



**Volume VII**

# **CIJL Yearbook**

**January 1999**

## ***The Judiciary in a Globalized World***

***Editor: Mona A. Rishmawi***

***Centre for the independence of Judges and Lawyers  
Geneva, Switzerland***

Established in 1978 by the International Commission of Jurists in Geneva, the Centre for the Independence of Judges and Lawyers:

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

In pursuing these goals, the CIJL:

- works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers endorsed by the UN General Assembly;
- organizes conferences and seminars on the independence of the judiciary and the legal profession. Regional seminars have been held in Central America, South America, South Asia, South-East Asia, East Africa, West Africa and the Caribbean. National workshops have been organized in Cambodia, India, Nicaragua, Pakistan, Paraguay and Peru;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- provides technical assistance to strengthen the judiciary and the legal profession;
- publishes a Yearbook in English, French and Spanish. It contains articles and documents relevant to the independence of the judiciary and the legal profession. Over 5,000 individuals and organizations in 127 countries receive the CIJL Yearbook;
- publishes a yearly report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers" world-wide.

### ***Appeals Network***

Jurists and their organizations may join the world-wide network which responds to CIJL appeals by intervening with government authorities in cases in which lawyers or judges are being harassed or persecuted.

### ***Affiliates - Contributors***

Jurists' organizations wishing to affiliate with the CIJL are invited to write to the Director. Organizations and individuals may support the work of the CIJL as Contributors by making a payment of Swiss francs 220 per year. Contributors will receive by Air mail Copies of all ICJ/CIJL regular and special publications .

### ***Subscriptions to CIJL Publications***

Subscriptions to the Yearbook and the annual report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers" are Swiss francs 25, each, or for combined subscription Swiss francs 43, including postage.

*Note:* Payment may be made in Swiss francs or in the equivalent amount in other currencies either by direct cheque valid for external payment or through a bank to Société de Banque Suisse, Geneva, account No. 142.548.0; National Westminster Bank, 1 New Bond Street, London W1A 2JH, account No. 11762837. *Pro forma* invoices will be supplied on request to persons in countries with exchange control restrictions to assist in obtaining authorization.

### ***Centre for the Independence of Judges and Lawyers***

P.O.Box 216 - 81 A, avenue de Châtelaine  
CH-1219 Châtelaine/Geneva  
Switzerland

Tel: (4122) 979 38 00  
Fax: (4122) 979 38 01

© Copyright, International Commission of Jurists/Centre for the Independence  
of Judges and Lawyers, 1999.

ISSN 0252-0354

Printed in France, Imprimerie Abrax - Chenôve, France

## *Table of Contents*

<b>Editorial .....</b>	<b>7</b>
<b>The Judiciary and Constitutionalism in a Democratic Society .....</b>	<b>15</b>
<i>Ismail Mahomed</i>	
<b>The Role of International Financial Institutions in Judicial Reform .....</b>	<b>31</b>
<i>Diego Garcia-Sayan</i>	
<b>The Courts of the Future .....</b>	<b>51</b>
<i>Michael Kirby</i>	
<b>The UN Special Rapporteur on the Independence of Judges and Lawyers .....</b>	<b>63</b>
<i>Param Cumaraswamy</i>	
<b>Judicial Independence vs. Judicial Accountability: A Debate</b>	
<b>I. An Introduction .....</b>	<b>85</b>
<i>P. N. Bhagwati</i>	
<b>II. A Comment .....</b>	<b>91</b>
<i>Jerome J. Shestack</i>	
<b>Reflections on Judicial Independence, Impartiality, and the Foundation of Equality .....</b>	<b>95</b>
<i>Claire l'Heureux-Dubé</i>	
<b>A Note on the CIJL Protection Work .....</b>	<b>109</b>
<i>Marie José Crespin</i>	

## *Editorial*

---

This volume is dedicated to the 20th anniversary of the Centre for the Independence of Judges and Lawyers (CIJL), which was established by the International Commission of Jurists in January 1978 with the global mission of promoting and protecting judicial and legal independence throughout the world.

The CIJL started its work on two fronts. The first aspect focused on exploring the meaning of judicial and legal independence and the components of these principles. To this end, it organised meetings and workshops to clarify concepts and principles. It later moved into a standard-setting exercise when it worked with the United Nations on the formulation of the United Nations Basic Principles on the Independence of the Judiciary, and their eventual adoption in 1985, as well as the United Nations Basic Principles on the Role of Lawyers, and their eventual adoption in 1990. It can now be somehow confidently stated that this first aspect of the CIJL's mission is largely fulfilled, although there will always be a need to adapt the standards to new challenges and opportunities.

The second part of the CIJL's mission, however, is far from being achieved. It is focused on organising support for judges and lawyers who are harassed for carrying out their professional duties. Unfortunately, the persecution of jurists continue to be a daily occurrence. The CIJL intervenes on behalf of persecuted jurists, sends fact-finding missions to countries to report on their level of respect of these principles, and observes the trials of jurists. The CIJL protection work culminated in 1994 with the establishment by the United Nations' Commission on Human Rights of the mandate of the Special Rapporteur on the independence of the judges and lawyers as one of the Commission's thematic protection mechanisms. This was done following CIJL's recommendation.

In carrying out its work, the CIJL has mainly focused on the role of the State. However, new forces are entering the scene nowadays. These forces can impact on judicial and legal independence. During the last few years, various international financial institutions, as well as development and funding agencies have been deeply involved in judicial reform. Their activities have direct impact on the independence of judges and lawyers.

In fact, the State's role in human rights promotion and protection in general is now changing as we see the very issue of State sovereignty taking a new shape. Today's State is different from yesterday's entity. Its control over its affairs is far from absolute. In most parts of the world today, decisions by governments are determined by the requirements of the international market. The concerns of investors and international financial institutions often become the most decisive factor in the governmental decision-making process.

In today's world, economic considerations dominate. The ideological considerations and strategic interests that once dominated relations amongst nations during the Cold War, are now replaced with economic benefits as the free market prevails. People in an increasing number of countries drink Coca-Cola, eat McDonalds, and watch CNN, if they can afford these commodities.

Yesterday's political alliances are now replaced by today's economic alliances. Grabbing new markets, and finding ways to reduce production costs, to eliminate legal and other barriers on trade, and to ensure free and fair competition in trade, dominate international relations. As a result, the World Trade Organisation (WTO) has become a major player on the international arena, only a few years following its establishment in 1995.

Many governments, particularly in the Third World as well as in Eastern Europe and the former Soviet Union, have to adjust

their systems to these new realities. Privatisation and the dictum of small government are now being aggressively promoted by the international financial institutions. The role of what is termed as civil society is also encouraged. While this has no doubt reduced government costs, it forced States to retreat in many countries from subsidising basic needs, such as food, water, and electricity, and from rendering basic services such as health care and education. While the quality of services may have improved as they were left to the competitive private market, the services themselves often have become more expensive and inaccessible to the underprivileged. The trend has also established a new power basis. It has, for instance, increased the role that the business community has traditionally played in governance issues. In some countries, like Russia, it has also led to the emergence of new forms of organised crime that control not only economic and political life, but also basic security.

Globalization has its affects on the work of national parliaments as well. In many countries, they are busy adjusting their laws to the requirements of the international financial institutions and business. The judiciary is also directly affected. International business agreements often require that disputes are referred to arbitration, rather than to national courts, which are perceived as too slow and inadequate to deal with commercial disputes. To improve the quality of judicial services, grants are provided to assist the courts in modernising their equipment, and introducing computer technology and other media. Rules of procedures are also reviewed to speed the judicial process and reduce backlog.

On the positive side, modern technology allows courts to benefit from the globalized media. The Internet, for instance, exposes the judiciaries in various countries to the jurisprudence of other parts of the world in an instantaneous manner as many courts place their decisions on the Internet as soon as they are delivered. Such media advances also increase the accountability of judges for their actions as was lately evident by the intense international media coverage of some trials such as that of the

former Deputy Prime Minister of Malaysia, Anwar Ibrahim, or the case of General Pinochet of Chile before the Judicial Committee of the House of Lords in England.

In short, amongst the advantages of the new world order is that it requires judiciaries to be reformed, courts modernised, judicial quality improved through training, procedures shortened, and accountability enhanced. Although the reform is often mainly focused on accommodating foreign investment, it inevitably leads to an increase in the quality and efficiency of the system as a whole.

There are serious disadvantages however. In many reformed legal systems, justice is treated as a business that must generate profit. Court fees are increased, and legal aid for the poor is reduced. Proper justice, therefore, becomes an expensive commodity that only the rich can afford.

Moreover, while the conditions of court services improve, judicial salaries often remain at their low rates. At the time when consumerism dominates, this provides an invitation for corruption. While corruption is far from being a new phenomena, only recently have the international financial institutions started to work against it. Now with proposals for regional and international conventions, the international fight against corruption is being intensified.

While judges and arbitrators are given more prominence on commercial issues, in too many countries court decisions are often ignored, and judges are attacked, either violently, or through professional sanctions when they decide against governments in human rights matters. In these countries, strengthening the judiciary stops short of including human rights concerns. In such a globalized world with its emphasis on civil society, the level of respect for the universal human rights principles should be considered as a yardstick to guide international relations. This is far from being the case however.

In this respect, it was a remarkable achievement that 120 States voted in July 1998 in Rome for the establishment of the International Criminal Court. Seven countries, including the powerful United States of America, opposed. The creation of this international court to try those accused of genocide, crimes against humanity and war crimes, takes humanity to a higher level. It asserts positive universal moral and legal values.

The above issues and others are debated in this *Yearbook*. Most papers published in this volume were presented during the Triennial Conference of the International Commission of Jurists entitled '*The Rule of Law in A Changing World*' that took place in Cape Town, South Africa, from 20 to 24 July 1999. During this meeting, the ICJ family celebrated the 20th anniversary of its Centre for the Independence of Judges and Lawyers.

In his most eloquent and inspiring keynote speech, Chief Justice Ismail Mahomed of South Africa reminds us of the role of judges in a modern democratic society based on the rule of law. He explains that the administration of justice is not merely a technical function and that human rights standards should become more firmly based in national legal systems and that courts should provide remedies for victims of violations of these rights.

Dr. Diego Garcia-Sayan then looks at the role of the international financial institutions in judicial reform. The judiciary in many countries does not have the resources to play its rightful role as the protector of justice. Although the three State branches are meant to be separate and equal, in reality however, the judiciary is financially dependent on the other branches of power. It is often granted scarce resources and is thus unable to deal with its workload. The issue of resources also affects the standing of the judiciary in society and the self-esteem of judges and their ability to confront pressure. Dr. Garcia-Sayan examines what are the considerations that should be kept in mind in examining and assessing the role of the international financial institutions with regard to the judiciary.

Justice Michael Kirby explains the impact of modern technology on the Courts in Australia. He informs us about the actions of the Australian courts not only to place judgments on the Internet, but also to hear evidence through video links. He even anticipates future virtual courts. In this address to young lawyers, which is reproduced here for its high relevance to our topic, Justice Kirby then exposes the danger of acting judges, bringing us back to the reality of inadequate respect for fundamental principles of judicial independence, such as security of tenure for judges, even in technologically-advanced countries such as Australia.

The paper of Dato' Param Kumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers, reminds us indeed that not only the media connects the world, but also that universal values and institutions establish a set of standards for all countries of the world. The article examines how the United Nations, in particular, the UN Commission on Human Rights, consider the question of judicial and legal independence as a value shared amongst nations.

The last three papers examine some basic elements in judicial independence. They are based on the assumption that for the legal system to function adequately, the public must have confidence in the judges. Justice must be efficient and accessible. Its quality, fairness, and ability to develop sound rules of law must be ensured. In other words, the ultimate goal of the system must be the protection of human rights.

These issues indicate the tense conceptual relationship between two essential values: judicial independence and judicial accountability. They demonstrate that while it is essential that judges be independent, it is also important that the judiciary, like other branches of government, be accountable to the public. Proper structures and mechanisms should be established to balance questions of accountability with the requirements of judicial independence. Justice P.N. Bhagwati and Mr. Jerome Shestack debate how far this accountability

should go, and what institutions should safeguard against abuse.

Justice Claire l'Heureux-Dubé then looks at equality as an essential component of the justice system. Disadvantaged groups, including women, minorities, and the poor look at the judiciary to fulfil the human rights promise of social equality and justice.

As a last note, Justice Marie-José Crespin, looks at enhancing the protection of judges and lawyers to enable them to fulfil their professional duties. She mainly explores the protection work of the Centre for the Independence of Judges and Lawyers.

Many of the papers touch on cross-cutting themes such as accountability, corruption, and protection. The collection of the papers published here demonstrate that while some of the premises under which the CIJL functioned when it was first established in 1978 have changed, the basic mandate of the CIJL remains valid. However to remain relevant, the CIJL must address the current challenges of today. This is why the CIJL has added two new foci to its activities during the years 1999-2000. The first one is to explore, as part of its fact-finding efforts in some countries, the impact of the activities of the international financial institutions on the independence of the judiciary and the legal profession. The second is to focus on measures to examine judicial corruption as corruption remains today amongst the main obstacles against the establishment of an independent judiciary in many parts of the world.

Mona Rishmawi  
*CIJL Director*  
January 1999

# *The Judiciary and Constitutionalism in a Democratic Society*

---

*by*

*Ismail Mabomed\**

## **Introduction**

The Second World War brought monstrously cruel levels of devastation and pain, widespread death and suffering, massive cruelty and tyranny for many millions upon millions, all over the world. But it also released deep and romantic dreams to build a better, more caring, more sensitive, more compassionate world inspired by commitment to the universal attainment of fundamental human rights and disciplined by the rigour of the Rule of Law.

There was a compelling power about this vision. It began to unleash new creative energies across the continents. It united men and women of great nobility and courage who elevated the human condition. It began to promise hope and romance to a Europe devastated by the Nazi experience, to democracies both old and new compromised by the War and its imperatives, to massive areas in the Afro-Asian world ruled by distant colonial minorities from abroad, to the victims of racial bigotry in South Africa, in the United States and elsewhere and to millions

---

\* Chief Justice of South Africa. This the keynote speech that opened the session on the Independence of the Judiciary in the Conference of the International Commission of Jurists entitled 'Rule of Law in A Changing World' that took place in Cape Town South Africa, from 20-24 July 1999.

everywhere entrapped within the enmeshing syndrome of political repression, economic devastation and emotional despair.

The end of the War saw the pitiless brutality of Hiroshima and Nagasaki, but it also saw wave upon wave of fresh idealism as good and noble men and women began to sing a resonating song of beauty and brotherhood, love and protest across the oceans physically dividing their ancient lands, sometimes mixed with intoxicating natural beauty and grotesque human cruelty.

There was a state of creative restlessness everywhere as humanity appeared to seek a new mutation. Within a relatively brief period of potential glory, the movement towards colonial emancipation for millions became irreversible, racial bigotry in key areas began its first retreat, and the United Nations was established offering to some dreamers the first glimpses of an incremental progression towards the vision of a world government. The Universal Declaration of Human Rights was adopted<sup>1</sup> articulating with eloquence the sweetest dreams of a chastened humanity which had come so perilously close to its own annihilation by the menacing combination of its capacity for scientific aggression and its own emotional immaturity.

### **The rule of law**

The ethos which informed the establishment of the International Commission of Jurists and which has continued to sustain it in the ensuing years has its roots in that same firmament which dominated the world immediately after the War, notwithstanding the continuing chasm between the vision it sustains and the disgraceful pathologies in the vision which humankind has to endure in many areas. In its essentials, it is an ethos which must

---

1 By Resolution 217 (A) of the General Assembly of the United Nations on 10 December 1998.

rest on at least five very crucial, mutually reinforcing and interdependent premises:

- First, a defensible and durable civilisation can only sustain itself legitimately and effectively if it recognises the inherent dignity of every member of the human family. For this reason, a credible moral civilisation must consistently and vigorously seek to protect all the civil and political rights of every citizen. These include the right to life, liberty and security of the person<sup>2</sup>, the right to equal treatment before the law<sup>3</sup>, the right to freedom of thought, conscience and religion<sup>4</sup>, the right to freedom of opinion and expression<sup>5</sup>, the right to freedom of peaceful assembly and association, the right to freely take part in the government of the country, and the right to hold government accountable for its actions and to vote out of office those who deserve to be<sup>6</sup>. These are all not only conditions fundamental to a just civilisation; they define the very meaning of that civilisation.

- Second, civil and political rights constitute only one wheel of the chariot of an acceptable civilisation. That chariot cannot move as long as masses of humankind are demeaned and brutalised by pervading levels of poverty, by debilitating unemployment and homelessness, by preventable disease and malnutrition by disempowering areas of illiteracy and by the accumulated legacy of race and gender discrimination. All these matters sustain themselves in a symbiotic and grotesque dance mocking at the loftiest aspirations of our civilisation. The commitment to the progressive realisation and fulfilment of fundamental economic, social and cultural rights is, therefore, not merely a good and desirable aspiration for the more affluent

---

2 Article 3 of the Universal Declaration.

3 Article 7 of the Universal Declaration.

4 Article 18 of the Universal Declaration.

5 Article 19 of the Universal Declaration.

6 Article 21 of the Universal Declaration.

and the more fortunate to engender as some act of charity to the weak and the oppressed - it is necessary for the very survival of the civilisation which we seek to protect and the life which it sustains<sup>7</sup>.

- Third, the protection and the progressive realisation of fundamental human rights cannot be guaranteed simply by initiatives within the political, executive and social agencies of society. They must be articulated in and, in some measure at least, policed by and enforced by law.

- Fourth, the laws designed to protect fundamental human rights must, themselves, enjoy some measure of immunity from legislative review and amendment. No law-making authority - however formidable be its military arsenal, however confident it might be about its own wisdom and however popular it might even believe itself to be in the perception of the electorate which put it into power - should ever be allowed to exceed the legitimate parameters of the constitutional covenant articulating fundamental human rights. This is save in the most compelling circumstances and through extraordinary procedures specially identified and defined within the very constitutional instrument from which it derives its power. One of the great and irreversible truths yielded by the ethos of human rights generated after the Second World War is that Parliament is not sovereign, only the Constitution is.

