

article



of the International Covenant on Civil and Political Rights

Vol. 5, No. 2

April 2006

ISSN 1811 7023

focus

impunity *VS.* the rule of law in Indonesia

any person whose rights or freedoms are violated shall
have an effective remedy, determined by competent
judicial, administrative or legislative authorities

The meaning of article 2: Implementation of human rights

Since the adoption of the Universal Declaration of Human Rights in 1948, the human rights movement has worked hard to spread its gospel. The development of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) was a major milestone. Numerous other conventions and declarations have further improved and enhanced the body of human rights principles, and articulated them to the global community. United Nations mechanisms have provided a base for monitoring the observance of rights.

All over the world extensive programmes are now taking place to educate people on human rights. States engage in this work to varying degrees, United Nations agencies facilitate them, and academic institutions participate. The most important education work is done by human rights organisations. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated all over the world.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things. In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

Human rights monitoring mechanisms aim to redress individual violations. This approach is inadequate when dealing with systemic breaches. For example, a country may be condemned for acts of torture, mass murder, crimes against humanity and other violations, and a monitoring body may make some recommendations to correct these. However, monitoring bodies have neither the mandate nor capacity to engage in studies on the actual functioning of components within the justice system—the police, prosecutors and judiciary—through which such recommendations have to be achieved. Thus, even if one person or another is punished, the actual system allowing violations remains, and may even get worse.

Legislation on human rights also does not by itself result in improvements in rights. Legislation can work only through the administration of justice. If justice institutions are fundamentally flawed then legislation remains in the books and is used only to confuse monitoring bodies into believing that conditions are improving. For example, a constitution may provide for fair trial, however the criminal investigation, prosecution and judicial systems may not have reached a credible standard. Such legislation then only mocks the victims and cynically manipulates monitoring bodies and the international community.

Article 2 aims to draw global attention to article 2 of the ICCPR, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads as follows. [*Continued on back inner cover*]

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Somchai Neelaphaijit honoured with 2nd Asian Human Rights Defender Award of the Asian Human Rights Commission

On 11 March 2006 the Asian Human Rights Commission (AHRC) honoured Somchai Neelaphaijit with its 2nd Asian Human Rights Defender Award, in recognition of his tireless efforts to bring justice to victims of human rights abuses in Thailand, for which he ultimately sacrificed his life.

Somchai was a world-class human rights lawyer and defender of basic human freedoms. He frequently represented clients accused of threatening state security. He confronted powerful state agents without fear. He was highly successful, and relentless in his efforts to hold government authorities accountable for their actions.

At the time of his abduction on 12 March 2004, Somchai was advocating for a group of torture victims being held under extended detention without charge. He was petitioning senior government officials on their behalf, having failed to secure their release through conventional channels. He had openly accused the police of torture. He was also collecting 50,000 signatures to submit to parliament in order to have martial law lifted in the south of Thailand.

On 12 January 2006, the Criminal Court in Bangkok found that Somchai had been abducted, and sentenced one of the five police defendants to three years in prison for coercion. Under intense pressure, the prime minister of Thailand said that Somchai had been killed and that by the end of February further investigations would lead to murder charges being laid. This has not been done, due largely to the failure of the Department of Special Investigation to pursue the case properly. However, as the case has received persistent public attention it has put an enormous responsibility on the government to explain what happened. Even in death, Somchai continues to be at the centre of demands for accountability and justice.

Somchai has become a symbol of tremendous importance for the movement against forced disappearances not only in Thailand but indeed throughout Asia. The AHRC earnestly



Somchai Neelaphaijit

believes that both Somchai's name and what it represents will in time obtain global proportions. It hopes that the giving of this award is a small step in that direction.

The Asian Human Rights Commission and its sister organisation the Asian Legal Resource Centre have been deeply involved in the case since Somchai was abducted, working with his family and monitoring the entire court proceedings against the five police officers.

Somchai's wife, Angkhana Neelaphaijit, has been unrelenting in her efforts to obtain justice, unsparing in her criticism of government authorities, and has taken the lead role as an articulate and courageous spokesperson for the families of disappeared persons in Thailand. She has clearly indicated that she will continue her struggle for her husband no matter what. By giving this award to Somchai, the AHRC has also recognised and applauded the tremendous contribution that Angkhana Neelaphaijit has made in confronting the impunity enjoyed by state officers in Thailand. For this she has also been recognised by the National Human Rights Commission of Thailand and May 18 Memorial Foundation (Korea), among others.

John Clancey, chairperson of the AHRC Board of Directors, presented the award to Angkhana Neelaphaijit in Bangkok on behalf of her husband, to mark the second anniversary of his abduction. The keynote address on the occasion was given by Professor Vitit Muntarbhorn of the Faculty of Law, Chulalongkorn University, who is also presently the UN Special Rapporteur on human rights in North Korea. Their speeches follow.

Keynote speech by Professor Vitit Muntarbhorn

Two years ago, Khun Somchai Neelaphaijit, an exemplary Thai lawyer and human rights defender, disappeared under suspicious circumstances. He had been defending various persons accused of security offences. It was well known that the authorities were apprehensive of his work, since he had received information concerning torture and maltreatment of persons whom he was representing while they were in detention. The circumstances of his disappearance implied that this was a case of forced disappearance, and it was suspected that various officials were involved.

To date, the body of Khun Somchai has never been found. However, while five law enforcers were prosecuted for offences relating to his forced disappearance, recently only one was found by a Thai court to be guilty of a minor offence relating to coercion. One ministry is continuing its investigations, and the latest twist is that some clues may have been found in a province outside Bangkok, at the bottom of a river.

The case indicates a disconcerting state of affairs in a country which was liberated from military rule in 1992. Yet it should not be forgotten that a number of cases of forced disappearance remain from that era. The Somchai case is all the more poignant



because his abduction took place at a time when Thailand was, or is, supposed to be on a road to democracy. Needless to say, the case is closely linked to the ongoing violence in southern Thailand and the authorities' strong-hand tactics in addressing that situation.

Since the existing national-level remedies are inadequate, it is natural for those who seek justice to resort to international law and help to clarify the case. The pain and suffering of the family members of abducted persons are interminable, since they are uncertain about the fate of their loved ones. In the Somchai case, his family and particularly his wife, Khun Angkhana, need sustained support in their search for justice; they are incredibly brave people who deserve global admiration.

The Somchai case has already been referred to the United Nations Working Group on Enforced or Involuntary Disappearances, which has a global mandate to investigate such cases and influence the state authorities to offer effective remedies. Although the Working Group is not a court of law, it can make recommendations for effective action and accountability.

International action against abductions ("enforced, involuntary or forced disappearances") is guided by the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearances, which calls upon all states to criminalize these practices. States are obliged to provide a prompt and effective remedy to determine the whereabouts of persons allegedly abducted by the authorities, and a person deprived of liberty is to be detained only in an officially-recognized place of detention. The acts constituting such disappearances are considered to be a continuing offence where the perpetrators conceal the whereabouts of the disappeared persons and the facts remain unclarified.

When applied to the Somchai case, the principles inherent in the UN declaration indicate that although a court has already rendered judgement on the issue in Thailand, it is unfinished business in the eyes of international law, since there is a continuing offence until his whereabouts are known. The option of an appeal to a higher court and need for an independent inquiry have been underlined by various persons. Most importantly, there is the need for political will "to come clean" on what happened, since it is suspected that various powerful forces remain at work, higher in the political echelons than the middle-ranking law enforcer who has been found guilty by a court at first instance. There is also a need to permit the use of DNA evidence in relation to the concerned parties.

The international community has now gone further by adopting an international treaty on forced disappearances which will enable more monitoring on the issue globally. The International Convention on the Protection of All Persons from Forced Disappearance was finalized in 2005, and it brings greater clarity to the situation which some powerful forces prefer to obfuscate.

“The Somchai case is unfinished business in the eyes of international law, since there is a continuing offence until his whereabouts are known”

“A key challenge for Thailand is to expose the crimes and malpractices committed by state officials and thwart the longstanding immunity enjoyed by powers-that-be”

First, the notion of "forced disappearance" is identified as concerning the deprivation of a person's liberty by state agents or equivalent, "followed by the absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person".

Secondly, the new treaty stipulates that the perpetrator is to be punished for the crime; the offence covers conspiracy and attempts to abduct a person.

Thirdly, the systematic or massive practice of forced disappearances is now considered to be an international crime. This implies that it falls under the jurisdiction of the International Criminal Court. Even a country such as Thailand may be affected by the court's jurisdiction, although not yet a party to its statute. Where its nationals travel to a country which is a party, the latter country may cross-refer cases to the court.

Fourthly, the treaty provides for "universal jurisdiction" to criminalize an act of forced disappearance and bring the perpetrator to justice. This implies that a crime anywhere is a crime everywhere. In real terms, countries will be able to prosecute another country's nationals if they have committed such crime--even when the crime did not take place on their territory.

Fifthly, orders from a higher-ranking officer to commit a crime do not exonerate a lower-ranking officer who follows them. Both are guilty, although there may be circumstances for reducing punishment of the latter.

Sixthly, the convention supports the right of a person to complain to a competent and independent state authority and to have that complaint immediately, thoroughly and impartially investigated by that authority.

Seventhly, there is no date for the expiry of a possible claim against the perpetrator, no statutory limitation period for those who wish to prosecute the perpetrator.

Eighthly, those affected and their families are entitled to seek reparation and compensation from the perpetrators.

Finally, the convention will set up an independent international monitoring committee, and state parties will be obliged to report to it periodically. The committee will be able to receive complaints from those affected. It will be empowered to undertake missions to the country under scrutiny.

Will Thailand become a party to this convention?

At a time when the international community is highlighting the need for transparency and accountability of the state and its agents, a key challenge for Thailand is to expose the crimes and malpractices committed by state officials and thwart the longstanding immunity enjoyed by powers-that-be where they err. It is at a critical juncture where resort to international law

and its processes may help to overcome the whims of abusive, powerful interests that seek to cloak themselves behind a veil of impunity.

Presentation speech by John Clancey

Some years ago, I was showing my children the many beautiful exhibits in the Natural History Museum in New York City. In one wing there were models showing the many ways that people around the world cared for the dead: besides burying deceased persons in the ground and cremating their remains, some of the others ways included placing the dead bodies on wooden platforms or in stone towers. My older daughter asked, "Daddy, why do they leave the body on the platform for birds to eat?" I pointed out to her that both the body and platform were elaborately decorated and told her that people around the world had developed their own ways to say goodbye to dead relatives and friends. I explained that all cultures and religions recognized the importance of a ritual way to say goodbye and show respect for the deceased person and to remember the contributions that he or she had made to the lives of others.

Today we cannot yet formally say goodbye to Somchai Neelaphajit because his body has not yet been returned to his family. Somchai was abducted on 12 March 2004 and has not been seen by his family or friends since that day: he is yet another victim of forced disappearance.

Forced disappearance is a heinous crime, which is condemned by all civilized persons and societies. The International Convention on the Protection of All Persons from Forced Disappearance was finalised in 2005 and is due to come into effect. It defines forced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

We know that a senior police officer has been found guilty of abducting Somchai, but so far he is the only member of the abduction team to have been convicted. Yet there is still concealment of the fate or whereabouts of Somchai. His wife, Angkhana Neelaphajit, has said, "We want him back, even his ashes or any of his remains, so we can perform religious rites for him."

Those persons who carried out this heinous crime and those who are involved in the subsequent cover up have placed themselves outside the boundaries of civilized society. The actions and silence of those persons have caused pain and sorrow for Somchai's wife, children, other relatives and friends. The forced disappearance of a person is in effect an assault on the psyche of their relatives and puts them into a world of uncertainty.



“ A civilized society marked by the rule of law recognizes the role of lawyers to represent all persons, no matter what their political or social background or beliefs ”

However, those persons who have carried out this horrendous crime have done much more: by not allowing families and friends to proceed with a proper funeral they have insulted religion--all religions, including Buddhism and Islam and Christianity. And in so doing, they have dishonoured a core principle of all cultures, including Thai culture.

The crimes and continuing silence of these persons offends the norms of all civilized persons and societies. The culture of silence among some members of the police and military that serves to protect the identities of those involved in gross human rights abuses is not in any way honorable. It must be seen for what it really is: a cancer that eats away at their own humanity and at the basic human values of Thai society.

The persons involved in the forced disappearance of Somchai have also undermined the rule of law in Thailand. A civilized society marked by the rule of law recognizes the role and responsibility of lawyers to represent and defend all persons, no matter what their political or social background or beliefs. Lawyers are an integral part of the judicial system. By abducting Somchai, those responsible have sought to threaten and intimidate members of the legal profession and to undermine the entire judicial system. All those who today protect the abductors continue to weaken the judicial system and rule of law in Thai society.

No one should be forcibly disappeared. Yet, Somchai was special.

