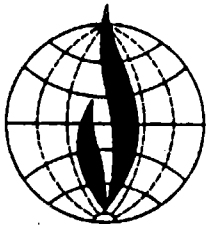
CIJL BULLETIN



Nº 24

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

October 1989

Editor: Reed Brody

THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to counter serious inroads into the independence of the judiciary and the legal profession by:

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

In pursuing these goals, the CIJL:

- intervenes with governments in particular cases of harassment or persecution and, in some instances, solicits the aid of a network of jurists and lawyers' organisations throughout the world to do likewise;
- works with the United Nations in setting standards for the independence of judges and lawyers and the impartial administration of justice. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary adopted at the Seventh Congress on the Prevention of Crime and Treatment of Offenders in 1985 and endorsed by the UN General Assembly. It is now working with the UN on similar principles on the role of lawyers;
- organises 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. Several national seminars have also been organised. These seminars bring together judges, lawyers, government officials, activists and academics to discuss obstacles to the implementation of the U.N. standards and how to overcome them;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries.

Affiliation – Contributions

The affiliation of judges', lawyers' and jurists' organisations is welcomed. Interested organisations are invited to write to the Director, CIJL.

Individual contributors support the work of the Centre by contributing not less than SFr. 100.– per year. They receive all publications of the Centre and the ICJ.

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EDITORIAL

Justice Bhagwati to Head CIJL Board

On 14 August 1989, the CIJL Director announced the formation of an Advisory Board to assist the CIJL in carrying out its work. The Chairman of the Advisory Board is P.N. Bhagwati, former Chief Justice of India. The other board members, whose names are listed on the inside back cover of this Bulletin, include several present Chief Justices and representatives of the leading international and regional bar associations.

Justice Bhagwati stands as one of the leading judicial activists of our time. During his tenure on the Supreme Court of India, he helped convert it from "an arena of legal quibbling for men with long purses" (in the words of one 1973 judgment) into an instrument of the oppressed majority. He encouraged social action litigation and brought about a "democratization of remedies," making the judicial process accessible to segments of the population which had been priced out of the legal system. We are extremely pleased to have persuaded him to take on the Chairmanship.

We are even more pleased with the dedication with which he has already applied himself to his task. On the same day of his appointment, Justice Bhagwati, announcing the release of the CIJL's report on "the Harassment and Persecution of Judges and Lawyers," made a stirring call to the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to take action to assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers. The Sub-Commission responded by naming its French expert, Mr. Louis Joinet (also a member of the CIJL Advisory Board), to study means by which the Sub-Commission could accomplish these tasks. Two weeks later, Justice Bhagwati went to Grenada to deliver the keynote address at the CIJL seminar on "the Judiciary and Human Rights in the Commonwealth Caribbean." There, he urged the

Chief Justices and Attorneys General present "to convert the rhetoric of human rights into reality." Each of these activities is reported elsewhere in this issue. He then prepared a letter to national Bar Associations and Chief Justices around the world, calling on them to join the CIJL in its efforts to promote the independence of the judiciary and the legal profession and returned to India to organise a CIJL seminar for High Court judges there.

We look forward to working with Justice Bhagwati and the other members of the Advisory Board in meeting the difficult and important challenges which lie ahead.

GHANA

Bar Association leaders detained;
Biennial Conference of the African Bar Association cancelled

The President and other leaders of the Ghana Bar Association were detained in Ghana in June and the Biennial Conference of the Africa Bar Association scheduled for 17-22 September 1989 in Ghana was canceled by the government of Ghana.

Mr. Peter Ala Adjetey, the president of the Bar Association, was detained from 23 June 1989 to 7 July 1989 and Mr. Nutifafa Kuenyehia, the National Bar Secretary, was detained from 27 June 1989 to 14 July 1989. Their detention is reported to have been in solitary confinement and consisted of extended periods in pitch darkness or in brightly lit rooms. Both Bar Association leaders were later released without charge after strong protests led by the CIJL, the International Bar Association and Amnesty International. A former president of the Bar Association, Sam Okudzeto, has also twice been detained without trial.

Peter Adjetey had been previously detained under PNDC Law 4 of 1982 and at the Bar Association Conference in 1987 he called for its repeal. Under Law 4, any person can be detained indefinitely without charge or trial if the PNDC (the Provisional National Defence Council, headed by Flight-Lieutenant J.J. Rawlings which took power in a 1981 coup) deems it in the interest of national security. This law was given retrospective effect to 2 January 1982 although passed on 2 March 1982 in order to "legalize" the detention of 492 ministers and party officials of the previous government and opposition.

The detentions of the two Bar Association leaders were connected to Memorial Lectures which were to be held at the end of June in memory of the three High Court judges and a retired Army officer who were abducted and murdered on 30 June 1982.

The murder of the three judges, Justice Cecilia Koranteng-Addo, Justice Fred Sarkodee and Justice K Agyepong in 1982, is an emotionally

charged subject. Prior to their deaths, the three had ordered the release of a number of security prisoners. The PNDC declined to prosecute one of its members and the head of the Ghana Security Service, who were amongst a group of ten suspects recommended for prosecution by a Special Investigation Board appointed by the PNDC. Other suspects arrested for killing the judges were charged, tried and executed shortly afterwards with no legal representation or right of appeal. The senior police officer who investigated the murder was later imprisoned on an apparently trumped up charge as was a police surgeon who refused to falsify a post mortem finding to conceal evidence of torture.

The PNDC has accused the Ghana Bar Association of objectives that are purely political and the cancellation of the 6th Biennial Conference of the African Bar Association must be seen in light of these other developments. The Ghanaian authorities, which had previously approved holding the long-awaited conference, canceled it at the last minute after many participants had already arrived in Accra. The government, in correspondence to the Ghana Bar Association, referred to financial considerations and stated that "as a result of new commitments it is advisable to space out all international conferences scheduled to take place in Ghana from now till the end of 1990. This is to allow for a full inventory and rehabilitation of existing conference facilities."

There have been allegations in the government-owned press in Ghana that the conference was to be used as a "launching pad for a destabilization campaign of economic sabotage, social turmoil and violence." Allegations leveled in the press state that Adjety met with representatives of Amnesty International and the U.S. Embassy in London who gave him advice and support for his supposed plans to topple the PNDC. The president of the Bar Association has refuted these allegations, concluding that "these publications must have been influenced or originated by persons who have evil intentions against me personally or against the Ghana Bar Association or its present leadership and are using the 6th Biennial Conference of the African Bar Association and its theme of Human Rights to project us as enemies of the government in order to have us eliminated or destroyed."

SUDAN

Bar leaders detained, judges dismissed, in coup aftermath

On 30 June 1989, the Revolutionary Council for National Salvation (RCC) headed by Brigadier (later promoted to Lt-General) Omar Hassan al Bashir, took power in a bloodless coup in the Sudan, overthrowing the elected government of Prime Minister Sadiq el Mahdi.

In the aftermath of the coup, the new government detained most political leaders. The entire senior command of the armed forces was also dismissed and all political parties, other non-religious associations and newspapers were banned.

Executive members of the Sudanese Bar Association, Mustafa Abdelkadir, Sadiq Al-Shami and Gelal Edin Al-Saayid, were arrested in early August 1989 after protesting against the dissolution of the bar association by the government.

Although they have not been formally charged, there is strong reason to believe that the bar association leaders have been arrested and detained solely for having protested the dissolution of the bar association and the government's suspension of the activities of trade unions and professional associations since the coup. On 31 July, the bar association and others submitted a memorandum to the government protesting the suppression of trade unions and calling on the government to allow the Sudanese Bar Association and trade unions to participate in the drafting of a new trade union law proposed by the government. The memorandum in addition urged the government to respect the international instruments ratified by Sudan.

Another prominent bar leader, Dr. Amin Mekki Medani, was arrested on 7 September and is also being held without charge. Dr Amin Mekki Medani was an executive member of the bar association and vice-president of the Sudanese Organization for Human Rights. He had been an outspoken critic of Islamic law punishments.

Judge Nimeiri of Omdurman was arrested during the week beginning 14 August 1989. It is believed that he was arrested after adjourning his court for one week in protest against government interference in the judiciary.

In addition to these arrests, at least 300 other people have been detained in the Sudan since the coup.

On 28 August, the CIJL wrote to the government of Sudan expressing its concern at the detention of these individuals and asked for them to be charged or released.

The new military government has also dismissed at least 57 judges who had objected to the violations of the rights of civilians facing trial in special military courts.

The RCC, on 4 July 1989, announced the establishment of these special courts to try members of the previous government under the guise of profiteering, corruption and sedition laws. The courts' panels are composed of three army members or anyone authorized by the RCC. If these courts pass the death sentence, a year or more imprisonment or a fine of 10,000 Sudanese pounds or more, there is appeal to an appeal court, whose decision is final save that Lt-General Omar al Bashir has to approve the death sentence. The courts are empowered to impose punishments which include amputation, stoning, flogging and crucifixion.

On 12 August, the first court sat to hear the case against the former Deputy Chairman of the Council of State, Idris el Banna, but was postponed. On 21 August, a strike of the judiciary was organised and more judges were dismissed and 20 were detained. On 25 August, the judges submitted a memorandum to the RCC objecting to the dismissals and protesting the establishment of the special courts, stating that they could not be independent as their members comprised of military officers. Since then, more judges have been dismissed.

On 2 September, Idris el Banna was charged with corruption and misappropriation of road building equipment. He was given 4 days to

prepare evidence in his defense and was not allowed to get legal counsel but was only allowed a "friend" in court. The trial lasted 2 hours, during which the defendant was verbally abused by members of the court. He objected to the jurisdiction of the court, stating that a military court had no right to try a civilian, but he was nevertheless found guilty and sentenced to 40 years imprisonment.

It is reported that Awad el Gid, a prominent Islamic juror and an architect of the introduction of Islamic law into Sudan in 1983, has been asked to appoint new judges to replace those no longer in office.

The signs are clear that the new military government has the goal of removing all the independent secular members of the judiciary, who have been in place since Sudan gained independence, and replacing them with militant Islamic government appointees who will follow government instructions.

ACTIVITIES OF JURISTS' ORGANISATIONS

Arab Lawyers Union

The Arab Lawyers Union, which brings together the bar associations of the Arab world, held its 17th Conference in Damascus, Syria, from 19-22 June 1989. Over 2,000 lawyers met in plenary session and ten special commissions. The CIJL Director attended and intervened in the commissions on human rights and on the independence of judges and lawyers. Below we reproduce the resolution of the commission on the independence of judges and lawyers, as translated by the CIJL.

The independence of the Judiciary

One of the deep-rooted principles in human consciousness is the independence of the judiciary and the independence of judges. This independence is provided for in international declarations and covenants on human rights, including the Universal Declaration on Human Rights which states the principle of equality before the law and the right of each individual to a fair and public trial before an ordinary, independent and impartial court. These courts should be formed in accordance with law and with the International Covenants on Human Rights and with the Universal Declaration on the Independence of Justice approved in Montreal (Canada) in 1983. Most constitutions and fundamental laws in the world provide for the independence of the judiciary, which is considered to be the basis for the establishment of justice in society.

The safeguard and protection of this independence in a country, in theory as well as in practice, means the achievement of democracy and the safeguard of human rights. It is also an indication of political and social stability in that country.

Because of disparities in many countries between these texts and principles and the reality of the independence of the judiciary and judges, the conference emphasises its previous resolutions and recommends the following:

1. Provide in Arab constitutions and fundamental laws for an effective independence of the judiciary and for its separation from the executive and legislative branches. Also, provide for the independence of judges and members of judicial bodies, link prosecutors with the judiciary and provide them with guarantees and immunities which protect them from any undue legislative or executive intervention. Constitutions should state that the judiciary is a branch of the government and not a service and that judges are bound to the national law and not to the law of civil servants. Judges should not submit to any other branch. They should adhere to the law and to their honour and conscience, applying this in letter and spirit. States should enact deterrents and laws aimed at punishing any individual who tries to undermine the independence of the judiciary and judges. States in which constitutions and fundamental laws include these principles should adequately implement these principles.

