



***The Inability to  
Prosecute and  
Failure to Protect  
Human Rights in  
Asia***

***Report of  
the Fourth  
Consultation on  
an Asian Charter  
on the Rule of Law***

***17-21 November 2008  
Hong Kong***



**Asian Legal Resource Centre**



# **The Inability to Prosecute and Failure to Protect Human Rights in Asia**

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998 Canton Road  
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Hong Kong SAR, China  
Tel.: (+852) 2698 6339  
Fax: (+852) 2698 6367  
Email: [ahrc@ahrc.asia](mailto:ahrc@ahrc.asia), [alrc@alrc.net](mailto:alrc@alrc.net)  
Websites: [www.ahrchk.net](http://www.ahrchk.net), [www.alrc.net](http://www.alrc.net)

Edited by  
Nick Cheesman

Layout and design by  
Clear-Cut Publishing & Printing Co.  
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Fourth Consultation on an Asian Charter on the Rule of Law 17-21 November 2008, Hong Kong

# Foreword

A group of jurists, legal academics and lawyers from around Asia on 17 to 21 November 2008 gathered in Hong Kong for the Fourth Asian Human Rights Consultation on the Asian Charter of Rule of Law, on the theme of prosecution systems in Asia.

A well-functioning judicial system is one of the cornerstones for upholding the rule of law and democracy. Concerns about the relative perception of the rule of law and the absence or erosion of democratic values in any society reflect the state of affairs of the judicial system in that society. Protection, promotion and fulfilment of human rights and human values are impossible without a rule of law regime.

The absoluteness of the rule of law is a mythical concept. No state can or will ever be a perfect model that guarantees all tenets of the rule of law to everyone. Challenges and prejudices in government ripple out from myriad whirlpools. These political, cultural, historical and racial influences perpetually affect rule of law regimes irrespective of jurisdiction.

The Asian Human Rights Commission (AHRC) is taking the initiative to formulate an Asian Charter on the Rule of Law. It is an attempt to postulate a functioning as well as reasonable example of a code for the rule of law that could be adapted by states, particularly in Asia. To formulate such a charter it is imperative to understand the issues that adversely affect judicial institutions in the region.

One of the elements of the justice machinery that is often less explored and least understood is the office of the prosecutor. Irrespective of procedural philosophy in applying the law, the prosecutor plays an important role in the day-to-day functioning of the courts. The work of the prosecutor represents the philosophy of the state in punishing crimes. In this capacity, the prosecutor often wears different hats, ranging from that of an inquirer, to that as representative of the victim, or of the state, as well as an officer of the court and a professional lawyer.

In most Asian jurisdictions the office of the prosecutor has a diminished capacity to understand and appreciate its tremendous responsibility. The prosecutor's office is often mistakenly conceived as an arm of the government or as a moderator. As an arm of the government it is expected to persuade the court to hand down a conviction in every case. As a mere moderator it is expected to liaise between the investigating agency and the courts.

The state and others who wield effective control often misuse the prosecutor's office to render 'selective justice'. To achieve this end the state employs various means to interfere with the work of the prosecutor. Being state appointees, prosecutors are often selected so as to support the state's agenda. States often keep the office in flux, through uncertainty of tenure or even by transferring prosecutorial powers to police officers, so as to exploit the

anxiety of staff about their jobs and ensure that only those who are acceptable to its goals continue in their posts. There are places where prosecutors, by law or by practice, are being required to work under the supervision of police or military officers, again adversely affecting the independence and impartiality of the office. And in domestic and international forums, prosecutors have frequently been required to wash the dirty laundry of their states.

The effect of such interference on the work of prosecutors results in either of two things: the creation of a prosecutorial office with unwarranted powers or an office and officers who are demoralised because there is no hope of improvement to their conditions. Low morale coupled with dishonesty in work has resulted in a very low standard of professionalism in prosecutors' offices.

In some Asian jurisdictions, appointment as a prosecutor or as a state attorney is considered to have within it a guaranteed invitation to the judiciary. Judges who come to their jobs by this backdoor entrance have sometimes contributed to the devaluation of the judiciary, which will take much more time to recoup than it did to lose in the first place.

This regional consultation was held to explore, identify, document and share the concerns of practitioners and jurists who feel that these sorts of issues are part and parcel of their own jurisdictions. Issues unique to particular countries also were identified. The consultation was not conceived with the idea that it would immediately make recommendations to correct decades-old problems, but rather that it would serve as a platform to air, discuss and document the real problems of prosecution in Asia.



# **Introduction: Obstacles to the protection of human rights through administration of justice**

*Basil Fernando, Director, Asian Human Rights Commission*

After very intense discussions at the Fourth Consultation on an Asian Charter on the Rule of Law, held in Hong Kong from 17 to 21 November 2008, a strong consensus emerged on some important issues relating to the administration of justice in most countries of Asia. Apart from some exceptional places, like modern-day South Korea and Hong Kong, participants acknowledged that their countries, including Pakistan, Bangladesh, India, Nepal, Thailand, Cambodia, Indonesia and the Philippines have certain common characteristics that serve as obstacles to the protection of human rights through administration of justice.

One thing that very clearly emerged was that these countries are operating under something other than a rule of law system. By rule of law system, we do not mean a perfectly-operating system of the sort found in theory. Rule of law systems are also imperfect, and may contain many defects. The United States' imprisonment of detainees at Guantanamo Bay, the introducing into many developed jurisdictions of laws to detain and restrain alleged terrorists without trial, and the courts' allowance of increased surveillance of citizens in democratic countries are all examples of how the law can be misused to curtail fundamental rights in places where its rule is established. However, none of these are the same as the problems found in countries around Asia that are operating outside of the rule of law, and to compare the administration of justice in such places with those in the region would be misleading. It would also prevent a proper analysis of the types of problems faced in these jurisdictions.

Within a rule of law system, even where there are many serious defects, they can over time be dealt with not only because the work of policing, prosecuting and judicial agencies is established and supported, but also because of the relative strength of public opinion and protest. By contrast, what exists outside of such systems is overwhelming lawlessness, with at most but a few institutions able to maintain a semblance of the rule of law. In some of these countries there remains legislation that had been enacted in the past and a handful of professional traditions that has been kept intact over some decades that together create an appearance that there is some sort of rule of law. But in the bigger picture these things are unimportant and among the ruling classes and subservient intellectuals the rule of law is, although there may be rhetorical commitments to it, not considered relevant at all. In fact, these groups often find the rule of law inimical to their interests, and military interventions and other actions aimed at strengthening executive power serve to prevent it from being realised.



The two set ups, one a flawed rule of law, the other, a system that substantively encourages impunity with only a few measures and means to ensure accountability, cannot be usefully compared. Take the case of Guantanamo Bay. The authorities responsible for this detention centre had to conceive of it in order to deprive prisoners the rights that are ordinarily available within the system of justice in the United States. This means that a strong and comprehensive justice system does exist but some people are being actively denied the rights that are available to them within that system. The opponents of these deliberate measures have with growing success called for the shutting down of Guantanamo Bay and the bringing of all persons detained there into the ordinary justice system. They have had a variety of avenues available to make their case heard, including the media, electoral system, and the conventional courts themselves. By contrast, in a system where impunity is substantively encouraged, not only is the incidence of abuse routine but the avenues to fight against it far fewer. Victims may as a matter of practice simply be forcibly disappeared and killed, rather than deliberately detained outside of the conventional system. The criminal justice system may prove unable or unwilling to do anything about it. There may be hardly any possibilities for victims or their families to get the assistance of courts. Corruption, inertia, political interests, delays in adjudication, the ease with which witnesses may be intimidated and evidence erased all accumulate to a point that the system has no capacity at any level to respond effectively. The public space available for making public opinion is also limited. The newspapers and electronic media may be subject to severe restrictions, and may instead primarily disseminate state propaganda to justify extralegal actions, or name dissenters as traitors. Where some kind of electoral process exists, again avenues for change may be very limited. It may be manipulated to ensure that candidates favouring authoritarian policies obtain victories.

Any meaningful discourse to resolve the types of problems found in systems encouraging impunity, which are prevalent in the countries that were discussed at the consultation in Hong Kong, should be grounded in firm understanding of what is really happening in these places. Merely to describe a superior model and restate that such a model should be adapted to fit these places is to do nothing more than offer a pious hope. The restatement of the norms upon which a developed system is founded does not have the capacity to alter the

existing situations in most countries around the world. Such an approach is intellectually evasive and morally timid. The problems must first be stated accurately if we want solutions.

Much of the time in this consultation was spent to articulate the real conditions of the prosecution, as well as the police, judiciary, political system and means for public expression in the countries where the participants work and live. Shocking details emerged. Prosecutors are in some places so deeply politicised in favour of existing regimes as to make their normative function completely irrelevant. Members of the judiciary are utterly corrupted and subjected to executive control. The work of police is entirely unlike that found in rule of law set-ups. Political systems and the media are inhibited through the use of violence against opponents and vocal critics. These are the conditions that the participants encounter everyday that must come vividly into the debate on these matters.

### **Institutional reform to protect human rights is the top priority**

There was agreement among participants at the consultation that the top priority for the protection and promotion of human rights in Asia should be institutional reforms to policing, and the prosecuting and trying of cases. Whereas in the past human rights work has concentrated more on education and the search for redress in individual cases, these approaches can work only where something approaching a rule of law system is already in place. In countries characterised by systemic impunity, institutional flaws defeat the possibilities for individual redress and do not provide opportunities for education and training to be put to use.

State initiatives on human rights often encourage donors to provide technical training, particularly for the police but also sometimes for the prosecutorial and judicial arms. However, when institutional defects make the training of some individuals irrelevant these investments do not produce the expected results. For example, some police have received instruction on forensic science and human rights. Where these officers are operating in a system that is premised on the non-investigation of crime, even if they are well trained and sincere it will make little difference because there exists an institutional understanding that offenders should not be caught that goes far beyond questions of technical capacity. No amount of forensic training can alter that institutional practice. In this instance, reform depends on the development of policies and procedures to ensure that no one who commits a crime is exempt from sanction. The same can be said about the human rights training of state officers. However much human rights education may be imparted, its practical use depends on the system itself. If the system is so politicised that such training is merely to create an impression that the state is interested in human rights and to obtain some more resources from abroad then such learning will be of little practical value. In both cases this sort of training may also cause further demoralisation, as people equipped with new skills and knowledge that are keen to use them find that they have no real opportunity to do so. Money, time and skills are wasted in such programmes, which do not bring the desired results.

National human rights commissions in Asia encounter the same problems. When there are fundamental flaws in how people are prosecuted, investigated and tried there is very little

that these institutions can do. Sometimes they try to take on some of the functions of the police, prosecution and judicial branches, even though this is not their mandate and nor is it something that they are equipped or empowered to do. Rather, they can only work as complements to functioning institutions, not their substitutes. In Europe, the concept of the ombudsman was developed after basic systems for administration of justice were well developed. Such an agency cannot work where the rest of the system is badly malfunctioning. So again it can be seen that while in recent decades donors have invested heavily in these national institutions their efforts were from the start bound to fail for want of the necessary systemic preconditions.

Systemic reform requires deep understanding of the political, social, cultural and legal arrangements that have prevented the system from orienting itself towards the effective administration of justice, and the bringing of this understanding into public debate. It is only through the making of public opinion that lasting change can be achieved. This means exposing what is wrong with the existing systems through detailed documentation and professional articulation of the problems, both in terms of what is being done that should not be and what is not being done that should be. Human rights groups need more sophisticated means for communication to wide audiences and they must be prepared with the means for rebuttals of government denials. All this requires thorough accounts of violations, the institutional causes of these violations, and detailed suggestions for improvements.

### **The preminent position of the police has seriously undermined the administration of justice in Asia**

The legal texts of most countries in Asia envisage functioning justice administration systems with a healthy balance between prosecuting, investigating and trying crimes. In most places, as far as these texts are concerned there are legal safeguards against the police gaining a preminent position within the system as against the other actors. But in reality there are in most countries in the region vast gaps between the legal texts and actual practices. Over long periods the police have come to dominate the administration of justice to an extent that there is very little room left for the proper implementation of law. The extent of police power provides enormous opportunities for corruption and for political and criminal elements to exploit the police for their benefit.

The capacity of the police to investigate can be subverted at the point at which complaints are made or during investigation itself.

The receipt of a complaint is the beginning of any inquiry into a crime. Unless a complaint is received promptly, politely and efficiently, much information and evidence can be lost. In most of the countries where the participants at the consultation work, the police subvert the complaint-receiving process by making life difficult for complainants. They may, for instance, extort money in order for a complaint to be recorded, or neglect to put down the full details in order to protect the perpetrators through inadequate or incorrect record keeping. Participants narrated many other methods that are used directly to inhibit or prevent the recording of complaints in specific instances. Beyond these, perhaps the most

effective way to deny complaint making at a systemic level is by creating a general awareness that complainants are unlikely to obtain any positive results but may instead face reprisals, causing people to opt out altogether. Victims of crime may convince themselves or be advised that it is better to remain silent and bear the loss than to complain and suffer greater problems.

During investigation, police can obstruct justice either by incompetence or sabotage. Unqualified police who may also perform duties such as security for visiting VIPs are at other times given the task of conducting investigations. They do not develop the skills they need for the job. Good investigators may also be subjected to political interference, being punished through transfer or other forms of reprisal. Some are even killed or threatened with death, sometimes by other police personnel. In such cases, the lack of competence is not the result of incapable or untrained personnel but a deliberate policy to keep the police inefficient and corrupt. Political loyalties and the capacity for compromise at higher levels in the system may also feature prominently and serve to undermine stated principles and values. In these cases investigations are often brought to a halt through intervention of higher-up officers acting in cooperation with politicians or other powerful sectors of society.

Wherever the state encourages the police and military to engage in systemic abuse of rights, such as via forced disappearances, extrajudicial killings and torture, it creates enormous obstacles for investigations and directly or indirectly endorses impunity. This often happens when emergency regulations and anti-terrorism laws are used. In many countries across Asia such laws have been applied for long periods and for millions of people have become normal. However, such incidents can also take place systemically under the influence of corruption and where powerful interests mitigate against the proper administration of justice.

A direct cause for the subversion of the complaint-making and investigation functions of the police is the loss of command responsibility, which is essential for its proper functioning. The police hierarchy often subordinates to politicians and other non-police officers. This may happen in circumstances beyond the control of the police or because the police themselves are trying to acquire greater powers for personal advantage through new alignments. When command responsibility is broken down, not only the senior officers but also their subordinates develop new methods to gain some personal advantage. Across time, these eclipse the work of the police as an institution for the public interest and can make it almost entirely self-serving.

### **Inadequate funds for administration of justice**

When budgetary allocations for administration of justice are compared to other items on government budgets in Asia, most of the time they come out far down on the list. In some countries they are so inadequate that there is no possibility for the effective functioning of prosecutors, judges and police at all. When combined with the fact that military budgets usually vastly exceed those for the administration of justice, there is a doubly adverse effect. The prestige of the armed forces and their capacity to operate comes to outweigh enormously that of the police and judiciary. As the public image of the military grows taller, that of all

other institutions grows smaller. So too does impunity loom larger and larger in the workings of the military, which in turn further reduces the means for justice to be administered on the principle that no one is above the law.

In the most alarming circumstances, a policy of military expansion is accompanied with rhetoric to the effect that independent institutions for the administration of justice are an obstacle to the war on terrorism. A former Sri Lankan junior minister of defence put this position succinctly in parliament by stating that counter-terrorist operations could not be done according to law. The view that Great Britain took during the Second World War that victory could be assured only if the courts were independent and functioning is not a doctrine that is widely accepted in countries of Asia. Sometimes, a similar line of rhetoric even emerges in language on development, where the independence of the judiciary is not held as an essential component for economic and social progress. All this encourages the legislative and executive arms to postpone considerations about improvements to the administration of justice on the grounds that they are of less importance and urgency than many other matters.

Taking all these factors into consideration the participants at the consultation were of the view that the human rights movement should make it a priority to agitate for adequate budgetary allocations for the administration of justice. Local and international advocacy should be directed towards achieving this goal, lest much of the discussions and work on human rights again prove incapable of achieving practical results.

### **The problems of prosecution systems**

The participants were of the view that a proper system of prosecution requires credible mechanisms to receive and investigate complaints, to allow the accused a right of defence, to protect witnesses and to ensure judicial independence. That most countries in Asia do not have these mechanisms seriously undermines the capacity of the state to prosecute crimes, especially those committed by state officers.

In most Asian countries powerful sectors of society remain above the law and the prosecutors have neither the inclination nor the capacity to deal with them, least of all where complaints relate to prevalent bribery and corruption in business life. Thus, prosecutors only deal with cases related to less-powerful groups. Compounding these obstacles, where parts of the executive or legislature interfere with the work of prosecutors their work is further undermined.

Often legal doctrine is misinterpreted to justify prosecutorial inaction. For example, prosecutors may claim to be neutral, by which they mean that if the police do not investigate a crime and present them with a dossier then they can wash their hands of responsibility. This allows them to do nothing and even abdicate their responsibilities. However, in other cases it allows them to use their discretion in a subjective manner. In some instances of special interest they may interact with investigators to ensure a proper investigation, while in others they may insist that they are unable to do anything.

## Some other matters to emerge

**Witness protection:** In most countries of Asia there are no effective modes of witness protection. In some places the extent of police power and perversion of the system as a whole may be such that at present it is literally impossible to provide an effective and credible independent witness protection programme. Where the police are used to kill and harass witnesses there is hardly any way to protect them. Where a tacit policy of non-investigation of certain types of crime exists, interested persons harm witnesses knowing that the police will not pursue them. The human rights community must give far greater attention to the issue of witness protection, and make it a part of its agenda and public debate across the region.

**Role of lawyers:** In some countries, criminal lawyers who want to be successful need to become collaborators with the police. They often must act as intermediaries between the police and others trying to make payments to get investigations resolved one way or another. As a consequence they have to compromise on the rights of their clients. Those who refuse to play along can be blackmailed and otherwise harmed. Those who undertake cases against the authorities become direct targets for legal and physical attacks from the police and other powerful interests.

**All-pervading bribery and corruption:** One of the participants described how a law student attended a lecture on prevention of corruption in Bangladesh. The lecturer, a senior lawyer, mentioned many ways to avoid corruption. The student asked, "Sir, when I join a chamber to practice law soon, as I expect, if I am given some money by my senior to carry to the judge, what can I do?" Perhaps this sums up the awareness of most participants in the consultation that corruption pervades the institutions in which they are forced to work. When it comes to human rights violations, corruption is even worse than usual. A policeman accused of torture, for example, may develop a relationship with a judge that benefits the latter far more than anything provided by ordinary persons. Thus, when human rights cases enter the courts they may cause new relationships to develop with negative effects for the system as a whole. Clearly, the struggle against bribery and corruption must also be at the core of the human rights movement. It is impossible to diminish the preeminent position of the police without developing anti-corruption agencies outside the policing system. Participants acknowledged that the Independent Commission Against Corruption in Hong Kong is a good example of the type of agency that is needed in every country throughout the region.





# Resolutions

## **1. Support of the lawyers' movement in Pakistan**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law unequivocally pledge our support for the lawyers' movement in Pakistan. We applaud the heroic 18-month struggle of the lawyers committed to the rule of law in Pakistan, and recognize the sacrifices they have already made and are making for the sake of an independent judiciary. The struggle is unprecedented in the history of Pakistan.

The peaceful protests of the lawyers have reinvigorated Pakistan and given a new impetus to the movement. The people have witnessed and rallied behind the protests. They saw lawyers beaten and fired upon, arrested and barred from their profession. Many have lost their livelihoods. Yet, looking at the actions taken so far by the ruling government, the goal still seems very far away, and activist lawyers continue to be persecuted. The present government's current agenda suggests that there is little hope that Chief Justice Iftikhar will be restored in the near future.

The current persecution must stop. Recently the Pakistan Bar Council (PBC), under pressure from its Chairman, the Attorney-General for Pakistan, has suspended practising licences of the Presidents of the Peshawar High Court Bar Association and the Multan Bar Association and another 10 lawyers in retaliation to their activism, which is getting increasingly aggressive to the discomfort of the government. The lawyers and judges of Pakistan have been wronged, and lack of redress leaves them with little choice. After a countrywide protest on the first anniversary of Musharraf's state of emergency, more than 100 lawyers were booked on charges of agitation and disturbing the peace.

The dodging tactics of the new government also threaten to damage the rule of law in the country even further. They discredit the supremacy of the judiciary and the civilian rule of the country. In this way the present Government is playing into the hands of those military generals who do not want a free and independent judiciary and want the status quo to continue, giving them another opportunity to take over absolute control over the country.

In these circumstances, affirming our solidarity with the lawyers' movement for the establishment of the rule of law in Pakistan, which is a movement possible only through an Independent Judiciary, we

1. Demand that all judges deposed unconstitutionally, including Chief Justice Iftikhar Muhammad Chaudhry, are restored immediately to their rightful constitutional positions, as on November 3, 2007, when the state of emergency was imposed.
2. Condemn the series of new cases registered against lawyers and office-bearers of various Bar Associations: these are lawyers charged with agitation for action taken in defence of the imperilled judicial independence.

3. Demand that the military's unconstitutional and illegal changes be reversed, and a constitutional amendment bill be introduced after broad public consultation and extensive parliamentary debate, in order to restore the 1973 Constitution to its original position with a liberal parliamentary structure including the repeal of the notorious 17th Amendment and the Federal Shariat Court as well.
4. Demand that opportunities for executive interference in the higher judiciary be reduced by immediately ending the practice of appointing retired judges to executive posts until two years after their retirement.
5. Demand that appropriate recommendations made by earlier government legal reform commissions be followed to improve the delivery of justice, including an expansion of court facilities, personnel and other resources in order to make access to justice for the common person a reality.

## **2. On the case of two Supreme Court advocates in Burma**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law, are alarmed at the worsening conditions for lawyers in Burma (Myanmar). We wish to draw particular attention to the case of two Supreme Court advocates whose case we have studied in this consultation. The facts of the case as they have been iterated to us are as follows.

Supreme Court advocates U Aung Thein and U Khin Maung Shein are both lawyers of over 20 years experience in Burma. They have represented many defendants in criminal cases arising from the protests of September 2007. Among them were five cases lodged against three young men, Ko Htun Htun Oo, Ko Maung Maung Latt and Ko Aung Kyaw Moe, and one young woman, Ma Htar Htar Thet, Felony Nos. 307-311/2008 before Judge Daw Aye Myaing of the Hlaing Township Court in Rangoon (Yangon). The hearings were proceeding, like others from last September, in a special courtroom within the Insein Central Prison, under an order from the Supreme Court.

At the hearing of 3 October 2008 the family members of the defendants were not allowed to enter the courtroom nor leave food for them. Thereafter, at the hearing on October 6, Ko Htun Htun Oo, speaking on behalf of the four defendants, informed the court that as the family members had been denied the right to attend the hearings and as the defendants "no longer had faith in the judicial process" they had decided that they would no longer cooperate with the court. They would refuse to be examined, give testimony, or cross-examine witnesses through their counsel. They also would withdraw the power of attorney from the two lawyers at the next hearing. After he made this statement, the judge instructed that the same be put to the court through the lawyers. U Aung Thein asked that the court record the same in its record and U Khin Maung Shein did likewise. It was clear from this procedure that the withdrawal of power of attorney was made through consultation of the clients with their advocates, in accordance with the clients' wishes. Thereafter the two attorneys left the courtroom.

At the hearing of October 13 U Khin Maung Shein appeared to inform the court that the submissions to withdraw power of attorney had not yet been prepared. Thereafter he left the court.

On October 20 U Khin Maung Shein in the courtroom gave the submissions to withdraw power of attorney in the five cases to the four defendants. They read the documents thoroughly and each signed them. The two attorneys also had their signatures affixed. Then the documents were submitted to the court. At that time the judge said that the remark in paragraph 2 of the submissions to withdraw power of attorney that the defendants “no longer had faith in the judicial process” had not been made orally at the earlier hearing. Two of the defendants, Ko Htun Htun Oo and Ko Aung Kyaw Moe, both objected that they had said these words and they would again make a submission to the court to this effect. But Judge Daw Aye Myaing said that, “It is too late. Don’t speak.”

The Hlaing Township Court then made an application to the Supreme Court under section 3 of the Contempt of Courts Act, 1926, that, contempt of court may be punished with imprisonment for a term that may extend to six months, in Miscellaneous Criminal Application No. 99/2008, Daw Naw Than Than Aye applicant.

On 6 November 2008 the Supreme Court found the two advocates guilty of contempt of court and sentenced them to four months’ imprisonment each. In a letter of appeal against the sentence, U Khin Maung Shein noted that in Judge Daw Aye Myaing’s report of the proceedings of October 6, “After examination [of a prosecution witness] the defendants did not present any cross-examination,” which supports the lawyers’ assertion that it was the clients’ loss of faith in the judicial process as stated in the letter that caused this behaviour, not the lawyers’ own ideas. Furthermore, he observed that the clients would not have signed the documents to withdraw power of attorney with the said words if they had not really said them. This fact was even noted by the Supreme Court, which recorded that, “Although Daw Aye Myaing said that the defendants did not know anything about this matter as their signatures are on the submissions this issue needs to be examined for clarification.”

The wives of defendants Ko Htun Htun Oo and Ko Aung Kyaw Moe, Daw Khin Ma Win and Daw Win Maw Aye have also verified that when they each visited their husbands in prison the defendants said that because the families had not been allowed into the courtroom and because they no longer had faith in the judicial process they would withdraw power of attorney from the two lawyers. The two wives wanted to submit affidavits to the court to this effect but had been denied the opportunity.

Like defendants from last September 2007, the prison authorities have transferred the two lawyers to prisons remote from their families, in the Irrawaddy Division. U Aung Thein is now at the Bassein Prison, at the divisional capital. U Khin Maung Shein is now in the Myaungmya Prison, further to the west. They are due for release on 7 March 2009.

The international standard concerning contempt of court today, one reflected in section 13 of the Contempt of Courts Act 1971 of India, is that it must substantially interfere, or tend to substantially interfere, with the due course of justice. There is nothing in any of

the available information concerning this case to indicate that such substantial interference in the working of the court has occurred from the two lawyers merely recording the view of their clients that they “no longer had faith in the judicial process” as the reason for the withdrawal of their power of attorney. Furthermore, the United Nations Human Rights Committee has observed in its jurisprudence “that the imposition of a draconian penalty without adequate explanation and without independent procedural safeguards falls within the prohibition of ‘arbitrary’ deprivation of liberty” within the meaning of the International Covenant on Civil and Political Rights (article 9[1]) (Mudiyanselage S B Dissanayake v. Sri Lanka, Communication 1373/2005, paragraph 8.2).

Accordingly, the imprisonment of the two Supreme Court advocates in this case must be deemed arbitrary, and we assembled jurists, lawyers and legal academics duly call for the immediate release of U Aung Thein and U Khin Maung Shein and for no like actions to be taken against other lawyers in Burma (Myanmar) in order that the legal profession be allowed to conduct its work without threat, interference and obstruction.

Furthermore, we express our grave concerns at the state of law in Burma, where, we have learned, criminal procedure has in many respects been completely abandoned such that parties to cases are denied their most basic rights and political interests and corrupt practices determine the outcome of trials. We abhor the executive-cum-military dominance of the judiciary, and express our strong solidarity with lawyers and others in the country working under extremely pressing conditions and against the odds to protect some notion of legality and defend the public interest.

### **3. Concern for witnesses, journalists and lawyers in Sri Lanka**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law note with serious concern the attacks on lawyers engaged in human rights work, victims of human rights abuse, journalists and others attempting to exercise their freedom of expression and association in order to defend human rights in Sri Lanka. The government’s passive response in the face of such attacks to take effective legal action amounts to a failure to honour the state obligations under the constitution as well as under international law. In fact, the details of these attacks indicate the encouragement of these actions by some agencies of the government itself.

A criminal justice system can function only to the extent that the people have the right to make complaints about their grievances without fear and with the hope that making complaints will lead to responses from the investigating, prosecuting and judicial branches of the government to ensure redress. In all the acts of violence relating to the categories of persons mentioned above the negative reactions of the police prevent the workings of the state machinery, as the police are under Sri Lankan law the agency responsible for recording complaints and making investigations into such violations. The dysfunctional nature of this policing institution has been brought about through design, by defeating the principle of command responsibility politicizing the entire system such that repression can take place to the benefit of a few.

The attacks on lawyers who are already working in extremely hard conditions to provide some form of limited assistance to the victims of crimes and abuse of power can only result in victims losing this assistance and thereby being unable to pursue their complaints. If at least some victims try to proceed against the odds to seek justice from state agencies for violations of their rights, then these victims themselves are subjected to assassination and other forms of serious harm.

The case of Sugath Nishanta Fernando and his family amply demonstrates the powerlessness of victims who experience grave injustices at the hands of the police. Nishanta Fernando was killed while pursuing charges against bribery and torture by some policemen in the Negombo area. The family has also been threatened with death. However, no protection has been afforded to them. Prior to the killing Nishanta Fernando also complained of death threats to the Sri Lankan authorities but no protection was afforded to him either.

The attacks on lawyers are an extension of the attacks on complainants. A grenade attack on a senior lawyer who is involved in anti-graft and human rights abuse cases against many state officers, including some powerful politicians, drew a sharp reaction from lawyers and their associations in Sri Lanka. However, there was no effective investigation into this crime, which if it had succeeded could have killed the entire family.

Shortly after this a letter was distributed to many lawyers and registrars of courts by a group calling itself Mahason Balakaya (Ghosts of Death Battalion), threatening them with death if they appear for alleged terrorists. A letter was soon also published on the defence ministry website naming some lawyers who had filed fundamental rights applications before the Supreme Court for some alleged terrorist suspects. The tone and content of the two letters were the same: lawyers and human rights organisations are termed as paid agents of the Liberation Tigers of Tamil Eelam.

The basic design of these publications is to intimidate and terrorize lawyers and thereby create a sense of helplessness among the complainants about the abuses they have suffered at the hands of state agencies. It is also aimed at creating an impression, by intimidating complainants, that the lessening of complaints is an indication of the improvement of human rights in the country and therefore claims of abuse are exaggerations by interested parties.

The attacks on journalists are associated with an overall approach to create helplessness among the people and force them to accept deprivation of their rights in silence. Journalists have been killed, physically harmed and prosecuted without any basis and exposed to extremely serious situations in which they may become victims of abuse by government supporters or by mobs. Several of the attacks on journalists were led by a minister in the government. As in the other attacks mentioned above, the government maintains well-calculated passiveness in the face of complaints.

Under the present circumstances the criminal justice system cannot function with any degree of credibility. Violators of rights can act with assured impunity and under the patronage of powerful persons and agencies.

We have studied this situation with anxiety and we wish to express our deepest solidarity with the suffering people of Sri Lanka who have lost avenues to seek justice. We can see no other way than for the people themselves to organise effectively for the purpose of protecting their rights and demanding far reaching reforms in the criminal justice field. It is the duty of all political parties, media agencies and civil society groups to consider the protection of witnesses and complainants, lawyers and journalists as a priority. This venture for achieving reforms in criminal justice within Sri Lanka deserves the support of all peoples in the Asian region, who now need to come together to protect each others' basic rights. Global movements of human rights and democracy should wholeheartedly support the Sri Lankan people in their struggle to achieve basic institutional reforms for justice and protection.

