



# **The Independence of Judges and Lawyers in PAKISTAN**

Report of a Seminar 9 - 10 November 1989  
held at Lahore, Pakistan

Convened by the

Centre for the Independence of Judges and Lawyers  
International Commission of Jurists  
Ministry of Law & Justice, Pakistan

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of Judges and Lawyers  
in  
PAKISTAN**

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**Centre for the Independence  
of Judges and Lawyers  
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Ministry of Law & Justice, Pakistan**

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## **PREFACE**

**BY**

**REED BRODY**  
Director, CIJL

**Fundamental human rights and liberties can only be preserved in a society where the legal profession and the judiciary enjoy freedom from political interference and pressure. As the 1982 All-Pakistan Bar Councils Conference declared:**

**"A strong and independent judiciary is the ultimate arbiter and guarantor of civil rights and civil liberties, and all attempts to stifle the functions and powers of the judiciary are against the vital interest of Pakistan."**

**In recognition of this precept, the International Commission of Jurists in 1978 created a Centre for the Independence of Judges and Lawyers. The CIJL works to:**

- promote world-wide the basic need for an independent judiciary and legal profession; and**
- organise support for judges and lawyers who are being harassed or persecuted.**

In pursuing these goals, the CIJL intervenes with governments in cases of harassment or persecution and works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary endorsed in 1985 by the UN General Assembly. We are now working with the UN on similar principles on the role of lawyers.

We recognise the importance of moving forward at the local level to turn these principles from mere declarations into living reality. To this end, we have begun a series of regional and national seminars in which government officials, judges, lawyers, academics and human rights activists meet to examine the obstacles faced by the judiciary and legal profession and to discuss means of overcoming those obstacles. In 1987, a South Asia regional seminar was held in Kathmandu at which important conclusions and recommendations were adopted to further the independence of the judiciary and the legal profession in the region. It was also agreed to undertake national follow-up seminars.

We were thus very pleased that the Ministry of Law and Justice of Pakistan and the Human Rights Commission of Pakistan (HRCP) agreed to join us in organising a national seminar on the Independence of Judges and Lawyers in Pakistan on 9 and 10 November, 1989.

We were particularly happy to be able again to give support to the Pakistan bar. The lawyers of Pakistan, through their Bar Associations and Bar Councils, displayed extraordinary courage during the Martial Law period, boycotting the courts and organising mass demonstrations in the face of Government retaliation. At one point, over 300 lawyers were incarcerated for their efforts to restore the Rule of Law. I am pleased to say that the Centre for the Independence of Judges and Lawyers stood with

Pakistan's lawyers during those difficult times, organising international campaigns on their behalf.

This seminar was opened by Syed Iftikhar Gilani, Minister for Law and Justice. The Minister pointed to an

independent judiciary as the best guarantee for the rule of law, which he described as the corner-stone of a civilized society. He also highlighted the importance which Islam has always placed on fair and independent judges. The Minister announced that the government was earmarking rupees 35 million for carrying out improvements in the working conditions in the lower courts. He also underlined the duty of the bar to act as a watchdog for the administration of justice.

After a welcome from Asma Jahangir, Secretary of the HRCP and an introduction to the seminar by the Director of the CIJL, Chief Justice (Retd) Jules Deschenes of Quebec, a member of the CIJL Advisory Board, delivered a keynote address on "The Independence of the Judiciary - an International Perspective.

In plenary session, the seminar then heard presentations on

- The Independence of the Judiciary, by Justice Ajmal Mian (Pakistan);
- The Role of the Bar, by Param Kumaraswamy (Malaysia) and Abad Hasan Minto ( Pakistan ) ;
- Distributive Justice, by Neelan Tiruchelvam ( Sri Lanka) and Asma Jahangir (Pakistan) and
- Judicial Implementation of Human Rights Norms, by Jeremy McBride ( United Kingdom ) and Makhdoom Ali Khan ( Pakistan).

The participants then formed working groups on the four topics and developed conclusions and recommendations which were reviewed and adopted in a final plenary. Among these was a call for the repeal of surviving martial law enactments which curtail the independence of the judiciary.

The meeting received front-page coverage in all the national newspapers, many of which printed the conclusions and



recommendations. The Pakistan Times serialised the papers of Abid Hasan Minto and Makhdoom Ali Khan. The national television gave extensive coverage as well, on both evening news and in a 25 minute special programme.

This report contains the edited presentation to the seminar and the conclusions and recommendations, together with the United Nations Basic Principles on the Independence of the Judiciary and the Bangalore Principles on the Judicial incorporation of human rights norms.

We are most grateful to the Ministry of Law and Justice of Pakistan for their co-sponsorship of the seminar and to the Minister, Syed Iftikhar Gilani, for opening the meeting. We give our particular thanks to Asma Jahangir of the HRCP who, together with her small team, worked tirelessly and efficiently to ensure that the seminar would be a success. We are again indebted to the Swedish International Development Authority for its generous support. We are also grateful to the Centre for Human Rights of the United Nations which collaborated in the seminar by sponsoring the participation of one of the world's foremost proponents of judicial independence, Justice Jules Deschenes of Quebec.

**JUDICIAL INDEPENDENCE:**  
**AN INTERNATIONAL PERSPECTIVE**

KEYNOTE ADDRESS DELIVERED BY  
**THE HONOURABLE JULES DESCHENES, Q.C., LL.D.**

Former Chief Justice of the Superior Court of Quebec,  
President-elect of the Royal Society of Canada,  
Chairman of the Board of the Canadian Human Rights Foundation

**AT A SEMINAR HELD AT LAHORE, PAKISTAN**

Under the auspices of

Centre for the Independence of Judges and Lawyers, International  
Commission of Jurists, Ministry for Law and Justice of Pakistan

In Collaboration with

**UNITED NATIONS CENTRE FOR HUMAN RIGHTS**

**9 - 10 NOVEMBER, 1989.**

Not many years ago I had the occasion of meeting a Judge from Sierra Leone. A man in his early fifties, he gave an immediate and lasting impression of soberness and calmness, illuminated by an occasional burst of witty laughter. Yet, it was with tears in his eyes that he recounted an experience which he had lived some time earlier. He happened to be working in his chambers when a group of men in uniform noisily invaded the building, pushed open the door of his colleague's office, forcibly took his brother judge away feet first and carried him outside. That judge was never heard from afterwards. People saw a link between the kidnapping and some judgments rendered lately by the judge in favour of the opposition to the government.

Such an incident, multiplied so many times too often, goes a long way to explain why we are meeting here today. Not, of course, to discuss the pros and cons of the independence of justice: We are all converted to the idea; but rather to examine the ways through which that independence can be best established and secured. One of those ways, conceivably the most important one, lies in the growing international support which the concept has been attracting over the recent past. Indeed the United Nations has now kept the matter under more and more active consideration for a decade; those are the efforts which I wish to consider with you.

Some people, it is true, feel that this is an exercise in futility, inasmuch as the independence of justice must drive its roots deeply into the national soil where all efforts should be primarily, if not solely, directed.

There is admittedly a certain degree of truth in such a position. Essentially, justice is administered at a national, regional, or local level and it is at those levels that, at first, its independence must be organized, seen and respected.

Now, examples of violations of this independence abound. Less than three months ago, the C.I.J.L. rendered public a report edited by its Director, Mr. Reed Brody, which showed that, between January 1988 and June 1988 --- a mere eighteen months -- no less than 144 judges and lawyers in thirty-one countries had been killed,

detained, threatened or otherwise harassed in the discharge of their duties.

The C.I.J.L. study made no distinction between judges and lawyers; and rightly so. An independent bar is essential to the functioning of independent courts. In the system which we have inherited from the British tradition, it is at the Bar that the future judge will learn the price of liberty. It is hand in hand with the members of the bar that the members of the bench will defend and vindicate the rights and freedoms which are engraved in the heart of every man and woman.

Today, however, I will focus on the independence of judges, leaving to other distinguished guests the care of dealing with the independence of lawyers. The violation of judicial independence may take a cynical, if not even somewhat comical, aspect. Take what happened in Uruguay in 1967 when a law overtly abolished judicial independence on the pretext that the separation of powers was "a thesis incorrectly attributed to Montesquieu".

The 1989 C.I.J.L. report cited instances coming from thirty-one countries. It is significant, and extremely saddening, that those instances occurred all over the world: nine in Latin America, eight in Africa, eight in Asia, three in the Near East and three in Europe including the United Kingdom, in connection with the murder in cold blood of a solicitor in Northern Ireland last February.

All those instances would be worthy of being recalled case by case. Suffice it to remember now how judicial independence was violated in Malaysia in 1987, when the law was amended so as to deny any right of judicial review to persons arrested by virtue of the Internal Security Act.

The situation even turned for the worse as a result of the unbelievable dismissal of the Lord Chief Justice Salleh Abbas and two of his colleagues, at the request of the Prime Minister, following certain decisions which had gone against the party in

power. An ad hoc tribunal found that the Chief Justice was guilty of misbehaviour for having said:

"The judiciary is the weakest of the three branches of government.

It has no say in the allocation of funds -- not even in determining the number of staff needed for the running of its own system".

This is a finding which I had more than once the opportunity of expressing in Canada, orally and in writing; I would have been astonished that anyone should find it an offence against the rule of good behaviour.

Judicial independence was again violated on 11 May, 1988 in El Salvador when Judge J.A. Serrano was murdered at the doorstep of his residence, a few days before rendering public his decision on petition for amnesty in favour of members of the military forces who were implicated in a kidnapping - for -profit case.

This independence was violated in Guatemala on 20 July, 1988 when Judge J.A.T. Duque was kidnapped, one week after having ordered the preventive detention of sixteen police officers involved in charges of kidnappings and murders.

That independence was violated last year in Fiji, under an act which provides for a period of administrative detention of up to two years under ministerial fiat, without any right of judicial review.

That independence was violated last year also in Kenya, where the President has been authorized, by a constitutional amendment, to remove judges at his own discretion .

But probably the most severe blow to judicial independence has been dealt in Colombia. Already back in 1985, in the course of a battle between the guerillas and the army for the

control of the court-house in Bogota, at least 95 persons, including 17 judges, had been killed. Now according to the C.I.J.L. report, "In the past four years (in Colombia), two hundred and ten judges and judicial employees have reportedly been killed (....). On 15 January, 1989 (...) twelve members of a judicial commission, including two judges, were killed in an ambush (...)."

This sinister picture would be difficult to believe, were it not for the unimpeachable character of the source of the information as well as the fact that, through the media, it has become public knowledge worldwide.

Luckily enough, neither this country nor Canada, nor India for that matter, appear on the ugly list collected by the C.I.J.L. We do not kill or kidnap our judges although, most regrettably, a retired judge, against whom two attempts had previously failed, was murdered in Srinagar city (India) only five days ago.

But it has happened in your own Pakistan experience that judicial independence was threatened through other, and not always very subtle means: transfer of a judge without his consent, forced retirement, imposition of a new oath of allegiance, promotion at pleasure, appointment of ad hoc judges. It is not necessary to put names on those examples. But let me quote at greater length an instance which occurred in my own country a year ago.

For quite some time there had been discussions aiming at the unification of three courts coming within the jurisdiction of the province of Quebec, namely: the provincial court, the court of sessions of the peace and the youth court. The initiative appeared advantageous and it was finally brought to fruition on 17 June, 1988, when the three courts were consolidated into one under the name of the Court of Quebec.

Unfortunately, the realization was marred at the level of the chief judges, their deputies and associates. In spite of the adverse submissions of the Bar, S.154 of the act was passed,

providing that "The terms of office (of the various chief judges) shall end on the day of the entry into force of the act". Thus the legislature decided unilaterally to oust the chief judges in the course of their mandate and gave to the executive the power to appoint replacements. In actual fact, one of the three chief judges was re-appointed as the chief judge of the new court, but the other two were purely and simply thrown out of office with a one-year sabbatical as a consolation prize !

This is an extremely dangerous precedent. Under the guise of a reorganization of the judicial system, both the executive and the legislative branches of government have assumed the right to interfere with the independent administration of the courts, to dismiss chief judges legally in office and to appoint new judicial officers in their stead. The procedure provided for by law for the removal of judges for cause has been side-stepped. In my personal view, the constitutional provisions designed to underpin the independence of justice in Canada have been flouted. Who can now be assured that, following an eventual change of Government, the new legislature would not intervene again to dismiss the recently-appointed chief magistrates and appoint new ones more to its liking?

Thus we see that nobody is immune from the dangers of the erosion of justice; and, be it in one part of the world or another, in one form or another, some attempt against judicial independence is nearly always raising its unseemly head. So, worthy as it obviously is, the battle for that independence at the national level can never be totally won, unless the effort be bolstered by a strong international support. The search for such a support is, therefore, not an exercise in futility.

Earlier this year, in Caracas, former Chief Justice Bhagwati of India has commented --- poetically, I am tempted to say -- that "independence, of course, is a quality which must come from within the heart". Current doctrine however holds -- and Chief Justice Bhagwati agrees with it -- that judicial independence comprises two equally important facets: the personal independence of the judges and the collective independence of the judiciary. The

latter cannot exist without the former, but the former is re-inforced by the latter. They are the two equally important pillars of the edifice of justice and both must be sought after with equal eagerness. Indeed it is because so many people have reached that conclusion that the effort, at the level of the United Nations, could attain in recent years such telling proportions. This effort has followed two separate, yet converging streams and, in order properly to assess the current situation, it will be useful to survey each of those streams individually. I propose to call them Stream I, which started in Geneva, and Stream II, which started in Caracas.

Stream I goes back to 1980. The United Nations sub-commission on prevention of discrimination and protection of minorities entrusted Dr. L.M. Singhvi, then president of the Bar of the Supreme Court of India, with a study "on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers".

In a parallel fashion, however, many international organizations were tackling the difficult subject; between 1980 and 1983, no less than nine conferences were held in Oslo, Malta, Geneva, Siracusa, Lisbon, Jerusalem, New Delhi, Noto and Tokyo. But the more conferences there were, the more it appeared that a common forum must be found where a world consensus could be reached. In the spring of 1982 I formed the project of setting up that forum.

It eventually led to the First World Conference on the independence of justice which sat in Montreal in the first week of June, 1983. There were then in attendance representatives of 24 international organizations based in all parts of the world: in Europe, in North, Central and South America, in the Mid-East, in Asia and in Africa. To give but one example of the interest of the meeting, it was the first time in history that the judges of the four international courts sat together to discuss the status of international judges.

During four days the conference considered a Draft Declaration which had been patterned after the United Nations



mandate given to Dr. Singhvi. It consisted of five chapters dealing respectively with international judges, national judges, lawyers, jurors and assessors. By some sort of a miracle, all difficulties could find a solution and, when I put the matter to the final and critical vote, the Draft as amended was approved unanimously. This was quite a moving moment: The full audience rose to their feet, applauding and cheering. They were realizing that, for the first time, all parts of the world had agreed on a set of principles acceptable to all civilisations and conducive to the sound establishment of an independent system of justice.

At the closing dinner I enjoyed both the honour and the pleasure of delivering into the hands of Dr. Singhvi the text of the "Universal Declaration on the Independence of Justice" which, barely three hours earlier, had been adopted by the conference. Dr. Singhvi undertook to take the matter to the United Nations.

It so happened that I was then elected to the sub-commission on the prevention of discrimination and protection of minorities. Thus, chance made me a member of the very body to which Dr. Singhvi was expected to report.

He did indeed report finally in 1985. He then proposed the adoption of a declaration patterned after that of Montreal.

However, in 1987 the Secretary-General of the United Nations was requested by the sub-commission to send Dr. Singhvi's text for comments to all governments. Nineteen (19) countries responded and, as a result, Dr. Singhvi brought to this draft several amendments of substance. Overall the final text which he submitted to the sub-commission in the summer of 1988 differed from the Montreal Declaration in at least three material aspects:

1. The position of civilians vis-a-vis military tribunals in times of emergency is weakened;
2. The immunity of judges from prosecution is restricted;

3. The bar against judges taking an active part in political activities is dropped.

The watering down of those provisions is extremely regrettable.

However that may be, the Singhvi draft has an overall value which should not be underestimated. During the course of the debate on the question in the sub-commission on August 24th, 1988, a couple of members suggested amendments, an equal number wanted still to defer further the consideration of the draft, but a large majority expressed their satisfaction as well as their desire for concrete and immediate action. Together with the other chapters dealing with lawyers, jurors and assessors, which I am not called upon to examine, Dr. Singhvi's suggestions with respect to judges were agreed to by the sub-commission which sent the Draft Declaration to the Commission on Human Rights on 1st September, 1988.

On March 6th of this year, the Human Rights Commission considered the draft declaration, congratulated the rapporteur and "invited Governments to take into account the principles set forth in the draft declaration in implementing the Basic Principles on the independence of the judiciary", which I will comment on in a moment. Then the commission sent the draft declaration back to the VIII United Nations Congress in 1990 for it to be taken into account when the congress would complete its work on the basic principles on the role of lawyers.

Such was the meandering course followed by Stream I in Geneva.

Stream II began in Caracas, at the VIth United Nations Congress on the prevention of crime and the treatment of offenders. The congress called on the Vienna Committee on crime prevention and control to include among its priorities the elaboration of guidelines relating to the independence of judges.

The Vienna Committee in turn asked me to prepare a draft of such guidelines. The Montreal conference had been held shortly before. No one will therefore be surprised that my draft followed very closely, with only a few necessary adaptations, the text of the Montreal Declaration.

This draft was discussed in Vienna (March 1984) and Varenna (September 1984), finally to appear on the agenda of the VII, United Nations Congress in Milano. On 6th September, 1985 the Congress adopted the "United Nations Basic Principles on the independence of the judiciary". Without being encumbered by the delays which have plagued the progress of the Singhvi report, the basic principles were immediately endorsed by the United Nations General Assembly (29 November, 1985) which invited Governments "to respect them and to take them into account within the framework of their national legislation and practice".

This would complete the survey of the course followed in the United Nations by Stream No. II, were it not for the fact that the drafting of procedures for the implementation of the basic principles was later undertaken by the United Nations Social Defence Research Institute (based in Rome) jointly with the United Nations Committee on crime prevention and control (based in Vienna), in cooperation with the International Association of Judges (also based in Rome). This effort resulted in the adoption by the Vienna Committee, on 31 August, 1988, of "Procedures for the effective implementation of the Basic Principles of the Independence of the Judiciary".

This technical document, which also fills a few holes in the basic principles has in turn been approved by ECOSOC -- the Economic and Social Council of the United Nations -- in New York on 24 May, 1989.

Now, can those two international instruments -- the Basic Principles and the Draft Declaration -- help bolster the independence of the judiciary in the world and, especially, in this country? -- I firmly think that they can, first as a matter of principle, second as a matter of practicality.

Let us first consider them at the level of principle. The basic principles possess the immense advantage of being the first and only international instrument on the subject to have been adopted by governments and approved by a unanimous vote in the United Nations General Assembly.

The first of those Basic Principles states:

"The independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country" .

Then the principles go on to deal with impartiality and fairness, freedom of expression and association, selection and training, tenure, immunity and discipline. Add to those provisions the recent "Procedures for the effective implementation of the Basic Principles" which call for the widest dissemination of the basic principles and especially impose, beginning in 1988, a quinquennial reporting obligation on the part of the member states on "the progress achieved in the implementation of the basic principles". Add equally that the General Assembly has recommended to all governments to respect those basic principles and to take them into account within the framework of their national legislation and practice.

Obviously the importance of the basic principles cannot be overestimated. Indeed, the Vienna Committee is currently carrying a world survey on the implementation of the basic principles, the results of which will be placed before the VIII, U.N. Congress in Havana next August.

The draft declaration has not yet reached that degree of approval by the U.N. General Assembly. Nevertheless, it has gone successfully through the Human Rights Commission and, at the latter's request last March, must be taken into account by the VIIIth U.N. Congress next year. Now the draft declaration deals with the question of judicial independence in a much more detailed fashion. Indeed, in addition to the ground already covered by the

basic principles, it expands on independence from legislative and executive powers, posting, promotion and transfer, disqualifications, discipline, court administration, among other matters.

It is clear that, at the level of principle the two instruments which I have been discussing constitute a world-wide recognition of judicial independence and should go a long way toward establishing it on a firm footing everywhere the U.N.'s influence is exerted.

That they should furthermore be of a current interest here in Pakistan appears from a recent news item in 'The Pakistan Times'. We have thus learned that, three days ago, the Prime Minister has held a meeting with the President in Islamabad where, according to the newspaper, "another important matter reportedly discussed in the meeting was the issue of appointment of judges". A reference to the international instruments might not be out of order.

However below the level of principle, must also be considered the level of practical realities; these are no less important to the solid anchoring of judicial independence. The judiciary must conquer its independence in its own administration and in that of the courts over which its members preside. This in itself is an extremely vast topic. On that aspect, I would like to call on the Canadian experience.

In 1981, while I was Chief Justice of the Superior Court of Quebec, I was commissioned by the Canadian Judicial Council, the Canadian Judges Conference and the Canadian Institute for the Administration of Justice to carry on, in collaboration with Professor Carl Baar, a study on the independent judicial administration of the courts in Canada. On 14 September, 1981 we produced a report entitled "Maitres chez eux -- masters in their own house".

In dealing with court administration, the report foresaw three stages of development in matters of budget, personnel and general administrative policies:

First, consultation between executive and judiciary.

Second, decision-sharing where, thanks to a gradual shift of power, the judiciary is not only consulted, but also share with the executive the decisions relevant to court administration.

Third, independence where the judiciary has become master in its own house. The report goes into great details concerning the legislative, executive and judicial aspects of the system.

It is interesting to recall the decisions which the Canadian Judicial Council reached in this connection in September, 1982:

#### "STAGE (I)

That the principle of consultation with the judiciary on the administration of the courts, set forth in recommendations 91-106, be approved and that each province establish the appropriate means within the province for implementation of the consultative process.

#### STAGE (I)

That the principle of decision-sharing between the judiciary and the executive in matters relating to court administration be approved and that the specific recommendations set forth in recommendations 108-123 be considered as possible means of implementing the process of decision-sharing.

#### STAGE (III)

The council is not prepared at this time to approve the third stage, described in the report as "independence", but decided to monitor the developments arising in this field from the implementation of

the approved recommendations of this report, with the possibility of further action in the future.

So the first two stages were approved for the immediate present, together with the 32 recommendations promoting them. The third stage was not disapproved, but reserved for "further action in the future".

The ball was in the judge's camp. The results, I must confess, have been disappointing. The Canadian judiciary have shown no earnestness to claim their administrative independence. Not many chief justices, very few indeed, have taken steps to put in practice the resolutions of the Canadian Judicial Council. Few and far between are the places where the recommended second stage: Decision-sharing, has been achieved. Even the first stage: consultation, is not always and everywhere put into practice

This -- and I say it blushing -- must be contrasted with the situation which the Chief Justice of the High Court of Lahore was describing to me yesterday: here the court prepares its own estimates of the expenses associated with its needs as it perceives them. This is an excellent first step -- absent, alas! in Canada -- which allows the court to assert its autonomy and opens the door to positive discussions with the executive.

But the Canadian study had been conducted before the approval by the U.N. of the two international instruments on judicial independence. Those instruments can also, at the level of practical realities, give a powerful impetus to the judiciary's necessary search for administrative autonomy.

Listen to basic principle number seven: "It is the duty of each member state to provide adequate resources to enable the judiciary to properly perform its functions."

