



**The Independence
of Judges and Lawyers
in
SOUTH ASIA**

Report of a Seminar
held in Kathmandu from 1 to 5 September 1987

convened by the

Centre for the Independence of Judges and Lawyers
International Commission of Jurists
Nepal Law Society

INTERNATIONAL COMMISSION OF JURISTS

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Preface

In 1978, in response to the increasingly frequent attacks on judges and lawyers by governmental and para-governmental forces, particularly in Latin America, the International Commission of Jurists created the Centre for the Independence of Judges and Lawyers (CIJL).

Since that time, the CIJL has become the focal point for activities to protect the independence of the legal profession and the judiciary and has acted as a clearinghouse for information about threats to that independence, using this information to mobilise international support. In fulfilling this role, the CIJL works with bar associations, encouraging them to act on behalf of persecuted colleagues, and disseminates information about regional and international steps to protect lawyers and judges from undue government interference.

Another part of the CIJL's task is to educate lawyers, judges and governments as well as the general population about the role of lawyers and judges in society, including the social responsibilities of lawyers and the important role played by judges and lawyers in the protection of human rights.

Perhaps the most important part of the CIJL's work, however, has been the elaboration at the international and regional level of standards for the independence for judges and lawyers. In particular, the CIJL was instrumental in the drafting of the Basic Principles on the Independence of the Judiciary and in their unanimous adoption by the Seventh United Nations Congress on Crime Prevention and Control in 1985. These principles, which are set forth in an Annex to this report, were endorsed by the General Assembly (A/Res/40/32), which called on governments to respect them and take them into account in their national legislation and practice (A/Res/40/146). The CIJL also played a leading part in the adoption of the Montreal Universal Declaration on the

Independence of Justice by delegates from over 20 international lawyers' and judges' organizations and judges of the International Court of Justice and regional courts. Excerpts from this Declaration are also annexed.

To complement this standard-setting, in 1986 the ICJ and the CIJL began a series of regional seminars at which participants would examine the norms being developed at the international level, discuss how these norms should be applied and adhered to in their regions, and make recommendations for their implementation. As part of this series, the CIJL and the ICJ planned to co-sponsor with the Bangladesh Institute of Human Rights and Legal Affairs a seminar on the independence of judges and lawyers in Dhaka, Bangladesh. As the seminar approached, however, it became clear that the independence of the judiciary was a very sensitive political issue in Bangladesh. Indeed, the Bangladesh government was refusing visas to a significant number of participants, including ICJ/CIJL staff.

As a result, the venue of the seminar was changed to Kathmandu and, with the help of the Nepal Law Society, rearrangements were made very quickly and on 1-5 September 1987 the seminar was held in Nepal. It brought together present and former judges, practising lawyers, academics and present and former government officials from Bangladesh, India, Nepal, Pakistan and Sri Lanka. The opening session was addressed by Kusum Shrestha, President of the Nepal Law Society, ICJ Commission members Fali Nariman and Justice (Retd) Dorab Patel, former CIJL Director Ustinia Dolgopol, Justice (Retd) Abdur Rahman Chowdhury and the new CIJL Director, Reed Brody.

In his keynote address, Justice Patel introduced a theme which was to be repeated by many others during the course of the seminar, namely the role of public opinion in the region. An examination of the recent history of coups, emergencies and martial law reveals that "in the long run, the manner in which judges and lawyers discharge their duties can build up public opinion for the courts, and public opinion is a better safeguard for the independence of judges than laws and constitutional guarantees." The public will support the courts if they are seen as an effective forum for the enforcement of rights rather than a slow, corrupt mechanism for protecting entrenched interests. The same note was later struck in the working paper of Bharat Upreti when he pointed out that "the independence of the legal profession can neither be promoted nor protected in the absence of public faith and support. In addition to providing legal services of quality with utmost honesty and integrity, the profession must collectively be involved in public interest issues, including legal aid for the poor and human rights. This will result in considerable respect for the legal profession and will have to be taken into account by those in power."

After the opening session, the participants divided into working groups which considered

- the judiciary as an independent branch;
- the status and rights of judges; and
- the independence of the legal profession.

Discussion in each of the groups was begun by the presentation of a valuable working paper (or, in the case of the first group, by Justice Patel's keynote address).

Each group developed a set of recommendations, which were amended and adopted at a closing plenary which also drafted an outline for follow-up activities and elected a committee of one representative from each country to supervise the follow-up.

This report contains the recommendations agreed to by the participants and excerpts from the opening speeches and the working papers. In order to make them more widely available in the region, we have included in an Appendix the text of the UN Basic Principles on the Independence of the Judiciary, which served as a working document for the seminar.

The ICJ and the CIJL wish to thank the Nepal Law Society and the Bangladesh Institute of Human Rights and Legal Affairs, whose members worked tirelessly to ensure the smooth working of the seminar. We also wish to thank the Swedish International Development Authority for its financial support which made the seminar possible.

Reed Brody
Director
CIJL

Niall MacDermot
Secretary-General
ICJ

November 1987

Address of Welcome
by
Mr. Kusum Shrestha
President, Nepal Law Society

It is a great honour for me to preside this inaugural session, though I am a small man for the chair before this galaxy of distinguished personalities.

The Nepal Law Society feels greatly honoured to co-sponsor this seminar with the Centre for the Independence of Judges and Lawyers and the International Commission of Jurists.

The theme of the seminar is of seminal importance. Justice constitutes one of the essential pillars of liberty. To realize justice, the independence of judges and lawyers, both institutionally and individually, is of paramount importance. Without it justice becomes a misnomer.

The seminar affords us an opportunity to deliberate on the varied facets and implications of the independence of judges and lawyers. In particular, it will give participants the opportunity to exchange their views and share their experiences.

The theme of the seminar is particularly important to us, the Nepalese judges, lawyers and law teachers. Since our institutions are in the formative stage, in which the infrastructures are being created, we shall gain immensely from the teachings and the experiences of the rest of you. Before the revolution of 1950, Nepal was a closed state engulfed in darkness, ignorance, exploitation and deprivation. The courts then, in their crude form, served as cogs in the wheel which perpetuated tyrannical rule. Lawyers were unknown. People were reduced to status of subjects. The revolution ushered Nepal into the world arena and carried the commitments of democracy and justice. The Interim Government of Nepal Act, 1951, introduced the concept of the rule of

law. The independence of the judiciary was ensured in the Supreme Court Act of 1952. Lawyers were given legal recognition in 1959. A law college was established in 1953. The Nepal Bar Association was founded in 1957, and despite many limitations, is playing a significant role in the promotion of the rule of law. It recently, for instance, constituted a special Legal Aid Committee to render litigation-oriented and strategic legal aid with an emphasis on legal literacy and "conscientisation" among the poor. The Nepal Law Society was incorporated in 1976 and, through its publications, meetings and seminars, is endeavouring to create a favourable atmosphere in favour of the rule of law. As you see, we are still striving to build stable institutions despite the many twists and turns in our national life, and this seminar will stimulate us in that effort.

We have not been able to provide all the comforts befitting our distinguished delegates as we have many constraints and limitations. We have a saying, however, that the Himalayas and the greenness of our nature are witnesses of our pure intentions.

Introduction to the Seminar

by

*Ustinia Dolgopol,
Former Director, CIJL*

It is a great honour to open the first in a series of seminars to be sponsored by the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers in the Asian region.

I believe it is an auspicious beginning for our work that the seminar is opening in a country which gave birth to one of the world's major religions and which has traditionally been one of the cross-roads of Asia.

This seminar is one of several CIJL/ICJ seminars taking place throughout the world. One purpose of the seminars is to focus attention on the importance of protecting and preserving the independence of the judiciary and the legal profession. Another is to provide an opportunity for eminent jurists, whether judges, practicing lawyers or academics to come together and discuss the difficulties they face and to devise practical recommendations that will enhance the independence of their professions.

Another purpose is to bring local and regional attention to developments at the international level. In December 1985, for instance, the United Nations General Assembly adopted the Basic Principles on the Independence of the Judiciary and authorised the Committee on Crime Prevention and Control to draft a set of principles on the independence of the legal profession.

Prior to this, the ICJ and its CIJL, together with the International Bar Association and Lawasia, as well as international and regional bar associations, had worked to create standards to further the independence of the judiciary and the legal profession. However, it became clear that action was needed within the UN system, in order to obtain a commitment from governments to adhere to such standards.

The ICJ and CIJL used their consultative status to the UN to convince the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to undertake work on this subject and to prepare a draft declaration on the independence of justice for eventual adoption by the UN General Assembly. This work began in 1980 and a Special Rapporteur, Dr. L.M. Singhvi of India was appointed. A conference bringing together the major international organisations which had worked on this issue was held in Montreal, Canada, in 1983, for the purpose of assisting Dr. Singhvi. His study has been completed and there is now a draft declaration before the Sub-Commission.

While this work was proceeding at the Sub-Commission, another branch of the UN, the Committee on Crime Prevention and Control, decided that the issue of an independent judiciary was crucial to its sphere of work and undertook the drafting of a set of basic principles on the independence of the judiciary. This committee hosts an international congress every five years, and it was at the 7th Congress held in Milan, Italy, in September 1985, that the Basic Principles were adopted and passed on to the General Assembly. They were unanimously endorsed and welcomed by the General Assembly, and it is therefore fair to say that all of our governments have accepted these principles as the crucial benchmarks of an independent judiciary.

At the same time the General Assembly gave its approval to a Congress resolution which called attention to the importance of the legal profession in the protection and promotion of fundamental human rights. The General Assembly charged the Committee on Crime Prevention and Control with the task of drafting a set of principles which would give practical content to this concept. These principles are to be presented to the next Congress in 1990.

It is of paramount importance to bring attention to these international instruments. Too often governments vote in favour of declarations or resolutions which further the protection and promotion of human rights, but fail to make these documents known to their nationals.

A review of the Basic Principles reveals their relevance to the problems faced by judges and lawyers in today's world. One of the greatest challenges to the independence of the judiciary comes from the imposition of states of emergency or martial law. All of us are aware that governments are capable of using internal dissension as a pretext for declaring an emergency, and under the guise of the emergency taking away the ability of the courts to protect against arbitrary infringements of fundamental rights. Often the jurisdiction of the courts is severely circumscribed, special courts are established to try newly-created crimes or to take over certain classes of cases from the ordinary courts.

The Basic Principles provide that everyone has the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals not using these procedures should not be created to displace the jurisdiction belonging to the ordinary courts or tribunals.

A major concern in many countries is the selection criteria used for members of the bench. In an article published in CIJL Bulletin No. 8, Mr. Justice Lionel Murphy of the High Court of Australia stressed the need for a balance in the appointment of judges, arguing that there needed to be a fair mix of social classes and of the sexes if public confidence in the judiciary was to be maintained. He argued that such a balance is particularly crucial in common law systems where there is reliance on judge-made law.

A judiciary which does not reflect the composition of society can easily be attacked by unscrupulous members of the executive who view independent judges as a threat to their power. We have all read accounts of members of the executive who have tried to rally the public against the judiciary on the ground that judges were elitists, protecting the interests of the privileged, and that their decisions stood in the way of progress.

Although the Basic Principles do not give a preference to one method of selection over another, they do set out certain criteria, including that of non-discrimination and the necessity that all appointees be persons of integrity whose selection is not made for improper motives. A related issue, which will be addressed in the principles concerning lawyers, is the need to ensure that all sectors of society have access to legal education and that in accepting students, due regard is paid to having a legal profession which is representative of the society it serves.

Furthermore, judges must be prepared to take a more active part in addressing the crucial social issues of our times. In many countries, a major problem has been finding ways of satisfactorily addressing the aspirations of the various ethnic, religious, tribal and linguistic groups that make up our societies. Both judges and lawyers have a vital part to play in the process of defining and meeting these needs. A workshop sponsored by the International Centre for Ethnic Studies, Sri Lanka and the Public Law Institute, Kenya considered the role of the judiciary in plural societies and noted that it is the judiciary which ultimately ascertains the effect of government policies on the lives of individuals and social groups. The participants asserted that the judiciary must be ready to move away from a mechanical approach to the law and must improve its competence to adjudicate matters involving key issues of social justice. This requires changes in the methods used to educate lawyers and the inclusion of social sciences in the legal curriculum. These other disciplines could provide the judiciary with data and concepts relevant to the

actual social reality. Concepts such as pluralism, defined as respect for diverse ethnic and cultural communities as well as respect for the diverse points of view reflected in these communities, would provide the judiciary with the legal and political tools for the sensitive implementation of existing law and for the creative development of new and more relevant judicial doctrine.

There can be no doubt that we, as lawyers, must put our education and training to work for the benefit of our societies. We must spend more of our time with our countrymen, learning to communicate with them, developing an understanding of their needs and learning to listen to their ideas as to how their problems might be addressed. We must learn to harness the untapped energy and creativity of the mass of our populations and we must also make our knowledge available to them, not by making them dependent on us, but by making them legally literate.

Much work has been done in this area and there are those in the audience today who have worked tirelessly to create legal aid and resource centres in their countries. As observed by the Nepal Law Society in its report on Legal Aid in Nepal (see CIJL Bulletin No. 17), legal aid must be viewed as a human right and must be guaranteed by law.

The CIJL has sought to publish reports of your activities and of your demands on your governments to create or enlarge these programmes. The CIJL will continue to publish such information, so that it can be a medium for the exchange of ideas in this field.

Progress must be made if the task of law, as defined by the Supreme Court of India in *Bonded Labour Liberation Front vs. Union of India* is to be carried out: "Law must not only speak justice but must also deliver justice."

