



Asia:

Towards the Elimination of Corruption and Executive Control of the Judiciary

REPORT OF THE FIRST CONSULTATION ON THE
ASIAN CHARTER ON THE RULE OF LAW

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Asian Human Rights Commission
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Introductory Note

A group of 24 persons from Cambodia, China, Bangladesh, India, Indonesia, Philippines, South Korea, Sri Lanka and Thailand gathered in Hong Kong from February 16-21, 2006, for the first consultation on the launching of the Asian Charter on the Rule of Law.¹ The Asian Human Rights Commission (AHRC) proposed the drafting of such a charter in October 2005. This proposal was based on the AHRC's realization, having worked extensively for human rights throughout Asia, that discussions on issues relating to human rights have limited meaning if they are not linked to the obstacles faced in the development of the rule of law within the region.

The purpose of having wide consultations prior to the drafting of such a charter is to enable as many persons as possible to voice their experiences regarding the rule of law as well as human rights. It is hoped that the participants at these consultations will detail the manner in which the rule of law is being subverted in their countries and suggest various means through which these problems can be addressed, both by governments as well as civil society organizations.

The first of these consultations was an occasion on which intense discussion regarding the collapse of the rule of law took place. The participants, among whom were senior retired judges, practicing lawyers and human rights advocates, discussed at length the variety of experiences affecting their different jurisdictions.

These deliberations brought to the surface the problems facing democratic institutions in the participants' respective countries in general, and the problems facing their respective justice systems in particular. The harsh realities faced by ordinary people as well as judges and lawyers, due to defects in the policing, prosecution and judicial systems, were discussed.

Mid-way through the deliberations, there was a realization among

the participants that the primary issues that needed to be discussed were those regarding the corruption and the executive control of the judiciary. During this discussion, the areas covered were the causes giving rise to judicial corruption and executive control, the manner in which such corruption and control takes place, and suggested remedies. All the participants were encouraged to reflect on these issues based on their own country experiences. The following statement consists of the list of issues that came up during the discussions. The participants were intensely involved in articulating their problems and the substantive points identified by them have been retained, with only minor editorial changes.

One of the difficulties faced by the participants in the course of this exercise was the different legal systems that exist throughout Asia; certain countries have common law systems, others have civil law systems, while still others have mixed or socialist systems. Furthermore, even countries with the same legal system have disparities, owing to their different levels of jurisprudential development. Under these circumstances, the participants did not attempt to introduce solutions that would be valid for all situations, but rather they reflected the problems as concretely as possible, to ensure that the depth of the problems would not be overlooked. In particular, the participants avoided making generalized statements that may sound good and be acceptable to everyone, but in fact would reveal very little of the reality experienced by people in their daily encounters.

Notwithstanding the shock experienced by the participants in listening to the details of corruption and executive control within the judiciary in countries of Asia, there was a common perception that they had contributed to the study of this problem from a new perspective. They agreed to take this discussion to their countries and further analyze the problems, not just with the urban elite, but also with those from remoter areas. There was also consensus to continue the discussions regionally and internationally through meetings as well as by way of print and electronic media.

The Importance of This Statement

The independence of the judiciary has been a common topic of discussion in Asia as well as other places. However, the discussions have taken place mostly from a western text-book approach, enumerating certain aspects of judicial independence such as legal provisions for the separation of powers, financial independence by drawing funds from a regular fund not subjected to political control, adequate remuneration for judges and security of tenure. In recent decades there have even been gatherings of chief justices from different countries, resulting in the declaration of certain principles relating to this issue (the Bangalore Principles of Judicial Conduct, 2002).

This present statement differs from such approaches by shifting the discussion on judicial independence to a discussion on the elimination of judicial corruption and executive control. Such an approach attempts to begin from the day to day experience of people in different countries, and thereafter map out possible ways to eliminate the practices that negate judicial independence. In other words, the approach was to diagnose the disease before prescribing the remedies. The success of this approach was evident from everyone's active participation, resulting in a lively debate on the issue. This is important, as the independence of the judiciary is a significant constitutional issue, which must necessarily be debated by everyone in a country. Constitutions created without such involvement will be unable to guide popular movements for reform.

