Lesson Series 62

Arbitrary detention

Summary

This lesson will discuss the issue of arbitrary detention, which is a prevalent practice in the Asian region. It is used by state agents for various means, including instilling fear, silencing dissent, and even extortion.

The lesson will examine cases of arbitrary detention, and how they inevitably lead to further rights abuses, including torture and disappearance. The lesson will also look at various international norms and standards preventing arbitrary detention.
Theme: Arbitrary detention

The Issue

Arbitrary detention is increasingly becoming a gateway to graver abuses within the Asian region. It is used for the purposes of intimidation and/or punishment, by state forces as well as individuals. Such detentions violate numerous fundamental human rights and international norms.

The Lessons

Lesson 1 will give an overview of the practices of arbitrary detention in Asia.
Lesson 2 will discuss the link between arbitrary detention and other human rights.
Lesson 3 will look at the international principles and standards relating to arbitrary detention.

This lesson will look at how arbitrary detention is used and abused in various Asian countries.

A. Overview of arbitrary detention practices around Asia

Arbitrary detention in most of Asia is not exceptional, but rather an endemic practice. This is indicated by numerous cases from various countries, all of which show a consistent and widespread pattern of abuse of authority by law enforcement agencies concerning illegal and arbitrary detention.

The practice of arbitrary detention engenders a climate of fear and is a gateway violation that enables a chain of abuses, including torture and forced disappearance, which continue to blight the region. This is indicated in the following cases.

In February 2010, a Rapid Action Battalion (RAB) team illegally arrested, detained and interrogated Mr Mainul, Mr Salim, Mr Mohammad Ali, Mr Abdul Hasanat, Mr Mohon and Mr Mamun in Pirojpur village, Bangladesh. They were handcuffed, blindfolded and taken away without knowing the reason for their arrest. Mr Mohammad Ali testified that during his interrogation, police officers threatened to fabricate charges against him, and three of the men stated they were tortured. The RAB officers then organized a setup and put arms and bullets in Mr Mainul, Mr Hasanat and Mr Mohon’s pockets before charging them with murder and arms possession. Mr Salim has not been heard of since his arrest, and there are concerns that his life is in danger.

No information was given to the men’s families after their arrests, no warrant was produced and criminal procedure in this case was entirely subverted. Under Bangladeshi law, the police have the right to arrest people without a warrant for small misdemeanors, such as creating public disorder, which allows them to hold people for 24 hours and to fine them. This charge is often presented to magistrates to explain cases of illegal arrest [For further details see AHRC-UAC-043-2010, 14 April 2010].

In another case from Bangladesh, Mr Sohrab Hossain was illegally arrested on 7 January 2010, along with two other persons, Mr Hamidur Rahman and Mr Selim Morol. The two men were allegedly involved in several criminal cases, whereas no warrant had been issued against Mr Hossain. He was repeatedly tortured during arrest and while in police custody with sticks, fists and boots, and his valuables were taken. The next day, the police fabricated a pending robbery case against him.

At the time of reporting this case, Hossain had been detained for more than 65 days without being brought before a court, which is a clear violation of the Code of Criminal Procedure (1898). Furthermore, not knowing
the reasons for his arrest and detention, Sohrab’s relatives were forced to pay bribes to the police in order to access a copy of the First Information Report (FIR), as well as to provide him with food and pay for his transportation to jail [For further details see AHRC-UAC-028-2010].

The Bangladeshi police are in fact notorious for arresting people on bogus charges and fabricating cases against them for the purpose of extorting enormous sums of money. This has been well documented by the Asian Human Rights Commission (AHRC), particularly in the case of 42-year-old Mr F M Abdur Razzak, together with a table detailing the exact amount of money he was required to pay, to which police officer, and for what purpose. Razzak was arrested on 3 November 2008 and detained for more than two months, during which time his family paid 159,660 taka (around 2,300 USD) to the police, to prevent his mistreatment and torture, to ensure he was given the food sent to him by his wife and so forth. Razzak’s wife was able to prove that the charges against him were false, and he was finally released on bail on 12 January 2009 [For further details see AHRC ‘Disconnected policing and the justice trade in Bangladesh, article2, vol 8, no 1, March 2009].

