Lesson Series 43

Rule of law: The role of the judiciary in human rights implementation

Summary

This lesson discusses the importance of the judiciary for the realization of human rights. The experiences of numerous Asian countries with regards to judicial independence and the rule of law are studied. International standards regarding the conduct of the judiciary are provided as appendices.

This is the last of a four-part series on the rule of law and human rights implementation.
THEME: Rule of law: The role of the judiciary in human rights implementation

The Issue

The judiciary is the last resort for citizens seeking justice, particularly when it is other government agencies that have violated their rights. When the judiciary itself ignores human rights and participates in the abuse of power—as is common in many parts of Asia—it becomes a serious impediment to citizens and an obstacle to the effective implementation of human rights in the region.

The Lessons

This lesson is the last of a four-part series on the rule of law and human rights implementation.
Lesson 1 discusses the independence of the judiciary.
Lesson 2 examines systemic and institutional obstacles to the effective functioning of the judiciary.
The appendix consists of international principles and guidelines regarding the conduct of the judiciary.
Lesson 1

Independence of the judiciary stems from the notion of the separation of powers, whereby the executive, legislature and judiciary form three separate branches of government, which can constitute a system of checks and balances aimed at preventing abuses of power. This separation and consequent independence is key to the judiciary’s effective functioning and upholding of the rule of law and human rights. Without the rule of law, there can be no realization of human rights, which has been discussed throughout the four-part lesson series, particularly in HRCS Lesson Series 40. The role of the judiciary in any society must be to protect human rights by way of due process and effective remedies. This role cannot be fulfilled unless the judicial mechanism is functioning independently, with its decisions based solely on the basis of legal principles and impartial reasoning.

This lesson gives an overview of the factors comprising judicial independence—institutional independence, individual independence, impartiality and accountability—through the experience of various Asian countries.

Institutional independence

Institutional independence requires the judiciary to be able to function without any influence from the government or other state agencies. This is usually necessitated by either the constitution or other legal provisions in all but socialist countries or those with military dictatorships. However, throughout Asia, it is the practical realization of this principle that is more problematic. This can either be because legal provisions themselves are shaky, or that they are not being enforced as they should be. In its written submission to the 61st session of the Commission on Human Rights for instance, the Asian Legal Resource Centre (ALRC), sister organization of the Asian Human Rights Commission (AHRC) stated that in Sri Lanka,

the Constitution of 1978 shifted power very much in favour of the executive president, to the detriment of the parliament and the judiciary. Though the constitution theoretically accepts the separation of powers, in actual fact the type of power arrangement it contains relegates the judiciary, including the Supreme Court, to a lesser position. The judiciary has very limited powers over judicial review [ALRC, ‘The independence of the judiciary in Sri Lanka’, E/CN.4/2005/NGO/42].

Similarly in Cambodia, while the constitution accepts judicial independence, the pre-UNTAC political and legal structure remains in place, which saw the courts forming an organic part of the executive branch of government. In other words, the courts functioned as an arm of the government, which was dominated by the military.
As the current political and legal system in Cambodia is maintaining the old structure while having a new constitution, it is not difficult to see why there is no democracy and human rights even today, more than ten years after UNTAC. The present judges have associations with either the military or political parties; they are bound by circulars from the ministry of justice; the majority of judges are not properly qualified; socialist trials are still the norm—it is presumed that if a person has been arrested, there is enough evidence to find them guilty, so judges have already decided the verdict prior to the trial. Furthermore, both the appeals and supreme court are ineffectual.

In India on the other hand, while the principle of judicial independence is accepted legally, there is no implementation. For instance, while the Criminal Procedure Code was rewritten in 1973 with the express intention that the judiciary be severed from other parts of the government, the AHRC has constantly pointed to the fact that in West Bengal the lower judiciary in particular is largely controlled by the police. In fact, the police there control almost all aspects of criminal proceedings, whether it be arrest, conviction, imprisonment or death. Numerous urgent appeals taken up by the AHRC clearly show the power held by the police, and their complete disregard for the institutional independence of the judicial and prosecution mechanisms.

Most recently, the AHRC reported the case of the Beldanga police in Murshidabad district, West Bengal who blatantly disregarded court orders regarding the filing of a complaint and subsequent investigation of the death of Saidul Mullick, a potato vendor in March 2005. The police ignored two separate court orders regarding this case, and finally even stated that they had no intention of carrying out investigations as they had decided that Mullick’s death was a case of suicide.

Mullick left his house on 29 November 2004 with two business partners with Rs 70,000 (USD 1,600) in his pocket to purchase potatoes. When he had not returned till evening, his wife, Mrs Dilruba Bewa, went to Devkundu to look for him but she could not find any of the three persons. That same night, one of the business partners came to her house and told her that Saidul would be returning later. When Mullick had not returned in three days, his wife lodged a complaint of his being missing with the Beldanga Police Station on 1 December 2004.

The next day, Saidul’s dead body was found on the railway tracks near the Rezinagar Railway Station. The railway police seized the body and registered an unnatural death after conducting a post-mortem. However, according to lawyer Hoshna Arrah (alias Bulbul), Dilruba’s neighbour, the post-mortem report did not reveal the actual cause of death, nor whether it was a murder or suicide.

