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**INDEPENDENCE OF THE LEGAL PROFESSION:**  
**GLOBAL AND REGIONAL CHALLENGES**

The Hon. Justice Michael Kirby AC CMG\*

**THE PRINCIPLE OF INDEPENDENCE**

One of the features of the law that tends to irritate other sources of power is the demand of the law's practitioners – judges and lawyers – for independence. The irritation is often true of politicians, wealthy and powerful people, government officials and media editors and their columnists. Those who are used to being obeyed and feared commonly find it intensely annoying that there is a source of power that they cannot control or buy – the law and the courts. Yet the essence of a modern democracy is observance of the rule of law.<sup>1</sup> The rule of law will not prevail without assuring the law's principal actors – judges and practicing lawyers and also legal academics – a very high measure of independence of mind and action.

The concept of judicial independence requires that judges be free from any interference in the exercise of their judicial powers. Each judge must be independent from external influences that may seek to reduce his or her objectivity and impartiality. This requires independence both from the other branches of government, and from any other influences that may affect the capacity of a judge to decide a case strictly on the basis of its legal merits. It also requires independence from other

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<sup>1</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

judges involved in decision making, although the systems of appellate and judicial review necessarily impinge on a judge's independence of action. An impartial assessment of the facts and objective application of the law are essential for legal independence.

Judicial independence encompasses both institutional and individual aspects. As an institution, the judiciary must be respected as a distinct, separate and independent branch of government. At the same time, within the judiciary, individual judges must have the substantive freedom necessary to perform their duties in an independent and impartial manner, beyond any improper or undisclosed influence and pressure.

At a practical level, the doctrine of judicial independence incorporates a number of different factors. In relation to individual judges considerations such as competent appointments, security of tenure, and ensuring adequate remuneration are minimum requirements for the maintenance of judicial independence. At an institutional level, elements such as administrative independence, separation from the other arms of government, adequate resources and exclusive jurisdiction over matters for decision are essential for the establishment and maintenance of an effective judicature.<sup>2</sup>

An independent legal profession also requires that lawyers be free to carry out their work without interference or fear of reprisal. Lawyers have a duty, within the law, to advance the interests of their clients fearlessly and to assist the courts in upholding the law. To enable them to perform these duties it is necessary that lawyers enjoy professional independence. Challenges to such independence may arise where lawyers are not able to form independent professional organisations; are limited in the clients whom they may represent; are threatened with disciplinary action, prosecution or sanctions for undertaking their professional duties; are in any other way intimidated or harassed because of their clients or the work that they undertake; or are subjected to unreasonable interference in the way they perform their duties.

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<sup>2</sup> See, for example: *Valente v The Queen* [1985] 2 SCR 673; *Mackeigan v Hickman* [1989] 2 SCR 796; *R v Généreux* [1992] 1 SCR 259; *Van Rooyen & Ors v The State & Ors* 2000 (5) SA 246.

Independence is not provided for the benefit or protection of judges or lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, its purpose is the protection of the people, affording them an independent legal profession as "... the bulwark of a free and democratic society."<sup>3</sup>

Differences exist concerning the details of what is necessary and sufficient to ensure the independence of judges and lawyers. Thus, the High Court of Australia recently decided a case concerning whether the rule providing for immunity against civil actions for negligence on the part of advocates and other practising lawyers for court-related work was essential to uphold their independence of action and duties to the courts.<sup>4</sup> Like courts elsewhere, I took the view that professional immunity was not part of the Australian common law. However, a majority of the High Court of Australia concluded that immunity remained in place and served several interests, including professional independence. Judges, who do not give advice, are immune from personal civil liability for their judicial acts, and also for some administrative actions. Views therefore differ as to matters of detail. But on the fundamental point of the necessity of protecting both judicial and legal professional privilege, there is no dispute. Such independence is vital for the impartial and honest administration of justice and the courageous maintenance of the rule of law.

### **A PRINCIPLE OF INTERNATIONAL LAW**

The principle of an independent legal profession is recognised internationally. The importance which the international community places upon the independence of the judiciary and of lawyers is evidenced by the emphasis that it is given in numerous international and regional treaties<sup>5</sup>, United Nations resolutions<sup>6</sup> and international

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<sup>3</sup> J Debeljak, *Judicial Independence in the Modern Democratic State* (1999) 74 Reform 35, at 38.

