries with dysfunctional systems can only happen if this approach is adopted as policy in countries with functional systems. Bringing about such a change of human rights priorities requires an enormous amount of work by conscientious organisations and individuals to prepare the way for such a change. Committed scholars, academics and other

intellectuals need to play a very prominent role and bring this matter sharply to the attention of the governments of developed countries and also to civil society if the proposed change is to take place. Once again we are reminded of the role played by Thomas Clarkson and others in the anti-slavery movement, as well as many others in many of the important reform movements relating to human rights. There is also the work of many groups and persons, including creative writers such as Aleksandr Solzhenitsyn, who exposed the sheer cruelty and the absence of law and justice under former communist regimes. A dysfunctional legal system causes similar misery for the whole population of a country where such a system prevails. Thus, intellectual efforts and promotional efforts in countries with functional systems are the most important ways to make progress on the issue of how to create functioning institutions of justice in countries with dysfunctional systems.

"We need radical change in the priorities of the global human rights movement by laying emphasis on creating or reforming institutions of justice"

6. Gary Haugen lays great emphasis on funding this project of creating functioning public justice systems. He appeals to western governments, as well as institutions such as the World Bank, to fund the work relating to this and argues that it will bring better results for these governments and financial institutions themselves. We agree with that point of view. However, we are of the view that to reach the stage where governments and international financial agencies will begin to support this cause, much work needs to be done by willing organisations and individuals to highlight this problem and to urge the adoption of a positive policies.

7. If lawyers and their organisations in countries with functional systems are to be effective in bringing about this change of approach to the building of functioning institutions of justice in countries where they are dysfunctional, they will need to develop close cooperation with lawyers, their organisations and others based in those countries who are pursuing the same goal. There are, in fact, large numbers of lawyers, even judges—particularly those who are retired—legal academics and members of human rights organisations who are deeply committed to seeking a way out of dysfunction. Building close and creative cooperation will primarily depend on the initiatives undertaken and resources made available by those in countries with functional systems.

Recommendations

To the global human rights movement and international human rights organisations:

1. We need radical change in the priorities of the global human rights movement by laying emphasis on creating or reforming institutions of justice so as to make them functional and credible. As stated above, this will contribute to attaining a new stage in global human rights work, transcending the earlier emphasis on the articulation of international norms and standards and achieving domestic laws incorporating such

norms, to an involvement with the institutional aspects of justice. This will require a re-examination by each international human rights group of their present-day practices and a discussion of the changes needed to meet the challenge in terms of institution building, which enables the actualisation of human rights.

2. We need much closer cooperation between those concerned with human rights in countries with dysfunctional systems and those with functional ones. If the actual depth of misery that people suffer under dysfunctional systems is to be understood by persons from countries with functional systems, who are fortunate not to experience such misery, closer linkages and cooperation with people from these two different contexts are needed. The intellectual efforts of human rights organisations based in countries with functioning systems will become richer, particularly with regard to the institutional developments, if there are such linkages and competence is developed to understand and articulate the concerns of people living under dysfunctional systems. It cannot be said that such close cooperation exists at present. There is a deep divide between those who live under better justice systems and those who live under dysfunctional systems. If human rights work in the future is to retain its credibility, this gap must be closed, and initiatives in this regard should mostly come from human rights organisations based in countries with functioning systems, as they generally have greater organisational capacities, greater intellectual freedom and greater financial and other resources. The response from people in the countries without these means will not be found wanting.

"There is a deep divide between those who live under better justice systems and those who live under dysfunctional systems"

To the Office of the High Commissioner for Human Rights:

1. The accumulated experience of the High Commissioner's office itself would confirm the premise that dysfunctional justice systems are the major obstacle for the practical implementation of human rights. Many statements from the commissioner's office, many reports from treaty bodies and special procedures of the United Nations provide valuable and extensive information about this situation. However, if there is to be any change there has to be a radical transformation of the attitude coming from the commissioner's office, which should unambiguously state that priority needs to be given to the creation of functional institutions of justice. The mere formula that advocates investigations, prosecutions and payment of compensation for violations of rights does not adequately represent the need to overcome the institutional obstructions to such investigations, prosecutions and other redress. The absence of compliance with recommendations made over the years is clear evidence of the failure of advocacy based on that formula. The leadership given by the commissioner's office for a change of policy may yield

positive responses from governments of developed countries to provide resources for such efforts and also from the UN human rights agencies themselves to adopt practices leading to the discovery of institutional defects and ways to remedy them.

> "The High Commissioner could direct United Nations agencies dealing with development goals to make the creation of functioning institutions of justice in less developed countries a higher priority"

2. The High Commissioner could direct United Nations agencies dealing with development goals to make the creation of functioning institutions of justice in less developed countries a higher priority. The commissioner could direct one or more of the relevant agencies to develop a conceptual framework for introducing this theme into all UN agencies and in particular those dealing with development. The commissioner may take other appropriate measures for the pursuit of this goal.

3. The High Commissioner's office could facilitate training for its staff as well as those involved in treaty bodies to develop their capacity in dealing with the issue of institutional development as an essential element in the protection and promotion of human rights. The High Commissioner's office can also facilitate such training for human rights and civil society organisations throughout the world.

4. The High Commissioner, in her reviews on the implementation of human rights, which she generally makes to the Human Rights Council and other UN bodies, may devote her efforts to reflect more upon the issue of the development of functioning institutions of justice and make suitable recommendations for the achievement of this goal.

To the International Commission of Justice (ICJ):

1. The ICJ is a unique institution that could contribute to the necessary development of jurisprudence and perspectives for taking up the issue of the struggle against dysfunctional institutions of justice as a primary obstacle to the achievement of international norms and standards that have been articulated and adopted by the international community during the last 60 years since the Universal Declaration of Human Rights came into effect. The previous work of the ICJ in contributing to the development and promotion of important human rights themes encourages others to look to the ICJ for leadership in this area.

2. Even to achieve the benefits of other great ventures of the global human rights community such as the International Criminal Court and the related developments for the prosecution of crimes against humanity and war crimes there is the fundamental requirement for the existence of functioning justice institutions. Where such systems do not exist, for example, as in Cambodia, the possible positive outcomes for a particular country where such tribunals are held end up being limited, as no living systems of justice exist into which to assimilate the lessons taught by such tribunals. Thus, completion of the work done in the past for the protection and promotion of human

rights, particularly in less developed countries, now requires serious efforts for the creation of functioning systems of justice.

3. The ICJ's connection with jurists throughout the world and experts in the field makes it an eminently suitable agency to initiate this important new aspect of human rights promotion. Particularly in the area of the articulation of ideas, policies and strategies, the ICJ is placed in a uniquely advantageous position to take the initiative.

Conclusion

If the results of work done for many decades on the protection and promotion of human rights are to reach the people of countries with dysfunctional systems of justice, the issue of creating functioning public institutions of justice should become the priority of the global human rights effort. If this happens, the fruits of that success would be even greater than all the achievements the global human rights movement has made in the past. If this does not happen, for vast numbers of people living in less developed countries, human rights will remain "an empty parchment promise".

An appeal for Burmese lawyers struggling for justice in a highly dysfunctional system

Burma Desk, Asian Human Rights Commission,
Hong Kong

Half a century of one form of direct or indirect military rule has resulted in a massively dysfunctional justice system in Burma. Despite this situation, many lawyers in Burma take a strong interest in social causes, and some in political ones. Many undertake their day-to-day professional tasks with eyes towards larger goals for societal change. However, because the legal system through which they must work has deteriorated dramatically over the last half century, it no longer has power to intervene in major events or affairs. It has lost significance in the public imagination and has become profoundly dysfunctional.