2. Limit the right of appointment, promotion, discipline, removal and forced retirement and pensions to the judiciary in accordance with fixed criteria and the principle of the independence of the judiciary, and free it from any legislative or executive intervention.

3. Emphasize the right of the judiciary to adjudicate the constitutionality of laws which have been enacted by the legislature and the executive.

4. Secure salaries and compensation for judges commensurate with their position, dignity and responsibility. Secure a decent wage for them, as well as for their families. Secure retirement pay for them, and periodically adjust these salaries and compensations according to inflation.

5. Provide judges with legal immunities and guarantees to ensure their neutrality and to enable them to carry out their duties with impartiality. Refrain from removing them from office without their consent. These

guarantees and immunities should ensure their security and the security of their families during the exercise of their duties and during retirement.

6. Draw up specific conditions for the selection and appointment of judges based on good conduct and professional and moral ability, without any distinction as to race, colour, sex, language, religion, opinion, wealth, income, kinship or rank. Ability alone should be the criterion for selection.

7. Judges should not be entrusted with activities belonging to the executive without their consent and the consent of the judiciary.

8. Secure health insurance and social guarantees such as accommodation and other necessities for judges and their families.

9. Create special institutions in the Arab countries to train newly appointed judges, providing programmes on human rights. Introduce modern means of coordinating activities in the fields of Arab judicial practice and jurisprudence. Judges should be sent to legal conferences and symposiums both in the Arab countries and abroad.

10. Create centres for research on legal matters in every Arab country and ensure their coordination in order to unify rules, legislation and judicial systems in the Arab countries.

11. Dismantle all exceptional courts, whatever name they bear, in the Arab countries.

12. Create a permanent committee within the Arab Lawyers Union entrusted with the task of investigating any violation of, or encroachment on, the independence of the judiciary or of the legal profession in the Arab countries.

13. Place all jails, arrest and detention centres, criminal investigation departments, forensic medicine and all other institutions relating to justice, as well as their staff, under the sole supervision of the judiciary.

14. Ameliorate the heavy workload of judges by increasing their number, and distributing work among them evenly.

15. Respect and implement judicial decrees against state departments. Refrain from enacting legislation which prevents their enforcement.

16. Improve the system of legal aid.

17. Entrust to the judiciary alone the task of extending judicial service after the official age of retirement, in order to emphasize the principle of the independence of judiciary. Emphasize the right of judges to resign when they wish to do so.

18. Refrain from applying emergency and martial laws in matters falling within the jurisdiction of the judiciary.

19. Base the promotion of judges on an objective evaluation of their good conduct, impartiality, professional ability, experience and commitment to the supremacy of law and human rights. This should be carried out by the judiciary alone.

20. Sanction and remove judges by appealing to the judiciary alone in a trial held in camera where it is possible for judges to defend themselves and to prove their innocence. No judge should be removed without evidence of professional or moral incapability.

21. The Conference recommends to the Council of Arab Ministers of Justice and to the Federation of Arab Members of Parliament the setting up of an Arab project aimed at unifying the judiciary in the Arab countries, providing all guarantees and immunities which strengthen, in theory as well as in practice, the independence of the judiciary.

22. Limit the jurisdiction of military courts to military crimes only. Guarantee legal training for military judges, guarantee their independence and neutrality, and allow their judgments to be annulled by ordinary courts.

The Independence of the legal profession

The legal profession is a basic element of justice and a fundamental pillar for freedom and justice.

The independence of the legal profession is a basic guarantee for the protection and consolidation of the right to a defense which is a fundamental human right provided for in the Universal Declaration of Human Rights and in other international instruments. The safeguarding of the independence of the legal profession and its institutions including the bar and other associations, is a basic element for the establishment of the supremacy of law. Therefore, the Conference recommends the following:

1. Provide, in all constitutions and fundamental laws, especially laws relating to the legal profession in the Arab countries, for the independence of the legal profession and of its institutions, including the bar and other associations. The councils of these organisations should be elected by the general bar in a democratic and free way. Lawyers should benefit from all legal guarantees and immunities which could enable them to carry out their professional duties in total freedom, without any pressure, intervention or threat from any quarter for any reason.

2. Entrust the permanent committee for the independence of the judiciary and the legal profession within the Arab Lawyers Union with the task of observing and investigating all violations of the independence of the legal profession in the Arab countries. The permanent committee should denounce these violations and should contribute to the amendment of Arab laws affecting the independence of the legal profession and the freedom of lawyers.

3. Create independent bars, associations or institutions for lawyers in those Arab countries which still lack such institutions.

4. The long term efforts of the Union aimed at implementing the project for a united Arab bar are hindered by the disparity of judicial and bar systems as well as the disparity of political systems in the Arab world. Hence the Conference recommends that the Union form a special

committee to draft general principles for the organisation of the legal profession. This project will be called a "Gentlemen's Agreement" and all Arab bars and associations of lawyers will be committed to its implementation. It will include the general rules and global principles which cannot be opposed on an Arab or international level in matters regarding independence and freedom of the profession, as well as the freedom, rights, immunities and obligations of lawyers in accordance with the to customs and rules of conduct of this prestigious profession. The permanent committee is given the necessary powers to adopt this project and to present it at the forthcoming conference.

5. Create higher level institutions to train lawyers before they join their profession. These institutions should provide programmes on human rights, on the independence of the judiciary and the legal profession and customs of conduct of the legal profession.

6. Allow Arab lawyers to plead before courts in all other Arab countries, provided that this includes the participation of a local lawyer without being tied by the principle of reciprocity,

7. Prohibit the simultaneous exercise of public and private offices for those practicing law, except for those teaching law in universities.

8. Create retirement plans (pensions) in bar associations which lack them. Such retirement plans should enable the retired lawyer and his family to enjoy a decent living in case of resignation or incapacity.

9. Bar associations should assume their social and humanitarian role in the protection and welfare of lawyers and their families by ensuring medical care, accommodation and offices and by providing the necessary assistance in case of need or in emergency situations. All retired lawyers should benefit from such advantages.

10. Protect young and junior lawyers through their associations and teach them how to preserve the independence, freedom, dignity, customs and rules of conduct of their profession. Help them to overcome the hard-

ships they face in their professional lives. Create committees for young lawyers within the Arab Lawyers Union.

11. Form a special committee to set up a project for a united Arab training of junior lawyers.

12. Entrust lawyers' unions with the task of creating committees composed only of lawyers to sanction lawyers for professional misconduct.

13. Emphasise the permanent and continuing interaction between the legal profession and the judiciary. Establish an adequate basis for the full participation of both disciplines in lawyers' conferences and in the sessions of the Council of Arab Ministers of Justice and its special committees. Hold a conference in every meeting of the Arab Ministers of Justice and its special committees. Hold a conference in every Arab country periodically, to study common cases in order to achieve the independence of justice.

Colombian Judicial Union

ASONAL JUDICIAL, the union of magistrates, judges and officials of the Colombian judicial system was asked by CIJL and the European Association of Magistrates for Democracy and Freedom (MEDL) to report on the plight of judges in Colombia. The judicial branch has suffered a tremendous loss of life: more than 220 victims since 1977. Nearly 1,000 judges live under constant threat of death since the Government declared war on drug traffickers.

ASONAL JUDICIAL, which represents magistrates, judges and other Colombian justice officials, counts about 17,000 members including officials of the Justice Ministry.

This union is a pluralistic body (lacking political, religious or racial distinctions) where all those involved in the jurisdictional administration of justice can come together. It is a progressive-minded assembly in that it advocates an "advanced" conception of the State and the Law and it is democratic because it seeks to promote the rule of law in keeping with the democratic and liberal traditions of Colombian institutions.

The following report was prepared by Antonio Suarez Niño, President of ASONAL JUDICIAL.

I

The current situation of the justice system can be described in concrete terms as follows:

1. Ever since Colombia became a unified republic, it has had a tradition of violence, organised around a government struggling for legitimacy which has been unable to penetrate and affirm itself in certain areas of the country where paramilitary gangs have resisted its authority. A former Attorney General (*Produrador General de la Nacíon*), recently denounced the links which these gangs maintain with certain sections of the armed

forces. In 1988 alone, these groups perpetrated more than 60 massacres (i.e. collective murders of more than five people).

This predicament is steadily degenerating. Official sources have conceded that "foreign military advisors", i.e. mercenaries, are training these gangs, whose number has risen to 138, and which are scattered throughout the country.

The Government has thus been incapable of respecting its constitutional obligation to ensure the protection of the lives, honour and property of its citizenry.

2. For the past 40 years, the Government has based its action on a "state of emergency", authorised in the Constitution for periods of severe domestic strife or times of foreign war. This has led to a dictatorial "martial legality" where exceptional specialised jurisdictions come into existence, parallel to the regular procedures of civil law. This situation must be criticised as disregarding procedural guarantees and the rights of the defendant.

3. Compounding all the above is the constant propensity of the executive to subordinate the judicial branch by undermining its independence and autonomy.

While a democratic image of Colombia is projected to the outside world, inside the country, the judiciary is prevented from administering its own resources, and there are attempts underway to seize political control of this branch by creating various bodies dependent on the President of the Republic, such as: the Superior Council for the Administration of Justice and the *Fiscalia General de la Nacion,* which have been incorporated into the constitutional reform amendment, now under debate in the legislature.

Moreover, the President has been granted far-reaching power to intervene in the administration of justice. He is authorised to set up special jurisdictions and to establish or discontinue courts and staff positions.

Colombian judges and magistrates, meeting at their Seventh National Congress, opposed the proposed constitutional reform because its provisions on the administration of justice are seen as antithetical to the democratic aspirations of the nation and the judiciary.

We have called for a Constitution which embodies a new social contract and which is the outgrowth of national consensus, ensuing from consultation with the people, the first concerned.

Other factors have had a hand in the gradual dissolution of judicial authority:

- a grossly inadequate budget, amounting to 1.9% of government expenditure;
- a recruitment policy in which promotion is subject to bureaucratic criteria or party affiliation, thus institutionalizing bipartisanship: to gain admittance to the upper judicial echelons, one must be a Liberal or Conservative;
- a lack of job security, reflecting an anti-democratic concept of the judicial profession: judges and magistrates hold mandates which never exceed two and four years respectively;
- outright violence against judges. The Colombian judiciary is the only one in the world to have suffered two mass slaughters of its officials: the first on 6-7 November 1985, which left 110 dead in the Supreme Court building, and that of 14 January 1989, in which fourteen judicial officials were murdered in San Vincente de Chucuri, Dept. of Santander, in the center of the country by a paramilitary group, "Los Macetos".

  In addition to the assassinations, six judges and their families were forced to flee the country in the view of constant death threats aimed at them. This already precarious situation has been exacerbated by the appearance of two groups which threaten and murder judges: the M.A.J. (Death to Judges), which emerged in Medellin, and the "Extraditables", which is striving to open a dialogue with the Government and threatens to murder ten judges for every Colombian who is extradited to the United States. Nevertheless, there exists no

resolute state policy to protect the lives of judges, magistrates and justice officials, who must confront the causes, instead of the effects, of criminality.

All of the above has led Colombian judges, through ASONAL JUDICIAL, to submit a list of minimum demands to the government concerning our security. We have not received any concrete reply to date.

In so doing, we hope that the government will procure all necessary means to protect our lives. Our current fight can be summed up succinctly as follows: THE POSSIBILITY FOR JUDGES TO SURVIVE IN COLOMBIA WITHIN THE FRAMEWORK OF A DEMOCRATIC STATE.

4. The drug trade has managed to infiltrate and corrupt wide social, economic and political circles.

The perpetrators of this crime hold investments in the large cities and control vast areas of the finest land in the country where, in addition, they resort to violence to protect their enormous interests.