When Dilruba went to the Beldanga Police Station to claim her husband’s body and to file a First Information Report against Saidul’s business partners, she was not only refused by the police personnel but also threatened that they would impose false charges on her if she did so. Dilruba then took the case to the district magistrate and Ms Indrila Mukherjee, the Sub-Divisional Judicial Magistrate (SDJM) at that time, directed the Beldanga police
to register a case and submit a report, which they failed to do.

On 29 March 2005, Dilruba complained to the SDJM that the police were refusing to file her complaint regarding her husband’s murder and were trying to cover it up, insisting that it was a case of suicide. At this time, the Sub-Divisional Magistrate, Ms Yasmin Fatema ordered the Beldanga police to file her complaint, conduct an enquiry and report back to the court. However, the Beldanga police deliberately disobeyed the court’s order, merely making an excuse that the officer-in-charge (OC), Mr Arun Kumar Das, was on leave and it was not possible to pursue the matter in his absence. However, it was later found by reliable sources that the OC was in fact on duty at the time.

When local human rights group MASUM spoke to Mr Arun Kumar Das, he categorically stated that though the Beldanga police received orders of the SDJM, they had not complied with them and would not do so in future because the case was one of suicide. In the meantime, the Superintendent of Police (SP), Murshidabad District, said that the case inquiry was over and it was found to be death by suicide and not murder. As regards the court’s directive the second time, the SP further said that the General Railway Police would be asked to conduct an inquiry into the case as ‘the place of occurrence’ falls under their jurisdiction [See further: AHRC UA-54-2005, 4 April 2005].

Even the Indian Supreme Court is not exempt from such undermining of its authority, as evidenced by the Uttaranchal state government’s non compliance with its orders regarding land rights, as reported in the AHRC’s hunger alert of 27 October 2004.

Over eight months after the Supreme Court of India, the highest court in the country, declared that around 150 Dalit families in Ambedkhar settlement have legal rights to over one-thousand acres of land in Kashipur sub-district, Uttaranchal, the state government has not yet complied with the order.

The Dalit community of Ambedkhar settlement had been legally tilling the land in question for over thirty years. In 1992, a local government official declared it to be ‘surplus land’ under state law, which means that legal rights to the land could be granted to the villagers. However, after that, a local company called M/s Escort Farms Ltd contested the granting of title in the Allahabad High Court. In the meantime, the director of the company used his local influence to have the villagers violently and illegally evicted in 1993 with the help of local police and officials, and their village demolished. Over 80 of the villagers were detained for eight days on charges of disturbing the peace.

Nonetheless, in May 1995 the court decided against the company and ordered it to pay one million rupees in compensation, to be used for the rehabilitation and resettlement of the villagers. The company appealed, and the case went to the Supreme Court, which finally gave its decision, also in favour of the Dalit villagers, in February 2004. The court ordered unequivocally that the state take control of the land with a view to returning
it to the affected community.

However, the state government has to date failed to act to see that the land is returned, despite the efforts of local human rights organisations to raise attention to the matter. In fact, the illegal sale and occupation of the land by the company involved, in connivance with local authorities, is reported to have continued unabated. This is despite the fact that the Social Development Foundation has on at least one occasion directly approached state government ministers, together with the affected villagers, to inform them of these activities.

Meanwhile, hunger is prevalent in the community, which has struggled to survive since the eviction. Villagers such as Veer Singh, who works as a sugarcane cutter for under the minimum wage, do not eat until coming back from work at the end of the day. On a visit to the village by the Social Development Foundation he told them that, “One of my sons died due to lack of medication. I had no money for the doctor’s fees. It is painful that sometimes we don’t have money to buy anything. Many days we have to live without any rations.”

Fifty-two-year-old Dhoom Singh, who has one son and four daughters, has been without land since the eviction, and his children have had to work as labourers. He has remarked that,

The situation is difficult for us, as there is no work. I could never get my children educated. It is over 10 years now that we are out of our places and nothing has been done. We people have had faith in courts as people like you have been helping us, yet where do we go to get our livelihood. Poor people cannot wait. They have to arrange for their next day’s meal and they have saved a lot and contributed for court cases. Till the Allahabad High court, still many people were around, but after the matter was in the Supreme Court, people completely lost faith in the judiciary. They cannot wait for so long. [See further: AHRC HA-05-2004, 27 October 2004. Also, see HRCS Lesson Series 38 for more information regarding the right to food and a related Supreme Court of India order].

The judiciary in Nepal is undermined to the extent that court orders to release those arrested and detained arbitrarily by both police and military forces are simply ignored, with the persons being immediately detained as soon as they step outside the courts. In fact, many individuals have stated they prefer to remain in police or judicial custody, rather than be released only to be immediately rearrested, particularly by the military. In June 2005 the AHRC reported that at least 32 political activists and human rights defenders had been rearrested in violation of court orders since King Gyanendra’s coup of February 2005 [See AHRC UA-100-2005, 22 June 2005].

Even prior to the coup however, Nepal’s judiciary was weakened—the AHRC has consistently reported on such cases. For instance, in July 2004 the AHRC issued an urgent appeal stating that for the third time that year it was reporting an instance of rearrest in violation of court orders. Four persons were arrested as soon as they stepped out of the judge’s chambers at the Morang District Court on 14 July 2004. Four lawyers from the local
bar association were also present at this time, but this did not deter the security forces in the least.