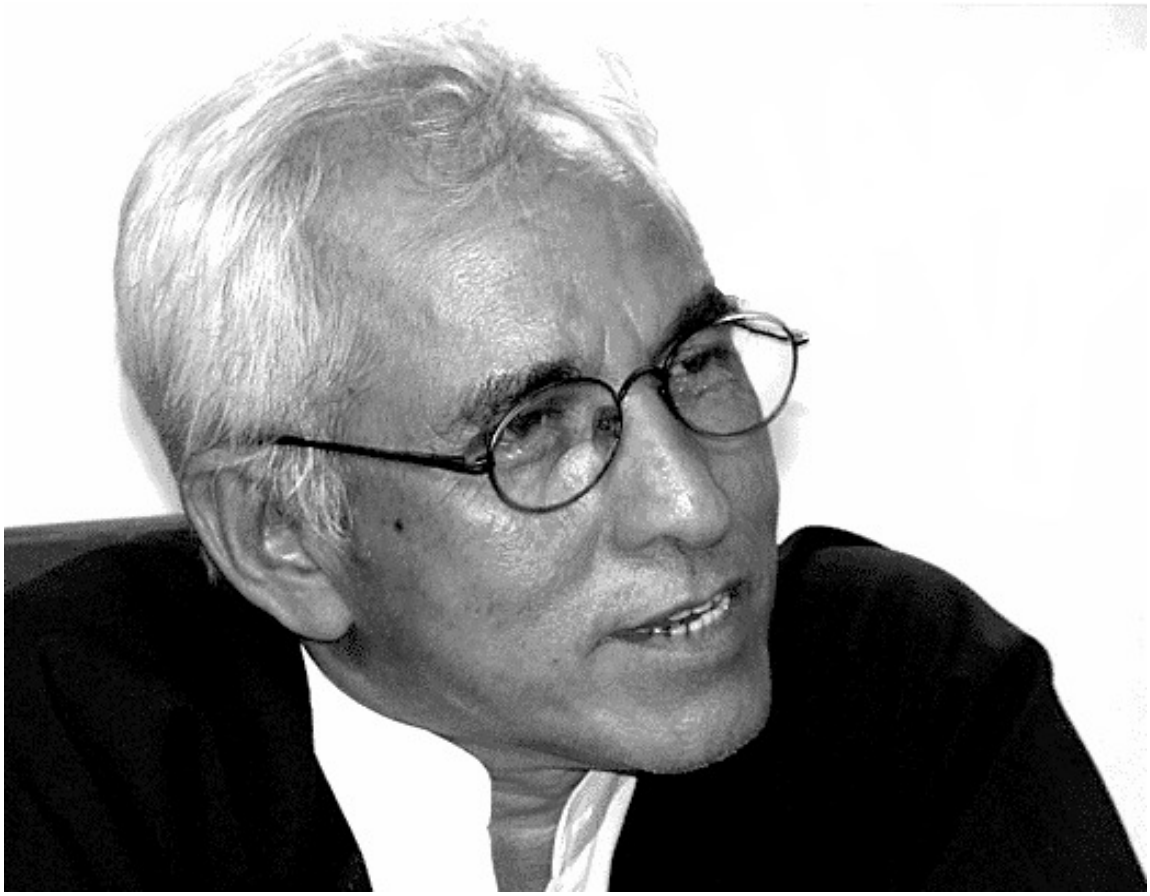
The prospect of reprisals for undertaking their ordinary professional activities is one that acutely affects the work of lawyers in Burma and speaks to the overall decline in formal legality and rise in systemic dysfunction. The very first item on the code of conduct for lawyers appearing before court is a warning not to engage in any behaviour that may constitute contempt. Once a lawyer has been convicted for contempt, or for practically any other purported infraction, he can be disbarred. In 1993 the former secretary-1 of the now defunct military junta, Lt-Gen. Khin Nyunt, listed some reasons for disbarment as including "criminal cases involving traitorous rebellion, violation of provisions in the Unlawful Associations [Act], sedition against the national government, insulting judges and interference with the judiciary, cheating and swindling, fabrication of records, bribery, exchange of foreign currency, violation of regulatory law, etc." A complete list of reasons for disbarment would presumably be considerably longer.

The threat of losing one's professional privileges on a trivial allegation of contempt or for some other breach of rules ensures that most lawyers do as they are told, and avoid cases that will cause them difficulties. A few do otherwise, and take on cases

that lead them into conflicts with judges. These include prominent cause lawyers like U Aung Thein and U Khin Maung Shein, who in 2008 were defending four persons charged over the anti-government protests of the year before. One of the accused informed the court that as they "no longer had faith in the judiciary" they wished to withdraw the power of attorney given to the two advocates. The judge instructed that the reason for withdrawal of power of attorney be put in writing and submitted through the defence counsel. When the lawyers followed her instruction, she accused them themselves of making up the statement, and lodged a complaint for contempt. Neither lawyer was invited to a hearing. Aung Thein said he learned that he had been sentenced to four months in prison while at home one day after the application against him and his colleague had been lodged. Neither lawyer had an opportunity to see the verdict prior to imprisonment. After release, each received a perfunctory notice informing him that his licence to practice had been revoked. Again, neither was offered a chance to make a defence, despite legal provisions to the contrary.

"The prospect of reprisals for undertaking ordinary professional activities is one that acutely affects the work of lawyers in Burma and speaks to the overall decline in formal legality and rise in systemic dysfunction"

A number of cause lawyers who have collaborated with the International Labour Organisation on forced labour and land confiscation issues also have lost their licences. U Aye Myint in 2005 received seven years in jail under section 5(e) of the



U Aung Thein

Ko Phoe Phyu

Emergency Provisions Act, 1950 for spreading "false" news about army confiscation of pastureland. Thanks to ILO pressure he was released from prison, but had his licence revoked. Ko Phoe Phyu received four years in prison in 2009 under section 6 of the Organization Law, 1988 for having set up an unregistered lawyers' group with six colleagues, which the judge described as having as its stated objective the defence of justice and human rights through legal means but in fact having as its purpose the making of seditious statements in the courts via cases in which its members were appearing. He too was released following ILO pressure, and within a week received a letter notifying him that the Supreme Court had suspended his licence.

In November 2011, 16 of these lawyers who have had licences revoked wrote to the president of Burma on their own behalf, and that of another 16 of their peers, to seek the renewal of their licences. In their letter, the lawyers pointed out that their licences were unilaterally revoked not in accordance with the terms of the Bar Council Act, whereby they have a right to make a defence against revocation of the licence. Many of them also received harsh prison terms, some from military tribunals. They note that in the current period, the president has met with Daw Aung San Suu Kyi and both sides are concerned with dialogue for national reconciliation, a process that the lawyers also

strongly support. They argue, therefore, that a review of the revocation of their licences is in the current period appropriate, in order to further the process of political reform and progress towards national reconciliation.

> **"Each of these 32 lawyers did no more than freely represent their political opinions in accordance with the law; a number did no more than practice their profession in accordance with relevant codes of conduct"**
>
> ***—Wong Kai Shing, AHRC director***

The lawyers have requested international support for their petition. Accordingly, on 22 December 2011 the Asian Legal Resource Centre submitted a letter in support of the lawyers' petition to the Chief Justice of the Supreme Court, which has final authority on the revocation or suspension of lawyers' licences. In that letter, Wong Kai Shing, the director of the Asian Legal Resource Centre, wrote that,

> Each of these 32 lawyers did no more than freely represent their political opinions in accordance with the law. A number of them did no more than practice their profession in accordance with the relevant codes of conduct. Most of them did not get any opportunity to represent themselves prior to the removal of their licences, as required under the terms of the Bar Council Act, the Legal Practitioners Act and the Courts Manual, but were simply informed about the revocation of licence via letter.
>
> In light of the unjust circumstances under which the licences of these lawyers were revoked, their shared concern for the upholding of the rule of law through professional practice, and given the changed political circumstances in Myanmar of the last year, we ask that the Supreme Court seek a review of the decisions to revoke the licences of each one of these 32 lawyers, and others in similar circumstances, with a view to restoring them their professional qualifications.
>
> In this regard, we note in the state media of 3 October 2011 the Attorney General of Myanmar, Dr. Tun Shin, did inform the parliament that the Bar Council is authorized to review cases were licences have been revoked and make submissions to the Supreme Court on the same. We urge that in each of the cases of the lawyers listed below, that process now take place in order that they are again able to earn their livelihoods and also contribute towards the development of their country at this vitally important time.

After issuing the open letter, the ALRC also issued a special worldwide appeal, including to the International Bar Association, International Commission of Jurists and UN Special Rapporteur on the Independence of Judges and Lawyers, in support of the lawyers. In the appeal, the ALRC called for letters of support from professional bodies, particularly those with international mandates, and those in the region. Letters of support for these lawyers can be sent directly to the chief justice at the following address:

U Tun Tun Oo
Chief Justice
Office of the Supreme Court
Office No. 24
Naypyitaw
MYANMAR

Tel: + 95 67 404 080/ 071/ 078/ 067 or + 95 1 372 145
Fax: + 95 67 404 059

The letter need not be long, but should be explicit in its support for the rights of these lawyers in Burma whose licences were removed from them for their simple expression of political views, or for no more than the defence of persons accused of political offences. We are particularly interested to get the support for these lawyers from their counterparts in professional groups around the world, because we are confident that these will have a strong effect both as a source of encouragement for the lawyers and also as an impetus for the professional bodies concerned in Burma, or Myanmar, to review their cases. Groups not wanting to draft their own letters can use the following template:

