



**The Independence  
of the Judiciary  
in  
INDIA**

Report of a seminar  
held in New Delhi on 20 and 21 January 1990

convened by the  
Centre for the Independence of Judges and Lawyers

in cooperation with the  
United Nations Centre for Human Rights

edited by  
Reed Brody

INTERNATIONAL COMMISSION OF JURISTS

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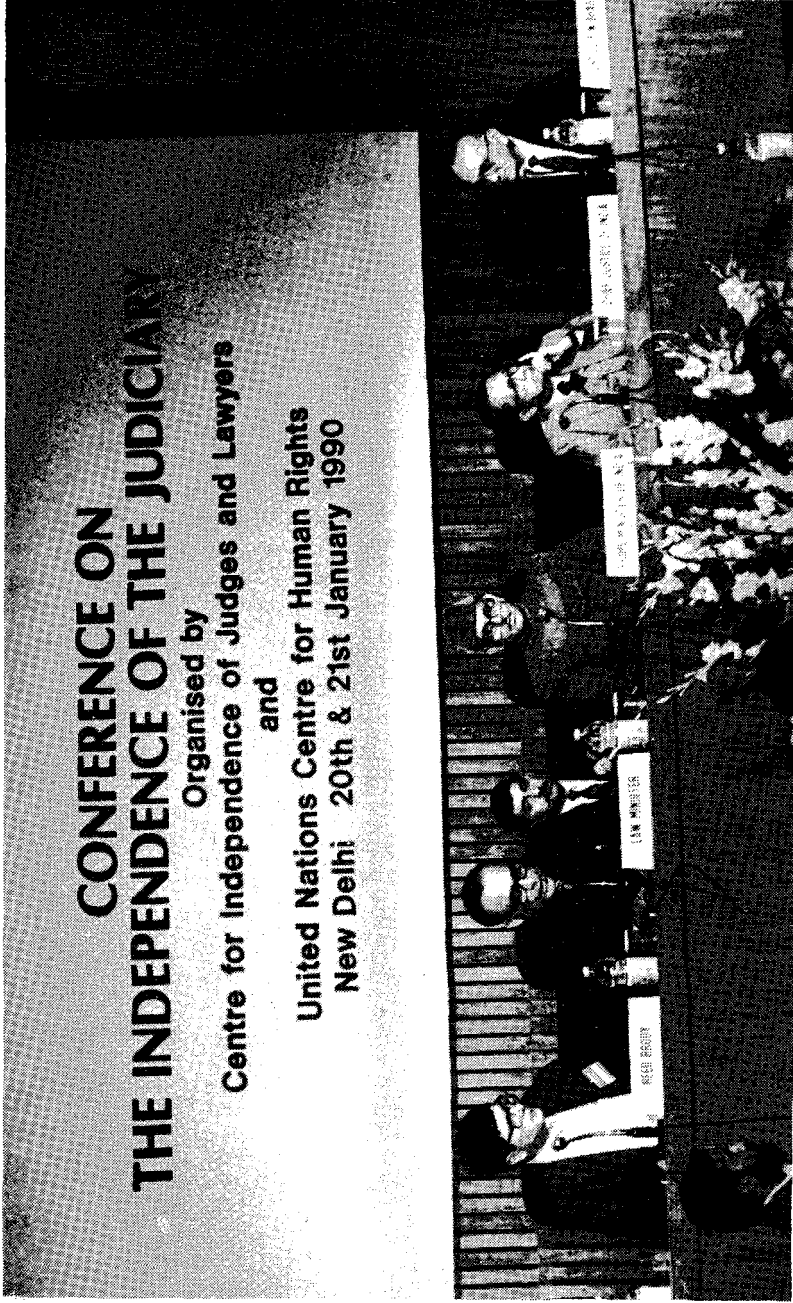
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# CONFERENCE ON THE INDEPENDENCE OF THE JUDICIARY

Organised by  
Centre for Independence of Judges and Lawyers

and

United Nations Centre for Human Rights  
New Delhi 20th & 21st January 1990



*Inauguration of the Seminar. L to R: CIJL Director Reed Brody, Law Minister Dinesh Goswami; Prime Minister Vishwanath Pratap Singh; Chief Justice Sabyasachi Mukarji, former Chief Justice P.N. Bhagwati. (Photo: Mohd Ilyas)*

## Preface

by

*Reed Brody*  
*Director, CIJL*

On 20 - 21 January 1990, the Centre for the Independence of Judges and Lawyers organised, in collaboration with the United Nations Centre for Human Rights, a seminar on the Independence of the Judiciary in India in New Delhi. The seminar was convened by the Chairman of the Advisory Board of the CIJL, the former Chief Justice of India, P.N. Bhagwati.

The opening of the seminar was addressed by the Prime Minister of India as well as the Chief Justice of the Supreme Court, the Law Minister and the CIJL Director. The Attorney General, the Solicitor General and several Justices of the Supreme Court also addressed the seminar and participated in its deliberations, together with 20 Chief Justices and Justices of the Indian High Courts as well as Justices of the Supreme Courts of Bangladesh, Mauritius and Pakistan.

In his opening address, Prime Minister Vishwanath Pratap Singh reaffirmed his commitment to an independent judiciary and pledged himself to work with the judiciary to resolve three key questions which have in the recent past tended to undermine judicial independence: excessive executive discretion in appointments to the higher judiciary, the transfer of judges from one High Court to another without their consent and the non-confirmation of "additional judges" by the executive on political considerations.

The Law Minister also noted that over the years there had indeed been an "increasing tendency on the part of the executive to influence the judiciary", particularly in the matter of appointments and transfer, and re-iter-

ated the government's pledge for a "structural change" in these areas through a National Judicial Commission on appointments and transfers.

In two days of plenary sessions, the judges heard short presentations on:

- "The Independence of the Judiciary" by P.N. Bhagwati, Chairman of the Advisory Board of the CIJL and former Chief Justice of India;
- "Obstacles to the Independence of the Judiciary" by Justice K.N. Singh, Supreme Court of India;
- "The Independence of the Judiciary: Imperative for Distributive Justice" by Mr. Neelan Tiruchelvam, Director, International Centre for Ethnic Studies, Sri Lanka;
- "Distributive Justice" by Justice Ranganath Mishra, Supreme Court of India;
- "The Role of the Bar" by Mr. Param Kumaraswamy, former President, Malaysia Bar Council and member, CIJL Board of Directors;
- "The Bar and the Judiciary" by Dr. L. M. Singhvi, former United Nations Rapporteur on the independence of judges and lawyers;
- "The Bar in India" by Mr. Ashok Desai, Solicitor General of India;
- "Judicial Implementation of Human Rights Norms" by Justice Rajsoomer Lallah, Supreme Court of Mauritius, ICJ Commission Member and Chairman, United Nations Human Rights Committee; and
- "Remarks on the Judicial Implementation of Human Rights Norms" by Mr. Soli Sorabji, Attorney General of India.

Each of the presentations was followed by a debate among the participants that was characterised by an open and frank airing of the problems facing the Indian judiciary. The paper of Justice Singh, which discussed court delays, lack of adequate financing for the administration of justice, inadequate remuneration and pension for judges and criticism of decisions, for instance, gave rise to heated debate which continued throughout the session.

At the end of the second day, the participants agreed on a set of conclusions and recommendations designed to strengthen the independence of the judiciary.

This report contains some of the presentations made to the seminar, the conclusions and recommendations, and two important documents which were examined and endorsed at the meeting: the United Nations Basic Principles on the Independence of the Judiciary and the Bangalore Principles on the Domestic Implementation of International Human Rights Norms.

The CIJL is grateful to the Swedish International Development Authority, the United Nations Centre for Human Rights and the state governments of India for their financial support of this seminar. We owe a deep debt to the Prime Minister of India for the honour which he did to us and to the cause of an independent judiciary by opening the seminar. We also thank the Chief Justice of India for his generous co-operation in the organisation of the seminar. Thanks go also to Mercedes Waggoner Young for helping to edit this report.



## Welcome

by

*P.N. Bhagwati*  
*Former Chief Justice of India*  
*Chairman, CIJL Advisory Board*

This is a unique occasion when Chief Justices and Judges of the High Courts and the Supreme Court are assembling in conference to discuss the extremely important topic of "Independence of the Judiciary". We, on behalf of the Centre for Independence of Judges and Lawyers - which is a unit of the International Commission of Jurists based in Geneva - are thankful to you Mr. Prime Minister for sparing some of your valuable time to come here and inaugurate this Conference. Your presence here bears testimony to the commitment of yourself and your government to the independence of the judiciary. We are also deeply grateful to the Chief Justice of India who has lent his whole-hearted support and co-operation in organising this Conference. It is a matter of great pride and satisfaction for us that the very first conference which he would be addressing after assuming charge of his high office is a conference on the independence of the judiciary.

We are also happy that we have in our midst two eminent judges of neighbouring countries, namely Mr. Justice Shafi-Ur-Rehman of the Pakistan Supreme Court and Mr. Justice Lallah who is not only a judge of the High Court of Mauritius, but also the Chairman of the United Nations Human Rights Committee. It is indeed unfortunate that India has so far had no representative on this high-powered committee which has been set up by the United Nations for monitoring the implementation of the Human Rights embodied in the International Covenant of Civil and Political Rights. We have also with us two human right activists: one from Malaysia and the other from Sri Lanka who have fought consistently for the inde-

pendence of the judiciary. Mr. Param Kumaraswamy from Malaysia indeed led a campaign in his own country protesting against the treatment meted out by the government to the Lord President of the Supreme Court of Malaysia. I am sure he is going to speak about this unhappy episode which shocked the conscience of the civilized world. It is also gratifying for us that the judges of the Supreme Court of India and Chief Justices and Judges of the High Courts have responded to our invitation and agreed to participate in the deliberations of this Conference.

We have also been able to get the support and cooperation of the bar because without a strong and independent bar, there can be no real independence of the judiciary. It is always a strong and independent bar which nurtures a strong and independent judiciary, and we are therefore extremely thankful to the members of the bar who have responded to our invitation and come here to this opening ceremony to express their solidarity with the judiciary.

It is necessary to remind ourselves that the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. The Constitution of India is not a neutral charter nor is it a dry parchment. It is a document of social revolution which casts an obligation on every instrumentality, including the judiciary which is a separate but equal branch of state, to transform the status-quo into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has, therefore, a socio-economic destination and a creative function. It has to function in a society pulsating with urges of gender justice, worker justice, minority justice, dalit justice and equal justice between chronic unequals.