This is the bare principle, which article 33 of the Draft Declaration re-affirms and calls "A priority of the highest order for the State". But listen now to articles 32 and 34 of the Draft Declaration:

**"COURT ADMINISTRATION**

32. The main responsibility for court administration including supervision and disciplinary control of administration, personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

34. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the need and requirements of judicial administration."

Nothing else needs to be added at the level of practical realities, the goal is also clear.

What should be expected now, both in principle and in fact, is action.

We have in hand two international instruments: the basic principles on the independence of the judiciary, approved by the U.N. General Assembly and recommended to all governments; the Universal Declaration on the independence of justice, welcomed by the Human Rights Commission and recommended to the next U.N. Congress.

Furthermore, at its last session in August of this year, the U.N. sub-commission on the prevention of discrimination and protection of minorities, after having been seized of the C.I.J.L. report to which I have referred earlier, declared itself "disturbed" and called on its French expert, magistrate Louis Joinet, to prepare a working paper on means by which the sub-commission "could



assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers".

Ten years of effort are therefore beginning to bear fruit. All of this, however, will be of little value, unless one keeps in mind the statement made in Kathmandu two years ago by Mr. Justice Dorab Patel, formerly a member of the Supreme Court of this country: "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 recognizes human rights" (I.C.J. Seminar, 1-5 September, 1987, P.19).

Fortunately, after having been so valiantly defended by the bar during the military rule, the concept of, and respect for human rights have made a new start in this country: The mere holding of this conference is evidence of this healthy situation. There remain, nevertheless, impediments which, with all due respect, must be eradicated and uncertainties which must be straightened up. Let me refer more particularly, if I may, to the provisions dealing, for instance, with the transfer of judges, the insecurity of their tenure, the gradual separation of subordinate courts from executive, the curtailment of the inherent power of the court to review the validity of amendments to the Constitution, and the existence of separate Shari'at courts.

Therefore, on the strength of the unequivocal international support, which I have described, it now belongs to the judiciary and to the bar, taking into account domestic circumstances, to enter into a positive dialogue with the political authorities in order to achieve the constitutional and administrative independence to which the judiciary is by nature entitled. I wish you luck in this worthy enterprise.

**SEMINAR ON  
"THE INDEPENDENCE OF JUDGES AND LAWYERS  
IN PAKISTAN"  
LAHORE, 9 -10 NOVEMBER, 1989.**

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**OPENING ADDRESS BY SYED IFTIKHAR GILANI,  
MINISTER FOR LAW AND JUSTICE.**

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1. It is indeed a great privilege for me to inaugurate this Seminar and to welcome all the participants. We are particularly grateful to Mr. Deschenes, former justice of the Superior Court of Quebec, Mr. Reed Brody, Director of the Centre for the Independence of Judges and Lawyers, and the foreign participants who have come here especially for this occasion. We are also indebted to the International Commission of Jurists and the Human Rights Commission of Pakistan for co-sponsoring the Seminar. We hope that the deliberations of this Seminar will help in finding new ways to strengthen the Rule of Law and the independence of the Judiciary.

2. In Pakistan an independent judiciary, with the Supreme Court at its apex, is the guardian of the country's Constitution, the custodian of the Rule of Law, a guarantor of freedom, human rights, and liberties and protector of the weak from the strong. For the experts gathered here these are not merely abstract words because the Rule of Law is the corner-stone of any civilized society;

it cannot be guaranteed without ensuring independence of the Judiciary. In a modern welfare state, only an independent judiciary can protect the rights of citizens against arbitrary actions of the Government. In the final analysis it is the Rule of Law which protects freedom --- freedom not only from arbitrary use of authority, but also from want, poverty and destitution.

3. Although the concept of the Rule of Law, guaranteed by an independent judiciary, is central to all human societies, it has been given a unique status in Islamic Society. Respect for the Rule of Law and the inviolability of justice are of paramount importance in Islam. Islam describes justice as one of the attributes of Allah and ordains Believers to adjudicate disputes among themselves with justice and without transgressing the limits ordained by Allah. The Holy Prophet ( Peace be upon him ) set a personal example of dispensing justice of the highest order tempered with mercy where it was due and forgiveness where it was warranted. It was Islam which for the first time, during the second Caliphate, separated the judiciary from the executive and laid down the traditions of independence, integrity and impartiality of judges. In a letter written by one of the early Caliphs of Islam, Hazrat Ali, to his Governor in Egypt, he said:

"Select for your Chief Judge one from the people who is by far the best among them, one who is not obsessed with domestic worries, one who can not be intimidated, one who will not decide before knowing full facts, one who will be strictly impartial in his decisions, one whom flattery can not mislead or one who does not exult over his position".

4. It is my conviction that in order to embody the noblest concepts of Justice and the Rule of Law, the judiciary must not only be completely independent but also armed with necessary authority. It must have the powers, as it had in the early days of Islam, to question and punish even the ruler of the day if the ruler was found to deviate from the right and judicious path. As the custodian of an individual's life, honour, liberty and rights, the judiciary personifies the conscience of a society.

5. The importance of a highly trained, independent, incorruptible and fearless judiciary in a poor third world country cannot be over emphasized. But when that poor third world country is also a federation like Pakistan the role of the judiciary becomes even more important because it has the power to declare laws and executive actions void and violating the Constitution.

6. Some people think that a great danger to the independence of the judiciary is the insecurity of tenure of judges and the attendant worries about a decent standard of living. Our Constitution provides a reasonable sense of security of tenure to judges by laying down the retirement age and that the holding of judicial office is contingent upon right conduct and not executive pleasures.

7. But a lot depends upon the judges themselves in maintaining the high standard of independence and integrity. Muslim history is replete with instances to prove this. Imam Abu Hanifa continually refused the office of Chief Justice because he felt that his integrity was likely to be compromised. Imam Ahmed Bin Hanbal refused to compromise his principles and integrity to appease a Caliph. He was imprisoned and publicly flogged by the Abbasid Caliph Al-Mamoon, but he did not relent. In Pakistan we have the example of the late Mr. Justice M.R.Kayani, who happened to belong to my home district Kohat in the N.W.F.P. He raised his voice against Ayub Khan's Martial Law and was consequently punished when the order, already passed, for his elevation to the Supreme Court, was rescinded. In foregoing his right of promotion, Justice Kayani demonstrated that democracy, Human Rights, the Rule of Law, and an impartial, independent and incorruptible judiciary are not given as gifts or charity to a nation. You have to struggle, suffer and make sacrifices to achieve these great ideals.

### ABROGATION OF CONSTITUTIONS

8. Our people have suffered the might of dictatorship which suppressed the Rule of Law. We have seen how Constitutions in this country were abrogated, suspended and held in abeyance and

the powers of judicial review withdrawn from the Supreme Courts. We have seen how the judiciary was maimed by successive impositions of Martial Law and suspension of human rights. I am indeed ashamed of the high mortality rate of our Constitutions. Constitutional governance was first dispensed with in Pakistan in 1958. Another Constitution was wantonly suppressed in 1977 and ridiculed as a mere 15 page document which could be torn apart at any time.

9. Some people think that Superior Courts could have reacted strongly in Constitutional and Human Rights cases against dictators, whilst others feel that the courts cannot act in isolation. However, the abrogation of a country's Constitution is an occasion when silence speaks, and when public opinion does not condemn the usurper, the Supreme Court has to invent the "doctrine of necessity" to justify the successful military coup.

#### THE DAWN OF DEMOCRACY

10. The new democratic Government is committed to help build a strong and independent judiciary which, together with strong public opinion and an independent body of legal practitioners, can protect the Constitution and defend the citizen against violations of his or her Human Rights. The dawn of democracy in Pakistan in December, 1988, after a decade of dictatorial rule, also coincided with the 40th Anniversary of the adoption of the Universal Declaration of Human Rights by the U.N. General Assembly. We will endeavour that these rights are never usurped again.

11. We will strive to uphold the basic human rights for all and guarantee civil liberties. We will seek to repeal all laws which are discriminatory against some sections of the society, particularly women. We will uphold the cause of an independent and strong judiciary and an equally independent, strong and responsible press. That is why the press has been completely freed of all shackles.

12. We will also endeavour to improve the image of our lower courts. As a first step we have earmarked Rs.35 million for carrying

out improvements in the working conditions in the Lower Courts of all the Provinces. A matching grant will also be provided by the Provincial Governments for this purpose.

13. Let me also add a few words about the role of lawyers. It is the duty of the Bar to act as the watch-dog of the administration of justice. By upholding the Rule of Law, lawyers can play a decisive role in determining the ultimate body politics of the State. Lawyers have played a key role in our independence struggle. They were also in the forefront in the Movement for Restoration of democracy in Pakistan in 1983. One eminent crusader of civil liberties and fighter for the rights of the oppressed, Ms. Asma Jahangir, is sitting here. She also has rendered valuable assistance in the holding of this Seminar. We deeply appreciate her contributions and the role played by many others like her in giving meaning and substance to Human Rights.

14. Members of the Bar, more than anybody else, ought to remember that constant vigilance is the price we have to pay for guarding our freedom and our rights. That is how we can protect the Constitution from being torn apart as a mere 15-page document, and that is how we can defend democracy and ultimately the country, because in the final analysis the survival of the country depends upon democracy.

## INDEPENDENCE OF THE JUDICIARY

by

Chief Justice Ajmal Mian

The trichotomy of State power - in other words, the separation of the executive, legislative and judicial functions - is a relatively modern concept. In earlier civilisations, the tribal chieftain, monarch or ruler combined in himself all three powers. The judicial function was separated from the executive function by the Holy Prophet (peace be upon him) when he appointed a Qazi for each province. This separation became more effective during the Second Caliphate, that of Hazrat Umar, who appointed Qazis that were not under the Governor's control.

2. This separation of the judiciary was effected in pursuit of justice, which is the foundation of Islam. The concept of justice in Islam is different from the concept of remedial justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what may be called "absolute justice" or "absolute fairness".

3. Islam postulates two essential features of justice. Firstly, it is to be done not only in accordance with law but also in such a way that it results in complete fairness. Secondly, justice is not the concern of the judge alone but is the collective responsibility of the

community as a whole. Every member of the community is involved in the process of dispensing justice. If the commitment of an injustice is within a person's knowledge, he cannot stand apart as a silent spectator even if he is not personally responsible for the act of injustice. The Holy Prophet (peace be upon him) and the four Caliphs, by their acts and deeds demonstrated how justice was to be administered independently and impartially. A few instances will suffice.

- (i) The Holy Prophet (peace be upon him) appeared himself personally in several cases brought against him to establish that no one was above the law. He permitted a complainant to nudge him when he stated that the Holy Prophet did the same to him on one occasion.
- (ii) Jablah bin Al-Aiham was the ruler of a State in Syria. He embraced Islam. Once when he was performing Haj, a part of his gown was trampled over by a poor Arab (beduin); Jablah gave him a slap. The beduin retorted with a slap. The infuriated Jablah went to Caliph Umer to complain about it, but was told that he had already received justice. Thereupon, Jablah said that the beduin would have been hanged had he been in his country. The Caliph's reply was that a pauper and a prince were equal in Islam and that the beduin did not do anything wrong.
- (iii) Once Hazrat Umer, second Caliph, appeared in person as a defendant in compliance of a summons from a Court and insisted that the two litigants be given equal place and position before the Qadi. So also Hazrat Ali, the fourth Caliph, who refused to accept a better place than that accorded to a Jewish defendant. He lost the case before the Court as he was relying upon the evidence of an interested witness."

To a layman, independence of judiciary means that there should be no interference by the Government or the executive authorities and judges should be free to arrive at their decisions



regardless of the government's administrative policies or the political philosophy of the party in power. However, independence of the judiciary is not confined to independence from executive pressure or influence. It implies independence from all other pressures, considerations and prejudices.

In the developed countries, where democracy has fully blossomed and there are no political turmoils, there is always strong public opinion in support of independence of the judiciary, and it is easy for the judiciary to discharge its functions without any hindrance. However, in a country where the democratic process is not fully entrenched and is interrupted regularly by the imposition of Martial Laws or by other political turmoils, the work of the judiciary becomes very difficult, particularly when the required public opinion to control and contain the Martial Law is lacking. Thus, the judicial performance of a particular country must be viewed with reference to the situation obtaining in that country.

Pakistan's forty-two-year history has witnessed three periods of Martial Law lasting about 15 years and obstructing the working of the judiciary. Pakistan was established on 14th August, 1947, under the Indian Independence Act of 1947. Under this Act a Constituent Assembly was formed and was entrusted with the task of framing of a constitution. The Assembly was also to act as a legislative body. This Constituent Assembly adopted the "Objectives Resolution", containing the philosophy of the Islamic State of Pakistan and providing the basis for running the affairs of the country. It included, inter alia, the guarantee for the independence of the judiciary. Unfortunately, this Constituent Assembly was dissolved by the then Governor-General of Pakistan in 1953 before it could frame a Constitution. The erstwhile Chief Court of Sind, of which the Sind High Court is the successor, adjudicating upon a constitutional petition, filed by the Speaker of the dissolved Assembly, Moulvi Tameezuddin Khan, declared this act of the Governor-General as illegal and ordered the restoration of the dissolved Constituent Assembly. Had this judgment been maintained, Pakistan might have had a different political history. However, on appeal, the then Federal Court of Pakistan set aside

the judgement of the Sind Chief Court on a legal ground. To fill in the vacuum, the Federal Court, in a reference made to it by the Governor-General, advised that a new Assembly could be brought into existence on the basis of the legal device called "State necessity". It was this Assembly which framed the first Constitution of Pakistan in 1956. In 1958 the Governor-General was himself removed by Mr. Iskandar Mirza with the help of General Ayub Khan, the then Commander-in-Chief of the Pakistan Army, who then dethroned Iskandar Mirza on 27 October, 1958,

abrogated the Constitution and ruled the country under Martial Law until he promulgated, 1962 Constitution, which was framed by the Chief Martial Law Administrator's advisers and not by the representatives of the people. The 1962 Constitution provided for a presidential form of Government. It did not contain any provisions regarding fundamental rights, but provided for the common law remedies of writs. Then in March 1969, this Constitution was abrogated by General Yahya Khan, to whom Field Martial Muhammad Ayub Khan handed over power after he was unable to control public agitation. Since there was large scale public agitation, General Yahya Khan issued a Legal Framework Order providing, inter alia, for the framing of a new Constitution by the representatives of the people who were to be elected. In pursuance thereof, general elections were held in 1970 in which the erstwhile East Pakistan Awami League secured the majority of seats, whereas in West Pakistan, the Pakistan People's Party won the majority of seats. After the fall of Dacca in 1971, the remaining members of the West Pakistan National Assembly framed the interim Constitution of 1972 and then the permanent Constitution of 1973 (hereinafter referred to as the Constitution) . It included the above-mentioned "Objectives Resolution" as its preamble and provided for the enforcement of fundamental rights. Article 175 of the Constitution contemplated that the judiciary shall be separated progressively from the executive within 3 years. This period was extended by Constitution Fifth Amendment Act No. LXII of 1976 to 5 years and then to 14 years by President's Order No. 14 of 1985. The Constitution had hardly functioned for about four years when the third and longest Martial Law was imposed on 5th July, 1977 by the then Chief of Army Staff, General Zia-ul-Haq. It lasted till 31st December, 1985. In spite of the above constraints on the judiciary

in Pakistan, it has always made efforts to act independently and to dispense justice evenly. During the last Martial Law, the Supreme Court in the case of Begum Nusrat Bhutto (PLD 1977 SC 657) accorded recognition to the Martial Law, keeping in view the situation prevalent in the country. But it stated conditions, which included that the Superior Courts would continue to exercise their jurisdiction to the full extent under Article 199 of the Constitution and would be entitled to review the acts, actions and orders of the Martial Law authorities / Courts and that the elections would be held within the shortest possible time. The Chief Martial Law Administrator had promised to hold elections within 90 days and then within six months. The attempt of the Supreme Court in the above case to control and contain uncontrollable and uncontainable Martial Law failed when the Chief Martial Law Administrator, after having entrenched himself into power, first enacted Article 212-A of the Constitution in October, 1979, depriving the Superior Courts of their power to review the acts, actions, and orders of the Martial Law Authorities and Courts. The above amendment was challenged, inter alia, in the Sind High Court and the Balochistan High Court. The majority view of the former was that Article 212-A was competently enacted, whereas the view of the Balochistan High Court was that the above Article 212-A was ultra vires of the Doctrine of State necessity on the basis of which recognition was accorded to the Martial Law regime. The matter went before the Supreme Court but before it could have been adjudicated upon, Provisional Constitution Order 1981 (hereinafter referred to as the PCO) was issued by the Chief Martial Law Administrator on 24 March, 1981. Article 15 of the PCO debarred the Courts from entertaining any proceedings against the Martial Law Authorities and actions and orders of Military Courts.

In spite of this ouster of jurisdiction, the Superior Courts made efforts to grant relief. It will not be out of context to refer to a few instances.

- (i) In the case of Agha Zahiruddin Vs. Government of Sind, reported in PLD 1984 Karachi 30, the following two questions arose:-

- (a) Whether the detenus under the Martial Law Orders lodged in the civil prisons were entitled to the benefits of the Civil Jail Manual ?
- (b) Whether the writ jurisdiction of the High Court was available to the Martial Law detenus for the breach of the rules of the Jail Manual in spite of Article 15 of the PCO ?

The stand taken by the Provincial Government of Sind was that since the custodies of the detenus were with the Martial Law Authorities, the Court had no jurisdiction, because of Article 15 of the PCO. A Division Bench of the Sind High Court held that since there were no contrary rules framed by the Martial Law Authorities for regulating the custody of the detenus in the civil prisons, the jail manual was applicable and the detenus were entitled to file the constitutional petition, notwithstanding the bar of jurisdiction under Article 15 of the PCO. The writ was allowed and the jail authorities were directed to follow the Jail Manual.

- (ii) In the case of Muhammad Afzal Khan vs Karachi Development Authority and 6 others (PLD 1984 Kar. 114) a Division Bench of the Sind High Court attempted to claim jurisdiction in respect of actions purported to have been taken under a M.L.O. or M.L.R.:

"However, we are inclined to hold that the Courts still have jurisdiction to be satisfied, whether the impugned order or action purported to have been passed/taken under a M.L.O. or M.L.R. was passed/taken by the authority /person, prima facie clothed with the power, which he purported to exercise, e.g. an Officer neither connected with the administration of the Martial Law nor authorised to act under the relevant Martial Law Order/Regulation or by the Martial Law Authorities in terms of the relevant M.L.O./ M.L.R., cannot claim

immunity from scrutiny of his order by the Court on the ground that he purported to have passed the order under a M.L.O. or M.L.R."

- (iii) In the case of Abdul Hai vs. The Administrator, Hyderabad Municipal Corporation, Hyderabad, and another (PLD 1985 Kar. 319), a distinction was made by a Division Bench of the Sind High Court between an order passed by a Martial Law Authority and a delegatee of the Martial Law Authority:

"Though no objection was raised before us on the ground that the petitions were hit by the P.C.O. but we have examined this aspect. In our view, a distinction is to be drawn between an order passed by personnel of the Martial Law Authority and an order passed by a delegatee of the Martial Law Authority, i.e. civil functionary, which is otherwise amenable to writ jurisdiction. In the latter case if the impugned order before the High Court is admittedly beyond the scope of the relevant M.L.O. or M.L.R. , a civil functionary will be amenable to writ jurisdiction".

When Martial Law was lifted on 31st December, 1985, fundamental rights were restored, and the state of Emergency was also lifted. However, before lifting of Martial Law, the Parliament, which came into existence in March, 1985, passed the Eighth Amendment Act, which, *inter alia*, incorporated Article 270-A in the Constitution. It may be pertinent to reproduce clauses 2 & 3 of above Article, which read as follows :-

"270-A --- (1)-----

(2) All orders made, proceedings taken and acts done by any authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of July, 1977, and the date on which this Article comes into force, in exercise of the powers derived from any proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications,

rules, orders or bye-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever.

(3) All President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws in force immediately before the date on which this Article comes into force shall continue in force until altered, repealed or amended by competent authority.

**Explanation.** - In this clause, "competent authority" means,--

- (a) in respect of President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders and enactments, the appropriate Legislature; and
- (b) in respect of notification, rules, orders and bye-laws the authority in which the power to make, alter, repeal or amend the same vests under the law."

A perusal of the above quoted clauses of the newly incorporated Article in the Constitution indicates that an attempt was made to exclude the jurisdiction of the Superior Courts to examine the legality of, or to re-open past and closed transactions in relation to Martial Law acts, actions and orders. The Co-Chairperson of the Pakistan People's Party filed a direct petition in the Supreme Court of Pakistan under Article 184 of the Constitution, challenging the amendments made in the Political Parties Act (III of 1962) regarding the requirement of registration of political parties, on the ground that it was violative of Article 17 of the Constitution, which guarantees the right of association. It was contended by the State that the above clauses of Article 270-A protected the above amendments made in the aforesaid Act and the Court had no jurisdiction to examine this question. The

Supreme Court rejected this contention and declared the above provision as ultra vires being violative of Article 17 of the Constitution. It was pointed out by the Supreme Court that right to form an association is a continuing right and, therefore, any provision in an enactment violative of the above Article can be struck down. The State's contention, that the petitioner was not an aggrieved party to maintain a petition under Article 184(3) directly before the Supreme Court, was also rejected and it was highlighted that for invoking above Article 184(3) for the enforcement of fundamental rights a person need not be an aggrieved party in terms of Article 199 of the Constitution. The above judgment of the Supreme Court of Pakistan can be termed as a turning point in the political history of the country as it paved the way for general elections on party basis.

In the case of Federation of Pakistan and Another V. Malik Ghulam Mustafa Khar, reported in PLD 1989 SC 26, the question before the Supreme Court was whether Article 270-A could provide a blanket cover to the acts, actions, proceedings of the Martial Law Authorities and Courts, which were without jurisdiction or were corum non judice or malafide. The above question was answered by the Supreme Court in the negative and it was held that notwithstanding Article 270-A of the Constitution, the Superior Courts would be entitled to entertain petitions against acts, actions and proceedings of the Martial Law Authorities/Courts which were without jurisdiction or corum non judice or malafide. This judgment can also be termed as a landmark in the legal jurisprudence of Pakistan. It made it possible for the Superior Courts to undo to some extent the injustices which might have occurred during the Martial Law Days.

I might mention that the original version of our Constitution of 1973 contained a number of provisions to ensure and promote the independence of the judiciary. However, the amendments made therein have adversely affected the above objective. I refer to some of them:

- (i) Article 196 of the Constitution, which deals with the appointment of an Acting Chief Justice of a High Court,

originally provided that in case of vacancy or absence of a Chief Justice of a High Court the President shall appoint the most senior of the other Judges of the High Court to act as Chief Justice. The above provision was amended by the Constitutional (Fifth Amendment) Act, 1976, Act LXII of 1976, hereinafter referred to as the Fifth Amendment and in place of the words "the most senior of other Judges of the High Court" the words "one of the Judges of the High Court who have not previously held the Office of Chief Justice of the High Court otherwise than under this Article", were substituted and remain intact till today.

- (ii) Clause (1) of Article 200 originally provided that the President may transfer a Judge of a High Court from one High Court to another High Court, but no Judge shall be so transferred except with his consent, and after consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both High Courts. To the above clause (1), a proviso was added by the Fifth Amendment, stating: "provided that such consent or consultation with the Chief Justices of the High Courts, shall not be necessary if such transfer is for a period not exceeding one year at a time". The above one year period was extended to two years by President's Order No. 14 of 1985.