He was a good husband and father. He was also a world-class human rights lawyer, who regularly took legal action to defend basic human freedoms. He was an asset to Thai society, who insisted that all persons in authority respect the rule of law and follow the procedures established to ensure the rule of law is maintained. Somchai frequently represented clients who were accused of threatening state security and in the process he had to confront powerful state agents, which he did without fear. He was motivated by justice and insisted that the rules of fair play be followed. At the time he was abducted, he was representing a group of torture victims who were being held under extended detention without any charges being laid against them. Somchai had openly accused some police officers of committing torture.

We admire the strength of character of Somchai. In the face of strong opposition, harassment and threats to his life, he continued his fight for justice, both in principle and for each of his clients

We have the greatest respect for the professional legal commitment that has been demonstrated in his service to clients in need, especially those who were abused and tortured. We note that in his lifetime Somchai was honoured by the Lawyers Council of Thailand for his devotion and professionalism.

We praise his commitment to justice and his commitment to using the judicial system to seek justice for others and his work to strengthen the rule of law in Thailand.

At the same time, we also honour his wife, Angkhana Neelaphajit. As we noted when announcing the award for Somchai, she

has been unrelenting in her efforts to obtain justice, unsparing in her criticism of government authorities and has taken the lead role as an articulate and courageous spokesperson for the families of disappeared persons in Thailand. She has clearly indicated that she will continue her struggle for her husband no matter what. By giving this award to Somchai, the AHRC Board of Directors is also recognizing and applauding the tremendous contribution that Angkhana Neelaphajit has made in confronting the impunity enjoyed by state officers in Thailand.

Angkhana recently said, "It will build up the good image of the government and the justice system in Thailand if we don't let impunity remain rampant."

In her introduction to the Thai-language edition of *Memories of a Father*, a book in which Professor T V Eachara Varier describes the abduction of his son by the Inidan police and his subsequent relentless struggle to obtain answers and justice, Angkhana wrote:

On the surface Thailand appears to have beauty, peace and material development, but deep down violence and misuse of authority are still taking place. Suppression and torture are so common that people are used to them. The violence and discrimination of state authority against the powerless has caused pain to innocent people. No one knows how grief and misery from loss and injustice cause more pain than that from a death. This is a wound that is deep in the heart, which cannot be seen or touched but reflects well those injustices in society... Encouragement and hope for justice are getting less. I am asked to receive compensation instead of justice. I am forced to be convinced that there is no justice in this world... I believe that beyond human laws there are universal laws and what goes around will come around. Finally, I strongly believe that there is justice in the hands of God.

So, we honour both Somchai and Angkhana.

But we do more than honour them and admire the strength of character and commitment to justice by both Somchai and Angkhana.

We don't stop at honouring Somchai's contributions to the legal profession and to working to enforce and uphold the rule of law in Thailand.

We go beyond praising Somchai's service to those in need, especially minority groups and those who had been tortured and unjustly detained.

The Asian Human Rights Commission pledges to remain in unity with his wife who demands answers and insists on justice being done. We stand in solidarity with those who demand justice for Somchai and his clients. We commit ourselves to working with those who want to uphold the rule of law and to demand that the judicial system ensures that justice is done and that the rights of all litigants and the lives of all judges and all lawyers will be respected and protected.

**“We honour both
Somchai and
Angkhana ”**

The Asian Human Rights Commission commits itself to working with groups in Thailand who are urging Thailand to ratify the international Convention against Torture and to introduce this convention into domestic law. We will also continue to work with and support groups in Thailand who are trying to stop the widespread use of torture, disappearances and extrajudicial killings by police officers and members of the security forces. And we will work with all groups who are promoting and trying to uphold the rule of law in Thailand and with all groups who condemn violence and are working for a peaceful settlement of disputes.

We will work with all those persons who are helping to develop a culture that will not tolerate any further disappearances, and that demands the end of impunity and that all who commit this heinous crime of forced disappearance be severely punished.

We urge the Government of Thailand to be among the first countries to become a signatory to the International Convention on the Protection of All Persons from Forced Disappearance. We also urge the Government of Thailand to pass legislation to make both torture and forced disappearance crimes in Thailand.

When we are working, until that day when we have a chance to formally say goodbye to him, we consider that Somchai is working with us.

We also hope that our work will bear fruit and that we will be able to convince Angkhana that while justice is in the hands of God we can make justice a reality in this world.

Somchai, for all you have done we honour you. Angkhana, for all you have done we say thank you: for all you will do in the future, we offer you our support.

Acceptance speech by Angkhana Neelaphaijit

I would like to say thank you to the Asian Human Rights Commission for recognising Somchai's work and devotion in his fight for justice. Actually, today he should have been here, to receive the award by himself. But for whatever reason, either the lack of justice or whatever else, he was disappeared.

Somchai always fought according to the law, and never used illegal or corrupt methods to close a case. We saw [today] a video... on human rights defenders. One thing that came out was that few human rights defenders have comfortable lives. Many of them have faced different destinies: some have been hunted and could not even find a place to sleep; some have lost their loved ones, and many have had to sacrifice their lives. However, I believe that those who come to this field are ready to pave the way for those who come after us. I do not believe that we can get anything easily, without loss.

But how do we experience loss in order to gain something for those who come after? In my fight, I have faced so many obstacles: from access to justice, to the difficulty of getting information when the other party in the dispute consists of state officers. I found



that one important piece of evidence presented before the court was not endorsed by senior authorities. I am curious as to whether this was a mistake made in good faith or an intention of the investigating officers. I have no answer.

At the moment Somchai's case has been transferred to the Department of Special Investigation, the director of which is a former supervisor of those five defendants. How can we have an impartial, transparent and accountable agency so that a small, ordinary person like me can access justice by means of the law? Even though the DSI has taken the case for several months, it has never used forensic science in order to get evidence.

It is hard for ordinary people to access justice, especially when the conflicting party consists of the state authorities, with power, weapons and the country's leader on side. I do not want to use strong words, but would like to inform Mr Thaksin that you said you were emotional when seeing the tears of parents whose children have given up drugs. Unfortunately, Mr Thaksin has had no chance to see the tears of the lost families whose members are abducted, killed and tortured. The tears of more than 2000 families who lost members by the unlawful "war on drugs" operation are not seen by him.

Finally, I would like to thank you all for the many things given by allies and friends. I could not have moved this far if there were no one to assist me, as well as the devotion from you. The success of a person consists of the many hands behind them.

I thank the Asian Human Rights Commission for backing my battle at all times. Thank you to the Faculty of Political Science at Chulalongkorn University, for giving me enthusiasm and society a shelter when there is a conflict with the state. Thank you Mr Stephen Toope, Ms Hina Jilani, representatives of the United Nations; Ms Suciwati, a new friend who is a good ally at both regional and international levels. Thanks also to Amnesty International, the Thai Working Group for Human Rights Defenders, FIDH, OMCT and ICJ.

And I must not forget to thank an eyewitness [to Somchai's abduction], an anonymous lady who walked to the court alone without any protection. She identified the culprit three times during the investigation.

The one other thing I would like to say here is that we appreciate Somchai for his devotion to suffering people, but those who have been tested with real suffering are all of his five children. Therefore, I would like to take this opportunity to thank them on behalf of Somchai for living with sacrifice, tolerance and non-violence throughout the battles we have fought.

I have learnt a precious lesson and am able to conclude that no matter how others treat us, beyond hatred and cruelty there is friendship, kindness, care and learning to be tolerant, to fight for justice. Beyond injustice and unlawful ways, there is a natural order, and what goes around will finally come around.

“It is hard for ordinary people to access justice, especially when the conflicting party consists of the state authorities, with power, weapons and the country's leader on side ”

About Somchai Neelaphaijit

Somchai Neelaphaijit was born in Thailand on 13 May 1951. After graduating, he took on many human rights cases, especially those that other lawyers would not. He defended persons accused of national security violations in the south, Burmese exiles, and in one celebrated case, a group of Iranians accused of planning to blow up the embassy of Israel in Bangkok: they were acquitted in 1995. In 2004 he was advocating strongly for the lifting of martial law in the south of Thailand and had publicly accused the police of brutally torturing detainees there.

Somchai served as the deputy chairperson of the Human Rights Subcommittee, Law Society of Thailand, and was a founding member and chairperson of the Muslim Lawyers Club of Thailand, which offered pro bono services in human rights cases. He also served as an advisor to the Senate Human Rights and Justice Subcommittee. In 2003 he received an award from the Lawyers Society of Thailand in recognition of his services. In June 2005 he was also named for the prestigious Thongbai Thongpao award. He leaves behind his wife Angkhana and their five children.

About the Asian Human Rights Defender Award

The Asian Human Rights Commission recognises that human rights and liberties are expanded most by persons willing to make a sacrifice in the defence of these principles. Society is obliged to recognise and honour such sacrifices. For these reasons it has chosen to present awards to human rights defenders at opportune moments. Nominees must be exemplary human rights defenders with whom--or on behalf of whom--the AHRC has worked intensely over some time, and for whom the symbolic act of receiving the award will be significant. Nominations may be submitted to the AHRC executive director by anyone, at any time. The AHRC Board of Directors reserves the exclusive right to accept or reject any nomination.

The inaugural AHRC Human Rights Defender Award was presented to Michael Anthony Fernando in 2003, in recognition of his struggle for basic freedoms in Sri Lanka. Fernando served a nine-month jail term for contempt of court arising from a fundamental rights case in the Supreme Court of Sri Lanka. He was jailed because of his determination to uphold principles of liberty with an uncommon sense of courage, seriousness and self-sacrifice. The second award to Somchai Neelaphaijit follows in this tradition.

The Human Rights Courts and other mechanisms to combat impunity in Indonesia

Fergus Kerrigan & Paul Dalton,
Danish Institute for Human Rights

Article 1 (3) of the revised Constitution of Indonesia affirms that Indonesia is a state ruled by law. Article 4 (1) states that the President of the Republic holds the power of government “in accordance with the Constitution”—thus binding the executive power in general to the law and constitution. Similarly, the presidential oath in article 9 binds the president to respect the constitution and “to conscientiously implement all statutes and regulations”.

Thus, all agents of the state who exercise public powers under the ultimate authority of the president, do so only in accordance with the law and constitution. Use of state power that is not for a legal purpose or carried out according to legal rules is illegal and potentially criminal.

The independence of the judiciary is guaranteed by article 24 of the constitution. A catalogue of human rights, including the rights to legal protection and equality before the law (article 28D), is guaranteed in chapters X and XI. The state and government’s duty to protect and fulfil these rights is laid down in article 28I(4).

Among the most difficult challenges faced by any legal system is that of ensuring that officials of the state whose job it is to enforce the law are themselves subject to punishment for breaking it. This can be a difficult balance. Police must be allowed to effectively protect the community against crime, and must be

This is an abridged version of a longer article prepared under the same title. The authors are respectively the Head of the Education Team and Project Manager at the Danish Institute for Human Rights. The DIHR has been in partnership with the Indonesian Supreme Court since November 2003, aiming at improving the capacity and performance of the Human Rights Courts. To this end a series of seminars has been held with the Human Rights Courts at all levels, and Courts of General Jurisdiction. As well as judges, the seminars have included participants from the prosecution, police, military judges and prosecutors and (occasionally) the Human Rights Commission, Komnas HAM.

“A lack of control can undermine public faith in the legal system and the legitimacy of the state itself”

allowed to act based on their best judgment in difficult and dangerous situations. At the same time, the powers given to law enforcers are subject to law and allowed only for particular purposes. They must never degenerate into a licence to commit crime with impunity. A lack of control can undermine public faith in the legal system and the legitimacy of the state itself.

According to law, there are three possible legal forums where serious violations of human rights can be prosecuted and tried in Indonesia. These are:

(i) Courts of General Jurisdiction, applying the Indonesian Penal Code, if the offences are tried as ordinary crimes;

(ii) Human Rights Courts established under Law 26/2000, if the offences are classified as crimes against humanity or genocide as defined for the purposes of that law; and,

(iii) Military courts, applying the Penal Code and the Military Penal Code, if the offences are assessed as having been committed by a member of the armed forces on duty.

Courts of General Jurisdiction

As a general rule, military personnel cannot be tried in Courts of General Jurisdiction. This is by virtue of article 9(a) of Law 31/1997, which provides that the Military Court has the jurisdiction to “prosecute any crime committed by a person when (the person) committing the said crime is a soldier”. Article 2 of the Military Penal Code states further that “unless there are exceptions determined by law, the Penal Code shall apply for any crimes which are not included in this Military Penal Code that are committed by any person subject to the Military Court”. An exception exists as regards criminal trials in which military personnel and civilians are indicted as co-accused. In such cases, the trial may be heard in a Court of General Jurisdiction according to the ‘koneksitas’ procedures described in Chapter XI of the Criminal Procedure Code. To date these procedures have only rarely been used in practice, although they may become more common in the future, following the entry into force of Law 4/2004 on the Justice Authority. Article 24 of Law 4/2004 provides that crimes jointly committed by those who are under the Civil Court and the Military Court will be prosecuted by the Civil Court, unless special circumstances exist, in which the head of the Supreme Court may issue a decree that the case be prosecuted by the Military Court.