> Dear Chief Justice
>
> **MYANMAR: Appeal to review cases of 32 lawyers disbarred for political reasons**
>
> We are writing to you further to a letter submitted to the President of Myanmar dated 4 November 2011 by 16 lawyers who were disbarred because of alleged political crimes or politically related violations of their codes of practice.
>
> According to the 16 lawyers, they had their licences revoked unfairly and unlawfully, inasmuch as the revocations were not done in accordance with correct procedure and were motivated not in response to breaches of professional codes of conduct but because of dissatisfaction of the authorities with their political activities, or efforts to defend the rights of persons accused in political cases.
>
> These 16 lawyers constitute half of a total of 32 lawyers in an enclosed list who have had their licences to practice revoked for political reasons. They include 25 advocates licenced to appear before the Supreme Court, including three women advocates; and, seven Higher Grade Pleaders, licenced to appear before lower courts, including one female pleader. A list of the 32 lawyers follows. We believe that there will be other lawyers aside from these 32 in the same situation of having had their licences revoked for political reasons, many having spent periods in jail.
>
> We ask that the Supreme Court review of the decisions to revoke the licences of each one of these 32 lawyers, and others in similar circumstances, with a view to restoring them their professional qualifications, so that they are again able to earn their livelihoods and also contribute towards the development of their country at this vitally important time.
>
> Yours sincerely
>
> [Signed]
>
> SUPREME COURT ADVOCATES (licence numbers in brackets)
>
> 1. U Aye Myint (4377) 2. U Myint Than (2639) 3. U Har Mar Nyunt (1756) 4. U Myint Htay (1827) 5. U Khin Maung Thein (2694) 6. U Thaung Myint 7. Daw Khin San Hlaing (4203) 8. U Kyi Win (1506) 9. U Htay (3860) 10. U Khin Maung Thant (1784) 11. U Thein Than Oo (3695) 12. U Sein Nyo Tun (3978) 13. U Aung Thein (2703) 14. U Khin Maung Shein (4660) 15. U Robert Sann Aung (2469) 16. U Saw Hlaing (4666) 17. Daw Tin Htwe Mu (1447) 18. U Saw Htun (2791) 19. U Htun Htun Han 20. Thura U Tin Oo 21. U San Ni Tin Pe 22. U Aye Myint (Guiding Star) (4821) 23. U Myat Hla (1154) 24. Daw Hla Myint 25. "BBC" U Ne Min (2090)

HIGHER GRADE PLEADERS (licence numbers in brackets)

1. Daw Ohn Kyi (6764) 2. U Aung Kyi Nyunt (3710) 3. U Htun Oo (11942)
4. U Nyi Nyi Htwe (24702)

Professional groups sending letters can also send copies to the Burma Desk of the AHRC at the address found on the back of this edition of *article 2* or scan and send them to burma@ahrc.asia. So far we have received copies or details of letters sent from professional groups in Australia, Canada, France, Korea and Nepal. Further inquiries can also be directed to the desk through that email address.

Below we reproduce the list of 32 lawyers with summations of their cases and links to sites for further details, where available, which the ALRC submitted to the chief justice with its open letter. Note that since the time of sending the letter at least two more lawyers have lost licences for representing clients in cases that ran contrary to state interests.

List of 32 lawyers in Burma known to have been imprisoned previously and to have had licences revoked for political reasons

1. U Aye Myint

Supreme Court Advocate, licence number 4377	
Town of residence	Kale
Court	Mandalay Division Military Tribunal Number 3
Sentence	Death penalty
Decision date	21 September 1989
Release date	December 1997
Revocation of licence	2 May 2000

Brief summary of the case

Served as the chairperson of National League for Democracy (NLD) in Kale Township. In 1988, during the time of uprising, the whole general strike committee was given punishment over the death of U Thaung Aye, a Township People's Council member.

2. U Myint Than

Supreme Court Advocate, Licence number 2639	
Town of residence	Shwebo
Court	Mandalay Division Military Tribunal Number 4
Sentence	Death penalty
Decision date	September 1989
Release date	December 1997
Revocation of licence	1989
Signatory of letter to president	

Brief summary of the case

In 1988 he was running a strike committee in Shwebo. He was accused in a murder case arising out of events in 1988 and punished under the Emergency Provisions Act, 1950, section 5.

3. U Har Mar Nyunt

Supreme Court Advocate, Licence number 1756	
Town of residence	Kyaukse
Court	Mandalay Division Military Tribunal Number 2
Sentence	13 years imprisonment
Decision date	22 December 1989
Release date	26 March 1995
Revocation of licence	23 January 1996 (Supreme Court Order No. 1/96)
Signatory of letter to president	

Brief summary of the case

During the 1988 uprising, he was secretary of the strike committee in Kyaukse. Soon after he was punished under the Public Property Protection Act, 1947, section 3.

4. U Myint Htay

Supreme Court Advocate, Licence number 1827	
Town of residence	Thazi
Court	Meiktila Military Tribunal Number 10
Sentence	5 years imprisonment
Decision date	23 December 1989
Revocation of licence	23 April 2003 (Supreme Court Order No.63/ 2003)
Signatory of letter to president	

Brief summary of the case

Working as the secretary in a strike committee at the time of the 1988 uprising, he was accused in connection with the takeover of the ruling Burma Socialist Programme Party office in Thazi Township, and the office of the Lanzin Youth (party youth wing). He was sentenced under the Penal Code, sections 452/447/427.

5. U Khin Maung Thein

Supreme Court Advocate, Licence Number 2694

6. U Thaung Myint	**Supreme Court Advocate**
Town of residence	Thazi
Court	Yangon Division Military Tribunal Number 1
Sentence	25 years imprisonment
Decision date	30 April 1991
Release date	4 May 1992
Revocation of licence	1993

Brief summary of the case

In 1990, these two lawyers were elected to the parliament as representatives of the National League for Democracy (NLD) in Khin Oo constituency. Both were given life imprisonment under the Penal Code, section 122, for treason, but in 1991 were released.

7. Daw Khin San Hlaing

Supreme Court Advocate, Licence number 4203	
Town of residence	Wetlet
Court	Yangon Division Military Tribunal Number 1
Sentence	25 years imprisonment
Decision date	30 April 1991
Release date	4 May 1992
Revocation of licence	1999

Brief summary of the case

She was elected to parliament as the NLD representative in Wetlet Township constituency during the 1990 election, convicted of treason but subsequently released. She lost her licence for organizing NLD members.

8. U Kyi Win

Supreme Court Advocate, Licence number 1506	
Town of residence	Labutta
Court	Myaung Mya District Court
Sentence	2 years imprisonment
Decision date	August 1999
Release date	July, 2011
Revocation of licence	August 1990
Signatory of letter to president	

Brief summary of the case

From the central committee of the NLD, he was elected as parliamentary representative for Labutta constituency 1 and convicted of upsetting public tranquility under the Penal Code, section 505(b).

9. U Htay

Supreme Court Advocate, Licence number 3860	
Town of residence	Pyapon
Court	Pyapon Township Court
Sentence	7 years imprisonment
Decision date	March 1993
Release date	1998
Revocation of licence	2000

Brief summary of the case

Advocating for farmers whose lands were forcibly seized by the state in Pyapon, he was given 7 years in prison under the 1950 Emergency Provisions Act, section 5.

10. U Khin Maung Thant

Supreme Court Advocate, Licence number 1784	
Town of residence	Mandalay
Court	Mandalay Division Military Tribunal Number 4
Sentence	10 years imprisonment
Decision date	5 February 1990
Release date	2 February 2001
Revocation of licence	26 September 2001 (Supreme Court Order No. 97/2001)
Signatory of letter to president	

Brief summary of the case

Serving as the vice–chairperson of the National Political Front (NPF), being involved in the National Industrial Safety Committee (NISC) and he was given a penalty under the 1950 Emergency Provisions Act, section 5(j).

11. U Thein Than Oo

Supreme Court Advocate, Licence number 3695	
Town of residence	Mandalay
Court	Mandalay Division Military Tribunal Number 4
Sentence	14 years imprisonment
Decision date	5 February 1991
Release date	2 February 2001
Revocation of licence	26 September 2001 (Supreme Court Order No. 97/2001)
Signatory of letter to president	

Brief summary of the case

He was given punishment for serving as the second secretary of the NPF and secretary of the NISC, for unlawful publication of printed materials and for distribution of cassettes threatening the integrity of the armed forces for which he was convicted under the Emergency Provisions Act, section 5(j).

12. U Sein Nyo Tun

Supreme Court Advocate, Licence number 3978	
Town of residence	Mandalay
Court	Mandalay Division Military Tribunal Number 4
Sentence	7 years imprisonment
Decision date	5 February 1991
Release date	1995
Revocation of licence	26 September 2001 (Supreme Court Order No. 97/2001)
Signatory of letter to president	

13. U Aung Thein

Supreme Court Advocate, Licence number 2703

14. U Khin Maung Shein

Supreme Court Advocate, Licence number 4660	
Town of residence	Yangon
Court	Supreme Court
Sentence	4 months imprisonment
Decision date	7 November 2008
Release date	7 March 2009
Revocation of licence	15 May 2009 (Supreme Court Order No. 46/2009)
Signatories of letter to president	

Brief summary of the case

U Aung Thein was working and serving in the NLD main office as deputy chairman of the Central Legal Committee, which was giving legal assistance and advocating in political cases; U Khin Maung Shein was volunteering with the committee part time. In 2008, they were representing clients in political cases heard in the special courts inside Insein Central Prison They were given prison terms for contempt of court. Two months after release from prison both had licences revoked by the Supreme Court under the Bar Council Act, section 10(1).