<sup>4</sup> *Ryan D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

<sup>5</sup> For example, judicial independence is guaranteed under: Article 10, *Universal Declaration of Human Rights*, Article 14.1, *International Covenant on Civil and Political Rights*; Article 6, *European Convention for the Protection of Human Rights and Fundamental Freedoms*; Article 7, *African Charter on Human and Peoples' Rights*; Article 8, *American Convention on Human Rights*; Article 3, *Inter-American Democratic Charter*.

statements.<sup>7</sup> The principle of judicial independence is also enshrined in countless national constitutions<sup>8</sup>. The creation of the office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers is further evidence of international recognition of the need to develop, protect and strengthen the independence of the legal profession. A distinguished lawyer from the Asia/Pacific region, Dato' Param Cumaraswamy of Malaysia, was the initial Special Rapporteur for this purpose. He was vigorous and influential. His success ensured that the office would continue within the United Nations human rights system – as it has. The pursuit of the independence of judges and lawyers is not, therefore, merely an aspirational principle. It is a central tenet of international human rights law of great practical importance.

The *Beijing Statement of Principles of the Independence of the Judiciary* evidences the universality of this concept as a core value of international law. Almost ten years ago this statement of judicial independence was adopted by unanimous resolution at the 6<sup>th</sup> Biennial Conference of Chief Justices of Asia and the Pacific. The statement was supported by the Chief Justices of twenty nations.<sup>9</sup> A further twelve signatories

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<sup>6</sup> For example: UN General Assembly Resolutions 40/32 (29 November 1985) and 40/146 (13 December 1985); UN Commission on Human Rights Resolutions 2004/33 (19 April 2004), 2003/43 (23 April 2003), 2002/43 (23 April 2002), 39/2001 (23 April 2001) and 2000/42 (20 April 2000).

<sup>7</sup> For example: *Suva Statement on the Principles of Judicial Independence and Access to Justice* (2004); *Cairo Declaration on Judicial Independence* (2003); *Bangalore Principles of Judicial Conduct* (2002); *UN Basic Principles on the Role of Lawyers* (1990); *Basic Principles on the Independence of the Judiciary* (1985); *International Bar Association's Minimum Standards of Judicial Independence* (1982); *United Nations Draft Principles on the Independence of the Judiciary* (1981).

<sup>8</sup> For example: Article 126, *Constitution of the Peoples' Republic of China*; Section 119 of the *Constitution of the Democratic Republic of East Timor*; Article 97, *Basic Law for the Federal Republic of Germany*; Article 35(2), *Constitution of Ireland*; Section 76(3), *Constitution of Japan*; Article 165(2), *Constitution of the Republic of South Africa* (1996); Article 118, *Constitution of the Republic of the Fiji Islands*; Article 117(1), *Constitution of Spain*.

<sup>9</sup> Chief Justice of Australia; Chief Justice of Bangladesh; Vice-President, Supreme People's Court of the People's Republic of China; Chief Justice of Hong Kong; Justice of the Supreme Court of India; Chief Justice of Indonesia; Chief Justice of the Republic of Korea; Chief Justice of Mongolia; Chief Justice of the Supreme Court of the Union of Myanmar (formerly Burma);

have since been added.<sup>10</sup> Despite the political, social, cultural, and economic differences between these states, all have agreed that the principle of a strong and independent judiciary is a common goal of societies that uphold human rights and respect the rule of law.

The adoption of the *Beijing Principles* involved a significant commitment. The development of international and regional instruments of this kind, emphasising the independence of the judiciary and the legal profession, is a positive step. However, expressing minimum standards in human rights instruments or national constitutions does not, of itself, ensure that those standards are always observed in practice. For the independence of judges and lawyers to be respected in practice, it is necessary to guard against the erosion of this independence and to be vigilant in translating the theory of legal professional independence into practice.