The four persons Yek Raj Basnet, Khagendra Sambahamfe, Ram Bahadur Ingaram and Tek Bahadur Bista were initially arrested nine months earlier, and held for ‘preventive detention’ under the Public Security Act (PSA), which can hold detainees up to 12 months without charges. According to our source, these four persons were afraid to be released and felt safer in prison because they thought that they would be executed or disappeared once they were released. Since last year, Nepal tops the number of enforced disappearances in the region. Fearing the forced disappearance of people, NGO groups in Nepal are advocating that detainees should not be released without the presence of their family members or civic group members [See AHRC UA-86-2004, 16 July 2004. For further cases of rearrest in violation of court orders see also AHRC UA-74-2004, 23 June 2004 and AHRC UA-51-2004, 24 May 2004].

That the judiciary cannot safeguard the authority of its decisions or prevent the security forces from abusing the legal process indicates the failure of the judicial system in Nepal.

Other elements of institutional independence can relate to administrative, financial and jurisdictional issues. While these are not discussed in this lesson, more information can be found in the various appendices at the end of the lesson.

**POINTS FOR REVIEW**

- When the orders of the judiciary are ignored or overlooked, what can be done?
- Do judges have the authority to take action against those who disregard their orders?
- If so, why do they not take action? If not, what can you propose?

**Individual independence**

Together with institutional independence, it is essential that individual judges are also guaranteed the independence to undertake their work effectively. The two are obviously linked, and if there is no institutional independence, there is little chance of there being any individual independence. Both entitle and require judges to ensure that judicial proceedings are conducted fairly and the rights of all parties are respected; both require that judicial accountability is upheld. This is particularly important when it comes to senior members of the judiciary, such as chief justices or the presidents of apex courts. They have greater power that can be abused, as well as the fact that their conduct will not only be observed by the public but by their junior colleagues.
For instance, public opinion in Sri Lanka sees Chief Justice Sarath Silva responsible for the lack of justice within the country and the collapse of rule of law. Lawyers typically claim he intimidates them when in court, and threatens to debar them from practice, especially in human rights cases. Others accuse him of manipulating panels and dates of hearings in a manner that casts doubt on the objectivity of proceedings. In a lengthy book entitled *The Unfinished Struggle for the Independence of the Judiciary* (2002), prominent journalist Victor Ivan has exposed extensive misconduct and abuse of authority by Silva both as Attorney General and Chief Justice. Most recently Nuwara Eliya District Judge Prabath de Silva resigned in protest against the Chief Justice.

In November 2003, not for the first time, an impeachment motion was filed against the Chief Justice—the only avenue by which he may be investigated—with the signatures of about one hundred members of parliament. However, the Sri Lankan President exercised her political power to protect him. Thus, serious allegations against the highest judicial officer in the land were reduced to political bargaining chips. Meanwhile, a survey conducted by a reputable organization found that the public perceives the judiciary to be the second most corrupt institution in the country. This may explain the premature resignation of the country’s senior-most judge, Mark Fernando.

The Sri Lankan judiciary is thus incapable of addressing its own institutional defects. With its highest member defending himself from allegations of misconduct, internal reforms cannot even begin. The judiciary’s inability to respond to widespread criticism is demoralising both the profession and the country’s citizens. As a result, people are increasingly seeking to resolve their grievances from outside the law, and so crime is on the increase [See further: AHRC AS-06-2003, 1 April 2003 and AHRC statement of 10 December 2003].

Another aspect of abuse of power by senior judicial officers relates to judicial appointments and promotions; when there is no independent mechanism to do this job, it is left up to the chief justice. In many countries, this has led to allegations of nepotism. In a speech given at Sri Lanka’s International Centre for Ethnic Studies, former UN Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy said

Recent cases decided by the Supreme Court of India illustrate. The Constitution of India provides for the appointment of judges by the president after ‘consultation with the Chief Justice of India’. In a 1993 case the court held that this ‘consultation’ must be genuine and not a sham. When there is a conflict between the opinion of the executive and that of the Chief Justice, the opinion of the Chief Justice should prevail… Controversy arose thereafter as to whether the power can be vested in just one person like the Chief Justice or whether it should require consultation with a plurality of judges. In 1998 the President of India referred this and other doubts caused by the 1993 judgment back to a full bench of the Supreme Court without the Chief Justice…

Thus the Supreme Court, [held that] … the expression “consultation with the Chief Justice of India”, read into the Constitution not only that the Chief Justice’s opinion must be a collective opinion formed after taking the views of his senior colleagues but also that when that opinion conflicts with that of the executive the opinion of the judiciary “symbolised by the view of
the Chief Justice of India” should have primacy [Dato’ Param Cumaraswamy, ‘Tension between judicial independence and judicial accountability’, *article*2, vol. 2, no. 5, October 2003].

Abuse of power is not something that is only relevant while speaking of senior members of the judiciary however. In fact, a significant proportion of cases are dealt with by the lower judiciary, by judicial officers such as magistrates, session judges or district judges. In many instances, it is easier for them to abuse their individual independence, particularly when the system is such that no one is taking note of their conduct.

The infamous instance of an arrest warrant being produced for the President of India for a certain fee speaks to the pathetic situation faced by the Indian judiciary. On 13 January 2004, a Zee-TV Network reporter and cameraman approached two prosecutors of the Mehani Nagar Court in Ahmedabad, Gujarat and inquired whether it would be possible to obtain arrest warrants against rival businessmen. They were told that it would require a 40,000 rupees fee, as well as 5000 rupees for the judge. The reporter submitted the names of the Indian president and chief justice, as well as the former chairman of the Bar Council. Warrants were issued accordingly after the magistrate was paid his fee.