Areas to Be Covered

- Definitions of judicial corruption and executive control
- Causes of judicial corruption and executive control
- Stating details of the manner in which corruption take place
- Stating consequences of judicial control
- Making recommendations for the prevention of corruption and

executive control

A. Definition of Judicial Corruption and Executive Control

- Judicial corruption pertains to acts, behaviour or attempted acts that impair the search for or the submission of truth in the delivery of justice. This pertains to investigation and pre-trial processes in addition to actual trial process.
- This includes any act or omission from any source, whether bribery, intimidation or any other act, committed with intent or reasonable foreseeability that judicial or quasi-judicial orders, judgments and other issuances will result in corruption. Judicial corruption includes the acceptance of patronization offered by the people in power/ leading to subversion of the administration of justice causing bias

B. Causes of Corruption

B. I. Separation of Powers

- Lack of separation of judiciary from executive and legislature
- Calling upon judges to perform functions and duties other than of a judicial nature
- Factors that cause insecurity and fear among judges like other organs of the state, other than an independent body, performing the assessment of the function of the judiciary

B. II. Appointments, Training, Remuneration and Disciplinary Control

- Institutional favouritism and the politicization of methods of selection/appointment, transfer, dismissal and disciplinary con-

trol of judicial officers

- Incompetence of judges, and defects in judicial training
- Judicial arrogance which obstructs due process
- Inadequate remuneration and employment benefits for judges and their court staff, who then use their ability to influence the judges to gain profit
- Special perks being offered to particular judges to gain political influence over the judicial process
- The absence of adequate disciplinary procedures for judicial officers, other than impeachment, which leads to absolute impunity for judges
 - □ Non-attendance to complaints regarding the individual indiscipline of judicial officers
 - □ Lowering disciplinary mechanism for the higher judiciary such as the method of impeachment
 - □ Lack of prompt, ethical disciplinary procedures with the possibility of participation by civil society
- Extension of tenure of office beyond pensionable age
 - □ Offering and acceptance of extrajudicial positions to sitting judges
 - □ Inadequate measures for protection in their retired life lead judges to undertake other assignments for profit

B. III. Procedural Issues

- Judges hearing cases despite the existence of conflicts of interest
- Constitutional provisions that provide scope for judicial corruption and executive control
- Lack of proper contempt of court laws, giving judges an opportunity to exploit or abuse this power
- Difficulties in proof of judicial conduct, leading to impunity
- Lack of reform of criminal procedural laws in terms of human rights standards
- Lack of resources

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- □ Inadequacies in technical resources for the gathering and maintenance of evidence, such as forensic facilities
- □ Lack of court facilities such as fax machines, computers, recording equipment etc
- □ Lack of provisions for legal aid, particularly to foreigners and other minorities
- □ Delays in the adjudication process
- □ Absence of expert witnesses and eyewitnesses, and legal procedures allowing judgments to be made without evidence being led in court
- □ Defects of investigating bodies leading to injustice in adjudication and lack of accountability in this issue and absence of provisions for judicial supervision or control over these issues
- □ Inadequate protection for female staff working in courts, leading to intimidation by judges and investigating agencies
- □ Emergency and anti-terrorism laws which take over normal powers of the judiciary, giving rise to corruption and political manipulation
- □ Deprivation of judicial review and reduction of judicial powers, such as limits to retrials, which undermines the role of the judiciary
- □ Retrospective legislation
- □ Courts being overloaded with work
- □ Wide discretion without proper guidelines for sentencing and punishment

B. IV. Issues of Public Criticism and Supervision

- □ Lack of independent review body, such as an Ombudsmen
- □ Disproportionate restrictions on public monitoring including public discussion on the judiciary and judgments and restrictions on transparency in dealing with complaints against judges
- □ Lack of publicly available information on court proceedings
- □ Lack of civil participation in judicial procedure, e.g., absence of juries