### **UPHOLDING THE RULE OF LAW**

Why is it so important to protect the independence of the legal profession and to be constantly on guard against attempted encroachments? If the law is to be applied to all people equally, the people must have confidence that the judiciary applies the law neutrally against the government and is not afraid of making unpopular decisions against powerful interests. If the people are to have faith that legal decisions are based upon their legal and factual merits rather than political interests or popular clamour, judicial independence is essential. If *all* people are entitled to equal protection under law, without exception, lawyers must be able to represent unpopular clients fearlessly and to advocate on behalf of unpopular causes, so as to uphold legal

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Chief Justice of Nepal; Premier Président, Court of Appeal of New Caledonia; Chief Justice of New Zealand; Chief Justice of Pakistan; Chief Justice of Papua New Guinea; Chief Justice of the Phillipines; Chief Justice of Singapore; Justice of the Supreme Court of Sri Lanka; Chief Justice of Vanuatu; Chief Justice of Vietnam; Chief Justice of Western Samoa.

<sup>10</sup> Chief Justice of Fiji; Chief Justice of Japan; Chief Justice of the Republic of Kiribati; President of the Constitutional Court of Korea; Chief Justice of Malaysia; Chief Justice of the High Court of the Marshall Islands; Chief Justice of Nauru and Tuvalu; Chief Justice of the Republic of the Seychelles; Chief Justice of the Supreme Court Russian Federation; Chief Justice of the Solomon Islands; President of the Supreme Court of Thailand; Chief Justice of Tonga.

rights. To ensure the supremacy of the law over the arbitrary exercise of power a strong and independent legal profession is therefore essential.

In this way, an independent legal profession is an essential guardian of human and other rights. By ensuring that no person is beyond the reach of the law, the legal profession can operate as a check upon the arbitrary or excessive exercise of power by the government and its agents or by other powerful parties. By basing advocacy and judgments upon the rule of law, as opposed to the wealth or power of relevant interests or the transient popularity of the decision or of the interests affected, both lawyers and judges are indispensable instruments for the protection of minority and individual rights.

There is no single ideal model that encapsulates perfectly the independence of the legal profession. Different arrangements may be adopted in different countries and different areas of the law's operation. This fact was acknowledged recently by Chief Justice Gleeson of Australia in relation to judicial independence in the decision of the High Court of Australia in *North Australia Aboriginal Legal Aid Service Inc v Bradley*<sup>11</sup>. Whilst there is diversity amongst nations over the precise methods used in implementation, it is important that our societies remain unified in the underlying commitment to the principle of the independence of the legal profession and to practical measures to ensure that it is upheld. This means that judges and lawyers must explain why it is important. Sometimes, to do so, they must reach over the heads of antagonistic sources of power in government, the community and the media, jealous of the law's independence.

### **CHALLENGES TO THE INDEPENDENCE OF THE LEGAL PROFESSION**

Despite its important position as a protector of minority rights and individual freedoms, the judiciary is also the weakest arm of government. It is the branch of government that holds "... neither the sword nor the purse".<sup>12</sup> This fact increases the

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<sup>11</sup> *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 78 ALJR 977, per Gleeson CJ at 979.

<sup>12</sup> Justice Susan Denham, *The Diamond in a Democracy: An Independent, Accountable Judiciary* (2001) 5 TJR 31 at 45.

need for vigilance to ensure the strength and vitality of the institution. Even in countries where the independence of the legal profession has a long history and appears to be well entrenched, it is easy to take the principle for granted. There are many examples illustrating the fragility of the independence of the legal profession. These examples should be considered, not simply to indulge in censure but to learn from them and to avoid repeating mistakes.

The extent of the challenge is demonstrated in the recently released *2004 Country Reports on Human Rights Practices*, which is compiled by the United States State Department.<sup>13</sup> The report raises concerns over the independence of the legal profession in more than half of the nations whose Chief Justices have endorsed the *Beijing Statement of Principles of the Independence of the Judiciary*. By the same token, in the same period, concerns have been expressed within the Asia-Pacific region over the independence of action of the courts and legal profession in the United States in respect of detainees in Guantanamo Bay. Those concerns have been partly assuaged by the decision of the United States Supreme Court in *Rasul v Bush*<sup>14</sup>, deciding that those retaining the detainees of the “war on terror” are answerable to the courts and not just to the executive government.