The government's response to this state of affairs has been contradictory and most distressing. At the outset, it was decided to make concessions to "hot money" (as accumulated drug money is called) by granting tax exemptions to undeclared fortunes during the presidencies of Belisario Betancurt and Virgilio Barco in 1986. In contrast, after the assassination on 18 August 1989 of presidential aspirant Luis-Carlos Galan Sarmiento and the ensuing "total war" on drug trafficking, laws were promulgated to step up repression of this crime, providing for extradition and the confiscation of property.

However, the situation engendered by the murder was also used as a pretext to strike out at other sectors, by lengthening sentences for rebellion and sedition in the hope of dealing a blow to insurrectional movements, with which, for the most part, peace talks are currently in progress in any case. At the same time, various traditional democratic institutions have been restricted, suspended or done away with, such as,

the "*jurado de conciencia*" (popular penal jurisdiction), the right of *habeas corpus* and the principle of an open trial.

It goes without saying that the war on drugs compromises the safety of judges who must make the decision to imprison the presumed drug dealers and confiscate their property.

Since extradition is mainly a political issue, it behooves the government to resolve it. Yet it must, at the same time, reinforce the judicial branch and aid in the preservation of the rule of law. The rule of law cannot be simply dismantled in disregard for our republican traditions on the slightest pretext, even that of a direct assault on crime.

Colombian judges, who attempt to exercise their profession under the conditions described at the high price of bloodshed, are well aware that drug trafficking is not the only social plague in Colombia: the unemployment rate stands at 16% of the work force; the foreign deficit is 17 billion dollars and 70% of the population earn $85 dollars a month or less. The great majority of Colombians live in conditions which range from abject poverty to utter destitution.

5. It must be pointed out that Colombian justice is a force, a moral reservoir, which fosters the preservation and development of a genuine rule of law. The judicial profession supports every measure within the limits of legality and national sovereignty, to combat any form of criminality. However, it has recently been plunged into an improvised struggle and forced to defend the integrity of its constantly beleaguered members.

Therefore, it is with great distress that we view the Disciplinary Regime (*Regimen Disciplinario*), which the government has just imposed on the judiciary. This disciplinary regime seems to be founded on the erroneous assumption of rampant immorality among judges and magistrates. It enables the government to institutionalise the persecution of union members in disrespect for the national statutes which implement International Labour Organisation Conventions 87 and 88 on the freedom

of association; it sets up expeditious and summary trials for judges and magistrates which flout the rights of the accused.

II

The Colombian judicial union voices the distress of its magistrates, judges and judicial officials; it is disturbed by the situation of justice in the country and the growing insecurity which looms overs the judicial branch.

It summons European organisations which cherish democracy and law, associations of European Magistrates, universities, democratic governments and non-governmental organisations to call upon the highest Colombian authorities to respect the following obligations:

1. To implement all possible legal means to protect the lives of magistrates, judges and officials of the judicial branch, knowing that any assault by organised crime on them is tantamount to an all-out attack on the rule of law.

This plea expresses the political resolve of the Colombian government itself in concrete and specific terms.

2. To grant a decent salary progressively to the judicial branch. This requires a commitment, a genuine State crusade, to give the judiciary the means to perform its duties, and should be included directly in the budget.

3. The rule of law is rooted in the autonomy of the Judiciary. Consequently, it behooves the Government to refrain from promoting constitutional amendments whose sole aim is to undo the checks and balances of power, but instead to encourage democratic, constitutional reform and a new social contract, product of a consensus. As far as the administration of justice is concerned, bodies must be established which safeguard its independence, quite unlike the *Fiscalia General de la Nacion* and the Superior Council for the Administration of Justice, currently proposed to the legislature by the executive.

4. To refuse any type of foreign interference in the internal affairs of the country, even if it is motivated by the international war on crime: the examination and judgment of offences committed inside our borders is a matter of national sovereignty, exercised constitutionally by the judiciary. Without prejudice to mutual international judicial assistance, we cannot allow pretexts for foreign intervention.

5. To safeguard the freedom of association within the judicial branch by rescinding the present disciplinary regime, which makes the right to peaceable protest a punishable offence and which muzzles the democratic expression of criticism and demands.

To establish instead a professional career code, which, in keeping with the United Nations Basic Principles on the Independence of the Judiciary, guarantees judicial tenure or, at the very least, the stability of the judicial function, in addition to equal access to promotion.

ARTICLES

On the Shame of Not Being an Activist: Thoughts on Judicial Activism

by Upendra Baxi*

The fact that appellate justices make law, and not merely interpret it, is now fully acknowledged amongst the *cognoscenti*. But there are many, including the appellate justices, who even at this day and age contest this simple proposition. They do this in a manner reminiscent of the Three Sisters in Salman Rushdie's *Shame* who until the mysterious happened to them (or more accurately to *one* of them though, alas! no one will even know *which* one) firmly believed that 'fertilization might have been supposed to happen through the breast through "bizarre genitalia" such as holes in the chest into which their nipples might snugly fit' (Rushdie, 1983, p. 13). Those who wish to preserve their jurisprudential pubescence are entitled to such fantasies; but the shame of belated discovery would haunt them, like the Three Sisters, forever, with some sinister and some very tragic results.

If we, then, accept jurisprudential adulthood, the question is not any longer whether or not judges make law: rather the questions are: what *kind* of law, how *much* of it, in what *manner*, within which self-imposed *limits*, to what *willed results* and with what tolerable accumulation of unintended results, may the judges make law? These kinds of questions direct immediate attention to the ineluctable policy and political choices which judges have to make in their daily administration of justice and to the problem of accountability for their actions (see Baxi, 1982).

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It is only natural that judges wish to exercise power but do not wish to be particularly accountable to anyone. It is natural, too, for them to begin to indulge themselves in the honest fiction that they are merely carrying out the intention of legislators or discovering the immanent something called the Law. The tradition of the law and the craft of jurisprudence offer such judges plenty of dignified exits from the agony of self-conscious wielding of power. This stance suits, equally, also the lawyer and the scholar who also find it more convenient to deal with immediate issues of technique and substance, rather than look back to more fundamental questions of the role of the judge and the lawyer in a changing (often traumatically so) society. Hence, the conspiracy of the Great Blackstonian Lie; and hence, to borrow the felicitous phrase of Picasso, the incredibly persistent attempt to convince the people of the truth of the lie that judges do not make law.

These questions concerning power and accountability have been extensively discussed in literature (e.g. Bickel, 1962; Weschler, 1959; Miller & Howell, 1960; Stone, 1964, 1966; Dworkin, 1977; Baxi, 1980; Ely, 1982). They will continue to be discussed for a long time to come, with or without any satisfactory final answer since there cannot be, in the very nature of things, a universal theory of the nature of judicial process (Baxi, 1980).

But with all its richness and promise, even the present framework of discussion continues to be confined to the problematic of the power of judges to make law and its justification. It ignores other powers which justices exercise which are not patently legislative and yet are almost as important. Let us call these powers '*faute de mieux* executive powers of appellate justices'. These deserve study by all those interested in the judicial process as a species of political process.

The 'executive' power of judges involves at least seven distinct sets of powers. Most of these powers may even result in a decision not to proceed to a decision! The executive powers thus extend to:

(i) powers of admission;
(ii) powers of scheduling cases for hearing;

(iii) powers to form benches or panels;
(iv) powers of granting 'stay' *pendente lite*;
(v) powers of 'suggestive jurisprudence';
(vi) powers of scheduling reasoned judgements and
(vii) powers of allowing/disallowing a review.

Except in category (vii) where occasionally at least a judgement needs to be written, there are, at least in India, no guidelines on how the rest of the discretionary executive powers should be used. In each of these categories the powers of appellate justices, and especially of the Supreme Court, are absolute, without a trace of accountability.

In regard to the first facet, take, for example, a prayer of a citizen before the Supreme Court of her country that the imposition of martial law or emergency or dissolution of a legislature or emergency should be allowed to be legally contested: the Court allowing such a challenge, regardless of the ultimate decision, would indeed be exercising its discretionary admission powers to allow space for political action. Take the less dramatic issues of *locus standi*: in deciding who shall have the right to activate the Court, the Court will undoubtedly make some law. Not so however, when it, in a non-speaking order, just dismisses the petition *in limine*. A group of citizens may be denied political voice just by refusal to hear them, even on the issue of why they should be heard.

The power of scheduling cases is also fraught with immense potential for good and bad use. Hearings on imminent violations of fundamental rights may be scheduled after their large-scale violations have taken place! Challenges to suspension of *habeas corpus* or the legality of military rule or the Emergency may be scheduled for hearing after the horrible realities of detention without trial and torture without redress have become *faits accomplis*. At less dramatic levels, courts could so organise their dockets as to hear late cases which should be heard early, given their social or political importance; and vice versa. This may happen through design or default, intention or inertia. The result, overall, is the same. Justices do not lag behind editors and proprietors of newspapers; these latter have the power to 'kill' stories. Justices have the power by simple or devious

docketing exercise, to kill controversy, contention and social relevance of cases before them.

In the third category, peculiar only to countries where the Court as a whole does not sit, the Chief Justice possesses enormous powers to constitute benches or panels of justices to decide matters. There are no guidelines for the exercise of this discretionary power; it has unfettered and hitherto unreviewable administrative discretion, open to malign and benign uses. In any case, the Court becomes fragmented, shifting panels of judges decide cases and in many cases the Court as an institution loses its corporateness and craftspersonship. From the point of view of the citizen, the Court as an institution becomes merely a panel of a few justices selected unaccountably by the Chief Justice from time to time.

The power of granting stay, *ex parte* and upon hearing till the disposal of the matter, is also a very potent power, which can be used to great mischief or great service, depending on the specific litigious and overall political context. To decline to give stay against demolition of twenty thousand hutments of pavement dwellers one day may mean bulldozing of their lives and livelihoods; and to grant a stay the next time round would be to allow them to continue to cheat their way to survival. To allow governments to transfer incorruptible officials in favour of more 'pliable' ones by refusing stay might cancel all the possible gains of upholding on 'merits' after some years their plea against transfer. In the meantime, effective enforcement of legislation (say, land reforms) beneficial to the masses may be suspended by the *de facto* placement of a corrupt official. The examples can be multiplied. The fact remains – a decision to exercise judicial power to favour or restrain redistribution is made when stays are allowed or disallowed. The decision, howsoever masked in terms of 'balance or convenience' and related 'tests', is ultimately grounded in some political choice, favouring either status quo or redistribution. Undoubtedly, this is an important power, especially in countries like India where population explosion seems not unrelated to docket explosion (Baxi, 1982; Dhavan, 1978). It is the Indian experience, at least, that justices cannot be hurried, based perhaps on the maxim 'Justices hurried are justices buried'!

Powers of 'suggestive' jurisprudence often result in compromise, settlement, abandonment of a case or evolution of jurisprudence *ex concessionis*. Justices have ways of communicating to counsel, in a variety of explicit and implicit ways, the anticipations they have of how the case might be decided by them, and good counsel decide often accordingly. This is not an insignificant power at all. The career of an important constitutional conception or an elaboration of a doctrine could be aborted by, for example, proceeding on the basis that the so-called ratio of a case is what counsel for the instant case agree it to be (as partly happened in the *Indira Nehru Gandhi* v. *Raj Narain* in regard to the 'ratio' of the basic structure in *Kesvananda Bharati*: see Baxi, 1978). The same result, more or less, might ensue when a case is withdrawn on the basis of compromise, led by justices. Once again it needs saying that suggestive jurisprudence is not in itself good or bad; but its possible uses and abuses do need attention.

It is not to be assumed, at least in India, that upon the completion of the hearing on merits a reasoned judgement will follow in reasonable time. In the Supreme Court of India, judgements take a long time to come; unaccountably, they are held up by some justices for months and years together. Sometimes, orders are given but reasons deferred, and these are delivered after long lapses of time. The time-context in which a judgement is rendered is often charged with political or social significance, and unreasonable delay, planned or inadvertent, affects the course of public opinion and social action on the issues involved.