- Finally, some credible body must be vested with the power to blow the whistle when the parameters of the constitutional

---

7 See The Hon. Claire L'Heureux-Dubé, "Making a Difference: The Pursuit of Equality and a Compassionate Justice" 1997 *SAJHR* at 335. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights referred to in *ESR Review* vol. 1, no. March 1998 at 14; The International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations by Resolution 2200 of December 1966.

covenant are transgressed. Without such power that covenant has no teeth. The body armed with that power cannot be the alleged transgressor itself. It cannot be the State agency accused of the transgression. In a credible democracy it can, therefore, only be the judiciary. It, and it alone, must have the final power to decide whether the impugned enactment or decree of a powerful legislature, or the action of an equally powerful executive or administration, has transgressed the constitutional covenant.

### **Judicial Review**

The power of judicial review is, therefore, a potentially awesome power. It impacts in crucial times and in crucial areas on the very destiny of some nations. But is also a strangely paradoxical power. Unlike Parliament or the Executive, the courts do not have the power of the purse or the army or the police to execute their will. The highest courts in constitutional democracies do not have a single soldier at their command. They would be impotent to protect the Constitution if the agencies of the State which control its massive financial and physical resources, refuse to command those resources to enforce the orders of the courts. The courts could easily be reduced to paper tigers with a ferocious capacity to snarl and to roar but no teeth to bite and no sinews to execute their judgments which may then be mockingly reduced to pieces of sterile scholarship, toothless wisdom or pious poetry. As has already happened many times, the potentially awesome theoretical power of the judiciary in the Constitution, could, in those circumstances, implode into nothingness. Judges, in such circumstances, would visibly be demeaned. But there is much worse: human rights could irreversibly be impaired and civilisation itself dangerously imperilled.

How then does the judiciary confront this peril and cope with this apparent paradox? There are many nuanced and subtle

complexities which need to be analysed and developed in confronting that question. At the very heart of an effective response to this challenge, however, there must be one clear and fundamental truth: the real and ultimate power of the judiciary must lie in its independence and integrity and in the esteem which this generates within the minds and the hearts of the people affected by its judgments. No politician can afford to be seen to defy the orders of a judiciary perceived by the people to be scrupulously independent and honest in the defence of the constitutional values bonding a nation. Therein lies the real source of the strength of the judiciary, and its legitimacy in seeking to execute its potentially awesome powers. Therein lies the secret of its capacity to defend and protect the Constitution of a nation. A judiciary which is independent and which is perceived to be independent within the community protects both itself and the freedoms enshrined in the Constitution from invasion and corrosion. A judiciary which is not, impairs both.

## **Judicial Independence**

The real search in the pursuit of those freedoms, therefore, lies within the areas which protect, nurture and enhance the independence and the integrity of the judiciary. There are at least three such areas:

The first is infrastructural. The culture of judicial independence must be sustained by procedures for appointment to the bench which are fair, transparent and reasonable, and in which the judicial input is substantial and manifest. It should guarantee security of tenure for judges and protecting them against dismissal or suspension save under the most extraordinary and compelling circumstances. It should accord to them judicial salaries adequate to protect the judges' dignity and vulnerability. It should make the secretarial facilities available to the judges adequate to enable them to discharge their functions efficiently

and effectively. It should enhance opportunities for them to acquire training and sensitivity towards groups unfairly marginalised or otherwise disadvantaged by previously unarticulated assumptions. It should encourage access to technological equipment and to research assistants which facilitate just and expeditious decisions. It should provide full and generous opportunities for judicial training and education in the vast network of increasingly complex sociological and scientific disciplines which impact on the identification and protection of the core values articulated by an increasingly transnational constitutional culture and mediated by universally shared values and aspirations.

The second area is institutional. The institutions of justice must themselves project and nurture the reputation of the judiciary for independence and integrity by providing adequate domestic mechanisms to correct erroneous or unjust decisions. They should make access to the courts friendly and comfortable. They should demystify what is in the language of the law which makes it unintelligible. They should evolve accessible mechanisms substantially controlled by the judiciary itself to protect litigants from judges who give judgments which are ultimately fair in the result but who are rude, insensitive or sour towards litigants in the course of reaching a just result. They should develop mechanisms and procedures to protect even successful litigants from the sometimes ravaging consequences of a judge so debilitated by his or her open-mindedness as to make it impossible for him to make up his mind within a reasonable time, thus seriously impairing the delivery of justice without intending to do so.

Effective infrastructural and institutional responses directly or indirectly impacting on the judiciary are necessary conditions to underpin judicial independence and to enhance the consequential esteem within which the judiciary is held even among those in disagreement sometimes with the content of its judgments. But they are not sufficient conditions.

There is a third area, substantially within the responsibility of judges themselves. The independence of the judiciary and the legitimacy of its claim to credibility and esteem must in the last instance rest on the integrity and the judicial temper of judges, the intellectual and emotional equipment they bring to bear upon the process of adjudication, the personal qualities of character they project, and the parameters they seek to identify on the exercise of judicial power. Judicial power is potentially no more immune from vulnerability to abuse than legislative or executive power but the difference is that the abuse of legislative or executive power can be policed by an independent judiciary, but there is no effective constitutional mechanism to police the abuse of judicial power. It is, therefore, crucial for all judges to remain vigilantly alive to the truth that the potentially awesome breath of judicial power is matched by the real depth of judicial responsibility. Judicial responsibility becomes all the more onerous upon judges constitutionally protected in a state of jurisprudential solitude where there is no constitutional referee to review their own wrongs.

## **The Legislature and the Courts**

For this reason, some critics who have appreciated this difficulty, have suggested that the power vested in a judiciary to set aside the laws made by a legislature mandated by the popular will, itself constitutes a subversion of democracy. That argument is without substance and is based on a demonstrable fallacy. The legislature has no mandate to make a law which transgresses the powers vesting in it in terms of the Constitution. Its mandate is to make only those laws permitted by the Constitution and to defer to the judgment of the court in any conflict generated by an enactment challenged on constitutional grounds. If it does make laws which transgress its constitutional mandate or if it refuses to defer to the judgment of the court on any challenge to such laws, it is in breach of its own mandate. The court has a

constitutional right and duty to say so and it protects the very essence of a constitutional democracy when it does. A democratic legislator does not have the option to ignore, defy or subvert the court. It has only two constitutionally permissible alternatives, it must either accept its judgment or seek an appropriate constitutional amendment if this can be done without subverting the basic foundations of the Constitution itself - but it has no other option other than these two<sup>8</sup>.

Notwithstanding these jurisprudential answers, controversy will continue to be generated from time to time when courts with appropriate jurisdiction strike down legislation or make other orders which are sometimes perceived to transgress passionately held convictions by various constituencies within the community. The debates provoked by judicial rulings on laws permitting capital punishment and abortion manifest this problem. The charge against the judiciary in those controversies takes this kind of form: "The Constitution gave to Parliament the power of law making. Parliament has made a law which has popular support. The courts are usurping and subverting that authority by their rulings against such law."

It is important in a constitutional democracy for judges to correctly identify the parameters of a permissible judicial response to such a serious charge. Their answer must be cogent and persuasive. They have to say something like this: "We have a constitutional duty to determine what the Constitution means. We do so by interpreting the language used, by analysing, contrasting and comparing different and analogous provisions of the same Constitution, by reference to legal presumptions of fact and of law which have survived the scrutiny of the ages, by employing classical judicial techniques in ascertaining the

---

8 See *Premier Kwa Zulu-Natal and Others v. President of the Republic of South Africa and Others* 1966 (1) SA 769 (CC); *Kesavananda v. The State of Kerala* (1973) S.C. 1461; *Indira Nehru Gandhi v. Raj Narain* (1975) SC 2299.

intention of the law maker, by applying rational and objective standards rigorously, by the meticulous assessment of evidence where it is appropriate, and by recourse to the wisdom and experience of comparable jurisdictions and international instruments where they are applicable and relevant. If on a proper application of these standards we come to the conclusion that an impugned law is unconstitutional, we have a constitutional duty to say so. Our personal views are irrelevant. The perceived popularity of the impugned law is also irrelevant. The only relevant issue is the objective meaning of the relevant constitutional provision. The Constitution has mandated us with the duty to ascertain that meaning. We shall do so without fear or favour." That can be the only legitimate jurisprudential answer to that charge.

The theoretical and jurisprudential cogency of that answer is beyond dispute. The real difficulty often lies in its application, or how to apply that theory.

Theoretically it is clear that it is for the court to say whether one or other of the political alternatives favoured by the legislature in an impugned law was a permissible constitutional alternative, but it is not for the court to choose between one or more constitutionally permissible alternatives. It has been contended that in pronouncing judgment on a particular constitutional challenge, the court in practice sometimes effectively makes a choice of legible alternatives under the nominal rubric of deciding whether the law is constitutional or not. It is suggested, for example, that when a court says that capital punishment is unconstitutional, because it offends the constitutional guarantee against cruelty degrading on human treatment, it effectively chooses between the desirability of different forms of severe punishment under the protection of deciding its constitutionality. Such an attack is without substance. The court is clearly not choosing between different permissible constitutional punishments. It is simply determining what punishments are constitutionally permissible.

But the problem really becomes more difficult in the crucial area of socio-economic rights, such as the right to basic health care, education, work or shelter<sup>9</sup>. This difficulty and complexity arises for two reasons. Firstly, because the enforcement of the relevant right might not only involve a negative protection against its invasion but also a positive duty to deliver the right to the aggrieved citizen to whom it is denied<sup>10</sup>. Secondly, because the effect of the judicial orders in this kind of area might be to compel the legislature and the executive to restructure their priorities, their budgetary resources or the methods they might have chosen to secure different constitutional rights. An order, for example, that primary education at State expense be accorded to all children under the age of 16, might compel the State to prioritise that right over the right to deliver nutrition to dying infants in hospitals who are entitled to primary health care. The objection to that kind of constitutional activism is that it might give to a court, which does not have the burden of political accountability, the power to make order in areas in which it has no greater expertise than the legislature or the executive. Also because it invades the guarantee inherent in the separation of powers upon which a legitimate constitutional democracy is premised<sup>11</sup>.

What should be the approach of the judiciaries to these difficulties in the vital area of social and economic rights? Part of the solution might depend on the precise language chosen by the drafters of a Constitution to articulate that concern for the

---

9 See *Shantistar Builders v. Narayan Khimalal Totame and Others* (1990) 1. SCC 520.

10 See Van Wyk, Dugard, De Villiers and Davis [eds], *Rights and Constitutionalism: The New South African Legal Order* Juta, 1994.

11 See Haysom. "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" *SALJ* Vol. 8 page 454. Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 *SALJ* at 464, 467, 468.

relevant socio-economic rights sought to be protected. There might be a distinction between what is articulated without qualification as a substantive socio-economic right, and a right which the State is merely enjoined to extend “progressively” or within its “available resources” or “to the best of its endeavours” as a formula in many constitutions. The extent of deference which has to be accorded to the Legislature or the Executive in the second category of cases might be greater, but even in such cases, the court might not be impotent to protect the aggrieved citizen. Depending on the exact formula favoured by the relevant constitutional provision, the court might still have a duty to inquire whether the necessary resources did in fact exist to enable to deliver the right sought to be asserted, or whether the relevant State agency did in fact make a proper endeavour to effect such delivery, or whether it had in fact “progressively” sought to extend the benefits of the right to members of the relevant community.

Reservoirs of judicial craftsmanship may profitably be developed to make such inquiries meaningful. Various tests might be considered to measure the cogency of the constitutional challenge to the impugned law or executive action impacting on the right concerned. Is the action of the State *bona fide*? Is there a rational basis upon which the inaction or the inability of the State to protect or promote the relevant right to the aggrieved citizen can be justified? Is there adequate evidence of a commitment by the State to give effect to the constitutional right involved? Is there evidence to support the inference that the relevant organ of the state is behaving in a manner in which no reasonable person seeking to give effect to the relevant constitutional right could support? Has the conduct of the State agency involved been influenced by an inherently suspect classification? Does such a suspect classification manifest itself in the objective result? If so, is there any room for subjecting that kind of conduct to a constitutionally elevated test of strict scrutiny? What kind of conduct permits a more generous form of scrutiny?

None of these tests are decisive. Some may be irrelevant or inappropriate or even wrong. Others may have to be finessed and analysed. But what they do illustrate is the wide variety of potential weapons in the judicial arsenal which can possibly be harnessed by a diligent and vigilant judiciary to make the constitutional commitment to civil and political as well as socio-economic rights part of a living and vibrant legal culture bringing hope and relief to large areas of humankind effectively entrapped by the weight of a manifestly and demonstrably unjust past in clear conflict with the ethos of a defensible culture of human rights. The judiciary has a crucial role to perform in the protection and promotion of that culture. It need not be impotent, it need not render itself substantially impotent by limiting its scrutiny of legislative and executive performance to an examination of *bona fides* only if other inquiries are permissible. The judiciary might in appropriate cases need to examine potentially creative areas of legitimate enquiry by requiring the relevant agencies of the State to justify the impugned legislative action or inaction which is challenged, and by subjecting any such purported justification and any evidence urged in support of it to proper standards of rationality and cogency within the parameters of the Constitution<sup>12</sup>.

Many States or their agencies will survive and even welcome this kind of judicial vigilance, but there will be others who will not and judges must consciously accept the risk that their judgments in crucial areas may be subject to vigorous attack and criticism. This should not cause judges any distress. A viable and credible constitutional culture evolves most effectively within the

---

12 See *P. B Khet Mazdoor Samity v. State of W.B.* 1996 (AIR) SC 2426; c/f Andhyarajina, *Judicial Activism and Constitutional Democracy in India* 1992; N.M. Tripathi Private Ltd, Bombay 34-35; Ahmadi C.J., "Judicial Process: Social Legitimacy and Institutional Viability" (1996) 4 SCC (J) at 6.

crucible of vigorous intellectual combat and even moral examination. Judges, therefore, have no right to demand any kind of protection from the same kind of vigorous criticism to which they subject the contentions on behalf of the litigants who appear before them. What they are entitled to demand, and do demand, is that such criticism should be fair and informed; that it must be in good faith; that it does not impugn upon their dignity or *bona fides* and above all that it does not impair their independence, because judges themselves would not be the only victims of such impairment. The constitutional covenant itself would mortally be wounded and the civilisation which it seeks to mediate would dangerously be imperilled. It is for this reason that every organ of the State, including the legislative and executive, and every component of civil society has a vested interest in the protection of the independence of the judiciary. Subvert that independence and you subvert the very foundations of a constitutional democracy. Attack the independence of judges and you attack the very foundations of the freedoms articulated by the Constitution to protect humankind from injustice, tyranny and brutality.

## Conclusion

The independence of the judiciary is crucial. It constitutes the ultimate shield against that incremental and invisible corrosion of our moral universe which is so much more menacing than direct confrontation with visible waves of barbarism.

Judges are clearly entitled to demand and to expect fidelity to these truths from the society which sustains them, but that society is also entitled to demand from judges fidelity to those qualities in the judicial temper which legitimise the exercise of judicial power. Many and subtle are the qualities which define that temper. Conspicuous among them are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity

and energy<sup>13</sup>. More difficult to articulate but arguably even more crucial to that temper, is that quality called wisdom enriched as it must be by a substantial measure of humility and by an instinctive moral ability to distinguish right from wrong and sometimes the more agonising ability to weigh two rights or two wrongs against each other, which comes from the consciousness of our own imperfection. But imperfection is inherent in all evolution; it is the essential energy which propels us to excellence and to the excitement of new vistas into the unfolding heavens beyond, as we grow and mutate to new levels of intellectual and spiritual maturity.

---

13 "The Role of the Judiciary in a Constitutional State," (1998) *SALJ* Vol 115, pages 111-115.

# *The Role of International Financial Institutions in Judicial Reform*

---

by

*Diego García-Sayán \**

## Overview

Old development patterns are being replaced with new ones with unfamiliar rapidity. New areas are coming under scrutiny, and new theories are being refined through experimentation. The so called "second generation" of reforms, after the first generation associated with the initial transition to formal democracy, involves a focus on the principles of good governance, on strengthening democratic institutions, and widespread judicial reform. Reform of countries' legal systems is seen as a *sine qua non* for their further sustainable economic and political development. At the same time, the State's role has changed dramatically from controlling and directing to facilitating and regulating, while the private sector becomes the primary employer and producer of national wealth.

International financial institutions (hereafter "IFIs"), notably the World Bank, and regional banks such as the Inter-American Development Bank, have greatly increased the emphasis put on judicial reform during this decade. For example, reform of the judicial system is one of the three major components in the Inter-

---

\* Executive Director of the Andean Commission of Jurists, Peru; Member of the CIJL Advisory Board and Member of the Executive Committee of the International Commission of Jurists.

American Development Bank's program of reform and modernisation of the State, on which UD\$ 800 million were spent in 1997<sup>1</sup>. This interest coincides in a public desire for judicial and institutional reform, specially in Latin America, where the macroeconomic crisis of the 1980s has receded. The ongoing economic reforms in most countries of the world, including privatisation and transition to an open market economy, have increased the number of transactions with new unknown actors, and thus increased the demand for conflict resolution mechanisms. Countries have not been slow to realise this ; it is after all, they who ask for the assistance of the IFIs in this matter, and they have done so in increasing numbers over the last decade.

There is increasing academic and societal interest, after years of unjustifiable neglect, in the linkages between justice and peace; justice and a stable economic system; justice and a stable political order; and justice and development. Development, it is belatedly realised, is a process which is not solely economic in nature, involving social integration and respect for human rights or at the very least, the successful realisation of economic development requires an appropriate legal and social backdrop. Rule-based, predictable legal regimes are of the utmost importance in the new market order. New disciplines have been brought into the field to assist in the continuing struggle against instability, poverty and corruption. Studies are beginning to calculate the true cost of poorly-functioning judicial systems. It is not uncommon in Latin America for cases to take up to 12 years to be resolved. In 1993, for example, the backlog of cases in Colombia exceeded 4 million. Yet around 70% of the typical Latin American judges' time is consumed by paperwork<sup>2</sup>.

---

1 See Inter-American Development Bank, *Annual Report 1997*, Washington DC.

2 See *The Judicial Sector in Latin America and the Caribbean*, World Bank, Washington DC, April 1996.

Colombia has the highest murder rate in the world, yet one of the lowest incarceration rates<sup>3</sup>. All of these are indicators of judicial systems in a perpetual state of crisis, failing to regulate society and resolve its disputes.