It may also be pointed out that sub-clause (3) to the above Article 200 was added by the Constitution (First Amendment) Act, 1974 (33 of 1974) with effect from 4 May, 1974 providing that, "If at any time it is necessary for any reason to increase temporarily the number of Judges of a High Court, the Chief Justice of that Court may require a Judge of any other High Court, to attend sittings of the former High Court for such period as may be necessary, and while so attending the sittings of the High Court, the Judge shall have the same power and jurisdiction as a Judge of that High Court." Further clause (4) was incorporated to above Article by



President's Order No. 14 of 1985 which provided that "A Judge of a High Court who does not accept transfer to another High Court under Clause (1) shall be deemed to have retired from his office and, on such retirement, shall be entitled to receive a pension calculated on the basis of length of his service as Judge and total service, if any, in the service of Pakistan".

- (iii) Under Article 7 of the Provisional Constitution Order, 1981 Benches for the High Courts in the Provinces were constituted, namely, for the Lahore High Court a Bench each at Bahawalpur, Multan and Rawalpindi, for the High Court of Sind a Bench at Sukkur, and for the Peshawar High Court a Bench each at Abbottabad and Dera Ismail Khan and for the High Court of Balochistan a Bench at Sibi. Clause (5) of Article 7 of the Provisional Constitution Order provided that a Bench shall consist of such Judges of the High Court as may be nominated by the Chief Justice from time to time for a period of not less than one year.
- (iv) A new Chapter 3-A was added in the Constitution by President's Order No. 1 of 1980, in May 1980, creating a new Court by the name of the Federal Shariat Court and also providing for appeal to the Shariat Appellate Bench of the Supreme Court. Under Article 203-C of the newly added Article a Judge of a High Court could be appointed for a period not exceeding one year, without his consent, as a Judge of the Federal Shariat Court. This period was extended to two years by President's Order No. 24 of 1985. A Judge of a High Court who does not accept appointment as a Judge of the Federal Shariat Court shall be deemed to have retired from his office and, on such retirement shall be entitled to receive a pension calculated on the basis of the length of his service as Judge and total service, if any, in the service of Pakistan.

- (v) Clause 4B was added to article 203-C by P.O. No. 14 of 1985. This related to judges of the Federal Shariat Court. With regard to them, the President was empowered to:
  - (a) modify the terms of appointment of a Judge.
  - (b) assign to a judge any other office, and
  - (c) require a judge to perform such other functions as the President may deem fit.

The 1973 Constitution was framed with the consensus of all the political parties in the Parliament. It contemplated trichotomy of power inter se between the three organs of the State, namely, the legislature, the executive and the judiciary. Each organ of the State was to function within the bounds specified in the Constitution. The judiciary was assigned a very important role, namely, to act as the watch-dog and to ensure that government functionaries did not violate any of the provisions of the Constitution or of any other law. Since this role was a very delicate one, it was envisaged that the judiciary would be independent and separate from the other organs of the State. The introduction of the provisions for transfer of a High Court Judge to another High Court without his consent and the appointment of a High Court Judge to the Federal Shariat Court without his consent at the peril of his being retired, and the provision relating to the nomination of a High Court Judge to any of its Benches (created under the PCO) militate against the concept of the independence and separation of judiciary, as envisaged by the Constitution.

In my view the following steps would promote the independence of the judiciary:

- (i) Complete separation of judiciary from the executive;
- (ii) Strong public opinion in support of the independence of judiciary;

- (iii) A strong independent bar;
- (iv) International opinion in support of independence of judiciary;
- (v) Efforts to get constitutional and other legal provisions, which impair the independence of judiciary, repealed;
- (vi) Financial independence of judiciary;
- (vii) Security of tenure of judges;
- (viii) A reasonable amount of emoluments for judges;
- (ix) Selection of judges on their merit, integrity and knowledge of law; and
- (x) Organisation of international seminars to project the importance of independence of judiciary.

It will not be out of context to quote from a letter of Hazrat Ali Karam Allah Wajho, the fourth Caliph of Islam, addressed to Ashtar Malik, the Governor of Egypt, which has direct bearing on the questions of qualifications, selection and emoluments of judges:

"So far as dispensing of justice is concerned, you have to be very careful in selecting officers for the same. You must select people of excellent character, superior calibre and meritorious record. They must possess following qualifications: Abundance of litigations and complexity of cases should not make them lose their temper. When they realise that they have committed a mistake in judgement they should not persist in it and should not try to justify it. When truth is made clear to them or when right path opens up before them, they should not consider it below their dignity to correct the mistake made or to undo the wrong done. They should not be corrupt, covetous or greedy. They should not be satisfied

with ordinary enquiry or scrutiny of a case but scrupulously go through all the pros and cons, must examine every aspect of the problem carefully and whenever and wherever they find doubtful and ambiguous points they must stop, go through further details, clear the points and only then proceed with their decisions. They must attach greatest importance to reasonings, arguments and proofs. They should not get tired with lengthy discussions and arguments. They must exhibit patience and perseverance in scanning the details, in testing the points presented as true and in sifting facts from fiction and when the truth is presented to them they must pass their judgments without fear, favour or prejudice. They should not develop vanity and conceit when compliments and praises are showered upon them. And they should not be misled by flattey and cajolery.

Pay them handsomely so that their needs are fully satisfied and they are not required to beg or borrow or resort to corruption. Give them such a prestige and position in your State that none of your courtiers or officers can overlord them or bring harm to them. Let judiciary be above every kind of executive pressure or influence, above fear or favour, intrigue or corruption."

## THE POLITICS OF THE JUDICIARY IN A PLURAL SOCIETY

by

Neelan Tiruchelvam

Constitutional discourse in Sri Lanka is primarily doctrinal in character, and framed in terms of the outcome of individual court decisions. Even the doctrinal questions have been narrowly posed and little effort has been made to explicitly address the policy issues and value choices which surface in alternative approaches to legal doctrine. Nor has a comprehensive attempt been made to adopt any institutional perspective and to assess the importance of the various institutions in upholding the theories of constitutionalism envisaged under different constitutional arrangements. Institutional commentary has added to the mystification of constitutional forms and failed to unmask the more insidious political reality. Few constitutional writers have been sensitive to the use and usurpation of constitutional ideologies by the politically dominant group, to subvert democratic ideals. Little systematic attempt has been made to understand the relationship between the institutions that exercise state power and the distribution of political power in Sri Lankan society.

This paper will endeavour to assess the role and importance of the judiciary in addressing the sensitive and complex social and political questions which confront Sri Lankan society. The paper will review the specific tasks and functions that had been assigned to the apex judiciary under the Second Republican

Constitution, and how the Courts have responded to this challenge.

In assessing the role that has been accorded to the judiciary under the Second Republican Constitution, we perceive distinct and contradictory trends. The first trend was to expand and elevate the role that was assigned to the judiciary. Secondly there was an attempt to ideologically reconstitute and reorient the court, and a refusal to acknowledge and to concede to even such a reconstituted court the autonomy or the freedom to confront declared state policy on contentious questions. The former aspect of the constitutional order was referred to by Chief Justice Sharvananda on October 31st 1984. He stated:

"It has to be realised that the constitution has invested this court with a new status and stature. In the hierarchy of our courts this court is at the apex and is the final Court of Appeal. It has taken the place of the Privy Council. It has been my humble desire that this court being the successor of the Privy Council its judgment should rank equal in quality and profundity with those of the Privy Council".

The Attorney General Shiva Pasupathy, speaking on 11th Sept. 1978, effused the "Supreme Court...is now truly supreme". The Court had for the first time been explicitly conferred a constitutional jurisdiction in respect of the review of the constitutionality of legislation, and the exclusive authority to pronounce on all questions relating to the interpretation of the Constitution. The adjudication of fundamental rights complaints was vested in the court, which was further vested with a consultative jurisdiction on questions of law or facts of public importance.

Another important jurisdiction conferred on the court was with regard to the legitimacy of the electoral process, particularly with regard to the election of the President where the entire country becomes the electorate. Even with regard to the impeachment of a President on the grounds of treason or violation of the constitution, Parliament cannot proceed without a determination of guilt by the Supreme Court. These provisions

led Justice A.R.B. Amerasinghe to conclude that the Supreme Court had become more elevated than it had been. It is in this setting that we examine the independence and performance of the higher courts in Sri Lanka.

The doctrine of judicial independence is grounded in two inter-related safeguards. The first one is security of tenure. The second is the independence of the judiciary from executive interference or control. These are now discussed in turn.

### SECURITY OF TENURE

The Second Republican Constitution contained two extra-ordinary provisions to the effect that the previous Supreme Court would cease to exist and that all judges of the Supreme and High Courts would cease to hold office. This was in sharp contrast to the transitional provisions relating to the legislature and the bureaucracy, whose members continued to hold office notwithstanding the constitutional transformation. Similarly, the tenure of the minor judiciary and other officers of the state and of local government remained intact on the same terms and conditions. In lieu of the abolished Supreme Court, two appellate courts were established : the Supreme Court and the Court of Appeal. Eight Judges of the previous Supreme Court were not reappointed to either of the appellate courts, and at least one of them declined the offer of appointment to the Court of Appeal on the ground that the appointments were not effected in a "righteous" manner. Three former Justices (D. Wimalaratne, Percy Colin-Thome and Barnes Ratwatte) accepted appointments in the Court of Appeal. The controversy and the bitterness that accompanied the reconstitution of the court continued to trouble the judiciary for years. Security of judicial tenure had little meaning, when the entire higher judiciary could have been exposed to the sudden loss of office. Colvin R. de Silva described these provisions as invading the "innermost sanctum, the very arcanum of the judiciary's independence".

The politicization of appointments to high judicial office and the lack of clear precedents with regard to promotion from one tier to the next in the judicial hierarchy had caused much anguish and disappointment to judges and law officers of the state. The proceedings of the Select Committee to inquire into complaints in respect of the Special Presidential Commission of Inquiry is

revealing with regard to the personal and political intrigue that surrounded the appointment process. Even judges who endeavoured to distance themselves from the political process found that they were ignored or excluded from consideration unless they pressed their claims before influential members of government.

Justice K.C. de Alwis complained during this inquiry that Justice D. Wimalaratne continued to harbour grievances against the government for appointing junior judges to the Supreme Court, while demoting him to the Court of Appeal. Justice Wimalaratne pointed out in his rejoinder that K.C. de Alwis was a mere District Judge when he was leap-frogged into the Court of Appeal, superceding several High Court Judges with more extensive judicial experience. The statement by Justice Percy Colin-Thome also revealed the lack of clear principles to guide the appointment process. Parts of his statement are most illuminating:

"In 1974 when the Courts were re-structured Mr. Felix Dias Bandaranaike offered appointments on the Supreme Court to Mr. R.Wanasundera, Mr. V.S.A.Pullenayagam, DSG and Mr. Noel Tittawella, DSG. Although I was also a DSG at the time handling the biggest case in the A.G's Department, namely, the Insurgency Trials, Mr Felix Dias Bandaranaike did not offer me a place on the Supreme Court even after Mr. Wanasundera and Mr. Pullenayagam declined to be appointed to the Supreme Court. He offered these two placed to the District Judges in addition to that they were previously allocated and (my so-called friend) sent me to the High Court of Colombo.

"Therefore, in the next two years he was instrumental in the appointment of three other Judges to the Supreme Court ignoring my claims. In 1976 another vacancy on the Supreme Court was pending. I saw Mr. Felix Dias Bandaranaike in the Ministry of Justice on 6-10-74 by appointment and pressed my claims for the next vacancy. I told him I was not trying to climb over anyone, I was only asking for my due place. He assured me that I would get the next appointment.



"However, shortly afterwards I was informed that he was doing his best to have his brother-in-law Mr. O.M.de Alwis, Legal Draftsman, appointed to the next vacancy to occur in January 1976. It was also rumoured that Mrs. Bandaranaike, Prime Minister, wanted Mr. A.K. Premadasa appointed on the Supreme Court. My chances at this stage were very bleak. There were sharp disagreements between the Prime Minister and the Minister of Justice over who should be appointed. To make matters worse early in December I received a letter from His Excellency's Secretary that I was to function as the High Court Judge, Galle from 1st January 1976. I therefore sent a petition on 9th to His Excellency William Gopallawa, President of the Republic of Sri Lanka, protesting strongly at the injustice that was about to be meted out to me. The petition was handed personally to Mr. Harris Wijesinghe, P.S. to the President by my Registrar Mr. S. Wittanachi. Mr. Wijesinghe made an appointment with the President to see me the next day. Mr. Wittanachchi is now an Assistant Secretary in the J.S.C. To make matters really worse early in January 1976, Mr. Felix R.Dias Bandaranaike, the Minister of Justice, transferred me from Colombo to the High Court of Galle. Eventually, I became the via media between O.M.de Alwis and A.K. Premadasa and I was appointed a Supreme Court Judge w.e.f. 12-01-76 by a miracle."

### INTERFERENCE

Article 116 of the Constitution prohibits any attempt to direct or otherwise interfere with the exercise of judicial power. However, during the past decade the court has had to face intimidation, pressure and scrutiny from many quarters. Chief Justice Samarakoon observed ominously on the inauguration of the New Courts in 1978:

"My brothers and I have been members of the old Supreme Court and would have wished for it an honourable demise and a decent burial, but that was not to be. Words have been uttered and aspersions cast in another place which seemingly affect its hallowed name. What more is in store I do not know".

The first major conflict between the government and the judiciary arose out of the decision to appoint a Special Presidential Commission of Inquiry to investigate allegations of abuse of power during the period of the previous government. The Commission retrospectively found Mrs. Sirimavo Bandaranaike and Mr. Felix Dias Bandaranaike (the former Prime Minister and the former Minister of Justice, respectively) guilty of acts of political misuse and abuse of power. In consequence of this determination, Parliament deprived them of their civic rights including the right to hold public office or to support anyone else who did. One of the persons in respect of whom a notice was issued by the Commission was Mr. A.H.M. Fowzie, a former Mayor of Colombo.

On 9th July 1982, Mr. Felix Dias Bandaranaike filed a petition in the Court of Appeal against Mr. K.C. de Alwis, alleging that Mr. Alwis had entered into financial dealings with Mr. Fowzie, while he was subject to a notice issued by the Commission. As Justice Percy Colin-Thome later observed, "this was the first time in history of Sri Lanka that a Judge of a Supreme Court had financial dealings with a litigant in his Court". This application was argued before the Chief Justice and Justices Wimalaratne and Percy Colin-Thome. The Court by a majority decision held that Mr. K.C. de Alwis was guilty of misconduct and thereby became disentitled to hold the office and function as a member of the Special Presidential Commission. This judgment was delivered two days before the Presidential Elections in 1982.

Mr. K.C. de Alwis addressed a petition to the President where he alleged that Justices Wimalaratne and Percy Colin-Thome were biased and that this animus had affected their determination. The government in response to this petition took the extraordinary step of appointing a Select Committee to inquire into and determine inter-alia (a) the propriety of Justices Wimalaratne and Colin Thome hearing and determining the application, and (b) the implications of the refusal of the Court to afford the Attorney General an opportunity of being heard on behalf of the state.

The constitutionality of a Select Committee being appointed to inquire into the conduct of the Justices of the Supreme Court and their interpretation of questions of procedural and substantive law was questionable. Such legislative scrutiny of

judicial conduct constitutes an encroachment on the separation of powers and the express safeguards relating to the independence of the judiciary. No such inquiry seemed permissible unless it was related to proceedings to impeach a Judge on the ground of misbehaviour or incapacity. Even the direct exercise of judicial power by Parliament could be construed as a violation of article 4 (c) of the Constitution, which limited the exercise of such power to matters relating to the privileges of Parliament.

However, neither Justice Wimalaratne nor Justice Colin Thome questioned the constitutionality of the inquiry by the Select Committee of Parliament, although the latter had characterized the allegations as being based on "hearsay, double hearsay, speculative gossip, rumour and blatant falsehoods". In fact, Justice Wimalaratne in a statement dated 21st June 1983, conceded that it was his duty to assist the Committee, as it was "Parliament and Parliament alone" that could inquire into the question of bias.

The sorry spectacle of the Chief Justice and half the Justices being paraded before the Select Committee in Jayewardenapura, being represented by counsel, and being subjected to questioning by each other was deeply damaging to the prestige of the court and its collective self image. During the inquiry, the controversy relating to the reconstitution of the Supreme Court in 1978 was resurrected to substantiate the allegation that Justices Wimalaratne and Colin-Thome were hostile to the government. This exposed Justice Wimalaratne to the indignity of pointing out that his judicial determinations were not such as would have embarrassed the government. He further proceeded to list 13 of the more important election petition cases, writ applications, and fundamental rights cases and land acquisition cases, disposed of by him, where an adverse decision would have caused embarrassment to the state. He pointed out that in each of these cases he had ruled in favour of the state or dealt with the application in such a way as not to embarrass the government. Justice Percy Colin-Thome also refused the allegation that he was hostile to the government. He pointed out :

My relation with His Excellency J.R. Jayewardene during this period has been very cordial. We met at several functions at President's House and at other places and in

1981 he invited me and my wife for a birthday party at the President's House

He had further added: "I was one of only three Supreme Court Judges to attend to the induction of Mr. H.W. Jayewardene QC, as President of the Bar Association 1976...later I met Mr. J.R. Jayewardene at a reception at the Kandy Club and had a long cordial conversation with him". These proceedings could hardly have been calculated to inspire public confidence in the independence of the judiciary or the autonomy of the judicial process.

### SUBJUGATION

Two cases demonstrate the complete disregard by the executive arm of government for judicial pronouncements. The first of these, the Pavindi Handa case, emerged from the opposition to the Referendum to extend the life of Parliament. P. Udugampola, the then Superintendent of Police of Gampaha, had seized 21,000 pamphlets issued by Rev. Ratnasara Thero of Pavidi Handa (the voice of Clergy) opposing the Referendum. Rev. Ratnasara alleged that his fundamental right to the freedom of speech, expression and of publication had been violated. On 8th February 1983, the Supreme Court upheld the petition and awarded Rs. 10,000 damages against the Superintendent personally and costs. The government decided to promote the Superintendent and the state agreed to pay the damages and the cost. Wide publicity was given by the state to this decision in the national media.

Within a month of this decision, on International Women's Day, Mrs. Vivienne Goonawardena, a prominent trade unionist and political activist, together with others, participated in a demonstration which included the delivery of a letter of protest to the U.S. Embassy in Colombo on the Indian Ocean Peace Zone. On the way back some Police Officers took away their banners, and when Mrs. Goonawardena proceeded to the Kollupitiya Police Station to inquire about the arrest of a photographer, she was placed under arrest, thrown to the floor and kicked. The Court consisting of Justices Soza, Ratwatte and Colin-Thome held that the arrest of the petitioner was illegal and a violation of her fundamental rights and ordered the state to pay Rs. 2,500/- as

compensation. On the following day, the Police Officer who had arrested Mrs. Goonewardena was promoted. Two days later an organised gang of hooligans demonstrated in front of the houses of Justices Ratwatte and Percy Colin-Thome and what they believed to be the house of Justice Soza. The mobs arrived on public transport, and shouted obscenities at the judges. The judges tried to telephone the Police, but found the lines mysteriously out of order. Despite the public promise of a vigorous inquiry, the Police made no progress with regard to the identity or the arrest of the person responsible.

President J.R. Jayewardene, when questioned by Paul Sieghart on these incidents, conceded that he had ordered the promotion of the two Police Officers, and the payment out of public funds of the damages and the costs. He contended that judiciary would pose difficulties to the executive "if they are wholly outside anyone's control". Sieghart concluded: "The conclusion is inescapable that he was deliberately seeking to teach the judges a lesson in order to make them more pliable to the Executive's wishes. If that is so, these were grossly improper acts".

A further crisis, involving the whole of the Supreme Court and the Court of Appeal, followed the enactment of the Sixth Amendment to the Constitution which required all judicial and state officers to swear to a new oath of allegiance to the state. The amendment in its original form required all Judges of the Supreme Court and the Court of Appeal to take the oath within a month of its ratification by the Speaker on August 8th 1983. Accordingly, all of the Judges of both courts took their oaths before each other before the 9th of September 1983. However during the course of argument in Vishvalingam v Liyanage, it was discovered by one of the Justices on the bench that the Sixth Amendment had been altered during the committee stage of the debate. This change required the Justices of the Supreme Court and the Court of Appeal to take their oaths before the President of the Republic and this requirement had escaped the attention of the entire court. The proceedings of the court were suspended and the judges decided to write to the President that the period of one month would expire at midnight on the 9th and that the judges were willing to take their oaths. The President made no reply, and the Chief Justice was informed by the Minister of Justice that the period of one month

had expired on 7th and that accordingly no oath or affirmation could be administered.

On the following working day, the 12th, it was found that the courts of the Supreme Court and the Court of Appeal, and all the chambers of all judges had been locked and barred, and that armed Police guards had been placed to prevent access to them. The guards were, however, withdrawn on Tuesday.

The President decided on the 14th of September that the constitutional crisis should be resolved by requiring all the Judges to take their oaths on the following day both in terms of the Sixth Amendment and as new Justices of the Supreme Court. The court was nevertheless called upon to decide whether the oath before the President was mandatory, and whether they had ceased to hold office in terms of the Sixth Amendment. A full bench of the court by majority decision held that despite their acceptance of fresh letters of appointments, they remained de jure judges, on the 15th September, as the requirement to take the oath before the President was a directory provision. The dissenting judges (Ranasinghe, Rodrigo and Abdul Cader) had little difficulty in pouring scorn over this determination and pointing to the inconsistency between this interpretation and the conduct of the court in writing an unqualified letter to the President on the 9th of September, and in pursuance of this letter accepting new letters of appointment on the 15th of September without any form of demur.

Perhaps the most dramatic episode, in the one hundred and eighty five year history of the judiciary in Sri Lanka, grew out of a relatively little known tutory for typists owned by Mr. Raja Sinnathuray. Mr. Sinnathuray had invited the Chief Justice, Mr. Neville Samarakoon, to be the Chief Guest at the Annual Prize day scheduled for the 14th of March 1984. One of the offices managed by Mr. Sinnathuray had been ransacked and 182 chairs and 62 typewriters removed during the July violence. During the course of his introductory remarks, Mr. Sinnathuray had referred to the impact of the ethnic riots on the work of the Institute. The Chief Justice in his ex-tempore remarks made, inter-alia, the following observations:

Ethnic means racial and I do not agree that what took place in July last year, was racial in that sense.

I have been asked this question in India for the past ten days and everywhere I went all the judges I met asked me what all these racial riots and ethnic riots were. It is certainly not ethnic in nature.

Take your minds back, ladies and gentlemen, to the last two or three years when terrorism and terrorists were very active in the North. There was resentment building up among the people against the terrorists and the killings that were being done by the terrorists. It was not against the Tamils.

And anybody who kept his eyes and ears open, who did not live in ivory towers, could see that resentment was building up, not only against terrorists but against the establishment itself that was not taking proper action against them.

And as a result what happened was that people were driven, I think to take a hand themselves and in effect they told the terrorists "what you can do we can do better", and they did.