Full details of case:

http://campaigns.ahrchk.net/burma-lawyers/

15. U Robert Sann Aung

Supreme Court Advocate, Licence number 2469	
Town of residence	Yangon
Court	Insein Prison Special Court
Sentences	7 years imprisonment; 2 years and 6 months
Decision dates	11 April 1997; 20 November 2008
Release date	17 December 2010
Revocation of licence	1 January 1993
Signatory of letter to president	

Brief summary of the case

He has been imprisoned approximately six times in total.

16. U Saw Hlaing

Supreme Court Advocate, Licence number 4666	
Town of residence	Indaw
Court	Military Tribunal
Sentence	25 years imprisonment
Decision date	1991
Release dates	27 May 1992; 12 November 2001
Revocation of licence	1991
Signatory of letter to president	

Brief summary of the case

He was elected to parliament as a representative for NLD in the 1990 election. Afterwards, he was sentenced under the Emergency Provisions Act, section 5(j); and the Printers and Publishers Registration Law, section 16/20. He has been imprisoned four times in total.

17. Daw Ohn Kyi

Higher Grade Pleader, Licence number 6764

Town of residence	Meiktila
Court	Yangon Division Military Tribunal Number 1
Sentence	25 years imprisonment
Decision date	30 April 1991
Release date	4 May 1992
Revocation of licence	1993

Brief summary of the case

She was elected to parliament for the seat of Meiktila in the 1990 election, and subsequently charged with treason under the Penal Code, section 122.

18. U Aung Kyi Nyunt

Higher Grade Pleader, Licence number 3710

Town of residence	Chaungzon
Court	Chaungzon Township Court
Sentence	2 years imprisonment
Decision date	December 1990
Release date	10 April 1992
Revocation of licence	September 1992

Brief summary of the case

Elected to parliament in 1990 for the NLD, in Chaungzon constituency, Mon State.

19. U Htun Oo

Higher Grade Pleader, Licence number 11942

Town of residence	Yangon
Court	Yangon Division Military Tribunal Number 1
Sentence	Life imprisonment
Decision date	1 November 1989
Release date	2 November 1999
Revocation of licence	1989

Signatory of letter to president

Brief summary of the case

Penalized for attempting to bring down the state over his part in the 1988 protests.

20. U Nyi Nyi Htwe

Higher Grade Pleader, Licence number 24702

21. Saw Kyaw Kyaw Min

Higher Grade Pleader, Licence number 28261

Town of residence	Yangon
Court	Yangon Western District Court
Sentence	6 months imprisonment
Decision date	30 November 2008
Release date	2009; absconded
Revocation of licence	mid 2010

Nyi Nyi Htwe signatory of letter to president

Brief summary of the case

Convicted under the Penal Code, section 228, for allegedly failing to comply with a judge's instructions over a protest action by clients in a political case arising out of the 2007 demonstrations; Saw Kyaw Kyaw Min absconded and fled to Thailand before the sentence was passed.

Further information: http://www.humanrights.asia/news/forwarded-news/AHRC-FPR-032-2008/

22. U Tin Aung Tun

Higher Grade Pleader, Licence number 21483

Town of residence	Minbu
Revocation of licence	2011

Signatory of letter to president

Brief summary of the case

He was assisting farmers in their legal claims against land grabbers in Kanma Township when his licence was revoked without reason. Not imprisoned.

23. Daw Tin Htwe Mu

Supreme Court Advocate, Licence number 1447

Town of residence	Yangon
Court	Mawlamyinegyun Military Tribunal
Sentence	5 years imprisonment
Decision date	1990
Release date	1995
Revocation of licence	1995

Signatory of letter to president

Brief summary of the case

The daughter of Thakin Ba Thein Tin, a leader of the Burma Communist Party, she was put behind bars under the 1950 Emergency Provisions Act.

24. U Saw Htun

Supreme Court Advocate, Licence number 2791	
Town of residence	Monywa
Court	Monywa Township Court
Sentence	2 years imprisonment
Decision date	2 June 2003
Release date	29 May 2004
Revocation of licence	10 December 2003

Brief summary of the case

While he was volunteering as a member of the NLD legal aid support group in his township, he put up an NLD signboard, whereupon he was detained and charged under the Penal Code, section 505(b) with upsetting public tranquility.

25. U Htun Htun Hein

Supreme Court Advocate	
Town of residence	Naungcho
Court	Naungcho Township Court
Sentence	21 days
Decision date	March 1989
Release date	June 1989
Revocation of licence	December 1992

Brief summary of the case

He was elected as parliamentary representative for the NLD in Naungcho Township. In 1992, he participated in the National Convention to prepare drafting of a new constitution. Also he has been part of the NLD legal aid central committee.

26. Thura U Tin Oo

Supreme Court Advocate	
Town of residence	Yangon
Court	Military tribunal
Sentence	7 years imprisonment

Brief summary of the case

NLD deputy chairperson; tried for treason; imprisoned and licence revoked.

27. U San Ni Tin Pe

Supreme Court Advocate	
Town of residence	Yangon
Court	Military tribunal
Sentence	Life imprisonment
Decision date	1988

Brief summary of the case

Imprisoned for his involvement in a strike committee during 1988.

28. Ko Phoe Phyu (a.k.a.) Yan Naing Aung

Higher Grade Pleader, Licence number 23815

Town of residence	Yangon
Court	Aunglan Township Court
Sentence	4 years imprisonment
Decision date	17 March 2009
Release date	March 2010
Revocation of licence	11 March 2010

Brief summary of the case

Around May 2008 he worked through a young lawyers group to give legal aid to clients being tried in the Insein Central Prison. He was accused of forming an illegal organization under the Organisation Law 1988 while working through his Youth Lawyers Group to represent farmers whose lands had been seized from them.

Further information: http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-032-2010

29. U Aye Myint

Supreme Court Advocate, Licence number 4821

Town of residence	Bago
Court	Daik-U Township Court
Sentence	7 years imprisonment
Decision date	31 October 2005
Release date	2006
Revocation of licence	12 May 2006 (Supreme Court Order No. 40/2006)

Signatory of letter to president

Brief summary of the case

Imprisoned under the 1950 Emergency Provisions Act, section 5(e), over cases of forced labour in which he was assisting farmers through his Guiding Star group. Released due to pressure from the International Labour Organisation.

Further information: http://www.humanrights.asia/news/urgent-appeals/UA-119-2006/; http://www.humanrights.asia/news/urgent-appeals/UP-125-2006

30. U Myat Hla

Supreme Court Advocate, Licence number 1154

31. Daw Hla Myint	**Supreme Court Advocate**
Town of residence	Bago
Court	Bago Township Court
Sentence	Acquitted
Decision date	1994
Revocation of licence	1992

Brief summary of the case

In the 1990 election U Myat Hla was chosen as parliamentary representative from Bago constituency 2. He was the chairman of the Bago NLD also, and president of the Bar Association in Bago. A client brought a politically motivated complaint against him and Daw Hla Myint for alleged malpractice. Although the case was dismissed, their licences have remained revoked.

32. "BBC" U Ne Min

Supreme Court Advocate, Licence number 2090	
Town of residence	Yangon
Court	Insein Prison Special Court
Sentence	35 years imprisonment
Decision date	21 October 1988; 2003
Release date	1996; 2011
Revocation of licence	1989

Brief summary of case

Charged under the Unlawful Associations Act, section 17(1)(2), the Emergency Provisions Act, section 5(j) and the Official Secrets Act, section 10 for having unauthorized possession of a telephone and for involvement in the 1988 protests in 1988, including contact with a BBC reporter. Imprisoned twice for eight years. Licence revoked before first conviction.

Eradicating hunger requires concrete action, not hollow promises!

Avinash Pandey, Research Scholar,
Asian Human Rights Commission, Hong Kong

One would hardly expect the prime minister of a country that fashions itself as the biggest democracy of the world and hopes to be a 'superpower' by 2020 to acknowledge that his country is home to hunger. Yet that is precisely what the Indian prime minister did recently. Harder to believe is that the prime minister did not stop at that but went on to call it a national shame.

He was not off the mark. With more than 42 per cent of Indian children being underweight, a national shame it is. One would be tempted, though, to ask what his government and those of his predecessors have been doing to fight and eradicate this national shame.