Individual independence also requires that judges are free to make decisions based solely on legal principles, free from fear of criticism or reprisal. In several Asian countries, the main obstacle to this independence is the fear of reprisal. For instance, judges in Sri Lanka increasingly face threats in carrying out their duties, as the Asian Legal Resource Centre wrote to the 61st session of the UN Commission on Human Rights:

2. On 19 November 2004 a senior high court judge, Sarath Ambepitiya, was assassinated in Colombo. This was the first assassination of a high court judge in the history of the judiciary in Sri Lanka. A few months earlier, another high court judge was reported to have been attacked in an attempted rape. Both instances highlight the lack of protection for judges in Sri Lanka. In a statement by the Bar Association of Sri Lanka it was pointed out that Judge Ambepitiya had received threatening telephone calls in the days prior to the assassination. Although these calls were reported, no security measures were taken. In fact, three days prior to the killing, protection previously provided to the judge at his place of residence was removed. The Bar Association also stated that at the time of the murder the telephone lines of the judge’s residence were disconnected; as a result there was a considerable delay in the police arriving at the scene of the crime. Later, during the investigations, it was revealed that the alleged mastermind of the murder had connections with several senior-level police officers. The Bar Association has called for a commission of inquiry into security matters related to this murder. In the case of the judge who was attacked, it was found that the police guard assigned to her residence for security purposes was asleep at the time of the incident [ALRC, ‘The independence of the judiciary in Sri Lanka’, E/CN.4/2005/NGO/42].

Most recently, former magistrate of the Wellaya Magistrate Court Janaka Bandara was sent death threats by telephone, demanding that he resign from the Judicial Service and refrain from attending an inquiry to be held
on 13 July 2005. The inquiry was regarding Judge Bandara’s indictment by the Judicial Service Commission, after he issued a warrant against Senior Superintendent of Police, Sherief Deen, who was alleged to be involved in a fatal accident case but whose driver was produced in court as the culprit. After hearing the evidence, Judge Bandara issued a warrant for Deen to be produced in court. However, he himself was indicted by the Commission.

His interdiction caused one of the most vocal protests by the Bar Association of Sri Lanka. The new Bar Association president fought his election campaign on the basis of ensuring a fair inquiry into this controversial case. It was thus no coincidence that the judge was subjected to death threats and told not to attend the inquiry.

At the time of the inquiry the AHRC noted

That a magistrate is facing death threats is an indication of the extremely dangerous security situation prevailing in the country. More often than not, death threats are carried out. Within the last 25 years the number of persons who have been slain in this manner can be counted in the thousands. Those who have been slain belong to a variety of social strata and include intellectuals, journalists, civil rights activists, politicians, and crime victims who are pursuing their cases in courts, particularly those involving complaints against state officers and political dissidents of various sorts. Just recently there was a public meeting organised by journalists to condemn death threats and to defy those who take such action.

The magistrate’s case is seen by the legal profession as a very important one as the magistrate has resisted cowing down to all pressures to demand justice in his case. The legal profession has viewed the action taken by the magistrate of issuing a warrant on an alleged suspect as an exercise of his legitimate duties. The legal profession also believes that any action taken against the legitimate use of power by a judicial officer threatens the independence of the judiciary itself. The legal profession has whole heartedly supported this magistrate’s endeavor to seek justice. The general perception has been that if judges themselves are prevented from carrying out their duties, there cannot be any expectation of justice for any other citizen...

The civil society of Sri Lanka should not underestimate the enormous implications of death threats issued against a judge. A death threat to any citizen is a gross violation of human rights and a threat to social security. However, the threat to the life of a judge is much more. It is a threat to the system of justice itself [AHRC AS-79-2005, 13 July 2005].

Less life threatening forms of reprisal are also common, such as the interdiction in the above case, as well as arbitrary dismissals or promotions, which are seen in Burma, India, Malaysia.
Impartiality

Judicial impartiality is another aspect of judicial independence; while judicial independence requires that the judiciary be able to function effectively without undue interference from political or other agencies, judicial impartiality requires the judiciary to base their decisions on facts and in accordance with the law. Judges should thereby not have any preconceptions regarding issues they are deciding upon, nor should they favour either of the parties to the dispute. This includes the arbitrary use of contempt of court proceedings.

In 2004, the AHRC noted many cases where the nexus between the judiciary, police and government officials in Burma was clearly visible. The judgements being given were not only in favour of government officials and thus in violation of the principles of just decisions based on merit, but in reaching these judgments judges were making use of harsh and outdated laws. Furthermore, the decisions inevitably further violated the rights of victims who were seeking redress for previous abuse. The ALRC wrote to the 61st session of the UN Commission on Human Rights regarding this issue, stating that

2. The experience of U Ohn Myint and Ko Khin Zaw, both of whom were charged with criminal defamation for complaining of forced labour is indicative. Although the Government of Myanmar outlawed the use of forced labour in 1999, reports of the practice continue to be widespread, and attempts to lodge complaints in accordance with existing legal provisions have proved futile. When Ko Khin Zaw and U Ohn Myint filed a complaint in the Henzada Township Court, Ayeyawaddy Division in July 2004 after being jailed for failing to do sentry duty at a village monastery, their complaint was summarily thrown out of the court. However, the same judge then entertained a complaint of criminal defamation by the vengeful local administrative officials. The two villagers were found guilty, and were offered a fine or six-months’ imprisonment. In an act of defiance, the two men chose jail.