Many liberals were dismayed by the apparent rationalization of the ethnic violence of July 1983, and by the Chief Justice's belief that the indiscriminate and large scale killing of Tamils was the only effective response to political violence in the North. Although the Chief Justice did express regret that Mr. Sinnathuray's tutory had been subjected to violence, there was no condemnation of one of the darkest episodes in Sri Lankan history which had outraged the conscience of the international community. In a subsequent statement he endeavoured to clarify his speech: "When Mr. Sinnathuray referred to the riots as ethnic, I was quick to correct this impression. A whole race was being branded as racial rioters . . . . Propaganda in India against the Sinhalese race appears to be very effective. At one discussion, a delegate stated that the Sinhalese were out to "exterminate" the Tamils. I took pains to explain my point of view that it was not racial, and I believe I succeeded in most cases . . . It was not fair to damn the majority race in that way".

Within ten days of this speech, the Standing Orders Committee of Parliament formulated a new standing order relating to the impeachment of Supreme Court Justices. This Standing Order 78A was adopted by Parliament on 4th April 84 and empowered a Select Committee of Parliament to investigate allegations of misbehaviour and incapacity and outlined the procedure to be followed by such a committee. The committee proceeded in pursuance of a Resolution to remove the Chief Justice, to determine whether the statement attributed to the Chief Justice constituted improper conduct likely to affect the impartial administration of justice or calculated to bring the court into disrepute. The Chief Justice, who was represented by counsel, adopted two broad defences. Firstly, he questioned the constitutionality of the proceedings of the Select Committee, and the Standing Order 78A, on the ground that it was a violation of the separation of powers under the constitution. Secondly, he contended that he acted within the limits of free speech. The Select Committee came to the conclusion that the Chief Justice's speech constituted a serious breach of convention and had thereby imperilled the independence of the judiciary. However, the Committee added that, while condemning the speech, it could not conclude that the Chief Justice was guilty of proven misbehaviour,

## **ENFORCEMENT OF FUNDAMENTAL RIGHTS**

During the nineteen-eighties, both domestic and international human rights groups had engaged in extensive documentation of arbitrary and indiscriminate arrests and detentions without trial, and the cruel and degrading treatment of detenus. These arrests and detentions were affected either under the Prevention of Terrorism act or in pursuance of Emergency Regulations issued under the Public Security Act. The fundamental rights jurisdiction of the Supreme Court and the jurisdiction of the Court of Appeal to issue writs of habeas corpus were frequently invoked in many of these cases. In such instances, the courts were called upon to reconcile the duty to protect the right to life and the right to liberty and personal dignity of all persons with the perceived needs of national security and of national emergency. Article 13 of the Constitution guarantees freedom from arbitrary arrest, detention and punishment, but such freedoms are subject to



restrictions prescribed by law in the interests of national security and public order (see Article 15 (7)). In Joseph Perera vs the Attorney General, the petitioners were arrested and detained for twenty days for distribution of seditious literature. Justice Wanasundara conceded the need during an emergency for wider discretion being vested in the Police in the matter of arrest. He argued that the existence of reasonable grounds for arrest must be assessed by reference to the state of mind of the person making the arrest. In this regard, he pointed out that it was necessary to take cognizance of the fact

"that a state of terrorism amounting to almost civil war is raging in the Northern and Eastern Provinces of the country and that incidents like bomb explosions of a terrorist nature occur sporadically in other parts. A state of Emergency is in existence and prevails in the country and it is the duty of the Police and Armed Forces to be as alert and as vigilant as possible to defend the state and the people from armed attack and subversion".

In Withanachchi v Cyril Herath, M.M.D. Perera, an Assistant Director, and Salmon, Games Warden of the Wild Life Department, were arrested for spreading rumours likely to cause public alarm and detained in pursuance of a detention order for about 40 days. Justice Seneviratne held that there must be sufficient material for a reasonable public officer to entertain a reasonable suspicion. In this case the court, while upholding the legality of Mr. Perera's initial arrest, held that the excessive and unnecessary period of detention was unlawful and in violation of his fundamental rights. With regard to Salmon, the Court held that both the arrest and detention were unlawful as there were no reasonable grounds for suspicion.

In Wijesekara v Bandaranaike it was held that a telephone call from a Minister that he had received information that his house had been attacked and destroyed by a mob led by Mahinda Wijhesekera, was a reasonable ground to justify Wijesekar's arrest. Similarly in Nanayakkara v Perera, Justice Percy Colin-Thome upheld the legality of the arrest of Vasudeva Nanayakkara for distributing leaflets in contravention of Emergency Regulations. Both courts, however, upheld the principle that continued detention after such arrest must be for the purpose of investigation and that a warrant of detention would not be issued

for an unspecified and unknown purpose. In Nanayakkara's case the court held that there was "no substance in the allegation infringing his fundamental rights under Article 13 (4) of the Constitution".

An important remedy in respect of illegal arrest and arbitrary detention has been the great and efficacious writ of habeas corpus which enables the court to secure the release of persons detained without legal justification. Although the Emergency Regulations enacted in 1971 sought to oust the jurisdiction of the courts to issue habeas corpus, under the Second Republican Constitution the writ of habeas corpus cannot be taken away by Emergency Regulations. However, the effectiveness of the remedy had become progressively eroded due to a procedural change which dispensed with the requirement that the corpus be produced in court on the date of the hearing. Article 141 of the Constitution clearly provides that the Court of Appeal may issue writs in the nature of habeas corpus to bring before such court the body of any person illegally or improperly detained in public or private custody. Even where it was expedient or inconvenient to produce such a body in Colombo, it was lawful for the court to require the body of such person to be produced before the most convenient court of first instance. However, where a writ of habeas corpus was applied for, to have the bodies of the two persons detained under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 to be dealt with according to law, article 141 was referred to the Supreme Court for interpretation in Reference No. 2 of 1981. The respondents to this application were the Army Commander, the Inspector General of Police and the Minister for Internal Security. Justice Wimalaratne interpreted article 141 to mean that it was not mandatory to produce the corpus before the Court on the date of return to the notice.

This decision was subsequently followed in all applications for the writ and resulted in the State frequently denying that the corpus was ever in their custody or contending that the corpus had been released. The processing of these writ applications were frequently postponed due to the delays by respondents to file counter affidavits. At present the writ of habeas corpus is neither effective nor expeditious, and more than a thousand applications are pending disposal in some cases for years. The ineffectiveness of the writ has partially contributed to the alarming increase in disappearances and extra-judicial killings.

Article 11 guarantees freedom from torture, cruel, inhuman or degrading treatment. This right is absolute and not subject to amendment even during a state of emergency, without a Referendum. Although complaints of shocking and revolting incidents of torture in the course of law enforcement and security operations have been documented in detail, the judicial response has been one of caution and of self-restraint. Both in Thedchanamurti vs Attorney General and Velmurugu vs Attorney General the court declined of the application on a preliminary question of law, while in the latter case the majority of the court held that the petitioner had failed to establish the allegations on the facts. Justice Sharvananda in his dissenting judgment in Velmurugu's case admonished the court to be mindful of the difficulties that victims of torture experience in pressing such allegations against the Police or the Army. Such victims may fear reprisals against themselves or their families, and often acts of torture are committed without witnesses, rendering corroboration difficult. Traces of ill-treatment may lapse with time or leave no external marks with the increasing recourse to sophisticated methods. The legalistic and technical approach of the court to these questions seemed far removed from the moral outrage and repugnance with which human rights groups have responded to the sordid treatment and humiliation to which victims of torture are subjected.

In Amal Silva v Kodithunskku, the Court adopted a more expansive view and held that state would be liable when a suspect had been severely assaulted and otherwise subjected to degrading treatment while in police custody, although it could not be clearly established who had actually inflicted the injuries.

Other decisions with regard to the right to protest and demonstration are also revealing with regard to the judicial approach of the Court in limiting the scope of fundamental rights. Whenever the Court has intervened to provide relief it has done so on narrow technical grounds and failed to articulate wider principles or legal doctrines which transcend the redress of individual grievances.

However, in Joseph Perera v Attorney General, an Emergency Regulation restricting the distribution of leaflets among

the public was held to be violative of article 14 (1) (a) relating to freedom of speech. Justice Sharvananda pointed out that "debates on public issues should be uninhibited, robust and wide open and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government."

### LIABILITY IN STATE ACTION

We can now look at how the courts approached the questions of jurisdiction and standing in constitutional adjudication. In this regard it is useful to compare the judicial approach to the issue of state action both in the United States and in Sri Lanka. The principle relating to state action was articulated in the Civil Rights cases of 1883. The view was that the Fourteenth Amendment provides no shield against private conduct however discriminatory or wrongful. Constitutional thinkers have refused to accept with equanimity the distinction of state and society. As Lawrence Tribe pointed out in his study on "Constitutional Choices", the pervasive system of racial apartheid which existed in the South for a century before the Civil War, thrived "only because of the resonance between society and politics . . . the close fit between private terror, public discrimination and political exclusion". When there is positive state inaction in the face of patterns of deprivation, it seems necessary to re-examine the premise that only identifiable state action can be called to constitutional account. The state action theory philosophically presupposed a dichotomy between state and society, between public and private.

In Screws v United States, the Court upheld the conviction under the Criminal Civil Rights Statute of police officers who had beaten a black man to death after arresting him and knocking him unconscious. The Court held that since the homicide was committed by the officers in the course of their official duties, while they were clothed with the authority of the state, they had acted under "colour of law". "Under the colour of law" has been interpreted to mean the pretense of law. The test applied is to examine the nexus between the person or entity blamed and the state.

In Lugar v Edmondson Oil Company, the court held that even a wholly private individual is considered a state actor if he acts in conjunction with and obtains significant aid from state officers.

In Burton v Welmington Parking Authority, the plaintiff used both the private actor and the state entity in an effort to hold them responsible for the refusal of the Eagle Coffee Shop, which was located in a city owned parking centre, to serve him because he was black. The Court held that if the nexus between the private entity and a public authority is tight enough to characterise the activities as a joint venture, then the state may be held responsible for some offensive act by the private entity. Burton's case was the high water mark in a tide of state action cases. The courts have been more willing to find state action where racial discrimination is involved.

In Sri Lanka, the Supreme Court has consistently adopted a more restrictive conception of administrative and executive action. In 1980 in Thatchanamoorthy v A.G. a complaint was made of torture and of cruel and degrading treatment by the Inspector of Police of Eravur Police Station and 2 others. The Court held that to constitute executive or administrative action required an administrative practice of torture, or of mistreatment. Wanawundara, J. stated "it seems extremely improbable that a Government would openly authorize acts of torture or of such other cruel or degrading treatment, or punishment unless in war times or in an emergency situation. It is, however, likely that a Government may covertly sanction such illegal acts or connive in the perpetration of such acts, or sanction them, or tolerate them to such an extent that they become a virtual administrative practice". The implication of the judgment was that an illegal act by a state official acting under colour of office did not constitute state action, unless it formed part of an administrative practice.

Accordingly, in the Luter Velmurugu case, affidavits were obtained from the Service Commanders and the IGP that they had at no time authorized or condoned unlawful acts or breach of discipline.

In Velmurugu v A.G., Wanasundara, J. further refined this text by drawing a distinction between what he described as the

acts of high state officials where there would be strict liability, and liability in respect of subordinate officers which would apply only to acts which were under colour of office - i.e. within the scope of their authority, or done at least with the intention of benefitting the state. Accordingly, if an army officer engaged in torture with the intention of extracting information which would be beneficial to the state, then such conduct could possibly constitute administrative or executive action. However, if during the course of detention or custody, a woman detenu is raped by a prison official to satisfy his lust, then such conduct would not amount to executive or administrative action. The minority opinion of the Court, composed of Justices Sharvananda and Ratwatte, disagreed with this approach which sought to limit the scope of article 126 by "finely spun distinctions concerning the precise scope of the authority of state officers and the incidental liability of the state". They argued in favour of a more liberal construction, if the freedoms and rights enshrined in chapter III are not to be reduced to an empty formula.

"When the state has endowed one of its officers or agencies with power which is capable of inflicting the deprivation complained of, it is bound by the exercise of such power even in abuse thereof. The state has endowed one of its officers with coercive power, and his exercise of its power, whether in conformity with or in disregard of fundamental rights, constitutes executive action". The official's act is ascribed to the state for determining responsibility, otherwise, the constitutional prohibition will have no meaning.

Similarly, in Mariadas Raj v A.G. et al, the Court held that liability under article 126 is not a vicarious liability, but a liability of the state itself. The relief granted is principally against the state, although the delinquent official may also be directed to make amends and/or suffer punishment.

In Wijetunga v. Insurance Corporation of Sri Lanka, an attempt to import the Indian concept of state action into the definition of executive or administrative action, was rejected by the Court. The Court ruled that a public corporation carrying on a commercial activity could not be identified with the state, or be regarded as the alter ego, or the organ of the state. The expression "executive or administrative action" in article 126 embraces

executive action of the state, or its agencies, or instrumentalities exercising governmental functions. It refers to the exertion of such power in all its forms. Sharvananda, J. added the "private conduct abridging individual rights does not attract the jurisdiction of this Court vested in it under article 126". The test that was applied by Justice Sharvananda was the nexus test. "The inquiry is whether there is a sufficiently close nexus between the state and the action of the agencies that is challenged, so that the action of the agencies may finally be treated as that of the state".

The issue of standing was raised in the case of Neville Fernando v Douglas Liyanage, where the shareholders of a company complained that their Printing Press had been sealed on the orders of the Secretary to the Ministry of State under

Emergency Regulations. The petitioners contended that it was a violation of their right, in association with others, to engage in business. The Court, rejecting the application on the ground that the petitioners lacked standing, contended: "no one other than those whose fundamental rights are directly infringed can complain of such infringement. A complainant cannot succeed because someone else in whom he is interested has been hit by such an act". The shareholders were told that they had no direct proprietary interest since the Company had a distinct legal personality, while the Company was told that fundamental rights actions could be instituted only by natural and not juristic personalities.

There are moments in the constitutional history of many societies where a combination of political and ideological forces are poised to bring about a basic transformation in the nature of the polity and in the constitutional order. They are what may be properly called constituent moments, giving rise to the transition from aristocratic to democratic forms of governance, monarchical and military dictatorships giving way to republicanism. Many plural societies seem to be on the threshold of redefining their polities and adopting federal or quasifederal power sharing arrangements. These constituent moments are also important in the history of ideas. They point to the growing need to develop and expand concepts of the group rights of ethnic minorities and of indigenous people which had hitherto not found part of the discourse of constitutionalism.

After years of economically debilitating and bloody fratricidal war, Sri Lanka was on the threshold of such a constituent moment pregnant with new opportunities to reconstitute the nation state, to redefine the polity and to assert fundamental values of tolerance and accommodation. Proponents of the idealistic view of judicial review placed high expectations on the judiciary to give a new thrust and direction to this process of societal transformation. Even as astute an observer of legal developments in Sri Lanka as Paul Sieghart, based these expectations on the early history of the judiciary. He argued "Sri Lanka has for long enjoyed the benefit of a respected and courageous judiciary, both before and since Independence. The Supreme Court . . . has produced many judges of outstanding integrity and learning, and its judgements have made signal contributions to the common law of the Commonwealth". Our review of constitutional adjudication in the past decade is conclusive that these expectations are not matched by the performance of the court. Our aspirations must accordingly be modest and we need to concede that in our society there is a limited supply of persons with the reforming zeal, the boldness of vision to seize the constituent moments of each generation.

## CONCLUSION

Paul Sieghart has observed that Sri Lankans at all levels care a great deal about legality, legitimacy and the impartial administration of justice. There are important constitutional guarantees of these values, but such guarantees have failed to insulate the judiciary from efforts to intimidate and bend the judiciary to the will of the regime in power. The controversy relating to the reconstitution of the Supreme Court and the politicization of the appointment process continued to bedevil the court and created animosities and tensions within the judiciary which intensified over the years. The discontent within the court with regard to preferential treatment in the allocation of chambers, official vehicles, appointments to prestigious and remunerative Commissions of Inquiry, opportunities to travel abroad on judicial delegations, surfaced during the legislative inquiries into judicial conduct. Even if the executive had engaged in a calculated campaign to contain and confine the influence of the court, the



intensive personal intrigue and enmity within the court did little to enhance its prestige and public image.

The controversy surrounding constitutional adjudication is also partially related to the pressures of an island society, where there is a close and often intimate interaction within a small legal, political and bureaucratic elite exercising disproportionate influence over questions of national policy. Issues of public policy become enmeshed with questions of personal ambition and individual career advancement. Individual members of the government are sensitive to, and react negatively to adverse judicial findings. Determinations of the legality or propriety of administrative action is interpreted as a personalised criticism of the public official or member of the political executive responsible for such action.

It is also no accident that the turbulent history of the court during the eighties coincided with a period of political turmoil and unrest unprecedented in the post-independent decades. The political controversies which engulfed the court during the period were the very questions which had deeply fragmented the Sri Lankan polity. They related to the deprivation of the civic rights of Mrs. Bandaranaike, the holding of the Referendum to extend the life of Parliament, the ethnic violence of July 1983, the 6th Amendment to the Constitution, the Indo-Sri Lanka Accord and the devolution of political power. The judiciary showed little capacity to rise above the darker passions generated by these conflicts and to assert fundamental values or resolve disputes over the distribution of power in a democratic state.

## DISTRIBUTIVE JUSTICE

by

Asma Jahangir

"Distributive Justice" is a more rarefied concept than the normal legal precepts relating to equality and justice, and goes beyond the principles of equity. Distributive Justice implies the application of law, not only according to the rules of equality and equity, but also to ensure that the application takes into account the inherent disadvantages between two disputing parties. Often, distributive justice is confused with the concept of reverse discrimination. There is a thin line between the two. If justice is not distributed carefully, it can result in reverse discrimination. Distributive justice thus bridges the gaps of inequality, whilst reverse discrimination places an additional burden on one of the two equal recipients.

Principles and precedents of applying distributive justice must be periodically reviewed. Application of the law must mould itself and flow with the development of the target group. If the application of 'distributive justice and law' remains static, the target group can at a certain stage be adversely affected by the same principle from which it once benefitted. One such example is found in Pakistan in the seats allocated to women in specialized educational institutions. Since women had less educational opportunities, the government devised a policy of allocating a percentage of seats for women in certain educational institutions. Female students could not compete with male students on merit. Hence the allocated quota of seats ensured opportunities to a

limited number of female students. Gradually, however, women began to compete with men on merits, owing to better facilities and awareness. At this stage the quota system transformed into a disadvantage for women.

As long as females fell below the required merit, the standard policy of allocating a quota of female seats in co-educational medical colleges was not challenged. But by 1987, far more female students qualified for admission on the basis of equality (merit). The quota system was challenged in the Lahore High Court as being discriminatory on the basis of sex.<sup>1</sup> The court set aside the quota policy. An appeal was made on behalf of the Government. It was accepted. Article 22(3)(b) of our Constitution states that: "no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth". Article 25 (2) of the Constitution guarantees, "there shall be no discrimination on the basis of sex". The court ruled that under Article 22 the denial to admission did not include sex as a criteria. Since Article 22 specifically addressed itself to educational institutions, it took the status of a special law, whereas Article 25 was general in nature. The court further argued that a law which is special in nature overrides the general one, hence Article 22 was upheld.<sup>2</sup> It is evident that Article 22 purposely left out sex as a criteria for equal access to all educational institutions in order to protect segregated educational institutions. It was a protection for those female students who could not study in co-educational institutions owing to social bias. The same protection in reverse discriminated against female medical students. An appeal is pending in the Supreme Court of Pakistan.<sup>3</sup>

In some parts of the world, distributive justice remains a far cry. Even basic concepts of justice are not fully comprehended by the legislature and the judiciary. These bodies remain

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1. PLD 1987, Lah. 178.

2. PLD 1987, Lah. 336.

3. The Supreme Court has recently held that quota is discriminatory and merit will be the criterion for admission.

insensitive to values of equality, equity and justice. Social norms and concepts of imposed social morality continue to sway the rulings of courts. Injury to the male ego is accepted as a plausible defence for the accused, in cases of crimes against women. The Lahore High Court, (a Superior Appellate bench in Pakistan), granted bail to Haq Nawaz who was accused of abducting Ms. Shahida Parveen. The court ruled;

"The facts of the case in brief are that Mst. Shahida Parveen wife of Muhammad Shahbaz complainant had an intrigue with Haq Nawaz petitioner. She allegedly had eloped with the petitioner on the night of 30th June, 1982 and was seen in his company boarding a bus bound for Faisalabad. On 13th July, 1982 a case was registered under Articles 10,11 of Offence of Zina (Enforcement of Hadood) Ordinance, 1979. During investigation she was recovered through Panchiat from the custody of the petitioner on 17th July, 1982. It is admitted before me that the abductee (Mst. Shahida Parveen) has since been killed by her husband (complainant in this case) as all the eye-witnesses have sworn affidavits including the father of the deceased, about his innocence.

"An earlier bail petition moved by the petitioner was dismissed on 7th October, 1982 by the learned Additional Sessions Judge, Vehari, therefore he approached this Court.

"I have heard learned counsel for the petitioner, as well as for the State and perused the record. It is contended on behalf of the petitioner that Mst. Shahida Parveen, abductee, in this case, was a woman of easy virtue and was, therefore, done to death by her husband. Her activities were so ignominious that her family heaved a sigh of relief at her death; so much so that her father has excused her killer. It is next contended that the petitioner was involved in the case due to enmity and that the star witness against him in this case, is no more in this world, as result whereof the case against the petitioner has not only become weaker but the chances of its

success have almost vanished. In these circumstances it is urged that the petitioner is entitled to the grant of bail.<sup>4</sup>

Men and women are equal insofar as virtue or lack of it is concerned. Yet, the term "easy virtue" has gained currency only in respect of women, and judges persist in the application of double standards.

Not only should justice be interpreted to the advantage of the deprived classes of litigants, but laws should also be designed in order to empower such disadvantaged classes of people. The legislature has little time to scrutinise the legal position of the disadvantaged groups. Forty per cent of Pakistan's population comprises children under the age of fifteen.<sup>5</sup> Laws regarding children are few. They overlap and are outdated. Since 1955, the legislature has not debated any legislation for the protection of children.

Legislation for the protection of labour is miserably lacking in comparison to the laws enacted for the promotion of large industries. The vested groups take priority with the legislatures.

For centuries bonded labour has existed in Pakistan. It is practised openly. Every successive government has held an inquiry into the matter. Each of these inquiries has concluded that bonded labour does in fact exist. The recommendations of the previous inquiries are repeated. None of the recommendations have ever been debated by successive legislatures.

Forced labour is prohibited under the Constitution. Several bonded labourers have been set at liberty through the courts. Except in one instance, the courts have taken no action against the offenders. Illustrative is the example of bonded labour case taken up by the Supreme Court of Pakistan.<sup>6</sup> The bonded

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4. P.Cr. LJ 1983 Lah 287.

5. Statistical Yearbook 1988, Government of Pakistan.

6. Constitutional Petition I of 1988.

labour case was the first case of public importance taken up under suo moto powers of the Supreme Court. No definition of bonded labour was laid down by the Court. The judgment was a compromise decision: future loans were prohibited, and past loans were made recoverable through civil litigation. Labourers were directed to rejoin the services of their employers and if a labourer wished to leave his employment, he was now required to take a certificate of his leave from the courts. This was the form of distributive justice to the labourers.

Distributive justice cannot be applied in societies where most disadvantaged groups are not even considered while making laws and policies. Neglect by itself is an indication of the insensitivity of policy-makers towards disadvantaged groups. The mode of dress prescribed for judges in Pakistan does not take into account that women can ever hold judicial office. Judges of the Superior Courts are required to wear a Sharwani.<sup>7</sup> The headgear they are permitted to wear is a Jinnah cap.<sup>8</sup> It may be argued that since there are no women judges, their dress code was not prescribed. However, there are hundreds of women lawyers. So far the dress prescribed for lawyers is either Sharwani or trousers and a shirt.<sup>9</sup> Women lawyers continue to appear in courts out of uniform.