- Lack of protection for whistle blowers
- Lack of public audit of the properties of judicial functionaries

C. Details in the Manner of Corruption

C. I. Direct Acts of Corruption

- Judges not providing fair and equal hearings for all parties
- Partiality towards police and other authorities at the expense of other citizens including but not limited to ethnic, racial, gender or religious bias of judges
 - □ Judges and prosecutors acting in cohort and putting leading questions to defendants to prevent them from presenting their case
 - □ Secretive meetings of parties to proceedings or lawyers with judges before, during or after the proceedings
 - □ Judges obtaining files only from one party so that he is aware of only one side of the case
 - □ Intimidating lawyers by direct or indirect means to prevent them from representing their clients
 - □ Involvement of the bar with the bench and taking part in non-professional activities together, including social and religious activities
- Higher judicial officers bullying and directing members of the lower judiciary to influence the outcome of cases
- Forcing unprincipled settlements/plea bargains or providing mediation with the judge currently presiding over the case
- Failure to adhere to procedures for making and writing judgments: Making decisions in a corrupt and arbitrary manner, and the misuse of discretion to hide this
- Obliging to the manipulation of the authorities who appoint, transfer, promote and discipline judges
- Not sitting at required times and paying little attention to the rights and conveniences of litigants and lawyers and devoting

- office time for other personal matters
- ☐☐ Delegating judicial functions to non-judicial officers
- ☐☐ Making false travel claims
- ☐☐ Not recording witness statements verbatim and the dictation of witness statements by judges, allowing for judicial revision (lack of recording equipment)
- ☐☐ Not recording the motions and applications (requests made by counsel) on the court record, sometimes leading to the denial that such applications were made or the misinterpretation of the nature of such applications
- ☐☐ Judges or court officers, such as registrars, requesting monies to be personally deposited as rewards for judgments (auctioning of judgments)
- ☐☐ Magistrates not observing rules relating to medical examinations of torture victims thereby paving the way for police to take part in corrupt practices
- ☐☐ Making judicial orders for remand without persons being produced before a magistrate
- ☐☐ Judges associating with undesirable circles or fraternizing with other legal officers who will be presenting to their court, such as police officers
- ☐☐ Failure to apply international human rights law or heed recommendations of international bodies and deciding cases purely on technical grounds, particularly on issues of public interest
- ☐☐ Admittance of evidence gained through unconstitutional means and in violation of human rights
- ☐☐ Abstaining from passing judgments and adjourning cases sine die or for long intervals
- ☐☐ Judges hearing cases of friends and relatives and cases in which they have conflict of interest
- ☐☐ Meetings of one party with the judge prior to hearing
- ☐☐ Despite common knowledge of police corruption, deciding cases purely on prosecution case
- ☐☐ Judges taking part in court auctions and manipulating such process in favour of certain persons or bodies

- ☐☐ Post retirement appointments and soliciting such appointments while in service

C. II. Other Acts that Contribute to Corruption

- ☐☐ Political and social forces interfering with the independence of the judiciary and compelling judges to give certain orders
- ☐☐ Lower courts abusing their powers to subvert the appeal process and the powers of summons
- ☐☐ Charging and re-charging accused, particularly indigent accused, repeatedly on the same charge to harass and intimidate persons
- ☐☐ Creating pressure for disposals by higher court by setting targets which are impossible to achieve, often leading to unfair dismissal of cases
- ☐☐ Use of previous personal history or the criminal record of the accused in new trials
- ☐☐ Lack of consistency in rules relating to granting of bail and leading to abuse
- ☐☐ Excluding parts of complaints and investigating parts of complaints, excluding other crimes on the part of the accused
- ☐☐ Criminally investigating essentially civil matters
- ☐☐ Despite the existence of laws, not creating investigation authorities to investigate such crimes, thereby preventing prosecution
- ☐☐ Biased selection of expert witnesses
- ☐☐ Bringing unfair actions against judges without any real basis in order to assist friends or to intimidate judges
- ☐☐ Due to limitations in the law, judges being unable to proceed with cases, even of serious crimes, providing police and prosecutors an opportunity for corrupt gain
- ☐☐ Ineffective methods of confiscation for monies or properties obtained through corruption
- ☐☐ Obstruction of the enforcement and execution of judicial orders
- ☐☐ Threats and executions of judges who are not corrupt
- ☐☐ Lack of consistency in rules/laws like those relating to granting of bail