3. Not only is the criminal defamation law used in this case problematic - in recent years criminal defamation has been condemned globally as offensive to basic rights and many countries have removed it from the statute books - but the case demonstrates the punitive actions taken against citizens in Myanmar attempting to exercise their rights. The fact that U Ohn Myint and Ko Khin Zaw were recently freed after the fines imposed on them were reported to have been paid by military intelligence officers further highlights the absence of any rule of law in the country. U Ohn Myint and Ko Khin Zaw’s complaints of forced labour are typical of the situation throughout the country, particularly in remote areas. The only difference is complaints from far-flung regions are little publicised, let alone heard in the courts.

4. In another instance, on 18 April 2004 Police Corporal Aung Naing Soe came to Thida Street, in Thida Ward, Kyimyindaing Township, and began to clear away homeless people present in the vicinity, including one Ma San San Htay, a betel nut seller, who quarrelled with him. He then hit her in the mouth, grabbed hold of her hair and before many witnesses dragged her along the road while she cried out for help. When 26-year-old Kyaw Min Htun intervened, the police officer hit him, whereupon Kyaw Min Htun hit back, breaking the officer’s nose. Kyaw Min Htun was then taken and charged under section
**Rule of law: The role of the judiciary in human rights implementation**

333 of the Penal Code with inflicting violence on a public servant while in performance of his duties. On 24 June 2004, the Kyinmyindaing Township Court found Kyaw Min Htun guilty, and sentenced him to two years imprisonment with hard labour.

5. This case demonstrates how local authorities operate to guarantee impunity for government officers under any circumstances in Burma. In reaching its verdict, the court did not assess the relative merits of the arguments on both sides, or even ask if there was any validity to the claims of assault against the police officer. While the court sentenced Kyaw Min Htun, it did not question whether hitting and dragging a woman along by her hair would be appropriate behaviour for an officer ‘in the course of his duties’. It merely established that the accused hit the officer and sentenced him accordingly. This underlines the nexus that exists between local police officers, government officials, and the judiciary throughout Burma that denies the possibility of natural justice for any person challenging one or another of these authorities.

6. This nexus is particularly visible in the sentencing of Ma San San Aye, aged 16, and Ma Aye Mi San, both from Pyapon Township, Ayeyawaddy Division in October 2003 to four years imprisonment, for lodging a police complaint against U San Net Kyaw, a local official who raped them. The case is particularly disturbing because the guilty official was even charged with rape after a local tribunal conducted an investigation, but was not arrested by the district police, who instead referred the matter to the township law office. Upon instruction from the Pyapon District Law Office, the charges against him were dropped, but ironically the victims were charged and sentenced to four years hard labour for falsely accusing a government officer on 20 October 2003. Their current whereabouts are unknown...

8. It is thus of particular concern that not only do U Ohn Myint, Ko Khin Zaw, Kyaw Min Htun, Ma San San Aye, Ma Aye Mi San and countless other victims of human rights violations have no channel for effective redress, but they have to suffer further from the punitive action taken against them for attempting to exercise their rights. Moreover, the message delivered to the Myanmar public is that asserting their rights is both dangerous and meaningless [ALRC, ‘Impunity and the un-rule of law in Myanmar’, E/CN.4/2005/NGO/41].

This lack of impartiality connotes a lack of institutional and individual independence. Judges in Burma are rarely appointed on the basis of merit or qualifications, rather, they are appointed based on their relationship with those in power.

Without this independence, it is impossible for the judiciary in any country to function as it is meant to. If it does not function in this manner, there is no hope for the rule of law to flourish, and instead violence and impunity will be rife. Furthermore, if citizens do not have faith in their judicial institutions, they themselves will seek other ways of obtaining justice, which may in turn lead to more violence. It is for this reason that it is as crucial for the judiciary to be *seen* as being independent as it is for it to actually be so.
Questions For Discussion

1. Are these situations familiar to you? How would you describe the judiciary in your own country? Does it have the power to ensure the implementation of its orders?
2. What is the relationship between effective rule of law and the judiciary?
3. In your opinion, what is the greatest obstacle to the effective functioning of the judiciary? Discuss how this and other obstacles could be removed.
4. What are the international and domestic legal provisions available to protect and promote the effective functioning of the judiciary? How can they be enforced?

Lesson 2

There are many systemic obstacles that have led to the deterioration of the judiciary in many Asian countries; this lesson will examine some of these.

A. Institutional deterioration

Infrastructure

One basic problem that is faced by the judiciary around Asia is the inadequate facilities provided for courts as well as the small number of personnel working in these courts. Wages and benefits are also not very high.