The devil lies in the details hidden in the answer to this question. The details expose the paradox of high rates of chronic hunger in a country where millions of tons of foodgrain rot in the godowns of Food Corporation of India (FCI) every single year. For example, while replying to a question in parliament, Sharad Pawar, the incumbent minister for Food and Agriculture, informed the lower house that over 11,700 tons of food grains worth 68.6 million Indian rupees (or approximately USD1.5 million) were found damaged in government warehouses. This wastage of food could be seen as—and dealt with as—a criminal offence in any country, leave alone India with so many hungry stomachs to feed!

Added to this is the fact that at any given point in time the FCI stocks almost double the amount of buffer norms, an amount that hovers around 30 million tons of foodgrain. Evidently, the government is not hard-pressed with any shortage of food. Quite on the contrary, it has more than enough to release not merely to save children from malnutrition but also to save the foodgrain from rotting.

> **"India has been ranked in the 'alarming' category on the Hunger Index prepared by the International Food Policy Research Institute"**

This is not to suggest that the prime minister or his government has woken up to the disturbing fact of malnutrition with a start. The writing has been on the wall all this while. There was enough data to shake it out of its slumber, more so because the data was coming from a multitude of sources including its own agencies, independent economists, research institutions and international watchdogs among others.

For example, India has been ranked in the 'alarming' category on the Hunger Index prepared by the International Food Policy Research Institute. Notably, every single country in Asia barring Bangladesh has been performing better, and that includes war torn countries like Afghanistan and Iraq! In fact even Guinea-Bissau, Togo, Burkina Faso, Sudan, Rwanda and Zimbabwe were found to be feeding their people better than India. The findings merely corroborated the research of Utsa Patnaik, one of the most renowned contemporary Indian economists, who has decisively shown that an average Indian family in 2005 was consuming a staggering 110kg less grain as compared to that in 1991.

Patnaik has not stopped at that. Her meticulous studies have pointed out that when it comes to food security, India is failing its citizenry on every single count. Never mind the alarming gap between required protein intake and actual consumption, a silent majority was not getting enough for mere physical survival in terms of calorie intake. Backed with solid data, she has gone on to demonstrate that per capita food consumption in contemporary India is worse than that in the colonial times!

The situation on the ground is horrifying to say the least. If one goes by the criteria for famine put forward by the World Health Organisation (WHO), then the world's largest democracy can be labelled as famine stricken. One of the WHO criteria to determine famine defines a community with more than 40 per cent of its population having a body mass index (BMI) of less than 18.5 as famine stricken. By that yardstick, Indian children as a whole and many other communities, mostly the Dalit and tribal, are in the grip of a near-perennial condition of famine!

About the same time that Paitnak was using the data from the National Sample Survey Organisation (NSSO)—an agency reporting directly to the Government of India—to reach her conclusions, P. Sainath, one of the best journalists in India, was demonstrating how frightening the situation in the Indian countryside has become.

The deepening agricultural crisis in rural India has culminated into two separate but entwined scenarios that would be enough to shame any country, let alone, again, the world's largest democracy. India on one hand has been witnessing the largest documented wave of suicides by small and marginal farmers unable to repay debts, and on the other, a huge exodus from the countryside, in the absence of emergency or exigency.

The crisis has not escalated to this point overnight. It has been long coming. Governments too have been well aware of it. However, they have responded in a fashion that can at best be termed 'knee-jerk'. Most of them have done nothing and others, precious little. The set pattern of response has included launching welfare schemes ostensibly aimed at bringing people out of the self-reinforcing vicious circle of poverty and hunger, on the premise that such schemes will break the tie between poverty resulting in stunted growth and that stunting in turn resulting in more poverty.

"The Public Distribution System is beneficial for everyone; it is just that "everyone" here does not include the poor and dispossessed"

Some of these schemes are almost as old as the republic itself. In order to help the poor and needy through the Public Distribution System (PDS), governments opened fair price shops selling subsidised rations, kerosene oil (and even clothes, in the distant past) in as many villages as it could. Most of these shops remain closed to the needy. Their rations and kerosene get siphoned off to the open market and contractors make a lot of money. Of course there are officials entrusted with the job of fighting such blatant corruption, but then, most of them act in collusion with the contractors and take their own cuts. Such a system is beneficial for everyone. It is just that "everyone" here does not include the poor and dispossessed.

Before rubbishing this argument as consisting of baseless allegations, bear in mind that these are the findings of the Justice Wadhwa committee which was appointed by the Supreme Court of India to study PDS reform.

The Integrated Child Development Scheme (ICDS), formulated in 1975 with a mandate of fighting malnutrition among children under six years of age, tells a similar story. Malnutrition among children, as acknowledged by the prime minister himself, runs at 42 per cent. Need one say more about the efficiency and success of the scheme? Not really, barring one fact that begs our attention. A closer look at the budgetary allocation for the scheme brings out that every child is entitled to a grim 4 rupees of budgetary allocation per day, or less than a twelfth of a single US dollar. At the current market rates, the amount would seem to be a cruel joke for any sane person, even forgetting the distressing fact that a significant chunk of even this meagre sum is eaten up by widely prevalent corruption.

The menace of corruption is of course nothing new. Rajiv Gandhi when he was Prime Minister of India poignantly noted way back in late 1980s that 86 paisa out of every rupee earmarked for such schemes was lost to corruption. The figures must be far worse now. But if we account for the four rupees per child using his estimate, we find that the actual money reaching a child through the ICDS entitlement is a mere 56 paisa. One might think of this callousness as a one-off accounting mistake were it not for the fact that the same government is trying to lower the poverty line to an abysmal 32 rupees (USD 0.60) for urban dwellers and 20 rupees (USD 0.40) for rural dwellers per capita per day.

"State governments have identified 111 million Indian families to be in poverty, as against the central government's estimation of around 60 million"

Similarly, policies aimed at inclusion are subverted to exclude the needy and the bureaucracy seems to master the art of administering misery instead of delivering benefits. The exclusionary character of the policy has been lamented time and again, even by those in the system. The Justice Wadhwa Committee identified it as the core problem plaguing the system and asserted that the very basis of adjudging the poverty level at an expenditure of less than 15 rupees a day was 'too low'. It also submitted to the Supreme Court that nearly half of the poor do not have Below Poverty Line (BPL) cards and are thus disentitled.

Even this disentitlement is not one off. One would find it hard to believe, but the Planning Commission of India had the audacity to put a central cap on the number of BPL families in the provinces and then defend it while acknowledging that it does disentitle those genuinely needy. For the uninitiated, the 'central cap' is an arbitrary figure that the state governments follow for the purpose of identifying families below poverty lines. Further, it leaves the states to deal by themselves with any population in excess of the cap. It does not give any assistance for that population. Having a significant population in perpetual poverty is no big deal to the central government. It can just be wished away by the magic wand of statistics, it seems.

In a written submission to the Supreme Court the Planning Commission argues that it "is aware that many States complain that people who are indisputably poor are left out of the BPL list because of the cap imposed by the Central Government. It is not denied that this is indeed the case in many states." What then does it do? It blames it all on state governments, arguing that the problem has been caused by its identification by the states! Any rational person would find the argument not merely baffling but also absurd, as did the Supreme Court. In an order dated 29 March 2011, the court expressed its dismay over the issue and asserted that it failed "to comprehend the rationale and justification of putting a cap by the Planning Commission".

The fact of the matter is that the state governments, taken together, have identified 111 million Indian families to be BPL, as against the central government's estimation that puts the BPL count at half of that, or just around 60 million. Interestingly, even the central government seems to know that its own estimate is not merely unreliable but also seriously low. What else would explain the National Food Security Bill proposed by the same government, putting the BPL cap at 46 per cent in rural areas and 28 per cent in urban ones?

Evidently, everyone—including the government, the judiciary and the civil society—is well aware of the problem. The Supreme Court has also been trying its level best to address it, even if it means taking on the role of the executive, because the executive has refused to discharge its duties as mandated by the constitution. Yet, it does not mean much for those fighting hunger on the ground. The Supreme Court is neither that easily

accessible to them, nor can it afford to adjudicate on individual cases in a country with a population of more than a billion.

The system, of course, has a grievance redress mechanism at the lower levels, offering remedies to anyone whose rights or freedoms get violated. Unfortunately, this system is no less inefficient and corrupt than its counterparts in the administrative and legislative branches. In fact, even the Supreme Court of India has taken notice of the corruption and inefficiency rampant in the judicial ranks. The situation is far worse at the lower rungs of the judiciary, which often is the first point of contact for a person seeking remedy and the rest of the system.