#### **4. On the rule of law and human rights in Bangladesh**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law call for the following steps to address the dire state of the rule of law and human rights in Bangladesh:

1. Establishing the independence of the judiciary, by ensuring full financial power to the chief justice along with administrative power.
2. Curtailing the exclusive power of the police in respect to holding inquiries into cases and the abusive power exercised as a consequence, and ensuring the accountability of police personnel.
3. Holding of preliminary hearings on the credibility of police reports prior to trial in order to avoid false accusations and fabrication of charges.
4. Ending of abuse of police power exercised under Sections 54 and 167 of the Code of Criminal Procedure, in light of the recommendations passed by a Division Bench of the High Court Division of the Supreme Court of Bangladesh in the case of BLAST and Other NGOs versus Bangladesh (reported in 55 DLR 363).
5. Repealing of all ordinances, regulations, proclamations and rules promulgated by the government, which are opposed and derogatory to the provisions of the Constitution of the People's Republic of Bangladesh.
6. Lifting of the state of emergency with immediate effect, for the purpose of holding a transparent and fair election and ensuring a transition to democracy.
7. Repealing of indemnity provisions of Article 46 of the Constitution of Bangladesh.
8. Amending of the procedure of criminal investigation to allow for investigation by an impartial authority other than the police.
9. Establishing of a separate and independent prosecution institution under control of the Supreme Judicial Council to make effective the system for administration of justice.

10. Immediate releasing of persons illegally arrested, arbitrarily detained and charged in fabricated cases during the state of emergency.
11. Prosecuting of all perpetrators of extrajudicial killings and torture.
12. Stopping of harassment of human rights defenders and journalists through the filing of fabricated charges against them, release of such persons from charges and giving of adequate protection and compensation.
13. Giving of equal opportunity to all lawyers irrespective of seniority in the hearing of the cases by the High Court Division and Appellate Division.

## **5. On human rights in Indonesia**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law acknowledge that after reformation in 1998, there have been major developments in the law enforcement system and the human rights field in Indonesia. That Indonesia is a law-based country has been reemphasized. That human rights have value has been introduced in detail. Based on the normative guarantees of the new constitution, it is clear that the goal is to have a law-based country that guarantees and protects human rights and a state that wants to realize welfare and social justice.

However, among such developments there are specific matters in the prosecution that need attention. This is because the regulations are still weak and the settlement of violations of human rights cases is impeded. The following are some of the examples: (1) a back and forth documents submission between the Human Rights National Commission and the Attorney General, (2) rejection of the Attorney General's authority to conduct investigations on human rights violations that happened in the past. Apart from the regulations problem, the resistance of actors at each step still impedes the enforcement of law and the upholding of human rights. These actors are not only the parties who are suspected to have violated the laws but also law enforcement officers who take advantage of the current system.

Aside from this, the major problems in the prosecution or judicial system related to the law and human rights enforcement are the problems incurred within the judicial institutions, including police, prosecution and courts, either related to organization, human resources or other technical matters, such as: (1) low integrity, low understanding of legal practice and also low experience in trial practice, (2) deliberate lack of coordination between prosecutors and the police in the investigation and prosecution process causing delays and confusion, (3) contradictions in the position of the prosecutor's office in the state structure relating to threats to independence and interference in the office's work, and, (4) a supervision system that is inadequate to ensure prosecutorial integrity and quality.

To solve certain problems mentioned above, the mending and enhancement of law enforcement bodies, including the prosecutor's office, is needed, including the following:

1. Empowering the Judicial Commission, Prosecution Commission and Police Commission with authority to sanction directly judges, prosecutors or police officers who have misconduct or unprofessional behaviour. It is important to make the supervision of police, prosecutors and judges very comprehensive and strong, with certain parameters and clear punishment.
2. Guaranteeing the independence of the prosecutors' office, by having the President nominate and appoint the Attorney General with the approval of the House of Representatives. The mechanism to elect the Attorney General must also be open, transparent and accountable.
3. Giving of public education to people through the civil society movement. It is necessary to make public awareness better day by day.

## **6. On human rights in Thailand**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law acknowledge the following aspects and needs concerning human rights in Thailand:

1. Concerning education:
  - a. Educate people in all walks of life on the spirit of human rights, in particular the young generation, so they understand what human rights are, and acknowledge the dignity inherent in a human being and responsibility to protect human rights and fight for human rights.
  - b. Organize activities to be aware of community values and community life and to participate in the building of democracy and respect of human rights within society.
  - c. Make the young generation understand people's power and democratic movements for change, which come from the grassroots of society.
2. Concerning international pressure:
  - a. Put pressure on local government, such as the use of economic sanctions to protect human rights.
  - b. Make all levels of media, both domestic and international, expose the situation on human rights and rule of law in a country.
3. Concerning support by international society:
  - a. Give support to those who contribute to human rights (human rights defenders) in order to protect them; for instance, by being given awards from around the world



- b. Provide academic support to educate human rights defenders in developing countries by scholarship or training programs.
- c. Provide human rights defenders with the opportunity to take part in seminars, conferences and human rights schools etc., so that they can share these experiences back in their own countries.

## **7. Concern over the systemic failure of the prosecution in India**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law express our grave concern at the systemic failure of the prosecution system in India.

From the discussions concerning the criminal justice system in India it was implicit that inefficient policing and delays in court are the root causes of lost public faith in the system, including in the work of the prosecution.

We note that the current state of affairs within the criminal justice system promotes grave offences like custodial torture, offences against women, disappearances and encounter killings. The dysfunctional criminal justice system also promotes widespread corruption.

The degeneration of the criminal justice process has resulted in citizens resorting to extrajudicial means for settlement of disputes. The confused state of affairs in the criminal justice system has provided opportunities for corruption that police, prosecutors, lawyers and even members of the judiciary exploit. As a result crime flourishes, the rule of law is negated and the societal fabric is irreparably rent apart.

Caste and religious-based discrimination, which are interwoven into the social life in India, also make change impossible, thus curtailing development and denying the fruits of development to an estimated 70 per cent of the population.

India being a regional player, the problems affecting justice delivery have an adverse impact upon other states in the region and also upon international human rights bodies like those of the United Nations.

Successful prosecution mostly depends upon effective investigation and efficient policing. While the police remain corrupt to the core, prosecutors can take few steps to ensure fairness to the victims of crime. Prosecutions launched after inherently defective investigations have little chance to succeed.

What follows is selective justice, contrary to the basic norms of equality. Politicians with control over law enforcement agencies, particularly local police, use state agencies for their exclusive benefit. Law enforcement agencies let the exploitation continue so that their corrupt ways can continue unabated.

It is widely acknowledged that the above factors are impediments to the state responsibility to protect, promote and fulfil human rights and thus the rule of law in India. No reforms to the criminal justice system are possible without addressing issues concerning the state of affairs of policing. State-sponsored commissions and civil society organizations have expressed similar concerns about the failure of rule of law in India. The Supreme Court has on several occasions expressed concern about the above issues, while the court has had occasions to deal with individual cases brought to its attention, particularly during the past three decades.

The latest was in deciding a case filed by a former police officer, Mr. Praksah Singh, seeking directives from the court to permanently sever the perpetual control of the privileged over the police. The court in 2006 has directed the state to implement the recommendations of the National Police Commission/Committees, like the Soli Sorabji Committee on Police Reforms.

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law hereby urge the Government of India to immediately implement the directives of the Supreme Court laid down in Mr. Prakash Singh and Others v. Union of India and Others.

We express anguish over the complete lack of action of the Government of India in implementing these directives and further urge the state/provincial governments in India NOT to dilute the spirit of the directives of the court while framing local laws to comply with the directives.

## **8. On prosecution in South Korea**

We assembled jurists, lawyers and legal academics from throughout Asia gathered in Hong Kong on 17-21 November 2008 for the Fourth Regional Consultation on an Asian Charter for the Rule of Law acknowledge that the principle of the rule of law in South Korea has come about by way of a long struggle for democratization and a series of judicial reforms thereafter. For this reason, the judicial system in South Korea has been recognized as one of the more well-developed systems in the region for promoting and protecting human rights.

However, with the new administration, serious doubts have arisen as to whether the government, through new legal measures, has demonstrated sufficient legal grounds for its actions. Of particular concern is the execution of laws since the last mass protest in relation to the US beef importation agreement in May, such as those by way of the Act on Assembly and Demonstration, the National Security Act and the Criminal Penal Code.

Even though the prosecution has ostensibly shown independence, its execution has still been in favour of particular politicians and the government, including unjustifiable indictments of media personnel, people participating in protests and labourers. This clearly shows that the use of prosecutorial power has been politically biased and its execution has been unjustified.

The reason for this misuse of prosecutorial power and its political bias comes as a result of excessively concentrated power inside the prosecutors' office coupled with the lack of participation from a monitoring system by the civil sector.

In order to address the misuse of prosecutorial power, we call for the

1. Abolishing of the intelligence investigative functions of the Supreme Public Prosecutors' Office.
2. Reducing of investigative functions in order to maintain neutrality and fairness.
3. Filling of positions in the Ministry of Justice with non-prosecutors.
4. Allowance of people's participation in auditing prosecutors' activities and in the disciplinary process.
5. Opening of positions in the Prosecutors' Office to non-prosecutor lawyers.

### **Signatories to resolutions**

Justice Nasir Aslam Zahid (retd.), Supreme Court of Pakistan

Dr. Chandrasekharan Pillai, Dean, Kochi, University of Science & Technology, India

Mr. S. Ashiq Raza, High Court Advocate, Pakistan

Mr. Chung Mi Hwa, Lawyer, Former Vice President, Lawyers' Association for a Democratic Society, Rep. of Korea

Mr. M. Shamsul Haque, Advocate, Supreme Court, Bangladesh

Ms. Phromlak Sakpichaimongkol, Lawyer, Lawyers Council of Thailand

Mr. Jijo Paul, High Court Advocate, India

Mr. Asep Rahmat Fajal, Director, Indonesian Legal Roundtable

Mr. Rishikesh Wagle, Lawyer, Nepal

Mr. Basil Fernando, Director, Asian Human Rights Commission, Hong Kong & Attorney-at-Law, Sri Lanka

Mr. Bijo Francis, Programme Officer, South Asia Desk, Asian Human Rights Commission & Lawyer, India



# Notes from discussions

## A few questions

### The problems

1. How efficient is the complaint-receiving process in your country?
2. How efficient is the investigation process?
3. Do defects in the complaint-receiving process and investigation process affect prosecutions?
4. On human rights-related crimes, what are the real avenues for complaint making?
5. What are the mechanisms for investigations into these human rights violations?
6. How many prosecutions take place in such cases?
7. What is the frequency of fabricated charges?
8. How far is the complaint-making process utilised for moneymaking purposes?

### The solutions

1. What solutions has the government proposed to improve complaint receiving and investigation?
2. How far are civil society actors involved in trying to expose the defects of the system and what are their recommendations for improvements?
3. Is anyone creating public awareness about the need for better complaint receiving, investigating and prosecuting?
4. What are the judicial pronouncements on the limitations of the system and the ways to overcome these?
5. Have United Nations agencies made any specific recommendations for the improvement of the criminal justice system?
6. What kind of documentation exists regarding the complaints of people about the defects of the system?

## Some issues that emerged

### 1. Police domination over the entire criminal justice process

Police exercise a necessary and unavoidable role in criminal investigation, but what is their role in a proper process? How is it created? What checks and balances exist so that they do their jobs but not more than their jobs? How can they be kept subordinate to the courts? Although everything else may be a facade, the policeman alone is doing something that is not a facade: arresting and detaining a person. What can all the other people and agencies do about it?

**Pakistan:** A person goes to lodge a First Information Report (FIR), the officer declines, the petitioners must go to the High Court or bribe the officer; the poor or women may instead be locked up and released on a bribe. In Karachi a political group that acts like the mafia makes matters worse; there is no way to lodge FIRs against their crimes, most people negotiate and settle rather than lodge an FIR, therefore most cases go unreported; in some

places local NGOs agitate but not much done. The higher judiciary also plays an important role in corrupting police because of the failure to take action against them

**Sri Lanka:** Some cases are handled well but others, the majority, not well. At one time to get a statement on torture recorded was very difficult. By about 2004 a high-ranked group of police were assigned the role (Special Unit of Inquiry). They did not seek bribes or harass complainants. But in sensitive cases, like disappearances, it is usually very difficult. The completely degenerated state of the Sri Lankan police results in denial of fair complaint and proper investigating procedure into crimes in general and human rights violations in particular. This further generates corruption at all levels of the justice system. The failure of the state to provide adequate funding for criminal justice has aggravated every other problem, such as the delays, the absence of adequate competence at all levels, and the low morale that exists throughout. Without a drastic change it is not possible to expect progress. At the same time, it is not possible to expect any change of policy without a strong popular movement that is well-informed and conducted so that cogent advocacy can force a change of policy.

**Bangladesh:** Like Pakistan, no one can lodge an FIR without giving something to the police, at least a pack of cigarettes, and most officers require money. When police refuse to record an FIR, especially in women's abuse cases, a victim can lodge a complaint with a magistrate, but ultimately it will go to the police and the victim or complainant will still have to pay lest the police report not go in their favour. Magistrates ask, "Why would police arrest you if you did not commit the offence?" This causes frustration for lawyers. Arbitrary arrest is often followed by severe torture. Judicial orders are made to try to address these problems. Codes and regulations contain provisions but they are not followed, even after recommendations from the High Court Division. Under the present Emergency, fundamental rights in the constitution have been suspended. Anyone implicated under the Emergency Act will not get bail, although it has not been explicitly prohibited. Magistrates can accept or refuse the charge sheet of the police but even if it consists of errors or is fabricated it will be accepted. There should be a provision to establish the veracity of the charge sheet in the court. Magistrates do not record evidence of police torture on the custody warrant, and thereafter other officials, such as custodial officers, also do not make a record. Proper recording may only be made in cases concerning highly influential persons.

**India:** The view had been that magistrates had no power or oversight over the police investigation process. But the Supreme Court enlarged the scope to do so: section 156(3) contains implied power to order investigation of a criminal offence or direct police to conduct proper investigation. The section allows parties to a case to file a petition seeking such action. A magistrate may also order others than police to investigate.

**Hong Kong:** The Independent Commission Against Corruption cut down police dominance. The only way to stop police degeneration is by creating a strong anti-corruption agency of this sort that is completely outside the policing system of the country. However, resistance comes from parts of the establishment that want the system to allow corruption at all levels. Once again this problem is one of public policy, and policy cannot be changed

without a strong mass movement which is well-informed and developed with the assistance of a professional, qualified and knowledgeable team committed to achieve such change.

## **2. The need to protect victims and witnesses to ensure their participation in the criminal justice process**

Most places do not have a witness protection law but even those that do lack the means of implementation, specifically due to problems of funding and training of personnel; in some jurisdictions, victims have rights of representation during trial. Usually witnesses and complainants are not informed about progress. They suffer from the long delays before coming to trial. In many places people do not want to enter into the complaint-making system at all because the consequences can be death or other forms of serious harm. The overwhelming perception is that there will be more difficulties and sufferings encountered by pursuing grievances than by finding any solutions or solaces. Those who enter into the justice process and persevere to the end are once again very few in number compared to those who start out. Of those who pursue their cases to the end it is sometimes only one per cent, in other places five to ten per cent, that get a successful result at the end. This comes only after many years. States do not have adequate measures, in law and financial arrangements, for protection of witnesses. Communities fear to be involved with those who have cases before the courts or are pursuing complaints against state agencies. Often families are divided over the pursuit of justice. One member of a family who wishes to pursue it may be a threat to the others.

**Cambodia:** There is a new Criminal Procedure Code but no witness protection law. Witnesses are fearful to speak. When prosecutors or investigating judges ask them to be examined in court they do not come. They are afraid to appear before the accused.

**China:** There is consideration of how to protect victims. When victims make complaints, if they are not recorded there are two possible channels: 1. Complain to court directly, and go from 'public' to 'private' prosecution; or, 2. Complain to the prosecution and inquire as to why a complaint was not recorded. Prosecutors have powers to supervise police investigations. Where a complaint has not been investigated they can order the police to explain the reason and if they find that there is no sufficient reason then the prosecution can order the police to take the complaint. At other stages of criminal process too victims have rights. They can employ a legal representative to participate in the trial. The main function of that person is to pursue a civil claim, which can be considered together with a criminal case. The judgment will then include both a sentence and a decision on compensation. The victim's lawyer can also represent an opinion on the criminal charge to the court. The problem is that persons required to pay compensation either don't have money or refuse to pay. Their idea is that if they are being put in jail, why should they pay? Nowadays the approach is towards reconciliation in criminal cases. Before sentencing the victim sits with the accused to negotiate the amount of compensation. The result seems to be good because if there is agreement on this the judge will also reduce the sentence. But there is no special witness protection law, and witnesses are afraid or unwilling to appear in court. Although legal reforms are moving towards adversarial trial with witnesses appearing, it is still a major problem. We are exploring how to solve it.

**Thailand:** The witness protection law exists but has failed. Only in high-profile cases is there protection. Important witnesses in criminal cases are shot before appearing. Victims also are shot dead.

**Indonesia:** There is a new witness protection law and a National Commission for Witness and Victim Protection. It includes members of the National Human Rights Commission, ex-police, ex-prosecutors, academics and NGO staff. It has operated for three months.

**Bangladesh:** If a complainant is influential he or she will have some protection, otherwise not, in which case he or she may be beaten, killed or framed. Victims in serious cases are threatened, or other family members also face risks. Bail can be retracted if witnesses are threatened, but there is no specific law to protect them. Victims appoint private lawyers in criminal cases because they don't trust prosecutors. They also financially participate. If they don't pay for investigation the charges won't be brought. They have to take responsibility to see witnesses come and depose, including by giving them money for food, travel and accommodation.

**Korea:** Is there any progress notice system for victims? Yes, a very good one, during investigation and trial. Is there any protection programme for victims? Yes, several measures exist to protect victims during investigation and trial. First, under article 163(2) of the Criminal Procedure Code, victims of crime can be involved in the investigating process. There are also videotaping measures at trial. Victims can give testimony elsewhere rather than face-to-face with the accused. Sometimes this can be done before the trial begins, especially if the witnesses or victims are minors or concerned with sex crimes. Victims also have a right to speak during the trial, and not only their testimony but also opinions can be recorded. Is there legal aid for victims? Yes, special laws exist for this purpose. There is a victims' fund. There is not any witness protection programme after the trial; however, before the trial is completed if the accused tries to get to the victim then he or she will face an aggravated sentence. There is also a compensation scheme for victims. But during trial victims cannot hire lawyers to represent them in court. They are auxiliary parties. If wanting to get compensation a victim must personally attend the trial or submit a document to demand it.

**Sri Lanka:** The denial of protection to complainants and witnesses remains a matter of policy. The state in its present form will be unable to cope with the extent of public complaints against the police, military and other state officers, including leading politicians, unless there is a credible complaint-receiving mechanism and criminal investigation process.

### **3. Public perception of the criminal justice process: hopeless**

In most places, it is hopeless; in some places, it is a cause of panic. The key question is: how many people who suffer abuse really complain? One reason for the lost confidence is delays. Instead of trying to complete all cases in time, why not prioritise? For instance, election-related cases get priority in some places now; suppose that torture cases also got priority. We could make a hierarchy of offences to be prioritised. Here the question is not only about disposal of cases; it is also about their disposal where justice is done according to law. Even if all cases are disposed of but the conviction rate remains at five per cent, as in Pakistan, then the purpose of the system has not been served. However, there are people who cannot



avoid the system. Those are persons who have either been arrested or detained unjustly and whose families have to fight for their liberties. In the process they get entangled in the web of extortion and intimidation associated with the law-enforcement agencies. The burden often is too much to bear, both financially and in terms of harassment suffered; however, they cannot quit as their loved ones are incarcerated. This type of situation creates serious personal and family crises and sometimes results in suicides. Often the traumatic nature of the experience is not considered at all.

Our strategy should be to go to some key issues like this. Otherwise we will go in circles. If one or two key issues like allocating of sufficient funds for the system to function and addressing of corruption are not addressed then nothing will change. We cannot expect that systems unable to cope with mundane cases will be able to do anything about the most embarrassing and difficult cases, like torture. The result is that everyone will be knowingly just playing a game. Judges give dates knowing that nothing will be done on that day. Others also know, but instead just bluff. The trial process is reduced to farce. In countries like the United Kingdom lawyers meet with the court registrar and fix dates, but if lawyers in South Asia asked for a series of free dates, it might be 10 or 20 years hence. If such dates were given, parties would be scandalized, so seemingly near dates are given when it is known that the case will take many more years. If this sort of thing can't be addressed then we can give up on everything else.

#### **4. Collaboration between the police, prosecutors and judges**

Often the police and local judges act in coalition to support the arrest and detention of persons irrespective of legal procedures, with the purpose of controlling some elements that are considered undesirable, improving their records, or making money. In some places alleged criminals are killed after arrest and reports are filed in court that the killing happened when the suspect tried to escape or resist arrest. The judges take the police versions of these matters and close the files so that there can be no investigations. There are other instances where the courts have rules, either written or by practice, where persons can be kept in detention for long periods without trial and without any evidence presented, as a deterrence for some crimes. For example, there are prescribed periods of refusing bail for some cases, such as murder, which are very lengthy. Besides the general problem that these regulations cause for all suspects, the police also misuse these provisions in order to harass persons of their choice, extract bribes and extort favours. Practices are developed, particularly in the lower courts, in order that bail applications do not proceed speedily. Various pretexts can be used for delays, and unscrupulous police officers can utilise these practices to keep persons in detention so as to obtain undue gain and for other purposes.

#### **Some issues that repeatedly arose**

1. Most justice systems in Asia exist to benefit only a very small minority of powerful persons. For the poor and the powerless, these systems are mostly burdens, forms of oppression.
2. To deal with the situation, governments must allocate more funds. The existing funding policies for administration of justice in almost all parts of Asia are totally unrealistic.

Within such financial constraints it is not possible to develop functioning systems of justice. This inadequate funding and the political will to keep it that way results in systemic dysfunction.

3. Delays in adjudication make the justice process a fraud. Perhaps the political need again exists to keep it as such so as to prevent the possibility of an efficient system of justice emerging. As it is not possible to have no justice system at all, governments find fraudulent systems expedient, and useful for social control.
4. A fraudulent system of justice becomes a trading house that benefits many persons. The police get most benefit. They can utilise powers of arrest and detention to extract money and favours and exert power in many forms. Many unscrupulous practices also develop among lawyers to make a career out of the confusion that exists within the justice system. Litigants too may learn to utilise the system for their benefit.
5. A fraudulent system of justice obstructs possibilities for social change. It creates the illusion that it can solve problems that it in fact cannot. When proven otherwise, it demoralises people through a long process of denial.

### **Some priorities for each country**

#### *Pakistan*

1. Complete separation of prosecution and investigation agencies, ensuring complete independence of prosecutors.
2. Revival of committal proceedings.
3. Appreciable increase in budgetary allocations for administration of justice
4. Transparency in the appointment of prosecutors and security of their tenure.
5. Citizen-police liaison centres
6. Women police sections in all police stations.
7. Information and reception centres in courts.
8. Victim and witness support or legal aid centres
9. Advanced techniques for training of police and investigation officers
10. Law commissions should have full time members and be professionalised, e.g. following the UK model, functioning daily, and people should have access to the commission

#### *Sri Lanka*

1. The completely degenerated state of the Sri Lankan police results in denial of fair complaint and investigating procedure into crimes in general and human rights violations in particular. This further generates corruption at all levels of the justice system. The only way to solve this is through a strong anti-corruption agency completely outside the policing system, like the Independent Commission Against Corruption of Hong Kong. However, resistance to this will come from the political establishment, which wants the system to allow corruption at all levels. Once again this problem is one of public policy, which cannot be changed without a strong mass movement that is well informed and developed with the assistance of a professional, qualified and knowledgeable team committed to achieve such change.

2. The state failure to provide adequate funding for criminal justice aggravates every other problem. Without a drastic change of policy it is not possible to expect any change. At the same time it is not possible to expect any change of policy without a strong popular movement that is well informed and conducted so that the cogent advocacy can force a change.
3. Denial of protection to complainants and witnesses remains a matter of policy. The state in its present form will not be able to cope with the extent of public complaints against the police, military and other state officers, including leading politicians, unless there is a credible complaint-receiving mechanism and criminal investigation process.

### *Indonesia*

In Indonesia, to improve receipt of complaints and investigation, the government has proposed to or has already commenced to:

1. Make some new laws, like a law on victim and witness protection and a law on the public service.
2. Build some independent commissions, such as the:
  - a. Corruption Eradication Commission,
  - b. National Human Rights Commission,
  - c. Judicial Commission, which has as its main function the supervision of judges' behaviour and election of candidates for justices of the Supreme Court.
  - d. Police Commission, which is authorised to supervise police behaviour and give advice to the president about policy from the police office.
  - e. Prosecution Commission, to supervise the prosecutors' behaviour and give some advice to officers of the attorney general.
  - f. Commission on Victim and Witness Protection,
  - g. Commission of the Ombudsman, to receive public complaints about mal-administration in all public institutions.

In the current situation, even though the many new institutions and some new laws exist, corruption persists. Some NGOs in Indonesia have concluded that the reasons for this are:

1. That the regulatory power of the commissions is weak. No commission has authority to punish directly, only make recommendations.
2. The low of integrity of the prosecutors and investigators.
3. The high level of intervention from other institutions.

To change this situation, they recommend to:

1. Create judicial review in the constitutional court.
2. Pressure the parliament to amend the law, which is already in process (Supreme Court Law, Judicial Commission Law and Commission of the Ombudsman Law).
3. Monitor the judicial process and advocate on every case where there is misconduct or abuse of power.
4. Make a public movement regularly. For example, some NGOs choose Thursday to demonstrate in front of the president's palace on some human rights cases. And for judicial corruption cases, some choose Friday to demonstrate in front of the Supreme Court.

5. Build a legal reform team in the Supreme Court and Attorney General's Office with opportunities to give some advice to the chief justice and attorney general very often.

Public awareness is very important, because it can make the prosecution and judicial system work better, at least so that judges and prosecutors don't have plenty of time and opportunities to be corrupt as they might otherwise. When public awareness comes we believe that some judges and some prosecutors have been worried. Some NGOs have publicly examined controversial cases with professional lawyers, some academics and other stakeholders and have distributed their findings and analyses. Some faculties of law now monitor judicial mechanisms as a part of the curriculum and send their results to the Judicial Commission.

Additional ideas:

1. How can we ensure the independence of prosecutors? The answer is supervision. It must be comprehensive and strong, with clear punishment.
2. On conflict of interest and misuse of the prosecutor by the executive, the prosecutor must be nominated and appointed by the president with approval of the House of Representatives; however, in conducting work prosecutors must be independent.

### *India*

1. Independence of police: Supreme Court directions have been given.
2. Separation of investigation from law and order functions, and personnel should not be interchanged.
3. Independence of prosecution.
4. Independence of judiciary, and merit and commitment to public issues should be criteria for appointment.
5. Human rights commissions' work should be suitably integrated with the legal system.
6. Establish a legal reforms commission that should function continuously.
7. Academic writing should be encouraged.
8. Media should also be encouraged to act in tandem with the legal system.
9. Writ courts should have the power of superintendence over the lower formations of the judiciary.
10. Institutions like the ombudsman should have independent investigative machinery, and the practice of depositions from police should be given up.
11. Effective mechanisms should be established for policing the police and prosecution machinery.
12. The complaint process in cases of corruption in the police and prosecution must be made effective.
13. Provision for victims' participation in criminal trials.
14. Law commissions should consult human rights organisations and civil society in matters of judicial reforms.
15. Avoid to the extent possible unnecessary procedural requirements like roll calls and summoning of witnesses for irrelevant purposes.
16. Educational programmes should be held to generate human rights awareness, connected to universities and in collaboration with NGOs and civil society groups.

### *Bangladesh*

1. Independence of the judiciary with full financial power.
2. Enact and provide proper systems so that people can obtain the benefit of law.
3. Accountability of police personnel and prosecutors.
4. Monitoring for proper implementation of laws.
5. Expose the habit of fabricating cases and other steps needed to stop this practice: strict implementation of existing law.
6. A permanent and competent prosecution department; abolishing the present system of temporary appointments.
7. Changed mindset of judicial officers and lawyers from the present arbitrary style of work.

### *Korea*

1. Abolishment of pyramid-like stepladder position system for prosecutors.
2. Abolishment of the High Public Prosecutor's Office and the intelligence and investigative functions at the Supreme Prosecutor's Office.
3. Reduction of the investigative function and bolstering of prosecutorial activity.
4. Filling positions in the ministry of justice with non-prosecutors.
5. Allowing people's participation in auditing prosecutors' activities and disciplinary process.
6. Restricting prosecutors' discretionary power of prosecution by introduction of a grand jury or equivalent, and mandatory prosecution.
7. Restricting prosecutors' power of appeal.
8. Reform of the appointment system of prosecutors.
9. Opening important positions in the Prosecutors' Office to non-prosecutor lawyers.

### *China*

1. Increase allocation of resources to prosecution.
2. Strengthen means of prosecution supervision over police conduct. Make supervision of police activities effective.
3. Regarding how the prosecution exercises discretionary power, need to improve the judicial review system over the discretionary power of the prosecution.
4. Set up a principle to prevent double jeopardy, to limit repeat prosecutions of prosecutors on the same case.
5. Strengthen legislative measures to protect witnesses.
6. Strengthen professional responsibilities of prosecutors, so that they can act objectively and fairly.

### *Nepal*

1. The most important thing is drafting and promulgating a democratic constitution with wider participation of the people.
2. Make the transitional process successful by a multidimensional approach. Among other things, judicial and judicious handling of the past human rights violations and atrocities is a challenging job. The proposed Truth and Reconciliation Commission and Disappearance Commission Bill should be fine-tuned at par with international standards and it should ensure independent and effective functioning of the Commission.

3. Investigative and prosecutorial agencies should be strengthened and it is necessary to develop a mechanism to ensure a high level of professional accountability and professional ethics in those agencies.

### *Thailand*

1. Implementation, social morality
2. Public education
3. Control, pressure on business where there is no human rights protection
4. Scholarships for human rights activists to go abroad
5. Use of Internet for discussion, distribution of information

### *Philippines*

1. Change personnel, need leadership committed to the values of the constitution that can give the prosecutorial service the political will that it requires.
2. Reorient the organisation and strengthen the prosecutorial institution.
3. Strengthen watchdog institutions, especially civil society, NGOs, media and polling groups to augment other work done.

# Articles

## Investigation and prosecution: Implementation of international law in Asia

*Carla Ferstman, Director, REDRESS*

The right to complain about torture and other serious human rights crimes requires states to guarantee the following elements both in law and practice:

- Individuals alleging to have been victimised, or their relatives, must have the right to bring a complaint. States must provide for this by adopting laws and administrative measures to set up complaints procedures. Procedures may either relate to a wide range of complaints, or alternatively they may be special to specific crimes, such as the Prosecution of Torture Perpetrators Unit set up in Sri Lanka during 2000;
- States should designate appropriate authorities which are competent to receive complaints, such as the judiciary, police oversight bodies, and national human rights institutions: a number of states, including Argentina, Bosnia and Herzegovina, Canada, Chile, Ethiopia, Guatemala, Indonesia, Mexico, the Netherlands, Serbia and Montenegro, Timor-Leste and the United Kingdom have established specialized prosecutors' offices, police investigative units and/or courts that focus on serious violations of human rights (UN Doc. E/CN.4/2004/88, para.41);
- States must provide effective access to the complaints authority, including the right to be informed about available remedies and procedures; the right to have access to lawyers, physicians and family members and, in the case of foreign nationals, diplomatic and consular representatives;
- The right to have access to external bodies; and,
- The right to compel competent authorities to carry out an investigation and the right of effective access to the investigatory procedure.