Sustainable and effective solutions to the problems which have plagued legal systems in Latin America, and elsewhere, depend firstly upon an accurate assessment of the root causes of those problems. Lack of resources is undoubtedly a severe problem hampering the development of fair, transparent, and accessible legal systems, but it would be foolish to think that throwing money at legal institutions would solve anything, as indeed the IFIs themselves recognise. A much more nuanced approach is required, identifying the prerequisites, besides proper financing, for effective judicial systems. The proper role of the IFIs must be developed in a spirit of true cooperation and partnership with different sectors in the borrowing country in order to achieve the most fruitful convergence of interests to build a healthy and sustainable rule of law.

It is important to recognise the variety of roles which the legal system plays in society; judicial reform is meant to serve different purposes. Penal reform may restore dignity to victims of crime, or increase the potential for rehabilitation of offenders. An improved judicial system, combined with alternative dispute resolution mechanisms, help to resolve conflicts in society, whether between neighbouring landowners, or foreign investors and those who contract with them. The content of laws both reflects the values held by society (its descriptive function) and is a tool for change of those values, by sending powerful signals about what is acceptable behaviour (its normative function). Balancing these roles is an essential part of effective reform.

---

3 See Juan Enrique Vargas Viancos, *Lessons Learned : Introduction of Oral Process in Latin America*, CAJ Round Table, May 1996.

The current waves of reform offer a very real promise of proactive action, moving forward to build healthy democratic systems, instead of merely responding to crisis after crisis in the economy and politics. This opportunity should be seized with both hands, using the expertise built up after years of confronting a much more difficult external environment.

### **Problems of Judicial Systems Stemming from Lack of Financial Resources**

The problems of underdeveloped judicial systems have been catalogued extensively before, and I only recall some of them here briefly. They consist, in varying degrees depending upon the country, of: long delays; poor case management; inaccessibility of the courts, (often especially to the most vulnerable and/or marginalised sectors of the population, such as women, the poor, and indigenous peoples); lack of transparency and accountability; unsatisfactory separation of powers, (often implying excessive political control of the judiciary); extensive bribery and corruption; little public or self-esteem for the judiciary and legal officials; poor initial training and lack of ongoing education; poor calibre of officials; lack of judicial independence from all kinds of influence; unpredictability of decision making; a personalisation of justice which pervades everything and prevents any effective equal treatment before the law from occurring; promotions based on criteria other than merit; poor physical infrastructures; pervasive impunity; lack of access to information and technology; and, extreme centralisation of courts and resources.

Many of the above-mentioned problems have everything to do with lack of financing. To take one example, low judicial salaries mean that the highest calibre law students are not attracted to careers on the bench, and also affect the poor perception that judges and the public have of the judiciary, by considering their skills of low value. This can make judges susceptible to

corruption and to utilising their position for their own profit, or that of friends and relatives. But this example shows us the limitations of a purely financial approach. Merely increasing the salaries of judges will not by itself reverse years of public distrust of the office. Judges are seen as weak, manipulated, lacking any real power, and all are tarred with the same brush of corruption. Increasing salaries alone smacks of trying to buy judges fidelity to the law - and as everyone knows, if you try to bribe someone who can be bought, you are always vulnerable to your opponent offering a higher bribe.

Centralisation of resources and courts leads to the majority in a country feeling isolated and remote from the reach of justice. Laws become perceived as something only for the benefit of the rich, or those who live in the capital city. Overcoming this requires capital, to build court buildings and to train and employ more judges, to publicise the availability of judicial resources. Money alone is not sufficient. Again, it must be accompanied by adequate training to deal with cultural differences, and easily available translation. Possibly also methods of witness protection will be required. But if one analyses *why* there has been such concentration in the past, instead of an even, but thin, spread of the few available resources, one encounters another level of problems which require to be analysed and the confronted. Overcentralisation indicates a lack of political value assigned to the provinces, which, in turn, may indicate that there are problems within the democratic system which mean that not all voices are given equal treatment. There may also be elements of ethnic or racial discrimination and slant to the benefit of certain industries, for example: petroleum over farming. It may indicate a lack of infrastructure, again due to lack of political will, as much as lack of money.

None of this negates the vital role that adequate financing plays; a necessary if not sufficient condition for a smoothly-run, rapid and equitable judicial system. One can understand why it is mandated in the Costa Rican constitution that 6% of the annual

public expenditure should go towards the judicial branch, even if one has doubts about the lack of flexibility in such a provision. This at least gives justice a high, and ongoing, priority in the activities of the State, something which is much deserved according to all modern theories of development.

### **What Role International Financial Institutions can Play?**

I first give an outline of the types of reform we are considering. I then discuss what, in my view, are the two most important contributions of IFIs.

Judicial reform, as part of an IFI-sponsored package, typically includes some or all of the following elements :

- improving the quality and efficiency of the administration of justice;
- rationalising laws and procedures;
- improving the internal administration of tribunals;
- improving the training and education of judges and legal officials in general;
- developing and utilising alternative methods of dispute resolution, such as conciliation, mediation and arbitration;
- increasing and maintaining the independence of the judiciary;
- controlling cost measures, and
- increasing the access of the poorest to justice.<sup>4</sup>

Such elements can be classified in various ways, such as the institutional, organisational and rule-based. Some can also be aimed at increasing the “supply” and “demand” of justice. I will not develop this analysis further in this paper, although such

---

4 See, for example World Bank Technical Document Number 2805 which gives an overview of the types of reforms found in packages.

elements certainly constitute useful tools for evaluating programs. I would like simply to propose that the two main roles IFIs play in assisting the judicial branch of government, which are more effectively carried out by them rather than by any other actor, are providing: I. finance and II. know-how.

## **I. Finance**

In most countries of the South today, it is simply impossible for States to finance from their contracting budgets an effort which will only yield long-term and somewhat uncertain or intangible financial gains. Still chained to debt, under pressure to rationalise and pay off excess staff, and to reduce expenditure so as to balance budgets, States are hardpressed to reduce their role in this field. Given the low priority currently assigned to justice in most governments' budgets, and the fact that vigorous courts can prove inconvenient to incumbent governments, it does no harm to have a separate source of funding available which is not dependent on political will.

Other solutions to the funding problems have been floated by the IFIs, including a more enterpenerial approach towards courts and sliding scale fees which might discourage frivolous claims. However, these have inherent limitations and are likely to be limited to a subsidiary role. One serious concern is likely to be access of the poorest to justice, which means some external financing will always be necessary. The status of justice as a public good must also be considered, justifying public funding for it. Investment in justice could one day be seen as worthwhile as investment in business development.

## **II. Know-How**

Another important role that IFIs can play in the process of judicial reform - arguably as important as funding - is facilitating the sharing of information. Never has as much legal reform been

occurring simultaneously, from the building of essentially new systems in the former Soviet republics, to the restructuring of European legal systems as part of the process of integration, and of course, the changing of global perspectives to orient legal systems more towards a world of freer trade and smaller government.

IFIs have been instrumental throughout these developments of the late 1980's and 1990's, and have accumulated a wealth or expertise in such areas. They are furthermore the only bodies with the technical expertise and financial ability to carry out largescale investigations of legal systems, which allows them to correctly diagnose problems, and to record progress and failure in a way, with a depth and breadth of detail which governments cannot compete with. What works and what fails in knowledge should be shared freely bearing in mind that different legal, cultural and social contexts may yield different results. There is no good reason why judicial software once developed in one country should not be copied and used extensively in other countries.

The globalisation of law, resulting in part from global and regional economic or cultural integration, and in part from information sharing among legal officials, is an ever more necessary form of know-how that should be shared. The IFIs have the expertise and experience to be good facilitators of such an endeavour. The disciplines of comparative and international law can only help to advance the efficacy of law.

### **Limitations of the IFI Approach**

There is no doubt that IFIs are important actors in the process of judicial reform. There are a number of reasons, however, for why there should not be an exclusive dependence on their programs. Complementary national programs should be developed and a sense of self-responsibility for the maintenance and ongoing reform of any judicial system should evolve. The appropriate

relationship is one of partnership and dividing responsibilities in an appropriate manner.

It is important to recognise from the outset, that there are different ideological bases, and interests, for the different actors in a reform process. This may result in conflicts of interest. This is, however, a normal occurrence in general human relations as well.

The IFIs, for example, have a very clear ideological slant, in that they believe very strongly in a private-sector led model of growth, and in small government. They also have a constituency to appeal to - that is, the donor governments - and a clear mandate to facilitate matters for foreign investors. Their focus in judicial reform will naturally lie in contractual law, as opposed to criminal law. Their goals could include enhancing clear and easily ascertained property rights, properly-regulated and well-functioning financial markets which provide access to capital and assist investment, speed and fairness in dispute resolution, whether traditional or alternative, lower transaction costs and predictability. Such are the goals of foreign investors. Local actors may have completely divergent, not to say contradictory, interests in judicial reform. Rural farmers may want a cheap, easy way to vindicate their land rights. Political campaigners may want more effective supervision and control of governments. Ordinary citizens may want fairer trials and criminals taken off the streets. Victims of crime may want monetary compensation. Such different constituencies, as foreign-based multinational companies and small local businesses, may, of course, all benefit from clear, stable and fair rules, as well as simplified and cheaper procedures.

Where a conflict can lie is in the *timing* of changes, and the *substantive* changes that occur. Timing is important, because although all the reforms taken together make a cohesive whole, in the real world, some prioritisation and ordering are necessary. So who is to be helped first? The foreign investor whose dollars may raise the prospect of thousands jobs and help the current

account, or the small businesswoman who, with thousands like her, may also create jobs and whose support is necessary for the momentum of the reform process? Such questions are difficult and it is imperative that they are not glossed over by too ready an assumption that there is only one way, and one order in which to progress with reform. It is politically vital to ensure that progress is made in criminal, environmental, and administrative law, simultaneously with financial regulation and contractual law, although the former remain out of the spheres of interest of IFIs.

Secondly, of course, there is the important question of what content the new laws and procedures take. Sometimes this will necessarily involve a choice between competing interest groups. Just because, say, a particular privatisation is good for a nation's current account and will produce greater efficiency and productivity, it does not automatically follow that there will be no losers. The IFIs must be willing to look to those who lost in such processes, and to assist them with retraining business development, or whatever is necessary in the circumstances, to ensure that understandable resistance to change does not derail the reform process.

Thirdly, there are the constitutional limitations on IFIs. The World Bank is, by its constituent instrument, specifically prohibited from interfering in political matters. Yet any changes, particularly important ones, are inevitably extremely politicised. There is a transfer of power. There are many decisions which IFIs cannot legitimately take, but which should be taken by democratic means in the recipient country which requires a great deal of effort on the part of that country. This is necessary for the sustainability of the reform process as I shall discuss below.

Another area with potential conflict that I briefly touched up on earlier, is the broader question of government spending as a whole. All the qualitative evidence points out to an increasing use of litigation as a society develops. An ever-greater number of court cases is probably a sign of a healthy economy. But the IFIs

frequently put pressure on States to balance their books and reduce spending, something which will become increasingly difficult to do as long as its regulatory, as opposed to interventionist, role is on the increase. The expanded emphasis on individual rights, the wider access to justice, and the drive to increase the role of the private sector and diminish that of the government, paradoxically enough will increase the demand for government services.

Dr. Ibrahim Shihata, the Legal Counsel of the World Bank<sup>5</sup>, warns however that ordinary costs should not be financed out of extraordinary income, and in this he is certainly correct. Given that expenditure on the judicial system will become a permanent and necessary feature on countries' budgetary horizons, they should plan how to finance such expenditure themselves as soon as possible. Secondly, Shihata cautions against over-reliance on the World Bank even as a source of extraordinary funds for judicial reform. It was only in 1980 that it first occurred to the bank that such programmes could fit into its mandate to further economic development, but it may be that some countries have reached a stage of development where this can no longer be true, or the Bank and similar institutions may decide to focus their energies and funds on some other priority.

All of this causes us to necessarily consider the appropriate role of other actors, on which I will shortly say a few words. One limitation which is often supposed to exist and is greatly exaggerated, and which I should like to rebuff now, is the idea that IFIs should not involve themselves in matters too closely connected with human rights mainly because of their inherently political nature. It is true that these institutions are banks, and must act as such, but they are also part of an interstate, multilateral system, which includes the advancement of human rights as one of its primary objectives. The UN system, of which

---

5 See *Justicia y Desarrollo*, p. 293.

the World Bank is a part, works within the framework of the Universal Declaration of Human Rights. In order to effectively carry out the role of promoting and protecting human rights, IFIs must grow out of the idea that judges only exist to resolve disputes. They must also be a course of power in their own right, which can take a principled stand against other power bases in the society. The ideas of judicial guarantees and due process are at the very heart of all human rights systems and instruments, and these require meaningful judicial independence and power, not just paper ones.

### **Analysis and Assessment of the Role of IFIs**

The contribution of IFIs can be measured by reference to their goals or the goals of different groups within the country. It can be measured quantitatively through court statistics about the length and volume of cases, as well as through opinion surveys of public and business confidence in the justice system. It can be measured temporally, according to the different stages of reform. Judicial systems can be compared, with all due caution to the standards achieved by other legal systems, or to what would have been the situation without the presence of IFIs. Although all of these methods have something to commend in them, we should always bear in mind the ultimate goal, which is the creation of a reliable, fair and efficient justice system, a necessary component of a society under the rule of law.

Good quality statistics, as well as qualitative studies, are necessary for any proper evaluation of reform. These have historically not existed, although now there are a number of efforts in progress to ensure that better records are kept and utilised in analysis. It is wise to look beyond the numbers themselves to see what they actually reveal about the success of the process. If there is greater confidence in the judicial sector, it may be relied upon more, and used more, which means that the short-term backlogs may increase. This, read properly, indicates

the success of one aim, although it must quickly be followed-up with improvements in case management and processing, if it is not to be lost. Computerisation of the information, and posting it on the Internet, enhances accountability to a wider public, and the important goal of transparency.

One useful indicator for analysing the success or failure of IFI sponsored programs is to look at the level of cooperation among different organs and institutions. It is a truism that the most successful programs have the greatest level of dialogue, participation and cooperation. There has been no small debate about how far the circle of consultation should be widened, before important decisions are taken. The World Bank has tended to limit itself to those in the legal community, which I believe to be unduly narrow. Of course, the wider the consultation is the slower the pace of reform. Against this, however, has to be balanced the democratic imperative and the increased chances of the reforms lasting. Civil society can, of course, demand a role for itself in the reform process by becoming well-informed on matters relevant to it. Generally speaking, the more people have a say, the more likely the most appropriate decisions will be taken, and the more people will feel that they have a stake in their judicial system.

Many of the new programs are constructed with longterm objectives, and it would be unfair to judge them now. For instance, the introduction of computer technology will obviously take some time to become familiar and useful and the changes in the legal profession's educational structure may take a long time to lead to improvements in the quality of judicial decisions, which is a notoriously difficult thing to measure anyway. That does not mean that it is not possible to compare progress with what is expected and reasonable in the circumstances, and for regular monitoring to take place, with feedback from participants and all affected.

Some programs have tended to concentrate on providing the easily rendered, such as new buildings, and put less emphasis on

the more difficult, but more necessary changes, such as judicial culture. New buildings are necessary, in some circumstances, to replace crumbling or inadequate courts, and there is no doubt that they can enhance the status of judges, and have a real, albeit intangible, impact upon public respect for the institution of the law - but they are costly, and it may well be that they are not the most immediate need in most countries.

In all cases, the plan for reform should have been carefully tailored to the needs and abilities of the debtor country, taking account of the ordering of its priorities, and attempting to balance short-term easily-won gains, with longer-term, less tangible but equally necessary improvements, so as to maintain public support and some steady level of progress. Analysis of the success of otherwise of any program should also be according to country-specific criteria. Civil society must examine critically and comment frequently on the progress of reform, including such matters as I discussed above, the content, timing and direction of reform, and those directing change must be responsive to criticism.

### **The Role of Civil Society and other Actors**

A vigorous civil society, as I have indicated above, has a major role to play in coalition building and building support for judicial reform. This should not be limited in vision to traditional NGOs, supporting human rights or various sectors of society, but can also include the commercial or business sector in a country. All these groups can benefit from a stable, accessible and fair system of justice, and can mobilise resources, and more importantly, people. Various studies<sup>6</sup> have found that this works best when

---

6 See CAJ Round Table, *Recent Experiences in Coalition and Constituency Building* Robert J. Asselin Jr. May 1996.

there are reliable court statistics to inform public opinion, and in the context of a free and vociferous media. Opinion surveys of the public are also useful. Participation should begin at as early a stage as possible in the preparation of reform, this incidentally helps to ensure that the debate is a well-informed one by the time actual decisions are being taken. The IFIs may incidentally assist this process, through civil sector projects under other headings, but it would not be legitimate for them to attempt to direct public sentiment in any particular way.

It is of the greatest importance that, besides obtaining funding, States have the fulsome support of their citizens for the reform process. This is a task best left to governments and civil organisations, although IFIs may have a limited role in public education about their rights. It is necessary to obtain some kind of consensus as to what the content of reforms should be, what the priorities for change are, and the rough direction of future change, so that the process can continue even once the IFI funding has finished. Decentralisation, unless broadly supported within the country, is easily reversed at the end of a program.

One key factor in ensuring the irreversibility, and continued vitality, of reform which is often overlooked, is whether the public actually uses the judicial system. For this reason, the provision of small claims courts, and publicity about how to use the hopefully simplified system are both very important. No-one should doubt the enormity of the task, in many countries, of overcoming a deep-seated distrust and cynicism about the legal system. The more positive encounters people have with courts, however, the more likely they are to feel some kind of stake in maintaining changes. If the public does not see any improvement in the quality of judicial decisions, then paying for increased salaries out of the national budget will become politically impossible, and the ideal concept of a nationally-financed, universally respected legal system, will have begun to collapse.

Judges too should be fully involved in and, as far as is reasonably possible, supportive of the reform process. The

importance of this is seen in relation to issues like the deeply unsatisfactory criminal justice system in most Latin American countries, resulting in the longterm imprisonment of remand prisoners in overcrowded and poorly-kept jails. As the Andean Commission of Jurists report *"Deletreando Democracia"* or *"Spelling out Democracy"* comments, "[it seems] that modernity cannot reach into judicial systems unless bureaucratic tradition is tackled at the root. If sectors linked to justice do not assume as theirs these processes [of reform] and if those in charge do not conduct these processes with creativity, they will remain only good intentions."