This is where we can start digging deeper into the real factors that lead to such terrible state of chronic hunger affecting the citizenry of a country claiming to be moving up the ladder. To begin with, chronic hunger does not affect the citizenry as a whole but affects only those who have been condemned to live on the margins of Indian society. Even a cursory glance at any data on hunger brings this fact out. The Hunger and Malnutrition (HUNGaMA) report, whose findings the prime minister based his national shame comment on, underscores that the children from Muslim and Scheduled Caste/Scheduled Tribe households are among the largest numbers of victims, and they suffer more than others.

The finding partly explains the administrative inertia; despite all the urgency that the government shows when talking about the problem. To put things in perspective, this is not the first time that the prime minister has shown such concern over malnutrition affecting Indian children. Taking cognisance of the enormity of the issue and its implications for the nation, the government had set up the Prime Minister's National Council on Nutrition way back in 2008, but then the council did not even meet but once in 2010! Not a single decision taken in that meeting, like the restructuring and strengthening of the ICDS, was ever implemented, despite recommendations from various governmental committees as well as civil society groups.

The government can well afford to ignore hunger. For it does not exist in isolation but is deeply embedded in the social system that Dr BR Ambedkar famously referred to as a system of 'graded inequalities'. Hunger affects those who occupy the lowest rungs on the ladder, people who are seldom represented in the mainstream discourse. They are the people the government can choose to forget, for their sheer numbers ensure that it would never be in short of labour even if it let a large section of them silently die.

Barring a small but highly committed section of the civil society, these people get a short shrift from larger society, even when it cannot actually do without them. They build the factories and houses, guard gated communities, and run errands as house-helpers while getting systemically dispossessed from their

"The government can well afford to ignore hunger, for it does not exist in isolation but is deeply embedded in the social system that Dr BR Ambedkar famously referred to as a system of 'graded inequalities'"

lands and livelihood, as happened in the Narmada Dam project and is happening all over India in the Special Economic Zones.

"The government needs to radically restructure the whole system with an emphasis on building an honest delivery mechanism with corresponding mechanisms for addressing grievances"

This is where Indian democracy reduces itself into a terribly deficient and in fact delinquent form of government. In a social system that penalises people for accidents of birth in a particular group instead of giving equal opportunities to all individuals irrespective of their caste, creed or community, primary responsibility for helping those on the margins lies with the state. This is why the state is treated as *parens patriae* (parent of the citizens) and has the right to intervene in cases of interest to the citizens such as in matters of health, physical comfort and welfare, whenever such interests are threatened. But the Indian state would have none of this. Instead it seems prepared to let its citizenry live with the paradox of a democracy in the political arena rendered futile by extreme levels of socioeconomic inequality, as forewarned by Dr Ambedkar.

The only way to deal with the issue perhaps is to ensure that one fights hunger, social exclusion, dispossession and other such ills through a system of justice. A system of justice, in turn, can only be based on rule of law, ensuring effective, efficient and immediate remedies to people whose rights or freedoms have been violated through the malfunctioning of the system.

What the government and the prime minister need to do is radically restructure the whole system with an emphasis on building an honest delivery mechanism with corresponding mechanisms for addressing grievances. The government would do well to start at the grassroots, say by making the system transparent and giving communities a stake in running the mechanism. For example, the experiences of social audits in the case of the Mahatma Gandhi National Rural Guarantee Act (MNREGA) have been tremendously encouraging. Not only have the social audits seen massive participation by the community members but they have also helped fighting corruption. Almost all studies on the MNREGA have found that it has been most successful where the process of social audits backed by community-based organisation has become institutionalised.

Devising a mechanism like social audits can actually be a real good beginning that would go a long way in ensuring food security and alleviating hunger. Need one say that in the face of such community action deriving from a right, diverting the foodgrain meant for the community would become far more difficult than it is now? Making the lower judiciary more accessible and affordable may be the next step in the direction for ensuring that those subverting the system are dealt with. Till the government gets its act together on these two counts, all talk will remain empty, words devoid of any meaning.

India, a corpse of rights without justice as its soul

Sachin Kumar Jain, Journalist, Bhopal

One of the sad truths that we have to live with today is that the people's struggles for human rights are highly fragmented in India. Equally disheartening is the fact that whenever or wherever human rights comes up for discussion, they are addressed piecemeal, ignoring and leaving far behind a comprehensive approach to rights based on the notion of justice. The focus is usually on the concept of rights understood within the limited periphery of 'people's welfare' in which the quotient of 'justice' is forgotten.

In India we have 713 pieces of legislation that deal with people's rights, their entitlements and protection. Another 19 on food, nutrition and health are on the anvil. In fact, what we have is a law-making regime for last 65 years, and yet the concept of justice is missing in the country.

Do rights make any sense without justice? Can we expect that human rights will be guaranteed without justice? Can we afford to seek justice only through the courts, exempting the executive?

When public pressure concerning an issue disturbs the state, the state comes out with a policy and passes a law. But laws are meaningless if there is no system to implement them. And where there is no accountability within the system, legislating becomes a farcical exercise. The basic objective of the people's struggles in the country is to ensure proper implementation of laws. What we need to do is to think where and how deep are the negations of rights permissible within the system. Otherwise the enormous efforts of the people's struggle to claim these rights would go in vain.

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There are more than 3000 struggles for justice going on in the country's 640,000 villages where over 3500 thousand voluntary and non-governmental organisations work. This is because although India has some of the most progressive laws in the world and claims to be the world's largest functioning democracy, it is a country in which 9000 custodial deaths take place every year and over 1500 thousand children die of malnutrition, while policymaking continues unmindfully!

"Although India has some of the most progressive laws in the world it is a country in which 9000 custodial deaths take place every year and over 1500 thousand children die of malnutrition"

In such a situation how can we ignore the question of why the system refuses to change? How can we not ask why the lives of people count for nothing and why their standard of living shows little sign of improvement?

There are 15,777 under-trial prisoners in Madhya Pradesh and 15,784 in Maharashtra. They are not considered eligible for bail, and are forced to wait for a final verdict till an uncertain time. Many among them have already spent more time in the prison than what the sentences for the crimes alleged against them might warrant. The path of justice tends to veer towards injustice because the state, which has the responsibility to dispense justice, is not accountable to the people. Is this, perhaps, part of its well-thought-out strategy to retain supremacy over the society? It is a thought worth considering.

The government formulates policies and passes laws allegedly to solve these problems. But the laws remain on paper. They are of use to the society only if an institutional framework for implementing them is created, an adequate budget sanctioned, officers appointed, and other necessary infrastructure put in place.

For instance, the government claims that the people have a right to health. But if there are no doctors, no hospitals, no money to buy medicines, what does this right mean? When will people enjoy its benefits? The government has also passed a law giving people the right to free and compulsory education. But to ensure quality and equal education to all we need enough teachers, new teaching methodologies and classrooms and toilets in schools. But the financial resources available for all this are not even half of what is in fact required. So what kind of right to quality education can our children hope for?

Justice must be evident and should appear to be done. Rights cannot be seen as disconnected from justice. If the state is unjust, if it abdicates its responsibility to dispense justice, people can neither claim nor protect their rights. In India, the state is only putting on an act with its 'people-oriented' policies and laws to hoodwink the people. The reality is the continuing violation of all basic rights.

Take the example of the law guaranteeing the Right to Information (RTI Act 2005). It says if people are denied this right the responsible official will be penalised to ensure that such violations do not occur in future. The right is for seeking and obtaining information, but justice is for taking actions to punish

those officials who violate the right. As long as this aspect is ignored, talk about rights is mere deception.

Justice and rights are not limited to the judiciary or to the state that is supposed to safeguard them for society. They go beyond these institutions. Justice is a universal trait, a basic human character, like courage, equality and respect for nature. It is not something that one obtains only through a court of law. The notion of justice starts with the faith that justice will not be denied. Justice is also the belief that the authorities and the system will respect your claims to rights and treat you in a way that raises your morale and reinforces your belief in the system.

The search for justice could begin for instance with the police inspector or a constable in a police station. If they are unjust, one cannot get justice from the court that in a criminal case will have to depend upon the police for investigation of a criminal charge. The decision of the court is based on the case report the police present. That is why justice is not something that only a court of law ensures.

“The search for justice could begin with the police inspector or a constable in a police station; if they are unjust, one cannot get justice from the court that in a criminal case will have to depend upon the police for investigation”

There is also the country's media that presents a case before the public. If the media is unjust, they cannot feel the soreness that a victim experiences when rights are violated. Investigations about rights violations without a perspective of justice serve only the purpose of whitewashing of some and slinging mud at some others.

If more and more cases of rights violation keep occurring, and if they continue to be viewed in a perspective devoid of justice, the policies that are eventually formulated will also be devoid of justice. If justice is not ingrained into the system, then the system will become a purveyor of injustice.