Similarly, the report *Attacks on Justice: the Harassment and Persecution of Judges and Lawyers (2002)*, released by the International Commission of Jurists records reprisals against 315 lawyers and judges, including 38 murders and 5 disappearances in the period covered.<sup>15</sup> Undoubtedly, this report understates the real position. The instances illustrate that a gap exists between the commitment to the theory of legal independence and translation of that commitment into day to day practice.

Recent examples, both within our region and around the world, illustrate just how easily independence can be compromised and how quickly the strength of the judiciary and legal profession can be eroded.

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<sup>13</sup> Bureau of Democracy, Human Rights and Labor (U.S Department of State), *Country Reports on Human Rights Practices – 2004*, 28 February 2005. Accessed at: <http://www.state.gov>.

<sup>14</sup> *Rasul v Bush* 124 S.Ct. 2686 (2004).

<sup>15</sup> International Commission of Jurists, *Attacks on Justice: the Harassment and Persecution of Judges and Lawyers*, 2002.

For example, the situation in Nepal is obviously of concern. On 1 February 2005 His Majesty King Gyanendra dismissed the government, assumed direct rule and declared a state of national emergency. Since that date, human rights lawyers have been amongst the leaders and activists who have been detained or placed under house arrest. Sindhu Nath Pyakurel (the former President of the Nepal Bar Association) was reportedly one such detainee. He was ultimately released just two hours before the Supreme Court of Nepal was listed to consider his *habeas corpus* petition.<sup>16</sup> Once again, the importance of the Great Writ for the defence of liberty and the maintenance of the rule of law was demonstrated. The recent royal order establishing the Royal Commission on Corruption Control has also been condemned by the Nepal Bar Association. The Association has said that the establishment of the Commission is contrary to the rule of law and undermines judicial independence.<sup>17</sup> Time will tell whether this is so.

An example outside the Asia/Pacific region, one in which a resolution appears to have been achieved, concerns the Swaziland judicial crisis in November 2002. That crisis was triggered by the government's rejection of a judgment of the High Court of Appeal. The government claimed that the judges were influenced by "external forces" in their judgment. The government declined to release certain people who had been granted bail by the court. The crisis led to the resignation of the entire bench of the High Court of Appeal. A fact-finding mission conducted in January 2003 by the International Commission of Jurists concluded that:

“... threats to judicial independence are deeply rooted and routine in Swaziland and that periodic attacks on the judiciary by the Executive have given way to an Executive attitude that holds the judiciary, the rule of law,

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<sup>16</sup> Human Rights Watch, *Nepal: Media Blackout Heightens Risk of Abuse*, Press Release, 16 February 2005, Accessed at: <http://www.hrw.org>; Human Rights Watch, *Nepal: Danger of "Disappearances" Escalates*, Press Release, 9 February 2005, Accessed at: <http://www.hrw.org>.

<sup>17</sup> OneWorld South Asia, *Nepal: A Step into Lawlessness*, 3 March 2005. Accessed at: <http://southasia.oneworld.net/article/view/103556/1/5339>.



and the separation of powers in virtual contempt, in particular when they conflict with entrenched interests.”<sup>18</sup>

The crisis was only resolved in August 2004 when a new Prime Minister unequivocally withdrew the government statement that had triggered the crisis. He introduced legislation to reconstitute the High Court of Appeal and to pave the way for the release of all persons who had been granted bail by the courts but who were still incarcerated.<sup>19</sup>

Similarly, direct attacks on judicial independence, also outside the Asia/Pacific region, have been seen in both Venezuela and Ecuador. In Venezuela, the enactment of so-called “court-packing” legislation has allowed the ruling coalition to expand the size of the Supreme Court by more than half its former number, through the appointment of twelve new Justices to the Court in December 2004. The new Organic Law of the Supreme Court also purported to give the governmental coalition the power to remove judges from the Supreme Court without the two-thirds majority vote required by the Constitution.<sup>20</sup>

In Ecuador, the Congress in a special session called by President Lucio Gutierrez in December 2004, voted to replace 27 of the 31 Supreme Court Justices. The replacement Justices were all selected from political parties that had successfully opposed earlier attempts to impeach the President. This move followed the replacement of the majority of judges on the Electoral Court and Constitutional Court the previous month. It occurred despite the fact that the 1998 Ecuadorian Constitution does not grant Congress the authority to impeach justices and specifically provides that vacancies on the Supreme Court should be filled by the Court,<sup>21</sup> itself a somewhat controversial provision.

