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article 2

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

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

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

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

of the International Covenant on Civil and Political Rights

A sister publication of Human Rights SOLIDARITY

About *article 2*

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

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

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

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

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

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

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Remarks at the launch of 'Endemic torture and the collapse of policing in Sri Lanka'

Professor Michael Davis, Faculty of Law, Chinese University of Hong Kong

Asia is the only part of the world without any regional human rights institutions, and when I read this report I was struck by that. Anyone who studies regional institutions knows that they tend to have a bit more progress than the international ones, notably in Europe, but increasingly in the Americas and Africa. I noted the role of the UN Human Rights Committee in some of these cases. I appreciate its role, but we know that it can criticise and that is about the limit of its function. There is little follow-up, and it is difficult to get implementation of what it suggests. So in the end it all returns to the political process, and anyone involved in human rights work knows that to have influence politically involves good use of information and publicity. I really appreciate this report for that reason.

So for that person at the bottom, the chance to have somewhere to go and complain and have one's voice heard is often greatest at the national and regional level. Now we know the weaknesses at the national level, and those are identified in this report, but there is no place to turn at the regional level, and I think we should try to emphasise that in Asia we need a regional human rights treaty more and more. Of course, a regional institution wouldn't be a panacea, but would it be a good thing? I say yes. I feel a sense when I travel around the region that human rights problems are discussed in isolation. So I appreciate the need for comparisons, but we need more than this. We need something within which we can work on human rights problems at the regional level.

Unfortunately, the absence of regional dialogue means that we don't talk about these issues. I hope this report will overcome some of that silence; I hope it doesn't disappear into the flutter

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This is the edited text of remarks made at the launch of the second special report on torture in Sri Lanka published in *article 2*, 'Endemic torture and the collapse of policing in Sri Lanka' (vol. 3, no. 1, February 2004), on 26 March 2004.

of international news. So can we start talking to each other about it? I don't think there is a country in Asia for which this discussion wouldn't be important.

On another point, there is a model for dealing with police abuse that is especially common in the Commonwealth where you have complaints commissions and other avenues for complaints against the police, but there are always debates about whether these institutions are independent, whether they can investigate properly or not. A supplement to these could be better rules of evidence, excluding evidence obtained by torture. We know from this report that judges aren't paying enough attention to complaints of abuse, and this is another part of the problem that requires our attention, not just investigating police.

Michael Davis: "A regional institution wouldn't be a panacea, but would it be a good thing? I say yes"

Law Yuk-kai, Director,
Hong Kong Human Rights Monitor

Compared to the situation in Sri Lanka, the situation in Hong Kong is much better, but there are still areas where we can learn from each other. The recommendations in the report are particularly useful for Hong Kong, such as on how to prevent impunity. In the past we have had a number of serious cases in police stations for which to this day we have not had any satisfactory answers and nobody has been brought to justice. So this brings home to us the importance of independent monitoring of police, in particular, the power to investigate them. Interestingly, in Hong Kong the Ombudsman has the power to investigate the police only to the extent that they fail to comply where access to information is concerned, and in the meantime the government is doing its best to shelter them. That is very sad, because if the problem is not serious, why protect a few 'bad apples'? On the other hand, if the problem is widespread, then we do indeed need some system to bring it under control, yet currently we have no independent investigating body.

Another issue is how to ensure that there is no political control of the police force. Recently in Hong Kong we have witnessed signs of the possible politicising of the police. These are coming from various directions, including changes in laws, and changing methods of policing. For instance, police have gone to apartment buildings with questionnaires about Falun Gong demonstrators: 'Do they block your way?' 'Are they a nuisance?' In the past, these kinds of questionnaires were only used in serious crimes like murder, never with regards to demonstrations or similar events. There are also recent cases on the use of serious force by the police in dealing with demonstrators, and the courts have recognised that there are certain problems with the police response to 'politically troubling' behaviour. So if we do not properly control our police force, it may well become a political tool.

We also understand the importance of having a national human rights institution or equivalent body, but unfortunately in Hong Kong we don't have any such agency at this time. I

Law Yuk-kai:
"Both Sri Lanka and Hong Kong need to consider ways to ensure that laws prohibiting torture are used"

understand the government has certain views towards this, and may hold further consultations, but to this time it has been resistant to calls for the establishment of such a body.

Likewise, we see the importance in holding officers in charge of police stations accountable for the protection of detainees, and in Hong Kong theoretically these are the duty officers. However, I think there should be further reform of our laws to ensure that there is a special statutory obligation for these duty officers to protect persons in their custody. In particular, this means bringing officers who have been accused of torture before the courts. While the Convention against Torture aims to make torture a universal offence, in Hong Kong police who have clearly inflicted physical and mental pain upon detainees have not been charged with torture. Under our Crimes (Torture) Ordinance, torture is an offence punishable with life imprisonment. Yet, although there are officers against whom clear evidence of acts amounting to torture has been presented, the government has not charged them with torture. So far the Crimes (Torture) Ordinance has never been used. It leads me to think that both Sri Lanka and Hong Kong need to consider ways to ensure that prosecution is fairly conducted, and that the laws prohibiting torture are used when they are really necessary, not just lying there like window-dressing. So we hope that we can learn from each other.

Basil Fernando, Executive Director, Asian Human Rights Commission

This is not just a report about torture. It is about the collapse of a policing system. Why did we choose to publish stories rather than statistics? To show that torture in Sri Lanka is not the result of a political or military crisis where it is being used to extract information. Go through these stories and ask, 'What was the purpose of torture in these cases?' What is the point of torturing someone accused of petty theft? We are trying to make a point that in these cases the purpose of torture was not to extract information, but to find a *substitute* for the guilty party. So there is a complete breakdown in investigations. This is a point of great relevance for virtually all of Asia, and it is a very deep point for the global human rights movement: if the institutional framework breaks down, how can the International Covenant on Civil and Political Rights be enforced? Without a functioning judiciary in a country, how can we talk about regional bodies? This came up in Europe and other parts of the world: when a basic structure exists, you can build on it. When there is not even a basic structure, then the investigation system will fail completely.

If in Hong Kong we are now seeing signs of politicising of the police, then lessons should be learnt from Sri Lanka, where what has happened to the policing system is a direct consequence of political control. The politicians were able to tell the police what to do. Little by little, police escaped responsibility for their actions.

Hierarchy was no longer respected. People at the bottom became more powerful and independent. By and by, the rule of law ceased to exist.

Let's take another case: Thailand. Everybody spoke of Thailand in recent years as a relatively better scenario, but last year in Thailand over 2000 people were killed in an anti-drug trafficking campaign, many of whom apparently had nothing to do with drug trafficking. And that is the government statistic. We also produced a report on this issue (*article 2*, vol. 2, no. 3, June 2003). What it discussed is that all this happened simply on orders of the prime minister. So you remove safeguards, the police do what they want, and people with power exploit the situation. As a result, most recently a leading lawyer has been disappeared by the police, and the details emerging are that he had a lot of evidence of torture being committed in the south of the country.

So the question is, can we continue with a discussion about human rights in Asia purely at a generalised level, without touching on the absence of the rule of law? Or will we allow the new authoritarianism to take control, where instead of overtly suppressing the rights of people, you remove a few judges, replace them with the ones you want, then the judges don't give redress. You put some people in the police at positions you want them, so that they will not do their jobs, and in the end you rule happily. This is the central issue for the whole of Asia.

Pressure alone is not enough. We need to develop a discussion around issues of jurisprudence. When torture is not a crime, how far can we take a case? How—not in the west, but in our countries—can we develop the jurisprudence to deal with this? You can write a constitution and put anything you like into it, but what does it matter? In Cambodia, according to the constitution, all of the United Nations conventions are automatically part of the law. But what rights do any Cambodians have? Their situation is a thousand times worse than Sri Lanka. So they have a constitution, but what is its use?

The human rights movement in Asia is not debating these issues, despite years of activity. If the overall structural problems are not addressed, nothing happens in the end. In Sri Lanka now there is a National Police Commission, the purpose of which is to remove political control of the police. But it is not easy for this body to simply enter into the situation and say do this or do that without wider discussion. But our talk on human rights does not come to that level, and that is the point this report is trying to make.

Sri Lanka has ratified all necessary international instruments, and the UN Human Rights Committee, Working Group on disappearances, the Commission on Human Rights—in a special resolution—have all made lists of recommendations, but nothing has been done. That is where we come back to the title of this journal: article 2—effective implementation of these standards.

Basil Fernando:
"Can we continue with a discussion about human rights in Asia purely at a generalised level, without touching on the absence of the rule of law?"

And if we don't take it upon ourselves to raise these issues, there is no one else who will do it now. We have to pose questions and work towards a response.