It is in this context that the principle of independence of the judiciary becomes a principle of vital importance. It is only a strong and independent judiciary committed to the constitutional values which can discharge this function effectively and satisfactorily and carry out its obligations to the people who are the real wielders of power and who have reposed their trust in the judiciary under the constitutional scheme to dispense social justice with a view toward bringing about an egalitarian society founded on social and economic restructuring. If there is one principle which runs through the entire fabric of the constitution, it is the principle of the rule of law under the constitution. It is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the power conferred upon it under the constitution and the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task

that the power of judicial review has been conferred upon the judiciary and it is by exercising this power that the judiciary seeks to protect the citizen against violation of his constitutional and legal rights or misuse or abuse of power by the state or its officers or what I call "governmental lawlessness". It is the pathology of power to be abused and the judiciary has to stand firm against such abuse of power. There are also affirmative obligations undertaken by the state with a view toward bringing about social and economic change and improving the life conditions of the poor. It is not uncommon to find that these obligations are not properly carried out by the officers of the state and the benefits of legislative as well as administrative rescue measures do not reach the intended beneficiaries. The judiciary has to exercise its power of judicial review for enforcing performance of these obligations and ensuring to the poor and disadvantaged their basic rights and entitlements under the constitution and the law. It is therefore absolutely essential that the judiciary must be free from executive pressure or influence and it must be able to discharge its functions without fear or favour. It is also necessary to remind ourselves that the concept of the independence of the judiciary is not limited only to the independence from executive pressure or influence, but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely fearlessness of other power centres, economic or political and freedom from prejudices acquired and nourished by the class to which the judges belong. The judges have to be of stern stuff and tough fibre unbending before power, economic or political, and they must uphold the core principle of the rule of law which says: "Be you ever so high, the law is above you." This is the principle of the independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable sections of the community, and we have assembled here to discuss this important and vital principle.

Before I close, I would like to express my sense of appreciation for the reform in the system of appointment of judges of the superior courts which, Mr. Prime Minister, your government is contemplating to introduce. I have said in no uncertain terms in my judgment in the "Judges' Appointment and Transfer Case" that the power of appointment of judges of High Courts and particularly the Supreme Court is a large power which, if not properly exercised, can cause considerable damage to the entire system of administration of justice and shake the confidence of the people in the integrity and efficiency of the justice system. I said in that case:

That no power should be vested in a single individual howsoever high and great he may be and howsoever honest and well-meaning. We are all human beings with our own likes and dislikes, our own predilections and prejudices and our mind is not so comprehensive as to be able to take in all aspects of a question at one time and moreover sometimes, the information on which we base our judgment may also sometimes be imperceptibly influenced by extraneous or irrelevant considerations. It may also be noticed that it is not difficult to find reasons to justify what our bias or predilection or inclination impels us to do. It is for this reason that we think it is unwise to entrust power in any significant or sensitive area to a single individual, howsoever high or important may be the office which he is occupying. There must be checks and controls on the exercise of every power, particularly when it is a power to make important and crucial appointments and it must be exercisable by plurality of hands rather than be vested in a single individual.

You will notice that as far back as 1981, I suggested that in case of appointment of judges of High Courts and the Supreme Court, the recommending authority should be more broad-based and there should be consultation with wider interests, and this can be achieved by vesting this power in a collegium composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the bench and of the qualities required for such appointment. I am glad to find that my 1981 suggestion has found response with the government and that the government is thinking of introducing reform on the same lines.

With these words, may I welcome you Mr. Prime Minister, Mr. Chief Justice, Mr. Law Minister, my colleagues of the judicial fraternity and my lawyer friends to this important conference.

## Inauguration of the Seminar

by

*Vishwanath Pratap Singh*  
*Prime Minister of India*

We have chosen for ourselves a democracy based on the rule of law. Such a system can only work when we have an independent judiciary. That is why, our founding fathers and framers of the Constitution had taken sufficient care to see that an independent judiciary is provided for in the Constitution itself. This is also treated as a basic feature of the Constitution by our highest Court. I need not quote the articles and various provisions of the Constitution which safeguard and maintain the independence of the judiciary, by providing a set procedure for the appointment of judges and for their removal, etc. However, certain supersessions in the past in the appointment of Chief Justices have raised certain doubts. Many eminent jurists and intellectuals felt that such supersessions result in the corrosion of the independence of the judiciary. They are also apprehensive that if such supersessions could take place where there is a written Constitution which provides for fundamental rights as a part thereof, the independence of the judiciary remains a mere myth unless they are checked in time. Hence, from time to time, suggestions are being made that the judiciary must be fully insulated against erosion of its independence specially from the Executive. This becomes very essential, according to them, as the final guarantee of the citizen's right is not the Constitution but the personality and intellectual integrity of the judges. Eminent persons can be appointed to man the judiciary only when there is an objective Body, which is capable of assessing the merit. Realising the need, therefore, we have already announced our intention to appoint a National Judicial Commission to look into the matter of appointment of judges and to deal with them. The Elev-

ent Law Commission of India, headed by Justice D.A. Desai, has gone into the matter and recommended such a Commission to envelope the entire judicial system. However, we would presently restrict it to the appointments to the higher judiciary. Our proposal is before the Nation and it is for all of you to debate thereon and advise us as to how best we can constitute such a Commission to safeguard and strengthen the independence of the judiciary.

It may not be out of place to mention here about another apprehension which is lurking in the minds of many regarding the transfer of judges. Many feel that this is another threat to the independence of the judiciary. Justice Bhagwati, who is sitting here, has observed in Sankalchand's case that the independence of judiciary, the fighting faith of our Constitution and fearless justice is a cardinal creed of our founding document, and in order to ensure and guarantee the same, it is inconceivable that the founding fathers should have left a loophole and conceded power to the Executive to inflict injury on a High Court Judge by transferring him without his consent so as to wipe out the effect of other provisions and denude them of meaning and content.

Yet another apprehension is about the non-confirmation of additional judges by the Executive on political considerations.

I would like to assure you that in the matter of maintaining the independence of the judiciary, I am one with you. I can also assure you that nothing will be done by the Executive in the matter of judiciary without effective consultations with the judiciary itself.

After seeing the outcome of the national debate on the National Judicial Commission, we shall certainly take suitable action so as to allay all the apprehensions.

## Opening Address

by

*Dinesh Goswami*  
*Law Minister of India*

It will be a repetition of the oft-repeated saying to state "that for a democracy to flourish, an independent judiciary, free particularly from the control of the executive, is an essential pre-requisite". Our Constitution guarantees fundamental rights of equality of law and equal protection of the law, freedom of expression, freedom of assembly, right to life and personal liberties and a number of other rights, but these rights though enshrined in the Constitution can not even be effective without an independent judiciary. To quote Justice Frankfurter of the U.S. Supreme Court: "The most prized liberties thus pre-suppose an independent judiciary through which these liberties may be, and often have been vindicated." The founding fathers of our Constitution took special care to see that the independence of the high judiciary is maintained by guaranteeing the judges of the Supreme Court and High Courts security of tenure, immunity from criticism, inviolability of their salaries and other terms and conditions of service after appointment, a rigorous special procedure for removal of judges for proved misbehaviour and incapacity as well as special provisions for the appointments to the highest judiciary.

But over the years it has been felt that norms have been violated in some cases, in the matter of appointment of judges and there has been an increasing tendency on the part of the executive to influence the judiciary. Decisions to transfer some of the judges from one High Court to another also came under severe criticism. Even the Law Commission of India, while examining the question of appointment of judges of High Courts and Supreme Court, had to observe that "the impression, nevertheless, has pre-

vailed that the appointment of judges to the High Courts has not been always on merits and that has affected the image of the High Courts". The Commission further observed "that in the prevailing procedure, the Chief Justices of the High Courts gave their concurrence to prevent an awkward situation arising from appointment of persons not recommended by them". The National Front in its election manifesto promised a structural change in the matter of appointments and transfer of judges through a National Judicial Commission. The Government has now taken a policy decision to constitute such a Commission and I have addressed letters to the Chief Justice of India, the Chief Justices of High Courts, the Chief Ministers of States, the Bar Council of India and the Bar Associations of High Courts inviting their comments on:

- i) What should be the composition of the Commission?
- ii) On what grounds can its recommendations be rejected?
- iii) What procedures should the Commission adopt? Should these procedures be laid down by law made by Parliament?

On receipt of comments and after interacting with various political parties in Parliament, the Government intends to introduce a Constitution Amendment Bill to establish the National Judicial Commission for appointment and transfer of judges. We look forward with interest to the deliberations of this august body of such eminent personalities with wide experience in the field of administration of justice and the views expressed by you will help us in the final formulation of our proposals.

When we discuss the independence of the judiciary, though the primary task is to ensure freedom from interference by the executive, yet the judiciary must also take particular care to see that it is free from other kinds of external influences, pressures and incursions. It must be kept in mind that the experiences of developed countries and more particularly of the developing countries and our own country over the years have proved that in the ultimate analysis the final guarantee of the citizens' rights is not the Constitution but the personality and intellectual integrity of the judges of the higher judiciary. Executive misuse is always amenable to a certain amount of corrective influence of the legislature and finally to the application of the straining mechanism of the people. The judiciary functions without any apparent regulatory apparatus outside its own framework. This lack of a "braking system" exercisable by an authority outside the judiciary makes the institution's functioning all the more onerous. The corrective machinery of the courts, especially the higher courts, is to be evolved by itself. A judge by the very nature of his office is to maintain the highest



standard of judicial ethics. I am tempted to quote the observation of Sir Winston Churchill who summed up the true profile of an ideal judge in these words: "A form of life and conduct more severe and restricted than that of ordinary people is required from judges and, though unwritten, has been most strictly observed. They are at once privileged and restricted. They have to present a continuous aspect of dignity and conduct." It is indeed a matter of great satisfaction that by and large the judges of our Supreme Court and High Courts have, in spite of odds at times, maintained their high tradition, confidence and respect in the public eye. However, the institution of the judiciary cannot satisfy itself on the basis of past laurels. The high image of the judicial institution can be sustained only by the constant endeavour of the members individually and collectively, of the distinguished fraternity, to live up to the standards expected of them in the very scheme of our democratic polity. There have been comments recently by none other than the members of our own highest judiciary about some disturbing features. As our Government is fully committed to the independence of the judiciary, I will not dilate on the same but I am sure that this conference will take note of these comments made by both members of the bench and the bar to take corrective measures so as to remove all kinds of apprehensions.

## Presidential Address

by

*Sabyasachi Mukarji*  
*Chief Justice of India*

We have assembled here to ventilate and deliberate our views on subjects which are vital for the evolution of civilised society. Justice and the rule of law are, perhaps, two of the important concepts evolved by the spirit of man. But neither the ideals of justice can be fostered nor the rule of law can be maintained without ensuring independence of the judiciary. Justice, the rule of law and the independence of judiciary are bound together as part of an integrated whole. It is said that the judiciary often is the weakest of the three organs of the State. The judiciary has neither the power of the purse nor that of the sword, neither money nor patronage, not even the physical force to enforce its decisions, yet the judiciary exerts supreme power upon the minds and lives of the people because it rests, and it should rest, its authority on the respect and acceptance of the people. Its effectiveness and relevance can only be ensured to the extent that it has the moral authority and the confidence of the people. The courts can perform its functions if they realise their true role to do justice between the contestants, the rich and the poor, the powerful and the weak, the State and its citizens, without fear or favour. But the efficacy and the usefulness of judiciary are affected if the independence, impartiality or the integrity, moral or intellectual, are eroded or even doubted. This may be due to some actions on the part of other organs of the State or due to the actions, conduct or words of the members of the judiciary itself or the erstwhile members of the judiciary. For ensuring the independence of the judiciary, the respectability, credibility and their acceptability must be ensured if the courts are to administer justice according to law and maintain the rule of law.