Much the same can be said concerning the powers of courts to review their own decisions. For example, following the 'Open Letter to the Chief Justice of India' (see Baxi *et al.*, 1979), national women's organizations insisted that the Court review its verdict of acquittal in that rape case. The review was actually taken in hand after about two years and quietly dismissed. The power and procedure for review of its own judgements by the Supreme Court of India are subject to no specific discipline and accountability; almost all is left to the 'good sense' and power of the deciding justice.

This rapid review does suggest that the 'executive' powers of appellate justices are as important as their law-making powers and, importantly, there appears to be an even greater degree of unaccountability in their exercise of the executive powers. For example, by the fairness standards the Supreme Court of India has itself developed, concerning the exercise of administrative judicial powers (see Baxi, 1982), many of these powers are too wide and confer uncanalized discretion and their actual exercise violates many of the fairness requirements! *Quis custodiet ipsos custodes?*

Discussion on judicial activism has hitherto focused merely on the exercise of judicial lawmaking powers. But 'activism' also has an important role to play in the exercise of judicial executive/administrative powers discussed in the preceding paragraphs. In each of the seven categories identified by us (and there indeed might be some more still to be identified), judges have the choice of exercising their powers militantly in favour of constitutional values or of behaving merely in a bureaucratic manner, looking at issues presented before them strictly as routine managerial tasks. One would expect that an activist justice will be inclined to take the former view in exercise of executive powers as she is inclined to do in exercise of her judicial legislative powers. But this correlation has to be empirically established. There might also be dissonance in judicial behaviour in these two realms.

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'Activism' is one word, but does not have one meaning for all those who use the term. An activist judge, to my mind, is a judge who is aware that she wields enormous executive and legislative power in her role as a judge and that this power and discretion have to be used militantly for the promotion of constitutional values. Such a judge realises that the legal system is, to some extent or other, relatively autonomous both from the economy and the polity and that this autonomy is a function of the very nature of the coalitions of the ruling class which have acquired the powers of national governance.

An activist judge knows that the constitutional value proclamations are an aspect of the ideology-maintenance apparatus of the state and are designed

to enhance or reinforce the legitimacy of the ruling classes. By the same token, such a judge also knows that the ruling class is divided in its pursuit of constitutional values, since an authentic pursuit of these values will bring about a change in the very class character of the state. Elaboration of constitutional values by justices assists the process of legitimation of the ruling classes; at the same time, it tends to expose them to new demands, new uncertainties, new sources of discontent and fresh challenges to their legitimacy. The dual character of judicial elaboration is always pre-eminent to the mind of activist justices and that itself is the source of strength and legitimacy of judicial activism. An activist judge is thus one who has developed a heightened political consciousness concerning the structure of her society and the nature of transformation processes. The scope of her activism depends on how the ruling groups perform through the ensemble of state institutions. In what follows, we look at this aspect a bit closely.

If the legislature is in effect discharging its job of legislating, the scope for judicial legislation is constricted, and vice versa. let us take some concrete examples from the domain of relations between labour and capital in India. Parliament did not legislate on the legality of the scope of the contract labour system; the Supreme Court in 1960 laid down conditions under which contract labour is legally and constitutionally permissible. It is this decision which led Parliament to enact the Contract Labour (Regulation and Abolition) Act, 1962.[1] Similarly, when owners ask for voluntary winding-up of a company, the workers have no standing under the Companies Act even to contest the petition. Suggestions have not been lacking for the reform of this excessively pro-capital legislation. At last in 1982, some activist justices of the Supreme Court held that labour is not just a marketable, vendible commodity, but rather an equal partner with capital and changed the law to require that workers be heard.[2] Similarly, the Supreme Court radically redefined the concept of 'industry' under the Industrial Disputes Act, finding that Parliament had been inactive for over

1 Standard Vacuum Refining Co. of India Ltd. v. Their Workmen (1960) II Labour Laws J. 233, S.C.

2 National Textile Workers Union v. Ramkrishnan (1983) 2 S.C.C. (Supreme Court Cases) 248.

two decades and it had not altered the definition which was unclear and misleading in the first place.[3]

In other words, an activist judge will consider herself perfectly justified in resorting to lawmaking power when the legislature just doesn't bother to legislate. Whatever may be said in the First World concerning this king of lawmaking by judges (see Dworkin, 1977; Ely, 1982), it is clear that in almost all countries of the Third World such judicial initiatives are both necessary and desirable. At least in the Indian experience, it does not appear that legislators have resented much the judicial takeover of their burdens, since it liberates them to attend to other tasks of *realpolitik.*

There are other kinds of situations in which a legislature of a multi-ethnic society acts, but is often acts in such a way as to preserve anti-constitutional traditions and practices of a minority group. For example, while amending the provisions of the Indian Criminal Procedure Code relating to maintenance, Muslim spouses were excluded, not because the system of *mahr* was considered to ensure adequate maintenance to Muslim women but because the ruling coalition apprehended alienation of Muslim male-dominated constituencies. Justice Krishna Iyer valiantly reinterpreted the relevant provisions to apply to Muslim women, thus daringly reversing the exclusion specifically desired by the legislature.

An activist judge would also legislate to protect and preserve the human rights of ethnic minorities guaranteed by the Constitution. The Indian Supreme Court, for example, has devised (primarily through the medium of P.N. Bhagwati) a unique form of epistolary jurisdiction through which public citizens or groups can activate the Court on account of violation of fundamental rights of ethnic and other minorities in Indian society. Any citizen may now activate the Court by means of a letter which is treated as a writ petition: the traditional law relating to *locus standi* has thus undergone cataclysmic innovation. What is more, the Court has devised an unusual procedure for investigating facts relating to torture, terror, extra-judicial executions, deprivations and denials of rights, and gross abuses of power. It now appoints citizens' commissions of enquiry

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[3] *See* Bangalore Water Supply Sewerage Board v. Rajappa (1978) I Lab. L.J. 349.

whose reports are held to establish facts sufficient for the purposes of judicial action (see Baxi, 1983 for a detailed account and analysis). In this process of developing social action litigation, the Court has fundamentally transformed, among other provisions, Article 21 guaranteeing life and personal liberty into a source of inexhaustible new rights and procedures for the victims of governmental lawlessness.

The responsibility for effective execution of legislative mandates expressed through statutes rests clearly upon the executive. If the executive defaults on its legal and constitutional obligations however, courts and judges cannot for too long take a view that violations of rights involved in such defaults are no concern of theirs. If the duly authorised constitutional officers do not appoint judges in time, creating a situation of massive arrears, whatever be the inherited law and wisdom about mandamus, an activist justice may feel justified in issuing directions to them to do their jobs expeditiously. If there are large numbers of undertrial prisoners, not brought to trial for a long time, such a judge might feel more than justified in ordering expeditious trials or their release. If conditions in jails are inhuman and debasing, such a judge may order creation of minimum facilities. If officers under the Contract Labour Act are not doing their duties, or if the relevant Committees under the Bonded Labour or Equal Remuneration Acts are not established, such a judge might order compliance with the statute. India has many laws, including constitutional amendments, which the executive has been authorised to bring into force but which it simply refuses to do. Even the activist justices refused to direct the executive to bring these into force; but their hesitation is a matter of surprise, looking at their otherwise unblemished activist record.

When an activist judge finds that directions given to the executive are not fulfilled, she has three choices:

(i) to struggle ahead with the effective exercise of contempt powers;
(ii) to stage a mini-takeover of the concerned department or the institution or
(iii) to accept defeat with grace.

In the Indian experience, alternatives (i) and (iii) have not been as yet resorted to, although governmental intransigence is now manifest over certain matters. Instead, the Supreme Court has been able to stage mini-takeovers, especially of custodial institutions such as jails or remand homes. In the Agra Women's Protective Home case, for example, the Supreme Court has ordered compliance with creation of additional sanitary facilities, supervised medical treatment of inmates, and regularly (over the past two years) supervised discharges from the Home.[4] In the Bihar undertrial cases (see Baxi, 1980), the Supreme Court has monitored thousands of entries in jail records to ensure that no undertrial languishes in courts and, as a result of its labours, arrived at such an understanding of the problem as to direct an annual census of all prisoners toe submitted to the Court. In the Bihar blindings case the Court ha supervised medical treatment and rehabilitation programmes, even as the principal hearings on merits are under way. All these furnish outstanding examples of uses of interlocutory jurisdiction; the Court thereby acquires 'creeping jurisdiction' over State institutions hostile to the citizen's basic rights.

Obviously, an activist judge or an activist court soon confronts problems of 'coping'. Daily administrative vigilance or overall policy oversight is simply not possible for any Apex Court in the world. Some activist justices have had, therefore, to fashion substitutes to do these jobs for the Court on a delegation basis. In addition to co-opting the High Courts and District Courts for these functions, the Court through its activist justices has also begun making use of state legal aid boards and other social action groups. The issues of institutional competence are imposing in the extreme when stated at a scholarly level (Horowitz, 1979).

The Indian experience so far shows that the question is not so much one of lack of competence in the Supreme Court but rather of its wider and sustained diffusion throughout the entire judicial system. Indeed, the Indian experience shows that judicial activism can be contagious. The initial reservations, conflicts and tensions, inevitable when some activist justices designed a continental shift in the Court's concerns and profile, have now given place to understanding and even enthusiasm for social

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4 *See* Dr. Upendra Baxi v. State of U.P. (1983) 2 S.C.C. 308.

action litigation. What was formerly insurrectionary jurisprudence has now become a part of the institutional culture of the Court. Of course, not all justices like the characteristic features marking the birth and growth of judicial activism, especially through social action litigation. Many continue to worry about the future roles of the Court were unrestrained activism to guide most of its actions. For the moment however, the Court has developed far-reaching communication constituencies and has innovated in both juristic and judicial activism.[5] Through all this, it has acquired enormous political legitimation.

An activist judge will also be inclined to use *suo moto* powers when she deems it necessary. The use of *suo moto* powers is not widely prevalent even in India, the home of epistolary jurisdiction, but Justice M.P. Thakkar, now Supreme Court Justice, resorted to this power frequently to achieve justice. He has on one occasion acted on newspaper reports of injustice or atrocities, by taking jurisdiction, with telling effects. Usually, *suo moto* interventions are directed to check a continuing abuse of power by the executive. The most justified case for the exercise of *suo moto* powers exists whenever there is an allegation of atrocity or torture in police custody or jail, because both these institutional processes fall within the direct oversight of the judiciary. Such allegations are prima facie allegations concerning violation of basic human rights; and people are committed to fails only through Court directions. Even when they are not in prison through Court directions, the Court's jurisdiction should extend to them. For example, an activist judge, were she located in Sri Lanka during the recent prison massacres, would not have to summon up too much courage to start *suo moto* enquiries. Such a judge would find jurisdiction over the prison staff and prisoners incarcerated on conviction who were allegedly responsible for this brutal violence.

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5 For the distinction between *juristic* and *judicial* activism see U. Baxi (ed.), Introduction to K.K. Mathew on Democracy, Equality and Freedom, Lucknow, Eastern Book Co., 1978.

II

An activist judge will thus legislate when she must and will use her executive powers also when she must. An activist judge will do all this in the title of constitutional values, as these grow in interpretative content. Judges who are inclined towards restraint and moderation will not use their powers and continue to maintain that their job is to adjudicate disputes according to something that they call 'the Law'. Such judges must know, or must be told, that their *not* using their powers is indeed a way of actually *using* them. Between judicial restraint and the support of the status quo, there is a very thin line of difference, particularly in third world societies, whose governing elites are still apt to see the state as their private property.

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Judges In South Africa: Black Sheep Or Albinos?

by Jeremy Sarkin-Hughes*

> "Behind decisions stand judges; judges are men; as men they have backgrounds. Beyond rules, again lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch."[1]

> "What is needed today, it is said, is a dynamic, or at least an activist, judiciary, ready and willing to develop the law to fit the changing times."[2]

The judiciary in the turbulent, conflict-ridden society of South Africa, where there is no Bill of Rights,[3] have a vital function to perform in the protection of basic human rights and liberties. Judges have a special role in the protection of the Rule of Law and in demonstrating their distress at the curtailment of fundamental freedoms and violations of human rights. It is a role which they failed to play from the mid 1950s to the late 1970s.[4] That has been changing to some extent, though, in the 1980s.