This is also all about the level of fear in a society. In Cambodia, human rights groups will say that the level of torture is relatively low right now. Why? Because anybody who is arrested will immediately sign a confession, such is the level of fear. Nobody will resist. If the police say, 'You killed a man', the reply is, 'Yes, I killed a man'. But in Sri Lanka, an innocent person will still at first protest, so they have to have an admission beaten out of them. That is why it is especially common that it is innocent people who are tortured. Because initially they will say, 'I did nothing, why did you bring me here?' And only after they have been tortured will they look for some way out, and say, for instance, 'Yes, I have a stolen watch at home', but when they go with the police to find it, there is nothing, so again they are beaten. So we have to consider the level of fear in society, and what creates that fear.

We also have to make our discussions meaningful for the ordinary person. Let us suppose we are now talking with a torture victim. What do our discussions about human rights standards and conventions have to do with that person? At the end, will we just say, 'I can do nothing for you'? Should we not go beyond that point?

A comment on 'Endemic torture and the collapse of policing in Sri Lanka'

Jack Clancey, Lawyer, Hong Kong

Reading the descriptions in this report on the torture carried out by the police in many parts of Sri Lanka reminded me that in 1776 Cesare Beccaria regarded torture and the reasoning behind it so ridiculous that he asked, "Ought such an abuse to be tolerated in the eighteenth century?" That in the *twenty-first* century the same question must still be asked of the government of Sri Lanka is immeasurably shameful.

Despite widespread calls for investigations and numerous complaints both to the National Human Rights Commission and the National Police Commission in Sri Lanka, apparently not one President or Prime Minister of the country has spoken out against the use of torture. Further, no senior government official has initiated any investigations into these well-documented allegations of torture, nor has the promise of proper investigations ever been extended. From all available evidence, it would appear that there is at least implicit acceptance of torture by the government, if not actual support for a policy permitting its use by the police.

The stories in this report, 'Endemic torture and the collapse of policing in Sri Lanka' (*article 2*, February 2004, vol. 3, no. 1) are about innocent people who, though seldom charged with any crime, were beaten and otherwise systematically tortured by the police for hours and often days. Sometimes the innocent victims were tortured and sent on their way without receiving any medical attention, but were given a warning that they should not tell anyone about what had been done to them. How many more persons are so fearful that they accepted the police warning and are still silently suffering? Among those who did report to

This is the edited text of a comment Jack Clancey read at the launch of the second special report on torture in Sri Lanka published in *article 2*, 'Endemic torture and the collapse of policing in Sri Lanka' (vol. 3, no. 1, February 2004).

hospital, some were so severely beaten that upon seeing their medical condition, doctors refused to admit them, sometimes knowing well who the culprits were.

"Beccaria states the obvious, logical truth, that by torture the robust escape and the feeble are condemned"

Beccaria in his *Essay on Crimes and Punishments* notes that even in the eighteenth century, "In the eye of the law, every man is innocent whose crime has not been proved." He wonders how some persons can believe that pain should be the test of truth, "As if truth resided in the muscles and fibers of a wretch in torture." He then states the obvious, logical truth—although apparently it has escaped the police in Sri Lanka to this day—that by this method of torture, "The robust will escape and the feeble will be condemned." In other words, if a person is able to bear the pain inflicted on him, he will resist making a confession, whereas if a person cannot bear the pain, he will probably agree to anything just to stop the torture from continuing. Proper police training should strongly impress on the trainees that beatings and other forms of torture only mask the truth and encourage the victim to agree to anything once his pain threshold has been reached.

Ought such an abuse to be tolerated in the twenty-first century? The answer has to be a resounding NO! It is my hope that the publication of this report in *article 2* will contribute in some small way to a change in the behaviour of political leaders, prosecutors and police officers in Sri Lanka. I hope that they too will soon answer the question with a resounding NO. I further hope that this report will lead to some practical steps for judicial reform to stop the practice of torture by the police, and to initiate and implement a policy to prosecute all those who continue to abuse the rights of other human beings in this manner.

New member joins *article 2* editorial board

This edition, Bijo Francis has joined the editorial board of *article 2* as its eleventh member. Mr Francis, who is an advocate from Kerala, India, has in the past contributed a number of pieces of writing to *article 2* and has always shown a keen interest in its contents. He is currently completing a Master of Law (Human Rights) degree at the University of Hong Kong. He is warmly welcomed to the board.

What the absence of a parliament means for the rule of law and democracy in Nepal

Basil Fernando, Executive Director,
Asian Human Rights Commission

This April 2004, democratic groups in Nepal have been engaged in daily demonstrations in the capital. They have been brutally attacked by the police and security forces, and large numbers illegally detained, among them, some 300 journalists. Those detained have not received water, food, adequate sanitation, medical attention, clothes or bedding, nor have they been given access to the outside world. Proper records of arrest and detention are not being kept. The situation is worsening daily.

These persons are putting their lives and limbs at risk to demand an end to 'regression', which refers to the abolition of parliament by the constitutional monarch, who has now taken both legislative and executive power for himself. This is 'regression' to the days before 1990, when an elected parliament was finally established under a constitutional—rather than absolute—monarchy.

What regression means practically is that the people's sovereignty has been denied in favour of sovereignty by the monarch. The absolute monarchy was brought to an end by a popular uprising, and a broadly democratic constitution was promulgated with the same will. Despite the constitution's many weaknesses, it can be said that in 1990 Nepal had entered into a new period of history, with the establishment of parliament and recognition of political parties. Since then, the rule of law in the country has been intrinsically linked to the election of people's representatives to govern the country. The abolition of parliament and failure to call new elections, therefore, has effectively done away with the very framework within which the country's legal system is expected to function. The constitutional provisions stipulating regular elections, accountable government, guarantees of basic human rights and the rule of law, and an independent judiciary are in reality no longer applied. This is the problem now affecting the whole country. The consequences

are not only political: they have economic, social and legal implications. In fact, in the current situation nothing is binding; nothing has legitimacy.

"The real question now facing Nepal is what is the state?"

The real question now facing Nepal is *what is the state*? According to the constitution of 1990, it consists of the elected representatives of the people and a constitutional monarch. Unlike French King Louis XIV, who claimed, "I am the state", since 1990 the king of Nepal has no legal grounds upon which to make such a claim. Without this authority, the king has now resorted to rule as commander-in-chief of the armed forces. However, in a democracy the commander-in-chief does not exercise absolute power over the military. His role as commander-in-chief is subject to the scrutiny of the prime minister and cabinet, who are responsible to the parliament (in a presidential system, the president is subject to the control of the congress and other constitutional bodies). As Nepal no longer has a parliament, there is no possibility of control over the king's use of the military, and no legitimate mechanism exists to monitor its behaviour. This absence of conventional checks and balances on the military is jeopardising not only the physical integrity of the protesters, but also the rights of all citizens.

Typically of conflicts of this nature, the world has misunderstood what is going on in Nepal; it has been painted in convenient ideological terms as a struggle between Maoist insurgents and the state. Few outside the country are aware of the role that the king has played in abolishing the parliament. As a result, the protests of democratic groups have gone unheeded, and the repression that they are now experiencing has been underestimated and under-reported.

Of course, everyone recognises that a lasting solution to the civil conflict is a national priority. The 2003 report of the National Human Rights Commission of Nepal, for instance, observed that

> Since its establishment, the Commission has been convinced that all problems can be solved only by holding peace talks between the parties in conflict. Talks should be held for maintaining long lasting peace because without peace, no campaign can be launched against poverty, social discrimination and uneven distribution of resources.

The Commission is right to point out that the country's serious economic problems, and those of groups discriminated against on the basis of caste—such as Dalits—and religious and ethnic minorities, will persist until the civil conflict is resolved. We can add to these problems well-known cultural traditions encouraging discrimination against women and sexual abuse, child abuse and the trafficking of women and children, at least a thousand documented cases of forced disappearances, and widespread torture. However, this grim human rights situation is bound to worsen dramatically if events continue as they are at present, as indeed they look set to do so.

Having managed to take its first few steps without facing much outside protest, the Nepalese military will now feel emboldened. Its next moves will quite likely be directed towards greatly

increasing its control of the population, to the detriment of democratic space and basic freedoms. Without a parliament, many people have sought out democratic political parties to defend their basic rights. If these parties and their leaders are now seriously repressed it will cause great demoralisation, and the possibilities for democratic growth in the country will be significantly diminished for years to come.

The international community therefore needs to distinguish between the insurgency of rebel groups and the protests of democratic parties. To continue to ignore these protests will have dire and lasting consequences for democratisation and human rights in Nepal. Without outside support, these groups will be thrown into a helpless position between two extreme sides locked in mortal combat for absolute power.