- ☐☐ Willful obstruction of execution proceedings and confiscation of properties pre and post trial

D. Consequences

D. I. To Litigants

- ☐☐ Unjust judgments and the denial of justice for victims
- ☐☐ Successive and lengthy appeals
- ☐☐ Individuals losing the desire to pursue their cases in courts
- ☐☐ People with grievances resorting to direct and indirect forms of violence

D. II. To the Society

- ☐☐ 'Parallel legal systems': people favouring violence and force, including the use of criminal elements, in dispute settlement, instead of the court and legal procedures. This undermines the rule of law, causing a state of chaos, corruption in all sections of the society, violence and crime, thereby destroying the foundations the state, weakening its credibility before the international community, and hampering the nation's development
- ☐☐ Creating a culture of impunity by placing human rights violators far from the reach of human rights victims, far from justice
- ☐☐ Breeds and cultivates corruption in all sectors of society
- ☐☐ Creating a situation of utter hopelessness, resignation and cynicism as well as a fear psychosis
- ☐☐ Creating disillusionment and demoralisation among citizen and among legal professionals including other judges and lawyers
- ☐☐ Marginalization of minorities and weaker sections of society, who are denied many rights and justice
- ☐☐ Impairs or destroys the predictability of law, public confidence in courts and judges, other institutions and the state itself
- ☐☐ Displacing the reason for the existence of courts, therefore destroying the separation of powers and creating authoritarianism

- Failure to attract persons with principles and quality to become judicial officers
- Creating a loss of memory of law on issues such as constitutionality and legality and destroying the concept of the predictability of law
- Bringing up new generations without any practical understanding of justice
- Limiting the society's capacity to challenge injustices and violation of constitutional rights
- The weakening of the state and its credibility before the international community

E. Recommendations

E. I. Direct Recommendations for Improving the Judicial System

Separation of Powers

- The separation of the judiciary from the executive should be the basis on which all rules relating to the judiciary should be developed
- The executive shall not decide which judges sit for particular cases
- The legislature shall not invade the domain of the judiciary by creating legislation such as bills of attainder and retrospective legislation
- There should be legal protection for the independence of judges, which includes sanctions against interference in judicial matters
- There must be adequate and independent budgetary allocation for the judiciary

Remuneration, Training, Discipline, Infrastructure

- □ To have an independent committee on judicial appointments, transfer, which should include reputed academics and others including other civil society players
- □ The formation of cliques among judges with a view to get unfair advantages for themselves, unfair treatment of lawyers like bullying of lawyers should be treated as misconduct
- □ In the operation of bodies that have the power of appointment, promotion, transfer and disciplinary control of judges, all members must have equal rights to participate and no coercion must be used internally or externally to prevent any member from performing their duties
- □ Only persons being physically fit and mentally alert with unquestionable integrity should be inducted as judicial officers, without discriminating against persons with disabilities
- □ Retirement age of the judicial officers shall be universalized and adequate measures taken to stop them undertaking any office of profit for a period of ten years immediately after the date of retirement
- □ Judicial office shall not be abolished while there is a substantive holder
- □ There should be an adequate budget for the judiciary in a consolidated fund that is managed by the judiciary
 - □ Judicial salaries shall not be reduced; salaries of all judges should be charged on the consolidated fund which must also provide for facilities to judges like housing and conveyance
- □ Judges should be made to declare their assets before appointments and review them periodically
- □ Avoid protocol duties for attendance on politicians and dignitaries and clerical duties by the judicial officers that hampers the effective and efficient performance of the judicial functions
- □ Judges should not have any political affiliations