One can broadly distinguish between two classes of crimes committed by military personnel. Firstly, there are incidents where a soldier, in the course of performing military duties, abuses the force and powers given to him or her and commits a crime. Secondly, there are crimes which, though unrelated to military service, are committed by a person who happens to be a member of the armed forces. Either type of offence can involve cooperation between soldiers and non-soldiers. Law 4/2004 does not seem to distinguish between these two categories. In the

past, the koneksitas model has been used for both of these classes of crime. While the failure to prosecute senior officers was strongly criticised, the prosecution of soldiers and a civilian for the killing of Teuku Bantaqiah and his followers in Aceh in July 1999 is a notable example of the use of koneksitas procedures for crimes related to military actions. However, it should be pointed out that a koneksitas court is not properly a court of general jurisdiction. Military judges sit together with civilian ones, and military police and prosecutors work together with their civilian counterparts.

“Police can legally block the investigation and prosecution of their own personnel ”

So in practice, almost all criminal prosecutions of military personnel—including for alleged human rights violations—can only be tried by military courts under existing Indonesian law.

By contrast, since the separation of the police from the armed forces with the fall of the New Order regime, police officers can be prosecuted and tried by the Courts of General Jurisdiction.¹ Nevertheless, there is major legal obstacle to the prosecution of police in that the Criminal Procedure Code (Kitab Undang-undang Hukum Acara Pidana, or KUHAP) does not permit prosecution of any case that has not been the subject of an investigation by the police, including cases against the police themselves. KUHAP makes a distinction between preliminary investigators and investigators. Article 4 defines a preliminary investigator as "an official of the state police of the Republic of Indonesia". Article 6(1) defines an investigator as "an official of the state police" or "a certain official of the civil service who is granted special authority by law". Indonesian police and prosecutors have interpreted these provisions to mean that, in the absence of special authority having been granted by legislation, no one but the police can carry out a criminal investigation and no prosecution can take place without such an investigation having first been carried out.

The effect of this provision is that police can legally block the investigation and prosecution of their own personnel. This obstacle is only likely to be overcome where a case is of such high profile that there is sufficient political pressure on the police to conduct an internal investigation. The possibility that exists in many other civil law countries of filing a complaint directly with the prosecution does not exist in Indonesia. The resulting lack of a check or balance on police power is a serious flaw that leaves the door open for abuse, but one that could be remedied by legislation granting special authority to a public agency functionally and operationally independent of the police force to investigate all cases of alleged police criminal wrongdoing.

KUHAP should be changed to allow for impartial, transparent and accountable investigations of police. A team of experts should examine this issue and recommend the most appropriate legal and institutional changes necessary.

Law 26/2000 and the Human Rights Courts

“The Human Rights Court has interpreted that it is necessary to establish that a person was exercising *de jure* authority over the person or persons perpetrating the violations [to be held legally responsible]”

The Human Rights Courts were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East Timor). In 2000–2001 there was much hope that the Human Rights Courts could be used to seriously combat old patterns of impunity for human rights violations. Most observers, both Indonesian and international, agree that this has not proved to be the case.

While Law 26/2000 was generally intended as a vehicle to incorporate some serious international crimes into Indonesian law, and although article 7 of Law 26/2000 makes explicit reference to the Rome Statute of the International Criminal Court, there are some significant definitional differences between the two, in particular with regards to “gross violations of human rights”. Some of the important differences are as follows:

- Article 8 of Law 26/2000, dealing with genocide, does not include the ancillary crimes of complicity, attempt, incitement and conspiracy.

- Article 9, dealing with crimes against humanity, is to be read together with the General Provisions of Law 26/2000, which contain definitions of these crimes. While these definitions are broadly similar to the definitions of crimes contained in the Rome Statute and the “Elements of Crimes” elaborated pursuant to the Statute, there are some unfortunate gaps. One of these is the lack of a general inclusive provision similar to article 7(1)(k), covering “acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.²

- Article 9 of Law 26/2000 inserts the word “direct” into the definition of crimes against humanity; i.e., acts perpetrated as part of a widespread and systematic direct attack. International law knows no requirement that the attack be “direct”.

- Article 42 of Law 26/2000, on superior responsibility for the crimes referred to in articles 8 or 9, contains (at least in the English translation), some significant variations from the text of the corresponding provision in article 28 of the Rome Statute. Article 42(1) provides that a military commander or person acting as a military commander “may” be held responsible, while article 28 uses the mandatory form “shall”. Representatives of both the Supreme Court and the Attorney General’s Office have confirmed that the word used in the Indonesian text is “may”. Further, in relation to Article 42(2), the Human Rights Court has, in the jurisprudence arising from the East Timor cases, interpreted the word ‘subordinates’ as indicating that it is necessary to establish that a person was exercising *de jure* authority over the person or persons perpetrating the violations. At international law, it is well established that *de jure* responsibility may be indicative but is not conclusive of responsibility. The test to be satisfied is

whether a superior, be he *de jure* or *de facto* responsible for the actions of others below him in the chain of command, had effective control over the persons committing the violations.³

In terms of jurisdiction, in order for an offence to be tried by the Human Rights Courts, the crime alleged must be either genocide or crimes against humanity (Law 26/2000, articles 4 & 7). Many serious violations of human rights, including torture, extrajudicial killing or enforced disappearance, do not in themselves meet this requirement and so do not fall within the jurisdiction of the Human Rights Courts.

The jurisdictional split between the Human Rights Courts, the Courts of General Jurisdiction and Military Courts renders impossible indictments for crimes against humanity or genocide where there are alternative lesser charges of ordinary crimes or violations of the laws of war. The actors at the preliminary stages of the criminal process, the Human Rights Commission (Komnas HAM) as the inquirer, and the Attorney General's Office as the investigator, must decide whether the case ought to be prosecuted as genocide or crimes against humanity in the Human Rights Courts, as ordinary crimes in a Court of General Jurisdiction, or as violations of the Military Penal Code, under the jurisdiction of the Military Court.

At international law, special conditions are required to meet the evidentiary burden for crimes against humanity. In simple terms, it must be shown that the act was one of the crimes referred to in article 9 of the Rome Statute, that it occurred as part of a widespread or systematic attack directed against any civilian population, and that the perpetrator was aware of such an attack. Proving the widespread or systematic requirement is very onerous. This requires extensive documentation of the general situation at the time, evidence showing that the attack was backed by state or organisational policy, and, as regards the third element evidence, that the alleged perpetrator was either *de facto*, or in certain circumstances, *de jure* aware of the attack.

At first sight, it would appear to be a far more attractive option for a busy and under-resourced prosecutor to prosecute (non-military) personnel in the Courts of General Jurisdiction, thus avoiding the need to prove that the incident was part of a widespread or systematic attack. Taking this course would mean sending the inquiry report to the National Police to conduct the investigation or, if the case involves only military personnel, to the military police or prosecutor.

However, the Human Rights Courts offer procedural advantages not present in the general courts, namely, an inquiry by a Komnas HAM team and the ability to try military personnel in a civilian court, especially one including ad hoc judges from outside the career judiciary. In Indonesia, lack of public confidence in the impartiality and probity of the principal justice institutions—the police, the prosecution service and the courts—make these procedural differences significant.

“ Many serious violations of human rights do not fall within the jurisdiction of the Human Rights Courts ”

“The limited jurisdiction of the Human Rights Courts is poorly understood among judges and prosecutors”

A further advantage of Law 26/2000 is the concept of superior responsibility, which by virtue of article 42 extends to criminal liability for omissions. By contrast, article 55 of the Penal Code of Indonesia (Kitab Undang-undang Hukum Pidana, the KUHP), dealing with forms of participation in criminal acts, does not include liability for omissions. Among articles 127, 129 and 132 of the Military Penal Code (the KUHPM), which address command responsibility, article 132 provides that superiors who intentionally fail to take proper steps to repress criminal acts by their subordinates will be subject to prosecution, but only as accomplices. There is no reference to command responsibility in Law 31/1997 on the Military Courts. Doubts have also been raised about the capacity and commitment of the Military Courts to investigate or prosecute senior military officials.

The jurisdictional and procedural advantages of Law 26/2000 could lead to situations where Komnas HAM (or the Attorney General's Office) is tempted to recommend for investigation human rights violations which, while they are very serious and should be prosecuted, do not amount to crimes against humanity or genocide as these terms are understood at international law. The Attorney General, although legally free to make his own determination on this issue, may feel considerable public pressure to adopt the same view and proceed to an indictment under Law 26/2000, concluding in an unsuccessful prosecution.

The limited jurisdictional reach of the Human Rights Courts is poorly understood among judges and prosecutors, as well as many Indonesian human rights campaigners and the general public. There is a widely-held perception that any cases involving serious violations of human rights should be a matter for these courts, rather than the ordinary courts. This also appears to be the case among some members of Komnas HAM inquiry teams. Komnas HAM has attempted to address this problem through continuing education. Added to this is an understandable urge (in the absence of other courts where perpetrators can be held accountable) to stretch the limits of the Human Rights Courts' jurisdiction through a liberal interpretation of the “widespread and systematic” concept.

For as long as specialized courts dealing with human rights violations are maintained, it should be considered to extend their jurisdiction *ratione materiae* to cover both war crimes and ordinary crimes under the KUHP. This would remove the obvious jurisdictional and practical gap. War crimes need to be included in their jurisdiction because of, among other reasons, the concept of superior responsibility. Both civilians and military should be liable for the acts of persons under their effective control. Article 28 of the Rome Statute makes no distinction between military and civilians in this respect. This is now the position in customary international law as a result of the Celebici decision.

Coordination between Komnas HAM and the Office of the Prosecutor also needs to be improved. There has been a consistent tendency on the part of the Prosecutors' Office to blame

the quality of the inquiry for problems encountered during investigation or at trial. Some of the criticisms may be justified, but a more constructive approach could lead to regular dialogue and exchange of opinions between the two institutions.

Law 26/2000 also does not include mechanisms for addressing a situation where the inquirer and the investigator reach different conclusions as to whether or not to prosecute a case, or as to which person or persons should be indicted. In their absence, the Attorney General has the final say, under article 23(1). In the Tanjung Priok case, Komnas HAM identified 33 people who in its opinion should have been made accountable for their actions, among them General Benny Moerdani (former head of the military, now deceased) and General Try Sutrisno (who at the time of the incident was Regional Military Commander). The Attorney General decided to indict only 14 persons. Neither Moerdani nor Sutrisno were among them, and no reasons were provided for the decision. For Komnas HAM to protest the decision or to make a formal request for reasons would be to go beyond its mandate under the law, yet there remains a common public perception that both Moerdani and Sutrisno were involved. The larger question here is whether or not Komnas HAM's very specific role in *pro justitia* inquiries under Law 26 is compatible with its general mandate as a human rights monitor. If Komnas HAM did not have the inquiry function, it might be more openly critical of the Attorney General's approach to such cases, demanding transparency and the provision of clear reasons for non-prosecution.

Where the Attorney General refers a case for prosecution but the prosecutors decide not to proceed, article 140 of KUHAP requires that they specify whether the decision is based on insufficiency of evidence, that the facts do not disclose commission of a crime, or closure in the interest of law. However, there is no requirement that this information be provided to victims or complainants.

Military Courts

Since the fall of the New Order regime, several significant administrative and legal reforms have been undertaken in relation to the armed forces. The military no longer enjoys separate representation in Parliament, and according to a law passed on 30 September 2004 it will be obliged to give up its commercial interests over a five-year period.

However, the status of the military remains controversial, especially the continuation of the regional commands, which enable it to maintain a presence at all levels of government. Some fear that this will continue to allow the military to influence government policy and its execution. Serving military personnel can reportedly continue to occupy positions in the civilian administration. Furthermore, the military has not yet been placed under the control of the Ministry of Defence, which is considered to be necessary to ensure that policy development and budgetary

“Law 26/2000 also does not include mechanisms for addressing a situation where the inquirer and the investigator reach different conclusions as to whether or not to prosecute a case”

“The most significant obstacle to the effective implementation of human rights laws in Indonesia is fear of the military”

matters are determined by the government of the day. More recently, Law 31/2004 placed the Military Courts under the Supreme Court. Nevertheless, pending further legal reforms the Supreme Court does not have formal supervision over the Military Courts. For now, the military remains in control of their composition, organisation, procedure and financial administration.

There is a vibrant ongoing debate in Indonesia regarding the implications of the above reforms, and whether—or when—further amendments to those laws governing the armed forces will occur. This could include a transfer of jurisdiction over some types of crimes committed by military personnel to the Courts of General Jurisdiction.

For example, a revised KUHPM might include a distinction between “service related” and “non-service related” offences, with jurisdiction for the latter category of offences under the civilian courts. This distinction is made in criminal justice systems in many countries, and has often been identified as a step that should be taken in order to promote accountability within the armed forces. With such a change it would be important to indicate clearly that serious violations of human rights, including torture, rape, hostage taking, enforced disappearance and the deliberate killing of persons not taking part in hostilities cannot be considered “service-related acts”, and must always be tried in either Courts of General Jurisdiction or the Human Rights Courts, depending on the alleged crime. This is the position increasingly adopted in international human rights bodies and in national best practice.