"Without outside support, democratic groups will be thrown into a helpless position between two extreme sides locked in mortal combat for absolute power"

Under any circumstances, peace talks are impossible without there being a legitimate government, as stipulated by the constitution. Thus at the moment there is no possibility at all of having any meaningful dialogue, as one of the requisite parties, a legitimate government, does not even exist. The result is only likely to be worsened fighting between the army and insurgents, with a huge increase in civilian casualties and gross abuses of human rights by both parties to the conflict.

To avoid this outcome, the international community should immediately and seriously approach the king, political leaders and civil society groups in Nepal with a view to finding ways to restore democratic rule and stop the current repression of civilian protesters. Failure to do so will only result in deadlock, and a deepening human rights crisis, the likes of which Asia has known too many times before.

The government of Nepal must stop the use of cruel and unnecessary force

Asian Human Rights Commission

A group of journalists, law practitioners, intellectuals and human rights activists have come from various parts of Nepal to participate in the five-day (April 4–8) Consultation on Effective Ways to Prevent Torture and Establish the Rule of Law, in Kathmandu, organized by the Asian Human Rights Commission, Hong Kong.

On the basis of their consultation and monitoring, the Asian Human Rights Commission wishes to express its grave concern over the situation that has evolved over some time in Nepal and states the following:

1. We strongly protest the cruel and excessive use of force by the security forces on the protesters against 'regression', organised by the five major political parties of Nepal.
2. We urge the government to instruct the security forces not to use banned rubber bullets and poisonous tear gases, which cause grave bodily harm and unnecessary injuries. Such items have affected the health of leaders, activists and ordinary citizens involved in the protests.
3. We also demand that authorities instruct the law enforcement authorities to immediately stop using batons with nails. These batons have been used on large groups of peaceful demonstrators for crowd control tactics.
4. Gravely concerned by the situation, we urge that weapons and instruments that cause bodily harm and unnecessary injuries not be used on peaceful demonstrators in the name of maintaining law and order and internal security.
5. We also demand that the practice of conducting search operations inside hospitals and harassing the wounded be stopped.

This text was originally released as a press release, 'Situation in Nepal', on 6 April 2004 (AHRC-PL-35-2004).

6. We appeal to the government to provide immediate medical care and aid for those injured in the demonstrations.

7. While supporting the globally recognised concept that 'only within a democracy can human rights be protected', we strongly demand the respect and implementation of human rights principles that His Majesty's Government of Nepal has recently promulgated in accordance with its international obligations and the Constitution of the Kingdom of Nepal.

Nepal: Acts of violence by the armed forces and impunity

Asian Legal Resource Centre

1. Akash Sharma, an eight-year-old boy, is currently in critical condition after being shot by plain-clothed army security personnel in the Madheli Village Development Committee (VDC)-3, Sunsari District on 16 December 2003. That morning, Akash Sharma, the son of rickshaw-puller Govinda Sharma and student of the Thalaha Primary School, received a bullet wound in his neck while he was urinating in the open field near his house.

2. According to eyewitness Bhola Nanda Sharma, three locals were urinating when they saw plain-clothed army security personnel with weapons. As they started to run away, one of the officers ordered Asha Ram Sharma, who was one of the three fleeing from the site, to halt, but he did not. "So the army fired at him, but hit Akash instead," Bhola Nanada said.

3. After the incident, the army personnel rushed Akash Sharma to the B. P. Koirala Memorial Hospital in Dharan and gave Rs. 700 (about US$ 9) to the victim's parents for expenses. According to doctor Nabin Kumar Karna, who examined the victim, the condition of Akash Sharma is very critical, as the veins of his neck were crushed and he has lost the use of both legs permanently.

4. The Asian Legal Resource Centre is concerned that the above case has found its place among many other similar cases that go unheard. The military spokesperson has not given any information regarding the outcome or update of the inquiry that was allegedly conducted after the incident. Neither has there has been any government response to the incident. Statistics show that since the involvement of the military in peacekeeping operations in the country, the loss of life has increased.

The Asian Legal Resource Centre submitted this written statement to the sixtieth session of the United Nations Commission on Human Rights this 2004, under item 11(d), Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity.

5. The very fact that an army officer can randomly shoot at fleeing people immediately calls for certain reflections on

a. The sheer lack of value for human life.

b. The impunity the perpetrators enjoy.

c. The fear people have towards army personnel.

d. Government inaction.

e. The total failure of rule of law.

Under any circumstances, the deployment of the army to carry out random attacks on a civilian population and thereby terrorizing the general public is despicable, more so an act of state-sponsored terror.

6. Arbitrary killing and the impunity extended for such acts are a clear violation of all human values. They point towards anarchy within the country, as well as towards a lack of clear directions for law enforcement officials. It is questionable whether Nepal currently needs to deploy its army to solve its internal conflict.

7. Deployment of the army means the inability of domestic law to challenge any act of state sponsored violence. The constitution of Nepal vide article 88 (2) contains a clear provision whereby the constitutional court cannot challenge any act committed by the military or proceedings in a military court. Thus there is no mechanism to ensure liability or accountability for the acts of state sponsored violence. This legal deadlock also brings in impunity.

8. The argument used by the government of Nepal, that regular law enforcement agencies have failed to contain the conflict within the country is a ruse to bring in sheer military power to suppress opinions. Human rights activists as well as the press have been muzzled so that voices speaking about the atrocities committed cannot be heard. The killing of Krishna Sen, editor of Janadisha, an outspoken publication, in the year 2002 is one such example. Any murder committed by the army is overlooked with the defense of 'retaliatory action'. This effectively curtails all complaint procedures and gives the perpetrators an absurd level of impunity.

9. The National Human Rights Commission of Nepal has also expressed concern over the human rights violations and arbitrary killings by the army security personnel in its report of 25 October 2002. Although Nepal has ratified various international human rights instruments, the human rights situation in the country is deplorable. As a signatory to the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nepal is under obligation to put an end to this horrendous situation.

10. In light of the above the Asian Legal Resource Centre urges the Commission to:

a. Pressure the government of Nepal to call off the deployment of the army within the country.

b. Pressure the government of Nepal to establish a procedure for independent investigation of complaints regarding acts of violence committed by the Royal Nepal Army and to provide compensation for the victims and to punish the perpetrators thereby establishing effective rule of law in Nepal.

c. Recommend the establishment of an applicable legal framework for the employment of the army in assisting with civil administration, and ensure that all military operations make their Rules of Engagement public and establish procedures for follow up situations.

d. Pressure the government of Nepal to ensure that the basic principles of rule of law are protected and that law and order is maintained in line with international obligations.

e. Urge the government of Nepal to facilitate a judicial review of rulings and prosecution of torture perpetrators under the applicable law.

Urgent Appeals File: Mousumi Ari—A human body preserved like a fish & a rotted justice system in West Bengal

Asian Human Rights Commission &
Manabadhikar Suraksha Mancha

In October 2003, 17-year-old Mousumi Ari, of Narayanpur Village, West Bengal, was murdered by her in-laws. Whereas the role of the state personnel should have been to investigate and prosecute the perpetrators, in fact they did exactly the opposite, as one of the accused was attached to the investigating police station as a member of the Home Guard. When officers from Kakdwip police station, led by Sub Inspector (SI) A K Ghosh, arrived at the scene, rather than investigating properly, they removed Mousumi's clothes and put fresh clothes on her body. They took away the bloodstained clothes in a packet. They failed to undertake their primary duty, that of sending her to the hospital for medical examination. In fact, although they arrived at the scene on the morning of October 25, they did not dispatch the body, according to records, until 12:45pm. It may even be that when the police arrived, Mousumi was still alive, however, their neglect resulted in her death. The police also failed to collect blood and other evidence on the scene, and failed to secure the place; subsequently, the bloodstains on the floor and wall were washed away.

Urgent Appeals File
(UA-33-2004)

This article is the compilation of a number of appeals that the Asian Human Rights Commission (AHRC) has made on the case of Mousumi Ari and defective post mortem procedures in West Bengal. See further: INDIA: AHRC letter to the President of India regarding the horrendous practices during forensic examinations in West Bengal, (AG-01-2004, 23 March 2004); INDIA: Police, magistrate and doctor cover-up murder of 17-year-old girl (UA-33-2004, 2 April 2004), and a statement issued on the same day; INDIA: Post mortem procedures in West Bengal and the case of Mousumi Ari (UP-18-2004). All documents are available on the AHRC website (www.ahrchk.net). At the time of publication, AHRC had received a letter of general acknowledgement from the office of the Chief Minister of West Bengal, however, nothing specific with regards to action taken in this case.

This is also the first in the new 'Urgent Appeals File' series, which will discuss in detail recent Urgent Appeal cases taken up by the Asian Human Rights Commission.