For the legal profession to carry out its tasks it must be free from government interference and must be self-regulating. If not, as noted by the Fifth Pakistan Jurists Conference, there will always be the fear that disciplinary action is being taken for improper motives, such as a lawyer's representation of an unpopular client or cause. But if bar associations are to be self-regulating, they must ensure that adequate standards of conduct exist and that discipline is effectively maintained. A bar that does otherwise cannot hope to have the respect of the population it claims to serve.

We hope, then, that the principle of a self-regulating bar association will be enshrined in the basic principles on the independence of lawyers, to be adopted by the United Nations.

During the CIJL/ICJ meeting at Noto, Sicily, which brought together international experts for the purpose of formulating principles on the independence of the legal profession, a lengthy discussion took place on the rights and duties of lawyers. One of the rights which governments often find

difficult to accept is the right of lawyers to take part in public discussion of matters concerning the law and the administration of justice. In conjunction with this is the right of lawyers to recommend law reform, including reforms for the administration of justice. It is to their credit that the lawyers of Bangladesh and Pakistan have attempted to carry out this responsibility.

Distinguished colleagues, over the next four days you will be deliberating on many of the crucial issues facing the judiciary and the legal profession. The working groups have a heavy burden. They must identify the difficulties which exist at present, and then use their creativity and wisdom to formulate recommendations which would further the cause of an independent judiciary and an independent legal profession in the South Asian region.

It is crucial that these recommendations be both practical and progressive, for they must be the catalyst for change. Before we conclude, a programme for implementation of the recommendations should be established, including the creation of a follow-up committee. Each of us should leave this beautiful valley having made a commitment to assist with the implementation of the recommendations. A part of that commitment should be informing colleagues within our countries of the content of the recommendations and providing them with copies. We must do all we can to make our work known, otherwise our efforts and time will have been in vain.

Address

by

*Mr. Fali Nariman,
Member ICJ; President, LAWASIA*

You Excellencies, Justices of the Supreme Court of Nepal, Judges, Ladies and Gentlemen;

I welcome you to this seminar on behalf of the ICJ.

I also bring you greetings from the Chief Justice of India who was to have inaugurated this seminar. He has just returned to India after participating in the Conference of Chief Justices at San Francisco organized by the American Bar Association in connection with the bicentennial of the United States Constitution. It was unanimously agreed at this Conference that the Rule of Law was vital to the functioning of democratic societies, and as a corollary, judicial supremacy was an essential concomitant in the political contribution of modern polities. As Mr. Anthony Lewis commented, the Conference discussions made evident what we sometimes forget – that what really gives meaning to human rights is the capacity and willingness of an independent judiciary to protect them.

Political interference with the functioning of a judiciary is not restricted to the new democracies established after the Second World War in the developing nations of the world. Last year in an article in *Current Legal Problems* (1986), Mr. Dawn Oliver recorded the alarming and substantial increase in the number of persons in the U.K. who believed that judges are influenced by government, and correspondingly fewer believed in their independence. The recurring theme of the year-long miners' strike in the U.K. was the public suspicion of political interference with the judicial system, in an attempt by the government to influence courts against the striking miners.

"Influence" and "independence" are, of course, ambiguous terms. Mr. Dawn Oliver suggests that there is very little evidence of "influence" in the form of directly applied pressure. But he does find that there is ample reason for the man-in-the-street to infer that indirect pressure is put on the courts – as happened in the miners' dispute. Politicians involved themselves in and made controversial public statements about legal issues (and then, seemingly unconnected) judges pronounced the law to be in accordance with the ministers' statements!

Another example comes to mind: the Supreme Court of the Philippines ruled (during the Marcos regime) that evidence gathered by the Agrava Commission after the assassination of Benigno Aquino could not be used in criminal proceedings against General Fabian Ver and other Filipino military officials. The Court's decision (10 to 3) was based on the fact that the Commission had not advised witnesses of their rights – thus barring the defendant's past self-incriminating testimony from current proceedings. The ruling all but destroyed the prosecution case against General Ver, a favourite of Marcos, and he was acquitted. Section 5 of the Presidential Decree that created the Commission gave a witness the right to refuse to answer a question whilst in the witness stand if in his belief the answer would elicit self-incriminatory evidence. General Ver voluntarily testified before the Commission but the Supreme Court held that his evidence could not be used in the criminal proceedings.

In an interview in *Newsweek* (September 16, 1985), Agrava panel's general counsel was asked:

Question: "Are you suggesting that the majority of the Supreme Court is simply uninformed about these distinctions?"

(He replied)

Answer: "The legal principles are well-known to the renowned erudite Supreme Court Justices. These principles are taught in our law school; even laymen know of them. It is unthinkable that any lawyer would confuse the rights of suspects under police investigation with the rights of ordinary witnesses. *There is only one conclusion. If the justices did not observe the distinction they must have had something in mind other than reaffirming well-established legal principles.*"

Rather a polished way of suggesting that the judges were not beyond being "influenced."

These two examples – and they are only two examples – emphasize the importance of this seminar of the Independence of Justice and Lawyers in the South Asian Region. It is not to be a mere exercise in restatement of principles

that have already been enunciated. The difficulty is now in their application. Besides influence there is also force to reckon with. The distressing recent events in Fiji, where its Chief Justice has been dismissed by the leader of a coup against a newly-elected government, tends to leave in the public mind the impression that 'might is right' – an impression which is destructive of the Rule of Law.

The time has now come for more to be done than merely restating principles and mouthing cliches. There is need for more immediate action. We can only hope to influence the judges in the area, who are straining to uphold the Rule of Law, by giving them a feeling of regional kinship, a feeling that they are not only justices functioning in national courts, but are part of a larger judicial canvas, namely of a regional group of justices functioning under different systems all attempting to achieve the goal of upholding the Rule of Law.

I would impress upon this seminar to consider the propriety of a Regional Forum of Justices not only of the higher judiciary in each country, but of all men and women who help work the judicial system – they could and should form a regional network for wider dissemination of information pertaining to the Independence of the Judiciary.

One of the brave judges in the Republic of South Africa, Judge President John Milne of the Natal Supreme Court recently wrote to me saying

"It seems that however much they may pay lip service to the idea that the Judiciary is totally independent to the Executive, politicians throughout the ages and throughout the world would actually much prefer to have executive minded lackeys and are considerably irritated by independent Judges functioning in an independent manner."

As for the legal profession, I am happy to see throughout the countries in the region that they are independent and zealous of their independence. They are at the spearhead of all human rights movements in their respective countries. Without an independent bar there is little chance of having an independent judiciary.

We meet in troubled times – but it is such times that are generally productive of new ideas. We hope to see a discussion of them at this seminar. On behalf of the ICJ, I welcome you all and wish the deliberations great success.

Keynote Address on the Independence of the Judiciary

by

*Justice Dorab Patel,
Member ICJ, Former Judge,
Supreme Court of Pakistan*

The concept of the independence of the judiciary has a long history, and its meaning has changed from time to time, because the problems of the judiciary in the past were different from the problems of today, and even today, the problems of the judiciary in the small group of countries from which we have assembled are not the same.

The concept of the independence of the judiciary became popular in the eighteenth century and was then associated with the doctrine of the separation of powers, embodied in the Constitution of the United States of America. Though it was based on a misunderstanding by European thinkers of the British parliamentary system, rulers and parliaments at that time accepted without question the principle that there were moral limitations on their power of law-making. The success of the American Constitution was due to this sentiment against tyrannical laws, which was reflected in the limitations imposed by the Constitution on the law-making powers of the legislature.

As the doctrine of the separation of powers was based on a misunderstanding of British precedents and of the powers of the British Parliament, it was inevitable that English jurists should seek to correct the position. They did so, and in doing so, perhaps they over-emphasised the principle of the sovereignty of Parliament. This led to Stephen's famous dictum that because Parliament was sovereign, it could validly enact a law that all blue-eyed babies

should be hanged. The implications of Stephen's dictum were monstrous, and Dicey, to whom the sovereignty of the legislature was the basis of his concept of the Rule of Law, accepted Stephen's dictum, with the qualification that a British Parliament would never pass such arbitrary and absurd laws. This assumption was on the whole justified by the conditions prevailing in Dicey's times. But we live in a different age which has seen massacres and tortures on a scale not known in the past. Perhaps this has blunted our conscience.

The law makers of today do not always accept the principle that there are moral limitations on their powers, and elected rulers in most Third World countries have been as guilty of enacting oppressive and arbitrary laws as military regimes which have seized power by coups. The result is that there are far more prisoners of conscience today in the Third World countries than there were in the days of colonial rule, and they are languishing in jails under laws which have been upheld by the courts. Therefore, if we equate the concept of the independence of the judiciary merely with the separation of the judiciary from the executive and with similar matters like rules for guaranteeing security of tenure for judges, the concept will become a cloak of tyranny and oppression. And, if this is all that the concept means, then it can be argued that Nazi Germany was a model of the independence of the judiciary, because its judges merely enforced the laws which had been validly enacted according to the constitution, which they had sworn to uphold. Thus, the concept of an independent judiciary is meaningless unless it is linked with the Rule of Law, by which I mean a legal system which recognises human rights.

Secondly, an independent judiciary does not mean merely a judiciary which is independent of the government. An independent judiciary must also be independent of the tides of public opinion, so that it does not succumb to waves of hysteria which convulse all societies from time to time. No country is free from such paranoia. I would refer in this regard to the United States Supreme Court, the model example of an independent judiciary supported by the Constitution and its traditions of many generations. Yet, its 1942 judgment on the fate of American citizens of Japanese descent, who were compulsorily shifted from their homes on the Pacific Coast after Pearl Harbour, makes sad reading.

As the American experience demonstrates, no formulation of constitutional guarantees or legal guarantees can always ensure the preservation of the independence of the judiciary. Nonetheless, there are steps which we can take in order to remove obstacles in the way of the judiciary. Methods of appointment which exclude political interference will help to build up an independent judiciary. Similarly, guarantees which protect judges from arbitrary dismissal are also necessary. Here again, I must point out that until the Government of

India Act 1935, the Judges of Indian High Courts held their office during the pleasure of the Crown, yet our British rulers had never dismissed a judge from any high court. Necessarily this means that it is possible to build up an independent judiciary without any laws for protecting the independence of judges. Indeed, while most of Britain's former colonies enacted laws after independence protecting judges against arbitrary dismissal or removal, judges in most of these countries are less independent than they were under British rule. Indeed, in some countries their lives are not safe, and in two republics judges have been murdered.

I will confine the remainder of my discussion to the problems of the judiciary in India and Pakistan.

At independence in 1947, both our countries began with the same laws and the same court structures. As we valued the British concept of an independent judiciary, the framers of our Constitutions gave constitutional protection to the judges of the superior courts. India, therefore, made its Supreme Court the guardian of its Constitution and we followed suit. Unfortunately, Pakistan has had a high mortality rate for Constitutions, but, as in India, the Supreme Court has been the guardian of all our Constitutions. The method by which we have sought to protect the judiciary is, however, different from India's. According to Section 124 of the Indian Constitution, which follows the British model, a judge of the superior courts (the Supreme Court and the High Courts) cannot be removed from his office "except by an order of the President passed after an address by each house of Parliament supported by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of that house present and voting... for such removal on the ground of proved misbehaviour or incapacity." Pakistan had partially adopted this method in its First Constitution, but adopted a different method in its Second Constitution which has been followed in subsequent Constitutions. It sets up a Supreme Judicial Council consisting of the Chief Justice of Pakistan, the two next most Senior Judges of the Supreme Court and the two senior-most Chief Justices of the High Courts. A judge of the superior courts can be removed on a reference by the President only after this Council is of the opinion that the judge "is incapable of performing the duties of his office or has been guilty of misconduct." As a former member of this Council, I can say without any hesitation that this method is as effective as any conceivable device for protecting judges against their unjustified removal from office.

No judge of the superior courts has been summarily dismissed in India, but more than 15 judges of the superior courts of Pakistan were "compulsorily retired" in March 1981 without even informing them of the grounds. How is it that the fate of judges in two countries, which began their history as

independent nations with the same laws and the same legal system, has been so different?

The judges of Pakistan were dismissed in March 1981 simultaneously with the abrogation of our Third Constitution. This again raises the question whether the law is capable of furnishing safeguards for an independent judiciary. And, if not, what is the way out? How are we to build up an independent judiciary? Rather than make academic proposals for preserving the independence of the judiciary, I shall attempt to explain, first by historical reference, why all attempts to protect the independence of the judiciary in Pakistan have failed and then suggest proposals in the light of the experience of Pakistan and India.

The East India Company began its empire-building in Bengal, and when it took over the Diwani of Bengal, Bihar and Orissa in 1765, it set up its own courts. At that time, its civil servants were thoroughly corrupt and, therefore, the beginning of an independent judiciary could not have been more inauspicious. In 1773, however, the British Parliament passed an Act setting up Supreme Courts in the port cities of Calcutta, Madras and Bombay. The judges of these Supreme Courts were barristers brought from England and the courts had to apply common law except in personal matters. Further, these courts had the same powers as the English courts to issue Writs against the government. The Supreme Court of Calcutta set up in 1774, more than 200 years ago, had the power, which it exercised, of issuing Writs against the English Government. This was a complete change in the conditions then prevailing in India and can only be described as a legal revolution.

The early judges of the Supreme Court of Calcutta were men of outstanding ability and courage, and because their personalities had a decisive effect on that institution, I will briefly refer to two of them, Sir William Jones and Sir Elijah Impey. Sir William Jones was not only a judge of absolute integrity, he was a scholar of languages. He translated Hafeez into English and introduced Persian literature to the English. He also translated Kali Dass into English and introduced Sanskrit Drama to English people. He even found time to help in the translation of Arabic and Hindu authorities on Muslim and Hindu law. The fact that a judge of such outstanding calibre served on the Supreme Court must have helped to protect it against challenges by the executive.