- Bench fixing (judge shopping, forum shopping) should be completely eliminated and any allegation of interference of bench fixing should be treated as a serious breach of discipline
- There should be adequate protection for the security of judges
- Transfer and disciplinary control of judges should be made legally challengeable by any judge or member of the bar who feels unfairly treated
- There should be a continuous and on going programme for evaluation of the quality of judicial pronouncements and other functions
- All trial judges should be elected among lawyers of good standing and this should not leave any room for politicization of such actions
- There should be record-tracking of the candidates for judges in the selection process including integrity, capability and also human rights record and background
- Transfer and promotion schemes for judges of inferior courts should be formulated strictly taking into consideration their seniority and their grades unless for grave personal needs the individual judges opt otherwise
- It is imperative to provide infrastructural support, including electronic recording evidences
- Judges should exclude government policy for their consideration when they make their judgment
- Human rights awareness programs for judges are crucial

Procedural Issues

- Management and safe custody of court records must be under the responsibility of the judge
- Reasons should be given in all judgments
- Constitution of benches should be done by a process which is fair and through judicial consensus where senior judges must not be allowed to prevail upon subordinate officers

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- Judges must behave with courtesy towards all lawyers, affording all the professional treatment that they are entitled to. Bullying of lawyers by any judges should be treated as misconduct and be subjected to appropriate punishments
- Judges should not treat witnesses in a contemptuous manner in court, all witnesses should be treated with respect
- The accused should not be brought to court in a manner that violates their rights and the judges should take special steps to ensure respect for them.
- Judges should promptly record the complaints of detainees against the authorities
- Appropriate punishment should be provided for proven intentional perjury
- Tampering with the prosecution by the executive like transfer of prosecutors while dealing with a case, particularly while in trial and acts like holding office at the pleasure of the executive must be stopped
- Allowing international/universal jurisdiction of human rights violation in domestic courts
- Elimination of delays in adjudication and the exploitation of delays in original and appeal matters
 - □ Over burdening of judicial officers must be avoided
- Reform of the criminal justice system
 - □ Adequate co-ordination amongst investigating agency, prosecution agency and judiciary shall be setup
- Appeal should always be available unless in cases of proven admission of guilt
- Provide for pronouncement of judgments as early as possible after the final hearing possibly within a specified time
- To internationally establish lower standards of evidence to prove graft and corruption for administrative and criminal actions
- Practices such as taking signatures on blank papers and other forms of manipulation should be prevented by law and such documents should not be admitted as evidence

- To eliminate all police-generated documents from being admitted as evidence without being proven beyond reasonable doubt
- On human rights issues by state actors there should be a shift of the burden of proof on the alleged perpetrators, however the human rights of the perpetrators should be respected as in the case of other accused
- Statutes of limitations on human rights abuses shall be abolished and special constitutional remedies provided
- Establish separate, competent domestic forensic science departments and an international forensic science body. Laws should be introduced that oblige opinion of these bodies.
- Reform the medico-legal system
- Interference with the official documents and registers such as register of detainees etc. and also court records should be treated as a serious breach of discipline
- The constitutional court should have jurisdiction to review cases that are in violation of the constitution
- The state actors should comply with court orders and there should be avenues for punishment of an state actors who do not carry out court orders
- Laws should be introduced and strengthened, especially regarding human rights, to reduce the ability of judges to misuse their positions, and to provide them with the ability to hold governments, and their officers, accountable
 - □ All countries should sign and ratify the ICCPR and its optional protocols
 - □ The law should criminalize all human rights violations and provide appropriate remedies for such violations. Further, countries should, dependent on the jurisdiction, implement their international obligations into domestic law, respect their international obligations under treaties.
- During trials of foreigners and also for locals who speak different dialects than that officially used in the court in question, there

should be interpreters provided, so that the under-trial prisoner understands and follows the proceedings and is able to give necessary instructions to his counsel.