It is difficult, if not impossible, to visualise any truly democratic society which does not provide for the independence of the judiciary. The principle of the complete independence of judiciary from the executive is often considered by many progressive countries as the foundation of civilised growth. As Winston Churchill said, the judge has not only to do justice between man and man, but, and this is one of the most important functions which was considered incomprehensible in past but now accepted by many countries, to do justice between the citizens and the State. He has to ensure that the administration conforms to law, and to adjudicate upon the legality of the exercise by the executive of its power.

As observed by Lord Atkin: "Justice is not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men." It has to be remembered that improper or intemperate criticism of judges stemming from dissatisfaction with the decisions given by them, constitutes a serious inroad into the independence of the judiciary and whatever be the form or shape which such criticism takes, it has the inevitable effect of eroding or even corroding the independence of the judiciary. Adverse publicity, embarrassing accusations in public and populist pressures to deflect the judiciary from its appointed role are the factors which we must recognise and proclaim, which affect the impartiality and independence of judges. Each attack on a judge for a decision given by him, not by pointing out legal infirmity but imputing an imputation of motive, is an attack on the independence of the judiciary because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision-making process. It is essential that in a country governed by rule of law, every decision must be made under the rule of law and not under the pressure of one group or another, no matter how sincerely motivated; and if a judge has to be in fear of personal criticism by political or pressure groups or other individuals while deciding a case, it would certainly undermine the independence of the judiciary. Unfortunately, those who indulge in such improper or intemperate criticism or attack on judges little realise the incalculable damage they are doing to the institution of the judiciary and the rule of law.

It is trite saying that the judiciary must interpret the law in the light of the Constitution but it is wrong to say anything in an appreciable sense "that certain judges are prone to wielding their powers for themselves and not for the people". Judges do attempt to free themselves from the pressures but it is wrong to say that this tendency isolates them in ivory towers where they are distanced from the will of the masses. Fulfilling the interests of the masses in the light of the Constitution is the commitment of

judges, by and large. The judges are certainly accountable but they are accountable only to their conscience. It is time that such misinformed criticism of the judges on the judicial role from persons who should know better be restrained. This creates a psychological atmosphere whereby attempts are made to erode the impartial and objective outlook of judges. I hope the discussion in this Conference would enlighten you and make you aware of this menace. The importance of the independence of judges is more vital today for the emerging nations of the world. Development, progress and growth depend upon the exercise of power and authority. Energy must be applied, and applied properly by those who are charged to implement or translate the aspirations of the people. Therefore, those who exercise power for that purpose, perform a very needed and essential function for the future and growth of society. But those who question that exercise of power, perform an equally important and necessary function because they decide as to whether power should control reason or reason should control power. It is, therefore, necessary to develop a responsible and responsive relationship between those who exercise that power and those who question that power. Absolute independence of the judiciary is essential for a meaningful correlation between the two.

In India, independence and impartiality were considered to be essential qualities of the judge from the earliest times. According to Yajnavalkya, independence of character, great learning in the various branches of law and impartiality were the essential qualities of a person occupying a judicial office. Even modern India and its Constitution remain committed to an independent judiciary. The first Prime Minister of India - Pandit Jawaharlal Nehru - reiterated the commitment to independence and impartiality of the judiciary when he said :

It is important that these judges should be not only first rate but should be acknowledged to be first rate in the country, and of the highest integrity, if necessary, people who can stand up against the executive and whoever may come in their way.

Independence of the judiciary has been accepted throughout the democratic world. The importance of this principle and requirement has increased in modern times. The expansion of the welfare State with wide ranging legislation and administrative regulations and a corresponding expansion in litigation against the Government make judicial independence a crucial necessity for the administration of justice. For the realisation and enforcement of "social rights" - a typical by-product of the welfare State - the independence of the judiciary is again a pre-requisite as most of

the social rights cast obligations on the executive branch of the State for their realisation. Development of collective procedures like class actions in America and the emergence of what is known as "public interest litigation" in India, most of which is aimed at requiring the State to do or not to do certain things for the deprived and weaker sections of the society, demands from the judiciary a high degree of independence and fearlessness vis-a-vis the other branches of State.

Integrity, intellectual, moral and financial, is the main priority. Courage of conviction, therefore, must be cultivated and the objective conditions which make that courage to assert itself should be ensured. Another development which calls for ensuring and preserving the independence and impartiality of the courts, is the "judicialisation" of issues for reasons of largely political convenience by the other branches of Government. Both the legislature and the executive from time to time find it convenient to shift to the judiciary the task of initiative-taking in sensitive areas because they may fear having to decide such issues for themselves. The responsibility of decision on vital issues and objects is shifted to the judiciary.

It is, therefore, necessary to emphasise that any talk about the independence of the judiciary would be futile if it is confined to the discussion of the independence of courts in its narrow sense. Independence of the judiciary must, therefore, be understood in its true perspective as the independence of the means of judicial review. Review by reason and logic with objectivity, actions of man against man, actions of society against man, and of man against society are the prime functions of courts. Therefore, the conditions - subjective and objective — must be ensured so that the judiciary can fulfil its functions properly, and if the future has to be looked at with prospect and purpose. In a narrow sense the independence of judiciary has been understood to mean "a judiciary which dispenses justice according to law without regard to policies and inclinations of the Government of the day". But this aspect of judicial independence, though of vital importance, is only one aspect of the concept of judicial independence. This is the substantive independence of a judge which is referred to as functional independence. There are other essential aspects of judicial review, including personal independence, collective independence and internal independence, which must be complied with so that the judiciary must be viewed as "independent" in any real sense of the term.

The threat to judicial independence arises from without and from within. The threat from without is largely from the systems where almost every activity and aspect of life is either regulated or affected by legislation and statutory orders. The acts of the executive and equally of the legislative body must come up for judicial review. It is the independence of the ju-

diciary in the popular sense that is of vital importance. In all such matters it is for the judge to hold the scales of justice even. The judges today have not only to perform their functions in the truly adversary system of adjudication, they have to go further and enter into an inquisitorial or probing arena as innovators for social reforms in enforcement of constitutional and fundamental rights of man, not merely as an adjudicator of things which cannot be done but as an enforcer of duties which must be performed both by men and society.

In my opinion, the labels attached in popular talk or by some scholars of the courts to some judges as being pro-citizens or pro-government really amount to misinformed criticism of the concerned judges for a judge cannot be pro- or anti-anything. Nobody wins or loses because of a judge. Justice is administered according to law. It has been said that the basic fundamental of securing judicial independence from without, is security of tenure and preventing the executive from affecting the financial and other privileges or rights enjoyed by judges for rendering hostile or inconvenient decisions. Financial security to judges is another important aspect of securing independence of judges against threats from outside. The Indian Constitution lays down elaborate provisions for insulating the judiciary from what is conceived as such pressures or threats from the executive organs. I dare say that the constitutions of all democratic countries attempt to ensure that.

Unlike in the case of threat from without, so far as the threat from within is concerned, it is up to a judge to make himself invulnerable against it. The threat comes from a judge's own nature and temperament, his ideologies which he allows to affect his judgments, and his likes and dislikes which get translated into his judgments. In this context, it is very relevant to remember what Judge Learned Hand said years ago. He said:

If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men nor its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the judges may forfeit their independence, if they do not abstain. If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds. A society whose judges have thought it to expect complaisance will exact complaisance; and complaisance under the pretence of interpretation is rotteness.

Rendering of an honest, unbiased opinion or judgment based on the law and facts, is one of the most difficult and delicate tasks which can be imposed on fallible man. It demands not only wisdom, knowledge, conscience and insight but also a sense of balance and proportion, and if not absolute freedom from bias and prejudice then at least the ability to detect and discount such feelings so that these do not becloud the fairness and impartiality of the judges.

The true nature and purpose of judicial functions must be appreciated in order to objectively examine the judgment. It is necessary to emphasise that independence of judiciary in its wider sense is very vital for the survival of society based on justice and the rule of law but whether and to what extent the judiciary in any country can be viewed as independent, will not only depend on the law and the constitution of that country but also on the character of those who fill the office of judges and also on the status, respect, independence and credibility enjoyed by the bar, on the nature and character of the people who hold the office of a judge and who belong to the bar, on the political structure and social climate, and on the traditions prevailing in the country.

It is high time that the tendency to run down the judiciary or the judges, when one does not agree with the decision rendered by them, is given a goodbye if the independence of the judiciary has to be respected and protected. Interference by the organs or groups in due discharge of judicial duties has also to be viewed seriously, be it in the shape of organised strikes by lawyers or others for causes unconnected with judicial administration, and is a matter which should receive serious attention. Whereas judges are charged with the ultimate decision over the life, freedom, rights, duties and property of citizens, it is essential that the impartiality and independence of judiciary must be maintained so that there shall not be improper or unwarranted interference with the judicial process or judicial decisions be coloured by prejudice or ill-will.

I am sure that the Seminar organised by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists will provide an opportunity to eminent and competent men from different parts of the world to evolve conceptual as well as normative strategies to further strengthen and ensure the independence of the judiciary and the legal profession in every part of the world. I wish you an interesting and purposeful discussion.

## The Obstacles to the Independence of the Judiciary

by

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What factors operate as obstacles to the independence of judiciary? I would refer to some of these obstacles, both external and internal. The external obstacles postulate budget allocation for the judiciary, the system of appointment of judges, security of tenure, transfer, promotion of judges and conditions of service including salary, pension, etc. In almost all democratic countries judges are appointed by the Executive. In the United Kingdom, judges are appointed by the Queen on the advice of the Lord Chancellor. In the United States of America, federal judges are appointed by the President subject to confirmation by the Senate by majority vote. In France, judges are appointed from the beginning, to a type of career service on passing competitive examinations. They are chosen for higher judicial offices by the Minister of Justice in consultation with the High Council which consists of President of the Republic and the Minister of Justice. In our country, the appointment is made by the President on the aid and advice of Council of Ministers headed by the Prime Minister on the recommendations made by the Chief Justice of India. A proposal for appointment to the Supreme Court of India is initiated and submitted by the Chief Justice of India who is the Head of the Judiciary to the President, but the recommendation made by him is not binding on the Executive. Instead the Executive has the ultimate power to accept or reject the recommendation made by the Chief Justice of India in making appointments to the Supreme Court. A similar situation prevails in the case of appointment of judges of the High Court except that the proposal for appointment is initiated by the Chief



Justice of the High Court, and has to be approved by the Chief Minister of the State, the Chief Justice of India and finally by the President. This is the present position of law as declared by the Supreme Court in the famous "Judges' Transfer Case" (*S.P. Gupta vs. Union of India* (1982) 2 S.C.R. 365). The Supreme Court held that the Constitution postulates "consultation" and not the "concurrence" of the Chief Justice of India. The judgement emphasised that the consultation of the Chief Justice of India must be "effective" and ordinarily it should be accepted but the ultimate authority to accept or not to accept the recommendation of the Chief Justice of India vests in the Executive. This judgement was adversely commented on by the bar and the press. It is not proper or desirable for me to express any opinion on the rival contentions, but the fact remains that the members of the bar and jurists throughout the country believe that the judgement has inflicted a severe blow to the independence of the judiciary as it has provided a handle to the Executive for appointing judges of its own choice, as the ultimate power to appoint judges rests entirely with the Executive.