There are numerous instances in courts around Asia where a lack of judges will be found. In India, this lack of personnel and facilities means increasing delays in court procedures, with cases lasting one or two decades. This lack of resources is both a cause and effect of inefficiency. The case of Hasna Mondal is indicative: Hasna was tortured and raped on 27 February 1995 and a complaint was lodged the next day. At present however, her case is indefinitely adjourned, since the court in which her case is to be heard has not had a presiding judge since 26 February 2004. Furthermore, after her complaint was finally investigated and a charge sheet submitted to the Sub-divisional Judicial Magistrate on 26 December 1996, the hearings went on till July 2003, when the last prosecution witness was examined—seven years. Since then, the court assigned numerous dates for the examination of the investigating officer, with nothing happening. And now, as the Additional Sessions Court is vacant, it is unsure when the next hearing will take place [See further: AHRC UP-93-2005, 9 August 2005 and
The situation in many courts is such that resources are not available for court officers to communicate with other government agencies. For instance, in a general appeal, the AHRC drew the attention of the Sri Lankan government and all relevant authorities to the unnecessary suffering caused to people including extra days spent in jail by persons despite court orders to release them. This problem is due to a lack of infrastructure for communication from and to the court to the appropriate authorities in case a person is ordered to be released or in case any additional information is to be collected by the court where a petition requesting for the release of the person is filed in court. Providing fax machines to all the courts in Sri Lanka could solve this problem. The Magistrate courts, District courts and High courts can be much helped by providing this facility. It is unfortunate that the courts still do not have such a facility when even small businesses and many private individuals are using such facilities. As telephone facilities are available there is no hindrance to immediate introduction of fax machines to the court. The primitive communication systems prevailing only show careless disregard for administration of justice and civil liberties of the people.

The recently well published case of Koralaliyanage Palitha Tissa Kumara who was tortured and in whose mouth a TB patient was forced to spit into by a sub-inspector attached to the Welipenna police is one example. The response of the police when the victim complained was to fabricate two cases and to remand him on the excuse of these false charges. One charge was the possession of a bomb and the other was of armed robbery. After conducting inquiries, the National Police Commission was satisfied that the complaints against the police were true... [Although the Appeals Court ordered bail on 26 May 2004 and the High Court on July 16, the victim is still in remand, unable to obtain proper medical treatment.] The Magistrate Court states that the bail cannot be granted as the papers it has received from the Appeals Court have a typographical error. There is no easy way to correct the error as communication takes some time. He may still be in remand prison for a few more days. Had there been a fax machine in the Magistrate Court, the poor man by now would have seen a doctor despite typographical errors [UG-02-2004, 28 June 2004].

However, it must be noted that when necessary—as deemed by the courts or government agencies—courts are capable of overcoming these shortcomings, as seen in the murder trial of Sri Lankan judge Sarath Ambepitiya, which was the speediest trial into a serious crime ever conducted in the country, completed within 25 days.

Together, the criminal investigation and trial in the Ambepitiya case were completed within seven months, demonstrating that the typical delays in Sri Lanka’s legal process can be overcome. It would be a slur on the judiciary if it were to be said that this case was considered as a special one and therefore some special procedure was followed. Everyone is equal before the law—the murder of a judge is therefore of no more importance that the murder of even the most humble of citizens in the country. In fact, more prominent persons have been assassinated in Sri Lanka previously, among them being a prime minister, a president and several cabinet ministers; however, on those occasions the trials were not so swift.
The reason that the trial in its entirety took 25 days was that the case was heard on a daily basis as cases used to be heard when jury trials were conducted. However, common procedure in Sri Lanka’s high court trials today is that partial evidence is taken on one day and then the case is postponed for several months depending on the court’s calendar. Thus, a case may be heard over 25 separate days with at least three months lapping between each day of trial. This would mean that six years might pass before the court could reach a conclusion. An important lesson from the Ambepitiya case is that if criminal trials are heard from beginning to end in one session with daily hearings, it is possible to overcome the present impasse and to ensure speedy trial. Usually the spacing of dates is blamed on the court’s work overload or lawyers finding excuses to have distant dates set. The Ambepitiya trial, however, shows that such excuses are unjustified and that when a case is pursued with determination it is possible to overcome all other difficulties. In the case of judge Ambepitiya, three judges were involved as it was a trial-at-bar. If this could be done in his case, then surely this could be emulated in other trials where only one judge is present [See further: AHRC AS-75-2005, 7 July 2005].

Lessons from this trial can be learnt by many countries. In particular, it must be noted that the lack of infrastructure affects the morale of judges and provides reasons for corruption, as well as affecting the confidence of the public.

Appointments, discipline

The way that judicial appointments are made and discipline enforced will greatly affect the institutional environment. The appointment, promotion, dismissal and discipline of judges should be based on professional qualifications, merit and personal integrity, not on any other influences or bases. The same can be said for security of tenure and finance. However, this is not always the case, as already noted in some of the cases mentioned in Lesson 1. To further illustrate,

...Burmese judges operate in accordance with executive instructions and other exigencies rather than the laws even as they exist under the current regime. In fact, it is well recognised that most judges are appointed on the basis of their relationship to persons in the armed forces and administration, rather than training, and relatively few have proper legal qualifications. Even in the Supreme Court, earlier provisions stipulating professional requirements for judges were long-since removed in order that socialist party cadres of the earlier regime and persons close to the state leadership could take over the bench. Similar practices have continued today: in November, two Supreme Court judges and numerous other senior legal officials were sacked after the removal from power of the former prime minister, who was also the head of military intelligence. The judges were said to have either had connections with the former intelligence chief or had refused to give legal advice to convict him and his colleagues on corruption charges [AHRC AS-60-2004, 8 December 2004].
This situation is familiar not only to Burma, but to most countries in the region.