Pending reforms to the KUHPM, it is important that there nevertheless exist mechanisms within the military justice system to ensure the effective investigation and prosecution of any persons believed to be responsible for crimes, irrespective of rank or status. This clearly requires ensuring that military police, prosecutors and judges are placed outside of the ordinary military command hierarchy.

Obstacles to human rights cases in Indonesia

Perhaps the most significant single obstacle to the effective implementation of human rights laws in Indonesia to date is fear of the military. Military intimidation of victims and witnesses, members of the Komnas HAM inquiry teams, prosecutors and judges, real or perceived, direct or indirect, eats away at the effectiveness of the process and prevents all parties from carrying out their roles effectively. However, to date the prosecution of most human rights violations alleged to have been committed by military personnel remains almost exclusively within the remit of the military justice system rather than the civilian courts.

Intimidation is often coupled with other forms of interference in the judicial process. Victims are frequently bought off. The notion of punishment as a deterrent is not widely appreciated.

Witnesses are unprotected, and it is hardly surprising that they choose out of court settlement over the uncertainties of a judicial system that has obtained little respect among the population. There is still no law on witness protection, and no way to provide it.

The reports on the East Timor trials contain many criticisms of the work of the prosecution, documenting a lack of seriousness in prosecuting the accused that can only be described as deliberate bad faith.⁴ The criticisms can be categorized in several groups.

Firstly, there are criticisms of the prosecution concerning improper influence, corruption and politics. In this respect, human rights cases cannot be seen in isolation from the general condition of the Attorney General's Office. Many reports have underlined the enormity of the task of reforming this centralized bureaucracy, with a rigid command structure, insufficient guarantees of independence from government and, according to many, institutionalized systems of unofficial payments. It has also been no secret among prosecutors that there is little career incentive to work on trials involving senior military officers.

A second set of problems involves a lack of knowledge and resources among prosecutors. There have been some efforts to resolve these, with the creation of a special unit within the prosecution to pursue human rights cases. This unit has sought external assistance, through which it has received some limited training.

A third set of difficulties is organisational. Komnas HAM officials have pointed out that there is too much rotation of staff within the prosecution, so that those with skills are moved on. Even within the same case, there is a lack of continuity of prosecutors at investigation and trial. As the prosecutor at trial is not permitted to introduce evidence other than that described in the bill of indictment, poor work done at the indictment stage can fatally hamper the work done later in court. New evidence can only be introduced if asked for by the judges. The lack of a pre-trial procedure to iron out problems like this is a weakness of KUHAP.

Yet a fourth set of obstacles concerns the inability of prosecutors to obtain evidence, either documentary or testimonial, from the military. Unlike, for example, the Rules of Procedure and Evidence of the ICC, Law 26/2000 contains no provisions relating to the confidentiality of matters affecting national security. Neither do the rules laid down by KUHAP. The result is that in theory, the armed forces are obliged to reveal all information required of them by the civilian investigators, even matters that might jeopardize the security of members of the armed forces in combat situations. In practice, the armed forces simply signal an unwillingness to comply. The prosecutors appear not to insist, and the evidence is not forthcoming. The authors are unaware of any principled legal contest on this issue between

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“A significant group of judges opposes reform and deeply resents the international pressure which led to the introduction into Indonesian legal practice of international human rights law”

the prosecution and the armed forces that has gone to court. The Attorney General's office has instead attempted to negotiate a Memorandum of Agreement with the military. Thus, instead of having a set of rules with reasonable safeguards for legitimate cause, there are unrealistically broad rules that are unenforceable in practice. Subordinating the military to the rule of law and civilian institutions is still in its early days in Indonesia, particularly in the judicial domain.

It is also certain that Indonesian investigators and judges will continue to come under close domestic and international scrutiny, and questions regarding their independence will continue to be posed. Pressure to acquit will, for political and institutional reasons, remain high for the foreseeable future. A culture of judicial and prosecutorial independence and professionalism will take time to firmly establish, and it is by no means guaranteed that current reform initiatives will not be reversed in the future. A significant group of judges, particularly in the higher courts, opposes reform and deeply resents the international pressure which led to the establishment of the Human Rights Courts and introduction into Indonesian legal practice of international human rights law and jurisprudence. Through Law 26/2000 and the related Law 39/1999, concerning human rights, Indonesian law has begun to engage with the international human rights standards.

The reform process has likewise promised transparency, giving rise to an expectation that judgments can be readily accessed and a proper explanation will be given for the decision reached in each case. A problem that exists across the whole judiciary is the frequent inaccessibility of judgments, not only for interested members of the public, but even for the parties to the proceedings and their legal representatives. Many observers have commented on the desirability for the whole judiciary to practice increased openness and to facilitate the access of interested parties, their legal representatives and the general public to decisions of the courts, and the Supreme Court has identified this as a reform priority.

Conclusion

Since the adoption of Law 26/2000, there has been overwhelming domestic and international expectation on the Indonesian Human Rights Courts, and on the agencies responsible for investigating and prosecuting crimes that fall within their jurisdiction, to bring the perpetrators of serious violations of human rights to account for their actions. In large part, these expectations have been disappointed. There are many reasons for this, legislative, political, and procedural.

Nevertheless, even within the existing legal and judicial framework there exist underutilised possibilities to ensure accountability for these crimes. The Indonesian Penal Code contains numerous provisions that could be used to prosecute human rights violators, which in many cases would be more

suiting to the crimes alleged than the restricted list of crimes that fall within the jurisdiction of the Human Rights Courts but in practice are not being used to any significant degree at present. The result of this, when coupled with the jurisdictional limitations of Law 26/2000, is that violators of human rights continue to enjoy impunity, bar a few exceptions.

At the same time, all criminal justice institutions in Indonesia need to continue with measures to root out the corruption and nepotism that was a characteristic of the New Order period, and to replace these values with a working culture that promotes probity, professional independence, a love of justice and a desire to uphold the rule of law. Instilling such values will require a commitment by the government of Indonesia to improve material conditions of service for justice officials, and by the government and cooperation partners alike to increase the legal knowledge and capacity of these officials to implement the law faithfully.

Further legal and procedural reform is needed to close some of the gaps in human rights protection and enforcement mechanisms that currently exist. Of the many issues raised in this article, three are of particular concern.

First, the Human Rights Courts—or any other court that may in the future be given jurisdiction to try cases of crimes against humanity and genocide—must also be able to consider indictments in the alternative, so as to avoid a situation where a defendant can walk free, despite strong evidence to support a conviction for a crime of, for example, extrajudicial killing or torture because the evidence is not sufficient to meet all of the elements of one of the previously named crimes. Further, in this regard, courts trying cases of alleged human rights violations by military personnel must be invested with jurisdiction over war crimes.

Secondly, there must be a review of existing jurisdictional demarcation between the different courts as regards competence to try military officials accused of human rights violations, and at the same time to ensure that the principle of superior responsibility in Indonesian law is in accordance with international law, so that both *de jure* and *de facto* leaders can be held to account.

Thirdly, cases involving the alleged commission of human rights violations under the KUHP by members of the police force must be carried out by an independent agency, and the police officers in question suspended from their posts pending the outcome of the enquiry. The outcome of such investigations should always be made public. The first of these measures is required to ensure full compliance with Indonesia's obligations under the UN Convention against Torture, which it has ratified.

Under the revised constitution, Indonesia is now a state ruled by law, where all holders of public office, from the president down, are obliged to respect the constitution and apply the laws of the land faithfully. Measures undertaken by the judiciary, together

“There must be a review of existing jurisdictional demarcation between different courts as regards competence to try military officials accused of human rights violations”

with prosecution and investigation agencies, to hold violators of human rights accountable are not only in the interests of the vast majority of the people of Indonesia; they also protect and strengthen the legitimacy of the state and its institutions.

Endnotes

¹ MPR Decree VII/MPR/2000, clause 3.4.a and 7.4 provides that the police should be subject to the civilian courts. The decree was implemented by Law Number 2 of 2002 on the National Police of the Republic of Indonesia (POLRI).

² A complete discussion of the divergences between Law 26/2000 and the Rome Statute can be found in the Amnesty International document, 'Amnesty International's comments on the Law on Human Rights Courts (Law No. 26/2000)', AI Index: ASA 21/005/2001, available online at: www.amnesty.org.

³ See the Celibici case: *Prosecutor v Delalic et. al.*, IT-96-21-T, Judgment 16 November 1998 (Trial Chamber); *Prosecution v Delalic et. al.*, IT-96-21-A, Judgment 21 February 2001 (Appeals Chamber).

⁴ See 'Intended to Fail: the Trials before the Ad Hoc Human Rights Court in Jakarta', Professor David Cohen, International Centre for Transitional Justice, available online at: www.ictj.org. See also, 'The failure of Leipzig repeated in Jakarta: Final Assessment on the Human Rights Ad-Hoc Tribunal for East Timor', Elsam, Jakarta, 9 September 2003, available online at: www.elsam.or.id.

New law needed to implement the UN Convention against Torture in Indonesia

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The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment obliges state parties to “take the effective legislative, administrative, judicial or other measures to prevent acts of torture” and “ensure that all acts of torture are offences under its criminal law and punishable by appropriate penalties”. Indonesia ratified the Convention in 1998 and is bound by those obligations. However, it has not reformed its legislation in line with the Convention. In fact, the act to ratify the Convention, Law No. 5 of 1998, contains only two articles: the first affirming that Indonesia ratifies the Convention and the second affirming the validity of the act itself. It does not offer any additional regulations or commentary to see the Convention implemented.

In its Initial Report to the UN Committee against Torture in 2001 (CAT/C/47/Add.3), the Indonesian government stated that it has fulfilled its obligations under the Convention through existing legislation. It argued that the prohibition of torture is covered in the Constitution of Indonesia, the Human Rights Act (Law No. 39 of 1999), and Human Rights Court Act (Law No. 26 of 2000). It argued that torture is already defined in the Human Rights Act. Additionally, the government argued that articles 422, 351, 353, 354, 355, 53 and 55 of the Penal Code already address criminal punishment.

Do these laws fulfill Indonesia’s obligation under the Convention against Torture? Can they be implemented to punish the act of torture? Specifically, are the provisions of the Penal Code, Human Rights Act and Human Rights Court Act sufficient to be consistent with the state obligation under the Convention? Does the Indonesian government need to reform existing legislation to bring it into line with the Convention? These questions can best be answered by first recalling the provisions of the Convention.

Recalling the Convention against Torture

“The definition of torture under article 1 of the Convention contains several key elements”

The definition of “torture” under article 1 of the Convention against Torture provides that

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention does not specifically define “other cruel, inhuman or degrading treatment or punishment”. But as read in article 16(1) those acts are also prohibited, and by referring to article 1 the difference is in the degree of pain or suffering. This can also be found in article 2 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which states that “torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”.

The definition of torture under article 1 of the Convention contains several key elements:¹

- a. Acts which intentionally inflict severe physical or mental pain or suffering;
- b. For an illicit purpose;
- c. Committed, consented or acquiesced to by a public official; and,
- d. Not arising only from, inherent in, or incidental to lawful sanctions.

Severe pain or suffering is identified as both physical and mental. In the first report of the Special Rapporteur on the question of torture in 1986, P Kooijmans explained that

Torture is the violation of par-excellence of the physical and mental integrity—in their indissoluble [sic] interdependence—of the individual human being. Often a distinction is made between physical and mental torture. This distinction, however, seems to have more relevance for the means by which torture is practiced than for its character. Almost invariably the effect of torture, by whatever means it may have been practiced, is physical and psychological. [E/CN.4/1986/15, 19 February 1986, para. 4]

An illicit purpose may include obtaining information or a confession, punishing a victim, intimidating or coercing a victim or another, or any discriminatory reason. To distinguish between torture and other ill-treatment “the Convention in principle only

applies in a situation in which a person has been deprived of his freedom”² and in cases where a victim is “under the factual power or control of the person inflicting the pain or suffering”.³

The state through its public authority has a responsibility to give the citizens a sense of security. Therefore, torture in the meaning of the Convention is not an ordinary crime because it is done by “the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. Kooijmans explains in his first report that “consequently, State responsibility is apparent... However, private acts of brutality... should not imply State responsibility, since this would usually be ordinary crime offences under national law” [para. 38].

Article 2 of the Convention against Torture is a common provision on implementation, in keeping with article 2 of the International Covenant on Civil and Political Rights. It holds that, “Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 4 expands on this, stipulating that

1. Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Therefore, torture must be punishable as an extraordinary crime, with appropriate penalties. Burgers and Danelius explain that even though it “does not mean that there must be a specific, separate offence” to cover torture, “the criminal law must cover all cases falling within the definition in article 1 of the convention”.⁴ It is important to note that the obligations under article 4 of the Convention cannot be separated from the definition of torture under article 1. The criminal provisions enacted must be in conformity with the definition of torture.