In this state of affairs those who aspire for appointment as judge of a High Court or the Supreme Court have been lobbying in the corridors of the Executive. The Executive has got the opportunity to appoint those who share their political philosophy or who are amenable to their wishes. In this process, merit and suitability have been casualties. Appointments have sometimes been made on extraneous considerations like caste, community, and regional representations. This has brought reaction. The Minister of Law and Justice of the Government of India has made a public statement regarding the Government's proposal for constituting a Commission for the appointment of judges to the High Courts and the Supreme Court. The Commission as proposed contemplates appointments of High Court judges on the recommendation of the Commission which will include the Chief Justice and Chief Minister of the concerned State and the senior-most judge of the High Court, the Attorney General of India, the Chief Justice of India and two or three senior-most judges of the Supreme Court and the Minister for Law. Similarly, for appointments to the Supreme Court, the proposed Commission shall include the Chief Justice of India, and two or three senior most judges of the Supreme Court, the Attorney General and the Law Minister of the Union Government.

The proposal as published in the press indicates that the recommendations made by the Commission will not be binding on the Government, instead the Executive will be free to reject the recommendations made by the Commission. If that be so, I wonder what useful purpose will be served by the Commission. The proposal will not bring any useful change in the existing procedure. It is said that it will avoid delay in making appointments

- but how - as the delay has always been caused by the Executive and not by the State. If the Executive causes delay in accepting the recommendation what would be the position? It would be the same as it exists today. I do not consider it necessary to express any further opinion on the question but the members of the bar, jurists, and judges should debate the proposal and express their opinion freely with a view to secure and maintain the independence of the judiciary. Appointments should be made on merit, ability, integrity and character of a person and not on the basis of regional, caste, and community considerations.

The judiciary has no control over arms or the purse. The judiciary as an institution has to depend on the Executive for the finances for the administration of justice. At first sight, many would not regard the control of finances as providing any threat to judicial independence. But on close scrutiny, it would be apparent that control of finances for the administration of the legal system is capable of preventing the performance of those very functions which the independence of judiciary is intended to preserve, namely the right of the individual to a speedy and fair trial of his claim by independent judges. The enforcement of the rule of law by the judiciary is frustrated by the Executive's refusal to appoint judges, to provide adequate court rooms for them to sit or staff, and to provide housing accommodation or adequate finances for the office equipment necessary for the proper functioning of the court. The Executive has a tendency to overlook the pressing need of finances for the appointment of a sufficient number of judges to meet the increasing need of the society for more courts. During the last 40 years of our independence, there has been rapid growth of population and a plethora of laws have been enacted by the Central and State Legislatures regulating almost the entire activity of an individual, be it personal, professional, commercial or industrial in nature. But there has not been a relative increase in the number of judges, courts, court-rooms and staff on account of the apathy of the Executive to allocate sufficient finances for the development and growth of the judiciary. What to say of increasing the number of courts? The Executive for the last several years has never taken effective steps to fill even the existing vacancies of judges. No High Court has functioned with the full strength of a sanctioned number of judges. This has resulted in huge arrears of cases. Litigants have to wait for many years to get their cases decided. This phenomena has raised serious doubts about the credibility of the judicial system. The functioning of the magistracy and the subordinate judiciary is still worse. In many parts of the country subordinate judges, munsifs and magistrates have no proper courtrooms or staff and the cases pending before them are so large in number that they find it impossible to cope with the problem of disposal within

a reasonable period of time. On account of delay in the disposal of cases, the judiciary has been receiving brick bats from almost all quarters, but they have not considered the basic reason for this situation in proper perspective.

The budget for the Supreme Court is approved and passed by the Executive and Parliament. Similarly, the budget for the High Courts and the Subordinate Courts in the States is approved and passed by the State Legislatures. The allocation of funds for the judicial administration is determined by the Executive. During these 40 years of independence various development plans have been drawn up by the Planning Commission and funds are allocated on the recommendations of the Planning Commission for implementation of those plans. But in none of the VIII Development Plans that we have does the judiciary find any place because the Executive and Planning Commission have both treated the judiciary as a non-plan subject that does not require any development. The Executive has not allocated a sufficient amount of finances for the setting up of adequate courts and the appointment of an adequate number of judges and magistrates to cope with the litigants' demand for speedy justice. If the Parliament and Executive control the allocation of funds and if no adequate funds are allocated, how can the judiciary be independent of the Legislature or the Executive? For illustration, I refer to Delhi's judicial requirement as considered by the Supreme Court. In *R. L. Gupta vs. Union of India and Ors.* (1988) 2 S.C.R. 250, the Court found that the population of Delhi has been growing very fast and so has the number of cases pending before the courts. There was need, therefore, to sanction more judges and magistrates. The Court noticed that the Delhi High Court had requested the Delhi Administration to sanction 169 additional posts in the Judicial Service and while doing that it gave the number of cases pending before the courts. According to the case, there were 97,943 cases pending before the courts of the Chief and Additional Chief Metropolitan Magistrates and 235,033 cases pending before other magistrates. The High Court requested the Delhi Administration to sanction posts for judges and magistrates so that the cases could be disposed of but the Executive did not pay any attention to the problem. While disposing of the case, the Supreme Court directed the Union of India and Delhi Administration to sanction 150 more posts in the Judicial Service and about 40 in the Delhi Higher Judicial Service and also to take immediate steps to establish additional courts, but nothing has been done and the cases are piling up in the Metropolitan city. This has led to frustration amongst litigants, lawyers and judges. Unless the Executive and the Parliament cooperate or unless the allocation and control of finances are placed in the hands of the Head of the Judiciary, the lack of finances shall continue

to be a great obstacle to the independence of judiciary.

The policies of transferring High Court Judges and appointing Acting Chief Justices in the High Courts are other obstacles to the independence of the judiciary. In spite of the aforesaid policies, it must be said to the credit of our judges that by and large they have performed their duties in administering justice in an objective and independent manner. But judges are after all human beings. They cannot be said to be infallible. If a judge is to perform his delicate task of administering justice under the constant threat of transfer, especially in cases where the interest of the party in power is involved, he cannot function in a manner expected of an independent judiciary. The transfer of judges may sometimes be necessary, but it must be on principles with the concurrence of the Chief Justice of India for very strong reasons and not on the ground that a judge is inconvenient to a party of the State. An Acting Chief Justice is always under a threat of transfer and he aspires to be confirmed as Chief Justice, and in that process he has to compromise his position. This is a serious inroad on the independence of the judiciary. The policy requires drastic change to ensure the independence of the Chief Justice and judges of the High Courts.

There are other obstacles, though minor in nature but effective in the functioning of an independent judiciary. The salary, pension, perquisites and other allied matters are of vital importance for independent functioning of the judiciary. In some countries the judges of the High Courts and the Supreme Court after their retirement are paid the same salary which they may have been drawing while in office and they are also entitled to the same facilities which they may have been enjoying as judges of the Courts. In our country the system is quite different. A judge, whether he be a Supreme Court Judge or a High Court Judge, is granted pension which is wholly inadequate to maintain the high standards expected of him even after retirement. A judge of the High Court on his retirement is entitled to practice before the Supreme Court as well as before other High Courts but a judge of the Supreme Court after his retirement is not entitled to legal practice. There is therefore no guarantee for a retired judge of the Supreme Court to lead a comfortable life in a dignified manner as he is denied the basic prerequisites which he has been enjoying while in office. The inadequacy of pension and absence of any facility has caused great damage to the independence of the judiciary. Judges on the eve of retirement have to look forward for employment either in the shape of being a member or Chairman of a Commission or like appointment. In that process, there is an inherent danger of affecting the independence of a judge even before his retirement. Some of the retired judges have been privately giving legal opinions to litigants, companies and corporations on payment of a fee

which is not conducive to the independence of the judiciary. Those who are engaged in such practice rightly argue that the pension granted to them is not adequate to meet their requirements to lead a dignified comfortable life. This is a serious matter and I think that unless the judges are granted the same salary, allowances and perquisites as they get while in office, it would be difficult to control the judges' aspirations for re-employment after retirement or engagement in giving legal opinion to litigants. The Executive and the Parliament should remove this great obstacle to ensure the independence of judiciary by granting the same salary and allowances and perks to the retired judges which they may have been enjoying in office with a condition that the judges be willing to serve the country whenever they should not be permitted to undertake any profession or employment. judges have to beg for small mercies while going abroad to attend international judicial conferences and for domestic air travels for Executive Class, perks and even for small matters like reservations in trains or planes. For all this judges have to approach the Minister on every occasion.

The temptation of being a populist judge, either by virtue of being too liberal in granting relief in undeserving cases or denying relief in deserving cases with a view to be popular either with the Government or with the people, poses a great danger to the independence of the judiciary. Many times bold, the arbitrary and unjustified decisions make a judge popular with the people through the media. This is an internal obstacle to the independence of the judiciary. Judges must refrain themselves from this. An independent judge must decide the case according to his ability in an objective manner on the application of the laws and constitutional provision without having any regard to the popularity or unpopularity which may result as a consequence of the decision. Many times a judge has to decide popular causes in a manner incurring the wrath of the people, but the judge must decide according to law and reason. Sometimes, unpopular causes determined by a judge also result in criticism.

In the recent past, there have been outbursts in certain quarters against Supreme Court Judges on the decision of cases. The press and the people both criticised the judges in the National Anthem case in an unjustified and unreasonable manner. Slanderous and contemptuous statements were made against the judges who decided the case. One leader of a political party went to the extent of saying that a judge who decided the case was neither Indian nor fit to be a judge. No member of the bar protested. Bonafide criticism of judges and their judgments, constructive in nature by the bar, the press or by the retired judges, is welcome as it provides guidance to the judges, but criticism which maligns the judges for their decisions deters the judges to decide the case according to their wisdom in ac-

cordance with law. In the "Bhopal Gas Case", a settlement was arrived at by the parties before a Constitution Bench of the Supreme Court and the Court passed orders accordingly. One may agree or disagree with the merit of the judgment or its implications, but in several quarters slanderous and malicious allegations were made against the judges imputing motive to them. Some of the social activists went to the extent of holding demonstrations before the Supreme Court and cleaning the stairs of the Supreme Court on misconceived notions, proclaiming that by giving that judgment the precincts of the Temple of Justice had been polluted and denigrated and therefore required cleaning. Some of the senior members of the bar also shared the public platform in criticising the judges, questioning their decisions the case. Does this amount to constructive criticism? A judgment may be incorrect on facts or in law, but the criticism of a judgment based on preconceived notions tantamount to denigrating judges affects the independence of judges. Judges are human beings, they are not infallible, they are likely to commit mistakes but that should not be a ground to denigrate them publicly. The apprehension of fierce criticism and adverse reaction is a great obstacle in the delicate task of justice without fear or favour, a cardinal principle for the independence of the judiciary. It is high time that this aspect is appreciated by the members of the bar, the bench and the people.