The British ruled our country, India, for more than 200 years as a colony. They came for business and later continued to influence our systems, political, economic and social. They also made laws and created institutions. Definitely those were not for the welfare of the people and to ensure justice. They made them to control any action that might challenge their rule. They created the police force in 1861, and they made forest a state property by creating the forest department at the same time with a clear message that Indian communities had no ownership over their natural resources.

The colonial rulers followed a specific meaning of the rule of law, which for them translated as a regime to establish the rule of the state over the native society, to suppress the strength of the people, so that there was no opposition to colonial interests. One country rules the other for looting, not for welfare, so one cannot expect that the coloniser will go to any pains to set up standards of living, welfare or norms for human rights. In such a situation the ruler (not the state per say) is the key culprit in human rights violations. “Justice” to the ruler means protection of a section of people who provide them support to rule.

The British hanged Indians who demanded justice, dignity, rights and freedom. They used the judicial system to rule without considering norms of justice or rights. Tax and revenue systems were made for looting resources and the education system was contaminated to create a bonded society. These systems' key objective was that there would be no revolt even after extreme injustices like massive food shortages. This was the key objective of the coloniser and that is why the concept of law and order became important for them. We, in the independent state, continue to follow the same approach. If you go for an agitation, you will be booked and may be disappeared forever. Why is there no scope and space for those in the country who want to share their anger, frustration and agony? Why are they treated as criminals? Such space was not there before 1947 and still is not there, 65 years since.

"In the past, village institutions controlled resources but today these resources are retained in the central treasury by the state and the panchayats and gram sabhas have to extend their palms to plead for central 'alms'"

Making laws is a collective process of the legislature. The government drafts a bill and presents it to the parliament. The bill is normally sent to as parliamentary standing committee, which invites comments and suggestions from institutions/ organisations and from the public. The bill is accordingly modified and sent back to the parliament. But the government is not bound to accept all the recommendations of the committee. So it is free to ignore any provisions that may be mistakenly viewed as diluting the legislature's power or compromising its position. The passage of the bill depends on the strength of the ruling coalition. If it enjoys a majority in the house it faces no compulsion to keep the people at the centre of its legislation.

A law is an all-encompassing document of the right in question. But often it does not outline the steps required for its implementation or for creating the required institutional structure. These are dealt with in rules and procedures and this is where the next deception of the people occurs. Unlike the bill, there is no scope for the standing committee to offer its views and suggestions about the rules and procedures nor do people have the right to have their say. There are enough loopholes and pitfalls in them for people to stumble into and get trapped. There are no systems to ensure that our rights are clothed in the cloak of justice.

The key to the implementation of a law is with the state. The 73rd Amendment of the Constitution had paved the way for the decentralisation of state power through the Panchayati Raj, with authority given to the panchayats (elected local bodies at the cluster of villages) and gram sabhas (village councils). But no panchayat can impede the salary of a corrupt official who does not perform his or her duty. It can only make recommendations to the executive that action is to be taken against an erring officer. In the past, the village institutions controlled resources but today these resources are retained in the central treasury by the state and the panchayats and gram sabhas have to extend their palms to plead for central 'alms'.

Our society is still ruled by the caste system. We all know this truth. It is plagued with discrimination, gender inequality, untouchability and feudalism, which is the reason why there is little hope for the society or for its social institutions to make any real effort in creating a system that is based on equality and social justice. Our society remains silent when confronted by deaths from starvation and malnutrition. It fails to raise its collective voice against the rapes that it witnesses. And instead of resisting the naked exploitation of our resources it spends its energies looking for escape routes such as internal or external migration. It is in such situations that the role of the state comes into focus.

"Madhya Pradesh is a state where six million children are battling malnutrition; their chances of winning this battle are slim because the state government does not provide them the kind of support they need"

The expectation is that the state will create a system to counter and abolish inequality, discrimination, exploitation and social boycotts. Such a system cannot be limited to policy formulation and law making. Laws create the system and the system should, in principle, function within their ambit. Social contradictions can only be resolved by governance guided by value and justice-based laws. In today's context, it means justice and values should remain not just the responsibility of the state, but also that of its banks, media, markets, production systems and in the private sector. Otherwise these agencies inevitably become the new players in the processes of exploitation and subjugation.

Rights cannot be claimed or given unless and until an accountable and institutionalised structure is created to implement them. The laws enacted should be such that they carry the message of rights with justice. They should explicitly state that an institutionalised structure will be set up for implementation, with an effective, transparent and decentralised mechanism to monitor the implementation and register and resolve complaints within a specified time. They should also contain provisions to punish the guilty and compensate the victims of rights violations. Equally important is sanctioning of the required budget, because without such allocations, nothing is possible.

Child malnutrition: An example of the gap between policy and reality

Madhya Pradesh is a state where six million children are battling malnutrition. Their chances of winning this battle are slim because the state government does not provide them the kind of support they need. But eradicating malnutrition is a battle that the state should be fighting because it is the constitutional guardian of our children. The Integrated Child Development Scheme (ICDS) was formulated in 1975 to address and resolve the problem. Its primary target is children aged below six years, who are most susceptible to malnutrition. But 37 years after its launch, malnutrition remains a scourge that continues to play with the lives of our children. The question we need to ask is: why did such an ambitious scheme fail to bring any significant change in the situation?

> **"In 1991, the government made an allocation of one rupee per child for providing nutritious food. But the actual disbursal was 47 paisa per child"**

The ICDS provides for setting up anganwadis (child development centres at the level of every local habitation) to care for all children, and the Supreme Court has decreed that such care centres must be established in every village and habitation and no child should be denied its services. The anganwadis have the infrastructure to provide six crucial services to children, at least on paper. These include monitoring their growth and development, providing nutritious food, imparting health and nutrition education to pregnant/lactating mothers as well as adolescent girls, vaccinating children, imparting pre-school education and admitting the seriously ill to hospitals.

An anganwadi has to cater for the needs of around 40 children aged below six years, under the supervision of an anganwadi worker and a helper, who are recruited from the village. The worker has to maintain six registers with vital data about the children and the services rendered. Can two workers cope with this large burden of responsibility? The Supreme Court has instructed that the anganwadi services should be universalised and their quality should be improved. The government continues to enrol children in the care centres but it has done very little to increase human resources, their capacities, infrastructure facilities and remuneration.

In 1991, the government made an allocation of one rupee per child for providing nutritious food. But the actual disbursal was 47 paisa (USD 0.023) per child. If seen from another angle the budgetary provisions would be adequate for only 47 per cent of the child population in this age group. Moreover, when the village community complains that nutritious food is not provided for six months in a year, the bureaucracy did not point out that the allocation itself has been drastically cut and that is why children remain hungry. Instead, it blames the anganwadi workers and takes action against them to maintain the power of the state. Where can the anganwadi workers go to fight for their rights and justice? There is no mechanism to give them justice.

Another distressing fact is that the budgetary provision remained unchanged for 15 years until 2005, when it was raised to two rupees per child. Today, in 2012, the amount is four rupees per child, which is still only half of the actual need. The government calls malnutrition a 'national shame' yet it allocates a measly amount, which cannot even buy a cup of tea in today's market price, to resolve the crisis. A country with one of the fastest growing economies of the world has the largest population of malnourished children among all nations and yet it has no willingness to give more than one per cent of its budget for children aged below six years, who constitute 14 per cent of its population!

The ICDS has been riddled with corruption since the time it was launched. There is no mechanism in the system to register complaints against this corruption, carry out an impartial investigation, take immediate action, award punishment, or

protect the rights of children and women. If a complaint is registered, the state government asks the district collector and the programme head in the district to conduct an inquiry. These officials themselves are an integral part of the implementing agencies. So in a way they are responsible for the corruption and negligence. Should the accused be given the responsibility of investigating the misdemeanour and felony?

> **"The state is becoming progressively ill equipped to deal with its responsibilities even as its officials show an increasing tendency to abuse their authority"**

Madhya Pradesh has constituted a State Commission for Protection of Child Rights. To begin with, it is a moribund organisation. Even if any of its members take the initiative to fulfil its responsibilities, there is little likelihood of anything coming out of the exercise because the commission only has the power to make recommendations but not the power to ensure compliance by the implementing agency, which has unlimited and unrestrained power. Perhaps the government wants it this way. That is why it never acknowledges that the lack of accountability.

The state does not appear committed to protect human rights or dispense justice. In such a situation, children will continue to starve and be malnourished. Their hunger is not so much the outcome of inadequate food but the lack of accountability, corruption, carelessness and despicable apathy of the state.

A question of intent

Child malnutrition in India, like other violations of fundamental human rights, is a question of intent. On the one hand there is no system or mechanism to ensure justice, while on the other our judicial system is caught up in protecting its own interests. In 2011, a total of 26.3 million cases were pending in Indian courts. It would require 24 years for the courts to clear the backlog, provided no new cases are registered in the interim. If cases continue to be registered at the current rate, the courts will have a backlog of 240 million pending cases.