- □ Judges should ensure that parties have legal assistance.
 - □ Foreigners should be given access to justice mechanisms, if necessary, by providing free legal aid at the instance of state and/or judiciary
- □ There should be a department established for compensation of victims, particularly of human rights violation, which also provides preliminary remedies
- □ There should be an absolute prohibition of double jeopardy
- □ Contempt of court laws should be enacted, laying down strict limits for the operation of this law and considering the liberal views on adopted in developed jurisdictions. Under no circumstances should a judge/s before whom contempt of court is alleged to have been committed sit as judges in adjudicating the issue in the first instance or in appeals

Supervisory Mechanisms/Institutions

- □ The media freedom for reporting and commenting on judicial process should be fully respected. The freedom of expression to expose the limitations of a justice system by writing or other means such as caricatures/cartoons and by electronic means should be respected
- □ Transparency of the actions of court staff must be ensured, including a regular review of the performance of judges, and the report should be made public
- □ Enforce the views expressed by international bodies, such as the Human Rights Committee, and recommendations of treaty bodies, such as the CAT committee, the working group on forced disappearances, etc.
- □ Judges should ensure that, on allegations of torture and gross human rights violations by the police there should be an investi-

- gation by an independent team of persons
- Ombudsman must be appointed from persons having the highest degree of integrity and honesty and/or by appointing a judicial collegiums by the highest or apex court of the country
 - Establishment of national institutions on human rights matters can be useful for resolving some of these problems.
 - Provide for a forum to make complaints against judicial officers and dispose the complaints in a transparent manner with opportunity to the complainants
 - There should be an independent appointed body composed of personalities of different sectors of society and judicial appointment should be made on the basis of known professional qualifications, experience and judges' training curriculum should have a strong ethics and human rights component
 - There should be an independent body to look into the assets of existing judges. The report of the body should be made public. If any wealth has been accumulated in a judges name beyond his means it should be confiscated
 - Prior to the appointment of the chief justice there should be the possibility for the public to air their views on the candidate for the consideration of a competent independent body
 - Public representation before the appointment of superior court judges
 - There should be an international support programme for victims of human rights violations
 - There should be a national legal aid programme that is substantial and sufficiently financed

E. II. Lobbying and Movement Efforts

- It is essential to develop movements for justice reforms
- It is necessary to identify and focus on the role of judicial officers in promoting and protecting human rights within the ambit of judicial system

- Educate on protection of fundamental rights and human rights has to be engendered so that it permits the culture of justice jurisprudence
- National people's movements for elimination of delays in adjudication should receive priority in the civil and human rights organizations
- Establish an international network of fact-finding and lawyer exchanges
- To establish an international mechanism to check on and rule upon complaints of highest courts' judgments affecting human rights and judicial corruption
- Organizing education and awareness for people for proper participation on these matters
- Peoples' movement should provide opportunity for education of people on judiciary related issues

Despite many safeguards in the judicial system, several people, especially the poor and the vulnerable sections of societies, still face many violations of their basic human rights in their contact with the justice system. While these violations are most often by the police and the jail authorities, the respectability of overseeing these authorities and holding them accountable by ensuring correct procedures is in the hands of judicial officers who are the custodians of rule of law in the society

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Convened and organised by the Asian Human Rights Commission

Launch of Discussion on Drafting the Asian Charter on the Rule of Law

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A Statement by the Asian Human Rights Commission (AHRC)

The AHRC is holding its advanced human rights study programme from October 9-14, 2005 in Hong Kong, at which participants from 10 nationalities will participate. To mark this occasion, the AHRC is launching a series of discussions aimed at drafting an Asian Charter on Rule of Law.