The full involvement of legal officials means drawing upon their experiences and ideas, working with them not against them, and can limit the vulnerability of reform to changes in the political regime - that is, providing the judiciary is fully independent. Providing computerised information retrieval systems is an expensive waste of time if the users of the justice system are not willing and able to utilise them to the fullest. On the contrary, case studies of Argentinean and Bolivian reforms show that a favourable judicial attitude towards reform is a more important variable than the executive attitude in predicting the success of the changes<sup>7</sup>. Judicial ethics, a much-discussed subject, have to be fully internalised by members of the judiciary, if their training, access to information technology and improved status are to mean anything. On the whole, IFIs have worked well with legal officials and have facilitated numerous workshops, seminars and meetings, although it is important that this should not hinder the development of autonomous professional or bar associations. In the long run, the aim must be to delegate such education and training to these associations and law faculties.

---

\* See Robert J. Asselin Jr. Paper at p13 *supra*, CAJ Round Table.

## **The Importance of Judicial Independence**

No discussion of judicial reform is complete without a discussion on the independence of the judiciary. Judicial independence is intimately bound up with the question of resources, political as much as monetary.

One has to recognise from the outset that it is rare to find constitutional separation of powers in as idealised a form as in the US version, and there are a number of historical reasons for the US example. More can be achieved by an executive with close links to a legislature with a democratic legitimacy. But it is important in any system to have a system of checks and balances - some limitations on power to prevent it from being absolute. As we all know, "absolute power corrupts absolutely", even though we recognise a place for human ambition in democracies.

What does this mean in relation to judicial reform, starting from a far from ideal situation, where judges do not have security of tenure and are subject to political interference, and sometimes death threats and assassinations? It means that the judiciary's importance as the safeguard of individual rights is heightened. It means that any reform process which fails to look at judicial independence is doomed to failure. It means that again civil society is vital in the process. If we examine who could provide the political back-up necessary to increase judicial security and independence, we find that the legislature and executive have strong reasons for not wishing too forthright a judiciary. Recent events in Peru, for example, show that the IFIs do not always have enough political clout to prevent abuses of the judicial position - their only sanction is to withhold finance - which governments have demonstrated their willingness to put up with, in pursuit of some other goal. Some Supreme Courts, despite the reform process, continue to demonstrate extreme and intolerable levels of politicisation. Only civil society, the people, are constant, and have the continual potential to make noise and exert pressure on the government, no matter what the exact nature of the regime is.

Effective judicial independence requires many other things: training in ethics and law, civil immunity for things said and done in the courtroom (although not criminal immunity), protection of the person where this sadly is necessary, adequate pensions to ensure judges need not worry about their future and so on. But it is a very cornerstone of justice, common to all developed legal systems, and it is impossible to emphasise it too much. The end is not an irresponsible, carefree judiciary, but a profession whose incentives and sanctions are balanced in order to maximise the use of their skills in a responsible and effective manner. Election or appointment of judges is a debatable area into which I will not go now, I only wish to point out that neither form of judicial selection guarantees independence on its own, and that either system is compatible with meaningful independence providing that selection is based on merit. There may be alternative ways to ensure that people are involved meaningfully in the judicial process. The final result should be a judiciary which is not unduly populist and influenced by public opinion, but which is independent from improper pressures exerted by government, society, economic or other factors.

## **Conclusion**

I wish to stress the longterm nature of the transition process now underway in many countries, which means that we must expect change to be slow. In many countries, there has quite simply never been a trustworthy legal system, and we should not underestimate the radical change in thinking required to move towards and accept a revolution in the structure of the State and society. Short term goals are useful incentives, but this is not a goal-orientated task, but an open-ended process in which participation and trust must be secured before anything else. Attitudes take time to change, and they will change only through a slow process, in which there are no serious setbacks to damage fragile confidence.

The longterm goal in all countries undergoing judicial reform must be to take on more and more responsibility for the financing and conduct of the reform. Reform is a continual process; laws and legal systems will need to be continually revised to adapt to a changing world, whilst retaining certain key values and social aims. Ultimately it is more important to build a system which can generate its own changes than to impose all the changes which are necessary at the present moment, something along the lines of "Give a country a judge, and you will have justice until she retires, but teach a country how to make judges and you will have justice forever."

Among the most challenging goals is winning public approval for budgetary allocations for justice. Modern justice does not come cheap, once salaries, infrastructure and information facilities are added up, and its spiralling costs are of concern in wealthy countries where poverty is a grave problem and where there are plenty of other urgent priorities for expenditure. According to plentiful theories, justice is a worthwhile expense, but this must be demonstrated in practice. IFIs will only be willing to invest in judicial reform projects for a limited period. Already, countries should be planning how to finance their own legal systems in the future.

Sustainability of reform is a key challenge too. The signs are not at all good. governments used to getting their own way from judges do not take kindly to implied or actual threats to their position, and still seem too apt to wade in with heavy hands against judges who try too hard to assert their autonomy. IFIs and civil society are the most important actors in creating a climate whereby judges become "untouchable" for governments.

---

### Select Bibliography

- Edmundo Jarquín and Fernando Carillo, *La Economía política de la reforma judicial*, Inter-American Development Bank, Washington DC, 1997.

- *Justicia y desarrollo en América Latina y el Caribe*, Inter-American Development Bank, Washington DC, 1993.
- Malcolm Rowat, Walsed E. Malik and María Dakoliss, *Reforma Judicial en América Latina y el Caribe*, World Bank Technical Paper 2805, Washington DC, 1997.
- María Dakolias, *The Judicial Sector in Latin American and the Caribbean*, World Bank, Washington DC, April 1996.
- *Deletreando Democracia*, Comisión Andina de Juristas, Lima, Peru, January 1998.

# *The Courts of the Future*

---

*by*

*Michael Kirby*<sup>\*</sup>

## **Young Lawyers and Hope**

I seize every opportunity I can secure to meet young lawyers. Last week I gave a lecture by telephone link with a law class at the Queensland University of Technology. Next year we hope to do this annual event by video-link or video supplement. The High Court has pioneered the use of video-links in the law in Australia. A large proportion of the special leave applications before the Court are heard by video links established between the judges in Canberra, and lawyers and their clients in Brisbane, Darwin, Perth, Adelaide and Hobart.

Also, last week, I addressed an equity class at the Law School at the University of Technology, Sydney where a former associate of mine is lecturer. I find such encounters a useful stimulus to reflection on legal principles. One can count on young people - even young lawyers - to speak more directly with fewer "with respects". They look at legal principle with eyes that are often informed by different values. Theirs are the values which will carry our legal system into the coming century. No judge, however lofty and grand, can afford to get too far out of touch with contemporary values. Because in our legal system judges, inescapably, have choices to make, their values inevitably affect

---

\* AC CMG; Justice of the High Court of Australia. President of the International Commission of Jurists (1995-1998). This text is based on a speech that was delivered before New South Wales Young Lawyer's Conference, on 21 September 1998.

their choices. They affect the construction that they give to the Constitution or the Acts of Parliament. They affect their perception of whether common law precedents, designed in earlier times, are apt for new problems in our times. Some commentators, and not a few politicians, would prefer to think of judges as pilots, flying a jumbo jet eternally switched onto automatic pilot. It is not so. Under our system the judges have, as they should have, their hands firmly on the controls. Every day of their lives, they are making decisions vital to the safety and well-being of our society.

### **Court, the Internet and the Future**

Young people also know more about technology than most judges. Young lawyers use the Internet as a matter of course, and comfortably. Last week a British Minister, Mr. Geoff Hoon, predicted that litigants of the future will resolve many disputes from their homes over the Internet rather than going to court. He outlined<sup>1</sup> British proposals which envisage “virtual” court hearings in which people can communicate with the judge and lawyers over the Internet via their television sets. According to his prediction, many of the traditional trappings of justice, including legal documents, books, papers, and formal court hearings, are likely to disappear or to be conserved to particular circumstances and defined cases. The British Government Consultation Paper asks a crucial question:

Is it the physical courtroom with associated trappings that is important to most people, or is it the confidence that their dispute is being addressed by an appropriate impartial person?

---

1 *The Times* (London), 11 September 1998, at 6. See Lord Chancellor's Department (UK), Consultation Paper, Civil Justice, 1998. The Consultation Paper is accessible on the Department's website: [www.open.gov.uk/led/index.htm](http://www.open.gov.uk/led/index.htm)

The British government clearly considers that there is a large unmet need for legal and judicial services that we have to re-think so that they will be provided by what are called "affordable jargon-free legal help at the fingertips of large numbers of clients across the world wide web". Older members of the judiciary and the legal profession may be horrified at the prospect of litigation outside a courtroom with its live witnesses, a judge in wig and gown and the paraphernalia that is so familiar. But the experience of the High Court with the video-links has been that there is no diminution in the effective use of judicial and lawyer time. On the contrary. The Court's statistics reveal that hearings by video-link tend to be shorter. Somehow, video-link seems to encourage a more economical presentation of argument. The living presence of human beings somehow breathes into all concerned prolixity and oratorical flourishes that disembodied electronic form appears to control and minimise.

If I reflect on the technological changes that have occurred in the law in my own lifetime, and those now in prospect, I cannot by any means dismiss the British proposal. There seems to be, for example, much merit in the suggestion of a website to act as an online civil justice service - as a first port of call for anyone seeking information or advice on legal problems. Perhaps this will be a way to bring justice and law to the people in the twenty-first century. That was, after all, the fundamental objective of King Henry II seven centuries ago in England. Lawyers must move with the electronic times.

## **The High Court and the Internet**

The High Court of Australia is a world leader in the judicial use of the Internet<sup>2</sup>:

- Within minutes of the delivery of the Court's judgments they are accessible and can be downloaded throughout the world.

UNIVERSITY OF AUSTRALIA LIBRARY

2 The High Court's website can be found at [www.hcourt.gov.au](http://www.hcourt.gov.au)

- The transcripts of oral argument before the Court are on the Internet within hours of completion of argument.
- Summaries of cases pending and those which stand for judgment are included in the Court's website.
- Decisions are now given, in medium neutral form, so that they can be referred to without necessary citation of a page in a printed report.
- The range of comparative law material used by the Court is vastly increased by access to legal materials in all parts of the world. No longer are Australian lawyers captive solely to the decisions of the English courts. There is a world-wide treasury of the common law to which we now have ready access.
- The Court has instituted a "virtual tour" of its premises which can be seen by every Australian citizen with access to the Internet and by people all around the world.
- In about six months, as soon as security issues have been resolved, it will be possible for lawyers to tap into the High Court's case management system to find precisely the state of play in any case. Thus it will become possible to find exactly when a party's submissions are filed. Those submissions will be accessible virtually instantaneously.

The picture of cobwebbed Australian courts living in the past, so well beloved of some sections of the media, is often quite different from the reality. The High Court sets the standards; but all Australian courts are rapidly moving into the electronic age. For example, the Federal Court of Australia has established the first permanent all digital court room in Sydney. Evidence can be presented electronically. The court is connected to the Internet. Transcripts can be retrieved in near to real time<sup>3</sup>. If the lesson of science and technology in this century is any guide, the most

---

3 Reported *The Australian* 15 September 1998, p.30.

exciting developments lie ahead. They will include access to justice, in at least some cases, through the Internet. For my own part, I do not doubt that, in the fullness of time, artificial intelligence will be also brought to bear for the solution of at least some legal problems.

## **Essential Continuities**

Having predicted a big technological future for our discipline, it remains to insist upon the enduring continuities which give law its quality as a vocation committed to justice. It is no accident that the central question in the British Government's Consultation Paper is concerned with how they can preserve the indispensable pre-requisite of a just legal system. This is access to an "appropriate, impartial person". For the foreseeable future it will have to be a "person". Someone with the will to do justice according to law. No machine yet on the drawing boards can be programmed to have that will. But who is the "appropriate impartial person"? Who is to be trusted with making decisions on behalf of the community and other citizens? making such decisions on questions crucial to the Constitution and legal ordering of society; making the decisions in highly charged criminal cases; making them in important civil claims where reputation, funds, and the allotment of power are at stake?

Under our system, many decisions of great legal importance are made by police officers, company directors, public servants and media personalities. They have profound effect on our society and the people who make it up. But ultimately, we are all answerable to the law. And, ultimately, the law is upheld and enforced by judicial officers (magistrates and judges) who must be trained for, and independent and neutral in, the decisions they make. These are precious features of Australia's legal system and we must hang onto them. No matter how the medium of access and performance is changed, the quality of manifest independence and integrity of the decision-maker is absolutely

central to the integrity of our legal system and, ultimately, to its acceptability to the people of Australia. In December this year, I will complete 25 years of service as a judge. There is only a handful of judicial officers in the country who have served in judicial office for a longer time. Mind you, I fall far short of the unattainable service on the High Court of Sir Edward McTiernan (46 years) and Sir George Rich (37 years). Now that the life tenure of such judges has been abolished, there will be no more terms of that length. But it is, I believe, a proud boast that never in my twenty-five years have I received a telephone call from a Minister telling me how to decide a case. Or from an official in the government. Or from a captain of industry. Or from a union official. Or a media magnate. In Australia, it just does not happen that way. We must keep it so. My service for the United Nations in many foreign countries has taught me how important this principle of independence and integrity is. It is not true of most countries of the world. Indeed, it is rare. So it is precious.

In Australia, the attacks on judicial independence do not come from the unwanted telephone call. They come in different forms. Sometimes they arise out of well-intended innovations designed to serve public needs.

### **Acting Judges: From Exceptional to Regular**

I regard the proliferation of acting judicial appointments, particularly in New South Wales, as an illustration of this problem. At the outset, it is appropriate to say that some arguments have been voiced that the system of acting judicial appointments in the State courts is unconstitutional. Certainly, given the terms of the Australian Constitution, it would appear impossible to have acting federal judges. None has ever been appointed. Those who exercise the judicial power of the Commonwealth under Chapter III of the Australian Constitution must be appointed under the conditions laid down by the

Constitution and the laws validly made under it<sup>4</sup>. Since the decision of the High Court in *Kable v Director of Public Prosecutions* (NSW)<sup>5</sup> critics of the schemes of acting appointments have begun to suggest that it is not possible to appoint acting judges to courts which must be of a character suitable to receive federal jurisdiction under the Constitution. I make no comment on that argument. One day, it may come for decision to the High Court, be fully argued and decided then.

Assuming the schemes for the appointment of acting judges in the State courts to be constitutionally permissible, what has concerned many observers is the extent to which the number of appointments of acting judges has so rapidly increased in recent years. From a truly exceptional form of judicial appointment, usually preliminary to permanent confirmation when a sitting judge retired and a position became available to be filled, the situation has now been reached in New South Wales, at least, that acting judicial appointments constitute a most significant part of the judicial branch of government.

Whilst respecting the integrity of those who serve, the good intentions of the Attorney-General and his predecessor in the appointments, and the laudable desire of courts to clear their lists, the position reached is clearly causing concern. In the period from 1 July 1998 to 30 June 1999, forty-nine acting judges of the District Court have already been commissioned to serve: 10 retired judges, 1 retired judge now a solicitor, 21 solicitors, 16 barristers, and 1 academic.

There are smaller numbers in the Supreme Court. The appointments in that court conform to an entirely different legal regime. Whereas the acting judges of the District Court<sup>6</sup> are, if

---

4 Australian Constitution, s 72.

5 (1996) 70 ALJR; 138 ALR 577.

6 Under the *District Court Act 1973* (NSW), s 18.

practitioners or academics, typically not required to act as a judge during the whole period of their commissions, acting judges of the Supreme Court<sup>7</sup> receive a commission for a fixed period. In that period, they must fit any work of their practice around their judicial duties. In the District Court, typically, the position is the reverse. The judicial duties are fitted into practice or other obligations of professional life.

Whilst it is reported that the District Court appointments have resulted in a reduction of a backlog of cases recently assumed by the District Court from the Supreme Court<sup>8</sup>, the fundamental question is how that backlog accumulated in the first place. To some extent, at least, it appears to be the product of the failure to increase the judicial establishment so that it can dispose of cases in an orderly and efficient way as befits the judicial branch of government. And so that extraordinary and inappropriate appointment arrangements are not required.

I will refrain from repeating<sup>9</sup> the criticisms of principle addressed to the adoption of a semi-permanent supplement of the tenured judiciary with large numbers of acting judges. I will make no reference whatever to the international principles of fundamental rights which stand against what is happening. I realise that appeal to fundamental principles is regarded with contempt by some media commentators<sup>10</sup>. Unlike the judiciary which must live every day with fundamental principle, reference to such considerations is often dismissed in the media and elsewhere as

---

7 Under the *Supreme Court Act 1970 (NSW)*, s 37.

8 R Ackland, « Clearing the legal logjam », [the backlog is estimated at 3,000] *Sydney Morning Herald*, 4 September 1998 at 19.

9 M D Kirby, « Independence of the Judiciary - Basic Principle, New Challenges », unpublished address to the International Bar Association Conference, Hong Kong, 12 June 1998.

10 See eg Ackland, above n 8.

an appeal to “lofty theoretical grounds”<sup>11</sup> or to considerations “more theoretical than actual”<sup>12</sup>.

## Acting Judges: Practical Concerns

So let me try to explain, quite bluntly and practically, why the development we are witnessing is causing concern to many informed observers:

1. It undermines the tenured judiciary. Tenure has commonly been regarded as essential to judicial independence<sup>13</sup>. When you think of the many countries which do not have this feature of the judiciary and the long constitutional struggle that lies behind Australia’s achievement of it, it seems a trifle reckless to throw it away so readily and to denounce those who resist as “assorted purists ... snorting”<sup>14</sup> when they are actually defending a hard-won right which belongs not to lawyers but to the people - and especially litigants - against incursions from executive governments.
2. When it said that the dangers are “theoretical”, what is meant is that critics cannot always point to an actual case where a judge has tailored his or her decision to avoid the displeasure of a government or a client. In the nature of things such cases would be hard to find and virtually impossible to prove. But judicial impartiality is not only a matter of avoiding actual bias<sup>15</sup>. Australian law defends people who come to our courts

---

11 Editorial, “Making judges more efficient” in *Sydney Morning Herald*, 30 July 1998 at 15.

12 See eg Ackland, above n 8.

13 *Valente v The Queen* (1985) 2 FCR 678; *The Queen v Beauregard* (1996) 2 FCR 56.