There must be no delays in the complaint process as allegations must be investigated 'promptly'. As a guide, Rule 36 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners provides that prisoners must have the opportunity each weekday to make requests or complaints to the director of the institution or the officer authorized to represent the prisoner.

States must not only examine complaints, they must also investigate wherever there are reasonable grounds to believe torture or other serious human rights violations have been committed, even if there has been no complaint. These duties entail the following obligations:

- The complaint need not be formal. The victim only needs to bring the allegation of torture to the attention of a competent authority for the latter to be obliged to treat the allegation as a complaint that must be investigated (CAT, *E. A. v. Switzerland* and

*Blanco Abad v. Spain*, para.8.6). The competent authority should also be mandated to commence inquiries ex officio;

- Investigations must be undertaken unless a complaint is ‘manifestly unfounded’ (CAT, *Henri Parot v Spain*, para.10.4);
- Investigations must be prompt. ‘Prompt’ should be given its full literal meaning (CAT, *Halimi-Nedzibi v Austria* and *Encarnacion Blanco Abad v Spain*. See General Comment 20, para.14). This obligation relates not only to the time taken to commence the investigation, but also the speed with which it is conducted. Although no particular time period is referred to, the case of Abad before the Committee against Torture is illustrative. The complainant alleged that she had been tortured on her first arraignment on anti-terrorism charges. The complaint was not taken up by a judge until fifteen days had passed and it was another four days before an inquiry was commenced. The inquiry then took ten months, with gaps of one to three months waiting for forensic reports. The Committee held that this delay was unacceptable;
- Investigations must be impartial. The investigating body should be autonomous and independent from the body alleged to be responsible for the abuses. The procedure when investigations are carried out must also be impartial. It must be free from real and perceived bias in the way it searches for, receives and evaluates evidence (UN Doc. CAT/C/CR/31/7);
- Investigations must be ‘effective’ and ‘thorough’. They must genuinely seek to determine the nature and circumstances of the alleged acts and establish the identity of the perpetrators. This includes questioning suspects and all relevant witnesses, seeking evidence at the scene, receiving independent medical reports and, in death in custody cases, carrying out an exhumation and new autopsy.
- States must protect complainants and witnesses from intimidation and reprisals, and ensure their psychological integrity before, during and after the proceedings. The right to protection for victims and witnesses has also been increasingly recognised in statutes of international and internationalised courts [see for instance, articles 43(6), 54(1)(b), 57(3)(c), 64(2)(6)(e), 68, 87, 93(1)(j) of the Rome Statute of the International Criminal Court, and articles 15, 20 and 22 of the Statute of the International Criminal Tribunal for the Former Yugoslavia]; and,
- Survivors, or next of kin where appropriate, must have access to all information relevant to the investigation, and be kept informed of the progress and result of the investigation and any subsequent prosecution (see Principle 4 of the Istanbul Protocol; CAT, *Hajrizi v. Yugoslavia*, para.9.5). This right to access and participation has also been recognised by other human rights bodies (see ECHR, *Cakici v Turkey*, para.49; *Ergi v. Turkey*, para. 83; *Mentes v. Turkey*, para. 91 and the Inter-Am. Ct.H.R. in the *Caracazo Case*, para.118).

Courts in various jurisdictions have ordered the responsible authorities to take particular measures during investigations, such as reopening them following an appeal by complainants, albeit with limited practical impact in ensuring the effectiveness of subsequent investigations. The lower Courts of most countries have a weak record in calling for or instituting investigations in those cases where torture allegations have been raised before them, for example in habeas corpus proceedings or where procedural decisions to close investigations are challenged before courts.



The Supreme Courts of both Sri Lanka and India and the Indian High Courts have ordered the national authorities to carry out investigations into allegations of torture. In India, *Punjab & Haryana High Court Bar Association v State of Punjab and Ors*, 1996, was a case concerning the abduction and murder of an advocate, his wife and their two year old child for which the police appeared to be responsible on the basis of the available evidence, where the Supreme Court held that:

“The police officers in question must be suspended by the State and the trial is transferred to the Designated Court at Chandigarh. The Court is to direct the trial expeditiously within six months of its commencement. In accordance with the requirements of the Criminal Procedure Code the State of Punjab is to sanction the prosecution of the police officers immediately, within one month of receiving this order.”

In *Sebastian M. Hongray v. Union of India*, 1984, the Supreme Court issued a mandamus to the Superintendent of Police directing him to take its judgement “as information of cognisable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure”. In *State of Punjab v. Vinod Kumar*, 2000, the High Court directed the state Government to sanction the prosecution of the officials in question, as required by Section 197 of the Code of Criminal Procedure, without delay when asked by the investigating Central Bureau of Investigation. The Supreme Court of Sri Lanka, in 2002 directed the attorney general “to consider taking steps under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act, Act No.22 of 1994, against the respondents and others who are responsible for acts of torture perpetrated on the petitioners.” (See further for Sri Lanka *Abasin Banda v. Gunaratne*, SC (FR) 109/95, SCA 623/00; SCA363/00 and *V v. Mr. Wijesekara and Others*, Supreme Court, Sri Lanka, 2002.) These judgments have, however, largely not resulted in full and effective implementation, thus undermining their impact.

The United Nations set of principles for the protection and promotion of human rights through action to combat impunity recognizes that “the official status of the perpetrator of a crime under international law—even if acting as head of State or Government—does not exempt him or her from criminal or other responsibility and is not grounds for a reduction in sentence” [Report of Diane Orentlicher to update the set of principles to combat impunity, E/CN.4/2005/102, para.27(c)]. Equally, it acknowledges the general trend in international jurisprudence to recognise the inapplicability of statutes of limitations not only for such international crimes as crimes against humanity and war crimes, but also for gross violations of human rights such as torture. Statutes of limitation are inconsistent with states’ absolute duty under the Convention to prosecute or extradite torture cases as such laws introduce qualifications to the duty. The Committee against Torture has repeatedly stated that there should be no statutory limitations for torture [e.g. CAT/C/CR/30/5, para.7(c)], as has the Inter-American Court of Human Rights, such as in the *Barrios Altos Case*: “provisions on prescription ... are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture” (para.41). Nonetheless, such time limits in the prosecution of torture cases are common. For example, in Nepal the criminal offence covering torture can only be prosecuted if a victim brings a complaint within a period of between 35 days to three months time, depending on the

offence in question. In countries such as China and Japan the limitation periods commonly applicable in torture cases stretch from three to ten years. As a result, investigations and prosecutions may not be possible because of the lapse of time where victims of torture are, whether for objective or subjective reasons, not capable of lodging a complaint in time. Recently, the UN Committee Against Torture said in its concluding observations on the Republic of Korea's State Party report that it was "concerned that the application of a statute of limitations on torture offences, in both criminal and civil law, may result in the lack of investigation, prosecution, and punishment of acts of torture, as well as in the lack of compensation and other remedies provided to victims of torture" (CAT/C/KOR/CO/2).

### **Investigations and prosecutions in Asia: The view of the UN**

In Asia, impunity for torture remains a systemic problem. In its concluding comments on Cambodia, the Committee Against Torture observed the persistence of, "Impunity for past and present violations of human rights committed by law enforcement officials and members of the armed forces and, in particular, the failure of the State party to investigate acts of torture and other cruel, inhuman or degrading treatment or punishment and to punish the perpetrators" (CAT/C/CR/30/2). The Committee stated in its concluding observations on Indonesia that,

"The Committee is deeply concerned that credible allegations of torture and/or ill-treatment committed by law enforcement, military and intelligence services personnel are seldom investigated and prosecuted and that perpetrators are either rarely convicted or sentenced to lenient penalties that are not in accordance with the grave nature of their crimes. The Committee reiterates its grave concerns over the climate of impunity for perpetrators of acts of torture, including military, police and other State officials, particularly those holding senior positions who are alleged to have planned, commanded or perpetrated acts of torture. It notes with regret that no State official alleged to have perpetrated torture has been found guilty, as confirmed by the Special Rapporteur on torture." (CAT/C/IDN/CO/2)

In respect of Thailand, the UN Human Rights Committee has noted with concern "the persistent allegations of serious human rights violations, including widespread instances of extrajudicial killings and ill-treatment by the police and members of armed forces... and any investigations have generally failed to lead to prosecutions and sentences commensurate with the gravity of the crimes committed, creating a culture of impunity" (CCPR/CO/84/THA). In respect of the Philippines, The Human Rights Committee decried "The lack of appropriate measures to investigate crimes allegedly committed by State security forces and agents, in particular those committed against human rights defenders, journalists and leaders of indigenous peoples, and the lack of measures taken to prosecute and punish the perpetrators" (CCPR/CO/79/PHL). The Committee in its concluding observations on Sri Lanka's state party report of 2005 expressed concern that "violations by law enforcement officials are not investigated promptly and impartially by the State party's competent authorities (art. 12). The Committee is concerned about the undue delay of trials, especially trials of people accused of torture" (CAT/C/LKA/CO/2).

In the absence of regional human rights treaty bodies and limited access to individual complaints procedures, UN Charter bodies such as the Special Rapporteur on Torture,

national courts and NGOs have played an important role. For instance, several UN bodies have expressed concerns about allegations of widespread corruption among public officials in the criminal justice system, and lack of judicial independence. Indeed, in 2008, the highest number of individual complaints (38 per cent) made to the UN Special Rapporteur on the Independence of Judges and Lawyers came from Asia (A/HRC/8/4/Add.1). Concern has also been expressed about unfair trials, and the lack of effective complaints mechanisms, among other issues.

### **Implementation of international law in Asia: Issues and challenges**

A key challenge in the implementation of international law standards in Asian countries (as in many other countries) relates to the fact that treaties are often not self-executing and there is rarely adequate or sufficient national implementing legislation to guarantee international law standards in domestic law. Without a regional human rights court applicable in Asia, the UN human rights machinery is particularly important; however, many of the UN procedures are declarative and recommendatory only. While the UN Human Rights Committee and Committee Against Torture have repeatedly recommended states to establish procedures to implement their 'views' arising from individual complaints procedures, few states have heeded this advice. Both the governments of Sri Lanka and the Philippines have indicated that they do not see the 'views' of these bodies, to the consternation of the committees, NGOs and complainants alike.

For example, in the case of *Wilson v. the Philippines* [Communication No. 868/1999, CCPR/C/79/D/868/1999 (2003)], the Human Rights Committee recognised that the treatment and suffering during death row breached article 7 of the International Covenant on Civil and Political Rights (ICCPR), but the Philippines nonetheless rejected the finding of the merits and replied that it had no obligation to afford reparation. Similarly, in the *Singarasa case*, the Sri Lankan Supreme Court held, *inter alia*, that the ICCPR binds Sri Lanka as a state but has no domestic effect in the absence of any legislative or other measures to implement its provisions in Sri Lanka [*Singarasa v. the Hon Attorney-General*, Supreme Court of Sri Lanka, Court File S.C. SpL (LA) No. 182/99, judgment of 15 September 2006]: "The accession to the Covenant binds the Republic qua State. But, no legislative or other measures were taken to give effect to the rights recognised in the Convention as envisaged in Article 2. Hence the Covenant does not have internal effect and the rights under the Covenant are not rights under the law of Sri Lanka." The result of this judgment is that the views of the Human Rights Committee of 23 August 2004 (in *Nallaratnam Singarasa vs. Sri Lanka*, Communication No.1033/2001, CCPR/C/81/D/1033/2001) have not been enforced.

While the decisions of the Human Rights Committee are of a quasi-judicial nature, they constitute an authoritative interpretation of compliance or non-compliance on the part of the state party which the latter must consider in good faith. This is reflected in the implied powers asserted by the Human Rights Committee to ensure compliance with its decisions:

"The word 'consider' in Article 5, paragraph 1 of the Optional Protocol need not be taken as meaning consideration of a case only upon the adoption of a final decision, but consideration in the sense of engaging in those tasks deemed necessary to ensure implementation of the provisions of the Covenant." [A/CONF. 157/TBB/3 (1993)]

A state party, that is all branches of government, including the judiciary, is obliged to implement its obligations under the Covenant, which includes adhering to the Committee's views. As recognised in General Comment 31:

“The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.” (CCPR/C/21/Rev.1/Add.13)

# The prosecution system and administration of justice in Bangladesh

*M. Shamsul Haque, Advocate, Supreme Court of Bangladesh*

Since the dawn of civilization people have developed certain customs, rules, procedures and laws for their social stability, peace, harmony and tranquility. Thus individual civil and political rights were ensured. Whenever these individual rights have been infringed upon, the perpetrator is liable to be suited for a civil wrong and tried for committing a crime, or liable to be prosecuted. In prosecuting, certain procedures are followed and systems practiced. If those systems and procedures are followed strictly, individual rights can at least partially be ensured. This is the ultimate goal of adjudication and trial.

## Commencing prosecution in Bangladesh

In Bangladesh prosecution starts in one of two ways:

### 1. One can lodge a First Information Report (FIR) against the offender with the local police station (section 154 of the Code of Criminal Procedure 1898).

After getting the FIR the officer-in-charge of the police station shall enter it in a book to be kept and shall register the same as a police case, and if the offence is cognizable direct it to be investigated by the competent police officer of the police station. If the allegation is non-cognizable, the officer-in-charge shall seek permission from the magistrate to submit a prosecution report.

On the basis of information in a cognizable offence the police officer shall visit the place of occurrence, bring the accused into book and if the accused is arrested send them to the magistrate within 24 hours along with the FIR if the accused is not granted bail by the police authority. In holding an investigation, the investigating officer shall examine the witnesses and record their statements, and seize the alams (material evidence), if any. In a murder case the officer must hold an inquest and send the dead body for post mortem, and do such other works as necessary, and after obtaining due permission submit the reports either recommending a final report (when no offence is constituted) or charge sheet when *prima facie* case is made out against the accused.

### 2. One can file a petition of complaint in the court (of a judicial magistrate) directly (section 200 of the Code of Criminal Procedure 1898).

When a petition of complaint is filed in the court of magistrate having power of taking cognizance, the magistrate shall examine the complainant and the witnesses if any, on oath (if the complainant is not a public servant), and after examining the complainant the magistrate may dismiss the complaint or may issue process against the person complained against,

or send the case to the competent person or authority to enquire into the veracity of the allegations brought against the accused person or persons. On receiving the report if any case is made out the magistrate shall try the case, and if not set the accused at liberty.

### **Police report**

After receiving the police challan (report) the magistrate may accept it or send the case for reinvestigation.

If the police report is accepted, the magistrate may set the persons at liberty where no prima facie case has been made out during investigation or where the investigating officer has submitted a final report, commence trial of those persons against whom the charge sheet has been submitted if the case is triable by the magistrate, or if it is triable by the court of sessions, send it to that court for holding trial. The accused persons if brought to appear before the magistrate may be enlarged on bail or remanded into custody. Normally if the case is triable by the sessions judge, metropolitan or special judge, or by tribunal or by the special judge, the accused persons are not granted bail by the magistrate.

### **Procedure of trial**

For holding trial the procedures laid down in the Criminal Procedure Code are normally followed. The trial court on receiving the case record fixes the date of trial, issues summons upon the prosecution witnesses and on the date fixed for framing of charge, trial begins.

In framing charge, the accused persons are brought before the court, and in case they are already on bail granted earlier, they should be present. The accused may prefer application for discharge if the accused considers that the charge is groundless. After hearing the parties and considering the material evidence on record if the court thinks that the charge is groundless it may discharge the accused. If not discharged they are to be asked whether they are guilty or not. If they plead guilty the court shall give punishment as per law and if not guilty, prosecution witnesses are called upon to give evidence to prove the case [section 241A and 265(c)].

After the closing of evidence led by the prosecution the accused persons again are asked if they have heard the statements made by the prosecution witnesses and what do they say: guilty or not guilty? They also need to be asked whether they will adduce any defence witness or have anything to say or intend to put in any documentary evidence in support of their case. After considering the evidence if the court is satisfied that the prosecution has been able to prove its case and the accused persons are liable to be convicted and sentenced then it will pronounce judgment, inflicting punishment on the accused persons. If satisfied that the accused persons are innocent then it will pass judgment for acquittal.

This in a nutshell is the prosecuting system in Bangladesh. The following policies are followed in prosecuting the offenders:

- Prosecution normally is conducted by state lawyers but private lawyers may assist;
- No one should be condemned un-heard;
- Sufficient opportunity must be given to the accused to mount a defence;
- Let the guilty be freed rather than the innocent be punished; and,

- One must not be vexed twice for the same offence.

The principle of the prosecution system is to ensure justice with an impartial view, giving full opportunity to both parties, the complainant or informant and the accused, with a view to promote and maintain public confidence in the administration of justice.

Similarly, in prosecuting the accused, the person's fundamental rights must not be infringed or ignored. In this regard, Part III of the Constitution of the Peoples Republic of Bangladesh stipulates in article 27 that, "All citizens are equal before law and are entitled to equal protection of law." Article 28 has it that, "The state shall not discriminate on the ground of religion, race, caste, sex or place of birth." While article 31 most emphatically gives the right to protection of law, running as follows:

"To enjoy the protection of the law and to be treated in accordance with law and only in accordance with law is the inalienable right of every citizen, wherever he may be and of any other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law."

In article 33 it has more specifically been said that,

"(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he denied the right to consult and be defended by a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of the magistrate..."

These constitutional provisions indicate that the prosecution system in Bangladesh must be capable of protecting human rights as per article 2 of the International Covenant on Civil and Political Rights. The question is: how far are these being practically followed or materialized within the territory of Bangladesh?

### **The separation of powers and independence of the prosecution**

The independence of the judiciary has been expressly guaranteed under article 94(4) of the constitution, which runs as follows: "Subject to the provision of this Constitution the Chief Justice and the other judges shall be independent in the exercise of their judicial functions." Similarly in article 116A it is said, "Subject to the provision of the constitution, all persons employed in the judicial services and all magistrates shall be independent in the exercise of their judicial functions." The state policy of Bangladesh also is to make the judiciary separate from the executive as stated in article 22 of the constitution.

No doubt the higher judiciary is independent and the Supreme Court judges are freely performing their functions as per law. But with regard to the subordinate judiciary it is not easy to say that it is working freely without any influence or interruption.

According to article 116,

“The control (including the power of posting, promotion and grant of leave) and discipline of persons employed in the judicial service and Magistrates exercising judicial functions shall vest in the (President) and shall be exercised by him in consultation with the Supreme Court.”

The word “President” was substituted for “Supreme Court” and the words “in consultation with the Supreme Court” were inserted in *vide* order No. 18 of 1978. The president by framing rule rests the matter in the hands of the ministry and as such the subordinate judiciary was via this order brought under full power and control of the executive. The employees of the judicial service were brought into the executive service, treating their service as Bangladesh Civil Service (Judicial) as contained in the Bangladesh Civil Service (Re-organization) Order, 1980.

In this state of things some judicial officers who were either district judges, additional district judges or subordinate judges and other judges filed Writ Petition No. 2424 of 1995, widely known as the *Masder Hossain case (Md. Masder Hossain and Others v. Secretary, Ministry of Finance)* and the petitioners obtained a rule. This is a remarkable case in the history of Bangladesh’s judiciary and deserves some discussion.

In this writ petition, six points were argued challenging *inter alia* the *vires* of the Bangladesh Civil Service (Re-organization) Order, 1980. The points were:

1. The term BCS (Judicial) is a fundamental misconception, as a judicial service is recognized and treated separately in articles 115, 116 and 116A of the constitution and defined separately in article 152(1). The subordinate courts are part and parcel of Part VI of the constitution as a separate and independent entry and can’t be a part of the civil, administrative and executive service of the country. Article 133 cannot be invoked for judicial officers; there are separate provisions for them in articles 115 and 116.
2. That the petitioners were entitled to get a declaration that the judiciary had already been separated under Part VI of the constitution and the respondents should be directed to implement and carry out the mandate of the constitution in pursuance with articles 109, 115, 116 and 116A. The state should immediately bring the judicial service under the direct control of the High Court Division.
3. For effective implementation of the articles 115 and 116 necessary rules had to be framed by the president.
4. The constitution need not be amended for separation of the judiciary as it is a separate organ and article 109 brings the subordinate courts and tribunals under the control and superintendence of the High Court Division. Necessary rule-making power has been given to the Supreme Court. Moreover, in the Fundamental Principles of State Policy, article 22 of the constitution provides that the state shall ensure the separation of the judiciary from the executive organs of the state.



5. Judicial officers do not come within the jurisdiction of the administrative tribunal courts and judges are not subordinate to the administrative tribunal (as created under article 117 of the Constitution) as the service conditions of the judiciary are governed under Chapter II, Part VI of the constitution (articles 115, 116, 116A).
6. The unreasonable pay scale of the officers of the subordinate judiciary is *ultra vires* to the constitution, being in violation of articles 27 (equality before law) and 29 (equality of opportunity in public employment).

After hearing the case the High Court Division by a judgment dated 5 July 1997 made the rule absolute. The inclusion of judicial officers in the Bangladesh Civil Service (Reorganization) Order, 1980 was declared to have been *ultra vires* the constitution. The High Court Division also held that the judicial officers are outside the purview of Part IX of the constitution, and articles 133 and 136 have no application in their cases.

Against the aforesaid judgment and order, the secretary, Ministry of Finance, preferred Civil Appeal No. 79 of 1999. The Appellate Division granted leave to proceed and after hearing passed a judgment and order on 2 December 1999 as follows: "The appeal is partly allowed without any order as to cost. The direction of the High Court Division with regard to payment of salary and other benefits will continue. Judgment containing directions, orders observations and guide lines follow."

The content of the judgment of the Appellate Division [52 DLR (AD) 82] contained among other things that:

1. The judicial service is a service of the republic but it is distinct and separate from the civil executive and administrative service. It cannot be amalgamated and mixed with any other service of the republic.
2. The service (reorganization) order has no application to the judicial service and magistrates exercising judicial functions.
3. Creation of BCS (Judicial) cadres is *ultra vires* the constitution.
4. Steps must be taken forthwith to make rules under article 115 to implement the constitutional mandate. A judicial service commission must be established with a majority of members from the senior judiciary of the Supreme Court and the subordinate courts for recruitment to the judicial service on merit.
5. A rule or law must be enacted relating to posting, promotion, leave, discipline (except suspension and removal) pay, allowances, pension and other terms and conditions of service consistent with articles 116, 116A, etc.

However, the Appellate Division did not part with the view of the High Court Division that there is no need to amend the constitution to make the judiciary independent and that the judicial officers do not come within the jurisdiction of administrative tribunal.

In the light of this judgment the Bangladesh Judicial Service Commission (Appointment, Place of Posting, Promotion, Grant of Leave, Discipline and Terms and Conditions of Services) Rule, 2007 was framed by the president *vide* SRO Nos. 9 and 10 of 2007, published in the extraordinary gazette dated 16 January 2007. Subsequently certain amendments were brought in those rules.

As per the rules, remarkable changes have been made in the judicial administration of Bangladesh. The rules establish a separate pay commission for judicial officers and a separate service commission. The president in consultation with the Supreme Court will appoint judicial officers, and judicial officers of the districts including the magistrates performing judicial functions are brought under the control of the district judge.

All these changes in judicial administration undoubtedly make the judiciary separate, but it cannot be said that the judiciary will have become independent until and unless it is fully brought under the control of Supreme Court and a separate establishment is formed to provide it with full financial authority over its affairs. The former Chief Justice of Bangladesh, Justice Mustafa Kamal, recently said that as per the *Majder Hossain case* the judiciary has been separated from the executive, but it cannot be said that it has become independent, which requires that the lower judiciary be placed under the control of the chief justice not the president. (Reported in *The Daily Jugantor*, 1 November 2008)

### **Impediments found in the present criminal justice system**

**Preeminence of investigating officers:** Each and every cognizable offence is generally investigated by a police officer not below the rank of sub-inspector. This investigation stage is very important and the investigation officer plays a vital role in criminal proceedings. The pen of this officer decides who will stand in the dock to face trial, and who will or will not be set up in the charge sheet. If the police officer is sincere and honest it is no matter, but if he is dishonest, it is likely that innocent persons may be implicated and guilty persons may escape. This absolute power of the investigating officer should be curtailed and the investigation of a case be done by two or three investigating agencies whose majority view should be taken into consideration. Earlier there was a committing court where every cognizable case was examined before a magistrate and if the court found that the accused persons were liable to be tried, the case was sent to the trial court or court of sessions. Now that provision has been repealed.

**Lack of skill among investigating officers:** Nowadays cases are being investigated by some unskilled police officers. If the procedural law is not strictly followed the substantive law must fail. If the investigation is not properly done there remains every possibility of acquittal of guilty persons merely on technical grounds.

**Non-appearance of prosecution witnesses in court:** In criminal cases the prosecution side takes a series of adjournments, as witnesses do not come on the dates fixed, as a result of which unnecessary harassment is caused to the accused and the informant or complainant as well.

**Lack of honesty and sincerity of prosecutors:** In our country it is very often said that most of the public prosecutors and assistant public prosecutors are not sincere and sometimes some of them are blamed for their dishonesty. If so, justice can never be ensured.

**Unnecessary delay in disposal of cases:** The criminal cases pending in the courts are not being disposed of in time. Especially in the High Court Division there is a serious backlog of cases. There are several instances of people being sentenced to 10 years' imprisonment who could not get their appeals heard within that period.

**Enactment of harsh and stiff laws:** Often it is found in our country that harsh and apparently unjust laws are making the life of the common people more and more difficult. Instead of getting the protection of law, it is as if the law is being used to attack us.

**Misuse of power and highhandedness of police and investigating officers:** The great trouble nowadays is in the exercising of powers conferred on police officers, such as the power of arrest without a warrant (section 54 of the Criminal Procedure Code), the discrepancies in investigations, the taking of confessional statements from the accused via coercion or threat, and the use of torture to extract confession. All these matters have been elaborately discussed in *Bangladesh Legal Aid and Services Trust (BLAST) and Other NGO v. Bangladesh and Others* (55 DLR 363).

### **Recommendations of the High Court Division**

A Division Bench of the High Court Division, comprising Justice Md. Hamidul Haque and Justice Salma Masud Chowdhury by their judgment dated 7 April 2003 gave certain recommendations to deal with such problems, which are as follows.

#### **“Recommendation A**

1. The First Condition may be amended as follows:

First, any person against whom there is a definite knowledge about his involvement in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so involved.

2. The Seventh condition may be also amended like the first condition

3. A subsection (2) shall be added which shall contain the following provisions:

(a) Whenever a person is arrested by a police officer under sub-section (1) he shall disclose his identity to that person and if the person arrested from any place of residence or place of business, he shall disclose his identity to the inmates or the persons present and shall show his official identity card if so demanded.

(b) Immediately after bringing the person arrested to the police station, the police officer shall record the reasons for the arrest including the knowledge which he has about the involvement of the person in a cognizable offence, particulars of the offence, circumstances under which arrest was made, the source of information and the reasons for believing the information,

description of the place, note the date and time of arrest, name and address of the persons, if any, present at the time of arrest in a diary kept in the police station for that purpose.

(c) The particulars as referred to in clause (b) shall be recorded in a special diary kept in the police station for recording such particulars in respect of persons arrested under this section.

(d) If at the time of arrest, the police officer finds any marks in injury on the body of the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or to a Government doctor for treatment and shall obtain a certificate from the attending doctor about the injuries.

(e) When the person arrested is brought to the police station, after recording the reasons for the arrest and other particulars as mentioned in clause (b), the police officer shall furnish a copy of the entries made by him relating to the grounds of the arrest to the person arrested by him. Such grounds shall be furnished not later than three hours from the time of bringing him to the police station.

(f) If the person is not arrested from his residence and not from his place of business or not in presence of any person known to the accused, the police officer shall inform the nearest relation of the person over phone, if any, or through a messenger within one hour of bringing him to the police station.

(g) The police officer shall allow the person arrested to consult a lawyer, if the person so desires. Such consultation shall be allowed before the person is produced to the nearest Magistrate under Section 61 of the Code.

### **Recommendation B**

1. Existing subsection (2) be renumbered as subsection (3) and a new subsection (2) may be added with the following provisions.

Subsection (2)(a) if the Magistrate, after considering the forwarding of the Investigating officer and the entries in the diary relating to the case is satisfied that there are grounds for believing that the accusation or information about the accused is well-founded, he shall pass an order for detaining the accused in the jail. If the Magistrate is not so satisfied, he shall forthwith release the accused. If in the forwarding of the Investigating Officer the grounds for believing that the accusation or information is well founded are not mentioned and if the copy of the entries in the diary is not produced, the Magistrate shall also release the accused forthwith.

(b) If the Investigating Officer prays for time to complete the investigation, the Magistrate may allow time not exceeding seven days and if no specific case about the involvement of the accused in a cognizance offence can be filed within that period, the accused shall be released by the Magistrate after expiry of that period.

(c) If the accused is released under clause (a) and (b) above, the Magistrate may proceed for committing offence under section 220 of the Penal Code suo motu against the police officer who arrested the person without warrant even if no of complaint is filed before him.

2. Subsection (2) be substituted by a new subsection (3) with the following provisions:

(a) If a specific case has been filed against the accused by the investigating officer within the time as specified in sub-section (2)(b), the Magistrate may authorize further detention of the accused in jail custody.

(b) If no order for police custody is made under clause (c), the investigating officer shall interrogate the accused, if necessary, for the purpose of investigation, in a room specially made for the purpose with glass wall and grill in one side, within the view but not within hearing of a close relation or lawyer of the accused.

(c) If the investigating officer files any application for taking any accused into custody for interrogation, he shall state in detail the grounds for taking the accused in custody and shall produce the case diary for consideration of the Magistrate. If the Magistrate is satisfied that the accused be sent back to police custody for a period not exceeding three days, after recording reasons, he may authorize detention in police custody for that period.

(d) Before passing an order under clause (c), the Magistrate shall ascertain whether the grounds for the arrest was furnished to the accused and the accused was given opportunity to consult lawyer of his choice. The Magistrate shall also hear the accused or his lawyer.

3. Subsection (4) be substituted as follows:

(a) If the order under clause (c) is made by a Metropolitan Magistrate or any other Magistrate he shall forward a copy of the order to the Metropolitan Sessions Judge or the Sessions Judge as the case may be, for approval. The Metropolitan Sessions Judge or the Sessions Judge shall pass the order within fifteen days from the date of the receipt of the copy.

(b) If the order of the Magistrate is approved under clause (a), the accused before he is taken in custody of the Investigating Officer shall be examined by a doctor designated or by a Medical Board constituted for the purpose and the report shall be submitted to the Magistrate concerned.

(c) After taking the accused in custody only the investigating officer shall be entitled to interrogate the accused and after expiry of the period, the investigating officer shall produce him before the Magistrate. If the accused makes any allegation of any torture, the Magistrate shall at once send the accused to the same doctor or Medical Board for examination.

(d) If the Magistrate finds from the report of the doctor or Medical Board that the accused sustained injury during the period under police custody, he shall proceed under section 190(1)(c) of the Code against the investigating officer for committing offence under section 330 of the Penal Code without filing of any petition of complaint by the accused.

(e) When any person dies in police custody or in jail, the Investigating Officer or the jailor shall at once inform the nearest Magistrate of such death.