"The police kept the body in their possession for 24 hours without consulting any doctor"

The police insisted that the case was a suicide and they would lodge a report to that effect. But Laxmi Sahoo, Mousumi's mother, refused to accept their judgment, so the police took her, the body of her daughter, and other relatives to the police station. They were kept there until late night, when finally Mousumi's uncle, Subodh Sahoo, was forced to write a complaint, as dictated by the police, stating that Mousumi had killed herself. Laxmi Sahoo was forced to sign the paper. Five in-laws were then arrested, but charged only with causing the suicide of Mousumi (Kakdwip PS Case No. 101; Unnatural Death Case No. 73/2003, 25 October 2003).

The inquest into Mousumi's body was conducted at the police station on the same day, without the presence of a doctor to declare the body legally dead, as required by the law. Mousumi's relatives were also not called to the inquest, although they were being held in the police station at the time. D K Kanoongo, Executive Magistrate, conducted the inquest, and in his report he found there were no injuries on the body. The body itself was not received at the morgue until October 26 at 1pm. This means that police kept the body in their possession for 24 hours without consulting any doctor. Finally, according to records, at 1:45pm on October 26, Dr G Biswas, Medical Officer of Diamond Harbour Hospital, examined the body. He also submitted a report that there was no injury, except one mark on her neck.

Who was it who took the necessary steps to obtain justice in this case? Not the police, not the magistrate, not the autopsy surgeon; it was the mother and aunt of the deceased girl. Rural villagers involved in the fish trade, they knew only that a grave wrong was being committed against them by the state. Instead of cremating Mousumi's body upon getting it back from the morgue, and against all religious customs and social traditions, they took the unprecedented step of covering the body with plastic and burying it in an eight-feet-deep pit filled with 70 kilograms of salt. Just as fish could be preserved with salt, they concluded, so could their loved one's body be preserved, in the hope that some kind of new investigation would follow.

It was this drastic step by the two women that allowed for what happened next. After Mousumi's father returned from sea, he obtained help to draft letters to state officials, and in December the case was brought to the attention of local human rights organisation, Manabadhikar Suraksha Mancha (Masum). After investigations, Masum went to senior police and the Chairman of the West Bengal Human Rights Commission, without result. Finally, through its intervention, the Sub Divisional Judicial Magistrate ordered a new post mortem on December 20.

On 2 January 2004, Mousumi's body was exhumed in the presence of senior police officers, but remarkably, the same Executive Magistrate who conducted the first inquest held the second inquest, and again found nothing. He and the local police officers then made an attempt to get the post mortem also conducted at the same hospital. However, Masum successfully

lobbied government officials for the post mortem to be held at the Calcutta Morgue. There, a team of doctors, led by Associate Professor L K Ghosh, Department of Forensic and State Medicine, examined the body on January 3. The team found numerous injuries on the body and concluded that death was caused by "forceful impact on head with hard blunt agent or hard rough surface". The team also could not find any mark on the neck as indicated in the first report, but noted that the first doctor had failed to properly examine the victim.

After the second autopsy, police added a charge of murder against the five accused. However, the final investigation report still suggests a case of suicide, not murder. The report includes 36 witness statements all carefully crafted by the Investigating Officer SI Ghosh, which are part of his work to pervert the course of justice, rather than to undertake a real investigation and accurately record genuine witness statements. The times and dates of events in various official documents also do not correspond. The contradictions contained in the final report are sufficient to lead to an acquittal of the accused on the benefit of the doubt, particularly when witnesses taking the stand in court are likely to make statements that further contradict what has been recorded by the police.

In a letter to Mr Buddhadeb Bhattacharjee, Chief Minister of West Bengal, the Asian Human Rights Commission, in calling for the immediate suspension from service of the said officers and reinvestigation of the case, has pointed to some of the problems in the case. These include that,

1. The police failed to send Mousumi's body immediately to a hospital, as is their primary duty, to determine if she was even dead at the time of their arrival. In fact, the police appear to have kept the body for over 24 hours.
2. The police removed evidence from the scene of the crime, but did not record it on the list of seized items. They also failed to collect vital evidence, which should have been sent for forensic examination.
3. The police failed to secure the place of occurrence. Subsequently, bloodstains on the floor and walls were simply washed away, thus vital evidence was destroyed.
4. The police refused to record a complaint of murder from the mother. Instead they forced her to sign a complaint indicating that her daughter had committed suicide due to cruelty.
5. There are inconsistencies in the times and dates of various official records, speaking to the fact that they had been badly fabricated.
6. Although the body had not been declared legally dead by a doctor, as required by law, the magistrate held his inquest, and did so without the family members present. The same magistrate was later called upon to conduct a second inquest.

"The police refused to record a complaint of murder from the mother and instead forced her to sign a complaint that her daughter committed suicide"

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7. While the Investigating Officer added a charge of murder to his final report, the substance of the investigating documents, including the majority of witness statements, suggests an act of suicide. This contradiction may allow the Court to acquit the accused on the benefit of the doubt.

8. The first autopsy surgeon failed to properly examine the body, and may not even have sighted it.

> "The first autopsy surgeon failed to properly examine the body, and may not even have sighted it"

A second letter, below, has since been sent to the Chief Minister urging that he take up the case without delay.

While Mousumi Ari's case is remarkable because of the steps taken by the family to obtain justice despite the obstacles placed before them, it is in every other respect typical of the total decay of the criminal justice system in India today. Let us ask some basic questions about the role that each part of the criminal justice machinery plays in such cases.

What is the intended role of the police? It is to apply the law and investigate crimes. Throughout India, however, the police are responsible for the most flagrant violations of the law in order to protect the perpetrators of crime.

What is the intended role of the autopsy surgeon? It is to establish the cause of death. Throughout India, however, doctors fail to conduct proper autopsies and either deliberately or carelessly submit false reports that again allow the perpetrators of crimes to escape detection.

What is the intended role of the magistrate at time of inquest? It is to inquire independently, and through a quasi-judicial process, into the cause of death. Throughout India, however, magistrates collude with the police to produce fabricated reports. In West Bengal in particular, the magistrates responsible for these inquiries are under the same department as the police, and therefore for all practical purposes no procedure for independent inquiry exists.

What is the intended role of the bureaucracy, government agencies, and human rights commissions? It is to ensure that the citizens of the country are properly governed, and their rights protected. Throughout India, however, the state agents, including senior police, ministers, chief secretaries and human rights commissioners, fail to take any interest in the misdeeds of their subordinates, and often assist them in covering up crimes. In fact, subordinate officers can expect that their illegal actions will either be ignored, or steps will be taken to protect them.

Who is responsible for the increase of crime? Throughout India, it is the agents of the criminal justice system: the police, judicial officials, medical personnel and other state officers who one way or another prevent even the most rudimentary criminal investigations from proceeding as they should. Where criminals control and staff a system, it can only be expected that crime will increase as a result. It then falls to the victims themselves to stand for justice and fight against this rampant criminality through whatever means they have available.

Mousumi Ari is now dead, although not yet cremated; her body is still being preserved by her family, who fear that it may yet be needed as evidence. The Chief Minister of West Bengal should now order the immediate suspension of all state officers involved in covering-up the murder, and order a reinvestigation by personnel from outside the state police force. When the Nobel Prize medallion of Rabindranath Tagore was stolen recently, the Chief Minister lost no time in ordering high-level outside investigators on to the case. Presumably the Chief Minister would not like to give the impression that the life of a citizen is worth less than a piece of metal. These simple steps, if taken by the Chief Minister, will do nothing to resolve the massive systemic problems facing the criminal justice system, but they will at least go a small way to restoring some of its credibility in West Bengal. They will certainly give hope to one poor family that their desperate efforts on behalf of their slain relative were not in vain.

Letter submitted to the President of India on defective post mortem procedures in West Bengal

23 March 2004

Dr A P J Abdul Kalam
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INDIA

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Dear Sir

The Asian Human Rights Commission (AHRC) is concerned about the horrendous practices during forensic examinations at the government hospitals in the state of West Bengal, India.

At the Srirampur Government Hospital of Hooghly District, West Bengal, Mr Ratan Dom conducts the autopsies (if one can call it an autopsy). Even though Dr Gaffar is the forensic surgeon responsible for the examination of the bodies, in practice Mr Ratan conducts the autopsy.

According to reliable information received, Mr Ratan is a government employee appointed for carrying corpses in the mortuary. He conducts the 'post mortem examination' with crude instruments like rusted knifes and hammer.