With a view to drafting an Asian Charter on the Rule of Law, the Asian Human Rights Commission (AHRC) is launching a series of discussions on the relationship between the rule of law and the implementation of human rights. Wide consultations are planned to be held before writing and approving a final draft of this charter. This work is a follow up to the Asian Human Rights Charter-A Peoples' Charter, declared in Kwangju, South Korea, in May 1998.

The radical themes of the Peoples' Charter need to be further developed from the perspective of the implementation of rights. The AHRC has in its work consistently identified the prevailing breakdown in the rule of law throughout Asia as the primary obstacle to the achievement of human rights. It is hoped that the discussion being launched will provide an opportunity for a detailed articulation of the problems relating to the breakdown of the rule of law by ordinary people as well as concerned groups and academics throughout Asia.

These observations and recommendations will subsequently be compiled into a document that reflects the common problems being faced

by people in all Asian countries and would suggest means through which these problems could be addressed and remedied.

Democracy, Human Rights and the Rule of Law

There have been numerous attempts to promote democracy all over Asia, largely unsuccessful. Their failure lies in the absence of accompanying strategies to establish or enhance the rule of law. As a result, defective rule of law systems are able to distort and even destroy democratic institutions and practices. An election held without the rule of law, for instance, will merely become a farce legitimising the power of those individuals able to manipulate the process. A Parliament will become fraudulent when legislative power is abused to the detriment of basic freedoms. The absence of rule of law creates avenues for corruption, which spreads cancerously into the democratic system. All attempts to promote democracy must therefore be associated with equally strong attempts to establish and promote the rule of law.

Similarly, all human rights recognised today as universal depend on the existence of operative rule of law for their implementation. The right to life, for instance, depends largely on state institutions that are meant to respect, protect and fulfil people's fundamental rights. If these obligations are not met, hunger, disease and the collapse of educational institutions will take place.

The lack of effective investigation, prosecution and judicial mechanisms can also threaten people's rights to life and liberty: innocent people can be subjected to arbitrary punishments, including death. Therefore, despite the proclamations of rights in national constitutions or through states becoming parties to international covenants, people will be deprived of the enjoyment of rights in the absence of rule of law. The common Article 2 of the International Covenant on

Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises this when it obligates state parties to take legislative, judicial and administrative measures to uphold human rights.

Breakdown in the Rule of Law and Key Institutions

Vast obstacles are faced in all countries of Asia by those attempting to uphold or promote the rule of law. In some countries, the principle of the rule of law itself is rejected on the premise of maintaining order with or without law. To this effect, the law is regarded by officials and bureaucrats as an obstacle to a country's development and social stability and is at times superseded by way of executive orders. One consequence of this is the transformation of law enforcement officers into order enforcement officers. Another consequence is that barbaric acts-massacres, large-scale disappearances, extrajudicial killings and torture-are committed by the police and other authorities regardless of legal or constitutional restraints. Many governments also neglect to provide the basic financial and other resources for the proper functioning of law enforcement agencies and even the judicial system (courts). These include staff salaries and benefits, training facilities and facilities needed for investigations, such as forensic science equipment. This means that even when laws exist on paper they cannot be enforced because personnel in many institutions claim that they are incapable of carrying out their mandates due to resource limitations.

The primary institutions responsible for the administration of justice, such as the police, prosecution and judiciary, are now facing significant problems. Some of these are caused by the historical development of these institutions, which may have been hampered by colonialism, feudal traditions, inherent societal discrimination and periods of internal conflict or civil war. Others are related to the lack of

independence enjoyed by these institutions to perform their duties with competence and integrity; often attempts are made by political authorities to manipulate the institutions for their own interests, thereby affecting their objectivity and impartiality. Without studying these causes and making deliberate attempts to develop these institutions, it is not possible to prevent the institutions from becoming obstacles to effective rule of law. It is also important to study how the necessary political environment for the rule of law to flourish can be created. Such studies should thus be an important component of this series of discussions.