About such custodial death: Under the existing provisions of this section, the Magistrate is not bound to hold an inquiry. So, we like to emphasize that the duty of the Magistrate shall be made mandatory. For this the following amendment in section 176 is recommended:

### **Recommendation C**

Existing subsection (2) be re-numbered as subsection (3) and the following be added as subsection (2).

(2) When any information of death of a person in the custody of the police or in jail is received by the Magistrate under section 167(4)(e) of the Code of (as recommended by us), he shall proceed to the place, make an investigation, draw up a report of the cause of the death describing marks of injuries found on the body stating in what manner or by what weapon the injuries appear to have been inflicted. The Magistrate shall then send the body for post mortem examination. The report of such examination shall be forwarded to the same Magistrate immediately after such examination.

### **Recommendation D**

1. A new subsection (3) be added with the following provisions:

(3)(a) The Magistrate on receipt of the post mortem report under section 176(2) of the Code (as recommended by us) shall hold inquiry into the case and, if necessary may take evidence of witnesses on oath.

(b) After completion of the inquiry, the Magistrate shall transmit the record of the case along with the report drawn up under section 176(2) (as recommended by us), the post mortem report, his inquiry report and a list of the witnesses to the Sessions Judge or Metropolitan Sessions Judge, as the case may be, and shall also send the accused to such judge.

(c) In case of death in police custody, after a person taken in such custody on the prayer of the investigation officer, the Magistrate may proceed against the investigating officer, without holding any inquiry as provided in clause (a) above and may send the investigating officer to the Sessions Judge or the Metropolitan Sessions Judge as provided in clause (b) along with his own report under subsection (2) of section 178 and post mortem report.

### **Recommendation E**

(a) One proviso be added in section 330 providing enhanced punishment up to ten years' imprisonment with minimum punishment of a sentence of seven years if hurt is caused while in police custody or in jail, including payment of compensation to the victim.

(b) 2nd proviso for causing grievous hurt while in such custody providing minimum punishment of sentence of ten years' imprisonment including payment of compensation to the victim.

(c) A new section be added as section 302A providing punishment for causing death in police custody or in jail, including payment of compensation to the nearest relation of the victim.

(d) A new section be added after section 348 providing for punishment for unlawful confinement by a police officer for extorting information, etc. as provided in Section 348, with minimum punishment of imprisonment for three years and with imprisonment which may extend to seven years.

A clause may be added in section 114 of that Act incorporating the above principle.

### Recommendation F

34. The new section in the Evidence Act shall provide that when a person dies in police custody or in jail, the police officer who arrested the person or the police officer who has taken him in his custody for the purpose or interrogation or the jail authority in which jail the death took place shall explain the reasons for death and shall prove the relevant facts to substantiate the explanation.

35. In the Police Act of 1861, there is no provision for maintaining any diary for recording the reasons for arrest without warrant and other necessary particulars as have been mentioned in the recommended subsection (2) of section 54 of the Code. So, we like to recommend that a new section be added after section 44 of the Police Act.

### Recommendation G

36. The new section in the Police Act shall provide that the officer in charge of a police station shall keep a special dairy for recording the reasons and other particulars as required under recommended new subsection (2) of section 54 of the Code.

37. We have already mentioned that the provisions of the existing sections 54 and 167 of the Code are to some extent inconsistent with the provisions of articles 27, 30, 31, 32, 33 and 35 of the Constitution and we have recommended that the above two sections may be amended for the purpose of safeguarding the liberty and fundamental rights of the citizens. We also like to emphasise that the respondents are to be directed to remove the inconsistency within the time fixed by us.

38. A question may be raised as to whether this Court has any power to make recommendation for amendment to any law. Our answer is that this Court has such power under article 102. As we have found that some of the existing provisions of sections 54 and 167 of the Code are inconsistent with the fundamental rights of the citizens, this Court cannot only recommend amendment, it can even issue directions. In Masdar Hossain's case [7 BLC (AD) 92], the Appellate Division issued directions upon the Government to ensure separation of the Judiciary from the Executive and the Appellate Division modified the drafts and made those drafts as part of its order. It is expected that with the separation of judiciary from Executive, the Magistrate and the Courts may exercise powers free from any Executive Pressure.

39. We are conscious that some of our recommendations cannot be implemented without making necessary amendments in the relevant law but at the same time we like to insist that some of the recommendations may be implemented immediately as these are in conformity with some of the existing provisions of the Constitution and the Code itself. So, we would like to issue some directions to follow those immediately. The directions are as follows:

(1) No police officer shall arrest a person under section 54 of the Code for the purpose of detaining him under section 3 of the Special Powers Act, 1974.

(2) A Police Officer shall disclose his identity and, if demanded, shall show his identity card to the person arrested and to the persons present at the time of arrest.

(3) He shall record the reasons for the arrest and other particulars as mentioned in recommendation A(3)(b) in a separate register till a special diary is prescribed.

(4) If he finds any marks of injury on the person arrested, he shall record the reasons for such injury and shall take the person to the nearest hospital or Government doctor for treatment and shall obtain a certificate from the attending doctor.

(5) He shall furnish the reasons for arrest to the person arrested within three hours of bringing him to the police station.

(6) If the person is not arrested from his residence or place of business, he shall inform near relations of the person over phone, if any, or through a messenger within one hour of bringing him to the police station.

(7) He shall allow the person arrested to consult a lawyer of his choice if he so desires or to meet any of his nearest relations.

(8) When such person is produced before the nearest Magistrate under section 61, the police officer shall state in his forwarding letter under section 167(1) of the Code as to why the investigation could not be completed within twenty four hours, why he considers that the accusation or the information against that person is well-founded. He shall also transmit copy of the relevant entries in the case diary BP from 38 to the same Magistrate.

(9) If the Magistrate is satisfied on consideration of the reasons stated in the forwarding letter as to whether the accusation or the information is well-founded and that there are materials in the case diary for detaining the person in custody, the Magistrate shall pass an order for further detention in jail. Otherwise, he shall release the person forthwith.

(10) If the Magistrate releases a person on the ground that the accusation or the information against the person produced before him is not well-founded and there are no materials in the case diary against that person, he shall proceed under section 190(1)(c) of the Code against that police officer who arrested the person without warrant for committing offence under section 220 of the Penal Code.

(11) If the Magistrate passes an order for further detention in jail, the Investigating officer shall interrogate the accused, if necessary, for the purpose of investigation in a room in the jail till the room as mentioned in recommendation B(2)(b) is constructed.

(12) In the application for taking the accused in police custody for interrogation, the investigating officer shall state reasons as mentioned in recommendation B(2)(c).

(13) If the Magistrate authorizes detention in police custody, he shall follow the recommendations contained in recommendation B(2)(c)(d) and B(3)(b)(c)(d).

(14) The police officer of the police station who arrests a person under section 54 or the Investigating Officer who takes a person in the police custody or the jailor or the jail, as the case may be, shall at once inform the nearest Magistrate as recommended in recommendation B(3)(e) of the death of any person who dies in custody.

(15) A Magistrate shall inquire into the death of a person in police custody or in jail as recommended in recommendation C(1) immediately after receiving information of such death.”



In addition to these recommendations, some of the other steps that need to be taken include:

1. There should be separate branch of police who only investigate cases and are not required to engage in protocol, security, etc.
2. In habeas corpus matters or under section 493 of the Criminal Procedure Code whenever it is declared by the proper court of law that an arrest and detention is illegal and without lawful authority, the officer who detained or arrested the person illegally should be punished under section 220 of the Penal Code.
3. To curb the abusive exercise of police power, a competent judicial authority should evaluate officers' work and performance every three months to establish that the officers have performed their duties in conformity with the laws. The report of that authority should be considered in respect of promotion and such other service benefits for police officers.

## **AHRC case study: Accused in Bangladesh forced to pay bribe to the Special Public Prosecutor and judge**

*The names of the complainant and the accused persons are not the real names concerning their individual security.*

Sameer Ali's divorced wife, Roza lodged a case with the Nari O Shishu Nirjatan Daman Bishesh Adalat (Women and Child Repression Prevention Special Tribunal) of Jessore five years ago under sections 11 (Kha) and 30 of the Women and Children Repression Prevention Act, 2000.

In the complaint Roza alleged that on the date of incident, Sameer accompanied by his mother and elder sister went to her parents' house to collect dowry. In the evening when she was alone at home with her two-and-a-half-year-old daughter they forcibly entered the house, beat her brutally with kicks and fists in her abdomen and back, and attempted to strangle her in the presence of her aunt and cousin. As a result she went faint and had swollen injuries on various parts of her body. As soon as the neighbours and relatives arrived at the scene the three alleged perpetrators fled away.

In the complaint it was also mentioned that when Roza's father came back home he found his daughter senseless in the living room and took her to the hospital at around 12:30am (the early morning of the following day) for treatment of her injuries. As her condition deteriorated while under the care of the family's private physician her father transferred her to the Jessore General Hospital, which is the biggest public hospital of the district headquarters. After collecting a medical certificate from the hospital's doctor, the complaint was lodged with the court following the refusal of the Kotwali police to record the case.

The complainant attached a medical certificate issued by the Emergency Medical Officer of the Jessore General Hospital on the date of the alleged incident, signed by Dr. M. Samsul Hassan as the on-duty doctor and the president of a medical board. The medical certificate, bearing a reference number of the Emergency Unit Registration, reports that Roza, aged 23, wife of Sameer Ali (although they were divorced) had received first aid at the hospital at 8:50am on the day of the alleged incident for bruises on the front side of her neck, chest and lower abdomen. The injuries were simple in nature and happened within 72 hours of the time that the certificate was issued.

In fact, the medical certificate was a fake: the doctor received some money after phone calls from the ruling party political leaders and subsequently issued it. In reality, there had been no assault. However, according to the Women and Children Repression Prevention Act, 2000 if any complaint is lodged with any of the concerned tribunals under its sections then the persons named as accused in the complaint will be detained as a result of the non-bailable nature of the sections.

In a thorough interview with the AHRC, Sameer described that until the declaration of the verdict after almost three years acquitting him from the charges, for almost three years he suffered immense personal and financial costs. His financial and family lives have been ruined.

Sameer said that his father-in-law, a rich man attached to the ruling party, paid money to the medical doctors of the hospital, the staff of the court and the police station and influenced them politically to get the complaint lodged as well as to issue an arrest warrant against Sameer, his mother and sister. 10 days after the case was lodged, the three of them surrendered to the court. Thereafter,

“My brother engaged a lawyer who lodged a bail petition with the Nari O Shishu Special Tribunal of Jessore for me. As soon as the bail petition was lodged with the tribunal the steno and peon [staff responsible for assisting the judge’s office] named Mr. Ranju came to my brother and started explaining the probable problems and sufferings we might experience in the case. Later, the steno of the judge, Mr. Shafik, also joined Ranju, and they together came to us. They were intimidating us, saying that the judge of the tribunal, Mr. Mir Awlad Hossain, receives money for granting bail; they also described that no party can get any benefit from that tribunal without paying money to the judge, and intimidated us saying that, ‘It is a case under the non-bailable section of the Nari O Shishu Nirjatan Daman Ain, your brother, mother and sister must be detained for sixty days without bail. If you want to free them, it is at your hand; if you don’t pay money, I am sure that they will never be released!’

We were scared of going to prison. We were also worried about my sister’s seven-year-old daughter, who frequently gets sick; if we three persons were detained together then there would be no person at home to take care of my niece, as my brother used to stay separately in another place. Following the intimidation and fearing the worst consequences, like social humiliation, my brother was considering paying money to ensure the release of all three accused persons: me, my mother and sister. My brother bargained with the steno of the judge, Mr. Shafik, who fixed the amount as Taka 15,000, saying that, ‘If you pay a penny less than 15,000, then I cannot guarantee you of getting bail for all three persons.’ Then, my brother went out and came back borrowing money from his friends and paid Taka 10,000 as an advance, agreeing to pay 5000 more to the judge’s steno Mr. Shafik if the bail was granted; steno Shafik also agreed with him. The judge granted me bail on condition of depositing Taka 10,000 as a bond against our bail order. My brother paid the amount for the bail bond and we were released from the court’s custody. After about four days we had to pay the 5000 due to Mr. Shafik.

It was a very expensive week for us, because we had to deposit Taka 10,000 to the court to fulfill the requirements of the order from the judge; Taka 15,000 as bribes to the judge through the steno and peon; and around 1,300 to the lawyer and the ‘mohuri’ [clerk of the lawyer], beyond the expenditure of typing costs for the petitions submitted to the court, copying documents, buying judicial stamps, telecommunications and our own conveyance and food, which were a few hundred Taka more.

It was a false case against us; I was ready to fight it at any cost. But, at no point I wanted to see my mother, who was in her 60s, and my innocent sister detained in prison. On the other hand, the steno and peon of the judge continued intimidating us, informing me that if I did not pay money to the judge, Mir Awlad Hossain, then my mother and sister might be detained in prison until the verdict was declared, which was unthinkable for me. Steno Shafik bargained with me and promised that the judge would drop the charges against my mother and sister while framing a charge against me, and finally the verdict would acquit me from the charges at the cost of Taka 50,000 for which I would have to pay 25,000 before the date of framing the charge of the case, the rest before the date of the verdict.

After long bargaining Shafik informed me that the judge agreed to settle it with Taka 40,000; however, I would have to pay 25,000 before the framing of the charge. I had no alternative but to pay the money.

I consulted with my lawyer about the probable fate of us and the intimidation of the steno and peon of the judge, as well as their insistence on paying bribes, and the lawyer opined that the judge understood that the case was fabricated, but that he and the PP [Public Prosecutor] could lead it toward a certain direction if they wished. Regarding the bribes, although he did not say no [to them] he was trying to make me understand that paying bribes is safe to get a favourable verdict from the judge, which was an indirect instruction to pay money to the judge.

The Investigation Officer, Sub Inspector of the Kotwali police station of Jessore, Mr. Abul Kashem, insisted I pay a bribe to prepare a 'positive investigation report' for me. I was bound to pay Taka 500 to him when he came to me.

I had endless suffering, tension, harassment and expenses having been victimized in this case. The Special PP of the tribunal was also another corrupt guy. One day, before framing the charge, the SPP advocate, Mr. Zafor Sadik, came to me and said, 'Hey, I see all of you are going to be convicted in this case with a life term of rigorous imprisonment! Do you have any way out?' It was a very scary moment for me, though I did not bother for myself, but I could not imagine my mother and sister in prison. I asked him, 'Is there any way to save my mother and sister, first?' The SPP told me, 'It is a very strong case. I am worried about you! Try your best, if you can escape the punishment!' I asked him whether he could do anything for me, as he was the PP of the tribunal. He said, 'I can try...'

On my way between my workplace and home I used to have meetings with the SPP. Whenever I met him he used to intimidate me in the same way. The way he used to speak seemed that he was expecting money and if he got some money, he may not be harmful to me. I gave him money before the date of framing the charge; he took the money, smiled at me and said, 'Keep trying!' Finally, the names of my mother and sister were dropped! The tribunal framed the charge against me only...

During the argument [in trial], one day advocate Zafor Sadik came to me again and said, 'You are going to be ruined; none can save you from at least seven to ten years of imprisonment. If I argue strongly, you will be in more trouble!' I paid Taka 2000 to him and requested to keep his mouth shut during the argument sessions. I heard from my relatives and friends that he received more than ten times that from the complainant's side, promising to convict me in the trial.

During the trial the judge Mr. Mir Awlad Hossain was transferred to elsewhere for his notorious identity as a corrupt judge, which was an open secret to everyone. He was so irresponsible that on every Thursday, at around 12 noon to 1pm he used to leave Jessore to meet his family, who reportedly used to stay somewhere near to Dhaka... And after the weekend, he used to come back to the office after the lunch hour, and there was no judge to take over responsibility from him. So apparently, the parties and persons related to that particular tribunal used to lose almost two working days a week because of the judge's style of life: we had no hope for those two days! Mr. Noor Mohammad Moral replaced him as the judge of the tribunal, following the initiatives by the District & Session Judge at that time.

We heard that the new judge was not dishonest. But, the steno Shafik used to persuade me regularly saying that the new judge also takes bribes like his predecessor and insisted I pay the remaining Taka 15,000 as part of the earlier oral contract with him. I was forced to pay him the money before the judgment, though later I came to know that the judge did not take the money; it was swallowed by Shafik himself.”

## The Cambodian prosecutorial system

*Chum Sen Sethea, Deputy Prosecutor, Kompong Cham Provincial Court, Cambodia*

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which have been adopted by Cambodia and are part of the national law via the constitution state that every human being has a right to an effective remedy granted by an independent judicial body in case of a violation of his or her rights. It is the obligation of every signatory to establish a judicial system that is able to fulfil people's rights.

The 1993 Constitution of the Kingdom of Cambodia explicitly acknowledges the basic right to judicial protection against all kinds of violations of rights no matter if the right is violated by third parties or by the government. Article 38 states that every citizen shall enjoy the right to defence through judicial recourse. Article 39 states that citizens shall have the right to make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall be the competence of the courts, which have their independence guaranteed under article 128. The judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens. The judiciary shall cover all lawsuits including administrative ones.

The constitution provides due protections such as the presumption of innocence, and also guarantees an independent judiciary. Efforts are still being made to train judicial personnel to implement these principles, and to ensure basic human rights for Cambodians. The constitution provided for a supreme judicial tribunal whose members were to be appointed by a People's Assembly. Because of civil and military turmoil, however, this system has never been fully implemented.

The current legal system consists of lower courts, an appeals court and the Supreme Court. There is also a military court system. The constitution provides for the Constitutional Council and Supreme Council of Magistracy, which appoints and disciplines judges.

A judge involved in a trial or investigation is called a sitting judge. A judge who holds a position in the prosecution department is called a standing judge (prosecutor). A sitting judge can be a standing judge during his or her career in the court and vice versa. Both types of judges have equivalent rank.

The functions of the Prosecution Department are to:

- Defend the state authority of the people and democratic legality,
- Preserve public security and social order,
- Protect public property, and,
- Protect the rights, freedoms, life and legitimate interests of citizens.

The prosecutor exercises the right to represent the state, and with the cooperation of the police collects evidence concerning an alleged crime or offence. In this process, the prosecutor must ensure that all evidence is valid and not extracted by unlawful means. The prosecutor must bring the case to trial, presenting the charge and making the case on the basis of admissible evidence. After trial, the prosecutor pursues the implementation of the verdict. The prosecutor must also investigate prison conditions to ensure that the human rights of the prisoner are respected.

The principle of separation of powers in government is the bedrock of a democratic state based on the rule of law. The judicial power is one of the three powers of a democratic government. There is no liberal democratic system if there is no separation of powers between the executive, legislature and judiciary.

Who governs Cambodia? The answer is in articles 118 and 121 of the constitution. The Council of Ministers is the Royal Government of Cambodia. But the members of the Royal Government shall be collectively responsible to the National Assembly and every member of the Royal Government shall be individually responsible to the prime minister and assembly for his or her own conduct. While the executive may execute and implement the laws made by the National Assembly, there is no provision in the constitution enabling the executive to make any law as such.

The National Assembly is the legislative body and is the only organ to hold legislative power. This power is not transferable. This categorical assertion in the constitution rules out any other institution or individual making any laws. In other words, it is only laws that are adopted by the National Assembly that the king is required to promulgate. Therefore, if any minister or any other individual or body purports to make any law, this law will be unconstitutional.

Likewise, under article 130, judicial power shall not be granted to the legislative or executive branches. The nomination of the judges is a matter for the Supreme Council of the Magistracy. The king is the guarantor of the independence of the judiciary. Therefore, the people and all concerned with its independence can urge the king to take all steps that are necessary to guarantee this. The king is duty-bound in this regard.

Within this framework, the only function of the Department of the Public Prosecution is to investigate and file criminal suits. The Department of the Public Prosecution decides on its own to investigate and prosecute a case or not.

During the United Nations Transitional Authority for Cambodia regime in 1993, the Law of Establishment of the Courts and the Law on Criminal Procedure were passed to govern the work of the prosecutor, among other things. Now these laws are null and void and have been replaced by the new Criminal Procedure Code.

In reality, the prosecution department faces a lot of problems, such as insufficient and inadequate laws; difficulties with the new Criminal Procedure Code, including not enough

training on its provisions; pressure from outside affecting independence; small and indiscrete workplaces, with the staff of the department and courts sharing offices; no law on evidence; absence of defence lawyers; inadequate security; insufficient funding; lack of medical specialists to depose on cases in court; and, unskilled police investigations.

To address these problems, the following measures are necessary:

1. The prosecution department must be located away from court premises;
2. Prosecutors must have full and equal rights with police to investigate criminal cases, and powers to order or advise the police to find more evidence;
3. The prosecution department should have a separate budget from the court and have enough money to investigate criminal cases;
4. More laws must be introduced, such as an evidence law and business law;
5. Enough lawyers must be available to present accused persons at the courts;
6. The security of judges and prosecutors must be guaranteed; and,
7. A doctor should be appointed to each court to help the prosecutor to investigate cases on the basis of medical evidence.



## Public prosecution in India

*Dr. K. N. Chandrasekharan Pillai, Director, Indian Law Institute, New Delhi*

In organized societies, there is a public prosecution system to prosecute offenders who violate societal norms. The system in common law countries differs from that in the continental countries, but in both, this office is a centre of attraction, a power centre. It wields a lot of authority. It is the repository of the public power to initiate and withdraw prosecution. These powers are untrammelled in continental countries, where this office is called procurator. The word 'procurator' is derived from the Latin word 'procurator', which means 'I care, secure, protect'. Though the prosecutors in the common law countries do not carry these adulations, it appears the powers exercised by procurators are similarly understood to be available to the prosecutors in common law countries. However, many of the main powers are not available.

In continental countries the procurator is looked upon as the strict eye of the state. He prohibits, punishes and prevents. The defence lawyer is viewed as defender. One of the procurator's chief functions must be to protect citizens' legitimate rights and interests with actions, not words, as prescribed by the law. The impression that the procurator is independent and impartial is accepted in the common law countries though in fact in these countries they may not be impartial. Even in the face of statutory provisions to the contrary, their traditional rights like *nulle prosequi* are accepted. Therefore, generally speaking, it could be said that the prosecution system in common law countries works within the statutory provisions in the context of traditional powers and duties attached to this office in continental countries.

In India, we have a public prosecutor who acts in accordance with the directions of the judge. The control of trial is in the hands of the trial judge. Investigation is the prerogative of the police. The decision to prosecute—a function attributed to the procurator in continental countries—is taken in India by the magistrate on the report submitted by the police. Again, the withdrawal of the prosecution can also be done only with the permission of the court. However, it is generally believed that traditional right of *nulle prosequi* is available to the prosecutor.

Being an officer of the court, the prosecutor is believed to represent the public interest and as such not to seek conviction of a party by hook or crook. The prosecutor is supposed to lead evidence favourable to the accused for the benefit of the court, not conceal it to secure a conviction. It is also believed that in a case of withdrawal of prosecution, if the prosecutor makes an independent decision to withdraw a case then the court should accept this and permit withdrawal under section 321 of the Criminal Procedure Code (CrPC).

Section 24 of the CrPC provides for appointment of public prosecutors in the High Courts and the district by the central government or state government. Subsection 3 lays down that for every district, the state government shall appoint a public prosecutor and

may also appoint one or more additional public prosecutors for the district. Subsection 4 requires the district magistrate to prepare a panel of names of persons considered fit for such appointment, in consultation with the sessions judge. Subsection 5 contains an embargo against appointment of any person as the public prosecutor or additional public prosecutor in the district by the state government unless his name appears in the panel prepared under subsection 4. Subsection 6 provides for such appointment wherein a state has a local cadre of prosecuting officers, but if no suitable person is available in such cadre, then the appointment has to be made from the panel prepared under subsection 4. Subsection 4 says that a person shall be eligible for such appointment only after he has been in practice as an advocate for not less than seven years. Section 25 deals with the appointment of an assistant public prosecutor in the district for conducting prosecution in the courts of magistrate. In the case of a public prosecutor also known as district government counsel (criminal) there can be no doubt about the statutory element attached to such appointment by virtue of this provision in the CrPC 1973.

In this context, section 321 of the CrPC is also relevant. As already mentioned, it permits withdrawal from prosecution by the public prosecutor or assistant public prosecutor in charge of a case with the consent of the court at any time before the judgment is pronounced. This power of the public prosecutor in charge of case is derived from the statute and must be exercised in the interest of the administration of justice. There can be no doubt that this function of the public prosecutor relates to a public purpose entrusting the officer with the responsibility of so acting only in the interest of administration of justice.

The nature of the powers of the public prosecutor is sometimes doubted. At times, it appears to be executive power. In certain contexts, it may appear to be quasi-judicial. The principle that the Supreme Court laid down in *R K Jain's case* (AIR 1980 SC 1510), quoting *Shamsher Singh v. State of Punjab* [(1974) 2 SCC 831], as regards the meaning and content of executive powers tends to treat the public prosecutor's office as executive. But the conclusions of some courts create doubt as to its exact nature. To the suggestion that the public prosecutor should be impartial (a judicial quality), the Kerala High Court equated the public prosecutor with any other counsel and responded thus:

“Every counsel appearing in a case before the court is expected to be fair and truthful. He must of course, champion the cause of his client as efficiently and effectively as possible, but fairly truthfully. He is not expected to be impartial but only fair and truthful.” [*Aziz v. State of Kerala* (1984) Cri. LJ 1060 (Ker)]

In a subsequent decision, however, the same high court had to distinguish between a public prosecutor and a counsel for the private party thus:

“Public prosecutors are really ministers of justice whose job is none other than assisting the state in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to use the innocents go to the gallows. They are also not there to see the culprits escape conviction. But the pleader engaged by a private person who is a defacto complainant cannot

be expected to be so impartial. Not only that, it will be his endeavor to get the conviction even if a conviction may not be possible.” [*Babu v. State of Kerala* (1984) Cri. LJ 499 (Ker) at 502]

Though the office of the public prosecutor seems to have the features of the executive, the judiciary does not appear to treat it so, because it does not approve of the appointment of police officers as public prosecutors. The Punjab & Haryana High Court in *Krishan Singh Kundu v. State of Haryana* [1989 Cri. LJ 1309 (P&H)] has ruled that the very idea of appointing a police officer to be in charge of a prosecution agency is abhorrent to the letter and spirit of sections 24 and 25 of the Code. In the same vein the ruling from the Supreme Court in *SB Sahana v. State of Maharashtra* [(1995) SCC (Cri) 787] found that irrespective of the executive or judicial nature of the office of the public prosecutor, it is certain that one expects impartiality and fairness from it in criminal prosecution. The Supreme Court in *Mukul Dalal v. Union of India* (1988 3 SCC 144) also categorically ruled that the office of the public prosecutor is a public one and the primacy given to the public prosecutor under the scheme of the court has a social purpose. But the malpractice of some public prosecutors has eroded this value and purpose.

In *Sunil Kumar Pal v. Phota Sheikh* [(1984) 4 SCC 533] the Supreme Court was presented with a peculiar situation. In this case, some miscreants murdered the appellant's brother and there were virtually no subsequent proceedings against the accused for quite some time. The appellant was not present in India to pursue the case vigorously. When he came to India, he approached the state government to expedite things. Due to his persistence, one lawyer was appointed as a special public prosecutor. He approached the session court judge trying for an adjournment, as he had no records with him. He was granted only a day and he returned the briefs, as he did not have sufficient time to prepare for the case. Then the junior of the public prosecutor in the area was appointed as special public prosecutor for this case. He was also given a day for preparation before the commencement of the trial, in which it was astonishing to find that the nine accused were represented by the public prosecutor of the area! The trial was a farce. Supporters of the Communist Party of India (Marxist) assembled around the court and shouted slogans against the prosecution. Witnesses were intimidated and several did not turn up. Some turned hostile. The accused were acquitted. The appellant's prayer for leave to appeal was rejected. The Calcutta High Court also rejected his appeal under section 401. Then he approached the Supreme Court with special leave. The court set aside the order of acquittal after making a survey on the administration of the lower court and in paragraph 10 observed thus:

“The order passed by the learned additional sessions judge acquitting respondent nos. 1 to 9 obviously suffers from a serious infirmity and we do not think it is possible to sustain it on any view of the matter. There can be little doubt that the trial culminating in the acquittal of respondent nos. 1 to 9 was appallingly unfair so far as the prosecutions is concerned and was heavily loaded in favour of respondent nos. 1 to 9. It is difficult to understand how consistently with ethics of the legal profession and fair play in the administration of justice, the public prosecutor of Nadia could appear on behalf of respondent nos. 1 to 9. The appearance of the public prosecutor, Nadia on behalf of the defence does lent support to the allegation of the appellant that respondent nos. 1 to 9 were supported by the Communist Party of India (Marxist) which was at the material time the ruling party in the State of West Bengal and

this would naturally give rise to apprehension in the minds of the witnesses that in giving evidence against respondent nos. 1 to 9, they would be not only incurring the displeasure of the government but would also be fighting against it. Moreover, it cannot be disputed that when the trial was going on and the witnesses were giving evidence, there were a large number of supporters of the Communist Party (Marxist) who were allowed to assemble in the court compound and who created a hostile atmosphere by shouting against the prosecution and in favour of the accused. Though the appellant and the complainant as also the witnesses were intimidated, no steps were taken for according protection to them so that they may be able to give evidence truly and fearlessly in proper atmosphere consistent with the sanctity of the court. It is significant to note that quite a few witnesses turned hostile and that obviously must have been due to the fact that they apprehended danger to their life at the hands of respondent nos. 1 to 9 and their supporters. It is also regrettable that though at the time when the trial commenced on 22nd May, 1978, Shri S. N. Ganguly, who was appointed special public prosecutor to conduct the prosecution, asked for an adjournment of the trial in order to enable him to prepare the case particularly since he was appointed on 20th May, 1978, the trial was adjourned only for one day, with the result that S. N. Ganguly had to return the relief. Then late in the evening of 22nd May 1978 Shri S. S. Sen, additional public prosecutor was asked to conduct the prosecution and he had to begin the case on the very next morning on 23rd May 1971 without practically any time for effective preparation. We have no doubt that under these circumstances the trial was heavily loaded in favour of respondent nos. 1 to 9. The trial must in the circumstances be held to be vitiated and the acquittal of respondent nos. 1 to 9 as a result of such trial must be set aside. It is imperative that in order that people may not lose faith in the administration of criminal justice, no one should be allowed to subvert the legal process. No citizen should go away with the feeling that he could not get justice from the court because the other side was socially, economically or politically powerful and could manipulate the legal process. That would be subversive of the rule of law.”

This decision reflects on the poor administration of criminal justice in India. A partisan government may cause a breakdown of the constitutional order. It also shows that unless the state has an independent prosecution agency, the administration of justice might suffer irreparably.

It has been the consistent policy of the appellate courts that it is the prerogative of the public prosecutor to recommend withdrawal of prosecution. Indeed, this prerogative right is to be exercised with the permission of the court. And it is the impression, having regard to the case law, that if the public prosecutor comes up with the proposal of withdrawal independently, i.e., without being influenced by the government, the court may grant permission. The courts reiterate this principle time and again, even in cases where permission is refused. In *State of Punjab v. Union of India* [1987 Cri. L.J 151 (SC)], the Punjab & Haryana High Court ruled that public prosecutor's withdrawal from prosecution could follow not only from the paucity of evidence but also in order to further the broad ends of public justice, which may include appropriate social, economic and political purposes. In *R K Jain v. State* (AIR 1980 SC 1510), the Supreme Court sketched out the contours of the public prosecutor's power for withdrawal of cases. In *Shonandan Paswan v. State of Bihar* [(1987) 1 SCC 288] and in *Mohd. Mumtaz v. Nandini Satpathy* [1987 Cri. L.J. 778 (SC)], the Supreme Court ruled that the public prosecutor can withdraw a prosecution at any stage and that the only limitation is the requirement of the consent of the court. Even when reliable evidence has been adduced to prove the charges, the public prosecutor can seek the consent of court to

withdraw prosecution. The court specifically ruled that it should be seen whether application for withdrawal is made in good faith, in the interests of public policy and justice and not to thwart or to stifle the process of law.