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<sup>18</sup> International Commission of Jurists, *The Independence of Judges and Lawyers*, 1 April 2004, Accessed at <http://www.icj.org>.

<sup>19</sup> Parliamentary Report, *Swaziland – Judicial crisis ends after two years* (2004) The Parliamentarian, Issue 4, pp. 380-381.

<sup>20</sup> Human Rights Watch, *Venezuela: Chavez Allies Pack Supreme Court*, Human Rights News, 14 December 2004. Accessed at: <http://www.hrw.org>.

<sup>21</sup> Human Rights Watch, *Ecuador: Supreme Court Purged*, Human Rights News, 17 December 2004. Accessed at: <http://www.hrw.org>.

Recently proposed legislation met a different fate in Italy. It was vetoed by President Ciampi. Concerns had been expressed that the legislation, approved by the Italian Parliament, would have a potentially limiting effect upon judicial independence. The primary concerns included the role to be played by the Justice Ministry in nominating the chief prosecutor for important criminal prosecutions, the weakening of the Higher Judicial Committee, and the provision of increased Executive powers in relation to the judicial disciplinary process<sup>22</sup>. The United Nations Special Rapporteur on the Independence of Judges and Lawyers wrote to President Ciampi on 15 December 2004, expressing concern that the changes:

“... represent a worrying limitation to the guarantees of independence that, for over a decade now, have been considered to be key features of the Italian judiciary.”<sup>23</sup>

Of continuing concern has been the reported situation in Zimbabwe. There the independence of the legal profession appears to have been seriously compromised in recent years. Zimbabwe Lawyers for Human Rights recently expressed concern over what it said were “... increasing incidences of intimidation of justice administration officials by State security agents.”<sup>24</sup> The perceived refusal of the government to abide by judicial rulings, seen as being against its interests,<sup>25</sup> and the intimidation of lawyers and judges through arrests and criminal prosecutions,<sup>26</sup> appear to have had a

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<sup>22</sup> The British Institute of Legal and Comparative Law, *Bulletin of Legal Developments* (2005) Issue No. 1, 17 January 2005, p. 3.

<sup>23</sup> UN Press Release, *UN Expert Welcomes Italian President's Decision to Send Judicial Reforms Back to Parliament*, 17 December 2004, accessed at: <http://www.unhchr.ch>.

<sup>24</sup> AllAfrica.com, *Harassment of Lawyers Slammed*, 21 February 2005, Accessed at: <http://www.allafrica.com>.

<sup>25</sup> Two recent examples are the decisions in March 2004 by the Government to ignore rulings by Magistrate Tsamba and Justice Bhunu ordering the release of two accused (Mr. James Makemba and Mr. Phillip Chiyangwa). The Government instead ordered the police to re-arrest both men.

<sup>26</sup> One recent example was the arrest of former Justice Blackie, two months after his retirement. Justice Blackie was charged with corruption and obstructing the due administration of justice following his sentencing of the former Justice Minister to a three months imprisonment for contempt of court. The Prosecution ultimately withdrew these charges prior to the hearing, with

chilling effect on legal independence in Zimbabwe. The United Nations Special Rapporteur on the Independence of Judges and Lawyers concluded in 2004 that examples such as these are part of:

“... a series of institutional and personal attacks on the judiciary and its independent judges over the past two years, which have resulted in the resignations of several senior judges and which have left Zimbabwe’s rule of law in tatters. When judges can be set against one another, then intimidated with arrest, detention and criminal prosecutions there is no hope for the rule of law, which is the cornerstone of democracy. It paves the way for governmental lawlessness.”<sup>27</sup>