Legal systems should review the theories they follow. Often, western concepts are followed blindly without reflecting upon the socio-economic conditions of the developing societies. "Ignorance of the law is no defence" is indeed relevant where literacy is the rule rather than the exception. Not so in countries where the law is often passed without debate, where an overwhelming percentage of the population is illiterate and has no access to media and the legal system. More importantly, if a citizen is penalised for ignorance, then the State should also be penalised when information on legislation is not adequately disseminated.

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7. Long national jacket for men.
  8. President Order 15 of 1980 Superior Courts (Court Dress & Mode of Address) Order 1980 Section 3.
  9. High Court Practice & Procedure by Fiaz Muhammad Sadiq.

Apart from legislation, procedures for obtaining justice should be fairly designed. The law in Pakistan restricts polygamy. Any man wishing to take an additional wife requires permission to remarry. However, he can remarry and the second marriage is recognised. The first wife has the right to complain of second marriage contracted without permission. The complaint, however, can only be filed where the second marriage took place. There is no official means for finding out the territorial jurisdiction of the performance of a second marriage.

Distributive justice can only be applied in societies where the policy-makers and the administration realise and pay attention to the needs of the less fortunate groups of society. An understanding of the social and economic restraints of such groups is a pre-requisite to the application of distributive justice. Often, judges and policy-makers misread the actual problems faced by the disadvantaged groups. In their misguided sense of justice they provide protection for the group. Such protection turns out to be a stumbling block to actual justice.

## THE ROLE OF THE BAR

by

Param Kumaraswamy

### INTRODUCTION

The legal profession, possibly the most controversial of all professions today, is now under stress; it has come in for criticism, harassment and persecution emanating not only from Governments but also from the public at large. Even the well-established English legal profession, the model and indeed the cradle for many legal professions in the Commonwealth, is now under stress. The controversial Green Paper on "The Work and Organisation of the Legal Profession"<sup>1</sup> presented to Parliament in January of this year makes sweeping proposals for reform of the practices and the structure of the profession. This paper has sparked off unprecedented protests from the profession and, not surprisingly, the judiciary in the United Kingdom.

However, the United Nations has come to our rescue. We must be the only profession in the world today 'selected' for protection by the world body. The draft Basic Principles on the Role of Lawyers endorsed by the Economic & Social Council will be submitted to the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990. Among the several

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1. Her Majesty's Stationery Office CM570



principles enunciated in this document for member Governments to observe is the one which reads:

"It is the responsibility of Governments to ensure that Lawyers shall not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action or defence taken in accordance with established professional duties, standards and ethics, where the security of lawyers is threatened as a result of discharging their functions, they shall be safeguarded by the authorities".

One of the main causes for Governments' resentment against lawyers is the profession's assertion of its independence coupled with its now universally recognised function to promote and protect human rights<sup>2</sup>.

### INDEPENDENCE - WHAT IS IT ?

The terms "independence of the judiciary" and the "independence of the legal profession" are often either misunderstood, or distorted. In the developing nations, where literacy levels are low, this concept means nothing to the masses. To many the independence of the legal profession is a self-proclaimed slogan used by the profession for its own enrichment. At least that is how Government politicians distort the concept to undermine the credibility of the profession. Whenever the Bar protests publicly against Governmental interference, the people are told by the Government that such protests are motivated by a fear of economic loss to the profession. Little is said or done to explain that this independence is a prerequisite for the advancement of the rule of law and the protection of the liberties of the people. Here

2. See I.C.J. Report on the Committee of Experts on the principles on the Independence of Legal Profession 1982. Also 1983 Montreal Universal Declaration on the Independence of Justice.

the profession itself is also to be blamed for inaction and their failure to explain to the people their role in society.

The Montreal Universal Declaration on the Independence of Justice declares, *inter alia*:

"There shall be a fair and equitable system of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason."

While the words 'any quarter' suggest that these interferences do not emanate from the government alone, there is no gainsaying the fact that whenever there is an allegation of interference into the independence of the profession it is assumed that it is governmental. However, it must be recognised that another subtle and insidious interference comes from multinational corporations, large financial institutions and other commercial giants. This is more apparent in countries where the profession is overcrowded and competitive — when supply surpasses demand. Corporations can then dictate terms to the profession to the extent that the lawyer is no longer an independent professional but a mere commercial salesman of his own services. Out of a need to compete and survive, lawyers succumb to such dictates. New-comers to the scenario are the syndicated crime operators. The present tragic events in Colombia are glaring examples. There is a need for organisations like the CIJL and the IBA to look into these areas of interference which, if left unchecked, could not only impede independence, but could also erode professionalism.

### ROLE OF THE LEGAL PROFESSION

It is now recognised that the independence of the legal profession is an essential guarantee for the promotion and protection of human rights. In addition to discharging their

traditional roles of advising clients and representing their interests in court, lawyers either individually or collectively have a wider and more noble role to discharge in society today. Human rights being legal in nature, the legal profession, quite naturally, is looked upon by all quarters, save some governments particularly in the developing countries, to take the lead in the promotion and protection of this cause.

Here the lawyers in the more advanced countries are on safer ground. In such countries the independence of the profession is taken for granted. Any serious encroachment by the Government could lead to that Government's downfall. Furthermore, in such countries there are, in addition to the traditional courts, other avenues available to the people to voice their grievances over violations of their rights. A free and vigilant press stands as a bulwark guarding against human rights violations. This is not the case in many developing countries. The lack of a free press, human rights commissions or an ombudsman imposes a greater burden on the legal profession to espouse these causes.

Sometimes even the courts in such countries are ineffective institutions as independent arbiters of disputes against the Government. The regime judges in these courts become, to use the words of Lord Atkin, "more executive minded than the Executive itself".

It is precisely in this area of activism that the profession is subjected to severe harassment and its members subjected to all forms of persecution including detentions without trial, unjust prosecution and even assassinations. What I say here is nothing new to the courageous lawyers of Pakistan. They stood up against all odds for the return of democracy and rendered many sacrifices.

#### ESSENTIALS OF AN INDEPENDENT LEGAL PROFESSION

In practically all developing countries the profession is governed by statute. It is also assumed that in such countries the

profession is fused rather than distinct as in England and Wales and some other advanced countries. Statutory provisions governing entry qualifications, practice and discipline, are quite common. The disadvantage of such statutory control is that it negates the concept of absolute independence. Parliamentary control may lead to control by the Government. The ruling party forming the executive arm of the Government will necessarily control Parliament. In these circumstances the profession cannot be said to be absolutely independent. Executive interference through Parliament was seen in recent years in the number of amendments to the Legal Profession Legislation in Pakistan, Malaysia, Singapore and other countries. However, one advantage of statutory control is that it confers legal recognition upon the profession. What is of utmost importance is that such controlling legislation must recognise and explicitly declare the independence of the profession. Once that is secured, the commitment of the members of the legal profession to uphold the cause of justice and human rights without fear or favour will be the motivating force to nurture and preserve that independence. Without commitment from the rank and file within the profession, it will be an exercise in futility.

To secure and preserve independence, the profession must be given responsibility to decide on the qualifications of entrants and it must be self-regulatory and self-disciplining. Any legislation governing the legal profession should leave these three essentials to be determined by the profession itself, possibly in concert with the judiciary. At any rate there must not be any involvement of any government organs or department, save maybe the Attorney- General, in the case of qualifications.

#### QUALIFICATIONS FOR ADMISSION TO PRACTISE

The profession is in the best position to decide on the qualifications for practice so as to ensure that uniform standards are maintained within the profession. However, this should not be abused by applying restrictive closed-shop policies of the kind that led the British Government to introduce the Green Paper to reform the practices and structure of the legal profession in the U.K. The

profession must become conscious of the need for providing legal services and monitoring the situation. In practice, this responsibility is shared with the judiciary, the Attorney-General and the Universities. But the fact remains that there is today a growing concern over the deterioration in the standards of the profession. It lacks commitment and is becoming too commercialised. This is a universal problem. It is a reflection on the education and training of lawyers. If the situation is not arrested and improvements are not made the profession will become the target of further public criticism, thus undermining public confidence in lawyers and leading, in turn, to Government control. It is imperative, therefore, for the profession to reflect on this issue and seek radical changes in the training of lawyers. In the training curriculum, a course on human rights should be made compulsory for a better appreciation and awareness of this cause and to inculcate a sense of commitment to it.

#### SELF-REGULATION

Self-regulation is imperative for maintenance of the independence of the profession. Here again the profession should not abuse this privilege and take a attitude. It should regulate the practice of law for the achievement of the highest standards and integrity. Stringent rules should be formulated to achieve these goals. There should be an effective enforcement machinery. While entrusted with the power to self-regulate, the profession must review the rules from time to time so as to ensure that the rules are adequate to meet the changing times and the public interest. Self-regulation of the profession is now being questioned in many countries. The Prime Minister of Singapore called it a myth. There is a fear that if the proposals in the Green Paper are implemented, the two branches of the legal profession in Britain may lose their rights to self-regulate.

#### SELF-DISCIPLINE

Stemming from self-regulation is self-discipline. This has been a sore issue in practically all jurisdictions including the advanced. The public cannot possibly understand the rationale of a lawyer being tried for professional misconduct by his own peers. There is a constant suspicion in their minds that the profession cannot possibly be independent in such adjudications and that it will at all times protect its members. This does not conform with their notion of justice. To them the very structure of the profession is to protect itself and the interests of its members. The system cannot possibly be expected to protect the public against delinquent lawyers. Hence the public outcry continues, supported by the media, which always finds the legal profession a target for sensationalism. Governments, particularly in developing countries, where the profession is active, exploit the situation and further add to the injury by interfering under the pretext of putting some order in the profession as the profession itself is unable to handle the situation. Governments achieve their purpose. The profession becomes discredited and the public begins to lose faith in its lawyers. The profession's influence in society is reduced. It is often suspected that in developing countries, where the media are often controlled by the Governments, issues are sensationalised and blown out of proportion, to the detriment of those groups which are critical of the Government and its policies. In this course, lawyers are singled out.

Be that as it may, the profession is itself, to a large extent, to be blamed for such a situation. The cumbersome disciplinary procedures resulting in long delays of adjudication of complaints leaves the public utterly frustrated. The profession's apathy to the feelings and aspirations of the general public is another cause. Complacency is yet another cause. All these culminate in public outcry for the discipline to be taken over by another body like the Government. The Government is only too ready to oblige.

The Malaysian Bar was subjected to public criticism over its disciplinary procedures. For a period, such complaints became a feature in the letters to the editors columns in the English dailies. The Bar Council took cognisance and began a soul-

searching exercise and, in November 1985, set up a high-powered committee to look into the disciplinary procedure provided in the Legal Profession Act and to consider its adequacy and recommend changes. The committee was headed by a former Prime Minister, Tun Hussein Onn, who was a practising lawyer himself. The committee included the former Lord President of the Federal Court Tun Mohammed Suffian, representatives of the Chief Justice, public interest groups and members of the Bar. The formation of the committee was generally welcomed by the public. Media editorials hailed it as a step in the right direction. The committee's report was made public at the end of 1986. Radical changes were recommended. Amongst its recommendations was the need for the presence of lay persons in disciplinary tribunals. Such representation would allay the public suspicion of protectionism within the Bar. The presence of lay persons in such tribunals is now accepted in many countries. Their presence does not in any way erode the independence of the Bar, but could very well enhance the public image of the profession. What is important here is that the public is made aware that self-regulation and self-discipline also involve self-examination and self-correction. For the preservation of independence, it is imperative that the profession handles these problems and does not give the Government an excuse to encroach. The Bar Council has submitted draft amendments to the Legal Profession Act incorporating the recommendations. The draft is currently before the Attorney-General.

While dwelling on the subject of discipline, the recent advice of the Privy Council on the appeal of Singapore's former lone opposition member in Parliament, Mr. J.B. Jeyaratnam, against the order striking him off the rolls of advocates and solicitors, should serve as a warning to disciplinary bodies, whether it be the Bar or the court, not to go overboard. Such bodies should not be seen to be the tool of the Government to persecute its political opponents. This seems to be what happened in J.B. Jeyaratnam's case. In Singapore the disciplining authority is the court. In a scathing attack over the manner in which the courts earlier found Mr. Jeyaratnam guilty of some criminal charges, which resulted in losing his seat in Parliament and thereafter

becoming the subject of disciplinary proceedings, the Privy Council in its advice concluded as follows:

"Their Lordships have to record their deep disquiet that by a series of misjudgments the appellant and his co-accused Wong have suffered a grievous injustice. They have been fined, imprisoned and publicly disgraced for offences of which they were not guilty. The appellant, in addition, had been deprived of his seat in Parliament and disqualified for a year from practising his profession. Their Lordships' order restores him to the roll of advocates and solicitors of the Supreme Court of Singapore, but because of the course taken by the criminal proceedings, Their Lordships have no power to right the other wrongs which the appellant and Wong have suffered. Their only prospect of redress, Their Lordships understand, will be by way of petition for pardon to the President of the Republic of Singapore<sup>3</sup>."

### **ROLE OF BAR ASSOCIATIONS**

Bar Associations, being associations of lawyers, are the hub of the legal profession. They speak up for the legal profession. In addition to looking after the interest of the profession, they have also the duty to protect public interest against delinquent lawyers. Being the spokesmen for the legal profession they are expected to speak out against human rights violations. In some countries, where there is extensive repression, the collective voice of associations may be safer than that of individuals. Thus, when individual activist lawyers look up to associations for support against reprisals by the government, it is the duty of the associations under such circumstances to rush to the aid of their members.

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3. Jeyaratnam vs. Law Society of Singapore (1988) 3 M.L.J. 465 at 434.



Often activist Bar associations involved in the promotion and protection of human rights are characterised as being political. Recently the Malaysian Prime Minister was reported to have accused the Bar Council of "playing too much politics and devoting less time to legal work". He went on to say that it appeared "as though the Bar Council was more like a political party". "They give more attention to their political role. And while they play politics, many are in remand waiting for counsel to represent them in Court". He then went on to make a startling and misleading remark. "In other countries like the United Kingdom the Bar Council was headed by a lawyer in the Government. However, in Malaysia an "independent lawyer" preferred to play politics than devoting to legal work".

In response to that accusation the President of the Bar replied sharply in a three-page Press statement. But the controlled and self-restrained Malaysian Press failed to give that statement full coverage. A copy was sent to the Prime Minister. But he never replied.

On this very issue the Prime Minister of Singapore had the following to say in the course of a Parliamentary Select Committee Proceedings on the Legal Profession (Amendment) Bill 1986:

"But if I come to the conclusion that, in fact, as was the case with so many Chinese old boys associations and musical song societies, that some activists, through the indifference of the majority of members, have misled the society to wilful ways unconnected with the profession, then I will find an answer to it. Because it is my job as the Prime Minister in charge of the Government of Singapore to put a stop to politicking in professional bodies. If you want to politick, you come out. That is why I asked you. You want to politick you form your own party or join Mr. Jeyaratnam."

These words are echoes of what you (lawyers in Pakistan) had already heard during your struggles in the early eighties when

the Legal Practitioners and Bar Councils Act 1973 was amended to prohibit you from "indulging in any political activity, directly or indirectly". It was your then (Military) Government's contention that Bar Councils and Bar Associations were statutory bodies and had well defined legal functions to perform; these could not be used as a forum for political activity.

What needs to be emphasised to our political masters is that every human rights issue will have political overtones. Even, as stated by Sir Owen Dixon C.J., a discussion on the constitution would be political because the constitution is a political instrument. Hence, are these political leaders seriously suggesting that a comment on the constitution is beyond the purview of Bar Associations? It could also be driven home that issues involving human rights are not the preserves of politicians. It is wholly undemocratic to suggest that only the politicians are competent and entitled to comment on such issues. The public, and indeed the Bar, will support such leaders if they promote, protect and defend human rights. But what is reprehensible is that these very leaders undermine these basic human values. On their part, the Bar Associations, as collective bodies of lawyers, should, in order to avoid any suspicion, stay clear of aligning themselves with political parties or subscribing to any political philosophies. They should not lend support or be seen to be lending support to organizations whose motives are subversive in nature. To maintain our integrity and credibility in society we must at all times be constructive and not destructive.

#### UNITY WITHIN THE LEGAL PROFESSION

A united Bar is the best defence against any encroachment or attempted encroachment into the independence of its members. The adage 'united we stand, divided we fall' applies in equal force to the Bar. The Malaysian judiciary would have averted the Executive's aggression on its independence recently and would have stood up mightily today if there were unity within it. Unfortunately there was not. And as such, its independence was eroded. In contrast, more than two years ago, the lawyers in

Bangladesh displayed admirable unity and courage when they successfully protested the appointment of the Chief Justice who was alleged to be aligned to the Executive. It is learnt that as a result the Chief Justice does not sit on the Bench but is confined more to administrative work.

A concerned, insecure or threatened Government would always attempt to dislodge or disunite an activist Bar. I understand that this was done here in Pakistan in 1981 when the Legal Practitioners and Bar Councils Act of 1973 was amended to enable an advocate to practise at the Bar without being a member of a Bar Association. In such circumstances, the profession is put to the acid test. If there is individual commitment, professional unity can be achieved without any legislation. In the final analysis it is the character and commitment of the individual lawyers which will reflect upon the quality and independence of the legal profession in any country.

#### **THE BAR IN DEFENCE OF THE INDEPENDENCE OF THE JUDICIARY**

The extent and quality of the independence of the judiciary is often measured by the extent and quality of the independence of the Bar in any country. It is a fearless Bar which gives strength and sustenance to the judiciary to remain independent. While the Bar can often speak up on any violations of human rights outside the four walls of the courtroom, the judiciary often has to restrain itself unless the matter is formally brought before it for adjudication. Recently in Malaysia, when a High Court judge made an extra-judicial comment relating to a constitutional provision after declaring open a students' legal seminar, he was immediately characterised as having gone political. When the opposition party in Parliament, after being frustrated in its efforts to get much redress on certain issues through Parliamentary procedures, brought their cases for redress to the Courts, the Courts were accused of being used by politicians.

Be that as it may, it is the duty of the Bar to remain alert and rush to the aid of the judiciary whenever the latter's

independence is threatened. The Malaysian Bar has, to-date, lived up to this expectation. Never in the history of the Malaysian legal profession was it put to test as it was last year when the six Supreme Court judges were suspended and thereafter three of them were dismissed and the other three were reinstated. Their only offence was that they stood up in support of the independence of the judiciary. At two extraordinary general meetings, attended by an unprecedented number of members, very strongly-worded resolutions were adopted. One of them called for the then Chief Justice, now the Lord President, to resign for his conduct in the whole affair. That resolution read as follows:

"That by his recent actions the Acting Lord President, Tan Sri Abdul Hamid Hj. Omar, has shown himself to be unfit for judicial office and the Malaysian Bar no longer has any confidence whatsoever in him as a Judge or Chief Justice or Acting Lord President and therefore calls for his immediate resignation and / or removal from the Bench."

A fund for the defence of the independence of judges and lawyers was launched. Many contributed generously. Despite the controlled media, which in one case refused even advertising space to print the resolutions, the Bar handed self-printed copies of the resolutions as hand-bills to the public. Senior lawyers from large leading firms appeared as Counsel for all the six judges. They did not seek any fees. Armbands, badges and car-stickers were used by lawyers to show to the public the Bar's solidarity with judicial independence. Now the Bar Council ends all its correspondence with the words "return the independence of our judiciary". But, we did not take to the streets as freedom of assembly is restricted under Malaysian laws, and since such actions would have been exploited by racial elements.

Pursuant to a direction of the general body of the Bar, the Bar Council applied for leave of the Supreme Court to cite the Lord President for contempt of court. The grounds for the application were his conduct as the then Chief Justice and Acting Lord President: he had directed that the doors of the Supreme

Court be closed and the Seal of the same Court be put away to prevent the five courageous Supreme Court judges from sitting to hear an urgent application from Counsel representing the then Lord President, who was subjected to trumped-up charges before a Tribunal chaired by the Chief Justice himself. The application was supported by an affidavit of the Secretary of the Bar Council. The facts alleged were not denied. However, as expected, the Application was dismissed. As a reprisal an application was made against the Secretary of the Bar Council to cite him for contempt for having made those allegation in his affidavit against the Lord President. Leave was granted by the Supreme Court. However, it is now more than four months and the Supreme Court has not served the papers (on the substantive application) on the Secretary. More than three hundred lawyers are on standby to intervene in the proceedings and to apply for an order that they too be cited for contempt as they feel that the Secretary was only carrying out a mandate of the general body of the Bar.

Security of tenure of office of judges is the corner-stone of an effective independent judiciary. It is only with such security that judges can be expected to dispense justice without fear or favour. The fact that it was so easy to suspend and eventually remove judges within a period of a few months, has brought home the startling reality to all Malaysians, and to the legal fraternity everywhere, that the so-called security of tenure of judges provided in constitutions is in reality a false sense of security. The Malaysian Prime Minister was bent on taking control of the judiciary. He could not, and does not, appreciate the role of the judiciary and the importance of its remaining independent and vigilant. He has always equated the judiciary with any other Government department in the civil service under Executive Control. He used judges against judges to give his scheme a semblance of constitutionalism. He succeeded. The Lord President and two senior-most independent judges of the Supreme Court were dismissed. The then Chief Justice who chaired the tribunal which recommended the dismissal of the Lord President is now the Lord President. Those shoddy events of 1988 saw the retreat of judicial independence in Malaysia. But the lawyers are determined to continue with their struggle for its return.

What had happened to these valiant and independent judges in Malaysia could happen to judges in any other country. We need to be vigilant to prevent such tragic events happening again.

When your Prime Minister (of Pakistan) was in Kuala Lumpur recently, she gave an interview to the Far Eastern Economic Review. In this interview she expressed, inter alia, the need for an international court to promote human values. She (Ms. Benazir Bhutto) said:

"We want to use the platform of the Commonwealth for promoting human values. Many countries have reservations about my ideas, but we need some kind of international court or forum for this. Because my own father (Prime Minister Zulfikar Ali Bhutto) was unjustly tried, I know how important it is to have an independent forum. There is the European Court of Justice. The Commonwealth could have such a body, even if it were just advisory, which could determine what is a political trial and what is a substantive one."

While some Commonwealth Governments may have reservations, not surprisingly, she can rest assured that the Malaysian Bar, and I am sure other Bar Associations in the region, will support her call.

In the light of these grave injustices in the region, an Asian Commission for Justice was formed at the LAWASIA Council Meeting in Hong Kong in September this year. The LAWASIA Constitution was accordingly amended to provide for the setting up of this Commission. The Commission will be composed of distinguished retired Chief Justices and Appellate judges in the region. Access to the Commission will be as follows:

"Any person, firm, corporation, country, community, minority group or other aggrieved party having exhausted his or its rights in the Highest Court or

Tribunal of a Country may apply to the Council for an opinion in relation to its case where it is believed that an injustice has been done".

While the opinions of this Commission are not enforceable with any sanctions, yet it is hoped that they would have some moral force. It is our fervent hope that this Commission will one day be transformed to a full scale regional court on human rights like the European Court on Human Rights in Strasbourg.