This situation is far from limited to Bangladesh. The unmonitored and illegal detention of persons in Sri Lankan police station cells is a grave and widely tolerated crime, leaving many vulnerable to torture and abuse by police, with little chance of finding redress. A recent such case that was brought to the attention of the AHRC was that of 30-year-old Mr Gayan Thusitha Kumar in April 2010, who was arbitrarily arrested, tortured and held in remand for more than two years in Sri Lanka. He was told by police that he needed to give a statement about a theft but was then illegally arrested and accused of stealing mobile phones. The police also obtained a detention order against him for arms possession after they planted his fingerprints on a small explosive. Mr Kumar’s trial is ongoing, and he suffers from physical and mental trauma while raising four children as a single parent [For further details see AHRC-UAC-049-2010].

Apart from torture and implication in false cases, arbitrary detention can also lead to disappearances, as is seen in Pakistan. In April 2010, the AHRC reported the case of Mr Jalil Ahmed Reki Baloch, who remained missing at the time of writing after his arrest by plain clothed intelligence agents, 15 months previously, on 13 February 2009. At the beginning of 2009, the head of Pakistan’s Inter-Services Intelligence Agency (ISI), Quetta division, asked the chief minister of Baluchistan province to file an FIR against Jalil Reki for burning Pakistan’s flag and chanting anti-government slogans. As the chief minister refused to support this false accusation, the ISI took Jalil Reki into custody and was not seen since [For further details see AHRC-UAC-053-2010, 27 April 2010].

Another similar case is that of Mr Murad Khan Marri, who was disappeared in June 2009 also by plain clothed intelligence agents, after being charged with crimes related to anti-state activities. He reappeared in March 2010 and appeared to have been badly treated. Although the Supreme Court of Pakistan has made strong
efforts to address the issue of disappearances, it is still unable to hold military and intelligence staff accountable for illegal arrests and detentions [For further details see AHRC-STM-068-2010, 27 April 2010].

In Burma, ordinary groups and individuals face arbitrary and illegal detention and arrest on spurious claims of alleged involvement in illegal organizations. In particular, those helping with relief efforts after Cyclone Nargis of 2008 have been targeted. In the run up to the general elections of this year, the government seems to be increasing such arrests and detention. These include Khine Kyaw Moe and ten others who have been accused of involvement in an outlawed ethnic organization, the All Arakan Students Youth Congress (AASYC). Another seven persons were also targeted for arrest but have reportedly escaped custody. The detainees were held in illegal detention for over three months, during which time they were allegedly tortured to extract confessions that would be used against them in court [For further details see AHRC-UAC-016-2010, 26 February 2010].

Failing justice systems and lack of democratic space

As the above cases indicate, the prevalence of arbitrary detention in Asia is a reflection of failing justice systems; of a suppressive policing system and ineffective prosecution and judicial mechanisms. It is also proportionate to the absence of democratic space in a particular society [See Lesson 2 of this series for more analysis on the relationship between arbitrary detention, other human rights and democracy]. While arbitrary detention is increasingly supported by counter-terrorism narratives, it is in fact rooted in weak institutions and the lack of remedies available to victims. This lack stems from an absence of legal provisions regarding arbitrary detention, as well as inefficient mechanisms that are incapable of providing justice [See HRCS Lesson Series 40-43 on the rule of law and justice systems in Asia].