A recent decision of the Supreme Court of Zimbabwe, quashing an order of the State Media and Information Commission denying a newspaper a licence to operate, shows that judges and lawyers still have a role to play in that country. However, the same decision refused to strike down several restrictive provisions in the *Access to Information and Protection of Privacy Act* causing media interests to describe the overall ruling as ‘disappointing’.<sup>28</sup>

Encroachments on the independence of the legal profession can take many forms. They are not limited to direct interference in the judicial process by the Executive. An example of a more systemic problem, and an issue that raises many serious questions about judicial independence, is the conduct of judicial election campaigns in the United States of America. The Brennan Center for Justice in that country recently revealed that, during the 2004 United States elections, television spending in State Supreme Court elections in those States where judges are elected or re-elected to office, reached an all time high of just over \$21 million dollars. Deborah Goldberg, the Director of the Democracy Program at the Brennan Center, identified the potential questions that this spending raised in relation to judicial independence. She said:

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the International Commission of Jurists suggesting that the charges were “politically and racially motivated.”

<sup>27</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers (Addendum: Situations in specific countries or territories)*, 4 March 2004, UN Document E/CN.4/2004/60/Add.1.

<sup>28</sup> International Bar Association, *Legal Brief Africa*, Issue No. 121, 14 March 2005.

“High spending by candidates means that special interest groups are giving substantial amounts directly to judicial candidates, furthering the impression that justice is for sale.”<sup>29</sup>

In Australia, there has long been a lively controversy over the appointment of acting and part time judges, especially from lawyers who serve for a time and then return to private practice. As this is a matter that may one day come before me judicially, I will say little about it. For constitutional reasons such appointments cannot be made to the federal judiciary. However, in some States they have been made, or proposed to be made, to the State judiciary. The President of the Australian Judicial Conference (Justice Ronald Sackville) has said that the appointment of part time judges in Australia “... constitutes a practical threat to the integrity of the judicial system ...”<sup>30</sup> So in no country are issues concerning judicial and professional independence irrelevant. In every land, there is a need for attention to principle and to public as well as professional debate.

### **STRENGTHENING INDEPENDENCE WITHIN THE REGION**

Although there are numerous examples of state practice that does not meet the rigorous principles expressed in instruments such as the *Beijing Statement of Principles of the Independence of the Judiciary*, it is important to recognise that there have been positive developments within the Asia-Pacific region. One example in which the independence of the legal profession at work was demonstrated is the trial, appeal and ultimate release from prison of Datuk Seri Anwar Ibrahim, the former Deputy Prime Minister of Malaysia.

In 2001, following his arrest, the Kuala Lumpur Bar Committee issued a memorandum stating that the administration of justice was facing “... its darkest hour

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<sup>29</sup> Brennan Center for Justice, *Buying Time 2004: Total amount spent on judicial advertising peaks at \$21 million*, Press Release, 18 November 2004, Accessed at: <http://www.brennancenter.org>.

<sup>30</sup> See: *The Threat to Victorian Courts*, The Age, 28 February 2005, p. 11.

since independence.”<sup>31</sup> The imprisonment of Anwar Ibrahim was criticized domestically and internationally, on the ground that the charges and the prosecution were politically motivated and that the trial was flawed.

The overturning of Anwar Ibrahim’s sodomy conviction in a 2-1 decision of Malaysia’s Federal Court on 2 September 2004, obviously represents a very public assertion of judicial independence and of the rule of law within Malaysia. The judgment was described by the Asian Human Rights Commission as a “... watershed decision ...”<sup>32</sup>. Before the entire world, in a most visible case, it upheld the independence of the judiciary in Malaysia. The decision was implemented, promptly and without question, by the Government of Malaysia. Anwar Ibrahim is a guest at this Conference. Every time I visit UNESCO headquarters in Paris, I see Anwar’s photograph prominently displayed amongst the past Presidents of the General Conference of UNESCO. It can be expected that, as a beneficiary himself of the independence of bench and bar, he will now become a powerful and articulate champion of the virtues of such independence in Malaysia, our region of the world and beyond.