Another internal obstacle to the independence of the judiciary is the philosophy of an individual judge. A judge before joining the bench may have political affiliations, or a social philosophy of his own, but once he occupies a place on the bench he is required to decide the case in accordance with constitutional provisions and laws having regard to the welfare of the people and the community at large consistent with the constitutional philosophy and not on the basis of his own individual philosophy.

There have been assaults on the independence of the judiciary but the citadel has never fallen except from within. The respect for the judiciary is enhanced by example and not by words. The functioning of the institution and the conduct of the individual judges is a *sine qua non* for the independence of the judiciary. Independence of the judiciary to a large extent depends upon its internal functioning and the conduct of judges. Judges have to conduct themselves in an impeccable manner with dignity to justify the respect and confidence which the people have reposed in the institution of the judiciary. There are many other areas of internal functioning of the judiciary which affect its independence and credibility. These are the listing of cases, the constitution of benches and the disposal of cases, giving patient hearing to the parties, sitting in court in time and the delivery of judgments in time. There has been a tendency among the judges to criticise brother judges either in court, or outside the court, which causes great

damage to the institution. Needless to say that the independence of the judiciary depends upon the conduct and functioning of the courts and judges. Judges should not be politically motivated, they should be free from bias and prejudices. The tendency of looking forward for political favour poses a potential internal threat to judicial independence. There is, therefore, imperative need to improve the internal functioning of the judiciary lest the independence of the judiciary is in peril. The damage caused to the institution either by its decisions, as happened in the "Emergency Case" (*A.D.M. Jabalpur vs. S.S. Shukla etc.* (1976) S.C.R. (Supp.) 172), or in the "Judges' Transfer Case", the conduct of judges is far more injurious to the independence of the judiciary than the external assaults. If judges are not independent, the rule of law will be the casualty, resulting in confusion and disorder. Justice Douglas observed: "A strong and independent judiciary is a part of the guarantee which a free people need, lest the Executive and Legislative branches become a law unto themselves."

These words are of far-reaching importance. Therefore, it is imperative for the Legislature, the Executive, the judges, and the members of the bar to make all our efforts to remove obstacles which impinge upon the independence of the judiciary.

## Distributive Justice

by

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A little more than a century back John Stuart Mill stated:

Society should treat all equally well who have deserved equally well of it, that is, who have deserved equally well absolutely. This is the highest abstract standard of social and distributive justice; towards which all institutions, and the efforts of all virtuous citizens should be made in the utmost degree to converge.

He added:

It is universally considered just that each person should obtain that (whether good or evil) which he deserves; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is perhaps the clearest and most emphatic form in which the idea of justice is conceived by the general mind. As it involves the idea of desert, the question arises of what constitutes desert.

What was considered distributive justice in the last century has gradually come to be understood as the equivalent of social justice, and the appeal to social justice has now become the most widely used and effective process in modern times. The concept of making the law equal for all has been universally accepted as the measure of the level of civilization. Modern constitutions have highlighted this concept by incorporating the equal-



ity clause. Our own Constitution which is four decades old has given appropriate emphasis on this approach and apart from providing in the body of the Constitution guarantees to that effect, the Preamble itself has highlighted that justice must take within its ambit social, economic and political aspects.

Social justice is not the equivalent of the concept of distributive justice, though both aspects appear to be part of one common concept. There can, however, be no dispute that while the ambit of social justice has so diluted the concept of distributive justice that it has more or less merged into it, it would not be out of place to indicate that the main difference between the order of society at which classical liberalism aimed and the sort of society into which it is now being transformed is that the former was governed by principles of just individual conduct while the new society is to satisfy the demands for social justice. In other words, the former demanded just action by the individuals while the latter more and more places the duty of justice on authorities with power to command people what to do. By this process of transformation the concept of social justice has become pervasive and has been receiving recognition in modern jurisprudence.

Social justice has a moral value, acceptance of which has helped transform society into one of a fundamentally different type. It appears to be an on-going process today, the difference being that in some parts of the world it has reached an advanced stage while in others it is receiving gradual acceptance and people in those parts are waiting for the onward march.

It is not my endeavour in this small paper to talk of the philosophy of social justice but the effectuation of the concept by the judicial process is the theme.

Independence for us came after more than a hundred years of struggle. The Imperialist Government of Britain had its sway over the country for almost two centuries and during that period, had drained out of the country as much of the resources as possible and under its various policies a group of local rich men thrived who had shared the advantages within permissible limits with the ruling class. As a result of this, the community became divided into two groups - on one side, the rich few in whose hands wealth had been amassed, and the majority of the people who were rendered poor and economically weak, a few having the advantage of modern education and the bulk of the people rotting without any light of knowledge. Laws operated to protect the interests of the haves and the poor had no access either to the justice forum or even to the administrative superior.

When the dream of freedom was fulfilled, the Constituent Assembly set itself to the task of giving the free people a Constitution. Centuries of repression and suffering on one side, and promises and dreams on the

other, had surcharged every mind with a dose of philosophy and led to the generation of a sense of equality. The Constitution Fathers were anxious that the benefits of freedom should be shared by the entire population and the social wealth should be available for the benefit of the whole community. Guarantees were put into the Third Part of the Constitution and were labelled as fundamental. The Constitution Fathers were, perhaps, afraid that the ambit of guarantees should not be extended beyond a point and, therefore, many other aspects which perhaps should also have been included in Part III were grouped out into Part IV under a different label known as the Directive Principles of State Policy. Article 37 declared that the principles of Part IV, though fundamental in the governance of the country and it would be the duty of the State to apply those principles in making laws, were not enforceable by courts.

Over the years, the Supreme Court obliterated the distinction between Part III and Part IV by enlarging the meaning of Article 21; allowing workmen to participate in industrial management; by ensuring equal pay for equal work; by making the preservation of the ecology and environment a justifiable issue and by extending protection to minors and women. The Court held that the right to life enshrined in Article 21 meant something more than survival of animal existence. It introduced the concept of human dignity; it stated that all those aspects of life which go to make a man's life meaningful, complete and worth-living came within the concept. The Court spelt out that the right of a person not to be subjected to bonded labour or to unfair conditions of labour and rehabilitation after release from bondage were also included in the term. The Court imported into the concept the right to the bare necessities of life, such as nutrition, clothing, shelter, facilities for reading, writing, and having interviews with members of the family and friends when a person was under detention.

In the case of *Lingappa & Ors. vs. State of Maharashtra & Anr.* (1985) 2 S.C.R. 224, the Supreme Court, while dealing with vires of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974, which provided for annulment of transfers of agricultural lands by tribals to non-tribals and for restoration of possession thereof to the tribals, observed:

The problem of how far and to what extent the law of contract should be used as an instrument of distributive justice has been engaging the attention not only of the Legislatures and the Courts but also of scholars. Kronman in his thoughtful article 'Contract Law and Distributive Justice', observes: *'If one believes it is morally acceptable for the State to forcibly redistribute wealth from one group to another, the only question that remains is how far the redistribution*

*should be accomplished.*' According to the learned author this could be achieved not only by taxation but also by regulatory control of private transaction. He accepts that distributive fairness can only be achieved by taxation or contractual regulation, at some sacrifice in individual liberty.

This Court added:

The present legislation is a typical illustration of the concept of distributive justice, as modern jurists know it. Legislators, Judges and administrators are now familiar with the concept of distributive justice. Our Constitution permits and even directs the State to administer what may be termed 'distributive justice'. The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities and rectifying the injustice resulting from dealings or transaction between unequals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of the society based upon the principle: 'From each according to his capacity, to each according to his needs'. Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transactions. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of the society for there may be legislative control of unfair agreement.

There are several instances of legislation undertaken for distributive justice. Reference could be made to Debt Relief Laws, Land Reforms legislations and the Urban Land (Ceiling and Regulation) Act.

Parliament, the law-maker, speaks only once when it enacts or codifies the law, but the law is not self-operative. After independence with a view to giving effect to the mandate of the Constitution, several laws have been enacted for implementing distributive justice but the benefits of such laws have not yet gone to the people. Appropriate enforcement of the laws depends upon an efficient judicial process. The common man in India does

not have adequate economic support. He has no means of access to the adjudicatory process and does not have the advantage of participating at par in the fruits of independence. The dream of the Constitution Fathers and the will of the legislators can only be translated into a practical situation if the modality of distributive justice is properly geared up. Status quo is always an obstruction to progress and, therefore, the judiciary has to face the challenge. The goal has been set by the Constitution; the philosophy thereof has to be understood and remembered and action within a time-frame has to be undertaken. Every man is entitled to expect the fulfillment of his dreams. It has to be remembered that the poor men have more dreams because they have less opportunities of fructifying them into reality. Access to justice has in recent years become easy and convenient. Legal Aid is being provided by the State machinery in an effective manner to the weaker sections of the society - the beneficiaries being the members of the scheduled castes and tribes, women, children, the physically handicapped and economically weaker sections by the means test. Public interest litigation has opened the access directly even to the Supreme Court. If India has to be transformed into a land of satisfaction and happiness in a peaceful method, distributive justice is the only effective modality to be adopted.

# The Domestic Application of International Human Rights Norms

by

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## I. Historical Background

Until the beginning of this century, concern for the protection of human rights found expression almost exclusively at the national or domestic level in accordance with the varying notions of changing times. In some countries popular upheavals took place and gave birth to charters, e.g. the Magna Carta, the French Declaration of the Rights of Man and of the Citizen of 1789, followed two years later by the American Bill of Rights. These instruments were, by modern standards, undeniably limited in content and were not perceived as being of universal application. Undoubtedly, however, they inspired reform in many countries in the field of human rights.

At the international level, notions of human rights were no more than selective extensions of certain rights which powerful nations wanted their own coreligionists or nationals to enjoy elsewhere and hence the justification of those nations for certain religious wars or, upon the expansion of international commerce, the inclusion in bilateral treaties of provisions for the protection of their nationals. Again, humanitarian laws regulating the conduct of war depended on mutual agreement between states. It could not be said, therefore, that the norms of human rights on which states acted had any claim to universality or were other than those which some states bilaterally accepted or else found it convenient to impose, not from any

ethical considerations but rather from the practical need to safeguard their own national interests.