Penal Code of Indonesia does not comply with the Convention against Torture

As noted, in its Initial Report to the Committee against Torture, the government of Indonesia argued that Indonesian criminal law already contains provisions to prohibit torture:

Although it does not use the term “torture”, the Penal Code of Indonesia (KUHP) and the Law of Criminal Procedure (KUHAP) already contained provisions which implied the prohibition of torture. Articles 351 to 358 of the Penal Code of Indonesia, for example, prohibit the act of “maltreatment” which is very close in meaning to torture as defined in the Convention. [Para. 69]

In another part of the Initial Report, the government added that under Indonesian criminal law

“In its Initial Report to the Committee against Torture, the government of Indonesia argued that Indonesian criminal law already prohibits torture”

“In fact, the Penal Code does not contain the elements of torture as read in article 1 of the convention”

There are legal provisions on the classification of torture, such as articles 422, 351, 353, 354, 355, 53 and 55 of the Penal Code. Article 422 of the Penal Code states that an official who in a criminal case uses force to secure a confession or information will be punished with a maximum of four years' imprisonment. [Para. 75]

In paragraphs 76 to 79 of the Initial Report the government spelled out how articles 351 and 353 to 355 could be said to comply with the Convention:

Article 351 of the Penal Code states that:

- (a) The maltreatment will be punished with a maximum of two years and eight months in jail or a fine of 300 rupiahs;
- (b) If the action causes serious injury, the guilty person will be punished with a maximum of five years in jail;
- (c) If it causes death, it will be punished with a maximum of seven years in jail;
- (d) The maltreatment is equal to intentional damage to health.

Article 353 of the Penal Code states that:

- “(a) Maltreatment committed with premeditation shall be punished with a maximum imprisonment of four years;
- (b) If the act results in a serious physical injury, the offender shall be punished with a maximum imprisonment of seven years;
- (c) If the act results in death, he shall be punished by a maximum imprisonment of nine years.”

Article 354 of the Penal Code states that:

- “(a) A person who deliberately causes to another serious physical injury, shall, being guilty of serious maltreatment, be punished by a maximum imprisonment of eight years;
- (b) If the act results in death, the offender shall be punished by a maximum imprisonment of 10 years.”

Article 355 of the Penal Code states that:

- “(a) Serious maltreatment committed with premeditation shall be punished by a maximum imprisonment of 12 years;
- (b) If the act results in deaths, the offender shall be punished with a maximum imprisonment of 15 years.”

The report also identifies articles on an “attempt to commit crime” (article 53) and the legal provision for “those who intentionally provoke the execution of the act” (article 55) [paras 80–81].

In fact, the Penal Code does not contain the elements of torture as read in article 1 of the Convention against Torture. “Maltreatment” is not the same as torture as it does not entail purpose, the involvement of a public authority or the degree of suffering.

It has also been made clear by the Committee against Torture that traditional legal terms such as “maltreatment” do not properly address acts of torture. Chris Ingelse spells out the Committee's views as follows:

The special nature of torture would be masked by classing torture together with traditional terms such as mistreatment or abuse of authority. And while torture is certainly covered, to a large extent, by

national terms, there is one important difference. A substantial characteristic of torture is that the actions are performed by the State. Bringing torture under the traditional national terms and provisions would damage an important qualitative and distinguishing aspect of torture.⁵

The European Court of Human Rights has also held this position that to make torture a crime under the traditional definitions in the Penal Code is not appropriate. In *Selmouni v. France*, for instance, the court citing the *Tyrer Case* stated that “the Convention is a living instrument which must be interpreted in the light of present-day conditions”.⁶

Under any circumstances, the provisions of the Indonesian Penal Code, which have been in place since 1946 and are based upon the earlier Dutch Penal Code, do not absorb many of the elements of torture, including the following:

a. The application of “maltreatment” in the Penal Code is limited to physical harm and does not account for “mental pain or suffering”.

b. The use of torture “for an illicit purpose” is not encompassed by articles 351, 353, 354 and 355 of the Penal Code. Article 422 mentions use of force “to secure a confession or information” but does not describe what is meant by this use of force nor the consequences for the victim.

c. Articles 351, 353, 354 and 355 and other provisions of the Penal Code are applicable to any perpetrator and are not specific to the actions of state agents, thereby denying the “important qualitative and distinguishing aspect of torture” noted above. And even though article 422 of the Penal Code is applicable to “an official” it still lacks other elements such as the level of suffering and the illicit purposes of the act. The provisions also do not take into consideration command responsibility in acts of torture.

It should also be noted that Indonesian prosecutors always use articles 351, 353, 354 or 355 to allege ill-treatment of any kind. The use of article 422 is unheard of, since government officers are rarely prosecuted for criminal abuses although torture is widespread in Indonesia. In its written response to the Committee against Torture in 2001 the government mentions only one case of torture, which happened in Aceh during 1999, and even in that case article 422 was not applied.

Other legal reforms have not satisfied Indonesia’s obligations under the Convention against Torture

The second amendment to the Constitution and Human Rights Act establish a principle that cannot be implemented

In its Initial Report to the Committee against Torture the government of Indonesia argued that “article 33(1) of Law No. 39 [of 1999 on Human Rights] resembles the Convention in stating that ‘every person has the right to be free from torture and other cruel, inhuman or degrading treatment or punishment’” (para.

“The provisions of the Indonesian Penal Code, which have been in place since 1946, do not absorb many of the elements of torture”

“Neither under the Constitution nor the Human Rights Act is the prohibition on torture self-executing”

66). It also held that the definition of torture has already been adopted in article 1(4) of that Human Rights Act. In the same report the government mentioned that the second amendment of the Constitution of Indonesia, adopted in 2002, provides under article 28i(1) for the right not to be tortured.

However, neither under the Constitution nor the Human Rights Act is the prohibition on torture self-executing. Although it exists in principle it is not automatically applied in torture cases and therefore torture still is not punishable. To be implemented, it requires penal regulations. Without these, the provision cannot be enforced and the Convention has not been applied. It remains a principle without implementation.

The Human Rights Court Act does not meet state obligations under the Convention

The Human Rights Court Act allows for perpetrators of “gross violations of human rights” to be brought before a special court, the Human Rights Court. Although the government of Indonesia has argued that the Human Rights Court Act also penalises acts of torture, in fact its provisions too are not in line with state party obligations under the Convention.

For an act of torture to fall under the authority of the Human Rights Court, it needs to be part of an act of genocide or a crime against humanity. Article 9 stipulates that such acts must be widespread or systematic. To meet this requirement, an act of torture must consist of so many elements and conditions as set down in common practice through international tribunals such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, or the International Criminal Court. Even when the Human Rights Court Act was applied in establishing the Ad Hoc Human Rights Court for East Timor, the requirement that the crimes be “widespread or systematic” became the main point for contention. Therefore, most incidents of torture in Indonesia—which occur during ordinary criminal process—cannot be punished under this legislation.

A new criminal law is needed to apply the Convention against Torture in Indonesia

Indonesia needs to reform its criminal law to make all acts of torture punishable in accordance with the Convention against Torture. This would best be done by adopting a new separate act on torture. The new act should provide a full definition of torture in line with article 1 of the Convention, appropriate penalties, a special criminal procedure for dealing with torture and other measures meeting all obligations in the Convention. The alternative would be to amend the current Penal Code to bring in the same definition, penalties and procedural changes.

By adopting a new separate act to prohibit torture it would be possible to introduce many supporting regulations above and beyond ordinary criminal procedure, which are not sufficient to make the act of torture punishable. It could also more readily adopt other obligations in articles 2 through 16 of the Convention. Other countries can set an example. Sri Lanka introduced the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act, No. 22 of 1994. Section 12 of that act gives the same definition of torture as article 1 of the Convention, and adopts all of its elements. For punishment, section 2(4) provides imprisonment of 7 to 10 years.

“By adopting a new separate act to prohibit torture it would be possible to introduce many supporting regulations beyond ordinary criminal procedure”

In the event that a new law is not drafted, at the very least the Penal Code must incorporate new provisions on torture in order to comply with the Convention. Since traditional provisions on maltreatment are not in line with the definition of torture, it is not sufficient to rely on those provisions in order to punish torture. The Penal Code must incorporate the definition of torture in article 1 of the Convention in full, and should provide appropriate penalties. However, in view of the fact that preparations for a new criminal law to replace the existing Penal Code of 1946 have been underway since 1977 (at least), and there is as yet a lack of discussion about incorporating torture into the draft, a new law specifically criminalising torture should be preferred.

Endnotes

¹ See Deborah E Anker, *Law of Asylum in the United States*, 3rd edn, 1999, p. 485.

² Chris Ingelse, *The UN Committee against Torture: An Assessment*, 2001, p. 211.

³ J Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1988, p. 120.

⁴ Burgers & Danelius, *The United Nations Convention against Torture*, p. 129.

⁵ Ingelse, *The UN Committee against Torture*, p. 218

⁶ *Selmouni v. France*, (25803/94) 1999, ECHR 66 (28 July 1999), para. 101.

Report on visit to Indonesia by the UN Special Rapporteur on the independence of judges and lawyers

The present report concerns a mission to Indonesia undertaken from 15 to 24 July 2002 by the Special Rapporteur on the independence of judges and lawyers. The Special Rapporteur had received information concerning the state of the rule of law, the administration of justice and in particular the independence of the judiciary, with allegations of widespread and systematic corruption within the administration of justice affecting all actors, including judges, prosecutors, police and other court officials.

General background

The Special Rapporteur had received information concerning the state of the rule of law, the administration of justice and, in particular, the independence of the judiciary in Indonesia.

The Special Rapporteur was informed that, since independence, the administration of justice had suffered much damage as it had been used by the executive as a tool to implement government policy. In turn, judicial power steadily eroded. The Special Rapporteur was informed that, in the current post-Soeharto era, the judiciary was no longer perceived as an instrument of government policy but rather as open to the highest bidder in a system in which the mechanisms of control and accountability are weak and ineffective at best and non-existent at worst. This has, the Special Rapporteur was informed, in turn served to create a mentality within certain segments of Indonesian society in which it is considered routine to attempt

This article consists of extracts from the 13 January 2003 report of the then-UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, on his visit to Indonesia (E/CN.4/2003/65/Add.2). This was the last visit by a UN expert in this capacity to Indonesia, and the observations of the rapporteur are as relevant today as at time of writing, and should be recalled and cited by all persons concerned with the state of human rights and the judiciary in Indonesia. The full report can be found on the UN website.

to bribe judges, where the office of the judge and the judiciary as an institution have completely lost their prestige and dignity, and where judges themselves have, over the years, lost their self-esteem.

Constitutional provisions concerning the administration of justice

The Constitution in force in Indonesia dates from 1945 and has been amended four times since 1998. The First Amendment altered the status and powers of the President. The Second Amendment includes Chapter XA on human rights; article 28D provides that each individual has the right to recognition and protection before the law, certainty of the law and the right to equality of treatment before the law. Article 28I protects the individual against retrospective application of laws. The Third Amendment enacted on 9 November 2001, *inter alia*, expands the powers of the Supreme Court and provides for the establishment of a Constitutional Court and Judicial Commission. The Fourth Amendment, adopted in August 2002, provides, *inter alia*, for direct election of the President and Vice-President.

There is no constitutional provision expressly guaranteeing the independence of the judiciary. There is also no express constitutional provision guaranteeing the right to a fair trial.

Article 24B deals with the Judicial Commission. Article 24B (1) characterizes the Judicial Commission as independent with the “authority to propose candidates for appointment as justices of the Supreme Court and shall possess further authority to maintain and ensure the honour, dignity and behaviour of judges”. The members of the Commission shall possess legal knowledge and experience, and shall be persons of integrity with a personality that is not dishonourable, and are appointed to, and dismissed from, their position by the President with the approval of the DPR [House of Representatives]. The structure, aims and membership of the Commission is regulated by law.

Article 24C deals with the Constitutional Court. It has the power to try a case at the first and final levels, and shall have the final decision-making power in reviewing laws against the Constitution, determining disputes over the authority of State institutions, whose powers are given by the Constitution, deciding on the dissolution of political parties, disputes with respect to a general election, and with respect to the removal of the President. It is composed of nine persons selected by the President: three persons are proposed by the Supreme Court, three by the DPR, and three by the President.

Neither the Constitutional Court nor the Judicial Commission has been set up.

“There is no constitutional provision expressly guaranteeing the independence of the judiciary or the right to a fair trial ”

“A judge is appointed and dismissed by the President on the proposal of the Ministry of Justice”

The judiciary

There are three main pieces of legislation dealing generally with the judiciary: Law 14/1970 concerning the Basic Principles of Judicial Power, Law 2/1986 concerning the General Judicial System, and Law 35/1999 on Amendment of Law 14/1970, which included a number of significant changes intended to bring about greater independence of the courts.

Article 1 of Law 14/1970 provides that the judiciary is the independent power of the State in administering justice to maintain law and justice based upon “Pancasila”, the five principles governing the Indonesian State and society. The five principles are: belief in the one and only God; a just and civilized humanity; the unity of Indonesia; democracy guided by the inner wisdom of deliberations of representatives; and social justice for all Indonesian people.