Sir Elijah Impey, the first Chief Justice of the Supreme Court of Calcutta, had an even more decisive impact on India's judicial traditions. As the judges of the Supreme Courts were members of the English Bar, brought directly from England, they brought with them the common law tradition of an independent judiciary, and Sir Elijah Impey lived up to this tradition. He never shied away

from a confrontation with the government. In the well-known case of the Zamindar of Cossijurah, the Zamindar resisted the court's attempts to enforce a decree against him by physically assaulting the court's officers. He was encouraged in his defiance of the court by the government which was prepared to assist him with the help of soldiers. The court, however, gathered a band of sailors and armed them for the inevitable clash. The plaintiff in whose favour the decree ran then filed an action in the Supreme Court against the Governor General and the members of his Counsel. Before this action could be decided, the dispute was settled and an armed clash averted, but this was not the only instance in which the Chief Justice was prepared to assert the Court's authority against the Government.

The Supreme Courts of Madras and Bombay, set up in 1801 and 1803 respectively, followed and upheld the traditions of the Supreme Court of Calcutta. The judges of these courts also had continuous friction with their governments, thus building up a tradition that judges should keep as far as away from the executive as possible.

Motilal Setalvad, the first Attorney General of an independent India, said in his Hamlyn Lecture on the Common Law in India (p. 44) "The history of the administration of justice in India in the early days contains many accounts of successful resistance offered by judges to pressure from those in charge of the administration. Indeed, rigid aloofness from the executive was for a long time the attitude of the superior judiciary of India."

I consider this rigid aloofness from the executive a prerequisite for an independent judiciary. Indeed, it is more important now than in British days, because judges now are dealing far more frequently with cases which have political over-tones.

The Supreme Courts, which had made invaluable contributions both to our jurisprudence and to the building up of an independent judiciary, were abolished in 1862. This was the result of the Government's decision to create a unified structure, setting up High Courts in the place of the Supreme Courts and the courts set up in the Mofussil by the East India Company. In pursuance of this policy, the Supreme Courts of Calcutta, Madras and Bombay were replaced in 1862 by the Presidency High Courts of Calcutta, Madras and Bombay. These courts inherited the writ jurisdiction of the Supreme Courts, but this jurisdiction was not conferred on the other High Courts set up subsequently in the country. As the legal structure had been unified, a mixed cadre of judges for the High Courts came into existence, some recruited from the bar and others from the judicial branch of the civil service. As observed by Setalvad in his lectures on Common Law, "... it was felt that judges drawn from the civil service did not show the independence found in judges recruited from

the Bar." Most human beings cannot change their habits with their occupation, especially if they change their occupation late in life, and this recruitment of High Court judges from the civil service could have undermined the tradition of an independent judiciary, which was the great legacy of the Supreme Courts. However, the British wisely restricted the number of judges who could be recruited. In this manner, and, further, until the very end of their rule, it was their invariable practice only to appoint members of the Bar as Chief Justices of High Courts.

None of the High Courts set up after 1862 had the power of issuing writs against the Government, except for the writ of Habeas Corpus. This of course curtailed its independence vis-à-vis the government. Therefore, it was fortunate for India that the 1949 Constitution conferred the writ jurisdiction of all Indian High Courts.

The position in Pakistan was, however, different. The provinces which constitute Pakistan today were conquered by the British after 1840, but it was some years before regular courts were set up. As Sind was part of the Bombay Presidency, it only had subordinate courts until the end of the nineteenth century. A superior court was set up for the Punjab within a decade of its annexation, known as the Judicial Commissioner's Court and having most, but not all the powers of the High Courts. In its early existence, the Courts' judges were mostly officers of the I.C.S., the highest administrative service of India. These judges were no doubt men of integrity and ability but, as noted earlier, the approach of a judge who has spent his life in the service of the government, is necessarily different from that of a judge recruited from the bar or the subordinate judiciary. Moreover, until about a 100 years ago it was possible for an I.C.S. officer to serve as a judge of the Judicial Commissioner's Court and then revert back to a senior post in the administration. This interchange was obviously inconsistent with the tradition of the Supreme Courts of the aloofness of the judiciary from the executive.

This Judicial Commissioner's Court ultimately became the Chartered High Court of Lahore in 1919, and within the next decade the courts in Karachi and Peshawar were up-graded and deemed High Courts under the Government of India Act 1935.

Although, before 1947, none of the superior courts in Pakistan had the power of issuing writs against the government, except the writ of Habeas Corpus, the British, who wanted to build up the image of the judiciary, appointed judges with great care. The judiciary at all levels was noted for its integrity in India and Pakistan, and when the two countries were created, the prestige of the judiciary was very high.

Pakistan's Constituent Assembly took seven years to frame a Consti-

tution, and during this long period, the country was administered under the Government of India Act 1935 with amendments made from time to time in this Act by the Constituent Assembly. In 1954, after an inexplicable delay of seven years, the Constituent Assembly amended the Government of India Act 1935 and conferred the writ jurisdiction on all High Courts in the country. The timing of this amendment was a misfortune for our judiciary. It was enacted just as the Constituent Assembly had finally agreed on a draft Constitution. As this Constitution was based on the Westminster parliamentary system, the Governor General, who was allergic to the very idea of democracy, dissolved the Constituent Assembly in order to prevent it from passing the Constitution. Mouvli Tamizuddin, the Speaker of the Constituent Assembly, filed a writ petition in the Sind High Court against the Governor General's action. The Sind High Court allowed the writ petition and held the Governor General's order dissolving the Constituent Assembly to be illegal. As Pakistan was then a dominion of the British Commonwealth, it is difficult to understand how the Governor General could, after the statute of Westminster, passed in 1931, claim the power of dissolving parliament at his pleasure, the more so as parliament was also the sovereign Constituent Assembly of the country. Be that it may, the Sind High Court's judgment was reversed by the Federal Court. With this judgment, the prestige of our judiciary suffered a blow from which it never recovered. The further consequence of this judgment was that the writ jurisdiction of the Courts ceased to exist, though it was restored by our First Constitution.

Our First Constitution was framed and came into force in 1956. It contained elaborate provisions for maintaining the independence of the judiciary. I have already discussed the Supreme Judicial Council and the provisions for security of tenure set up under subsequent Constitutions. But this Constitution also contained provisions for the appointment of judges to the superior courts which were reproduced in subsequent Constitutions.

The Chief Justice of Pakistan is appointed by the President whilst the Judges of the Supreme Court are appointed by the President "after consultation with the Chief Justice." Supreme Court judges must have been judges of a High Court for five years or advocates of a High Court of 15 years standing. After the experiences through which Pakistan has passed, it seems that the discretion vested in the President to appoint judges is excessive. Unless the President is restricted to choosing a Chief Justice from amongst the judges of the Supreme Court, his power is likely to lead to political appointments with disastrous consequences for the judiciary. Many jurists in Pakistan have thus suggested that the appointment of the Chief Justice should follow the rule of seniority. If seniority is made an inflexible rule, however, it can also lower

judicial standards. The only sure protection against improper appointments then would be the growth of conventions to regulate appointments to the judiciary. Thus, throughout the long period of British rule, although the Governor General had the power to appoint the Chief Justice and judges of the High Court, he always consulted the Governor. The Governor, in turn, consulted the Chief Justice of the High Court, (except regarding the appointment of the Chief Justice) and invariably the advice given by the Chief Justice was followed by the Governor General. Our only hope is that we, who have inherited the common law and the traditions of an independent judiciary from our erstwhile rulers, will also be able to build up such conventions.

The appointment of other Supreme Court judges is also made by the President, who is merely required to consult the Chief Justice. I know of at least one occasion when the President appointed a judge of the Supreme Court against the advice of the Chief Justice. This cannot but undermine the independence of the judiciary. I cannot think of any reason which could justify a President in rejecting the advice of the Chief Justice. Therefore, the recommendations of the Chief Justice for the appointment of judges to the Supreme Court should be made binding on the President. It is possible that a Chief Justice can make a mistake, but so can the President, and the difference is that the Chief Justice knows more about the judges of the Supreme Court than the President.

The Pakistan Constitution also empowers the President to appoint senior High Court judges, as acting or ad hoc judges to the Supreme Court after consulting the Chief Justice of the Supreme Court. These provisions have been enacted to meet emergencies, which arise when a judge of the Supreme Court is ill, for example, or when he is absent from the Court.

Such appointments should be restricted to genuine emergencies, and genuine emergencies cannot last more than a few months. But in Pakistan such appointments have sometimes been for long periods. This is undesirable for more reasons than one. In the first place, if a senior judge of a High Court is appointed an ad hoc or acting judge for any length of time, it creates the impression on the public that he is on probation. Secondly, the judgments of such judges may not inspire confidence in cases which are very controversial or have political overtones. It is not possible for sitting judges to appreciate this reaction by the public, because the law of contempt unfortunately prevents the public from expressing its anxieties. Nevertheless, it is very damaging to the image of an independent judiciary. That is why the Indian Supreme Court held in *Gopal v. Prakashchandra* (A.I.R. 1974 S.C. 209) that an ad hoc judge of a High Court should not hear an election petition filed in that court.

It could not have been easy for Gopal and his lawyers to contend in the High Court that an ad hoc judge should not hear a case with political overtones,

and although the High Court rejected this contention, it is to its credit that it did not take any action for contempt. The judgment of the Supreme Court allowing Gopal's appeal cannot but command admiration. Further, by implication, the Supreme Court's judgment accepts the principle that judges should practise the freedom which they preach to the Government. I have no doubt that the acceptance of this principle must have enhanced the respect for the courts in India. And when the crises come, when there are confrontations between the courts and the government, it is only the support of public opinion which can save the judiciary.

The necessity for appointing ad hoc and acting judges also arises when judges of the Supreme Court are given other assignments. It should not be necessary, however, to give such other assignments to sitting judges, because every country has a large number of retired judges. Moreover, if a sitting judge is given other assignments, he may come into close contact with the executive. As I will presently show, this close contact between the higher judiciary and the executive has been a disaster for the judiciary in Pakistan. Unfortunately, our 1973 Constitution contained a provision that no person should be appointed as the Chief Election Commissioner, unless he had been or was a judge of the Supreme Court, or a judge of the High Court qualified for the appointment to the Supreme Court. This provision has been reproduced in Article 213 of the present Constitution. Now, the Chief Election Commissioner's duties are likely to involve him in political controversies, and, in any case, they are bound to bring him into very close proximity with the executive. When a judge, performing these dual functions, decides cases of a political nature, the public is apt to misunderstand his judgments and this leads them to suspect the independence of the judiciary, though sometimes unjustifiably. This has unfortunately happened in Pakistan. On the other hand, the Indian Constitution empowers the President to appoint any person to conduct elections. Even civil servants have carried out elections in India very successfully. Therefore, it would be better for the judiciary if provisions like Article 213 of our Constitution are deleted.

I now turn to the provisions for the appointment of Chief Justice and judges of the High Courts. The Chief Justice of a High Court is appointed by the President after consulting the Chief Justice of the Supreme Court and the Governor of the Province concerned, whilst for the other judges of the High Court, the Chief Justice of the High Court Province concerned is to be consulted as well. The Indian Constitution contains similar provisions, as both purport to follow the unwritten convention of British days with the further, beneficial obligation on the President to consult the Chief Justice of the Supreme Court.

Unfortunately, in Pakistan, there have been occasions when the Presi-

dent has rejected the advice both of the Chief Justice of the Supreme Court and the Chief Justice of the High court. And I do not think the position was different in India during the Emergency of 1975. A shocking example occurred in Pakistan in 1977. An advocate had stood for the Provincial election of 1970 and as he was elected, he became a minister. His election was challenged by the losing candidate in an election petition on the ground that the minister had been guilty of malpractices in the elections. This election petition was allowed in 1977 when the ruling party was losing power. As the minister's political career was at an end, for the time being, the President appointed him a judge of a High Court. The appointment was so outrageous that even the public criticised it. The Chief Justice of the High Court passed an order that no work should be placed before the judge, who resigned in a few weeks.

The only inference I can draw from these facts is that the President treated his constitutional obligation to consult the Chief Justices as a farce. Can we do anything to reduce the possibilities of such appointments? As the President has the benefit of the advice of two Chief Justices (of the Supreme Court and of the High Court), the provision requiring the President to consult the Governor should be deleted, and there should also be a provision in the Constitution that the President is bound to accept the recommendations of the Chief Justices when they are unanimous.

I now turn to the qualifications for the appointment of judges to High Court. Both under the Indian Constitution and under our Constitution, persons who have been advocates of High Courts for ten years, or who have held a judicial office for ten years, are qualified for appointment. But unlike India, our Constitutions have also contained an obnoxious provision which goes back to British days. In British days, ICS Officers of not less than ten years standing were qualified for appointment to High Courts after three years service in the subordinate judiciary as District Judges. So an officer who has spent his life in the executive branch of the ICS and who had never studied any law, could be appointed to the High Court after working for three years as a District Judge. The idea that a person became fit to be judge of a High Court after acquiring such knowledge of law as he could in three years was absurd. The other danger in such appointments was that a judge whose judicial experience was limited to three years would not have an independent outlook. This relic of colonialism has been dropped from the Indian Constitution. We have unfortunately retained it in all our Constitutions, and the CSP (Civil Service of Pakistan) officer of ten years standing can become a judge of the High Court if he has worked for three years a District Judge.

The Indian Constitution contains a provision for the transfer of a judge from one High Court to another High Court with the consent of the Chief

Justice of India. Under our Constitutions, a judge could not be transferred from one High Court to another without his consent. But an amendment of our 3rd Constitution in 1976 empowered the President, in his sole discretion, to transfer a judge from one High Court to another High Court without his consent. This amendment was resented by the bar as an attempt to interfere with the independence of the judiciary. The apprehension of the Bar was that this provision would be used to harass judges who were independent in their outlook. The present Constitution empowers the President to transfer a judge from one High Court to another for a period of two years.