The Madras High Court was confronted with a case wherein the same office of the public prosecutor that had a criminal case withdrawn with permission of the court after a change of government moved the court to reopen prosecution. Fortunately, the judge did not permit it, and added a sad commentary on the functioning of the public prosecutor thus:

“I feel that the same office of the public prosecutor which acted for the state to withdraw the cases, cannot come forward to set aside the order permitting to withdraw the cases, irrespective of the change in the ruling party as it will lead to uncertainty as to the finality of the proceedings when the government, ruled by a particular party, withdraws the prosecution and the successive governments, ruled by another party, wanted to set aside that order, what will be the situation, if there were successive changes in the ruling parties and if this request is allowed, certainly it will be a havoc and prejudice to the accused persons, without knowing the destination of the prosecution apart from the embarrassment to the public prosecutors. Therefore, I also feel that the state which moved for withdrawing the prosecution cannot seek to set aside the order of permission granting withdrawal of the prosecution. If a third party comes forward with such a prayer the position may be different.” [*State of TN v. Ganesan*, 1995 Cri. L.J 3849 (Mad) at 3851]

The Supreme Court in a later case viz. *V. S. Atchulthanandan v. R. Balakrishna Pillai* [(1994) 4 SCC 299] allowed the petition of a third party to annul the High Court’s order permitting withdrawal of prosecution against the respondent. It was with the active support of the state government that the prosecution against the respondent, a former minister, was permitted to be withdrawn. The opposition leader challenged this order in the Supreme Court. The court accepted his plea and set aside the order.

Of late, there has been a change of approach to public prosecution. With the advent of partisan politics, political parties tend to interfere with administration of justice, including appointment of public prosecutors and determination of their functions. The decisions in *Sunil Kumar Pal*, *Ganesan* and *Atchulthanandan* speak to the changes and the responses of the judiciary.

It seems that the office of the public prosecutor belongs to the executive. However, it is strongly felt that it is in fact not purely of the executive. As explained by the Supreme Court in the *Shamsher Singh*, it takes on judicial character and as such assumes a lot of importance in a democracy. The very establishment of this office presupposes the understanding that we cannot afford to permit private prosecution as it may result in utter chaos, particularly in the present political set up. However, while we adopt this office in the place of private prosecution, we cannot forget the interests of the victim. The public prosecutor may not share the concerns of the victim, or safeguard the victim’s interests. The Indian CrPC therefore permits pleaders appointed by private persons to represent the interests of victims. However, the courts insist that they should work under the directions of the public prosecutor. This shows that the court gives more importance to the public interest.

The public prosecutor in India does not seem to be an advocate of the state in the sense that the prosecutor has to seek conviction at any cost. The prosecutor has to be impartial, fair and truthful, not only as a public executive but also because the prosecutor belongs to the honourable profession of law, the ethics of which demand these qualities. The facts in *Sunil Kumar Pal* and *Ganesan* make us to open our eyes to the realities.

The difficulties arising where public prosecutors are appointed on the basis of political affiliations also came before the Supreme Court in *Kumari Srilekha Vidyarthi v. State of UP* [(1991) 1 SCC 212]. The Supreme Court deprecated this trend and said that appointment to such vital offices should not be allowed on the basis of political party preferences. But even today, state governments distribute these offices among their sympathizers. And after assuming office many incumbents feel that they need to look after the interests of the ruling party.

The parliament amended the CrPC so that state governments could adopt prosecution services consisting of a director of public prosecutions at the top and district public prosecutors and assistant public prosecutors at the lower formations. Section 25A inserted by Act 25 of 2005, section 4 (with effect from 23 June 2006) lays down that:

“25A. Directorate of Prosecution – (1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.”

The state governments are yet to implement these provisions. Reorganization of the public prosecution system in this pattern may help a lot in preventing police torture, harassment and delays. There would be more transparency in the police-citizen relationship if the public prosecutor were an independent functionary interposed between the police and the court.

## The prosecutor and prosecution system in Indonesia

*Asep Rahmat Fajar, Director, Indonesian Legal Roundtable*

In the Indonesian organization of the state, which is regulated in the constitution, the Supreme Court and related bodies have functions of judicial authority (article 24, paragraph 1). Pursuant to the Law on Judicial Authority, the other bodies comprise of the police, prosecutor and other courts (article 41, Law No. 4, 2004). In the Law on the Attorney General's Office, it is also stipulated that the Prosecution Office is a governmental body that implements state authority in the prosecution sector (article 2, paragraph 1, Law No. 16, 2004).

Based on the above laws, the prosecution office is a governmental body having a judicative function. It is the only body with the authority to determine whether an alleged criminal action can be prosecuted or not. Even though currently there is a Corruption Eradication Commission that can also conduct prosecutions, in effect this work is also being done through the prosecutor's office, because the prosecutors at the Corruption Eradication Commission are recruited from the prosecutor's office to assist the commission within a certain period of time.

### **Prosecutor's office and prosecution system**

The implementation of state authority over prosecutions is carried out via the Attorney General situated in the national capital, a high prosecutor's office in the capital city of each province and the district prosecutor's office situated at the district level (articles 3 and 4, Law No. 16, 2004). Pursuant to the applicable laws, the prosecutor's office must be free to carry out its tasks independent from any political or other influence, be it from the executive or legislative bodies or other state authorities.

The prosecutor's office has wide functions and authorities as:

1. General prosecutor,
2. Investigator of specific criminal actions,
3. Representative of the state in civil and administrative cases,
4. Advisor to government agencies on questions of law, and,
5. Representative of the public interest (article 30, Law No. 16, 2004).

Structurally, a prosecutor is responsible to the prosecutor who in the hierarchy constitutes his or her direct supervisor. So, prosecutors at the district prosecutor's office are responsible to the head of the district, the head is responsible to the head of the high prosecutor's office and that head is responsible to the attorney general (article 8, paragraph 2 and article 18, paragraph 1, Law No. 16, 2004).

Based on the laws in Indonesia, a general prosecution is an act to render a criminal case before the relevant district court based on the procedures as stipulated in the applicable laws,



accompanied with a request that the case be investigated and decided by a judge in a court. In the prosecution office, the general prosecutor has authority to:

1. Accept and verify the case investigation documents from the investigator and/or supporting investigator,
2. Hold a pre-prosecution inquiry in the event that there is a flaw in the investigation process, by giving directions in order to correct the investigation,
3. Order or extend detention, and/or change the status of a detainee after the case is handed over by the investigator,
4. Draft the accusation letter,
5. Hand over the case to the court,
6. Give notice to the accused of the day and time the case will be put on trial, accompanied by an invitation letter to the accused and to witnesses to attend the trial,
7. Conduct prosecution in court,
8. Close a case in the public interest,
9. Take any other action within the responsibilities and authority of a general prosecutor, and,
10. Execute the court judgment (article 17, paragraph 2, Law No. 4, 2004).

Pursuant to the applicable laws, a prosecutor as an investigator generally has authority to:

1. Accept a report from a person on the occurrence of a criminal act,
2. Take first action at the site of the crime,
3. Conduct capture, detention, search and seizure operations,
4. Prepare letters of investigation and seizure,
5. Invite any person to be heard and investigated as a suspect or witness,
6. Invite an expert to assist with the investigation,
7. Stop the investigation, and,
8. Take any other actions based on the prevailing laws.

### **Problems of the prosecution and upholding of human rights**

Since the reform period, there has been major development in the human rights field in Indonesia. Based on the normative guarantees of the constitution, it is clear that the goal is to have a law-based country that guarantees and protects human rights and a state that wants to realize welfare and social justice. Apart from the constitution, in 2005 the commitment to protect human rights was enhanced by the ratification of the two basic covenants on human rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (via Law Nos. 11 & 12, 2005).

However, there are still specific matters pertaining to prosecution that need attention. This is because regulations are still weak, so the settlement of human rights cases is impeded, by, for example:

1. A back and forth of documents being submitted between the National Human Rights Commission and the attorney general,

2. The attorney general's refusal to investigate human rights violations that happened in the past, and,
3. Authority to recommend the formation of ad hoc human rights courts being vested in parliament.

Apart from problems with regulations, the enforcement of law and upholding of human rights are still impeded by the resistance of actors at each step. These actors are not only the parties who are suspected of having violated the law but also the law-enforcement officers who take advantage of the current system. Another impediment is public pressure on law-enforcement and human rights institutions based on ideology or orders from parties involved in cases.

Lastly, but also importantly, a major problem in prosecuting human rights cases arises from the internal problems of the prosecutor's office, be they organizational, technical or human resource-related. In certain cases (processed by the Corruption Eradication Commission) prosecutors have been proven to have bought and sold cases or received bribes from parties. In fact, according to the 2007 survey of Transparency International (Indonesia) the courts and prosecutors are the most corrupt bodies as they actively ask for money. Apart from that, the head of the Supreme Court has criticized the quality of the accusation letters fielded by certain prosecutors containing weaknesses and incomplete data, causing suspects to go free, especially in drugs and corruption cases. In one case where a prosecutor incorrectly referred to the law in preparing the accusation, causing two murder suspects to be freed under an interim judgment, members of the public demonstrated at the prosecutor's office and—unable to control their emotions—ruined parts of the building. Prosecutors drafting accusation letters and preparing for trial also often suffer interference from their superiors. The head of a high prosecutor's office in a region may put some pressure on a general prosecutor to change the manner of conducting the case so that it will run contrary to fairness and the prevailing laws.

These problems are exacerbated by certain other factors that feature in all law-enforcement bodies, including the prosecutor's office. These include:

1. Low integrity, little understanding of the practice of law, and little practical experience in carrying out trial. Therefore, serious attention must be paid to both the quality and quantity of prosecutors. Currently, their number is not proportional to the number of cases that they must handle, which contributes to these difficulties.
2. Lack of coordination between management and lower officers, causing inconsistency between the heads of district prosecutor's offices and high prosecutor's offices in applying policy, especially in corruption and drug cases.
3. Lack of coordination between prosecutors and police during investigation and prosecution. Misunderstandings in conducting their duties commonly result in a back and forth of the case documents with mistakes that are not immediately obvious, particularly in the investigation of corruption cases.

4. Problems in executing the judgment, caused by differences in perception between the judge and prosecutor, especially in the wording of the judgment.

Structural problems associated with the prosecution include the following:

1. Currently, there is a dilemma concerning the position of the prosecutor's office in the structure of the state. Pursuant to the Law on the Prosecutor's Office, the office is a government body that acts for the state authorities in the prosecution. This position will not become a problem only if in carrying out duties a prosecutor acts independently and does not suffer government interference.
2. The Law on the Prosecutor's Office does not elaborate on qualifications to become a prosecutor at successive levels, other than the base requirements. As a result, the qualification requirements for the attorney general and other senior prosecutors are low. The mechanism to elect the attorney general and deputy attorney general is not transparent or accountable and has few participants. The process is closed and falls under the authority of the executive, i.e. the president.
3. The promotion and transfer system in the prosecutor's office has not succeeded in pushing prosecutors with high credibility and integrity into management positions in the office.
4. Recruitment of prosecutors is potentially affected by nepotism, collusion and corruption. Prosecutors hold administrative positions even though they don't have professional expertise and are needed for prosecution activities.
5. The supervision system is not good enough to make objective appraisals of prosecutor integrity and quality.

### **Reform and recommendations**

To date certain reforms have been announced and some implemented to restore public faith in the work of law-enforcement bodies, including the prosecutor's office. These were initiated with the statement of the President of the Republic of Indonesia in commemorating the agenda of the First 100 Days of the Indonesian Bersatu Cabinet, which in its chapter on Building a Fair and Democratic Indonesia, stipulated that

“Law enforcement must be made by any state which is willing to build a fair and democratic atmosphere. In Indonesia, certain efforts to have such atmosphere have been conducted through various means, especially by enhancing the courts institutions. It is believed that the enhancement of the court institutions will bring continuous effect which correlates to the law enforcement and development in other sectors, such as economy. Logically, the trading and the investment will not be developed if there is no certainty in the law enforcement.”

In this regard, Presidential Instruction No. 5/2004 on the Acceleration of Corruption Eradication stipulated the following objectives:

1. To optimize investigation and prosecution efforts against criminal acts of corruption and impose sanctions against the responsible parties, and save state monies,
2. To prevent misuse of authority and impose clear sanctions, conducted by the general prosecutor/law-enforcement prosecutor,
3. To enhance cooperation between the State Police of the Republic of Indonesia, Development and Money Supervisory Agency, Money Transaction Analysis and Reporting Center and state institutions related to law enforcement, and mitigation of state losses resulting from criminal acts of corruption.

With regards to the above, the Attorney General's Office prepared certain programs in 2004-2005, so as to:

1. Introduce the basics for reform of the system and the internal mechanism of the prosecutor's office to enhance the outcomes of its work,
2. Conduct recruitment, promotion, and transfer of prosecutors based on objective criteria and the activities of the relevant officers (to diminish, put pressure on and eliminate nepotism, collusion and corruption in the above activities),
3. Enhance coordination with other law-enforcement bodies in accelerating the handling of corruption cases and other specific criminal acts,
4. Ensure that in the corruption cases, especially those that cause losses to the state and obtain public interest, the process is accelerated, from investigation to prosecution and from prosecution to trial,
5. To review the SP3s (Letters of Order to Stop Investigation) in corruption cases done prior to the existence of the Indonesia Bersatu Cabinet.

Apart from the above, 12 reform programs were launched in 2005 in the following areas:

1. Reform of the Organization and Work Procedure of the Prosecutor's Office
2. Reform of the Organization and Work Procedure of the Prosecutor's Office's Intelligence
3. Reform of the Prosecutor Recruitment System
4. Reform of the Prosecutor Education and Training System
5. Reform of the Prosecutor Career Development System
6. Preparation of the Minimum Standard of Prosecutor Utilities
7. Review and Development of the Budgetary System of the Prosecutor's Office
8. Budget Increase for the Handling of Cases related to Corruption, Human Rights, Terrorism, Money Laundering and Stealing of Sea and Forest Wealth
9. Increase of the Functional Benefit for Prosecutors
10. Development of Information Management System in Handling Cases
11. Enhancement of Cooperation between the Relevant Institutions in the Law Enforcement of Cases Having a Public Interest

## 12. Development of a Controlling System that is Transparent and Accountable

The six directives of the Attorney General's Office concerning a reform program announced on 12 July 2007 represent an important base for bureaucratic reform within the office. The six define reform programs in the areas of recruitment, education and training, minimum professional standards, career advancement, business practice, code of conduct and supervision mechanisms. Bureaucratic reform is the main avenue for the office to comprehensively improve its work at an organizational level, and includes but is not limited to improvements in the reward system and officers' welfare that should enable the prosecutors to perform their duties with high integrity, accountability and dignity.

According to the deputy attorney general at the launch of the reforms on 18 September 2008, they aim to:

1. Recover public trust in the Attorney General's Office and improve the public prosecution's image as a law-enforcement institution with high levels of professionalism and integrity,
2. Enable public access to information on corruption-related criminal cases and other cases that the office handles,
3. Increase the amount of money returned to the state treasury, derived from savings and penalties,
4. Increase remuneration for public prosecutors and staff of the office,
5. Decrease the number of individuals generating a negative public perception towards the office,
6. Improve the quality of service to the public, and,
7. Develop a standard operating procedure with some breakthroughs regarding the case-handling process, but still in accordance with existing laws.

There are also several important issues that will become subjects of policy in the future that will have a positive effect on the prosecutor office, which are:

1. In order to avoid conflicts of interest and misuse of the prosecutor's office by the executive, the office should remain part of the government, but to guarantee its independence the attorney general must be nominated and appointed by the president with the approval of the House of Representatives, and in conducting prosecution duties, prosecutors must be independent.

Good and strict criteria to determine the person that will become the attorney general and deputy must be drawn up so that these posts are filled with persons of high credibility and accountability. The mechanism to elect the attorney general must also be open, transparent

and accountable, so that the public will be aware and involved and can give input on the credibility and integrity of the prospective attorney general. In addition to that, an independent team will give input to the president and receive input from the public on the candidates, through which nominations also will be able to be made.

2. Prosecutors should not fill administrative positions. Administrative professionals must be recruited for these posts and the capacity of the current administrative officers must be enhanced.
3. Parties outside the prosecutor's office must be involved in the recruitment process, such as persons from the universities who can assess potential and ensure that academic results will be the basis for recruitment. Other than that, recruitment must be conducted transparently and disclosed openly, supported by a good integrated computerized system so as to diminish the intensity of meetings between the prospective party and the office.
4. The examination of the accusation and prosecution must be conducted in a more effective way.

# The prosecutorial system and problems in Korea

*Chung Mi Hwa, Former Vice President,  
Lawyers' Association for a Democratic Society, Korea*

Korea has experienced dramatic changes in providing protection for people's fundamental civil and political rights since 1948. Before the nationwide June Struggle of 1987 that led to the collapse of Korea's authoritarian regime and opened a road toward democratization, the military and regime maintained that the value of "crime control" exceeded that of "due process" in criminal procedure. The Bill of Rights in the constitution was nominal, and criminal law and procedure were no more than instruments for maintaining the regime and suppressing dissent.

By contrast, the 1987 Constitution explicitly stipulated the idea of due process in criminal procedure. The amendments to the Criminal Procedure Code (CPC) of 1988, 1995, 2006 and 2007 have also strengthened the procedural rights of criminal suspects, defendants and defending lawyers to some degree. The Constitutional Court and the Supreme Court have made important decisions in favour of such rights. However, a number of problems still remain which overshadow constitutional procedural rights. One of the main causes of problems stems from the unchanged authoritarian prosecutorial system, which has evaded pressure for reform.

## **Outline of the prosecutorial system**

### ***Organization***

The public prosecutors' offices of Korea have a pyramid-like structure consisting of the Supreme Public Prosecutors' Office (SPO), five High Public Prosecutors' Offices (HPPO), thirteen District Public Prosecutors' Offices (DPO), and forty branch offices of District Public Prosecutors' Offices. These offices directly correspond to the three tiers of the court system without apparent and reasonable theoretical explanation. Authoritarian governments in the past set up and utilized this three-tier office system to correspond to that of the courts as well as to provide sufficient high-ranking positions for prosecutors.

Prosecutors are categorized into four classes according to their professional career: Prosecutor-General (P-G), Senior Prosecutor-Chief (SP-C), Prosecutor-Chief (P-C) and Prosecutor. An official of corresponding rank occupies each post. They make up a discrete hierarchy of government officials, so they receive special treatment in many respects, including in compensation and in strict guarantees of tenure of the sort accorded to judges. The status of the P-G corresponds to that of a cabinet minister, while the P-C is similar to that of a vice-minister and the SP-C is regarded as a position between these two classes.

Prosecutors' status in government is so conspicuously high that their decisions are very difficult to criticize inside the government. For this reason, many people jokingly call Korea a "Republic of Prosecutors".

***Personnel***

As of March 2008, the total number of prosecutors in Korea, which is growing year by year, was approximately 1655. A staff of about 7524, including investigators, administrative clerks and secretaries, assisted them in their work. The number of female prosecutors also has been rapidly increasing and exceeded 260 in the year of 2008. This heavy number of personnel stems from the investigative function of the prosecutors' office. The prosecutors' main function in Korea is in fact investigation, not prosecution. Approximately only 10 per cent of all prosecutors go to trial.

***Responsibilities***

The authorities and duties of the public prosecutor as a representative of the public are to:

1. Take measures necessary for investigation of crimes as well as filing and maintaining of prosecution,
2. Direct and supervise the police and other law-enforcement agencies concerning investigation of crimes,
3. Request the courts for appropriate application of laws,
4. Direct and supervise the execution of criminal judgments,
5. File, direct and supervise civil and administrative litigation, in which the government or government agency is a party or participant; and,
6. Prosecute criminal cases on behalf of the government.

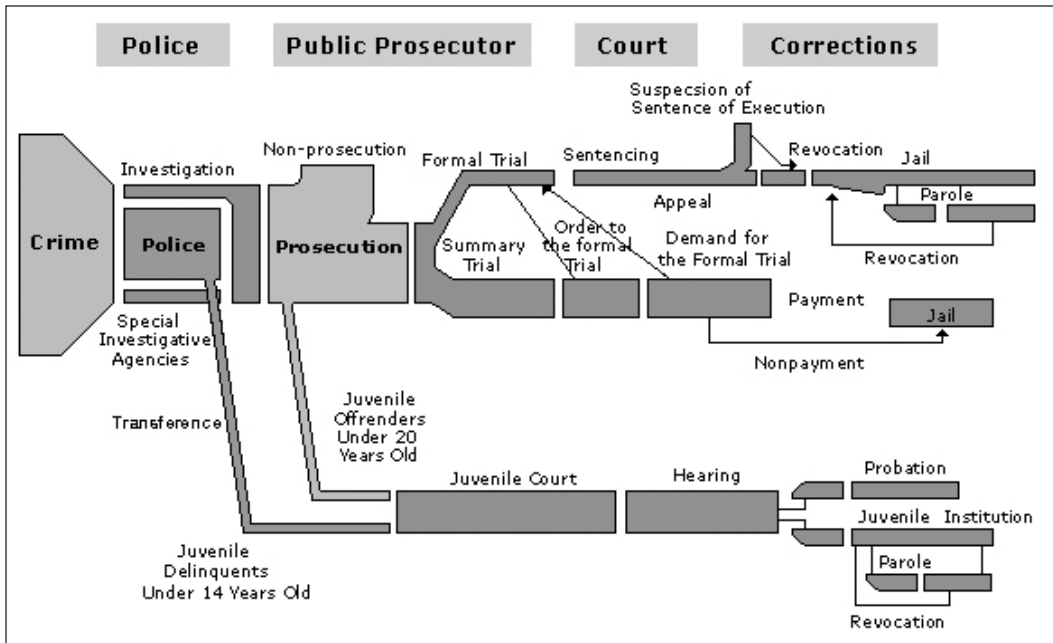
The president appoints and assigns prosecutors upon recommendation from the minister of justice. The qualifications for a public prosecutor are identical to that of a judge: they must pass the national judicial examination and complete a two-year training course at the Judicial Research and Training Institute. Like a judge, the public prosecutor may not be dismissed or suspended from the exercise of his or her powers or be subject to a reduction in salary other than through impeachment, conviction of crimes punishable by imprisonment, or more severe penalties or other disciplinary actions based on relevant laws and regulations.

***Workload***

In 2007, one prosecutor handled investigations of approximately 11 suspects a day. In addition to investigation work, prosecutors spend a considerable amount of time reviewing requests of warrants and providing direction to the police in regard to the progress of accusation cases. Out of the total number of cases, roughly 50 per cent are prosecuted, with approximately 99.9 per cent of those accused being found guilty.



### Diagram of general function



(From <http://www.spo.go.kr/user.tdf?a=user.pm.PmApp&seq=1122&chungcd=02000000&catmenu=050800&cc=2001>)

### Problems

#### *As an investigative authority*

There has been criticism of the organizational principle of prosecutors after democratization, which is called the 'principle of the uniformity'. This principle aims to guarantee uniformity and fairness of the investigative and prosecutorial authority as a single system. The problem comes from the principle's mantra that, 'Prosecutors shall obey the prosecutors in higher offices in prosecutorial affairs.' In cases involving powerful politicians or owners of renowned corporations, we have noticed that prosecutors in charge unwillingly quit their investigations, often under pressure or persuasion of prosecutors in higher offices, and through the Supreme Prosecutor's Office the ruling political party has kept substantial influence over the prosecutors in charge of cases. Many academics and civic organizations, such as the Lawyers' Association for Democratic Society, have strongly requested to revise the principle and its practice. Even though the request was partly reflected in the 2001 amendment of the Prosecutor's Office Law (POL), which allows prosecutors the right of protest against an improper order from a higher office, prosecutors seldom utilize the right.

#### *Quasi-judicial authority*

Prosecutors boast that they are a single quasi-judicial authority and the majority of academics accept this view. To insure that prosecutors are free from the influence of administrative powers, POL contains several measures: (i) duty of political neutrality and public servitude (articles 4 and 43); (ii) prohibition of acting in a presidential secretarial position (article 44-2); (iii) protection of status equivalent to that of judges (article 37); (iv) limited power of the minister of justice in supervising case work (article 8); (v) hearing for the appointment

of the Public Prosecutor General (PPG) at the National Assembly; (vi) guaranteed term of office for the PPG of two years; and, (vii) the PPG's right to offer an opinion to the minister of justice on the appointing of prosecutors (article 34).

### ***Lack of appropriate control***

Prosecutors in Korea have vast discretion in interpreting and implementing laws regardless of whether on administrative or criminal matters. Other departments of government or institutions do not check prosecutors' decisions on starting investigations, requesting warrants and gathering information. One of the measures to put a check on prosecutors is the 2007 amendment of the CCP (article 260), which expands the availability of a prosecution order by the High Court to all criminal charges against private interests and several criminal charges against public interests, such as violations of the Anti-Corruption Law or Public Election Law. Notwithstanding, prosecutors are uniformly immune from public opinion and individual prosecutors disregard public criticism based on the principal of neutrality and independence. Thus, prosecutors' mistakes and wrongful handling of cases are very difficult to filter beforehand.

### ***Mismatched organizational system***

There were no grounds to establish the HPPO except to provide high promotional positions for prosecutors. The HPPO creates a lot of bureaucratic inefficiencies for its name's sake. The SPO has more problems. It has four investigative departments: the Central Investigation Department; General Crime Department; Narcotics, Drugs and Organized Crime Department; and, the Public Security Department. It also has nine Investigative Sections and two Planning High Offices. Those are substantially utilized for controlling and auditing all prosecutors' discharge of duties according to the intentions of the president. Important positions of the ministry of justice are filled with prosecutors. The Bureau of Prosecutors in the ministry of justice, which assesses and assigns prosecutors, itself consists only of prosecutors. The principle of check and balance is in this set up almost non-existent.

### ***Conflict of powers***

Prosecutors have powers of investigation and criminal intelligence that are not for genuine prosecutorial purposes. In reality, the Bureau of Police conducts the majority of crime-related functions. This overlapping of function has created conflicts and tensions between prosecutors and police that make them compete for the favour of political powers.

### ***Measures***

Several measures to cope with current problems that have been suggested include:

1. Abolishment of the pyramid-like stepladder position system for prosecutors,
2. Abolishment of the HPPO and intelligence and investigative functions at the SPO,
3. Reduction of investigative functions and bolstering prosecutorial activity,
4. Filling positions at the ministry of justice with non-prosecutors,
5. Allowing people's participation in auditing prosecutors' activities and disciplinary processes,
6. Restricting prosecutors' discretionary power of prosecution by introduction of grand jury or others and mandatory prosecution,
7. Restricting prosecutors' power of appeal,

8. Introduction of an election system for the chief of DPO,
9. Reform of the appointment system of prosecutors; and,
10. Opening important positions in the PO to non-prosecutor lawyers.

The essence of the suggested measures is how to make prosecutors serve people instead of to lord over them, to maintain political neutrality, and to function fairly.

### ***Recent examples of political bias***

1. **Candlelight Vigil:** Once the minister of justice and PPG suggested that the famous and popular candlelight vigil against the mutual administrative agreement for importation of American beef was illegal, prosecutors started to apply for custody warrants for the leaders of the protests. Five of them were arrested. Prosecutors indicted them all uniformly, including the ‘cradle protesters’ who walked around peacefully with their babies in cradles.
2. **KBS Investigation:** When the president of the Korea Broadcast Service (KBS) appointed during the term of former the former national president did not resign voluntarily after the new president was inaugurated, prosecutors launched all-round investigations on possible charges against the KBS to put pressure on him. Finally, the president of KBS was indicted on a charge of a breach of trust because he let the KBS pay too much tax to the tax authority.
3. **Investigation on hindrance of business charges:** Prosecutors launched a full investigation on a citizens’ protest against goods of companies that put their advertisements in politically-biased daily newspapers.
4. **Investigation against former President of Korea:** Prosecutors initiated an investigation into the former President Ro on charges of not returning documents to the national archive. Ro simply kept copies of his presidential documents in preparation to write his memoirs.

## Pakistan's prosecution service: A new dimension

*Justice Nasir Aslam Zahid,  
Supreme Court of Pakistan (retired) & Professor Akmal Wasim*

Pakistan's legal system is founded on Anglo-Saxon common law, and like other sub-continental jurisdictions, such as India and Bangladesh, it follows the adversarial system.

Dr. Faqir Hussain, Secretary of the Law and Justice Commission of Pakistan, has comprehensively discussed the country's court hierarchy and the relevant civil and criminal jurisdictions of specific courts falling within the scheme (see [www.ljcp.gov.pk](http://www.ljcp.gov.pk)):

“On independence, the Government of India Act 1935 was retained as a provisional Constitution. As a consequence, the legal and judicial system of the British period continued, of course, with due adaptations and modifications, where necessary, to suit the requirements of the new Republic. This way, neither any vacuum occurred nor did any break result in the continued operation of the legal system. The judicial structure remained the same.

The Supreme Court is the apex Court of the land, exercising original, appellate and advisory jurisdiction. It is the Court of ultimate appeal and therefore final arbiter of law and the Constitution. Its decisions are binding on all other courts. The Court consists of a Chief Justice and other judges, appointed by the President. An Act of Parliament has determined the number of judges (At present the statutory strength is 29).

Its jurisdiction, original as well as appellate, is fairly wide. Besides entertaining civil and criminal appeals from the High Courts, the Court also hears appeals from the judgments against the Federal Shariat Court, Service Tribunals and some special courts. The Court also entertains cases of violation of Fundamental Rights under its original jurisdiction (Art 184(3)).

There is a High Court in each province. Each High Court consists of a Chief Justice and other puisne judges. The Chief Justice is appointed by the President in consultation with the Chief Justice of Pakistan and other judges, in consultation with the Chief Justice of Pakistan, Governor of the Province and the Chief Justice of the concerned High Court. The Court exercises original jurisdiction in the enforcement of Fundamental Rights and appellate jurisdiction in judgments/orders of the subordinate courts in civil and criminal matters. A large number of cases are pending in various High Courts.

The Court supervises and controls all the courts subordinate to it. It appoints its own staff and frames rules of procedure for itself as well as courts subordinate to it.

The subordinate judiciary may be broadly divided into two classes; one, civil courts, established under the West Pakistan Civil Court Ordinance 1962 and two, criminal courts, created under the Criminal Procedure Code 1898. In addition, there also exist other courts and tribunals of civil and criminal nature, created under special laws and enactments. Their jurisdiction, powers and functions are specified in the statutes creating them. The decisions and judgments of such special courts are assailable before the superior judiciary (High Court and/or Supreme Court)

through revision or appeal. The civil courts may be classified as follows:

(i) Civil & Criminal Courts

The provincial governments appoint the civil and criminal judges and their terms and conditions are regulated under the provincial civil servants acts/rules. The High Court, however, exercises administrative control over such courts. The civil courts consist of District Judge, Additional District Judge and Civil Judge Class I, II & III. Similarly, the criminal courts comprise of Session Judge, Additional Session Judge and Judicial Magistrate Class I, II & III. Law fixes their pecuniary and territorial jurisdictions. Appeal against the decision of civil courts lies to the District Judge and to the High Court, if the value of the suit exceeds specified amount. Similarly, in keeping with the quantum of penalty, appeals against criminal courts lie to Session Judge or High Court.