The South African legal system appeases its legitimacy requirements through supposed procedural fairness. Courts habitually look at this condition rather than to the substantive merits of an action, and thus

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1 Llewellyn, *Some Realism about Realism-Responding to Dean Pound* , 44 Harv. L. Rev. 1222, 1222 (1931).

2 P.Devlin, The Judge, 1 (1979).

3 The Courts have no testing powers and the decisions of Parliament are supreme.

4 H. Corder, Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910-1950 (1984); C. Forsyth, In danger for their Talents (1985); A. Mathews, Freedom State Security and the Rule of Law (1986); A. Sachs, Justice in South Africa (1973) and J. Dugard, Human Rights and the South African Legal Order (1978).

profess to remain independent of politics, upholding a facade of the separation of powers. Within this, we observe a developing ethos of assertiveness and activism among particular members of the judiciary. This must be recognized to a certain extent as resulting from the increasing clamp down that has occurred. Within this framework, the judiciary remains the solitary institutional impediment to executive abuses.

Judge Learned Hand wrote:

> "A society so riven that the spirit of moderation is gone, no court can save."[5]

Judge Jerome Frank replied:

> "They (the courts) can sometimes help to arrest evil popular trends in their inception."[6]

It is important to emphasize from the outset that change in South Africa will not materialize through the courts. The importance of the courts' function must not be overstated in terms of affecting the restructuring or the replacement of the present status quo with a system that has democracy and justice at its root. Rather than role-playing as agents of change, their function can be palliative; the courts can, and should, alleviate some of the suffering which occurs, however fleeting and meager this may be. If the courts can address some of these concerns, it will be far from ineffectual or inconsequential.

The courts ought, also, to edify the standards the law should uphold.[7]

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5 L. Hand, *The Contribution of an Independent Judiciary to Civilization, reprinted* in The Spirit of Liberty, Ch 20 (1952).

6 Frank, *Some Reflections on Judge Learned Hand,* 24 U. Chi. L. Rev, 697-98 (1957).

7 South African common law has not been replaced by apartheid laws and a dual system operates side by side. South Africa is a common law system where the statutes have, in some instances, overridden the common law but have not dismissed or overwhelmed it. South African law has acquired from both Roman-Dutch and English law a strong sense of justice (Mathews and Albino, *The Permanence of the Temporary- an examination of the 90- and 180- day detention laws*, 83 S. Afr. L. J. 37-38 (1966), Dugard, *supra* note 4, at 382-3; Hahlo and Maisels, *The Rule of Law in South Africa*, 52 Va. L. Rev. 13 (Jan 1966) and Dugard, *Using the Law to Pervert Justice*,11 Human Rights 25 (1983). Both common law lineages show origins that incorporate equality before the law and

The position that the courts in South Africa enjoy is becoming more open to exploitation and capitalization by opponents of apartheid. This has taken place because of the accessibility of the courts and the publicity that can be realized, as well as the short-term effects that can result from these applications.

The growth of public interest law firms has also played a role in the augmented use of the courts to accomplish more equitable results.[8] In the past, lawyers were averse to undertaking public interest cases due to a largely conservative disposition and insufficient resources. With funding from overseas becoming increasingly procurable, however, lawyers have found it salutary to engage in these court proceedings. As the number of lawyers perceiving a social responsibility increases, one begins to see an escalation in the number of applications.[9] Public interest law firms, such as the Legal Resources Centre, have developed long-term strategies to counter oppressive state policies, facilitating an improved and more systematic attack on those policies.

Opposition groups have secured growing patronage as well as assistance from established members of the legal profession. Senior counsel[10] have been far more amenable to contesting cases. Thus, an expanded

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the advancement of personal freedom by the means of the perpetuation of fundamental freedoms and rights (J. Dugard, *supra* note 4, at 71-72 382-3, 393; A. Mathews, Law, Order and Liberty in South Africa 308 (1971); Kentridge, *The Theories and Realities of the Protection of Human Rights Under South African Law*, 56 Tu. L. Rev. 227, 229-31 (1981)). Roman-Dutch Law displays signs of natural law thinking (Carey Miller, *South African Judges as Natural Lawyers - A Roman Dutch Basis?*, 90 S. Afr. L. J. 86 (1973) and Corder, *supra* note 4, at 10) and English law incorporated natural justice and impartiality.

8 Boulle, *New Beginnings*, S. Afr. J. Hum. Rts, 251, 255 (1985).

9 The Minister of Law and Order reported that there had been about 260 cases of detainees contesting their detention in the period up till then of the state of emergency. (Daily News, Oct.18, 1986.)

10 South Africa, like the United Kingdom, has a split bar comprised of advocates(barristers) and attorneys(solicitors) and senior advocates are appointed senior counsel(Queens Counsel). There are 6434 practising attorneys, (The Transvaal Law Society News, Nov. 1986) including those in the homelands, of whom 650 are black, while of the about 900 advocates approximately 45 are black, only two of whom are senior counsel.

sophistication in techniques and increasingly creative and innovative substantive arguments have begun to grace the court rooms. This has allowed progressive judges the chance to redress some of the inequities and injustices of the system.

Though there exists a small cadre of lawyers who for years have been opposing discrimination both in and out of the court room, a swelling commitment to get involved in public interest cases has developed, for a number of reasons. First, there has been an increasing amount of financing available to expend on the exorbitant fees demanded by these advocates. Lawyers have observed also that they are capable of acquiring a profile, both nationally and internationally, from appearances in such cases. There may also be some validity to the hypothesis that a number of the lawyers now willing to undertake these cases may have begun to experience a hitherto unknown pricking of their consciences. This new disposition may be the consequence of the growing encroachments on human rights and of the persistent, expanding resistance to the State.

The surge of popular non-violent opposition groups, such as the United Democratic Front (U.D.F.) and the Mass Democratic Movement (M.D.M.), indicated the need to find new ways to attack apartheid. With the desire of the anti-apartheid organizations to remain within the boundaries of the law, there has been increased litigation as a means of trying to extend these legal parameters.

Since the late 1970s there has been a shift in judicial attitudes. Some judges have developed an increasing awareness of the predicament they confront,[11] as they realize the lack of credibility and legitimacy accorded

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11 Estimated at about 30 judges of the about 130 judges (all white), of whom 90 are Afrikaans, Dugard, *The Judiciary in a State of National Crisis-with special reference to the South African experience*, 44 Wash. & Lee. L. Rev. 477, 498 (1987). There are about 800 magistrates, Los Angeles Daily Journal, Feb.19 1986, and excluding the magistrates in the "Independent Homelands" there are two so-called "colored "and six Indian magistrates, Ann. Sur. Race Rel , 471 (1985) and none who are black.(Minister of Justice House of Assembly Debates, Questions and Answers May 10, 1985 cols 1458-62). Magistrates are full-time members of the Department of Justice, were trained within the civil service, and are typically former prosecutors, all of which are likely to affect their

the courts by the majority of the population.[12] For many the judiciary is perceived as part of the machinery of the oppressive system.[13]

There has been a new, progressive liberal consciousness and stance that has been embraced to a degree in the courts during the 1980s, especially in the Natal[14] Provincial Division.[15] Impressions created by this proclivity have taken effect in other jurisdictions, including, rather remarkably, the Appellate Division (A.D.), which, prior to the state of emergency in 1985 began handing down decisions in favor of personal liberty and the protection of human rights.[16]

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independence and impartiality. The majority of the "political" cases do pass through the Magistrates courts, but whether the Supreme Court is insulated from security matters, as suggested by the International Commission of Jurists' *Preliminary Report on South Africa,* 38 Review 47, (1987) (authored by Bindman) is questionable. While it is true that much of their time is spent sitting on commercial disputes as well as divorces and other non-political cases, to say that "judges rarely have to face up to the conflict inherent in their participation in a repressive system", as the I.C.J. suggests, is debatable. Even if it were so, the moral dilemma would still exist as to participation in the system. Decisive as well is the fact that the lower courts have to abide by decisions of the Supreme Court in their provincial division, unless the A.D. overrules the Provincial Division decision. Therefore, decisions judges arrive at affect more people than just those involved in that particular case.

12 *See* Hoexter Commission Report 1984 and the Human Sciences Research Council(HSRC) investigation into Intergroup relations The South African Society: Realities and Future Prospects (1985) 166.

13 Dugard, *supra* note 11, at 487.

14 Natal is seen to be the most English speaking and liberal of the four provinces of South Africa.

15 These include Nxasana v Minister of Justice 1976 3 SA 745 D, In re Dube 1979 3 SA 820 N, S v Meer 1981 1 SA 739 N, Magubane v Minister of Police 1982 3 SA 542 N, Nggulunga & another v Minister of Law and Order 1883 2 SA 696 N, S v Khumbisa & others 1984 2 SA 670 N, Ndabeni v Minister of Law and Order and another 1984 3 SA 500 D, the first Gumede decision 1984 4 SA 915 N,Metal and Allied Workers Union(M.A.W.U.) v Castell NO 1985 2 SA 280 D, S v Ramgobin 1985 3 SA 587 N, Hurley v Minister of Law and Order 1985 4 SA 709 D, Mkize v Minister of Law and Order 1985 4 SA 147 N, Dlamini v Minister of Law and Order 1986 4 SA 342 D, Buthelezi and others v Attorney General, Natal 1986 4 SA 377 D and M.A.W.U. & Mchunu v The State President and 3 others 1986 SA 4 358 D.

16 These cases include Nkondo v Minister of Law and Order 1986 2 SA 756 A and Minister of Law and Order v Hurley 1986 3 SA 568 A. The Supreme Court consists of the Appellate Division, seven provincial divisions: Natal, Orange

Decisions prior to the state of emergency seem to support this more liberal awareness, but since 1985/86 there has been a retrogressive shift from that novel, progressive attitude, and despondency has set in among those who hoped the A.D. would resume their more intrepid position of the 1950s. In the cases during the emergency, the A.D. has even by formal positivistic concepts disregarded laid down presumptions sanctioning individual rights.

Although the A.D. has slammed shut the door which they had dared to open a notch, judges in other provincial divisions[17] have shown that they are amenable to following the activist lead of the Natal judiciary.

The next inquiry concerns why there has been an inclination on the part of some of the judiciary to see their current role differently than they or their contemporaries did in the past. The first possibility is that those judges who have long been human rights activists have only recently been capable of responding in any meaningful way. In the adversary system, the judiciary is dependent on arguments put to them - arguments which have recently been coming from a more activist legal profession. This is not an entirely adequate explanation, however, since at least a modest legal opposition has been prevalent for an extended period.

Free State, Northern Cape, Eastern Cape, Transvaal, Cape, South West Africa/Namibia and three local divisions: Witwatersrand, Durban and Coast and South Eastern Cape. Decisions of the A.D. bind all other courts of South Africa. Provincial and local divisions act as courts of appeal from the lower courts. Decisions of a provincial division are binding on all courts in that division, and in no other, but are of persuasive effect. Judges are appointed by the State President and political considerations play a role in determining elevation to the bench. *See* Mokgatle, *The Exclusion of Blacks from the South African Judicial System*, 3 S. Afr. J. Hum. Rts, 44 (1987).

17 These include Mbeka v Nell NO ECD 14 Nov. 1985 case 1714/85 (unreported), S v Baleka and Others 1986 1 SA 361 T, Nordien and Another v Minister of Law and Order 1986 2 SA 511 C, Momoniat & Naidoo v Minister of Law and Order 1986 2 SA 264 W, Dempsey v Minister of Law and Order 1986 4 SA 530 C, Jaffer v Minister of Law and Order, The Minister of Justice, and the Commanding Officer Victor Verster Prison 1986 4 SA 1027 C, U.D.F. v Acting Chief Magistrate, Johannesburg 1987 1 SA 413 W, Bill MC v The State President and Others 1987 1 SA 265 W and the minority judgement in Omar v Minister of Law and Order 1986 4 SA 530 C.