### PUBLIC RELATIONS

The legal profession is by far the most misunderstood of all professions. To the average layperson the profession is clouded by a mystery of legal jargon, antiquated laws and procedures perpetuated to keep it exclusively for the enrichment of its members. Very little attempt is made to explain and unveil the mystery by the profession. More than 59 years ago Lord Atkin recognised this apathy and in the course of his presidential address

to the Holdsworth Club advised lawyers as follows:

"There is so much ill-considered criticism of the law and lawyers at the present moment I cannot help thinking it is the duty of every lawyer, in whatever position he finds himself, to explain, maintain, and defend both the law and the profession of the law. I find myself sometimes in mixed companies of laymen and lawyers where, for the sake of jocularly, the lawyers themselves are a little inclined to repeat sophisms of the laymen in respect to the greed or rapacity, or its contentiousness or the insincerity of lawyers. I suggest to you that you should not follow that practice, however jocular you may feel. You will have many opportunities in your lives of meeting the attacks upon the Law and upon the profession, and my last words are that in view of the importance of the Law, the importance of the observance of the Law, the importance of the respect for the substantive law and the devotion to justice, which I do believe to be now the

prevailing feeling in every man's mind, that you should when you find attacks are made either upon the Law or the administration of justice or the profession - if they are unfair attacks or ill-founded attacks - you should do what is in your power to meet them. And you cannot do anything better for the purpose of removing criticism than by taking what part you can in conveying to the layman some sort of general impression of what the Law is, what its ideals are, and how they animate our profession"<sup>4</sup>

Public dislike for lawyers could lead to public sympathy with the Government whenever the lawyers are taken to task publicly by the Government. It is therefore imperative for the profession to win the goodwill of the general public. Public respect is not something which can be demanded. It must be earned. In addition to providing legal services of quality and displaying honesty and integrity in the discharge of professional duties, the profession collectively must explain itself and unveil the mystery surrounding it. Like any other public institution, the profession is accountable to society. It must be involved in public interest and social issues. This is particularly important in developing countries. The profession's involvement in legal aid for the poor and legal literacy programmes to educate the masses of their rights and duties will result in considerable respect for the Bar and will immensely enhance the image of the Bar. Public respect for the profession cannot possibly be ignored then by governments.

#### IN SEARCH OF WORLD PEACE - A LAWYER'S CONTRIBUTION

The United Nations was formed at the aftermath of the Second World War. Member nations who signed the Charter vowed never to permit another human conflict of that kind. However, today the world is threatened by a nuclear holocaust, the ultimate environmental catastrophe, and held hostage by a stockpile of

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4. The Rt. Hon. Lord Atkin 'Law and Civic Life' p. 137.



60,000 nuclear warheads, the equivalent of 20 billion tons of TNT or one million Hiroshima bombs. With these deadly arms surrounding us, how can mankind be assured of freedom from fear? Nuclear disarmament must therefore be high on the agenda of all governments.

The International Association of Lawyers Against Nuclear Arms (IALANA), in a declaration adopted at The Hague in 1989 affirmed, *inter alia*, that "the use or threat of use of nuclear weapons is a war crime and a crime against humanity, as well as a gross violation of other norms of international customary and treaty law". The Association appealed to member countries of the United Nations to take immediate steps towards obtaining a resolution of the United Nations General Assembly, requesting the International Court of Justice to render an advisory opinion on the illegality of the manufacture, possession and use of nuclear weapons.

During the recent Commonwealth Heads of Government meeting in Kuala Lumpur, the Malaysian Bar Council Human Rights Committee, jointly with the Malaysian Physicians for the prevention of Nuclear War, presented a petition to the Heads of Government in support of the appeal made by IALANA.

Lawyers' contribution to this cause for total nuclear disarmament to bring World peace will receive considerable support from the people and enhance the image of the profession. It should form part of the human rights programme of Bar Associations.

### THE ROLE OF INTERNATIONAL ORGANISATIONS

Activist lawyers who struggle for the cause of the independence of their profession and human rights do so at a heavy price. They make considerable personal sacrifices. The reprisals against them take different forms. Between December 1987 and December 1988, 30 human rights activists have been killed and 750 such activists have been persecuted by 61 governments

around the world. These figures include many non-lawyers<sup>5</sup>. Lawyers of Pakistan must in the course of their struggles have seen the worst of these persecutions.

The burden and stress of those who struggle for these ideals would be lessened if it were known that their cause is shared and actively supported by others and, in particular, by international and other national associations of lawyers and human rights organisations. Indeed, during my own trial for sedition in 1985/86 I received copies of protest letters over my charge from no less than five Bar associations in Pakistan to whom, I am most grateful. It is most gratifying to note that more international and national organisations have become aware of the increasing persecution of judges, lawyers and human rights activists around the world and are taking concerted actions by way of protests and observer missions. Some of those involved in these missions take considerable risks. The work of Amnesty International, the ICJ, the IBA and LAWASIA in this field should not be underestimated. The interest shown by the American Bar Association and other Lawyers' Associations in that continent are most encouraging.

But the violating governments resent these actions by these organisations. They assert that it is an interference in the internal affairs of their nations. The Singapore Government is most notorious for such allegations. It was on this ground that I, together with three other Malaysians, was banned from entry into that Republic since October 1987. The Singapore Government took offence to our protests over the administrative detention and arrests in April 1987. We were not even allowed to use the Singapore International airport for transit purposes! Earlier this year Mr. Anthony Lester, an eminent Queen's Counsel from England, too, was banned from appearing before any court in Singapore for the same reason.

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5. The Persecution of Human Rights Monitors, Human Rights Watch, December 1988.

Human rights violations by a Government are no longer an internal issue. Such violations are against humanity in general and the violating Government is accountable to the international community. It is on this premise that the Commonwealth has so strenuously campaigned against the violations in South Africa. The United Nations was formed with member nations declaring in the Preamble to the Charter their determination to reaffirm faith in

fundamental human rights. It is therefore imperative for lawyers, and in particular international associations of lawyers and other human rights organisations, to continue their efforts to press this home and establish the importance of accountability of Governments whenever they violate human rights.

#### RATIFICATION OF U.N. INSTRUMENTS ON HUMAN RIGHTS.

Many member nations of the United Nations have not ratified or acceded to some of the major U.N. instruments on human rights. At the conclusion of the recent Commonwealth Heads of Government meeting in Kuala Lumpur it was declared, *inter alia*:

"51. Heads of Government affirmed that all human rights and fundamental freedoms are indivisible and inter-related and that the promotion and protection of one category of rights should not exempt states from the protection of the other.

52. They reaffirmed their commitment to the observance of all human rights. They stressed the importance of the work of the Secretariat's Human Rights Unit in promoting understanding and respect for human rights within the Commonwealth, in accordance with the principles enshrined in Commonwealth Declarations and the main international human rights instruments in particular as enshrined in the two International Covenants. They urged those governments which had not done so to ratify or accede to those instruments. They asked the Secretariat to continue to facilitate exchanges

of information on law reform, national institutions and domestic procedures for the promotion of human rights in Commonwealth countries."

The two international covenants referred to above must necessarily be the U.N. Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. As a sequence to this declaration, Bar Associations in Commonwealth countries, where these Covenants are not ratified or acceded to, should intensify their campaigns to call upon their respective Governments to honour their commitment to the Kuala Lumpur Declaration. I understand that accession to these two important instruments is currently under study by the Pakistan Government.

### CONCLUSION

In the final analysis, the quality and effectiveness of the legal profession in any country will depend largely on the extent of its independence and the character and commitment of its individual members. Without these attributes no legal profession is worth its salt. It will remain not only docile, but subservient. The profession has an inherent right to independence. It is something which the profession should nurture and jealously guard against any aggression.

An independent judiciary and an independent Bar are twin pillars of the rule of law. When these two are stripped of their independence, rule of law will end. The enemies of equality before the law will succeed and the administration of the law will be brought to disrepute. Where there is no rule of law there will be no human rights. When man is denied his rights he is denied his humanity. The test of civilisation is not the quantum of wealth or materials enjoyed by the people but, as Felix Frankfurter put it, "is the degree to which justice is carried out, the degree to which men are sensitive to wrong doing and desirous to right it<sup>6</sup>." The degree of civilisation we all seek is a new World where, in the words of President John Kennedy, "the strong are just and the weak secure

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6. From the Diaries of Felix Frankfurter pg. 39.

and the peace preserved" . Lawyers everywhere must take the lead to pursue and further the cause of justice and promote and protect human rights to achieve that ideal state of civilisation for, using the words of your own (Pakistan's) distinguished and respected lawyer, Mian Mahmud Ali Kasuri, "I still do not know of a nobler mission than the struggle for the common man's right to a life of freedom, justice and dignity<sup>7</sup>."

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7. Speech delivered at the All Pakistan Lawyers Convention year.

## THE STRUGGLE FOR THE RULE OF LAW

by

ABID HASSAN MINTO

In 1982, the year in which I remained the President of the Lahore High Court Bar Association, a decision was taken by the lawyers to hold their All Pakistan National Convention in the Courtyard of the Lahore High Court. It was not the best of times, the country and people having been put to crucial test under the worst martial law in our history, the judiciary having suffered more than any other single institution. To hold such a meeting within the High Court premises, the permission of the Chief Justice had to be obtained. The then Chief Justice, Mr. Shamim Hussain Kadri, was more than gracious towards the request for permission, and while granting permission instantly, he also remarked that if the lawyers were able to build a strong enough movement, it would greatly help the Bench in performing its duties to uphold the rule of law.

In Pakistan, the role of the Bar has been laudatory in the fight against martial law and authoritarianism and for upholding the Constitution and the rule of law. The first such movement, which was directed against the martial law administrator Ayub Khan, was spearheaded by the lawyers of the country. The anti-Ayub movement aimed mainly at demanding a parliamentary and

federal constitution in the country. As an organised body, lawyers also take credit for having initiated the anti-Zia movement. The National Convention of Lawyers held in Lahore in 1980 was attended by over 4,000 lawyers from all parts of Pakistan. Although belonging to different political backgrounds and schools of thought, they showed complete unanimity in their commitment to the struggle against martial law and for the complete restoration of democracy under the 1973 Constitution.

The historic Lahore Convention was followed by similar conventions in Karachi and Peshawar. It was the momentum so generated which led to the formation of the MRD (Movement for the Restoration of Democracy) in 1981, a platform which united almost all major political parties of the country to strive for the withdrawal of martial law. Mass arrests of political leaders and lawyers began to take place throughout the country, to suppress all voices which demanded rule by the people.

Again, it was the legal community that was at the forefront of protests against these unlawful detentions. Another national convention of lawyers took place in Lahore in 1982 where it was decided to set up a National Co-ordination Committee of lawyers which would enhance unity and co-operation and which would discipline and organise the joint struggle against oppression. A declaration to this effect was also adopted unanimously at the Lahore Convention, which called for complete restoration of democracy and an end to military rule.

1983 and 1984 saw two more conventions in Lahore followed by general strikes, hunger strikes and voluntary courting of arrests at Karachi, Lahore and Rawalpindi as a protest against the continuing dictatorial activities of the martial law regime. Committees were set up throughout Pakistan to provide free legal aid to the victims of martial law who were harassed and prosecuted on frivolous charges and in a manner contemptuous of a society with a civilised legal system.

The struggle for upholding the rule of law has not remained confined to the time of martial law alone. In our history

we have seen periods of civilian rule which were not necessarily democratic. Before the coup d'etat of 1977, the elected government had taken several steps which betrayed its democratic claims. Elected political governments in two Provinces were arbitrarily dismissed, a state of emergency was continued and fundamental rights remained suspended. Even the Constitution was amended so as to impair the independence of judiciary by curtailing the powers of the High Courts . The amendment to Article 199 of the Constitution of 1973 by the 4th and 5th Amendment Acts of 1975 and 1976, restricting the powers of the High Courts in cases concerning preventive detention and the grant of bail were a consciously inflicted blow both upon the democratic set-up and the inherent powers of the judiciary. The amendments to the articles dealing with the retirement of the Chief Justice were steps in a similar direction; they were meant to place more and more control over the judiciary in the hands of the executive.

Executive and governmental devices to control the judiciary bred corruption in the institution. The appointments to posts and assignments in the legal profession have always been politically motivated and political considerations often tend to supersede merit, which is no longer a criterion for such appointments. The sole fact that the employer to these posts is an executive having political motives over and above the rule of law is conducive to more dependence and corruption within judiciary.

The legal community has not confined itself to the struggle for the restoration of democracy and the withdrawal of martial law alone. Lawyers have participated in, in fact even originated, various struggles for the enhancement and promotion of civil liberties in the country. They have fought for trade union rights, and have rendered special services to the victims of the bonded labour custom, by extending free legal aid to those affected. The case of the brick-kiln workers in the Supreme Court is a prominent landmark of this long struggle.

While the struggle for the restoration of democracy and the supremacy of the rule of law and the Constitution was on, the martial law authorities amended the Legal Practitioners and Bar



Council Act of 1973 by introducing the new sections 59-A and 59-B. These provisions prohibited Bar Councils and Bar Associations from indulging in what was termed as political activity and permitted legal practice without membership of a Bar Association. It was an attempt to isolate the Bar from politics, to place it in a watertight compartment, far removed from political activity.

True, the struggle for a constitution, for removal of martial law and the restoration of democracy is, by its very nature, a political struggle, but it cannot be isolated from the struggle for the rule of law, with which the legal profession is inevitably linked and in which it has direct and vital interests. This activity is, and should necessarily be, an integral part of the role which a lawyer is required to play as an aware and enlightened member of the society. The legal community reacted strongly to the amendments in the Legal Practitioners and Bar Council Act and was successful in having them abolished.

While talking about the independence of the judiciary and that of the legal profession it must be determined with clarity as to what is meant by independence in this context, and to identify the forces in our society which mar the complete independence of these institutions. When we speak of the independence of the judiciary we cannot but emphasise that it means adherence to the commitment for upholding the rule of law in society, irrespective of political and governmental influences. Logically, then, it follows that since the concept of independence, necessarily, and most importantly, envisages independence from the influence of the executive so as not to become a tool in its hands for the promotion of its interests, as well as independence from political influences, it also defines the nature of politics which will tend the most to exert its influence over the judiciary. Such politics is the "anti-rule-of-law" politics and it is by virtue of its being "anti-rule-of-law" that it influences the supposedly independent judiciary in order to obtain legal sanctions from it for all its acts.

Our courts have been confronted with such ignominious situations in the past. I regret to say that the judiciary has not always stood by the noble cause of the rule of law. From

Tamizuddin's to Dosso's case and from the verdict in the National Awami Party's issue to Begum Nusrat Bhutto's case, one can clearly see the judiciary succumbing to the influence of anti-rule-of-law forces.

Pakistan's history of 42 years has consistently lacked a set-up conducive to promoting the independence of the judiciary. From its inception until over nine years of its life Pakistan survived without a proper Constitution, which came in 1956, only to see its short life put to an end by the first Martial Law in Pakistan's history. It is important to note that the first Constitution was abrogated close to the time when our people were getting ready for the first general elections.

The second Constitution in 1962 was ironic in the sense that both its spirit and its mode of coming into existence were against the spirit of the generally recognised idea of a constitution. Imposed upon the people from above, it envisaged a Presidential form of government with autonomy for no one but the President himself. It was an unpopular, unrepresentative constitution meant only to give a garb of democratic perpetuity to the existing Martial Law in the country.

This guise of democracy being a poor guise could, however, not last for long and yet another Martial Law, which was to last another three years, 1969.

In 1973 the country received another Constitution, the Constitution of 1973, remnants of which still survive, though it remained in operation for only four years and was suspended in 1977 after the imposition of what was to be the longest of the many Martial Laws.

The longest Martial Law, besides taking its heavy toll on the society in general, particularly victimised the 1973 Constitution and brought about various very basic changes in it. The creation of a Federal Shariat Court and a Shariat Appellate Bench of the Supreme Court, by virtue of the addition of an entirely new chapter in the Constitution, is just one of such changes. The creation of a

Federal Shariat Court is not just the creation of a new parallel judiciary but also the establishing of a parallel legislature. The Federal Shariat Court has the jurisdiction to pronounce upon the validity of laws, with some exemptions, on the ground of repugnancy to the Islamic injunctions. The court is competent to say what, in its opinion, the law ought to be. The court's view is binding even though the Parliament may have a unanimous opinion to the contrary. In a recent judgment of the Shariat Bench of the Supreme Court, the law by which (in 1972) feudal control over land was sought to be restricted by a ceiling on land ownership, has been struck down as being repugnant to Islam. In other words, unlimited ownership of land, with all its social, economic and political implications, is now protected and the Parliament cannot make a law to the contrary even if it entertains a different view on Islamic injunctions. There are other important changes effected in the Constitution which have changed its parliamentary character by vesting large discretionary powers in the President, who is not answerable to the people or their representatives for acts done. Blanket protection has also been extended to laws made during the period of Martial Law, including those which exclude female testimony in some cases.

These tamperings with the Constitution, which manifest themselves most prominently in the form of the 8th Amendment, were evidently brought about to achieve specific purposes, namely to undermine the authority of the parliament and of the courts, and to maintain and preserve the status quo, which is the product of a backward socio-economic set-up.

The backward socio-economic set-up of the system is based on feudalism. The control of the landed aristocracy over the economic and social life in particular, and by virtue of that on the people in general, is enormous. This clique enjoys full control of the local executive and, in some cases, of the lower judiciary also. Thus violations of the law, of which the worst but alarmingly frequent example is crimes against women, are the everyday routine, because such violations are in the interest of the ruling feudal clique, and because the survival of the present socio-economic system depends upon keeping it undemocratic, maintaining illiteracy and ignorance

and suppressing education. Education results in the awareness in people of their legal rights and that very awareness poses a threat to the feudal structure. Feudal socio-economic conditions are an antithesis of democracy, which arose as a way of life in the West only after overthrowing feudalism.

For its own vested interests, this structure is supported and governed by the highly organised bureaucracy and by the Army which has come to stay as an important and decisive role player in the system. Most of the time even law-making has been done by the executive, which is true especially of the time during martial law. Most of the laws so made have come to stay as they support and strengthen the structural status quo of this society.

The executive, to procure for itself vast and unbridled powers, strives to create labyrinths within the system which operate to curb the activity of the elected representatives of the people. This whole system played its full role in promoting a peculiar and intentionally misconceived version of religion which had been adopted by the previous Martial Law regime as its justification and which supported the anti-democratic stance of the ruling elite by preaching authoritarianism, curbing social advancement and restricting the rights of women and minorities. The bureaucracy, the military and the landed aristocracy went out of their way to patronise the clergy and the fundamentalist groups who, in order to reap maximum benefits, reciprocated and lent their full support in the efforts to suppress awareness amongst the people.

Totally supplementing this system of the feudal-aristocratic-military trio is the enormous economic and political foreign influence which has consistently backed Martial Law, hampered progress and development, and is keen on impairing the freedom and consciousness of the people.

The system resulting from this is obviously a typical neo-colonial system in which each of the above-mentioned forces have had, or are continuing to have, a good hand. The most concise way to see what the system offers to the people is by looking at the budgetary allocations for expenditure in various spheres. Defence

and administration are at the top while social development and education are so far below that they appear to have been allocated only some residual spending. It is important to note that defence allocations, have, as a matter of practice, been kept outside the purview of parliamentary scrutiny. Such a neo-colonial system is only for the service of certain cliques and not for the people. *Democracy is alien to this system. Democratic culture and the rule of law cannot be firmly established without doing away with the prevalent neo-colonial system.*

The concept of an isolated struggle for upholding the rule of law in a neo-colonial system has no meaning. No successful struggle, indeed no struggle at all for the rule of law, the independence of judiciary and of the legal profession is possible without simultaneously linking the same with the struggle for ridding the system of neo-colonialism and for establishing a truly democratic society. Of necessity, the struggle for the rule of law and the constitution, which alone guarantee the independence of judiciary and the legal profession, becomes a political struggle also. It is necessary that the Bar play its role in the fight against feudal, bureaucratic and foreign control over society.

Today the country has rid itself, at least theoretically, of a purely dictatorial rule, and a representative civil government has come into power. However, the full and free working of an elected government cannot be guaranteed in the presence of the Constitution as it stands today, its having become a patch-work of random amendments with the disreputable 8th Amendment at the peak.

The curb on the powers of the courts, the parallel judicial system in the form of the Shariat Court, which claims supremacy even over the elected house of representatives, and a plethora of other provisions, still prohibit the return to a democratic system, and more so to a system which would ensure the independence of judiciary. So long as these situations subsist, the Bar is required to play its role, and the fight goes on.

The concept of a pure advocate-client relationship does not hold in societies like ours, where wider horizons need to be conquered by unrelenting struggles. By virtue of his education and training, a lawyer is a privileged and aware member of the society, or at least is required to be so. For him to play his role more effectively, changes need to be made in the legal education and training imparted to him. An awareness of human rights, civil liberties and legal ethics, as well as a proper social consciousness, must constitute an integral part of his training because his obligation to society extends beyond professional legal practice. As an enlightened citizen, he owes a duty to the society beyond his professionalism.

The same, I must say, is true of the judiciary. In a developing society like ours, when political awareness and democratic culture have remained suppressed, every aware citizen, including the judge, owes it to his people and their future to take a clear and firm stand on issues as they arise before him. Judges cannot avoid issues by brushing them aside as political questions. Indeed they have quite often dealt with such matters while deciding cases. The society, however, demands that they stick to the rule of law and the rule of democratic development rather than the rule of necessity or of expediency.

## JUDICIAL IMPLEMENTATION OF HUMAN RIGHTS NORMS

by

Jeremy McBride

I am very glad to have this opportunity to discuss with you the question of judicial implementation of human rights norms. The relevance of this topic to the broader issue of the independence of the judiciary seems clear; without serious efforts to secure the protection of human rights, such independence is unlikely to be worthwhile. The norms on which I wish to concentrate are international in terms of their formal status, but many of them reflect and amplify provisions in domestic constitutions and laws. I would like to encourage greater resort to these international standards in domestic judicial decision-making, as I believe that this will help domestic courts in discharging their constitutional responsibility to secure respect for human rights.

The importance of this responsibility for domestic courts can never be understated; it is at the domestic level that human rights should be enforced and, if things do go wrong, then it should be the domestic courts that are the source of the appropriate remedy. Despite the immense and impressive growth of international mechanisms regarding human rights in the last twenty to thirty years, most victims will rightly look first to their own courts for a remedy. However, the difficult task of adjudication can often be assisted by consideration of international norms and their interpretations by international tribunals.

Before looking at their use at the domestic level, it might be wise to establish what exactly I mean by international human rights norms. That phrase certainly embraces a great range of instruments and rules. One may immediately think of treaties, universal ones such as the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, regional ones such as the European Convention on Human Rights and its American and African counterparts. There are, however, many instruments, some regional and others universal, which don't deal with a whole body of rights but are more specific, dealing with matters such as Torture, Refugees, Labour Standards, Data Protection and Children. Moreover, international law recognises that some human rights have binding effect without the specific agreement of individual states, that is, the rules of customary international law. These now embrace matters such as the prohibition of slavery, genocide, racial discrimination, torture, and inhuman and degrading treatment.