B. Emergency and national security laws

Another problem that worsens arbitrary detention in Asia is the region’s prevalence towards national security legislation and militarization. In a written statement submitted to the UN Human Rights Council, the Asian Legal Resource Centre (ALRC) noted that,

There is a trend concerning legislative changes in India, Sri Lanka, Thailand, Indonesia and South Korea that favours extended periods of statutory detention, for which national security is used as an excuse. For instance, a person charged under the Internal Security Act BE 2551 (2008) in Thailand can be detained for a period of 30 days and the arresting authority is given wide-ranging discretionary powers that can infringe the fundamental rights of the detainee. While in most States the 24 hour norm is still the standard under the ordinary criminal procedure, newly drafted statutes provide exceptions to this norm for periods ranging from 30 to 90 days of detention. National security and the concept of preventive detention are being used to justify an increasing number of arbitrary, lengthy detentions [ALRC, ‘Asia: Council urged to do more to prevent arbitrary detention, the gateway to other grave abuses’, ALRC-CWS-13-01-2010, 17 February 2010].
Militarization and the use of force for social control makes the protection of all human rights more vulnerable, including protecting against arbitrary arrest and detention. As noted in HRCS Lesson Series 60: Militarization and human rights in Asia,

Under the pretext of national security, governments armed themselves and waged war against their own citizens. By incorporating national security into legal frameworks, whether as ‘emergency’ regulations, anti-terrorism laws or state/public security provisions, little room is left for dissent. Moreover, many of the relevant terms are ambiguously defined and the laws give discretionary powers to certain institutions/bodies. An earlier HRCS lesson describes the emergency legislation enacted in Bangladesh in 2007, and the resulting repression and human rights abuse [see HRCS Lesson Series 52: Militarization and human rights in Bangladesh]. Beginning May 2008, the South Korean government used a variety of laws to crack down on tens of thousands of protesters upset by the government’s decision to begin importing questionable beef from the United States. Subsequently, to give the government more leeway in prosecuting individuals, new laws were enacted while old ones were amended [see Jose Ney, ‘Democracy in South Korea: Mature society versus immature system’, Ethics in Action, vol. 2 no. 4, August 2008]. Similarly, the governments of Burma and Thailand have been busy arresting and prosecuting citizens for their commitment to free speech under regressive pieces of legislation [see Awzar Thi, ‘Censorship and cyber-thought crimes in Bangkok and Rangoon’, Ethics in Action, vol. 3 no. 2, April 2009].

Questions For Discussion

1. Have you come across any cases of arbitrary detention? Discuss reasons for such detention.
2. Are there any laws or mechanisms in your country preventing such detention? Can you make use of them?
3. Do laws exist that encourage or permit arbitrary detention? In your opinion, what is the purpose of such laws?
Lesson 2

This lesson will discuss the link between arbitrary detention and other human rights, and how it is used by state agents as a form of control.

Arbitrary detention and its relationship to other rights

As mentioned earlier, arbitrary detention is the gateway to other grave abuses. It is the initial point of contact between individuals and those responsible for abuse, it provides the mechanism through which state authorities can exert control over individuals and it paves the way for further depravation, particularly torture and disappearances. As the cases from Bangladesh and Pakistan made clear, once persons were arbitrarily detained, they were then vulnerable to torture, disappearance and further mistreatment. Addressing arbitrary detention is therefore an important component in the prevention of grave human rights abuses.

Why arbitrary detention?

Arbitrary detention has also become an effective instrument to impart fear among human rights defenders. The state police in the Indian state of Manipur arrested human rights defender and environmental activist, Mr. Jiten Yumnan, on September 14, 2009, along with seven other local political activists to end a state-wide protest against the state government demanding investigation and prompt action against the police officers who had killed two persons in an incident of extrajudicial execution. The detainees were charged under the provisions of a draconian law, the National Security Act, 1980. The police tortured Jiten in custody. After four months, the police released Jiten and withdrew the charges. Even though the victims want to pursue a case against the government and the police officers, they are afraid to do so since the courts in India will take at least a decade to decide the case, an inordinately long period during which the victims have no means to find protection from further persecution…

In a similar case reported from South Korea, the police arrested two human rights defenders, Mr. Park Lae-gun and Mr. Lee Jong-hoi, on January 11, 2010. Arrest warrants had been issued against Park and Lee for reportedly being instrumental in organizing protests concerning forced evictions in Youngsan-Gu, Seoul. Several participants were reportedly killed by the authorities during a crackdown on the protests. The cases registered against Park and Lee and their arbitrary arrests represent serious violations of their rights and of South Korea’s obligations under the International Covenant on Civil and Political Rights (ICCPR).