During the Emergency in India, judges were transferred from one High Court to another at the behest of the Prime Minister, but in India, the public reaction was very different from that in Pakistan. Writ petitions were filed in the courts challenging such transfers. Indeed, a former Chief Justice of India faced the risk of contempt and denounced such transfers as an attempt to undermine the independence of the judiciary. In view of this very strong public reaction, I do not think there is any possibility of this power of transfer being abused in India in future.

This raises the question whether there should be a power of transferring a judge from one court to another without his consent. I happened to be in India when this controversy was at its peak and I saw that some bar associations supported the Prime Minister's action. This was on the ground that the close relatives of some judges had built up enormous practices at the bar by taking advantage of their relationship. This was also the reason which led the late Mr. Bhutto to amend the Constitution in 1976 to enable him to transfer a judge from one High Court to another, if the judge was not able to control the greed and rapacity of his relations. Although the possibility of an abuse of this provision of transfer by the executive is dubious, I am of the view that a judge who takes no steps to prevent his close relations from making such fortunes at the bar, is damaging the prestige of the judiciary and is placing himself in a very vulnerable position. Thus, this power of transfer is sometimes necessary, and the only safeguard against its abuse by the government is public opinion. But this strong public reaction was possible only because India has a free and courageous press and because the Indian Supreme Court has liberalised the law of contempt.

Another provision generally considered to be necessary for safeguarding the independence of the judiciary is the provision of reasonable remunerations for judges, and the salaries of the judges of the superior courts have therefore been prescribed in the Constitutions of India and Pakistan. Such guarantees do not, however, prevent the erosion of the real income of judges by inflation. At the international level, recommendations have been heard that the judiciary

should be allocated a fixed percentage of the national budget by law. The proposal has the merit of ingenuity because revenue collection goes up with inflation. But I do not see the remotest possibility of such a proposal being accepted in the countries from which we come, and I am doubtful of the wisdom of any suggestion which put judges as a class into a separate and favoured position.

The connection between the salaries of the judiciary and its independence should not be exaggerated. As an example, I would refer to the cases of Pakistan and India. The emoluments and salaries of the judges of the superior courts have been raised twice in Pakistan since 1973 and their real incomes are higher than those of the judges of the superior courts of India. But it would be absurd to say that the Indian judiciary is less independent than Pakistan's judiciary.

All the ingenuity which we may exercise in framing constitutional guarantees for protecting the independence of the judiciary will be of no avail, if the Constitution containing the guarantees is abolished. And as this has happened thrice in Pakistan, we have to think of the possible ways of preventing a Constitution from being abolished, and this we can do only if we know why Constitutions have been abolished so easily in Pakistan.

Pakistan's first Constitution came into force in March 1956 and elections were due in 1959. The establishment in West Pakistan was allergic to elections, because it was afraid of losing its monopoly of power, and on 7 October 1958, the army seized power, abolished the Constitution and declared Martial Law throughout the country. The Governor General also promulgated an Order called the Laws (Continuance in Force) Order which stated that the Proclamation of Martial Law (by which the Constitution had been abrogated) could not be questioned in any Court. The Order also stated that no Court could issue any writ or order whatsoever against the orders of the Martial Law authorities. Mr. Justice Munir, who was then the Chief Justice of the Supreme Court, admitted ten years later that he had helped to draft the Order.

An appeal by the government against one Dosso and others was then pending in the Supreme Court. The conviction of the respondents had been set aside by the West Pakistan High Court on the ground that the law under which they had been convicted was void because it contravened the Fundamental Rights guaranteed in the Constitution. As the appeal came up for hearing after the Proclamation of Martial Law, the government relied on the laws (Continuance in Force) Order. Mr. Justice Munir presided over the Court which held in *The State v. Dosso* (PLD 1958 SC 533) that the Order was valid, because a successful military coup created a new legal order which the court had no option but to recognize as valid.

A debate about this judgment began two decades later when one of the judges in Dosso's said that the Supreme Court had been helpless because the public had supported Martial Law. The statement that the public had supported Martial Law is correct. Therefore, the real question is why there was absolutely no opposition to Martial Law in West Pakistan. The fear created by Martial Law is not a sufficient answer because although our third Martial Law was far more severe, there was considerable opposition to it. In my opinion, there was no opposition to Martial Law, firstly because the Constitution was against the wishes of the people, and secondly because the bureaucracy had created a siege mentality in the country for many years with the result that criticism of the government was equated with lack of patriotism. A society which does not respect the right of dissent also has no respect for the courts or for the independence of the judiciary.

I had referred earlier to Mr. Justice Munir's admission that he had helped to draft the Laws (Continuance in Force) Order. He had hoped to save some jurisdiction for the courts out of the wreck of the Constitution. But it is not possible to ride on the back of a tiger. And the fact that the Governor-General had sought the advice of the Chief Justice meant that, in his opinion, the tradition of the rigid aloofness of the judiciary from the executive did not exist. As these facts became known, the public reaction was adverse to the judiciary.

Martial Law was revoked on the promulgation of a new Constitution in 1962. As this Constitution did not contain any fundamental rights, the powers of the superior courts remained circumscribed. Fundamental rights were restored in 1964 but suspended in 1965. Therefore, the Constitution had not become a reality to the people when it was abrogated by our Second Martial Law in 1969. This time there was not only no reaction against Martial Law, but there was a feeling of relief that an unwanted Constitution had been scrapped. People also accepted Martial Law because of the army's promise to hold free and fair elections for a Constituent Assembly, which would frame a new Constitution for the country. This promise was fulfilled in one year in the only free and fair elections ever held in Pakistan. After these elections, however, an alliance between some generals and some politicians in West Pakistan prevented the Constituent Assembly from being called.

In 1973, we had our Third Constitution, and for the first time in the country's history, we had an elected Prime Minister. But this proved to be a false dawn, because although hostilities with India had ended in 1971, the Emergency was continued almost throughout the period of the elected government. And as the political rights guaranteed under the Constitution stood suspended because of the Emergency, once again the Constitution did not become a reality to the people of the country.

Our third Martial Law was declared on 5 July 1977. Once again the Chief Martial Law Administrator issued the usual proclamation that he had declared Martial Law and that the Constitution had ceased to exist. Then, as in the past, he issued a Laws (Continuance in Force) Order which stated that the Proclamation of Martial Law could not be questioned in any court and that no court could issue any writ or order whatsoever against any Orders of the Martial Law authorities. And as in the Martial Law of 1969, the Chief Martial Law Administrator gave a solemn promise to hold elections.

The late Mr. Bhutto was detained within a couple of months of the declaration of Martial Law. His wife filed a Writ Petition in the Supreme Court challenging the validity of this Martial Law. The position in 1977, however, was not what it had been when Martial Law had been declared in 1958 and 1969 because, as I said, the right of dissent was being recognised in the country, and the courageous agitation carried on by the opposition parties during the pendency of the Constitution had also created a consciousness of human rights. Therefore, the court on which I sat was in a better position to face the challenge of Martial Law than our predecessors had been in 1958 and 1969.

By our judgment, *Mrs. Nusrat Bhutto v. Chief of Army and others* (PLD 1977 S.C. 657), we validated Martial Law because we relied on the assurance given to us in the Court that elections would be held in a reasonable period. We also gave the Martial Law Authorities limited powers of amending the laws as well as the Constitution. But we over-ruled the earlier judgment of the Court in Dosso's case and expressly rejected the claim made in the Proclamation of Martial Law that the Constitution had been suspended as well as the claim made in the Laws (Continuance in Force) Order that the superior courts could not issue writs against the action of the Martial Law Authorities. And in pursuance of our judgment, the superior courts continued to issue writs against the Martial Law Authorities.

It is pleasant to record that in pursuance of the assurance given to us, the government announced elections for October 1979 and I am certain that elections would have been held, but for one circumstance, which transformed the situation in the country. This was the execution of the sentence of death passed against Mr. Bhutto for murder. The sentence was carried out in 1979, and there were no disturbances in the country. In October 1979 elections were postponed indefinitely, and in my opinion Martial Law thereafter became illegal, because it had violated the condition on which the Supreme Court had validated it.

Martial Law was also enforced with very great severity after the postponement of the elections. At the same time the government amended the Constitution by adding Article 212-A. As this article purported to abolish the

writ jurisdiction of the High Courts and of the Supreme Court against action taken by the Martial Law Authorities, it was an obvious attempt to nullify the Supreme Court's judgment in Mrs. Nusrat Bhutto's case and to go back to Dosso's case, which had been expressly overruled. The draft of the article had, however, been prepared by two extremely senior judges of the superior courts. The government resisted writ petitions against the orders of the Martial Law Authorities on the basis of this article, and the High Courts were then called upon to decide whether this article was ultra vires of the power of amending the Constitution which we had given to the Chief Martial Law Administrator in Mrs. Nusrat Bhutto's case. The Baluchistan High Court took the view that it was ultra vires, but the three other High Courts held that Article 212-A was valid.

Appeals were admitted in the Supreme Court and were to be heard in the winter of 1980. Somehow their hearing was delayed, and on 24 March 1981 the President and Chief Martial Law Administrator promulgated the Provisional Constitution Order. The title of the Order was a misnomer, because the Order sought to abolish the Constitution. According to the Order, the Proclamation of Martial Law of 5 July 1977 suspending the Constitution and the declaration in the Laws (Continuance in Force) Order that the Courts had not power to issue writs against the Martial Law Authorities were valid, notwithstanding any judgment to the contrary. The Order was thus the second attempt to overrule the Supreme Court's judgment in Mrs. Nusrat Bhutto's case, and lest we might set aside this Order too, it contained a further provision. The President reserved to himself the power of giving oath to judges, and the judges who refused to take oath to up-hold this Order and the judges who were not asked to take this oath, ceased to be judges.

This Order became the Constitution of Pakistan on 25 March 1981, as most of the judges of the Supreme Court and of the High Courts took oath on that day to uphold it. However, more than 15 judges of the Superior Courts ceased to be judges on that day, because they were not invited by the President to take oath. The attempt of the Supreme Court in the Nusrat Bhutto case to control Martial Law and to preserve the Constitution thus ended in failure, and the country went back to the law of Dosso's case.

I had said that the position of the judiciary was stronger in 1977 than it had been at the time of Dosso's case, and I will give what I think were the reasons for this debacle in 1981.

In the first place, the Chief Justices of the High Courts had acted as Governors for long periods immediately on the promulgation of Martial Law in 1977. Inevitably there was a close association between the Governors and the Martial Law Administrators, and the public thought that there was a close

association between the Chief Justices and the Martial Law Authorities. This had an effect on the image of the judiciary.

Secondly, as the High Courts of three of the four provinces of the country upheld the validity of Article 212-A, most people could not get relief from convictions by military courts after 1980, just when Martial Law had become very severe. It was also known that this article had been drafted by two very senior judges. Like Mr. Justice Munir in 1958, these judges had drafted Article 212-A because they thought that they would be able to preserve some powers for the Courts. This did not happen and these events only led to an adverse reaction against the judiciary.

Most important of all was the trial of Mr. Bhutto for murder. He was convicted and sentenced to death by the Lahore High Court, and his appeal was dismissed by the Supreme Court by a majority of four to three. I venture to think that the conviction of a charismatic ex-Prime Minister for murder would have shaken the judiciary of any country to its foundations. Further, by an unfortunate coincidence, the Chief Justice of the Lahore High Court, who presided over the bench which sentenced Mr. Bhutto to death, was also the Chief Election Commissioner at that time. Therefore his duties as Chief Election Commissioner required him to meet the Election Cell which was headed by a General. This, too, had an effect on the public's ideas about the judiciary. The other coincidence was that Mr. Bhutto was acquitted by three of the five permanent judges of the Supreme Court, but the four judges, who constituted the majority, refused to review the sentence of death confirmed by them. The public found this difficult to understand. The cumulative effect of this chain of events and coincidences was that the courts were in the same position in the crisis of March 1981 as they were in the crisis of October 1958.

The position of judges in Third World countries is very difficult. India was the exception until 1975, but a dictatorship is a dictatorship, whether it is described as Martial Law or as an Emergency, and the Indian Courts had a difficult time in the Emergency of 1975, as shown by the judgment of the Indian Supreme Court *Additional District Magistrate, Jabalpur vs. Shukla* (AIR 1975 S.C. 1207). It was not the judiciary which saved India in this crisis. It was the people of India, who resisted the government with great courage and forced the government to lift the Emergency. The result was that the Rule of Law was restored in the country with the restoration of Fundamental Rights. On the other hand, there are countries (including Pakistan) where constitutions have been abolished and the powers of the courts annihilated, sometimes without even a protest by the public.

In the ultimate analysis, therefore, it is only the people of a country who can protect a country's constitution and laws. This does not mean that we

should not work for changes in laws (including constitutions) which enable the executive to interfere in the appointments of judges. But discussions of such proposals should not divert us from the real problem, which is that of building up public opinion for the courts. This is an enormous task which cannot be discharged by judges and lawyers alone. It is the problem of society itself. But we should not forget that the image of the judiciary is damaged more by the law's delays, the expenses of litigation and the corruption which is creeping into the subordinate judiciary, than by the appointments of unsuitable persons as judges. Therefore, in the long run, the manner in which judges and lawyers discharge their duties can build up public opinion for the courts, and public opinion is a better safeguard for the independence of judges than laws and constitutional guarantees.

Address

by

*Justice Abdur Rahman Chowdhury,
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I am indeed grateful to the Centre for the Independence of Judges and Lawyers and the International Commission of Jurists for their kind invitation and for the honour done to my country and to me personally for the opportunity of addressing this galaxy of legal luminaries from South Asia.