After the 'post mortem examination', the bodies are left without even suturing the incisions. The bodies are kept on open floor without any protection and they are left to rot in the open humid environment and it is common that body parts are eaten away

by rats and dogs. The relatives of the deceased are to pay 'extra incentives' to Dr Gaffar and Mr Ratan if they are to conduct a proper autopsy. Even if the 'incentives' are paid, it doesn't mean that the autopsy will be conducted in a scientific manner with legal procedures respecting etiquette. It only guarantees suturing of the body after the examination. The attached photographs show how the bodies are handled in this particular hospital. Our information is that this is not the only hospital in which dead bodies are handled in such a fashion. It is the general practice in all government hospitals.

The very inhuman nature with which the bodies are handled and left to rot is an indicator of human values in the state and how far they are enforced and respected. It is also a pointer to the depth of exploitation, torture, neglect and corruption there, and indicates how little priority is given by the state to the prevention of crime and protection of rights. It is also a clear indicator of the resources earmarked for prevention of crime and administration of justice.

Torture is one of the most heinous crimes against humanity. Callousness in handling dead bodies as mentioned above and exploitation of death is also a crime that comes under the ambit of the term 'torture' according to the UN Convention against Torture. India has abstained from ratifying the Convention on the pretext that domestic legislation is adequate to prevent torture in the country. However, the above facts paint a different picture.

The purpose of forensic examination is not only to find out the cause of death, but also to help do justice to the deceased and her/his family. In cases of suspicious death where the result of an autopsy is vital, one can imagine how far the purpose of justice is served in conditions like those prevailing at Srirampur Government Hospital.

Even if forensic examinations are held in a proper manner, the records are handled by police officers on deputation to the courts. The unchallenged access to case records by the police officers on deputation to the courts is yet another serious hindrance to delivery of justice in the state of West Bengal. This must end.

AHRC is aware that the Government of India is planning to restructure its criminal legislation in line with the notorious Malimath Committee recommendations. At this juncture it is pertinent to note the response from the Calcutta High Court, signed by Mr Nure Alam Chowdhury, J, Mr Debi Prasad Sengupta, J, and Mr Narayan Chandra, J to the committee's questionnaire:

> Question. "7.6. Do you agree with the fact that Prosecution should place greater reliance on forensic evidence?"
>
> Answer. "No. Too much of reliance on forensic evidence may lead to disaster. Man falters – sometimes machines falters dangerously, leaving no scope for rectification. But for detection of the criminals and not the crime forensic evidence may be used."

(The reference to the detection of criminals indicates the positive attitude of judges to the polygraph test, which is another suggestive question in the questionnaire. The polygraph test is considered to be one of the most unreliable tests for detection of crime due to its inaccuracy, whereas forensic examination in laboratory conditions is time-tested and accepted in all jurisdictions worldwide.)

In the light of the existing facts, one may even wonder what is left to rely upon? It is a pity that the judges seem mainly concerned with taking away the basic ingredients of the rule of law, like the right to silence and presumption of innocence. The judges also recommended that article 20(3) of the Constitution of India be amended, as it was considered as a stumbling block in criminal cases.

Where gross violations of basic human values happen in such proportions within the state, and when the courts, government and other arms of the state ignore such violations and further permit it to continue, no justice whatsoever can be achieved.

Any attempt to restructure the legislation without addressing the basic facts and correcting inherent errors due to improper implementation of existing laws will only result in catering to the interests of a government fostering the idea of building a police state.

AHRC therefore urges the Government of India to take whatever necessary steps to

- Ratify the Convention against Torture and adopt the Convention at the domestic level through implementation of appropriate laws.
- Take immediate action to conduct an impartial inquiry into the incidents mentioned above and put an end to the callousness, exploitation and torture carried out by Dr Gaffar and Mr Ratan.
- Take appropriate steps without delay so that government hospitals in West Bengal are provided with enough resources to procure adequate equipment and personnel for proper discharge of their duties.
- End immediately the deployment of police officers in criminal courts in the state of West Bengal and replace them with civilian officers.

Truly yours

(signed)

Basil Fernando
Executive Director

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Second letter submitted to the Chief Minister of West Bengal on the case of Mousumi Ari

19 April 2004

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Kolkata-1, West Bengal
INDIA

Fax: +91-33-2214 5480

Email: cm@wb.gov.in

Your ref: 623 CMS

Dear Chief Minister

Re: Post mortem procedures in West Bengal and the case of Mousumi Ari

I thank you for your Assistant Secretary's letter dated 6 April 2004 acknowledging receipt of my letter on the horrible conditions of post mortem examinations in West Bengal, dated 23 March 2004.

I am sure you will appreciate how concerned the Asian Human Rights Commission (AHRC) is about the severity of defective post mortem procedures in West Bengal, as where post mortem procedures fail it can result in the complete denial of justice to victims of murder and their families. When people die as a result of foul play or under suspicious circumstances the best evidence they leave is their corpses, which can tell the tale of how the death occurred. When post mortems go wrong, the evidence of such crimes gets buried along with the bodies.

The terrible murder of Mousumi Ari and subsequent events in that case illustrate clearly that people throughout West Bengal are deeply aware that something is wrong with post mortem procedures. AHRC has already written to you regarding the murder of Mousumi Ari (Kakdwip PS Case No. 101, UD Case No. 73/2003, 25,10.2003; referred to you by AHRC on 2 April 2004). In this instance, the doctor conducting the post mortem, one Dr. Gauranga Biswas, colluded with the police officer investigating the case and the executive magistrate to make the murder appear a suicide. In fact, it is entirely possible that the doctor did not even examine the body before signing the autopsy papers. The outraged family members, led by Mousumi's mother and aunt, took the body back to their fishing village but rather than cremating it took the unprecedented step of covering it with plastic and burying it an eight-foot-deep pit that was then filled with salt. When they finally managed to secure a proper post

mortem, undertaken by proper forensic doctors, it confirmed that the girl had been murdered. In fact, the second report showed that the first one was completely bogus.

At present, AHRC is awaiting news to the effect that legal action is being taken against the errant police, medical and judicial officers in this case, and trusts that you are looking into the case accordingly. Steps taken by you to remedy the gross injustices caused to families such as that of Mousumi Ari will go a long way to restoring public confidence in West Bengal's judicial and medical institutions, particularly when coupled with serious reforms to forensic examinations in West Bengal. While Mousumi Ari's family took extreme measures in their efforts to obtain justice, most others are unlikely to resort to such an approach, and rely more heavily upon the effective functioning of government and judicial institutions in the first instance, if justice is to be done.

Under these circumstances I urge you to once again take some strong measures to alter the situation regarding post mortem inquiries in West Bengal, and in particular, to personally undertake to ensure that the family of Mousumi Ari obtain justice and adequate redress. As this is a matter of great importance it would be useful if you were to announce to the public the measures that you have adopted in taking up the matter with the authorities concerned, as indicated in the letter from your Assistant Secretary.

Yours sincerely

(signed)

Basil Fernando
Executive Director

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Bringing the Convention against Torture to India

Consultation on the Convention against Torture, Kerala, India

There is an enormous amount of violence occurring throughout the world, including India, however, domestic violence, religious and communal violence and child abuse do not fall under the definition of torture, because these acts are not ordinarily carried out by state agents in the course of their official duties. This distinction does not seek to rank forms of violence in terms of severity, but rather, establish who perpetrated the violence and for what purpose.

Ultimately, however, torture cuts across all other rights, because it is the very agents of torture who themselves are responsible for upholding the rights of others. Is it possible to stop violence committed by others until there is a decisive change regarding torture by the police? This is an important question, because in many discussions about torture, domestic violence, or some other form of violence in the society, will enter the exchange. Of course, it is not a question of choosing between police brutality and domestic violence, but if you think in terms of a solution, where do you go to complain about domestic violence? You need to go to a police station to make a complaint, and the person there to receive you, or his colleagues, may very well be a torturer. Under such circumstances, there is little hope of you getting a fair hearing for your complaint.

It is not just a matter of getting laws and declarations passed—it is about getting them implemented. This means more than just education about torture and rights. How can we educate without a decisive, practical strategy? If torture is permitted at a police station and every child and adult knows about it, what difference will education make without having measures in place

A group of human rights defenders from across India gathered at Thrissur, Kerala, India, from 15–18 August 2003 to discuss torture in India. The deliberations centred on the need to launch a campaign in India for ratification of the Convention against Torture. The concluding statement of the gathering was published earlier, in *article 2* of August 2003 (vol. 2, no. 4). This article recalls some of the discussion between participants.

to punish the culprits? A common problem we have now is that despite public complaints and interventions, the perpetrators of torture continue in their jobs without any punishment.