Furthermore, at present there is a great lack of judicial accountability in many countries, partly due to the lack of standardized procedures regarding appointment and discipline. Judicial independence and accountability are firmly linked; they can be seen as two sides of the same coin. While the independence of the judiciary must be guaranteed, the judiciary like any other public institution must also be held accountable for its behaviour. [See HRCS Lesson 30 for further information regarding judicial accountability]

B. Justice system

Rule of law and collapsing institutions

The absence of the rule of law in so many Asian countries means that there is no supremacy of law, as well as that the law does not meet the highest standards of human rights, but rather is becoming increasingly repressive. This will unavoidably have a detrimental effect on institutions functioning under such a collapse of the rule of law. For this reason, it is not just the judiciary as an institution that is suffering, but also other institutions, in particular those relating to the administration of justice—the police and prosecution. The deterioration of these other institutions (see HRCS Lessons 40 and 41 for more details) plays a significant role in the functioning of the judiciary, as for the purposes of administering justice, all three justice mechanisms must work together.

To begin with the judiciary as an institution, the following statement by the AHRC regarding the Indian Supreme Court is indicative of the collapse that can be seen throughout Asia.

In declining to use its powers to review the death sentence of Dhananjoy Chatterjee, the Supreme Court of India has today not only declined to take responsibility for the life that it has condemned, but also the principles which it ought to be representing.

The Constitution of India establishes that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The Supreme Court has rejected the petition filed by Bikas Chatterjee, brother of the sentenced man, as his appeal for clemency to the President of India was already rejected. By this narrow reasoning, the procedure established by law has been met, and a man can be killed.

But where was the procedure established by law when Dhananjoy Chatterjee was tried? A poor man who could not afford to engage good lawyers, the case against him was decided on circumstantial evidence. Just a few days ago prosecutors in the United States freed the 115th person condemned to death there, having finally proven his innocence on the basis of DNA testing. No DNA test has ever been conducted to prove the guilt of Dhananjoy Chatterjee, nor does the Supreme Court
Where was the procedure established by law during the last 13 years that Dhananjoy Chatterjee spent in solitary confinement? Precedents exist for the Supreme Court to commute the death sentence on the ground that the convicted person has already been punished enough due to an unreasonable delay in carrying out the sentence, and attendant suffering. The former Supreme Court Justice V R Krishna Iyer may have had these precedents—and the higher values they represent—in mind when he too appealed to the Court to overturn the sentence in this case. Regrettably, the current bench of the Supreme Court seems to subscribe to a lower standard of justice than did its predecessors [AHRC AS-25-2004, 13 August 2004].

In West Bengal, India all three justice institutions have collapsed to the extent that it is now the police that control both the prosecution and judiciary. Furthermore, delays in court cases typically go up to a decade or more. Such inefficiencies amount to a blatant mockery of justice, particularly when complainants at the courts are no longer around to witness the end of the farce that most cases become. Lakhichand Paswan for instance, died one day after the Calcutta High Court granted leave to prosecute the police officers who were allegedly responsible for the forced disappearance of his son. In such a case, what meaning does the court proceedings have?

**Bhikari Paswan—Ten years of waiting for justice in West Bengal end with a funeral**

On Wednesday, 28 July 2004, the Calcutta High Court took a short time to announce a decision on a matter that had stood before India’s courts for a decade: it granted leave to prosecute police officers allegedly responsible for the forced disappearance of Bhikari Paswan in 1993. The following day, Bhikari’s father, who had struggled for ten years to obtain justice, died. He had been in a coma since shortly before the court gave its decision.

The father, Lakhichand Paswan, will never know what officially happened to his son after he saw Additional Superintendent of Police (ASP) Harman Preet Singh and three of his men take Bhikari away in the early hours of 31 October 1993. He will never know where the body of his son was discarded. He was robbed of that knowledge, and the right to see the perpetrators punished, not by weaknesses in the case, but by an utterly callous and corrupted system.

Bhikari had been working as a labourer at a local jute mill during a time of serious industrial unrest. The mill workers were going virtually unpaid, and between October 18 and 21 a series of violent attacks occurred at the houses of politicians and complacent union leaders. On the night of October 21, police opened fire on a group of protesters, injuring three. In the ensuing melee, a constable was fatally injured.

At Bhadreswar Police station, a list of 22 names was drawn up on the First Information Report of the constable’s death (Case No. 239/93), among them, that of Bhikari. It was at about 12:30am on October 31 that ASP Singh and his men entered Bhikari’s
Lakhichand Paswan spent all his available energy approaching everyone from the Chief Minister of West Bengal to the lowliest administrators at the state government offices trying to find out about his son. His efforts attracted the attention of the media, opposition parties and human rights groups. Bhikari’s wife and father then submitted a habeas corpus petition to the Calcutta High Court (No. 15487[W] 1993). On 8 June 1994 the court ordered the central Criminal Bureau of Investigation “to investigate the matter and report whether Bhikari Paswan was at all arrested or taken into the custody of the police on the aforesaid date”.

A year later, on 12 June 1995, the Bureau submitted its report to the effect that, “Bhikari Paswan was indeed picked up by the police party from his residence on the night of 30/31-10-1993 at about 12-30am. His where-abouts since then are not known.” The report also indicated that “the statements of the police officers, drivers and the [District] Magistrate, Hooghly are inconsistent with the records” kept at the police stations. In other words, police records were fabricated to cover up the crime and the stories of various officers and officials became confused in their tangled efforts to throw off the investigators. In fact, an officer of the Central Forensic Science Laboratory earlier invited to examine a carbon copy of the Report had already concluded that Bhikari’s name had been deliberately obliterated by another name being written over the top (CFSL No. 94/D-998, dated 28 September 1994).