After the First World War, however, the beginnings of universality, though still restricted in content and scope, began to emerge. This was, in great measure, due to the founding of the League of Nations and eventually the creation of the United Nations system which thus provided a permanent structure for systematic work in the fulfillment of its mandate. The promotion and the protection of human rights were seen as an inseparable part of the mandate which states set for themselves (Articles 1 (3) and (4) and 55 of the United Nations Charter). To achieve this end, they pledged themselves "to take joint and separate action in co-operation with the Organisation" for the achievement of that objective (Articles 56 of the Charter). Further, within the system, functional machinery was specifically assigned particular tasks (ECOSOC and its subordinate bodies, especially the Commission on Human Rights and its sub-commission) to assist the General Assembly in its quasi-legislative functions in the human rights field (adoption of conventions, some eventually with independent treaty supervisory bodies like the Human Rights Committee, adoption of resolutions of declarations of general application). In addition, there was the general mandate of the General Assembly to ensure that the Article 56 pledges were fulfilled by states in which the situation of human rights became a matter of concern to the international community (e.g. in the case of El Salvador, Afghanistan and Chile in these past years).

To conclude this brief historical background, mention should be made of the enormously useful parallel work accomplished in the field of human rights by the United Nations specialised agencies within their field of competence (ILO and UNESCO in particular, the former even before the General Assembly came into being) and by regional organisations like the Council of Europe, the Organisation of American States and the Organisation of African Unity.

## **II. Sources and Content of International Human Rights Norms**

The quasi-legislative activity of the United Nations and the specialised agencies has produced a considerable number of instruments covering a variety of particular aspects of human rights. The constraints of this paper will only permit some discussion on the Universal Declaration on Human

Rights (1948) (UDHR) and its two implementing Covenants of 1966 on Civil and Political Rights (CCPR) and on Economic Social and Cultural Rights (CESCR).

Though the Universal Declaration is of prime importance, it is not a treaty and, therefore, technically it is weak as an instrument of protection. But its moral force and persuasive character have never been in doubt and it is universally regarded expounding generally accepted norms. It is a charter for objectives and policy and was drafted in broad and general terms. It was, therefore, necessary to implement those objectives by more precise and detailed formulation in the form of conventions which would be binding on states parties and hence the adoption of the two Covenants (CCPR and CESCR) which, in the original draft, were one. The Covenants were split into two since the CCPR created civil and political rights which would be immediately enforceable (Article 2 of CCPR) whereas the CESCR imposed obligations "to take steps.....to the maximum available resources, with a view to achieving progressively the full realisation of the rights" (Article 2(1) of CESCR). The CCPR gives treaty effect to the substance of Articles 1 to 21 of the UDHR whereas the CESCR, broadly speaking, gives effect to Articles 22 to 28 of the UDHR.

Briefly, in addition to the right of peoples to self-determination and to sovereignty over their natural resources (recognised both in the CESCR and the CCPR), the rights to which the CESCR specifically relates are: the right to work and to reasonable conditions of employment (Article 7); the right to form and join trade unions and associated rights (Article 8), social security and social insurance rights (Article 9); protection and assistance to the family, with special measures of protection for children (Article 10); adequate standards of living (Article 11), health (Article 12), and education (Article 13), particularly the taking of measures for the progressive achievement of free primary education for all (Article 14); and the right to take part in scientific and cultural life (Article 15). These rights are undoubtedly of the highest importance and, where states have given effect to them to the extent that their resources permit and by the enactment of appropriate legislation, these rights are justifiable domestically. However, the kind of enforcement machinery provided in the CESCR is not of a judicial character. Reports of the States parties are submitted to ECOSOC for study by a Committee of 18 elected by ECOSOC from persons nominated by states parties. That Committee, however, has no jurisdiction to receive complaints but general recommendations may result from their work. Domestic Courts could nevertheless find relatively useful material from those recommendations if occasion arises for the interpretation of rights in respect of which there is statutory provision.

The specific rights protected under the CCPR are: the right to equality and non-discrimination (Articles 2(1), 3 and 26); the right to effective judicial and other remedies (Article 2(3)); the right to life, including the restriction of the death penalty to the most serious crimes, the prohibition of that penalty on persons who are less than 18 or on pregnant women and the gradual abolition of that penalty (Article 6); protection of the individual from torture or other inhuman treatment or punishment (Articles 7 and 10); protection from servitude or forced labour (Article 8); the right to liberty and security of the person (Article 9); protection from imprisonment for inability to fulfil a contractual obligation (Article 11), freedom of movement (Article 12); protection of the alien from arbitrary expulsion (Article 13); fair and public hearing, presumption of innocence, procedural guarantees and due process, and protection from double jeopardy, etc. (Article 14); non-retroactivity of offences or punishments (Article 15); recognition of everyone as a person before the law (Article 16); protection of privacy, family, home, correspondence, honour and reputation (Articles 17 and 19(3)(a)); and freedom of thought, conscience and religion (Article 18); freedom of opinions and expression, of seeking, receiving and imparting information (Article 19); prohibition of war propaganda and protection from religious or racial hatred (Article 20), freedom of assembly (Article 21); freedom of association, of forming and joining trade unions (Article 22); the right to marry, equality of rights of spouses, protection of the family and the right of the child to special measures of protection (Articles 23 and 24); the right to take part in the conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections on the basis of universal suffrage and secret ballot, and the right to have access, on general terms of equality, to the public service (Article 25); the right of ethnic, religious or linguistic minorities in community with the other members of their group to the enjoyment of their culture, language or religion (Article 27); and strict limitations on the kind of rights from which derogations are permissible in times of emergency (Article 4).

The relevance of the work done under the CCPR to courts of law is somewhat higher than that done under the CESCPR. It provides greater potential for assistance to domestic courts in implementing human rights norms. This peculiarity results from two main factors.

First, the nature of the obligations undertaken by states parties is different under the CCPR. A state party here undertakes to respect and to ensure to all individuals within its territory the rights recognised in the Covenant, to adopt legislative and other measures to implement those rights, to ensure that any person whose rights are violated shall have an effective remedy, to ensure that any claim for such a remedy shall be determined by



judicial, administrative or other competent authority and to ensure that such remedies are enforceable.

Secondly, there is a specific organ established under the CCPR to supervise implementation. That organ is the *Human Rights Committee* consisting of 18 members, periodically elected or re-elected by the state parties. As in the case of the regional mechanism, members of the Committee are required to have a wide experience in the human rights field and they serve in their personal capacity. The functions of the Committee are three-fold: (a) it examines the periodic reports of states parties (at present numbering about 90) regarding implementation of the Covenant and adopts *General Comments* in the light of experience gathered in the course of the examination of States Reports; (b) secondly, it considers communications from individuals complaining of a breach of the Covenant by a state party which has acceded to the *Optional Protocol to the Covenant* (at present these states number about 45), the Committee's decisions on these cases are called "views" and their enforcement is founded on the obligations undertaken by the particular state party concerned under the *Optional Protocol*; (c) thirdly, it considers communications lodged by one state party against another but only in the case of states which have accepted this kind of jurisdiction under Article 41 of the Covenant (at present numbering 26).

Regarding the functions under (a) above, the reports are required to be extremely detailed covering the particular laws, regulations and administrative practices adopted by the state to give effect to each and every right recognised in the Covenant and any limitations to which the various rights may be subject. The Committee has issued guidelines to ensure that the reports are comprehensive. The examination of a report of a state party takes place in public in the presence of its representatives who are questioned over a number of meetings. As is apparent from the terms of Articles 2 and 40 of the Covenant, the report deals not only with legal but also other measures designed to give effect to the Covenant and, in particular, deals with any factors or difficulties encountered in the implementation of the Covenant within the internal system of the State, whether through its legislative, executive or its judicial arm.

Since the reports are from states which cover all continents and thus cover a much wider spectrum of political ideologies, of economic, social and cultural situations and constitutional and legal systems than would have been possible under regional instruments, the *General Comments* adopted by the Human Rights Committee from this enormously varied and rich source of experience has been the result of extremely patient and extensive deliberations from the 18 members themselves who come from a wide variety of systems and countries. For this reason, these *General Com-*

ments are, from an unpretentious start, gradually acquiring an authoritative character as representing generally accepted standards.

In the absence of any communications, the inter-state communications procedure at (c) above has not so far been engaged. However, the number of communications under the Optional Protocol have been quite substantial and the jurisprudence evolved by the Committee is growing in importance. Over the last 13 years, communications have been received from some 28 out of the 45 states that are parties to the Optional Protocol. It may very well be that individuals or even the legal profession in the remaining states that are not aware of the Optional Protocol or of the fact that their countries are parties to it.

### III. Emerging Jurisprudence on International Norms

This part of the paper will deal only with the jurisprudence and standards evolved by the Human Rights Committee in the performance of its functions under the Covenant. Even then only some idea of its jurisprudence could be given in a paper of this kind, since the period covered is one of some 13 years and the number of cases placed before the Committee as of July 1989 was 371 of which some 240 have been completed. Suffice it to indicate that the work of the Committee is recorded in the following among other documents: (a) the Official Records of the United Nations bearing General Assembly Supplement No. 40 for the years 1978 to 1989; (b) the Human Rights Committee Selected Decisions under the Optional Protocol No. CCPR/C/OP/1 obtainable from the Centre for Human Rights, UN, Geneva; (c) "Application of the International Covenant on Civil and Political Rights" by A. de Zayas, J. Moller and T. Ophsahl published in the *Canadian Human Rights Yearbook* (1986). (The first two authors are part of the Secretariat serving the Committee and Mr. Ophsahl was a member of the Committee for ten years and also a member of the European Commission on Human Rights); (d) periodic surveys in the *Human Rights Law Journal* (HRLJ) published by N.P. Engel in Strasbourg (France) and in Arlington (USA); (e) the *Interights Bulletin* published by Interights of Kingsway Chambers, 46 Kingsway, London WC2B 6EN.

There are two stages in the examination of communications. First the Committee determines whether the communication is admissible under the Optional Protocol. If the communication is admissible, the Committee then goes on to consider it on the merits.

There are a number of provisions governing the question of admissibility. All communications must relate to one or other of the rights protected under the Covenant. We need not mention all the rules governing the admissibility of a communication except one and it relates to the rule that no communication is admissible unless all available and effective domestic remedies have been exhausted. The significant result of this rule is that it enables the Committee to have the benefit of the thinking of the highest judicial authorities of the state concerned on the particular right in question, though the Committee may not eventually share that thinking, particularly where the legislation or the judge-made law relating to that right is not consistent with the provisions of the Covenant.

It would be invidious to select either a particular General Comment made by the Committee on specific articles or particular communications or cases. The following are merely illustrative and, for the sake of brevity, combine both "views" on communications and relevant parts of General Comments.

*Right to Life* (Article 6). The General Comment made by the Human Rights Committee rejects a narrow interpretation of the right to life as not being restricted simply to the abolition of capital punishment. The Committee has interpreted the commitment undertaken by states under this article to include, for example, a duty to take steps to reduce infant mortality, to eliminate malnutrition, to prevent epidemics and to banish weapons of destruction. These issues, however, are not easily justiciable. With regard to the death penalty as a form of punishment, there is a resolution of the General Assembly (32/61) proclaiming that the objective is that of "progressively restricting the number of offences for which the death penalty may be imposed" until its eventual abolition. The Committee has observed that, while Article 6(2) and (6) does not require states to abolish capital punishment totally, they are obliged to limit its use and, in particular, to abolish it for other than the most serious crimes. The Committee has further observed that the right to life cannot, under Article 4, be derogated from even during an emergency.