Similarly, the new Constitutional Court in Indonesia has demonstrated its independence in recent times. Last year the Court set aside the conviction imposed at trial on Masykur Abdul Kadir, who was convicted and sentenced to fifteen years imprisonment for his role in the Bali bombings that occurred on 12 October 2002. Kadir was not charged with conventional offences such as homicide or the like, but rather under anti-terrorism legislation introduced six days *after* the Bali bombings. In a 5-4 decision, the Constitutional Court ruled that these charges were unconstitutional, breaching the prohibition on criminal legislation having retrospective effect.

Given the significant damage caused by the Bali bombings and the international implications of the events, the pain experienced by the families of the victims, the

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<sup>31</sup> Kuala Lumpur Bar Committee, *The Administration of Justice in Malaysia – A Memorandum from the Kuala Lumpur Bar Committee*, 8 January 2001. Quoted in Human Rights Watch, *World Report 2002*, Accessed at <http://www.hrw.org>.

<sup>32</sup> Asian Human Rights Commission, *Court takes historic step in restoring independence of judiciary in Malaysia*, 3 September 2004. Accessed at: <http://www.ahrchk.net>.

importance to Indonesia of being seen to act strongly against terrorism, and the substantial evidence against the accused of involvement, there was considerable pressure upon the Indonesian authorities to ensure that those responsible for the bombings were brought to justice. In this light, the decision of the Indonesian Constitutional Court, whilst painful to the victims and their families, is a positive development for Indonesia. It indicates a determination to uphold the rule of law in what were certainly challenging circumstances. In a previous observation, I remarked:

“... in the long run, the fundamental struggle against terrorism is strengthened, not weakened, by court decisions that insist upon strict adherence to the rule of law. This extends to accused who are innocent, or who may be. But it also extends to accused who may be guilty. It is in Indonesia’s interests, and that of its neighbours and the Asia/Pacific region, that Indonesia’s courts should enjoy (even in such a case) a reputation for strict adherence to constitutionalism, the rule of law and the protection of human rights and fundamental freedoms. This prolongs the pain of many. But the alternative course is more painful for even more.”<sup>33</sup>

The independence of the legal profession has also been reflected in the actions of many lawyers within the Asia Pacific region, in representing clients whose cases may be legally arguable, but whose causes are not popular. Such independence has recently been recognised in Australia by the Law Council of Australia. The Council awarded its 2004 Human Rights Law Award to Mr Julian Burnside QC, a Melbourne barrister whose representation of asylum seekers in Australia has led to him becoming one of the most prominent critics of immigration laws and policies.<sup>34</sup> Further illustrations demonstrating that legal independence is alive and well in Australia include the many lawyers who acted *pro bono* for the asylum seekers rescued by the MV Tampa<sup>35</sup>; the lawyers who have represented Australian detainees at Guantanamo

<sup>33</sup> M D Kirby, *Upholding Human Rights after September 11: The Empire Strikes Back*. Contained in *Access to Justice in a Changing World: Collection of Papers from Judicial Colloquium in Suva, Fiji*, 6-8 August 2004, p. 48.

<sup>34</sup> Law Council of Australia, *Law Council Congratulates Human Rights Award Winner*, Media Release, 10 December 2004.

<sup>35</sup> See *Ruddock v Vadarlis* (2001) 110 FCR 491; *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

Bay<sup>36</sup>; and the teams of lawyers who have acted, generally free of charge and through the entire hierarchy of the courts, for detainees seeking protection under the *Refugees Convention* and the *Migration Act* giving it effect. Such lawyers provide clear examples of the importance of having an independent legal profession. In large and difficult cases especially, the courts themselves can scarcely perform their functions with efficiency and justice unless they have the assistance of experienced lawyers. Independent lawyers are a vital element in upholding judicial independence, human rights and the rule of law.