14 See eg Ackland, above n 8.

15 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *S es M Motor Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 368.

from the appearance or reasonable apprehension of bias. Of its very nature, that cannot be proved empirically. It rests on appearances and inferences. But Australian law is rightly very strict about this matter. If a barrister would love to be a permanent judge, may he or she not be tempted (or appear to be tempted) to avoid a decision that might upset the appointing government? If a solicitor generally acts for insurance companies (or workers) might he or she not be tempted (or appear to be tempted) to avoid making decisions that could upset actual or potential clients, their law partners or their interests? With sections of the media baying for law and order and stiffer penalties, might an appointee, hoping for a permanent seat on the bench, not be influenced by the need to avoid an unpopular sentencing or bail decision, however merited it might seem on the evidence and argument? These are not really theoretical questions. Every informed member of the legal profession knows of stories that are circulating. I certainly know of acting judges who were very disappointed not to secure a permanent appointment. Ambition for permanent appointment in an acting judge is potentially a very dangerous thing.

- 3 The acting judges doubtless do their best. But they are riding on the reputation for integrity hard won by the tenured judiciary who have a permanent investment in actual and manifest impartiality. If the acting appointments were limited to a few recently retired judges, called back for a period to full-time service on an acting basis or (as in my youth) people given acting commissions in anticipation of quick confirmation, there would be fewer expressions of concern. What is worrying is the growth of numbers and the fact that this is now becoming, apparently, a semi-permanent feature of our judicial scene. The exceptional has become the ordinary. There will always be excuses for avoiding proper funding of the judicial branch. Flexibility of available personnel can be bought at too high a price. It is legitimate for judges who have given a full-time commitment to be concerned about damage

to the judicial institution that can be caused by the number and variability of appointees who, in a sense, draw their store of reputation from the reputation of the permanent judiciary. It is especially inappropriate to have acting judges who are part-heard as lawyers appearing before other acting judges all of them returning to their chambers or offices to bump into their "judges" and have to deal with them, and negotiate with them, in the course of their private legal practices. This never happened in the past. Now it is happening all the time.

I do not regard these as theoretical problems at all. If they become systematised and endemic they will undermine our hard-won principle of manifest judicial independence. Perhaps more importantly, they will provide bandaids and temporary expedients for problems of case control and good court management. They will remove the pressure for permanent solutions for the efficient disposal of the business of the courts. Papering over problems of judicial administration by the use and expansion of what should be truly exceptional devices (such as acting appointments) is no real alternative to the proper funding of a judiciary of adequate numbers, proper resources and greater accountability, transparency and efficiency.

This is why many informed people say to executive government: Encourage the use of assessors who are solicitors or barristers. Sanction a litigant's refusal to use them or accept their decisions if you must. Facilitate conciliation by experienced legal practitioners in the hope of avoiding the need for a trial. Promote additional and alternative dispute resolution by agreement. But leave the judiciary a tenured, manifestly independent institution. Do not pretend to the citizens that busy part-time practitioners, scurrying back to their offices and chambers, are true judges. They are not. And they should not be held out as such.

## **Standing Up for Principle**

As young lawyers, you will have the obligation to explain to a

sometimes cynical and sceptical community how important is the principle of judicial independence. Of how it is just as important in Australia in State as in federal courts. Of how comparatively rare it is, in practice, in the world today. Of how, until now, we have enjoyed it as a settled given in the Australian judiciary. And of how we may endanger it by continuing down the path of appointing more acting judges. If those ignorant of hard-won constitutional freedoms treat your warnings with contempt, or accuse of "snorting" or self-interest, you still have a duty to place your concerns before the community. It is a duty that comes with study of the law, with knowledge of its history and institutions, and with loyalty to our constitutional arrangements. Never be deflected by the ignorant and the wrong. To speak up for fundamentals, and to defend the independent judiciary of this country, is a duty of all lawyers, and especially young lawyers who must pass this legacy on, undamaged. It is, indeed, the duty of all informed citizens.

# *The UN Special Rapporteur on the Independence of Judges and Lawyers*

---

by

*Param Cumaraswamy* \*

## **Introduction**

In his report *"A Place Apart: Judicial Independence and Accountability in Canada"*, prepared for the Canadian Judicial Council, Professor Martin Friedland begins his preface with "Senator Arthur Meighen stated in the Senate in 1932 that 'a judge is in no sense under the direction of the government. The judge is in a place apart'." The phrase "a place apart" captures a sense of the independence necessary to the position of the judiciary in society." Friedland concludes his admirable study on the sensitive subject of judicial independence and accountability with the following words: "The judiciary, as the title of this volume suggests, is properly "a place apart". That place has a solid historical foundation and fine edifice. This study suggests some relatively modest renovations in its structure to keep it a strong, respected and independent institution."<sup>1</sup>

Friedland no doubt was referring to the Canadian Judiciary. How many judiciaries today can be described as having a "solid historical foundation and a fine edifice" and still in pursuit of strengthening their independence? The annual reports on

---

\* UN Special Rapporteur on the Independence of Judges and Lawyers.

1 Martin L. Friedland *A Place Apart : Judicial Independence and Accountability*; 1995.

“Attacks on Justice” published by the Centre for Independence of Judges and Lawyers and “Attacks on Lawyers and Judges” published by the Lawyers Committee for Human Rights are good indications of the fragility of the independence of the judiciary and the legal profession. The CIJL report of 1997 shows a 25% increase over the number of cases of attacks reported the previous year.<sup>2</sup>

The attacks on judicial independence are not confined to the developing countries. Recent events in the United States, United Kingdom, Australia and Belgium show that even the developed nations are not spared. It is not safe even in countries where one would imagine it safe and secure. Hence the need for constant vigilance.

Attacks on judicial independence do not always emanate from the executive arm of the government. Other groups too can threaten judicial independence and impartiality. Sometimes powerful business interest groups can influence judges thereby undermining judicial impartiality. Sometimes the media can undermine judicial independence by excessive discussion about a case or a judge. In countries where the media is controlled by the government, the media can be used as a vehicle to undermine judicial independence.

Powerful criminals can sometimes threaten judicial independence as what has been happening in Colombia where 122 judges, lawyers and prosecutors were murdered between 1979 and 1995. Sometimes lawyers too can be a threat to not only their own independence but also to judicial independence. Sometimes the conduct of judges can undermine their own independence and impartiality and that of their institution.

---

2 *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers*; January 1996-February 1997; Centre for the Independence of Judges of Lawyers.

## International Standards

How then can the independence of the judiciary be secured? The growing problems associated with securing an independent justice system and protecting independent judges and lawyers became a topic of high priority on the agenda of organisations of jurists committed to the rule of law since the sixties. These organisations devised various programmes to grapple with the issues with limited resources. Protest letters were sent to governments concerned whenever there were violations. Missions were sent to do *in situ* studies in countries where independence was undermined or threatened. Observers were sent to trials of lawyers and judges; seminars and conferences were undertaken in various parts of the world as a means to inculcate the values of judicial independence. There is today a large volume of material resulting from these programmes.

Information gathered through these programmes resulted in these organisations formulating general international standards for securing and maintaining judicial independence. Today we have on record the following standards set by some major international non-governmental organisations:

- Draft Principles on the Independence of the Judiciary (Siracusa Principles) 1981.
- Draft Principles on the Independence of the Legal Profession (Noto Principles) 1982.
- The Rule of Law and Human Rights (Declaration of Delhi, Law of Lagos, Resolution of Rio, Declaration of Bangkok).
- Union internationale des avocats: The International Charter of Legal Defence Rights.
- International Bar Association; Minimum Standards of Judicial Independence 1982.
- International Convention for the Preservation of Defence Rights 1987.

The first three of these instruments were promoted by the International Commission of Jurists.

At the United Nations level the concern for securing an independent and impartial judiciary was debated at the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1978. The Sub-Commission called upon the Secretary-General to prepare a preliminary study and report to the same Commission.

The Secretary-General after receiving further information from governments in 1980 entrusted Dr. L.M. Singhvi, a prominent advocate from India, with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers. Dr. Singhvi submitted his final report to the Sub-Commission in 1985 with a draft declaration on the independence of justice which came to be known as the Singhvi Draft Declaration on the Independence of Justice. Annexed to this draft declaration were the ICJ Siracusa and Noto Principles and the Universal Declaration on the Independence of Justice (adopted by a meeting of eminent jurists in Montréal in 1983).

In the meantime the UN Congress on the Prevention of Crime and Treatment of Offenders, at its 7th Congress in Milan in 1985, adopted the Basic Principles on the Independence of the Judiciary which was endorsed by the UN General Assembly in the same year. In 1985 the UN General Assembly endorsed a set of Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.

At the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana in 1990 the UN Basic Principles on the Role of Lawyers were adopted. They were endorsed by the General Assembly that year. At the same Congress, a set of guidelines for Prosecutors known as the Guidelines on the Role of Prosecutors was adopted.

Hence today there are three United Nations approved instruments on standards for the independence of judges and lawyers and prosecutors and one instrument namely the Singhvi Declaration, which remained unendorsed<sup>3</sup>. It must be stressed that the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors, are general and very basic. General though they are, they represent the first intergovernmental standards spelling out the minimum standards of judicial independence and are today the acknowledged yardstick by which the international community measures that independence.

The adoption of the minimum standards for the independence of the judiciary in 1985 was a compromise bargain with the Eastern European States which vehemently rejected the original text. Rather than not having any standards at all, the original text was considerably diluted<sup>4</sup>.

By resolution 1989/32, the Commission on Human Rights invited governments to take into account the Singhvi Declaration in implementing the Basic Principles on the Independence of the Judiciary<sup>5</sup>.

The principles spelt out in the Basic Principles on the Independence of the Judiciary provide, *inter alia*, the following:<sup>5</sup>

- It is the duty of the government to respect and observe the independence of the judiciary. It is the duty of the judiciary to

---

3 By Resolution 1989/32, the UN Commission on Human Rights invited governments to take into account the Singhvi Declaration in implementing the Basic Principles on the Independence of the Judiciary.

4 See Howard Tolley; *The International Commission of Jurists: Global Advocates for Human Rights*; University of Pennsylvania Press., at 231.

5 For a list of the International Standards and their full texts, see *CIJL Bulletin* N° 25-26, "The Independence of Judges and Lawyers : A compilation of International Standards".

decide matters impartially. It is the duty of the government to provide adequate resources to enable the judiciary to properly perform its functions.

- Judges must not be subjected to or accept restrictions; improper influences; inducements; pressures; threats or interference of any kind with the judicial process.
- Judges have the exclusive authority to decide all issues that come before them.
- Judges should be properly trained and selected without any discrimination.
- The appointment of judges should be guaranteed up to a fixed retirement age, or the end of their term of office.
- Judges may only be removed for incapacity, or behaviour that makes them unfit to discharge their duty.

The Principles spelt out in the Basic Principles on the Role of Lawyers provide, *inter alia*, for “Government’s obligations to provide for access to lawyers; special safeguards in criminal justice matters; qualifications and training; duties and responsibilities of lawyers; guarantees for the functioning of lawyers; freedom of expression and association; and discipline of lawyers.”

The Principles set out in the Guidelines on the Role of Prosecutors provide the following, *inter alia* for “Minimum standards on qualifications, selection and training; status and conditions of service; freedom of expression and association; their role in criminal proceedings; discretionary functions; alternatives to prosecutions in relations with other government agencies and institutions; and disciplinary proceedings.”

## **Implementation**

Having set the basic standards the next problem was one of implementation. The UN Sub-Commission in 1989 appointed

one of its experts, Mr. Louis Joinet, a judge from France, to prepare a working paper on the means of monitoring the implementation of the standards. Mr. Joinet submitted several reports to the Sub-Commission over a period of four years and in his final report recommended the creation of a monitoring mechanism. In 1993 the Sub-Commission following this recommendation called for the creation of 'a monitoring mechanism to follow-up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officers and the nature of problems liable to attack this independence and impartiality'. In 1994 the Commission on Human Rights endorsed this recommendation of the Sub-Commission and thereupon requested the Chairman of the Commission to appoint a special rapporteur with the following mandate:

- (a) to inquire into any substantial allegations transmitted to him or her and to report his or her conclusions thereon;
- (b) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials, but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they were requested by the State concerned; and
- (c) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

It will be noted that the mandate is four-pronged - investigatory, advisory, legislative and promotional. It is thematic.

### **Role of the Special Rapporteur**

The Special Rapporteur carries out investigations of specific complaints on attacks on the independence of judges and lawyers. Such investigations are done through correspondence

and where appropriate a mission to the country is undertaken to do an *in situ* investigation. The investigations are more in the nature of information gathering to ascertain the causes for the attacks and study the scenario prevailing in the country concerned. In his investigations, the Special Rapporteur is assisted not only by the government concerned but also by the NGOs, bar associations and judges in the country. A report is then prepared and presented to the Commission<sup>6</sup>.

Urgent appeal letters are sent out to governments immediately upon receipt of any information of attacks or threats to the independence of judges or lawyers. In the letter governments are called upon to verify the truth of the information and if true, to explain and take appropriate action.

Information on attacks are received largely from NGOs particularly the international NGOs to whom the Special Rapporteur is most grateful. Unfortunately national Bar associations are not only reluctant to complain of specific attacks but are often slow in responding to inquiries on attacks. However, the commendable human rights programmes of a few associations like the Law Society of England and Wales and the Association of the Bar of the City of New York, who from time to time sent out appeal letters and alerts should be noted with appreciation.

The Special Rapporteur also takes note of positive developments in countries to improve judicial independence and reports his findings to the Commission.

Generally governments have been cooperative with responses. They are however, slow in permitting *in situ* missions for independent rapporteurs. Some mandates including this

---

6 In the last four years, the Special Rapporteur has presented four general reports and four mission reports on Peru, Colombia, Belgium and United Kingdom/Northern Ireland. These reports, save for Colombia, are available 'online' at the web site of the UN High Commissioner for Human Rights ([www.unhchr.ch](http://www.unhchr.ch)).

particular mandate have political overtones and are viewed as very intrusive.

On the advisory aspects, the Special Rapporteur is mandated to advise and recommend to the country concerned for improving the structural weaknesses in the judicial system to dispense independent justice. With so many new emerging democracies today this will be one of the challenging roles for the Special Rapporteur. In this area, the Advisory Services and Activities and Programmes Branch of the Office of the High Commissioner for Human Rights have already in place technical assistance and training programmes in several countries. The Special Rapporteur works closely with this Branch.

On standards, the Special Rapporteur can advise on the adequacy of the international standards and make recommendations accordingly. For greater public awareness of the importance of judicial independence and to promote its values for good governance in a democratic State, the Special Rapporteur undertakes speaking engagements not only with organisations of judges and lawyers but other lay organisations including parliamentarians, political parties, and professionals. The Special Rapporteur is in communication with the Inter-Parliamentary Union and the World Bank.

The mandate being thematic and with the limited resources, both financial and human, the Special Rapporteur inevitably needs to be selective on the issues he takes up.

The mandate of the Special Rapporteur is to investigate attacks on the independence of judges and lawyers, not all issues related to judges and lawyers. Experience has shown that there are some judges and lawyers who, by their own conduct, bring disrepute to their institutions, thereby even threatening the very independence of their positions and the institutions. Such judges and lawyers would be exposed with recommendations for their removal. There have been allegations of judicial fraud where court judgments are written in the law firms of lawyers acting for

one party. Allegations of judicial corruption are quite common. These, if proved, are gross and heinous judicial misbehaviour which should not be tolerated in civil society. The corridors of courts must be kept clean and unpolluted so that what flows from the fountain of justice remains pure.

As stated earlier in 1989, the UN General Assembly endorsed a set of procedures for the implementation of the Basic Principles. In 1995 the Crime Prevention and Criminal Justice Branch of the United Nations office in Vienna sent out questionnaires to all member States inquiring to what extent steps had been taken to implement the Basic Principles on the Independence of the Judiciary in accordance with the set procedures. Member States were given six months to respond. As of April 1997 only 50% of the member States of the UN responded! The inquiry was confined to the Basic Principles on the Independence of the Judiciary. A similar survey on the implementation of the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors would be undertaken by the same Branch in Vienna. The Special Rapporteur participated in the Seventh Session of the Commission in April 1998 and intervened on the agenda item on Standards.

Governments, in their responses often claim that the Basic Principles are already part of their national constitutions. That may be so. The question still arises whether in practice the Principles are implemented in the spirit in which they ought to. The responses can be categorised into four groups:

- Member States who are fully aware and are endeavouring to apply them.
- Member States who are aware but resist application for one reason or another, but largely for improper motives;
- Member States who are aware but for want of resources, both financial and human, are unable to apply;
- Member States who are not aware of the Standards.

## Regional standards

The regions of Europe, the Americas and Africa have their own regional human rights systems. The conventions create regional commissions and courts for Europe and the Americas<sup>7</sup>. Africa too is moving towards the establishment of a Court<sup>8</sup>. On 15 September 1994, the Arab Charter on Human Rights was approved by a majority of the Member States of the League of Arab States. This Charter has yet to come into force. The importance and need for an independent judiciary are incorporated in the treaties establishing the regional systems.

There is no intergovernmental charter or regional mechanism for human rights for the Asian region. Hence whatever standards there are for the Asian region, other than the international norms, regional standards were set by non-governmental regional organisations. At the 6th Conference of the Chief Justices of Asia and the Pacific in Beijing in 1995, under the auspices of LAWASIA, the eighteen Chief Justices present adopted what is now known as the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region 1995. This document is based on the United Nations Principles and other international instruments referred to above. It contains 43 principles on matters such as judicial independence, appointments, tenure including removal, conditions, jurisdiction, administration, relationship with the

---

7 Since November 1998, the Human Rights Commission and the Human Rights Court were amalgamated in Europe. *Editor's note.*

8 The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and peoples' Rights, was adopted on 8 June 1998 by the 34th Summit of the Assembly of Heads of States and Government of the Organisation of African Unity (OAU). The Protocol requires that fifteen instruments of ratification are deposited with the OAU for the Court to be established. As of today, Burkina Faso and Senegal have ratified the Protocol. For the text of the Protocol see, *ICJ Review no. 60. Editors Note.*

executive, resources and independence during states of emergency<sup>9</sup>.

The adoption of the Beijing Declaration constituted a significant step for the region. It was the work of by a group of eminent jurists who were no less than the heads of the judiciaries of the countries covered. Hence governments in the region may find it difficult to ignore these Principles. It is also significant to note that the Chief Justices concluded their declaration of the 43 Principles by qualifying that "these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary."