The cases that have come before the Committee have generally been violations of the right to life by law enforcement officials (*P. Camarge vs. Colombia* (45/79)), or else by the phenomenon of "disappearances" (*Eduardo Bleier vs. Uruguay* (30/78)). In such cases, the Committee has held that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities since the state has a duty to establish what has happened and to bring the culprits to justice and to pay compensation.

***Torture and Other Prohibited Treatment*** (Article 7). The numerous cases that have come before the Committee mostly concerned Uruguay, under its previous repressive regime, where victims were held incommunicado and were subjected to treatment outlawed under this Article and from which no derogations can be made even in times of emergency. It has sometimes been difficult to characterise particular treatment as amounting to torture or some other form of prohibited treatment and the Committee has on a few occasions applied this Article together with Article 10(1) which imposes an obligation to treat detainees with humanity and to respect the inherent dignity of the human person (*D. Marais vs. Madagascar* (49/79)).

The Committee has adopted a General Comment about the obligations imposed on states parties in addition to the enactment of legal provisions. Since violations occur in spite of legal provisions, the Committee has held that states must ensure effective protection through effective administrative machinery for control and special measures of investigation when complaints are made. Among other safeguards which may make controls effective are provisions against *incommunicado* detention: the allowing of visits to detainees by doctors, lawyers and relatives; the requirement that detainees should be held in places that are publicly recognised; measures requiring the names of the detainees and the places of their detention to be entered in a special register available to relatives and officials alike; provisions in the law or judicial practice making confessions or other evidence obtained as a result of violations of this Article inadmissible as evidence; and, lastly, the effective training and instruction of law enforcement officials so as to ensure that they do not resort to this kind of treatment.

***Right to liberty and security of individuals*** (Article 9). The Committee has adopted a General Comment on this Article indicating that paragraph 1 of the Article applies to all deprivations of liberty, whether in criminal or other cases such as mental illness, vagrancy, drug addiction, educational purposes, and immigration control, among others. The Committee has indicated that the individual must have a right in these cases to have the reasons for his or her detention investigated by a court and to be given compensation or other effective remedy in cases of a violation (Articles 2(3) and 9(5)).

Complaints have so far touched on three main aspects of the Article. First, many communications have been made under Article 9(1) complaining of arbitrary arrest and detention, for example, without a warrant, release not having been effected promptly after an order to that effect (*Soriano de Bouton vs. Uruguay* (37/79)), abduction in another country and bringing the victim over, the combined effect amounting to arbitrary arrest and

detention (*Lilian Celiberty vs. Uruguay* (66/70)) or detention for months or years without charge (*Mbenge vs. Zaire* (16/77), *Bolanos vs. Ecuador* (238/87)). Secondly, some complaints have related to a failure to bring the victim to judicial authority within a reasonable time either for the purposes of a trial or of a remand in custody, in breach of Article 9(3) (*Barbato vs. Uruguay* (84/81) and *Lueve vs. Zaire* (90/81)). Thirdly, some complaints have related to the unavailability of the remedy of *habeas corpus* or *amparo* or other access to a court to challenge the lawfulness of detentions (Article 9(4)) (*Fals Borda and Ors vs. Colombia* (46/79), *Vuolanne vs. Finland* (265/87)).

**Humane treatment during detention, imprisonment** (Article 10). In its General Comment on this Article, the Committee has indicated that this Article requires positive action by the state to ensure humane treatment and is thus a supplement to Article 7 which prohibits torture and other like treatment. The Standard Minimum Rules for the Treatment of Prisoners adopted under the aegis of the United Nations is also relevant, but the scope of the Article is broad enough to cover humane treatment.

Cases before the Committee have involved solitary confinement in small cells for prolonged periods (*Marais vs. Madagascar* (49/79)); *incommunicado* detention over a prolonged period at an unknown place of detention (*Romero vs. Uruguay* (85/81)) or else delay in informing a death row prisoner of the stay of his execution and his removal from the death cell (*Pratt and Morgan vs. Jamaica* (210/86 and 225/87)).

**The right to a fair hearing** (Article 14). This right constitutes the basic guarantee made available to the individual who, more often than not, is in an unequal situation vis-a-vis the state. It is not surprising that the Committee has made a General Comment comprising about twenty paragraphs, which would be too long to reproduce. A few points may, however, be highlighted in conjunction with communications which have been considered. First, in view of the different words used for the term "suit at law" in the various language texts of the Covenant, the Committee has been faced with the difficulty of deciding to what extent this Article applies to proceedings of an administrative nature but which nevertheless involve a civil right, particularly, in common law systems where there is no strict division between administrative and civil jurisdiction. The Committee decided to give a broad meaning to the term in order to secure to the individual a fair hearing where primary jurisdiction regarding what is essentially a civil right has been conferred by statute on a special tribunal other than a court of law (*Y.L. vs. Canada* (112/81)). The Committee has further indicated that all the guarantees would apply not only where normal courts exercise jurisdiction

but also where special courts, like military courts or tribunals, have jurisdiction.

Secondly, the Committee has found violations of Article 14(1), where the trial took place *in camera* or in the absence of the accused, or else where the judgment was not made public (*Altesor vs. Uruguay* (10/77), *Cubas vs. Uruguay* (70/80)).

Thirdly, the Committee has found violations where, because of the conditions of his detention, an accused party could not have access to legal assistance or did not have adequate time and facilities to prepare his defence (Article 14(3)(b)) (*Wight vs. Madagascar* (115/82), *Robinson vs. Jamaica* (223/87)).

Fourthly, the Committee has held that the right to a review of a conviction or sentence as provided in Article 14(5) does not leave the existence of the right to review to be regulated by domestic law, but rather the modalities of the review (*Salgar de Montego vs. Colombia* 64/79)). The Committee has further held that "the right under Article 14(3)(c) to be tried without undue delay should be applied in conjunction with the right under Article 14(5) to review by a higher tribunal and that, consequently, there was in this case a violation of these provisions taken together". The case in question, *Pinkney vs. Canada* (27/78), concerned a complaint that the exercise of an appellant's right of appeal had been prejudiced because the transcripts of the lower court's proceedings had taken two and a half years to be produced. *Pratt and Morgan vs. Jamaica* (supra) is also a case in point where written judgment on appeal in a death row case was delivered more than three and a half years after the appeal was heard.

*The right to freedom from interference with privacy, family, home or correspondence* (Article 17). In one case where immigration laws provided less generous treatment to foreign husbands than to foreign wives, the Committee held that, since the common residence of husband and wife is normal, the exclusion of one of the spouses from a country where close members of the family normally live can amount to an interference within the meaning of Article 17(1), even though the spouse is an alien (*Aumeeruddy Cziffra vs. Mauritius* (35/78)). In that case, the Committee considered that the precarious residence of a foreign husband amounted to an interference with the family life of his wife and, although this interference could not be described as "unlawful or necessarily arbitrary", it was nevertheless unjustifiable and was based on an adverse distinction based on sex, in violation of Articles 2(1) and 3 taken in conjunction with Article 17(1). In another case, *Estrella vs. Uruguay* (74/80), the Committee had occasion to hold that, although the authorities were entitled to exercise control over the cor-

respondence of prisoners, that control had to be subject to legal safeguards against arbitrary application and that the degree of restriction exercised had to be consistent with the standard of humane treatment of detained persons as prescribed under Article 10(1).

*Freedom of association* (Article 22). The freedom of association of the individual under this Article includes in express terms "the right to form and join trade unions for the protection of his interests". In *JB and Ors vs. Canada* (118/82), members of the Alberta Union of Provincial Employees complained that a law depriving them of their right to strike constituted a breach by Canada of this Article. The Committee, by a majority, declared the communication inadmissible *ratione materiae* on the ground that the right to strike was not protected by the Covenant on Civil and Political Rights but by the Covenant on Economic, Social and Cultural Rights. The minority was of the opinion that, *inter alia*, in covering the "right to form and join trade unions", Article 22 expressly envisaged the purpose for which this right was to be exercised by the individual, i.e., "for protection of his interests", and that this necessarily included the means by which that protection could be achieved; Article 22 also expressly made provision for the permissible limitations on the exercise of the right, but that was a question relating to the merits of the communication and not to its admissibility.

*The right of the family to protection* (Article 23). In the case already referred to under Article 17 (*Aumeeruddy Cziffra vs. Mauritius* (35/78)), the Committee also considered the matter in the perspective of Article 23. The Committee held that a couple, more so when there are children, constitutes a "family" and as such is "entitled to protection by society and State". Although the content of that protection may vary from country to country depending on different social, economic and other conditions, the principle of equal treatment of the sexes applies by virtue of Articles 2(1), 3 and 26, the last of which is also relevant because it guarantees the "equal protection of the law". Where the Covenant requires a substantial protection of the kind referred to in Article 23, it follows that the protection must be equal and not discriminatory since the protection of the family cannot vary with the sex of the one or the other spouse. The Committee therefore found a violation of Articles 2(1), 3 and 26 of the Covenant in conjunction with Article 23(1).

*Equality before the law and equal protection of the law* (Article 26). The Committee had long been in doubt as to whether this Article guarantees

mere formal equality before the law rather than substantive equality under the law. In a case (*Zwaan de Vries vs. The Netherlands* (182/84)) where the law granting social security rights treated men and women differently, the Committee came to the conclusion that the question at issue was not whether the Covenant on Civil and Political Rights imposed an obligation on states to provide social security but whether, where a state decided to institute a system of social security, it could do so in breach of Articles 2(1), 3 and 26 read together. In effect, the Committee considered that Article 26 imposed a code of behaviour on the state, whether in the exercise of its legislative, administrative or judicial activity. The Committee has also held that the right to equality before the law and equal protection of the law did not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria did not amount to discrimination within the meaning of Article 26 (*Danning vs. The Netherlands* (180/84), *Vos vs. The Netherlands* (218/86)).

#### IV. Problems of domestic implementation

International law leaves it to states to adopt legislative and other measures, consistent with their own constitutional processes, so as to give effect to the obligations which they undertake to implement and, more importantly, to ensure that any person whose rights or freedoms are violated have an effective remedy justiciable before independent and impartial tribunals. This is reflected in Article 2(2) of the Covenant on Civil and Political Rights.

Three main methods have generally been discussed for the implementation of the Covenant in domestic law:

- (a) direct incorporation of the rights recognised in the Covenant into what may be called a "bill of rights" in the national legal order;
- (b) the enactment of different legislative measures in the civil, criminal and administrative laws to give effect to the different rights recognised in the Covenant; and
- (c) self-executing operation of the Covenant in the national legal order.

Two sets of problems have bedevilled the question of implementation. The first of these arises from the fact that law-making powers are vested in Parliament and not the Executive, except to the extent that the latter has delegated its powers. These powers may not, however, be exercised con-



trary to the Constitution and existing law. Furthermore, it is the Executive which enters into treaties. Such treaties can therefore only have legal effect to the extent that they have been implemented in one way or another in domestic law, since the courts will only apply the law. Even in systems where the Constitution itself provides that a treaty which has been entered into in accordance with the constitutional processes will be binding internally, the problems still arises where there is an inconsistency between the Constitution and the treaty.