(ii) Revenue Courts

Besides the civil courts, there exist revenue courts, operating under the West Pakistan Land Revenue Act 1967. The revenue courts may be classified as the Board of Revenue, the Commissioner, the Collector, the Assistant Collector of the First Grade and Second Grade. The provincial government that exercises administrative control over them appoints such officers. Law prescribes their powers and functions.

(iii) Special Courts

The Constitution authorizes the federal legislature to establish administrative courts and tribunals for dealing with federal subjects. Consequently, several special courts/tribunals have been created which operate under the administrative control of the Federal Government. Most of these courts function under the Ministry of Law & Justice, however, certain courts also operate under other ministries/departments. Such courts/tribunals include the Special Banking Court, Special Court Custom, Taxation and Anti-corruption, Income Tax (Appellate) Tribunal, Insurance Appellate Tribunal, etc etc. The judicial officers presiding over these courts are appointed on deputation from the provincial judicial cadre.

(iv) Service Tribunals

Under Article 212 of the Constitution, the Government is authorized to set up administrative courts and tribunals for exercising jurisdiction in matters, inter alia, relating to the terms and conditions of service of civil servants. Accordingly, service tribunals, both at the centre and provincial level have been established and are functional. The members of these tribunals are appointed by the respective Government. Appeal against the decision of the Provincial Service Tribunal and the Federal Service Tribunals lies to the Supreme Court.

This phenomenon is caused partly because of the inadequate budgetary allocation towards the judiciary. Unfortunately the administration of justice, so far has been regarded merely as a welfare service to the community rather than a social responsibility. As a result, the judiciary suffered due to under-staffing (both judicial and ministerial), lack of courtrooms, equipment, residential accommodation and library material, etc. Obviously these and other problems had to be addressed and resolved if the administration of justice is to improve and become efficient. Keeping in view the problems of dilapidated court buildings and shortage of staff, adversely affecting the functioning of courts, the Government of Pakistan launched the Access to Justice Programme. Under the Programme, funding is made available to judiciary and other institutions concerning the administration of justice, e.g. department of police, prosecution and investigation, etc. Accordingly, the strength of judges in subordinate courts is being

increased and new court buildings constructed. Necessary equipment is also being provided. It has brought about an overall improvement in the functioning of judiciary. Needless to say, a sound and effective judicial system is a sine qua non for keeping peace in the society and maintaining growth and development.

### **Organisation of Subordinate Judiciary**

The subordinate courts (civil and criminal) have been established and their jurisdiction defined by law. They are supervised and controlled by the respective High Court. The administration of justice, however, is a provincial subject and thus the subordinate courts are organised and the terms and conditions of service of judicial officers determined under the provincial laws and rules. The issues of recruitment, promotions and other terms and conditions of service together with disciplinary proceedings, etc are dealt with under the provincial civil servants acts and the rules framed thereunder. Until recently, the appointing authority for judicial officers happened to be the provincial government but with the separation of the judiciary from the executive, such authority has been transferred to the High Court.

Initial recruitment as Civil Judge-cum-Judicial Magistrate is made through the Provincial Public Service Commission with the active involvement of the High Court. For the provinces of Punjab, NWFP and Baluchistan, recruitment is made through a competitive examination consisting of a written test and viva voce. In Sindh, however, such recruitment is made by the High Court itself through a written test followed by viva voce and the names of selected candidates are recommended to the Provincial Government for appointment.

A Committee of the judges of the High Court, decides the issue of promotion of judges. For appointment as Additional District & Sessions Judge, quota is fixed for service personnel as well as induction from the Bar. Appointment as District & Sessions Judge is by promotion on the basis of seniority-cum-fitness from among the serving judicial officers.

After appointment, the civil judges are usually attached for a few weeks to the Court of Senior Civil Judge/District & Sessions Judge to get practical training. They also receive specialized training at the Federal Judicial Academy and in the respective provincial academies. Such training comprises education in various substantive laws, court management, case processing and judicial procedure, etc.

As mentioned earlier the High Courts exercise supervision and control over the functioning of the subordinate judiciary. Such supervision and control is both administrative as well as judicial. In the administrative sphere, disciplinary proceedings may be initiated against a judicial officer by the High Court. Judicial control is also exercised through revision and appeals being filed in the High Court against the orders/decisions of the subordinate courts. The High Court carries out its supervisory functions through inspections and calling of record from the courts. The Member Inspection Team (MIT) mostly deals with the issue; however, the Chief Justice of the High Court or any other judge deputed by the Chief Justice also carries out regular as well as surprise inspections. The Chief Justice is competent to initiate disciplinary action against a judge and take appropriate action in the matter.

Disciplinary proceedings against judicial officers are apparently initiated and action taken under the (provincial) Government Servants (Efficiency and Discipline) Rules. Such rules were primarily designed for the executive officers whose duties and functions are different from judicial officers. Consequently, in their application to judicial officers, the rules do contain

certain gaps and anomalies. In particular, the rules are silent on how a judicial officer ought to conduct himself in and outside the court. There is, therefore, a need for preparing a separate code of conduct for the members of the subordinate judiciary, covering their private and public life and in particular, their conduct in the court so as to maintain propriety and decorum in the court and enhance public confidence in the administration of justice.

As regards the grievance of the judicial officers with regard to the terms and conditions of service, mechanism exists for resolving it. There exists a Provincial Judicial Service Tribunal for deciding appeals against the final orders of departmental authority. The judges of the respective High Court man such tribunals.

The subordinate judiciary in almost all the provinces operates under some constraints. There exists shortage of judicial officers, their supporting staff and equipment. The strength of subordinate judiciary has not kept pace with the rise in litigation due to which huge arrears of cases are piling up and there are enormous delays in deciding cases. As against the recommendations of several commissions and committees that the number of cases pending with a civil judge should not be more than 500 and the number of units pending with a District & Sessions Judge should not be more than 450 at a time, in actual practice the number of cases and units is far in excess of this prescribed limit.

There is a backlog of civil and criminal cases at the level of subordinate judiciary in all provinces.”

The Code of Civil Procedure 1908 prescribes procedure for proceedings in civil cases. The Code is in two parts, i.e. sections, which contain the basic and fundamental principles and can be amended only by the legislature, and schedules, which contain rules of procedure and can be amended by the High Court. The Code is indeed a consolidating statute, prescribing detailed procedure for instituting suit (meaning who may file a suit, how and where), pleadings (filing complaints/written statements, their form and particulars), proceedings, writing of judgment and execution of decrees, etc. The Code has been reviewed from time to time and its provisions amended to keep pace with time and changing conditions of the society. Similarly, the Criminal Procedure Code 1898 as well as various other special statutes prescribe criminal procedure. The Qanun-e-Shahadat 1984 (the statutory law of evidence) prescribes the competency of witnesses, the examination of witnesses, form of evidence and the procedure for presenting the same, etc. The procedure prescribed in the law applies to judicial proceedings and investigations by a court of law in civil or criminal cases.

### **The province of Sindh as a case study on the prosecution service**

Prosecutorial services are generally governed by Sections 492 to Section 495 of the Code of Criminal Procedure (CrPC), dating back well over a century, with necessary amendments from time to time. In criminal jurisdiction, the prosecution service is also regulated by the Sindh Law Officers (Conditions of Service) Rules 1940 and the Rules for the Conduct of the Legal Affairs of the Government. These rules superseded the rules made earlier in 1923. The change was necessitated on the separation of the Province of Sindh from the Bombay Presidency in 1937. From time to time indispensable amendments have been introduced into these rules.

The two provisions of the Sindh Law Officers Rules pertaining to conduct of the Legal Affairs of the Government i.e. Rules 9 and 10, are important, and exhibit the independence of the prosecutor in the conduct of criminal proceedings. The former rule provides for discretionary power to be vested in the law officers in conducting cases. However, the latter section retains the power of the government to issue any orders or directions to the concerned law officer, who is bound to act on such an order or directions. Rule 10 overrides any other section of the rules, including Rule 9.

The prosecution service throughout had remained under the home department, and had been regulated by the police, from which the Public Prosecutors and Deputy Public Prosecutors were drawn from the ranks of Deputy Superintendents of Police and Inspectors. Under no condition was any officer below the rank of sub-inspector authorized to act as a prosecutor in any case.

In 1985, for the first time the prosecution agency was transferred from the administrative control of the police department and placed under the law department. This exercise took place in two phases: Karachi Division was placed under the law department immediately, whereas the rest of the divisions came under the law department from 1 July 1986. The designations of prosecutors working as Public Prosecutors and Deputy Public Prosecutors were changed to District Attorneys and Deputy District Attorneys on the recommendation of the Sindh Civil Service Commission and were inducted into the Provincial Civil Service. Their terms and conditions were then to be governed accordingly by the Sindh Civil Servants Act 1973, and the rules framed there under.

On 2 April 1994, interestingly, the prosecution service was by another notification transferred back to the administrative control of the police, removing it from the solicitor's department in the law department. No cogent reason was given for the reversal of this policy. The District Attorney and other designated law officers were transferred back to the Police Department at the same level as deputy superintendents of police, inspectors and sub inspectors.

Finally, on 4 September 2001 restructuring of the Police Department began, and with it work on a separate prosecution service also commenced. In 2002 the Police Order was promulgated which repealed the Police Act 1861. Prior to the coming into force of the Police Order 2002, the prosecution service was again taken out of the administrative control of the police department and placed under the provincial law department, by notification of 31 December 2001.

In 2006, exercising powers under section 492 of the CrPC, the provincial government placed the services of all District Attorneys and other law officers, such as public prosecutors and deputy public prosecutors, to work as prosecutors in accordance with the Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Ordinance 2006. The Rules governing the Appointment and Conditions of Service of the Prosecutors were also notified in 2006. This ordinance has been re-promulgated and kept on the statute book.



This ordinance can be termed as the first-ever positive turning point in the political development of the prosecution services in Pakistan.

The newly-introduced prosecution service is still in its nascent stage of stabilizing as an institution. However, to substantively qualify as an independent institution, the office will have to comply with the international standards of professional responsibility and the essential duties and rights of prosecutors. The Independent Standards of Prosecution place the following responsibilities on prosecutors.

“Prosecutors shall: at all times maintain the honour and dignity of their profession; always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; at all times exercise the highest standards of integrity and care; keep themselves well-informed and abreast of relevant legal developments; strive to be, and to be seen to be, consistent, independent and impartial; always protect an accused person’s right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial; always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.”

The status of the prosecution service in Sindh was described in the DAWN daily of 21 January 2008:

“The fate of over 66,000 criminal cases pending in different courts across the province hangs in the balance since the Sindh Criminal Prosecution Service (SCPS) still awaits the appointment of the Sindh Prosecutor-General after the post was vacated when the first Prosecutor-General, Rana Shamim, was appointed as a Sindh High Court judge in the post-Nov 3, 2007, situation. Appointments to other essential posts including additional prosecutors-general, deputy prosecutors-general and assistant prosecutors-general, are also awaited.

The SCPS was constituted by the Sindh Governor on May 13, 2007, with the promulgation of the Sindh Criminal Prosecution Services (constitution, functions and powers) Ordinance 2007. The department was to supervise police and other divisions’ investigations into criminal cases in order to ensure the independent prosecution of cases where justice was doubted, the speedy disposal of cases that had been pending for many years and independent and efficient service for the prosecution of criminal cases. In this manner, it was thought, the justice system in the province could be improved.

Mr. Shamim was appointed as the first prosecutor-general but was later elevated as a Sindh High Court judge after the imposition of a state of emergency on Nov 3, 2007, since when the post has been lying vacant. Meanwhile, no inductions were ever made for the posts of additional prosecutors-general, deputy prosecutors-general and assistant prosecutors-general.

Ishaq Lashari, the SCPS secretary, told Dawn that the induction to these posts, as well as to the posts of district prosecutor, were in progress. “A commission, which is headed by the provincial chief secretary, will appoint the Sindh prosecutor-general and has called applicants in this regard,” he said. “Meanwhile, a requisition has been sent to the Public Service Commission for the appointment of nine additional, 27 deputies and nine assistant prosecutors-general to deal with criminal cases in the Sindh High Court, the Federal Shariat Court and the Supreme Court of Pakistan.”

According to Mr. Lashari, 27 district public prosecutors would be appointed to prosecute cases before the province's district and session's courts, while 93 deputy district prosecutors would be appointed for assistant and additional session's courts. As many as 214 assistant district prosecutors would be appointed for the courts of the judicial magistrates.

He told Dawn that 63 deputy district prosecutors had already been appointed while inductions for the remaining deputy district prosecutors, assistant district prosecutors and district public prosecutors were in progress. Mr. Lashari added that district public prosecutors would be appointed for prosecution in the 18 special courts in the province, including anti-terrorism courts, anti-corruption courts and anti-drugs/narcotics courts.

'Low conviction rates'

The SCPS secretary pointed out that the country's conviction rate was very low, 11.66 per cent in Pakistan and 2 to 5 per cent in Sindh, because of inefficient investigations conducted by incompetent policemen and unskilled prosecutors. The conviction rate in other countries was much higher: 37.4 per cent in India, 39 per cent in South Africa, 90 per cent in the UK crown courts and 98 per cent in the lower courts, 85 per cent in Australia, 85 per cent in US federal courts and 87 per cent in state courts, and 99.9 per cent in Japan.

Saying that the SCPS was currently lacking personnel in key posts, Mr. Lashari predicted that its performance would take off once the process of making appointments was completed.

The office of the Criminal Prosecution Service Department is housed in a portion of the old KDA building, Sindh Secretariat No.3, but the space available does not fulfill the requirements. According to the additional secretary of the SCPS, Iqbal Zaidi, offices have been acquired in the old State Bank Building, Sindh Secretariat No.6, and the renovation work being carried out there will soon be completed.

According to Dawn's sources, it is mandatory for the police and other investigation wings to send the Sindh prosecutor-general a copy of an FIR within 48 hours of it being registered. The SCPS is authorized to recommend strict departmental action against officials found responsible for registering defective or fabricated cases, and the department may also withdraw such cases."

The most recent figure available regarding jail inmates in the Province of Sindh as of 21 October 2008 (courtesy of the Legal Aid Office) are that the total number of detained is 18,162. Out of these, male convicts are 2266 and under-trial male Prisoners are 15,634. There are 43 female convicts, and 133 under-trial female prisoners. There are 38 babies suffering incarceration along with their mothers. The jail population also includes 228 condemned prisoners, including one female; 32 male and one female detenues, and three male civil prisoners.

The problem of people snatched by the criminal justice system (victims as well as accused) does not end with investigations; another ordeal in waiting is the prosecutorial phase in the courts. The interconnections between officials further aggravate injustice. Due to elitist political growth, more and more reliance was placed on the police in the past so as to consolidate power. This further corrupted the police and in the process destroyed the very foundations of investigation and prosecution. The police reputation has declined to

a point where even well connected and respected citizens are wary of dealings with them. They perceive police not as an instrument of the rule of law, but as a corrupt, militaristic, insensitive and a highly politicized force, operating mainly to guard the interests of the powerful.

An Asian Development Bank soft loan to Pakistan is de facto primarily responsible for the Access to Justice Program, in which the State is engaged “in improving justice delivery, strengthening public oversight over the police, and establishing specialized and independent prosecution services”. In this we see the Police Act 1861 being replaced by the Police Order 2002 and new laws to constitute and provide for the functions of independent prosecution services in Pakistan, thus, divorcing prosecution from the investigative arm of the police. Arguably, more valid grounds can be cited for the creation of an independent prosecution service in Pakistan, being article 175(3) of the constitution, which mandates that “the judiciary shall be separated progressively from the executive within three years from the commencing day”. Thereafter, there was the appeal decided in *Govt. of Sindh v. Sharaf Faridi* (PLD 1994 S.C. 105), and finally, article 37(i), which notes that: “The state shall decentralize government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.”

At this crucial juncture with the introduction of a comprehensively new and progressive prosecution system, what needs to be underscored is the difference in lawmaking and the law's implementation. Legislation per se does not solve problems; it is implementation which is the litmus test of good government, for it is in the implementation that the purpose and the objective of the legislation on the one hand, and transparency and accountability of the administration in the law's application on the other come under scrutiny. How far the new prosecutorial services are able to balance the rights of the accused vis-à-vis the victim will determine the elements of good government in the scheme's application.

Article 37(d) of the Pakistani constitution requires the state to ensure inexpensive and expeditious justice. The term “access to justice” in relation to crimes is generally correlated only to rights of the accused. But looking at the extremely low conviction rate in Pakistan, which hovers around 10 per cent (and in Sindh is less than five per cent), one is compelled to ask whether complainants and victims have “access to justice”: is the judicial system fair to those against whom crimes are committed?

If in a specified period in any given area a thousand rapes are committed, it can be safely presumed that a very large number of them are not even reported to the police; perhaps a hundred will reach the formal judicial system, and with the conviction rate at less than five per cent, the total number of perpetrators found guilty of their crimes may be no more than five in that thousand. In reality, it has been reported that during the last four to five years not a single gang rape case has ended in conviction in Sindh. Similarly, no more than five per cent of victims and complainants in cases of murder, armed robbery and other heinous crimes that take place all over the province do not get justice on account of the ridiculously low rate of conviction. There is something radically wrong with our judicial system that is responsible for this pathetic state of affairs! And while the judiciary has to take some blame for this failure, it is not the only player in the system. Apart from the judiciary, the other

main components are the police, (as the only investigation agency), the prosecution (which until recently was the police), and the prisons. Unless all these components work smoothly the results will always be disappointing.

It may be remarked that generally it is the poor, children, women, the have-nots, and vulnerable sections of our countries that don't get justice. Justice may seem to be open to all, but only in the same way as Harrods or Selfridges is "open to all": the doors are poised to welcome only those with the requisite financial stature. The black hole of such "unmet legal need" exists not just with reference to a lack of access to formal courts, but embraces interaction with police, the prosecutors and the prison authorities. Lack of judicial access is compounded by profuse ignorance of legal rights. And scarce judicial resources are concentrated in urban areas to the alienation of the masses in rural sectors.

Access to justice needs to be given the same priority that is given to nuclear power development or the military budget in India and Pakistan. As noted earlier, the Asian Development Bank provided Pakistan with a loan of USD 350 million under an access to justice development initiative. As a result of this scheme, there has been considerable additional work on court buildings, furnishings and library stocks, but there has been no change in the quantity and quality of justice being dispensed. The prosecution has not been a beneficiary, nor have personnel numbers. The United Kingdom with a population of around 60 million has some 30,000 lay magistrates alone, whereas 165 million Pakistanis are served by barely 900 magistrates. The magistrates handle and look after around 75 per cent of the total criminal cases that enter the formal criminal justice system and even this small number is not supported by an acceptable prosecution service. Furthermore, the pool of candidates from whom the magistrates and judges emerge is also shallow. In Pakistan, legal education remains in the doldrums and the questionable quality of law graduates is passed onto the bench.

Contrary to popular belief, formal courts are not the ones primarily responsible for the lack of access to criminal justice. The real cronies are the seemingly behind-the-scene players with whom an aggrieved person (including the complainant or the victim) will first interact. After all, the dispensers of justice depend on the facilities of justice. In this context, it is the police (as the investigation as well as the prosecution agency) that work as the main filter mechanism between individuals (i.e. complainant/victim and the accused). The more cumbersome or troubling it is to file First Information Reports and the more police harassment and bribery that exists, the more cynicism is associated with the processes to follow.

Article 2 of the International Covenant for Civil and Political Rights requires the prosecution service in any criminal jurisdiction to be viewed and assessed through the kaleidoscope of human rights. Whether the prosecution service fulfils the requirements of article 2 depends on its capacity to protect the fundamental rights of the main parties, i.e. the complainant/victim, the accused, and also the witnesses. The Sindh enactment of 2006 creating the Sindh Criminal Prosecution Service should be welcomed as a major step in the right direction. The new law inter alia visualizes the creation of an independent prosecution service that will be free from executive control and capable of protecting the rights of both the complainant/

victim and the accused. As observed earlier, only time will tell whether or not this law will be implemented, but obviously vested lobbies and obscurantist forces will employ all their powers and tactics to make it extremely difficult to enforce.

## **Lack of independence and political interference undermining prosecution system in the Philippines**

*Statement of the Asian Human Rights Commission issued after the consultation*

The participants from throughout Asia gathered for the Fourth Regional Consultation on an Asian Charter for the Rule of Law in Hong Kong from the 17-21 November 2008 studied the state of the prosecution system in the Philippines and its implications for human rights.

The Philippines' prosecution service, though maturing in recent years after being undermined during periods of martial rule, continues to suffer from political interference and still has a mindset that contributes to passivity which at times borders on abdication of responsibility. As a result the course of justice has at times been frustrated by its incapacity or unwillingness to dispense its duties effectively and adequately.

The National Prosecution Service (NPS), a government agency to which all public prosecutors are attached, remains under the direct control of the executive. The Department of Justice (DoJ), whose secretary is a presidential appointee, oversees the NPS, thereby exposing it to political interference, including through the removal and imposition of punishment upon public prosecutors with approval of the president. In recent times, there has been an increase in the number of cases brought through the service against people critical of the government.

Appointed secretaries of the DoJ have also become government mouthpieces instead of impartially pursuing cases in court for violations of the Penal Code and the constitution. And rather than imposing adequate checks and balances, for instance, by legislating to ensure that the prosecution is independent from the DoJ, successive administrations have instead continued to manipulate the prosecution service for political ends.

At the same time, impeachment proceedings and prosecution of administrative cases before the Office of the Ombudsman have become completely political exercises, exploited so that politicians can obtain favours, if not money, to support or reject moves to impeach the head of state. Instead of exercising the power given to them as representatives of their constituents so as to uphold civilian supremacy the members of both houses are using impeachment proceedings for personal and party survival.

The Office of Ombudsman, whose heads are also presidential appointees, has since likewise apparently failed to perform the role required of them in most cases that they have taken to court, in particular those involving officials occupying high-ranking positions and elected officials who have been accused of committing wrongdoing while in office. Deliberate delays in concluding cases filed in courts, trivialization of charges against those accused and the lack of performance pledges and accountability indicates that the office has virtually given

up on its job, despite the considerable power it wields as a constitutional body established to prosecute wrongdoings of elected and public officials, especially security forces alleged to have committed human rights violations.

While targeted extrajudicial killings and enforced disappearances have dropped sharply there have been serious developments regarding the use of the prosecution service against political activists, human rights defenders and lawyers. The filing of legally incoherent and questionable murder charges against labour lawyer Remigio Saladero Jr. and several other known activists in connection with an ambush in Puerto Galera, Oriental Mindoro two years ago illustrates that the prosecution system is being exploited for objectives inimical to human rights and the rule of law. Had Saladero not been arbitrarily arrested on October 23 of this year, he and his fellow accused would have not known that they had been charged over this offence, as they had not received any subpoenas or notices from the prosecutor's office and had thus not learned of the charges against them or made any defence. As to the charges, they have been so badly fabricated that it had apparently been overlooked that one of the accused was bedridden with diabetes at the time it occurred, while another had never been to the place of the incident in his entire life. Their names were added to the complaint by amending it on the pretext that they are the same persons who were earlier identified as "John Does and Jane Does" by a witness. However, the manner in which this was done was contrary to DoJ Circular No. 50, which requires that prosecutors should have solicited information from the witnesses and that they must ensure that the descriptions of those described as John Does or Jane Does match those of the persons later named as them.

These are among many other issues that were taken up concerning prosecution in the Philippines during the Fourth Regional Consultation on an Asian Charter for the Rule of Law and their implications for human rights, and to which the participants felt it necessary for the government to draw its attention. In particular, participants urged that the government and public in the Philippines should engage in vigorous discussion on the reestablishment of an independent prosecution service free from any forms of political interference, with policies to ensure strong checks and balances. By failing to address these issues effectively, the capacity of the prosecution service to impartially dispense its duties will continue to be seriously undermined. Any hope for legal redress and remedies for victims of human rights violations and for the holding of state agents accountable for abuses of human rights ultimately depends on the strength of the prosecution service.

## Participants

Justice Nasir Aslam Zahid (retd.), Supreme Court of Pakistan

Dr. Chandrasekharan Pillai, Dean, Kochi University of Science & Technology, India

Professor Zhou Changjun, Vice Dean, Shandong University Law School, China

Carla Ferstman, Director, REDRESS, United Kingdom

Chung Mi Hwa, Lawyer, Former Vice President, Lawyers' Association for a Democratic Society, Rep. of Korea

S. Ashiq Raza, High Court Advocate, Pakistan

M. Shamsul Haque, Advocate, Supreme Court, Bangladesh

Phromlak Sakpichaimongkol, Lawyer, Lawyers Council of Thailand

Jijo Paul, High Court Advocate, India

Chum Sen Sethea, Deputy Prosecutor, Kompong Cham Provincial Court, Cambodia

Asep Rahmat Fajal, Director, Indonesian Legal Roundtable

Basil Fernando, Director, Asian Human Rights Commission

Bijo Francis, Programme Officer, South Asia Desk, Asian Human Rights Commission

Md. Ashrafuzzaman, Programme Assistant, Asian Human Rights Commission

Danilo Reyes, Programme Assistant, Asian Human Rights Commission

Nick Cheesman, Editor, article 2

## Guest speakers and visitors

Professor Raul Pangalanan, Former Dean, College of Law, University of Philippines, Visiting Lecturer, Faculty of Law, University of Hong Kong

John Reading, Senior Prosecutor, Hong Kong

Professor Suzannah Linton, Director, LLM Programme, University of Hong Kong

Y. L. Cheung, Barrister, Hong Kong Bar Association

John Joseph Clancey, Chairman, Asian Human Rights Commission

Rishikesh Wagle, Lawyer, Nepal



# Appendix:

## Statement of Prosecution Policy and Practice—Hong Kong

*(Source: [www.doj.gov.hk/eng/new/index](http://www.doj.gov.hk/eng/new/index))*

### Introduction

The decision of whether or not to prosecute is a vital one. Vital for the suspect. Vital for the victim. Vital for the community. Great care must always be taken. A decision to prosecute should only be taken after the evidence and the surrounding factors, including those which are favourable to the suspect, have been carefully evaluated. An erroneous prosecution decision may erode public confidence in the criminal process.

High qualities are expected of the modern prosecutor. Good judgment. Complete integrity. An innate sense of fair play. A gut feeling for what is right and what is wrong. And fearlessness. Once a decision has been taken, it must be adhered to if it is right, no matter what. However, the modern prosecutor, who is trained to conduct his or her duties with skill, industry and vigour, must operate within the ambit of a defined and understandable prosecution policy.

The prosecutor is engaged directly in the administration of criminal justice. Prosecutorial discretion has to be exercised at the advisory stage, at trial and at the appellate level. That discretion must always be exercised in a way that is objective, fair and consistent. Decisions of whether or not to prosecute can be hard and controversial, and the profession of prosecutor is not for the faint-hearted. Morris Rosenberg, Deputy Minister of Justice, Canada has explained:

“Carrying out the duties of a prosecutor is difficult. It requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress. Not everyone can do this. Moreover, there is no recipe that guarantees the right answer in every case, and in many cases reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error.”

It has never been the position that those suspected of criminal offences must automatically face prosecution. A charge is only ever appropriate if it is in the public interest. In determining where exactly the public interest may be said to lie the prosecutor must examine all the factors and the circumstances. These vary from case to case, and no two cases are ever exactly the same. The prosecutor does not operate as a rubber stamp, and it would not be right to pursue every case without regard to the justice of the situation. In general, the more serious the offence, the more likely is it that the public interest will require a prosecution.

The prosecutor exercises an important discretion on behalf of the community of whether to institute a prosecution, and how to conduct a prosecution which has begun. The community for its part has a legitimate interest in the work of its prosecution service. The purpose of The Statement of Prosecution Policy and Practice is therefore not only to promote fair and consistent decision making in relation to public prosecutions amongst the prosecutors themselves, but also to make the prosecutorial process more understandable and open to the people of Hong Kong.

## **Prosecution policy and practice**

### ***1. The Independence of the Department of Justice***

1.1 The Department of Justice is responsible for the conduct of criminal proceedings in Hong Kong. In the discharge of that function the Department enjoys an independence which is constitutionally guaranteed. Article 63 of the Basic Law of Hong Kong stipulates that the Department ‘shall control criminal prosecutions, free from any interference’. That the notion of prosecutorial independence enjoys an entrenched status enables prosecutors to discharge their duties to the public within secure parameters. Prosecutors act independently without the fear of political interference or improper or undue influence. At the same time, the Secretary for Justice is accountable for their decisions and actions.

### ***2. The Position of the Secretary for Justice***

2.1 As Head of the Department of Justice, the Secretary for Justice stands, for all practical purposes, in the same position as did the Attorney General of Hong Kong in relation to the Government of Hong Kong prior to the resumption of the exercise of sovereignty by the People’s Republic of China in 1997.

2.2 The Secretary for Justice is responsible for varied duties which either involve or are related to the prosecution of offences. These include:

- a. the application of the criminal law;
- b. the formulation of prosecution policy;
- c. the superintendence of the Director of Public Prosecutions and of those who prosecute in Hong Kong.

In the discharge of these and other of the prosecutorial functions, the Secretary exercises an independent discretion.

2.3 In 1959 ministerial statements were made in the Parliament of the United Kingdom that:

“it would be ..... a very bad thing if this House or the Cabinet of the day tried to influence the semi-judicial functions of the Law Officers in the institution or dropping of prosecutions .....

and an earlier statement of policy was endorsed, namely:

“The Attorney General should absolutely decline to receive orders even from the Prime Minister or Cabinet or anyone else ..... (as to whether) ..... he should prosecute or not.”

The Secretary for Justice adopts a like stance.

2.4 The Court of Appeal has held that the powers and responsibilities of the Attorney General of Hong Kong are the same as those of the Attorney General in England (see *Cheung Sou-yat v R* [1979] HKLR 630). This constitutional doctrine was recognized by the Hong Kong Government in 1963, when it issued a guidance note stating that:

“It is the Attorney General who is responsible for all prosecutions in Hong Kong. It is for the Attorney General alone to decide whether or not prosecutions shall be instituted in any particular case or class of case, and his responsibility to control and conduct them.”

2.5 The responsibility of the Secretary for Justice in relation to prosecutions is identical. In exercising those responsibilities the Secretary has, like the former Attorneys General of Hong Kong, to bear in mind the public interest and the independence of the prosecution function. In 1951, Sir Hartley Shawcross KC, Attorney General of England and Wales, told the House of Commons that:

“I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize a prosecution, to acquaint himself with all the relevant facts, including for instance the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not.

On the other hand the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision and does not consist, and must not consist, in telling him what that decision ought to be.

The responsibility for the eventual decision rests with the Attorney General and he is not to be put under pressure by his colleagues in the matter. Nor of course can the Attorney General shift his responsibility for making the decision onto the shoulders of his colleagues. If political considerations, which in the broad sense that I have indicated affect government in the abstract, arise, it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations ....”