Torture is a policy. Openly, governments declare that they are against torture, but in practice they allow police to commit torture. Tacitly permitted policies cannot be broken without public debate. In Sri Lanka such debate is now going on. One week after police there tortured a man to death for refusing them a share in the winnings from a lottery ticket the incident was on national television. When the mainstream media begin to talk about torture openly, the fear that the people have is dispelled, and they also begin to talk. People usually find it difficult at first, because their fear is so deep, but it can be overcome. A year ago, very few people in Sri Lanka would have come forward to publicly accuse the police of torture; now the number is very large and growing still.

> "There is no specific legislation on torture whereby a case can be filed in a local court in India"

The fear takes time to dispel, because in order to survive, the perpetrators must perpetuate it. In fact, as people find, this fear is deliberately exaggerated. With community support, they begin to speak out, seek protection, and change their society.

The Convention against Torture

The Indian government often excuses itself from ratifying the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) on the ground that all the provisions of the CAT are already in the constitution. The argument is spurious. For a constitutional remedy, a victim must go to a High Court or Supreme Court. Such action is beyond the means of most persons in the country, and certainly these courts could not manage even a fraction of the existing torture cases in India today.

There is no specific legislation on torture whereby a case can be filed at a local court. Under the Indian Penal Code, torture is not mentioned as a crime. There is only a section providing that 'excesses committed by a police officer' or forced confessions are illegal. However, under this section it has to be proved that the offence was committed in conjunction with the person's authority in order to demonstrate the gravity of the act. Under the Criminal Procedure Code, a magistrate can order an inquiry into a complaint of torture. However, this inquiry will likely be undertaken by the same police station where the accused is on duty. The result of such an inquiry is easy to imagine. For these reasons, few complaints are ever filed, and even fewer are actually taken to court.

Despite some judicial interventions against torture committed by the police, such as the Supreme Court's recommendations in the D K Basu case, the situation has not improved. Even though India is a common law country, in practice, the D K Basu recommendations are not followed. There is also some question as to how many police officers are actually aware of these recommendations. In any case, the Indian government must

come up with actual remedies to address torture, which can only be done by effective domestic legislation, in other words, ratifying and implementing the CAT.

"The Indian government should establish a special unit to investigate and prosecute in cases of torture"

In the rare instances that cases of torture are actually heard in court, minimal compensation is awarded, and after a very lengthy procedure: in one case, it took the victim 25 years. Under any circumstances, compensation alone is not redress for torture. If a police officer is ordered merely to pay compensation, the gravity of torture has not been addressed. Therefore, there should be a procedure whereby the perpetrator is tried for having committed a heinous offence, and punished accordingly. The Indian government should establish a special unit to take and investigate complaints of torture, and prosecute the perpetrators accordingly.

India has also had countless commissions and inquiries dealing with the behaviour of its police and their human rights violations. Unfortunately, since these commissions have no legal authority, their recommendations are ignored. Yet without police reform, torture and corruption will remain rife. India should learn from the experience of Hong Kong, where reform of the police was seen as the key to economic and social development, and to firm establishment of the rule of law. For this reason, the Independent Commission Against Corruption made police reform its priority, and focused exclusively on this issue for the first three years of its existence.

India's civil rights movement has an obligation to see that the CAT is ratified, because once this is achieved, every year the government will be required to report on this issue, and, under the additional protocol, citizens have the right to file individual complaints to the Committee against Torture. Ratification of the International Covenant on Civil and Political Rights is meaningless without ratification of the CAT; it is a test for all other civil rights.

The struggle for justice

When the justice system breaks down, ordinary people in the society must fight for it. One good example is Sr Mariani, who is practically a legend in the Philippines. She was a young nun during the Marcos regime who pioneered the human rights movement there. After she was jailed, she realised the need for a solidarity movement linking victims in prison and victims of disappearances and torture with their families and human rights organizations. As a result, she set about establishing Task Force Detainees of the Philippines. It is this kind of person who builds popular movements, not judges, lawyers and intellectuals. It is necessary to remember that for the human rights movement to become popular, it must build upon the sympathy and emotions of ordinary people so that they too participate in it. It should not be a movement of judges, lawyers and intellectuals, but a movement of people to which judges, lawyers and intellectuals can also contribute.

Another example of such a movement is the campaign against the disappearances in Sri Lanka, begun by a young woman, Jayanthi, who lost her brother and fiancée during the emergency period there. After visiting the monument to the victims of the May 18 uprising in Kwangju, South Korea, she explored the possibility of erecting a monument for the disappeared in Sri Lanka. Jayanthi thought the monument could be constructed at the place where the bodies of her brother and fiancée were found murdered; a small plot of land not claimed by anyone. The authorities did not object to the construction, and the monument was erected with the support of the Asian Human Rights Commission and May 18 Memorial Foundation, in Kwangju.

> "Human rights organisations working on torture need new, advanced strategies"

This Monument for the Disappeared calls on the sympathy of the people, and enables members of victims' families to gain confidence and come out of their fear and seclusion. People now gather at the Monument to commemorate the loss of their loved ones; every year, religious events are held there, with close cooperation and understanding among different groups. As there is a church behind the Monument but no other public building nearby, the priest proposed his church for the Buddhists to give offerings to the monks. The monks accepted, and went to receive their offerings in the church, thereby initiating a 'living dialogue' between the Christians and Buddhists in that community, which a visiting sociologist came to witness and could not believe. Buddhist monks having their meal in a Christian church is unthinkable for those who want to arouse communal animosities, but such feelings do not exist among those people.

The Monument for the Disappeared speaks to how it is important to break silence and get public recognition of an issue. A monument is a very good way to do this, because it captures public imagination, and is much better than someone writing a book, for example. A monument symbolises not only remembrance of an event, but frustration at the failure of justice.

What kind of human rights organisations are needed for this work? First, human rights organisations that are more people-based, and those that ensure that they are indeed speaking for people, if not having them speak for themselves. Secondly, human rights organisations with advanced strategies, incorporating the use of modern communication facilities and international pressure in the fight against violations, taking advantage of public events to carry strong messages, and using various media to spread the message in a popular way.

Above all, however, there remains the need to remove fear. For most victims, silence is the best protection they have against further pain. Therefore, the only way to create participation and remove fear is by offering alternative forms of protection.

Custodial deaths and torture in India

Asian Legal Resource Centre

1. On 30 August 2003, police arrested Mr Babu, aged 37 years, of Kallur Village, Mukundapuram Thaluk, Thrissur, Kerala. They took him from his house without telling him why. His wife tried to bail him out, but the bail was refused. On September 2, Babu died. The police claim that he died of cardiac arrest, but the evidence reveals otherwise. Thirteen injuries on his body indicate that he died because of police torture. In spite of his repeated requests for medical attention when he was produced before the court, and visible injuries, he was denied any. His family is too afraid to file a complaint against the police officers.
2. The sort of torture inflicted on Mr Babu is routinely practiced at police stations in India. Unchallenged and unopposed, it has become 'normal' and 'legitimate'. Custodial deaths, disappearances and rape in custody are rampant. Police even torture persons on receipt of bribes. Torture of this kind results in death, as in the above case, as well as permanent disabilities and mental trauma.
3. The police torture not only suspects, but also any person close to a victim who is unfortunate enough to attract their attention. They also torture people in order to fabricate cases. They save influential and wealthy offenders by implicating innocent people and torturing them until a 'confession' is obtained. The Asian Legal Resource Centre is this year making a separate written statement to the Commission on how the Government of India is attempting to introduce reforms that will strengthen the legality of such 'confessions'. It is also submitting written statements on how torture is used as a tool of state-sponsored discrimination against entire communities of people, particularly indigenous people.

The Asian Legal Resource Centre submitted this written statement to the sixtieth session of the United Nations Commission on Human Rights this 2004, under item 11(a), Civil and political rights, including the questions of torture and detention.

4. The communal and caste divide in India is closely linked with torture. The police or other state institutions are directly involved in most of the communally charged violence. The massacre of Muslims in Gujarat in 2002 is one example, on which the Asian Legal Resource Centre has submitted separate written statements this year and last (E/CN.4/2003/NGO/148). In these situations, torture is widespread, unaccounted for and not prosecuted. It contributes to total anarchy and the rule of lawlessness. When police become a party to such violence, it becomes a state-sponsored crime against the people. Therefore, the fight against communalism and caste should start with the fight against torture.

5. The judiciary has tried to address torture in India, however, its involvement is limited to select cases and many instances of torture go unreported. The courts cannot attend to every reported case of torture. Local courts often also deny remedies due to the ignorance of judges. The lack of legislation outlawing torture is another reason. Since there is no specific law preventing torture, and since the law of damages is not often applied in torture cases, even if compensation is awarded it is paltry.

6. The National and the State Human Rights Commissions have no authority to change this situation. There is no independent body to inquire into reported cases of torture. Commission judgements are mere recommendations and are often ignored. Where torture is state-sponsored, the recommendations never get executed, such as in the case of the Gujarat Massacre and government-sponsored atrocities against tribal groups in Kerala. The Human Rights Act is just eyewash for the international community; as it cannot be enforced it is meaningless.