There is, in this regard, a difference in perspective between a domestic court and, for example, the Human Rights Committee established under the Covenant. Whereas the domestic court will pronounce on the constitutionality of legislative or other measures, the Committee has jurisdiction to pronounce on their (if I may coin a word) "convenantability" or their consistency with the Covenant. In other words, the Committee has jurisdiction to pronounce on the consistency of the national constitution itself with the Covenant. In practice, there need be no conflict between the two jurisdictions if the technique of interpretation is resorted to by the domestic jurisdiction so as to avoid any inconsistency with the treaty provisions. But this may not always be possible.

The second set of problems arises from the fact that treaty provisions are often general in character and need to be implemented by specific detailed provisions in the internal law. For example, the right to life, liberty and security of the person requires to be implemented not simply by a legal provision proclaiming the right but also by detailed provisions in the criminal, civil and administrative laws to provide appropriate remedies, sanctions and other measures designed to guarantee this right. In the same way, family, social, economic and other rights require a whole corpus of family codes, including welfare and industrial codes to ensure implementation which will, in turn, depend on the particular circumstances and traditions of each country.

For those states which are parties to, for example, the Optional Protocol, it is essential that the rights recognised in the Covenant should be given effect in the legal system for two reasons. First, because of the rule relating to the exhaustion of domestic remedies, states thereby ensure that alleged violations are investigated, in the first place, within their own internal system, and if need be, remedied. Secondly, the international control mechanism will have had the benefit of the thinking of the highest courts in the country against which violations are alleged.

In the case of those countries which are not parties to the Covenant, it is still relevant for the courts to ensure that generally accepted standards of human rights prevail since, by virtue of the obligations which states have

undertaken under the United Nations Charter, they might still, in certain circumstances, be answerable under the various procedures established within the United Nations system under sections 55 and 56 of the United Nations Charter.

In the result, whether states are parties to particular instruments or not, they are still answerable to the various international mechanisms for any failure in implementation and it is immaterial, for the purpose of the state's responsibility, whether that failure is that of the legislative, the executive or the judicial arm of the state. The judiciary has as much responsibility as the other arms of the state to ensure, in the exercise of its functions, the greatest possible consistency between national jurisprudence and the international jurisprudence which is now evolving.

In this connection, it is perhaps a misnomer to call the human rights norms we have been discussing "international". Their source and destination have always been domestic. Rules of equality and fair treatment, to take an example, are features of many civilisations, east or west, south or north, and find expression in one way or another in domestic law. The only aspect about them that is international is that they have formally been recognised after years of deliberation by all nations as being universal and there exists international machinery of a judicial character having jurisdiction over their implementation. Increasingly, judges at the highest jurisdictional level are no longer content to refer to jurisprudence evolved by their counterparts in other national jurisdictions but also to the jurisprudence now being evolved by international bodies of a judicial character such as the Human Rights Committee, the European Court and Commission on Human Rights and the Inter-American Commission on Human Rights. Additionally, periodic conferences of judges (Bangalore 1988, Harare 1989) are making judges sensitive to this inevitable and valuable trend.

One last thought needs perhaps to be expressed. Far too often in the past, the question of human rights at the international level has tended to be left exclusively in the hands of foreign ministries, admittedly with the assistance of Home Office legal advisers. It is to be wondered whether that is enough. It is the courts which normally deal with the implementation of human rights or their violations at grassroots level. The time has perhaps come to ensure that the thinking of the judiciary is tapped in a systematic way and that the judiciary should not only be more closely involved at the international level but also be regularly informed in a systematic way of what happens in the human rights field in all national as well as international jurisdictions.

## Conclusions and Recommendations

1. The participants in the workshop unanimously shared the view that securing, preserving and strengthening the independence of the judiciary is vital for the survival of democracy and rule of law in any society. It was agreed that independence in its wider sense, i.e. decision-making independence, institutional independence, collective independence and independence of the individual judge must be protected from all threats not only from without but also from within, including threats from all centres of power -political and economic.

2. It was agreed that in order to eliminate outside threats, particularly from the Executive, which enjoys the power of appointment, transfer and preferment of judges, an institutional mechanism must be evolved so that the Executive is not able to use this power in a manner which would tend to impair the independence of the judiciary.

3. It was also agreed that apart from evolving procedural and normative safeguards, it is important that judges must possess courage of conviction, inner strength and commitment to the principle of the independence of the judiciary because the threat from within is much more subtle and insidious and independence is a quality which resides in the heart of the judge and if it is there, no external circumstances can shake it.

4. It was the unanimous view that the legal profession is expected to be the sword of the judiciary and to defend and protect its independence.

5. The participants expressed the view that healthy responsibility and well-informed criticism of the judicial output must be appreciated by members of the judiciary as it helps them in discharging their responsibility to the society. But the view was shared by everyone of the participants that

any motivated, ill-informed or disrespectful criticism has the tendency to erode the independence as well as the credibility of the judiciary.

6. It was felt by all the participants that a body for appointment of judges of the superior courts should be set up which would ensure the independence of the judiciary. However, its composition, functions and powers require consideration in greater depth.

7. It was agreed that long delays in the delivery of judgments erode public confidence in the judiciary and in the administration of justice, in which confidence is necessary in order to sustain the independence of the judiciary.

8. There was agreement amongst all the participants that judicial vacancies should in all cases be promptly filled without delay. However, if the Government defaults in carrying out its obligation in time, it must make known to the public its reasons for not making the appointments in time together with the relevant facts relating to the delay.

9. The participants were unanimously of the view that the practice of keeping an acting Chief Justice for a long period was totally wrong and improper, it had had the effect of seriously impairing the independence of the judiciary.

10. There was widely shared opinion amongst the participants that the independence of the judiciary is essential for the judiciary to be able to discharge satisfactorily its constitutional function of rendering distributive or social justice. It was also the view of all the participants that the institution of "lok adalat" is a useful vehicle for promoting distributive or social justice.

11. The participants unanimously approved and endorsed the Bangalore Principles on the Domestic Application of International Human Rights Norms adopted by the Chief Justices and judges of Commonwealth countries of the South Asian and South East Asian Regions. It was also unanimously agreed that these principles, which recognise that international human rights instruments provide important guidelines in cases concerning fundamental rights, should be incorporated into the domestic jurisprudence by judges adopting an activist goal-oriented approach and creatively and innovatively interpreting the fundamental rights embodied in the Constitution.

**12. The participants unanimously agreed that conferences of this kind are extremely useful in strengthening the resolve of judges to assert and maintain the independence of the judiciary and in creating public awareness about the imperative necessity to preserve and safeguard such independence.**

## United Nations Basic Principles on the Independence of the Judiciary

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

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

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

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

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

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

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

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

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

"Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the

Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

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

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

## Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

### **Freedom of expression and association**

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

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

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.



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

### **Professional secrecy and immunity**

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

### **Discipline, suspension and removal**

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

## **Bangalore Principles on the Domestic Application of International Human Rights Norms**

A high-level judicial colloquium on the Domestic Application of International Human Rights Norms was convened in Bangalore, India from 24-26 February 1988.

The colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Honorable Justice P.N. Bhagwati (former Chief Justice of India), with the approval of the Government of India.

The participants were:

- Justice P.N. Bhagwati (India) (Convenor)
- Chief Justice E. Dumbutshena (Zimbabwe)
- Judge Ruth Bader Ginsburg (U.S.A.)
- Chief Justice Muhammad Haleem (Pakistan)
- Deputy Chief Justice Mari Kapi (Papua New Guinea)
- Justice Michael D. Kirby (Australia)
- Justice Rajsoomer Lallah (Mauritius)
- Mr. Anthony Lester, Q.C. (Britain)
- Justice P. Ramanathan (Sri Lanka)
- Lord President Mohammed Salleh (Malaysia)
- Justice Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussion of expert papers. The Convenor summarised the discussion in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all human-kind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and

freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers, generally.

4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement

officials; and meetings for exchanges of relevant information and experience.

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

*Bangalore, Karnataka State, India  
26 February 1988.*

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

### **List of Participants at the Working Sessions on 20th and 21st January, 1990**

#### **Judges**

- Mr. Justice Ranganath Mishra, Supreme Court of India  
Mr. Justice M.H. Kania, Supreme Court of India  
Mr. Justice K.N. Singh, Supreme Court of India  
Mr. Justice B.C. Ray, Supreme Court of India  
Mr. Justice P.B. Sawant, Supreme Court of India  
Mr. Justice S.R. Randian, Supreme Court of India  
Mr. Justice S. Ranganathan, Supreme Court of India  
Ms. Justice Fatima Beevil, Supreme Court of India  
Mr. Justice S.C. Aggarwala, Supreme Court of India  
Mr. Justice Yogeshwar Dayal, Chief Justice, Andhra Pradesh  
Mr. Justice R.C. Patnaik, Chief Justice, Orissa  
Mr. Justice Milap Chand Jain, Chief Justice, Rajasthan  
Mr. Justice R. Dayal, Chief Justice, Sikkim  
Mr. Justice S.D. Aggarwal, Allahabad High Court  
Ms. Justice Amreshwari, Andhra Pradesh High Court  
Mr. Justice S.C. Pratap, Bombay High Court  
Mr. Justice G.N. Ray, Calcutta High Court  
Mr. Justice M.K. Mukherjee, Calcutta High Court  
Mr. Justice Padma Khastagir, Calcutta High Court  
Mr. Justice S.B. Wad, Delhi High Court  
Mr. Justice Chandrakant Urs, Karnataka High Court

Mr. Justice Shivaraman Nair, Kerala High Court  
Mr. Justice S.B. Majmundar, Gujarat High Court  
Mr. Justice N.N. Goswami, Delhi High Court  
Ms. Justice Kanta Bhatnagar, Madhya Pradesh High Court  
Mr. Justice Ali Ahman, Patna High Court  
Mr. Justice N.P. Singh, Patna High Court  
Mr. Justice A.N. Grover, Former Judge, Supreme Court of India  
Mr. Justice G.L. Oza, Former Judge, Supreme Court of India

**Convenors/Resource Persons**

Mr. Justice P.N. Bhagwati, Chairman of the Advisory Board of the CIJL  
Mr. Reed Brody, Director of the CIJL  
Mr. Justice Rajsoomer Lallah, Supreme Court of Mauritius  
Mr. Justice Shafiur Rehamn, Supreme Court of Pakistan  
Mr. Justice Badrul Haidar Chaudhury, Supreme Court of Bangladesh  
Mr. Param Cumaraswamy, Malaysia  
Mr. Neelan Thiruchelvan, Sri Lanka  
Mr. Soli Sorabji, Attorney General of India  
Mr. Ashok Desai, Solicitor General of India  
Dr. L.M. Singhvi, Senior Advocate  
Mr. Mool Chand Sharma, Delhi University