Treaties and custom are legal norms which are binding or obligatory for states, but they are not the only norms which might be worth taking into account at the domestic level. There are also many declarations of bodies such as the UN General Assembly. Some of these, such as the Universal Declaration, may now be more than a pious aspiration and have passed (at least in part) into customary international law. But even if these declarations have not progressed as far as that, it would be foolish not to have regard to them as they often have much greater precision than the various legal instruments to which I have already referred. The sorts of things I have in mind are instruments such as the Minimum Rules for the Treatment of Prisoners, which set out in considerable detail the sort of regime appropriate for prisoners and which will be regarded as giving some substance and particularity to principles such as the prohibition of inhuman and degrading treatment, the right to family life and the right to a fair hearing. In this category we have instruments such as the Code of Conduct for Law Enforcement Officials, the Principles on the Independence of the Judiciary, the Council of Europe's Declaration on the Police, the Principles of Medical Ethics relevant to the role of Health Personnel in the Protection of Prisoners and Detainees and most



recently the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. Now, of course, you might say that this is all very interesting but what has it got to do with the domestic judge? These norms are international norms and the domestic judge is supposed to apply domestic law. Such a dualist attitude is understandable but not necessarily appropriate. In the first place the norms may actually have - despite their international origin - some domestic status, for instance when treaties have been accepted by the state. In that case, ratification necessarily means domestic incorporation. That is, however, not a feature of countries in the Commonwealth, but in many other countries treaties do have such a domestic status and there they are, therefore, instruments which the domestic courts can, and indeed must, apply in the resolution of disputes. Customary international law is regarded as applicable within many domestic legal systems and it is, therefore, incumbent upon domestic courts to take account of the human rights norms which enjoy that status. Regrettably this avenue is often of limited effect because of the prevailing view that laws having domestic origin should be awarded priority over customary rules where there is a conflict between them.

Given these qualifications, it is clear that human rights norms still have a limited domestic status in the sense of being an obligatory basis for the court's decisions. This is perhaps unfortunate, but it does not mean that such norms - even those that are not binding on a state in international law, such as an unratified treaty or a declaration that has not acquired the status of customary international law - have no relevance to the resolution of human rights cases in domestic courts. To take that view runs counter to the obvious parallels between the constitutional and legislative provisions of many countries and the international standards. There may be some differences in language and detail but the principles are broadly similar and it was for that reason that in the Bangalore Principles, adopted last year by a number of Commonwealth judges, specific support was given to the validity of referring to international standards in domestic decision-making and this has subsequently been endorsed at a second colloquium of Commonwealth judges held earlier this year in Harare. The

Bangalore Principles are an unqualified acknowledgment that the dichotomy between international and domestic human rights norms is more apparent than real. Nevertheless it does not amount to a suggestion that international standards should be unquestioningly applied. It is simply calling for them to be taken into account where appropriate, to be used to improve a Court's interpretation of constitutional and legislative provisions.

I would, however, like to suggest that one should be prepared to go a little further than the recommendation in the Bangalore Principles that resort to international standards is appropriate only where the national law is ambiguous or uncertain. That may be an appropriate approach to take when determining the scope of relatively detailed legislative provisions but it doesn't really help when one comes to the interpretation of constitutional guarantees.

Furthermore international standards may have uses beyond interpreting specific provisions of domestic law. A domestic court might, for example, be influenced, when deciding that it would be against public policy to enforce a contractual provision, by its impact on a person's internationally recognized human rights. Similarly, the conclusion that a particular exercise of discretion is unreasonable or an abuse of power, might be reached after due consideration of international human rights norms.

Of course international standards can be as broadly stated and as abstract as domestic constitutional provisions and not, therefore, particularly helpful. Increasing precision (and correspondingly greater assistance for domestic courts) is being achieved at the international level through the burgeoning jurisprudence of international human rights tribunals and the detailed norms being set out in the Codes and Declarations to which I have already referred, as well as provisions such as the General Comments being adopted by the Human Rights Committee in the light of the reports submitted to it by the states parties to the Covenant on Civil and Political Rights.

The usefulness of a developed case law as a source of guidance and comparison should be readily apparent to a domestic court seeking to resolve the human rights issues coming before it. I would, therefore, like to refer briefly to a small selection of the recent case law coming from two of the international human rights tribunals, the European and Inter-American Courts of Human Rights. I think that it should then be evident that these and other comparable tribunals are grappling with human rights problems which are not of concern solely to the context within which they operate - the problems, like the norms, are of universal relevance.

Thus, for example, the European Court gave last year a very impartial ruling on the responsibilities of the state when there is a demonstration which meets with opposition from groups that do not like the object of the protest. It is all too easy for legitimate protest to be frustrated in this way and in the case of Artze fur das Leben the Court made it clear that "genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the state not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 [the right to freedom of assembly] . . . [it] sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be". This is not an absolute obligation; the state must, however, take "reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully". It is, therefore, an obligation as to the measures, not the results, to be achieved. It would be difficult not to consider the principles elaborated in this case to be of relevance in any dispute about the appropriate policing of demonstrations. Both the European and Inter-American courts have had to consider the nature and extent of judicial guarantees for those who have been detained. The Inter-American court, in an Adversary Opinion on Habeas Corpus in Emergency Situations, took the view that, although the right to personal liberty could consistently with the American Convention on Human Rights, be suspended in an emergency, the remedy of habeas corpus could not be suspended as this was the only way of ensuring that measures going beyond what was permitted by the emergency had not been taken; "in a system governed by the rule of law it is entirely in order for an autonomous and independent

judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorised by the state of emergency". It is also a remedy which performs a vital role in ensuring that rights which are not derogable - life and physical integrity - are not violated. In the Brogan case, a more specific elaboration of this principle was seen in a ruling by the European Court against the United Kingdom. Certain individuals detained under special powers to deal with terrorism had been detained for more than four days without being brought before a judge or judicial officer. While the court acknowledged that the problems of combating terrorism present the authorities with special problems, it could not accept that a delay of four days and six hours could be regarded as consistent with the requirement of promptness in Article 5 in the Convention. In its view the result of taking a broad view of this word would be "a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence" of the right to personal liberty. The legitimacy of the motive behind the arrest was not enough ; the case did not rule out even lengthier detention but the court regarded a strict interpretation of the provision governing judicial supervision as essential if the risk of arbitrariness was to be minimized. In other words judicial control was essential for the rule of law. In the same vein, consider the statement by the Inter-American Court in the Velasques Rodriguez case that "if the state apparatus acts in such a way that [a violation of human rights] goes unpunished and the victim's enjoyment of such rights is not restored as soon as possible, the state has failed to comply with its duty to ensure the free and full exercise" of the rights. That case was concerned with the state's international responsibility but the reasoning is equally applicable to the breach of constitutional guarantees.

Finally, might I mention the case of Soering which was brought against the United Kingdom and arose out of attempts to extradite a West German national to the United States where he was wanted for murder. The penalty in this particular case was death. Although that was not specifically prescribed by the European Convention provisions applicable to the United Kingdom

(which has yet to ratify the Sixth Protocol), the Court took the view that the likely length of the period that the applicant would spend on death row (7 years), his age (18) and mental state at the time of the offence combined to suggest that he was likely to suffer inhuman and degrading treatment. This injury would not be directly inflicted by the United Kingdom - he would be suffering it in the United States which is not a party to the Convention - but the Court considered that responsibility could arise for a breach of the Convention where it was foreseeable that there was a real risk of such treatment being a consequence of extradition. Again this case was only dealing with one state's obligations under the European Convention but it would be strange not to regard the reasoning as applicable in any domestic proceedings where deportation or extradition decisions are being contested.

These decisions and many others, while dealing in the first place with a human rights problem in one country, are a source which can clearly inform legal reasoning in many other countries. Even where the terms of the provisions are not broadly similar, they can still be of assistance as the meaning of particular differences may be clarified by reference to the jurisprudence of international tribunals. It is, however, disappointing to note that, in a number of countries where international standards have domestic legal effect, the relevant case law is not being considered. This is particularly true of some of the countries that have ratified the European Convention and as a consequence cases raising issues which have already been clearly resolved continue to be the subject of petitions. This is at least in part attributable to ignorance of the relevant case law.

I would now like to say something about the experience of the United Kingdom courts in using international norms. The U.K. is a party to the European Convention and a number of other human rights treaties. Although none of these have domestic legal status, they are increasingly being recognised as a source to be taken into account in legal judgments and this is particularly true of the European Conventions. The experience is by no means consistent; sometimes judges are simply dismissive, using the international status of the Convention as something that precludes

its consideration in a domestic context. Moreover, the use of Convention has often foundered because too much is being expected of it by those arguing the case. Thus it is cited as a reason for a favourable decision simply by referring to a particular provision - which, like most constitutional provisions, is broadly phrased. No effort is made to involve the extensive case law, sometimes because counsel seem only to be aware of the case law involving the United Kingdom. But where the argument is fuller and doesn't stretch credibility, there does seem to be an increasing acceptance of its relevance. To give some examples, the free speech provision in the Convention figured prominently in the judgements in the Spycatcher saga - about whether the courts should restrain a former employee of the secret service from publishing his memoirs on the basis that it would be a breach of confidentiality. It is by no means the case that all the judgments reflected the balancing approach that one would expect of the European court of Human Rights in determining the extent to which national security interests can restrict free speech but it clearly influenced some of the judges in the way they handled the application of English Law. An awareness of the Convention must be credited at least with encouraging a greater primacy for free speech considerations than might formerly have been expected.

Similarly in the area of prisoners' rights, there has been considerable change, attributable at least in part to the development of the European Court's jurisprudence on the subject. That started with cases successfully impugning the standards being applied by the United Kingdom and has ended with its own courts developing the principles already elaborated by the European Court and thus ensuring that, for example, a prisoner's right of access to the courts was truly effective. Similarly there is now some account being taken of the right to family life in decisions on immigration matters though much still remains to be done - and some account is also being taken of international guarantees for refugees.

The use of international standards is perhaps going to be necessarily hesitant in a country such as the United Kingdom, which unfortunately lacks any constitutional guarantees of human

rights. Any reference to such standards is going to require a severe adjustment by the judiciary to an alien way of thinking. That should not be the case in countries which do have such constitutional guarantees; the international and the constitutional norms are part of the same tradition and philosophy and it is natural that there should be some interchange of experience at the level of application.

The value of borrowing from or drawing upon the reasoning of international tribunals is increasingly being recognised in many Commonwealth countries, particularly in those having constitutional guarantees similar to the European Conventions. But even where there is no such shared provenance, resort to international experience is no less relevant and helpful.

Although I have concentrated on the usefulness of international case law, I would like to emphasise that documents such as the codes, declarations and general comments to which I have referred can be equally valuable. Their detailed provisions might, for example, be of considerable assistance in assessing the compatibility of legislative measures and administrative decisions with broadly phrased constitutional guarantees of human rights.

Of course it is rather easy to point out the value of using international standards and much more difficult to put them into practice. One of the great obstacles to the effective use of such standards is knowledge about their existence; the treaties, codes and jurisprudence are now extensive but are still largely unknown as far as domestic judges and lawyers are concerned. Moreover even where there is a receptiveness to the use of international norms there is often a problem of their ready availability, particularly the case law. Furthermore the case law is often rendered inaccessible to many because it is only available in a limited number of languages. If it is accepted that international standards can be of use then arrangements for improving education and dissemination must be improved. This should be aimed particularly at judges, lawyers and law students, and their effectiveness should be monitored.

It is also vital that international human rights norms be treated with due seriousness; even if they are not even binding at the international level, they ought to be looked upon as valuable precedents and not dismissed out of hand. The responsibility here is perhaps as much with counsel as the judiciary; to cite a human rights provision in the abstract is rarely helpful - there must be the supporting argument, the relevant case law if any and in context. It seems to me that many cases in the United Kingdom have foundered with the European Convention being invoked as an argument of last resort. This has resulted in the Convention's peremptory rejection and the setting up of a prejudice against better arguments in future cases.

International norms should also be used with due account being taken of the local context. It would be particularly inappropriate to follow blindly the jurisprudence based upon those norms; for example, approaches to the application of limitations on particular freedoms ought to take account of local conditions and traditions - 'public morals' will vary from country to country. This doesn't mean that such cases are of no relevance; the underlying principles can still be helpful.

I would also like to emphasise that I do not see this as one-way traffic; i.e., domestic courts 'borrowing' from international courts. There are many domestic decisions which can help international tribunals, as well as other domestic courts. In countries where the European Convention has domestic status there are certainly issues being resolved at the national level which have yet to be canvassed before the European Court. Such cases clearly have relevance beyond national frontiers. I am also conscious of some decisions of the courts of Pakistan dealing with habeas corpus which could be of assistance elsewhere. In the end it is always a problem of knowledge.

Finally, I would just like to say that I don't see the encouragement to use international standards as taking sides in the dispute as to whether judges should be activist or restrictive when interpreting a constitution. Courts can be activist or restrictive when interpreting a constitution. Courts can be activist



without referring to international human rights norms but they can also be restrictive when using them. Indeed the activist/restrictive dichotomy can also be found at the international level. I do believe, however, that the resort to international standards and case law will make for more informed and better decision-making at the domestic level.

## THE COURTS AND THE FUNDAMENTAL RIGHTS

by

Makhdoom Ali Khan

In 1717 Bishop Benjamin Hoadly told the King of England that, in his opinion, "whoever hath an absolute authority to interpret any written laws is truly the Lawgiver to all intents and purposes, and not the person who first wrote them." I have begun this paper with a more than two hundred year old quotation mainly to give it an erudite kickstart, but also to emphasise the part which judges are called upon to perform in the implementation of human rights norms.

For the last two centuries this quotation has been recycled a number of times to underscore the pivotal role of the judiciary in a government of laws and not of men. In such a government, Chief Justice John Marshall declared, "It is emphatically the province and duty of the judicial department to say what the law is." This liberal view of constitutional construction found favour with Chief Justice Ajmal Mian and his colleagues when they directed the government to separate the judiciary from the executive.

Chief Justice Hughes of the United States expressed the view that "the Constitution is what the judges say it is". Justice Learned Hand regarded the words of the Constitution as empty vessels, "into which the judges pour everything which they like". Chief Justice Abdul Qadeer Chaudhry quoted these words with

approval when giving a liberal interpretation to the Constitution to strike down the dissolution of the Provincial Assembly of Balochistan as unconstitutional.

It is such broad interpretations of constitutional language which save the Basic Law from being congealed in the past. A constitution is made for all times and it is innovative judicial interpretation which keeps it in tune with changing realities. The courts must give to the constitution its ordinary and natural meaning. A parliamentary majority under a temporary impulse may write down as law whatever it considers expedient. It is the job of the judge to determine whether the legislation is consonant with, or contrary to, the basic rights of the citizen.

The very purpose of a bill of rights is to withdraw "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and freedom of worship and other fundamental rights may not be submitted to vote. They depend on the outcome of no election."

When a nation gives to itself a constitution and guarantees that certain human rights cannot be encroached upon by the executive or the legislature, it lays down the principles which determine the shape of society. These freedoms must be protected from executive depredations and even democratically elected governments do not have the authority to tamper with them. In our Constitution, however, many of the most important fundamental rights have been leagued with qualifications. They have been made subject to law. It is here that judicial craftsmanship will be required to protect the individual and restrain the government.

The scope of the restrictions which can be reasonably imposed by law and the reasonableness of the law itself will have to be determined by the superior courts. The judges are already being called upon, and in the days to come will be increasingly asked, in the exercise of their constitutional jurisdiction, to determine the vires of such laws. The restoration of fundamental rights thus

provides a new opportunity to the judiciary to give a direction to our constitutional government and ensure that the Constitution upholds progressive social and political values. To them has fallen the "vexatious task of defining the nature and scope of the enumerated guarantees, thereby limiting the coercive powers of government".

In defining the limits of these fundamental rights, in particular, the influence of the court will be profound. It will be for the judges to identify the promises of the Constitution and ensure that the other departments of government do not disregard them with impunity simply because these have been made subject to law. The extent of executive authority and legislative competence in this field has not been charted. Given the vital and momentous rights involved and the natural tendency of those in power to overstep authority it is inevitable that constitutional controversies will arise. The Constitution will come into play. In these circumstances it will be for the judiciary to determine the kind of society we are to become. It is constitutional constructions which will make the Basic Law a living document or a blank sheet of paper signifying nothing.

In our country the opportunities for the judges to express their views on basic human freedom have been few and far between. Fundamental rights have been in abeyance for inordinately long periods of time. When they have been restored more often than not the courts have used this power to strike down bad laws. In exercise of their powers under the 1956 Constitution they struck down the Punjab Control of Goondas Act; section 11 of the Frontier Crimes Regulation; section 7(i) of the Press (Emergency Powers) Act, 1931; parts of the East Bengal Acquisition and Tenancy Act, 1950; and sections 23-A and 23-B of the Foreign Exchange Regulation Act, 1947.

In the Ayub years, during the very brief period when fundamental rights were enforceable, the Court struck down as unconstitutional the arbitrary and unqualified power given to the provincial government to declare an association or political party unlawful. A law which authorised a district magistrate to depute a

person to attend a meeting for the purposes of making a report of its proceedings and directed the person conducting such a meeting to admit that person was declared to be an unjustified invasion of the right of free assembly and association. A law which required a permit to be issued by the Deputy Commissioner for the use of a loudspeaker in a public place was held invalid.

In the early years of the 1973 Constitution, when fundamental rights were made enforceable, albeit for a very short period, the court declared that any assault on the body of a person without specific legislative permission violated Article 9 of the Constitution. An order of detention which contained several valid as well as invalid grounds of detention was struck down as violative of Article 10 of the Constitution. The court ruled that, where several grounds of detention have been stated, the wrongful inclusion of any ground would render the orders of arrest and detention illegal as each ground contributed to the satisfaction of the detaining authority. The inclusion of a single bad reason vitiated the entire order.

Since 1985, judges again have been active in this area. The Supreme Court gave an extended meaning to Article 17 of the Constitution. The fundamental right to join and form a political party was declared, over the objections of the then Attorney-General, to include the right to contest elections on a party basis as well. A number of provisions of the Political Parties Act, 1962, which impeded the freedom of these parties were struck down in spite of the Constitutional protection granted to the Martial Law legislation by Article 270-A of the Constitution.

In another petition, the Court struck down Section 21 of the Representation of the Peoples Act, 1976, in so far as it failed to recognise the participation of political parties in the electoral process and imposed clogs on the allocation of a single electoral symbol to a political party. A number of cases are being decided on the touchstone of the Constitution. Recently it has been held that a person who is affected by construction activity in a neighbouring area can come to the court not only on the ground that his right of

easeement is undermined, but can also invoke his right of privacy under Article 14 of the Constitution.

Another very important feature of fundamental rights litigation since the withdrawal of martial law has been the lowering of the barriers of locus standi in fundamental rights cases. The Supreme Court has declared that lack of standing cannot defeat a petition where fundamental rights are an issue. A door has thus been opened for public interest litigation. Indeed Chief Justice Muhammad Haleem made it quite clear (in *Miss Benazir Bhutto vs. Federation of Pakistan* PLD 1988) that "this rule of standing is an essential outgrowth of Anglo-Saxon jurisprudence in which only

the person wronged can initiate proceedings of a judicial nature for redress against the wrong-doer . . . The rationale of this procedure is to limit it to the parties concerned and to make the rule of law selective to give protection to the affluent or to serve in aid of maintaining the status quo of the vested interests. This is destructive of the rule of law which is so worded in Article 4 of the Constitution as to give protection to all citizens."

A Full Bench of the High Court of Sindh held that whether the transfer of a judge is in the public interest can be challenged even by a lawyer. In another case the Chief Justice, after having visited a jail in his capacity as Official Visitor, took suo moto notice of the illegalities committed by the jail authorities against the inmates of a prison. The path-breaking decision by the Chief Justice that the court had suo moto jurisdiction in habeas corpus matters provided immediate relief to the affected persons as the jailers apprehending judicial intervention immediately discontinued their unlawful acts.

The rule of standing, however, is not the only legacy of Anglo-Saxon jurisprudence. We have inherited from the British the doctrine of parliamentary sovereignty and the belief, still prevalent in judicial circles that judges should decide the law according to the exions of positivist jurisprudence ignoring questions of social philosophy underlying the statute. The real achievement of the Constitution is that it ends parliamentary omnipotence and makes

all legislative departments and governmental agencies subject to the Fundamental Law; but this point is often missed.

The problem with the doctrine of strict construction, which exhorts judges to ignore that the Constitution is a socio-economic document directed towards achieving the objective of a federal-democratic-Islamic State, is that it reduces the fundamental law to mere legal words. This may be all right in England, where the courts can never examine the correctness or validity of parliamentary decisions. In a federation with a written constitution which clearly stipulates how the various institutions of government are to be organised, what powers are to be entrusted to them and the manner of their exercise, this view is clearly wrong. It is impossible to determine the reasonableness or constitutionality of laws by a reference to the intentions of the law-makers and the lexical meaning of the words of the Constitution. "The central flaw" of this literal approach is "that it fails to recognise that words are inherently indeterminate" - they can often be given more than one plausible meaning. If simply reading the constitution the "right" way was all the justices of the superior courts had to do, the only qualification for the appointment of a judge would be literacy and the only required reading would be a dictionary.

The meaning of the words of the Constitution is difficult to pin down. This is particularly so in the case of fundamental rights. The language employed here has an open texture.

Just what is the meaning of the dignity of man? Does the right of privacy merely mean that no one can enter your home without a knock on the door or does it protect you from electronic eavesdropping and the other forms of intrusion in your private lives by Big Brother? What are the meanings of life and liberty?

Does the right to live include the right to livelihood? Can the state impose a limit, or prohibit campaign contributions, or is payment of money a form of expression and thus a guaranteed fundamental right? What are the outer limits of speech and expression? Where does speech end and action begin? Is every citizen equal in every respect or can the state make laws for the

uplift of the downtrodden and the backward? If it can classify in such a manner, then what classifications are reasonable? What is property? In a third world state, should this right be invoked to stop all progress towards a welfare state?

These are just a few of the questions which will arise in a day in the life of a judge called upon to decide fundamental rights cases. He will find the dictionary of very little help in the determination of such controversies. These can only be decided by a reference to the spirit of the constitution, its socio-economic dynamics, the plight of the individual concerned and the social and moral norms of society.

Such vague and general expressions have been deliberately used. The language of the Constitution openly invites the judges to give life, in particular, to the words of the fundamental rights guaranteed by the Constitution. Constitutional interpretation involves an element of judicial creation. This is not an Alice in Wonderland argument which confers on judges the powers which Humpty Dumpty enjoyed. They cannot simply make a word mean what they choose it to mean. Human rights are not contingent on their fancy. In determining the nature and scope of these rights they must search for and uphold the principles of the constitution.

In post-colonial societies like ours, there are a few other myths which must be exploded: the myth, or as some judges would call it, the presumption, that official acts are properly done; the myth of a Parliament which deliberates over legislation and is responsible to people; the belief that if parliament has erred the people will correct it in the next general election. All this may be acceptable legal doctrine in the developed world. It needs serious re-examination in societies like ours.

The executive does not act properly. The Parliament hardly deliberates on complex legislation. It is prepared by the bureaucracy and much of it is beyond the pale of an average legislation in any event. The next general election will not be contested on the issue that the government forgot to put a full stop



at the end of a clause in an enactment. These high sounding expressions and Latin tags only conceal the fact that the judges are making presumptions which are completely at variance with the hard facts of third world government and politics.

There are some constitutional rights which are even more important than those enumerated in the chapter on fundamental rights. Article 4 of the Constitution commands that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Unfortunately, these words have been assigned a very restructured meaning in two judgments of the Supreme Court. The legislature has been declared exempt from the operation of this principle. It has been given a free hand in law-making. If it makes unequal, defective laws which fail to protect the citizens, Article 4 cannot be pressed into service. The question of whether the failure of the government to maintain order, its apathy towards the plight of the citizen, and its lack of will to control crime and foster ethnic harmony violate Article 4 or not is yet to be determined.