An independent judiciary is the very heart of a republic and the Rule of Law is the only safeguard for sustaining democracy. In these days when the pernicious influence of politicians has polluted almost all spheres of activity, the reputation of democratic institutions has been tarnished and their credibility steadily eroded, one institution which has remained unsullied is the judiciary. Yet in a society in which overall standards and ethical values are sharply declining and the probity of public servants as a class is under increasing pressure, how can judges be expected to uphold the high traditions of their august office?

While the judges still, as a class, perform far better than the other public services and the political cadres, delinquency has nevertheless been steadily invading the inner fibre of our robed brethren. Unless society's morals and mores rise, they cannot remain immune for long. To quote Thomas Jefferson:

"Our judges are as honest as other men and not more so."

Over the years, there has been systematic tampering and interference with judicial independence by the executive through influence, pressure, allurements, transfer, and an undermining of their security of service among

other methods. No judge can be expected to act without fear or favour with a sword of Damocles hanging over-head, or when he is dependent upon the executive for small favours and mercies. In my opinion, a bad judge is much preferable to a frightened judge.

Speaking as a former judge, can it be denied that we, the judges, have also sometimes played into the hands of unscrupulous rulers – military or otherwise? Have we not invented and applied the doctrine of necessity and political reality to legalise an otherwise illegal coup d'Etat? By the judgment in Dosso's case in 1958, the Pakistan Supreme Court conferred legality on the armed usurper calling it a 'Victorious revolution' and a successful coup d'Etat by relying on Hans Kelsen's positivist theory of efficacy. Had the Pakistan Supreme Court acted constitutionally and legally, no doubt at some risk to the Judges, the entire course of history of this Sub-Continent might have been different. It is interesting to recall that the same Supreme Court, under changed circumstances in Asma Jilani's case in 1972, overruled Dosso's case and gave an entirely different judgment holding the proclamation of Martial Law by Yahya Khan in 1969 as illegal. I would, therefore, prefer to think of the judgment in Dosso's case as based not on the doctrine of necessity or reality but of expediency. Dosso's case was subsequently quoted and followed with approval by the Supreme Courts in Uganda, Rhodesia and Nigeria in granting constitutional legitimacy to armed usurpers who also staged successful coups d'Etat. Dosso's case thus acquired the dubious distinction as a leading legal precedent for other usurpers to acquire the necessary legitimacy and constitutional cover for overthrowing duly elected constitutional governments. This prompted the Judicial Committee of the Privy Council to remark that

"What happened in Pakistan in October, 1958, then an isolated incident in the Commonwealth, has become a pattern for the new Commonwealth."

But at the same time, we are proud of a number of cases decided by the Pakistan Supreme Court, namely those of Malik Ghulam Jilani, Mir Abdul Baki Baluch and Begum Shorish Kashmiri – all of which upheld the fundamental rights and liberties of the people. The Supreme Court of Bangladesh also upheld the glorious tradition of judicial independence in protecting and safeguarding the liberty of the people and their fundamental rights during the short-lived existence of our constitution (which has lasted about six years out of the sixteen years of our independence).

We are equally proud of some of the decisions of the Indian Supreme Court, which have become landmarks in the constitutional history of the sub-

continent. It was held in Keshavananda Bharati's case, popularly known as the Fundamental Rights case, that while Parliament has the power to amend any part of the constitution (including the chapter on fundamental rights) the power cannot be so exercised as to destroy or alter the basic structure or framework of the constitution. The rationale of the Indian Supreme Court's judgment was simple and cogent. If the Parliament had the power to destroy the basic structure of the constitution, it would cease to be a creature of the constitution and become its master. Again in Minerva Mills Ltd.'s case (A.I.R. 1980 S.C. 1789) the Supreme Court of India struck down as invalid and ultra vires the unlimited amending power of the Parliament and the ouster of the court's jurisdiction to consider the validity of any constitutional amendment.

Today our heads hang down in shame and pain when we hear judges running after the ministers and party in power for material benefits such as posh housing plots, inclusion in foreign delegations, and jobs after retirement. The present generation of judges should not preside over the liquidation of a great heritage and legacy.

One of the important correctives, to my mind, is freer criticism of judges and judgments, founded factually and worded responsibly. Criticism of errors of public organs is fundamental and, as such, judicial errors and excess must also suffer public censor and criticism. In the United States when the famous book 'The Brethren' exposed in all nakedness the unedifying inside confrontations and compromises of the 'nine old men' of the United States Supreme Court, the court did not issue any contempt notice against its authors. Even in England when Lord Denning was criticised for his racist observations, he did not use his power of contempt to silence and punish his critics but gracefully retired from the Bench with dignity.

The government in most of the Third World countries is the largest single litigant in the whole country. If this litigant can select judges suitable to itself then that would be the end of the judicial system.

In the memorable words of Sir Winston Churchill while speaking in the House of Commons as the Prime Minister of England:

"The Principle of complete independence of the Judiciary from the executive is the foundation of many things in our life. The Judge has not only to do justice between man and man, he has to do justice between the citizens and the State. He has to ensure that administration conforms with the law and to adjudicate upon the legality of the exercise by the executive of its powers."

The valiant judges and lawyers throughout the world deserve a word of hope and cheer from this distinguished assembly of jurists by expressing

solidarity and support in their struggle to ensure the Rule of Law, the Independence of the Judiciary and human rights with human dignity.

On the Independence of the Legal Profession

by

Mr. Bharat Upreti*

A working definition:

The legal profession cannot remain independent if it cannot decide, on its own, the conditions and qualifications for entrance, and set its own discipline and regulations. In addition, lawyers must be independent in the discharge of their professional duties "without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." (Universal Declaration on the Independence of Justice adopted in Montreal, June 10, 1983. See CIJL Bulletin No. 12)

Its importance to the society and the individual:

An independent legal profession is essential to propagate, protect and encourage the respect for the rule of law in any democratic country. Lawyers discharge a dual responsibility. Firstly, it is the free legal profession which serves to assure, through the rule of law, an ordered society in which its members may live safely and prosper and, secondly, in an apparent contradiction, it also serves to assure that the governmental structure that it seeks to sustain does not repress the freedom and opportunity of those it purports to protect.

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The role of legal profession, particularly in the countries of this region, is necessarily wider than the traditional role of advising clients on legal matters and pleading cases in the court. In presenting legislation before the parliament, politicians very often fail to realise and appreciate the implication and ultimate effects of their proposals. They may also be prepared to sacrifice well-settled principles for short-term political gain. Lawyers, by virtue of their training and practice, and the nature of their profession, understand the intricacies and niceties of the law and constitution, and an independent legal profession can play an important role in generating public opinion against obnoxious legislation. Thus, the profession is of vital importance for a society duty bound to promote and protect human rights.

The service of an independent legal profession is equally important for the protection of an individual's economic, social and cultural as well as civil and political rights. Only by the representation of an independent lawyer can an individual get such rights enforced through the courts and other government machineries.

The need to educate the public about the importance of the Independence of the Legal Profession:

The Montreal Declaration rightly highlighted the responsibilities of lawyers to educate the public about the principles of the rule of law, and the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and relevant and available remedies. This responsibility of lawyers is of the utmost importance for sustaining the independence of the legal profession in the developing countries, where the majority of the population is often illiterate and surviving below the poverty level. This large group is often exploited and deprived of their rights, guaranteed under the existing law. The involvement of the legal profession in educating this illiterate mass as to their rights and remedies, will necessarily earn it the support of the people against threats of governments and vested interest groups.

Steps that should be taken to promote and protect an independent legal profession:

The independence of the legal profession can neither be promoted nor protected in the absence of public faith and support. In addition to providing

legal services of quality with utmost honesty and integrity, the profession must collectively be involved in public interest issues, such as legal aid for the poor and human rights issues. This will result in considerable respect for, and enhance the image of, the legal profession and will have to be taken into account by those in power.

This issue of promotion and protection of the independence of the legal profession with the help of public support and goodwill should be considered in the light of the challenges posed to the profession by different sectors of the society. These challenges vary greatly among nations depending upon their social, economic and political context. Some are posed by the general public and others from the government and the profession itself.

Of these, the challenges posed by the public or the society are alarming to the independence of the legal profession. If we do not reform ourselves in the light of these challenges, the public or the society will force some kind of change in the profession. Ultimately we may one day find that we no longer have the freedom that is so fundamental to our profession. Most of these challenges were discussed in the 19th Biennial Conference of the International Bar Association held at New Delhi in October 1982. Some of these problems have also been highlighted in national seminars on codes of conduct for the legal profession, such as that sponsored by Nepal Bar Association in August 1986. Some of these challenges presented in the form of complaints are as follows:

- (a) Lawyers are involved in dilatory practices inside and outside the court. This delay sometimes causes the denial of justice to deserving persons.
- (b) Lawyers are involved in bribing the judges and other officials involved in the process of decision-making and are ranging on the side of authority.
- (c) Lawyers use undesirable ways and means to solicit clients and some exert pressure against the client and deprive him of his right to obtain the service of a lawyer of his choice.
- (d) Lawyers charge high fees when they lack the required professional competency and quality.
- (e) Most lawyers take interest in commercial problems and take no interest in the legal problems of weaker sections of society.
- (f) There is a deficiency in the information concerning the services a lawyer can offer. As a result, a layman seeking a lawyer for specialized work, must rely on tips, hearsay or pure chance.
- (g) Established legal professionals are apathetic to the problems of new entrants. The legal profession has been reserved only for upper and

upper-middle class families. Even a brilliant law graduate of a lower-middle class family cannot join the profession because of financial problems and is often compelled to accept employment elsewhere.

- (h) Bar Associations are not taking an active interest in the matter of training young lawyers.

Challenges from the government are noteworthy as well. There has been an increasing tendency to refer cases to special courts in which hearings are conducted almost behind closed doors and public access is restricted. Sometimes even lawyers are prevented from attending the proceeding in the name of security and lack of space. The tendency of shifting courts' jurisdiction to administrative and quasi-judicial bodies has been on the increase. The situation has been aggravated by the natural tendency of these administrative and quasi-judicial authorities to refuse legal representation and, if representation is granted, to virtually deciding the case before they hear the lawyers. Militarization of the judiciary has also been a real challenge to the profession in some countries of this region.

Protection of the independence of the legal profession requires positive response to these challenges. Effective means have to be devised by bar associations to solve these problems. We have to justify the manner in which we practice law, justify our cost, justify our effectiveness and justify our honesty, integrity and dedication to justice. We have to justify that lawyers are members of an honorable and independent profession dedicated to fair, impartial speedy and effective justice. We have to find effective means of obtaining legislation giving express authority to the concerned Bar council to take necessary action against deviant members who lower the image of the profession. Similarly, governments should be persuaded not to transfer judicial authority to non-judicial or quasi-judicial bodies.

The Status and Rights of Judges

by

Mr. Kamal Hossain*

Introduction

The concept of independence of the judiciary has historically evolved from the experience of diverse societies, and has drawn upon different values and ideals upheld by those societies.

Bracton's proposition put forward in 13th century England, "*Rex non debet esse sub homine, sed sub Deo et sub lege*" – "the king ought not to be under men but under God and the law" – was shared by jurists in medieval Islam who refused appointment as judges or resigned their office as judges when they felt unable to allow royal directives to prevail over what they perceived to be the law¹. Chief Justice Coke in seventeenth century England took the position that he would not enforce either royal commands or acts of parliament if these were repugnant to "common rights and reason", or against the Magna Carta.² The framers of the Constitution of the United States in the eighteenth century, reacting against curtailment of liberty and arbitrary rule suffered by them under a colonial system, attached great importance to protecting individual liberty and preventing abuse of public power, by designing a constitution under which there would be separation of powers – legislative, executive and judicial – with checks and balances, and with independent judges functioning as guardians of liberty. Thus in Madison's view:

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"independent tribunals of justice will consider themselves in a peculiar manner the guardians of those (constitutionally protected) rights; an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in that Constitution by the declaration of rights."

Jefferson had urged that:

"The judicial power ought to be distinct of both the legislative and executive and independent upon (sic) both, so that it may be a check upon both, as both should be checks upon that".

Status and Rights of Judges in the South-Asian Region

In the countries of the South-Asian Region which prior to 1947 had been part of the British colonial system (Bangladesh, India, Pakistan and Sri Lanka), the tradition of judicial independence was substantially developed even prior to independence. Post-independence constitutions thus included a number of provisions designed to uphold and safeguard the independence of the judiciary.

The constitutional provisions made in the Government of India Act, 1935, were carried over with further improvements in the post-independence constitutions. The "constellations of provisions" which served as "hands off judges" clauses in the Indian Constitution (and other post-independence constitutions) have been succinctly summarised in a recent judgment of the Indian Supreme Court.¹ The relevant portions of the judgment are reproduced below, indicating against each the corresponding provision in the Bangladesh Constitution ("B.C."):

- (a) Judges of the High Court hold their tenure not at the pleasure of the President but till they attain the age of 62 years: Art. 217 (1); (S. 220 (2). G.I. Act, 35) (B.C. Art. 96 - 65 years).
- (b) Their salaries and allowances are charged on the Consolidated Fund of the State: Art. 203, (3) (d) (Sec. 78 (3) (d) G.I. Act, 35) (B.C. Art. 88) so that under Art. 203 (1) they are not subject to a vote of the Legislative Assembly: (Sec. 19 (1), G.I. Act, 35) (B.C. Art. 89).
- (c) The pensions of High Court Judges are charged on the Consolidated

Fund of India: Art. 112 (3) (d) (iii) (Sec. 33). Their pensions are not subject to the vote of Parliament. (Sec. 34 (1), G.I. Act, 35). Further, under Art. 221 (2), "neither the allowance of a judge nor his salaries in respect of leave of absence or pension are to be varied to his disadvantage after his appointment" (Art. 221, proviso, G.I. Act, 35) (B.C. Art. 147). Since the salaries payable to the judges are prescribed by Schedule II of the Constitution, they could not be varied without an amendment of the Constitution.