Perhaps the increase in judicial activism reflects a growing contempt for the manner in which the law has been subverted in the interests of the continuation of the status quo. The last decade has seen the growth of opposition as never before, and the state has reacted by clamping down, using the legal apparatus in order to preserve White domination. While mouthing reform, there have in fact been increasingly severe repression and further invasions into the area of civil liberties. There has been large scale violence, detention, and death, and it has been to this that some judges have seen a need to respond in some functional way.

Judges have been affected as well by contact with members of the judiciary in other countries and members of the liberation movements. Mounting criticism of their role from these and other factions has imbued them with a feeling of a need to respond to state fiat.

The final impetus is the consternation over what will displace the system of justice once change does transpire.[18] There is the belief that an investment in justice now is an investment for the continuance of this policy in the future. The more activist judges, who have only recently begun to hand down more liberal judgments, may wish to entrench some kind of system of human rights protection before the advent of majority rule.

The issue as to whether judges should remain within the system and fight in the ways available to them, or resign, is one that has entertained much academic debate.[19] Among critical questions that have been debated is

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18 *See* the speech made by Judge Leon at a meeting of Lawyers for Human Rights titled "A Bill of Rights for South Africa" *reprinted* in 2 S. Afr. J. Hum. Rts, 60 (1986) where he comments as to the inevitability of majority rule. A number of judges have been the vanguard in the fight to achieve a Bill of Rights. These include Chief Justice Corbett and Judge of Appeal Milne. Judge Milne was Judge President of Natal until the beginning of 1988 and his ascendency to the A.D. has to be linked to his considerable role, in his decisions and in choosing which judges sat on which case, in the prominence that the Natal judges have acquired.

19 *See* Wacks, *Judges and Injustice*, 101 S. Afr. L. J. 266 (1984); Dugard, *Should Judges Resign? A Reply To Professor Wacks*, 101 S. Afr. L. J. 286 (1984); Wacks, *Judging Judges A Brief Rejoinder to Professor Dugard* ,101 S. Afr. L. J.

the extent to which the continuation of judges in the system lends legitimacy to an illegitimate system. Those who down play this negative aspect, propagate the notion that the good the judges are able to accomplish is vital and outweighs the detrimental effects of their continuation on the bench. Further, can the judge who serves, in fact secure any propitious conclusions, or is the function played by the judiciary so trivial that more could be secured by resignation?

Prof. Raymond Wacks summed up the contention as to why judges who are dedicated to libertarian principles should get out of the system when he said:

> "A resignation would be a clarion call: a statement of judicial despair and outrage. It would be an assertion of the judge's absolute fidelity to justice, a protest against abuse of law. In a repressive legal order it would constitute an act of faith in the face of unconscionable legislation."[20]

Wacks' premise is that judges have in fact very little discretion, and there is an inconsequential amount that they can do to temper the harsh laws and the derogations of human rights standards. This is certainly controversial.[21] Wacks argues that this discretion is limited as judges in the positivistic sense need to find the law as intended by the legislature. But is judges discretion as circumscribed? True, judicial manoeuvre has been diminished or inhibited, but there is disagreement as to the scope of this discretion and how this can be rectified.

The radical perspective critiquing the judiciary sees that, regardless of the few positive results that emerge, the system gains legitimacy from those results which in turn bolsters its continued existence.

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295 (1984); Dyzenhaus, *Judging the Judges and Ourselves*, 100 S. Afr. L. J. 496 (1983); Etienne Mureinik, *No Shelter For Judges*, Sunday Tribune Apr. 3, 1983, Wacks Sunday Tribune Apr. 10, 1983, Didcott Sunday Tribune Apr. 24,1983, Robertson Sunday Tribune May 8, 1983, Mathews Sunday Tribune May 22, 1983.

20 *Id.* at 284.

21 Dugard, *supra* note 4, at 287.

The Civil Rights League, in a pamphlet titled "The Responsibility of Judges in Applying Unjust Laws in South Africa" wrote:

> "Resignation on the grounds of conscience may be looked at retrospectively, then be seen as the sparks which kept alight a fundamental belief in the best traditions of our western legal system."[22]

The cry to judges to resign has had little impact, but if there ever was a time for judges to stand up and be counted in this regard, then now would be the moment. This is especially so with the implementation of the state of emergency as the content of the law has never sunk so low.[23] If the law was not previously the antithesis of human rights standards, which is dubious, then it has certainly reached this point now.

Judges should not be concerned, and are over-punctilious if they are so, with the legitimacy of an activist role, when it is borne in mind that the legislature itself is undemocratic and the oath judges take demands that justice be administered.[24] While judges may face criticism from some quarters for this stance, they cannot easily be ousted, as once appointed they enjoy security of tenure until the age of 70. Impeachment requires an address from all three houses of Parliament asking for such a dismissal, and can only be accomplished for reasons of infirmity or misconduct.[25] Even in terms of the old constitutional requirements, the removal of a judge was virtually impossible and never occurred; with the Tricameral constitutional arrangement, [26] it is even more onerous. [27] If judges

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22 *Reprinted* in South African Outlook, (Jan. 1981).

23 *See* Gustave Radbruch who argues that there is a stage at which law ceases to be law. *Cited* in Dugard, *supra* note 4, at 399.

24 Hoexter, *Judicial Policy in South Africa*, 103 S. Afr. L. J. 436, 436-438(1986).

25 The Supreme Court Amendment Act 8 of 1985.

26 Republic of South Africa Constitution Act 110 of 1983 s 10(7). In this constitution "Coloreds" and "Asians" were brought into the decision making process. This was done by establishing three houses of Parliament, one for each of the groups. A system of own and general affairs was established whereby own affairs would be legislated solely by the house which was affected by it. If a matter is seen to be a general affair then all three houses are involved in the legislation. Where conflict arises between the houses, the President's Council

choose to remain on the bench, then their commitment to justice, democracy and civil liberties needs to be reflected through their actions rather than solely through their rhetoric.[28]

Judges who continue on the bench need to bear in mind and attempt to reconcile the fact that even with an activist policy, they still send apartheid law offenders to prison. [29]

It must be realized that the law develops faster in times of crisis and conflict. Now is the time for the activist and realist notions to be more widely applied, to allow the law to develop along a more enlightened and

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votes to end the stalemate. The council is dominated by members of the white house as is the body which elects the State President. The two houses of "color" suffer from a lack of credibility and one finds a very low voter turn out in elections .

27 Hahlo and Khan, The South African Legal System and its Background, 44 (1973).

28 Various judges have rightly criticized Apartheid legislation and every opportunity, publicly and otherwise, should be seized to show the contempt felt for these laws. The Judiciary should protest more strongly to the authorities, and in all other forums, to edify the standard the law should attain. Other avenues judges might pursue in attempting to temper the effects of Apartheid, besides seeking the lacunae they can, include: Making strong dissenting opinions, suggesting in their judgements areas of the law that might be attacked, reviewing magistrates' decisions stringently, interfering in the sentencing imposed by lower courts more frequently, demanding to sit on cases that will effect civil liberties, giving more suspended sentences and fines where possible, appointing assessors who represent the wider community, making more unannounced prisons visits, assuming confessions and admissions made while in custody are not freely and voluntarily made, being harsh on security forces abuses, finding extenuating circumstances in death penalty cases and assisting in Black legal education, *See* J Sarkin, An Examination Of Judicial Responses In The 1980s To The Law And Human Rights In South Africa And The Options Available To Temper The Effects Of Apartheid, unpublished thesis, Harvard Law School (1988).

29 The Central Statistics Services released figures that in the year ending 30 June, 1987, there were 139 convictions out of 343 prosecutions for crimes against state security. 98 convictions were under the Public Safety Act and the regulations issued in terms thereof. There has, however, been an increase in the numbers of convictions against "peace and order" and the figure for the year 1986/7 was 8740 out of 14179 prosecutions. Of the 5233 prosecutions brought under the public violence provisions, there only 1746 convictions. (Weekly Mail, Mar. 31 1988).

impartial path. These concepts should be used to allow some alleviation to occur from the perjorative features of the law and the derogation of human rights.

Conscious participation is needed. Judges should not delude themselves as to the moral responsibilities that face them. While the writing is on the wall that change will transpire in South Africa, what is uncertain is the manner in which history will judge the judges for participating in and lending legitimacy to an unjust and illegitimate system.

DOCUMENTS

Harare Declaration on Human Rights

Between 19 and 22 April 1989 there was convened in Harare, Zimbabwe, a high level judicial colloquium on the Domestic Application of International Human Rights Norms. The colloquium followed an earlier meeting held in Bangalore, India in February 1988 at which the Bangalore Principles were formulated (see CIJL Bulletin No. 22).

As with the Bangalore colloquium, the meeting in Harare was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon. Chief Justice E. Dumbutshena (Chief Justice of Zimbabwe) with the approval of the Government of Zimbabwe and with assistance from The Ford Foundation and Interights.

The colloquium was honoured by the attendance at the first session of His Excellency the Hon. R.G. Mugabe, President of Zimbabwe, who opened the colloquium with a speech in which he reaffirmed the commitment of his Government to respect for human rights, the independence of the judiciary, the rule of law and a bill of rights which is justiciable in the courts.

The participants were:

Chief Justice E. Dumbutshena – Zimbabwe (Convenor)
Justice A. Ademola – Nigeria
Chief Justice E.O. Ayoola – Gambia
Justice P.N. Bhagwati – India
Chief Justice B. Cullinan – Lesotho
Justice A.R. Gubbay – Zimbabwe
Justice M.D. Kirby – Australia
Justice Rajsoomer Lallah – Mauritius
Mr Recorder Anthony Lester Q.C. – United Kingdom
Chief Justice E. Livesey Luke – Botswana
Chief Justice F.L. Makuta – Malawi

Chief Justice C.H.E. Miller – Kenya
Chief Justice F.L. Nyalali – Tanzania
Justice E.W. Sansole – Zimbabwe
Chief Justice E.E. Seaton – Seychelles
Chief Justice A.M. Silungwe – Zambia
Justice J.N.K. Taylor – Ghana
Justice L.E. Unyolo – Malawi

The participants examined a number of papers which were presented for their consideration. These included papers which reviewed the development of International Human Rights Norms, particularly in the years since 1945; a paper which examined the domestic application of the African Charter on Human and Peoples' Rights; a paper on personal liberty and reasons of State and a paper on ways in which judges, in domestic jurisdiction, may properly take into account in their daily work the norms of human rights contained in international instruments whether universal or regional.

The participants paid especially close attention to the provisions of the African Charter on Human and Peoples' Rights. That Charter was adopted as a regional treaty by the Organisation of African Unity in 1981 and entered into force on 21 October 1986. At the time of the Harare meeting, 35 African countries had ratified or acceded to the Charter.

Various opinions were expressed by the participants concerning ways of strengthening the implementation of the Charter including:

- the interpretation of the provisions in the light of the jurisprudence which has developed on similar provisions in other international and regional statements of human rights;
- the clarification and strict interpretation of some of the provisions derogating from important human rights; and
- enlargement, at an appropriate time, of the machinery provided by the Charter for the consideration of complaints and the provision of effective remedies in cases of violation.

In particular the participants noted that:

- The opening recital of the Charter of the United Nations contains a ringing reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women";
- The Charter of the Organisation of African Unity includes reference to "freedom, equality, justice and legitimate aspirations of the African peoples";
- The preamble to the African Charter of Human and Peoples' Rights proclaims that fundamental human rights stem from the attributes of human beings and that this justifies their international protection;
- The freedom movement in Africa has had as a central tenet the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence which dignity and independence can only be realised fully if the internationally recognised human rights norms are observed and fully protected;
- There is a close inter-linkage between civil and political rights and economic and social rights: neither category of human rights can be fully realised without the enjoyment of the other. Indeed, as President Mugabe said at the opening of the colloquium: "The denial of human rights and fundamental freedoms is not only an individual tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations."