So, as far back as 1995 senior police investigators concluded that ASP Singh and his subordinates took Bhikari from his house that night in October: there was no question about the complicity of state agents; the questions that remained related only to what happened afterwards. Why was it then, that nobody was immediately arrested and charged? Because the Indian judicial system responded to the urgent needs of the case by snaring it in technicalities and further enquiries, while the perpetrators and their accomplices further tampered with documentary evidence and harassed the family, along with other witnesses and supporters.

Rather than immediately ordering the arrest of the perpetrators on the basis of the report it had commissioned, the Calcutta High Court proceeded at leisure with the writ before it. Finally, in March 1998, it effectively turned it into a ball that could be bounced endlessly from court to court, by directing the Chief Judicial Magistrate of Alipur to investigate the case, under a procedure allowed for by sections 200 and 202 of the Criminal Procedure Code. The magistrate opened the case on May 11 (Case No. C-1046/1998), and on September 15 issued summons against the four accused police, Samar Dutta, Swapan Namhata, Harman Preet Singh and Satya Prasad Banerjee, under sections 364/120B of the Indian Penal Code, for conspiracy, and abduction with intent to murder.

All of the accused subsequently obtained bail, although the sections under which they were charged were non-bailable offences. Furthermore, the accused policemen were not only not suspended but were promoted, thereby demonstrating the
contempt held by the state authorities for the serious charges against them.

In 2000, the case was passed to the District & Sessions Judge, Alipur, who in turn delivered it to the Additional Sessions Judge of the Vith Court, with the intention that a date should be fixed for trial. However, rather than proceed at that juncture, in April 2000 the judge referred the matter back to the Calcutta High Court on two technicalities: one pertaining to jurisdiction, the second, asking whether the government sanction was required to try Harman Preet Singh, who is an Indian Police Service officer. Masum has observed, however, that the action of the judge in referring the matter back to the high court could have been motivated only by a special intent to protect the accused, as the original order of the high court was sufficient to begin the proceedings. It was not, therefore, any business of the judge to raise further enquiries as to the legitimacy of the case.

The case lay at the doorstep of the high court until only through the gigantic efforts of human rights advocates and Bhikari’s family the case finally saw the light of day in October 2003, when a special bench was called to consider it “immediately”. Nine months later, the bench has held that government permission is not required to prosecute Singh, as ‘kidnapping was not among his official duties as a police officer’. Thus it has taken the Indian judiciary ten years to decide a matter that any informed person with an iota of common sense would have resolved in a few minutes.

It is too late. A chief witness in the case, Bhikari’s father, is now dead. With his passing, the congratulatory note struck by reports of the court’s decision is made nonsense. What meaning can ten years of such deliberations have, in view of this old man’s death? The perpetrators of the case knew well that Lakhichand was ailing. They knew well that without income and other means for prompt and effective medical treatment, he could not survive long enough to outlast their legal manoeuvres. They knew well that no state agency would come to his assistance. What meaning can the proceedings against these men now have in the absence of Lakhichand Paswan? After ten years, the court’s decision is a victory only for the accused.

Questions For Discussion

1. In your opinion, what is the relationship between the judiciary, prosecution and police in serving justice and promoting human rights?
2. What roles do the police and prosecution mechanisms in your country play in addressing human rights violations? How does this affect the judiciary?
Appendix I: Basic Principles on the Independence of the Judiciary


Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,
The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

**Independence of the judiciary**

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

**Freedom of expression and association**

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested.
by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Appendix II: The Bangalore Principles of Judicial Conduct

—Round table meeting of chief justices, The Hague, November 2002

Preamble

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.
WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the United Nations Basic Principles on the Independence of the Judiciary are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:

INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.
1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:

IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge’s family, has an economic interest in the outcome of the matter in controversy:
Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:
INTEGRITY

Principle:
Integrity is essential to the proper discharge of the judicial office.

Application:
3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
3.2 The behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:
PROPRIETY

Principle:
Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:
4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.
4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.
4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge’s court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.
4.4 A judge shall not participate in the determination of a case in which any member of the judge’s family represents a litigant or is associated in any manner with the case.
4.5 A judge shall not allow the use of the judge’s residence by a member of the legal profession to receive clients or other members of the legal profession.
4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge’s personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge’s family.

4.8 A judge shall not allow the judge’s family, social or other relationships improperly to influence the judge’s judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge’s family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge’s judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge’s judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practice law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organizations representing the interests of judges.

4.14 A judge and members of the judge’s family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.
4.15 A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:
EQUALITY

Principle:
Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”).

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.
Value 6:
COMPETENCE AND DILIGENCE

Principle:
Competence and diligence are prerequisites to the due performance of judicial office.

Application:
6.1 The judicial duties of a judge take precedence over all other activities.
6.2 A judge shall devote the judge’s professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court’s operations.
6.3 A judge shall take reasonable steps to maintain and enhance the judge’s knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.
6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.
6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.
6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge’s influence, direction or control.
6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION
By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS
In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:
“Court staff” includes the personal staff of the judge including law clerks.

“Judge” means any person exercising judicial power, however designated.

“Judge’s family” includes a judge’s spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge’s household.

“Judge’s spouse” includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.