Arbitrary detention is also used to infringe media freedoms. On April 2, 2009, the AHRC reported the cases in Myanmar of Ms. Ma Eint Khaing Oo working for Ecovision Journal and Mr. Kyaw Kyaw Thant, a freelancer with Weekly Eleven, who
were arrested by the authorities for arranging for victims of cyclone Nargis to meet with officers of the International Committee of the Red Cross (ICRC) and United Nations Development Programme (UNDP) in Rangoon. The authorities accused the journalists of inciting the citizens to stir up trouble and of creating animosity towards the government. Both were sentenced to two years imprisonment with hard labour, but were released in September owing to external interventions.

During the past two years, the government of Sri Lanka has used arbitrary detention as a tool to silence political opposition in the country. Recent events, particularly in connection with the presidential election, reveal shocking use of arbitrary detention as a tool of repression and revenge. The government has openly resorted to arbitrary detention of not only journalists and human rights defenders, but also of its own officials, including military officers, who publicly condemned the government. During the civil war, human rights defenders who condemned breaches of international humanitarian law were either detained without charges for long durations or were charged with offences under the draconian Emergency (Miscellaneous Provisions and Powers) Regulation No 1, as amended vide gazette notification 1132/14.

Arbitrary detention is also used against migrants. For instance, it is widely used for mass arrests of Burmese refugees staying in Thailand. The government of Thailand uses arbitrary detention as an instrument to ‘clean’ the country of unwanted migrants, violating their rights and its obligations under the ICCPR in the process [ALRC, ‘Asia: Council urged to do more to prevent arbitrary detention, the gateway to other grave abuses’, ALRC-CWS-13-01-2010].

The statement above spotlights how arbitrary detention is used to threaten and silence government opposition and critics. It is used to deny individuals their right to express their views, to political participation, to punish persons for sharing information ‘detrimental’ to the ruling government, politicians or other institutions. These are all rights that are central to the effective functioning of democracy. By suppressing these rights through detention, governments decrease the space for democracy and rule of law to flourish. This can only lead to further human rights violations.

Arbitrary detention is even used by ordinary police and other officers for personal purposes, mostly to allow them to extort money from the detainee, as noted in several cases in Lesson 1.

**Corrupt practices and institutions**

When state officers and institutions are infected with corrupt practices, they cease to function in accordance with the rule of law, and are in fact a hindrance—if not themselves violators—to the protection of citizens’ rights.

Razzak’s case as discussed in Lesson 1, is only one case amongst thousands within the region. Such corruption amongst police officers, and collusion with wealthy and powerful sources within society is common not only in Bangladesh, but in many Asian countries. The ALRC made note of the following case from Pakistan in its submission to the Human Rights Council:
In Pakistan, on 26 April 2009, the officers from the Airport Police Station in Rawalpindi (Punjab province), arrested Nadia (19 years old), Shazia Riaz (16) and Nazia (12) from their residence. At the police station, Station House Officer Choudhry Safdar and Assistant Sub-Inspector Basheer, abused and assaulted the three girls. After four days of illegal detention, the police produced the girls before civil judge, Mr. Azmat Ullah, in Rawalpindi. The police accused the girls of helping their brother, Fazal Abbas, to abduct Ms. Kulsoom Baloch, the daughter of a wealthy businessman. In fact, Kulsoom had married Abbas against the wishes of her family. Kulsoom’s family was using their influence with the local police to exact revenge on Abbas’ family [ALRC-CWS-13-01-2010].

Once institutions cease to function in accordance to law and to their own mandates, they eventually are no longer able to effectively carry out their mandate. In the case of law enforcement institutions such as the police, once they are unable to carry out proper criminal investigations, they end up using detention and torture as a means of investigation.