Article 4(3) of Law 14/1970 provides that any interference in the exercise of the judicial function shall be prohibited except for cases referred to in the Constitution.

The court system

Article 10 of Law 14/1970 provides that the Supreme Court stands at the apex of the court system. Beneath the Supreme Court, there are four branches of the judiciary—General Courts of Justice, which include the High Courts and the District Courts (approximately 349 in total); Religious Courts of Justice, which include the Religious Court of Appeal and Religious District Courts (approximately 383 in total); Military Courts of Justice, which include the Military Court of Appeal (approximately 31 in total); and Administrative Courts of Justice, which include the Administrative Court of Appeal (approximately 27 in total).

The Minister of Justice informed the Special Rapporteur that Indonesia requires approximately 7,000 judges for its 800 courts. Currently, there are approximately 3,500 judges, with 300 or so judges appointed to the bench each year. There are 51 justice positions on the Supreme Court, of which 19 are currently unfilled.

Appointment, transfer and discipline of judges

Article 31 of Law 14/1970 provides that judges are to be appointed and dismissed by the President. This provision is further amplified by the subsequent Law 2/1980, which provides in article 31 that a judge is appointed and dismissed by the President on the proposal of the Ministry of Justice in consultation with the Chief Justice of the Supreme Court.

Law 2/1986 lists the qualifications required for appointment as a judge, which are to be: an Indonesian national, devoted to God Almighty, loyal to the Pancasila and the Constitution, a civil servant, a law graduate, to be dignified, honest, just and of good behaviour, and not to be a current or former member of the Communist Party.

After graduation from law school, judges undertake a one-year training programme currently provided by the Ministry of Justice. Those who pass this training, work for one to two years in district courts as court clerks before qualifying for the position of junior judge. The first assignment of a junior judge is usually to a small district court.

According to Law 40/1995, appointment to the Supreme Court requires five years' experience as a chief justice of an appellate-level court or 10 years' experience as a judge of an appellate-level court or 15 years' experience in the legal field, i.e. non-career judges. Article 24A (2) of the Constitution provides that the judge must have integrity and a personality that is not disgraceful; he/she must be fair, professional and possess experience in the legal aspects; and the appointment will be made by the Judicial Commission. Pending the establishment of the Judicial Commission, appointment to the Supreme Court follows a "fit and proper test" conducted by the DPR, which receives nominations from the DPR, the Supreme Court, civil society, and the Government. For the current 19 vacancies on the Supreme Court, 72 out of the 74 names under consideration by the DPR were proposed by the Supreme Court.

Proposals for transfer of judges originate from the Ministry of Justice, which is then approved by the Supreme Court. However, the final decision on transfer rests with the Ministry of Justice. Transfers are made for three reasons—to benefit the court, to benefit the judge and to benefit the judge's family. The Special Rapporteur was advised that, in 2001, approximately 750 judges were transferred, of whom 20 judges were transferred by the ministry as punishment for misconduct.

Article 20 of Law 2/1986 provides that a judge can be removed for (a) commission of a criminal act; (b) committing a disgraceful act; (c) continuously neglecting their duties; or (d) violation of their oath of office. An Inspector General, also located in the Ministry of Justice, receives complaints relating to the alleged misconduct of judges. Of the approximately 125 to 150 complaints received per year, the Special Rapporteur was advised that approximately 20 judges are found guilty of misconduct. The Director-General was unable to explain to the Special Rapporteur, however, what these cases of misconduct related to or the sanction for such misconduct.

Concern was repeatedly expressed to the Special Rapporteur that the Ministry of Justice exercises excessive power in the appointment, transfer and discipline of judges, increasing the likelihood of making judges beholden to the ministry. Specific concerns were also shared with the Special Rapporteur regarding the fit and proper test for appointment to the Supreme Court; *inter alia*, that there was insufficient inquiry into a candidate's track record and that subjective criteria are used for selection.

“Concern was repeatedly expressed that the Ministry of Justice exercises excessive power in the appointment, transfer and discipline of judges”

“There is no systematic publication of court proceedings and decisions”

Accountability of judges

The Special Rapporteur was informed that there is very little formal substantive supervision of judges and no effective accountability mechanism. The Supreme Court has appointed a Deputy Chief Justice for supervision. However, concern was expressed that the Deputy Chief Justice has no full-time staff and is not fully familiar with the functions of the task required. The Special Rapporteur was also informed that though senior judges are required to supervise the work of junior judges, the former's heavy workload made that task difficult. This assessment was borne out during the Special Rapporteur's discussions with justices of the Supreme Court, one of whom stated that “what is required is more supervision in the process and integrity of judges and court officials. Our culture and habits are also not conducive” [to this supervision].

The Special Rapporteur was also advised that there is no systematic publication of court proceedings and decisions.

In addition to the concerns expressed over the lack of an effective accountability mechanism to oversee the conduct of judges, attention was focused on the civil service status of judges. Prior to recent reforms, Indonesian judges were considered as civil servants. The Elucidation to Law 2/1986 makes it clear that Act 8/1974, Principles concerning Civil Servants, is applicable to judges. This required the Ministry of Justice to evaluate a judge's efficiency and effectiveness like other civil servants. Moreover, article 13 provides that the general supervision of judges as civil servants shall be conducted by the ministry. Notwithstanding the recent legal reforms whereby judges are no longer considered as civil servants, a number of judges informed the Special Rapporteur that, after 37 years of serving as a civil servant, the challenges of altering mindsets to that of an independent and impartial judge are significant.

Incidence of judicial corruption

The following incident was recounted to the Special Rapporteur by a former Director-General of Anti-Corruption Activities in the Office of the Attorney General: We had arrested a suspect in connection with corruption over a pre-trial detention and had obtained a detention warrant to question the suspect further. The warrant was about to expire, so I went before a judge to request its extension. In order for the warrant to be extended, I gave the judge a bribe. I was reimbursed for my trouble from the official budget of the Office of the Attorney General.

Many and varied interlocutors with whom the Special Rapporteur met—judges, prosecutors, senior lawyers, members of civil society, academics and government officials—referred to the problem of endemic and systematic corruption within the administration of justice, in particular, within the judiciary.

During the Special Rapporteur's mission, a number of reports were issued by various Indonesian organizations alleging widespread and systemic corruption within the administration of justice system.

In July 2002, an Indonesian NGO, Indonesian Corruption Watch (ICW), reported that corruption takes place at every step in the criminal and commercial legal processes. Corruption patterns cited in the criminal court include choosing a judge and negotiating the verdict with the judge. In civil proceedings, corruption is reported to take place by, *inter alia*, giving extra money to register the case and choosing a favourable judge. ICW also reported that a number of these practices, particularly the trading of verdicts, affect judges of the Supreme Court.

These allegations are supported by complaints received by the National Ombudsman Commission, which reported that in 2001, its second year of operation, 45 per cent of complaints received related to allegations of judicial corruption. A 2001 national survey on corruption, undertaken by the Partnership of Governance Reform, ranked the judiciary, along with the traffic police and the customs authority, as the most corrupt public institution in Indonesia. Judges and prosecutors were consistently ranked among the least respected of public officials.

A number of reasons were proposed to the Special Rapporteur to explain the incidence of corruption within the judicial system. This included, primarily, the low wages paid to judges, who are paid only slightly higher than other civil servants.

The low salaries paid to judges also reflect the budget of the court system as a whole, which is considerably less than the total required.

A number of senior lawyers referred to the double standard being applied by foreign companies operating in Indonesia. On the one hand, these companies want an environment of legal certainty in order to secure their investments; on the other hand, when it comes to their own cases, some companies are alleged to pressure judges and use unscrupulous lawyers in order to ensure a ruling in their favour. These concerns were echoed to the Special Rapporteur by representatives of the donor community who admitted that it was only now that the international community had itself been affected by the calamitous legal situation existing in Indonesia, and in particular, after it had been the victim of corrupt practices, that it had been forced to realize the severity of the situation.

The police and the public prosecution service

As the Minister of Justice pointed out to the Special Rapporteur, corruption is not specific to the judiciary, but affects the Indonesian bureaucracy as a whole. The Special Rapporteur was repeatedly told that corruption plagues the police and the prosecution service.

“Corruption is not specific to the judiciary, but affects the Indonesian bureaucracy as a whole ”

“There are no figures on the number of practising lawyers”

The Indonesian Judicial Monitoring Society (MAPPI) reported recently on its survey undertaken in April 2002 of 600 respondents, including judges, lawyers, academics, prosecutors, police and civil society. The survey cited allegations that police were bribed either to conceal evidence or not to detain suspects, and prosecutors were bribed either to report insufficient evidence to bring charges or that the facts do not constitute a crime.

The legal profession

The Special Rapporteur was informed that there are no figures available on the number of practising lawyers. Membership of the seven bar associations is voluntary. There is no law applicable to the organization of the legal profession, though the Special Rapporteur was informed that a draft bill on advocates, regulating the profession, has been before the DPR for the past year. Representatives of some bar associations told the Special Rapporteur that they would be supportive of an organized profession and of making membership mandatory, provided that their independence was not affected.

Each bar association has its own code of ethics. The seven bar associations, including the three largest, have adopted the Joint Code of Ethics, implementation of which, the Special Rapporteur was informed, is the responsibility of each bar association. This has the effect that, *inter alia*, lawyers expelled from one bar association are able to join others and continue to practise.

Law graduates can immediately be recruited to work in a private firm or company. To work as a trial lawyer, however, requires that law graduates take an entrance examination, conducted by the Ministry of Justice, in order to obtain a license to practise. Continuing legal education programmes for lawyers is non-existent.

The Special Rapporteur was repeatedly informed about the use of so-called “hanky panky” or “black sheep” lawyers who have built up their practices and reputations through corrupt practices, such as bribing judges, prosecutors and other court personnel. Indeed, many judges referred to the pressure put on them by such lawyers who, judges alleged, frequent judges’ chambers before hearings in the absence of the other party so as to influence the judge’s decision.

Steps towards reform

The Government, DPR and judiciary have embarked upon a number of judicial and legal reform programmes. The Government’s programme for judicial reform is set out in the five-year National Development Plan and identified, *inter alia*, the following issues as the most problematic:

- The lack of independent, impartial, clean and professional courts due to government and other influences, as well as the lack of quality, professionalism and morality of the law enforcement apparatus (includes courts, police, prosecution);

- The lack of public confidence in the courts; and
- The large number of corruption, collusion, nepotism and human rights cases that are still outstanding.

The Minister of Justice [has] listed a number of steps taken to combat corruption, including adoption of a law on corruption, collusion and nepotism, the settlement of human rights violations, and development of a law on the establishment of an Anti-Corruption Commission. The Special Rapporteur was informed, however, that notwithstanding these initiatives, [government partners consider] that the Government's attention to reform of the justice sector has been sporadic and extremely slow.

In May 2000, a joint investigating team (JIT), coordinated by the Attorney General, was established by presidential decree to investigate and prosecute corruption, initially in the court system and subsequently in other areas as its capacity increased. However, the Supreme Court decided that the JIT was unlawful because it had not been established by law, as required by the law on the establishment of an Anti-Corruption Commission. However, it was the very absence of the existence of the Anti-Corruption Commission that encouraged the then Attorney-General to establish the JIT.

Other bodies supporting the process of judicial reform include the National Law Commission and the National Ombudsman Commission. Since its establishment in 2000, the National Law Commission has focused on developing a law reform programme. The results of a long process of research and consultation undertaken by 15 sectoral working groups are expected to be discussed by the Commission and other key partners in the near future, with a master plan for legislative reform to be adopted thereafter.

The National Ombudsmen Commission was established by presidential decree in 2000. Its main focus is on maladministration of the Government and the judiciary. In 2000, 35 per cent of the 1,723 complaints received related to the functioning of the courts. In 2001, 45 per cent of its 511 cases related to the courts. A draft law on the establishment of the Ombudsmen is currently before the DPR and provides the Ombudsmen with the power to investigate and make recommendations. The Special Rapporteur was informed that both institutions have been underfunded and have lacked political support.

A number of Indonesian NGOs, including the Indonesian Institute for Independent Judiciary and the Center for Indonesian Law and Policy Studies, have recently been formed to support legislative and judicial reform and are working in a collaborative way with the Ministry of Justice and the Supreme Court.

“ Government attention to reform of the justice sector has been sporadic and extremely slow ”

“In spite of the widespread allegations of judicial corruption, statistics on prosecution or discipline for judicial corruption are unavailable”

In December 2002, the DPR adopted the law establishing the Anti-Corruption Commission. The Commission will be composed of five members and will have full authority to both investigate all cases of corruption involving State officials and prosecute these officials in an ad hoc court. The Commission is authorized to take over existing corruption cases being investigated by the Police and Office of the Attorney General. The relationship between the Commission and other existing structures designed to tackle corruption, such as the Ombudsmen, which is also seeking to be endowed with investigatory powers, was not clarified to the Special Rapporteur.