### **THE CHALLENGE OF TERRORISM**

Potentially an important challenge to the independence of the legal profession world-wide is posed by the contemporary fight against terrorism. Responding to the perceived increase in the threat of terrorism whilst also protecting the rule of law and fundamental human rights constitutes a significant question for all nations, and a particular challenge for members of the legal profession. History teaches that increased pressure is placed on the independence of the legal profession in times of war and national emergency. This may be illustrated by the divided wartime decision of the House of Lords in England in *Liversidge v Anderson*<sup>37</sup>. The majority opinions in that case have now been overruled. They are generally read with embarrassment and legal condemnation. The legal profession needs to be on its guard against pressure for judges and lawyers:

“... to interpret the law in the government’s favour; to secure convictions or uphold administrative detentions; to refrain from challenging the constitutionality of questionable legislation; to accept evidence obtained in dubious circumstances or where its reliability or provenance is unsound; to adjust the burden of proof against the suspect; and to accept curtailed, abbreviated or expedited judicial procedures.”<sup>38</sup>

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<sup>36</sup> Including Stephen Hopper (representing the recently released Mamdouh Habib), and Major Michael Mori and Stephen Kenny (representing David Hicks).

<sup>37</sup> *Liversidge v Anderson* [1943] AC 206 (HL).

<sup>38</sup> Matt Waldman, *The Judiciary after September 11*. Contained in *Access to Justice in a Changing World: Collection of Papers from Judicial Colloquium in Suva, Fiji*, 6-8 August 2004, pp. 14-15.

The challenge for the judiciary and legal profession is, within constitutionally valid laws, to continue insisting upon the application of the rule of law and the protection of civil liberties, even in circumstances of heightened security concerns.

The President of the Supreme Court of Israel, Justice Aharon Barak, expressed this concept well in *Beit Sourik Village Council v The Government of Israel*. That was a decision in which the Supreme Court of Israel upheld, in part, a challenge by Palestinian complainants concerning the erection of the ‘separation fence’ or security wall constructed through Palestinian land:

“We are aware that in the short term, this judgment will not make the state’s struggle against those rising up against it easier. But we are judges. When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state’s struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is no security without law. Satisfying the provisions of the law is an aspect of national security.”<sup>39</sup>

### **TRANSLATING IDEAS INTO PRACTICE**

The independence of the judiciary and legal profession is a fundamental principle recognised by the international community as indispensable in the attainment of a civilised society. It is fundamental to ensuring that the rule of law is upheld and in guarding against violations of human rights and freedoms. It needs more than words of self congratulations. In the present age it needs reinforcement. It protects the weak, the vulnerable and unpopular as well as the strong and powerful. Obviously, there are examples of nations that do not respect this principle. The current international climate of terrorism and the “war on terror” poses particular challenges for ensuring that this independence endures and is strengthened.

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<sup>39</sup> *Beit Sourik Village Council v The Government of Israel*, unreported decision of the Supreme Court of Israel sitting as the High Court of Justice [HCJ 2056/04], 2 May 2004, (Barak P, Mazza VP and Cheschin J concurring), at 44-5, [86].



Members of the legal profession have a particular responsibility to guard against threats to their independence and to be vigilant against attempted derogations. This responsibility falls on them because of their understanding both of the purposes behind the principles and of the significant costs that would be paid by society if the independence of lawyers and judges were lost. The challenge is to match rhetoric with action so as to ensure that the ideals of independence stated in so many international instruments are implemented in the realities of the justice system. As Chief Justice Warren Burger of the United States Supreme Court once observed:

“Ideas, ideals and great conceptions are vital to a system of justice, but it must have more than that – there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions.”<sup>40</sup>

Of course, we must not think that securing the independence of judges and lawyers spells an end to the problems of the law. Such independence is necessary but not sufficient for a just society. It is not much use lawyers being independent if few individuals in need can afford lawyers or if legal aid is missing or hard to find. It is not much use if the law, when accessed, is unjust and there is nothing that the judges and lawyers can do about the injustice. Or if there is no interest in law reform. Or if judges and lawyers are unrepresentative of the variety of society and ignorant about, or out of sympathy with, the legal needs of women and minorities. I praise the efforts of the judiciary and the law associations in Asia and the Pacific in striving to uphold judicial and professional independence. In this century, whilst maintaining this commitment, we must do more to promote access to law, reform of the law and its rules and the engagement of lawyers with ordinary people and litigants to whom, ultimately, the law belongs.

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<sup>40</sup> Chief Justice Warren Burger, *Address to the American Bar Association* (San Francisco), reported in *Vital Speeches*, 1 October, 1972.