- (d) Article 221 prohibits a discussion in the Legislature of a State with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties (Sec. 40) (1) G.I. Act, 35).
- (e) Article 215 confers upon the High Court a power to punish for contempt of itself.
- (f) The provisions of Article 211 show that the judges are protected from criticism of their judicial acts from the Legislature which is a political assembly, and the provisions of Art. 215 show that the High Court has power to protect itself against interference in the course of the administration of justice from whatever quarter it may come.
- (g) Under the general law of civil liability (tort), words spoken or written in the discharge of his judicial duty by a judge of the High Court are absolutely privileged and no action for defamation can lie in respect of such words. This absolute immunity is conferred on the judges on the ground of public policy, namely, that they can thereby discharge their duty fearlessly.
- (h) The form of oath prescribed in the 3rd Schedule for a Chief Justice or a Judge of the High Court emphasises the absolute necessity for judicial independence if the oath is to be adhered to because it requires the judge to swear that he will perform the duties of his office "without fear or favour, affection or illwill". These words have been added to the form of the judge's oath prescribed by the G.I. Act 35, Schedule IV.2 (B.C. Art. 148: Third Schedule).
- (i) The independence of the High Court is emphasised by Article 229 (B.C. Art. 113), which provides that appointments of officers and servants shall be made by the Chief Justice or such other judge or officer as he may appoint.
- (j) Article 50 (B.C. Art. 22), which is a directive of State Policy, directs the State to take steps to separate the judiciary from the Executive in the public services of the State, thus emphasising the need of securing the judiciary from interference by Executive. These provisions do not stand alone. Chapter V of part VII of the Constitution deals with High Courts

in the States. Chapter IV deals with subordinate courts and Articles 233 and 235. (B.C. Articles 114-116), which as judicially interpreted provide that in respect of promotion, transfer and disciplinary action, the subordinate judiciary are under the full control of the High court and not of the executive government in order to secure judicial independence.

The power of appointment of judges in India and Bangladesh (and some of the other countries in the region) vest in the President. Under the Indian Constitution, the President is required to consult the Chief Justice, other judges and certain other functionaries. The 'consultation' requirement has been judicially considered in India in the context of transfer of judges under Article 222 of the Indian Constitution, which requires transfer to be made after "consultation". In the minority judgment of Bhagwati J., he held that a power to transfer without consent was subversive of the independence of the judiciary.

"If the power of transfer could be exercised by the executive and the High Court judge could be transferred without his consent, it would be a highly dangerous power because the executive would then have an unbridled power to inflict injury on a High Court judge by transferring him from the High Court to which he originally agreed to be appointed to another High Court, if he decides cases against the Government or delivers judgments which do not meet with the approval of the executive. That would gravely undermine the independence of the judiciary for the High Court judge would then be working constantly under a threat that if he does not fall in line with the views of the executive or delivers judgments not to its liking he would be transferred maybe to a far-off High Court... This would not only have a demoralising effect on the High Court judiciary, but it would also shake the confidence of the people in that administration of justice in cases where the Government was a party."

The majority judgment of the Supreme Court held that Article 222 did confer a power to transfer a judge without his consent, laying great emphasis, however, on the fact that "the President, had no power to transfer a High Court judge for reasons not bearing on public interest but arising out of the whim, caprice or fancy of the executive or its desire to bend a judge to its own way of thinking"; and that consultation with the Chief Justice must be "a real, substantial and effective consultation based on full and proper materials placed before the Chief Justice".

The power of removal of a judge under the Indian Constitution is provided by Article 218 read with Article 124 (4) and (5), under which a judge of

the High Court can be removed from his office by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

Under the Bangladesh Constitution, Article 96 provides that a judge can only be removed by the President after the judicial council (comprising of the Chief Justice and the two next senior Judges) reports to the President after enquiry that in its opinion the judge has ceased to be capable of properly performing the functions of his office or has been guilty of gross misconduct.

As regards remuneration, it may be said in general that judicial salaries have failed to keep pace with inflation, which not only means that the judges are not free from financial anxieties, but that the best qualified candidates are normally unwilling to accept appointment as judges. The countries of the region being resource-short, most courts can be seen to suffer chronically from a shortage of resources required to provide the administrative infrastructure needed for efficient functioning.

In this region, the Supreme Court and the High Courts have the power of contempt to protect themselves against scandalisation or any action which may bring a court or judge into contempt, or lower their authority, so as to interfere with the due process of justice. In a celebrated judgment where the Law Secretary of the Pakistan Government was proceeded against for criticising judgments delivered by the High Courts, the Supreme Court of Pakistan, while affirming the judgment of contempt, observed that:

“Scandalous attacks upon judges are punished by attachment or commitment upon the principle that they are against the public, not the judge, an obstruction to public justice... the question in every case is not whether the publication in fact interferes but whether it tends to interfere with the due course of justice...”

But in the same judgment the judges, anticipating the danger posed by the power of contempt to legitimate public criticism and comment, quoted with approval the following observations of Lord Acton:

“But whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public act done in the seat of justice. The path of criticism is a public way: the

wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motive to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even though outspoken comments of ordinary men.”¹⁰

Pressure on the Independence of the Judiciary in the South-Asian Region

In recent years the independence of the judiciary has come under pressure in different countries of the South-Asian Region. The CIJL Bulletin in its seventh issue drew attention to controversies in India concerning appointment, transfer and promotion of judges.¹¹ It noted that in 1973 the convention of promotion by seniority was disregarded for the first time and a further deviation was noted in January, 1977.¹² The exercise of the power to transfer High Court Judges without consent and power to appoint temporary additional judges for up to two years in certain cases but failing to confirm them as permanent judges, when “by and large every person who entered the High Court judiciary as an additional judge (did so) in the clear expectation that as soon as a vacancy become available... he would be confirmed as a permanent judge”,¹³ raised controversies, which led to a spate of writ petitions which were disposed of by elaborate judgments of the Indian Supreme Court.

The same issue of the CIJL Bulletin also contains a report of the resignation of several judges of the Pakistan Supreme Court who were called upon to swear an oath to uphold a new constitutional order imposed by the Martial Law Government. In their letters of resignation the judges stated that their conscience did not permit them to uphold the new provisional constitutional order. It appears a number of judges of different High Courts also resigned on the same ground.¹⁴

In Bangladesh, the independence of the judiciary was subject to measures which for a period had deprived the judiciary of all safeguards. Following the proclamation of Martial Law on 24 May 1982, the Constitution of the People’s Republic of Bangladesh remained suspended till 11 November 1986. The position that prevailed during the Martial Law period has been described thusly:

“The Chief Justice and other judges of the Supreme Court are appointed by the Chief Martial Law Administrator. No consultation with the Supreme Court

*is necessary with respect to the any matter relating to appointment of persons to offices and control or discipline of persons employed in the Judicial Services. The Chief Martial Law Administrator may appoint the Acting Chief Justice and additional judges or ad hoc judges to a Division of the Supreme Court, whenever necessary, for a specified period... The Chief Justice of Bangladesh, whether appointed before or after the proclamation of Martial Law holds office for a term of 3 years unless he attains the age of sixty-two years first, and thereafter retires from office. After promulgation of the 1982 Martial Law Proclamation (First Amendment), containing this provision for retirement, Mr. Justice Kemaluddin Hussain, Chief Justice of Bangladesh retired from his service abruptly... A person holding any judicial office may be removed from office by the Chief Martial Law Administrator without assigning any reason."*²⁵

This power was used to remove a Judge of the Appellate Division, and two serving judges of the High Court Division without assigning any reason.

While the Constitution remained suspended, the Martial Law regime in the name of decentralisation of the judiciary fragmented the High Court Division of the Supreme Court, the permanent seat of which under the Constitution was in the capital, by setting up "benches" of the High Court Division in six places in different parts of the country. Judges were summarily transferred without their consent to these benches. Transfers of judges from one bench to another without their consent became usual.

With the withdrawal of the proclamation of Martial Law on 11 November 1986, the Constitution was revived, along with the constitutional safeguards relating to the judiciary. The continuance of a legacy of the Martial Law period however led to a crisis in the functioning of the Supreme Court, resulting in the Supreme Court Bar Association resolving to abstain from appearing in the Supreme Court over several months. The expectation that the "benches" set up by the Martial Law regime outside the capital, and the practice of "transfer" of judges would come to an end with the revival of the Constitution was frustrated by action which was taken by the Chief Justice purporting to act under Article 100 of the Constitution which provides:

"The permanent seat of the Supreme Court shall be in the capital but sessions of the High Court Division may be held at such other places or places as the Chief Justice may, with the approval of the President, from time to time appoint."

The action taken was in effect substantially to maintain the "benches" as they had existed before the withdrawal of Martial Law by characterising them

as "sessions" of the High Court Division. The Supreme Court Bar Association has viewed this as a violation of the Constitution since the Constitution envisages an integrated Supreme Court with its permanent seat in the capital, and does not have any provision for transfer of judges to places outside Dhaka. This has given rise to issues which have grave implications for the independence of the judiciary in Bangladesh.

A recent report published following a Conference of eminent Asian judges and lawyers observed that human rights and judicial independence have come under particular pressure in the Asian region when states of exception, such as Martial Law, are in force, thus:

*"Militarisation with its resultant violations of human rights is on the increase. In the name of national security and development the fundamental rights of the people are suspended and often obliterated. The inalienable right of the poor and dispossessed to question the system is considered a crime which entails punishment. The underlying dogma of authoritarian regimes is that power is to be enjoyed and dispensed without any fetters. The days when judiciary acted as watchdog over the basic human rights of the people are over. In most Asian countries the laws and the legal systems have been prostituted, raped, maimed, to the point of impotency by Martial Law decrees and Emergency Regulations issued by dictatorial regimes."*¹⁶

Concluding Observations

The judiciary depends for its effectiveness on the public confidence that it enjoys, for as it was eloquently expressed by a distinguished U.S. Supreme Court justice:

*"The judiciary has no army or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse strings of government. Those two historical sources of power rest in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and experience. But they flourish when judges are independent and courageous."*¹⁷

To earn public confidence judges must in the last analysis have the moral and intellectual fibre which must sustain their own spirit of judicial independ-

ence, as is wisely acknowledged by a Supreme Court judge of the South-Asian region:

*"But if the judiciary should be really independent something more is necessary and that we have to seek in the judge himself and not outside. A judge should be independent of himself. A judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and illwill, hatred and contempt and fear and recklessness. In order to be a successful judge these elements should be curbed and kept under restraint and this is possible only by education, training, continued practice and cultivation of a sense of humility and dedication to duty. These curbs can neither be bought in the market nor injected into a human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go, the independence of the judiciary will not suffer. But with all these measures being there, still a judge may not be independent. It is the inner strength of judges alone that can save the judiciary."*¹⁴

Notes

1. N.J. Coulson, *A History of Islamic Law* (1964), p. 29; the case is noted of a *gadi* (judge) in Egypt in the eighth century A.D. who refused to continue in office when the governor set free a soldier the judge had imprisoned.
2. *Case of Prohibitions del Roy*, 12 Co. Rep., p. 63.
3. Quoted in J. Agresto, *The Supreme Court and Constitutional Democracy* (1984), p. 25.
4. *ibid.*, p. 100.
5. *Union of India vs. Sankalchand*, *All India Reporter* ("A.I.R.") 1977 (Supreme Court), p. 2327 at p. 2371, per K. Iyer, J.
6. *ibid.*, p. 2360, per K. Iyer, J.
7. *ibid.*, p. 2340, per Chandrachud, C.J.
8. *ibid.*, p. 2384, per K. Iyer J.
9. *Sir Edward Snelson vs. Judges of the High Court of West Pakistan*, *Pakistan Legal Decisions* ("P.L.D.") 1961 (Supreme Court), p. 237 at p. 283.
10. *ibid.*, Judgment of Fazle-Akbar, J., p. 291, quoting Lord Atkin in *Andre Paul Terency Ambarud vs. A.G. of Trinidad and Tobago*, A.I.R. 1936 (Privy Council), p. 141 at p. 145.
11. CIJL Bulletin, No. 7 (April 1981), pp. 1-7.
12. *ibid.*, p. 3.
13. *S.P. Gupta and others vs. Union of India*, A.I.R. 1982, p. 149.
14. CIJL Bulletin, *op. cit.*, at p. 11.

15. Bangladesh – Country Study by M.A. Motaleb, in S. Shetreet and J. Deschenes (Editors) *Judicial Independence: The Contemporary Debate* (1985).
16. *Judiciary under Siege* – Report of Conference of Asian Lawyers for Justice and Human Rights, organised by the Christian Conference of Asia, Hong Kong, 24-27 October, 1983, pp. 5-6.
17. William O. Douglas, *From Marshall to Mukherjea: Studies in American and Indian Constitutional Law* (Tagore Law Lectures – 1956), p. 345.
18. per Venkataramiah, J., in S.P. Gupta's case (note 13 above), p. 672.

Conclusions and Recommendations of the Seminar

The Judiciary as an Independent Branch

Independence from the Executive

1. The separation of the executive from the judiciary should be established at all levels of the judiciary including the lower courts. No executive officer should be appointed to perform judicial functions and no judicial officer should be appointed to perform executive functions.

2. Judges should always conduct themselves in such a manner as to preserve the dignity of their office, the impartiality and independence of the judiciary and their role as guardians of fundamental rights.

3. As guardians of the Rule of Law and of the Constitution judges should always protect and uphold the Constitution and not permit, justify or condone its abrogation or suspension by resort to doctrines inconsistent with the Rule of Law.

4. After retirement the judges of the superior courts should not be eligible for appointment to any public office of profit under the government or any statutory corporation.

5. Judges and former judges should not serve as chairpersons or members of commissions of inquiry except in cases where judicial skills are necessary. When a judge does serve on such a commission its report should be published.