## Enforcement

As it will be observed from what is said above, these are universal and regional minimum standards for securing the independence of the judiciary. They are standards for governments to observe in securing an independent system of justice for their people irrespective of the level of political and economic advancement of the countries. What if governments fail to observe these standards? What mechanism is there to enforce against a delinquent government? The answer is that today there is not enforcement machinery even within the United Nations structure. Even if governments violate the 1985 and 1990 UN Basic Principles on the Judiciary and the Role of Lawyers respectively, and many do, the most that could be done is to call upon the violating member State to explain and adhere to the norms. At most, resolutions against those who commit gross violations of human rights could be adopted at the UN Commission on Human Rights and the UN General Assembly levels. In the extreme cases sanctions may be called for.

---

9 For the text of the Beijing Principles and a discussion on them, see *CIJL Yearbook*; volumes V & VI, Combined Issue, March 1998; pp 88-123.

There is nothing more that can be done. These instruments were merely endorsed by the General Assembly. At most they are international guidelines. They do not have the stature and effect of a treaty which State parties ratify or accede to. Even when State parties to treaty instruments violate the principles enunciated therein the United Nations mechanisms are not very effective to deal and enforce expeditiously. The State under discussion could become subject to criticism during the submission of its report to the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights, for instance.

Though there is no effective enforcement machinery the existing procedures can be used to call upon governments to account publicly at annual sessions of the UN General Assembly and the UN Commission on Human Rights. The embarrassment of having to account to the international community is a useful sanction. Further, countries depending on foreign investments find such adverse disclosures of their judicial system to the international community not conducive to their domestic investment climate. There are of course a few hard core violators to whom such pressures do not matter.

### **Judicial Accountability**

Accountability and transparency are the very essence of democracy. In a democracy not one single public institution must be exempt from accountability. Hence the judicial arm of the government too is accountable. However, judicial accountability is not the same as the accountability of the executive or the legislative or any other public institution. This is because of the independence and impartiality expected of the judicial organ.

It is the view of the Special Rapporteur that judges are accountable to the extent of deciding the cases before them expeditiously, in public (unless for special reasons), fairly and

delivering their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by the appellate courts. No doubt legal scholars and even the public including the media may comment on the judgments. If they misconduct they are subject to discipline by the mechanism provided under the law. Beyond these parameters they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

Last year the Truth and Reconciliation Commission in South Africa was left in a dilemma. To assist the Commission in realising its objective to understand the role played by various parties who contributed to the violation of human rights during the *Apartheid* era, i.e. 1 March 1960 to 10 May 1994, amongst many others, the Commission invited all the judges to appear and answer questions. A large number of judges refused including the Chief Justices, both present and past. However, they gave written explanations.

The question arose as to whether the Commission should compel appearance of the judges by subpoena. The Special Rapporteur's advice was sought orally over the telephone. The following is the report of his advice as appears in his 1998 report to the Commission:

The Special Rapporteur advised that it would not be proper to compel the judges to appear before the Commission, however noble its objectives. Subpoenaing the judges for examination by the Commission as to their conduct during the relevant period would amount to reopening cases decided by them, examining the evidence, and generally reviewing the correctness of the decisions. Though judges are accountable, their accountability does not extend to their having to account to another institution for their judgements. That would seriously erode not only the independence of the judges concerned but also the institutional independence of the judiciary. Further, such

compulsion could violate the immunity conferred on judges. Finally, if they are subjected to public examination in the glare of the media, public confidence in the judiciary could be undermined, bearing in mind that prior to 1994 there was no written constitution in South Africa with an entrenched bill of rights for judges to apply and on the basis of which to rule on the legality of legislation. For these reasons, the Special Rapporteur advised that the Commission, having the benefit of written submissions from many judges, could make its findings without having to compel them to appear personally.<sup>10</sup>

To date the judges have not been subpoenaed.

In Canada, a Federal Court judge in Québec in 1996, while sentencing an accused woman found guilty of second degree murder in the death of her husband, berated a jury and made insensitive remarks about women and Jews. Those remarks caused an enormous controversy in Québec. Many including the media called for the removal of the judge. Women's rights associations and Jewish organisations went in an uproar. The judge did not resign. The matter went before the Canadian Judicial Council.

By a majority of 4 to 1, the Enquiry Committee of the Council found the judge unfit for office. They went on to say that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. This recommendation went before the full Judicial Council headed by the Chief Justice. By a majority of 22 to 7 the Council recommended to the Minister to move Parliament for the removal of the judge. The Judge eventually resigned.

In Belgium public outrage over the police and the judiciary was ignited over the manner in which the case of paedophile, Marc Dutroux, was handled. The crisis was further exacerbated

---

10 E/CN.4/1998/39 p. 44.

on 16 October 1996 when the Court of Cassation ruled that investigating Magistrate, Mr Jean-Marc Connerotte, should be removed from the case for violating his duty to remain strictly neutral in the investigation. The decision was based upon the fact that Mr Connerotte had attended a fund-raising dinner for the parents of the victims thereby calling in question his neutrality in the Dutroux investigation. This decision sparked off massive public demonstrations with about 350,000 people marching in protest in front of the *Palais de Justice* in Brussels. There were serious allegations of corruption and cover up alleged against the judiciary. Judge Connerotte was popular with the people for the speed in which he was investigating the case and found two young girls alive reported missing earlier.

The government, under pressure, proposed constitutional reforms for the administration of justice. There was fear within legal circles that these reforms could seriously impede judicial independence.

The Special Rapporteur accepted a mission to Brussels to study the situation. A preliminary report was submitted to the UN Commission on Human Rights in April 1998.

On the issue of the removal of the investigating Magistrate, the Special Rapporteur reported as follows:

The Special Rapporteur is convinced that the decision to remove Judge Connerotte was in light of the highest traditions of the independence and, in particular, impartiality of the judiciary. The Special Rapporteur found no evidence that there were any other ulterior motives for this decision. Despite the immense public pressure to decide otherwise, the Court faithfully applied the rule of law and maintained the principles of the profession.

He added:

The rule of law dictates that there are times courts have to make unpopular decisions which may not find favour with

the public. There will be anarchy if judicial decisions are tailored to meet the demands of street demonstrations.

## **Some Additional Issues of Concern**

Having been on the mandate for four years since its creation, there are some concerns the Special Rapporteur would like to draw attention:

### **I. Independence of judges of the lower courts**

Very often when the issue of judicial independence is addressed, it is often addressed in the context of the superior judiciary. It would appear that the UN Basic Principles too may have failed to address this class of judges.

The independence of judges sitting in the lower judiciary like magistrates courts, district courts or provincial courts are becoming a matter of some concern. This also includes judges of statutory tribunals. To what extent is their independence guaranteed? It must be borne in mind that in many jurisdictions these courts dispose of more than 70% of the total number of cases brought before all the courts, particularly criminal cases. This is the forgotten class of judges, the silent majority, whose independence is not given much attention. Their appointments are generally made pursuant to statutes and not the Constitution.

The recent decisions of the Canadian Supreme Court in a series of references known as "Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island"<sup>11</sup> are a welcome contribution to the jurisprudence on judicial independence.

---

\* (1997) 3 S.C.R.3; DLR (4th Series) Vol. 150 p. 577; see also in *CIJL Yearbook* Vol. V & VI, March 1998.

In 1995 nine judges of the Accident Claims Tribunal in Victoria, Australia filed an action against the State government for compensation for loss of office when the State Legislature repealed the legislation creating the tribunal. Unfortunately that action was settled for an undisclosed sum in compensation. A final ruling from the High Court of Australia in that action would have been of some assistance. I am also aware that the Magistrates Association of South Africa are concerned over their independence.

## II. Temporary Judges

In many countries, judges are appointed on a temporary basis. They are sometimes designated as provisional, part-time, *ad hoc*, judicial commissioners, etc. The fact remains that they are not judges appointed to the general mainstream with full security of tenure. The reasons for such appointments vary, in some cases for improper reasons. Are these appointments consistent with the concept of judicial independence? While accepting the fact that such appointments are necessary for the dispensation of justice to avoid delays yet the inherent danger is there. The problem arises when such judges are awaiting confirmation of a permanent appointment. Can they be perceived as independent and impartial? Should they only be confined to litigation where the State is not a party? The recent decision of the Norwegian Supreme Court in Jens Viktor Plabte vs The State is a case in point.<sup>12</sup>

## III. Accountability

With the advent of the information technology there will be demands for greater accountability and transparency from all public institutions. The judiciary cannot remain exceptional. To

---

12 Case N° 82B/1997, N° 108/1997 judgment delivered on 19 December 1997, published in *CIJL Yearbook* Vol. V & VI, March 1998.

what extent can the judicial institution be called upon to account without compromising on institutional independence of individual judges? Should not judges interact a little more in public discussions of the mystery of the law and its procedures? Should there be an independent supervisory body over the judiciary? Should there be lay persons involved in disciplinary bodies of the judges? Should judges be subjected to periodic evaluations of their judicial performance? if so, what should be the mechanism? These are some of the issues which in time need addressing. They are real and are already surfacing in some jurisdictions.

#### **IV. Standards**

The UN Basic Principles are bare minimum standards. As mentioned earlier, they were adopted after a considerable dilution in the face of the Eastern bloc's opposition to "Western concepts". With the collapse of that ideology should the Basic Principles not be reviewed and those principles which were dropped restored with new additions? For example, should the need for financial autonomy of the judiciary not be addressed in the Standards?

On the other hand, can the Basic Principles be expanded with creative and purposive interpretations? If so, who should be the authority? Maybe national courts could give some life and nurture these Standards.

#### **V. Bar Associations**

Lawyers, both individually and collectively as an association, have a definite role in the promotion and protection of human rights. The role of bar associations in this context can be implied from Principle 14 of the Basic Principles on the Role of Lawyers.

Experience has shown that in many countries Bar associations are not responding to this expectation. While in a few countries

where the regime is repressive, fears of reprisals are real, yet in many other countries there appears to be an apathy coupled probably with the association being more concerned with addressing commercial and more materialistic aspects of the profession and embroiled in external politics and factionalism.

A good indication of the interest shown by these associations is seen when questionnaires are sent for surveys. Less than 20% respond. Similarly responses to inquiries on attacks are not timely.

There is a need to sensitise Bar associations on their roles in the advancement of not only the independence of their profession, but also their role in the protection of judicial independence and human rights generally.

## **Conclusion**

In addressing the importance of judicial independence we need to address the wider concept of constitutionalism in government and call for an environment where an independent judiciary and the legal profession will be allowed to discharge their rightful roles. This environment must include the provision of adequate resources, both financial, human and technological, by the executive government to enable the judiciary to function effectively in compliance with the standards outlined. Here the media has an important role to mobilise public opinion for such a constitutional government. Unless there is executive respect for the institutional independence of the judiciary individual independence of judges would be ineffective. The repressive autocratic regime in Nigeria under the late General Abacha made it difficult for judges to exercise their independent role. In their joint report on Nigeria to the Commission on Human Rights the Special Rapporteurs provided a long list of court orders disobeyed by the military government. In one case in February 1996 a judge was reported to have said "if the orders of

the court cannot be complied with, the court itself should be scrapped and let us live in a country of anarchy and chaos."

What then is the status of judicial independence today? Though so much has been said and written about this fundamental constitutional value for a democratic State for the preservation of the rule of law yet it is the most threatened. It is a priceless intangible commodity for the welfare of civil society yet is fragile. As I have stated earlier, it is not safe even in the countries we think were secure. It should never be taken for granted. There must be greater public awareness of the significance of an independent judiciary. The public must be told that it is the presence of an independent judiciary in a democracy which distinguishes that form of government from that of a dictatorship. The Belgian experience is a good illustration of the need for greater public awareness of the role of an independent and impartial judiciary in a constitutional government.

On the issue of constitutional values, I take this opportunity to salute President Nelson Mandela for his staunch belief in constitutionalism for good governance. In November 1995 the Constitutional Court of South Africa, on an application for judicial review, struck down a proclamation of the President in an electoral boundary delineation matter as being unconstitutional. Immediately the same evening President Nelson Mandela went before the media and addressed the nation to the effect that he honestly thought that Parliament had given him the power of proclamation to him. But as the Constitutional Court found it otherwise, he respected the decision of the Court. He went on to say "This decision clearly demonstrates that in the Republic of South Africa even the President is subject to the law." Simple words, but they are words of conviction and commitment to the independence of the judiciary and the rule of law in a constitutional government by a great statesman of our time.

Sigmund Freud in his essay on *Civilisation and its Discontents* placed justice as the first requisite of civilisation. He adds "... that

is, the assurance that the law once made will not be broken in favour of an individual." He was obviously referring to the rule of law and equality before the law. The International Commission of Jurists since 1952 has relentlessly championed the cause of the rule of law throughout the World. Under its umbrella the Centre for the Independence of Judges and Lawyers for the last 20 years untiringly championed the cause of independence of judges and lawyers and contributed substantially in the creation of universal standards so that justice could be dispensed without fear or favour to enable humankind to live in peace and harmony in a civilised environment free from fear. *I am proud to be associated with these two global institutional advocates of our time.*

# *Judicial Independence vs. Judicial Accountability: A Debate*

---

## *I - An Introduction*

*by*

*P.N. Bhagwati \**

It was said by Lord Acton several years ago that power corrupts and absolute power corrupts absolutely. What he then said holds good for all time to come because it is the pathology of power to be abused and there must, therefore, be control and check on the exercise of power whatever its character or form. There must be accountability for the exercise of power because all power is a people's trust and judicial power is no exception. There is a predominant fiduciary component in judicial power and it is this fiduciary component which provides control and check over the exercise of judicial power.

We may in this context remind ourselves of the famous words of admonition of Edmund Burke:

All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust and that they are to account for their conduct in that trust to the one great master, author and founder of Society.

In a society based on the rule of law and democratic rules of governance, that master author and founder happens to be the

---

\* Former Chief Justice of India; Chairman of the CIJL Advisory Board.

people. Every power holder, whether legislative, executive or judicial is, in the ultimate analysis, accountable to the people. This accountability goes with the exercise of power because the power holder in a democracy governed by the rule of law derives its power from the people. It is the people who are the source of power and through the constitution and the law made by them, they delegate power to the various organs such as the legislature, the executive and the judiciary created by them. This is the *raison d'être* for the accountability of the exercise of the judicial power to the people of the country. Accountability thus constitutes a basic and essential component of every power including judicial power. This accountability is not to any particular individual or to any particular government, but it is to the people of the country.

It may express the same ideal in a slightly different format. There are two classes of power holders. One class consists of those who exercise power without any external control or check. They exercise power according to their own will. The people of the country belong to this class of power holders. They control decisions affecting their lives in the manner provided in the Constitution. The Constitution reflects their will and conscience and sets out the goals, the objectives which they want to see accomplished.

The second class of power holders consists of those to whom power is entrusted by the people and who are expected to exercise such power for achieving the objectives and goals determined by the people in the Constitution and the law made by them. The three organs of the State, namely the legislature, the executive and the judiciary, fall within this second class of power holders. These three organs of the State are, therefore, implicitly under an obligation to exercise the power vested in them to accomplish the will and the goals set out by the people who are the real power holders. They are accountable to the people in the discharge of their functions in the exercise of the power entrusted to them by the people, and this accountability

holds them responsible for acting for the benefit of the people as a whole and accomplishing the objectives and goals set out by the people.

It is partly because of lack of proper understanding of the judicial function and partly because the judiciary at times – perhaps quite often – is oblivious of its responsibility and accountability to the people that public perception brands the judiciary as anti-democratic, anti-majoritarian, hegemonistic and exercising its power without any accountability. This criticism is to my mind unfounded. In most countries of the world, the judiciary is not elected by the people but it is still accountable to the people, and neither the judges nor the judiciary, as an institution, must forget this accountability.

How is this accountability to be secured? To answer this question, we must understand the nature of the judicial function. Plato posed the problem 2000 years ago. Is it more advantageous to be subject to the best men or the best laws? He answers by saying that laws are by definition general rules and that generality falters before complexities of life. Laws' generality and rigidity are at best a makeshift, far inferior to the discretion of the philosopher king whose pure wisdom will render real justice by giving each man his due. Aristotle was, however, in favour of the rule of law. He said: "He who bids the law's rule bids God and reason rule, but he who bids the man rule adds the element of the beast, for desire is a wild beast and passion perverts the minds of rulers even though they be the best of men." Aristotle and Plato knew that the law cannot anticipate the endless permutations of circumstances and situations. There is bound to be a gap between the generalities of law and the specifics of life. This gap in our system of administration of justice is filled by the judge. In entrusting this task to the judge, we have synthesised the wisdom of Plato and Aristotle. It is here that the judge takes part in the process of lawmaking. Lawmaking is an inherent and inevitable part of the judicial process. The judge moulds and develops the law and often creates new legal norms in the

process of interpretation of the law. This process of lawmaking through legal interpretation must be appropriate and adequate enough to meet the needs of the society and to achieve the objectives and goals set-out in the Constitution. It must be remembered that a judge is not a mimic. Greatness on the bench lies in creativity. It is for this reason that when the Constitution or the law comes before a judge, he has to invest it with meaning and content so as to achieve the social purpose of the law and the values embodied in the Constitution. Law derives its legitimacy from justice. The people obey the law if it is just and in accordance with the norms and values which they have set out in the Supreme document. Herein lies the accountability of the judiciary to the people of the country.

Judicial creativity or judicial activism as it is commonly called must have a social purpose and must advance the law in the direction predetermined by the people in the Constitution. Above all, it must have the welfare of the people and of the common man as supreme in its scale of values. The judiciary is not on an uncharted sea in this exercise of judicial interpretational lawmaking. The constitutional values and the international human rights instruments serve as a beacon light, a lodestar to guide and provide direction to the judge, and he must follow the dictates contained in these documents, since these documents represent the will of the people and the aspirations of the world community. The judiciary cannot escape its accountability to these values by a mechanical or narrow doctrinaire view of the Constitution and the law.

This accountability can be secured through a vibrant media and a critical academia. Law academics and well-informed journalists must provide their comments and criticism on judgments delivered by the judiciary in the country. They must act as watchdogs anxious to secure that the judicial process moves in the right direction and serves the needs of the community as a whole. Whenever a judgment is delivered which is contrary to the constitutional values or inconsistent with human rights or

adverse to the interests of the vulnerable sections of society, the law academics and journalists should come out fiercely with criticism of the judgment and point out how the judge has failed to discharge its accountability to the people. Of course, the criticism must be in temperate language and must be directed only against the judgment and not against the judge, for the credibility of the judge must not be affected. Equally, where there is a progressive judgment upholding constitutional and/or human rights values, the law academics and journalists should applaud it. Let it not be forgotten that judges do not stand in chill distant heights. The tides and currents which engulf the rest of men do not bypass them, and they do not remain unaffected by criticism or praise. The law academics and the media can, therefore, help considerably to enforce the accountability of the judiciary to the people and to the values set out in the Constitution and the human rights instruments.