7. India has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), but not ratified it on the pretext that existing laws have adequate provisions to prevent torture, in addition to constitutional safeguards. But the provisions of the Criminal Procedure Code, Indian Evidence Act and Indian Penal Code are worthless, since there is no procedure for independent inquiry and compensation of victims. In cases of torture where they too may be implicated, magistrates order police to investigate one another, thereby destroying all credibility and public faith in the judicial system. Apart from this, the government has now implemented new draconian laws like the Prevention of Terrorism Act, which literally takes away any guarantees of fair trial for the accused. Constitutional remedies too are meaningless for most victims. The constitutional courts are virtually inaccessible to ordinary folk, and even if a victim is successful in getting a case heard, they usually experience delays. Furthermore, the recent approach of these courts is to disallow any claims for compensation, directing the victim to claim damages through

a civil suit. In short, if a victim of torture in India has a strong case and enough will, she may get some limited redress from the courts after 20 years. The lack of motivated lawyers and legal assistance, and a defective prosecution system, do nothing to alleviate this situation. India has not ratified the Optional Protocol to the CAT, thereby preventing its citizens from making individual complaints to the Committee against Torture when they feel they have no effective domestic remedies.

8. As for Babu's widow and her children, all of this is now immaterial. The police tortured her husband to death. Her children may have to leave school and help their mother find some food for the family lest they starve to death. Their father's murderers are still in service, and some are due for promotion. While their case is raised at the Commission, Babu's family will be working in inhuman conditions to get enough food for the day. Not the Constitution of India, existing laws, the courts nor government institutions have come to their rescue.

9. The Asian Legal Resource Centre therefore recommends that the Commission, and in particular the Committee against Torture,

a. Insist that the Government of India take immediate steps to prevent torture in custody by making police at the rank of officers in charge of stations and above accountable for every case of violence in custody, and hold them personally liable.

b. Urge the Government of India to inquire into the death of Babu, take steps to punish the perpetrators and compensate the family according to international standards without delay.

c. Pressure the Government of India to ratify the CAT at once. To date, there have been very few efforts to this end from the international community. Persuasive attempts to ratify a convention have in the past yielded results. In the case of India, there should be more done to see that it fulfils this important international obligation, upon which the Commission must closely monitor compliance to see that the CAT is speedily brought into domestic law. This would amount to the introduction of new legislation and repealing of any provisions contrary to its spirit.

d. Provide the means and encouragement for India's National Human Rights Commission to conduct independent inquiries in alleged cases of torture, and enforce its findings.

e. Encourage the Government of India to refrain from using the police as a tool of repression against minorities and political opponents.

Book review: *The right to speak loudly*

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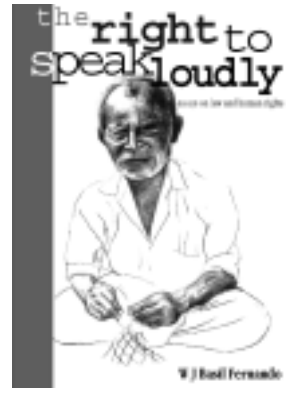
Fernando, W J Basil, *The right to speak loudly: Essays on law and human rights,* Asian Legal Resource Centre, Hong Kong, China, March 2004, ISBN 962-8161-0509, 125pp.

The right to speak loudly brings together Basil Fernando's personal reflections on various human rights issues of serious concern for Asia, such as torture, independence of the judiciary, impunity, corruption, and victims' rights, among others. Fernando is a well-known human rights activist, and as director of the Hong Kong-based Asian Human Rights Commission he has championed the rule of law in many Asian countries. In *The right to speak loudly* Fernando shares with the reader his many years of hands-on experience with human rights issues in Hong Kong, Cambodia and Sri Lanka.

The right to speak loudly comprises seventeen chapters. Chapters one to four focus on freedom of speech; social change and the rule of law; torture in police custody; and impunity. Chapters five to seven concern the human rights situation in Hong Kong, with an interesting recollection and analysis of the 1 July 2004 'pro-democracy march', which saw around one million persons taking to the streets and demanding democratic change, universal suffrage and the preservation of basic human rights guarantees in Hong Kong. In chapter eight, Fernando reflects on features of certain 'new authoritarian regimes', while chapters nine to twelve, fourteen and sixteen focus on specific issues of concern in Sri Lanka, such as enforced disappearances and the lack of proper morgue facilities. In chapters thirteen, fifteen and seventeen Fernando considers the deterioration of law enforcement agencies in Asia, reviews Asian frameworks for governance, and comments on the deterioration of the Indian justice system.



"The theme of victims' rights runs through Fernando's essays"

In chapter four, entitled 'Impunity as a cause of poverty', Fernando presents perhaps one of the more interesting arguments of his book: "Whereas poverty is widely held to be the biggest problem facing most parts of the world today, relatively few persons recognise how poverty is caused by impunity" (p. 17). He contends that, "The tendency has been to treat impunity as a problem of some importance, but not as a key to unlock the reasons for more serious problems of economic deprivation" and that "wherever there is increasing poverty, there is deepening impunity" as well as 'institutionalised corruption' (p. 17). Fernando goes further to argue that the main development agencies "pour money into institutions from which it drains out of innumerable holes, rather than reaching its intended recipients" (p. 17). He then cites relevant examples from Burma, Cambodia, India, Indonesia and Sri Lanka, and urges that concerned agencies should direct more funds towards the building of effective institutions and the elimination of impunity and institutionalized corruption. This in turn would make development aid implementation more effective, and benefit those most in need. Fernando's evident frustration over this issue is quite understandable. Corruption has to be recognized among the main obstacles to democracy, the rule of law, economic development and the full enjoyment of human rights. In 'Some features of the new authoritarianism' (chapter eight), Fernando warns that certain corrupt authoritarian regimes manipulate poverty into a political issue that relegates the poor to the status of 'political slaves', because institutions tend to cater exclusively to those "who have demonstrated political allegiance" (p. 36).

One could mention that, at the United Nations level, Ms. Christy Mbonu, Alternate Expert Member of the UN Sub-Commission for the Promotion and Protection of Human Rights, also remarked on this in her 2003 working paper, "Corruption and its impact on the full enjoyment of human rights, in particular economic, social and cultural rights". In that paper she observed that

> In many societies, bad leadership breeds corruption and poverty. Unfortunately, poverty itself induces corruption in the societies. Everywhere corruption is frowned at, yet, in many countries, corruption thrives, and becomes systemic or endemic; it becomes a way of life. In some it is blatant and crude; in others it may be refined and indeed camouflaged in public relations budgets. Whether open, endemic or systemic, blatant or polished, corruption has disastrous effects on society generally and on most vulnerable groups in particular. ... Corruption creates poverty, which in turn engenders denial of economic, political, social, civil and cultural rights.

In other essays, Fernando urges an empowering of the poor with better means to defend their rights—above all the right to seek and obtain adequate remedy for harm suffered—in order to free society from the shackles of corruption, impunity and poverty. He argues that, "Any attempt to alleviate rural poverty must include a strategy for protection of those persons seeking to defend their rights" (p. 21). The theme of victims' rights runs through

Fernando's essays and he touches upon such issues as the enjoyment of available remedies, equitable redress, forms of reconciliation, access to justice and monetary compensation (pp. 43, 51, 57, 65). While Fernando approaches these matters exclusively from the domestic angle of his extensive Sri Lankan experience, his arguments in favour of granting crime victims some basic forms of redress find support in many international standards and are of universal relevance. In this connection, one could mention that the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 affirms that victims of crime are entitled to have access to justice, to obtain prompt redress and that the related formal or informal procedures should be expeditious, fair, inexpensive and accessible. The Declaration also underlines that victims should receive material, medical, psychological and social assistance as part of their right to redress. In cases where public officials or other agents acting in an official or quasi-official capacity have violated domestic criminal law—a concern Fernando voices all throughout his book—the Declaration provides that victims should receive restitution from the state whose officials or agents were responsible for the harm inflicted. The Declaration also encourages states to incorporate into their national law norms proscribing abuses of power and providing remedies to victims of such abuses, as well as to establish funds for the compensation of crime victims, and to include restitution as one of the sentencing options in criminal cases. Better conformity of state legislation and practice with these minimum standards would provide a good platform upon which to improve the rights of victims in Asian countries.

The right to speak loudly also comprises four appendices, including an interesting draft document proposing the establishment of a public complaints procedure against the police, which the Asian Human Rights Commission submitted to the Sri Lankan National Police Commission, as well as a comment by the Asian Human Rights Commission challenging the 2003 Sri Lankan Bill on Organized Crime as possibly resulting in the "encouraging and rewarding of torture"—both well worth reading.