One of the most important provisions in the Constitution is Article 3. It contains the essence of the socio-economic philosophy of the Constitution. The state has a duty to ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle from each according to his ability to each according to his work. The state has completely failed in this constitutional duty. Every form of exploitation based on sex, religion and domicile continues. Bonded labour continues. The practice of employing workers through a contractor so that they can be dismissed with ease and are paid less than a subsistence wage is widespread. It has received judicial support on the ground that the employer has the right to reorganise his business. Discrimination against women in admission to medical colleges simply on account of their sex has been approved by a Division Bench of the Lahore High Court as well as the High Court of Sindh.

What is worse is that so far neither any lawyer nor any judge has made even an attempt to explore the limits of Article 3.

This most potent provision remains a dead letter so far as the legal fraternity is concerned. Its imaginative use can make the Constitution have a direct bearing on the daily life of a citizen.

We must remember that constitutional rights and fundamental freedoms have little meaning for the ordinary man. For him the basic concern remains his daily bread. He has neither the time nor the means to approach the courts. The courts will have to reach out to him.

It is the task of the lawyers and the judges to make the constitution have an impact on the life of the citizen. Till this happens human rights will continue to remain an upper middle class concern.

It is for us to inspire the confidence of the citizen in the Constitution. We have to make him see that he gets a better deal from constitutional government and the rule of law. Social action groups, lawyers willing to take up public interest litigation and activist judges can bring the fruits of fundamental rights to the door of the common man.

I know that judges loathe taking sides. That is proper. But the time has come to realise that they cannot avoid taking sides. They take sides as much by exercising jurisdiction as by refusing to do so.

Everything the court does, including nothing at all, results in securing some interests and sacrificing others. The decision to allow a challenged law to stand is itself a decision in favour of the status quo. So when one asks the judges to take on a more activist role, the request is only to demonstrate a bit more concern for the plight of the downtrodden and a little less regard for the bureaucratic machine.

Human rights will survive only if the public regards them as having some importance. If the benefits are not evenly distributed, then any dictator can dismiss the constitution as a sheaf of papers which he can tear and throw away. Like the last

time, there will be no one to stop him from suspending basic rights. And if we continue to keep the benefits confined to a few, believe me, there will be a next time.

## **CONCLUSIONS AND RECOMMENDATIONS**

### **INDEPENDENCE OF THE JUDICIARY**

#### **REPORT OF GROUP I**

The following recommendations were made after consideration of the situation with regard to the independence of the judiciary in the Constitution and domestic legislation as well as the principles laid down in international instruments.

#### **RECOMMENDATIONS:**

1. Taking note of Article 175(3) of the Constitution of Pakistan 1973 which provides for the separation of the judiciary from the executive within a period of fourteen years from the commencing date (this period having expired in 1987), the group strongly recommends that in order to ensure the independence of the judiciary, immediate measures must be taken for the implementation of the guarantee contained in this article.
2. The Committee finds that amendments made in the Constitution from time to time have seriously curtailed the powers of judicial review of executive action. This has jeopardised freedom of the judiciary to work independently of executive influence and pressure. The Committee recommends the repeal of these

amendments including the amended provisions with regard to the appointment of judges to the superior courts.

3. Being aware that pressurisation by the executive has especially affected the independence of the subordinate judiciary, it is recommended that appointment and administration of the subordinate judiciary be brought completely under the control of the High Courts.

4. Realising the force of public opinion, the committee felt that a strong public consciousness in favour of judicial independence must be created in order to ensure a proper implementation of this principle. For this purpose in addition to the work done at the international level, domestic human rights organisations, Bar Councils and Bar Associations must plan and carry out an extensive campaign for public education on the concepts of human rights generally, and the promotion of the principle of independence of the judiciary in particular.

5. Realising also, the positive influence of international public opinion and its favourable effects on the independence of the judiciary, it is recommended that the Bar and the Bench must treat any violation of this principle as an international issue and provide support to this principle at the international level.

6. Noting that the General Assembly of the United Nations has unanimously adopted the Basic Principles on the Independence of the Judiciary, the Committee calls upon the Government of Pakistan to implement these principles through appropriate legislation and/or policies. The text of this document must be made available to the judiciary, the Bar and the public in general.

7. Realising that the manner of selection of judges, security of tenure and adequate remunerations and working conditions have a direct bearing on the quality of judicial performance, the Committee adopts the Basic Principles 10, 11, 12 and 13 on the Independence of the judiciary laid down by the United Nations.

8. Keeping in view the principles mentioned above, the Committee recommends that any provisions of the Constitution or law contravening any of the principles should be repealed.

9. In consideration to the special concerns expressed by the members of the group with regard to the situation prevailing in Pakistan, it is recommended that reasonable and adequate emoluments and facilities must be granted to judges, specially the subordinate judiciary.

The conditions of the lower courts need to be substantially improved in order to improve proper working conditions for the judges and for the expeditious disposal of cases. It is further recommended that revenues received by way of court fees, etc., must be exclusively spent on the improvement of court facilities and on the judiciary. The Government must grant substantial support to these funds in order to enable the judiciary to meet these expenses.

The Committee realises that independent and strong Bar Associations and Bar Councils are necessary for an independent working of the judiciary. The Bar is, therefore, urged to work for such independence within these professional organisations.

10. Realising also the significant role that Bar can play in the promotion and enforcement of Human Rights, it is recommended that Bar Councils and Associations must take note of the international instruments on Human Rights and create appropriate mechanisms for monitoring violations of international norms of human rights.

**THE COMMITTEE CONSIDERED THE UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY AND FULLY ENDORSES ALL THE PRINCIPLES ENUNCIATED IN THIS DOCUMENT.**

## conclusions & Recommendations

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### Judicial Implementation of Human Norms

Mr. Anwar Kamal	- Chair
Ms. Nasreen Azhar	- Rapporteur
Mr. Jeremy McBride	
Mr. Makhdoom Ali Khan	
Mr. Sabihuddin Ahmed	
Mr. Amjad Ali	

#### Conclusions

It was generally felt that there was a need to collect and disseminate information about international Human Rights Treaties, Codes, Declarations, Reservations and Decisions to judges, lawyers, students of law and the public at large.

The group agreed to adopt for recommendation the principles enunciated by the Commonwealth Conference of Judges held in Feb. '88, popularly known as the Bangalore Principles, and these are appended as an integral part of this report.

Regrettably even some members of the law, and judiciary are unaware of the various developments that are taking place in the field of Human Rights. To help correct this situation use

should be made of existing organizations, such as the Nadesan Centre in Sri Lanka, and of publications, like the Inter-Rights Bulletin.

The Law Ministry could also play a more active part in this endeavour by including lectures on human rights in the curriculum of the Federal Judicial Academy and helping to circulate printed material. In addition the Law Ministry could also make available to human rights groups and individuals the publications and material in their well stocked library.

The group also felt that in the particular social context of third world societies the judiciary has a particular responsibility to play a more activist role in the implementation of Human Rights.

#### Recommendations

- 1) The Government of Pakistan should be asked to immediately ratify all the treaties/conventions on Human Rights. Human Rights organizations should bring pressure to expedite such ratification.
- 2) Texts of international Treaties, Codes, Declarations, Resolutions and Decisions concerning Human Rights should be given wide publicity by law journals, newspapers and magazines.
- 3) The courts should apply recognized international standards and Human Rights norms in the interpretation of domestic laws and should also act in accordance with the principles evolved by the Commonwealth Jurists conference, known as the Bangalore Principles.
- 4) Concerned Human Rights activists must write regularly in law journals, newspapers and magazines to create and enhance awareness of the issues and relate International Human Rights principles to the specific conditions in Pakistan.



- 5) **The Human Rights Commission of Pakistan, concerned NGOs, universities and Colleges, especially law colleges, service and judicial academies, staff and defence colleges, and law associations must organize discussions and seminars on Human Rights issues and international norms.**
- 6) **The Ministry of Law and Justice should be persuaded to include Human Rights in the Curriculum of the Federal Judicial Academy to circulate literature on Human Rights issues and to make their well-stocked library available to concerned groups and individuals.**
- 7) **Cases in Pakistan where Human Rights have been implemented, or there has been a failure to take account of violations of Human Rights, should be better publicized.**
- 8) **Efforts should be made to set up Human Rights Resource Centres which could collect and disseminate information on Human Rights.**
- 9) **Lawyers and judges should be encouraged to raise and decide Constitutional and Human Rights issues in ordinary civil and criminal cases.**
- 10) **Judges must be persuaded to play a more activist role in keeping with their particular responsibility especially in the context of Third World societies.**
- 11) **Creative and constructive criticism of judicial pronouncements failing to come up to international norms of Human Rights should be encouraged and the Law of Contempt of Courts should be liberally construed.**
- 12) **The proceedings and discussions of this conference should be given wide publicity.**

**Ms. Agnes Tabassum raised certain questions before the Committee regarding minority rights, and the Committee was of**

the view that the same be put up before the House for discussion and recommendations. Her suggestions were as follows:

- 1) Non-Muslim Advocates should be allowed to appear before the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court.
- 2) There is no justification for applying the Hudood Laws to non-Muslims and yet excluding the testimony of non-Muslim victims and witnesses in Hadd Offences.
- 3) Separate electorates should be abolished and the minorities should be allowed to be part of the mainstream of the country's political and social life.

## **SEMINAR ON "THE INDEPENDENCE OF JUDGES AND LAWYERS IN PAKISTAN"**

**Lahore, 9-10 November, 1989**

On 9-10 November, 1989, the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, together with Ministry for Law and Justice and in collaboration with the United Nations Centre for Human Rights, held a seminar in Lahore on "The Independence of Judges and Lawyers in Pakistan." Local arrangements were organised by the Human Rights Commission of Pakistan.

The seminar was opened by Syed Iftikhar Gilani, Minister for Law and Justice. The inaugural session also heard a keynote address on "The Independence of the Judiciary - an International Perspective", by retired Chief Justice Jules Deschenes of Quebec, Canada, and an introduction by CIJL Director Reed Brody.

In plenary session, the seminar heard speeches on

- The Independence of the Judiciary, by Justice Ajmal Mian (Pakistan);

- The Role of the Bar, by Param Cumaraswamy (Malaysia) and Abad Hasan Minto (Pakistan);

- Distributive Justice, by Neelan Tiruchelvam (Sri Lanka) and Asma Jahangir (Pakistan); and

- Judicial Implementation of Human Rights Norms, by Jeremy McBride (United Kingdom) and Makhdoom Ali Khan (Pakistan).

The participants, who included judges, lawyers and academics from all provinces of Pakistan, as well as members of the Ministry of Law and Justice, then formed working groups on the four topics and developed conclusions and recommendations. These conclusions and recommendations were then discussed, modified and adopted at a closing plenary session.

Following are the conclusions and recommendations of the seminar:

## I. INDEPENDENCE OF THE JUDICIARY

### Recommendations:

1. Taking note of Article 175(3) of the Constitution of Pakistan 1973 which provides for the separation of the judiciary from the executive within a period of fourteen years from the commencing date (this period having expired in 1987), the meeting strongly recommends that in order to ensure the independence of the judiciary, immediate measures be taken for the implementation of the guarantee contained in this article.

2. The meeting finds that amendments made in the Constitution from time to time have seriously curtailed the powers of judicial review of executive action. This has jeopardised the freedom of the judiciary to work independently of executive influence and pressure. The meeting recommends the repeal of these amendments including the amended provisions, with regard to the appointment of judges to the superior courts.

3. Being aware that executive influence has affected the independence of the subordinate judiciary, it is recommended that appointment and administration of the subordinate judiciary be brought completely under the control of the High Courts.

4. Realising the force of public opinion, the meeting believes that a strong public consciousness in favour of judicial independence must be created in order to ensure a proper implementation of this principle. For this purpose in addition to the work done at the international level, by domestic human rights organisations and the legal fraternity, Bar Councils and Bar Associations must plan and carry out an extensive campaign for public education on the concepts of human rights generally, and the promotion of the principle of the independence of the judiciary in particular.

5. Realising also the positive influence of international public opinion and its favourable effects on the independence of the judiciary, it is recommended that the Bar and the Bench treat any violation of this principle as an international issue and provide support for this principle at the international level.

6. The meeting considered the United Nations Basic Principle on the Independence of the Judiciary and fully endorsed all the principles enunciated in this document.

Noting that the General Assembly of the United Nations has adopted the Basic Principles on the Independence of the Judiciary by consensus, and called on governments to respect them, the meeting calls upon the Government of Pakistan to implement these principles through appropriate legislation and / or policies. In keeping with the Guidelines for Effective Implementation of the Basic Principles on the Independence of the Judiciary adopted by the United Nations Economic and Social Council, the text of the Basic Principles must be made available to the Judiciary, the Bar and public in general.

7. Realising that the manner of selection of judges, security of tenure and adequate remunerations and working conditions have a direct bearing on the quality of judicial performance, the

meeting particularly adopts the Basic Principles 10,11 12 and 13 on the Independence of the Judiciary.

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

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

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

The Committee recommends that any provisions of the Constitution or law contravening any of these principles should be repealed.

8. a) In consideration to the special concerns with regard to the situation prevailing in Pakistan, it is recommended that reasonable and adequate emoluments and facilities must be granted to judges, especially the subordinate judiciary.

b) The conditions of the lower courts need to be substantially improved in order to improve the working conditions of judges and for the expeditious disposal of cases.

c) The Government must grant substantial additional funds in order to enable the judiciary to meet these expenses. The distribution and administration of these funds should be in the hands of the superior judiciary.

9. The meeting realises that independent and strong Bar Associations and Bar Councils are necessary for an independent working of the judiciary. The Bar is, therefore, urged to work for such independence within these professional organisations.

10. Realising also the significant role that the Bar can play in the promotion and enforcement of human rights, it is recommended that Bar Councils and Associations take note of the international instruments on human rights and create appropriate mechanisms for monitoring violations of international norms of human rights.

## II ROLE OF THE BAR

We are conscious that the legal fraternity is already committed to the principles of justice, independence of the judiciary, the rule of law and human dignity and has been striving for, and has made valuable contributions towards the same.

Besides their obligations towards clients and courts, lawyers are also committed to serve the cause of the public at large.

We are confident that the Bar Associations and Bar Councils, will continue playing a vital important role in particular towards the following OBJECTIVES:

1. To uphold the cause of justice without fear or favour, irrespective of their own pecuniary interest or that of their members.
2. To provide free legal aid to the deserving citizens and to create awareness of their rights and remedies.

3. To hold seminars at the national and international levels and maintain coordination with other Bar Associations and Bar Councils for the other purposes.
4. To promote universal respect for the observance of human rights and fundamental freedoms.
5. To work for the uniformity of laws within the country.
6. To strive for the separation of the judiciary from the executive and for the independence of judiciary.
7. To work for the application and adoption of universally accepted charters and covenants relating to human rights, and the independence of judiciary and lawyers.
8. To oppose and seek repeal of all laws violative of human rights and the independence of the judiciary.

### III JUDICIAL IMPLEMENTATION OF HUMAN RIGHTS NORMS

#### A) Conclusions.

1. There is a need to collect and disseminate information about international human rights treaties, codes, declarations, reservations and decisions to judges, lawyers, students of law and the public at large.
2. The meeting adopts for recommendation the principles enunciated by the Commonwealth Conference of Judges held in February, 1988, popularly known as the "Bangalore Principles," and these are appended as an integral part of this report.
3. Regrettably even some members of the bar and judiciary are unaware of the various developments that are taking place in the field of human rights. To help correct this situation, use should



be made of existing organisations, such as the Nadesan Centre in Sri Lanka, and of publications like the Interights Bulletin.

4. The Law Ministry could also play a more active part in this endeavour by including lectures on human rights in the curriculum of the Federal Judicial Academy and helping to circulate printed material. In addition the Law Ministry could also make available to human rights groups and individuals the publications and material in their library.

5. In the particular social context of third world societies the judiciary has a particular responsibility to play a more activist role in the implementation of human rights.

#### **B) Recommendations**

1. The Government of Pakistan should be asked to immediately ratify all the treaties /conventions on human rights. Human rights organisations should bring pressure to expedite such ratification.

2. Texts of international treaties, codes, declarations, resolutions and decisions concerning human rights should be given wide publicity by law journals, newspapers and magazines.

3. The Education Ministry should ensure that human rights education based on the international principles of human rights be provided at all levels.

4. The courts should apply recognised international standards of human rights in the interpretation of domestic laws and in accordance with the "Bangalore Principles" evolved by the Commonwealth Jurists conference.

5. Concerned human rights activists must write regularly in law journals, newspapers and magazines to create and enhance awareness of the issues and relate international human rights principles to the specific conditions in Pakistan.

6. The Human Rights Commission of Pakistan, concerned NGOs, universities and colleges, especially law colleges, service and judicial academies, staff and defence colleges, and bar associations must organise discussions and seminars on human rights issues and international norms.

7. The Ministry of Law and Justice should be persuaded to include human rights in the curriculum of the Federal Judicial Academy, to circulate Literature on human rights issues and to make its library available to concerned groups and individuals.

8. Efforts should be made to set up a permanent and up-to-date Human Rights Resource Centre which could collect and disseminate information on human rights.

9. Lawyers and judges should be encouraged to raise and decide Constitutional and human rights issues in ordinary civil and criminal cases.

10. Judges must be persuaded to play a more activist role in keeping with their particular responsibility especially in the context of third world societies,

11. Creative and constructive criticism of judicial pronouncements failing to come up to the international norms of human rights should be encouraged and the law of contempt of Courts should be liberally construed.

12. The Law should not discriminate between legal practitioners on the basis of race, caste or creed. Evidence of all citizens should be taken regardless of sex.

13. The proceedings and discussions of this conference should be given wide publicity.

#### IV DISTRIBUTIVE JUSTICE

### A) Conclusions

1. The meeting made an evaluation of selective enforcement of general legislation to various geographical areas of Pakistan. After an exhaustive discussion of the definition of distributive justice, the meeting agreed upon the following basic definition:

"Distributive Justice takes into account the political, economic, social and cultural realities while providing equity and equality to all sections of society. It also seeks to protect those persecuted on the basis of the belief, sex and status.

The group also categorised the term "disadvantaged". By and large, children, women, minorities, physically and mentally handicapped and the impoverished fall within the category of disadvantaged. It was concluded that even amongst the disadvantaged, some social groups bear a double disadvantage.

2) The meeting was concerned that owing to misguided policies of the state, the proportion of the disadvantaged and double-disadvantaged population seems to be on the increase.

3) There is selective application of law according to geographical areas within Pakistan, and the jurisdiction of the regular court system does not extend to some areas. As a consequence, the population of such areas are deprived of the principles of the Rule of Law.

4) It is recognised that the State must bear the responsibility for providing adequate finances for the dispensation of justice.

### B) Recommendations:

On the above observations and discussion the meeting:

(1) Recommends to the Federal and Provincial Governments that:

- a) Existing legislation be scrutinised and brought in conformity to the internationally recognised human rights standards.
- b) Substantial revenue be spent on the legal system.
- c) Judicial officers on appointment be given training, orientation courses and periodical refresher courses in order to enable them to dispense proper justice.
- d) Governments should as a priority enforce uniform application of existing law and court systems.
- e) In order to safeguard against hasty and ill-conceived legislation and to ensure adequate dissemination of existing and proposed legislation, governments should arrange for the widest possible publicity to all bills and enactments.
- f) The electronic and print media under the aegis of the Government be used to impart legal information and basic fundamental rights.
- g) The Principles of Policy, in the Constitution should be translated into legal instruments and effectively implemented.
- h) In order to make distributive justice a reality, more economic resources should be spent for providing basic needs such as health, education, food and housing.

2. Calls upon non-governmental organisations (NGOs), bar associations and other social action groups:

- a) To mount a campaign to sensitize the policy-makers concerning the basic needs of the disadvantaged. Where possible NGOs should also seek dialogue with the policy-makers in order to promote these objectives.

- b) To design similar campaigns to sensitize the judiciary and the legal profession to the socio-economic realities of the under-privileged.
- c) To provide legal assistance to all disadvantaged sections. Bar associations should encourage the concept of public interest litigation.
- d) In order to implement the spirit of distributive justice lawyers and bar associations should work closely with other socio-economic developmental groups.
- e) NGOs, in particular bar associations, should focus public attention on judgments contrary to established human rights principles as well those judgments which promote human rights norms.

**THE MEETING RECOMMENDS the following  
programmes of action.**

1. A joint action be undertaken by NGOs to mount a nation-wide campaign to highlight the existing injustices prevalent in the society. Towards this end it is suggested that preparations be made in order to mark 10 December, 1990 as the campaign day.
2. The Human Rights Commission of Pakistan undertakes to conduct research and investigation on the legal system prevailing in Balochistan. It is, however, asserted that such investigations be later extended to other similar situations in other regions of the country. The International Commission of Jurists is requested to collaborate with HRCP on this research and investigation.

## DISTRIBUTIVE JUSTICE

**General: (A)** The group made an evaluation of selective enforcement of general legislation to various geographical areas of Pakistan. After an exhaustive discussion on the definition of distributive justice, the group agreed upon the following basic definition:

"Distributive justice takes into account the political, economic, social and cultural realities while providing equity and equality to all sections of society. It also seeks to protect those persecuted on the basis of their belief, sex and status."

The group also categorised the term "disadvantaged". By and large children, women, minorities, physically and mentally handicapped and the impoverished fall within the category of disadvantaged. It was concluded that even amongst the disadvantaged some social groups bear a doubly disadvantage.

**B)** The group was concerned that owing to misguided policies of the state, the proportion of disadvantaged and double disadvantaged population seems to be on the increase.

**C)** That there is selective application of law according to geographical areas, within Pakistan and in some areas the jurisdiction of normal court system is not extended. As a consequence the populations of such areas are deprived of the principles of the Rule of Law.

**D) It is recognised that the State must bear the responsibility for providing adequate finances for the dispensation of justice. It is regrettably noted that in Pakistan the legal system generates far more income than is spent on it.**

**On the above observations and discussion the group made the following recommendations:-**

- 1. Existing legislation be scrutinised and brought in conformity with the Internationally recognised human rights standards.**
- 2. Adequate revenue be spent on the legal system.**
- 3. Judicial officers on appointment be given training, orientation courses and periodical refresher courses in order to enable them to dispense proper justice.**
- 4. Governments should as a priority enforce uniform application of existing law and court systems.**
- 5. In order to safeguard against hasty and ill-conceived legislation and to ensure adequate dissemination of existing and proposed legislations, governments should arrange for the widest possible publicity to all Bills and enactments.**
- 6. The electronic and print media under the aegis of the Government be used to impart legal information and basic fundamental rights.**
- 7. The Principles of Policy in the Constitution should be translated into legal instruments and effectively implemented.**
- 8. In order to make distributive justice a reality, more economic resources should be spent for providing basic needs such as health, education, food and housing.**

**Calls up Non-Governmental organisations, bar associations and other social action groups.**

1. To mount a campaign to sensitize the policy-makers concerning the basic need of the disadvantaged. Where possible NGOs should also seek dialogue with the policy-makers in order to promote these objectives.
2. Similar campaigns be designed to sensitize the judiciary and the legal profession to the socio-economic realities of the under-privileged.
3. Legal assistance be provided to all disadvantaged sections and bar associations should encourage the concept of public interest litigation.
4. In order to implement the spirit of distributive justice lawyers and bar associations should work closely with other socio-economic developmental groups.
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**INTERNATIONAL COMMISSION OF JURISTS**

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