There is also one other phenomenon to which I must draw attention while discussing the question of judicial accountability. We find that in recent times there are several instances where holders of high judicial offices have acted in a manner not befitting the requirements of the high office held by them. There are allegations of corruption against some of them though such judges are fortunately still very few. However, such allegations of corruption are highly disturbing, and they seriously affect the credibility of the judiciary as an institution. There are, for example, instances in India where lawyers have gone on strike to protest against alleged corruption of some errant judges. There is, of course, the constitutional remedy in India of impeachment of judges for misconduct such as corruption, but it is too drastic a remedy, and it is well nigh impossible to secure evidence which would satisfy the heavy burden of proof before the tribunal established under the Constitution. There are also instances, not uncommon, where judges do not come in on time in court, absent themselves without sufficient cause, misconduct outside the court and do not deliver judgments for months and sometimes for two or three years, as happened in the case of an Indian

Supreme Court judge. There is no mechanism in India at present to correct such deviant behaviour of judges. It is, therefore, high time we evolve a mechanism – a permanent body to check such deviant behaviour on the part of judges. Such a step would go a long way towards effecting the accountability of the judges. This mechanism would have to consist only of judges. The executive should have no representation on it because that would affect the independence of the judiciary. Such a mechanism is absolutely essential and exists in some of the States in the United States of America. If a national judicial commission is set up for appointment of judges, it could well serve as the mechanism for correcting and checking deviant behaviour of judges. Some thought would have to be given to this aspect of the matter in order to arrest the deterioration which is currently seen to be taking place in the judiciary in some countries.

However, I must state that by and large the higher judiciary in most countries has acquitted itself very credibly and enjoys high credibility amongst the people – higher than any other organ of the State. The judiciary has, through its decisions, helped to improve the quality of life of the people and toned up the governing mechanism. The judiciary has also helped the nation to solve some of its most intractable problems.

Let me conclude by observing once again that it is misleading to say that the judiciary is not accountable or that it exercises power without any accountability. Such an indictment of the judiciary is based upon an inadequate appreciation of the true role of the judiciary in a democratic country governed by the rule of law under a regime of values of social justice and human rights.

## *II - A Comment*

*by*

*Jerome J. Shestack* \*

Justice Bhagwati's paper starts off with quoting the saying 'power corrupts and absolute power corrupts absolutely'. All power is held in trust and there must be accountability for judges as well. He said that law derives its legitimacy from justice and that people obey the law if it is just and in accordance with the norms and values they have set out in the supreme document to realise the accountability and judiciary to the people of the country.

Actually, there seems to be a tension between accountability and independence. If a judge is truly accountable, can he also be truly independent? Every person is entitled to an autonomous world and the autonomy of a person is the priority element of universality, but that must be conducted in such a way as not to harm others. To that extent, while the rule of law must govern, it is how the rule of law is applied that provides a measure of accountability.

How do we secure accountability? Justice Bhagwati suggests that it can be secured through an informed academic community and the media. This could be insufficient however.

---

\* Member of the Executive Committee of the International Commission of Jurists, and President of the American Bar Association. This is an edited transcript of the remarks made by Mr. Shestack during the session on the Independence of the Judiciary in the Conference of the International Commission of Jurists entitled 'Rule of Law in A Changing World' that took place in Cape Town, South Africa, from 20-24 July 1998.

To start with, there is a certain process of accountability that is routine. Judges in lower courts are subject to reversal by upper courts. In other words, all lower courts judges are accountable in that process. Also, judges' decisions that do not affect the constitution can be overturned by the legislator and that is a form of accountability. We need not focus much on this routine form, however.

Justice Bhagwati suggested that the academic community can play a vital role to achieve accountability. Academia however is slow and cautious. A few academicians criticised the decisions of the court in South Africa during the *Apartheid* era, because, among other things, they ignored international law. For the most part, *Apartheid* judges acted like good soldiers. The academic community now writes much about what has happened, but not at the time. So I think we cannot rely too much on the academic community for accountability.

As far as the media is concerned, it is often the problem not the solution. Justice Bhagwati conditions that criticisms must be informed. In reality, however, most of the media criticisms are uninformed and have been made with dubious knowledge. In the United States of America, for instance, judicial decisions are criticised because they are perceived as lenient on crime or because judges do not like to impose the death penalty. In fact judges need protection against the media in this respect because the media provides a chilling affect on judges. It is perhaps the responsibility of the Bar to deal with that.

What are the solutions? One solution is to have quality judges and that means self-accountability. If you have judges with high character, knowledge, training, and commitment to the rule of law, that in itself is a measure of accountability. To have such judges requires merit selection and tenure shielded from politics.

Another solution for accountability is to exercise the responsibility of the bar. The bar should establish a dialogue with the judiciary. Judges become accountable when they know they

will be protected by the Bar if they decide matters fairly and on the basis of the rule of law. This means that the bar itself should criticise decisions that depart from the principles of the rule of law and justice, but at the same time maintain the independence of judicial decisions.

In matters relating to misbehaviour such as inefficiency, absence, or inappropriate behaviour of a judge, there must be a procedure for discipline. This leads to the issue of corruption, which is a widespread problem in many countries. To deal effectively with corruption, the organ of the State government must be reformed. There is a need for harmony, honesty and integrity between the organs of government and the judiciary.

Corruption should also be exposed by the Bar; surely the Bar knows where the corruption is. It is ironic however that the Bar is often the corrupting influence. The judges themselves should also play a role because they generally know those who are corrupt. Requiring judges to give information about their colleagues is more difficult to achieve. Few are able to do that.

There is also major role for the business community. While business is often a source of corruption for the judiciary, it is essential to realise that business can best operate in a stable government and an independent judiciary, and an independent judiciary is certainly not a corrupt judiciary. Many businesses, and their shareholders, do not wish to be implicated in corruption scandals. In a modern global world, the business can play a leading and constructive role in combating corruption. There are international treaties that are currently being elaborated against corruption.

In conclusion, I would like to state that we do not have a ready means of accountability for judges. The situation is different from the legislative branch, which is directly accountable to the people - and this accountability is exercised through elections - or the executive branch where accountability comes through chief executives, and also through elections. This is why it is

imperative that the appointed judges are committed to the rule of law, and are not appointed because they are loyal to the executive. Ultimately, judicial accountability is best assured by an independent judiciary consisting of judges with quality, integrity, courage, and commitment to the rule of law.

# *Reflections on Judicial Independence, Impartiality and the Foundations of Equality*

---

*by*

*Claire l'Heureux-Dubé \**

Equality of all human beings is the most fundamental precept of human rights. As the concept of human rights becomes ever more universally accepted around the world, energy must be devoted to ensuring that these important ideals can be put into practice. The equality guarantees of international treaties and national constitutions, both young and old, must be lifted from the paper on which they have been carefully scrolled and be given life in the societies that they are intended to make more just. Invariably, armed with international human rights and constitutional guarantees, claims for equality, which are claims for justice, will be made through the legal system. Previously excluded and disadvantaged groups will hope, and expect, that their situations will be redressed and their complaints of injustice vindicated by judiciaries entrusted with the protection and enforcement of human rights in accordance with the rule of law.

Perhaps ironically, these demands for equality will be made most often to those very people in comparison with whom the rights claimants' disadvantage appears so unjust. These are the social,

---

\* Justice of the Supreme Court of Canada, and the President of the International Commission of Jurists (ICJ); I wish to thank my law clerk, Raymond MacCallum, for his invaluable assistance in the preparation of this paper.

cultural, racial, religious or economic élite who occupy the benches of the world's courts. Superficially, this reality may provide cause to despair for the meaningful advancement of substantive equality within the nations of the world. But a more nuanced appreciation of the operation of the judicial branch of government suggests that the justice system can not be so shallowly anchored that the gender of the judge, the image of his god, or the colour of her skin, will cast justice adrift. If in a particular country the system of justice is so shallowly anchored, then there exist more pressing concerns about the quality of justice than can be fixed by merely creating a judiciary that is representative of the society's constituent elements.

Of greater fundamental importance to the successful legal achievement of substantive equality is the institutionalisation and protection of an independent and impartial judiciary. The principles of judicial independence and impartiality underlie all constitutional human rights jurisprudence, and ever undergird the responsibilities of the judiciary in adjudicating equality rights disputes. This paper will discuss judicial independence and impartiality in the equality context, with the aim of explaining how the protection of these principles serves the broader goal of creating a legal, and ultimately a social environment, in which substantive equality can be enjoyed by all.

## **Judicial Independence**

What conditions allow judges to freely undertake the search for substantive equality, and to force the legislatures to uphold the social contract of which equality rights guarantees are an integral component in modern constitutional democracies? It is perhaps trite to state that the independence and impartiality of the judiciary are those building-blocks necessary to the achievement of more equitable societies.

An independent judiciary is fundamental to a democratic society founded on the rule of law. The rule of law has been explained as

meaning that “The law must stand supreme as the source and fabric of all social organization”.<sup>1</sup> It is aimed at achieving the objective of “the establishment of individual freedoms and the protection against any manifestation of arbitrary power by the public authorities”.<sup>2</sup> In this conception of the rule of law, it has a primary human rights, and equality, purpose. Internationally, a consensus exists in support of both safeguarding, and promoting, this ideal. In this respect, noteworthy is the Universal Declaration on the Independence of Justice,<sup>3</sup> which comprehensively lays out the constitutional and institutional requirements for an independent judiciary that would allow judges to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.<sup>4</sup> This is appropriately strong language to protect a fundamental safeguard of individual liberty and human rights ideals.

- 1 The Right Honourable Brian Dickson, Chief Justice of the Supreme Court of Canada, *“The Rule of Law: Judicial Independence and the Separation of Powers”*, address to the Canadian Bar Association, August 21, 1985, at p.2.
- 2 Adama Dieng, “The Rule of Law and the Independence of the Judiciary: An Overview of Principles”, *CIJL Yearbook*, vol. I, (April 1993) 21, at p. 21.
- 3 The Universal Declaration on the Independence of Justice was unanimously adopted by the First World Conference on the Independence of Justice, held at Montréal, Québec, in June of 1983. Reproduced in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985) at pp. 447-461. See also *CIJL Bulletin*, No. 25-26 (April -October 1990), Special Issue on the Independence of Judges and Lawyers: A compilation of International standards.
- 4 Article 2.02 of the Universal Declaration on the Independence of Justice, *ibid.*

The impetus for, and the accomplishment of, the Universal Declaration on the Independence of Justice, was carried through in subsequent years, and led to the development and endorsement by the United Nations General Assembly, in 1985, of the United Nations Basic Principles on the Independence of the Judiciary.<sup>5</sup> As the Universal Declaration had done before it, the Basic Principles expressly linked the creation of independent judiciaries in national systems throughout the world, with the world community's 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.<sup>6</sup>

Why is the independence of the judiciary so important to a democratic society committed to, and based upon, the rule of law and the equality of all of its members? In any democratic system, the judiciary is an integral component of a political system that provides for the settlement of disputes, and the accommodation of interests, in accordance with the rule of law. The judiciary bears the responsibility for adjudicating these inevitable disputes, whether they arise between individuals, between an individual and the government, or between different levels of government. The role of the judiciary is of particular importance in the constitutional law context, where it serves to adjudicate constitutional rights claims by individuals against their governments. It bears the further responsibility for nurturing, both directly and indirectly, a universal respect for the rule of law, so that the need to resort to violence, or employ other extra-legal means for dispute resolution, is precluded.

---

5 A/RES/40/32, 29 November 1985. Reproduced in *CIJL Bulletin*, No. 23 (April 1989), Special Issue on the International Commission of Jurists Conference on the Independence of Judges and Lawyers, Caracas, Venezuela (16-18 January, 1989) at pp. 109-113.

6 Basic Principles, *supra* note 5, the Preamble.

The independence of the judiciary is absolutely necessary to ensure that judges can perform their very important constitutional role, and in particular, that they can decide individual cases on their merits, informed and bound only by their good conscience understanding and interpretation of the law.<sup>7</sup> By constructing and protecting an independent judiciary, judges are insulated, at least theoretically, from the inevitable social and political pressures that accompany many legal disputes, and accordingly can resolve the legal issues without fear of interference or repercussion. In this way, ideally, the law ultimately resolves disputes, rather than disputes being settled by the arbitrary injustice of political, physical or economic might.

What practical content is there to the principle of judicial independence? In *Beauregard v. Canada*, the Supreme Court of Canada held that judicial independence is protected in three distinct ways: through the financial security of judges, through the security of tenure of judges, and through the administrative independence of the judiciary. The financial security of judges is a necessary prerequisite to judicial independence because it ensures that the executive or legislative branches of government cannot use a judge's salary as a tool to effect their own objectives in legal disputes before the courts in which they have an interest. Security of tenure of a judge is integral to judicial independence because a judge who can be removed from his or her office at the pleasure of the government cannot make decisions based only upon the dictates of the law, because he or she must be wary of displeasing the government. The rule of law, and consequently, the protection of individual rights from arbitrary State action, is impossible without security of tenure. In *R. v. Valente*, the

---

7 In its ever-developing jurisprudence, the Supreme Court of Canada has generally accepted these principles. See, generally, *Valente v. The Queen*, [1985] 2 S.C.R. 673 [hereinafter *Valente*]; *Beauregard v. Canada*, [1986] 2 S.C.R. 56 [hereinafter *Beauregard*], and; *Re Provincial Court Judges*, [1997] 3 S.C.R. 3.

Supreme Court of Canada gave content to the requirements of security of tenure in the following terms:

...that the judge be removable only for cause, and that the cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure ... is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.<sup>8</sup>

Finally, administrative independence of the judiciary is a necessary component of an independent judiciary, and must include judicial control over those administrative matters that bear directly and immediately on the exercise of judicial functions, namely, the assignment of judges to particular cases, sittings of the court and court lists, the allocation of court rooms, and the direction of the court staff responsible for carrying out these tasks.<sup>9</sup>

It is important to emphasise, at the risk of stating the obvious, that in spite of superficial appearances to the contrary, the enumerated components of judicial independence – financial security, security of tenure, and administrative independence – are not jealously guarded by the judiciary for their own self-interest. Judges do not expound upon, and affirm judicial independence in order to protect their own careers and benefits, and their own sphere of political power. Rather, by ensuring the independence of the judiciary, judges help to accomplish the objectives of the rule of law, which is to ensure respect for individual and collective rights and interests – including equality rights – in accordance with the Constitution, international law, and other democratic legal traditions. Clearly, the protection of judicial independence serves a much broader and fundamental

---

8 *Supra* note 7, at p. 698.

9 *Valente, supra* note 7, at p. 712.

collective social purpose than the self-aggrandisement of the judiciary.

## Equality

How does the independence of the judiciary further equality jurisprudence? In a democratic society, the practical reality of the political and governmental system is that it can tend toward myopically furthering majority interests, to the exclusion of minority concerns. In so doing, the majority can also entrench myths and stereotypes about the characteristics of the minority groups, upon which it will rely in the conduct of the business of governing society. Although in Canada now, after many years of increasing awareness and sensitivity, and over a decade with a constitutional guarantee of equality inequality tends now to be perpetuated through less overt and conscious processes, the resulting inequalities are no less justifiably eradicated. In a democratic society such as Canada, and many, many other countries, where this social tendency to ignore, overlook, or undervalue minority concerns has been recognised, and equality rights constitutionalised in order to combat this all too human inclination, an independent judiciary is crucial to safeguarding and giving substance to equality.<sup>10</sup>

10 Section 15 of The Canadian Charter of Rights and Freedoms, Schedule B, Part 1 of The Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 44, reads:

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

An independent judiciary can either rebuke the majority's approach to a particular problem or policy that has the effect of disenfranchising a minority group,<sup>11</sup> or it can reformulate the approach in order to respect the differences that characterise the minority. In Canada, since the constitutionalisation of equality rights in 1985, all governmental action, in order for it to be lawful, must respect the equality rights of all. Because an independent judiciary can act without fear of retribution, and is immune from interference, it can give full and practical effect to equality rights in the myriad of different ways that equality concerns manifest themselves in our complex, multicultural society. This frequently requires us to interfere with the legislative process by either striking down otherwise duly enacted legislative provisions, or by amending such provisions, where it has been determined that they contravene equality guarantees, or any other rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms.

To those critics of the exercise of such a fundamental judicial responsibility who believe that the courts are thereby subverting democracy by interfering with the democratically expressed will of the majority, (and it is those critics against whom judicial independence is absolutely necessary in order to sustain a democratic society based on the rule of law), a forceful and eloquent rebuttal was voiced by my colleague at the Supreme Court of Canada, Justice Michel Bastarache, who, when addressing these same criticisms, stated that:

rather than inimical to democracy, [this] role of the Court is essential to democratic institutions.<sup>12</sup> Substantive equality is a fundamental principle of a robust and just

---

11 See, e.g., *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

12 The Honourable Michel Bastarache, Supreme Court of Canada, "Experience, Morality, and the Liberty Interest in the Charter", address to The Lawyers Club, Toronto, Canada, January 5, 1998. See also, *Vriend v. Alberta*, *supra* note 11, at paras. 129-143, per Iacobucci J.

democracy. Of greater significance to the achievement of a democratic society than a formalistic respect for legislative procedure, is the substantive outcome that all members of society feel equally deserving of concern, respect and consideration.<sup>13</sup>

The rule of law, enforced by an independent judiciary, can achieve this outcome in those circumstances where the more short-term and political, as opposed to legal, interests of our elected representatives fail to adequately respect and protect minority interests and concerns.

## Impartiality

Judicial independence, although a necessary component of a democratic system based on the rule of law and committed to the substantive equality of all of its members, is insufficient by itself. An impartial judiciary is as integral to equality and to justice, as is an independent judiciary.