Independence from the Legislature

6. The Constitution should contain an express provision preventing the legislature from retrospectively nullifying the effect of any judgment.

7. The superior courts should be vested with unqualified jurisdiction to rule upon the validity of any law on the ground that such law or any section thereof is inconsistent with the Constitution.

8. No discussion should take place in the legislature with respect to the conduct of any judge in the exercise of his duties, except in proceedings for impeachment or removal.

Responsibility for Court Administration

9. The control and supervision of the judges of the lower courts should be vested in a committee comprised solely of judges of the superior courts.

10. The jurisdiction of existing ordinary courts should not be curtailed or abridged either by the ouster of their jurisdiction or by the creation of special courts or tribunals.

11. There should be an appeal on the facts and the law to the ordinary courts from any decision of a specialised court or tribunal including military and administrative tribunals.

12. The procedure before such specialised courts or tribunals should conform to internationally accepted standards of fairness.

13. No civilian should be tried by a military tribunal.

14. The writ jurisdiction of the superior courts should not be curtailed by legislation and should extend to proceedings before specialised courts and tribunals.

The Rights of the Courts to Hear Petitions for Habeas Corpus

15. Applications for writs of habeas corpus should be given priority and decided expeditiously.

16. These applications should be heard day to day.

17. The court should require the production of the detainee whether or not he is represented by counsel.

18. If the detainee is not produced the court should inquire into the non-production of the detainee.

19. Even where an order of detention ceases to have effect the court should be empowered in appropriate cases to examine the legality of the detention order.

20. The court should be empowered to inquire into the manner of detention.

21. The jurisdiction of the courts to issue writs of habeas corpus should not be ousted or in any way restricted.

The Right of Judges to Ensure Fairness of Proceedings Including the Right to Inquire into the Mistreatment of Prisoners

22. The attention of governments should be drawn to the UN Standard Minimum Rules for the Treatment of Prisoners and compliance with such standards should be urged.

23. Persons awaiting trial should be provided with all basic requirements.

24. No person awaiting trial should be held imprisoned in default of bail for a period longer than the maximum period of imprisonment provided for such offence.

25. The case of a person held in default of bail should be reviewed periodically by the remanding court with a view to reducing the quantum of bail or releasing him on a bond without bail.

26. Judges of the superior courts should be required to make periodic visits to prisons to view the conditions of detention and interview prisoners if they so wish.

27. There should be no preventive detention except in times of public emergency which threaten the life of the nation and the existence of which is officially proclaimed.

28. In the case of preventive detention (other than detention by court order) no person should be held for a period exceeding 3 months unless such person is produced before a Board of Review and such Board authorises a further period of detention up to 3 months. No such detention should extend beyond 12 months. The Board should have access to all information and documents relevant to the detainee and such documents should be disclosed to the detainee and/or detainee's counsel unless the Board decides that such disclosures will affect public security. The Board should consist of two judges

of the superior courts. The detainee should be entitled to legal representation.

29. Any person in custody should have a right to apply to a court for relief in respect of the conditions of custody.

30. No law should be enacted which would deny a judge the power to ensure that proceedings are conducted in a manner that is fair, just and reasonable.

31. No law should abridge the power of the courts to grant bail in appropriate cases.

The Role of Courts in Protecting Human Rights

32. The concept of an aggrieved party should be enlarged so as to permit public interest litigation.

33. Judges should keep themselves informed about international conventions and other instruments establishing human rights norms, and seek to implement them as far as feasible within the limit set by their national constitutions and laws.

The Need to Educate the Population about the Role of the Courts

34. It is the role of bar associations to educate the public about the importance of an independent judiciary and about the administration of justice. In carrying out this role, bar associations should consider the production of pamphlets explaining the role of the courts in simple and local language. Bar associations should work with other associations of lawyers as well as human rights and civil liberties organisations to these ends.

The Need to Develop the Law to Give Effective Remedies

35. All countries in the region have a chapter in their respective Constitutions on the directive principles of State policy. Governments should be urged to enact legislation to give effect to these directive principles.

36. Courts should be empowered to give effective remedies so that petitioners will not be denied the full benefit of findings in their favour.

Criticisms of the Courts and Judgments of Courts

37. The offence of contempt of court should be restricted in relation to criticism so that only malicious or reckless criticism will come within its purview.

38. Bone fide criticism even if mistaken should not constitute an offence of contempt.

39. Truth should be a complete defence to a charge of contempt based on attack made outside of court against a judge.

40. In offences of contempt that arise from criticism the offenders should not ordinarily be liable to imprisonment.

41. Except in cases of contempt in the face of the court, the judge in relation to whom the alleged contempt has been committed should not try the contempt case.

Suspension of the Constitution

42. A democratic government adhering to the principles set out in the International Bill of Rights and upholding the Rule of Law is a prerequisite for an independent judiciary and the protection of human rights. The abrogation or suspension of a democratic constitution is a serious threat to the Rule of Law and as such should be condemned by the international community.

The Independence of the Legal Profession

The Current Role of the Legal Profession and its Perception in the Eyes of the Public

43. The independence of the legal profession includes the unrestricted right of members of the legal profession to protect, defend, prosecute and advance the lawful interests of their clients without fear, unhindered by the threat of jeopardy in the discharge of their professional responsibilities in accordance with generally accepted standards. Independence of the profession must not only be real but must also be perceived and apparent. The legal profession must not be seen as representing merely the interests of the law-

giver, but as the real representative of the large mass of society that the law seeks to monitor, regulate and govern. The touchstone of independence lies in the unhindered access to law of all people to secure the vindication of both their natural and legal rights, as these rights are understood according to generally accepted international standards.

44. Effective legal representation presupposes the existence of legal practitioners of competence, commitment and integrity.

45. The standards of education, training and internships of prospective members of the legal profession needs to be examined.

46. The legal profession in the region is perceived as representing, by and large, the interests of the privileged and the ruling classes. The large mass of the people have neither easy nor free access to effective legal redress.

47. Schemes for the promotion of legal literacy and legal aid for the oppressed, indigents and juveniles are grossly inadequate in the region.

Recommendations

While fully cognizant that the development of the legal profession is integrated with the progress of other sections of society, and while realising that the members of the legal profession cannot remain independent in isolation, and mindful of cultural, economic, social and political conditions, the participants recommend that:

48. The draft principles on the legal profession in the Montreal Universal Declaration on the Independence of Justice should be internationally debated and, allowing for any necessary modification to suit regional conditions, be adopted as a universal declaration by the United Nations General Assembly and other international and regional and national forums.

Legal Education and Training

49. Legal education in the region should focus more sharply on the need for the learning, advancement and defence of human rights as they are defined by the International Bill of Rights.

50. Legal education be made particularly relevant to the needs and aspirations of the given society.

51. Internships and pupillage be a mandatory condition for entry to the legal professions, closely monitored by Bar Councils, Bar Associations and

other regulatory bodies, with a view to securing conditions that inculcate incentive for learning, integrity, the rendering of community legal services, and securing just reward for services.

52. The responsibility for legal education be entrusted to law teachers, leading practitioners and judges.

53. Given the paucity of legal education, financial resources should be alleviated by enlisting retired judges and practising lawyers on a pro bono basis for the conduct of moot courts and other models of practical training.

54. Law schools should be aware of the need for adequate representation for all sectors of society and geographical areas in the country.

55. It is the responsibility of Bar Councils, Bar Associations and other regulatory bodies to frame schemes for the continuing education of the members of the legal profession and towards that end to prescribe mandatory minimum requirements. The continuing education should inter *alia* be geared towards enabling the legal profession to keep pace with the developing trends in national and international law including human rights law.

Role and Duties of Bar Associations

56. The existence of a self-regulating Bar Association is essential for the independence of the legal profession. Adequate and proper legislation should be enacted in countries where such provisions do not exist. Each Bar Association should establish codes of conduct for practising lawyers as well as rules for entry into the profession. Anyone guilty of an offence involving moral turpitude such as bribery and corruption should not be admitted to the profession.

57. Tribunals should be established by Bar Councils or such other legal regulatory bodies with powers to discipline members of the legal profession. There should be a right of appeal from such tribunals to established courts.

58. It is the duty of the relevant Bar Association actively to intervene on behalf of and to defend its members put in jeopardy on account of any lawful advice tendered or action taken in the discharge of professional obligations, such as the bringing of human rights cases, and to that end it is incumbent on each such Association to liaise with other Bar Associations on the national, regional and international level with a view to mobilising public opinion.

59. In recognition of the vanguard role of associations of women lawyers, it should be the duty of Bar Associations and other regulatory bodies to ensure effective representation for women lawyers and towards that end to

take such steps as may be necessary to safeguard, develop and advance the rights of women.

60. In view of the increasing role being played by the State and its controlled bodies as a litigant and recipient of legal services, Bar Associations, Bar Councils and other regulatory bodies must ensure that such work not be an instrument of political patronage but to the contrary be regulated on the basis of a policy compatible with merit and the notions of equity.

61. It should be a canon of professional responsibility that a lawyer champion the Rule of Law and mobilize public opinion against laws and derogations of established fundamental rights and liberties. In this context, if any government systematically and consistently violates the principles of the Rule of Law, it is the duty of every lawyer and Bar Association, Bar Council and representative professional association to counter such violations and it is incumbent on the entire legal fraternity to mobilize its resources peaceably for the restoration of the Rule of Law.

62. It is the duty of lawyers' associations to promote public discussion on and to widely disseminate the implications of legislation affecting human rights and thus promote an awareness among the people of the importance of protecting human rights and the Rule of Law.

63. While it is a primary responsibility of governments to provide for legal aid clinics and projects and legal literacy of the masses, Bar Councils, Bar Associations and other legal groups must also give these matters the highest priority.

64. It is the responsibility of Bar Councils, Bar Associations and other legal groups to take up social causes and assist, if necessary, in public interest litigation.

65. The right of every legal practitioner otherwise qualified to appear in legal proceedings before courts, tribunals or other authorities must be not curtailed on the basis of caste, creed, belief, religion, race or sex.

66. The ends of justice must not be defeated on account of delays and the flux of time and towards this end it is the duty of Bar Associations and lawyers to strive for the expeditious disposal of a cause or controversy.

67. Bar Councils, Bar Associations and other regulatory bodies should mobilize public opinion against corrupt judicial and legal practices.

68. The Bar must be vocal in suggesting legislative reforms to defend, secure and advance the rights of the people and be engaged in sponsoring such legislation, consonant, however with prevailing objective conditions.

69. The legal profession must resist the creation of special courts and tribunals that deny accepted standards of due process of law.

70. Having regard to the legal profession's responsibility to the society

and the criticism often made by the public about the fees charged by lawyers, Bar Associations in the region should take cognizance of the matter and formulate proper guidelines to regulate such fees and urge their members to abide by such guidelines. Lawyers, however, should not accept anything other than the fee by way of commission, such as a share of profits in the litigation.

71. There is a disturbing tendency on the part of some members of the legal profession in the region to exploit their close relationship with sitting judges. Whilst the right of the lawyer to practice in courts in which his close relatives are judges (though not in the court where the judge himself sits) cannot be denied, lawyers and Bar Associations should monitor such matters to ensure that no undue advantage is taken by lawyers of a close relationship with a judge of the court.

Status and Rights of Judges

Appointments

72. Lower Judiciary: Qualification for appointment should be left to each country but it should be ensured that persons selected for appointment be individuals of integrity and ability with appropriate training in the field of law or sufficient educational qualifications in the law. It is desirable that appointments be made only after consultation with the superior judiciary.

73. Superior Judiciary: Political factors enter too often into the appointment process. In some countries where consultation with a Chief Justice is constitutionally provided for, this consultation is often *pro forma* and does not necessarily ensure an independent selection. Appointments of judges after full consultation with a Judicial Appointments Commission is a more appropriate means of ensuring that those chosen will be independent persons of capacity and integrity. The composition of that Commission should include, *inter alia*, the Chief Justice, some if not all the judges of the highest court, and representatives of the Bar Association/Bar Council.

74. General: Direct lateral entry into all levels of the judiciary at least up to the High Court/Regional Court, from the practising lawyers of requisite standard should be encouraged. Where politicians cannot be excluded from the appointment process there must be other safeguards in the interest of an independent judiciary.

Tenure

75. The retirement age of judges on occasions has been conveniently altered to suit political ends. It is imperative that judges have guaranteed tenure until a specified mandatory retirement age fixed by law at the time of appointment, which must not be altered under any circumstances.

76. In one country there are term appointments which may be renewed at the discretion of the executive until a retirement age. Term appointments with the possibility of renewal are not conducive to a independent judiciary and should be avoided. Appointment of temporary or additional acting judges should be avoided unless absolutely necessary.

77. There has been a disquieting tendency of abolishing courts for reasons other than their reconstitution or restructuring. Established courts of the land must not be abolished though they may be reconstituted or reduced in number; the tenure of judges serving on such courts shall not be affected except for their transfer to another court of the same status.

The Need to Have Appointments to the Bench Reflect the Composition and Diversity of Society

78. The composition of the judiciary in the region does not adequately reflect the diversity of society, though there is a recent trend towards appointments which reflect this diversity. This trend is welcome. There is a need for appointments to the bench at all levels to reflect the significant diversities in society, but without reference to the numerical composition of the different sections of society and without affecting the efficiency and independence of the judiciary. In order to achieve this goal, it is necessary to provide for adequate representation of various sections of society, especially disadvantaged groups and women, in educational and professional training institutions.