Fernando has a talent for homing in on difficult human rights issues while at the same time keeping the victim in central focus. *The right to speak loudly* makes refreshing reading because it reflects well Fernando's commendable enthusiasm and commitment to the human rights cause in Asia.

"Fernando has a talent for homing in on difficult human rights issues while at the same time keeping the victim in central focus"

A further comment on *The right to speak loudly*

Nick Cheesman, Projects Officer,
Asian Legal Resource Centre

In *The right to speak loudly* Basil Fernando makes an important appeal. Talk on justice and human rights, he urges, desperately needs to be taken beyond the confines of the West and its traditions. This is necessary both to increase its global relevance and in order that people coming from the western tradition can better understand the immense problems faced by those elsewhere in the world. This book is about generating that talk, and in particular, about finding a loud and vigorous voice for those who are ordinarily not heard.

The significance of the book is captured in its title. Usually, freedom of speech is understood as the right to speak aloud. But there is a vast difference in the meaning between speaking aloud and speaking loudly. The former suggests that one's voice may be heard, but perhaps only by a few, and perhaps only in a way that will be palatable to the self-described elite guardians of society: be they in government, the judiciary or religious orders. By contrast, the latter asserts the ordinary person's right to shout out loud when and where atrocities are committed and injustices are performed. It means making noises that may sound unpleasant for many, particularly those persons with authority who are unused to being challenged. Fernando, for one, has never been afraid to have his voice heard. *The right to speak loudly* is his challenge to others genuinely concerned with human rights and the rule of law to do the same.

Some features of the new authoritarianism

Basil Fernando, Executive Director,
Asian Human Rights Commission

These days, it is common to find governments that use the trappings of democracy to conceal an authoritarian character. For example, regimes are elected to power at one time or another and maintain the facade of being re-elected by elections conducted on their own terms. Despite this democratic exterior, the new regimes engage in certain activities that make them unmistakably authoritarian.

Creating confusion about the role of the judiciary and judicial process

The new authoritarian regimes keep the façade of judicial organisation established in an earlier era intact, but so deeply interfere with the actual functioning of the judiciary that it all but ceases to operate as originally intended, particularly in relation to disputes between citizens and the state. Many strategies are used. Initially, there may be threats and intimidation directed towards the judiciary as a whole, or towards individual judges not willing to comply with orders. Attachment to liberal ideas may be discouraged. Uncooperative judges may be dismissed or transferred to unimportant roles, thus passing the message that such behavior will no longer be tolerated. This may go on for some time until, by and large, the message sinks in.

After the judiciary is brought to heel, more blatant steps are taken. Persons who will comply with the regime's demands are put into positions of authority. At this stage, conflicts are likely to occur within the judiciary itself, although they may be unknown to outsiders. Sometimes the conflicts may spread throughout the whole legal profession, with a few persons trying to continue as before, while others try to adjust to the new situation. The result can be traumatic for the majority of lawyers otherwise unwilling to get involved in political conflicts or other

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disputes relating to their professional engagements. However, by this time there is no longer any neutral space. Those deeply committed to maintaining professional integrity may choose to withdraw, rather than be corrupted. Complete or partial withdrawal of such persons may happen on a large scale, allowing for more cynical attitudes to emerge within the profession as a whole, poisoning the relationship between the judiciary and lawyers. This new situation suits the executive, which wants to weaken judicial process so that the judiciary will not monitor or disrupt its activities.

"Over time, the executive claims a mandate for itself that does not require the making of new laws to do this or that"

Finally, the executive may try to show the society that the judiciary is basically under its control. By giving this impression it gains a great deal of power over the ordinary citizens, who are virtually told that they have no legal means through which they can challenge the government's actions. The lack of legitimate space to canvass for whatever citizens think is right or wrong creates a social paralysis, particularly among the more educated segments. While a few may think of extralegal measures with which to challenge the executive, the average citizen thinks only of the possibilities that exist within the law. When the executive is able to convince the citizens that no such space exists, it has secured for itself a situation of near absolute power while not completely wiping out the judicial institutions. As far as the outside world is concerned, courts, judges and lawyers exist: some kind of activity goes on, and it may even appear similar to what went on before the executive displaced judicial power, but in fact nothing remains besides.

Creating confusion about the place of law

New authoritarian regimes do not necessarily abolish all the existing laws, or even declare martial law or emergency regulations. The executive gains such control over the legal process that it can have near absolute power without needing such laws. Even if they are introduced, emergency regulations may be retracted after a short period, but meanwhile the new power of the executive has become part of the normal situation. How is this achieved? Over time, the executive claims a mandate for itself that does not require the making of new laws to do this or that. Parliament is maintained, but the executive goes about its business without reference to the legislature. By various means, the legislature is relegated to an unimportant position. Over time it loses its habit of operating as a check against the executive. Only if an opposition party at some stage gains such a huge majority that it becomes determined to challenge the government is the situation likely to be altered. But such situations rarely occur and for the most part opposition parties enter into compromises to avoid conflicts with the regime. The executive can also threaten to dissolve the legislature if it becomes too much of an obstruction. Thus members of parliament enter into tacit agreements not to challenge each other or worry very much about the role of the executive. The

executive in turn provides various facilities and amenities to the members of the legislature, as a reward for their non-interference.

Making law enforcement agencies dysfunctional

A properly functioning law enforcement agency is a threat to an authoritarian regime. The executive needs to be sure that it will not be subjected to criminal investigations. However, it is not possible to achieve this simply by giving orders to law enforcement officials not to investigate this or that matter. What the executive does instead is to create conditions in which law enforcement officers become lethargic. This can be achieved in many ways. One common method is to appoint key officials who understand the requirements of the executive and set about complying by destroying the internal workings of their agency. These persons can create sufficient conflict among the higher ranks that the agency loses its capacity to act with a common vision and purpose. Avenues for corruption are then encouraged, and these spread quite fast to the lower ranks. Police become engaged in making money rather than conducting criminal investigations. The executive and law enforcement heads connive to ensure that internal discipline decays, and perhaps completely collapses. Hardly anyone gets punished for anything. Mutual reprimands among culprit officers become a substitute for effective disciplinary action. Officers are assured that whatever happens, they are safe from retribution. This psychology spreads and creates a sense of total impunity. Under these circumstances, crimes increase and more public complaints follow. The executive makes public gestures, and may talk of introducing the death sentence or performing some dramatic acts to stop crime and to ensure the rights of the victims. However, these promises will be mere rhetoric. The efficiency of the police cannot be increased, because they would threaten the persons that the executive wishes to protect. Thus, the policy of self-protection overrides concerns for public security and social stability.

“Mutual reprimands among culprit officers become a substitute for effective disciplinary action”

Using the very poor as political slaves

Sometimes governments are provided foreign donors' money for poverty alleviation, which may include direct contributions to people below the poverty line. On the face of it, such actions are harmless, and perhaps laudable. However, there is a strong link between the electoral programmes of new authoritarian regimes and the politics of poverty alleviation. Leaders of an authoritarian government will help “their poor”: those who have demonstrated political allegiance. In each locality, the regime's representatives become channels for aid to the poor, and as a result they increase their own power. They become capable of mobilizing large masses for whatever political activity they dictate, which may include spying on and silencing “the other's poor”, often though violence and intimidation. Political manipulations are made to appear as mindless mob actions. In

this way, deep divisions grow among the poor themselves. The "other's poor" wait for their chance to get revenge if or when political power changes hands.

"Police stations develop their own ways of doing things, knowing that they are politically protected"

Local political leaders with large numbers of supporters behind them also impose their will on law enforcement officers. Police are compelled to side with "their people" and stay silent about criminal acts committed by supporters. The officers' sense of loyalty to their agency is weakened, and in its place grows a sense of loyalty towards local political leaders. Higher-ranking officers are unable to impose discipline. Police stations develop their own ways of doing things, knowing that they are politically protected. Often, localised corruption becomes associated with torture and killing, as police use their powers to enrich themselves and help their friends.

For a foreign donor agency entering this situation, it is very difficult to understand the ways that local political leaders may use foreign assistance to strengthen anti-democratic forces. Only if the donor agencies take the time to develop sufficiently deep links and understand local realities can they mitigate the negative effects likely to arise out of their contributions. But the issue should not be about how to avoid doing harm locally, but rather about how to avoid the greater harm that may be done to those working for democratization and human rights at the national level. Ultimately, if poverty alleviation programmes help new authoritarian regimes build an army of political slaves among the poor, then their results will be very harmful indeed, despite intentions to the contrary.

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

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

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

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

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

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

In this issue of *article 2*

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

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