Conclusions

When the Soeharto regime was overthrown, an opportunity arose for the review of the 1945 Constitution and the adoption of a new Constitution to meet the aspirations of the people for a democratic country under the rule of law, as happened in the Philippines in 1987. Unfortunately, this did not happen. The piecemeal amendments to the Constitution since 1998, and moreover some of these amendments yet to be implemented are not satisfactory.

The independence of the judiciary is the cornerstone for the rule of law in any democratic society. The Special Rapporteur notes with extreme concern the lack of a culture of judicial independence in the country. For the first 40 years after independence, judicial power was seen as an extension of executive power. This has resulted in the judiciary being plagued with corrupt practices.

The Special Rapporteur notes with particular concern the excessive influence of the Ministry of Justice over the appointment, transfer and discipline of judges.

The Special Rapporteur also finds that the practice of transferring judges for misconduct to other courts instead of bringing them to a more formal disciplinary process is inappropriate and harmful to the interests of the public and consumers of justice.

It is apparent to the Special Rapporteur, that a considerable change in the mindsets of judges is required in order for them to fully disengage from their former civil service mentality and accept and fully understand their new roles as responsible for ensuring an effective and functioning independent and impartial judicial system.

With regard to judicial corruption, the Special Rapporteur notes with surprise that in spite of the widespread allegations of judicial corruption statistics on prosecution or discipline for judicial corruption are unavailable. Though the Special Rapporteur appreciates that judicial corruption is difficult to detect, failure to investigate it effectively brings the Ministry of Justice and the Supreme Court into disrepute.

The vast majority of interlocutors with whom the Special Rapporteur discussed the matter admitted the prevalence of corruption within the judiciary. Supporting research undertaken by Indonesian organizations on the matter also supports these findings. Accordingly, the Special Rapporteur finds that concerns regarding allegation of widespread corruption are real. Though there is no doubt that there are some honest judges, the integrity of these judges is tainted by unabated and widespread judicial corruption.

While there is admission from all quarters, including the Government, of the very high incidence of corruption in the public sector and in particular in the administration of justice, and calls for reforms are heard loud and clear both domestically and internationally, the slow pace with which the Government and the DPR are addressing the issues has called into question the political will of these institutions to deal with the situation on an urgent and priority basis. The Special Rapporteur fully understands that in this process of transition, Indonesia is beset by a number of challenges and that identifying priorities is a perilous task. The Special Rapporteur is convinced, however, that public confidence in the Government and its administration of justice is seriously undermined; there is a risk that the public will resort to self-help and take justice into their own hands unless something is urgently done. If corruption is not arrested and excised, the negative impact on the flow of investments will continue and the rule of law in Indonesia will remain in jeopardy.

The Special Rapporteur considers that it is essential to place the allegations of judicial corruption in the context of the administration of justice system as a whole. Corruption is not limited to the judiciary. Instead it spreads as cancer in the entire system, the judiciary, police, prosecutors and Office of the Attorney General.

Inadequate financial resources for the judiciary have also encouraged bribery and corruption, though the Special Rapporteur is of the view that low salaries alone do not contribute to the prevalence of corruption within the judicial system. Instead the incredible incidence of corruption reported seems, in part, a reflection of the institutional culture of corruption as an acceptable or, at the very least, tolerable practice of doing business.

The Special Rapporteur finds that the absence of publicly available information on court proceedings and decisions further fuels the lack of confidence with which the judiciary is held by the public at large. Corruption flourishes in a web of darkness and secrecy. By making judges publicly accountable for their conduct, the temptation to risk taking unsound decisions and follow unsound processes could be reduced.

An independent and organized legal profession is an integral part of the administration of justice and provides strength and support for the maintenance of an independent judiciary.

“Public confidence in the Government and administration of justice is seriously undermined; there is a risk that the public will take justice into their own hands ”

“Lack of regulation has allowed the legal profession to breach its professional responsibilities”

Accordingly, the Special Rapporteur notes with disappointment that though there are at least seven bar associations, there is no law applicable for the organization of the legal profession in Indonesia. Though there is a uniform code of ethics adopted jointly by the seven bar associations, implementation varies with each bar association. There is no procedure to discipline lawyers. This means that there is no real procedure to seek accountability from the legal profession. The procedures for qualification and admission are not adequately provided for under the law; there are some who conduct legal practices without adequate qualification. The Special Rapporteur finds it quite amazing that during his mission and after, no one was able to inform him as to how many lawyers there are in Indonesia.

The lack of regulation has allowed the legal profession to breach its professional responsibilities owed to the court, the client and society and to seek to improperly influence the judge.

The lack of a professional framework entails that the legal profession is not in a position to advocate effectively for change in the administration of justice. Its potential as a voice for reform is drowned by a cacophony of competing interests of each bar association. The profession is generally perceived as self-centred and works for its own enrichment.

The judicial reform process that began in 1999 has been slow. There are a number of initiatives under way but it is unclear how they relate to each other. Whatever changes and reforms may have been undertaken by the Government and the judiciary, they are not seen in reality.

Harassment and intimidation of judges, prosecutors and lawyers, particularly those handling human rights-related cases, is a matter of grave concern. Based upon the information provided to the Special Rapporteur, the governmental authorities appear to have failed in their duty to protect these judges, prosecutors and lawyers in areas of conflict.

Further, the Special Rapporteur is distressed to learn that, notwithstanding the attention focussed on the issue of victim and witness protection, at both a domestic and international level, including through the visit to the country in 1998 of the Special Rapporteur on violence against women, its cause and consequences, there is no comprehensive mechanism to guarantee protection for witnesses and victims. In this regard, the Special Rapporteur welcomes the protection provided by certain NGOs to victims and witnesses, but this should not be regarded as a substitute for a state-funded programme.

Recommendations

With regard to constitutional provisions concerning the administration of justice:

a) The Constitution should be amended to provide a complete separate chapter for the provision of an independent judiciary and an impartial prosecutorial service providing for fair trial procedures in accordance with international standards; and

b) Procedures for judicial appointments at all levels must be such as will ensure the appointment of persons who are best qualified for judicial office. In accordance with principle 10 of the Basic Principles on the Independence of the Judiciary, and article 12 of the Statement of Principles on the Independence of the Judiciary, any mode of appointment must safeguard against improper influences being taken into account so that only persons of competency, integrity and independence are appointed.

With regard to judicial corruption:

a) The Special Rapporteur considers that the prevailing situation requires drastic, urgent and far-reaching action. The Chief Justice, supported by the Ministry of Justice, should as a matter of priority initiate both a short-term and a long-term strategy with processes to address complaints of judicial corruption;

b) In the short term, and with the main objective of restoring public confidence in the system, the Chief Justice should be empowered to take leadership to deal with this matter supported by both the Supreme Court and the Ministry of Justice;

c) As a first step the Chief Justice should make clear to all judges that judicial corruption needs to be addressed seriously and urgently. Accordingly, the Chief Justice should call upon all judges who had indulged in corrupt practices to own up and resign from their judicial positions within a prescribed time period, say six months, in which event no punitive or further action will be taken against them;

d) In the event these judges fail to resign voluntarily within that time period, the Chief Justice should inform the judges that all allegations of judicial corruption or suspicions of judicial corruption will be investigated promptly and action taken;

e) As a second step, a transitional judicial disciplinary tribunal should be established guaranteeing the right to due process for judges. Upon a finding of corruption by such a disciplinary tribunal, the judge should be removed. Disciplinary proceedings before such a tribunal and a finding by that tribunal should be distinct from criminal proceedings before the ordinary criminal court and any finding by that court;

f) The procedure outlined provides judges with the opportunity to deal with the situation themselves and allows corrupt judges to leave quietly or be investigated and removed after due process. It will protect the honest judges and will restore confidence in the system speedily;

“ The prevailing situation requires drastic, urgent and far-reaching action ”

“The entire prosecutorial system and the police force, too, need to be addressed”

g) The fact that judges could not easily be appointed to replace the removed judges should not be used as an excuse not to adopt this recommendation. Concurrently the process of selection and appointment of new judges should be undertaken;

h) Similar urgent procedures must be adopted to address corrupt practices in the prosecutorial and police services. Action against lawyers involved in such practices too must be urgently addressed;

i) The establishment of the transitional disciplinary tribunal will require separate legislation and the DPR should attend to this need on an urgent basis. The body should be composed of the Chief Justice, a representative of the Ministry of Justice, senior lawyers and legal academics. The procedure should conform with the minimum standards provided in principles 17-20 of the Basic Principles on the Independence of the Judiciary. Being a transitional tribunal to deal with the current crisis of confidence in the judiciary and as a short-term measure a time limit for its existence should be provided;

j) As a long-term measure the Judicial Commission should handle all judicial disciplinary measures; and

k) The DPR must give this matter urgent attention.

A review of the salary scales of judges should be undertaken, drawing upon the comparative experiences of other States with similar socio-economic and cultural characteristics.

Publishing and disseminating court proceedings and decisions should be made a priority.

With regard to the legal profession:

a) The legal profession should be organized by legislation providing for a self-governing and regulating bar association. The independence of the profession should not be impinged upon. It is essential that a self-disciplining mechanism for the legal profession be established by law to enforce the code of ethics for the profession; and

b) In the interim, the seven bar associations should seek to integrate their activities. In this regard, a useful model to emulate is the integrated bar association of the Philippines.

The need for a holistic approach to reforms:

a) Reform should be holistic and the various phases coordinated. Addressing the judiciary per se will not be sufficient; the entire prosecutorial system and the police force, too, need to be addressed. A comprehensive master plan, encompassing the entire administration of justice system and identifying a coordinated structure needs to be prepared and implemented;

b) The Government should substantially increase budget allocations to finance these reforms for the next 5 to 10 years to complement the assistance committed by international donors;

c) Civil society should be encouraged to play an active role in the reform process to ensure that reform addresses public aspirations and rebuilds confidence of the public in the administration of justice system;

d) The reformers within the system should be supported by the international community. The support of the international community to the reform process is crucial; it is essential that its support is channelled into the coordinated approach; and

e) The effect of these reforms should measure up to the minimum set out in the Basic Principles on the Independence of the Judiciary; the Basic Principles on the Role of Lawyers; and the Guidelines on the Role of Lawyers.

Contempt of the constitution: Reaching the zenith of disregard for the rule of law in Sri Lanka

Kishali Pinto-Jayawardena, Public interest lawyer
& columnist, Sri Lanka

The 17th Amendment to the Constitution of Sri Lanka was unanimously passed by parliament in 2001 to stipulate independent supervision over important appointments in public service and key commissions. Hailed domestically and regionally as a creditable effort towards remedying a highly-politicised police and public service in particular, the constitutional amendment mandated a process of appointments to these commissions and offices through approval by an apolitical, 10-member Constitutional Council (CC). The intervening authority of the CC was to be an external check over what had earlier been unrestrained presidential fiat in the appointment process. Its composition envisaged a process of consensual decision-making by the constituent political parties in parliament.

Five members of high integrity and standing were nominated jointly to the CC by the prime minister and leader of the opposition. One member was nominated by the minor parties in the house. All these appointed members held office for three years. They could be removed only on strictly-mandated grounds, and any individual appointed to a vacancy held office only for the unexpired portion of that term. In addition, the president also had the authority to appoint a person of his or her own choice. The rest of the CC comprised of the leader of the opposition, the prime minister and the speaker of the house *ex officio*.

The powers of the CC were twofold. Firstly, it was empowered to nominate members to key commissions, who were then appointed by the president. These bodies included the Elections Commission, Public Service Commission, National Police Commission, Human Rights Commission, Commission to Investigate Allegations of Bribery or Corruption, Finance

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Commission, and Delimitation Commission. Secondly, it was authorised to approve appointments to important public offices such as the auditor general, inspector general, chief justice and judges of the Supreme Court, as well as the president and judges of the Court of Appeal. It also had to approve the appointment of the two members of the Judicial Service Commission other than its third member, who is the chairman and by tradition, the chief justice.

Early implementation of the 17th Amendment

Some problems were identified in the implementation of the 17th Amendment during 2003 and 2004. For example, at one point, the first presidential appointee—a senior constitutional lawyer—wished to resign his position (due primarily to public criticism that he was continuing with his practice while a member of the CC). At that time, it was discovered that there was no provision made for the resignation of the presidential appointee, unlike the other nominated members. By similar oversight, the successor to the vacancy created by his departure also stayed on not for the unexpired portion of that term but instead held office for a full three years. There were other concerns at the non-prescribing of proper time limits of key constitutional bodies, and the lack of provisions for resolution of disputes arising between the recommendatory authority of the CC and the appointing authority of the president. More substantively, it became clear that the powers granted to the Elections Commission (exercised by the election commissioner during that period, as the commission was not set up) were inadequate.

However, despite the hasty manner in which the 17th Amendment was passed by parliament, all these deficiencies could have been corrected by a further constitutional amendment. Yet, what Sri Lanka witnessed thereafter was not a consensual effort at improving the 17th Amendment but rather its systematic downgrading and devaluing.