Education and Training of Judges

79. The administration of justice increasingly requires the use of specialised knowledge and modern techniques in a variety of fields. Judges are called upon to adjudicate the most complex questions in respect of which they may not have sufficient knowledge or information. Apart from the training at

law schools there are no adequate in-service training facilities for judges or any provision for their continuing education. There should be an adequate course of training prior to the first posting of a judge of the subordinate judiciary. Judges at all levels should also have adequate continuing education programmes to expose them *inter alia*, to developments in other disciplines and countries having an impact on the law and administration of justice. They should also be exposed to changing trends in society, and the prevailing realities in their own country, especially of the disadvantaged sectors. The formation of judges' institutes and the holding of periodic seminars to enable an exchange of ideas should be encouraged.

80. At present, judges are discouraged from travelling abroad in order to attend seminars and conferences on subjects of law and administration of justice. Judges should be encouraged to meet with judges and lawyers in other countries for exchange of ideas and experiences and governments should encourage such visits, providing facilities for the same, rather than place impediments.

Discipline and Removal

81. The procedure for removal of judges varies greatly in the region. Where removal is by way of impeachment, impeachment proceedings should be based upon a prior finding of a committee comprised of superior court judges recommending such proceedings.

82. For judges of the lower judiciary, there are statutory provisions relating to discipline, enforced either in consultation with the higher judiciary or with the Judicial Service Commission. Disciplinary control should remain with these bodies.

83. There is no provision for disciplining judges of the superior courts save and except provisions for their removal on grounds of proved incapacity or gross misconduct. Among the countries of the region, only Bangladesh and Pakistan have a code of conduct for judges of superior courts. Although judges of the superior courts should not be subject to any outside disciplinary process, a mode of self-discipline such as a code of conduct should be evolved. A gross violation thereof by a superior court judge would be reason for the Supreme Judicial Council to demand an explanation and if no satisfactory explanation is forthcoming and/or no amends are made, the Supreme Judicial Council should be entitled to demand that the judge concerned resign his office. Such a Supreme Judicial council should consist of the Chief Justice and such number

of judges, not less than two, of the highest court as may be deemed appropriate. All proceedings before the Council should be held *in camera* unless the concerned judge otherwise requests.

Remuneration

84. The salaries and other emoluments of judges are not currently commensurate with their status and responsibilities. The salaries emoluments and pensions of judges should be adequate at all levels, commensurate with the status, dignity and responsibility of their office. In particular, providing for suitable accommodation and facilities for transport requires immediate attention. But a mere increase in salary and perquisites is not by itself a guarantee of independence or efficiency of judges.

Professional Immunity

85. Judges enjoy immunity from suit for all acts and omissions in their official capacity. However there are instances of harassment of judges for their judicial decisions. Judges must be protected from harassment of any kind to enable them to discharge their duties fearlessly.

86. Currently, honest and fair criticism of judgments and judges is not always appreciated. Judgments, however, should be open to fair criticism whilst imputation of motives to judges should be deprecated. In cases of gross misdemeanor, however, a judge should not be immune from public criticism.

Resources Provided to the Courts

87. Budgetary allocation for the judiciary and the administration of justice is chronically inadequate. Consequently there is an insufficient number of judges and ministerial staff, insufficient court rooms and other accommodation, as well as supplies and equipment. Particularly disturbing in many courts is the want of up-to-date law books, legal journals and periodicals.

88. The judiciary should be provided with the means and resources necessary for the proper discharge of its judicial functions, especially by the

appointment of an adequate number of judges to cope with the increasing volume of work, sufficient number of courts and court rooms, well equipped libraries, suitable accommodation for judges, and other physical and ancillary facilities (including staff).

89. Budgetary provision for courts at all levels should be prepared in collaboration with the judiciary. The amount allocated should be sufficient to enable the courts to function efficiently. An appropriate mechanism, independent of the legislature and the executive, should be established for the disbursement of such funds.

Freedom of Association and Expression of Judges

90. No country in the region has an association of judges though Bangladesh and Sri Lanka have associations of judges of the subordinate judiciary. Many judges at various levels, however, are members of international groups or organisations of judges and lawyers. Judges of each country should be encouraged, pursuant to the UN Basic Principles on the Independence of the Judiciary, to form and join voluntary associations of judges or similar organisations to represent their professional interest, promote their training and protect their judicial independence.

91. Although judges are entitled to the same freedom of expression as other citizens, nevertheless they should always conduct themselves in and out of court in such manner as to promote public confidence in their integrity, impartiality and independence.

Transfer

92. In some countries the lower judiciary is under the constant threat of transfer by the executive. Transfer of judges of lower courts should therefore be (or remain) controlled by the superior judiciary or the Judicial Service Commission.

93. Politically motivated transfers have also been noticed in case of superior courts. Except where there exists a regular system of transfer by rotation, judges of superior courts should not be transferred without their consent. However such transfer may be effected if in the opinion of the Chief Justice such consent is unreasonably withheld.

Implementation and Follow-up

In order to assure the widest possible dissemination of the recommendations contained herein and to promote their adoption in the countries of the region, the seminar:

94. Decides that each participant should circulate among his or her colleagues and should make available to law journals and the press the recommendations of the seminar.

95. Calls on law teachers to bring the final report of the seminar to the attention of their students and to ensure that it is available in university libraries. Also calls upon them to continue to study problems facing the judiciary, the legal profession and the system of the administration of justice and to cooperate with bar associations in bringing about necessary improvements.

96. Calls on bar associations, associations of lawyers, and human rights groups to take up the conclusions and recommendations, to cooperate with academics in identifying steps to be taken in furtherance of their implementation, and to work towards regional coordination amongst professional associations.

97. Calls on the Centre for the Independence of Judges and Lawyers to give wide publicity to the final report of the seminar, including its recommendations and to bring the report to the attention of the United Nations Committee for Crime Prevention and Control.

98. Calls on all governments to take account of the recommendations of the seminar.

99. Urges all governments to complete the reports called for in resolution 1986/10 of the Economic and Social Council concerning implementation of the Basic Principles on the Independence of the Judiciary, and to utilise, if necessary, the expert and other assistance which the Secretary-General of the United Nations has been asked to provide pursuant to the same resolution.

100. Calls on bar associations and associations of lawyers to give assistance to their colleagues in all countries who are being harassed or persecuted because of their professional activities.

101. Calls on the participants to work with bar associations, lawyers' associations and human rights organisations to translate the United Nations Basic Principles on the Independence of the Judiciary and the recommendations of the seminar into local languages.

102. Decides to form of follow-up committee consisting of:

Mr. Justice Abdur Rahman Chowdhury (Bangladesh)

Mr. Fali Nariman (India)

Mr. Kusum Shrestha (Nepal)

Mr. Justice Dorab Patel (Pakistan)

Mr. E.A.G. de Silva (Sri Lanka)

103. The follow-up committee is charged with seeking to ensure that the calls set forth in recommendations 94-101 are heeded, and with the particular tasks of:

- (a) Bringing to the attention of governments and parliamentarians, the press, non-governmental organisations and bar associations the recommendations of this seminar as well as the U.N. Basic Principles on the Independence of the Judiciary;
- (b) transmitting to the Chief Justice, Judges of the Supreme Court and High Courts as well as local and regional Court Judges copies of the final report of this seminar as well as the Basic Principles on the Independence of the Judiciary;
- (c) bringing to the attention of national and local human rights organisations the conclusions and recommendations of this seminar and discussing with them ways of implementing their recommendations;
- (d) inquiring from the participants what efforts they have undertaken to publicise the report of the seminar;
- (e) reporting back to the Centre for the Independence of Judges and Lawyers by September 1988 on their activities and progress made in implementing the report of the seminar.

104. Calls on all participants to assist the follow-up committee in its efforts and to consider undertaking the organisation of national follow-up seminars.

105. Calls on the CIJL to give wide publicity to the information supplied by follow-up committee.

United Nations Basic Principles on the Independence of the Judiciary

The 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted by consensus Basic Principles on the Independence of the Judiciary.

The principles were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985) which invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

Below are the Basic Principles adopted by the 7th Congress:

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

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

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

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

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

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

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

"Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

"The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the Legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist."

Independence of the judiciary

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

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

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

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

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

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

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

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

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

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

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

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

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

Professional secrecy and immunity

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

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

Discipline, suspension and removal

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

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

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

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

Resolution on the Role of Lawyers

Also adopted at the 7th Congress was the following resolution on the role of lawyers which highlights the importance of an independent legal profession to the protection of rights and freedoms and recommends to Member States that they provide for the protection of practising lawyers in the exercise of their profession. This resolution was adopted by consensus and, like the Basic Principles, has been approved by the General Assembly. The CIJL has been asked to assist the Committee for Crime Prevention and Control with the work assigned to it by the Congress.

Role of lawyers

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Considering that a fair and equitable system of administration of justice and the effective protection of rights and freedoms of citizens depend on the contribution of lawyers and of the judiciary,

Considering also that the role of lawyers and of the judiciary mutually complement and support each other as integral parts of the same system of justice,

Recognising that adequate protection of the rights of citizens requires that all persons have effective access to legal services provided by the lawyers who are able to perform effectively their proper role in the defence of those rights, and to counsel and represent their clients in accordance with the law and their established professional standards and judgment without any undue interference from any quarter,

Aware that bar associations and other professional associations of lawyers have a vital role and responsibility to strive to protect and defend their members against improper restrictions or infringements, as well as to uphold their professional ethics,

Believing that the legal profession must serve all sections of society and that bar associations have a responsibility to cooperate in making available the services of lawyers to all those in need of them,

1. *Recommends that Member States should provide for the protection of practising lawyers against undue restrictions and pressures in the exercise*

of their functions;

2. *Requests* the Secretary-General to provide interested Member States with all the technical assistance needed to obtain the objective described above;

3. *Also requests* the Secretary-General to encourage international collaboration in research and in the training of lawyers, using, in particular, regional institutes for the prevention of crime and the treatment of offenders;

4. *Requests* the Committee for Crime Prevention and Control to study this question, taking into account the work already done and to prepare a report on the role of lawyers;

5. *Requests* the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and its preparatory meetings to consider further those issues.

Montréal Universal Declaration on the Independence of Justice *(Excerpts)*

The World Conference on the Independence of Justice was held in Montréal, Canada, from 5 to 10 June 1983. The delegates came from five continents and over 20 international organisations and professional bodies, including international courts. The conference was organised by the former Chief Justice of the Superior Court of Quebec, Jules Deschênes.

At the final plenary session on 10 June 1983, the delegates adopted the Universal Declaration on the Independence of Justice. As the conclusions and recommendations adopted in Kathmandu call for adoption of the principles on the legal profession contained in the Universal Declaration (para. 48), we reprint that section of the Declaration below:

- III - Lawyers

I. Definitions

3.01: In this chapter:

- a) "lawyer" means a person qualified and authorized to practice before the courts and to advise and represent his clients in legal matters;
- b) "Bar Association" means the recognized professional association to which lawyers within a given jurisdiction belong.

II. General Principles

- 3.02: The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.
- 3.03: There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
- 3.04: All persons shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights.

III. Legal Education and Entry into the Legal Profession

- 3.05: Legal education shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.
- 3.06: Legal education shall be designed to promote, in the public interest, not only technical competence, but an awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.
- 3.07: Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.
- 3.08: Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

IV. Education of the Public Concerning the Law

3.09: It shall be the responsibility of lawyers to educate members of the public about the principles of the Rule of Law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.

V. Rights and Duties of Lawyers

3.10: The duties of a lawyer towards his client include:

- a) advising the client as to his legal rights and obligations;
- b) taking legal action to protect him and his interest; and, where required,
- c) representing him before courts, tribunals or administrative authorities.

3.11: The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

3.12: Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability. Consequently, the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

3.13: No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

3.14: No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.

3.15: It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or

continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

- 3.16: If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.
- 3.17: Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearances before a court, tribunal or other legal or administrative authority.
- 3.18: The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.
- 3.19: Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including:
- a) absolute confidentiality of the lawyer-client relationship;
 - b) the right to travel and to consult with their clients freely both within their own country and abroad;
 - c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;
 - d) the right to accept or refuse a client or a brief.
- 3.20: Lawyers shall enjoy freedom of belief, expression, association and assembly;
and in particular they shall have the right to:
- a) take part in public discussion of matters concerning the law and the administration of justice;
 - b) join or form freely local, national and international organizations;
 - c) propose and recommend well considered law reforms in the public interest and inform the public about such matters; and
 - d) take full and active part in the political, social and cultural life of their country.

3.21: Rules and regulations governing the fees and remuneration of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

VI. Legal Services for the Poor

3.22: It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

3.23: Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

3.24: Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- the direction of such programmes or organizations being entrusted to an independent board composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment.

VII. The Bar Association

3.25: There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.

- 3.26: In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar association.

VIII. Functions of the Bar Association

- 3.27: The functions of a Bar association in ensuring the independence of the legal profession shall be *inter alia*:
- a) to promote and uphold the cause of justice, without fear or favour;
 - b) to maintain the honour, dignity integrity, competence, ethics, standards of conduct and discipline of the profession;
 - c) to defend the rôle of lawyers in society and preserve the independence of the profession;
 - d) to protect and defend the dignity and independence of the judiciary;
 - e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;
 - f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper procedures in all matters;
 - g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
 - h) to promote a high standard of legal education as a prerequisite for entry into the profession;
 - i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
 - j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
 - k) to affiliate with and participate in the activities of international organizations of lawyers.
- 3.28: Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

- 3.29: To enable the Bar association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice of
- i) any search of his person or property,
 - ii) any seizure of documents in his possession, and
 - iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer.

In such cases, the Bar association shall be entitled to be represented by its president or nominee, to follow the proceedings and in particular to ensure that professional secrecy is safeguarded.

IX. Disciplinary Proceedings

- 3.30: The Bar association shall freely establish and enforce in accordance with the law a code of professional conduct of lawyers.
- 3.31: The Bar association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar association with a view to its initiating disciplinary proceedings.
- 3.32: Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar association.
- 3.33: An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.
- 3.34: Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

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