Mrs. Muliyana (24) from Natar, Indonesia, was arrested by the Jakarta Metropolitan police on 24 July 2009, detained her for six days and tortured her in order to force her husband, Mr. Azwan Effendi, to surrender to the police. He was suspected of involvement in a bank robbery. Despite Effendi having surrendered himself, the police continued to torture Muliyana, including using electric shocks on her stomach in front of her husband to get him to confess to the robbery and to locate the stolen money. The police released Muliyana without registering a case and charged her husband with robbery [ALRC-CWS-13-01-2010].

Not only are victims vulnerable to such abuses, but they also suffer from the prevalence of impunity, which gives free reign to law enforcement agencies and encourages widespread human rights violations. In Manipur, India illegal arrest and extrajudicial killing are common on the part of the state police. On 14 March 2010, Mr Nanao was illegally arrested by members of the Manipur State Police Commando Unit in front of his brother-in-law Bobo. The police had no warrant against Nanao and warned Bobo not to tell anyone of their actions towards Nanao. When Nanao’s relatives found and identified his dead body the next day, the police claimed he belonged to a prohibited militant organization and had been killed in an encounter with the police.

This chain of events is played out on a regular basis in Manipur, as well as other places in Asia. It is believed that at least 260 persons were extrajudicially executed between January and November 2009 in Manipur. In all cases, the state has claimed—contrary to strong factual evidence—that the deceased were killed in armed encounters and that they were members of militant groups. According to the information available to the AHRC, not a single witness has been examined in any of these cases, and in instances where the witnesses were willing to speak out, they were threatened by officers related to the case. None of the perpetrators has ever been punished.
When state officers are not held accountable for their actions, human rights violations against ordinary people increase and the remedies available decrease [For further details see AHRC-UAC-029-2010].

Questions For Discussion

1. Discuss reasons for arbitrary detention in your country.
2. In your opinion, what other rights are most commonly violated through the practice of arbitrary detention?
3. Discuss what can be done to prevent arbitrary detention.

Lesson 3

This lesson outlines international provisions and standards regarding arbitrary detention.

The right to be free from arbitrary detention

**Article 9, Universal Declaration of Human Rights (UDHR)**

*No one shall be subjected to arbitrary arrest, detention or exile*

**Article 9, International Covenant on Civil and Political Rights (ICCPR)**

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

While the term “arbitrary” is not defined, the Commission on Human Rights resolution 1991/42, under which the UN Working Group on Arbitrary Detention was set up, considered as arbitrary those deprivations of liberty contrary to relevant international provisions laid down in the UDHR or other relevant international instruments ratified by states, as noted in the ICCPR.
Principle 2, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

The introduction to the Body of Principles defines arrest as the act of apprehending a person for the alleged commission of an offence or by the action of an authority, detention as the condition of any person deprived of personal liberty except as a result of conviction for an offence, and imprisonment as the condition of any person deprived of personal liberty as a result of conviction for an offence.

Prevention of arbitrary (and prolonged) detention

Article 9, ICCPR

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Principle 4, Body of Principles

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.
**Principle 9**

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

**Principle 10**

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

**Principle 13**

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

**Principle 17**

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

**Principle 36**

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
Principle 38
A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Conditions of detention

Article 10, ICCPR
1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

Principle 1, Body of Principles
All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 6
No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 24
A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.
**ARBITRARY DETENTION**

**No. 8, Standard Minimum Rules for the Treatment of Prisoners**
The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.

**No. 12, Standard Minimum Rules**
The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

**No. 20, Standard Minimum Rules**
(1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

(2) Drinking water shall be available to every prisoner whenever he needs it.

**No. 22, Standard Minimum Rules**
(1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry.

Questions For Discussion
1. Are you aware of any laws in your countries preventing arbitrary detention? What are their strengths and weaknesses?
2. Discuss further provisions to those outlined above, to prevent and punish arbitrary detention.