Opening tussles between the Constitutional Council and presidency

One of the new commissions established under the 17th Amendment was the Elections Commission (EC). This body was given greater powers than what had existed previously in regard to supervision of the electoral process, including the power to appoint a competent authority for two state media institutions if they violated guidelines in the pre-election period. As abuse of the state media had become a recurring and well-documented feature of Sri Lankan elections, this was a salutary provision.

However, the EC was not even established due to opposition raised by then President Chandrika Kumaratunge over the proposed chairperson. Though the CC (which included a presidential appointee) considered her objections, it found no merit in them. Thereafter, the recommendations it again forwarded to President Kumaratunge were not accepted, despite

“Despite the hasty manner in which the 17th Amendment was passed, deficiencies could have been corrected by a further constitutional amendment; yet, what Sri Lanka witnessed thereafter was its systematic downgrading”

“By early 2006, the 17th Amendment had essentially broken down”

frequent pleas from the incumbent elections commissioner that the EC be speedily constituted. His appeal to the Supreme Court on the same went unanswered. A similar appeal filed by a public interest group in the Court of Appeal, calling upon the court to compel President Kumaranatunge to appoint the members of the EC, also failed (see *Public Interest Law Foundation vs. the Attorney General and Others*, CA Application No 1396/2003, CA Minutes of 17.12.2003). In the latter instance, the argument was interestingly that article 41B of the Constitution (brought in by the 17th Amendment) did not permit the president to wield unfettered powers over the appointment of the EC, and that she had no discretion over the appointments once the CC forwarded its recommendations. However, article 35(1) of the Constitution was held to give ‘blanket immunity’ to the president from proceedings instituted or continued against her in any court in respect of anything done or omitted to be done in her official or private capacity, except in limited circumstances constitutionally specified in relation to *inter alia* ministerial subjects or functions assigned to the president and election petitions.

In the period thereafter, the new National Police Commission was also hampered at every turn by politicians who took umbrage at its efforts to prevent political transfers of police officers prior to elections. Astonishingly, government politicians proposed in 2005 that the inspector general of police should form part of the police commission.

The 17th Amendment breaks down

By early 2006, the 17th Amendment had essentially broken down. The term of the six appointed members to the first CC had expired in March 2005, but the vacancies had not been filled. The terms of office of the commissions on police and public service lapsed in late 2005, but new appointments could not be made due to the ongoing failure to constitute the CC. The cabinet therefore decided on a novel remedy. In December 2005 it agreed that “the arrangements that prevailed prior to the establishment of these Commissions could be resorted to, purely as an interim measure...” The “responsibilities” of the National Police Commission and Public Service Commission were thus “assumed” by the inspector general of police and secretaries of ministries or heads of departments respectively.

Further controversy followed. In early 2006, the two senior judges of the Supreme Court who constituted the Judicial Service Commission along with the chief justice resigned their positions, citing grounds of conscience. The widely-held perception was that the resignations were due to differences with the chief justice, whose actions in dismissing and transferring judges of the subordinate courts had been seen as arbitrary and unfair in past years.

Only one 17th Amendment body was still left functioning, namely the Human Rights Commission. That lapsed too in March 2006. With that, the 17th Amendment all but collapsed.

The failure to constitute the CC was due to the deliberate inaction of minor political parties. Though these parties were vested with the constitutional duty of agreeing, on majority vote, to one remaining member to the CC, they did not make that single nomination. For his part, the new president, Mahinda Rajapakse, also refrained appointing the five nominees jointly sent to him by his own prime minister and leader of the opposition.

Contempt of the constitution

Taking this constitutional fiasco even further, President Rajapakse recently proceeded to make direct appointments to the commissions, thus effectively voiding the vetting process vested in the CC. These appointments were made without first attempting to compel the smaller parties, one of which is closely allied with his own party, to come to a consensus on the remaining nominations to the CC. He also did not attempt to make the appointments of the nominations already communicated to him.

The appointments were problematic not only in procedure but also in substance. The appointees are predominately supporters and close personal friends of the president. The incredibly slipshod manner in which they were made was disclosed when President Rajapakse went on to make seven appointments to the police commission without being properly advised that there were still two serving members. By his appointments, the police commission came to have nine members, two more than the constitutionally-stipulated number. This caused great embarrassment to the government. The status of that commission is now obscure, with unconfirmed reports that the new appointments have been revoked. However, the appointments to the Public Service Commission have gone ahead and the commissioners are now apparently serving in their positions despite calls being made to them to resign, given the unconstitutional manner of the appointments.

Insofar as the other commissions are concerned, the Judicial Service Commission has also been balanced on a knife edge of constitutional propriety by having two acting members appointed to it by the president. The constitution permits acting appointments to be made without the approval of the CC only up to 14 days. One presumes that the acting appointments are being renewed every 14 days, thus violating the spirit if not the letter of the constitution.

Prior to its members also going out of office, the Human Rights Commission delegated its powers of investigation to a committee. But, no official recommendations or reports could be released as a result of the non-constitution of the primary body. This effective crippling of its functioning had serious impact in the northeast,

“Taking this constitutional fiasco even further, President Rajapakse recently proceeded to make direct appointments to the commissions”

“It does not require profound constitutional deliberations to acknowledge the lesson that this holds for the conflict in the northeast”

where the commission had been engaged in safeguarding citizens caught in the cross fire between government and opposing forces. President Rajapakse, in line with his other appointments, subsequently made direct appointments to the commission.

Ironically, two former members of the Human Rights Commission, both senior law academics, declined reappointment, even though they had been lobbied hard by government officials. In their stead, a former judge of the Supreme Court, now in his eighties, and a retired judge of the Court of Appeal who had sat on various presidential commissions of inquiry together with three others (two of which were virtually unknown to the human rights community in Sri Lanka) accepted the appointments. In this case as well, protests by civil society organisations were to no avail.

Conclusion

The president's flagrant violation of the constitution has now reached its zenith with the filling of vacancies in the Court of Appeal and one vacancy in the Supreme Court, disregarding the pre-condition of approval by the CC. This step has consummated the unholy disregard for due constitutional process. These appointments again bypassed the constitutional requirement decreeing approval by the CC upon a recommendation by the president. This requirement obviously could not be complied with in the absence of the CC. The question that now arises is: will decisions by judges appointed in this manner possess constitutional legitimacy if challenged at any point in the future?

Currently, there are grave concerns that the government might legitimise its bypassing of the 17th Amendment and embark on its own process of expedient constitutional reform. These fears were borne out recently by efforts through the Ministry of Constitutional Affairs to hold discussions on a "new bill of rights for Sri Lanka" without addressing the outstanding problem of the non-implementation of the 17th Amendment. The destruction of the 17th Amendment also reflects negatively on Sri Lanka's newly-won seat in the United Nations Human Rights Council, and creates doubts over the government's commitment towards constitutional democracy.

It does not require profound constitutional deliberations to acknowledge the lesson that this holds for the conflict in the northeast. Where constitutional provisions for effective governance in the south are disregarded so easily, what is there to allay fears of the ethnic minorities that a similar fate may visit constitutional compromises of devolution or federalism as the case may be, at any moment that the government may find it politically expedient to do so? There is no simple answer to this devastating question.

New book: *The other Lanka*

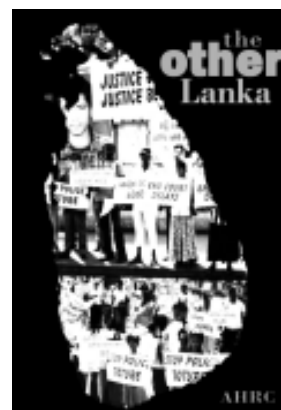
Asian Human Rights Commission, Hong Kong

The other Lanka, Meryam Dabhoiwala & Rob Hanlon (eds), Asian Human Rights Commission, Hong Kong, May 2006, ISBN-10: 962-8314-29-7; ISBN-13: 978-962-8314-29-14, 192pp.

In recent years the Asian Human Rights Commission (AHRC) and its sister organisation the Asian Legal Resource Centre have published a considerable amount of material on Sri Lanka's legal and justice systems, as well as its human rights abuses. Most recently, the AHRC published *An x-ray of the Sri Lankan policing system and torture of the poor* (September 2005), which documents 65 cases of police torture. Other books include *The right to speak loudly: Essays on human rights* (March 2004) and *An exceptional collapse of the rule of law: Told through stories by families of the disappeared in Sri Lanka* (October 2004), covering the stories of over forty families whose loved ones were forcibly disappeared. Two special reports in *article 2* have also focused on torture and other human rights issues in Sri Lanka ('Torture by the police in Sri Lanka', vol. 1, no. 4, August 2002; 'Endemic torture and the collapse of policing in Sri Lanka', vol. 3, no. 1, February 2004). Besides this, many articles written by the AHRC on human rights issues in the country have been published in Sri Lanka and abroad.

The other Lanka, the latest publication in this series, is a collection of AHRC materials that have been reproduced in Sri Lankan newspapers and other periodicals, together with articles from a weekly column in the Sunday Times by journalist Kishali Pinto-Jayawardena, and published articles by Basil Fernando, executive director of the AHRC.

The book's abiding concern is with the collapse of the Sri Lankan justice system, which has fallen to a point where it is unable to benefit those seeking justice, but instead serves those committing crimes. This collapse is linked to Sri Lanka's failure to modernise its policing system, to address delays in its courts and to ensure accountability in its public institutions. Inevitably, corruption is rampant. Rather than halting this collapse, the ruling elite has in recent years taken steps to undermine all measures initiated previously to shore up the few remnants of the rule of law in the country.



“The ethnic conflict in Sri Lanka is itself a product of the breakdown of governance ”

The most significant damage in recent times has been caused by the utter degrading of the 17th Amendment to the Constitution. This amendment, while limited and incomplete, was a genuine response to the unlimited power given by the 1978 Constitution to the executive president. The amendment enabled several commissions to supervise the functioning of key public institutions, including by way of powers over appointments and disciplinary control of employees. Commission members were to be selected by a Constitutional Council, appointed with agreement by all parties in order to prevent the government from making political appointments. Due to the failure of the president and government to ensure that appointments have been made to the Constitutional Council, none of the 17th Amendment commissions are functioning at present. The abandonment of the 17th Amendment ends independent supervision of key public institutions and returns absolute power to the executive president.

Sri Lanka is no exception to the rule that power corrupts, and absolute power corrupts absolutely. Even the auditor general is now being attacked for carrying out his duties, on the premise that his audit reports of public institutions may create a wrong impression.

Earlier this year, two Supreme Court judges resigned from the three-member Judicial Service Commission as a matter of conscience. Despite strong local and international demands for the judges to voice these matters of conscience, silence prevails. It is clear the judges fear the repercussions of speaking out. This fear of repercussions is very real. It prevails throughout all aspects of life in Sri Lanka.

Through statements and articles published in 2005, *The other Lanka* illustrates the expectation that every attempt to assert independence or to reveal wrongdoing may lead to serious threats on life, employment and property. Many persons living outside Sri Lanka see ethnic conflict as the only—or main—problem facing the country. For people living in Sri Lanka however, there is another reality: the reality of authoritarianism, which affects everyone and everything. The AHRC has always held that the ethnic conflict in Sri Lanka is itself a product of the breakdown of governance in the country, especially after the introduction of authoritarian rule through the 1978 Constitution. It is this “other” Lanka that needs study and understanding if the present catastrophic situation is to be resolved.

[Continued from front inner cover]

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

Sadly, article 2 is much neglected. There is a dearth of relevant international jurisprudence, and hardly any mention of it in the enormous volumes of annual literature on human rights.

There is a reason for this neglect. In the 'developed world' the existence of basically functioning judicial systems is taken for granted. This does not mean that these systems are perfect; in some instances they may face serious problems. But those from countries with developed democracies and functioning legal systems may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. As persons from such countries guide the global human rights movement, vital problems outside their experience do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise. One is the fear to meddle in the 'internal affairs' of other countries too intimately. State parties especially can create many obstacles for those trying to go deep down to the roots of problems. Thus, inadequate knowledge of actual situations may follow from the nature of interactions and the monitoring system itself. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

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

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

In this issue of *article 2*

Focus:

Impunity vs. the rule of law in Indonesia

*Fergus Kerrigan & Paul Dalton,
Danish Institute for Human Rights*

- The Human Rights Courts and other mechanisms to combat impunity in Indonesia

*Taufik Basari, Attorney, Legal Aid Institute of Jakarta,
Indonesia*

- New law needed to implement the UN Convention against Torture in Indonesia

And

- Report on visit to Indonesia by the UN Special Rapporteur on the independence of judges and lawyers

Also

*Kishali Pinto-Jayawardena, Public interest lawyer & columnist,
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- Contempt of the constitution: Reaching the zenith of disregard for the rule of law in Sri Lanka

Asian Human Rights Commission, Hong Kong

- New book: *The other Lanka*

And

- Somchai Neelaphaijit honoured with 2nd Asian Human Rights Defender Award of the Asian Human Rights Commission

article 2 is published by the Asian Legal Resource Centre (ALRC) in conjunction with *Human Rights SOLIDARITY*, published online by the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

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

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Annual Subscription Fee (6 issues)

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ISSN 1811702-3



Printed on
recycled paper