The participants were encouraged in their work by the declaration of President Mugabe that the nations of Africa, having freed themselves of colonial rule and the derogations from respect for human rights involved in such rule, have a particular duty to observe and respect the fundamental human rights for which they have sacrificed so much to win, including the struggle against racial discrimination in all its aspects. The ultimate achievement of the freedom struggle in Africa will not be complete until the attainment throughout the continent of proper respect for the human rights of everyone – as an example and inspiration to humankind everywhere. In the words of Nelson Mandela, to which President Mugabe drew attention, "Your freedom and mine cannot be separated."

The participants agreed as follows:

1. Fundamental human rights and freedoms are inherent in humankind. In some cases, they are expressed in the constitutions, legislation and principles of common law and customary law of each country. They are also expressed in customary international law, international instruments on human rights and in the developing international jurisprudence on human rights.

2. The coming into force of the African Charter on Human and Peoples' Rights is a step in the ever widening effort of humanity to promote and protect fundamental human rights declared both in universal and regional instruments. The gross violations of human rights and fundamental freedoms which have occurred around the world in living memory (and which still occur) provide the impetus in a world of diminishing distances and growing interdependence, for such effort to provide effectively for their promotion and protection.

3. But eloquent statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts. It is in this context that the Principles on the Domestic Application of International Human Rights Norms stated in Bangalore in February 1988 are warmly endorsed by the participants. In particular, they reaffirm that, subject always to any clearly applicable domestic law to the contrary, it is within the proper nature of the judicial process for national courts to have regard to international human rights norms – whether or not incorporated into domestic law and whether or not a country is party to a particular convention where it is declaratory of customary international law – for the purpose of resolving ambiguity or uncertainty in national constitutions and legislation or filling gaps in the common law. The participants noted many recent examples in countries of the Commonwealth where this had been done by courts of the highest authority – including in Australia, India, Mauritius, the United Kingdom and Zimbabwe.

4. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms – stated in international instruments and otherwise. In this respect the participants endorsed the spirit of Article 25 of the African Charter. Under that Article, States parties to the Charter have the duty to promote and ensure through teaching, education and publication, respect for the rights and freedoms (and corresponding duties) expressed in the Charter. The participants look forward to the Commission established by the African Charter developing its work of promoting an awareness of human rights. The work being done in this regard by the publication of the *Commonwealth Law Bulletin*, the *Law Reports of the Commonwealth* and the *Bulletin* of Interights (The International Centre for the Legal Protection of Human Rights) was especially welcomed. But to facilitate the domestic application of international human rights norms more needs to be done. So much was recognised in the Principles stated after the Bangalore Colloquium which called for new initiatives in legal education, provision of material to libraries and better dissemination of information about developments in this field to judges, lawyers and law enforcement officers in particular. There is also a role for non-government organisations in these as in other regards, including the development of public interest litigation.

5. As a practical measure to carrying forward the objectives of the Principles stated at Bangalore, the participants requested that the Legal Division of the Commonwealth Secretariat arrange for a handbook for judges and lawyers in all parts of the Commonwealth to be produced, containing at least the following:
   - the basic texts of the most relevant international and regional human rights instruments;
   - a table for ease of reference to and comparison of applicable provisions in each instrument; and
   - up-to-date references to the jurisprudence of international and national courts relevant to the meaning of the provisions in such instruments.

6. If the judges and lawyers of Africa – and indeed of the Commonwealth and of the wider world – have ready access to reference material of this kind, opportunities will be enhanced for the principles of international human rights norms to be utilized in proper ways by judges and lawyers performing their daily work. In this way, the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties.

   In this way the noble words of international instruments will be translated into legal reality for the benefit not only of the people we serve, but also of the people in every land.

Harare
22 April 1989

Grenada Declaration on the Judiciary and Human Rights in the Commonwealth Caribbean

On 11-12 September 1989, the CIJL and the ICJ, together with the Caribbean Justice Improvement Project of the University of the West Indies and in cooperation with the United Nations Centre for Human Rights, held a seminar in Grenada W. I. on "the Judiciary and Human Rights in the Commonwealth Caribbean." The seminar brought together 55 leading Caribbean jurists including the Chief Justices of Barbados, Grenada, Guyana and Jamaica, the Attorneys General of Antigua, Barbados, Guyana, Jamaica and St. Kitts and six bar presidents. In addition, distinguished jurists from outside the region, such as P.N. Bhagwati, former Chief Justice of India, addressed the meeting and took part in its discussions.

At the conclusion of the meeting, on the motion of Mr. Carl Rattray, Q.C., Attorney General of Jamaica, the seminar adopted the following declaration:

"The participants of the Seminar on the Judiciary and Human Rights in the Commonwealth Caribbean,

Having met at Grenada on 11-12 September 1989 under the auspices of the International Commission of Jurists, its Centre for the Independence of Judges and Lawyers and the Caribbean Justice Improvement Project, and with the cooperation of the United Nations Centre for Human Rights,

Believing that the Seminar provided a valuable opportunity to share experiences, views and information on common issues and problems,

Convinced that the faithful implementation of the rule of law, of constitutional guarantees, and of international and regional norms of human rights, are essential to the fulfillment of the aspirations of the Commonwealth Caribbean people for a society built upon the rights and freedoms of individuals, and of the rule of law,

Resolve:

1) To continue to work resolutely for the judicial enforcement of human rights in the spirit of the Universal Declaration of Human Rights.

2) To maintain contacts and to continue to share experiences and information on the judicial enforcement of human rights in the Commonwealth Caribbean.

3) To encourage the ratification by all Commonwealth Caribbean states of international and regional conventions on human rights, especially the international Covenants on human rights, the Convention against Torture, and the American Convention on Human Rights.

4) To invite governments, organisations and academic institutions in the Commonwealth Caribbean, as well as international organisations such as the United Nations, the OAS and the International Commission of Jurists, and regional organisations such as the Organisation of Commonwealth Caribbean Bar Associations (OCCBA), the CARICOM and Caribbean Rights, to continue to mobilise their efforts for the further advancement of the judicial enforcement of human rights in the Commonwealth Caribbean.

5) To invite particular attention to the development of further regional co-operation on the following topics:

   a) the collection and publication of decisions of Commonwealth Caribbean Courts on the judicial enforcement of international human rights norms and constitutional guarantees of human rights;
   b) the further training of Commonwealth Caribbean law students and lawyers on the application of international and regional human rights norms in Domestic Courts;
   c) the provision of all relevant information to Commonwealth Caribbean judges and lawyers to enable them to continue to strive for the judicial enforcement of human rights guarantees;

d) the organisation of regular consultative meetings of Government officials responsible for the domestic implementation of international and regional human rights Conventions, especially those responsible for the preparation of reports and submissions to international supervisory organs;
e) the development of further courses on human rights in schools, colleges and universities in the Commonwealth Caribbean;
f) the identification of specifically Commonwealth Caribbean problems and issues which may require the elaboration of Commonwealth Caribbean regional human rights norms for assuring the fullest possible enjoyment of human rights and fundamental freedoms in the Commonwealth Caribbean;
g) the development of appropriate forms of urgent response by Commonwealth Caribbean countries to situations of gross violations of human rights and fundamental freedoms in the Commonwealth Caribbean;
h) the development of an appropriate role for the CARICOM in promoting regional co-operation for the enhancement of human rights protection in the Commonwealth Caribbean;
i) the development and enhancement of a partnership between governmental, non-governmental, academic and other institutions in the Commonwealth Caribbean for the further enhancement of respect for human rights and fundamental freedoms in the Commonwealth Caribbean;
j) the further development of legal aid systems in the Commonwealth Caribbean; and
k) the establishment of a Commonwealth Caribbean Court of Appeals to facilitate access by the public to this level of appellate jurisdiction and the development of a Commonwealth Caribbean jurisprudence."

Legal Defense in Northern Ireland:

Report of an International Delegation of Lawyers

On 12 February 1989, Patrick Finucane, 38, a Belfast solicitor, was shot dead in his home, in front of his wife and children. He is the first solicitor to be killed in Northern Ireland since 1969.

For several years Mr. Finucane represented members of the Irish Republican Army, and was active in various human rights and prisoners' rights cases, attracting much attention from the media. In 1981, he represented the families of hunger strikers who died while in official custody. He also represented the widow of a victim of a 1982 "shoot-to-kill" incident in which unarmed members of the IRA were shot by members of the Royal Ulster Constabulary(RUC). He successfully argued many cases in Northern Ireland and in the European Court of Human Rights involving police abuse of prisoners and other misconduct.

He was involved in the recent challenge to the British Home Secretary's media ban on broadcast interviews with representatives of Sinn Fein (the political arm of the IRA). In January 1989, he challenged and overturned the refusal by the authorities to give reading materials and beds to Protestant and Catholic prisoners in solitary confinement.

Mr. Finucane openly criticized judicial and law-enforcement institutions in Northern Ireland, including the non-jury Diplock Court System, the conduct of British security forces, and the use of torture against prisoners and detainees.

Mr. Finucane was eating dinner with his family when three armed men broke into his home, killing Finucane and wounding his wife. The three assassins escaped in a hijacked taxi.

No arrests have been made. Responsibility has been claimed by the Ulster Freedom Fighters, a loyalist paramilitary group.

An international delegation of lawyers visited Belfast to investigate the issues arising out of Finucane's death and to make recommendations. The delegation represented the Bar of Paris, the International Federation of Human Rights, the International Association of Democratic Lawyers, the Haldane Society of Socialist Lawyers, and the National Council for Civil Liberties (London), and was composed of Georges-Henri Beathier, Geoffrey Bindman, Jean-Yves Carlier, Paul Hunt and Yves Laurin.

The delegation found that the cumulative effect of Northern Ireland's wide powers of arrest, seven day detention, abolition of the right of silence, restrictions on access to a solicitor, questionable interrogation practises, weak rules on the admissibility of confessions and reliance on confessions and juryless courts, has produced a system of criminal justice significantly weighted against the accused. It points to growing concern among lawyers at what appears to be a campaign of smears and innuendos against certain solicitors engaged in criminal work.

In 1984, Lord Gifford, QC, in a report on the use of "Supergrass" evidence in Northern Ireland reported a statement by the police who said that they knew that certain solicitors were feeding information to the IRA.

The report mentions numerous other "smears" against lawyers by the RUC. Against this background the report finds "extraordinary" the comments of the Parliamentary Under-Secretary of State for the Home Department, Douglas Hogg MP in a Committee debate on a Terrorism Bill on 17 January 1989, regarding the right of solicitors to make disclosures for the purpose of seeking their clients' instructions or giving their clients advice.

In attempting to justify an encroachment on this right, Secretary Hogg said: "I have to state as a fact, but with great regret, that there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA. I repeat that there are in the Province a number of solicitors who are unduly sympathetic to the cause of the IRA. One has to bear that in mind."

According to the report, these remarks shocked many in the legal profession in Northern Ireland. The Secretary of the Northern Ireland Law Society wrote to Mr Hogg regretting the remarks and stating that if they were true, the body would support the bringing to book of any solicitors guilty of criminal activity. Editorials in the *Independent* and the *Guardian* also criticised the statement and there were calls for Mr. Hogg's resignation.

Reacting to the statement by the Under-Secretary, MP Seamus Mallon said: "I have no doubt that there are lawyers walking the streets or driving on the roads of Northern Ireland who have become targets for assassins' bullets as a result of the statement that has been made tonight." This prophecy came true less than a month later when Patrick Finucane was shot.

The delegation stated that it had no doubt that Douglas Hogg's statement and Patrick Finucane's murder have had a significant effect upon solicitors and barristers who defend in emergency legislation cases in Northern Ireland.