2.6 In *R v Tsui Lai-ying and Others* [1987] HKLR 857, the Court of Appeal stated:

“The office of the Attorney General in Hong Kong must be invested with the ordinary common law powers that clothe its United Kingdom counterpart ..... The Attorney General is the senior law officer of the Crown and it falls upon his shoulders to develop and to control the administration of the criminal law in the public interest generally and in the interests of ‘public justice’.”

2.7 Those sentiments are of continuing relevance, and provide guidance to the Secretary for Justice in the conduct of public prosecutions.

### ***3. The Position of the Director of Public Prosecutions***

3.1 The Secretary for Justice is aided in the discharge of the prosecution function by the Director of Public Prosecutions. The Director is the Head of the Prosecutions Division of the Department of Justice. He or she is responsible to the Secretary for:

- a. advising the Secretary on all criminal matters;
- b. directing public prosecutions;
- c. advising the law enforcement agencies, and other branches of government, on the enforcement and implementation of the criminal law;
- d. developing and promoting prosecution policy.

3.2 The Director is responsible for cases advised upon and conducted by lawyers in the Prosecutions Division, as well as for prosecutions conducted by Court Prosecutors and Departmental Prosecutors. Counsel who prosecute on fiat are subject to the Director's general direction in the exercise of their prosecutorial functions. The Statement of Prosecution Policy and Practice is provided for guidance to all of those who conduct public prosecutions in Hong Kong, whether or not on fiat.

3.3 The Secretary for Justice is accountable for the decisions taken by the Director and by those who act on his or her behalf.

### ***4. The Role and Ethics of the Prosecutor***

4.1 The prosecutor occupies a powerful and privileged position, and has considerable resources at his or her disposal. The decisions the prosecutor takes may profoundly affect the lives of others. A prosecution must only be brought for good cause. No one should ever be prosecuted simply because he or she may have committed an offence, or even probably has.

4.2 The decision whether to prosecute is among the most important decisions the prosecutor has to make. Great care must be taken in each case to ensure that the right decision is made. A wrong decision to prosecute, as well as a wrong decision not to prosecute, has the potential to undermine public confidence in the criminal process. There is little margin for error.

4.3 When at court, the prosecutor must at all times act independently. He or she represents the Hong Kong Special Administrative Region, not the government, the police or any other agency. When he addressed the University of Hong Kong in 1987, James Findlay QC, Director of Public Prosecutions, explained:

“It is very important that the public prosecutor in Hong Kong should be recognised as a part, and an essential part, of the means by which our society maintains personal liberty. He must be seen to be the public prosecutor, not because he prosecutes the public but because he prosecutes on behalf of, and in the interests of, the people of Hong Kong.”

4.4 In the discharge of the prosecution function the prosecutor is as independent as the judge. The interest of the prosecutor at all times is to assist the court to arrive at the truth. A fair trial is one in which all relevant evidence is presented, tested and adjudicated upon

according to law. As the representative of the public interest the prosecutor must guard against the conviction of the innocent. The prosecutor should:

- a. ensure that the prosecution case is firmly and fairly put;
- b. vigorously test the defence case, but with courtesy, and temperately;
- c. avoid submissions of fact or law which are not soundly based;
- d. eschew prejudice or emotion in the conduct of the case;
- e. reveal the existence of material that may assist the accused;
- f. invite the court to stop the proceedings if the point is reached at which he or she concludes there is no longer a reasonable prospect of conviction;
- g. use all legitimate means to achieve a just disposal of the issues in contention.

4.5 As a minister of justice, the prosecutor acts independently, yet in the public interest. His or her interest is not so much to win a case as to ensure that justice is done. The prosecutor will wish to obtain a conviction on the basis of evidence which is strong and credible, and not on the basis of evidence which is weak and dubious. The objectives of prosecution and the ethics of the prosecutor have been variously defined:

“It is important to observe that in a just society, the conviction of the guilty is in the public interest, as is the acquittal of the innocent.” - Mr Justice Li CJ

“It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologise for so doing. It is not unfair to prosecute, and the defence will look after the defence. I believe in hard hitting, but with blows that are scrupulously fair.” - Christmas Humphreys QC

“The interest of the prosecutor is confined to assisting the courts to do justice.” - Mr Justice Bokhary PJ

“Even in a minor case, prosecution has serious implications for all concerned - the victim, the defendant and others. Prosecutors must be fair, independent and just.” - Lord Irvine of Lairg LC

“Just as the judge must scrupulously protect the rights of the accused who stands trial, so must the prosecutor determinedly safeguard the rights of the suspect who does not.” - I Grenville Cross SC

“The prosecutor must act as a minister of justice, presenting the prosecution evidence fairly, making full disclosure of relevant material and ever conscious that prosecution must not become persecution.” - Lord Brennan QC

“The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.” - Mr Justice Rand

“Prosecuting is the art of the possible; you can only prosecute if you have evidence.” - Sir David Calvert-Smith QC

“He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.” - CS Kenny

“It is better by far to allow a few guilty men to go free than to compromise the standards of a free society.” - Lord Griffiths

In the practice of his or her profession, the prosecutor in Hong Kong is committed to these ideals and to their application.

### ***5. The Impartiality of the Prosecutor***

5.1 The prosecutor must be fair, independent and objective. Recognised prosecutorial criteria must be applied at each stage of the decision making process. A decision of whether to prosecute must not be influenced by:

- a. the personal feelings of the prosecutor concerning the offence, the suspect or the victim;
- b. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct;
- c. the race, religion, sex, national origin or political associations, activities or beliefs of the suspect or any other person involved;
- d. possible political advantage or disadvantage to the government or any political party, group or individual.

### ***6. The Prosecutor and the Investigator***

6.1 The functions of the prosecutor and the investigator are separate and distinct. The prosecutor decides if a prosecution should be instituted and, if so, on what terms. He or she acts independently of those responsible for the investigation. Whilst the prosecutor may consider the views of the investigator where appropriate, in the end it is the responsibility of the prosecutor to decide whether or not to proceed.

6.2 The roles of the prosecutor and the investigator are interdependent. Whilst each has separate responsibilities in the criminal justice system, they need to work in partnership to enforce the law. The prosecutor cannot direct investigations, but he or she advises the investigator on the conduct of cases. This includes advice in relation to:

- a. what criminal charges are open, including:
  - i. whether there is sufficient evidence to support a charge;
  - ii. the admissibility of evidence;
  - iii. the most appropriate charge in the circumstances;
- b. the present state of the law;
- c. whether a case should be tried summarily or on indictment;
- d. the institution of appeals or reviews of sentence;
- e. the disclosure of evidence.

6.3 If the prosecutor and the investigator are not in agreement as to the conduct of a case, the issue may need to be resolved through discussion at successively more senior levels on both sides. This is provided for by the Memorandum of Understanding, which was signed by the Director of Public Prosecutions and the Director of Crime and Security, Hong Kong Police Force, in July 2000, and contains the agreed levels of service which prosecutors and police provide to each other. Article 2.10 of the Memorandum recognises that:

“The Department of Justice remains solely responsible for the taking of all prosecutorial decisions and the police remain solely responsible for the conduct of investigations.”

## ***7. The Decision to Prosecute***

7.1 The prosecutor must consider two issues in deciding whether to prosecute. First, is the evidence sufficient to justify the institution or continuation of proceedings? Second, if it is, does the public interest require a prosecution to be pursued? That policy is consistent with the policies applied by prosecution agencies throughout the common law world. That consensus has been recognised by the Martin Committee in Canada in these terms:

“It is a fundamental principle of justice in this country that not only must there be sufficient evidence of the commission of a criminal offence by a person for a criminal prosecution to be initiated or continued, but the prosecution must also be in the public interest.”

7.2 In Hong Kong the position is underlined by section 15(1) of the Criminal Procedure Ordinance, Chapter 221 which states:

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

7.3 In response to a question in the Legislative Council in March, 1987, Michael Thomas QC, Attorney General, emphasized that the Attorney General has a discretion whether or not to prosecute and he set out the factors to be taken into account when making a decision in these terms:

“First, there must be enough evidence to prove all the ingredients of an offence. This is not always easy to determine, especially where an offence requires proof of a state of mind or an intention of which there is often little or no direct evidence. Even if there is evidence that tends to prove the necessary ingredients of an offence, a bare prima facie case is, generally speaking, not enough to warrant a prosecution. There must be a reasonable prospect of securing a conviction because it is not in the interests of public justice, nor indeed of the public purse, that weak, or borderline, cases should be prosecuted.

But at the same time there are other factors to be considered in order to assess where the interests of public justice lie. And among these are:

- What are the surrounding circumstances of the offence?
- How serious was it?
- What were its practical effects?
- What extenuating circumstances are there?

- What is the attitude of the suspect?
- How would the decision to launch a prosecution affect other people?
- How serious a view would a court take of the offence if there were a conviction?
- Would the consequences of prosecution be out of all proportion to the seriousness of the offence or to the penalty a court would be likely to impose?

I emphasise that this is not an exhaustive list, but sufficient I hope to indicate to Members that the decision whether to prosecute ultimately depends on a broad view of the interests of justice.”

7.4 It is not the rule that all offences for which there is sufficient evidence must be prosecuted. In 1951, Sir Hartley Shawcross KC, Attorney General of England and Wales, outlined to the House of Commons the following principles, which have since been accepted as correct by prosecution agencies which have common law systems:

“It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should ..... prosecute, amongst other cases: ‘wherever it appears that the offence or the circumstances of its commission is or are of such a character that prosecution in respect thereof is required in the public interest’. That is still the dominant consideration.”

7.5 That statement applies equally to the position in Hong Kong. The public interest is the paramount concern. In the same speech, Sir Hartley Shawcross quoted with approval the views expressed by a predecessor, Sir John Simon KC, in 1925:

“There is no greater nonsense talked about the Attorney General’s duty than the suggestion that in all cases the Attorney General ought to decide to prosecute because he thinks there is what the lawyers call ‘a case’.”

## ***8. The Sufficiency of Evidence***

8.1 When considering the institution or continuation of criminal proceedings the first question to be determined is the sufficiency of the evidence. A prosecution should not be started or continued unless the prosecutor is satisfied that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. The Secretary for Justice does not support the proposition that a bare prima facie case is enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. When reaching this decision, the prosecutor will wish as a first step to be satisfied that there is no reasonable expectation of an ordered acquittal or a successful submission of no case to answer.

8.2 A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the court, as well as an evaluation of the admissibility of evidence implicating the accused. The prosecutor should also consider any defences which are plainly open to or have



been indicated by the accused, and any other factors which could affect the prospect of a conviction. In a matter as vital as the liberty of the citizen the prosecutor will wish, in the event of uncertainty, to err on the side of caution.

8.3 When the prosecutor evaluates the sufficiency of evidence, regard will be had to such matters as:

- a. The Secretary for Security's Rules and Directions for the Questioning of Suspects and the Taking of Statements, which contain provisions for the questioning of persons by the police and are designed to ensure the reliability of evidence derived from confessions or other statements made to a police officer. If there is material available to the prosecutor that suggests that a confession might not be voluntary or was obtained in circumstances that could affect its admissibility or credit, that is an important consideration where the prosecution cannot proceed without that evidence;
- b. Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that he or she is either hostile or friendly to the accused, or that the witness may for some other reason be unreliable?
- c. Has a witness a motive for telling less than the whole truth?
- d. What sort of impression is the witness likely to make? (Prosecutors who conduct cases are not permitted to interview non-expert witnesses. Reliance therefore should be placed on assessments given by the police as to the impression the witness is likely to make in court. From time to time in difficult cases it may be that the prosecutor will have to assist the police in taking a statement from a witness. In this event under no circumstances should that prosecutor take the witness in chief or in re-examination.)
- e. Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?
- f. Where child witnesses are involved, are they likely to be able to give credible unsworn evidence?
- g. If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the accused? Special attention should be given to the law on identification evidence;
- h. Are there substantial matters that the defence may properly use to attack the credibility of the witness?
- i. Where there are a number of suspects the evidence against each accused must be considered separately. Is the evidence sufficiently strong so that the case can be proved against each suspect should separate trials be ordered?
- j. Is there anything in the case to suggest that a false story may have been concocted?

8.4 By relying on his or her knowledge of the law the prosecutor is required to assess these and other factors to determine whether or not there is a reasonable prospect of conviction on the evidence that is available to the prosecution. Each case must be considered on its own particular facts and in light of the surrounding circumstances. The prosecutor must apply judgment, experience and common sense in the determination of what is the just course.

## ***9. The Public Interest Criteria***

9.1 Once the prosecutor is satisfied that the evidence itself can justify proceedings in the

sense that there is a reasonable prospect of obtaining a conviction, he or she must then consider whether the public interest requires a prosecution. Regard should be had to the availability or efficacy of any alternatives to prosecution.

9.2 Although the public interest will be the paramount consideration, the interests of the victim are an important factor in determining the balance of the public interest and should be taken into account. The factors which can properly lead to a decision not to prosecute will vary from case to case, but, broadly speaking, the graver the offence, the less likelihood will there be that the public interest will allow of a disposal less than prosecution, for example, a caution by the police. In assessing the gravity of the offence, it will be necessary to consider whether the victim has suffered significant harm or loss: the meaning of 'significant' may be relative to the circumstances of the victim. Where, however, an offence is not so serious as plainly to require prosecution, the prosecutor should consider whether the public interest requires a prosecution. If the case falls within any of the following categories, this may be an indication that proceedings are not required, subject to the particular circumstances of the case:

#### **a. Likely penalty**

When the circumstances of an offence are not particularly serious, and a court would be likely to impose a purely nominal penalty, the prosecutor should carefully consider whether the public interest would be better served by a prosecution or some other form of disposal such as, where appropriate, a caution. This applies particularly where the offence is triable on indictment when the prosecutor should also weigh the likely penalty with the likely length and cost of the proceedings.

#### **b. Staleness**

Regard must be had not only to the date when the last known offence was committed, but also the length of time which is likely to elapse before the matter can be brought to trial. The prosecutor should pause to consider the propriety of prosecuting if the last offence was committed long before the probable date of trial, unless, despite its age, an immediate custodial sentence of some length is likely to be imposed. Less regard will be paid to staleness, however, if it has been contributed to by the accused himself, or the complexity of the case has necessitated lengthy police investigation, or the particular characteristics of the offence have themselves contributed to the delay in its coming to light. Generally, the graver the allegation, the less the significance to be attached to the element of staleness.

#### **c. Youth**

The stigma of a conviction can cause irreparable harm to the future prospects of a young adult, and careful consideration should be given to the possibility of dealing with him or her by means of a caution.

#### **d. Old age and infirmity**

- i. The older or more infirm the offender, the more reluctant the prosecutor may be to prosecute unless there is a real possibility of repetition or the offence is of such gravity that a prosecution is unavoidable. In general, proceedings should not be instituted where a court is likely to pay such regard to the age or infirmity of the offender as to induce it to impose only a nominal penalty, although there may well be circumstances, such as where the accused has held or still holds a position of some importance, when proceedings are required in the public interest regardless of the likely penalty;
- ii. It will also be necessary to consider whether the accused is likely to be fit enough to stand his or her trial. The prosecutor should have regard to any medical reports which have been made available by the defence solicitor and may arrange for a further medical examination where this is necessary.

#### **e. Mental illness or strain**

- i. Where there is evidence to establish that an accused or a person under investigation was suffering from a mental disorder at the time the offence was committed, the prosecutor may conclude that prosecution will not be appropriate in the circumstances unless it is overridden by the wider public interest, including in particular the gravity of the offence. Other material considerations will include the circumstances of any previous offences, and such relevant information concerning the nature of the person's condition, the likelihood of further offending, and the availability of suitable alternatives to prosecution. The mental condition of the suspect may be such as to require treatment rather than prosecution;
- ii. Where criminal proceedings are contemplated or have been instituted and the prosecutor is provided with a medical report to the effect that the strain of criminal proceedings may lead to a considerable worsening of the accused's mental health, such report should receive careful consideration. This can be problematic as in some instances the accused may have become mentally disturbed or depressed by the mere fact that his or her misconduct has been discovered and the prosecutor may be dubious about a prognosis that criminal proceedings will adversely affect his or her condition to a significant extent. Where, however, the prosecutor is satisfied that the probable effect on the accused's mental health outweighs the considerations in favour of a prosecution in that particular case, he or she should not hesitate to advise against or to discontinue proceedings. An independent medical report may be sought, but should generally be reserved for cases of such gravity as plainly require prosecution unless the examination provides clear evidence that such a course would be likely to result in a permanent worsening of the accused's condition. The accused's mental state will, of course, be relevant in considering any issue of mens rea or fitness to plead.

#### **f. Sexual offences**

When young persons have participated in the offence and there is no element of seduction or sexual corruption, a prosecution may not be required. [Sexual assaults upon children

should always be regarded seriously, as should offences against adults, such as rape, which amount to gross personal violation. In such cases, where the prosecutor is satisfied as to the sufficiency of the evidence, there will seldom be any doubt that prosecution will be in the public interest. The position might be different if the assailant is young or the assault minor.]

#### **g. Peripheral defendants**

Where an allegation involves several suspects, the prosecutor, in general, should have regard to the need to ensure that proceedings are pursued only against those whose involvement goes to the heart of the issue to be placed before the court. The inclusion of suspects on the fringe of the action and whose guilt in comparison with the principal offenders is minimal can lead to additional delay and cost, as well as to an unnecessary clouding of the essential features of the case.

#### **h. Remorse**

Where a suspect has admitted the offence and shown genuine remorse and a willingness to make amends, the prosecutor should carefully evaluate this. A suspect cannot expect to avoid prosecution simply by making compensation.

#### **i. Delay**

Where there has been a long delay since the offence was committed, common law and human rights considerations make it necessary to consider the consequences of that delay. Factors to be considered include:

- i. whether any delay was caused or contributed to by the suspect;
- ii. whether the fact of the offence or the suspect's alleged responsibility for it has recently come to light;
- iii. where any delay was caused or contributed to by a long investigation, whether the length of the investigation was reasonable in the circumstances;
- iv. where the victim has delayed in reporting the offence, the age of the victim both when the offence was committed and when it was reported;
- v. whether the suspect allegedly exercised a dominant position over the victim;
- vi. whether there was actual prejudice caused to the alleged offender by reason of any delay or lapse of time.

#### **j. Mitigation**

Where there are mitigating factors present, the prosecutor should consider whether these are factors which should be taken into account by the sentencing court in the event of a conviction rather than factors which should lead to a decision not to prosecute.

#### **k. Availability of a civil remedy**

Civil proceedings may sometimes offer a more appropriate method of settling the issues in a case. Depending on the circumstances, the right of a party to seek civil redress may influence

the prosecutor in favour of a disposal other than prosecution. A suspected offence may amount in reality to little more than a civil dispute between the two parties.

### **l. Counter-productiveness of prosecution**

If a prosecution would be perceived as counter-productive, for example by bringing the law into disrepute, the prosecutor must exercise caution. The law may be obsolete or obscure, and a warning to the suspect might be all that is required. A prosecution may not be desirable if it provides a person with an obsession an opportunity to air his or her views in public and to gain publicity for a particular cause. A prosecution may not be effective in stopping a person with an obsession from making a nuisance of himself or herself.

### **m. Mistake**

If the offence was committed as a result of a genuine mistake or misunderstanding, or is no more than a mere technicality, a prosecution may not be required. That it occurred through a misjudgment may also be of relevance.

### **n. Attitude of the victim**

In addition to considering the impact of the alleged offence on the victim, the prosecutor may have regard to any available information indicating the views of the alleged victim as to whether prosecution is appropriate or whether the case might appropriately be disposed of by other means. In the assessment of the public interest the views of the victim will be an important factor for consideration.

### **o. Assistance to the authorities**

Where the suspect is willing to cooperate in the investigation or prosecution of others, or if he or she has already done so, a prosecution may not be necessary.

9.3 The following factors, which are not exhaustive, increase the seriousness of the offence and thereby the likelihood that the public interest requires a prosecution:

- a. where a conviction is likely to result in a significant penalty;
- b. where the suspect was in a position of authority or trust, which has been abused;
- c. where the offence was premeditated;
- d. where a weapon was used or violence was threatened during the commission of the offence;
- e. where the suspect was a ringleader or an organizer of the offence;
- f. where the offence was carried out by a group;
- g. where the victim of the offence was vulnerable, was put in considerable fear, or suffered personal attack, damage or disturbance;
- h. where there is a marked difference between the actual or mental ages of the suspect and the victim;
- i. where there is any element of corruption;
- j. where the suspect's previous convictions or cautions are relevant to the present offence;

- k. where the suspect is alleged to have committed the offence whilst on bail, on probation, or subject to a suspended sentence or an order binding over the suspect to keep the peace and be of good behaviour;
- l. where the offence, although not serious in itself, is widespread in the area in which it occurred;
- m. where there are grounds for believing that the offence is likely to be continued or repeated, as where there is a history of recurring conduct.

### ***10. The Position of the Juvenile Offender***

10.1 It is a long standing statutory requirement that the courts shall have regard to the welfare of the juvenile appearing before them, in criminal as in civil proceedings. It is accordingly necessary that, in deciding whether or not the public interest requires a prosecution, the welfare of the juvenile should be fully considered as well as the provisions of section 109A of the Criminal Procedure Ordinance, Chapter 221 which restricts sentences of imprisonment of persons between 16 and 21 years of age.

10.2 There may be positive advantages for the individual and for society in using prosecution as a last resort. In general there is, in the case of juvenile offenders, a much stronger presumption in favour of methods of disposal which fall short of prosecution unless the seriousness of the offence or other exceptional circumstances dictate otherwise. The objective should be to divert juveniles from court wherever possible. Prosecution should always be regarded as a severe step.

10.3 It will never be right to prosecute a juvenile solely to secure access to the welfare powers of the court. Where the prosecutor thinks that there may be grounds for care proceedings and that this might better serve the public interest and welfare of the individual, he or she should invite the police to put this possibility to the Social Welfare Department.

10.4 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such factors as:

- a. the seriousness of the alleged offence;
- b. the age and apparent maturity and mental capacity of the juvenile;
- c. the available alternatives to prosecution, particularly a Police Superintendent's discretion power to issue a caution to juveniles, and their efficacy;
- d. the sentencing options available to the relevant Juvenile Court if the matter were to be prosecuted;
- e. the juvenile's family circumstances particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;
- f. the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and
- g. whether a prosecution would be likely to be harmful to the juvenile or be inappropriate, having regard to such matters as the personality of the juvenile and his or her family circumstances.

## ***11. The Charging Practice and Procedure***

11.1 There must be available admissible evidence which supports all the ingredients of the offence or offences charged. The prosecutor will exercise his or her discretion on the choice of charge on the basis of the following principles:

- a. Every effort should be made to keep the number of charges as low as possible. A multiplicity of charges imposes an unnecessary burden on the administration of the courts as well as upon the prosecution, and often tends to obscure the essential features of the case. Where the evidence discloses a large number of offences of a similar nature, the use of specimen charges should always be considered. Consideration should be given to inviting the court, if the accused agrees, to take outstanding offences into account for the purposes of sentencing. Where numerous different types of offence are disclosed, the ability to present the case in a clear, simple manner should remain a key objective;
- b. The charges laid should adequately reflect the gravity of the accused's conduct and will normally be the most serious revealed by the evidence. Provided, however, that the offence charged is not inappropriate to the nature of the facts alleged and the court's sentencing powers are adequate, the prosecutor should take into account matters such as speed of trial, mode of trial and sufficiency of proof which may properly lead to a decision not to prefer or continue with the gravest possible charge. The prosecutor should also take into account probable lines of defence when exercising his or her discretion;
- c. In many cases the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the court with an appropriate basis for sentence;
- d. In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, and the probable lines of defence to a particular charge, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.

## ***12. The Mode of Trial***

12.1 Where a case is considered too serious for trial in the Magistrates Court, where for most offences the maximum sentence is 2 years' imprisonment, the prosecutor should consider carefully whether the trial ought properly to take place in the District Court, where the maximum sentence that can be imposed is 7 years' imprisonment, or in the Court of First Instance, where the maximum sentence is that prescribed by law, including, for certain offences, life imprisonment. In the selection of venue, the penalty which is likely to be imposed upon an accused after trial is an important factor for the prosecutor to bear in mind.

12.2 Whilst the attraction of an expeditious disposal should never be the sole reason for summary trial, the prosecutor is entitled to have regard to the fact that trial in the Magistrates Court is almost certain to be speedier as well as less expensive. Other considerations such as the length of trial or the possibility of a plea of guilty by the accused are generally not relevant.

### ***13. The Review of the Decision to Prosecute***

13.1 Once a prosecution has been instituted, the prosecutor is under a duty to ensure that its continuation remains in the public interest. If circumstances change, or if new material comes to light, the prosecutor may have to review the prosecution. If it becomes apparent that it is no longer in the interests of justice to proceed with the case, it should be stopped. Alternatively, the prosecutor may decide that it is appropriate to proceed on amended or alternative charges.

13.2 On 27 April 1994, Jeremy Mathews, Attorney General, explained to the Legislative Council:

“The Director of Public Prosecutions, indeed the prosecuting authorities generally, must keep an open mind in respect of decisions to prosecute and it is not uncommon for there to be changes to earlier decisions and I am sure that members of the community would expect the Director and the prosecuting authorities to act in that way.”

13.3 If the prosecutor is invited to resolve criminal proceedings by the acceptance of adjusted pleas, this may be considered provided that it is in the public interest and after a consideration of whether:

- a. the adjusted charge is supported by the evidence;
- b. the adjusted charge reflects the essential criminality of the conduct;
- c. the plea to the adjusted charge will match the seriousness of the crime, particularly if there are aggravating features;
- d. the saving of expense and time is great when weighed against the likely outcome of the matter if tried; and/or
- e. it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in court.

13.4 Plea negotiation will not normally be instituted by the prosecution. In no circumstances should the prosecutor enter such a negotiation if the accused maintains his or her innocence in respect of a charge to which a guilty plea is offered. Nor should the prosecutor accept an alternative plea if this will produce a distortion of the facts and create an artificial basis for sentencing. If pleas are accepted to a reduced number of charges, or to less serious charges, the prosecutor should be prepared to explain the decision in open court.

13.5 Before the prosecutor discontinues a prosecution, or accepts an adjusted plea, he or she should, if practicable, ascertain the views of the victim and of the reporting department or agency. These views, whilst not determinative of the issue, will assist the prosecutor in reaching an informed decision. The more finely balanced the factors involved, the greater will be the assistance to be derived from the views of others.

13.6 The procedures that exist for consultation with interested parties and for the obtaining of appropriate clearance where issues concerning the review of the decision to prosecute arise, are designed to ensure consistency, fairness and openness in the conduct of public prosecutions.



#### ***14. The Bind Over Order Procedure***

14.1 When a person has been charged with an offence, the prosecution are sometimes asked to offer no evidence if he or she agrees to be bound over to keep the peace and/or be of good behaviour. If such an arrangement is acceptable to the prosecution and the court, a bind over arrangement operates as a form of preventive justice. Although the bind over procedure is not on a par with a conviction, it is not to be treated as a 'let-off'. The accused knows that if he or she is guilty of further misconduct during the operational period, the recognizance may be lost.

14.2 The bind over procedure may be viewed as a rehabilitative measure in its own right. It serves to keep the accused on the straight and narrow. There are consequences to the accused for non-compliance with the terms of the order.

14.3 When a bind over arrangement is proposed, the prosecution look to see if there is material of which they were not aware, or perhaps not sufficiently aware, when the prosecution was instituted, and which may have a direct bearing on the propriety of pursuing the prosecution. In such circumstances, the prosecution reassess the case in accordance with the basic criteria applicable to the initiation of a prosecution.

14.4 A decision to agree to a bind over is taken after a careful consideration of the circumstances of the case and of the representations made, and after due regard has been had to whether the interests of justice require the prosecution to proceed. It may not be appropriate to pursue the prosecution if its continuation would cause consequences to the accused which are out of all proportion to the gravity of the offence. Other factors which, when taken in conjunction with others, might be relevant, will be found in the likely penalty in the event of a conviction, the age of the accused, the record and character, the mental state, the view of the victim, and the attitude of the accused to the offence.

14.5 A request to the prosecutor to accept a bind over arrangement is usually made by the defence. On occasion, the court may invite the prosecution to consider such an arrangement. The prosecution cannot be compelled to accept such a disposal if it is deemed to be inappropriate in the public interest. The more serious the offence, the less likely is it that the prosecution will feel disposed to accept this arrangement.

#### ***15. The Consent to Prosecute***

15.1 It is a condition precedent to the institution of some proceedings that the consent of the Secretary for Justice be first obtained. In respect of some offences, the consent to prosecute is exercised personally by the Secretary. In respect of others, the Secretary has authorized the Director of Public Prosecutions and senior prosecutors to provide the necessary consents.

15.2 Where legislation provides for consents to prosecute to be given the basic intent is to ensure that prosecutions are only ever instituted after the appropriate level of scrutiny of a case has been exercised. This is particularly so where the criminal law is to be deployed

in a sensitive area, or where issues of public policy may arise. Often the reason for the requirement for a consent is a factor which will ordinarily be taken account of as part of the decision whether to prosecute.

### ***16. The Immunity from Prosecution***

16.1 The use of informers as prosecution witnesses is always a matter which requires careful and balanced judgment. On the one hand, there is often a reluctance to trust an informer, particularly if that informer stands to gain from giving evidence. On the other hand, the evidence of informers is evidence which can be evaluated by a court and in many instances truthful testimony will be given. There are some areas of law enforcement where a prosecution will only ever be possible as a result of evidence from informers.

16.2 The Director of Public Prosecutions will in appropriate cases authorize the offering and granting of an immunity to a person who is to assist a law enforcement agency in the detection or control of criminal activity, and who by so acting may become a party to the commission of criminal offences. In general an immunity will only be offered:

- a. where the criminal activity under investigation is of a serious kind or of a kind that poses a serious threat to law and order or public safety within Hong Kong; and
- b. where conventional means of detection or control are unlikely to prove effective.

16.3 The prosecutor has a special responsibility to ensure that the processes of justice do not miscarry when an informer is used. In all cases where it is proposed to use an informer as a witness, the prosecutor should ascertain whether the informer has been promised any reward for giving evidence or hopes to gain any benefit from testifying. The prosecutor should study the criminal record of the informer and look for any motive for lying. Sometimes the prosecutor may conclude that the informer is so tainted that the testimony should not be used at all, at least in the absence of corroborative material. The court and the defence should be made aware of any matter which might affect the assessment of the evidence of an informer.

16.4 In principle it is desirable that the criminal justice system should operate without the need to grant immunities to persons who participated in alleged offences in order to secure that evidence in the prosecution of others. However, in some cases this is in the interests of justice. As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty, the accomplice who is prepared to cooperate in the prosecution of another can expect to receive a substantial discount in sentence. In general, an accomplice will only be given an immunity from prosecution if:

- a. the evidence the accomplice can give is considered necessary to secure the conviction of the accused, and that evidence is not available from other sources; and
- b. the accomplice can reasonably be regarded as significantly less culpable than the accused.

16.5 The central issue in deciding whether to give an accomplice an immunity is whether in the overall interests of justice the prosecution of the accomplice should be foregone in order to secure that person's testimony in the prosecution of another. In deciding where the

balance lies, these factors are relevant:

- a. the significance to a successful prosecution of the evidence which it is hoped to obtain;
- b. the degree of involvement of the accomplice in the criminal activity in question compared with that of the accused;
- c. whether any inducement has been offered to the person concerned;
- d. the likely credibility of the accomplice as a witness;
- e. whether the accomplice has made, or is prepared to make, full disclosure of all facts and matters within his or her knowledge;
- f. the nature and strength of any corroborative or other evidence.