This only shows that the state is becoming progressively ill equipped to deal with its responsibilities even as its officials show an increasing tendency to abuse their authority. Even then the government makes no commitment to overhaul the system to ensure that the people do not have to wait endlessly for justice. People living in Manipur, Arunachal Pradesh, Nagaland and Tripura have to travel all the way to the high court in Guwahati because there are no other high courts in these northeastern states.

Take a look at the following example. In 2006, the Indian government passed a law recognising the forest rights of scheduled tribes and other traditional forest dwellers. The law declares in its opening statement that the indigenous communities have been subjected to historical injustice for centuries and the state seeks to give them justice through this legislation. Now take a look at its provisions. In order to establish community rights to forests the villagers have to produce adequate documentation to show that they have been using

forests for their livelihood, grazing and access or for cultural and religious purposes or for foraging forest produce for their daily needs. This is a task that is beyond most of them.

"It is not as if the government has never built a strong institutional framework for implementing its laws. Wherever it needs to protect its powers it ensures that such a system is established"

In India, systematic records have been maintained at the district level (in district record rooms) from even before 1950 of every village, its resources and their use. Many people are not even aware of this storehouse of data and information. These documents are called *nistar patrak* (record of use of land, forest and other natural resources) and Bajib-ul-Arz. It is almost impossible for villagers to access these documents in the maze of modern bureaucracy and red tape. The result is that only around five per cent of the claims to community rights have been legally established and recognised.

If the intent of the government is to confer community rights to the rightful claimants why did it not add a provision to the law stating that it will make available all the documents in its possession to the gram sabha and the village level forest rights committees to enable them to process claims and establish the rights of the community? It is the responsibility of the government to provide the required documentation, not of the people who have been subjected to this historic injustice. Until and unless the state internalises the concept of justice every utterance of its officials will be futile and meaningless. But the state is reluctant to part with the power it has over the people.

It is not as if the government has never built a strong institutional framework for implementing its laws. Wherever it needs to protect its powers it ensures that such a system is established. For example, when electricity production was privatised, private companies were permitted to decide electricity tariffs, a job which the government did earlier. It set up an Electricity Regulatory Commission to approve the tariff increases and give them the official stamp. The commission gives priority to the arguments of the private companies, not the government or the people, in arriving at its decisions. As a result, electricity tariffs have been raised by 20-30 per cent every year.

Water is also in the process of being privatised and the necessary institutional changes will be made. Poor people living in slums will now have no access to free water. Prices will be raised periodically and those who cannot pay will be deprived of their right to water and electricity. The government gives statutory powers to these commissions, which make them more powerful than even the parliamentarians. This clearly shows that the implementation of a law depends on the kind of enabling institutional structures that are created.

The problem is not that 42 per cent of our children are victims of malnutrition or that our prime minister calls this a national shame. The problem is that the state has made no concrete effort to resolve the problem, and nor has it created accountable and resource-rich institutions to deal with it. Nor does the system

have responsible people and policy makers or a planned mechanism to implement a solution. The problem is that the bureaucracy is neither accountable nor capable of dealing with the situation. Even if there are capable bureaucrats who do good work, they end up being punished instead of rewarded because corruption is accepted as a way of life.

"Prior to 1997, everyone could get rations through the public distribution system; then the government decided to draw a poverty line and declared that only those below this line could receive subsidised rations"

People's struggles, agitation and advocacy

We also need to understand the link between people's struggles, agitation and advocacy. People's struggles emerge in certain special circumstances and the initiatives they take aim to change the mindset of society. They see the problem from a social and political perspective but find themselves caught up in many dilemmas. They cannot decide how to change the system if the very root of the crisis lies in its unjust nature. The system can only be changed by democratic means, but there is a reluctance to enter into electoral politics to affect such political change. The people find themselves caught up in answering the questions posed by the government when in reality it is they who should be demanding answers from the government. The people's struggles have been weakened and divided by the state through its power to distribute favours and services.

Prior to 1997, everyone could get rations through the public distribution system. In 1997 the government decided to draw a poverty line and declared that only those below this line could receive subsidised rations. The poverty line was a ruse to deny rations to 64 per cent of the population. And now when a people's struggle is being fought to bring about institutional change in the rationing system, our middle class and the class of people excluded from the ambit of rations by the poverty line turn their backs on this struggle, saying they have nothing to do with it. And those who are eligible for rations are so socially and economically debilitated and deprived that they find it difficult to leave everything to fight for their rights.

The state weakens the people's struggle for social, political and economic rights in this way. In the past 20 years we have seen farmers and agricultural labour melded into a powerful force but the state had created divisions between them through its policies. For example, it has reduced the concessions and subsidies extended to agriculture, raising the cost of production. At the same time, it has raised the wages of unskilled labour, who also work as farm labour, through the National Rural Employment Guarantee Act.

The government has not given proper support prices for agricultural produce while it has given a fillip to the import of cheaper agriculture products from other countries, where farmers are given large subsidies. With cheap imports flooding the markets the local farmers have no market for their produce. The outcome is that they are in a pitiable state today. Most of them (77 per cent) are small and medium farmers owning less

than two hectares of cultivable land. They find committing suicide to be an easier alternative than farming.

> **"We must ourselves clearly understand that human rights cannot be defined without justice, and justice cannot be limited to the courts but must permeate and become an integral part of society"**

The growing urbanisation of the country is also responsible for alienating society from the concerns of our villages. The pitiable state of health and education services in rural areas and the crisis caused by development project-linked displacement of people does not strike a chord in the cities. The possibility of launching a people's campaign is low in such a scenario. There is a thin line between people's struggles and advocacy. People's struggles raise issues and slap the government to take notice of these issues. Advocacy involves building up a fact-based and analytical understanding of issues to strengthen the people's struggles. The two do not themselves look for solutions to problems but try to force society and the state to take up the task of looking for solutions.

Advocacy is a process that takes up one or several linked issues with the objective of bringing about a change. When we work on any issue, case or incident there are three objectives we have in mind: the affected individual, people or community should receive their rights with justice. Those responsible for perpetrating injustice should be punished and their accountability should be fixed so that no abrogation of rights can occur in future. The weaknesses of the system should be removed, in keeping with these objectives, so that it is no longer unjust in character.

And finally, we must ourselves clearly understand that human rights cannot be defined without justice. And justice cannot be limited to the courts but must permeate and become an integral part of society, the state and the system. Change cannot happen only by formulating policies or making laws. It requires provisions for an administrative, economic and infrastructural system (buildings, equipment, roads, water supply, sanitation, etc.), creating an accountable mechanism for redress of grievances that works in a time-bound manner. We have to decide on the values and standards that govern this system and the government should pledge to adopt these values and standards.

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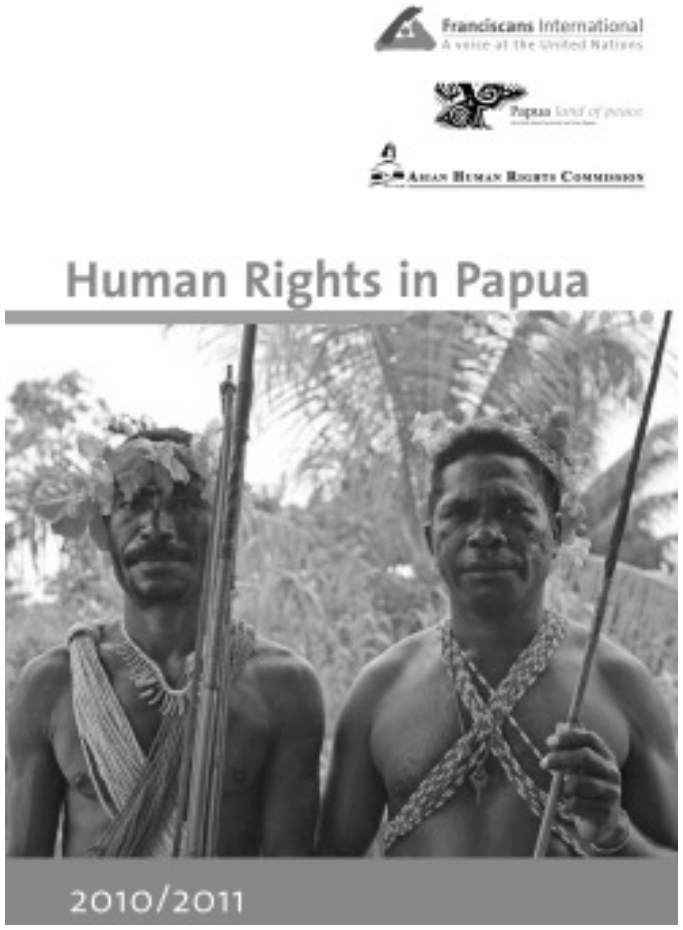

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