Judicial impartiality is distinct from judicial independence, at the same time that it is an essential component of it. Where judicial independence is about the nature of institutional relationships between the judiciary and the executive and legislative branches of the government, impartiality is about the individual judge's state of mind. A relationship of dependence between the judiciary and, for instance, the legislature, may create bias in the individual judge in favour of the legislature, when the legislature is a party before his or her court. But bias may also be the result of upbringing, experience, prejudice, or personal relationships with a party or a cause. And bias can interfere with a just result based on a good conscience application of the law, as much as can the absence of judicial independence. Bias, whether systemic or personal, will also jeopardise the legitimacy of the judiciary,

---

13 *Egan v. Canada*, [1995] 2 S.C.R. 513, at p. 545, *per* L'Heureux-Dubé J.

which weakens its protection and ultimately undermines the rule of law.

There are practical impediments to the achievement of complete impartiality in decision-making. As Benjamin Cardozo noted:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs ... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [he or she] be litigant or judge.<sup>14</sup>

This does not mean that impartiality is not possible, and should not be assiduously pursued. Justice Aharon Barak, President of the Supreme Court of Israel, explained the challenge of impartiality for a judge in the following way:

The judge must reflect the long term beliefs of society. He must avoid imposing on society his private creed ... This requirement for objectivity places a heavy burden upon the judge. He must be able to distinguish between his personal

---

14 Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921). As the Canadian Judicial Council more simply noted in its *Commentaries on Judicial Conduct*, "[...] there is no human being who is not the product of every social experience, every process of education, and every human contact". (Cowansville: Editions Y. Blais, 1991) at p. 12.

view of the ideal and the present day reality of society. He must establish a clear division between his personal beliefs and his judicial perception. He must recognize that his personal beliefs may not be those of society at large. He must distinguish clearly between his personal credo and that of the nation. He must be self-critical and restrained in his views. He must respect the shackles that bind him as a judge.<sup>15</sup>

Consistent with President Barak's position, true impartiality can be accomplished by uncovering and discarding the false preconceptions that have informed the individual judge's perspectives, so that they do not interfere with impartial decision-making. This is a necessary objective in order to do justice, particularly in the context of equality rights claims. Impartiality implies, and demands, that all parties before the courts be equal, and equal under the law, and deserve to have their individual claims resolved with this basic and fundamental notion in mind.

But in this context impartiality does not mean judicial neutrality. My colleague Justice Beverley McLachlin and I made this point in the recent Supreme Court of Canada case *R.D.S.*<sup>16</sup> In our view, the trial judge's comments did not evidence an impermissible partiality based on unfounded myths and stereotypes, but rather, demonstrated that she had properly taken into account the reality of the inequitable social context in which the alleged offence was committed, and her own experience of this social context. She then appropriately related this understanding of the

---

15 *Efrat v. Registrar of Population*, 47 (1) P.D. 749, 781, 782 (1993).

16 [1997] 3 S.C.R. 484. In *R.D.S.*, an acquittal of a black youth charged with assaulting a police officer was challenged by the Crown, who alleged that the black trial judge's comments when giving her oral reasons at the conclusion of the trial, that white police officers have been known to lie when dealing with black suspects, raised a reasonable apprehension of bias.

world to the conduct of the trial before her. In this sense, the judge was not neutral. But she was impartial.

Judges should not aspire to neutrality. When judges have the opportunity to recognize inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so. Impartiality does not demand that judges close their eyes to the reality of the society in which legal disputes occur, but rather that they remain open-minded to the possibilities for deeper understanding that differing viewpoints and experiences can provide. In this respect, I agree with Professor Richard Devlin that the classical image of justice – Themis blindfolded – is a deficient icon in a complex, multicultural society.<sup>17</sup> Professor Devlin proposes instead a “situationalist” conception of justice, which recognises the reality that everyone involved in the legal system, judges included, has been moulded, and continues to be affected by their own experiences. He points out too, that such a conception of justice is consistent with a substantive approach to equality jurisprudence “because it can contemplate the possibility of differential treatment being a mechanism of equality”.

In the context of discussing the foundations of equality, and the impartiality of the judiciary in particular, it is appropriate to reflect and comment on those justifiable and understandable demands for a judiciary that is more representative of our societies than the traditionally élite, white, and male judiciary. Do we really need, for instance, more women judges to perform the very challenging task of impartial, equality-sensitive adjudication? Demands for a more representative judiciary are premised on the recognition that women’s life experiences tend

---

17 See generally, Richard Devlin, “Judging and Diversity: Justice or Just Us?”, presented to the annual meeting of the Ontario Court of Justice (Provincial Division), 1996, available on the Internet at <<http://www.acjnet.org/capecj/delvin.html>>.

to differ from men's in some significant, shared ways and that women's perspectives are equally important to men's in determining a just result to a legal question or dispute. The exclusion of women's different perspectives and experiences from the historical development of the law has certainly contributed to the entrenchment of many myths and stereotypes in our legal systems which, in turn, have perpetuated inequalities and injustices. The lack of diversity on the bench, and in the legal profession more generally, has similarly led to inequality in the law's treatment and understanding of other groups outside of the white, male, able-bodied norm.

There is an obvious correlation between the presence of women on the bench, and advances in gender-sensitive jurisprudence. A more representative bench undoubtedly has achieved, and will continue to achieve, advances for substantive equality. The more diverse are the personal experiences that judges can bring to the law, and incorporate into the decision-making process, the richer will be the quality of law-making. The legal marketplace of ideas can only benefit from a more varied selection.

But as the first woman Justice of the Supreme Court of Canada, Bertha Wilson, sagely pointed out, "it will be a Pyrrhic victory for women and for the justice system as a whole if changes in the law come only through the efforts of women judges and women lawyers".<sup>18</sup> The same is true for other under-represented groups. The legal advancements in the name of equality have not been achieved only due to the efforts of those with a personal stake. Any system of justice that depended on the group identity of the judge for the correct outcome would be truly impoverished. Our energy and focus should not be directed primarily at forming a representative bench. Even more important than increasing the representativeness of the judiciary for its own sake, is ensuring

---

18 Bertha Wilson, "Will women judges really make a difference?" (1990), *Osgoode Hall L.J.* 507, at 516.

that all members of the judiciary, indeed all individuals in positions of authority and power, whatever their gender or colour or ability or sexual-orientation, are equipped with the capacity to speak the language of equality, and to open their minds to experiences that are not their own. And in this crucial task of improving justice, everyone with input into the legal process must play a part, whether as judges, advocates, or academics, to assist the judiciary to understand experiences that are not their own. Only in this way can it be ensured that all equality claims are justly adjudicated, and that substantive equality is the final outcome.

## **Conclusion**

The essential function of our legal systems is to render justice. The independence of the judiciary ensures that judges are only beholden to the demands of justice, while an informed impartiality ensures that judges are not blind or deaf to those demands. Integral to satisfying the demands of justice is that equality be achieved in the process and in the outcome, because inequality is injustice. Inevitably injustice leads to oppression, which has no place in the societies we wish to build for our children.

## *A Note on the CIJL Protection Work*

---

*by*

*Marie-José Crespin* \*

The Centre for the Independence of Judges and Lawyers (CIJL) is now twenty years old and has collected a rich experience of positive results, as well as of disappointments. Defending the rule of law and international norms in the field of the independence of judges and lawyers is somewhat of a challenge; a difficult objective for a militant organisation such as the CIJL, owing to the immensity of such work, the dedication of its staff and institutional commitments made over a long period of time.

It is worthy to report that year after year, and despite the CIJL's indefatigable commitment to denounce the most serious violations perpetrated against judges and lawyers, that the monitoring of the human rights situation in the world in general can lead to discouragement. This is because it seems that the will of man to dominate his kind is becoming ever more aggressively ascertained. Also, the hegemonic tendency to invade the geographic, political and psychological domains of others is becoming less uncommon. In addition, the trade of deadly weapons, i.e., more sophisticated and imaginative arms, prospers, and threatens many individuals and countries.

These scourges are all inherent to human nature and are certainly amplified by the effects of globalisation and today's immediate dissemination of information. They link-up to

---

\* Member of the ICJ; Member of the Conseil constitutionnel, Senegal. This is a translation of the original French text.

provoke, for instance, the multiplication of conflicts, trials, and the annihilation of the incessant efforts undertaken by those whose conscience is hurt, and who have chosen to erect human rights as the cornerstone of their lives.

The CIJL ambition is to alert public opinions which have become oblivious to the fact that in many countries of the world it has become the norm to practice torture in police stations and to carry out arbitrary detentions and the assassination of many judges and lawyers. Owing to such CIJL efforts, it is now quite possible to affirm that, year after year, the list of countries which have been indexed for their treatment of judges and lawyers is growing.

There is no doubt that many countries have been able to escape scrutiny simply because of lack of reliable information. However, at this stage, it is possible to note that in 1989, the CIJL singled-out 48 countries for their violations of the independence of judges and lawyers. In 1990, it singled-out 48 countries; in 1991 it singled-out 49 countries; and between June 1992 and June 1993 it singled-out 55 countries; and in 1995 it singled-out 52 countries.

In the 1995 CIJL survey it was noted that 572 jurists suffered reprisals for having performed their professional duties. Amongst them, 26 were assassinated, 2 were "disappeared", 97 were persecuted, arrested, detained or even tortured, 32 were physically attacked, 91 received verbal threats of violence and 324 were professionally sanctioned or dismissed without due consideration of their right to defence. This is an ironic situation in the case of jurists who are also human rights defenders.

Such a worrisome evolution leads us firstly to conduct a summary analysis of the type of judges and lawyers who become victims of such violations, as well as of the type of countries where such violations generally occur. Secondly, it leads us to enumerate the means that are currently available to combat human rights violations, whether they are more or less violent or

more or less subtle. Finally, it forces an attempt to find solutions collectively bearing in mind that debates will almost certainly ensue in connection to the possibility of envisaging other methods of investigation, persuasion or denunciation.

## **Summary analysis of the profile of some violating countries**

Below is a summary of the profile of some countries which have been catalogued for human rights violations, and identification of the victims who belong to the legal professions. The work is based on CIJL annual reports, *Attacks on Justice*.

### **I. The Countries**

It should first be observed that no continent is spared. It might be worth noting as well that such violations occur in all sorts of countries whether they have opted for a political system which is economically liberal, socialist or monarchic and traditional. Nearly all of these regimes have enshrined the independence of the judiciary as a principle in their respective constitutions, and nearly all have also recognised the principle of the separation of powers.

It should also be mentioned that it is in countries that are in a state of internal or international conflict, or have experienced a coup d'état, that the most serious violations of human rights have been committed. Over a period of five years, a dozen countries have been cited with regularity. These include Cambodia, China, Colombia, Guatemala, Haiti, Turkey, Tunisia, Argentina, Colombia, Egypt, and The Philippines.

### **II. The Victims**

The phenomenon of victimisation is, more often than not, a cascading one. In that resides the most poignant feature of human rights abuses affecting judges and lawyers.

It would be very serious if the lawyers who perform their professional right to provide defence or the judges who carry out their duty to adjudicate cases, were subjected to summary justice on the part of adversaries, whether they are members of the power structure or parties to any particular given case. However, should psychological or physical pressures be exerted on the family of a lawyer or judge, which is not infrequent, the reality would become that much more serious.

If, in the end, such pressure tips the scale of the balance in favour of one of the parties, or if impunity prevails over the rule of law, this would lead to turning the world over in a way that has never been advocated by any religion, political ideology, or constitution.

Naturally, it is always the most committed jurists who pay the highest price in systems where justice is being mutilated. These include the judges and lawyers who have a sense of political commitment, and are often members of professional associations; the militant jurists who belong to human rights organisations and who, because of the positions they have adopted, often bear the risk of being jailed or assassinated in defending a cause; finally, it is often the most independent judges and lawyers who, because of their professional and personal ethics, as well as their integrity, are weakened in the context of dictatorship.

It is regrettable to note that the judiciary and legal profession constitute most vulnerable bodies. This is because these two professions often fall hostage to power, including that of the media, which is the driving force and moulder of public opinion. Their obligation to remain silent, at least as far as judges are concerned, compel them to stay clear of all kinds of polemics as well as to avoid having to justify their decisions. As far as their decisions are concerned, only the decisions themselves are made public, not the particular states of mind which have shaped them.

There is also a certain form of frustration on the part of members of the legal profession whom are granted security of tenure on the one hand, but are stripped of it on the other, for reasons that are left to the appreciation of the executive branch.

The picture is not complete and remains sketchy. It merely serves to outline the problems faced by judges and lawyers whose very professional strength is at the same time the cause of their weakness. The existence of such a paradox renders jurists more conscious of their responsibilities and professional duties and makes them a privileged target for the oppressors of their independence.

### **Ways to combat threats against Judicial and Legal independence**

The CIJL's most important and concrete contribution remains to have actively lobbied for the establishment of a UN Special Rapporteur for the Independence of Judges and Lawyers. The Rapporteur, himself a CIJL Member, is facing threats in his own country.

*Attacks on Justice*, the annual publication of the CIJL, catalogues the many cases of harassment and persecution of judges and lawyers which have occurred over the past five years. Distributed around the world, the publication is a convincing plea in favour of the independence of the judiciary and of the bar. The story is a vivid one in terms of all the violations described.

In effect, alerting public opinion is a form of sanction which should provoke many governments to reflect upon their record. Such governments have a right to respond and to defend themselves against the accusations made against them in the international public arena. One has to note, nevertheless, that the manner in which some of the governments choose to respond to the accusations is, sometimes, quite bewildering in that it often

reflects a lack of democratic maturity in respect of pertinent universally recognised international norms.

Denunciation and persuasion remain, at the domestic as well as at the international level, the best way to provoke discussion on the violations. It remains, however, to be seen whether the means at the disposal of the CIJL are sufficient and adequate to have an impact on a large enough public audience.

The *CIJL Yearbook* is a publication that contains articles on the independence of the judiciary in certain countries as well as reports from conferences and seminars held on the same subject. It is a forum for expression of jurists from different horizons and as such it is a welcome initiative. It is a means for lawyers and judges to voice their concerns relating to the non-application of norms within the daily reality of their respective countries. The Yearbook hence encourages a debate on the subject.

The *Yearbook* replaced in 1992 the *CIJL Bulletin*, which was issued twice yearly. The 1990 issue of the *CIJL Bulletin* 25-26 on international norms in the field of the independence of the judiciary and of lawyers should become the reference tool of all jurists. Nevertheless, it is not difficult to realise that very few jurists, even at the highest levels, know about the existence of such norms or have had the opportunity to come across the 1985 UN Basic Principles on the Independence of the Judiciary and the 1990 UN Basic Principles on the Role of Lawyers. In such circumstances, how can judges and lawyers proceed to defend the interests of their respective professions or resist such pressures if they are not even cognisant of their rights in situations where, in the performance of their daily regular functions, they have to face executive invasion in the domain of the judiciary?

Even the monitoring organs of the judiciary itself, i.e., the disciplinary boards and other professional bodies staffed by high-ranking judges, don't usually have copies of the

constitutional guaranties relating to the independence of the judiciary in their libraries.

Apart from its publications, the CIJL attracts the attention of governments on individual cases of persecution of jurists. It issues *Alerts* highlighting these cases. It would be interesting to evaluate, how many governments respond to such complaints, and how many actually give them a favourable response, once they have been informed. This is to measure the impact at the national level of such international interventions.

The CIJL proposes technical assistance to jurists in the field of the independence of the judiciary, as well as in any other discipline that is linked to human rights and justice.

The CIJL sends delegations to countries to investigate issues related to the independence of the judiciary. It also sends observers, as often as possible, to report on trials of jurists and on the effective application therein of the various constitutional guaranties or international standards.

### **What more can be done?**

The answer is difficult since so much has already been intellectually achieved by the CIJL and also since, over the last twenty years, the Centre's action has been so diversified. There is no doubt that our proposals will be made in a context of *déjà vu* or *déjà fait*.

Essentially, and at least as far as the less visible and more subtle attacks against the independence of judges and lawyers are concerned, such violations are the fruit of observations made in the context of the monitoring of the judiciary. As far as the most egregious violations are concerned, where the very right to life of judges or lawyers or their families is at risk, it is very difficult to correct the situation without risking to fall into utopia. In fact, we feel quite powerless to put an end to the natural and basic instinct of violence of man, except in advocating such measures

as the establishment of an International Criminal Court. This Court will have the mission to combat the spectacular development of the phenomenon of impunity whose victims are mainly civilians and amongst whom are found jurists, journalists and women, who are particularly targeted in the case of genocide and of other crimes against humanity.

# ***Centre for the Independence of Judges and Lawyers***

## ***Advisory Board***

### ***Chairman***

P.N. Bhagwati

Former Chief Justice of India

### ***Board Members***

Perfecto Andres Ibañez

Judge (Spain)

Lloyd Barnett

President, Organization of Commonwealth  
Caribbean Bar Associations (Jamaica)

Amar Bentoumi

Secretary-General, International Association  
of Democratic Lawyers (Algeria)

Sir Robin Cooke

President of the Court of Appeal (New Zealand)

Marie José Crespin

Member, Conseil Constitutionnel (Senegal)

Dato Param Kumaraswamy

UN Special Rapporteur on the Independence  
of the Judiciary; past President, Malaysia Bar Council

Jules Deschênes

Former Chief Justice, Superior Court of Québec (Canada)

Enoch Dumbutshena

Former Chief Justice (Zimbabwe)

Diego García-Sayán

Andean Commission of Jurists;  
Member, UN Working Group on Disappearances (Peru)

Stephen Klitzman

Chairman, Committee on International Human Rights,  
American Bar Association (USA)

Pablito Sanidad

Chairman, Free Legal Assistance Group (Philippines)

Beinusz Szmukler

President, American Association of Jurists (Argentina)

Suriya Wickremasinghe

Barrister (Sri Lanka)

### ***Director***

Mona A. Rishmawi

The Centre for the Independence of Judges and Lawyers (CIJL) was created by the International Commission of Jurists in 1978. Its mandate is to promote world-wide the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers. The CIJL organises support for judges and lawyers who are harassed or persecuted, it sends observers to the trial of jurists, missions to examine the state of the independence of the judiciary and the legal profession throughout the world, and issues two periodic publications. *Attacks on Justice* analyses legal structures and their effect on the independence of the judiciary in more than 50 countries of the world and documents cases of jurists who are harassed or persecuted for carrying out their professional activities. The *CIJL Yearbook*, is a legal journal devoted to discussing issues related to the independence of the judiciary and the legal profession.

---



---

Centre for the Independence of Judges and Lawyers  
Geneva, Switzerland