16.6 An immunity should only be given if the interests of justice so require. The Director of Public Prosecutions and his Deputies are authorized to grant full or partial immunity to persons suspected or accused of offences in return for their undertakings to give truthful evidence on behalf of the prosecution. The immunity will be in writing and where necessary translated. A copy of the immunity should be provided by the prosecutor to the court and the defence at trial.

### ***17. The Nolle Prosequi***

17.1 Proceedings pending on indictment in the Court of First Instance and the District Court may be stayed by the entry of a nolle prosequi. A nolle prosequi may be entered only on the direction of the Secretary for Justice personally and it is not subject to any control by the courts.

17.2 A nolle prosequi is now usually directed to be entered in cases where the accused is unable to plead in court or stand trial owing to physical or mental incapacity which is expected to be permanent. The entry of a nolle prosequi stays the prosecution but does not operate as a bar or discharge or an acquittal and the accused remains at risk of re-indictment if that is deemed by the prosecution to be just.

### ***18. The Duty of Disclosure***

18.1 Every accused has a right to a fair trial, a right long embodied in our law and guaranteed under Article 87 of the Basic Law. A fair trial is the object and expectation of all of those involved in the trial process. The prosecutor must make fair disclosure to the defence as an integral part of a fair trial.

18.2 The duty to disclose is a positive duty placed upon the prosecution. It is also continuing. If material becomes relevant during the course of a trial it should be disclosed.

18.3 The prosecutor must be alert to the need to make advance disclosure of material of which he or she is aware (either from his or her own consideration of the papers or because attention has been drawn to it by the defence) and which he or she, as a responsible prosecutor, recognizes should be disclosed at an earlier stage. Such material includes:

- a. previous convictions of a complainant or deceased if that information can reasonably be expected to assist the defence when applying for bail;
- b. material which may enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process;
- c. material which may enable a defendant to submit that he or she should only be committed for trial on a lesser charge, or perhaps that there should not be a committal for trial at all;
- d. material which will enable the defendant and the legal advisers to make preparations for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye witnesses who the prosecution do not intend to use).

18.4 The prosecution should make available to the defence any witness whom they do not propose to call but whom they know could give material evidence that tends either to weaken the prosecution case or strengthen the defence case. If the prosecutor is possessed of material which may be of relevance to the defence, whether documentary or otherwise, this should be disclosed. There is a positive duty to ascertain the existence of, and to disclose scientific evidence which might assist the defence. The task of the prosecutor is to evaluate the materiality of information which he or she possesses.

18.5 Not all material needs to be disclosed to the defence. The rule is that information need not be disclosed by the prosecutor if such disclosure would be prejudicial to the public interest. This may arise in various situations, as where disclosure would harm the proper functioning of the public service. The concept of 'public interest immunity' recognizes not that the prosecution have a privilege to withhold information, but that there is immunity from making disclosure when the public interest in withholding information in a particular case outweighs the normal rules requiring disclosure.

18.6 In *R v Keane* (1994) 99 Cr App R 1, the Court of Appeal defined 'materiality', emphasized the prosecution's duty in judging materiality, and set out the balancing exercise to be undertaken by judges in deciding upon disclosure. The procedure to be adopted, whether it be by way of inter partes hearing, or exceptionally in an ex parte hearing, is governed by rules of practice identified both in *R v Keane* and in *R v Davis, Johnson and Rowe* (1993) 97 Cr App R 110. In *R v Keane*, it was held that the prosecution should have notified the defence before the trial began that an ex parte application was to be made to the court, and such an application should have been made so that the trial judge could have seen the material and heard the prosecution's reasons for not wishing to disclose it before making a ruling. The prosecution had to identify the documents and information which were material and, having done so, such material should be disclosed unless they wished to maintain that public interest immunity or other sensitivity justified withholding some or all of it. Only that part which was both material in the estimation of the prosecution and sought to be withheld should be put before the court for its decision. The more full and specific the indication the defence lawyers gave of the defence or issues they were likely to raise, the more accurately both prosecution and judge would be able to assess the value to the defence of the material. The guidance provided in *Keane* encompasses the common law duty of disclosure which applies in Hong Kong (*HKSAR v Lau Ngai-chu* [2002] 2 HKC 591). Any order that

material otherwise disclosable be withheld on the basis of public interest immunity should be no wider in scope than the public interest demands; and similarly it should not remain in force any longer than necessary (*Johnson and Others v R* [1999] EWCA Crim 885).

18.7 If the prosecution wish to claim public interest immunity in a criminal trial for documents which might help the defence case, they should give notice of their intention to the defence so that, if necessary, the court can be asked to rule on the question. If, in a wholly exceptional case, the prosecutor is not prepared for the issue to be decided by the court, the prosecution may need to be discontinued. Material covered by legal professional privilege, including confidential advice given on the case by the prosecutor to the investigator, is not in general subject to the rules of disclosure.

18.8 The ultimate arbiter of what must be disclosed is the court and not the prosecutor. Subject to that, the material which the prosecution is required to disclose is that which can be seen on a sensible appraisal by the prosecution:

- a. to be relevant or possibly relevant to an issue in the case;
- b. to raise or possibly raise a new issue whose existence is not apparent from the evidence that the prosecution proposed to use; and
- c. to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which go to (a) or (b).

Thus any unused material in the possession of the prosecution, e.g. a statement of a witness which contains information inconsistent with the evidence that he or she is expected to give, must be disclosed.

18.9 In deciding whether to provide copies of audio and video surveillance to the defence the prosecution are entitled to take into consideration the protection of the safety of an undercover police officer (*R v Crown Prosecution Service and Another, Ex parte J and Another* TLR 8 July 1999).

18.10 The prosecutor's duty is to prosecute the case fairly and openly in the public interest and does not extend to conducting the case for the defence. It follows that the prosecution are under no duty to disclose to the defence material which is relevant only to the credibility of a defence witness; indeed, there is a clear distinction to be drawn between such material, and material which may assist the defence case, which is disclosable. Accordingly, where the result of checking an alibi notice is to provide the prosecution with material which undermines the credibility of a witness who supports the alibi there is no duty on the prosecution to disclose that material to the defence.

18.11 In *R v Ch'ng Poh* [1996] 1 HKCLR 18 concern was expressed about the somewhat cavalier attitude of the prosecution to the duty of disclosure of material that was or might be relevant. The discharge of that duty is to be measured, not by the actual knowledge or difficulties of the prosecution or departments concerned, but by the potential effect upon the defence of the accused and the extent to which it may be assisted or prejudiced.

18.12 The Criminal Procedure and Investigations Act 1996, does not apply to Hong Kong but the following provisions (section 3 and section 9) are suggested for guidance:

- a. The prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused;
- b. Where material consists of information which has been recorded in any form the prosecutor discloses it:
  - i. by securing that a copy is made of it and that the copy is given to the accused; or
  - ii. if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;  
and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded;
- c. Where material consists of information which has not been recorded the prosecutor discloses it by securing that it is recorded in such form as he thinks fit and:
  - i. by securing that a copy is made of it and that the copy is given to the accused; or
  - ii. if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;
- d. Where material does not consist of information the prosecutor discloses it by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;
- e. Material must not be disclosed to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly;
- f. The prosecutor must keep under review the question whether at any given time there is prosecution material which:
  - i. in his opinion might undermine the case for the prosecution against the accused; and
  - ii. has not been disclosed to the accused;  
and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable.

18.13 The prosecutor should disclose to the defence the previous convictions of a prosecution witness. If discreditable conduct has previously been established against a prosecution witness which might affect the assessment to be made of him or her as a witness, that should also be disclosed. The safest course for the prosecutor is to make enquiry about a witness's record and character where his or her credibility is likely to be a crucial issue in the case.

18.14 Material which is subject to legal professional privilege is not disclosable, unless privilege is waived. Legal advice by a prosecutor to an investigator is privileged. Internal notes, memoranda, correspondence or other materials generated by the prosecution in the preparation of the case for trial may also be privileged. As a general rule, privilege attaches to matters of opinion as opposed to matters of fact.

## ***19. The Prosecutor and the Victim of Crime***

19.1 The prosecutor must be sensitive to the interests and needs of the victim of crime. If those who commit offences are to be prosecuted, victims and witnesses must be willing to report offences and to testify at court. They need to know that they will be treated with respect and understanding. The manner in which the prosecuting authority treats the victims of crime is a measure not only of its efficacy, but also of its humanity.

19.2 The prosecutor acts in the public interest, not just in the interests of any one individual. But he or she must always think carefully about the interests of the victim, which are an important factor in deciding where the public interest lies. Victims are entitled to have their role in the prosecution process fully explained, and are entitled, where possible, to be consulted as to the various decisions made in the process which may directly affect them and to be advised of the developments in the case as it progresses through the criminal justice system.

19.3 A victim of crime when called upon to testify may need to relive the violence and physical distress suffered from the offence, and of this the prosecutor needs to be mindful. The prosecutor must protect the position of the victim at court, explain what is happening and provide comfort when necessary. The prosecutor should ensure that the court is apprised of the effects of the crime upon the victim. If significant harm has been caused, whether physical, psychological or financial, the prosecutor must consider applying, in an appropriate case, for an enhanced sentence under section 27 of the Organized and Serious Crimes Ordinance, Chapter 455. That may require the preparation of a victim impact statement.

19.4 The prosecutor must respect the rights of the victim. These include the rights to:

- a. be treated with courtesy and respect;
- b. be kept informed of the progress of cases;
- c. have their views considered by prosecutors and investigators;
- d. be provided with proper facilities at court;
- e. have their circumstances and views brought to the attention of the court whenever appropriate;
- f. be notified of the offender's pending release, or escape, from penal custody;
- g. respect for privacy and confidentiality.

19.5 Prosecutors must, to the extent that it is relevant and practicable to do so, have regard to the Victim of Crime Charter, 2000.

## ***20. The Role of the Prosecutor in the Sentencing Process***

20.1 It has been said that the prosecutor is a minister of justice, and that the prosecution have no vested interest in securing a more severe sentence. The prosecutor should not attempt by advocacy to influence the court in regard to sentence. The prosecutor nonetheless plays an important role in the sentencing process. The duty to assist the court is part of the prosecutor's general duty in the administration of justice.

20.2 The public interest requires no more of the prosecutor than that he or she assists the court to have access to all available and relevant matters which may affect sentence and protects the court from any errors which may have to be remedied on appeal or review.

20.3 There are obvious ways in which the prosecutor discharges his or her duty to lay before the court fairly and impartially the whole of the facts which comprise the case for the prosecution. At a contested trial the prosecution call all the relevant evidence in order to discharge the burden of proving the case and thereby provides the sentencer with the factual material which may aggravate or mitigate the sentence.

20.4 On a plea of guilty the prosecutor will address the court to provide a proper presentation of the facts of the case. On conviction, the prosecutor tells the court of the accused's antecedents, and must ensure that these are up to date. He or she also has a duty to deal with ancillary matters such as costs, compensation, forfeiture, restitution and the disposal of exhibits.

20.5 The prosecutor has additional and no less important duties and responsibilities:

- a. It is the duty of the prosecutor, where the accused has pleaded guilty, to ensure that the facts which are then placed before the court support each and every ingredient of the charges laid, and that they provide a sufficiently comprehensive factual basis for sentencing;
- b. Where there is a major difference between the factual basis upon which an accused pleads guilty and the case contended for by the prosecution, there is an adversarial role for the prosecution in establishing the facts upon which the court should base sentence;
- c. He or she must be aware of any legal limitations on sentence, of what the maximum sentence is, and whether the court has jurisdiction to impose any particular sentence. This assists the court to avoid appealable errors;
- d. The duty of the prosecutor is to draw the attention of the court to any facts which may affect the assessment of sentence, and this applies equally whether it involves a mitigating or an aggravating factor. The former consideration bulks large when the accused is not represented;
- e. The prosecutor should be familiar with the relevant 'tariff' or 'guideline' cases prior to sentencing. In the Court of First Instance, he or she is permitted to bring decisions of the Court of Appeal to the attention of the trial judge if it is felt that they will help the court to arrive at a just and proper sentence. This should be done before the address in mitigation, and the prosecutor has no right of reply. Judgments which do not provide guidelines, but instead turn solely on the facts of the particular case, should not be cited. The prosecutor should be careful not to suggest any particular sentence or type of sentence, or to say anything that could be taken as advocating severity. These same principles also apply in the District Court and the Magistrates Courts, and in the latter it is permissible also for the prosecutor to draw attention to relevant appellate judgments of the Court of First Instance. Where the accused is represented, the cases intended to be cited should be made known to his or her lawyer. If the accused is not represented, the cases intended to be cited should be supplied to him or her (If he or she requires an adjournment for legal advice, or else requests that the cases be explained or translated, then this will be a matter for the court.);



- f. When matters are advanced in mitigation which the prosecution can prove to be wrong, the duty of the prosecutor is first to inform the defence that the mitigation is not accepted. If the defence persists in the matter it becomes the duty of the prosecutor to invite the court to put the defence to proof of the disputed material and if necessary to hear any rebutting evidence. He or she must carefully exercise the discretion as to whether the inaccurate mitigating facts are of such a nature as to require the intervention of the prosecution to prevent the court from proceeding on a wrong basis;
- g. The prosecutor should not volunteer information about the prevalence of particular offences but should be ready to assist the court if he or she has reliable material which is called for by the court. Statistics which are accurate and up to date can properly be tendered if requested;
- h. The prosecutor should not volunteer information as to the broad range of sentences being passed for a particular offence, but can provide such if so requested by the court;
- i. The prosecutor should be familiar with the provisions of section 27 of the Organized and Serious Crimes Ordinance, Chapter 455, which supplements the traditional role of the prosecutor. Section 27 entitles the prosecutor to place certain material before the Court of First Instance or the District Court at the sentencing stage. It also entitles the prosecutor to invite the court to conclude that a specified offence is an organized crime. If reliance is to be placed upon section 27, the prosecutor must ensure that only evidence which is admissible is adduced, and that proper notification and other procedures are adhered to. Section 27 enables the court to impose a more severe sentence in light of the stance adopted by the prosecutor thereunder;
- j. The prosecutor should bring to the attention of the court the victims' circumstances and views whenever this is appropriate.

### ***21. The Prosecutor and Conviction Appeals***

21.1 When there is an appeal against conviction to the Court of Appeal or to the Court of First Instance, the duty of the prosecutor is to assist the court as required to achieve a just disposal of the appeal.

21.2 The prosecutor should be familiar with, and observe the relevant Practice Directions.

21.3 Once the perfected grounds of appeal are received, together with the appellant's authorities, the prosecutor should decide upon, and serve such additional authorities as will assist the court in determining the issues raised by the appeal. The invariable duty of the prosecutor to assist the court through the preparation of a written submission applies irrespective of whether the appellant is represented.

21.4 When an appellant is not represented, the prosecutor should scrutinise the papers with especial care to determine whether there is any legitimate ground of appeal which has not hitherto been noticed. If he or she discovers such, the court should be informed.

21.5 Although the prosecutor will generally seek to uphold a conviction, if the view is formed that the appeal should succeed the prosecutor should acquaint the court of that view

and explain the reasons for it. If the court disagrees, the prosecutor is entitled to adhere to his or her view and is not obliged to conduct the appeal in any way which conflicts with his or her own judgment. At the same time it remains the prosecutor's duty to give assistance to the court if requested to do so.

## 22. The Prosecutor and Sentence Appeals or Reviews

22.1 Where an accused appeals against sentence to the Court of Appeal or the Court of First Instance, the prosecutor should be in a position to assist the court as required. This may involve drawing its attention to the relevant 'guideline' or 'tariff' cases. The prosecutor should not seek to place before the court 'comparables', that is, judgments which might bear some similarity to the case under consideration, but which ultimately turn on their own facts. He or she should also, if required, be in a position to address the court on the prevalence of the offence, on the customary range of sentences for a particular offence, and to provide accurate statistics.

22.2 It is no part of the prosecutor's function on appeal to seek to uphold a sentence which he or she considers to be manifestly excessive, wrong in principle or not authorized in law. Equally, the prosecutor should, if required, indicate why it is felt that the sentencer has achieved a fair and just result in all the circumstances. The prosecutor must be in a position to assist the court as to its powers in disposing of the appeal.

22.3 When the prosecutor represents the Secretary for Justice on an application for review of sentence, it must be remembered that he or she is, as at first instance, a minister of justice. When the application is based upon an error of principle or of law, it is incumbent on the prosecutor to identify the nature of the error alleged, and authority can properly be cited to establish the error. Where it is alleged that a sentence is manifestly inadequate or manifestly excessive, the prosecutor must provide the reasons. This will generally involve identifying mistakes made by the sentencer, and reference to authority. It is also permissible for the prosecutor to indicate what he or she considers the correct approach ought to have been. The prosecutor may properly draw attention to any matter appearing on the record, but may not adduce new evidence in order to secure an enhanced sentence. The right of reply is limited to answering any mis-statements of fact or any mis-statements of legal principle made on behalf of the respondent.

22.4 The power of review of sentence was conferred to correct errors in what the Court of Appeal has called 'exceptional cases' (*Attorney General v Lau Chiu-tak* [1984] HKLR 23). An application for review of sentence will only usually be instituted where it is clear that the sentencer has fallen into serious error and the public interest requires that this be rectified. Applications for review of sentence must be signed by either the Secretary for Justice or the Director of Public Prosecutions. No other prosecutor is authorized to make any decision in relation to sentence or to give undertakings about the Department's attitude. The Secretary will not be bound by any such decision or undertaking, unless it is authorized by the Director.

## 23. The Private Prosecution and Intervention by the Secretary for Justice

### 23.1 Article 63 of the Basic Law provides:

“The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference.”

23.2 Under the common law, every person has exactly the same right to institute any criminal prosecution as the Secretary for Justice or any one else. The right to begin criminal proceedings belongs to everyone, whether as an individual or acting in a group, and whether in a private or public capacity. Even the private citizen can prosecute in the public interest. The right to prosecute does not include a right of access to police statements, reports and photographs.

23.3 The Secretary for Justice is always entitled to take over and continue, or discontinue, a private prosecution. The power of the Secretary to intervene is not subject to review by the courts. (*Gouriet v Union of Post Office Workers* [1977] 3 All E R 70). Any private person can institute and pursue a private prosecution but the Secretary can bring this to a halt by entering a *nolle prosequi*.

23.4 In respect of the Court of First Instance, section 17 of the Criminal Procedure Ordinance, Chapter 221 provides that “Every indictment shall be signed by the Secretary for Justice, and shall bear date on the day when it is signed.” In *R v George Maxwell (Developments) Ltd.* [1980] 2 All E R 99, it was held that a private prosecutor was not a litigant in person before the Crown Court and was not entitled to act as an advocate in any way in those proceedings because (a) once the indictment was signed the proceedings thereafter continued in the name of the Sovereign and (b) the public interest required that the prosecution in the Crown Court be impartial and subject to the constraints necessary to ensure a fair trial.

23.5 In respect of summary offences in the Magistrates Court, section 14 of the Magistrates Ordinance, Chapter 227, provides for a complainant or informant to conduct the prosecution in person or by counsel. It states as well that the Secretary for Justice may at any stage intervene and assume the conduct of the proceedings. From the date of such intervention the Secretary is deemed to be a party to the proceedings.

23.6 In considering whether to take over a prosecution the following factors are relevant:

- a. the wishes of the parties;
- b. whether the public interest will be advanced if the prosecution is taken over;
- c. whether the prosecution will be taken over to be terminated. If so, regard will be had to whether:
  - i. the proceedings are vexatious or oppressive;
  - ii. there are reasonable prospects of success;
  - iii. a decision already taken by the Department of Justice will be thwarted;
  - iv. the evidence is sufficient;
  - v. there is any duplication;

- vi. the Department of Justice should offer no evidence or enter a nolle prosequi;
- d. whether there will be a fair trial;
- e. the seriousness of the charge;
- f. whether the Department of Justice has already instituted proceedings arising out of the same incident;
- g. whether the proceedings are contrary to the public interest.

23.7 The public interest may at times override the individual interests or wishes of those who institute criminal proceedings. The taking over of proceedings is exceptional. Access of citizens to the courts will not be impeded except in special circumstances. A prosecution will not be taken over unless that course is approved personally by the Secretary for Justice.

#### ***24. The Re-starting of a Prosecution***

24.1 People should be able to rely on decisions taken by the Secretary for Justice. Normally, if a suspect or an accused is told that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special circumstances in which a prosecution will be re-started, particularly if the case is serious. These circumstances include:

- a. rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;
- b. cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the accused will be told that the prosecution may well start again;
- c. cases which are stopped because of a lack of evidence but where more significant evidence is discovered later;
- d. cases where a witness who has been granted an immunity fails to provide truthful testimony.

#### ***25. The Publication of Reasons for Prosecution Decisions***

25.1 The Department of Justice is committed to as much openness in relation to the decision making process as is consistent with the due administration of justice. Reasons for decisions made in the course of prosecutions or of giving advice may be given where practicable. This may be done orally or in writing. Reasons for particular decisions may be given to a court in the course of criminal proceedings for which it is responsible. Detailed reasons will not normally be given for the decision to institute or not to institute either an appeal against an acquittal or a review of a sentence.

25.2 Reasons for decisions will usually only be given to those with a legitimate interest in the matter and where it is appropriate to do so, and these may be in general terms. A legitimate interest includes:

- a. the interest of the court in knowing why a particular course of action is deemed to be appropriate;
- b. the interest of the victim in knowing how the case is being handled and disposed of;

- c. the interest of the reporting department or agency in knowing on what basis advice is given;
- d. the interest of the media in the open dispensing of justice where previous proceedings have been public.

25.3 If the way in which prosecutorial decisions are taken can be explained, public education as to how the prosecution process works will be furthered. However, the public interest is the guiding consideration, and the nature and extent of information made available to the public must be closely monitored by the prosecutor to ensure that ongoing investigations or prosecutions are not prejudiced. Care must be taken to ensure that the desire for justice to be seen to be done does not result in justice not being done.

25.4 Reasons for decisions may not be given in any case where to do so would adversely affect the interests of a victim, a witness, a suspect or an accused, or would prejudice the administration of justice. In particular, public discussion of a decision not to prosecute might amount to the trial of the suspect without the safeguards which criminal proceedings are designed to provide. As Sir Patrick Mayhew QC, Attorney General of England and Wales, explained to Parliament in 1992:

“It is extremely important that where somebody has not been prosecuted or where a prosecution has been discontinued against somebody, the evidence that would have been available had that prosecution continued should not be paraded in public.”

25.5 The public are entitled to know the general principles which the prosecution apply to the cases it decides. It will not, however, usually be in the interests of justice for the prosecution to go further and to give details in individual cases. No distinction exists in this regard between decisions to prosecute and decisions not to prosecute. This policy is rooted in fairness to the suspect. As Michael Thomas QC, Attorney General, told the Legislative Council, in 1987:

“There are good reasons why the Attorney General does not normally explain in public a decision not to prosecute in a particular case. It is rare for any public announcement to be made of that decision because it would reveal unfairly that someone had been under suspicion for having committed a criminal offence. And even where that fact is known, to give reasons in public for not prosecuting the suspect would lead to public debate about the case and about his guilt or innocence. The nature of the evidence against the suspect would have to be revealed. Then some might say that that was proof enough of guilt, and the suspect would find himself condemned by public censure. Sir, in our legal system, the only proper place for questions of guilt or innocence to be determined is in a court, where the accused has the right to a fair trial in accordance with the rules of criminal justice, and the opportunity to defend himself.”

25.6 If the prosecutor receives confidential information from a party to the proceedings, such as material as to the medical state of a suspect or witness, confidentiality must be respected. Those who supply confidential or sensitive material which is relevant to a case are entitled to rely upon the discretion of the prosecutor. The Personal Data (Privacy) Ordinance, Chapter 486, places limits upon the information which the prosecutor, as a data user, can properly disclose in the absence of consent from the data subject.

25.7 Legal advice to a reporting department or agency is subject to legal professional privilege. The prosecutor should not disclose a legal opinion unless privilege has been waived. Whether or not privilege attaches depends on the nature of the relationship, the contents of the advice and the circumstances in which it is sought (*R v Stinchcombe* (1991) 68 CCC (3d) 1, 9-10).

## ***26. The Basic Law and the Bill of Rights***

26.1 The principal sources of the human rights of members of the Hong Kong community are the Basic Law (especially Chapter III), the Hong Kong Bill of Rights Ordinance, Chapter 383, and the common law. In determining whether to prosecute or continue a prosecution, account should be taken of the rights of the accused, the victim and witnesses. Prosecutors should be aware that the Basic Law recognizes:

- a. Equality before the law: Article 25
- b. Freedom of speech: Article 27
- c. Inviolability of the person: Article 28
- d. Inviolability of the home: Article 29
- e. Freedom and privacy of communication: Article 30
- f. Freedom of movement: Article 31
- g. Freedom of conscience and religion: Article 32
- h. Right to legal advice: Article 35

The Basic Law guarantees such basic rights of the accused as the:

- a. Right to trial by jury: Article 86
  - b. Right to a fair trial: Article 87
  - c. Right to trial without delay: Article 87
  - d. Right to be presumed innocent: Article 87
- Article 42 recognizes the obligation to abide by the laws in force.

26.2 In addition, Article 38 expressly preserves other rights given to members of the Hong Kong community. This is obviously a reference to rights at common law which are not mentioned expressly or impliedly in the Basic Law or in the Hong Kong Bill of Rights Ordinance. Article 8 of the Basic Law preserves the laws previously in force, including the common law.

26.3 Article 39 of the Basic Law provides that the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted except as prescribed by law, and such restrictions shall not contravene the provisions of Article 39.

26.4 Part II of the Hong Kong Bill of Rights Ordinance (“BOR”) incorporates the ICCPR as applied to Hong Kong as part of Hong Kong’s law. Prosecutors should be aware that the BOR guarantees rights of an accused, including:

- a. Equality before the law: Article 10
- b. A fair hearing and public hearing by an independent and impartial tribunal: Article 10
- c. Presumption of innocence: Article 11(1)
- d. To be informed promptly in the language he understands of the nature of the criminal charge: Article 11(2)(a)
- e. Right to be tried without undue delay: Article 11(2)(c)
- f. Right to legal assistance where the interests of justice require: Article 11(2)(d)
- g. Right to obtain the attendance and examination of witnesses on his behalf: Article 11(2)(e)
- h. Right against self-incrimination: Article 11(2)(g).

### ***27. The United Nations Guidelines***

27.1 In 1990, the ‘Guidelines on The Role of Prosecutors’ were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. These provide guidance to prosecutors in Hong Kong. The Guidelines appear at Appendix I to The Statement.

### ***28. The International Association of Prosecutors***

28.1 The ‘Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors’, were adopted by the International Association of Prosecutors, of which the Prosecutions Division of the Department of Justice is an organizational member, in 1999. These provide guidance to prosecutors in Hong Kong. The Standards appear at Appendix II to The Statement.

## **Conclusion**

The Department of Justice is committed to open justice. It seeks to provide the people of Hong Kong with a just and independent prosecution service. High ethical and professional standards are applied to instituting and, where necessary, terminating prosecutions, without fear or favour. The effective combat of crime requires constructive liaison between prosecutors and law enforcement agencies. In their dealings with the public, prosecutors need to be transparent and honest, just as they are required to be sensitive and understanding when they deal with victims and witnesses. Those accused or suspected of crime must also be treated fairly and with respect. Through The Statement of Prosecution Policy and Practice the parameters within which prosecutors operate are defined, and the prosecution process is explained to the public as a whole. By applying the policy and practices contained in The Statement, prosecutors will continue to advance the rule of law and to contribute to the proper administration of criminal justice in Hong Kong.

# Appendix I:

## United Nations guidelines on the role of prosecutors

*Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.*

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

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

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

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

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

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



Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress, the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

### ***Qualifications, selection and training***

- 1 Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
  - a. Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
  - b. Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.  
Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.
7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.  
Freedom of expression and association
8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
9. Prosecutors shall be free to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status.

### ***Role in criminal proceedings***

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:
  - a. Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
  - b. Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
  - c. Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
  - d. Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.
17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

### ***Alternatives to prosecution***

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

### ***Relations with other government agencies or institutions***

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

### ***Disciplinary proceedings***

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

### ***Observance of the Guidelines***

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

## Appendix II:

# The International Association of Prosecutors: Standards of professional responsibility and statement of the essential duties and rights of prosecutors

*(23 April 1999)*

WHEREAS the objects of the International Association of Prosecutors are set out in Article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice;

WHEREAS the United Nations, at its Eighth Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990, adopted Guidelines on the Role of Prosecutors;

WHEREAS the community of nations has declared the rights and freedoms of all persons in the United Nations Universal Declaration of Human Rights and subsequent international covenants, conventions and other instruments;

WHEREAS the public need to have confidence in the integrity of the criminal justice system;

WHEREAS all prosecutors play a crucial role in the administration of criminal justice;

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another;

WHEREAS the exercise of prosecutorial discretion is a grave and serious responsibility;

AND WHEREAS such exercise should be as open as possible consistent with personal rights, sensitive to the need not to re-victimise victims and should be conducted in an objective and impartial manner;

THEREFORE the International Association of Prosecutors adopts the following as a statement of standards of professional conduct for all prosecutors and of their essential duties and rights:

### **1. PROFESSIONAL CONDUCT**

1.1 Prosecutors shall:

- at all times maintain the honour and dignity of their profession;

- always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;
- at all times exercise the highest standards of integrity and care;
- keep themselves well-informed and abreast of relevant legal developments;
- strive to be, and to be seen to be, consistent, independent and impartial;
- always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;
- always serve and protect the public interest;
- respect, protect and uphold the universal concept of human dignity and human rights.

## **2. INDEPENDENCE**

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

## **3. IMPARTIALITY**

3.1 Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

- carry out their functions impartially;
- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;
- act with objectivity;
- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

## 4. ROLE IN CRIMINAL PROCEEDINGS

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

- where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;
- when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;
- when giving advice, they will take care to remain impartial and objective;
- in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;
- throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;
- when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore:

- preserve professional confidentiality;
- in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;
- safeguard the rights of the accused in co-operation with the court and other relevant agencies;
- disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;
- examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;
- refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;
- seek to ensure that appropriate action is taken against those responsible for using such methods;
- in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

## 5. CO-OPERATION

5.1 In order to ensure the fairness and effectiveness of prosecutions, prosecutors:

- shall co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and
- shall render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

## 6. EMPOWERMENT

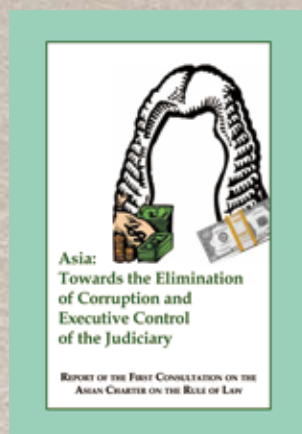
6.1 In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

- to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;
- together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;
- to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;
- to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;
- to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;
- to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;
- to objective evaluation and decisions in disciplinary hearings;
- to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and
- to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.





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ASIAN LEGAL RESOURCE CENTRE  
19/F Go-Up Commercial Building  
998 Canton Road, Mongkok, Kowloon, Hong Kong  
Telephone: (852) 2698-6339 Fax: (852) 2698-6367  
E-mail: [ahrchk@ahrchk.net](mailto:ahrchk@ahrchk.net) Web site: [www.ahrchk.net](http://www.ahrchk.net)