The delegation's summary and conclusions are:

"a) It is a fundamental requirement of the rule of law that those accused of crime are given access to skilled and independent legal representation.

b) In Northern Ireland there is a web of emergency legislation, some of which violates the rule of law and international standards of human rights.

c) The emergency legislation has produced a system of criminal justice weighted significantly against the accused.

d) The emergency legislation, with its wide police powers and erosion of suspects' rights, places an especially heavy responsibility upon defence lawyers who become increasingly isolated and exposed. In a volatile situation, such as exists in Northern Ireland, this may lead to intimidation, harassment and physical attacks.

e) Criminal defence lawyers in Northern Ireland do not confine their practices to either one community or the other.

f) The role of the criminal defence lawyer includes putting forward as vigorously as necessary all the arguments and evidence which favour the client, and presenting the case as the client would be able to do, given the advantage of the lawyer's experience and training.

g) In a society as tense and violent as Northern Ireland, lawyers are placed in an extremely dangerous position if the error is made of identifying them with the politics of their clients.

h) Several features of the law and practice of the emergency provisions betray the authorities' distrust of Northern Ireland's legal profession. These public manifestations of official distrust of the legal profession combine with other factors to contribute to the increasing isolation and vulnerability of some lawyers in Northern Ireland.

i) Although police powers have been extended, the law is still perceived by some members of the security forces as obstructing the achievement of their objectives. In the forefront of that perceived obstruction is a small group of defence lawyers, typified by Patrick Finucane.

j) There is a history of alleged RUC smears and innuendos against lawyers in Northern Ireland. Some of the allegations ... are convincing; they are also dangerous to those against whom they are directed.

k) In the tense and delicately poised political environment of Northern Ireland, it was predictable that an accusation of the kind made by Douglas Hogg on 17 January 1989 would provoke an act of terrorism against a lawyer from Northern Ireland. We did not find, of course, any evidence that Douglas Hogg's statement led directly to the murder of Patrick Finucane 26 days later. We conclude, however, that Douglas Hogg's statement played a part in creating a climate in which

the likelihood of the murder of Patrick Finucane, or another lawyer, was increased.

l) There is convincing evidence of the British authorities engaging in unlawful 'dirty tricks' in Northern Ireland; the relationship, if any, between those responsible for these undercover operations and those who advised Douglas Hogg on 17 January requires investigation.

m) Some of the press have been guilty of irresponsible reporting when referring to solicitors acting for members of the IRA.

n) Douglas Hogg's statement and Patrick Finucane's murder has had a significant effect upon the security measures taken by those defence lawyers undertaking emergency legislation cases in Northern Ireland. Paramilitary threats against lawyers have greater impact now than before the statement or murder.

o) In our opinion, a small minority of legal cases are not being pursued as they would have been before January 1989.

p) In the light of evidence of collusion between loyalist paramilitaries and members of the security forces in Northern Ireland, we believe a judicial enquiry established on the lines of our recommendations should also consider this question."

The mission recommended that:

"a) A full, public, judicial enquiry should be established to investigate:
   (i) The background to Douglas Hogg's statement made on 17 January about lawyers in Northern Ireland.
   (ii) The slurs against lawyers which RUC officers are said to have uttered while they interrogated subjects...
   (iii) Allegations of collusion between paramilitaries and members of the security forces in Northern Ireland.

b) The Government urgently considers, with representatives of the legal profession, what steps it can take to repair the damage inflicted by Douglas Hogg's statement of 17 January 1989.

c) Regular meetings between the Law Society and Bar Council of Northern Ireland, and the Northern Ireland Office should take place to discuss pressures on the legal profession.

d) Wherever possible lawyers who are subjected to threats report them, in strict confidence if they wish. Only if threats are recorded can the scale of the problem be understood and strategies devised to tackle it.

e) Despite the lack of confidence, in some quarters, in the RUC, threats should be reported to the police. In addition, ... the legal profession sets up a committee to monitor in confidence threats to lawyers.

f) If intimidation is occurring on a significant scale ... the legal profession in Northern Ireland should establish a panel of lawyers who are prepared to accept responsibility for the conduct of cases in which an individual lawyer has been intimidated or fears intimidation.

Consideration should be given to involving a professional association or other organisation in the conduct of some cases where a lawyer has been threatened.

g) The Law Society and Bar Council in Northern Ireland liaise with their counterparts in Britain, to ensure that the issues which are the subject of this report are addressed throughout the legal profession of the United Kingdom.

h) The press and the National Union of Journalists should remind their members of the dangers of associating lawyers with the political views of their clients.

i) The police investigation into the murder of Patrick Finucane should be intensified; ... the investigation into Patrick Finucane's murder should be supervised by an external police authority.

j) In early 1990, when the provisions of the Police and Criminal Evidence Act are extended to Northern Ireland, ... audio tape recording of the interrogation of all suspects should be introduced as a matter of urgency. Defence lawyers must be given access to the tapes of their clients' interrogation. The mission was vigorously opposed to the suggestion that the interrogation of terrorist suspects should be excluded from audio tape recording.

k) RUC Guidelines should be issued regulating what interrogators may say to suspects about legal advisers; a breach of the Guidelines should be a disciplinary offence.

l) The legal professions in other countries give whatever support they can to their counterparts in Northern Ireland."

UNITED NATIONS ACTIVITY

1. United Nations Crime Branch

a) ECOSOC ADOPTS "PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY"

The 7th U.N. Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted by consensus "Basic Principles on the Independence of the Judiciary."[1] The Congress documents were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985), which later specifically welcomed the Basic Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

As reported in Bulletin 22, draft "Procedures for the Effective Implementation of the Basic Principles." were adopted by the Committee on Crime Prevention and Control at its Tenth Session in Vienna from 22 - 31 August 1988. These draft Procedures were reproduced in Bulletin 23.

On 24 May 1989, the Economic and Social Council (ECOSOC), adopted the Procedures in its resolution 1989/60.

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1 *See* Human Rights: A Compilation of International Instruments (United Nations publication, Sales No E 88.XIV.1), chap. G 38. *Reprinted in* CIJL Bulletins Nos. 16 and 23.

b) DRAFT BASIC PRINCIPLES ON THE ROLE OF LAWYERS AMENDED

The draft "Basic Principles on the Role of Lawyers," (reprinted in Bulletin 23) was discussed in five regional preparatory meetings for the 8th U.N. Crime Congress. At these meetings, several amendments were suggested. In addition, the Commission of Human Rights requested that the Crime Committee and the 8th Congress take into account, in completing work on the draft principles, the draft declaration prepared L.M. Singhvi (see below). As a result, the U.N. Crime Branch secretariat asked the CIJL to propose new text, taking into account both the suggestions made at the regional meetings and the points covered in the Singhvi declaration but not previously found in the draft. The CIJL's proposed amendments were largely incorporated in the new draft, which will be submitted to the Committee on Crime Prevention and Control in February 1990 and then to the 8th Congress in August 1990.

2. United Nations Sub-Commission appoints Joinet to suggest role in protecting judges and lawyers

At its 40th Session in August 1988, the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities transmitted to the Commission on Human Rights the draft "Declaration on the Independence of Justice" prepared by Special Rapporteur L.M. Singhvi of India. It also created a special item on its future agenda to examine the independence of judges and lawyers (see Bulletin 22). In March 1989, the Commission on Human Rights, in resolution 1989/32:

- invited governments to take account of the Singhvi declaration in implementing the Basic Principles on the Independence of the Judiciary;

- requested the Crime Committee and the 8th Congress take into account the Singhvi principles, in completing work on the draft basic principles on lawyers; and

- requested that the Sub-Commission use its new agenda item to "consider effective means of monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers."

At the 41st session of the Sub-Commission in August 1989, the CIJL presented its report on "the Harassment and Persecution of Judges and Lawyers: January 1988 - June 1989" (see this issue) and called on the Sub-Commission to respond urgently to the Commission's request.

As a result of the CIJL's appeal, the Sub-Commission passed a resolution declaring itself "disturbed at the continued harassment and persecution of judges and lawyers in many countries." It called on governments to respect the independence of the judiciary and to provide protections for practising lawyers. Most importantly, it called on its French expert, Mr. Louis Joinet, to prepare a working paper on means by which the Sub-Commission "could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers."

The CIJL welcomes the appointment of Mr. Joinet, prosecuting magistrate with the *Cour de Cassation*, former Secretary-General of the French *Syndicat de la Magistrature* (Magistrates Union) and member of the CIJL Advisory Board, and looks forward to working with him in the preparation of his study.

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THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS, JANUARY 1988 - JUNE 1989

On 14 August 1989, the CIJL released its first annual report on the "Harassment and Persecution of Judges and Lawyers". The report listed 145 judges and lawyers who have been harassed, detained or killed in reprisal for their professional activities in 31 countries between January 1988 and June 1989. It included 35 jurists killed, 37 detained and 38 who had been attacked or threatened with violence in the last 18 months. Another 13 were professionally sanctioned (disbarment, removal, banning, etc.). The countries with the most reported cases were the Philippines (28) (including 6 killed and 17 attacked or threatened with violence), Colombia (23) (21 killed, 2 attacked or threatened) and Peru (15) (2 killed, 9 attacked or threatened).

In releasing the report, the CIJL Director stressed that the protection of human rights required that lawyers be free to take up all cases - however unpopular - without fear of reprisal. Yet, he noted, "in all too many countries, lawyers risk their liberty and even their lives when they carry out their professional obligations".

The report, which was presented to the 1989 session of the U.N. Sub-Commission on Prevention and Discrimination of Minorities, received wide publicity, including a leading article in *le Monde*. In addition, the *International Herald Tribune* of 18 August published an article based on the report by CIJL Director entitled "Stand up for Human Rights Lawyers" .

The CIJL plans to publish a similar report in August of each year and calls upon bar associations and human rights groups in all parts of the world to help it by providing information on the harassment or persecution of judges and lawyers.

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

The Harassment and Persecution of Judges and Lawyers
January 1988 to June 1989

Edited by Reed Brody. Published by the ICJ, Geneva 1989.
English. ISBN 92 92037 043 2. Swiss Francs 12, plus postage.

The Independence of Judges and Lawyers in the Commonwealth Caribbean

Report of a seminar held in Tobago from 12 to 13 September 1988.
Convened by the CIJL, ICJ and the UWI/USAID Caribbean Justice Improvement Project.
Published by Caribbean Graphics, Barbados, 1989.
English. Swiss Francs 12, plus postage.

L'indépendance des magistrats, des avocats et des officiers ministériels en République de Guinée

Report of a mission for the CIJL by Maître Aminata Mbaye (Senegal)
and Yao Bohue Martin (Ivory Coast).
Published by the ICJ, Geneva 1989.
French. ISBN 92 9037 042 4. Swiss Francs 10, plus postage.

Paraguay: Seminario Internacional sobre Independencia del Poder Judicial

Report of a Seminar held in Asunción from 9 to 11 November 1988.
Convened by the Law Faculty of the Catholic University of Asunción,
the Bar Association of Paraguay, SIJADEP, the CIJL and the ICJ.
Published by La Ley S.A. Editorial, Asunción, 1988.
Spanish. Swiss Francs 15, plus postage.

South Asia: The Independence of Judges and Lawyers

Report of a Seminar held in Kathmandu from 1 to 5 September 1987.
Convened by the CIJL, ICJ and the Nepal Law Society. Published by the ICJ, Geneva, 1988.
English. ISBN 92 0037 035 1. Swiss Francs 12, plus postage.

La Independencia de Jueces y Abogados en Argentina, Brasil, Paraguay y Uruguay

Report of a Seminar held in Buenos Aires from 21 to 25 March 1988.
Convened by the CIJL, ICJ, the Centro de Estudios Legales y Sociales and
the Asociación de Abogados de Buenos Aires.
Published by Editorial M.B.A., Montevideo, 1988.
Spanish. Swiss Francs 15, plus postage.

The Independence of the Judiciary and the Legal Profession in English-Speaking Africa

Report of Seminars held in Lusaka from 10 to 14 November 1986
and Banjul from 6 to 10 April 1987.
Convened by the CIJL, ICJ and the African Bar Association.
Published by the ICJ, Geneva, 1988.
English. ISBN 92 9037 038 6. Swiss Francs 20, plus postage.

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