The defective policing institution in many countries is a key obstacle to the actualisation of the rule of law. Police behaviour often resembles that of the military or paramilitary forces. Such policing is unfriendly to civilians and tends to use force as its working method. Torture often becomes a common and endemic practice as a result of such policing.

Prosecution mechanisms also have fundamental problems that affect their upholding of the rule of law. In some countries, the prosecution is directly controlled by the State and used for political purposes; false charges against political opponents of the State are a common occurrence. Similarly, the prosecution mechanism in many places bases its decisions not on the rule of law but on extraneous factors, such as political pressure. Such pressure is greater in systems where no separate prosecution function exists so that the same department is responsible for state affairs as well as criminal prosecution. At times of civil conflict, practices contrary to international norms, such as state prosecutors acting as defence counsel for military and police officers accused of gross human rights abuses, have occurred in certain prosecution systems. These officers have then been advised by their counsel to fabricate statements and other evidence, which, in turn, affects the overall morale and credibility of the prosecution department.

The judiciary is another faulty institution which needs to be addressed when considering obstacles to the rule of law. Several Asian countries do not recognise the principle of an independent judiciary. Where the principle is recognised, there is often a lack of competent and qualified judges. In other countries, political regimes impose severe restrictions on the judiciary, even bringing about constitutional limitations on judicial powers. The appointment and promotion of judges as well as other administrative processes are used as leverage, preventing them from acting independently.

Supervisory mechanisms to ensure the rule of law and human rights must also be studied. In some countries, such mechanisms do not exist at all while in other countries their actual capacity for intervention is limited. Many such mechanisms suffer from limited mandates and a lack of resources.

Together with institutions, the justice and legal systems in Asia must also be scrutinised. The problems faced by marginalised sectors of society in obtaining legal redress are a significant aspect of the breakdown in the rule of law. These groups, which, in fact, are a majority in the region, are often entirely excluded from the legal process. Some of these exclusions have occurred throughout history. Women, Dalits, indigenous peoples and religious minorities are often those deprived of all access to law.

Anti-terrorism and emergency laws are another aspect of the increasingly repressive nature of legal systems in Asia. The use of such laws removes all forms of legal protection. It is for this reason that torture, mass killings after arrest and disappearances have taken place while such laws are in operation.

Towards an Asian Charter on the Rule of Law

The issues mentioned above as well as many others make it essential for there to be a genuine consideration on what is involved and what

First Consultation on the Asian Charter on the Rule of Law

is needed to make the achievement of human rights a reality. The purpose of conducting Asia-wide discussions on this issue is thus to document these problems in detail and to debate these matters publicly in order to promote local education as well as to educate the international community about the real problems that need to be addressed if the rule of law and human rights are to be realised in Asia.

The AHRC calls upon everyone to take an interest in order to contribute to making this project-of taking concrete steps to promote the rule of law-a success. While focused discussions will be held in various countries, the possibility of having discussions through e-mail networks, the internet and other print media will also be explored. All comments and suggestions in regard to this proposal are welcome.

The Asian Human Rights Commission

A group of 24 persons from Cambodia, China, Bangladesh, India, Indonesia, Philippines, South Korea, Sri Lanka and Thailand gathered in Hong Kong from February 16-21, 2006, for the first consultation on the launching of the Asian Charter on the Rule of Law.¹ The Asian Human Rights Commission (AHRC) proposed the drafting of such a charter in October 2005. This proposal was based on the AHRC's realization, having worked extensively for human rights throughout Asia, that discussions on issues relating to human rights have limited meaning if they are not linked to the obstacles faced in the development of the rule of law within the region.

The purpose of having wide consultations prior to the drafting of such a charter is to enable as many persons as possible to voice their experiences regarding the rule of law as well as human rights. It is hoped that the participants at these consultations will detail the manner in which the rule of law is being subverted in their countries and suggest various means through which these problems can be addressed, both by governments as well as civil society organizations. This booklet summarises their deliberations.

—from the Introductory Note



Asian Human Rights Commission
&
Asian Legal Resource Centre